Case Studies of
Mass Tort Limited Fund
Class Action Settlements &
Bankruptcy Reorganizations

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I also wish to thank the numerous lawyers, judges, and court officials who were generous in sharing their time and memories with us as we attempted to reconstruct the histories of the cases studied in this monograph. Regardless of the questions that might be raised with the benefit of hindsight concerning the resolution methods used, it is clear that the judges and lawyers involved in these cases deserve recognition for the care, creativity, and good intentions they displayed in seeking fair and efficient solutions for mass tort problems facing them.

My undertaking of this project has been supported throughout its course by the University of North Carolina School of Law, and I appreciate my school's and colleagues' interest and encouragement. Cindy Singer Cafaro provided helpful research assistance in the summer of 1999, for which I thank her. For almost a year Matt Stiegler worked tirelessly with me on this project, serving as research assistant, collaborator, editor, and friend. The teacher learned much from the student, and it is hard for me to imagine how this monograph could have been written without him. I will be forever grateful to him.

Finally, I want to thank my family—Bob, Daniel, and Benjamin—for their unflagging love and support. They provided encouragement on all the occasions that I needed it, and they wisely learned to stop asking, "When will your project ever be finished?" This monograph is dedicated to them.

Executive Summary

This monograph examines three limited fund class action settlements of mass tort claims (including one settlement attempt that was abandoned in favor of bankruptcy) and four bankruptcy reorganizations precipitated by mass tort litigation. Each case is unique in the circumstances that precipitated it and the dynamics of its proceedings. Despite those differences, an examination of the class action settlements as a group in contrast to the bankruptcy reorganizations that were studied allows some comparisons about the fairness and effectiveness of these two means of achieving global resolutions of mass tort liabilities.

The Limited Fund Class Action Settlements

White v. Eagle-Picher Industries, Inc.

In 1990 Eagle-Picher Industries, Inc. sought to use a class action under Federal Rule of Civil Procedure 23(b)(1)(B) to cap its tort liability. Its effort to achieve a limited fund settlement of all its present and future asbestos claims met with great opposition, however, and eventually was abandoned in favor of a Chapter 11 reorganization. Without engaging in any prior negotiations with plaintiffs' counsel, Eagle-Picher tried to get a limited fund class action certified so that a non-opt-out settlement could be negotiated. The defendant pursued this strategy before a supportive judge, who had grown frustrated at the existing, costly methods of resolving asbestos claims. The failure to obtain the support of or to allow the direct involvement of lawyers who might have been opinion leaders of the diverse, largely autonomous asbestos plaintiffs' bar contributed in large measure to the opposition that the attempted settlement faced. The proposed settlement, which provided for the payment of some $505 million to the plaintiff class over a twenty-year period, was perceived as a pro-defendant solution that was being forced on plaintiffs by Eagle-Picher, the court, and the court's handpicked lawyers. The size of the limited fund (i.e., the value of the company along with any insurance coverage) was never established.

Butler v. Mentor Corporation

Mentor Corporation successfully achieved a limited fund settlement of its breast implant litigation by means of a Rule 23(b)(1)(B) settlement class in 1993. It first engaged in negotiations with members of the plaintiffs' steering committee in the breast implant multidistrict litigation (MDL) proceedings. Mentor reached a settlement agreement before it initiated the class certification proceedings and thus was able to present with plaintiffs a joint application for class certification and approval of the settlement to the court. The company benefited from the substantial efforts made by the MDL plaintiffs' lawyers to explain and sell the settlement to breast implant plaintiffs' lawyers around the country. The approval process was largely nonadversarial, and few objections were made by members of the plaintiff class. In the end, the settlement provided for Mentor's payment of $25.8 million over a three-year period into a settlement fund. The fund was eventually distributed on a basis that required no proof of injury and drew no distinctions based on severity of injury.

Fanning v. AcroMed Corporation

In 1997 AcroMed Corporation, a manufacturer of orthopedic bone screws, achieved a Rule 23(b)(1)(B) class action settlement of the mass tort litigation it faced, over the substantial opposition of a codefendant and several class members. After reaching agreement on the terms of a settlement with the MDL plaintiffs' legal committee, AcroMed and the Plaintiffs' Legal Committee (PLC) jointly sought certification of a limited fund class and approval of the settlement. The court conducted a lengthy fairness hearing, at which the codefendant presented the testimony of an expert who disputed the proponents' evidence concerning the existence of a limited fund. The court certified a plaintiff class pursuant to Rule 23(b)(1)(B) and approved the settlement, relying in part on the testimony of the PLC's expert that, freed of the tort claims against it, AcroMed would be worth $104 million. A few months later, the company was sold for more than three times that amount. One group of class members apparently obtained a more favorable treatment than the rest of the class in exchange for agreeing to drop their appeals.

The Bankruptcy Reorganizations

In re UNR Industries, Inc.

Initiating one of the first mass tort bankruptcies, UNR Industries, Inc. filed a Chapter 11 petition in 1982 in order to obtain a resolution of its asbestos liability. Because of the unprecedented nature of the bankruptcy, negotiations got off to a slow start. Among the issues that the debtor first sought to resolve was its authority to include future claims in its reorganization plan and discharge. Once that issue was decided in UNR's favor, the debtor left it up to the unsecured creditors' committee, the asbestos claimants' committee, and the future claims representative to negotiate the appropriate basis for dividing assets between commercial claimants and asbestos disease claimants. Eventually the group arrived at a 1-to-2.27 ratio, which served as the basis for the reorganization plan. The parties then negotiated the share of equity that the shareholders would be permitted to retain, agreeing on 8% of the reorganized company's stock. The reorganization plan created a trust to pay asbestos disease claimants. The trust received a controlling share (63%) of the reorganized company's stock, which at the time of distribution had a market value of $150 million. The plan was confirmed consensually in 1989, all impaired classes having voted overwhelmingly to approve it. Payouts by the trust did not commence until late 1991.

In re A.H. Robins, Inc.

A.H. Robins, Inc. filed for bankruptcy in 1985, seeking to bring an end to the litigation it faced which arose out of its manufacture and sale of a birth control device, the Dalkon Shield. With the active participation of a district judge, who withdrew the reference to the bankruptcy court as to most matters, the debtor was able to obtain consensual confirmation of a reorganization plan in 1988. Following the establishment of a bar date (the deadline for filing proofs of claim) for tort claims and the creation of an extensive database concerning the nature of the claims that were filed, the district judge conducted an estimation hearing and established the value of the debtor's tort liability at $2.475 billion. With the liability capped at this amount, the company became more attractive to potential bidders. Eventually the company was sold in accordance with terms that were acceptable to all constituencies. The purchaser provided the funding for a $2.3 billion trust for Dalkon Shield claimants, which ended up pay-

ing all of the tort claims in full (as determined by the trust's resolution procedures, which encouraged settlement). Not only the debtor but also its officers, directors, successors, and insurers were released from any further tort liability as a result of the bankruptcy.

In re Eagle-Picher Industries, Inc.

Following its unsuccessful effort to obtain a limited fund class action settlement of its asbestos liability, Eagle-Picher filed for bankruptcy in 1991. The proceedings moved slowly at the beginning, but the appointment of a mediator to assist the parties in negotiating the terms of a plan eventually yielded results. The debtor was able to reach agreement with the asbestos claimants' committee and the future claims representative over the value of the asbestos claims and the general terms of a reorganization plan. However, the unsecured creditors' committee refused to accept that the asbestos claims were ten times greater in amount than the commercial claims. Eventually this stalemate required a judicial estimation of the value of the asbestos claims. The bankruptcy court ended up estimating the claims to be worth $1 billion more than the amount the debtor and asbestos claimants had previously agreed to. Eventually, the unsecured creditors' committee agreed to a compromise amount $500 million less than the court had estimated, and the plan was drafted on that basis. Under the plan, all of the stock of the reorganized company went to a trust created to pay the asbestos claims, and the existing shareholders received nothing. Because the shareholders were deemed to reject the plan and the class of unsecured creditors voted to reject it (owing to the negative votes of a few large creditors), the plan had to be crammed down (i.e., judicially approved over the objection of the rejecting classes). In 1996 the bankruptcy court, sitting jointly with the district court, confirmed the plan. Fifteen months later the trust sold the company for over $700 million.

In re Dow Corning Corp.

Dow Corning Corporation filed for bankruptcy in 1995, following its unsuccessful attempt in the MDL proceedings to arrive at a global settlement of its breast implant litigation. The company was able to use bankruptcy to consolidate the litigation against not only itself, but also its two shareholders. Although the debtor never succeeded in getting a trial of the disease-causation issue in the bankruptcy or district court, it did

eventually reach an agreement with the tort claimants' committee on the terms of a reorganization plan that they jointly proposed. Under the plan, Dow Corning was obligated to pay a maximum of $3.17 billion over sixteen years for breast implant claims, but the plan allowed the reversion to the debtor of any funds not needed to satisfy the claims. Because three classes—commercial creditors, Norplant claimants, and government payers—voted to reject the plan, it had to be crammed down. The bankruptcy court confirmed the plan in 1999, although it ruled that the plan had to be interpreted as preserving the claims against nondebtor parties of breast implant claimants who had not voted to accept the plan. The district court affirmed the plan confirmation, but reversed the bankruptcy court's interpretation of the release as being limited to accepting claimants.

The Appendix to this monograph contains summaries of the key features of each of the cases studied.

A Comparison of These Two Mass Tort Resolution Methods

Based on the cases included in this study, in Chapter 2 I compare limited fund class action settlements with bankruptcy reorganizations, focusing on four criteria: fairness of the resolution process, effectiveness of judicial review of the resolution, efficiency of the resolution process, and likelihood that the resolution process will be invoked. I conclude that bankruptcy comes out ahead of limited fund class action settlements with respect to the fairness of the resolution process and the effectiveness of judicial review. The confirmation requirement of voting by individual creditors (including tort claimants), the substantive bankruptcy protections for individuals and classes that vote against the plan, and the practice of appointing a future claims representative provide greater protection and opportunity for input for absent tort claimants than is available to them when a district court approves a limited fund class action settlement. Moreover, tort claimants are treated more equitably in a bankruptcy reorganization with respect to the defendant's other creditors, because all are forced to share the defendant's shortfall; in a limited fund class action settlement, only the tort claimants are forced to compromise their claims.

Judges presiding over bankruptcy reorganizations also have the advantage of having specific statutory standards for the confirmation of the

reorganization plan. The standards for determining whether a limited fund class should be certified and whether a settlement should be approved, by contrast, remain ill defined. While neither method appears to have an advantage when it comes to estimating the defendant's total mass tort liability, a difficult task regardless of the resolution method used, bankruptcy judges are likely to have more expertise than district judges in determining the value of a defendant company. District judges, on the other hand, may be in a better position to assess the fairness of the treatment of the tort claimants in light of the merits of the claims.

Where limited fund class action settlements come out ahead, in my view, is with regard to the efficiency of the resolution process and the likelihood that a defendant will invoke that resolution method. A limited fund class settlement can usually be achieved and approved by the court in much less time than it takes to achieve confirmation of a mass tort defendant's bankruptcy reorganization plan. Moreover, fewer parties, lawyers, and experts are generally involved in a limited fund class proceeding than in a Chapter 11 bankruptcy. Thus, a limited fund class action settlement should be achievable at much less cost than is required by a mass tort bankruptcy reorganization. A limited fund class action settlement in the past has most likely been seen by defendants as a more attractive option than bankruptcy, because it involves less stigma and presents no risk of loss of ownership of the company. However, the Supreme Court's recent *Ortiz* decision,[1] by raising doubts about the validity of limited fund class action settlements of mass tort claims, may make a defendant more reluctant in the future to attempt such a settlement to resolve its mass tort liability.

Because of my conclusion that bankruptcy reorganizations provide an inherently fairer method of resolving mass tort claims and because of doubts raised by the Supreme Court concerning the legitimacy of limited fund class action settlements of mass torts, I suggest that policy makers focus on ways to make bankruptcy more efficient. In Chapter 2 I also provide some suggestions for improving bankruptcy's efficiency as a mass tort resolution device.

1. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999).

Chapter 1

Introduction

Traditional methods for resolving tort claims—resolution on an individual basis by means of trial or settlement—are not well suited for dealing with mass tort litigation. When a defendant faces thousands of claims of a similar nature, even a successful defense of the claims may cost more than the company can afford. Moreover, plaintiffs with meritorious claims shared by thousands of others frequently face long delays in receiving compensation, and they run the risk that by the time they succeed in proving their claims, the company's resources will have already been expended on the claims of those ahead of them in line. Meanwhile, courts are forced to bear the strain of handling a sudden influx of a massive number of similar tort suits.

During the past decade one method that has been used as a means of resolving mass tort litigation in a small number of cases has been a limited fund class action settlement. Utilizing a provision of the class action rule that authorizes the certification of a mandatory, non-opt-out class, courts have certified class actions under Federal Rule of Civil Procedure 23(b)(1)(B) and approved class-wide settlements in situations in which they have found that a defendant's potential tort liability—or at least the cost of defending and resolving the mass tort litigation the defendant faces—threatens to overwhelm the company's assets such that the tort claimants face the risk that individual adjudications will "substantially impair or impede their ability to protect their interests."[2] From the plaintiffs' point of view, such a resolution has the advantage of providing an equitable division of the assets offered by the company, which perhaps have been augmented by insurance proceeds or borrowed funds made available only because of the achievement of a final resolution of the liti-

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2. *See* Fed. R. Civ. P. 23(b)(1)(B), which provides as follows:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: (1) the prosecution of separate actions by or against individual members of the class would create a risk of . . . (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests . . . .

gation. From the defendant's point of view, the limited fund class action settlement allows it to reach a resolution of virtually all of the existing and potential claims against it for a finite amount, after which it can continue in business without the mass tort cloud hanging over it.

Questions about the legitimacy of using Rule 23(b)(1)(B) for this purpose have been raised, however, by courts and commentators.[3] The Supreme Court recently addressed for the first time the use of this class action device for resolving mass torts.[4] Although the majority declined to decide whether a limited fund class action is ever properly certified for this purpose,[5] it did state that "the applicability of Rule 23(b)(1)(B) to a fund and plan purporting to liquidate actual and potential tort claims is subject to question."[6]

Whatever the ultimate answer to that question, examination of the limited fund class action settlement as a means of resolving mass torts yields insights valuable to policy makers involved in seeking solutions to the problems posed by mass tort litigation. Such an examination is enhanced by a comparison of the resolution of a mass tort through a limited fund class action settlement with its resolution through a bankruptcy reorganization. The latter proceeding rests on the same premise as the limited fund class action: The company has insufficient assets to satisfy all its liabilities in full, and everyone will fare better if the company can continue to operate and pay off its creditors in an equitable manner out of its future earning capacity. Because a limited fund class action settlement is in some sense a "designer bankruptcy,"[7] questions naturally arise as to whether it offers advantages (or disadvantages) over the more established method of dealing with companies with insufficient funds.

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3. *See, e.g.,* Flanagan v. Ahearn (*In re* Asbestos Litig.), 134 F.3d 668, 672–74 (5th Cir. 1998) (Smith, J., dissenting), *rev'd sub nom.* Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L. Rev. 1343, 1382–83, 1403–04, 1458–60 (1995); Richard L. Marcus, *They Can't Do That, Can They? Tort Reform Via Rule 23,* 80 Cornell L. Rev. 858, 880–81 (1995); William W Schwarzer, *Settlement of Mass Tort Class Actions: Order Out of Chaos*, 80 Cornell L. Rev. 837, 840 (1995).

4. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999).

5. *See id.* at 842, 844, 864.

6. *Id.* at 864.

7. *See In re* Joint E. & S. Dist. Asbestos Litig., 14 F.3d 726, 732 (2d Cir. 1993) (noting that the Rule 23(b)(1)(B) "process contemplated by Keene mirrors a bankruptcy proceeding").

Preparation of the Case Studies

In undertaking such an examination for the Working Group on Mass Torts,[8] I studied four cases from the 1990s—three limited fund class actions and one bankruptcy reorganization. The cases, selected by the Working Group and the Federal Judicial Center for study, involved mass tort litigation resulting from the manufacture and distribution of asbestos-containing products, breast implants, and orthopedic bone screws.

The earliest of the cases studied, *White v. Eagle-Picher Industries, Inc.*,[9] is discussed in Chapter 4 of this monograph. It was an unsuccessful attempt by a defendant asbestos manufacturer to resolve its litigation on a limited fund class action basis. That effort was terminated by the company's decision to file a Chapter 11 bankruptcy petition. The bankruptcy proceedings eventually resulted in the establishment of a trust to pay all present and future asbestos claimants. Eagle-Picher's bankruptcy reorganization proceedings[10] are the subject of Chapter 5. They not only completed the story of what happened to Eagle-Picher, but also provide some means of comparing limited fund class actions with bankruptcy reorganizations.

The third case studied, *Butler v. Mentor Corp.,* was the limited fund class action settlement entered into by breast implant manufacturer Mentor Corporation.[11] As is recounted in Chapter 6, after lengthy negotiations and extensive efforts to "sell" the settlement to plaintiffs' attorneys around the country, that resolution achieved court approval with relative ease.

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8. *See* S. Elizabeth Gibson, *Mass Tort Limited Fund and Bankruptcy Reorganization Settlements: Four Case Studies*, Report on Mass Tort Litigation app. E (1999). The Working Group that was authorized by the Chief Justice in 1998 to study mass torts was organized under the leadership of the Civil Rules Advisory Committee, with participation by members of other Judicial Conference committees. The Working Group made its report to the Chief Justice in February 1999. It recommended the appointment of an Ad Hoc Committee on Mass Torts, which would have the responsibility of recommending legislation, rule changes, and case management ideas, as well as practice changes and educational programs, to address the problems presented by mass tort litigation. This recommendation has not been acted upon.

9. No. CV-90-4243 (E.D.N.Y. filed Dec. 11, 1990).

10. *In re* Eagle-Picher Indus., Inc., Consol. Case No. 1-91-00100 (Bankr. S.D. Ohio filed Jan. 7, 1991).

11. Butler v. Mentor Corp., No. 93-P-11433-S (N.D. Ala. filed May 14, 1993).

The final case studied was the most recent, the class action settlement of orthopedic bone screw litigation in *Fanning v. AcroMed Corp*.[12] A successful resolution of the tort claims was achieved in that case as well, but it encountered more vigorous opposition and was subjected to more extensive court scrutiny than was the *Mentor* settlement.[13] This case is the subject of Chapter 7.

This monograph is an expanded version of the case study report prepared for the Working Group on Mass Torts. It includes a discussion in Chapter 3 of the Supreme Court's intervening *Ortiz* decision.[14] With added commentary and documentation, the present study also discusses three additional mass tort bankruptcy reorganizations: an early asbestos bankruptcy initiated by UNR and related companies,[15] which, in its successful creation of a fund to pay tort victims, served in many respects as a model for asbestos bankruptcies to follow; the pathbreaking bankruptcy of the A.H. Robins Company,[16] which successfully resolved the company's Dalkon Shield liability; and the recently completed *Dow Corning* Chapter 11 bankruptcy,[17] which, being prompted by silicone gel breast implant litigation, serves as a counterpoint to the Mentor class action proceeding. A review of these reorganization proceedings, the subject of Chapter 8, provides a broader context than the *Eagle-Picher* bankruptcy in which to consider the relative merits of a bankruptcy resolution of mass tort litigation. The Appendix contains summaries of the key features of each of the cases that were studied.

For each of the original cases studied for the Working Group on Mass Torts, Tom Willging, of the Federal Judicial Center, and I interviewed the judges and the lawyers most actively involved in the cases, usually in person but occasionally by telephone. The information they provided, which was agreed to be not for attribution, was supplemented

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12. No. 97-381 (E.D. Pa. filed Jan. 1997).

13. In March 1999, Judge Spiegel of the Southern District of Ohio certified a plaintiff class under Rule 23(b)(1)(B) and approved a settlement of product liability claims by some 17,000 class members against manufacturers of cardiac pacemaker leads. *See In re* Telectronics Pacing Sys., Inc., 186 F.R.D. 459 (S.D. Ohio 1999). That case—decided after the Mass Tort Working Group report was prepared—was not included in this study.

14 . *See* Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999).

15. *In re* UNR Indus., Inc., Nos. 82 B 9841 to 82 B 9851 (Bankr. N.D. Ill. filed July 29, 1982).

16. *In re* A.H. Robins Co., Bankr. No. 85-01307-R (E.D. Va. filed Aug. 21, 1985).

17. *In re* Dow Corning Corp., No. 95-20512 (Bankr. E.D. Mich. filed May 15, 1995).

by a review of the court files still available in the cases. Initial drafts of the case studies were circulated to the interviewees, and they were invited to provide comments and corrections.

I examined the additional cases without interviewing the lawyers and judges involved or examining the court files. I based these studies on judicial opinions, commentary, and other materials publicly available concerning these bankruptcy proceedings.

A draft of this monograph was reviewed by Judge Leslie Tchaikovsky and Professors Ed Cooper and Jay Tidmarsh, as well as by members of the Federal Judicial Center staff, prior to publication. I considered and responded to their comments as I deemed appropriate. I am appreciative of all the reviewers' suggestions, and I accept responsibility and apologize for any remaining errors.

Structure of the Case Studies

The original four case studies have a similar structure, addressing the following topics in this order:

1. nature of litigation and litigation maturity;
2. history of the lawsuit (or bankruptcy proceedings);
3. party structure;
4. attorneys;
5. settlement (or reorganization plan) terms;
6. negotiation history;
7. handling of future claims;
8. notice procedure and content;
9. approval and review process;
10. attorneys' fees; and
11. assessment.

The additional bankruptcy case studies also follow this same structure to the extent possible given the available information.

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Chapter 2

Policy Implications of the Case Studies & Conclusions

The features of limited fund class action settlements and bankruptcy reorganizations that make them attractive devices for resolving mass torts—including their compulsory nature, the ability to include future claimants in the resolution, and the ability of court-appointed counsel to negotiate on behalf of a class of all tort claimants—also present serious issues about the legitimacy of their use for this purpose. The literature on mass torts includes numerous discussions of the policy concerns presented by using either non-opt-out class action settlements or Chapter 11 bankruptcies as resolution devices.[18] It was with those concerns in mind, as well as the possible advantages to be gained, that the case studies included in this monograph were undertaken.

Before presenting the case studies themselves, I provide in this chapter an overview of the issues raised by the use of limited fund class action settlements and bankruptcy reorganizations as mass tort resolution devices. For ease of discussion, these issues are grouped under four broad headings: fairness of the resolution process, effectiveness of judicial review of the resolution, efficiency of the resolution process, and likelihood that the resolution process will be invoked. I then use this classification system to compare limited fund class actions and bankruptcy reorganizations as mass tort resolution devices. Because that comparison leads me to conclude that bankruptcy provides the fairer, although less efficient, solution, I make several suggestions for steps that might be taken to improve bankruptcy as a mass tort resolution device.

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18. *See, e.g.,* sources cited *supra* note 3; *see also* Edith H. Jones, *Rough Justice in Mass Future Claims: Should Bankruptcy Courts Direct Tort Reform?*, 76 Tex. L. Rev. 1695 (1998); Thomas A. Smith, *A Capital Markets Approach to Mass Tort Bankruptcy*, 104 Yale L.J. 367 (1994).

Issues Raised by the Case Studies

Fairness of the Resolution Process

The overriding issue presented by any aggregative method for resolving tort claims, as opposed to the traditional individual litigation method, is the fairness of the procedure to all parties involved, but especially to the tort claimants themselves. In limited fund class action settlements and bankruptcy reorganizations, binding resolutions are made as a result of negotiations between the defendant and counsel appointed to represent the tort claimants, rather than the claimants themselves or individually retained counsel. Therefore, the adequacy of representation of the class members' interests must be carefully examined, and, where those interests are sufficiently distinct, the need for subclasses must be considered.

The loss of class members' individual autonomy also makes it especially important to examine whether class members or their lawyers have a meaningful voice in the decision to accept the proposed resolution. Among the relevant issues here are the following:

- whether class members are given advance notice of court proceedings;
- whether they are given sufficient financial and other data to have a basis for making an informed judgment about the adequacy of the proposed resolution (including the terms and procedures of any payout mechanism);
- whether they are given an opportunity to express concerns about or opposition to the proposed resolution; and
- whether the approval process in fact gives weight to their views.

Of related concern is the possibility of collusion between the defendant and counsel negotiating on behalf of the claimants; whether the resolution procedure in question has built-in protections against such a possibility should be considered.

Another major issue of fairness concerns the treatment of future claimants. Since the goal of both limited fund class action settlements and Chapter 11 bankruptcies is to arrive at a global resolution of the mass tort claims against the defendant, efforts are frequently made to include in the plaintiff class persons who may not yet know that they will one day have a claim against the defendant. Accordingly, the adequacy of notice to potential claimants of the risk that their future claims may be extinguished merits consideration. Careful attention also needs to be paid to

the adequacy of representation of the interests of future claimants; among the issues that should be considered are whether an independent representative is appointed specifically for such class members and whether that representative has access to the information and resources needed for effective advocacy.

The effort to achieve a global resolution of a defendant's mass tort liability may affect the interests of persons other than the direct tort victims. For example, the resolution may also seek to release derivative claims, such as those asserted by family members, health insurers, and codefendants with claims for contribution or indemnity against the defendant. If parties such as these are included in the class for binding resolution of their claims, issues arise concerning the adequacy of their representation and notice, the possible need for subclasses or separate classification, and the ultimate fairness of the treatment of their claims.

The desire for an all-encompassing solution may also lead to the inclusion of parties other than the defendant in the protection offered by the class action or bankruptcy resolution. Such expansive protective provisions raise issues about the legal authority for affording such relief, as well as the fairness to the tort claimants of eliminating their claims against other potentially viable defendants. Moreover, because all of the defendant's creditors and shareholders are potentially affected by the company's mass tort liability, any resolution of that liability that requires tort claimants to recover less than the full amount of their claims raises questions about the equity of that treatment as compared with the treatment of equal or junior interests.

Effectiveness of Judicial Review of the Resolution

When either a limited fund class action settlement or a bankruptcy reorganization is used as a mass tort resolution device, the chief means of ensuring the fairness of the proposed settlement for all affected interests is the judicial review that is provided. In a class action, such review is provided by the district judge's decision whether to certify the class and approve the settlement, a decision that is usually based on the evidence presented at a fairness hearing. In a Chapter 11 bankruptcy, judicial review is provided by the bankruptcy judge's decision whether to confirm the reorganization plan; this decision follows the voting on the plan by members of the affected classes and a confirmation hearing. In assessing the cases included in this monograph, therefore, it is important to examine

with care the judicial review processes employed. One issue for consideration is the proper scope of judicial discretion. Is the judge bound by clearly established standards for approval of the proposed resolution? If so, there is likely to be greater confidence in the consistency and objectivity of the court's approval of the settlement. Another issue is whether the resolution method used—class action settlement or bankruptcy reorganization—tends to reduce possible conflicts of interest for the judge that otherwise might lessen the effectiveness of judicial review.

In either a limited fund class action settlement of mass tort litigation or a Chapter 11 reorganization involving mass tort claims, two issues that should be at the center of the court's review of the proposed resolution are the amount of the defendant's tort liability and the value of the defendant corporation. To certify a class action under Rule 23(b)(1)(B) in a mass tort case, the court must determine that the defendant constitutes a limited fund, which is generally taken to mean that its assets by some measure are not sufficient to satisfy its tort liability. Thus, those two amounts must be determined and compared. Furthermore, to approve the settlement amount as fair and reasonable, the court must determine the value of the company as an ongoing business in order to ensure that a fair portion of the value of the defendant's business (which is being allowed to continue) is being devoted to the tort claimants.

In a bankruptcy reorganization, the magnitude of the debtor's tort liability must be determined in order to ensure that any dissenting tort claimant is faring no worse under the reorganization plan than it would fare in a Chapter 7 liquidation and also to ensure that the treatment of the tort claimant class is equitable in relation to the treatment of classes of equal or lesser priority. The reorganization value of the debtor is relevant to the feasibility of the plan and other confirmation issues dependent on the value of the stock of the reorganized debtor.

In assessing the class actions and bankruptcy proceedings included in this study, therefore, as well in comparing these two devices as methods of resolving mass torts, one must examine the processes used for resolving these two difficult and central issues: estimation of the total tort liability and valuation of the defendant. Does either a limited fund class action or a bankruptcy reorganization appear to provide a more reliable means for making these essential forecasts? Do the courts in both situations independently and critically examine the figures put forth by the parties supporting the proposed resolution?

A final issue that arises in connection with judicial review of the proposed mass tort resolution is the extent to which the merits of the tort claims have already been or are able to be fully assessed. This issue concerns the wisdom and fairness of the resolution from the perspectives of both sides of the litigation, as well as that of society as a whole, and it requires consideration of the extent to which the court should defer to the judgment of the parties who are seeking to settle or to confirm a reorganization plan. Assessment of the merits also relates to the timing of the class action or reorganization and where the resolution falls in the maturity cycle of the tort.

Efficiency of the Resolution Process

Class actions and bankruptcy reorganizations have been used to resolve mass torts in the belief that such aggregative resolution procedures are more efficient than individual, repetitive litigation and settlement would be. Accordingly, it is appropriate to examine just how efficient these resolution devices are, particularly in terms of the time and money needed to reach a successful conclusion. Included in this inquiry are questions about the amount of attorneys' fees, both for class counsel and those individually retained, and the court's ability to place reasonable limitations on the fees of attorneys and experts in order to prevent such costs from draining the fund of assets intended for the tort victims.

Also relevant to the question of the efficiency of limited fund class action settlements and bankruptcy reorganizations is whether they permit the resolution of mass tort claims in a way that minimizes duplication of effort with other proceedings. This issue is especially important when one mass tort defendant chooses a resolution method—such as bankruptcy—different from the method being pursued by codefendants.

Likelihood That the Resolution Process Will Be Invoked

Regardless of how fair and efficient a procedure might be for resolving mass torts, it will be of limited utility if it is perceived by those who need to invoke it as being disadvantageous for some reason. Thus, a final set of issues presented by limited fund class action settlements and Chapter 11 reorganizations involves questions about who is able to invoke the resolution procedure—plaintiffs, defendant, court, others—and what risks (including possible reputational harm) the procedure presents for those who would otherwise consider invoking it.

A Comparison of These Two Mass Tort Resolution Methods

The analysis that follows focuses on the issues identified above as being key questions raised by the use of limited fund class action settlements and bankruptcy reorganizations to resolve mass torts. Based on the cases that were studied, observations are made concerning whether either resolution method appears to offer an advantage over the other with regard to the issues that have been identified.

Fairness of the Resolution Process

Perhaps the central issue to be considered about any aggregative method of resolving tort claims is the fairness of the process to absent tort claimants. The Supreme Court in both of its recent mass tort cases, *Amchem Products, Inc. v. Windsor*[19] and *Ortiz v. Fibreboard Corp.*,[20] stressed the need to interpret Rule 23 strictly in order to ensure that a fair basis exists for binding the absent claimants to the resolution that has been negotiated on their behalf by persons designated to represent them. Thus, the Court focused in both cases on the adequacy of representation of the class members, including the existence of possible conflicts of interest within the class that would necessitate the creation of subclasses with separate representation. Fair treatment of absentees also depends on the extent to which class members or their lawyers are given opportunities to participate directly in the proceedings prior to judicial acceptance of the resolution.

Bankruptcy appears to come out ahead of limited fund class actions overall on these aspects of fairness. The case studies included in this monograph show that, at least prior to *Ortiz*, both limited fund class actions and bankruptcy reorganizations have tended to use broadly defined classes of tort claimants, grouping their claims together regardless of extent of manifestation and severity of injury or likely value of the claims. Both resolution methods also rely on court-appointed representatives to negotiate settlements or reorganization plans. The court, or in a bankruptcy case, the U.S. trustee, can appoint either persons who are broadly representative of the group of tort claimants or persons who are expected to favor resolution by means of settlement or bankruptcy reorganization,

19. 521 U.S. 591 (1997).
20. 527 U.S. 815 (1999).

regardless of the wishes of the class. There is, therefore, the possibility of inadequacy of representation (in the sense of potential conflicts of interest and of failure to represent the views of absent claimants) with either procedure. Where bankruptcy has an advantage, however, is in its voting procedure. Even if a tort claimants' committee has negotiated a plan with the debtor, the tort claimants themselves are provided a detailed explanation of the plan and are permitted to vote on whether they approve it. If claimants representing more than one-half in number of those voting and at least two-thirds in dollar amount of claims of those voting do not approve the plan, then the court must determine that the substantive, cramdown protections have been satisfied. Thus, with respect to the rejecting class, the court must determine that the plan does not "discriminate unfairly" and that it meets the statutorily defined requirement of being "fair and equitable."[21] Although members of a limited fund class may express their objections to a proposed settlement, they cannot opt out, and the settlement can be approved without change over their objections. Moreover, members of a limited fund class need to take more initiative than is required of bankruptcy creditors in voicing their objections, and they must overcome the momentum of a settlement that has been preliminarily approved by the court. Thus, in reality, most limited fund class members are dependent on their representatives to adequately protect their rights.

The inclusion of future claimants in a mass tort resolution presents difficulties regardless of which of the two methods is used. One might question whether it is ever fair to compromise or discharge the claims of persons who at the time of the bankruptcy or class action have no awareness that they have or will have a claim against the company. If, however, an all-encompassing solution is to be sought, the appointment of a future claims representative or the creation of a separate class of future claimants with independent representation appears to be the most effective way to protect the rights of persons who are unaware of their injuries at the time the resolution proceedings are pending yet will later be bound by the resolution once their injuries become manifest. In the cases studied, only one of the limited fund class actions (*Eagle-Picher*) had a future claims representative, whereas all but one of the bankruptcy reorganizations (*Dow Corning*) appointed such a person. In part this difference may

21. *See* 11 U.S.C. § 1129(b)(1), (2) (1994).

be due to differences in the amounts of significant future tort liability the products involved were expected to create. Beyond that factor, however, it appears that mass tort bankruptcies have a more established tradition of appointing future claims representatives.

In asbestos bankruptcies, the Bankruptcy Code now authorizes a future claims representative and indeed requires such an appointment if the court enters an injunction channeling all further demands for compensation for asbestos-related injury to a trust created by the reorganization plan.[22] Furthermore, in 1997 the National Bankruptcy Review Commission recommended expanding the statutory requirement for a future claims representative to include all mass tort bankruptcies involving future claims, regardless of the product involved.

Perhaps differences between bankruptcies and class actions concerning the representation of future claimants will be reduced as a result of the *Ortiz* decision, in which the Supreme Court expressed disapproval of that limited fund class action's failure to create a subclass with separate representation for future claimants. To date, however, bankruptcy seems to come out ahead on this score.

An aspect of fairness in which neither method appears especially strong is in the treatment of persons who have derivative tort claims against the defendant or debtor. Such claimants include family members with loss of consortium claims, health insurers with subrogation claims, and codefendants with claims for indemnity or contribution. Generally such claims are included in the settlement or confirmed plan in order to eliminate any future tort liability for the defendant or debtor. Rarely are these claimants given an independent voice in arriving at a resolution, other than being afforded the opportunity to object and, in bankruptcy cases, to vote, usually as a small part of a large class of tort claimants. Resolution of the direct tort claims is the primary goal, and these derivative claims seem to be swept along with them.

The desire for an all-encompassing solution also frequently leads to the inclusion of other potential defendants in the protection afforded by the settlement or confirmed plan. The authority for and fairness of eliminating plaintiffs' rights against entities other than those making their assets available to fund the resolution can be questioned. In bankruptcy the authority for discharging nondebtor defendants is uncertain,

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22. *See id.* § 524(g)(4)(B)(i).

as is illustrated by the bankruptcies included in this study. Several courts approved releases extending to nondebtor parties, whereas the bankruptcy court in *Dow Corning* refused to interpret the plan to permit such releases with respect to claimants who had not voted to accept the plan. In limited fund class action settlements, however, the authority for broad releases rests on the legitimacy of the settlement itself. If properly designated class representatives agree to release claims against persons other than the defendant, effective notice is given to class members of the scope of the release, and the court approves that term of the settlement as fair, then such a release should generally be enforceable. With either resolution method, however, careful judicial attention needs to be given to the fairness of eliminating tort claimants' rights to proceed against persons or entities that are not providing any funds for the settlement or reorganization.

A final, perhaps overriding, fairness issue concerns the equitability of the tort claimants' treatment in relation to other entities of equal or lesser rank. It is in regard to this issue that bankruptcy has perhaps the greatest advantage. A limited fund class action settlement says to tort claimants, "This company is a limited fund. It does not have sufficient assets to defend and pay all of the tort claims that will be asserted against it; therefore, the company will settle with the group for a finite amount that will allow everyone to receive something, although no one will receive the full amount of his or her claim." It was on this basis, for example, that Eagle-Picher offered asbestos claimants some $505 million over a twenty-year period. At the same time, however, the company planned to pay its commercial creditors in full and to allow existing shareholders to retain their stakes in the company. If a company truly is a limited fund, why then should all unsecured creditors and shareholders not be made to bear the loss along with the tort claimants?

Bankruptcy, on the other hand, is based on an equitable distribution of the company's shortfall among all affected constituencies. As a result, Eagle-Picher's bankruptcy ended with the shareholders being wiped out, the commercial creditors being paid approximately 33% of their allowed claims, and the tort claimants owning the reorganized company. The bankruptcy result in that case was a fairer resolution than the proposed limited fund class action settlement, not just because the tort claimants were paid more, but because they were not singled out as the only ones to

suffer the results of the company's insufficiency of assets. Bankruptcy recognized that it was everyone's problem.

Effectiveness of Judicial Review of the Resolution

Since both limited fund class action settlements and reorganization plans have to be judicially approved in order to take effect, the presiding judge provides an important final protection for the absent tort claimants and other affected parties. The effectiveness of this judicial review depends upon a number of factors, including the existence of clearly established standards for the review, the judge's expertise in resolving the difficult issues usually at the heart of a limited fund class settlement or mass tort reorganization plan, the judge's willingness to examine critically the evidence put forth by the proponents of the settlement or plan, and the absence of potential conflicts of interest for the judge. A related issue concerns the ability of the judge to determine the wisdom and fairness of the proposed resolution in light of the overall merits of the mass tort claims.

Concerning the question whether clearly established judicial review standards exist for the cases considered in this monograph, the answer is more clearly yes for the bankruptcy proceedings than for the limited fund class actions. Judicial review of a mass tort bankruptcy reorganization plan requires application of a prescribed set of statutory standards for confirmation, standards known to and frequently applied by all bankruptcy judges. That such standards exist, of course, does not make the confirmation of a mass tort plan a simple matter. Application of these traditional standards in the unconventional context of a mass tort bankruptcy raises a number of challenging and still unresolved legal issues. Nevertheless, the principles on which confirmation rests are well established, and the confirmation judge can turn to a growing body of mass tort bankruptcy case law for guidance.

The standards for judicial review of limited fund class action settlements, by contrast, remain ill defined. Although courts have articulated general principles governing the approval of class action settlements, neither Rule 23 nor settled case law establishes the basis on which a district court is to judge whether a company facing mass tort liability constitutes a limited fund and, if it does, whether the proposed settlement provides for a fair distribution of the company's assets. The *Ortiz* decision gave some initial guidance on the minimum requirements for the certification of a limited fund class action, but it left many questions un-

answered. Without clearly established principles by which limited fund classes and the resulting settlements are to be evaluated, there may be the appearance of reduced objectivity on the part of the reviewing court.

Two issues at the heart of a resolution of mass tort liability by means of either a limited fund class action settlement or a bankruptcy reorganization are the total amount of the company's present and future tort liability and the value of the company. The effectiveness of judicial review of the settlement or plan therefore rests in part on the court's willingness and ability to tackle these difficult issues. With respect to establishing the total value of the tort claims, it appears that both district and bankruptcy courts prefer to allow the parties to negotiate the figure if at all possible rather than have the judge determine the amount. In only two of the cases studied—the *Robins* and the *Eagle-Picher* bankruptcies—did the court conduct an estimation hearing and rule on the value of the tort claims. In all the other cases, either the parties themselves determined the amount of the tort claims in relation to other unsecured claims, or they negotiated a settlement without establishing an announced value of the tort claims. In either type of case, however, effective judicial review requires that the court look behind the agreement of the parties to ensure that a limited fund in fact exists and that the proposed settlement is fair, or that the reorganization plan provides the required treatment for tort claimants who have voted against it.

Probably neither a bankruptcy proceeding nor a limited fund class action comes out ahead in terms of the court's expertise in arriving at an accurate determination of the total amount of the company's present and future tort liability. Although the Bankruptcy Code contains authority for the judicial estimation of contingent or unliquidated claims,[23] it is not a task frequently engaged in by bankruptcy judges. Certainly when it comes to determining the likely value of thousands of tort claims stretching over many years, a bankruptcy judge is not likely to have any greater wisdom or experience than a district judge.

On the other hand, bankruptcy courts are often required in confirmation settings to determine the reorganization value of the debtor company, and for that reason bankruptcy judges on the whole are likely to have more experience than district judges in assessing evidence presented by the parties concerning a company's value.

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23. *See* 11 U.S.C. § 502(c)(1) (1994).

Some may question whether a judge, in reviewing a mass tort resolution, might be unduly influenced by the knowledge that approval of the resolution will clear that court's docket of a large number of cases that will otherwise have to be individually resolved. Such a concern seems not to have been presented by the cases considered in this monograph. The two courts that actually approved limited fund class action settlements were both presiding over MDL proceedings. Had the cases not settled, they eventually could have been sent back to their home districts for trial, rather than remaining on the reviewing judge's docket.[24]

In the bankruptcy cases, the debtor's filing did in fact bring all of the mass tort cases before the reviewing court, but not with the expectation that the bankruptcy judge would end up trying them all. If actually tried, personal injury and wrongful death tort claims against a bankruptcy debtor must be tried either in the district court where the bankruptcy case is pending or in the district where the claim arose.[25] Should the bankruptcy judge deny confirmation, therefore, it would be unlikely that that judge would end up having to try the thousands of mass tort claims.

Undoubtedly, the reviewing judges in the examined cases acted with the knowledge that approval of the settlement or reorganization plan would remove a litigation burden from the federal and state courts as a whole. It seems unlikely, however, that they were motivated by the desire to reduce their own caseloads.

A final issue concerning judicial review is the ability of the court, in approving a settlement or confirming a plan, to assess the fairness of the treatment of the tort claims in light of the merits of those claims. A premature resolution, by means of either a class settlement or a bankruptcy reorganization, could result in either an undervaluation of claims that might later be shown to be of much more substantial value or an unnecessary diversion of corporate assets to satisfy claims that might later be shown to be largely without merit. Limited fund class action settlements

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24. Indeed, with the Supreme Court's decision in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach,* 523 U.S. 26 (1998), it became clear that the MDL court lacks statutory authority to assign transferred cases to itself for trial. (Although legislation has been introduced to provide such statutory authority, as of this writing it has not been enacted. *See* Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 1999, H.R. 2112, 106th Cong.) Even prior to the *Lexecon* decision, however, when some courts read 28 U.S.C. §§ 1404(a) and 1407 as allowing such self-transfers, an MDL court was not required to retain for trial any transferred cases that did not settle.

25. *See* 28 U.S.C. § 157(b)(5) (1994).

may have a slight advantage over bankruptcy reorganizations in this regard, since the judge asked to approve the settlement is likely to have a great familiarity already with the mass tort litigation being settled. Certainly that was true for all three class actions studied in this monograph. Two of the reviewing judges were presiding over MDL proceedings involving the mass tort in question, and the other judge had presided over scores of asbestos cases before the settlement effort was initiated.

A mass tort bankruptcy, by contrast, is generally filed in a court with no prior familiarity with the tort claims facing the debtor. The bankruptcy judge certainly becomes knowledgeable about the tort claims over the long course of the bankruptcy, and thus by the time of the confirmation hearing, the judge has a basis for assessing the strength of those claims. Nevertheless, the class action judge is probably in a better position to determine whether the resolution is sought prematurely and whether it is fair to both sides.

Efficiency of the Resolution Process

Because an important goal of any aggregative method of resolving mass torts is to gain efficiencies over the traditional case-by-case resolution method, it is useful to compare limited fund class action settlements with bankruptcy reorganizations in terms of efficiency. Without a doubt, limited fund settlements come out ahead.

The time it takes to achieve a successful limited fund settlement—at least the court time—is much less than the time required for the successful conclusion of a mass tort bankruptcy. The two successful limited fund class action settlements included in this study were resolved in a matter of months after the initial request for class certification and settlement approval, whereas the bankruptcy proceedings lasted for anywhere from three to seven years. Examining the duration of the court proceedings overstates to some degree the differences in the time required for resolution, however, because at the point that the class actions were initiated, lengthy negotiations leading to a settlement had already taken place. In the bankruptcies, by contrast, those negotiations took place in the course of the reorganization proceedings. Nevertheless, even taking into account the time for negotiations, limited fund class action settlements can generally be achieved in less time than it takes to confirm a mass tort bankruptcy reorganization plan, if for no other reason than

that bankruptcy requires a resolution of all of the debtor's liabilities, rather than just those arising from the mass tort.

Because in legal matters time equals money, it would seem to follow that a limited fund class action settlement can be achieved at less cost than is required for a successful bankruptcy reorganization—unless, of course, class counsel are rewarded with a generous percentage of the settlement fund without regard for the actual time and effort expended. Moreover, because many more parties are involved in a bankruptcy than in a class action settlement, the number of lawyers and experts is multiplied, and the costs rise as a result. Hard numbers for the costs of the class actions and bankruptcies studied were generally not available, yet it does appear that many millions of dollars were expended on costs and fees in the mass tort bankruptcies, sums apparently significantly exceeding the amounts of costs and fees incurred in achieving the settlements in the two successful limited fund class actions studied.

Both types of resolution procedures are able to achieve some efficiencies by avoiding duplication with other proceedings involving the same mass tort. The automatic stay in a bankruptcy case terminates all efforts to pursue the tort claims against the debtor outside the bankruptcy proceedings, and injunctive relief entered by the district courts achieves the same result for limited fund class action proceedings. Some of the cases included in this study demonstrate that efficiencies can also be achieved by coordinating efforts with related proceedings. The *Mentor* settlement, for example, used a claims administration facility jointly with other breast implant settlements, and the *UNR* and *Eagle-Picher* bankruptcies used a joint claims facility as well. Finally, Judge Pointer's assignment to preside over the breast implant claims in the *Dow-Corning* bankruptcy illustrates the possibility for coordination between MDL proceedings and bankruptcy proceedings.

Likelihood That the Resolution Process Will Be Invoked

A final, practical consideration for a comparison of limited fund class action settlements and bankruptcy reorganizations is how likely each method is to be invoked for the resolution of a mass tort. Both procedures are generally initiated by the defendant, rather than plaintiffs or the court, and thus the question is whether, despite the virtue of either method as a means of resolving mass torts, defendants are unlikely to take advantage of it.

The cases included in this monograph show that although under some circumstances, defendants are willing to use either method, bankruptcy is viewed as a last resort for most companies. The stigma of bankruptcy is a significant deterrent to companies that fear that a bankruptcy filing will undermine the image of reliability that they need to project to customers and investors. Moreover, as the bankruptcies in this study show, current managers and shareholders run the risk in filing for bankruptcy that the tort claimants will become the new owners of the reorganized company or that they will at least gain majority control. In comparison with bankruptcy, therefore, a limited fund class action solution of the type approved in the cases studied—which allows the company to continue to operate, the shareholders to retain their equity interests, and trade creditors to be paid in full—is more likely to be invoked by mass tort defendants. The *Ortiz* decision, however, raises doubts about whether the limited fund class action settlement will continue to be an attractive and viable option for such defendants.

Recommendations[26]

A comparison of limited fund class action settlements and bankruptcy reorganizations as devices for resolving mass torts suggests that bankruptcy may offer a fairer resolution method, in that it allows the direct participation by tort claimants in the approval process, has a stronger tradition of utilizing future claims representatives, requires all unsecured creditors and shareholders to share the loss occasioned by the debtor's insufficiency of funds, and has well-established standards for plan confirmation. Limited fund class action settlements, on the other hand, offer a more efficient method of resolving mass torts, in terms of both time and money, and are more likely to be favored and therefore invoked by defendants seeking an aggregative resolution method. If these generalizations are correct, then policy makers might consider either how to make mass tort bankruptcy proceedings more efficient or how to make the process for achieving limited fund class action settlements fairer.

Two factors indicate that policy makers' efforts would be better spent in pursuing the first task: making mass tort bankruptcies more efficient. The first factor leading to this conclusion is that the theory of a limited

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26. The recommendations that follow are my own and not those of the Federal Judicial Center or its Board.

fund class action settlement as it has been used to resolve mass torts is inherently unfair. The reason for forcing claimants to have their rights resolved as part of a mandatory class proceeding in a forum and with representatives not of their own choosing is that without the class action, some claimants will recover in full, but some or many will receive nothing. The fund they are pursuing is limited, and thus it will be exhausted before all are paid. When the fund is one against which only a designated group has claims, that class of claimants, if sufficiently large, can appropriately be certified pursuant to Rule 23(b)(1)(B). When the limited fund is the company itself, however, then all creditors have a claim to it. There is no basis, therefore, for allowing only one group of creditors to pursue the fund and leaving others with no recovery, or for making only one group of creditors accept less than full payment while reserving sufficient assets to pay everyone else in full. Either the entire fund has to be distributed equitably among all who have a claim to it, or else no claimants should be forced to accept partial payment without their consent.

The second factor indicating that attention is better focused on improving bankruptcy is that, as I read it, the Supreme Court's decision in *Ortiz* raises serious doubts about whether the Court would ever uphold a limited fund class action settlement of mass tort claims. The majority repeatedly questioned whether such a settlement is permissible,[27] and it made clear that a number of constitutional concerns led to its doubts.[28] Others may view the decision as having a more limited impact; however, the red flags raised by the Court suggest that a defendant seeking to use this method of resolving its mass tort liability would most likely risk lengthy and quite possibly successful appeals, even if it could succeed in getting the district court to certify a limited fund class and approve the

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27. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 842 (1999) ("[W]e . . . cannot decide the ultimate question whether settlements of multitudes of related tort actions are amenable to mandatory class treatment . . . ."); *id.* at 844 ("We do not, it is true, decide the ultimate question whether Rule 23(b)(1)(B) may ever be used to aggregate individual tort claims."); *id.* at 864 ("In sum, the applicability of Rule 23(b)(1)(B) to a fund and plan purporting to liquidate actual and potential claims is subject to question . . . .").

28. *See id.* at 845–46 ("[T]he certification of a mandatory class followed by settlement of its action for money damages obviously implicates the Seventh Amendment jury trial rights of absent class members . . . ."); *id.* at 846–47 (raising due process concerns about denying absent class members their day in court); *id.* at 864 ("[T]he policy of avoiding serious constitutional issues counsel[s] against leniency in recognizing mandatory limited fund actions in circumstances markedly different from the traditional paradigm . . . .").

settlement.[29] The advantage of a limited fund class action in providing a speedier solution and one more likely to be favored by defendants is therefore in large part eliminated by these uncertainties.

What, then, do the case studies suggest about efforts that might be undertaken to improve bankruptcy as a mass tort resolution device? The following are several suggestions for further consideration.

- Amendments to the Bankruptcy Code, such as those previously suggested by the National Bankruptcy Review Commission and others,[30] might provide clearer statutory authority for the use of bankruptcy to resolve mass torts. Among the issues that might be addressed by statutory changes are clarification of the definition of "claim" in a way that provides sure authority for the existing practice of including future claims in a reorganization plan, authorization for the appointment of future claims representatives outside the asbestos context, and clarification of the circumstances under which confirmation of a mass tort reorganization plan may release nondebtor parties from further liability.
- Consideration should be given to how to reduce the steep learning curve facing a bankruptcy judge who is assigned for the first time to preside over a mass tort bankruptcy. To date, mass tort bankruptcies are sufficiently rare that each one is probably the first for the bankruptcy judge who is assigned to preside over it. Methods need to be devised by which experienced mass tort bankruptcy judges can pass along to others the procedures and case-management techniques that they found over time to be

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29. *See, e.g.,* Beckert v. TPLC Holdings, Inc. (*In re* Telectronics Pacing Sys., Inc.), 221 F.3d 870 (6th Cir. 2000) (citing *Ortiz*, court of appeals decertifies Rule 23(b)(1)(B) certification and reverses approval of settlement in pacemaker leads class action); Wish v. Interneuron Pharmaceuticals, Inc. (*In re* Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.), No. 98-20594, 1999 WL 782560 (E.D. Pa. Sept. 27, 1999) (denying limited fund class certification in diet drugs class action, the district court reads *Ortiz* as "counsel[ing] against those class certifications which would deprive the class of the protections available under the traditional model"); *cf.* Walker v. Liggett Group, Inc., 175 F.R.D. 226 (S.D. W. Va. 1997) (basing decision on *Amchem*, district court withdraws preliminary Rule 23(b)(1)(b) and (b)(3) certification and denies class certification in cigarette class action).

30. *See* National Bankruptcy Review Comm'n, Bankruptcy: The Next Twenty Years 315–50 (1997); Alan N. Resnick, *Bankruptcy as a Vehicle for Resolving Enterprise-Threatening Mass Tort Liability,* 148 U. Pa. L. Rev. 2045 (2000).

helpful in moving their mass tort cases to completion. The means of conveying this information might include educational programs, both live and videotaped, and written materials, such as a mass tort bankruptcy manual. A more far-reaching proposal would be to create, with statutory authority, a panel of experienced mass tort bankruptcy judges whose members could be assigned to preside over future mass tort reorganization cases. Another possibility would be a legislative enactment authorizing the Chief Justice of the United States or the chief judge of a court of appeals to assign a mass tort case (as defined by legislation) to a bankruptcy judge, much as is currently done with municipal bankruptcies.[31]

- Some of the bankruptcy cases studied in this monograph illustrate the effective use that can be made in a mass tort bankruptcy case of an examiner or a mediator to assist the parties in negotiating a resolution, devising a method for estimating the value of the tort claims, or helping facilitate a successful sale of the company in order to fund the mass tort resolution. Use of such auxiliary personnel should be encouraged, perhaps by an amendment to the Bankruptcy Code specifically authorizing the use of an examiner for these and other purposes that go beyond the current statutory description of examiners' duties.[32]
- Also to be encouraged are the efforts made by some bankruptcy courts to coordinate a mass tort reorganization case with related mass tort proceedings. This coordination can occur both in the course of the bankruptcy itself and in the subsequent claims-processing phase.
- Finally, consideration needs to be given to whether the *Ortiz* decision has any implications for bankruptcy. The constitutional concerns raised in the Supreme Court's interpretation of Rule 23(b)(1)(B) in regard to limited fund class actions may arise in

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31. *See* 11 U.S.C. § 921 (1994) ("The chief judge of the court of appeals for the circuit embracing the district in which the case is commenced shall designate the bankruptcy judge to conduct the case.").

32. *See id.* § 1106(b) ("An examiner . . . shall perform the duties [relating to investigation of the debtor and its affairs] specified in paragraphs (3) and (4) of subsection (a) of this section, and, except to the extent that the court orders otherwise, any other duties of the trustee that the court orders the debtor in possession not to perform.").

bankruptcy cases as well. Specifically, further thought needs to be given to whether classes of tort claimants in mass tort reorganization plans need to be more discretely defined, as *Ortiz* requires for class actions, or whether bankruptcy's practice of broadly classifying all "substantially similar" claims together is permissible because of the availability of other procedural protections for bankruptcy claimants. Also meriting consideration is the related question of whether the practice of valuing all tort claims equally improperly mutes the voices of the more seriously injured claimants.[33]

Conclusion

This study focuses specifically on two types of mass tort resolution devices—limited fund class action settlements and bankruptcy reorganizations. It places the two methods side by side and examines the processes that led to the approval of the settlements or the confirmation of the reorganization plans and the results that these resolutions produced for tort claimants.

I have stated the conclusions that I draw from the case studies. It is my hope, however, that this monograph represents only a beginning and that others, reading the accounts of these class actions and bankruptcy cases, will express the conclusions that they draw from the case studies and will further pursue various issues that are suggested herein but that fall outside the scope of the present work. For example, scholars and policy makers might consider how through rule changes and legislation the best features of both mass tort bankruptcy reorganizations and limited fund class actions might be combined into a new resolution device that surpasses either existing method while at the same time passing constitutional muster. Likewise, consideration might be given to how the respective expertise of a bankruptcy judge and a district judge can be effectively used together in an aggregative resolution of a mass tort. Other issues for further study will undoubtedly suggest themselves to knowledgeable readers.

The judicial resolution of mass torts presents problems that defy simple solutions. I hope that this monograph, while not offering final

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33. *See* S. Elizabeth Gibson, *A Response to Professor Resnick: Will This Vehicle Pass Inspection?*, 148 U. Pa. L. Rev. 2095, 2112–13 (2000).

solutions, does provide data concerning the actual experience with two types of mass tort resolution methods that will serve as the basis for further research, thought, and action.

Chapter 3

Initial Supreme Court Guidance on Limited Fund Class Action Settlements: *Ortiz v. Fibreboard Corp.*

In *Ortiz v. Fibreboard Corp.,*[34] the Supreme Court addressed for the first time the use of a Federal Rule of Civil Procedure 23(b)(1)(B) settlement to resolve mass tort litigation. Adopting a narrow, historically based model for limited fund class actions under Rule 23(b)(1)(B), the Court rejected a $1.535 billion settlement arising out of what it termed "the elephantine mass of asbestos cases"—litigation that the Court recognized "defies customary judicial administration."[35] *Ortiz* may ultimately prove to be a case less significant for the questions it answers than for those it raises, for the Court pointedly questioned whether a limited fund mandatory class is ever appropriate in a mass tort case. The Court's reasons for rejecting the settlement before it, however, establish the minimum requirements that a Rule 23(b)(1)(B) class action settlement must meet.

Background of the Case

Fibreboard Corp. was an asbestos manufacturer from the 1920s through 1971. The asbestos litigation avalanche left Fibreboard litigating on two fronts, sued by individual tort claimants and suing two insurance companies that had briefly provided them with liability insurance in the 1950s.[36] In the early 1990s, Fibreboard began settling individual cases by assigning its rights against one of the insurers in the event Fibreboard prevailed in the coverage litigation. By 1993, Fibreboard had prevailed at trial against the insurers, establishing both its right to be indemnified by the insurers for its tort liability and the validity of its assignment settlements.[37] While the insurance cases were pending on appeal, the time was ripe for settlement negotiations between Fibreboard, the tort claimants,

34. 527 U.S. 815 (1999), *rev'g* Flanagan v. Ahearn (*In re* Asbestos Litig.), 134 F.3d 668 (5th Cir. 1998).

35. *Id.* at 821.

36. *See id.* at 822.

37. *See id.* at 822–23.

and the insurers. One insurer insisted upon a "total peace" settlement, one which bound all potential future claimants as well as present claimants and which provided no opportunity to opt out.[38]

After negotiating a settlement of some 45,000 pending claims,[39] the parties in August 1993 reached the global settlement that was ultimately reviewed by the Supreme Court. Under its terms, the insurers provided $1.525 billion to pay for future asbestos claims.[40] Fibreboard provided another $10 million, all but $500,000 of which came from other insurance proceeds. The parties contended that Fibreboard's assets (including its insurance coverage) constituted a limited fund inadequate to satisfy all its asbestos claims, thus justifying certification of a mandatory, non-opt-out class action under Rule 23(b)(1)(B).

The district court provisionally granted class certification and appointed a guardian *ad litem* to assess the fairness of the settlement to class members.[41] The guardian, Professor Eric Green, submitted a report, which concluded that from the perspective of the class members the settlement was fair and which recommended that it be approved.[42] Following an eight-day fairness hearing, the Court certified the class and approved the settlement, and the Fifth Circuit affirmed the decision.[43] The

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38. *Id.* at 824.

39. These claimants were represented by one of the firms that later became counsel for the global claimant class. *See id.* at 852. Full payment of claims (and thus fees to plaintiffs' attorneys) in this so-called inventory settlement was made contingent upon a global settlement of the asbestos claims or Fibreboard's successful resolution of the insurance coverage litigation. *See id.*

40. Included in the class on whose behalf the settlement was reached were three groups: all persons with personal injury claims against Fibreboard for asbestos exposure who had not yet brought suit or settled their claims before the settlement date; those who had dismissed such a claim and retained the right to bring a future action against Fibreboard; and past, present, and future spouses, parents, children, and other relatives of class members exposed to Fibreboard asbestos. *See id.* at 825–26. The class did not include claimants with cases presently pending against Fibreboard, because the parties had reached another agreement to set aside a separate fund to resolve those cases. Also excluded from the class were persons who, in exchange for cash payment, had dismissed their claims against Fibreboard and had retained only a right to sue Fibreboard upon development of asbestos-related malignancy. *See id.* at 826.

41. *See id.* at 827.

42. *See* Brief for Respondent at 13, Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999) (No. 97-1704).

43. *See* Flanagan v. Ahearn (*In re* Asbestos Litig.), 90 F.3d 963 (5th Cir. 1996).

Supreme Court then decided *Amchem Products Corp. v. Windsor*,[44] striking down another asbestos class action settlement, and remanded the present case for reconsideration in light of that decision.[45] The Fifth Circuit distinguished *Amchem* and again upheld certification and the settlement.[46] The Supreme Court granted certiorari and on June 29, 1999, handed down its reversal. Justice Souter wrote for the 7–2 majority. Chief Justice Rehnquist joined in the majority opinion and filed a brief concurrence, which Justices Scalia and Kennedy joined. Justice Breyer, joined by Justice Stevens, dissented.

The Supreme Court's Decision

The Court began its analysis with a review of the history of limited fund suits involving absent claimants from the perspective of the drafters of the 1966 amendment that codified the present Rule 23(b). From this history the Court divined what it termed "the historical model," identifying common characteristics present in the limited fund class action suits considered by the drafters. According to the Court, the historical model of the mandatory class action involved three elements: a fund with a definitely ascertained limit, equitable treatment of all claimants identified by a common theory of recovery, and exhaustion of the fund to pay liquidated claims.[47] In a mass tort Rule 23(b)(1)(B) class action, the Court held, the first two elements are required, and the third is at least presumptively necessary, such that any departure from full payment triggers a burden to justify that departure.[48] Such a narrow reading of Rule 23(b), it said, was necessary to honor the intent of its drafters,[49] to mini-

44. 521 U.S. 591 (1997).

45. *See* Flanagan v. Ahearn, 521 U.S. 1114 (1997).

46. *See* Flanagan v. Ahearn (*In re* Asbestos Litig.), 134 F.3d 668 (1998).

47. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 841 (1999).

48. *See id.* at 842 ("[T]here are good reasons to treat these [three] characteristics as *presumptively* necessary . . . . At the least, the burden of justification rests on the proponent of any departure from the traditional norm . . . ."); *see also id.* at 864 ("[I]t would be essential that the fund be shown to be limited independently of the agreement of the parties to the action, and equally essential under Rule 23(a) and (b)(1)(B) that the class include all those with claims unsatisfied at the time of the settlement negotiations, with intraclass conflicts addressed by recognizing independently represented subclasses . . . .").

49. *See id.* at 861 ("The nub of our position is that we are bound to follow Rule 23 as we understood it upon its adoption, and that we are not free to alter it except through the process prescribed by Congress in the Rules Enabling Act.").

mize Rules Enabling Act tensions, and to avoid constitutional concerns about due process and the right to a jury.[50]

Turning to the case at hand, the Court found that none of the three elements of the historical model was satisfied. First, the Court held that the existence of a limited fund can only be established through specific court findings, based on evidence subject to challenge, regarding both the value of the claims and the value of the fund.[51] Here, the evidence of the value of the fund (the defendant's equity plus its insurance) was insufficient, since the trial court uncritically accepted the parties' negotiated figure regarding the value of the insurance fund. Given the enormous fees at stake, the Court noted, the plaintiffs' attorneys could not be assumed to have negotiated the maximum settlement value.[52] Although it was unclear what an independent examination of the value of the insurance assets would have shown, the Court held that "objecting and unidentified class members alike are entitled to have the issue settled by specific evidentiary findings independent of the agreement of defendants and conflicted class counsel."[53]

Next, the Court turned to two problems regarding equitable distribution within the class: exclusion of numerous claimants from the class and unfairness in the distribution of the fund. The underinclusiveness of the class was problematic, the Court found, because during the course of negotiations a large number of potential class members (claimants with pending claims) settled separately with the defendant, while others were ultimately left out of the class.[54] It is "essential," the Court held, that a mandatory tort claimant class "include all those with claims unsatisfied at the time of the settlement negotiations."[55] The inequitable distribution of the fund, meanwhile, was manifested in the trial court's failure to address conflicting interests within the plaintiff class by creating separately represented subclasses pursuant to Rule 23(c)(4)(B). The Court contrasted the interest of those presently injured in a quick recovery with the interest of

50. *See id.* at 842.

51. *See id.* at 849.

52. *See id.* at 852.

53. *Id.* at 853.

54. Those left out included claimants who had previously settled with Fibreboard while retaining the right to sue again upon development of an asbestos-related malignancy and those who had claims pending against Fibreboard at the time of the initial announcement of the global settlement. *See id.* at 854.

55. *Id.* at 864.

those not yet injured in a maximized, inflation-protected fund.[56] At the same time, claimants whose exposure occurred before or during the time when Fibreboard was insured had more valuable claims than those whose exposure came later, yet this inequality was ignored by the class structure.[57] The Court explicitly noted that a judge's postcertification finding of the substantive fairness of the settlement cannot serve as a substitute for the precertification procedural protections required by Rule 23(a) and (b).[58]

The Court found that the third element of the historical model—exhaustion of the limited fund to satisfy the claims—had also not been met. Indeed, Fibreboard had been allowed to walk away with all but $500,000 of its net worth. The Court stopped short of saying that partial distribution of the fund alone would doom a limited fund class action settlement, "leav[ing] for another day" the question whether the debtor was entitled to capture some of the savings resulting from an aggregated resolution.[59]

Having concluded that none of the three elements of the historical model was satisfied, the Court readily rejected the Fibreboard class settlement.[60] The larger question, repeatedly raised but not answered by this opinion, was whether a mass tort case could ever qualify for mandatory class treatment under Rule 23(b)(1)(B).[61] The Court perhaps gave its strongest signal when it stated that "[t]he Advisory Committee did not

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56. *See id.* at 856.

57. *See id.* at 857.

58. *See id.* at 858–59 (citing Amchem Prods. v. Windsor, 521 U.S. 591, 622–23 (1997)).

59. *Id.* at 861. In leaving the question open, the Court noted that it did not need to decide "how close to insolvency a limited fund defendant must be brought as a condition of class certification." *Id.* at 860 n.34. It did point out, however, that if a company were allowed to resolve mass tort litigation by means of a limited fund class action settlement to which it made only a "de minimis contribution," that resolution would provide an incentive for other companies to seek similar resolutions, thereby "significantly undermin[ing] the protections for creditors built into the Bankruptcy Code." *Id.*

60. *See id.* at 864.

61. *See id.* at 842 ("[W]e . . . cannot decide the ultimate question whether settlements of multitudes of related tort actions are amenable to mandatory class treatment . . . ."); *id.* at 844 ("We do not, it is true, decide the ultimate question whether Rule 23(b)(1)(B) may ever be used to aggregate individual tort claims."); *id.* at 864 ("In sum, the applicability of Rule 23(b)(1)(B) to a fund and plan purporting to liquidate actual and potential tort claims is subject to question . . . .").

envision mandatory class actions in cases like this one, and both the Rules Enabling Act and the policy of avoiding serious constitutional issues counsel against leniency in recognizing mandatory limited fund actions in circumstances markedly different from the traditional paradigm."[62]

In his brief concurrence, Chief Justice Rehnquist emphasized the point, also made in the majority opinion and in *Amchem*, that asbestos litigation "cries out for a legislative solution."[63] He agreed, however, with the majority's application of existing law. Justice Breyer's dissent stressed the "special background circumstances" underlying the Fibreboard settlement[64] and argued that it met all three elements of the majority's historical model. He urged the Court to grant trial courts handling asbestos litigation "every bit of discretionary power that the law provides"[65] in order "to avoid delay and expense so great as to bring about a massive denial of justice."[66]

62. *Id.* at 864.
63. *Id.* at 865 (Rehnquist, C.J., concurring).
64. *Id.* at 866 (Breyer, J., dissenting).
65. *Id.* at 868.
66. *Id.* at 867.

Chapter 4

Aborted Asbestos Limited Fund Class Action: *White v. Eagle-Picher Industries, Inc.*

Eagle-Picher Industries, Inc., is an industrial products company based in Cincinnati, Ohio, that traces its roots back to 1843. Comprising three groups—industrial, machinery, and automotive—Eagle-Picher concentrated until the late 1940s on products related to its lead and zinc mining operations. Thereafter it expanded and diversified its operations, manufacturing a variety of products for the automotive, aerospace, nuclear, and defense industries. For a forty-year period, from 1931 to 1971, Eagle-Picher manufactured thermal insulation products containing asbestos—primarily high-temperature insulating cements. Sales of these products accounted for a relatively small percentage of the company's sales over the years, totaling no more than approximately $25 million. However, the products caused huge liabilities for the company. By July 31, 1990, Eagle-Picher had been named as a defendant in over 128,000 lawsuits brought by persons claiming injury that was due to exposure to its asbestos products.

In the summer of 1990, faced with dwindling insurance coverage and diminished capacity to fund the asbestos litigation out of corporate resources, Eagle-Picher decided to pursue a then novel strategy for resolving its asbestos liability. In three individual actions pending against it in the Eastern District of New York,[67] the company sought certification of a limited fund class action that as eventually defined was to include all present and future claimants against the company alleging asbestos-related personal injury or wrongful death. Despite the efforts of a supportive judge, Eagle-Picher's attempt to settle its litigation on this basis was eventually abandoned in favor of bankruptcy.

67. Application for Class Certification, Loper v. Eagle-Picher Indus., Inc., No. CV-87-1383 (E.D.N.Y. Aug. 24, 1990).

Nature of Litigation and Litigation Maturity

By the time that Eagle-Picher sought class certification, asbestos litigation had reached a fully mature stage. The history of that litigation has been set forth in detail elsewhere and will not be repeated here.[68] Eagle-Picher's own experience was similar to that of many of its codefendants as the litigation mushroomed during the 1980s. During the period 1966 to 1979, approximately 1,300 suits in which plaintiffs alleged personal injury from exposure to asbestos-containing thermal insulation products were filed against the company. Usually seeking compensatory and punitive damages against numerous defendants, plaintiffs generally claimed that the defendants failed to provide a warning concerning the potential health hazards of asbestos.

Beginning in 1979, the number of lawsuits began to escalate. More suits were filed against Eagle-Picher in that year than in the previous thirteen years put together, and in almost every year thereafter the number of new claims increased substantially over the previous year. A large increase occurred in 1986, when 11,900 suits were filed—3,000 more than in 1985. The following year—1987—saw an even larger increase, as Eagle-Picher received some 20,800 new claims. Although Eagle-Picher settled or otherwise resolved increasing numbers of the cases over time, its inventory of pending cases grew steadily. During the period 1976 to August 1990, the company paid $615 million, including legal fees, costs, and payments, to claimants, to resolve the asbestos cases. Only $150 million of that total came from its insurers.

Eagle-Picher settled 9,100 lawsuits prior to 1985, and the average settlement amount and legal expenses equaled $7,530 per case. In 1985 it joined with other asbestos defendants and insurers in forming the Asbestos Claims Facility (ACF) in the hope of achieving a more cost-effective means of settling cases. Its average cost for resolving cases, however, increased; the average amount of settlement plus legal fees per case in 1987 was $11,900. In March 1988 Eagle-Picher decided to go its own way and withdrew from the ACF.

Eagle-Picher then established a corporate Asbestos Claims Unit, which engaged in efforts to settle groups of cases early in the litigation

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68. *See, e.g.,* Deborah R. Hensler et al., Asbestos in the Courts: The Challenge of Mass Toxic Torts (1985); Thomas E. Willging, Trends in Asbestos Litigation (Federal Judicial Center 1987); Paul Brodeur, Outrageous Misconduct (1985); Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation (1991).

process before substantial defense costs were incurred. To implement this aggressive settlement strategy, the company targeted cases pending in courts in which the asbestos litigation was heavily concentrated and sought to avoid the possibility of consolidated trials or class actions. These settlement efforts met with only limited success. The company succeeded in settling approximately 48,000 cases from 1988 to 1990 for an average settlement amount (exclusive of defense costs) of $6,100 per case.[69] It could not, however, keep up with the influx of cases. In 1988, for example, Eagle-Picher started with a backlog of 49,800 claims, received 24,000 new claims, and settled 23,000 claims; thus, the number of outstanding claims increased to 50,800. By July 1990 over 64,000 claims were pending against Eagle-Picher. Assuming that the settlement value remained at $6,100 per case, this backlog of claims represented a total liability of approximately $390 million plus legal expenses.

During the same period—1988 to August 1990—Eagle-Picher prevailed (either by defense verdict or summary judgment) in 74 of the 135 cases it tried. In twenty others, although there was a verdict for the plaintiff, the jury award was offset to zero by settlement amounts already received by the plaintiff. In the remaining 41 cases, however, verdicts for plaintiffs totaled more than $35 million, and Eagle-Picher's share of these verdicts (including defense costs) averaged $170,000 per case.

History of the Lawsuit

A class action complaint in *White v. Eagle-Picher Industries, Inc.* was filed in the Eastern District of New York in December 1990 during the course of a hearing before Judge Jack B. Weinstein on whether to certify a limited fund class action against Eagle-Picher.[70] The possibility of a class action resolution of the company's asbestos litigation was first raised by Eagle-Picher the previous summer when it filed a proposed order to show cause in three individual actions already pending against it and

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69. Information concerning Eagle-Picher's claims and settlement history is derived from the affidavit of David E. Wilson, Director of Claims for Eagle-Picher's Asbestos Claims Unit, which was submitted in support of the company's application for class certification. Unfortunately, the data are not provided in consistent terms. For earlier years, figures are provided for average settlement costs including legal expenses. For later years, the information provided is for average settlement costs exclusive of legal expenses.

70. Class Action Complaint, White v. Eagle Picher Indus., Inc., No. CV-90-4243 (E.D.N.Y. Dec. 11, 1990).

other asbestos companies in the Eastern District of New York. On July 23, 1990, in the cases of *Loper v. Eagle-Picher Industries, Inc.*, *Liebson v. Raymark Industries, Inc.*, and *Schaefer v. The Celotex Corporation*,[71] Eagle-Picher sought an order to show cause "why an order should not be entered certifying this action as a class action pursuant to Rule 23(b)(1)(B) of the Federal Rules of Civil Procedure."[72] It also sought an interim order ("pending the hearing and determination of said application"[73]) certifying a class consisting of "all persons who have been exposed to asbestos and asbestos-containing materials and claim to have developed an asbestos-related illness."[74] Eagle-Picher's filing did not purport to include individuals who had been exposed to asbestos in Eagle-Picher's products but had not yet developed symptoms of an asbestos-related injury. In none of the three cases in which class certification was sought did the pleadings contain class action allegations. Notice of Eagle-Picher's request was given to attorneys for the plaintiffs and codefendants in the cases.

Subsequent proceedings related to this class action effort were divided into four phases, which I have labeled (1) proceedings before Special Master Frankel, (2) appointment of counsel and negotiations, (3) hearing before Judge Weinstein, and (4) rulings and their aftermath.

Phase 1: Proceedings Before Special Master Frankel

Judge Weinstein, to whom the *Loper, Liebson,* and *Schaefer* cases had been assigned, held a hearing on Eagle-Picher's request for class certification on August 13, 1990. At that time, following preliminary argument, Judge Weinstein entered an order appointing Marvin Frankel, a private lawyer and former U.S. district judge of the Southern District of New York, as a special master "for purposes of immediately holding hearings and reporting to the court as expeditiously as possible"[75] on issues relating to whether, as specified in Rule 23(b)(1)(B), "'adjudication with re-

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71. [Proposed] Order to Show Cause and Interim Order Certifying Class, Loper v. Eagle-Picher Indus., Inc., No. CV-87-1383, Liebson v. Raymark Indus., Inc., No. CV-87-1384, Schaefer v. Celotex Corp., No. CV-87-2273 (E.D.N.Y. July 23, 1990).

72. *Id.* at 2.

73. *Id.*

74. *Id.* at 3.

75. Memorandum and Order Appointing Marvin E. Frankel Special Master at 2–3, Loper v. Eagle-Picher Indus., Inc., No. CV-87-1383 (E.D.N.Y. Aug. 13, 1990).

spect to individual members of the class . . . would as a practical matter . . . substantially impair or impede' the ability of class members or others to protect their interests."[76] Specifically, Judge Weinstein directed Special Master Frankel to report on the following two issues:

> (1) Whether the financial assets of Eagle-Picher Industries, Inc. are so limited that there exists substantial risk that payment for the present and prospective asbestos-related personal injury and wrongful death claims, and cross-claims and third-party claims, brought against the company will be placed in jeopardy.
>
> (2) Whether "there is a substantial probability—that is less than a preponderance but more than a mere possibility—that if damages are awarded, the claims of earlier litigants would exhaust" the defendant's available and projected assets, including any pertinent insurance proceeds.[77]

Judge Weinstein set the first hearing before Special Master Frankel for August 15 and directed that Eagle-Picher give immediate notice of the hearing "by telephone, fax, newspaper or other means as shall be appropriate."[78] It was reported that Judge Weinstein indicated at the hearing that he was inclined to grant Eagle-Picher's certification request and that he envisioned a settlement on a limited fund class basis and the settlement funds being combined with those of other asbestos defendants to create a national fund for asbestos victims.

Eagle-Picher gave notice of the August 15 hearing by telephone and by fax to over 1,000 law firms with claims pending against the company and to 25 codefendants. Notice was also published in 26 newspapers throughout the country, although some of the ads did not appear until a day or two after the hearing. At the initial hearing, an expedited schedule for discovery, briefing, and hearing was set, notice of which was sent to approximately 2,000 plaintiffs' lawyers and 50 lawyers for other asbestos defendants. Prior to the evidentiary hearings before Special Master Frankel, Eagle-Picher produced over 5,000 pages of discovery materials relating to its financial condition and the claims against it.

At the hearings, which took place on August 27–30, 1990, Eagle-Picher presented the testimony of its chairman of the board/CEO, two of its vice presidents, the head of its Asbestos Claims Unit, and the engagement partner of its auditing firm. Special Master Frankel appointed expe-

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76. *Id.* at 2.
77. *Id.* at 3.
78. *Id.* at 4.

rienced asbestos plaintiffs' attorneys Gene Locks, Thomas Henderson, Stanley Levy, and Donald Marlin to act as a steering committee for plaintiffs, at least for purposes of the hearings before the special master. They were the only plaintiffs' lawyers who participated in the hearings, and they chose not to call any witnesses. They urged Frankel to find that Eagle-Picher had not carried its burden of proof of establishing the grounds required for certification. Locks and Levy also argued, however, that the evidence showed that the company was "likely insolvent."[79]

On September 7, 1990, Special Master Frankel issued his report to Judge Weinstein. He concluded that Eagle-Picher's assets (including its remaining insurance coverage) were sufficiently limited so as "to create a substantial risk that payments for present and prospective asbestos-related claims for personal injury and wrongful death will be in jeopardy."[80] Moreover, Frankel concluded that there was a "substantial probability that the award of damages to earlier litigants will exhaust defendant's available and projected assets."[81] Finally, he concluded that, although Eagle-Picher was not then insolvent in any relevant sense, there was a "likelihood that it will become insolvent within the next two or three years,"[82] long before its asbestos liability would be fully resolved.

In reaching these conclusions, Frankel noted that the number of future claims could not be predicted with complete certainty, but that the company's experience over the past few years suggested that there would not be an immediate decline in the number of new claims being filed and that "prudence dictates a need to provide for an indefinite future of liabilities no smaller than those of the last few years."[83] He cited the company's July 1990 projection of future asbestos liabilities as compared with available cash to satisfy those claims, which forecast a $9.1 million shortfall by the end of fiscal year 1992. Concluding that those projections were overly optimistic, he found that the shortfall at the end of 1992 was more likely to be in the range of $42 million to $75 million. Thus, there was, in

79. Report of Special Master Marvin E. Frankel to the Honorable Jack B. Weinstein at 6, Loper v. Eagle-Picher Indus., Inc., No. CV-87-1383 (E.D.N.Y. Sept. 7, 1990).

80. *Id.* at 23.

81. *Id.*

82. *Id.*

83. *Id.* at 12.

his view, "a clear danger of disaster for Eagle-Picher within the next two years."[84]

In reaching his conclusions, Special Master Frankel relied in part on the findings of Special Master Bertram Harnett, whom Judge Weinstein had appointed in August to determine the extent of Eagle-Picher's remaining insurance coverage. Special Master Harnett reported on September 6, 1990, that the company's remaining insurance coverage for bodily injury amounted to less than $10 million.[85]

Phase 2: Appointment of Counsel and Negotiations

A week after a hearing to show cause why Special Master Frankel's report should not be accepted, Judge Weinstein on October 1, 1990, appointed counsel to represent the proposed class, which was now more broadly described to include persons exposed to asbestos who "claim to have developed or will in the future claim to have developed an asbestos-related illness; and . . . have asserted or will assert such claims against Eagle-Picher."[86] Judge Weinstein chose not to continue with the plaintiffs' steering committee put in place by Special Master Frankel. He appointed Peter Angelos, a plaintiffs' asbestos lawyer from Baltimore with a large number of asbestos cases, to represent class members with existing claims and David Shapiro, an experienced class action negotiator from Washington, D.C., with few asbestos cases, to represent future claimants ("*i.e.* those class members who may file a claim against Eagle-Picher in the future"[87]).

To facilitate settlement discussions between the parties, Judge Weinstein appointed Kenneth Feinberg, who had served as a special settlement master in the *Agent Orange* litigation, as a special settlement master. Judge Weinstein stated that "[s]ettlement discussions should begin immediately,"[88] for he found that it was "in the best interest of the proposed class to expedite resolution of this matter to prevent further financial de-

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84. *Id.* at 21.

85. Report of Special Master Bertram Harnett at 2, Loper v. Eagle-Picher Indus., Inc., No. CV-87-1383 (E.D.N.Y. Sept. 7, 1990).

86. Amended Preliminary Memorandum and Order Appointing Counsel for Proposed Class Members and Special Settlement Master at 2, Loper v. Eagle-Picher Indus., Inc., No. CV-87-1383 (E.D.N.Y. Oct. 1, 1990).

87. *Id.* at 6.

88. *Id.* at 9.

terioration of Eagle-Picher and thus secure prompt and equitable payments to eligible present and future claimants."[89] He further noted that the outcome of the negotiations would be helpful in deciding whether a class should be certified and, if so, whether subclasses were needed.

During October and early November 1990, the appointed class counsel, counsel and representatives of Eagle-Picher, and financial advisors engaged in settlement negotiations. This first round of settlement talks culminated in an intensive thirteen-hour negotiation session, in which Judge Weinstein participated, at the federal courthouse in Brooklyn. The product of these negotiations was a handwritten "agreement" signed only by Judge Weinstein that was dated "11/3/90, 4:50 A.M."[90] According to that document, Eagle-Picher and the putative class representatives had accepted ten terms of settlement, subject to further negotiation on details. Under the agreement Eagle-Picher, after retaining 6% of net sales, would make annual payments in amounts ranging from $15 million to $45 million, and totaling $470 million over a twenty-year period, to a trust for the benefit of the plaintiff class. The putative settlement was silent about the treatment of preexisting settlements and judgments. Any remaining cash flow for a given year would be divided equally between Eagle-Picher and the trust. Payments from the trust were to be paid to the most seriously injured plaintiffs first, and plaintiffs' attorneys' fees were to be capped at 25%.

The agreement further provided that the "court shall, and hereby does, issue a stay of payments for asbestos claims to be effective until December 5, 1990."[91] Furthermore, it was stated that "[u]pon presentment to the court of a final agreement of settlement, the class will be certified and appropriate action taken to terminate all litigation except for the class action pending or its equivalent in any state or federal court"[92] and that the "court and parties undertake to terminate all litigation as soon as possible, including appeals, so that payments to those injured can be made as soon as possible."[93]

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89. *Id.* at 4.

90. [Tentative] Eagle-Picher Settlement Agreement at 1, Loper v. Eagle-Picher Indus., Inc., No. CV-87-1383 (E.D.N.Y. Nov. 3, 1990).

91. *Id.* at 2.

92. *Id.* at 2–3.

93. *Id.* at 3.

Later in the day on November 3, 1990, Judge Weinstein entered a written order in the *Loper*, *Liebson*, and *Schaefer* cases which stated that "[s]ettlement of the class action pursuant to Rule 23(b)(1)(B) of the Federal Rules of Civil Procedure has been reported to be imminent."[94] Confirming his early morning order, he ordered Eagle-Picher to cease payments for asbestos personal injury or wrongful death claims either previously settled but unpaid, to be settled in the future, or previously reduced to judgment, except for those claims settled before December 2, 1990, that involved "extreme hardship and exigent health conditions."[95] The order (without citation of authority) further stayed the execution and enforcement of judgments against Eagle-Picher, but it expressly stated that no one was stayed from proceeding with trial or other court proceedings or from negotiating settlements. By its terms the order was to expire on December 2, 1990, unless terminated earlier. The next week after it was entered, however, Judge Weinstein, acting in response to Eagle-Picher's application for modification of the order and certain plaintiffs' application for its vacation and termination, vacated the stay order.[96]

Although the appointed counsel for future claimants, David Shapiro, supported the November 3 agreement, the designated counsel for present claimants, Peter Angelos, expressed his opposition to it. In light of that development and "[i]n view of the extreme urgency reported by Special Master Frankel and the need for continuing settlement discussions,"[97] on November 19, 1990, Judge Weinstein appointed additional class counsel. Selected to represent the putative class of present claimants were Henry G. Miller, a former president of the New York State Bar Association, and Stanley M. Chesley, a nationally known class action lawyer, neither of whom had previously been active in asbestos litigation.

With the reinforcements in place, the negotiations between class counsel and Eagle-Picher continued. On at least one occasion Judge Weinstein lent his services to the effort, attending a Washington, D.C.,

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94. Memorandum and Order at 2, Loper v. Eagle-Picher Indus., Inc., No. CV-87-1383 (E.D.N.Y. Nov. 3, 1990).

95. *Id.* at 2–3.

96. Order, Loper v. Eagle-Picher Indus., Inc., No. CV-87-1383 (E.D.N.Y. Nov. 12, 1990).

97. Order at 1, Loper v. Eagle-Picher Indus., Inc., No. CV-87-1383 (E.D.N.Y. Nov. 19, 1990).

negotiation session. On November 24, 1990, two members of the plaintiffs' negotiation team, Shapiro and Chesley, submitted a document entitled "Plaintiffs' Proposed Principles of Settlement," which listed seven terms of settlement. Among the terms was a proposal for the twenty-year funding of a trust according to the following schedule: $38 million in Year 1, $20 million a year in Years 2 through 10, and $25 million a year in Years 11 through 20, a total of $468 million. In addition, $37 million was to be paid for preexisting settlements and judgments, for a grand total of $505 million. After the specified amount was paid in a given year, the terms provided that Eagle-Picher could keep the next 6.75% of sales, after which any remaining cash flow would be split 50–50 between the company and the trust. The document further provided that 50% of the company's stock would be given to the trust, and the stock would be nonvoting, nontransferable, and fully diluted. If the company made its required payments during the first five years, it could redeem half of the transferred stock; otherwise, all of the stock would remain with the trust. After five years any stock remaining with the trust would be converted to common-voting stock. The trust would have the right to appoint one member of the company's board of directors.

On November 26, 1990, Judge Weinstein issued an order to show cause why the proposed class should not be certified under Rule 23(b)(1)(B). The order was captioned "In re Eagle-Picher Industries, Inc.," and it defined the class as "all persons who presently assert or will in the future assert asbestos-related personal injury or wrongful death claims against Eagle-Picher."[98] Hearing was set for December 7, 1990, and the putative class representatives and the special settlement master were directed to report on the status of negotiations at that time and to "make such recommendations, if any, as they may have with respect to settlement."[99] The order also provided that parties should show cause why Eagle-Picher should not be stayed from participating in any asbestos-related personal injury or wrongful death proceedings other than appeals and from settling any such claims. Notice of the order was to be given by Eagle-Picher to putative class counsel, the special settlement master, plaintiffs' counsel known to Eagle-Picher, and codefendants known to it.

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98. Order Respecting Certification of Class and Related Matters at 1, *In re* Eagle-Picher Indus., Inc., NYAL Index No. 4000 (E.D.N.Y. Nov. 26, 1990).

99. *Id.* at 2.

Two days after the show-cause order was entered, Shapiro and Chesley and the CEO of Eagle-Picher executed a "Memorandum of Understanding of Proposed Settlement," which fleshed out the details of the earlier "Plaintiffs' Proposed Principles of Settlement." Apparently negotiated without the participation of the other putative class counsel, Angelos and Miller, this proposed settlement departed in some respects from the previously proposed principles. For example, the first year's payment was reduced from $38 million to $30 million, and the amount of immediate payments of preexisting settlements and judgments was increased from $37 million to $45 million. Total fixed payments to the trust over the twenty-year period were to equal $460 million (not discounted to present value). The overall sum of payments to the trust and payments for preexisting obligations remained at $505 million. The term concerning the carveout for the company was changed from 6.75% of "sales" to 6.75% of "net sales." As discussed more fully below, the proposed settlement also reflected changes from the proposed principles in the division of remaining cash flow between the trust and the company and in the provisions concerning the stock to be held by the trust.

The four attorneys appointed to represent the putative class prepared reports to the court on the proposed settlement. These reports were submitted at the hearing that commenced on December 7, 1990. Chesley and Shapiro filed a joint report that supported the proposed settlement and recommended that the court "commence the process looking toward certification of the prospective class and expeditious approval of the Proposed Settlement."[100] They argued that the terms of the proposed settlement were fair and reasonable and that a settlement outside of bankruptcy would yield a larger payment stream than would a Chapter 11 bankruptcy. Angelos and Miller, however, both filed reports opposing the proposed settlement. Angelos challenged the bankruptcy analysis on which the Chesley–Shapiro report relied, contending that it undervalued the asbestos claims and the going-concern value of Eagle-Picher, thus incorrectly understating the likely payout in a Chapter 11 case, against which it compared the settlement. He urged instead the consideration of alternative settlement proposals that he had previously proposed. Miller likewise urged the court to reject the proposed settlement "as being un-

100. Report and Recommendations of Court-Appointed Counsel David I. Shapiro and Stanley M. Chesley at 22, *In re* Eagle-Picher Indus., Inc., NYAL Index No. 4000 (E.D.N.Y. Dec. 6, 1990).

fair to the present claimants and deficient in many respects."[101] He set forth a number of concerns about the settlement terms, including the failure to provide for interest on the payments after the first year, an overly generous retention of net sales by the company, and an inadequate distribution of voting stock to the trust. These concerns are discussed below. In the end Miller's analysis led him to conclude that rejection of the proposed settlement was clearly called for, as it was not even "a close question."[102]

Phase 3: Hearing Before Judge Weinstein

The hearing before Judge Weinstein on class certification, the progress of settlement negotiations, and the advisability of a stay commenced on December 7, 1990, with a motion by plaintiffs' attorney Gene Locks for a continuance of the proceedings to allow plaintiffs an opportunity for discovery. The motion was denied. The court then proceeded to hear from Special Master Feinberg and the four attorneys for the putative class, each of whom in turn presented his views about the proposed settlement. Feinberg reviewed the history of the negotiations and stated that the agreement reached by Eagle-Picher with Shapiro and Chesley was "in my opinion about as far as one can reasonably expect the parties to go."[103] He expressed the fear that, if this agreement was not accepted, the company would have no choice but to file for bankruptcy.

Chesley spoke next in favor of the settlement, arguing that it would provide more value to the claimants than they would receive in a Chapter 11 bankruptcy. According to his analysis, the present value of payments to claimants under the proposed settlement was $260 million to $280 million, whereas the projected payout in a Chapter 11 would have a present value of no more than $180 million to $190 million. Thus, he argued that it was "to the benefit of the claimants for this company to . . . continue to be a viable company, but at the same time pay their claims and have a stream of income so that those people most seriously injured

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101. Report of Court-Appointed Counsel Henry G. Miller at 4, *In re* Eagle-Picher Indus., Inc., NYAL Index No. 4000 (E.D.N.Y. Dec. 6, 1990).

102. *Id.* at 17.

103. Transcript of Civil Motion Before the Honorable Jack B. Weinstein, U.S. District Court Judge, at 17, *In re* Eagle-Pitcher [sic] Indus., Inc., NYAL Index No. 4000 (E.D.N.Y. Dec. 7, 1990).

could be paid first during the course of this period of events."[104] Next to speak was Shapiro, who, after announcing that he had the flu, spoke briefly in favor of the settlement and then turned over the remainder of the hearing to his partner, Angelo Arcadipane. Arcadipane addressed some of the questions the court had raised about the details of the settlement.

After the presentations by the two class attorneys who supported the settlement, the court called Henry Miller. His views about the settlement, which are summarized above, were not publicly known, so it was with great anticipation that those attending the hearing listened to his presentation. He announced that he opposed the proposed settlement, although he hoped that an acceptable settlement could be negotiated. He then detailed the objections he had to the proposed agreement, which he had had no part in negotiating. Among other things, he raised concerns about the delay in funding the trust and the absence of sufficient remedies in case of default by the company. He also questioned the 6.75% "carveout" provision that would allow the company to keep that percentage of profits following payment to the trust. He calculated that in the first eight years of the plan, the trust would receive payments of approximately $25.2 million, and Eagle-Picher would retain some $56 million. He challenged that retention amount as being more than was required to keep the company viable.

Miller further challenged the stock payments to the trust, arguing that the only way that the trust got voting stock was if the company defaulted, in which case the company would probably be insolvent and the stock worthless. Miller also disagreed with Chesley's comparison of the settlement with bankruptcy. According to Miller's analysis, the present value of the proposed settlement was in the range of $204 million to $244 million, whereas the present value of a Chapter 11 payout to asbestos claimants was projected to be approximately $296 million. This disparity in analyses prompted Judge Weinstein to request that the experts for the various parties meet over the weekend in an effort to resolve their differences to the extent possible. Angelos then spoke briefly in opposition to the settlement, adopting the arguments made by Miller.

Eagle-Picher called its chairman and CEO, Thomas Petry, to testify in support of class certification and the proposed settlement. He explained

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104. *Id.* at 36.

that the company's representatives proposed this means of resolving the asbestos litigation because they were "in effect cannibalizing the company in order to make settlements"[105] and they had reached the point that they had "shrunk the company" as much as it could be shrunk and still remain viable.[106] He then explained the key features of the proposed settlement agreement and the rationale behind them. He stated that, if the settlement was not approved, the company would soon face a cash squeeze that might force it into bankruptcy. According to his analysis, bankruptcy would yield less than $150 million in value to the asbestos claimants, whereas the settlement would provide them with more than $250 million. Although some plaintiffs' attorneys cross-examined Petry at the conclusion of his testimony on December 7, the court recognized the right of others to cross-examine him when the hearing was reconvened on December 10.

At the outset of the hearing on December 10, Judge Weinstein stated some "tentative conclusions based on the hearings thus far."[107] He set forth five points on which the agreement should be altered or clarified:

1. November 30, 1993, should be the latest effective date of the agreement, and there should be no further delay owing to appeals.
2. Interest should accrue on all payments from the date the company was scheduled to make them.
3. If the company should file for bankruptcy, plaintiffs could seek payment for the full amount of their claims rather than the compromised amount.
4. Prompt payment should be made to those who had already obtained judgments or entered into settlements with Eagle-Picher.
5. Upon the company's default in making the first five-years' payments and after a specified grace period, the trust should gain effective control of the company.

Special Master Feinberg indicated that Eagle-Picher and Chesley and Shapiro agreed to these terms.

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105. *Id.* at 102.

106. *Id.* at 104.

107. Transcript of Hearing Before the Honorable Jack B. Weinstein, United States District Judge, at 6, *In re* Eagle-Picher Indus., Inc., NYAL Index No. 4000 (E.D.N.Y. Dec. 10, 1990).

The sole witness to testify on December 10 was Shapiro's financial expert, Arnold Chavkin, of Chemical Bank. After he testified concerning his analysis, which favored the settlement, he was cross-examined by a number of plaintiffs' lawyers. During the course of the cross-examinations, proceedings were interrupted by the announcement that three asbestos claimants had just filed an involuntary bankruptcy petition against Eagle-Picher in Cincinnati. Judge Weinstein declined to stop the proceedings, however, at first awaiting official notice of the bankruptcy and later declaring the petition to be "fraudulent on its face."[108] (The petition was dismissed by the bankruptcy court the next day, December 11, 1990.) Prior to the dinner recess, Chesley submitted to the court for filing a class action complaint in *White v. Eagle-Picher Industries, Inc.* Judge Weinstein accepted it and directed the clerk to "file and docket it in this hearing."[109]

Judge Weinstein then stated that the hearings had raised a bona fide question about the fairness of the proposed settlement. He announced that he was therefore taking the following actions: First, he was appointing Marvin Frankel as a special master to consider the question "whether bankruptcy or the settlement would be more favorable to claimants present and prospective."[110] Second, he would "tentatively certify the class, subject, of course, to Special Master Frankel's decision, with [fairness] hearings to be held in New York, Cincinnati and Detroit."[111] Third, he would appoint a three-person committee to represent codefendants. Fourth, he would appoint a committee of plaintiffs' attorneys to make recommendations about a payout scheme for the trust. Finally, as part of the certification, he would stay further proceedings against Eagle-Picher, but not payment of already obtained judgments and settlements. He stated that he would not actually enter the orders until the bankruptcy court in Cincinnati lifted the automatic stay.

After the dinner recess, Judge Weinstein announced that he would proceed with the entry of the announced orders because of the fraudulent nature of the bankruptcy petition and the fact that the proceeding before him was one initiated by Eagle-Picher rather than one brought against it. He declared: "I am tonight certifying the class, staying further proceed-

108. *Id.* at 181.
109. *Id.* at 161.
110. *Id.* at 162.
111. *Id.*

ings against Eagle-Picher and in accordance with the certification, setting the matter down for fairness hearings and setting the matter before Judge Frankel for a review of the critical issues raised by the proceedings thus far."[112] After several plaintiffs' counsel expressed opposition to the certification and proposed settlement and sought clarification of the court's intended procedure, the hearing was adjourned.

Phase 4: Rulings and Their Aftermath

The next day, December 11, 1990, Judge Weinstein entered a written order conditionally certifying the class in *White v. Eagle-Picher Industries, Inc.* Referring to the findings of Special Masters Frankel and Harnett and the December 7–10 hearing, Judge Weinstein conditionally certified a class "for settlement purposes pursuant to Rule 23(b)(1)(B)."[113] As defined by the *White* complaint and accepted by the court, the class consisted of "all persons who currently assert, or at any time in the future, will assert claims for asbestos-related personal injury or wrongful death against Eagle-Picher based upon alleged exposure to asbestos or asbestos-containing products."[114] It did not include, however, "persons whose claims were reduced to judgment or settled prior to December 10, 1990, the date upon which the class was conditionally certified."[115] The order stated that a memorandum in support of the conditional certification would follow shortly, "but in view of the precarious financial condition of Eagle-Picher and the need to end the hemorrhaging of its assets this order cannot await its completion."[116]

The same day Judge Weinstein also entered a written order staying proceedings. The order stated that injunctive relief was necessary to prevent the dissipation of Eagle-Picher's assets while the class action was pending and the court was considering whether to approve the settlement agreement, so as to maximize the funds to be paid to deserving asbestos claimants. Pending the entry of a final judgment in the class action, the court enjoined Eagle-Picher from participating in asbestos-related personal injury and wrongful death litigation, other than appeals,

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112. *Id.* at 183.

113. Order Conditionally Certifying Class at 5, White v. Eagle-Picher Indus., Inc., No. CV-90-4253 (E.D.N.Y. Dec. 11, 1990).

114. *Id.*

115. *Id.*

116. *Id.* at 6.

and from settling any such claims, including cross-claims, third-party claims, and counterclaims. Class members were similarly enjoined from litigating such claims against Eagle-Picher and from taking actions to collect or enforce judgments entered against Eagle-Picher after the date of the order. The order expressly allowed the payment of settlements and judgments previously obtained, and parties were permitted to apply for good-cause exceptions to the stay. The order ended with a request that "all parties in such pending litigation in which Eagle-Picher is a party, and all courts conducting such litigation in which Eagle-Picher is scheduled for trial as a party, . . . cooperate with the Court in the interest of preserving Eagle-Picher's assets—being dissipated at the rate of more than $2,000,000 per month for legal expenses . . . —for the benefit of all Class Members."[117]

The following day Judge Weinstein issued a memorandum on stays, which described the current status of asbestos litigation in the state and federal courts, reviewed the procedural background of the class action proceedings, and provided legal authority for the action he had taken in entering injunctive relief. Specifically, Judge Weinstein concluded that the injunction of pending state cases fell within the Anti-Injunction Act's "necessary in aid of jurisdiction" exception. He explained that "[a]n injunction of all proceedings is necessary to implement the terms of the settlement and to protect the court's jurisdiction over the class action."[118]

On December 18 and 19, 1990, two groups of state court plaintiffs with claims against Eagle-Picher—one group represented by Baron and Budd[119] and the other represented by Cadwalader, Wickersham & Taft[120]—filed petitions for writ of mandamus in the Second Circuit. They challenged Judge Weinstein's class certification and stay orders, which were entered, they argued, without authority, in violation of the Anti-Injunction Act, and in violation of the Constitution in an "effort to unilaterally impose a partial solution to the judicial administrative problems posed by the need to compensate the thousands of persons who suffer

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117. Order Staying Proceedings at 5, White v. Eagle-Picher Indus., Inc., No. CV-90-4253 (E.D.N.Y. Dec. 11, 1990).

118. Memorandum on Stays at 14–15, White v. Eagle-Picher Indus., Inc., No. CV-90-4253 (E.D.N.Y. Dec. 12, 1990).

119. Petitions for Writs of Mandamus and Prohibition, *In re* Patton, No. 90-3074 (2d Cir. Dec. 18, 1990).

120. Petition for a Writ of Mandamus, *In re* Ferril, No. 90-3077 (2d Cir. Dec. 19, 1990).

from diseases and illnesses caused by exposure to asbestos and asbestos-containing products."[121] They sought a writ directing the district court to vacate the order conditionally certifying the class and the order staying proceedings.

The Second Circuit's consideration of the mandamus petitions—as well as further proceedings before Judge Weinstein in the class action—were terminated by Eagle-Picher's filing of a Chapter 11 petition in the U.S. Bankruptcy Court for the Southern District of Ohio on January 7, 1991. When the sale of a plant needed to fund the payment of judgments against Eagle-Picher fell through, the company abandoned its efforts to deal with its asbestos liability by means of a limited fund class action settlement, the viability of which remained uncertain, and turned to a bankruptcy reorganization to provide a solution.

Party Structure

The class action complaint filed with Judge Weinstein at the hearing on December 10, 1990, included three named plaintiffs represented by Stanley Chesley and David Shapiro. It was amended, however, on December 21, 1990, and three more plaintiffs were added. The named plaintiffs were Sarah Jane White, administratrix of the estate of Gerald White; Donald Dellenbaugh; Linda Dellenbaugh; Fredrick Naumann; Samuel Lewin; and Andrew Moran. It was alleged that each of the first three plaintiffs had "asserted a claim against Eagle-Picher Industries, Inc. . . . as a result of death and/or personal injury caused by exposure to asbestos."[122] Plaintiff Naumann alleged that he had a claim against Eagle-Picher "as a result of personal injury caused by exposure to asbestos while employed as a seaman aboard vessels engaged in maritime commerce on the navigable waters of the United States or on the high seas."[123] Plaintiff Lewin alleged that he was "at substantially increased risk of contracting asbestos-related disease as a direct and proximate result of his exposure to or inhalation of asbestos manufactured, distributed or sold" by Eagle-Picher.[124] Plaintiff Moran alleged that he was at increased risk of contracting asbestos-related disease as a result of his exposure while a sea-

121. *Id.* at 3–4.

122. First Amended Class Action Complaint at 2, White v. Eagle-Picher Indus., Inc., No. CV-90-4253 (E.D.N.Y. Dec. 21, 1990).

123. *Id.*

124. *Id.*

man to "substantial amounts of asbestos from products manufactured, distributed or sold by [Eagle-Picher] for distinctly maritime purposes."[125] Eagle-Picher Industries, Inc. was the only defendant named in the *White* complaint.

The plaintiffs brought suit against the company "as a class action, on behalf of themselves and all others similarly situated," pursuant to Federal Rule of Civil Procedure 23(a) and 23 (b)(1)(B).[126] The single class on whose behalf they sued consisted of "all persons who currently assert, or at any time in the future will assert, claims for asbestos-related personal injury or wrongful death against Eagle-Picher, based upon alleged exposure to asbestos or asbestos-containing products, excluding all persons whose claims have been reduced to judgment or settled prior to December 10, 1990."[127] The class as defined by the *White* complaint was therefore broader than the class Eagle-Picher originally sought to have certified in its July 1990 filing. At that time, the company had sought certification of a class that was limited to persons who claimed to have already "developed an asbestos-related illness."[128] Judge Weinstein, however, in his October 1 order appointing counsel and in the November 26 show-cause order included all future claimants in the proposed class definition, and the *White* class, which he conditionally certified, was similarly broad.[129] No subclasses were created.

The original complaint that was before the court at the time Judge Weinstein conditionally certified the Rule 23(b)(1)(B) class stated no substantive claims against Eagle-Picher. After setting forth allegations supporting jurisdiction and venue, the complaint stated allegations concerning Eagle-Picher's limited fund and the settlement agreement. It then alleged facts relating to the requirements of Rule 23(a) and (b)(1)(B). The complaint ended with allegations supporting the plaintiffs' request for an injunction barring all pending and future asbestos-related personal injury and wrongful death litigation against Eagle-Picher and a prayer for class certification and injunctive relief. The amended complaint filed a

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125. *Id.*

126. *Id.* at 3.

127. *Id.* at 4.

128. [Proposed] Order to Show Cause and Interim Order Certifying Class at 3, Loper v. Eagle-Picher Indus., Inc., No. CV-87-1383 (E.D.N.Y. July 23, 1990).

129. Order Respecting Certification of Class and Related Matters at 1, *In re* Eagle-Picher Indus., Inc., NYAL Index No. 4000 (E.D.N.Y. Nov. 26, 1990).

few weeks later added counts of negligence, breach of warranty, and strict liability, as well as allegations in support of a demand for punitive damages.

Attorneys

Attorneys for the *White* plaintiffs in the class action were Stanley Chesley, one of the lawyers Judge Weinstein had appointed to represent present claimants, and David Shapiro, the appointed class counsel for future claimants. They, of course, were the class lawyers who supported the proposed settlement with Eagle-Picher. The other appointed class counsel, Peter Angelos and Henry Miller, did not participate in the filing of the class action complaint and apparently did not represent any of the named plaintiffs in the *White* action. After Judge Weinstein announced that he would conditionally certify a Rule 23(b)(1)(B) class and would hold fairness hearings on the proposed settlement in three cities, it was not completely clear what role, if any, Angelos and Miller were expected to play.

Several plaintiffs' attorneys who represented a large number of asbestos claimants participated actively at various stages of the class action proceedings before Judge Weinstein. In the initial proceedings before Special Master Frankel, Gene Locks, Thomas Henderson, Stanley Levy, and Donald Marlin served as a plaintiffs' steering committee. Thereafter, other plaintiffs' attorneys became involved in opposition to the class certification, proposed settlement, and stay of litigation. Among those most active at the show-cause hearing on December 7 and 10, 1990—in addition to class counsel—were Locks and Henderson, Ron Motley, Fred Baron, and Steven Kazan. In addition, Norman Senior, of Greenfield, Eisenberg, Stein & Senior, represented a group of plaintiffs' attorneys who sought to disqualify David Shapiro as class counsel, and Grant Hering, of Cadwalader, Wickersham & Taft, represented a group of state court plaintiffs who opposed the class action proceedings.

Arvin Maskin and Stephen Karotkin, of Weil, Gotshal & Manges, represented Eagle-Picher. Other asbestos defendants did not actively participate in the class action proceedings.

Settlement Terms

The proposed settlement that was executed on November 28, 1990, by Eagle-Picher, Stanley Chesley, and David Shapiro was never approved by

the court, because the company's bankruptcy brought an end to the process that Judge Weinstein had announced for further evaluation of its fairness. Thus, the terms that are discussed here are those that were proposed by Eagle-Picher and two of the four attorneys for the plaintiff class.[130]

The company agreed to pay approximately $45 million to claimants with whom it had previously settled, including settlements that were entered into during the fall of 1990, and to satisfy any other outstanding asbestos personal injury obligations of the company. These payments were to be made before the "effective date" of the settlement agreement, and most of the payments were to be made during the following eighteen months. No other payments were to be made prior to the agreement's effective date, which was originally defined as November 30 of the company's fiscal year in which all appeals were concluded, but in any event no earlier than November 30, 1993. Judge Weinstein later insisted at the December 10 hearing that this provision be modified to make November 30, 1993, the latest possible effective date.

The agreement then specified how Eagle-Picher's cash flow (annual pretax income plus annual depreciation and amortization) was to be allocated for a twenty-year period beginning with the effective date. Over that period the company would pay a claimants' trust a total of $460 million—$30 million in Year 1, $20 million in each of Years 2–10, and $25 million in each of the remaining ten years. This fixed payment to the trust was to be the company's first priority. The first year's payment would start bearing interest at 10% beginning December 1, 1991.

The next priority under the agreement was the company's retention each year of an amount equal to 6.75% of net sales. The third priority was a division between the company and the trust of any remaining "allocated funds" (defined as Eagle-Picher's pretax income plus its annual depreciation and amortization). In the first ten years, the split would be 50–50; in Years 11–20 the split would be 57.5% for Eagle-Picher and 42.5% for the trust. No payments would be made pursuant to this priority until any prior deficiencies in payments under the first two priorities were remedied.

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130. *See* Memorandum of Understanding of Proposed Settlement, Eagle-Picher Rule 23(b)(1)(B) Class Action (Nov. 28, 1990) [attached as App. 17 to Petition for a Writ of Mandamus, *In re* Ferril, No. 90-3077 (2d Cir. Dec. 19, 1990)].

The agreement also included complex provisions concerning the transfer of Eagle-Picher stock to the trust. Upon the effective date of the agreement, the company would transfer to the trust preferred, nonvoting, nontransferable, non-dividend-paying shares. This stock could be converted to 50% of the company's voting shares at the end of Year 5 if the company had failed to make all of the payments due the trust in the first five years. If, however, the company had made all of the first five years' payments, the preferred shares held by the trust could be converted to 25% of the company's common voting shares, but only upon a public sale of the stock. Under certain circumstances, the company would have a right of first refusal or a right to find a purchaser for the stock. If the company defaulted on any of its payments in Years 6–20 and the total amount in default amounted to $20 million or more, the trust could convert any remaining preferred shares it held to common voting shares. In addition, to remedy any defaults in payments for Years 5–10, the trust could convert another series of preferred stock to common voting shares in an amount equal to the amount in default. The agreement also gave the trust the right to name one person whom the company would recommend to its nominating committee for membership on the board of directors.

The company's obligations to the trust were effectively unsecured. Although the agreement provided that the company would grant the trust a first lien on all unencumbered property, plant, and equipment, such lien could become effective only if the company ended up having to pay (in excess of any insurance) more than $20 million in any year on all judgments or for any single settlement relating to lead or environmental claims against the company.

The agreement contained no provisions about the manner in which or amounts asbestos claimants would be paid by the trust. Nor did it contain any provisions concerning attorneys' fees.

Negotiation History

Eagle-Picher's goal in seeking class certification was to achieve a binding resolution of all of its asbestos litigation by means of settlement. Judge Weinstein was supportive of this goal, being concerned about the impact of the litigation on an otherwise healthy company and having become frustrated with the fact that large sums were being expended for litigation while deserving asbestos claimants with serious illnesses remained un-

compensated.[131] The court therefore actively promoted settlement efforts throughout the negotiation process. Following the submission of Special Master Frankel's report, Judge Weinstein appointed Peter Angelos and David Shapiro to represent the putative class on October 1, 1990. Gene Locks and Stan Levy, who had indicated their opposition to a non-opt-out class under Rule 23(b)(1)(B), were not appointed, even though they had been the most active of the plaintiffs' attorneys in the proceedings up to that point and had been members of the plaintiffs' steering committee appointed by Special Master Frankel. With class counsel in place, the court appointed Kenneth Feinberg as a special settlement master and directed negotiations to begin immediately.

The biggest battles during the negotiations were over how much equity in the company the claimants would receive. Eagle-Picher was very much opposed to plaintiffs' attorneys taking control of the company. Many plaintiffs' attorneys, however, believed that the company's asbestos liability was great enough to entitle the plaintiffs to a controlling share. The first phase of the negotiations culminated in the late-night session at the courthouse in Brooklyn on November 2–3, 1990, at which point it appeared that the terms of an agreement had been struck. According to the settlement principles signed by Judge Weinstein on November 3 at 4:50 a.m., the company would fund a trust for the claimants over a twenty-year period, and payments would be subject to collateralization by stock, but no outright transfer of stock would be made to the trust. Although some of the participants understood both class counsel to agree to these terms, Peter Angelos later disavowed the agreement. With only one of the two class attorneys in support of the agreement, the attempted settlement collapsed.

It was at that point that Judge Weinstein appointed additional attorneys to represent the present claimants. This time he chose two attorneys with no prior asbestos litigation experience. He appointed Stanley Chesley, a class action attorney, and Henry Miller, a former president of the New York state bar. The negotiations moved at a rapid pace after their appointment on November 19. At least one negotiation session, which Judge Weinstein attended, took place in Washington, D.C., within days of the appointment. Then on November 24, the Saturday after Thanksgiving, Chesley joined with Shapiro in submitting a document

131. *See, e.g.,* Memorandum on Stays at 3–5, White v. Eagle-Picher Indus., Inc., No. CV-90-4253 (E.D.N.Y. Dec. 12, 1990).

with seven proposed settlement terms. Among the terms was a provision for transfer of 50% of the company's stock to the trust, but the stock would initially be nonvoting and the company could redeem half of it if it made the agreed upon payments during the first five years.

Further negotiations then took place in Cincinnati without the presence of Angelos and Miller. These negotiations resulted in the proposed settlement agreement that Eagle-Picher, Chesley, and Shapiro entered into on November 28. That agreement was seriously undermined when Henry Miller gave his thoughtful and seemingly objective report in opposition to it at the December 7 hearing. Although Judge Weinstein announced plans to hold fairness hearings on the proposed settlement in three cities and to have Special Master Frankel report on the relative merits of settlement and bankruptcy, Eagle-Picher's bankruptcy filing terminated further consideration of the proposed agreement.

Handling of Future Claims

The class conditionally certified by Judge Weinstein included future asbestos claimants, that is, those persons who would "at any time in the future . . . assert claims for asbestos-related personal injury or wrongful death against Eagle-Picher based upon alleged exposure to asbestos or asbestos-containing products."[132] The court had previously appointed David Shapiro as class counsel for the future claimants. The November 28 settlement memorandum focused only on Eagle-Picher's funding of a claimants' trust and did not contain any provisions concerning how claimants would be paid. Thus, it did not give any details about how future claims would be handled. Had the bankruptcy not intervened, Judge Weinstein planned to appoint a committee of plaintiffs' attorneys to make recommendations about a payout scheme, using the modified Manville trust scheme[133] as a model.

On one issue the proposed settlement did draw a distinction between the treatment of future claims and one group of present claims. That was with respect to the payment of existing settlements and judgments. Under the agreement, Eagle-Picher would have devoted $45 million to the immediate satisfaction of all such obligations, including any individual

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132. Order Respecting Certification of Class and Related Matters at 1, *In re* Eagle-Picher Indus., Inc., NYAL Index No. 4000 (E.D.N.Y. Nov. 26, 1990).

133. *See In re* Joint E. & S. Dists. Asbestos Litig., 878 F. Supp. 473, 575 (E.D.N.Y. 1995), *aff'd in part, vacated in part,* 78 F.3d 764 (2d Cir. 1996).

settlements entered into during the course of the fall 1990 global settlement negotiations. This provision therefore would have allowed some present claimants to be paid the full amount of their judgments or settlements, whereas other present and all future claimants would have been required to resort to the trust's limited fund, from which they were expected to receive much less than full payment.

Notice Procedure and Content

Because of the intervening bankruptcy filing, notice was never given to class members of the conditional class certification or the prospective fairness hearings on the proposed settlement. Eagle-Picher's efforts to give notice during earlier stages of the class proceedings, however, had made the asbestos litigation bar, if not the claimants themselves, well aware of the company's efforts to settle present and future asbestos claims against it on a non-opt-out class basis. Notice was widely given to asbestos plaintiffs' lawyers and codefendants of the hearings before Special Master Frankel in August 1990 and of the December 7 and 10 show-cause hearing before Judge Weinstein. Dozens of attorneys appeared at the latter hearing.

Approval and Review Process

White v. Eagle-Picher Industries, Inc. never progressed to the point that the court held a formal fairness hearing or approved the settlement. The December 7–10 hearing, although primarily devoted to discussion of the proposed settlement, was in fact announced to be for the purpose of considering class certification and stay of litigation against Eagle-Picher and for obtaining a status report on the progress of settlement negotiations. Following the hearing, Judge Weinstein did conditionally certify a class and enter a stay. He also announced that he would hold fairness hearings on the settlement in New York, Cincinnati, and Detroit. Those hearings, of course, never took place.

Judge Weinstein's written order of December 11, 1990, conditionally certified a class pursuant to Rule 23(b)(1)(B). The order recited the findings of the special masters and noted that the "circumstances and Settlement Agreement were found by the court [at the December 10 hearing] to warrant conditional class certification and fairness hearings

pursuant to Rule 23."[134] Without making findings concerning the requirements of Rule 23(a) and 23(b)(1)(B), the judge "conditionally certified for settlement purposes pursuant to Rule 23(b)(1)(B)" a class as described by the *White* complaint,[135] and he appointed the *White* plaintiffs as class representatives. The order stated that this certification was "subject to a final memorandum and order following the conclusion of fairness hearings on the adequacy of the proposed settlement and the propriety of class certification."[136]

At the time of the court's ruling, there was no evidence in the record about the *White* plaintiffs or whether their claims were "typical of the claims . . . of the class," as required by Rule 23(a)(3). Indeed, their original complaint, filed just hours before the court's ruling, did not even state any claims against Eagle-Picher; that omission was not corrected until a few weeks later, when the first amended complaint was filed. Nor was there evidence concerning whether the class representatives would "fairly and adequately protect the interests of the class," as required by Rule 23(a)(4). Presumably, Judge Weinstein intended to address such issues in a memorandum accompanying any final order of certification that he might enter following the fairness hearings.

The determination that conditional certification was appropriate under Rule 23(b)(1)(B) because Eagle-Picher constituted a limited fund rested primarily on Special Master Frankel's report. The special master based his conclusions on a review of the company's earlier forecasts of its continuing asbestos liability; experience had shown these forecasts to be overly optimistic in several respects. The rate of new filings had not declined, settlements had become more expensive and less readily obtainable than had been projected, legal expenses had surpassed predictions, and the company's future cash flow had been overstated. Thus, although the company itself had projected that its funds would eventually be unable to meet its asbestos liabilities, the situation was most likely even bleaker than predicted. Although uncertainties remained about each of these figures for the future, Special Master Frankel stated that "the existence of such uncertainties [was] by no means a barrier to estimating the

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134. Order Conditionally Certifying Class at 4, White v. Eagle-Picher Indus., Inc., No. CV-90-4253 (E.D.N.Y. Dec. 11, 1990).

135. *Id.* at 5.

136. *Id.*

‘risk’ or the ‘likelihood’” that he had been appointed to determine.[137] “[I]t would call for some kind of bravado,” he said, “to doubt that there is both a likelihood of insolvency and a risk of insufficient assets to pay later claimants.”[138] Without, therefore, quantifying Eagle-Picher’s total asbestos liabilities or the size of the limited fund that the company could make available to compensate claimants, Frankel concluded that the evidence was clear and convincing that

1. Eagle-Picher’s assets were sufficiently limited so as to create a risk that payment of present and future asbestos claimants was in jeopardy;
2. there was a substantial probability that compensation of earlier litigants would exhaust the company’s available funds; and
3. there was a likelihood that Eagle-Picher would become insolvent over the next two to three years.

Little additional evidence was introduced at the December 7–10 hearing before Judge Weinstein in support of class certification. Thomas Petry, the chairman and CEO of Eagle-Picher, testified about the company’s reasons for seeking class certification. He stated that over the last five years the company had spent some $540 million on the asbestos litigation and that approximately one-third of that amount was in legal and administrative fees. Moreover, it now appeared that the number of new claims was not declining, and the company was starting to experience cash flow problems, since it had sold off most of its expendable operations. Petry testified that the company viewed a Rule 23(b)(1)(B) class action as preferable to the only other viable option, bankruptcy. It was hoped, he said, that a class action resolution of all Eagle-Picher’s asbestos liability would provide a quicker and less expensive means of achieving a desirable certainty for all concerned—claimants, customers, vendors, and employees—than would bankruptcy.

Attorneys’ Fees

The November 28 proposed settlement that was agreed to by Eagle-Picher and Chesley and Shapiro did not address the issue of attorneys’ fees; neither did the earlier Plaintiffs’ Proposed Principles of Settlement

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137. Report of Special Master Marvin E. Frankel to the Honorable Jack B. Weinstein at 18, Loper v. Eagle-Picher Indus., Inc., No. CV-87-1383 (E.D.N.Y. Sept. 7, 1990).

138. *Id.* at 21.

drafted by the two class attorneys. However, the November 3 early morning agreement signed by Judge Weinstein included a provision stating that individual plaintiffs' attorneys' fees from funds paid out of the trust that was to be created were not to exceed 25%.

Thus, although the proposed settlement that was to be the subject of future fairness hearings did not provide for any limitation on attorneys' fees, it is reasonable to assume that Judge Weinstein either would have insisted on such a provision in any settlement agreement that he would have approved or would have himself imposed such a cap in his supervision of payouts by the trust. Imposing a limit on attorneys' fees would have been one means of addressing Judge Weinstein's stated concern that too little of the money expended in asbestos litigation was going to the victims themselves. The court's October 1 order appointing class counsel provided that the fees and expenses of counsel for the plaintiff class and of the special settlement master would be paid from the settlement fund.

Assessment

One cannot fairly assess the limited fund class action proceedings in *White v. Eagle-Picher Industries, Inc.*, because they were never completed. Thus, it is not known what the terms of a final settlement might have been, what procedures the court would have followed in deciding on its fairness, or how a finally certified class might have been structured. Some observations might be offered, however, on the efficacy and fairness of the class action proceedings that did occur.

It is hard to read the record of the proceedings before Judge Weinstein without reaching the conclusion that Eagle-Picher's efforts to settle on a limited-fund-class-action basis were destined to fail. This effort was perceived—probably with substantial justification—as an attempt by the company, with the court as its ally, to force on plaintiffs a settlement that would have been more favorable to the company than to the claimants. The court's active involvement in the negotiation process and its choice of relative outsiders as counsel to represent the putative class served to exacerbate the asbestos plaintiffs' bar's mistrust of the proceedings. Without the involvement and support of a substantial number of the major players in the asbestos litigation, approval of any settlement on a non-opt-out basis would surely have been vigorously challenged on appeal or in a mandamus action with a significant chance of success.

Specific concerns might also be raised about the proceedings that did take place. A class was conditionally certified in a case just hours after it was commenced with the filing of a complaint containing no substantive claims; furthermore, the conditional certification was made with only limited examination of whether the requirements of Rule 23 appeared to be satisfied. The December 7–10 hearing was abruptly terminated without the conclusion of the cross-examination of the company's CEO and with the testimony of only one party's expert. Litigation against Eagle-Picher was stayed throughout the country without prior notice to the class members themselves. And all of these actions were taken in support of a proposed settlement, still in the form of a memorandum of understanding, that had been agreed to by just two of the four class counsel and only one of the three lawyers appointed to represent present claimants.

Judge Weinstein's memorandum in support of his stay order eloquently expressed his motivation for the actions he took in the *Eagle-Picher* class action proceedings. His frustration with existing schemes for resolving asbestos claims was evident:

> The national war over asbestos has produced unnecessary casualties. Many of the persons harmed by asbestos-containing products have been injured once again by our legal system's method of litigating tort cases. Case-by-case adjudication for each injured person has both delayed payment and consumed the bulk of the monies available for those injured. Less than 40% of every asbestos-litigation dollar goes to pay asbestos victims—the persons who actually suffered the injury. . . . Much of the billions of dollars in transaction costs going to attorneys could be used to compensate the suffering and injured. Court facilities now unnecessarily tied up in these cases could be used for other pressing needs.
>
> [Eleven companies] have all filed for bankruptcy protection in the face of a deluge of asbestos-related damage claims and mounting asbestos litigation expenses. The transaction costs and attorneys fees associated with these bankruptcy proceedings have further reduced the amount available to compensate the injured. The bankruptcies have also generally delayed payments for many years.
>
> It has become impossible to ignore this challenge to our justice system.[139]

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139. Memorandum on Stays at 3–4, White v. Eagle-Picher Indus., Inc., No. CV-90-4253 (E.D.N.Y. Dec. 12, 1990).

Although well intentioned, Judge Weinstein's aggressive pursuit of a limited-fund-class-action solution in this case probably did not improve its chance of success. The company was seeking a solution without first bringing the plaintiffs' lawyers on board, and the court's active role in support of it made the plaintiffs' lawyers all the more resistant. Given the number of plaintiffs' attorneys and the diversity of opinion among them, it would have been a difficult task under the best of circumstances to arrive at a class action settlement that most would have supported. The attempt by the company and the court to impose such a settlement over the objection of most plaintiffs' attorneys, however, certainly turned out not to provide a quick solution. With mandamus petitions pending and a shortage of funds to pay judgments that had come due, the company therefore turned to what it viewed as its only other option, bankruptcy.

In his appointment of Special Master Frankel to address questions of (1) whether there was a limited fund and (2) whether a bankruptcy or class action approach would produce more favorable results for present and future claimants, Judge Weinstein seemed to identify and confront two major issues as they arose. The critical question, however, turned out to be the size of the limited fund and its relationship to reasonably anticipated asbestos liabilities. Authoritative answers to these questions, it appears by hindsight, would have been necessary, but perhaps not sufficient, to dislodge the parties from their positions on the ultimate issue—who should own the company? That issue was resolved in the bankruptcy court, as is discussed in the next chapter.

Chapter 5

Asbestos Bankruptcy Reorganization: *In re Eagle-Picher Industries, Inc.*

As is discussed in Chapter 4, Eagle-Picher Industries, Inc., attempted to achieve a global resolution of the present and future asbestos claims against it by means of a non-opt-out, limited fund class action settlement. That effort, pursued during the summer and fall of 1990 in the U.S. District Court for the Eastern District of New York, was vigorously opposed by many members of the asbestos plaintiffs' bar throughout the country. Two such groups filed petitions for mandamus in the Second Circuit, seeking to overturn the district court's conditional class certification and stay order.

In the end the company abandoned the class action proceedings in favor of a Chapter 11 bankruptcy. Almost six years later, a reorganized Eagle-Picher emerged from bankruptcy freed of any further liability to asbestos personal injury claimants, and a trust was established to pay those claims. The trust owned all the company's stock, which it later sold for over $700 million in cash, an amount that compares favorably with the estimated $204 million to $280 million value of the proposed limited fund settlement in 1990. The bankruptcy proceedings were lengthy and costly, but the end result was one that both the company and the asbestos claimants supported.

Nature of Litigation and Litigation Maturity

The history and nature of Eagle-Picher's asbestos litigation is described in Chapter 4, which discusses the company's attempted class action settlement. Suffice it to say that, by the time Eagle-Picher filed for bankruptcy, the litigation was fully mature, and the company had more than 65,000 claims pending against it and many more expected to be asserted in the future.

History of the Bankruptcy Proceedings

On January 7, 1991, Eagle-Picher and affiliated companies filed Chapter 11 petitions in the U.S. Bankruptcy Court for the Southern District of Ohio. The bankruptcy case (referred to in the singular because the related petitions were jointly administered) was assigned to Chief Judge Burton Perlman in Cincinnati. The company reached the decision to seek bankruptcy relief after a deal to sell a plant fell through, a sale that was needed to enable the company to pay asbestos judgments and settlements that had come due. With no immediate class action settlement in sight and with mandamus petitions pending in the Second Circuit, the company concluded that bankruptcy provided the only hope for preserving its core operations.

Eagle-Picher did not emerge from bankruptcy with a confirmed plan of reorganization until November 1996.[140] When one looks at what happened in the almost-six-year interim between bankruptcy filing and confirmation of a reorganization plan, particularly insofar as the asbestos claims were concerned, it appears that the reorganization efforts progressed through four major phases, and a postconfirmation administration phase is still being played out. I labeled the first four phases as (1) commencement and initial skirmishing, (2) mediation, (3) skirmishing with unsecured creditors and equity shareholders, and (4) compromise and confirmation.

Phase 1: Commencement and Initial Skirmishing

The initial phase of the *Eagle-Picher* bankruptcy commenced with the filing of the petition in January 1991 and extended until June 1992. As in most Chapter 11 cases, much effort during this period was devoted to putting in place the structures and personnel needed to administer the bankruptcy case. In addition, because of the long history of the asbestos litigation and the recent contentious class action proceedings, there was a high level of animosity between the debtor and the asbestos plaintiffs' lawyers at the outset. This ill will was displayed in frequent litigation between the two sides and a disinclination to compromise.

140. *See* Order on Confirmation of Plan, *In re* Eagle-Picher Indus., Inc., 203 B.R. 256 (S.D. Ohio 1996).

Early in the case, two creditors' committees were appointed. As in other Chapter 11 cases,[141] the U.S. trustee appointed an unsecured creditors' committee made up of trade creditors and bondholders. Unsecured creditors with non-asbestos-related claims were owed approximately $150 million. A second committee was appointed to represent the interests of tort claimants. The injury claimants' committee, as it was called, was made up of, not claimants themselves, but their lawyers. Originally composed of seven asbestos plaintiffs' lawyers, the committee was later expanded to ten to include asbestos property damage and lead paint claimants' lawyers. Among the asbestos plaintiffs' lawyers on the committee were Gene Locks, Robert Sweeney, Thomas Henderson, Robert Steinberg, and Leonard Jaques. Sweeney served as chair of the committee.

A group of Eagle-Picher shareholders sought the appointment of an equity security holders' committee. After the U.S. trustee took no action on their request, they filed a motion seeking the appointment of such a committee by the court. This motion was opposed by the injury claimants' committee, which argued that, because the debtor was insolvent, no value remained for equity and thus they had no role to play in the case. Judge Perlman, however, granted the motion, directing the U.S. trustee to appoint an official equity security holders' committee. He did so in July 1991. A five-member committee was appointed.

Two other groups also sought official recognition as committees during the initial phase of the case, but they were unsuccessful. The first was a group of attorneys representing asbestos claimants with liquidated claims. The court denied their motion on the ground that they were adequately represented by members of the injury claimants' committee, some of whom had clients with liquidated claims. The other group seeking official committee status was a group of asbestos codefendants. After the court denied their motion, they continued their somewhat limited participation in the case as an "unofficial committee."

The final official "player" who was appointed in the case was a future claims representative. The issue of appointing a legal representative for persons who in the future would have personal injury or property damage claims against Eagle-Picher first arose in May 1991, when John Lloyd, a Cincinnati lawyer with apparently no connection to the asbestos litiga-

141. *See* 11 U.S.C. § 1102 (1994).

tion, moved to have himself appointed to the position. Although Lloyd's motion was denied, the U.S. trustee subsequently moved for the appointment of such a representative. That motion was supported by the debtor, the unsecured creditors' committee, and the injury claimants' committee. Judge Perlman granted the motion in October 1991 and appointed James McMonagle, a former Ohio common pleas judge and a trustee of the UNR asbestos claimants' trust, to the position.

Early in the case, Judge Perlman established procedures for the review and interim payment of professional fees and expenses. Under his May 1991 order, professionals retained in the case could be paid interim compensation and reimbursement of expenses by the debtor by submitting a monthly statement to Eagle-Picher's general counsel, James Ralston.[142] After review of the accuracy of the numbers and the reasonableness and propriety of the services rendered, Ralston could authorize payment of 85% of the fees and 100% of the expenses, amounts which would be paid by the debtor. Every four months the professionals were to file with the court an application for approval and allowance of the payments already made and for payment of the 15% holdback. The court also authorized the debtor to reimburse 100% of the out-of-pocket expenses incurred by members of the official committees.

Early in the case a number of issues produced disagreement and litigation among the parties. For example, in April 1991 the debtor sought a one-year extension of its exclusive period for filing a reorganization plan.[143] Among the reasons given in support of the motion was the debtor's need to assess and analyze the 65,000 asbestos claims pending against the company, as well as the need to determine the magnitude of the company's future asbestos liability. The injury claimants' committee opposed the motion. It argued that the debtor was merely trying to postpone "the day of reckoning with [its] creditors"[144] and that, given the class action proceedings that had taken place in the Eastern District of New York, the company already had all the information it needed to de-

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142. Order Authorizing Procedures for Payment of Interim Compensation and Reimbursement of Professionals, *In re* Eagle-Picher Indus., Inc., Consol. Case No. 1-91-00100 (Bankr. S.D. Ohio May 6, 1991).

143. Motion Pursuant to Section 1121(d) of the Bankruptcy Code to Extend the Exclusive Periods During Which the Debtors May File a Plan of Reorganization and Solicit Acceptances Thereof, *Eagle-Picher* (Apr. 11, 1991).

144. Injury Claimants' Committee's Objection and Memorandum in Opposition to Debtors' Motion to Extend Exclusivity at 1, *Eagle-Picher* (May 2, 1991).

termine the extent of its liability. The committee urged that the court grant no more than a ninety-day extension and that, if a consensual plan could not be negotiated during that period, exclusivity then be lifted. Judge Perlman granted Eagle-Picher an extension of its exclusive period for filing a plan until November 1, 1991, an extension of approximately six months.[145]

While its motion to extend exclusivity was pending, Eagle-Picher sought to have the court hold in contempt some 750 plaintiffs' lawyers who had failed to comply with the court's order to provide the debtor with the names and addresses of their clients who had personal injury claims against the company. This motion was later withdrawn in response to the court's extension of the time for compliance with its order.

A big battle arose between the debtor and the injury claimants' committee over whether a bar date should be set for the filing of proofs of claim by asbestos claimants. The debtor argued that a deadline for filing such claims was needed so that it would be possible to determine the exact number of present claims and so that frivolous ones could be identified and weeded out. The injury claimants' committee opposed a bar date, noting that other asbestos bankruptcies had not imposed such a deadline. The committee further argued that providing adequate notice of the bar date to claimants would be expensive and that the operation of a bar date would be inequitable, as some deserving asbestos claimants would be denied recovery merely because of their failure to file a timely proof of claim.

Judge Perlman eventually granted the debtor's motion and set September 30, 1992, as the bar date for filing asbestos-related proofs of claim by present claimants.[146] The court also approved the debtor's plan for providing notice of the bar date to claimants. Under that plan, notice of the bar date and a proof of claim form were mailed to all asbestos claimants known to Eagle-Picher and to the claimants' attorneys. In addition, in order to provide notice to present claimants whose identities were unknown to the debtor, notices were placed in over ninety newspapers around the country, as well as in asbestos litigation journals and union publications. A toll-free information request telephone line was also set

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145. Order Pursuant to Section 1121(d) of the Bankruptcy Code Extending the Exclusive Periods, *Eagle-Picher* (May 23, 1991).

146. Order Setting Bar Date (Asbestos-Related Claims) at 1, *Eagle-Picher* (June 11, 1992).

up to answer questions and to respond to requests for proof of claim forms. Approximately 162,000 asbestos claimants filed proofs of claim by the bar date.

A continuing issue throughout the initial phase of the bankruptcy case was whether the debtor needed and should be permitted to gather additional information about the asbestos claims before it began serious negotiations over the terms of a plan. That was the issue underlying the dispute over the setting of a bar date. Even after the court agreed to require present claimants to file proofs of claim by a certain date, the issue of information gathering remained, because the debtor argued that to place a value on the present claims, it needed to obtain additional information. It sought to require all or a selected sample of the claimants to complete a questionnaire about their exposure to Eagle-Picher asbestos products and the nature and severity of their injuries. The injury claimants' committee opposed this effort, arguing that the debtor already had sufficient information about the extent and value of the claims to enable it to engage in negotiations.

This dispute culminated in a three-day hearing in April 1992,[147] at which the debtor's expert, Thomas Florence, testified about the methodology for valuing present and future claims and about why additional information was needed in this case to undertake such a valuation. The injury claimants' committee's expert, Mark Peterson, on the other hand, testified that using existing information, he was able to value the present and future asbestos claims against the debtor pursuant to several different methods and that those analyses yielded a total value ranging from approximately $1 billion to $2 billion. He contended that, given the magnitude of the liability in relation to the company's assets, no greater precision was needed in order to negotiate a plan.

During closing arguments at the end of the hearing, the attorney for the unsecured creditors' committee, Carolyn Buller, asked the court to withhold ruling on the matter for forty-five days in order to give the parties an opportunity to negotiate the values. She indicated that the debtor had so far been unwilling to discuss claims valuation, taking the position that more information was needed. The unsecured creditors, injury claimants, and future claims representative had undertaken some preliminary negotiations on the issue, and Buller suggested that progress

147. Evidentiary Hearing, *Eagle-Picher* (Apr. 7–9, 1992).

might be made if the debtor joined the discussions. After the debtor's attorney indicated a willingness to meet with the other parties to discuss valuation, Judge Perlman asked Buller to convene a meeting of the various interests and to report back on whether any progress was being made. Meanwhile, the court took the debtor's motion under advisement.

Phase 2: Mediation

At the beginning of June 1992, after two months of attempted negotiations among the parties, Judge Perlman entered an order appointing a mediator "to assist the several constituencies . . . in attempting to negotiate a consensual plan."[148] He selected Jerry Lawson, a Cincinnati mediator, for the position and instructed him to communicate to the court "about the mediation process but not about the substance of the discussions."[149] Judge Perlman further ordered that during the mediation process there be "no direct communication between the parties or between their attorneys without the concurrence of the mediator."[150] The mediator was authorized to meet with parties separately or jointly, as he deemed appropriate.

This order ushered in the second phase of the bankruptcy case, which was marked by the attempt through mediation to arrive at a consensual plan. This phase extended for some seventeen months, until November 1993, at which point the debtor, the injury claimants' committee, and the future claims representative announced that they had reached an agreement on the principles of a reorganization plan.

The appointment of the mediator led to what the injury claimants' committee called "the first significant plan negotiations . . . seen in this case."[151] Other parties seemed to agree, and the court accepted the mediator's suggestion that exclusivity be extended until thirty days after the date that he declared the mediation to be at an impasse.

As the mediation process continued, the mediator began to focus his efforts on sessions involving only the debtor, the injury claimants' committee, and the future claims representative. The other constituencies, that is, the unsecured creditors' and equity committees, began to feel shut

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148. Order Appointing Mediator at 1, *Eagle-Picher* (June 5, 1992).

149. *Id.* at 2.

150. *Id.*

151. Official Injury Claimants' Committee's Objection to Debtor's Fourth Motion to Extend the Exclusive Periods at 1, *Eagle-Picher* (Aug. 10, 1992).

out of the process. In June 1993 those committees moved to modify or terminate the mediation or, in the alternative, to lift the communications ban. The unsecured creditors stated that since December 1992 they had been excluded from mediation sessions. Moreover, they and the equity committee feared that they would eventually be ambushed by a take-it-or-leave-it plan, because the communications ban was having the effect of denying them access to any information about the current negotiations. The mediator responded to the motions by authorizing counsel for the two committees to talk with counsel engaged in the mediation, and the court later denied the motions.

On November 10, 1993, Eagle-Picher issued a press release announcing that it had reached an agreement with the injury claimants' committee and the future claims representative on the principal elements of a reorganization plan. The parties had agreed to the creation of a trust, funded by cash and securities, that would provide compensation to the present and future asbestos claimants, whose claims, the parties agreed, had a value of $1.5 billion. The announcement stated that the debtor, the injury claimants' committee, and the future claims representative now planned to negotiate with the unsecured creditors' and equity committees in the hope of arriving at a consensual plan. If agreement could not be reached with those committees, however, a plan would be proposed that would pay unsecured creditors 30% of their claims and that would cancel existing common stockholders' shares and make no distribution to them. With this announcement, the bankruptcy case entered its third phase.

Phase 3: Skirmishing with Unsecured Creditors and Shareholders

For the next two years, the bankruptcy case was mired in the unsuccessful attempt to reach an agreement among all the constituencies on the value of the asbestos claims and the provisions of the plan for unsecured creditors and shareholders. The unsecured creditors could not be convinced to accept any valuation approaching the $1.5 billion figure that the debtor had agreed to, and the shareholders were still hoping to receive some value under the plan. Along the way, both the unsecured creditors' committee and the equity security holders' committee filed several motions in the bankruptcy court in an effort to gain some leverage in the negotiations; these efforts proved unsuccessful. In the end the

logjam was broken by the court's estimation of the asbestos claims at a value much greater than $1.5 billion.

Members of the unsecured creditors' committee were strongly resistant to the idea that the asbestos claims were worth ten times the value of the claims they represented. Especially unyielding was a large bondholder—The Baupost Group—who, it appeared, had paid too much for claims that it had purchased during the bankruptcy. With the unsecured creditors' committee clinging to a view of the case vastly different from the view of the constituencies that had reached agreement, the mediation effort went nowhere. Meanwhile, the equity committee merely waited on the sidelines; the proponents of the agreement were not willing to offer anything to them until they reached an agreement with the unsecured creditors.

In May 1994 the unsecured creditors' committee took the offensive and filed objections to a group of 100 asbestos claims.[152] It argued that the claims should be disallowed, because there had been no showing of exposure to Eagle-Picher's product or of the existence or extent of asbestos-caused injury. The committee also served interrogatories and requests for production of documents on the claimants whose claims they had targeted. Shortly thereafter, the unsecured creditors' committee and the equity committee filed motions seeking discovery from senior management and the directors of Eagle-Picher and from the debtor's expert, Florence. They sought to inquire into the basis for the agreement that the debtor had reached with the injury claimants' committee and the future claims representative in order to gain additional information needed to assess the proposed agreement. Finally, in early June 1994, the unsecured creditors' committee moved to terminate or modify exclusivity, contending that mediation had reached an impasse. In all of these efforts the unsecured creditors and shareholders were unsuccessful. Judge Perlman did not grant any of the motions. He either denied them or deferred ruling on them.

At the end of February 1995, Eagle-Picher, still at odds with the unsecured creditors' and equity committees, filed a reorganization plan, which it proposed jointly with the injury claimants' committee and the future claims representative. The plan valued the company's asbestos liability at $1.5 billion, wiped out the existing shareholders, and provided

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152. *See, e.g.*, Unsecured Creditors' Committee's Objection to Claim of Jack E. Derby, *Eagle-Picher* (May 4, 1994).

for payment to unsecured creditors of approximately 42.5% of their claims.

Several months thereafter the debtor, still having reached no agreement with the unsecured creditors, moved pursuant to 11 U.S.C. § 502(c) for an estimation by the court of its aggregate liability for asbestos-related personal injury claims.[153] The debtor stated that the purpose of this estimation would be to determine the appropriate distributions to creditor classes under the plan or any plan that was subsequently filed. Reversing its earlier position concerning the need to gather more information, Eagle-Picher argued that "[i]n view of the nature of the relief requested . . ., only limited discovery is necessary."[154]

Judge Perlman granted the debtor's motion for estimation and held an evidentiary hearing in October 1995.[155] Each of the official constituencies participated in the hearing, and each had its own expert testify concerning the aggregate value of the asbestos personal injury claims. The expert retained by the future claims representative limited his testimony to the value of the future claims, that is, those claims asserted against the debtor after the bankruptcy petition date; all of the other experts, however, testified as to the total value of present and future claims. Their results varied widely. The expert for the equity committee—Roman Weil—placed the lowest value on the claims. Basing his analysis on the experience of the UNR trust, which he contended shared many claimants with Eagle-Picher, he testified that the total value of the present and future claims as of the petition date was $325.5 million. All of the other experts' valuations, based on Eagle-Picher's actual experience in settling claims, far exceeded that amount. The unsecured creditors' expert—Scott Beiser—valued all of the claims in a range from $800 million to $1 billion. The expert for the future claims representative—John Burke—valued the future claims alone at $1.9 billion. The debtor's expert—Thomas Florence—placed the total value of the present and future claims at $2.5 billion. Finally, the injury claimants' committee's expert—Mark Peterson—testified that the total value of the claims was $2.9 billion.

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153. Motion to Estimate Debtors' Liability on Account of Asbestos-Related Personal Injury Claims, *Eagle-Picher* (July 13, 1995).

154. *Id.* at 6.

155. *See* Transcript of Proceedings, *Eagle-Picher* (Oct. 17, 1995).

Judge Perlman issued an opinion and order on estimation on December 4, 1995.[156] First holding that the claims were required to be valued as of the filing date of the petition, he carefully reviewed the testimony of each of the experts. On the valuation of the present claims, he found Peterson's testimony to rest on the soundest basis, since it took into consideration a large number of variables in the closed or resolved cases (such as disease type, occupation, state of residence, law firm) and used them in valuing the open present claims. When Peterson's valuation of the present claims was discounted to the filing date, it yielded a value for the present claims of $478 million.

With respect to the value of the future claims, Judge Perlman set forth seven criteria for estimating such claims:

1. The estimate should be based primarily on the history of Eagle-Picher, although general trends in the industry might be taken into account.
2. The total number of claims likely to be asserted should be estimated.
3. The estimation should categorize claims by disease and occupation type, as well as other factors.
4. The valuation should be based on settlement values close to the commencement of bankruptcy.
5. A reasonable rate for indemnity increases over time should be determined.
6. A lag time between assertion of claims and payment should be taken into account.
7. A discount rate should be applied to bring the future valuation back to its value as of the filing date.

Judge Perlman determined that Florence's testimony came closest to meeting these criteria, although he had testified as to 1995 values and therefore his figure had to be discounted to January 1991. After applying a 6% discount rate, Judge Perlman held that the future claims had a value of $2.02 billion. When he added that figure to the value he had found for the present claims, he arrived at a total estimated value for the present and future asbestos personal injury claims of $2.5 billion.

156. *In re* Eagle-Picher Indus., Inc., 189 B.R. 681 (Bankr. S.D. Ohio 1995).

Phase 4: Compromise and Confirmation

Given the court's estimation order, the writing was on the wall. Shortly thereafter, the debtor and the future claims representative moved to disband the equity committee, since it now had been determined that the asbestos and other unsecured claims far exceeded the value of the company. Judge Perlman ruled that the equity committee should remain in existence only for the purpose of pursuing the appeals it had taken from orders of the bankruptcy court, including the estimation order.[157]

The debtor then began engaging in efforts needed to move the case toward confirmation. In April 1996 Eagle-Picher moved for an order establishing the procedures for voting on the plan. Three claims purchasers objected to the proposal to allow each of them only one vote as an unsecured creditor rather than a vote for each claim that they held. Judge Perlman sustained this objection but otherwise approved the voting procedures.

Under the approved procedures, each asbestos personal injury claimant who had filed a proof of claim was entitled to vote. Those claimants who had themselves signed their proofs of claim would be sent solicitation packages directly. If an attorney representing a claimant had signed a proof of claim on the client's behalf, the solicitation package would be sent to the attorney. Plaintiffs' attorneys would receive master ballots listing their clients' names, and the attorney would indicate next to each claimant's name whether that person voted to accept or reject the plan. The attorney would have to certify on the ballot that he or she had authority to cast the ballot on behalf of the claimants. When it came time to tabulate the votes, each asbestos personal injury and property damage claim, as well as each lead personal injury claim, would be valued at $1.00. Thus, for classes holding those claims, the number of affirmative votes alone would determine whether they accepted the plan and the amount of each claim need not be determined.

There continued to be some skirmishing between the unsecured creditors' committee and the debtor. When the debtor filed an amended plan and disclosure statement in April 1996, the committee as well as some individual unsecured creditors filed objections to the disclosure statement. They argued, among other things, that the disclosure state-

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157. Order Regarding Motion for Order Directing the United States Trustee to Disband the Equity Security Holders' Committee, *Eagle-Picher* (Feb. 7, 1995).

ment failed to reveal that the plan could not be crammed down with respect to the class of unsecured creditors because it discriminated unfairly against them in relation to its treatment of asbestos claims.

Eventually, however, the debtor was able to strike a compromise with the unsecured creditors' committee. In August 1996 the debtor filed a third amended plan, still jointly proposed with the injury claimants' committee and the future claims representative, as well as a disclosure statement. This plan was based on a valuation of the asbestos liability at $2 billion, rather than $2.5 billion. As a result, it gained the support of the unsecured creditors' committee, although not the support of all of its members. The disclosure statement was accompanied by a letter from the chairman of the unsecured creditors' committee, stating that settlement discussions had resulted in the reduction of the valuation of the asbestos claims and that the committee recommended that general unsecured creditors vote to accept the plan in its current form. The chairman explained that the committee had reached its decision because of the difficulty of overturning on appeal Judge Perlman's estimation order and because even a successful appeal to the district court would probably result in further appeals and litigation by the injury claimants' committee, thus prolonging an already lengthy bankruptcy case. Each member of the committee, he said, except The Baupost Group, planned to vote in favor of the plan. The committee also planned to support confirmation and to dismiss its appeal of the estimation order.

The disclosure statement was approved following a hearing on August 28, and the confirmation hearing was set for November 13, 1996. Before it took place, the district court affirmed Judge Perlman's estimation order, and the equity committee was disbanded.

Voting on the plan yielded the following results: All of the classes that were eligible to vote and did vote, save one, voted overwhelmingly to accept the plan.[158] Over 96% of the class of asbestos and lead personal injury claimants supported the plan; almost 88,000 voted to accept it, and approximately 3,500 voted to reject it. Only the class of unsecured creditors rejected it. Although over 75% of the voting members of that class accepted the plan, it failed to receive the support of the required two-thirds in dollar amount of claims voted. The "yes" votes represented only 56.5% of the voted unsecured claim dollars. The equity security holders

158. *See* Order on Confirmation of Plan, *In re* Eagle-Picher Indus., Inc., 203 B.R. 256, 269–70 (S.D. Ohio 1996).

were deemed to have rejected the plan because they took nothing under it. Because of the rejection by the unsecured creditors and the deemed rejection by the equity security holders, the court had to decide whether the plan could be crammed down, that is, confirmed over their objection.

The outcome of the confirmation hearing was essentially a foregone conclusion. District Judge Arthur Spiegel presided along with Judge Perlman in order to reduce the time required for gaining compliance with the Bankruptcy Code § 524(g)'s requirement that the district court issue or affirm the order confirming the plan so that the channeling injunction provided for in the plan would be valid. The debtor stood to gain significant tax savings if the plan could be put into effect prior to the end of its fiscal year on November 30, 1996. The only parties that filed timely objections to confirmation were the unsecured creditor The Baupost Group, a group of shareholders, and Stanley Levy as trustee beneficiary for certain holders of asbestos personal injury claims. Two other creditors also objected, but their objections were eventually withdrawn. The unofficial asbestos codefendants' committee and two asbestos property damage claimants filed late objections, which were disallowed owing to untimeliness.

On November 18, 1996, Judges Spiegel and Perlman issued an order and opinion confirming the plan, including its injunction channeling all present and future asbestos claims to the asbestos personal injury trust that was to be created upon confirmation.[159] Finding all of the objections to be without merit, they held that the plan was fair and equitable with respect to the nonaccepting unsecured class and that the class was not unfairly discriminated against. No one contended, they noted, that it was improper to classify the asbestos claimants and the unsecured creditors separately.

The court also rejected The Baupost Group's argument that the plan failed to satisfy the best-interests-of-creditors test. That argument rested on the contention that future claims should not be included in the bankruptcy and that, if they were excluded, the remaining claimants would receive more under a liquidation than they were to receive under the plan. The district court, however, in an earlier appeal in the case, had ex-

159. *Id.*

pressly held that future asbestos claims were cognizable under the Bankruptcy Code.[160]

The other parties' objections were also rejected. The shareholders had no basis for objecting to the cancellation of their equity interests, the court held, because with unsecured creditors not receiving full payment, there was no value to be distributed to equity. Levy, who was a defendant in a pending preference action brought by the debtor, argued that any recovery ultimately awarded in the case should be paid to the asbestos personal injury trust rather than to the debtor. The court overruled this objection on the ground that the class of asbestos claimants had overwhelmingly accepted the plan even though it failed to require the payment to the trust of any recoveries on outstanding contingent claims.

After disposing of the objections, the court found that the plan met all the necessary requirements of Bankruptcy Code § 1129(a) and (b) and could be confirmed.[161] The court further held that the requirements of section 524(g) had been satisfied and thus the channeling injunction was proper.[162]

Eagle-Picher's reorganization plan went into effect on November 29, 1996. It established an asbestos personal injury trust to which all present and future asbestos claims against the company would be channeled. The trust was funded with all of the common stock of the reorganized debtor as well as additional cash, notes, and debentures. The plan provided that the class of unsecured creditors would receive payment in cash estimated at the time of confirmation to equal approximately 33% of the amount of the unsecured debt. Thomas Petry, Eagle-Picher's CEO, was retained in his position, as were all members of the company's board of directors.

Phase 5: Postconfirmation

In April 1997 Judge Perlman entered an order allowing final compensation and reimbursement of expenses for the professionals involved in the case.[163] This order reveals the price for obtaining a resolution of Eagle-Picher's asbestos liability. The total amount allowed over the course of

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160. *See* Order, *In re* Eagle-Picher Indus., Inc., No. C-1-96-206 (S.D. Ohio Sept. 25, 1996).

161. 203 B.R. at 281.

162. *Id.*

163. Order Allowing Final Compensation and Reimbursement of Expenses, *Eagle-Picher* (Apr. 8, 1997).

the bankruptcy for lawyers, accountants, and other financial advisors was $42.6 million.

At the time of my examination of court records in the case, the trustees of the asbestos personal injury trust had filed two annual reports with the bankruptcy court, both of which were approved. The first report, filed on April 30, 1997, reported only on the first month's operation of the trust (through December 31, 1996). It described the efforts undertaken by the trustees to retain professionals and to begin to establish procedures for payment. It also reported that the value of the net assets of the trust as of the end of 1996 was $731.8 million.

The annual report filed by the trust a year later, in April 1998, reported that the trust, as sole shareholder of Eagle-Picher, along with the company's board of directors, had entered into a merger agreement with Granaria Holdings N.V., a private investment firm based in the Netherlands.[164] Under the agreement the company was merged into a new company created by Granaria, the trust's shares were canceled, and the trust received a cash payment of over $701 million for its shares and for redemption of its sinking-fund debentures. As of the end of February 1998, when the merger was completed, the net assets of the trust amounted to $804.8 million.

The trust also reported that in 1997 it commenced making payments to asbestos claimants. Payment pursuant to the discounted cash payment option was begun, and by year's end the trust had paid over 2,000 such claims in an amount of approximately $1,450,000. Under that option, claimants are able to receive a scheduled amount upon proof of exposure to an Eagle-Picher asbestos-containing product and submission of a medical report diagnosing an asbestos-related injury. The trustees also adopted an initial payment percentage of 27.8 for allowed individualized claims. Approximately 163 prepetition settlements were paid according to that percentage. By the end of February 1998 the trust had reached an agreement with the UNR asbestos trust to establish a joint claims facility.[165]

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164. *See* Application for Order Approving Annual Report and Account of . . . Trustees at 16, *Eagle-Picher* (Apr. 30, 1998).

165. During the early stages of the Eagle-Picher reorganization, in August 1992, the Judicial Panel on Multidistrict Litigation had denied a motion to consolidate eight pending asbestos Chapter 11 reorganizations. The panel encouraged judges and parties to co-

Party Structure

The Chapter 11 reorganization proceedings were initiated by the debtor, Eagle-Picher Industries, Inc. (and related companies). Other parties in interest included the company's creditors and shareholders. They were represented in the bankruptcy by the official committees appointed by the U.S. trustee: the unsecured creditors' committee, the injury claimants' committee, and the equity security holders' committee. Additionally, the bankruptcy court appointed James McMonagle to represent the interests of those persons who had or would have personal injury or property damage claims against the debtor arising after the commencement of the bankruptcy case. Although denied the status of an official committee, an unofficial committee of asbestos codefendants also participated in the case from time to time.

Attorneys

Stephen Karotkin, of Weil, Gotshal & Manges, represented the debtor in the bankruptcy proceedings. Carolyn Buller, of Squire, Sanders & Dempsey, was the attorney for the unsecured creditors' committee. The injury claimants' committee—composed of attorneys—was represented by Kevin Irwin, of Keating, Muething & Klekamp. Among the asbestos plaintiffs' lawyers serving on that committee were Gene Locks, Robert Sweeney, Thomas Henderson, Robert Steinberg, and Leonard Jaques. Claude Montgomery, of Milgrim, Thomajan & Lee, represented the equity security holders' committee. The attorney for the future claims representative was Robert Balantzow, of McCarthy, Lebit, Crystal & Haiman.

Terms of the Reorganization Plan

The reorganization plan[166] that was confirmed classified the claims and equity interests into twenty-four classes, many of which consisted of secured claims. Of significance to this study is the plan's treatment of asbestos and other tort claims, as well as its provisions for other unsecured creditors and the existing shareholders.

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ordinate their cases voluntarily. The decision to establish a joint claims facility with another asbestos trust was consistent with the panel's suggestion.

166. Third Amended Consolidated Plan of Reorganization, *Eagle-Picher* (Aug. 28, 1996).

Asbestos Personal Injury Claims

Asbestos personal injury claims were placed in Class 17, along with lead personal injury claims. The plan defined this class to include all present and future rights to payment for death, bodily injury, or other personal damages resulting from exposure to asbestos or asbestos-containing products, or to products containing lead chemicals, that were manufactured or distributed by the debtor prior to the bankruptcy petition date. Expressly included in this definition were claims for contribution, reimbursement, indemnity, and subrogation.

According to the disclosure statement, some 162,000 asbestos personal injury proofs of claim were filed by the bar date. Only 128 lead personal injury proofs of claim were timely filed, and four of those were subsequently withdrawn and one was dismissed.

The plan provided for the establishment of a personal injury trust to which all asbestos and lead personal injury claims were channeled. Pursuant to 11 U.S.C. § 524(g), holders of these claims were forever enjoined from seeking compensation for such claims from the reorganized debtor and from others whose potential liability was derived from the debtor. The trust was funded with all of the reorganized debtor's common stock, as well as certain tax refund notes, debentures, divestiture notes, and cash. The determination of the amount distributed to the trust was based on a valuation of the asbestos personal injury claims in the amount of $2 billion, a compromise figure arrived at by the plan proponents and the unsecured creditors' committee subsequent to the bankruptcy court's estimation order.

Incorporated in the reorganization plan were the terms of a trust agreement that governed the establishment of the personal injury trust and the procedures for payment of asbestos and lead personal injury claims. According to the trust agreement, asbestos claims that were liquidated by settlement or judgment prior to the bankruptcy would be paid, if possible, within sixty days after the effective date of the reorganization plan. The total of such liquidated claims was stated to be approximately $40 million. The trust agreement did not provide for the payment in full of these liquidated claims; instead, the trustees were to set a payment percentage, which would be adjusted periodically, that would allow payment of all the claims expected to be presented. The same payment percentage would be applied to claims liquidated through the claims resolution

process. The disclosure statement indicated that the payment percentage was expected to be less than 33.

Not subject to the payment percentage were claims handled by the discounted cash payment method. This option, which claimants could select at the time of voting on the plan, provided for more expeditious payment in a certain amount based on the nature of the claimant's disease. The specified amounts were as follows: $6,500 for mesothelioma; $2,000 for lung cancer; $1,000 for other cancers; and $400 for a nonmalignancy. A claimant selecting this option would be eligible to receive payment upon submitting proof of exposure to an Eagle-Picher asbestos-containing product and a medical diagnosis of an asbestos-related disease, unless the trustees could not easily determine the validity of the claim, in which case the claimant could seek individualized review. Claimants selecting this option who submitted proof of a nonmalignant asbestos-related disease were eligible to file a subsequent claim for an asbestos-related malignancy should one later be diagnosed, and no deduction would be made from the payment for that claim on account of the earlier $400 discounted cash payment.

With respect to individually reviewed claims, the trust agreement provided that the trustees would establish categories of claims by injury and perhaps also by occupation, medical criteria, and other factors. For each category, a range of liquidated values based on historic settlement values would be determined, and upon review, a claim would be assigned an appropriate value within the applicable range. The claimant would be offered that amount multiplied times the payment percentage. The trust agreement established priorities for the payment of claims as follows:

1. claims asserted in lawsuits against Eagle-Picher prior to bankruptcy;
2. claims not sued on prior to bankruptcy but for which timely proofs of claim were filed in the Eagle-Picher reorganization;
3. claims that prior to the confirmation date were either asserted in lawsuits against defendants other than Eagle-Picher or pursued against other asbestos victims' trusts or claims; and
4. all other asbestos personal injury claims.

To be eligible for a payment, however, a claimant was required to have complied with the bankruptcy court's bar date or to be excused from failure to comply by the trustees. The trust agreement provided that the trustees would excuse noncompliance by any claimant whose asbestos-

related disease did not manifest itself until after the bar date, as well as noncompliance by others that was deemed excusable.

According to the trust agreement, because of the absence of any tort judgment against a lead pigment manufacturer and the resulting difficulty of estimating Eagle-Picher's potential liability to lead personal injury claimants, the trust would make no immediate payments for such claims. For lead personal injury claimants to receive compensation from the trust, they would have to demonstrate that they or another similarly situated claimant had obtained a final, nonappealable judgment against a lead pigment manufacturer under the state law applicable to their own claims against Eagle-Picher. Meanwhile, the trustees were directed to spend no more than $2.5 million of trust funds for medical, scientific, and other research concerning diseases and conditions potentially caused by exposure to products containing lead pigment. Only upon the occurrence of all of the following events were the trustees required to set aside a reserve for lead claims:

1. the passage of four years from the effective date of the plan;
2. the payment by the trust of $1 million in indemnity costs for lead personal injury claims in any one year; and
3. the obtaining by lead personal injury claimants of final, nonappealable judgments against lead pigment manufacturers in more than one state.

The plan provided that asbestos and lead contribution claims would be processed, allowed or disallowed, and paid according to procedures to be developed by the trustees. These procedures would require the validity of the claims to be determined in accordance with section 502(e) of the Bankruptcy Code and would require binding arbitration for the resolution of any disputes. Processing and payment of these contribution claims would be consistent with the processing and payment of the underlying asbestos and lead personal injury claims.

Other Tort and Environmental Claims

Class 16 of the reorganization plan consisted of asbestos property damage claims; Class 18, other product liability tort claims; and Class 19, environmental claims. Asbestos property damage claims were defined by the plan as claims against Eagle-Picher for damages arising from the presence in buildings or other structures of asbestos or asbestos-containing products manufactured or sold by the debtor prior to the petition date. The

plan channeled these claims to an asbestos property damage trust and enjoined all attempts to collect from the reorganized debtor. The treatment of these claims depended upon whether Class 16 voted to accept the plan. If the class did accept the plan, it was provided that $3 million in cash would be distributed to the trust, and the trustees would be selected by the representatives who filed class proofs of claim on behalf of asbestos property damage claimants. The selected trustees would then establish the claims resolution procedures. If, however, Class 16 voted to reject the plan, the trust would be funded with certain unsecured sinking-fund debentures in an amount based on the bankruptcy court's estimation of the value of the property damage claims. In any such estimation proceedings, the debtor indicated that it would argue that the value was $0. Should the court determine that the value of the claims exceeded $15 million, the plan would be null and void. Under the treatment to be provided if the class rejected the plan, the debtor would select the trustees and would establish the claims resolution procedures. (The class accepted the plan, and therefore the alternative treatment went into effect.)

Class 18 consisted of product liability claims against the debtor not included in any other class. According to the disclosure statement, the debtor was unaware of any such claims. To fall within this class, a claim had to be one for damages for death or personal injury arising out of exposure to products (other than those containing asbestos or lead chemicals) manufactured or sold by the debtor prior to the plan confirmation date and one for which the disease or injury had not manifested itself by the confirmation date. The plan provided that, if such claims were asserted before the final distribution date, they would be treated as Class 20 unsecured claims and paid accordingly. Claims asserted thereafter would receive payment equaling the amount they would have received if they had been unsecured claims on the effective date of the plan. (No holder of a claim in this class voted on the plan.)

Class 19 consisted of environmental claims against the debtor. The plan embodied the terms of an environmental settlement agreement that was previously entered into by the debtor and the Environmental Protection Agency, the Department of the Interior, and several states, and that was approved by the bankruptcy court. To the extent that the agreement recognized that the claimants had allowed unsecured claims, they were to receive the same treatment as Class 20 unsecured claimants. Their distribution amount was to be paid in cash.

Other Unsecured Claims

All of the unsecured claims not specifically classified elsewhere were placed in Class 20. This class therefore included, among other claims, claims for trade debt and debt securities, as well as prepetition claims for professional fees and expenses. The debtor estimated the total value of claims in this class as being approximately $107.6 million. The plan provided that these claims would be paid in cash in two installments in an amount, according to the disclosure statement, predicted to be approximately 33% of the allowed claims.

Equity Interests

Class 24 consisted of the equity interests of stockholders of the debtor. The plan provided that stockholders would receive no distribution under the plan and that their stock certificates would be canceled on the effective date of the plan.

Negotiation History

As previously described, serious negotiations over the terms of a reorganization plan did not get under way until some seventeen months into the bankruptcy case, when Judge Perlman appointed a mediator to assist the parties in negotiating a consensual plan. Although at first all of the official committees were present at the negotiations, eventually the mediator began to focus his efforts on negotiations among the debtor, the injury claimants' committee, and the future claims representative. Apparently the mediator believed that obtaining an agreement about the treatment of the asbestos claims was essential to any consensual plan and should precede efforts involving the unsecured creditors and shareholders. This negotiation strategy led the unsecured creditors' and equity committees to complain about being shut out of the process. Although in the summer of 1993 the mediator lifted the communications ban and permitted counsel for the two committees to talk with the counsel engaged in the negotiations, both committees remained on the sidelines of the negotiation efforts.

In November 1993 an agreement was struck by the debtor, the injury claimants' committee, and the future claims representative. As announced in a press release, these parties had agreed to a valuation of the present and future asbestos claims of $1.5 billion, meaning that nothing

would be left for the shareholders and that the ratio of asbestos claims to unsecured claims was approximately 10 to 1. The parties announced that, if agreement could not be reached with the unsecured creditors' committee, they would propose a plan that would pay unsecured creditors 30% of their claims.

Efforts to negotiate a consensual plan with the unsecured creditors' committee were initially unsuccessful. Based on advice the committee was receiving from its financial advisors, the committee refused to believe that the asbestos liability was as great as the agreed-upon $1.5 billion figure. After a period of skirmishing, in which the unsecured creditors' and equity committees took the initiative and unsuccessfully sought discovery from the debtor and from certain asbestos claimants whose claims they had objected to, the negotiation impasse was broken by the court's resolution of the valuation question. As previously recited, Judge Perlman estimated the value of the present and future asbestos claims as being $2.5 billion, a billion dollars more than the amount that the unsecured creditors' committee previously could have accepted. Faced with this finding and the difficulty of getting it reversed on appeal, the committee then negotiated a $2 billion asbestos claims value with the debtor and the asbestos claimants and agreed to a plan that would pay unsecured creditors an estimated 33% of their claims. No efforts were made by the plan proponents to negotiate a deal with the equity security holders' committee.

In the end the plan had to be confirmed through a cramdown, because the class of unsecured creditors did not vote to accept the plan (given the opposition of some large unsecured creditors) and the class of equity security holders was statutorily deemed to reject the plan, since it provided them nothing. The negotiation process, although unsuccessful in getting everyone's agreement, did play a critical role in establishing an alliance between the debtor and the largest creditors of all, the asbestos claimants, and these allies succeeded in getting a plan confirmed in the end.

Handling of Future Claims

On October 31, 1991, Judge Perlman granted the U.S. trustee's motion to appoint James McMonagle as the legal representative for future personal

injury and property damage claimants.[167] McMonagle was a former Ohio common pleas judge who was serving as the general counsel of the University Hospitals of Cleveland. As a state judge, he had handled all of the asbestos litigation in the Common Pleas Court of Cuyahoga County and later had been appointed by the Chief Justice of the Ohio Supreme Court to handle asbestos litigation throughout the state of Ohio. He had served as national advisor to the American Judges Association on asbestos litigation matters and since 1989 had been a trustee of the UNR Asbestos Disease Trust. McMonagle's appointment was supported by the debtor, the unsecured creditors' committee, and the injury claimants' committee.

McMonagle played an active role in the bankruptcy proceedings. He was one of the main participants in the plan negotiations and was one of the proponents of the reorganization plan that was confirmed. He also participated in the estimation hearing, presenting an expert—John Burke—who testified concerning the value of the future asbestos claims. Although the positions McMonagle took in the bankruptcy case were generally consistent with those taken by the injury claimants' committee, he provided an independent voice that represented the interests of asbestos claimants whose identities for the most part were not yet known.

Shortly after the appointment of the future claims representative, Judge Perlman entered an order defining the term "future claimants." Noting that there had been disagreement among the parties in interest over the precise scope of the class represented by McMonagle, Judge Perlman issued an order defining the "future claimants" as follows:

> Those persons or entities who have been exposed to or in the future will be exposed to asbestos or asbestos containing products mined, fabricated, manufactured, supplied or sold by debtors, who have been exposed to or in the future will be exposed to lead containing chemicals manufactured or supplied by debtors, or who have been exposed or in the future will be exposed to products containing silica manufactured or supplied by debtors, who as of the filing date of these bankruptcy cases, January 7, 1991, did not yet have a right to payment from debtors on account of such exposure, but had or will have such right thereafter.[168]

Under this definition, then, a future claimant's exposure to the debtor's asbestos-, lead-, or silica-containing product could have occurred either

167. Order Re Future Claimants' Representative, *Eagle-Picher* (Oct. 31, 1991).

168. Order Defining Future Claimants at 5–6, *Eagle-Picher* (Nov. 25, 1991).

before or after the petition date, so long as there was no "right to payment" as of the commencement of bankruptcy. The order did not discuss how it was to be determined when a right to payment arose. Although the definition was not explicit about the nature of the claims that were covered, by focusing on the claimant's "exposure" to the debtor's product, it seemed to embrace only personal injury claims and not property damage claims. The order appointing McMonagle, however, had designated him as the legal representative for "future personal injury and property damage claimants."[169]

Several months after his appointment, McMonagle sought a clarification of the definition of future claimants, arguing that the definition given by the court in its prior order was unworkable, since it required application of various state and federal tort rules for each potential claimant in order to determine when his or her right to payment arose. The future claims representative argued that the definition should be amended so as to provide a more definite basis for determining who fell within the represented class. His proposed amendment would have defined future claimants as those persons who had been or would be exposed to the debtor's asbestos-, lead-, or silica-containing products but who had not asserted a claim against the debtor prior to the bankruptcy date. Judge Perlman rejected the proposed amendment.[170] The definition of future claimant, he held, had to be based on the Bankruptcy Code's definition of claim, which is expressed in terms of the existence of a right to payment, not the assertion of a claim.[171] He did, however, amend the previously ordered definition of future claimants to tie it even more closely to the statutory definition of claim. According to the amended definition, a future claimant was one who had been or would be exposed to one of the specified products of the debtor and who as of January 7, 1991, did not yet have a claim as defined by 11 U.S.C. § 101(5)(A) against the debtor on account of that exposure but would thereafter have such claim.[172]

Four years later, when the district court affirmed the bankruptcy court's estimation order, Judge Weber used a still different definition of

169. Order Re Future Claimants' Representative at 3, *Eagle-Picher* (Oct. 31, 1991).

170. Decision on Motion of Future Claimants' Representative for Clarification, *In re* Eagle-Picher Indus., Inc., 144 B.R. 69 (Bankr. S.D. Ohio 1992).

171. *Id.* at 71.

172. *Id.* at 71–72.

future claimant.[173] He rejected the argument of the unsecured creditors' committee that the future asbestos claims were not cognizable in Eagle-Picher's bankruptcy, because he found that the "manufacture and distribution of debtors' asbestos products and the future claimants' exposure thereto arose prior to the petition date."[174] Thus, he concluded, "the future asbestos claimants have § 101(5) claims against the debtors."[175] The district court's conception of future claimants was therefore the opposite of the bankruptcy court's. As defined by Judge Perlman, future claimants were persons who did not have claims as of the bankruptcy petition date regardless of when their exposure occurred; according to Judge Weber, however, future claimants were proper participants in the bankruptcy case because they had been exposed prepetition and thus they did have claims against the debtor as of the petition date.

The reorganization plan seemed to use a definition of future claimant falling somewhere in between Judge Perlman's and Judge Weber's definitions. Under the plan, asbestos personal injury claims included any right to payment either already in existence or subsequently arising for death or bodily injury resulting from exposure to the debtor's asbestos-containing products prior to the petition date. Thus, like Judge Weber's definition, the plan required exposure to have occurred prepetition. But like Judge Perlman's definition, the plan did not require a claimant to have a right to payment and thus a "claim" as of the petition date.

Extending the terms of the plan and the scope of the discharge injunction to cover such asbestos claimants was consistent with section 524(g) of the Bankruptcy Code, which had been added by the time of the Eagle-Picher plan confirmation.[176] That provision authorizes the channeling of present and future asbestos claims to a trust created for that purpose if, among other things, a legal representative has been appointed to protect "the rights of persons that might subsequently assert demands of such kind."[177] As used in that provision, "'demand' means a demand for payment, present or future, that—(A) was not a claim during the

173. Order, *In re* Eagle-Picher Indus., Inc., No. C-1-96-206 (S.D. Ohio Sept. 26, 1996).

174. *Id.* at 17.

175. *Id.*

176. *See* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 111(a), 108 Stat. 4113.

177. 11 U.S.C. § 524(g)(4)(B)(i) (1994).

proceedings leading to the confirmation of a plan of reorganization; (B) arises out of the same or similar conduct or events that gave rise to the claims addressed by the injunction issued . . .; and (C) pursuant to the plan, is to be paid by a trust [meeting the statutory requirements]."[178]

The plan provided the same treatment in most respects for future asbestos personal injury claims as for present ones. The trustees were required to reserve $50 million for the payment of claims by persons who first manifested a disease after the effective date of the plan. The requirement of creating that reserve, however, did not "in any way alter the duties of the Trustees to pay similar present and future . . . [c]laims in substantially the same manner."[179]

There were some possible differences in treatment permitted under the plan. The trustees were not required to continue the discounted cash payment method of compensation into the future. That decision was left to the trustees' discretion, and they were given discretion to make future discounted cash payments in amounts differing from the original discounted payment amounts. The application of the bankruptcy court bar date, of course, also differed for present and future claims. The trustees were not authorized to deny a future claim (i.e., for injury that was not manifested until after the bar date) on the grounds of noncompliance with the bar date. Finally, in order to "ensure substantially equivalent treatment of all present and future valid Asbestos Personal Injury Claims,"[180] the trustees were required to calculate periodically a payment percentage based on a determination of the value of claims likely to be asserted against the trust and the value of the trust's assets. Although this requirement was an effort to ensure even-handed treatment of claims over time, future adjustments could lead to either more or less favorable treatment for later paid claimants than for those previously paid, a probably unavoidable consequence of any attempt to deal with such a large number of unliquidated claims over a long period of time.

Notice Procedure and Content

The major attempt in the bankruptcy case to provide notice to potential asbestos claimants against Eagle-Picher occurred in the months prior to

178. *Id.* § 524(g)(5).

179. Third Amended Consolidated Plan of Reorganization at A.1.1.13-12, *Eagle-Picher* (Aug. 28, 1996).

180. *Id.* at A.1.1.13B-1.

the bar date, which was established as September 30, 1992. On June 11, 1992, Judge Perlman approved the debtor's plan to provide notice of the bar date.[181] Pursuant to that plan, the debtor mailed a copy of the bar date notice and a proof of claim form to

1. each person who had commenced an asbestos-related action or other proceeding against the company prior to January 7, 1991;
2. each person whose name had been furnished to the debtor by an attorney pursuant to Judge Perlman's order early in the bankruptcy case; and
3. each person listed in the debtor's schedules as a holder of an asbestos-related claim.

The same documents were also sent to the attorneys of record for each of the identified claimants.

The bar date notice informed the recipient that September 30, 1992, was the deadline for filing asbestos-related proofs of claim in the *Eagle-Picher* bankruptcy, enclosed a copy of the bar date order, provided instructions about who was required to file a proof of claim and where such claims should be sent, and explained the effect of failure to file by the bar date. The notice included a toll-free number that a claimant could call with questions about how to complete the proof of claim form.

Notice of the bar date was also provided by publication in an attempt to reach claimants whose identities were unknown to the debtor. On two dates from June to September, 1992, notices were placed in the legal notice section of the Sunday edition of approximately ninety newspapers around the country. The newspapers selected included those with a national circulation, those in jurisdictions in which the largest numbers of claims were pending against the debtor, and those in the fifty largest cities in the United States. In addition, notices were placed in two asbestos litigation journals, and copies were submitted to the AFL/CIO and the Asbestos Victims of America. A press release about the bar date was sent to newspapers and wire service organizations throughout the country, and a toll-free information line was established. The published notice stated that September 30, 1992, was the last date for filing asbestos-related proofs of claim against Eagle-Picher, explained how to obtain a proof of claim form by calling the toll-free number, and stated where the proof of

181. Order Setting Bar Date (Asbestos-Related Claims), *Eagle-Picher* (June 11, 1992).

claim should be sent. The notice also listed the products manufactured by Eagle-Picher that may have contained asbestos fiber at various times.

Approximately 162,000 persons filed proofs of claims by the bar date. That number exceeded by almost 100,000 the number of claims that were pending against Eagle-Picher when it filed its Chapter 11 petition.

When it came time to vote on the reorganization plan in 1996, the debtor sent a disclosure statement and ballot directly to every asbestos claimant who had personally signed a filed proof of claim. In the case of claimants whose proofs of claim were signed by their attorneys on their behalf, solicitation packages were sent to the attorneys, along with master ballots listing their clients. The attorney had to certify that he or she had authority to cast the clients' votes. Approximately 91,000 asbestos claimants voted on the plan.

Approval and Review Process

Eagle-Picher's reorganization plan was reviewed and approved in accordance with the extensive statutory requirements governing the confirmation of a reorganization plan in Chapter 11. As required by the Bankruptcy Code, the debtor prepared and obtained court approval of a disclosure statement, which was sent to all persons eligible to vote on the plan. With the plan and the detailed disclosure statement before them, creditors—including asbestos claimants—voted either to accept or reject the plan. As previously noted, the vote was overwhelmingly in favor of the plan; the class of unsecured creditors was the only voting class that did not accept it.

Because not all impaired classes voted to accept the plan, the plan had to be confirmed pursuant to Bankruptcy Code § 1129(b), the cramdown method of confirmation.[182] Judge Perlman, sitting jointly with District Judge Spiegel, conducted a confirmation hearing on November 13, 1996. On November 18, they issued a joint opinion and order confirming the plan.[183] The opinion discussed and rejected each of the objections to confirmation that had been raised and then discussed the plan's compliance with each of the statutory requirements for confirmation. The plan could be approved despite its rejection by the class of unsecured creditors and the class of equity holders (who were deemed to

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182. *See* 11 U.S.C. § 1129(b) (1994).

183. *In re* Eagle-Picher Indus., Inc., 203 B.R. 256 (S.D. Ohio 1996).

have rejected the plan), they held, because no class junior to them would receive or retain any property under the plan on account of such junior claims or equity interests and no class senior to them would receive more than full payment.[184] The court further found that the plan did not discriminate unfairly against either class.[185] With respect to those members of impaired classes who had voted not to accept the plan, the court found that the best-interests-of-creditors requirement was satisfied.[186] That is, each such creditor or shareholder would receive under the plan not less than the amount that they would have received in a Chapter 7 liquidation.

Attorneys' Fees

Following plan confirmation, Judge Perlman entered an order allowing final compensation and reimbursement of expenses to the attorneys and other professionals in the case.[187] The total amount allowed for the almost six years of the Chapter 11 proceedings was $42.6 million. Of that total, approximately $17.6 million was for attorneys' fees; the balance was paid to other professionals and to reimburse expenses.

The plan and the trust agreement contained no provisions concerning the payment of fees to attorneys for individual claimants who receive compensation under the trust. Apparently such compensation was left to be governed by individually negotiated contracts between the claimants and their lawyers.

Assessment

The *Eagle-Picher* bankruptcy is viewed by most of its participants as having been a success. Although that is not the view of the former shareholders of the company, who lost everything, other constituencies believe that the result achieved through reorganization was a good one. Bankruptcy provided the company with a solution that it was unable to achieve through a class action, and it provided the asbestos claimants with more value than they were offered in the proposed class action set-

184. *Id.* at 277.
185. *Id.*
186. *Id.* at 275.
187. Order Allowing Final Compensation and Reimbursement of Expenses, *Eagle-Picher* (Apr. 8, 1997).

tlement. The approximately $804 million value of the company at the time of the merger in 1998 (discounted by 6% over 8 years to a value of approximately $504 million in 1990 dollars) compares quite favorably with the estimated $204 million to $280 million 1990 value of the proposed limited fund settlement.

It is obvious from reviewing the history of the bankruptcy case, however, that this result was achieved at a high price in terms of time and money. No asbestos claimants received compensation from Eagle-Picher from the end of 1990 until sometime in 1997, and in that year only a small fraction of the outstanding claims were paid. Moreover, over $40 million of the company's assets were expended in administering the bankruptcy.

With the benefit of hindsight, one can see several points at which the bankruptcy case seemed to bog down unnecessarily. It is troubling, for example, to read the injury claimants' statement that no serious plan negotiations occurred until after the mediator was appointed in June 1992—some seventeen months into the case. While the preexisting relationship among some of the parties perhaps necessitated some sort of cooling-off period before serious negotiations could take place, it seems likely that more pressure from the court or an earlier decision to appoint a mediator would have caused negotiations to commence sooner. Similarly, the case languished for two years after the debtor had reached an agreement with the injury claimants and the future claims representative. Had the debtor moved sooner to seek a court determination of the value of the claims—once it became clear that the unsecured creditors' and equity committees were unwilling to accept a $1.5 billion valuation—a plan would most likely have been confirmed sooner. Indeed, going back even further, had the court ruled after the April 1992 hearing on the methodology for estimating claims, the issues to be resolved through mediation would have been considerably narrower.

Despite its cost and time consumption, the *Eagle-Picher* bankruptcy did offer some advantages over a class action resolution. It provided a process in which all of the relevant constituencies were forced to and were able to participate. The unsecured creditors and shareholders were required to come to grips with the fact that they too were affected by the mass tort liability facing Eagle-Picher. The tort claimants themselves were not bound by what an appointed group of lawyers decided to agree to on their behalf. They—or at least their own chosen lawyers—were permitted

to vote. The plan that was confirmed was overwhelmingly supported by most of the classes.

Chapter 6

Breast Implant Limited Fund Class Action: *Butler v. Mentor Corporation*

Mentor Corporation is a Minnesota corporation that was founded in 1969 and that has its principal place of business in Santa Barbara, California. It is engaged in the manufacture and sale of urology, ophthalmology, and plastic surgery products, including silicone gel and saline breast implant products. From the time that Mentor acquired the Heyer-Schulte breast implant assets from American Hospital Supply Corporation in March 1984 until July 1993, approximately 185,000 persons received Mentor breast implants.

Beginning in the early 1990s, women who had received silicone gel breast implants began in large numbers to sue the product manufacturers, alleging injuries caused by the implants. Among the injuries they alleged were autoimmune system damage, neurological disease, connective tissue disorder, and rheumatic disease, all allegedly caused by leakage of silicone from the breast implants. In 1991 Mentor was named as a defendant in approximately twenty-four such lawsuits. The number of suits increased dramatically following a multimillion dollar verdict against Dow Corning in a San Francisco breast implant case in 1992. From then until early 1993, Mentor was sued by over 1,700 claimants in approximately 800 lawsuits.

The growing number of lawsuits in federal court as well as state court against Mentor and other breast implant manufacturers led the Judicial Panel on Multidistrict Litigation in June 1992 to consolidate the federal cases for pretrial purposes. The MDL cases were assigned to Judge Sam Pointer, Jr., of the Northern District of Alabama.[188]

Because Mentor was a small company that held a substantial share of the silicone gel breast implant market, it began to be overwhelmed by litigation costs. Shortly before the commencement of the MDL proceedings, its attorneys raised with plaintiffs' attorneys the possibility of a class action settlement of its breast implant litigation. That overture eventually

188. *In re* Silicone Gel Breast Implant Liab. Litig., 793 F. Supp. 1098 (J.P.M.L. 1992).

resulted in a limited fund class action settlement in the amount of $25.8 million, which was approved by Judge Pointer in September 1993.[189] This settlement was successfully achieved in part because extensive efforts were undertaken to convince individual plaintiffs' lawyers of its merits. In the end, the class certification and settlement were met with relatively few objections by members of the plaintiff class, and no appeals were taken from the certification and settlement approval.

Nature of Litigation and Litigation Maturity

Since the 1970s hundreds of thousands of women throughout the world received breast implants, most containing silicone gel, for cosmetic and reconstructive purposes. As recipients began to encounter problems with rupture and leakage of the implants, they brought product liability suits in state and federal courts of this country against the implant manufacturers—Dow Corning, Mentor, and others—alleging two types of injuries. First, plaintiffs sought damages for the costs of removal of allegedly defective implants, as well as damages for "local" injuries related to such product defects and the removal surgery required to alleviate the defects. Second, plaintiffs sought damages for "systemic" health problems, in the form of autoimmune or connective tissue diseases they allegedly suffered from as a result of the implants. Among their theories of recovery were strict liability, negligence, breach of warranty, failure to warn, and infliction of emotional distress. The manufacturers' defenses included lack of causation, insufficiency of product identification, and the learned-intermediary doctrine.

There were isolated plaintiffs' verdicts against implant manufacturers in the 1970s and 1980s. Then in the early 1990s, the litigation began to escalate. From March 1992 to June 1993, 1,030 lawsuits were filed against Mentor on behalf of 1,900 individual claimants. In addition, some of these suits were brought as class actions on behalf of all recipients of Mentor implants. During this same time period, Mentor incurred almost $4.4 million in defense costs, for which its insurance carriers denied coverage. The company incurred an additional $600,000 in costs and fees in pursuing its insurance carriers.

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189. Order No. 14 (Order Approving Mentor Settlement and Certifying Mentor Settlement; Final Judgment as to Claims Against Mentor), Butler v. Mentor Corp., No. 93-P-11433-S (N.D. Ala. Sept. 10, 1993).

No verdicts were ever obtained against Mentor in breast implant suits. In 1992 and 1993 the company did settle five such suits, set for trial in state courts, for a total of $120,250, or an average of $24,150 per case. By June 1993, then, when a limited fund class action settlement of the claims against Mentor was preliminarily approved, the litigation against Mentor was at a relatively immature stage.[190]

History of the Lawsuit

On May 14, 1993, simultaneously with the filing of a joint application for preliminary approval of a settlement and a provisional class certification, the plaintiffs' steering committee in the breast implant MDL proceedings filed a class action complaint in the Northern District of Alabama against Mentor and affiliated companies.[191] The complaint was filed on behalf of four named plaintiffs—Francesca Butler, Alice Taylor, Glenna Powell, and Betty Dasher—and a class of all persons who had received saline, silicone gel, or silicone-containing breast implants manufactured or sold by one of the defendants and implanted prior to June 1, 1993 (and those with derivative claims). Alleging few factual details, the complaint stated the following theories of recovery, among others:

- strict liability;
- negligence;
- failure to provide adequate warnings;
- breach of express and implied warranties;
- breach of warranty of fitness for a particular purpose;
- negligence per se resulting from breach of unspecified provisions of the Uniform Commercial Code, "applicable state law,"[192] the Food, Drug and Cosmetics Act, and state consumer protection statutes;
- misrepresentation;
- fraud by concealment;
- false advertising;

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190. Indeed, in subsequent years increasing doubt arose concerning whether silicone gel implants could be shown to cause systemic disease. *See infra* note 621 (discussing studies finding no evidence of causation of serious disease).

191. Amended Class Action Complaint for Damages, Injunctive and Equitable Relief, *Butler* (May 14, 1993).

192. *See id.* ¶ 16.

- conspiracy; and
- intentional and negligent infliction of emotional distress.

In addition to the recovery of compensatory and punitive damages, the plaintiffs sought an order enjoining the defendants from further research, testing, study, and manufacture of silicone gel breast implants, as well as other unspecified equitable and injunctive relief.

By joint application, the plaintiffs' steering committee and the Mentor defendants sought preliminary approval of a class settlement and provisional certification of a mandatory settlement class.[193] The settlement agreement called for defendants' payment over three years of $24 million and an immediate injunction against their further manufacture or sale of silicone gel products for breast augmentation purposes. In regard to silicone gel products for breast reconstruction or FDA study purposes, the settlement agreement called for an injunction against further manufacture or sale commencing no later than eighteen months after final approval of the settlement. Provisional certification of a mandatory plaintiff class was sought pursuant to Federal Rule of Civil Procedure 23(a) and (b)(1)(B), based on the argument that the defendants' assets constituted a limited fund, and 23(b)(2), based on the argument that injunctive relief was sought with respect to the class as a whole. The parties supported their application with declarations of Mentor's attorney William Griffin, plaintiffs' steering committee member Elizabeth Cabraser, and plaintiffs' expert Harvey Rosen.

Based on his review of the application and supporting documents, Judge Pointer on June 2, 1993, entered an order preliminarily approving the Mentor settlement, provisionally certifying a mandatory settlement class, and staying further litigation against Mentor.[194] He provisionally certified the class pursuant to Rule 23(a) and (b)(1)(B), stating that permanent certification would depend upon a satisfactory evidentiary showing that a limited fund or other circumstances existed that satisfied Rule 23's requirements. A fairness hearing to determine whether to grant final approval of the settlement and to confirm the class certification was set for September 9, 1993.

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193. Joint Application for Preliminary Mentor Settlement Approval and Provisional Settlement Class Certification, *Butler* (May 14, 1993).

194. Order No. 10 Preliminarily Approving Mentor Settlement, Preliminarily Certifying Mentor Settlement Class, and Staying Mentor Litigation, Butler v. Mentor Corp., No. CV 93-P-11433-S, 1993 WL 795477 (N.D. Ala. June 2, 1993).

The parties were directed to provide to class members the best notice of the class action, proposed settlement, and fairness hearing that was practicable under the circumstances. Such notice included the mailing to known claimants of a notice approved by the court and the publication of an appropriate summary of the notice in an effort to reach unknown claimants. The notice informed class members that they were invited to submit written comments supporting or opposing the settlement.

To preserve the limited fund of Mentor's assets pending final determination of whether to approve the settlement, Judge Pointer entered an injunction preventing members of the plaintiff class from commencing, continuing, or taking any action in any judicial proceeding in state or federal court against the Mentor defendants with respect to the claims covered by the class action, and preventing the defendants from settling any claim with a class member and from participating in any judicial proceeding with respect to any class claims without the court's permission. Judge Pointer cited the All Writs Act (28 U.S.C. § 1651) and Federal Rule of Civil Procedure 23(b)(1)(B) and (d) as authority for such temporary injunctive relief.

Pursuant to the court's preliminary approval order, written notice was sent to over 52,000 breast implant recipients, support groups, health care providers, and other interested persons. In addition, a summary notice approved by the court was published in the July 9 and July 16, 1993, national editions of *USA Today*.

In response to the notices, thirty-one objections to or comments on the settlement were sent to the court on behalf of class members, five objections were sent on behalf of doctors, hospitals, and physicians' groups, and two objections were sent on behalf of other implant manufacturers—Dow Corning and Applied Silicone. Class members' objections tended to raise concerns about the size of the settlement, the lack of detail concerning the actual payment amount, the failure to require immediate cessation of the manufacture of silicone gel implants for all purposes, or the impact of the settlement on recoveries against other defendants. The physicians who responded objected to provisions of the settlement agreement barring indemnity and contribution claims against Mentor, limiting Mentor's participation in discovery, and precluding further research by the defendants concerning the safety of gel implants. Finally, Dow Corning's objection, which Applied Silicone adopted, raised a number of concerns, including ones relating to the settlement agree-

ment's assignment to class members of Mentor's third-party claims and the provision for a return to Mentor of 15% of any recovery, the court's jurisdiction over a mandatory class, and the need for a uniform method of setting off the Mentor settlement payments against judgments obtained against other defendants.

On August 2, 1993, the plaintiffs' steering committee and the Mentor defendants filed a joint application for final approval of the settlement and final class certification.[195] Supporting the application were the declarations of Mentor lawyers William Griffin, Kelly Wooster, and Christopher Vejnoska; plaintiffs' steering committee member Elizabeth Cabraser; Mentor's financial expert, Bradford Cornell; Mentor president Anthony Gette; and the plaintiffs' attorney in charge of providing notice to class members, Dianna McBride. Also submitted were confidential documents bearing on Mentor's finances that the court placed under seal; access to them was limited to attorneys for the parties, their employees, and their consultants.

The fairness hearing took place on September 9, 1993, before Judge Pointer. No witnesses testified at the hearing, which lasted approximately two hours. The hearing consisted primarily of oral presentations by plaintiffs' steering committee members Margaret Branch and Elizabeth Cabraser and Mentor attorney William Griffin. Plaintiffs' expert Rosen was present, but was not called to testify. An exhibit summarizing the objections and comments that had been filed was introduced, as well as a reply by plaintiffs to the objections. At the end of the hearing, Judge Pointer indicated that he would grant final approval of the settlement in a written order to be subsequently entered.

The next day, September 10, 1993, Judge Pointer entered an order approving the Mentor settlement and certifying a settlement class pursuant to Rule 23(a) and (b)(1)(B).[196] In the final order the settlement amount was increased from $24 million to $25.8 million, owing to increased insurance recoveries by Mentor. The order also stated that the defendants agreed that the settlement amount would be further increased to include any additional amounts subsequently recovered from insurance carriers for foreign Mentor affiliates. Assigned to class members

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195. Joint Application for Final Approval of the Mentor Corp. Settlement and for Final Settlement Class Certification, *Butler* (Aug. 2, 1993).

196. Order No. 14 (Order Approving Mentor Settlement and Certifying Settlement; Final Judgment as to Claims Against Mentor), *Butler* (Sept. 10, 1993).

were Mentor's assignable third-party claims relating to saline, silicone, or silicone gel products, but not any claims for reimbursement of amounts Mentor paid for the settlement. Such claims for contribution and indemnity, both by and against Mentor, were barred.

In the September 10 order, Judge Pointer certified a mandatory, non-opt-out class pursuant to Rule 23(b)(1)(B).[197] This certification was based on the court's finding that the defendants' assets, including insurance benefits, constituted a limited fund and that the prosecution of separate actions by individual members of the plaintiff class against the defendants would substantially impair or impede the ability of other class members to protect their interests. The certified class consisted of all persons who had or might in the future have claims against any of the Mentor defendants based upon the implantation before June 1, 1993, of a breast implant product consisting of saline, silicone, silicone gel, or an elastomer made of silicone. The class expressly included persons who had received an implant before the specified date but who had not yet manifested any injuries, and it also included all persons with claims against the defendants resulting from a relationship with a qualified breast implant recipient.

Judge Pointer's order released the defendants from all present and future claims covered by the certified class action and permanently enjoined class members from prosecuting any such claims against the Mentor defendants in federal or state court. The order also enjoined the defendants from participating in most discovery proceedings in breast implant litigation. The defendants were immediately enjoined from the further manufacture or sale of silicone gel breast implant products for breast augmentation purposes. An injunction prohibiting the Mentor defendants from manufacturing or selling silicone gel breast implants for breast reconstruction or FDA study purposes was to become effective upon FDA approval of a gel substitute or eighteen months after the settlement closing date, whichever occurred first. Finally, defendants were enjoined from engaging in research concerning the safety and efficacy of silicone gel, subject to certain exceptions.

The September 10, 1993, order expressly preserved class members' claims against other defendants, including health care providers as well as other manufacturers. It also provided that the court retained jurisdiction

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197. *Id.* at 3.

to interpret, implement, and enforce the settlement agreement, to allocate the settlement fund after appropriate notice, and to rule on applications for attorneys' fees and expenses incurred in implementing the order and settlement agreement. The order stated, however, that the court would not entertain any applications for fees made by class counsel for negotiating or securing the settlement agreement.

No appeals were taken from the final order certifying the class and approving the settlement. After time-consuming efforts to achieve a global settlement of the breast implant litigation proved unsuccessful,[198] the distribution plan for the Mentor settlement was approved on October 14, 1996, shortly after the last installment of the settlement was paid and more than three years after the settlement was approved.[199] Utilizing a joint claims administration scheme linked with two other breast implant settlements—including one (*Bioplasty*) that arose out of a Chapter 11 reorganization plan—the Mentor plan provided for payments to eligible recipients without drawing distinctions based on severity of injuries. Any eligible recipient who received only a Mentor implant was entitled to a full pro rata share, for which she was paid $1,519.59. If an eligible recipient received a Mentor implant and a Bioplasty implant, she received 50% of a pro rata share of each settlement. Finally, if an eligible recipient received, in addition to a Mentor implant, an implant other than one made by Bioplasty, she received a 25% pro rata share in the Mentor settlement fund, for which she was paid $379.90.

On February 21, 1997, the Mentor claims administrator paid out approximately $26.7 million for claims received through January 1997. Thereafter, $200 was paid to each of 374 late-filing Mentor claimants who had also received other implants, $750 was paid to each of 1,117 late-filing Mentor claimants who had received only Mentor implants, and $200 was paid to each of 130 late- or incomplete-filing Mentor claimants for whom it could not be determined whether they had received other implants. Altogether, payments totaled $27.6 million. The increase from the original settlement amount of $25.8 million was possible because of interest that had accumulated. Less than one-half of 1 percent of the settlement fund went to the payment of administrative ex-

198. *See* Jay Tidmarsh, Mass Tort Settlement Class Actions—Five Case Studies 75–89 (Federal Judicial Center 1998).

199. Order No. 33A (Approving Distribution Plan for Mentor and Bioplasty Settlement Funds), *Butler* (Oct. 14, 1996).

penses, such as notices to the class, claims management, and disbursement of funds.

Party Structure

The complaint in *Butler* was filed by four named plaintiffs on behalf of a plaintiff class.[200] Each of the named plaintiffs alleged that she had received a breast implant manufactured by Mentor that contained either silicone or saline. The dates of their implantations ranged from 1987 to 1991. They sued on behalf of a class consisting of all persons (and their spouses or significant others) who received silicone gel or saline breast implants prior to June 1, 1993, which were manufactured, developed, designed, sold, or distributed by one of the Mentor defendants, and who claimed or might claim injuries, whether or not yet manifested, resulting from the silicone gel or saline breast implants. The class was not divided into any subclasses.

Named as defendants in the *Butler* action were Mentor Corporation and its subsidiaries or affiliates—Mentor Polymer Technologies, Inc.; Mentor O&O; Mentor H/S, Inc.; Mentor International, Inc.; and Teknar Corp.

Attorneys

The *Butler* complaint was filed by the cochairs of the MDL plaintiffs' steering committee, Ralph Knowles, of Atlanta, and Stanley Chesley, of Cincinnati. In addition to them, attorneys playing an active role on behalf of the plaintiff class included Margaret Moses Branch, of Albuquerque, and Elizabeth Cabraser, of San Francisco, who were the cochairs of the Mentor subcommittee.

Representing the Mentor defendants in the class action was Mentor's national counsel, William Griffin, of Brobeck, Phleger & Harrison in San Francisco.

Settlement Terms

The settlement agreement was executed on May 7, 1993, by the plaintiffs' steering committee on behalf of the representative plaintiffs and William

200. Amended Class Action Complaint for Damages, Injunctive and Equitable Relief, *Butler* (May 14, 1993).

Griffin on behalf of the Mentor defendants.[201] Subject to the court's final approval, the agreement provided that Mentor pay $24 million (later increased to $25.8 million by the court) for the settlement of all claims of class members against the defendants as follows: It paid $2 million upon execution of the agreement; it agreed to pay $6 million at the settlement closing; and it agreed to pay the remaining $16 million (later increased to $17.8 million) in three equal installments on the first, second, and third anniversaries of the closing date. The three-year installment obligation was to be secured by a security interest in all of the defendants' equipment, inventory, and accounts; the security interest would be subordinate to any present or future security interests securing the defendants' indebtedness for money borrowed for legitimate business purposes.

In addition to the monetary obligation, the Mentor defendants agreed to the entry of injunctive relief prohibiting them from

1. participating in formal or informal discovery proceedings, except as conducted, requested, and coordinated with the representative plaintiffs;
2. further manufacturing or selling silicone gel products for breast augmentation purposes, unless permitted by plaintiffs' counsel in a settlement agreement with any other manufacturer;
3. further manufacturing or selling silicone gel products for any purpose more than eighteen months from the final order approving the settlement; and
4. continuing to study or fund research related to silicone gel breast implants for augmentation or reconstruction, subject to certain exceptions specified in the agreement.

The defendants also agreed to assign to the plaintiff class all of their assignable rights, claims, and causes of action against third parties, other than the defendants' insurers, relating to the breast implant litigation. In the event that the plaintiffs obtained any recoveries on such claims, they agreed to pay the defendants up to 15% of the net proceeds. The defendants agreed to cooperate in the prosecution of such claims in good faith, including providing interviews and depositions and truthful testimony at

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201. *See* Settlement Agreement and Stipulation Between Mentor Corp. and Representative Plaintiffs, *In re:* Silicone Gel Breast Implants Products Liability Litigation (MDL 926) at 1, Master File No. CV-P-10000-S (CV-93-11433-S) (N.D. Ala. May 14, 1993) (indicating agreement entered into on May 7, 1993).

trial. The court's final order approving the settlement clarified that the assigned third-party claims did not include Mentor's claims against others for indemnity or contribution of amounts paid for the settlement.

The settlement agreement anticipated and provided for the possibility that Mentor might eventually undergo a court-approved corporate reorganization. It was agreed that if that occurred, any successor entities would be treated as released parties under the agreement, subject to their continued compliance with its terms, and that any successors engaged in activities not involving silicone gel or saline breast implant products would not be bound by the injunctive decree but would be liable for any remaining cash payments called for under the agreement.

The settlement agreement did not specify how the settlement fund would be allocated to members of the plaintiff class. Instead, it provided that the court would retain continuing jurisdiction over the allocation and distribution of the fund and that a fund administration committee would be appointed to recommend and implement guidelines for the administration of claims.

Plaintiffs' rights against other defendants were expressly reserved by the agreement. In addition, the defendants agreed to provide the plaintiffs' steering committee and its experts with full and continuing access to all Mentor financial records for the purpose of evaluating the defendants' financial status and financial obligations under the agreement.

Negotiation History

Mentor was a large player in the breast implant litigation in terms of market share, but was nevertheless a small company in terms of its finances. In the first half of 1992, as it started to be flooded with breast implant cases, the company began to realize that it could not keep up with the costs of defending the actions. Mentor's lawyers therefore approached Stanley Chesley, who represented plaintiffs in some of the suits brought against Mentor, and floated the idea of a limited fund class action settlement. Chesley solicited the views of some other plaintiffs' attorneys and apparently found sufficient interest to continue to pursue discussions with Mentor. The view he initially expressed was that a settlement might be possible, but not on a mandatory, limited fund basis. Not long afterward, the federal cases were consolidated before Judge Pointer, who indicated support for a class settlement.

A subcommittee of the Mentor plaintiffs' steering committee was designated as a negotiating committee. The negotiators included Margaret Branch and Elizabeth Cabraser, along with the steering committee's economist, Harvey Rosen, and its accounting firm, Ernst & Young. The company was represented in the negotiations by its attorney William Griffin; its controller; and sometimes its CEO or other upper-level manager. The negotiations continued throughout 1992 and into the winter and spring of 1993. The major sticking point during the negotiations was the amount of money Mentor would have to pay. The company wanted to come out better in the settlement than it would fare in bankruptcy. Because Mentor had few hard assets, the plaintiffs realized that they would get relatively little in a Chapter 7 liquidation, and they believed that the costs of a Chapter 11 bankruptcy would eat up a large amount of what they might otherwise recover. Because Mentor was a small company, it was hard to project its future earnings, but everyone agreed that the company needed to be left with sufficient assets to enable it to keep going so that it could pay future settlement installments. With open access to Mentor's financial records, the plaintiffs eventually agreed on the figure suggested by the company's accountants and bankers, $24 million.

The other major challenge in arriving at a settlement was selling it to the plaintiffs' bar. About 90% of the Mentor cases were handled by traditional personal injury lawyers, who tended to disfavor class action resolutions, especially on a mandatory basis. Steering committee member Margaret Branch, herself a traditional personal injury lawyer rather than a class action lawyer, played an important role in explaining the proposed settlement to the plaintiffs' lawyers and convincing them of its value. She explained that given the large number of potential claims and the relatively small size of the company, Mentor did truly constitute a limited fund from which a full recovery for everyone would be impossible. She also made the argument that arriving at a settlement with Mentor could prevent its bankruptcy, and a Mentor bankruptcy, it was feared, might pull the major defendant—Dow Corning—into bankruptcy as well.

Although there were some discussions about the plaintiffs' receiving a share of Mentor's equity, in the end the plaintiff negotiators rejected such an approach. They had philosophical objections to owning a breast implant company, and they feared that the administrative costs of running Mentor would be too great. Thus, they eventually accepted a straight cash payment along with injunctive relief.

Judge Pointer played a supportive but nonintrusive role in the negotiations. He was kept informed of the negotiators' progress and from time to time raised questions about the wording of notices or orders or other details. Although he did not involve himself in the substantive details of the settlement, it seemed clear to the parties that he wanted them to achieve a workable settlement and was there to assist them.

Handling of Future Claims

Persons who received a Mentor implant prior to June 1, 1993, were included in the plaintiff class even if they had not yet manifested any injuries that were due to the implants.[202] In the end, such claimants received the same treatment as persons who alleged that they had already suffered injuries. Under the claims administration process that was adopted, no one was required to present medical evidence demonstrating her injuries; instead, payment was based strictly on the implantation of a Mentor product prior to the cutoff date. The parties and the court decided that any payment scheme that differentiated claims on the basis of degree of injury would require administrative costs that would deplete the settlement amount. Thus, eligible future claimants were treated in the same manner as eligible present claimants.

Notice Procedure and Content

In his order preliminarily approving the settlement and provisionally certifying the class, Judge Pointer directed that notice of the proposed settlement and of the scheduled fairness hearing be given to the extent practicable to all members of the class.[203] The parties were ordered to use their best efforts to commence dissemination of the notice by July 9, 1993—sixty days before the hearing date—and to certify to the court their compliance with the notice requirement by August 20, 1993.

A Notice of Class Action and Proposed Settlement with the "Mentor Defendants" that had been approved by the court[204] was mailed to over 52,000 persons between July 9 and July 22, 1993. These mailings were

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202. *See id.* at 11 (defining "Settlement Class").

203. Order No. 10 Preliminarily Approving Mentor Settlement, Preliminarily Certifying Mentor Settlement Class, and Staying Mentor Litigation, Butler v. Mentor Corp., No. CV 93-P-11433-S, 1993 WL 795477, at *2 (N.D. Ala. June 2, 1993).

204. *Id.* at *3–*11.

directed to all known breast implant claimants and to identifiable counsel for breast implant claimants, as well as to plastic surgeons, general surgeons, hospitals, and outpatient clinics.

The mailed notice began by informing the recipients of the court's preliminary approval of a $24 million settlement with the listed Mentor defendants and of the scheduled date, time, and place of the fairness hearing. It then briefly described the litigation to date and described the class on whose behalf the *Butler* complaint was filed. Noting that $24 million appeared to exceed the forced liquidation value of the Mentor defendants' assets, the notice stated that the representative plaintiffs and their expert economist had determined that the defendants' assets would be insufficient to pay in full the claims of all the potential claimants against Mentor. Thus, it continued, "the capture of these assets in the proposed settlement for equitable distribution to all class members appears to be a fairer and superior alternative to the potential exhaustion of these assets in continued litigation . . . ."[205]

The notice summarized the terms of the settlement agreement, including the terms of the payment by defendants, the assignment of third-party claims, and the terms of the injunctive relief to be included in the consent decree. It included the recommendation of the plaintiffs' steering committee that the court approve the settlement as fair and reasonable and in the best interests of class members. The notice then pointed out that, if given final approval, the settlement agreement would release each class member's claim against the Mentor defendants, but would not release claims against any other breast implant manufacturers or other defendants. Stating that the settlement agreement did not make any allocation decisions, the notice said that class members would be given notice and an opportunity to be heard before any such decisions were made. Class members were invited to appear in person or through counsel at the fairness hearing in support of or in opposition to the settlement, or to submit written comments or objections in advance. They were further advised of the opportunity to review the court file in the case.

Attached to the notice was an information request form, which recipients could use to have their names removed from the mailing list, to have their identity kept confidential, to indicate a desire to receive further notices and information on making a claim, and to request copies of the

205. *Id.* at *5.

Butler complaint and the settlement agreement. Also attached to the notice was a list of the breast implant products that had been manufactured by the defendants.

In addition to the mailed notices, a summary notice, also approved by the court, was published on two consecutive Fridays in the national edition of *USA Today*.[206] This Summary Notice of Class Action and Proposed Settlement with the "Mentor Defendants" was directed to all persons who then had or might have in the future claims against the listed Mentor defendants based upon the implantation before June 1, 1993, of a breast implant product containing saline, silicone or silicone gel, or an elastomer made of silicone. The notice provided information concerning the court's preliminary approval of the settlement, the scheduled fairness hearing, and the provisional certification of a mandatory class. After describing the major terms of the settlement, it informed class members of their right to appear at the fairness hearing or provide written comments in advance. Counsel's names and addresses were included, and the notice stated that the complete printed notice could be obtained from them.

In the summer of 1996, notice was provided of the proposed distribution plan for the Mentor and Bioplasty settlement funds and of the hearing scheduled for October 11, 1996, to determine whether to approve the plan. This notice was mailed to some 48,000 persons—all persons who had indicated (or whose counsel had indicated) by registration or other communication with the claims office or by filing a proof of claim in the Bioplasty bankruptcy that they may have received breast implants manufactured by the Mentor or Bioplasty defendants.[207] The notice specified who was eligible to participate and how it was proposed that the settlement funds be allocated. It also explained how expenses and attorneys' fees and costs would be paid. The notice included a deadline for submitting objections to the proposed eligibility standards and distribution scheme and for filing a request to appear at the hearing. Attached to the notice was a claim form, along with instructions indicating that it had to be executed and returned to the claims office by December 16, 1996.

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206. *See, e.g., Summary Notice of Class Action and Proposed Settlement with the "Mentor Defendants,"* USA Today, July 16, 1993, at 6D.

207. *See* Order No. 33A (Approving Distribution Plan for Mentor and Bioplasty Settlement Funds), *Butler* (Oct. 14, 1996).

Approval and Review Process

The fairness hearing in the *Butler* case was brief and almost pro forma. All the evidence before the court was in the form of declarations and other written documents; no live witnesses were called. The proponents of the settlement made oral arguments in support of it, and Judge Pointer indicated his intention to enter a final order certifying the class and approving the settlement. That order was entered the next day.[208] No appeals were taken.

Proponents' Evidence in Support of Class Certification and the Settlement

Accompanying their joint application for final approval of the settlement and for final class certification,[209] the plaintiffs' steering committee and the Mentor defendants submitted declarations of the following people: Kelly Wooster, the attorney for Mentor in charge of its litigation against Dow Corning, the claim that was to be assigned to the plaintiff class; Christopher Vejnoska, the attorney for Mentor responsible for its insurance coverage matters; Anthony Gette, the president of Mentor Corporation; Bradford Cornell, professor of finance at UCLA and Mentor's expert; William Griffin, the attorney for Mentor in charge of its breast implant litigation; Elizabeth Cabraser, a member of the plaintiffs' steering committee; Dianna McBride, the plaintiffs' attorney who supervised the mailing of notices to class members; Harvey Rosen, an economic consultant and the plaintiffs' expert; and Loren MacFarland, Mentor's controller. The declarations and accompanying exhibits of Rosen and MacFarland were filed under seal, because the court found that they contained highly confidential and proprietary financial documents.

Beyond describing the lengthy negotiations that led to the settlement agreement and the notice procedures that were used to inform class members, the available (i.e., unsealed) evidence submitted attempted to demonstrate the existence of a limited fund justifying class certification under Federal Rule of Civil Procedure 23(b)(1)(B) and the fairness of the settlement terms. Evidence concerning the limited nature of Mentor's

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208. Order No. 14 (Order Approving Mentor Settlement and Certifying Settlement; Final Judgment as to Claims Against Mentor), *Butler* (Sept. 10, 1993).

209. Joint Application for Final Approval of the Mentor Corp. Settlement and for Final Settlement Class Certification, *Butler* (Aug. 2, 1993).

assets in relation to the claims against it included Cornell's declaration.[210] He first concluded that Mentor would be unable to withstand the entry of a judgment or judgments against it totaling $15 million over the next twelve to eighteen months. To satisfy judgments of that amount, the company would have to deplete all of its liquid assets and liquidate its hard assets, largely putting it out of business. In Cornell's opinion, the likelihood of Mentor's being able to borrow the funds needed to satisfy such judgments was remote, absent a global settlement of Mentor's litigation. Moreover, in his opinion, even if Mentor incurred no unfavorable judgments, the company could not sustain litigation costs in the projected range of $6 million to $12 million annually for any lengthy period of time. He further calculated that if the company settled only 1% to 5% of the 185,000 potential breast implant claims against it and those claims were settled at the 1992 average settlement amount of $24,150, the settlement costs alone would range from $44.6 million to $223.4 million, which would overwhelm Mentor's resources.

According to Mentor president, Anthony Gette,[211] the company's net worth at the end of the 1993 fiscal year was $43.4 million, and its tangible net worth was $20.7 million. Plaintiffs' expert, Rosen, in an affidavit in support of the motion for preliminary approval,[212] had concluded that Mentor's net assets were inadequate to pay all of the breast implant claims against it, and that defense costs and settlement of even a small percentage of the claims would exhaust Mentor's resources before other claimants had an opportunity to be compensated.

In support of the reasonableness of the settlement amount, the parties relied primarily on comparisons between that amount and the likely recovery for plaintiffs in a Mentor bankruptcy. Plaintiffs' expert, Rosen, projected that, rather than receive a guaranteed recovery of $25.8 million under the settlement, the plaintiff class would share with other unsecured creditors approximately $35.5 million in an immediate bankruptcy liqui-

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210. Affidavit of Dr. Bradford Cornell in Support of the Joint Application for Final Approval of Mentor Settlement and for Final Settlement Class Certification, *Butler* (Aug. 2, 1993).

211. Affidavit of Anthony R. Gette in Support of Application for Final Approval of the Mentor Corp. Settlement and for Final Settlement Class Certification at 1, *Butler* (Aug. 2, 1993).

212. Declaration of Dr. Harvey S. Rosen in Support of Joint Application for Preliminary Mentor Settlement Approval and Provisional Certification of Settlement Class, *Butler* (May 28, 1993).

dation. Because the other unsecured creditors would include not only trade creditors and other tort claimants but also holders of $24 million in Mentor debentures, Rosen projected that the bankruptcy liquidation recovery for the plaintiff class would be significantly less than the settlement amount. Should Mentor continue to defend the cases and postpone a bankruptcy filing until it had no other choice, the amount available for unsecured creditors would be even less, he concluded. The parties paid less attention to a comparison between the settlement amount and what the plaintiff class might be expected to recover in a Mentor bankruptcy reorganization. That option was seemingly dismissed as a serious possibility on the ground that Mentor executives and employees could not be forced to continue to work for the benefit of their creditors; they could choose liquidation instead. Thus, the parties argued in their joint application for final approval, "the forced liquidation of the company provides the best yardstick by which to measure this settlement."[213]

Objections

The small number of written objections to the settlement that were filed in advance of the fairness hearing came from four groups: class members, breast implant recipients' support groups, health care providers, and other implant manufacturers. Thirty-one objections or comments were submitted on behalf of class members, and two were submitted from support groups; five objections were filed on behalf of health care providers; and two objections were filed by manufacturers—Dow Corning and Applied Silicone. A number of the class members who commented expressed concerns about the settlement amount. Some noted that it would be inadequate to compensate them for the injuries they had suffered or expressed fear that the attorneys would end up being the main beneficiaries. Several objected to the lack of information about how the money would be allocated or complained that they might have to share the small amount with thousands who had only marginal claims. Other objections were raised about Mentor's continued ability to manufacture silicone gel implants for up to eighteen months, about whether the settlement contained sufficient protections in the event of a Mentor bankruptcy, and about the settlement's impact on recoveries against other defendants.

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213. Joint Application for Final Approval of the Mentor Corp. Settlement and for Final Settlement Class Certification at 25, *Butler* (Aug. 2, 1993).

The health care providers who objected were primarily concerned with the settlement's seeming elimination of their contribution and indemnity claims against Mentor and its assignment to the plaintiff class of Mentor's similar claims against them. Several challenged the court's jurisdiction to affect their rights in this manner. Others objected to the proposed injunctive relief prohibiting Mentor's continued breast implant research and participation in discovery. Finally, one group of doctors suggested the need for the appointment of a special master to undertake an objective evaluation of Mentor's financial condition; these doctors noted that the experts retained by the settlement proponents had made no attempt to evaluate the company's potential cash stream over a reasonably extended period of time or to value Mentor as a going concern.

Implant manufacturers Dow Corning and Applied Silicone moved to intervene in the *Butler* action in order to have standing to object to the settlement; these motions were later withdrawn by order of the court on the day of the fairness hearing. In its written submission, Dow Corning raised several objections to the settlement, all of which were adopted by Applied Silicone. It objected to the settlement's assigning to the plaintiff class Mentor's claims against third parties (with a 15% return to Mentor) while at the same time extinguishing contribution and indemnity claims against Mentor. Dow Corning argued that its contribution and indemnity rights could not be barred unless an appropriate setoff mechanism to protect nonsettling defendants was adopted. It suggested that the court should require a proportionate fault setoff rule. In the alternative, Dow Corning argued, the nonsettling defendants should be recognized as a subclass of the settlement class.

Final Order Approving Settlement and Certifying Class

On September 10, 1993, Judge Pointer entered an Order Approving Mentor Settlement and Certifying Mentor Settlement Class, which constituted a final judgment as to the claims against Mentor.[214] He found that the parties had negotiated the settlement "non-collusively and in good faith" and that the terms of the settlement, as clarified in the order, were "fair, adequate, reasonable, and in the best interests of the members of the Mentor Settlement Class."[215]

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214. Order No. 14 (Order Approving Mentor Settlement and Certifying Settlement; Final Judgment as to Claims Against Mentor), *Butler* (Sept. 10, 1993).

215. *Id.* at 2.

Because of additional insurance recoveries, the total dollar amount of the settlement was increased, with the defendants' consent, from $24 million to $25.8 million. The defendants also agreed to increase the settlement amount by any additional recoveries that might be obtained under any insurance policies issued to Mentor Medical Systems, PTY, Ltd. or any other foreign Mentor affiliate. That clarification was made in response to an objection raised by an Australian plaintiffs' attorney, who had questioned whether the assets and insurance coverage of that affiliate had been included in the calculation of the settlement amount. The final clarification made by the order was a statement that the assignment of Mentor's claims to the plaintiff class did not include claims seeking reimbursement for payments Mentor made to members of the class or for expenses it incurred in defending against claims by members of the class. The 15% return that Mentor was entitled to from any recoveries by the class on the assigned claims was limited to reimbursement of expenses Mentor incurred after April 14, 1993, in assisting in the prosecution of such assigned claims or in enforcing the court's final order.

Judge Pointer certified the plaintiff class pursuant to Federal Rule of Civil Procedure 23(a) and (b)(1)(B), finding that the defendants' assets and insurance benefits constituted a limited fund and that "prosecution of separate actions by individual class members would substantially impair or impede the ability of other class members to protect their interests."[216] The class action was dismissed with prejudice, and, subject to the defendants' performance of their obligations under the settlement agreement, class members were enjoined from "instituting, asserting, or prosecuting against any of the Mentor Defendants in any pending or future action in any federal or state court any and all class claims that the member had, has, or may have in the future."[217] All current or future claims by or against the defendants for reimbursement of payments made to members of the class or for expenses incurred in defending against class members' claims were likewise barred.

Judge Pointer then entered the agreed upon injunctive relief against the defendants. The Mentor defendants were permanently enjoined from participating in discovery proceedings in breast implant litigation unless Judge Pointer approved the participation, the proceedings involved implementation of the settlement agreement, or a state court permitted the

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216. *Id.* at 4.
217. *Id.* at 5.

Mentor defendants' participation with respect to discovery initiated by persons not parties to any MDL action. The defendants were immediately enjoined from the further manufacture or sale of silicone gel breast implant products for breast augmentation purposes; however, the terms of the injunction provided that it would be vacated if counsel for the class representatives entered into a settlement agreement with any other defendant that permitted that defendant to remain in the business of manufacturing silicone gel breast implants for sale or distribution. An injunction prohibiting the Mentor defendants from manufacturing or selling silicone gel breast implants for breast reconstruction or FDA study purposes was to become effective upon FDA approval of a gel substitute or eighteen months after the settlement closing date, whichever occurred first. Finally, the defendants were enjoined from engaging in research concerning the safety and efficacy of silicone gel, except as required by binding contracts with third parties or by FDA rulings, or pursuant to tests consistent with FDA requirements for postmastectomy and other reconstruction or adjunct studies.

The order sought to preserve to the maximum extent possible class members' claims against all nonsettling defendants. It recited that, since class members would not recover their claims in full under the settlement, they were permitted to waive participation in the fund, agree to a nonsuit, execute an agreement declaring that the settlement would reduce their claims against others only on a pro tanto basis, or take any other action required by applicable law to preserve their other claims.

Attorneys' Fees

The notice that was sent to class members informing them of the class action and proposed settlement stated that the plaintiffs' steering committee would not "apply to the Court for any award of attorneys' fees from the Mentor Settlement Fund for their services in negotiating the settlement or in representing the Mentor Settlement Class."[218] The right to seek compensation out of the fund for out-of-pocket expenses was preserved, subject to the court's approval of any request as fair and reasonable. The notice further stated that the payment of fees and expenses

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218. *See* Order No. 10 Preliminarily Approving Mentor Settlement, Preliminarily Certifying Mentor Settlement Class, and Staying Mentor Litigation, Butler v. Mentor Corp., No. CV 93-P-11433-S, 1993 WL 795477, at *10 (N.D. Ala. June 2, 1993).

from the settlement fund for attorneys individually retained by class members would depend on the terms of attorney–client agreements and would also be subject to court approval. Consistent with these assurances, the final order approving the settlement retained the court's jurisdiction to "rule on any applications for attorneys' fees, costs or expenses incurred in implementing this order and the Settlement Agreement."[219] The order further declared that the "court will not, however, entertain any applications for fees made by class counsel premised upon negotiating and securing this settlement."[220] Plaintiffs' steering committee members were left with the possibility of seeking payment of any such fees from the plaintiffs' litigation expense fund that was established at the outset of the MDL proceedings.

Several months after the approval of the settlement, Judge Pointer entered an order approving the request of the plaintiffs' steering committee for a loan of $1 million from the Mentor settlement fund for reimbursement of out-of-pocket expenses.[221] In the end, plaintiffs' attorneys substantiated expenses of $310,415.29, much of which was paid to financial consultants. The balance of the loan was repaid with interest. The subsequent distribution plan for the settlement fund noted that the release of such funds had been authorized and that class counsel would provide additional documentation to the court concerning expenses chargeable against the fund. It was noted that the court's review of that information might lead to additional payments to or refunds from class counsel, but such adjustments were not expected to be significant. The distribution plan also capped the fees payable to individual class members' attorneys out of their recoveries from the Mentor fund at 10%. It was explained that this limitation was justified by the relatively small recoveries plaintiffs received from the fund.

Assessment

The *Butler* settlement was achieved with little objection as a result of a number of factors. The members of the plaintiffs' steering committee, and in particular those negotiating the settlement on behalf of the plain-

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219. Order No. 14 (Order Approving Mentor Settlement and Certifying Settlement; Final Judgment as to Claims Against Mentor) at 7, *Butler* (Sept. 10, 1993).

220. *Id.*

221. Order, *In re* Silicone Gel Breast Implants Products Liability Litigation (MDL 926), Master File No. CV 92-P-10000-S (CV93-P-11433-S) (N.D. Ala. Apr. 14, 1994).

tiff class, were a diverse group, broadly representative of the plaintiffs' breast implant bar, rather than a self-selected or court-appointed group composed exclusively of class action deal makers. The proponents of the settlement put forth much effort in explaining its proposed terms and the advantages of a limited fund class action approach to attorneys representing members of the class. They answered their questions, provided them with information, and addressed their concerns. Thus, rather than having their views ignored or overridden, the personal injury lawyers were largely brought on board in advance of the fairness hearing. Moreover, by providing the plaintiffs' steering committee with open access to its books, the company was able to convince them of the good faith of its claim of a limited fund and of the fairness of the settlement amount.

Because of the broad base of support for the settlement, Judge Pointer in large part deferred to the parties' judgments that a limited fund existed and that the settlement was fair, reasonable, and in the best interests of the class. As a result, there was no adversarial presentation of evidence at the fairness hearing, which was relatively brief.

The acceptance of the settlement by class members and their lawyers was also undoubtedly facilitated by the circumstances of the breast implant litigation. Because Dow Corning was the major target of the plaintiffs' efforts, they were more willing to enter into a settlement with Mentor, a relatively small company from which a full recovery on all claims was not perceived to be realistic. Moreover, because Mentor was engaged in the manufacture of products other than breast implants, the plaintiffs were less desirous of seeing it put out of business and thus were more amenable to settling with it outside of bankruptcy.

The circumstances of this case that enabled the settlement to be approved with relative ease are not present in all mass tort situations, however, and thus a potential concern about the approval process might be noted. Because of the consensual nature of the fairness hearing and the joint submission of the evidence before the court, the court was not in a position to base its findings of the existence of a limited fund and the fairness of the settlement on an assessment of competing financial analyses. As one objector pointed out, no valuations of the defendant as a going concern were offered; thus, there was not a complete basis for determining whether Mentor, which was being allowed to continue in existence, had surrendered a fair share of its assets to the plaintiff class. In fact, the company has subsequently performed better than was expected

at the time of the settlement and has continued to manufacture silicone gel and saline breast implants (because of the continued manufacture of implants by other defendants). While any settlement necessarily rests on uncertainties, the concern noted here is that the record in *Butler* fails to reveal that the fairness of the settlement was considered in light of the continued existence of the company, as opposed to its potential liquidation. Thus, although the settlement might have offered the tort claimants a premium over what they would have received in a liquidation, there was no direct consideration of how the surplus value created by the company's continued operation might be most fairly distributed.

Given the small size of the defendant company and the fund involved, the approach taken in this case can be justified. Efforts were made throughout the proceedings to preserve assets for the plaintiffs themselves—through the fee waiver by the plaintiffs' steering committee, the 10% cap on attorneys' fees, the joint administrative structure with other settlements, and the payout pursuant to a schedule without proof of injuries. These efforts succeeded in distributing virtually all of the settlement fund to its intended beneficiaries; less than 0.5% was spent on administration. A more complex approval process would have been more costly and would have ultimately reduced the total amount distributed to plaintiffs.

It is interesting, therefore, to consider the potential impact of the recent *Ortiz* decision[222] on a settlement of this type. The minimum requirements for a Rule 23(b)(1)(B) class action settlement that the *Ortiz* Court derived from its "historical model" of limited fund cases appear to some extent to be at odds with the approach taken in the *Butler* settlement. The first requirement the Supreme Court identified is that "the settling parties must present not only their agreement, but evidence on which the district court may ascertain the limit and the insufficiency of the fund, with support in findings of fact following a proceeding in which the evidence is subject to challenge."[223] In support of the Mentor settlement, the parties did submit written evidence of the limits of the fund and expert opinions regarding the fund's inadequacy, all of which was subject to challenge prior to and at the fairness hearing. The court's opinion approving the settlement, however, failed to include "specific evidentiary findings" concerning the upper limit of the fund and its in-

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222. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999).
223. *Id.* at 849.

sufficiency.[224] Instead, the court confined itself to stating generally that the defendant's assets constituted a limited fund and to tracking in conclusory terms the language of Rule 23(b)(1)(B). *Ortiz* appears to require more specific findings by future courts.[225]

The second requirement imposed by *Ortiz* is that "the claimants identified by a common theory of recovery [be] treated equitably among themselves."[226] Although the *Butler* class met the *Ortiz* requirement of inclusiveness of "all those with claims unsatisfied at the time of the settlement negotiations,"[227] the failure to establish any subclasses with separate counsel appears to be unacceptable under *Ortiz*. The Supreme Court required the appointment of separate counsel for present and future claimants in order to address the tension between their respective interests.[228] *Ortiz* also requires subclasses when one group of claims is "more valuable" than another.[229] A class such as the one in *Butler*, which drew no subclass distinctions between claimants who alleged serious injury, those who alleged lesser injuries, and those who possessed no present injuries at all, appears suspect under *Ortiz*. Moreover, according to *Ortiz*, the absence of subclasses is not cured by the fact that the differently situated claimants received identical payments.[230]

It must be noted that the equitability obligations imposed by *Ortiz* run counter to the determination of the parties and the court in *Butler* to minimize administrative costs. Because of the small size of the fund available, it was believed that increased costs of achieving a settlement and

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224. *Id.* at 853.

225. *See id.* at 849 ("[T]he moment of certification requires 'heightened attention' . . . to the justifications for binding the class members.") (citation omitted); *id.* at 851 ("[T]here was no adequate finding of fact" where the court failed to "undertak[e] an independent evaluation of potential insurance funds . . . .").

226. *Id.* at 839.

227. *Id.* at 864.

228. *See id.* at 856 ("[I]t is obvious after *Amchem* that a class divided between holders of present and future claims . . . requires division into homogeneous subclasses under Rule 23(c)(4)(B), with separate representation to eliminate conflicting interests of counsel . . . .").

229. *Id.* at 857 (identifying class members who asserted the more valuable claims covered by insurance and those holding claims without coverage as possessing "disparate interests" that required "structural protection").

230. *See id.* ("The very decision to treat them all the same is itself an allocation decision with results almost certainly different from the results that those with immediate injuries or claims of indemnified liability would have chosen.").

administering the fund would unreasonably deplete the moneys available to compensate claimants. Separate subclasses, each with their own counsel, would have undermined that thrift, as would have a payout scheme that drew distinctions based on the nature and degree of injury.

The third feature of traditional limited funds that *Ortiz* identified is the distribution to eligible claimants of the entire fund without any attempt to provide the defendant with "a better deal than seriatim litigation would have produced."[231] Although the Court left open the question whether complete distribution is always required or whether the defendant might reap some benefit for itself of the transaction cost savings, the Court's identification of this feature at the very least calls into question whether it is ever permissible for a limited fund defendant to remain in business following a mandatory class action settlement that pays less than the full amount of the tort liability. In the *Butler* settlement, as indeed in all the class action settlements described in this monograph, the limited fund was not exhausted. In fact, Mentor retained a sufficiently substantial portion of its assets that it remains a thriving company. While a settlement of this nature can frequently be justified as making more funds available to tort claimants than they otherwise could have recovered if the defendant had been put out of business, *Ortiz* casts some doubt on the future of such settlements under the current Rule 23(b)(1)(B).

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231. *Id.* at 839.

Chapter 7

Orthopedic Bone Screws Limited Fund Class Action: *Fanning v. AcroMed Corporation*

AcroMed Corporation was a medical device company based in Cleveland, Ohio. Founded by a spine surgeon, its business was concentrated on the manufacture of orthopedic devices for the spine, including orthopedic bone screws used in spinal fusion surgery. These screws are used by surgeons in fusing two vertebrae together. Plates or rods are attached to the vertebrae by means of the bone screws, which are inserted into the pedicles, or bony structures extending posteriorly from each vertebra. These spinal fixation devices act as internal splints, immobilizing the vertebrae until they fuse, at which point the devices may be surgically removed. AcroMed was one of the leading producers of spinal fixation devices. Its major competitor was Sofamor/Danek.

In December 1993, ABC aired a *20/20* program titled "The Secret of the Back Screws," which focused on AcroMed and highlighted the fact that the FDA had never given premarket approval for the labeling and marketing of bone screws for pedicle fixation—a fact apparently previously unknown to many recipients of the device. Following this telecast, thousands of lawsuits were filed against AcroMed and other pedicle screw manufacturers in state and federal courts by persons who had undergone spinal fusion surgery that used pedicle screws.

Nature of Litigation and Litigation Maturity

Initially suits were brought by pedicle screw recipients and their spouses against the particular company that manufactured the screws used in the recipient's surgery. These suits asserted claims for negligence, strict liability, misrepresentation, and breach of express and implied warranties. The relief sought included compensatory and punitive damages and the establishment of a court-supervised medical monitoring program. Approximately 3,200 recipients of AcroMed pedicle screws filed suits of this type against the company.

Other lawsuits, referred to as the "omni actions," were eventually filed. These suits were brought by scores of plaintiffs against multiple defendants, including all the pedicle screw manufacturers, as well as pro-

fessional medical societies, hospitals, and spine surgeons. These cases were based on civil-conspiracy and concert-of-action theories. AcroMed was a defendant in over 1,500 such suits. Apart from these manufacturer and omni suits, some plaintiffs also brought malpractice actions against the surgeons who implanted their devices.

The defendant manufacturers asserted a number of defenses, including federal preemption and the learned-intermediary doctrine. They also argued that in many cases the pedicle screws had performed just as they were intended. The fact that the FDA had not approved the bone screws for this particular use provided no basis for liability, they contended; the FDA's action only controlled the labeling of the devices, and surgeons were free to exercise their own judgment as to whether to engage in an "off-label" use of the screws. Indeed, they asserted, pedicle fixation using the challenged devices was—and continued to be—the standard of care for treating various spinal conditions. There appeared to be, and continues to be, a consensus among orthopedic surgeons to that effect.

Prior to the *20/20* broadcast, about eighty product liability claims involving Acromed's bone screws had been asserted against the company in its ten-year history, including approximately thirty claims in Louisiana brought by one lawyer. Of these cases only three had been tried to verdict prior to December 1993. There was a verdict for the defense in a Mississippi case, and two plaintiff verdicts in Louisiana. In one of those cases, the jury returned a verdict of $950,000, but the court later reduced it to $500,000 plus prejudgment and postjudgment interest (for a total judgment of $673,000). The jury verdict in the other case was $475,000 (reduced to $410,000 plus interest), but it was reversed on appeal by the Fifth Circuit. Subsequent to the *20/20* broadcast, AcroMed tried two more cases. The retrial of the Louisiana case in which the verdict was reversed on appeal again resulted in a plaintiff's verdict, this time for $318,000 plus interest (for a total of $450,000); this judgment against the company was later affirmed on appeal. A trial in Pennsylvania resulted in a directed verdict for AcroMed. The Louisiana cases are arguably unique because they were based on an "unreasonably dangerous per se" legal standard that existed only in Louisiana and has since been abrogated by the legislature.

Of the other claims asserted against AcroMed prior to December 1993, the company settled thirty-three for a total of $5,676,000. This

group comprised twenty-two federal cases in Louisiana that were settled by AcroMed's insurer for approximately $5 million, and eleven cases that were settled for a total of $676,000. The company settled two other claims that had not produced lawsuits for a total of $8,500. In three other cases, courts granted AcroMed's motion for summary judgment, and plaintiffs voluntarily dismissed twelve cases.

In the months following the *20/20* show, several thousand suits were filed in state and federal courts against AcroMed and other pedicle screw manufacturers, including some brought as class actions. At AcroMed's request, in August 1994 the Judicial Panel on Multidistrict Litigation transferred all of the federal cases against pedicle screw manufacturers to Judge Louis Bechtle, of the Eastern District of Pennsylvania, for pretrial purposes pursuant to 28 U.S.C. § 1407.[232]

In February 1995 Judge Bechtle denied the motion of a group of plaintiffs for certification of a plaintiff class pursuant to Federal Rule of Civil Procedure 23(a) and 23(b)(1)(B), (b)(2), and (b)(3).[233] In that action, *Zampirri v. Acromed Corp.,* the plaintiffs sought to represent a class composed of two subclasses: those persons (and their spouses) who had had AcroMed pedicle screws surgically implanted in their spines, and those persons (and their spouses) who had had Sofamor/Danek pedicle screws surgically implanted in their spines. Although he found that all of the requirements of Rule 23(a) were satisfied, Judge Bechtle concluded that the requirements for none of the asserted subsections of Rule 23(b) had been met.

The attempt to certify the class pursuant to Rule 23(b)(1)(B) was limited to the claims against AcroMed and its founder. The *Zampirri* plaintiffs argued that AcroMed's assets and insurance coverage were insufficient to satisfy the numerous claims asserted against it and therefore "adjudications with respect to individual members of the class . . . would as a practical matter substantially impair or impede [other class members'] ability to protect their interests."[234] The court rejected this "limited fund" theory on the ground that the plaintiffs had failed to demonstrate sufficiently that AcroMed would be unable to satisfy their claims. In

232. Transfer Order, *In re* Orthopedic Bone Screw Prods. Liab. Litig., MDL No. 1014 (J.P.M.L. Aug. 4, 1994).

233. Zampirri v. AcroMed Corp., No. 93-7074, 1995 WL 273597 (E.D. Pa. Feb. 22, 1995).

234. *Id.* at *4.

reaching this conclusion, Judge Bechtle noted that the number of "actual 'ripe' actions" in which the plaintiffs had sustained actual injury was "somewhat vague."[235] He also concluded that certifying a non-opt-out class that would prevent the prosecution of pending state court actions would violate the Anti-Injunction Act, 28 U.S.C. § 2283.

The plaintiffs sought certification under Rule 23(b)(2) with respect to their claims against both manufacturers for the establishment of a court-supervised medical monitoring program, relief that they characterized as equitable in nature. Judge Bechtle denied certification on this basis, because he concluded that the plaintiffs had failed to demonstrate that "medical testing procedures exist which can detect warning signs of future problems which may result from spinal implantation surgery."[236]

Finally, Judge Bechtle denied certification of an opt-out class under Rule 23(b)(3), because there were "simply too many individual issues with respect to causation, liability and damages."[237] He concluded that these individual issues overshadowed the common issues relating to any defects in the defendants' products. Furthermore, he found that the superior method for handling these cases was not class action treatment, but continuation of the multidistrict litigation treatment with "consolidated discovery, coordinated motion practice, and the possible resolution of the few common issues (i.e. preemption) prior to sending these cases back to their individual districts for trial."[238]

Following the initial denial of class certification, the parties involved in the MDL proceeding continued to engage in vigorous discovery and other pretrial activity. There is disagreement among the participants about how mature the claims against AcroMed were at that time. Some view the litigation as being relatively mature, as a result of the prior verdicts and settlements.[239] The defendants in particular, however, contend that it was still immature, given the conflicting outcome of the few cases that had gone to trial; the arguable uniqueness of the verdicts based on

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235. *Id.* at *8.

236. *Id.* at *9.

237. *Id.* at *10.

238. *Id.* at *11.

239. *See also* Thomas Willging, Individual Characteristics of Mass Torts Case Congregations: A Report to the Mass Torts Working Group, *in* Report on Mass Tort Litigation, Including Appendices app. D, at 3 (1999) (classifying orthopedic screws litigation as "[m]odestly mature"); *id.* at 46 (describing the litigation as "[s]omewhat mature (not immature)").

Louisiana law; and, in many of the remaining cases, the plaintiffs' likely difficulty in establishing that any injuries they were suffering were caused by the pedicle screw implantation rather than the preexisting back problems that necessitated the surgery. The defendants also view the prior settlements as providing an inadequate basis for establishing the claims' values because of the wide variation in settlement amounts and some arguably unique aspects of the Louisiana settlements, which were entered into by AcroMed's insurer.

History of the Lawsuit

In January 1997, after the Plaintiffs' Legal Committee (PLC) in the MDL proceedings and AcroMed negotiated a settlement, the PLC filed a class action complaint against AcroMed in the Eastern District of Pennsylvania.[240] The named plaintiffs were Daniel Fanning and Margaret Schmerling. They brought suit on behalf of a class of all persons (and their spouses) who already had or might have in the future a claim in state or federal court against AcroMed arising out of the implantation of orthopedic bone screws on or before December 31, 1996.

Plaintiff Fanning alleged that he was the recipient of an AcroMed pedicle screw fixation device, whereas plaintiff Schmerling alleged that she was the recipient of a Sofamor/Danek pedicle screw fixation device (and thus claimed to be representative of those recipients of other manufacturers' devices who in the "omni actions" asserted civil-conspiracy and concert-of-action claims against AcroMed). Both alleged that they were presently suffering from injuries as a result of the implantation of the pedicle screws. The plaintiffs stated that they brought the suit as a class action for settlement purposes only, pursuant to Rule 23(a) and 23(b)(1). The complaint asserted claims against AcroMed for fraud on the FDA; civil conspiracy; concert of action; fraudulent marketing and promotion; negligent misrepresentation; strict liability; liability per se; negligence, gross negligence, and/or recklessness; breach of implied warranty of merchantability; and punitive damages.

The filing of the *Fanning* complaint followed the filing on December 5, 1996, by the PLC and AcroMed of a settlement memorandum that expressed their joint intent to settle all the orthopedic bone screw cases

240. Complaint—Class Action, Fanning v. AcroMed Corp., No. 97-381 (E.D. Pa. Jan. 1997).

against AcroMed pursuant to a limited fund, mandatory class action. This memorandum was not served on any other parties in the litigation.

Upon receipt of the memorandum, Judge Bechtle entered an order preliminarily staying all pending and future orthopedic bone screw proceedings against AcroMed and relieving the company and those related to it from any further obligation to appear in the MDL proceedings.[241] The order further stated that the court would seek to obtain a corresponding stay with respect to AcroMed's participation in state court proceedings.

On December 20, 1996, after learning of the settlement memorandum and trying unsuccessfully to obtain a copy of it from the court and from counsel for AcroMed and the PLC, nonsettling defendant Sofamor/Danek filed a motion seeking production of the memorandum. This motion was not ruled on until January 29, 1997, at which time it was dismissed as moot, because by that point the requested documents had been served on Sofamor/Danek and were publicly available at the courthouse.[242]

On January 8, 1997, the PLC and AcroMed entered into a proposed class action settlement agreement. Judge Bechtle preliminarily approved the settlement and conditionally certified the class action on January 16, 1997.[243] The order also authorized class counsel to send out notice of the preliminary approval and certification to members of the class and to inform them that a fairness hearing to consider final approval would be held on April 23, 1997. The preliminary approval order was entered without prior notice to the other parties to the MDL proceedings.

When counsel for Sofamor/Danek learned of the order on January 17, 1997, they filed an emergency motion to enjoin the sending of notice to the settlement class (which included persons who had received orthopedic bone screws manufactured by companies other than AcroMed) until the nonsettling defendants could review and analyze the settlement papers and could seek discovery and a hearing on whether the case

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241. Pretrial Order No. 655, *In re* Orthopedic Bone Screw Prods. Liab. Litig., MDL No. 1014 (E.D. Pa. Dec. 5, 1996).

242. Pretrial Order No. 744, *In re* Orthopedic Bone Screw Prods. Liab. Litig., MDL No. 1014 (E.D. Pa. Jan. 29, 1996).

243. Pretrial Order No. 724, *In re* Orthopedic Bone Screw Prods. Liab. Litig., MDL No. 1014 (E.D. Pa. Jan. 16, 1997) (Preliminary Approval Order).

should be certified as a limited fund class action. Judge Bechtle denied the motion, and the Third Circuit likewise denied an emergency stay.

Writing for the court of appeals, Judge Becker noted that, "while intimat[ing] absolutely no view on the merits," the court "nevertheless [found] sufficient substance to a number of the arguments set forth in [appellants'] papers . . . that we think it unfortunate that the district court declined to delay the notice so that it could give more time to consideration of these points."[244] The court of appeals, however, declined to interfere with Judge Bechtle's exercise of discretion in denying the stay. The court of appeals later dismissed for lack of appellate jurisdiction Sofamor/Danek's appeal from the preliminary approval/conditional class certification order. Because the district court had clarified that nonsettling defendants were not members of the plaintiff class, the court of appeals held that Sofamor/Danek's appeal challenging the entry of injunctive relief against the class was moot and further held that the conditional class certification order was not appealable.[245]

Prior to the fairness hearing, various nonsettling defendants made attempts to learn more about the basis for the class certification and to position themselves so that they could formally oppose it. In February 1997, Sofamor/Danek and Smith & Nephew Richards, Inc., moved for the appointment of a court expert to value AcroMed and the claims against it. Sofamor/Danek also sought to consolidate the *Fanning* class action with another suit brought by plaintiff Schmerling against the full complement of defendants, including Sofamor/Danek. In the alternative, Sofamor/Danek sought to intervene in the *Fanning* case so that it would have standing to object to the class certification and settlement.

On March 26, 1997, Judge Bechtle denied the motion for an expert and the motion to consolidate, but he granted in part the motion to intervene. The court declined to appoint the requested expert "at this time" because it was not "convinced that such an appointment would be productive at this stage."[246] Judge Bechtle said that he would make detailed

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244. Order at 1–2, *In re* Orthopedic Bone Screw Prods. Liab. Litig., Nos. 97-1029, 97-1030, 97-1039 (3d Cir. Jan. 24, 1997) (ruling on emergency motions for stay of notice provisions of pretrial order 724).

245. Judgment Order at 1 n.1, *In re* Orthopedic Bone Screw Prods. Liab. Litig., Nos. 97-1029, 97-1039, 97-1132 (3d Cir. Nov. 12, 1997) (dismissing appeals from pretrial order 724).

246. Memorandum and Order at 11, Schmerling v. Danek Medical, Inc., Nos. 96-2749, 97-381 (E.D. Pa. Mar. 26, 1997).

findings concerning AcroMed's financial status and would not certify the class unless he was convinced that the company's assets were insufficient to pay the claims against it. He allowed Sofamor/Danek to intervene "for the limited purpose of protecting their contribution claims against AcroMed."[247] The court, however, denied Sofamor/Danek's request to intervene to object to general class certification issues.

Sofamor/Danek and Smith & Nephew Richards unsuccessfully sought to obtain discovery from the PLC and AcroMed. They sought financial information about AcroMed and specific information about the plaintiffs' claims. The court denied these parties' motions to compel such discovery because they were outside the scope of the limited purpose for which Sofamor/Danek was permitted to intervene.[248]

On March 31, 1997, the PLC and AcroMed filed a joint motion for approval of the proposed settlement agreement and for certification of a settlement class under Rule 23(b)(1)(B).[249] Judge Bechtle conducted a hearing on the fairness of the settlement and the propriety of certification on April 23 and 24, June 3, and July 8, 1997. Prior to the hearing, AcroMed submitted some evidence by way of affidavits. During the hearing the PLC presented the testimony of their economic expert, Harvey Rosen, and AcroMed presented the testimony of its counsel, its CEO, and its expert, John Romney. These witnesses were cross-examined by several objectors. One of the objectors, Sofamor/Danek, presented the testimony of its own expert, Thomas Florence.

On October 17, 1997, Judge Bechtle issued a memorandum and order certifying the *Fanning* class under Rule 23(b)(1)(B) and approving the settlement with AcroMed as "fair, reasonable and adequate."[250] Based on the testimony of Rosen and Romney, he found that, considering AcroMed's financial condition, limited insurance coverage, and defense costs, as well as its exposure to some potentially large verdicts, "the $100 million that AcroMed will pay to settle this litigation is at the outer boundary of what AcroMed can afford to pay."[251] Judge Bechtle stated

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247. *Id.* at 10.

248. Pretrial Order No. 849, Fanning v. AcroMed Corp., No. 97-381 (E.D. Pa. Apr. 1, 1997).

249. Joint Motion of the PLC and AcroMed Corp. for Approval of the Proposed Settlement Agreement, and for Certification of a Settlement Class, *Fanning* (Mar. 31, 1997).

250. Fanning v. AcroMed Corp., 176 F.R.D. 158, 165 (E.D. Pa. 1997).

251. *Id.* at 170.

that this finding was supported by the fact that the PLC's and AcroMed's experts, using different methodologies, both reached this conclusion. Rosen's conclusion rested on a valuation of the company based on a cash-flow analysis and on an analysis of the value of the claims, whereas Romney's testimony focused on the company's inability to continue to pay defense costs and its inability to borrow funds to pay the claims without a settlement in place.

Judge Bechtle then concluded that all of Rule 23(a)'s requirements for class certification were met. In doing so, he distinguished the class before him from the one the Supreme Court had rejected in *Amchem Products, Inc. v. Windsor*,[252] noting that the bone screw class was "much more defined and congruous" and that it presented "no 'futures' problem," since any problems from spinal fusion surgery became apparent within a few months to a year after the surgery.[253] He also found that the class members shared a "uniform interest in obtaining the maximum possible recovery from AcroMed"[254] and that there were no conflicts among class members, because the allocation decisions were postponed until the settlement-administration phase of the litigation.

Concerning the requirements of Rule 23(b)(1)(B), Judge Bechtle concluded that the evidentiary record had become clearer in the period since his denial of the *Zampirri* class certification motion and now supported a limited fund finding. More than 6,200 persons had registered with the PLC as potential AcroMed settlement class members, and the evidence presented at the fairness hearing demonstrated that "AcroMed's net assets and insurance coverage [were] vastly insufficient to satisfy the many claims against them."[255] Defense costs alone, he found, would consume AcroMed's assets. He credited expert testimony that if only 10% of the 3,200 claims that had been filed went to trial, at $200,000 to $250,000 per case, defense costs would consume 60 to 80 million dollars. The settlement, on the other hand, would eliminate the company's defense costs and place "all claimants on the same plane, at the same time, . . . leaving each claimant's share to be determined by traditional application of equitable distribution standards."[256]

252. 521 U.S. 591 (1997).
253. *Fanning*, 176 F.R.D. at 173.
254. *Id.* at 175.
255. *Id.* at 177.
256. *Id.*

After considering and disposing of the objections to the settlement, Judge Bechtle assessed the fairness of the settlement by applying a nine-factor test adopted by the Third Circuit (discussed below[257]). He concluded that the proposed settlement was "fair, adequate and reasonable to all class members, including subrogation claimants and other derivative claimants as well as parties outside of the class, but affected by it."[258] The court's order certifying the class and approving the settlement also permanently enjoined all class members from initiating, asserting, or prosecuting any orthopedic bone screw claims against AcroMed or the other defendants released by the settlement.

Several of the objecting parties filed notices of appeal from the settlement approval/certification order. The appellants included Sofamor/Danek and some other nonsettling defendants, the plaintiffs represented by Public Citizen Litigation Group, and several health insurer subrogees. Eventually all of the appeals were withdrawn, and on May 11, 1998, Judge Bechtle entered an order declaring the settlement final as of April 3, 1998. The reasons for these withdrawals are discussed below.[259] Around the same time, it was announced that DePuy, Inc., a leading designer, manufacturer, and distributor of orthopedic devices and supplies, would purchase AcroMed for approximately $325 million,[260] over three times the value that had been placed on the company by the PLC's expert at the fairness hearing.

Party Structure

The complaint in *Fanning* was filed by two named plaintiffs without any spouses. One was the recipient of an AcroMed orthopedic bone screw, and the other was the recipient of a Sofamor/Danek screw. Both named plaintiffs sued on behalf of the entire class, and no subclasses were cre-

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257. *See infra* text accompanying note 292.

258. *Fanning,* 176 F.R.D. at 186.

259. *See* the section "Dismissal of Appeals" *infra*.

260. *See, e.g., DePuy, Inc. Outlines Details of AcroMed Acquisition; Anticipated Accretion in 1999*, *available at* http://biz.yahoo.com/prnews/980706/in_depuy_a_l.html (July 6, 1998). The public record does not reveal whether DePuy purchased AcroMed free of any obligation to pay the balance of the settlement fund or whether, in addition to the $325 million purchase price, it also was obligated to pay the remaining $70 million due within a year of the settlement's finality. In either event, the amount DePuy was willing to pay for AcroMed following the settlement was over three times the value placed on the company at the fairness hearing.

ated. The class was defined as including all persons (and their spouses) having claims against AcroMed then or in the future as the result of the implantation of an orthopedic bone screw no later than December 31, 1996. As eventually clarified by the parties and the court, the plaintiff class included persons and entities holding subrogation and other assigned claims, such as health benefit providers, but it did not include nonsettling defendants who might have contribution or indemnity claims against AcroMed. As noted above, however, bone screw manufacturer Sofamor/Danek was allowed to intervene in *Fanning* for the limited purpose of protecting its contribution claims against AcroMed. Although some 6,200 persons had registered with the PLC as class members by the time of the certification decision, the court noted that more than 100,000 pedicle fixation surgeries using AcroMed devices had been performed in the United States prior to the December 31, 1996, cutoff date.

AcroMed Corporation was the sole defendant in the *Fanning* action. The scope of the settlement release, however, extended to a number of additional persons involved as defendants in the bone screw litigation. Other parties released from liability by the settlement included officers and directors of AcroMed, members of the company's medical advisory panel, and claimants' personal physicians and hospitals to the extent of any "product-liability-related" claims against them and any claims based on their financial relationship with AcroMed.[261]

Attorneys

Judge Bechtle appointed the members of the PLC as settlement class counsel. This nine-member group included most, but not all, of the plaintiffs' attorneys with a significant number of bone screw cases. Especially active in the case were Arnold Levin, of Philadelphia, and John Cummings, of New Orleans.

Allison Zieve and Brian Wolfman, of the Public Citizen Litigation Group, represented a group of plaintiff–objectors. They became involved in the litigation in late 1996 or early 1997, when Tennessee counsel for this plaintiff group, as well as others, asked them to look over the terms of the proposed settlement.

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261. *See* AcroMed Corporation Settlement Agreement, Ex. E, *In re* Orthopedic Bone Screw Prods. Liab. Litig., MDL No. 1014 (E.D. Pa. Jan. 8, 1997).

AcroMed was represented by Rick Werder and Mark Herrmann, of Jones, Day, Reavis & Pogue. Nonsettling defendant Sofamor/Danek was represented by Steve Phillips and Tony Vale, of Pepper, Hamilton & Scheetz.

Settlement Terms

The settlement agreement provided that AcroMed would pay $100 million to a settlement fund, plus any additional insurance proceeds it was able to secure (estimated at the time of settlement to be from $6 million to $20 million). At the time the settlement was reached, AcroMed made an initial $10 million payment into an interest-bearing account. It paid $20 million more the day after the court approval and certification order became final (meaning no further appeals were pending), and the balance was to be paid within one year of the date of finality.

The agreement did not specify how the funds would be allocated among eligible claimants. Instead, it envisioned that after the order became final, the court would oversee the equitable allocation of the funds, assisted by a claims administrator who would devise a payment scheme based on individual claim submissions. The agreement provided that, in order to be eligible to receive compensation from the fund, claimants would have to register by a specified date if they had not already completed a questionnaire used in the MDL proceedings, and it was agreed that "not every surgery involving pedicle fixation with an AcroMed Orthopedic Bone Screw will necessarily result in a compensable claim under the Compensation Program."[262]

Persons who had claims against AcroMed but who had received pedicle screws manufactured only by other companies—that is, the "omni action" plaintiffs—were not eligible to participate in the settlement fund. The agreement, however, provided for the establishment of a "Non-AcroMed Orthopedic Bone Screw Recipients' Contingency Fund," to be funded from 25% of the interest earned on the primary settlement fund up to the amount of $2 million.[263] If the claims administrator eventually amended the definition of "eligible claimant" to include non-AcroMed bone screw recipients, an eventuality that might never occur, they could seek compensation from that fund. However, all funds in the contingent

262. *Id.* at 22.
263. *Id.* at 21.

fund were to revert to the primary settlement fund no later than three years after the settlement became final.

Health insurers, workers' compensation insurers, and other persons having subrogation or derivative claims against AcroMed were also included in the settlement class. They too were required to register with the fund by a designated date, originally set as May 1, 1997, and to provide specific information about the claimants from whom their claims were derived. These procedures were later modified, however, in exchange for the subrogation claimants' dismissal of appeals from the approval and certification order. Under the modified procedures, the PLC agreed to provide subrogation claimants with the registration forms and questionnaires submitted by bone screw recipients, and the subrogation claimants were given 120 days from the receipt of that information to provide the claims administrator and PLC with a list of claimants with respect to whom they were asserting subrogation claims. The claims administrator was to later establish procedures and deadlines for the submission of subrogation claims.

Other pedicle screw manufacturers, who did not settle their claims with plaintiffs, were not included in the settlement class, despite any contribution or indemnity claims they might have had against AcroMed. These claims were nevertheless released from further assertion or prosecution. In response to the vigorous objections of Sofamor/Danek and other nonsettling defendants, the settlement agreement provisions dealing with contribution and indemnity claims were amended twice. As amended, the agreement provided for setoffs and judgment reductions by plaintiffs against the nonsettling defendants to reflect AcroMed's appropriate share of the liability. It also included a contingency provision that authorized nonsettling defendants to seek relief from the bar order in limited situations in which AcroMed's presence in the lawsuit was required in order to protect the defendants' setoff or judgment-reduction rights under applicable law.

It was agreed that, upon the settlement becoming final, the representative plaintiffs and class members would dismiss with prejudice their pedicle screw claims against AcroMed and related defendants, including medical societies that had been sued. Plaintiffs and class members also agreed to execute a release of all claims against AcroMed and approximately seventy related individuals and entities arising from the implantation of an orthopedic bone screw. In addition to AcroMed Corporation,

the released individuals included its predecessors, successors, subsidiaries, affiliates, divisions, current and former officers, directors, employees, distributors, sales representatives, Medical Advisory Panel members, consultants, agents, attorneys, shareholders, vendors, raw material suppliers, and insurers.

The settled claims did not include civil-conspiracy and concert-of-action claims brought by AcroMed bone screw recipients against defendants other than AcroMed, the other released parties, and the professional societies. Also excluded from the settlement were claims against treating physicians for independent medical malpractice except to the extent that such claims rested on a product-liability theory or were based on the existence of any financial relationship between the physician and AcroMed.

The amount of attorneys' fees to be awarded to the PLC and individual plaintiffs' attorneys was not specified in the agreement. Instead, the approval of fees to be paid from the settlement fund and from accounts previously established in the MDL proceedings was left to the court. The agreement did, however, prohibit the payment of contingent fees to any plaintiffs' attorneys retained after the fact of settlement was made public.

Negotiation History

Sometime in the summer of 1996, Judge Bechtle raised the possibility of settlement with the parties. With discovery proceeding apace and defense costs mounting, it was starting to become clear that the assets of AcroMed in particular were rapidly being exhausted. Settlement discussions between the PLC and Sofamor/Danek went nowhere, but AcroMed and the PLC began to engage in serious negotiations. Each side thought the timing might be good for reaching a settlement. AcroMed believed that the plaintiffs were starting to worry about the strength of their claims, and the plaintiffs thought that AcroMed might be eager to settle because of the rejection of the defendants' preemption defense.

The main negotiators for the PLC were Arnold Levin and John Cummings, and William Kemp did most of the review and drafting of documents. Rick Werder was the main negotiator for AcroMed. Judge Bechtle was not a participant in the negotiations, but he was kept informed of their progress and from time to time offered suggestions about some of the provisions and documents. The parties were well aware of

the Third Circuit's *Georgine* decision,[264] which was then before the Supreme Court, and they structured the class and settlement based on the correct assumption that the Third Circuit's decision would be affirmed. When the parties raised with Judge Bechtle the possibility of a Rule 23(b)(1)(B) class action, he told them that he would need an adversarial presentation of evidence to support such a certification.

The parties were eventually able to reach agreement on two key points: AcroMed would pay $100 million, and not every surgery would result in payment. The $100 million figure was arrived at by back-and-forth negotiation. The company had a financial expert look at the issue, and the PLC and its expert were given access to the company's finances.

After the existence and size of a limited fund were agreed to, the parties negotiated the scope of the release. AcroMed insisted on a broad release that protected to some degree the treating physicians in order to prevent their later assertion of indemnification claims against the company and to preserve customer relations. AcroMed also did not want to be involved in resolving the allocation of the fund among class members. As noted above, the settlement was silent on that point, leaving allocation decisions to be resolved later by the court on the advice of the claims administrator.

The only information that exists about the negotiations is that which can now be gleaned from the participants. There was no public record of the discussions, and no discovery was sought into what transpired. One objector recently explained that absence of discovery by stating that there was no reason to suspect any improper dealing by class counsel. In his approval and certification opinion, Judge Bechtle described the negotiations as having been "'long' and 'protracted'" and having been "conducted at arms' length by capable counsel."[265] Along the way, the PLC consulted other plaintiffs' counsel, including potential objectors, and at times the PLC included other attorneys with a significant number of cases in the negotiations.

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264. Georgine v. Amchem Prods., Inc., 83 F.3d 610 (3d Cir. 1996), *aff'd sub nom.* Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).

265. Fanning v. AcroMed Corp., 176 F.R.D. 158, 165 (E.D. Pa. 1997).

Handling of Future Claims

The parties and the court thought that the orthopedic bone screw litigation did not present a significant future claims issue, and the *Fanning* class was structured to eliminate any such issue to the extent possible. The definition of the settlement class included a cutoff date for surgery—December 31, 1996; thus, the settlement neither compensated nor barred claims by persons who underwent a pedicle screw implantation after the settlement with AcroMed had been reached. Moreover, because any problems resulting from the surgery would generally manifest themselves within a few months, there were unlikely to be many class members who did not become aware of their injuries in time to register with the fund. Under the terms of the settlement, a claimant was given at least a year from the time of surgery to file a claim. For these reasons, the *Fanning* class was considered to be a class of only present claimants; accordingly, no subclasses were created, and no representative of future claimants was appointed.

Notice Procedure and Content

Following Judge Bechtle's preliminary approval order, notice was provided to class members of the terms of the settlement, the opportunity to voice objections to it, and the date of the fairness hearing. Notice was sent by first-class mail to almost 7,000 persons. This number comprised all plaintiffs in the MDL proceedings who had sued AcroMed, all plaintiffs' counsel of record in the MDL proceedings, and all plaintiffs in state court who were known to AcroMed. No notices were sent to class members holding subrogation or reimbursement claims. Nor was an attempt made to identify and send notice to the more than 90,000 potential class members who had surgery with AcroMed devices and had not filed a complaint against AcroMed before the settlement.

In an attempt to provide notice to class members whose identities were currently unknown, notice by publication was provided. Notices were run on two consecutive Fridays in the national edition of *USA Today* (which had a circulation of 1.9 million to 2.4 million), and once each in *Parade Magazine*'s national edition (which had a circulation of 36,342,000), *TV Guide*'s national edition (which had a circulation of 13 million), and *El Nueva Dia,* a Spanish-language newspaper of general circulation in Puerto Rico. No ads were placed in foreign publications,

because the class was restricted to patients who had undergone surgery in the United States.

The mailed notice began by highlighting key facts: the provisional certification of a mandatory class, the preliminary approval of a $100 million settlement with AcroMed, the scheduling of a fairness hearing for April 23, 1997, the right of class members to "support, object to, or participate in the benefits of the Settlement,"[266] and the deadlines for objecting to the settlement and registering to preserve eligibility. Then, after describing the litigation and providing brief information about class actions, the notice described the settlement class, summarized the terms of the settlement and the preliminary injunction, and explained how the settlement would affect a claimant's rights. The notice explained what would occur at the fairness hearing and stated that any class member could appear in person or through counsel to support or oppose the settlement and the class certification. The notice also gave addresses to which notices of intent to appear or written comments and objections could be sent prior to April 7, 1997. Along with the notice a registration form was mailed to all known claimants.

The published notice was addressed to "all persons who had spinal fusion surgery with pedicle screws on or before December 31, 1996" and others related to them.[267] It provided notice of the same key facts as the mailed notice, but did not otherwise summarize the settlement or the rights of class members. The ad provided an address for requesting the full mailed notice as well as means for obtaining the settlement agreement. It did not provide any phone numbers for additional information or answers to questions.

Approval and Review Process

No hearing was held prior to the preliminary approval of the settlement. After notice was given of Judge Bechtle's preliminary approval and conditional certification, fourteen objections were filed by class members, representing 52 class members who had been implanted with AcroMed devices (plus their spouses) out of the total of approximately 4,200 such persons who had registered with the PLC and 100,000 potential class

266. Preliminary Approval Order, Pretrial Order No. 724 at Ex. 1, *In re* Orthopedic Bone Screw Prods. Liab. Litig., MDL No. 1014 (E.D. Pa. Jan. 16, 1997).

267. *Id.* at Ex. 2.

members who were recipients of AcroMed devices. In addition, objections were lodged by nonsettling defendant Sofamor/Danek and by various health benefit providers, including the United States, who claimed rights to subrogation or reimbursement. The court conducted a fairness hearing over four days—April 23 and 24, June 3, and July 8, 1997. The class was certified and the settlement was approved on October 17, 1997.[268] The settlement became final on April 3, 1998, the date by which all appeals had been withdrawn.[269]

Conduct of the Hearing

The first three days of the fairness hearing were devoted to the presentation of evidence by the proponents of the settlement and by objectors. The final day was devoted to the parties' oral arguments.

The proponents of the settlement—the PLC and AcroMed—were allowed to present their evidence first, subject to occasional interruption to accommodate the schedules of some objectors who made brief presentations. Supplementing the declarations and documentary evidence previously submitted by the plaintiffs in support of the joint motion for approval and certification, three PLC members—Arnold Levin, Will Kemp, and Darryl Tschirn—spoke in favor of the settlement. They explained the rationale for it from the plaintiffs' perspective; argued how it met the Rule 23 certification requirements; responded to the objections that had been raised, rejecting the possibility of any side deals; explained some of the details of the settlement; and reviewed the history of the bone screw litigation. The PLC then presented its expert witness, Harvey Rosen, an economic consultant. He testified that, if the litigation were eliminated, AcroMed's value would be approximately $104 million. Given that value, he concluded that AcroMed's assets constituted a limited fund that, absent the settlement, would be insufficient to fully resolve the bone screw claims against it. Rosen was cross-examined by counsel for four of the objector groups.

AcroMed then presented its evidence in support of the settlement, first by the testimony of its counsel, Rick Werder. Werder highlighted some of the points he had made in an affidavit, which was also admitted

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268. *Fanning,* 176 F.R.D. 158.

269. Pretrial Order No. 1423, *In re* Orthopedic Bone Screw Prods. Liab. Litig., MDL No. 1014 (E.D. Pa. May 11, 1998) (declaring settlement to have become final on Apr. 3, 1998).

into evidence, concerning the insufficiency of AcroMed's assets in relation to projected defense costs and the company's reasons for supporting the settlement. He was subjected to cross-examination by objectors. On cross-examination, he stated that there had not been any side deals so far and that AcroMed did not intend to enter into any side deals with plaintiffs or objectors, although he added that "I guess you'd have to look at the circumstance."[270] AcroMed next called its president and CEO, Dekle Rountree, who testified about the impact of the litigation on the company and the reasons for the partial release of health care providers. After Rountree's cross-examination by objectors, AcroMed presented the testimony of its expert, John Romney, from the corporate finance group of Ernst & Young. Romney's testimony focused on AcroMed's borrowing capacity on a cash-flow basis, which he calculated would be within the range of $84 million to $114 million if the litigation were settled. Given that capacity, he concluded that AcroMed would be able to fund the settlement and that the settlement amount reasonably approximated the maximum amount that AcroMed could afford to pay. He, too, was cross-examined by objectors.

The only objector to present a live witness at the fairness hearing was Sofamor/Danek, which called its expert, Thomas Florence, the national director of litigation and forensic services for KPMG, Peat-Marwick. Florence testified about the closed-claims method of analyzing the value of pending and future litigation and about his belief that, because of insufficient data about the past resolution of bone screw cases, undertaking such an analysis was not possible in this case. He was cross-examined by Levin and Werder.

On the last day of the fairness hearing, all of the parties were allowed to address the court concerning their positions on the settlement and certification. Those making oral arguments were counsel for AcroMed, the PLC, Sofamor/Danek, the Morales objectors, the Brown objectors, the Anderson objectors (Public Citizen Litigation Group), two groups of subrogation interests, and the United States. At the end of the hearing, the court allowed all parties ten days in which to file posthearing briefs of no more than ten pages.

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270. Hearing Transcript at 116, *In re* Orthopedic Bone Screw Prods. Liab. Litig., MDL No. 1014 (E.D. Pa. Apr. 24, 1997).

Proponents' Evidence in Support of the Existence of a Limited Fund

Experts for the PLC and AcroMed took somewhat different approaches in coming to the conclusion that AcroMed lacked the resources to resolve all of the bone screw claims against it and thus it constituted a limited fund. Neither approach rested on a detailed valuation of the claims themselves. AcroMed's expert, Romney, relied exclusively on defense costs without regard to ultimate payouts for the claims. The PLC's expert, Rosen, did estimate a dollar value for the claims, but his analysis did not examine individual characteristics of the pending cases and how those characteristics fit into historical patterns for AcroMed's claims' resolution. Objector Sofamor/Danek's expert, Florence, rejected Rosen's approach and testified that there were insufficient data for determining the value of the claims.

Relying on AcroMed's counsel's estimate of defense costs (in the absence of a settlement) of at least $25 million in 1997 and far more than that amount in 1998, Romney concluded that AcroMed "would essentially run out of funds by the end of the fiscal years ending June 30, 1998 or 1999, collapsing under the weight of the defense costs of litigation."[271] Because he believed that outside funding would be unavailable to the company if no settlement were reached, he concluded that these defense costs would have to be paid for out of funds generated internally from operations and that they would deplete the company's earnings. He concluded that the settlement, on the other hand, would permit an infusion of funds from outside sources and that $100 million was "the maximum amount that the company could reasonably be expected to generate to fund a settlement."[272]

Rosen's analysis began with the conclusion that the company's net assets, which he valued at $58.4 million, were clearly insufficient to satisfy the claims against the company. For that reason he engaged in a cash-flow analysis, which yielded the conclusion that the company's value would be approximately $104 million if the burden of the litigation were removed. He explained that this figure represented that amount that "a willing buyer would pay a willing seller for this company (the cash flows

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271. *See* Declaration of John P. Romney at 9, *In re* Orthopedic Bone Screw Prods. Liab. Litig., MDL No. 1014 (E.D. Pa. Apr. 10, 1997).

272. *Id.* at 8.

generated) without the financial constraints of the litigation costs and the uncertainty of litigation outcomes."[273] He then turned to the value of the potential bone screw claims against the company. Considering only the pending cases involving an AcroMed device, he arrived at a value of almost $418 million without regard to defense costs. This figure was based on a calculation of 3,200 cases multiplied by what he considered to be the historical average settlement amount of $130,581. Rosen then added in $60 million to $80 million of defense costs for 10% of the cases that might be expected to go to trial. Even without taking into account defense costs for the settled cases or defense costs and payouts for cases involving non-AcroMed devices, he reached the conclusion that the value of the claims far exceeded the value of the company and thus "plaintiffs are faced with a limited fund from which judgments could be satisfied."[274]

In opposition to the class certification and the settlement, Sofamor/Danek presented the views of its expert, Florence. It was his opinion that it was "not possible to forecast reliably the cost to AcroMed of resolving the 3,200 pending claims" because of insufficient data concerning the individual characteristics of the resolved and pending claims.[275] Moreover, he stated that the information that was available was problematic because of the wide variation in settlement amounts and the existence of a group of settlements by AcroMed's insurer that had been challenged as having been in bad faith. Thus, he concluded that Rosen's valuation of the claims at $478 million to $498 million was "speculative and without valid statistical basis."[276] Furthermore, he expressed the opinion that legal defense costs could not be accurately forecasted, as AcroMed's counsel and expert had attempted to do.

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273. *See* Harvey S. Rosen's Report Concerning the Financial Analysis and Valuation of Claims of AcroMed Corp. at 5–6, *In re* Orthopedic Bone Screw Prods. Liab. Litig., MDL No. 1014 (E.D. Pa. Mar. 28, 1997).

274. *Id.* at 7.

275. Hearing Transcript at 111–12, *In re* Orthopedic Bone Screw Prods. Liab. Litig., MDL No. 1014 (E.D. Pa. June 3, 1997).

276. Verified Statement and Report of B. Thomas Florence at 6, Fanning v. AcroMed Corp., No. 97-381 (E.D. Pa. Apr. 14, 1997) (exhibit to Sofamor/Danek's memorandum in support of objections to certification and settlement).

Objections

The number of objections filed by class members was small—fourteen objections on behalf of fifty-two AcroMed recipient class members. Class members who did file objections to the settlement did not challenge the good faith of the negotiators or make any allegations that the PLC colluded with AcroMed in agreeing to the settlement. Instead, several objections challenged the mandatory nature of the class and argued that under *Phillips Petroleum Co. v. Shutts*,[277] they had a due process right to opt out. Some challenged the absence of detail in the terms of the settlement. They contended that, because allocation decisions had been postponed, class members lacked sufficient information to evaluate the fairness of the settlement. Other objections were to the absence of subclasses and the inclusion of a cutoff date for contingent fee agreements. Finally, one group of objectors, represented by the Public Citizen Litigation Group, objected to the partial release of health care providers. They pointed out that these released parties were not named defendants in the *Fanning* suit, they had not provided any consideration for the settlement, and their assets had not been considered in assessing the existence of a limited fund.

Several groups of health benefit providers—those who had provided health insurance or workers' compensation benefits to class members—also objected. They were particularly concerned about the May 1, 1997, deadline for registering their subrogation claims, since that date coincided with the deadline for bone screw recipients to register. Because they were limited to seeking subrogation only with respect to persons who filed timely claims, the health benefit providers objected that they were not given sufficient time to identify and file their subrogation claims. They also argued that the PLC and named class members did not adequately represent their interests.

Among the objecting health care providers was the United States. A number of bone screw recipients had received federal health benefits, and the United States argued that under federal law, the government was entitled to seek reimbursement of the amounts it had paid according to the terms and procedures specified by federal law. This right could not be compromised by agreement of the PLC and AcroMed. Moreover, the

277. 472 U.S. 797 (1985).

United States argued, its interests had not been properly represented, and it had not received notice in the manner required by federal law.

Finally, nonsettling defendant Sofamor/Danek objected to the settlement primarily on the ground that it failed to protect sufficiently its right to contribution and indemnity from AcroMed. It also questioned whether under *Shutts*[278] all class members would be bound by the settlement and thus obligated to reduce any judgment they might recover from Sofamor/Danek. In addition, Sofamor/Danek challenged whether the class satisfied all of the requirements for certification, in particular whether a limited fund had been properly demonstrated.

Court's Ruling on the Objections

In response to the federal government's claim that its rights to reimbursement under federal law could not by circumvented by agreement of the plaintiffs and AcroMed, Judge Bechtle interpreted the term "settled claim" as used in the settlement agreement not to include "any independent recovery rights the United States may have as provided for under federal law."[279] Thus, he held that "the United States' rights under applicable federal law are not impacted or limited by this settlement."[280] He overruled the objections of the private subrogation interests, however. The May 1 deadline for them was reasonable, he concluded, because they had received ample notice and "diligent subrogation claimants" had been able to comply.[281] Health benefit providers not meeting that deadline, however, could still seek approval by the claims administrator of late-filed claims.

The court overruled all of the objections raised by other parties as well. Judge Bechtle rejected the claim to a due process right to opt out, holding that the Supreme Court's *Shutts* decision was inapplicable to a limited fund class action, which is "purely equitable in nature."[282] Likewise, he rejected the claim that the settlement could not bind class members who lacked minimum contacts with the forum. Analogizing a limited fund class action to an interpleader action, he held that the court

278. *See id.*
279. Fanning v. AcroMed Corp., 176 F.R.D. 158, 179 (E.D. Pa. 1997).
280. *Id.* at 180.
281. *Id.* at 183.
282. *Id.* at 180.

could exercise jurisdiction over the fund itself and could thereby adjudicate all claims against it, since the claimants were adequately represented.

With little discussion Judge Bechtle overruled the objection concerning the partial release of health care providers. He based this ruling on the ground that the released product-liability-related claims had "the same underlying factual predicate" as the claims being settled against AcroMed.[283] Such factual overlap, the court held, kept the doctors' release from rendering the settlement unfair.

The court dealt at greater length with Sofamor/Danek's objection concerning the contribution and indemnity rights of nonsettling defendants. Noting the importance of the release and dismissal of contribution and indemnity claims against AcroMed in facilitating its settlement with plaintiffs, Judge Bechtle found that the agreement's setoff and judgment-reduction provisions adequately protected the rights of the nonsettling defendants. Under those provisions, he concluded, codefendants should not end up paying any more than they would have paid had they retained the right to seek contribution and indemnity from AcroMed. Moreover, because the settlement made more funds available to satisfy plaintiffs' claims than otherwise would have been available, the nonsettling defendants actually fared better as a result of the settlement. Judge Bechtle did state, however, that the agreement of plaintiffs and AcroMed could not circumvent any state law that might allow contribution and indemnity claims to go forward despite the settlement. Should such situations arise, the court held, AcroMed, not the plaintiffs or the settlement fund, would be responsible for resolving the claims.

Finally, Judge Bechtle overruled the objection raised concerning the cutoff of contingent fees for counsel retained after the settlement had been announced. Exercising the court's "broad, equitable powers to monitor contingency fee agreements," he found that the provision was reasonable, since the settlement eliminated the contingency of nonrecovery.[284]

Standards for Class Certification

Following the teaching of the Supreme Court's recent decision in *Amchem Products, Inc. v. Windsor*,[285] Judge Bechtle noted that the standards

283. *Id.* at 181.
284. *Id.* at 183.
285. 521 U.S. 591 (1997).

for the certification of this settlement class were the same as those for a litigation class. It was permissible, however, to include the settlement as a relevant factor in ruling on certification. As he had in his earlier ruling on the *Zampirri* motion, Judge Bechtle concluded that all of the requirements of Rule 23(a) were satisfied by the plaintiff class. He distinguished *Amchem* in finding that there were questions of law or fact common to the class. The present class, he concluded, was much more "defined and congruous" than the "sprawling" class that had been certified in *Amchem*.[286] Moreover, the case before him did not present a "'futures' problem.'"[287] Class members shared the common issue of whether AcroMed's orthopedic bone screws were defective products that were unreasonably dangerous, as well as the issue of the fairness of the settlement. Judge Bechtle found the requirements of both typicality and adequacy of representation satisfied in part because of the interest of all class members in maximizing the possible recovery from AcroMed. He concluded that there were no intraclass conflicts at that time, because the settlement did not embody any allocation decisions.

With respect to the requirements for certification under Rule 23(b)(1)(B), Judge Bechtle said that the parties had to present "'substantive evidence' showing that AcroMed's assets would be insufficient to meet plaintiffs' claims."[288] Without specifying the standard for valuing the company's assets, Judge Bechtle relied on the expert testimony that "AcroMed's net assets and insurance coverage [were] vastly insufficient to satisfy the many claims against them."[289] He concluded that defense costs alone would deplete the company's resources, leaving it with little or no ability to settle or pay any judgments. Judge Bechtle further found that AcroMed could not fund the settlement from cash on hand or by liquidating its assets; the settlement required an outside infusion of cash, and such an infusion was possible only if there was a settlement. The settlement therefore made possible what was impossible without it: an equitable division of an enlarged pie among all claimants. Without the settlement, recovery by some plaintiffs would prevent others in the class from recovering anything.

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286. *Fanning*, 176 F.R.D. at 173.
287. *Id.*
288. *Id.* at 176.
289. *Id.* at 177.

Standards for Approval of the Settlement

To approve the settlement, Judge Bechtle said that he had to find that it was "fair, adequate, and reasonable."[290] He relied on the Third Circuit's nine-factor *Girsh v. Jepson*[291] test in making this determination. *Girsh* calls for the consideration of the following factors:

> (1) the complexity, expense and likely duration of the litigation; (2) the reactions of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.[292]

Before discussing each of the factors, Judge Bechtle found that the settlement was the result of "good faith, arms' length negotiation" and that it was "not collusive in any respect."[293]

The first factor weighed heavily in favor of the settlement, Judge Bechtle concluded, because further litigation would be "exorbitantly expensive" to both the parties and the judicial system.[294] The second factor—the reactions of class members to the settlement—was in Judge Bechtle's opinion probably the most significant factor to be considered. In this case, that factor supported approval. He noted that there was a "relatively low" objection rate—only fifty-two plaintiffs who had received AcroMed devices objected to the settlement.[295] The maturity of the litigation also supported approval, Judge Bechtle found. The MDL proceedings had been pending for over two and a half years, and most of the class-wide discovery had been completed. These extensive pretrial proceedings gave the parties an "'adequate appreciation of the merits'" of the litigation prior to their negotiations.[296]

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290. *Id.* at 184.
291. 521 F.2d 153 (3d Cir. 1975).
292. *Fanning*, 176 F.R.D. at 184.
293. *Id.*
294. *Id.*
295. *Id.* at 185.
296. *Id*. (quoting *In re* General Motors Corp. Pickup Truck Fuel Tank Prod. Liab. Litig., 55 F.3d 768 (3d Cir. 1995)).

Judge Bechtle found that the risks for plaintiffs in establishing liability and damages further supported approval of the settlement. Because all the plaintiffs suffered from back problems prior to the implantation of the AcroMed bone screws, causation and damages would both be difficult to establish. In Judge Bechtle's mind, the sixth *Girsh* factor—the risks of maintaining the class action through trial—weighed heavily in favor of the settlement. There would not be a class if the settlement was not approved and the cases proceeded to trial, he said, noting that he had previously denied the *Zampirri* motion. Because of the limited fund finding, Judge Bechtle easily concluded that the seventh factor—the defendant's inability to withstand a greater judgment—supported approval.

Finally, Judge Bechtle concluded that the settlement was within the range of reasonableness as required by the eighth and ninth *Girsh* factors. The settlement represented a compromise that eliminated the best that either side could hope for, but because of AcroMed's limited fund status, the settlement amount of $100 million was safely within the range of reasonableness in light of the risk for many class members that AcroMed would have spent all its assets on defending the litigation before they were in a position to recover anything.

As Judge Bechtle analyzed it, then, approval of the settlement was not a close question.[297] All of the *Girsh* factors supported it, and the inability of AcroMed to otherwise satisfy the claims in full made settlement especially desirable.

Dismissal of Appeals

There was no appellate review of Judge Bechtle's certification of a class under Rule 23(b)(1)(B) or his approval of the settlement as fair, adequate, and reasonable. Although several of the objecting parties appealed, all appeals were eventually voluntarily dismissed.

The only plaintiffs to appeal were the Anderson objectors, who were represented by the Public Citizen Litigation Group. They sought review of the partial release of health care providers. In March 1998 their appeal was dismissed upon agreement of the parties. According to knowledgeable sources, this dismissal was procured by a substantial payment of an undisclosed amount to the Anderson plaintiffs by AcroMed. No changes

297. *Id.* at 186 ("*Girsh* factors, taken as a whole, plainly support approval of the proposed settlement.").

were made in the scope of the release or any other terms of the settlement. Instead, despite statements during the fairness hearing by counsel for AcroMed and members of the PLC that the parties intended to enter into no side deals, this group of objectors was paid to drop its appeal.

It is interesting that in negotiating the dismissal, AcroMed dealt directly with the appellants' local counsel rather than the Public Citizen lawyers who were handling the appeal. When asked how much money it would take for his clients to drop their appeal, local counsel responded with a figure that he thought would be rejected out of hand. AcroMed's counsel eventually made a counteroffer only slightly below the plaintiffs' proposed figure, and the Anderson objectors accepted it.

Appeals were also taken by Sofamor/Danek and one other nonsettling defendant, and these appeals were also voluntarily dismissed. Counsel for Sofamor/Danek later indicated that they did not pursue their appeal because in the end they felt that they had gotten most of the protection for their contribution and indemnity rights that they desired.

The final group of appellants consisted of various health benefit providers with rights to indemnity and subrogation. Their appeals were voluntarily dismissed following a settlement that was approved by Judge Bechtle. Under the terms of the subrogation settlement agreement, the claims administration process was modified to provide the subrogation claimants with all the registration forms filed by plaintiffs and then to allow the health benefit providers additional time to file their subrogation claims against the settlement fund.

Attorneys' Fees

The only provision in the settlement agreement concerning attorneys' fees was the provision eliminating the payment of contingent fees to plaintiffs' counsel entering into such contracts after December 4, 1996, the day before the PLC–AcroMed settlement memorandum was filed. Otherwise, the settling parties left the recovery of attorneys' fees for future court approval.

Prior to the settlement, the court had issued a pretrial order in the MDL proceedings specifying the terms and means of compensation for the PLC, and those procedures were to govern class counsel's compensation for their work in achieving the AcroMed settlement. Individually retained plaintiffs' counsel would receive their fees from their clients' re-

covery from the settlement fund, subject to approval of amounts by Judge Bechtle.

Assessment

Faced with thousands of lawsuits and having exhausted most of its insurance coverage, AcroMed was a defendant in need of a plenary resolution of the bone screw litigation. The company believed that bankruptcy was not a realistic option for it. Because of the small value of its assets, AcroMed's ability to make significant payments to plaintiffs rested on its income-generating potential. That potential, in turn, depended on maintaining the goodwill of its customers—spine surgeons—who the company believed would be scared off by a bankruptcy filing. A limited fund class action settlement was therefore attractive to AcroMed as an alternative to bankruptcy that would be binding on all class members. Moreover, by getting the named plaintiffs to agree to, and the court to approve, a broad release and order barring further pursuit of claims against the released parties, AcroMed also was able to eliminate most of the potential claims against it by other parties to the litigation. Freed from the litigation, AcroMed was sold shortly after the settlement became final for at least three times the amount at which it had been valued by the plaintiffs' expert in testimony at the fairness hearing, testimony that the court relied on in the certification and approval order.

The Supreme Court in *Ortiz* declined to reach the "ultimate question whether settlements of multitudes of related tort actions are amenable to mandatory class treatment."[298] But assuming that a Rule 23(b)(1)(B) class action may be appropriate for the resolution of some mass tort cases, one must ask how well such a procedure worked in this case. In answering that question, several concerns bear noting. At least three key issues should be resolved before a limited fund class action can be approved:

1. Does a limited fund exist?
2. If so, what is the size of the fund?
3. What is a fair allocation of the fund among the various groups that have a claim to it?[299]

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298. Ortiz v. Fibreboard Corp., 527 U.S. 815, 842 (1999).

299. These questions are consistent with the three characteristics of traditional limited fund class actions identified by the Court in *Ortiz*. The Court stated that the "first

Questions might be raised about the resolution of each of those issues in the *AcroMed* case.

One method for determining whether AcroMed constituted a limited fund depended on a valuation of the company and the claims against it. Rule 23, of course, gives no guidance on the standards or methods to be used in making these valuations, nor does clear guidance emerge from the limited case law.[300] Judge Bechtle relied in part on the expert Rosen's testimony that the going-concern value of the company was $104 million; the court explained that "[t]his amount reflects 'what a willing buyer would pay a willing seller for this company (the cash flows generated) without the financial constraints of the litigation costs and the uncertainty of litigation outcomes.'"[301] In fact, however, press reports indicate that AcroMed was sold a year after Rosen's testimony and only a few weeks after the settlement was declared final for more than three times the estimated value—$325 million. Perhaps a company of three times more value would also have constituted a limited fund. That, however,

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and most distinctive characteristic" of such a class action is that "the totals of the aggregated liquidated claims and the fund available for satisfying them, set definitely at their maximums, demonstrate the inadequacy of the fund to pay all the claims." *Id.* at 838. Thus, the inadequacy of the available fund in relation to the claims against it as well as the fund's size must be determined. The second and third characteristics identified by the Court both relate to the question whether a fair allocation of the fund is proposed. The Court identified as characteristic of a traditional limited fund class action that "the whole of the inadequate fund was to be devoted to the overwhelming claims" and that "the claimants identified by a common theory of recovery were treated equitably among themselves." *Id.* at 839. Although the Court declined to decide whether Rule 23(b)(1)(B) requires that the entire fund always be distributed (*see id.* at 861), it made clear that the distribution to claimants must be equitable both with respect to their treatment vis-à-vis each other (*see id.* at 855–57) and with respect to their treatment in relation to any benefit the settlement confers on the defendant (*see id.* at 839).

300. *See, e.g., id.* at 850 (referring to the "difficulties" in computing the total value of a large number of unliquidated tort claims); *id.* (noting that trial court's finding as to the company's sale value might have been "conservative" given that it was later acquired for more than two and a half times that amount). Other than noting the uncertainties involved in such valuations, however, the Court did not specify the basis on which such calculations should be made.

301. Fanning v. AcroMed Corp., 176 F.R.D. 158, 168 (E.D. Pa. 1997) (quoting Harvey S. Rosen's Report Concerning the Financial Analysis and Valuation of Claims of AcroMed Corp. at 5–6, *In re* Orthopedic Bone Screw Prods. Liab. Litig., MDL No. 1014 (E.D. Pa. Mar. 28, 1997)).

depends on the value of the claims against AcroMed, and that calculation also raises some concerns.

Anyone attempting to value the bone screw claims pending and likely to be asserted against AcroMed faced the problem of limited historical data. At the time of the settlement, AcroMed had only tried five such cases, and the results were mixed: three plaintiff verdicts (one of which was overturned on appeal) and two defense verdicts. The number of cases settled was also small (forty-four at the time of the fairness hearing), and the settlement amounts ranged from $1,000 to over $352,000 (the larger amounts being in cases with insurance coverage). AcroMed had also disposed of a number of cases without the payment of any money to plaintiffs. Although the plaintiffs' expert, in his report that was submitted to the court, calculated the value of 3,200 pending claims based on an average historical settlement value of $130,581, in his testimony at the fairness hearing, he admitted that there was "not enough data here to do what would be called some type of statistical analysis."[302]

AcroMed's method of proving the existence of a limited fund—comparing anticipated defense costs with the amount of cash that the company would be able to generate—avoided the necessity of making the valuations described above. It did not, however, eliminate the need to determine what the value of that limited fund was; such a determination was necessary in order to ensure that the limited fund was properly distributed.[303] Again, the seeming undervaluation of the company suggests that the fund was actually larger than was believed at the time the settlement was approved. Moreover, AcroMed's willingness to make additional payments to at least one set of claimants in order to get them to drop their appeal calls into question whether the settlement fully distrib-

302. Hearing Transcript at 128, *In re* Orthopedic Bone Screw Prods. Liab. Litig., MDL No. 1014 (E.D. Pa. Apr. 23, 1997).

303. *See Ortiz,* 527 U.S. at 839 (stating that a traditional limited fund class action distributed the "whole of the inadequate fund" to claimants); *id.* at 860 n.34 (declining to decide "how close to insolvency a limited fund defendant must be brought as a condition of class certification" but noting that if the defendant were allowed to "provide[] only a de minimis contribution to the ultimate settlement fund," the protections provided creditors under the Bankruptcy Code might be undermined).

uted the limited fund. If the company had devoted all that it had to the settlement, where did the additional funds come from?[304]

One answer to that question is that, unlike a limited fund of insurance proceeds of a known and finite amount, a limited fund consisting of an ongoing company's cash flow or borrowing capacity cannot be fully distributed.[305] Value must be retained by the company to fund continuing operations, which will in turn fund the settlement. Thus, even if the size of the limited fund is properly determined, judgments must be made about the fair allocation of that fund among tort claimants, other creditors, and the company itself. In the case of *AcroMed*, the fairness of that distribution may be questioned. The settlement with the Anderson objectors shows that, despite prior representations to the contrary, all claimants were not treated equally. Moreover, as always occurs with a Rule 23(b)(1)(B) resolution of mass tort litigation, non-tort claimants continued to receive full payment, and only the tort claimants were required to share a limited fund that yielded them less than the full amount that they sought to recover through individual litigation.

Having raised those concerns, however, I must note the benefits of using a limited fund class action settlement to resolve the bone screw litigation against AcroMed. The settlement facilitated the infusion of new funds to AcroMed that would not have otherwise been available to pay the tort claimants, and this resolution was achieved relatively quickly and inexpensively when one considers the probable duration and cost of a Chapter 11 proceeding. The court's approval of the settlement and class certification followed a lengthy fairness hearing at which all interested parties were allowed to be heard and objectors had a full opportunity to present their views. Moreover, the class and settlement were structured in ways to minimize conflicts of interest and concerns about self-dealing.

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304. The additional payment to one group of claimants also casts doubt on whether, as now required by *Ortiz*, the claimants "were treated equitably among themselves." *Id.* at 839.

305. The Court in *Ortiz* did not discuss this need of the settling company to retain assets for its continuing operation. After noting that traditionally the entirety of a limited fund was distributed, the Court merely raised (but did not approve) the possibility that some assets could be retained by the company as a credit for some of the transactions cost savings resulting from the settlement. *See id.* at 860–61.

Chapter 8

Other Mass Tort Bankruptcies: *UNR, A.H. Robins, and Dow Corning*

In order to have a more complete picture of how mass torts are resolved by means of bankruptcy reorganizations, I examined three additional Chapter 11 cases that were precipitated by mass tort litigation against the debtor corporations. These case studies are based on publicly available judicial opinions and documents and published commentary. Accordingly, they are not in all respects discussed in the same level of detail as the preceding case studies, which were based on reviews of the case files and personal interviews with judges and attorneys who participated in the cases, as well as on published opinions. Nevertheless, sufficient information was available to permit a fairly complete presentation of how the mass tort claims were resolved by means of these bankruptcy proceedings.

In re UNR Industries, Inc.

Invoking the protection of the bankruptcy court in July 1982, UNR Industries, Inc. was the first of the asbestos companies to file for bankruptcy, thus making it one of the first mass tort defendants to seek a bankruptcy solution to its tort liability problem. UNR and several of its subsidiaries and affiliates (jointly referred to here in the singular as "UNR" or "the debtor") had assets of over $200 million at the time they simultaneously filed for reorganization under Chapter 11.[306] The crushing asbestos litigation UNR faced was the primary impetus for the filing. Because of its relatively unprecedented nature, UNR's bankruptcy was a case with "an unusual amount of public interest and impact."[307] After almost seven years in bankruptcy, UNR successfully reorganized and emerged a healthy business, and the tort claimants' trust was the majority owner of the reorganized company. In achieving that result, the bankruptcy and reviewing courts had to grapple with a number of then novel issues presented by the application of bankruptcy law to mass tort litiga-

306. *See In re* UNR Indus., Inc., 42 B.R. 94, 95 (Bankr. N.D. Ill. 1984).
307. *In re* UNR Indus., Inc., 30 B.R. 613, 619 (Bankr. N.D. Ill. 1983).

tion. Some of those issues were later resolved by amendment of the Bankruptcy Code,[308] and others were addressed by patterns in the case law that emerged over time. The *UNR* bankruptcy, however, laid the groundwork for many of the mass tort bankruptcies that followed.

Nature of Litigation and Litigation Maturity

As well as engaging in other manufacturing activities, UNR manufactured asbestos-containing products from the 1930s until 1970.[309] This aspect of its business eventually gave rise to lawsuits against the company by thousands of shipyard workers and others, who alleged that they had incurred asbestosis, mesothelioma, and other serious illnesses as a result of their exposure to UNR's asbestos products. At the end of 1975, UNR faced 103 asbestos-related lawsuits. By 1978, this number had grown to 1,289. A year later, the total was 2,283.[310] By the time it filed for bankruptcy, UNR faced at least 12,000 suits brought by asbestos victims in 51 jurisdictions.[311] New claims were being filed at the rate of 400 per month,[312] and UNR's defense costs exceeded $1 million per month.[313] In addition to its asbestos disease claim liability, UNR also had over $163 million in other debt.[314]

History of the Bankruptcy Proceedings

UNR and ten of its affiliates and subsidiaries filed for Chapter 11 reorganization on July 29, 1982, in the Northern District of Illinois.[315] The

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308. *See* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 111(a), 108 Stat. 4113 (adding 11 U.S.C. § 524(g)).

309. *See In re* UNR Indus., Inc., 71 B.R. 467, 470 (Bankr. N.D. Ill. 1987); *In re* UNR Indus., Inc., 224 B.R. 664, 666 (Bankr. N.D. Ill. 1998).

310. *See In re* UNR Indus., Inc., 143 B.R. 506, 519 (Bankr. N.D. Ill. 1992).

311. *See id.*

312. *See* 1989 Mealey's Litig. Rep.—Asbestos 9 (Mealey Publications, Inc. Mar. 24, 1989).

313. *See* UNR Indus., Inc. v. Continental Cas. Co., 942 F.2d 1101, 1104 (7th Cir. 1991).

314. *See In re* UNR Indus., Inc., 42 B.R. 94, 95 (Bankr. N.D. Ill. 1984). This figure represents the unsecured debt of the eleven affiliated UNR companies that filed for bankruptcy. Eventually only eight of them were parties to the confirmed reorganization plan.

315. *See In re* UNR Indus., Inc., Bankr. Nos. 82 B 9841 to 82 B 9851 (Bankr. N.D. Ill. filed July 29, 1982). Several different bankruptcy judges presided over the *UNR* case during its pendency. The case was originally assigned to Judge Edward Toles, who presided

proceedings of the UNR debtors were jointly administered, and the debtor retained control as debtor-in-possession. The U.S. trustee appointed two official committees, one representing present victims of asbestos-related disease and the other representing trade creditors. Several years into the bankruptcy, a legal representative for future claimants was appointed.

Future Claims

One of the most challenging issues presented by the *UNR* bankruptcy was the question of the status of future claims in the proceedings. The debtor considered discharge of all future asbestos disease liability to be an indispensable component of any reorganization.[316] Given the long latency period of asbestos-related disease and the broad exposure to asbestos, UNR expected such claims to continue to be asserted against it until well into the twenty-first century; predicted numbers of additional claims ranged from 30,000 to 120,000.[317] The main obstacle to including future claims in any reorganization plan, however, was its novelty: No federal court of appeals had ever held that unmanifested injuries were "claims" that could be discharged in compliance with the requirements of the Bankruptcy Code and due process.[318]

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over it until his retirement in 1986. Judge Robert Ginsburg issued at least one of the opinions in the case, and Judge David Coar presided during the period from 1987 to 1994. Judge Erwin Katz presided over postconfirmation matters arising thereafter.

316. *See, e.g., In re* UNR Indus., Inc., 29 B.R. 741, 743–44 (N.D. Ill. 1983), *appeal dismissed*, 725 F.2d 1111 (7th Cir. 1984) ("The debtors allege what will occur if the Court denies their Application: . . . No lenders will extend credit to companies burdened by litigation costs exceeding $1 million per month, with exposure to damages in the incalculable millions of dollars. If the putative claims cannot be dealt with in a reorganization, the debtors will have no choice but to liquidate. Whatever hope the putative claimants have to a future recovery would vanish, because by the time their diseases are discovered there will be no company left with any assets to satisfy a judgment.").

317. *See id.* at 743; *In re* UNR Indus., Inc., 71 B.R. 467, 470 (Bankr. N.D. Ill. 1987) (noting that the predicted figures were based on a study commissioned by the debtor). The actual number of claims eventually filed against the UNR trust far exceeded the prediction. *See In re* UNR Indus., Inc., 1997 WL 759587 at *2 (Bankr. N.D. Ill. 1997) (indicating that more than 275,000 claims had been received and processed by the trust so far).

318. *See, e.g., In re* UNR Indus., Inc., 71 B.R. at 472 ("Whether future claimants are creditors as defined by the Bankruptcy Code is a question which has not been resolved by the Seventh Circuit, or any other circuit court.").

Undaunted by the challenge, UNR launched its strategy in October 1982, less than a month after appointment of the asbestos-related plaintiffs' committee. It filed an application for the appointment of a legal representative for all individuals who had been exposed to its asbestos products and who might in the future manifest an asbestos-related disease.[319] The district court,[320] rejecting the debtor's "'novel concept,'"[321] firmly denied the motion.[322] It noted that the Bankruptcy "Code by its terms does not provide for the appointment of a legal representative,"[323] and that "putative claimants—who have been exposed to asbestos some time in their lives but do not now have or do not know that they have an asbestos-related disease—have no claims under state law, and therefore do not have claims cognizable under the Code."[324] On a practical level, the court stated that "[n]o individual could represent such a large group with conflicting positions on such various and complex issues, particularly where such a representative would by definition be unable even to ask his/her constituents what it is they want."[325] The court continued:

> The practical and legal problems of notifying those who [sic] the legal representative would be able to bind . . . are insurmountable. . . . [I]t is inconceivable that any notice short of personal notice to every person whom the debtors would seek to bind—and this could include, theoretically, every person in this country—would be acceptable under the principles of due process.[326]

"A 'fresh start' for these debtors," the court concluded, "is not as important as this."[327]

On appeal, the Seventh Circuit concluded that the district court's order, not being final, was not appealable until either the plan was confirmed or a future claimant actually attempted to file a claim and it was

319. *See In re* UNR Indus., Inc., 29 B.R. at 743.

320. The district court ruled on the debtor's application, because in response to a motion of a party in interest it withdrew the reference to the bankruptcy court of this matter. *Id.*

321. *Id.* at 744.

322. *See id.* at 748.

323. *Id.* at 744.

324. *Id.* at 745; *see also id.* at 746 n.5 ("If one of these putative claimants . . . were to file a proof of claim in this Court, such claim would be summarily disallowed and dismissed. Such a putative claimant has no 'right to payment.'").

325. *Id.* at 747.

326. *Id.*

327. *Id.* at 748.

disallowed.[328] In dicta, the court emphasized that the question of the status of the future claims in the bankruptcy "is an open one in our minds."[329] The court then recited some of the competing arguments concerning the inclusion of future claims in the bankruptcy proceedings. It acknowledged that, because of the danger that UNR's reorganization without the discharge of future claims could be impossible, "a bankruptcy court's equitable powers just might be broad enough to enable the court to make provision for future asbestosis claims."[330] On the other hand, it observed that "the practical difficulties of identifying, giving constitutionally adequate notice to, and attempting to estimate the damages of the thousands upon thousands of people who have been exposed to asbestos sold by UNR but have not yet developed asbestosis are formidable, and possibly insurmountable."[331] The court of appeals further noted that "it can be argued . . . that it would be a quixotic undertaking far beyond the realistic boundaries of judicial competence to make sufficiently generous provision for upwards of a hundred thousand unidentified claimants to justify extinguishing their claims involuntarily."[332]

There the issue remained until May 1984, when UNR filed a motion in the district court to reconsider its earlier application for the appointment of a legal representative. The district court referred the matter to the bankruptcy court with the directive that "'the Bankruptcy Court should be free to consider the matter in its discretion in light of the prior decisions and any circumstances which in its judgment warrant such reconsideration.'"[333] In February 1985, over the objection of the Committee of Asbestos-Related Plaintiffs, the bankruptcy court approved the appointment of a legal representative.[334] While granting the debtor's application, Judge Toles limited the representative's role to "advis[ing] putative asbestos disease victims of the pendency of and their interest in these bankruptcy proceedings" and to "be[ing] heard with reference to any

328. *See In re* UNR Indus., Inc., 725 F.2d 1111, 1120 (7th Cir. 1984).

329. *Id.* at 1119.

330. *Id.* (citations omitted).

331. *Id.*

332. *Id.* at 1120.

333. *In re* UNR Indus., Inc., 46 B.R. 671, 674 (Bankr. N.D. Ill. 1985). In so referring the matter, the district court noted that the Seventh Circuit had previously concluded that the original order denying the appointment of a legal representative was interlocutory in nature and subject to reconsideration. *Id.*

334. *See id.* at 676.

plan or plans of reorganization" and "any motion to convert" UNR's Chapter 11 case to Chapter 7.[335] The court expressly left open the question whether future claimants were creditors of the bankruptcy estate and were thereby entitled to vote on, and were subject to discharge as a result of, a plan of reorganization.[336] Subsequently Kevin M. Forde, of Chicago, was appointed Legal Representative for Unknown Putative Asbestos-Related Claimants.

Having secured this limited victory, UNR now sought to achieve its ultimate goal of using the bankruptcy reorganization to cap its total asbestos liability at a finite amount, thus freeing the reorganized company of any further responsibility to the asbestos claimants. In August 1986, on the debtor's motion, the bankruptcy court agreed to impose a bar date some four months hence for the filing of claims against the bankruptcy estate.[337] The district court, however, stayed the bar date order pending appeal by the asbestos plaintiffs' committee and the future claims representative,[338] and it appears from the record that no bar date was ever imposed.[339]

UNR fared no better in its effort to establish the dischargeability of future claims. The Seventh Circuit's January 1984 ruling had suggested that the future claimants' status as creditors (and thus the possible discharge of their claims) might be tested prior to confirmation of the reorganization plan if an actual future claimant came forward to file a claim.[340] Perhaps not surprisingly, none did. When the debtor finally succeeded in seeking out two as-yet healthy individuals to file claims,[341] the

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335. *Id.* at 675–76.

336. *See id.* at 676.

337. *See* 1986 Mealey's Litig. Rep.—Asbestos 4958 (Mealey Publications, Inc. Sept. 12, 1986).

338. *See id.*

339. *See, e.g., In re* UNR Indus., Inc., 71 B.R. 467, 476 n.21 (Bankr. N.D. Ill. 1987) ("*Had* a bar date for the filing of claims been set in these proceedings, UNR could have then filed a claim on behalf of Mr. Anderson and Mr. Alban . . . .") (emphasis added). Asbestos claimants had to file a proof of claim at some point in the bankruptcy proceedings in order to be eligible to vote on the plan, but they could seek payment from the trust even if they had not filed a proof of claim. *See* 1989 Mealey's Litig. Rep.—Asbestos 10 (Mealey Publications, Inc. Mar. 24, 1989).

340. *See In re* UNR Indus., Inc., 725 F.2d 1111, 1120 (7th Cir. 1984).

341. *See In re* UNR Indus., Inc., 71 B.R. at 474 ("UNR actively sought out two putative claimants, Mr. Alban and Mr. Anderson, and encouraged them to file claims."). The bankruptcy court rejected the legal representative's argument that UNR had acted unethi-

problem remained of who would represent them in the ensuing litigation over the validity of their claims.[342] The claimants themselves could not afford to fund the debtor's test case on future claim dischargeability, and UNR could not ethically pay their costs.[343] So the debtor petitioned the bankruptcy court to order the legal representative to personally represent them.[344] The legal representative opposed the debtor's motion, as did the asbestos claimants' committee and the U.S. trustee.[345]

In the end, the bankruptcy court denied the debtor's motion.[346] Judge Ginsberg held that the legal representative would have a conflict of interest if ordered to represent these two "putative claimants," persons who might never develop an asbestos-related disease, because as the legal representative of future claimants, he had the responsibility to represent those persons who one day would in fact suffer from such a disease.[347] The debtor's effort to secure a preconfirmation determination that future claims were dischargeable was therefore unsuccessful. Accordingly, UNR had to negotiate with the legal representative and the committees for such a discharge.

The debtor eventually succeeded in persuading the legal representative and the committees to accept a plan that provided for discharge and payment of all future claims.[348] The battle over the discharge of future

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cally in seeking out these claimants and encouraging them to file proofs of claim. *Id.* at 475–76.

342. Having sought out and encouraged the two future claimants to file proofs of claim, UNR then objected to the claims, thus raising the question of their allowability. The bankruptcy court pointed out the goal of this strategy: "The debtor wants to resolve the question of whether the putative claimants and/or future claimants are in fact 'creditors' for Bankruptcy Code and Chapter 11 purposes. . . . It would prefer that both groups be determined to be 'creditors' so that they can be included in [its] plan and UNR can have these potential claims discharged by its plan. Therefore, UNR would like to challenge the Alban and Anderson claims and lose." *Id.* at 470.

343. *See id.* at 477 ("Litigation seeking to resolve the question of whether putative claimants are creditors under the Bankruptcy Code will be very costly. . . . UNR recognizes that these gentlemen cannot realistically afford to pursue their claims against this debtor.").

344. *See id.* at 469.

345. *See id.*

346. *See id.* at 481.

347. *See id.* at 479–80.

348. *See In re* UNR Indus., Inc., 20 F.3d 766, 768 (7th Cir. 1994) ("Claims relating to asbestos—whether the disease was manifest or latent at the time of the reorganization—must be presented to the Trust.").

asbestos claims did not end with confirmation of the plan on June 2, 1989, however. A group of former UNR employees, who had unsuccessfully objected to the plan prior to confirmation and had unsuccessfully sought to have its effects stayed pending appeal, launched a tenacious series of appeals (termed a "rear guard action" by one court[349]), which continued for at least five years after plan confirmation. These employees, who had already been diagnosed with asbestos-related disease, sought to establish, among other things, that future claimants were ineligible to recover from the asbestos trust, "thereby ensuring a greater pool of money available to pay [their] claims."[350] Their challenge to the injunction that prohibited future claimants from proceeding against the reorganized debtor was dismissed for lack of standing,[351] and their appeal of the confirmed plan's provision for future claimants to receive compensation from the trust was dismissed as moot.[352] The employees' subsequent challenge to the UNR trust was also dismissed by the district court on mootness grounds.[353] The Seventh Circuit affirmed that dismissal, holding that although the case was not in fact moot, the plan's trust provisions were too far implemented to be disturbed.[354] In so ruling, the court of appeals expressed its approval of the plan's inclusion of future claimants:

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349. *Id.*

350. UNARCO Bloomington Factory Workers v. UNR Indus., Inc., 124 B.R. 268, 273 (N.D. Ill. 1990); *see also In re* UNR Indus., Inc., 20 F.3d 766, 768 (7th Cir. 1994) ("We could give the employees much of what they want by holding that persons whose disease was not manifest by the date the plan was confirmed may not obtain compensation from the Trust; the employees then would have fewer competitors for the limited assets.").

351. *See UNARCO Bloomington Factory Workers*, 124 B.R. at 273 ("A finding . . . that the bankruptcy court could not enjoin suits brought by Future Claimants would have no direct effect on whether or not the Workers would have to share Trust funds with the Future Claimants.").

352. *See id.* at 282 ("We agree that the Plan has been implemented to such a degree that it would be impossible to grant relief . . . without effecting the kind of substantial and detrimental change that the mootness doctrine disallows. An alteration of the Plan's provisions for recovery by future claimants and the bar of suits by future claimants against New UNR would undermine the economic foundation upon which numerous innocent third parties relied in purchasing stock and transacting business with New UNR.").

353. *See* UNARCO Bloomington Factory Workers v. UNR Indus., Inc., 165 B.R. 198, 203 (N.D. Ill. 1993).

354. *See In re* UNR Indus., Inc., 20 F.3d 766, 771 (7th Cir. 1994) ("Thus although we do not share the district court's view that the case is moot, we approve its conclusion that the plan should not be disturbed.").

> Attaching labels such as "contingent" and "unmatured" and "disputed" to the interests of persons who will become sick in the future because of exposure to UNR's asbestos . . . does not put those interests beyond the power of the bankruptcy court. . . . We observed in an earlier appeal that making provision for future claimants would pose formidable logistical problems, but these have been overcome. We were concerned that the judicial effort might be a "quixotic undertaking far beyond the realistic boundaries of judicial competence." Things have turned out better than we feared in 1984. By 1992 we could declare the outcome a "notable success." So there is no absolute bar to the approach adopted in UNR's plan of reorganization.[355]

Negotiations

In addition to the question whether future claims could be included in the bankruptcy, the other big issue that had to be resolved in order to arrive at a consensual plan was how the value of the company should be allocated among the competing constituencies. UNR had aggregate assets of approximately $200 million[356] and over $100 million in non–asbestos-disease debt.[357] The face amount of the asbestos claims that were pending against the company in February 1989 was over $38 billion.[358] Given the overwhelming size of the asserted asbestos liability in relation to the value of the company, a major issue in the bankruptcy was who would control the reorganized company. To resolve this issue, at least three subsidiary questions had to be settled:

1. How much, if anything, would existing shareholders retain in relation to all creditors?
2. Among the creditors, how much would the trade creditors receive in relation to all asbestos disease claimants?
3. Among the asbestos disease claimants, how much would future claimants receive in relation to the present claimants?

These questions were eventually resolved by means of protracted negotiations among the debtor, the two official committees, and the legal rep-

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355. *Id.* at 770–71.

356. *See In re* UNR Indus., Inc., 42 B.R. 94, 95 (Bankr. N.D. Ill. 1984).

357. *See In re* UNR Indus., Inc. 1996 Bankr. LEXIS 1455 at *4 (Bankr. N.D. Ill. Aug. 13, 1996) (observing that the estimated value of unsecured trade claims was $112 million).

358. *See* 1989 Mealey's Litig. Rep.—Asbestos 9 (Mealey Publications, Inc. Mar. 24, 1989).

resentative, assisted by a court-authorized actuarial study of the value of present and future asbestos claims.

The negotiations got off to a slow start. In fact, Judge Toles eventually became so dissatisfied with the lack of progress in the case that on March 6, 1986—more than three and a half years into the bankruptcy—he imposed a moratorium on the interim award of fees and expenses to bankruptcy counsel and other professionals whom he deemed responsible for the lack of progress.[359] Even with the moratorium, it took three more years for the plan that was eventually confirmed to be filed.

Shortly after the imposition of the fee moratorium, in June 1986, the debtor filed its first plan of reorganization.[360] That plan called for the current shareholders to retain a third of the ownership of the reorganized corporation, and the remaining two-thirds of the stock to be allocated to a single class comprising both trade creditors and present and future asbestos claimants.[361] The plan failed to win the support of either of the official committees or the future claims representative.[362]

Thereafter, negotiations seemed to stall completely, and the various groups hardened in their views concerning the percentage of ownership that the current shareholders should retain.[363] All during this period, the debtor retained the exclusive right to file a plan, and it probably used this right and the resulting delay as leverage in the negotiations.

In April 1987 the bankruptcy judge granted UNR's motion to extend exclusivity yet again, over the vigorous objections of both committees and the legal representative.[364] The court explained its decision by noting that competing plans might lead to a total breakdown of negotiations and

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359. *See In re* UNR Indus., Inc., 72 B.R. 796, 798 (Bankr. N.D. Ill. 1987) (referring to earlier imposition of fee and expense moratorium). In April 1987, Judge Coar denied the debtor's motion to lift the fee moratorium but granted the motion with respect to the interim reimbursement of expenses. *Id.* at 801.

360. *See* 1986 Mealey's Litig. Rep.—Asbestos 4505 (Mealey Publications, Inc. June 27, 1986); *id.* at 4592 (text of plan).

361. *See id.* at 4505.

362. *See id.*

363. *See In re* UNR Indus., Inc., 72 B.R. 789, 792 (Bankr. N.D. Ill. 1987) ("[T]he underlying dispute is really over what percentage of equity UNR's shareholders are going to retain in the post-confirmation UNR. . . . The parties have staked out their positions and have refused to move.").

364. *See id*. at 790.

result in even more time-consuming litigation.[365] Judge Coar also declined to become personally involved in the negotiations, fearing the "appearance of a relationship which might compromise his judicial objectivity."[366] Instead, he appointed an examiner to act much like a special settlement master, monitoring the negotiations and reporting on whether negotiations had reached an impasse. The examiner was also authorized "to mediate any differences that exist."[367]

Some of the delay during the period from 1986 to 1989 appears to have been attributable to the debtor's efforts to minimize its liabilities and maximize its assets. In the summer of 1986, UNR sought to minimize its asbestos liabilities by filing objections against twenty claimants, all former naval shipyard workers, based on the government contractor defense. The district court withdrew the objections from the bankruptcy court and subsequently transferred UNR's motion for summary judgment against one of the claimants, which UNR pursued as a test case, to the U.S. District Court for the Eastern District of Pennsylvania—the district in which the claim arose.[368] There is no record of any further proceedings in the case.

Meanwhile, the debtor's attempt to maximize its assets led to two complex pieces of litigation. UNR sued its liability insurers to establish their duty to provide coverage for at least some of its asbestos liability,[369] and it sued the U.S. government for damages and indemnification with respect to claims arising from public and private shipyards.[370] Delay in resolving these issues, as well as the issue of the status in the bankruptcy of future asbestos claims—all of which UNR wanted resolved before it

365. *See id.* at 792–93 (noting that if confirmation occurred by cramdown, rather than by a consensual plan, then "those legal issues which have a bearing on UNR's solvency . . . would have to be resolved . . . [and] . . . it could take a decade to resolve these matters.").

366. *Id.* at 793.

367. *Id.* at 795–96.

368. *See In re* UNR. Indus., Inc., 74 B.R. 146 (N.D. Ill. 1987).

369. *See* UNR Indus., Inc. v. Continental Cas. Co., 942 F.2d 1101 (7th Cir. 1991) (noting that UNR had settled with nine of its carriers for $70 million and reversing the dismissal of another insurer, Continental Casualty).

370. *See In re* UNR Indus., Inc., 72 B.R. at 792.

engaged in serious negotiations[371]—bogged down the negotiation process.

In the end, the most difficult questions of the bankruptcy—whether future claims would be discharged, how much the asbestos claims were worth, and what percentage of ownership existing equity would retain—were all resolved by the parties themselves through negotiation, rather than by decision of the court. Concerning the value of the asbestos claims, the asbestos-related plaintiffs' committee had unsuccessfully sought to have the value of the present claims determined by means of individual trials in the district court.[372] The committee argued that the statutory provision mandating district court trials of personal injury tort and wrongful death claims set forth the estimation method for such claims.[373] It made no sense for the bankruptcy court to estimate the asbestos claims for any purpose, the committee argued, because bankruptcy court estimation by means of trials would be inefficient (since such trials would later have to be duplicated in the district court for purposes of distribution)[374] and bankruptcy court estimation by any other means might result in an undervaluation of the fund devoted to such claims.[375] The district court rejected these arguments, concluding that 17,000 trials were not necessary to obtain an accurate picture of the extent of the debtor's asbestos liability and stating that it had "utmost confidence in the bankruptcy court's ability to accurately estimate the asbestos claims."[376]

No such estimation process was ever undertaken by the bankruptcy court, however.[377] Instead, the parties arrived at a value for present and

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371. *See id.* at 791 ("UNR . . . insists that it has not engaged in dilatory conduct with respect to negotiations . . . [but that] [t]here are several uncertainties that the debtors argue should be resolved before they should be deprived of the exclusive right to file a plan.").

372. *See In re* UNR Indus., Inc., 45 B.R. 322 (N.D. Ill. 1984).

373. *See id.* at 326 ("[T]he Committee concludes that the trials mandated by [28 U.S.C.] § 157(b)(5) must have been meant to serve as the estimation method for those claims and therefore those trials should begin immediately.").

374. *See id.* at 326.

375. *See id.* at 327.

376. *Id.*

377. Nor was a formal valuation of the debtor ever performed. In 1983 the trade creditors' committee filed an application with the bankruptcy court seeking authority to retain an expert to conduct an appraisal of the debtor's assets on both a liquidation and going-concern basis. The court denied the application in order to keep down costs and

future asbestos claims through negotiation and with reliance on an actuarial study that the bankruptcy court had authorized.[378] The so-called Towers study, using a methodology that is not revealed by available sources, concluded that UNR's total asbestos liability through the year 2050, when the last member of the population at risk was expected to die, ranged from $560 million to $875 million.[379] The parties in the end used the median value of this range, which they reduced to present value, arriving at a value of present and future asbestos claims of $254 million.[380] That value was then compared with the estimated $112 million value of unsecured trade claims[381] to produce a ratio of 2.27 to 1, which the plan used in allocating ownership of the reorganized corporation between the two groups of unsecured creditors.[382]

Plan and Confirmation

UNR filed its Consolidated Plan of Reorganization with the bankruptcy court on March 14, 1989, more than six and a half years after it commenced the bankruptcy proceedings.[383] The plan gained the support of the two official committees and the legal representative for future asbestos claimants.[384] Under the plan, the existing shareholders, who were

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because (1) the committee had not informally requested such information from the debtor and (2) the motion was premature so long as the debtor retained exclusivity. *See In re* UNR Indus., Inc., 42 B.R. 99, 100–01 (Bankr. N.D. Ill. 1984). The importance of the issue was eventually diminished by the fact that the reorganization plan, which transferred controlling ownership of the corporation to the asbestos claimants, was confirmed consensually. *See infra* text accompanying notes 390–91.

378. *See In re* UNR Indus., Inc., 1996 Bankr. LEXIS 1455 at *11 (Bankr. N.D. Ill. Aug. 13, 1996) (quoting disclosure statement explanation of how the value of asbestos claims was arrived at).

379. *See* 1989 Mealey's Litig. Rep.—Asbestos 9 (Mealey Publications, Inc. Mar. 24, 1989).

380. *See* UNR Indus., Inc. v. Continental Cas. Co., 942 F.2d 1101, 1104 (7th Cir. 1991) ("UNR's bankruptcy resulted in a judgment or settlement (which one does not matter) against UNR in the amount of $254 million on asbestos claims.").

381. *See In re* UNR Indus., Inc., 1996 Bankr. LEXIS 1455 at *4.

382. *See id.* at *11.

383. *See* 1989 Mealey's Litig. Rep.—Asbestos at 9 (Mar. 24, 1989).

384. *See* 1989 Mealey's Litig. Rep.—Asbestos 46 (Mealey Publications, Inc. May 12, 1989).

primarily the managers of the corporation,[385] were to receive 8% of the stock of the reorganized corporation.[386] The remaining 92% of the stock was to be divided between the trade creditors and the asbestos claimants pursuant to the ratio described above. Thus, trade creditors were to receive approximately 29% of the stock, and the asbestos claimants (present and future) were to receive 63%.[387] Allocation of the asbestos claimants' share between present and future claimants was not specified in the plan; instead, the issue was left to be negotiated by the asbestos claimants' committee and the legal representative, subject to court approval.[388]

Following approval of the debtor's disclosure statement, the plan and disclosure statement were sent to all creditors and shareholders for voting. Over 96% of the asbestos claimants, 93% of trade and other creditors, and 99% of shareholders voted to accept the plan.[389] A confirmation hearing was held on May 31, 1989, before Judge Coar.[390] The next day he entered an order confirming the reorganization plan; the order took effect on June 2, 1989.[391] It was implemented on March 2, 1990.[392]

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385. *See* 1986 Mealey's Litig. Rep.—Asbestos 4505 (Mealey Publications, Inc. June 27, 1986).

386. *See In re* UNR Indus., Inc., 1996 Bankr. LEXIS 1455 at *3.

387. Mathematically, the division of stock between the two groups of unsecured creditors actually works out to be a 28% share to trade creditors and a 64% share to asbestos claimants. All sources, however, refer to the shares as being 29% and 63%, respectively. *See, e.g., id.* at *11 (quoting disclosure statement as stating that the amount of stock allocated to asbestos claimants would constitute 63% of the reorganized debtor's stock). Accordingly, those figures are used throughout this discussion.

388. *See* 1989 Mealey's Litig. Rep.—Asbestos E-4 (Mealey Publications, Inc. Mar. 24, 1989) ("The methods of distribution and allowance of Asbestos-Disease Claims shall be determined by agreement between the Plaintiffs' Committee and the Legal Representative, subject to Court approval, after Notice and a Hearing.") (UNR Reorganization Plan Art. III).

389. *See* 1989 Mealey's Litig. Rep.—Asbestos 46 (Mealey Publications, Inc. May 12, 1989). Available sources do not reveal how the asbestos claims were valued for confirmation purposes. Because no procedure for liquidating individual claims was used prior to confirmation, it appears that the bankruptcy court either valued all asbestos claims equally in determining whether the class had voted to accept the plan (as has been done in other asbestos bankruptcies), or valued the asbestos claims at their face amounts.

390. *See id.*

391. *See In re* UNR Indus., Inc., 143 B.R. 506, 514 (Bankr. N.D. Ill. 1992).

392. *See In re* UNR Indus., Inc., 20 F.3d 766, 768 (7th Cir. 1994).

Operation of the Trust

The plan provided for the creation of a trust to assume and resolve the debtor's asbestos health claims. The bankruptcy court initially approved the terms of the trust in May 1989, just prior to confirmation of the plan.[393] Five persons were selected as trustees, including James McMonagle, who later was appointed as the future claims representative in the Eagle-Picher bankruptcy.[394] The trustees were concerned about some of the initial terms of the trust, and so they proposed changes to the trust documents, which the bankruptcy court approved in February 1990.[395] At the same time, the court also approved the trust's claims resolution procedures and entered an order requiring claimants to follow those procedures for seeking payment from the trust before bringing any lawsuits to liquidate their claims.[396]

The trust procedures gave claimants three options for liquidating their asbestos health claims. Option 1 provided for an immediate payment of a flat sum and no individual valuation of claims.[397] Options 2 and 3 both required claim valuation. Under Option 2, the claimant received an immediate partial payment, and additional payments were to be made over time. The only available information about Option 3 states that it provided for valuation and then "a deferred claim."[398]

Full payment of the asbestos claims was never anticipated. Instead, in an effort to maintain sufficient funds to pay all future claims, the trustees had to determine the appropriate percentage of claims to be paid, which could be adjusted over time. In 1995 the payment percentage fixed by the trust was 17.2.[399] Thus, claimants not choosing the flat payment option

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393. *See* UNARCO Bloomington Factory Workers v. UNR Indus., Inc., 124 B.R. 268, 272 (N.D. Ill. 1990).

394. *See* 1989 Mealey's Litig. Rep.—Asbestos 12 (Mealey Publications, Inc. May 26, 1989). The other initial trustees were James H. Leari, Jr., managing director of First Boston Corp.; Michael E. Levine, dean of the Yale University School of Organization and Management; Charles W. Murdock, professor at Loyola University Law School; and David S. Shrager, former president of the Association of Trial Lawyers of America. *Id.*

395. *See UNARCO Bloomington Factory Workers*, 124 B.R. at 272.

396. *See id.*

397. *See* UNARCO Bloomington Factory Workers v. UNR Indus., Inc., 165 B.R. 198, 200 (N.D. Ill. 1993).

398. *Id.*

399. *See* 1995 Mealey's Litig. Rep.—Asbestos 21 (Mealey Publications, Inc. Sept. 22, 1995).

were paid the liquidated amount of their claims (determined by the trust administrators on the basis of a variety of factors) multiplied by the payment percentage.[400] The trust did not start making payments until late 1991. By April 1993 it had paid out more than $31 million in satisfaction of 75,000 of the 163,000 claims that had then been filed.[401] All of these claimants selected Option 1,[402] meaning that they each received approximately $400. By the end of 1997, the trust had received and processed over 275,000 claims. By that time, valid claims were being processed and paid within ninety days of receipt.[403] In the published sources that I was able to consult, no information could be found on the total amount of payments made or the extent to which Options 2 and 3 were used.

In an effort to reduce administrative costs, the trustees voted in 1996 to explore the possibility of establishing a joint claims-processing facility with Eagle-Picher Industries and Celotex Corporation, which were both about to emerge from bankruptcy and to activate trusts for the payment of asbestos claims.[404] Such a joint facility with Eagle-Picher was created in February 1998.

Party Structure

The reorganization proceedings were initiated by UNR Industries, Inc. and ten of its subsidiaries and affiliates. Three of those affiliates were not parties to the confirmed reorganization plan.[405] The U.S. trustee appointed two official committees: one to represent the trade creditors and the other to represent asbestos-related plaintiffs.[406] The bankruptcy court initially envisioned a broader, more active role for the trade creditors'

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400. *See id.*

401. *See UNARCO Bloomington Factory Workers*, 165 B.R. at 200.

402. *See id.*

403. *See In re* UNR Indus., Inc., 1997 WL 759587 at *2 (Bankr. N.D. Ill. 1997).

404. *See id.* at *3.

405. The three companies that filed a Chapter 11 petition along with the others but were not included in the confirmed plan were Dart, Inc., National Plastics, Inc., and Leavitt Structural Tubing Co. The record is silent on what happened to the first two, but it is clear that Leavitt filed a separate plan of reorganization, which was confirmed in 1985. *See* Unsecured Creditors Comm. v. Leavitt Structural Tubing Co., 55 B.R. 710 (N.D. Ill. 1985).

406. The trade creditors' committee was appointed on August 2, 1982, and the asbestos-related plaintiffs' committee was appointed on September 15, 1982. *See In re* UNR Indus., Inc., 30 B.R. 613, 614 (Bankr. N.D. Ill. 1983).

committee than for the asbestos plaintiffs' committee,[407] but it appears that the latter committee, which was composed of seven asbestos plaintiffs' attorneys,[408] did not confine itself to a limited role. In the third year of the bankruptcy, a legal representative for future asbestos claimants, Kevin M. Forde, was appointed.[409] The other active parties in interest were the shareholders. On at least two separate occasions, the bankruptcy court appointed an examiner in the case. The first time was in 1982, shortly after the case was commenced,[410] and the second time was in April 1987, when William L. Norton, Jr., was appointed for the purpose of monitoring the negotiations.[411]

Attorneys

UNR was represented in the bankruptcy by Malcolm Gaynor and Richard Bendix, of Schwartz, Cooper, Kolb & Gaynor. Counsel for the Official Creditors' Committee of Asbestos-Related Plaintiffs were J. William Cuncannon and Sarah Stegemoeller, of DeFrees & Fiske. The Official Committee of Unsecured Creditors was represented by several firms in succession during the bankruptcy, including Nachman, Munitz & Sweig; Winston & Strawn; and Ross & Hardies. Kevin M. Forde, the court-appointed Legal Representative for Unknown Putative Asbestos-Related Claimants, served as his own counsel and on occasion was represented by Mary Anne Mason.

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407. *See id.* at 619 ("[T]he role this Court envisioned for said Committee was in the area of devising fair and equitable means for paying asbestos claimants. . . . [T]he role of the Plaintiffs' Committee is limited and sharply defined unlike the pervasive role of the Trade Creditors' Committee . . . .").

408. Members of the asbestos plaintiffs' committee were Robert G. Steinberg, Robert E. Sweeney, Paul T. Gillenwalter, Thomas W. Henderson, Gene Locks, Gordon A. Stemple, and Rex Houston. *Id.* at 614.

409. *See In re* UNR Indus., Inc., 46 B.R. 671, 676 (Bankr. N.D. Ill. 1985).

410. *See In re* UNR Indus., Inc., 29 B.R. 741, 744 n.2 (N.D. Ill. 1983) ("[O]n December 13, 1982, pursuant to order of the Bankruptcy Court, the United States Trustee appointed an examiner in these cases to ascertain the need for a study of the debtors' potential liability in all of their pending and future asbestos litigation.").

411. *See In re* UNR Indus., Inc., 212 B.R. 295, 298 (Bankr. N.D. Ill. 1997); *In re* UNR Indus., Inc., 72 B.R. 789, 794 (Bankr. N.D. Ill. 1987) ("[T]his Court, on its own motion, shall appoint an examiner whose primary task will be to monitor the status of negotiations conducted among the parties.").

Terms of the Reorganization Plan

The UNR reorganization plan,[412] which was confirmed on June 2, 1989, effectuated the substantive consolidation of the Chapter 11 cases of eight of the affiliated UNR companies into a single case in which the assets and liabilities of the companies were merged and dealt with as a whole. It divided the claims and interests into six classes, three of which were declared to be unimpaired. The unimpaired classes, which were paid in full, were those designated for priority claims (Class 1), workers' compensation claims (Class 2), and secured claims (Class 3).[413] The impaired classes consisted of Class 4, which was defined as unsecured trade claims and other unsecured claims not falling in any other class; Class 5, which were the asbestos disease claims; and Class 6, the equity security holders.[414]

The plan provided that stock in the reorganized UNR Industries, Inc. (New UNR) would be distributed to the impaired classes in satisfaction of the claims and interests included therein. Under the plan, Class 6, the existing shareholders, received 8% of the shares of the common stock of New UNR (or 3,687,378 shares), plus warrants entitling them to purchase shares of stock from New UNR at a set price (fixed slightly above the preconfirmation market price)[415] for a period of six years from the time that the shares distributed to creditors could be sold.[416] Class 4, the trade and other unsecured creditors, initially received 12,967,843 shares of New UNR stock (approximately 29% of the reorganized company's common stock),[417] leaving 29,437,004 shares (a controlling interest of approximately 63% of New UNR's stock) for the trust established to pay asbestos disease claims.[418] The stock initially issued to satisfy the Class 5 asbestos disease claims had a market value of $150 million.[419] While it

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412. UNR's plan of reorganization is reprinted in 1989 Mealey's Litig. Rep.—Asbestos E-1 to E-9 (Mealey Publications, Inc. Mar. 24, 1989).

413. *See id.* at E-3.

414. *See id.* at E-3 to E-4.

415. *See* UNARCO Bloomington Factory Workers v. UNR Indus., Inc., 124 B.R. 268, 271 (N.D. Ill. 1990).

416. *See* Mar. 24, 1989 Mealey's at E-4 (describing treatment of Class 6 interests); *id.* at E-2 (defining "Shareholder Stock").

417. *See id.* at E-6.

418. *See id.* at E-7.

419. *See* UNR Indus., Inc. v. Continental Cas. Co., 942 F.2d 1101, 1105 (7th Cir. 1991).

was understood that the stock would not be sufficient to pay the asbestos claims (which had been valued at $254 million) in full,[420] as the court of appeals later pointed out, "one of the basic points of the bankruptcy reorganization was to ensure that the asbestos victims would receive majority control of UNR."[421]

Because unliquidated asbestos property claims were included in Class 4 along with the trade claims, the total value of the Class 4 claims remained uncertain at the time of confirmation. To retain the agreed upon 2.27-to-1 ratio of asbestos disease claims to unsecured trade claims, a reallocation provision was included in the confirmed plan.[422] Once the aggregate value of the Class 4 claims was determined (i.e., the value of the asbestos property claims was decided), this provision required the asbestos disease trust to convey to the disbursing agent for Class 4 a sufficient number of shares of stock to restore the 2.27-to-1 balance. Pursuant to this provision, the trustees of the asbestos claims trust eventually conveyed 88,953 shares plus $642,363 in dividends to Class 4.[423]

Along with the confirmation order, the bankruptcy court entered an injunction prohibiting all entities from seeking payment of asbestos claims from the affiliated UNR companies, New UNR, and insurance companies that had settled with the debtor.[424] This injunction effectively channeled all present and future asbestos disease claims to the asbestos claims trust established by the plan. The confirmed plan did not include the terms of the trust or the claims resolution procedures. Instead it provided that "[t]he methods of distribution and allowance of Asbestos-Disease Claims shall be determined by agreement between the Plaintiffs' Committee and the Legal Representative, subject to Court approval, After Notice and a Hearing."[425] It did provide, however, that punitive dam-

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420. *See id.* ("UNR paid the Trust only a portion of the asbestos victims' actual damages in the bankruptcy proceedings.").

421. *Id.* at 1108–09.

422. *See* Mar. 24, 1989 Mealey's at E-7 (requiring reallocation of stock between Classes 5 and 4); *id.* at E-3 (prescribing reallocation formula).

423. *See In re* UNR Indus., Inc., 212 B.R. 295, 301, 306 (Bankr. N.D. Ill. 1997).

424. *See In re* UNR Indus., Inc., 143 B.R. 506, 514 (Bankr. N.D. Ill. 1992) (quoting injunction order).

425. Mar. 24, 1989 Mealey's at E-4.

ages would not be allowable. In February 1990, the court approved the trust's claims resolution procedures.[426]

The plan provided that upon its confirmation, the assets of each of the debtors' bankruptcy estates would revest in the respective debtors free and clear of all liens, claims of creditors, and asbestos claims (present and future), except as otherwise provided in the plan.[427] It further provided that New UNR would initially have a board of directors composed of three members appointed by the bankruptcy court after receipt of recommendations by the legal representative for future claimants, three members named by the asbestos plaintiffs' committee, three members named by the trade creditors' committee, and two members specifically designated by the plan: William S. Leavitt and Dwight Rohn (representing the existing UNR shareholders).[428]

Negotiation History

As discussed earlier, negotiations over the terms of a reorganization plan proceeded slowly, as novel legal issues first had to be confronted and resolved. Among the issues that required resolution before the various groups could realistically engage in negotiations were the status of future asbestos claimants in the bankruptcy, the extent of UNR's insurance coverage, and the extent of the debtor's asbestos liability. Even Judge Toles's imposition of an interim fee moratorium did not immediately produce agreement on the terms of a plan.

UNR chose to leave to the unsecured creditors' and asbestos plaintiffs' committees and the legal representative of future claimants the task of negotiating among themselves how to divide up any equity in the reorganized company that would not be retained by existing shareholders.[429] With the assistance of examiner William Norton, the two committees and the legal representative were eventually able to come to an agreement on a 2.27-to-1 split of the stock between all asbestos disease

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426. *See* 1993 Mealey's Litig. Rep.—Asbestos B-1 (Mealey Publications, Inc. May 21, 1993) (reprinting memorandum opinion of bankruptcy court in *In re* UNR Indus., Inc., dated Apr. 4, 1993).

427. *See* Mar. 24, 1989 Mealey's at E-4.

428. *See id.* at E-6.

429. *See In re* UNR Indus., Inc., 212 B.R. 295, 298 (Bankr. N.D. Ill. 1997) (describing negotiation history).

claimants and the unsecured trade creditors.[430] As previously explained, this ratio was based on an agreed-upon estimate of the present value of total asbestos disease liability of $254 million in relation to the $112 million of unsecured trade claims. Once those groups were able to agree on their respective shares, the debtor then negotiated with them over the division of the total equity between unsecured creditors and existing shareholders. An agreement was eventually reached that permitted the shareholders to receive 8% of the shares of the reorganized UNR, thus leaving 92% for unsecured creditors. This agreement meant that the asbestos claimants would receive 63% of the total shares, thus giving them control of the reorganized company.

When the 2.27-to-1 ratio was agreed to, the parties did not expect there to be any asbestos property claims remaining to be dealt with by the plan.[431] By September 1987, however, it had become clear that there were some potentially substantial claims against the debtor for damages resulting from the need to remove asbestos from buildings. Under the classification scheme in the then-existing draft plan, the asbestos property claims fell within Class 4, as unsecured claims not included in any other class. The two committees and the legal representative agreed that, despite the inclusion of these claims in Class 4, the burden of satisfying these claims should fall on Class 4 and Class 5 together pursuant to the same 1-to-2.27 ratio.[432] Thereafter, however, it became apparent that it would not be possible to determine the total amount of the asbestos property claims prior to plan confirmation. Accordingly, a new provision was inserted in the plan that provided for a reallocation of stock from Class 5 to Class 4 once the total value of the property claims was determined; this redistribution would allow the agreed upon ratio for the stock division between trade claims and asbestos disease claims to be maintained.[433]

The debtor filed its reorganization plan with the bankruptcy court in March 1989.[434] It did so without having formal agreement for the plan

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430. *See id.*

431. *See id.*

432. *See id.*

433. *See id.* at 298–99.

434. *See* 1989 Mealey's Litig. Rep.—Asbestos 9 (Mealey Publications, Inc. Mar. 24, 1989).

from the asbestos plaintiffs' committee,[435] although the committee had been a party to the agreements providing the basis for the plan. In the end, all impaired classes voted overwhelmingly to accept the plan, and it was confirmed by the court on June 2, 1989.[436]

Handling of Future Claims

As previously discussed, the status of future claims in UNR's bankruptcy was a major issue confronting the courts and parties at the outset of the proceedings. Eventually, the bankruptcy court ordered the appointment of a Legal Representative for Unknown Putative Asbestos-Related Claimants.[437] The debtor thereafter succeeded in getting the negotiating parties to agree to the inclusion of future claimants in the plan. The plan defined "asbestos-disease claims" as "[a]ll alleged liabilities or obligations . . . for death, personal injury, personal damages or punitive damages . . . arising out of exposure to asbestos, and arising from acts or omissions by one or more of the Debtors . . . prior to the Effective Date, regardless of when the sickness, injury or disease which gives rise to such liability or obligation, becomes or will become manifest . . . ."[438] Such claims, including the future ones, were discharged in the bankruptcy and were relegated to the asbestos disease trust for payment. All voting classes approved the plan, and the Seventh Circuit, in a later reference to the inclusion of future claims, said that there was "no absolute bar to the approach adopted in UNR's plan of reorganization."[439]

The plan did not make any allocation of stock between present and future claims.[440] Instead, the terms of payment were ultimately addressed in the trust's claim resolution procedures, which the bankruptcy court approved.[441] Under these procedures, present and future asbestos disease

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435. *See In re* UNR Indus., Inc., 212 B.R. at 299.

436. *See id.* at 297.

437. *See In re* UNR Indus., Inc., 46 B.R. 671, 676 (Bankr. N.D. Ill. 1985).

438. Mar. 24, 1989 Mealey's at E-1.

439. *In re* UNR Indus., Inc., 20 F.3d 766, 771 (7th Cir. 1994).

440. *See* Mar. 24, 1989 Mealey's at E-4 ("The methods of distribution and allowance of Asbestos-Disease Claims shall be determined by agreement between the Plaintiffs' Committee and the Legal Representative, subject to Court approval, After Notice and Hearing.").

441. *See* UNARCO Bloomington Factory Workers v. UNR Indus., Inc., 124 B.R. 268, 272 (N.D. Ill. 1990) ("It was not until February 22, 1990, that the bankruptcy court en-

claims were treated alike. Payment could be sought from the trust by all claimants, regardless of whether they had filed a proof of claim in the bankruptcy.[442] To ensure the retention of sufficient assets to pay claims in the future, the trustees had to determine an appropriate percentage of each claim's liquidated amount that would be paid out.[443]

Notice Procedure and Content

None of the available court opinions in the *UNR* case discusses any widespread effort, as seen in other mass tort bankruptcies, to provide notice to potential asbestos claimants of the pendency of the company's bankruptcy or of the need to file a proof of claim by a certain date. As previously discussed, it appears that no bar date for asbestos claimants was ever imposed in this case,[444] although one source states that only the asbestos claimants who filed proofs of claim in the bankruptcy proceedings were permitted to vote on the UNR plan.[445] Unfortunately, the record does not indicate how those asbestos claimants who did file proofs of claim were initially informed of the bankruptcy.

Prior to plan confirmation, the court sent a copy of UNR's reorganization plan and an approved disclosure statement, along with a ballot, to all creditors eligible to vote on the plan. Over 96% of an undisclosed number of the voting asbestos claimants, representing asserted claims

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tered two orders, one approving the Trust Agreement and Claims Resolution Procedures . . . .").

442. *See* Mar. 24, 1989 Mealey's at 10.

443. *See* UNARCO Bloomington Factory Workers v. UNR Indus., Inc., 124 B.R. 268, 271–72 (N.D. Ill. 1990) ("[O]nce an existing claim is liquidated and the Trustees determine the amount to be awarded, they must hold back a portion of the award to ensure that all present and future claimants receive a similar percentage of their claims."); 1995 Mealey's Litig. Rep.—Asbestos 21 (Mealey Publications, Inc. Sept. 22, 1995) (stating that the then-current payout rate by the trust was 17.2%).

444. *See In re* UNR Indus., Inc., 71 B.R. 467, 476 n.21 (Bankr. N.D. Ill. 1987) ("*Had* a bar date for the filing of claims been set in these proceedings, UNR could have then filed a claim on behalf of Mr. Anderson and Mr. Alban . . . .") (emphasis added); *see also* 11 U.S.C. § 501(c) (permitting debtor to file a proof of claim on behalf of a creditor who "does not timely file a proof of such creditor's claim"). Of course if no bar date was ever imposed, no proof of claim would be untimely.

445. *See* Mar. 24, 1989 Mealey's at 10.

against UNR in the face amount of over $11 billion, voted to accept the plan.[446]

Approval and Review Process

The available opinions in the *UNR* bankruptcy case reveal few details about the proceedings leading up to the confirmation of the debtor's plan of reorganization. What is known is that the bankruptcy court approved the debtor's disclosure statement on March 22, 1989, over the objections of a group of former employees of UNR's Bloomington plant.[447] Whether objections were raised by other creditors is unknown. The Bloomington employees contended that the disclosure statement failed to provide adequate information, because it did not make clear whether they, as former employees with asbestos-related disease, had claims falling within Class 2 (workers' compensation claims) or Class 5 (asbestos disease claims). The bankruptcy court overruled the objections without deciding the classification issue the workers raised.[448]

Following approval of the disclosure statement, the plan was sent out for voting. As previously noted, it was approved by overwhelming majorities of the three voting classes (each class's votes in favor of the plan represented more than 90% of the claims of those voting).[449]

The Bloomington workers, whose lawyer had voted against the plan on their behalf, then objected to confirmation of the plan on grounds similar to those they raised in objecting to the disclosure statement, as well as others.[450] The bankruptcy court conducted a confirmation hearing on May 31, 1989.[451] The next day it entered an order confirming the plan, which took effect on June 2, 1989.[452]

After unsuccessfully seeking a stay of the confirmation order, the Bloomington workers appealed it. Although their original goal was to overturn the confirmation in its entirety and to have the case converted

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446. *See* 1989 Mealey's Litig. Rep.—Asbestos 46 (Mealey Publications, Inc. May 12, 1989).

447. *See In re* UNR Indus., Inc., 143 B.R. 506, 514 (Bankr. N.D. Ill. 1992).

448. *See id.*

449. *See* 1989 Mealey's Litig. Rep.—Asbestos 46 (Mealey Publications, Inc. May 12, 1989).

450. *See In re* UNR Indus., Inc., 143 B.R. at 514.

451. *See* May 12, 1989 Mealey's at 46.

452. *See In re* UNR Indus., Inc., 143 B.R. at 514.

to Chapter 7, by the time their appeal was heard by the district court, reorganization pursuant to the terms of the plan was too far along for a liquidation to be considered.[453] Accordingly, they argued more narrowly for a determination that future claimants should not be permitted to share distributions with present asbestos claimants and that all of the insurance proceeds meant for tort victims should be turned over to the asbestos claims trust, rather than going to the reorganized debtor for working capital. In addition, the workers pursued their argument that the classification of their claims under the plan was ambiguous.[454]

The district court held that the Bloomington workers' first two arguments were moot, as the plan was too far implemented to permit the granting of relief sought by the workers on these grounds.[455] The court did remand the case to the bankruptcy court for a determination of how these workers' claims were classified under the plan, however.[456] Upon remand, the bankruptcy court held that some of the workers had claims falling within both classes.[457] Apart from that limited success, the Bloomington workers were not able to overturn the confirmation of the plan, the injunction order, or the trust's claims resolution procedures.

Attorneys' Fees

The materials available to me do not provide a complete accounting of the attorneys' fees and expenses that were paid in the course of the *UNR* bankruptcy proceedings. They do, however, provide a glimpse of the fees and expenses that were awarded at various stages of the proceedings and the degree of control that the court exerted over such awards.

By June 1984—two years into the reorganization proceedings—the bankruptcy court had already awarded approximately $5.7 million in fees and expenses, and applications for another $1.65 million in fees and expenses were pending.[458] By April 1987, the amount of fees and expenses that had been paid out had risen to $21.3 million.[459] Such figures

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453. *See* UNARCO Bloomington Factory Workers v. UNR Indus., Inc., 124 B.R. 268, 281 (N.D. Ill. 1990).

454. *See id.*

455. *See id.* at 282.

456. *See id.*

457. *See In re* UNR Indus., Inc., 143 B.R. at 527.

458. *See In re* UNR Indus., Inc., 42 B.R. 94, 96–97 (Bankr. N.D. Ill. 1984).

459. *See In re* UNR Indus., Inc., 72 B.R. 796, 799 (Bankr. N.D. Ill. 1987).

prompted Judge Coar to remark that "[a]ttorneys fees continue to mount to levels that can only be described as extraordinary."[460] Over the course of the proceedings, UNR's bankruptcy counsel received $3.2 million in fees.[461] In addition, unknown sums were paid to counsel and professionals for the two official committees and the future claims representative, and for the reimbursement of expenses for committee members and professionals.

The bankruptcy court actively regulated payment of fees. From the outset, Judge Toles applied a substantial holdback on the interim fee awards.[462] Then in March 1986, he became dissatisfied with the lack of progress in the case and imposed a moratorium on the interim award of fees and expenses until a plan was filed and confirmed. This moratorium was made applicable to all bankruptcy counsel and professionals "who were or should have been active in negotiating a plan of reorganization."[463] A year later, Judge Coar was asked to reconsider the imposition of the moratorium in light of the hardship it imposed. He decided to lift the moratorium with respect to the reimbursement of expenses, but he continued it with respect to the interim award of fees until such time as he became convinced that "significant progress" was being made in the case.[464] In explaining his decision to continue the moratorium on fees, Judge Coar noted that its imposition appeared to have "restored" some "direction" in the case, perhaps reducing the amount of "time and expense . . . spent on collateral matters."[465] He stated that he was not willing to risk losing that direction. There is no indication in the available sources when, if ever, the court lifted the interim fee moratorium.

After the plan was confirmed, the debtor's bankruptcy counsel—Schwartz, Cooper, Kolb & Gaynor—sought an upward adjustment of its $3.2 million fee award in recognition of the high quality of its representation. Seeking a 25% enhancement, the firm argued that it had proposed "a novel use of bankruptcy in a mass tort situation involving thousands of asbestos-related lawsuits" and that the bankruptcy court had

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460. *Id.* at 800.
461. *See In re* UNR Indus., Inc., 986 F.2d 207, 208 (7th Cir. 1993).
462. *See In re* UNR Indus., Inc., 30 B.R. 613, 618, 619 (Bankr. N.D. Ill. 1983).
463. *In re* UNR Indus., Inc., 72 B.R. at 798.
464. *Id.* at 801.
465. *Id.* at 799.

praised its efforts "as 'downright ingenious' at times."[466] The Seventh Circuit, although remarking on the "notable success of [the firm's] approach,"[467] agreed with the bankruptcy and district courts that the firm had already received fair and reasonable compensation, awarded at the lawyers' usual billing rates, and that enhancement was not warranted.[468]

Assessment

Because there are gaps in the account of the *UNR* bankruptcy provided in publicly available sources, one cannot fairly attempt a complete assessment of its success in resolving the mass tort claims facing the debtor. Nevertheless, enough is known about the bankruptcy and subsequent operation of the trust to allow one to make some basic judgments and to raise some questions about the bankruptcy's fairness and effectiveness as a mass tort resolution device.

With its unprecedented use of Chapter 11 proceedings to resolve mass tort liability, the *UNR* bankruptcy presented a number of novel issues that had to be resolved either by court decision or by agreement of the parties before a successful conclusion could be reached. Accordingly, it is not surprising that the case was not quickly concluded. Even so, the impact of the length of the bankruptcy on the tort claimants should not be overlooked. From 1982 until the conclusion of the case in 1989, the automatic stay and pending bankruptcy prevented asbestos claimants from receiving any compensation from UNR. Thereafter, they were required to follow the procedures for seeking payment from the trust, which did not commence payouts until late 1991. By 1993, approximately 75,000 claimants had been paid pursuant to the flat sum payment option. More than that number of claimants still awaited payment. Thus, some claimants who were already suffering from asbestos-related injury in 1982 were forced to wait more than a decade to receive any compensation from UNR, and the compensation they did receive was the modest sum of $400. Although the bankruptcy court, through its interim fee moratorium and the appointment of an examiner, engaged in efforts to move the case to a more rapid completion, those efforts appear to have had a limited impact.

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466. *In re* UNR Indus., Inc., 986 F.2d at 208.
467. *Id.*
468. *See id.* at 211.

Questions might especially be raised about how successful the resolution of the bankruptcy was from the point of view of those suffering from the most serious injuries. Because the courts' opinions do not reveal the number of claimants selecting Options 2 and 3 or the amount of the payments made pursuant to these provisions, firm conclusions cannot be expressed about the fairness and adequacy of the treatment of the serious-disease claims. What is known is that as of April 1993—almost eleven years after UNR filed for bankruptcy—no payments had been made pursuant to these options, and thus persons desiring to receive more than $400 for their injuries still remained uncompensated.

If a major effort was made to provide notice of the bankruptcy to present and potential tort claimants, as was done in the other mass tort bankruptcies studied, it is surprising that no reference is made to that fact in any of the numerous available *UNR* opinions. Without such an attempt to provide notice, the legitimacy of the voting process might be questioned. Although filing a proof of claim in the bankruptcy was not a requirement for receiving payment from the trust, it was a requirement for voting on the plan. Surely the clients of the seven asbestos attorneys serving on the asbestos plaintiffs' committee were made aware of the proceedings. It is unclear, however, how others, especially those claimants who were unrepresented at the time yet whose interests were to be affected by the plan, were informed about the bankruptcy and of the need to file a proof of claim in order to have a vote.

Another question that is raised but cannot be definitively resolved concerns the accuracy of the estimate of UNR's asbestos disease liability. The reorganization plan was structured around the $254 million negotiated valuation of the debtor's asbestos liability. Based on that estimate, a 2.27-to-1 division of stock between the asbestos claimants and the unsecured trade creditors was agreed to. It appears that the trade creditors ended up receiving approximately 59% of the value of their claims.[469] Although the payout to asbestos disease claimants is not clearly indicated by available sources, the information that is available suggests that the percentage paid was much lower. If that is true, then the estimate of the

469. The stock distributed to the asbestos claimants' trust had a market value of $150 million. *See* UNR Indus., Inc. v. Continental Cas. Co., 942 F.2d 1101, 1105 (7th Cir. 1991). This works out to a value of approximately $5.10 a share. The 12,967,843 shares distributed to the trade creditors therefore had a value of $66.1 million, an amount paid in satisfaction of claims totaling $112 million.

asbestos liability—and thus the resulting distribution of stock to the claimants' trust—must have been too low.

In the end, any assessment of the *UNR* bankruptcy must be tempered by the recognition that it was among the first of the mass tort bankruptcies. Thus, the lawyers and courts had to figure out as they went along how to fit the resolution of thousands of unliquidated tort claims into the structure of a bankruptcy reorganization. This was uncharted territory. Indeed, it is instructive to be reminded now—at a point that mass tort bankruptcies have become more commonplace, if not yet routine—of the due process and practical concerns that the use of bankruptcy as a mass tort resolution device raised at the outset of the case. Despite the concerns and the challenges, however, the parties were able to arrive at a consensual plan that gave the tort claimants a controlling interest in the reorganized company. In doing so, they blazed a path for other mass tort bankruptcies that were to follow. The real value in studying the *UNR* bankruptcy, therefore, may be in using it as a benchmark against which subsequent bankruptcies can be measured. The viability of bankruptcy as a vehicle for resolving mass torts may depend on the extent to which subsequent bankruptcies adequately address the original concerns that were expressed and make improvements in the efficiency and fairness of the resolution procedures.

In re A.H. Robins Company, Inc.

Hoping to capitalize on growing demand for a contraceptive alternative to the birth control pill in the early 1970s, the A.H. Robins Company, Inc., purchased and aggressively marketed an intrauterine device known as the Dalkon Shield.[470] Robins, a Fortune 500 company that was family controlled but publicly traded, was a pharmaceutical corporation based in Richmond, Virginia, with operations in 120 countries. Demand for the Dalkon Shield was high, and worldwide sales exceeded 4.5 million products in under four years, earning Robins handsome profits.

Health concerns regarding use of the Dalkon Shield began to emerge almost immediately, however: Doctors reported a host of serious problems, including pelvic inflammatory disease (sometimes leading to hysterectomy) and septic abortions (occasionally causing the mother's

470. In addition to the Dalkon Shield, Robins's product lines included Robitussin and Chapstick.

death).[471] The mounting injuries forced Robins to withdraw the Dalkon Shield from the United States market in 1974 and foreign markets in 1975. However, it was not until 1984 that the company made any realistic effort to recall Dalkon Shield devices already sold.[472] Robins's reaction came too late to forestall an avalanche of lawsuits, which forced the company to file for reorganization under Chapter 11 of the Bankruptcy Code in August 1985. Almost three years later, a reorganization plan was confirmed, under which Robins was sold and a trust was created that ultimately paid out over $2.76 billion to hundreds of thousands of Dalkon Shield victims.

Nature of Litigation and Litigation Maturity

The first Dalkon Shield case went to trial in 1974, and by the fall of 1975, Robins faced 286 complaints and anticipated a great many more. At the end of 1975, the federal Judicial Panel on Multidistrict Litigation (MDL) consolidated all federal Dalkon Shield cases for pretrial proceedings by transferring them to the U.S. District Court for the District of Kansas.[473] Discovery in the MDL cases continued through 1980 and was reopened on two occasions thereafter when the plaintiffs learned of documents that Robins had failed to produce.

Rejecting Robins's efforts to use the MDL procedure as a settlement vehicle,[474] the MDL panel remanded the cases to their respective federal district courts for trial following the completion of discovery. In the Northern District of California, Judge Spencer Williams took the then novel step of conditionally certifying a Federal Rule of Civil Procedure 23(b)(1)(B) nationwide class on the issue of punitive damages and a Rule 23(b)(3) statewide class on liability and compensatory damages,[475] but

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471. Other injuries reported to be caused by the Dalkon Shield included perforation of the uterus, ectopic pregnancy, and birth defects. *In re* A.H. Robins Co., 89 B.R. 555, 557 (E.D. Va. 1988); *In re* A.H. Robins Co., 63 B.R. 986, 987 (Bankr. E.D. Va. 1986).

472. In September 1980, Robins had sent a letter to doctors recommending removal of the Dalkon Shield. The Fourth Circuit later described this first recall effort as not realistic, however. *In re* A.H. Robins Co., 880 F.2d 709, 711 (4th Cir. 1989).

473. *See In re* A. H. Robins Co., 406 F. Supp. 540 (J.P.M.L. 1975). The MDL cases were assigned to Judge Frank Theis, of the District of Kansas.

474. *See In re* A.H. Robins Co. "Dalkon Shield" IUD Prods. Liab. Litig., 610 F. Supp. 1099 (J.P.M.L. 1985).

475. *See In re* Northern Dist. of Cal. "Dalkon Shield" Prods. Liab. Litig., 521 F. Supp. 1188 (N.D. Cal. 1981), 526 F. Supp. 887 (N.D. Cal. 1981).

the Ninth Circuit reversed both certifications.[476] The court of appeals held that the Rule 23(b)(1)(B) certification was unsupported by the record, because there had been no fact-finding concerning the extent of Robins's assets in relation to its tort exposure and because it was not inescapable that separate punitive damage awards would have a detrimental effect on other class members. The statewide class was not certifiable under Rule 23(b)(3), the court held, because it satisfied neither Rule 23(a)'s typicality requirement nor (b)(3)'s superiority requirement. The litigation in California and elsewhere therefore continued to proceed to resolution on a case-by-case basis.

In the early years Robins did quite well in the litigation. Subsequently, however, as damaging Robins documents came to light through discovery, the tide began to turn in the plaintiffs' favor. In 1979 a Colorado jury awarded one plaintiff $550,000 in compensatory damages and $6.2 million in punitive damages; in 1985 a Kansas jury awarded another plaintiff compensatory damages of $1.75 million and punitive damages of $7.5 million. Robins shifted to an aggressive settlement strategy in the early 1980s, and by 1985 the company was settling eight cases per day. New claims were being filed at twice that rate, however. By the summer of 1985, Robins and its insurer had paid out $530 million to dispose of 9,000 cases. The Dalkon Shield litigation had plainly reached a mature stage.

Despite the settlement effort, Robins still faced almost 6,000 pending claims.[477] Although the company remained solvent, it was facing mounting legal costs, declining employee morale, serious cash-flow problems, and imminent discovery of sensitive documents. On August 21, 1985, Robins filed its petition for Chapter 11 reorganization.

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476. *See* Abed v. A.H. Robins Co. (*In re* Northern Dist. of Cal., Dalkon Shield Prods. Liab. Litig.), 693 F.2d 847 (9th Cir. 1982).

477. The company also faced a securities class action alleging misrepresentations and inadequate disclosures regarding the Dalkon Shield in its financial statements. The class action was ultimately settled for $6.9 million. *See In re* A.H. Robins Co., 88 B.R. 742, 743–44 (E.D. Va. 1988), *aff'd sub nom.* Menard-Sanford v. Mabey (*In re* A.H. Robins Co.), 880 F.2d 694 (4th Cir. 1989).

History of the Bankruptcy Proceedings

Robins filed its Chapter 11 petition in the Eastern District of Virginia.[478] The bankruptcy case was referred automatically to the bankruptcy court, but on the same day, at the debtor's request, U.S. District Judge Robert Merhige withdrew the reference as to most matters, retaining original jurisdiction over them.[479] Judge Merhige presided jointly over the bankruptcy proceedings with U.S. Bankruptcy Judge Blackwell N. Shelley. Judge Merhige's determination to maintain tight control over the *Robins* bankruptcy as he pushed hard for a resolution was evident throughout the proceedings.[480]

The U.S. trustee appointed official committees to represent (1) the Dalkon Shield claimants, (2) other unsecured creditors, and (3) equity security holders, and appointed a future claims representative.[481] The claimants' committee was originally made up of thirty-eight plaintiffs' attorneys, who represented a substantial majority of the existing tort claimants, but six months into the bankruptcy Judge Merhige granted the U.S. trustee's motion to dissolve that group, which was replaced with a five-person committee.[482] Three of the new committee members were Dalkon Shield claimants (two of them attorneys with bankruptcy experience), and the other two were plaintiffs' lawyers.[483] The future claims representative was a young attorney, Stanley K. Joynes III, who had no sub-

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478. *In re* A.H. Robins Co., Bankr. No. 85-01307-R (Bankr. E.D. Va. filed Aug. 21, 1985).

479. *See* Ackles v. A.H. Robins Co. (*In re* A.H. Robins Co.), 59 B.R. 99, 105–07 (Bankr. E.D. Va. 1986), *aff'd sub nom.* Beard v. A.H. Robins Co., 828 F.2d 1029 (4th Cir. 1987) (Administrative Order No. 1, withdrawing reference, attached as Ex. A).

480. A group of tort claimants was unsuccessful in seeking to disqualify Judge Merhige based on his personal relationship with Robins's president. *See In re* Beard, 811 F.2d 818, 828 (4th Cir. 1987) (denying petition for writ of mandamus directing Judge Merhige to disqualify himself).

481. *See In re* A.H. Robins Co., 88 B.R. 742, 744 (E.D. Va. 1988), *aff'd sub nom.* Menard-Sanford v. Mabey (*In re* A.H. Robins Co.), 880 F.2d 694 (4th Cir. 1989).

482. *See* Van Arsdale v. Clemo, 825 F.2d 794 (4th Cir. 1987) (affirming denial of motion challenging composition of reconstituted claimants' committee). After the original claimants' committee voted overwhelmingly to replace Murray Drabkin as committee counsel, the U.S. trustee moved to dissolve the committee. Judge Merhige granted that motion and retained Drabkin as counsel until new counsel could be selected by the new committee. The reconstituted committee chose to retain Drabkin as committee counsel. *See* Richard B. Sobol, Bending the Law 72–80 (1991).

483. *See Van Arsdale*, 825 F.2d at 796.

stantial bankruptcy experience and who had been a volunteer in Judge Merhige's office three years earlier. Although his appointment was questioned at the time, he proved to be a vigorous and effective advocate for the interests of future claimants.[484]

From the perspective of the tort claimants, there were two primary sources of funds available to pay for the injuries caused by the Dalkon Shield.[485] One source, of course, was the debtor corporation itself. Robins's bankruptcy filing meant that its corporate assets, at least $2 billion and perhaps considerably more, could be reached only in the bankruptcy court. The second source was the debtor's liability insurer, Aetna Casualty and Insurance Company. The plaintiffs believed that Aetna's liability was both derivative (as Robins's insurer) and independent, arguing that Aetna had participated in the suppression of crucial early tests that demonstrated the dangers of the Dalkon Shield. Aetna was a substantially wealthier corporation than Robins. The plaintiffs' attorneys generally favored pursuing the independent Aetna claims outside of bankruptcy court, whereas Aetna was eager to achieve final resolution of its Dalkon Shield liability through the bankruptcy proceedings.

Automatic Stay

Pursuant to 11 U.S.C. § 362(a)(1), Robins's filing automatically stayed all litigation pending against it and barred the filing of new prepetition claims in any other court. Judge Merhige applied the automatic stay broadly, barring any Dalkon-Shield-related litigation, including suits in which the injury was not manifested until after the filing date[486] and suits

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484. *See* Sobol, *supra* note 482, at 110–12. Joynes sought to retain at a low hourly rate Harvard bankruptcy professor Vern Countryman to assist him in representing future claimants. Judge Merhige denied the motion, however, stating that sufficient cause had not been demonstrated to authorize additional counsel. *See id.* at 111.

485. A third, relatively minor source was the Robins family and other top corporate officers. Litigation against them was stayed by the district court on the theory that tying up their time in litigation and exposing the company to indemnification claims by them would interfere with the reorganization. *See* A.H. Robins Co. v. Piccinin, 788 F.2d 994, 1008 (4th Cir. 1986) (affirming district court). In the end, claims against the corporate officers were extinguished by confirmation of the reorganization plan, in exchange for a $10 million payment by some members of the Robins family. *See* Sobol, *supra* note 482, at 221.

486. *See In re* A.H. Robins Co., 63 B.R. 986, 994 (Bankr. E.D. Va. 1986), *aff'd sub nom.* Grady v. A.H. Robins Co., 839 F.2d 198, 203 (4th Cir. 1988) (holding that a claimant who had a Dalkon Shield inserted prior to Robins's filing of the bankruptcy petition

against Aetna,[487] even if Aetna were sued alone and would have no right of contribution or indemnity against Robins.[488] Indeed, any hope Dalkon Shield claimants had of receiving payment prior to confirmation of the reorganization plan was dashed when the Fourth Circuit rejected a plan, approved by the district court, to create a $15 million emergency fund for claimants at risk of permanent infertility unless they received prompt treatment.[489]

Notice and Bar Date

The issue at the heart of the *Robins* bankruptcy case was the aggregate value of the tort claims arising from Dalkon Shield injuries. This novel and challenging issue[490] could have been resolved by the parties themselves through negotiation, but given the tort claimants' belief that the company's Dalkon Shield liability clearly exceeded its assets and their

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had a claim that arose before commencement of the bankruptcy case within the meaning of section 362(a)(1)).

487. *See* A.H. Robins Co. v. Piccinin, 788 F.2d 994, 1008 (4th Cir. 1986) (affirming district court's grant of preliminary injunction prohibiting continuation of suits against Robins's codefendants).

488. *See* Oberg v. Aetna Cas. & Sur. Co. (*In re* A.H. Robins Co.), 828 F.2d 1023, 1026 (4th Cir. 1987) (affirming district court's denial of motion to lift stay).

489. Official Comm. of Equity Sec. Holders v. Mabey, 832 F.2d 299 (4th Cir. 1987). The court of appeals held that the district court's approval of the emergency fund constituted an impermissible exercise of the court's equitable powers under section 105(a), because such payments would violate the Bankruptcy Code by providing preferential treatment to one group of unsecured creditors. Another attempt by Robins to make payments to certain (non-tort) unsecured creditors caused it to be held in civil contempt and prompted the claimants' committee to seek the appointment of a trustee. The committee's motion was denied. *See* Committee of Dalkon Shield Claimants v. A.H. Robins Co., 828 F.2d 239 (4th Cir. 1987) (holding that district court did not err in declining to find cause to appoint trustee).

490. *See* Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. Rev. 659, 681–82 (1989) ("The first issue confronting the court concerned its powers under Section 502(c) of the Bankruptcy Code. . . . Here, Robins was asking the court to estimate the total value of 200,000 still viable individual claims that had been filed, plus an unknown number of future claims, and to use that estimated number to set a cap on the total award Robins would owe all Dalkon Shield claimants. . . . A 502(c) estimation had never been conducted in a mass tort action, so little precedent existed in law or in practice.").

desire to see the company liquidated, such negotiations failed to bear any fruit.[491] A judicial resolution was therefore required.

The first step in valuing the tort claims was to decide who the eligible claimants were.[492] Robins, eager to define its liability clearly, moved in the fall of 1985 for the court to set a bar date beyond which claims could not be asserted. To satisfy due process, Robins proposed a publicity campaign to give notice of the bar date to potential claimants. Over the claimants' committee's objection to a bar date, Judge Merhige approved the plan and established a bar date roughly five months away.[493] The $4.5 million notice campaign included one-time full-page notices in eight leading magazines and quarter-page notices in 233 newspapers. Thirty-second announcements were broadcast 40 times on network television and 250 times on cable television over a three-week period.[494] Outside the United States, no advertising was purchased; the campaign instead relied on press releases and public service announcements mailed to 500 media outlets, as well as to public health officials and American embassies.[495] All potential claimants were instructed to mail in a postcard stating the claimant's name, address, and intent to file a claim.[496]

Robins, having faced approximately 15,000 claims in eleven years of litigation,[497] expected from 25,000 to 50,000 postcard claims.[498] Instead,

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491. One participant in the bankruptcy proceedings has noted that tensions between the parties also contributed to the lack of success of the negotiations: "Ill will among the parties also inhibited settlement negotiations. Not only had Dalkon Shield litigation created animosities in its fifteen year history, but a cultural chasm separated bankruptcy lawyers from tort lawyers. In addition, Robins had fired its initial bankruptcy lawyers, the judge had fired the claimants' committee, and the plaintiffs' lawyers had attempted to disqualify the judge. It was clear that a negotiated solution would be difficult to reach." *Id.* at 679 (footnote omitted).

492. There were two basic options with respect to identifying eligible claimants. The first, traditionally used in bankruptcy, involved establishment of a bar date or deadline for filing proofs of claim. Due process would require notice to potential claimants of the bar date before their claims could be extinguished in this manner. The second option, suggested by the disposition of the Johns-Manville asbestos bankruptcy, involved ignoring the bar date requirement and accepting all claims filed during the life of the tort claims trust. Robins pursued the first option. See Sobol, *supra* note 482, at 97.

493. *See* Vancouver Women's Health Collective Soc'y v. A.H. Robins Co., 820 F.2d 1359, 1360 (4th Cir. 1987).

494. *See* Sobol, *supra* note 482, at 98.

495. *See Vancouver Women's Health Collective Soc'y*, 820 F.2d at 1362.

496. *See In re* A.H. Robins Co., 862 F.2d 1092, 1093 (4th Cir. 1988).

497. *See In re* A.H. Robins Co., 880 F.2d 709, 717 (4th Cir. 1989).

more than 300,000 were returned.[499] Processing this staggering volume of claims required that more than fifty employees work in three shifts. A third of these claims were later disallowed for failure to complete a two-page questionnaire detailing the injuries, leaving 195,000 valid claims.[500]

The claimants' committee challenged the adequacy of the notice to foreign claimants. Pointing to evidence that the foreign notice campaign had not been carried out as promised, they questioned why nearly 90% of claims filed were filed by Americans, who accounted for only 61% of sales.[501] Ten percent of American users filed claims, whereas the response rates for users in Canada, England, France, and Mexico were 3.3%, 1%, 0.2%, and 0.0009%, respectively.[502] Both Judge Merhige and the Fourth Circuit rejected the claimants' challenge to the foreign notice procedure.[503]

The future claims representative also challenged the notice campaign. He questioned the application of the bar date to women who had as yet manifested no injuries.[504] Joynes argued that expecting women who had suffered no injury to respond to ads and file claims or lose their rights of redress forever was manifestly unfair.[505] This challenge was also rejected,[506] although eventually provision was made to reclassify some late-

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498. *See* Sobol, *supra* note 482, at 98.

499. *See* Georgene M. Vairo, *The Dalkon Shield Claimants Trust: Paradigm Lost (or Found)?*, 61 Fordham L. Rev. 617, 628 (1992).

500. *See In re* A.H. Robins Co., 862 F.2d 1092, 1093–94 (4th Cir. 1988).

501. *See* Vairo, *supra* note 499, at 628.

502. *See* Vancouver Women's Health Collective Soc'y v. A.H. Robins Co., 820 F.2d 1359, 1362 (4th Cir. 1987).

503. *Id.* at 1365 (affirming district court's rejection of challenge). The Fourth Circuit suggested that the lower foreign response might be explained by the possibility that these victims were "not as litigious as Americans." *Id.* at 1363–64.

504. Stanley Joynes, the future claims representative, argued that "'no notification scheme whose objective lies with prompting a response from persons who have no present injury can be made adequate.'" Sobol, *supra* note 482, at 112.

505. *See id.* Joynes further challenged the specific wording used in the ads. The notice said, "'IF YOU . . . may have used the Dalkon Shield but have not yet experienced an injury . . . and if you wish to assert a claim against [Robins], . . . the United States Bankruptcy Court . . . must receive your claim . . . on or before April 30, 1986 or you will lose your right to make a claim.'" *Id.* at 110 (quoting published notice). He argued that the wording misleadingly implied that a potential claimant should have a good reason beyond mere Dalkon Shield usage to assert a claim at that time. *See id.* at 112.

506. *See id.* at 112 & n.10.

filed claims as timely because of "excusable neglect," and to pay other claims brought after the bar date on a subordinated basis.

Database

Having determined who the claimants were, the court was one step closer to being able to estimate the aggregate value of their claims. The next step was to gather information on the seriousness of the individual claims, focusing on such factors as the gravity of the injury and the quality of the evidence of causation. To that end, the court appointed an expert, Professor Francis McGovern, to work with the committees, Robins, and Aetna to compile a database of such information.[507] Information was collected through a fifty-page questionnaire sent to a 6,000-claimant sample. At the same time, researchers compiled similar information for the Dalkon Shield cases that had already been resolved, using court and medical files.[508] From the resolved cases, they also gathered data regarding the historic monetary value of different types of Dalkon Shield claims.

Writing in 1989, McGovern described the database project as "the largest and most expensive social science survey ever conducted under the auspices of a court."[509] It cost $5 million and took fourteen months.[510]

Estimation Hearing

Concluding that a buyout or merger was the only way to provide the capital necessary to compensate the plaintiffs and that no serious offer would be made until the tort liability had been capped, Judge Merhige resolved to settle the matter himself.[511] He ordered an estimation hearing on the value of the Dalkon Shield claims. Following extensive discovery, the hearing took place on November 5–11, 1987, and Robins, the official committees, the future claims representative, and Aetna each presented experts.[512]

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507. *See* Menard-Sanford v. Mabey (*In re* A.H. Robins Co.), 880 F.2d 694, 698–99 (4th Cir. 1989).

508. *See* McGovern, *supra* note 490, at 682–84.

509. *Id.* at 686.

510. *Id.* at 684, 686.

511. *See In re* A.H. Robins Co., 88 B.R. 742, 746 (E.D. Va. 1988), *aff'd sub nom.* Menard-Sanford v. Mabey (*In re* A.H. Robins Co.), 880 F.2d 694 (4th Cir. 1989).

512. *See id.* at 746–47.

The estimates proffered by the parties seemed to be colored by strategic considerations.[513] For example, Robins valued the tort claims at $800 million to $1.3 billion, an estimate low enough to leave open the hope of reorganizing without having to sell or merge the company. The tort claimants calculated the claims at $4.2 billion to $7 billion. That figure was large enough to exceed any realistic sale price, leaving the claimants as owners of the company. Aetna carved out a middle position with a valuation of $2.2 billion to $2.5 billion, an estimate large enough to discourage Robins from settling without receiving a financial contribution from Aetna, in return for which Aetna's liability would be discharged.[514] In the end, Judge Merhige announced the value of the tort claims to be $2.475 billion, payable over a reasonable period of time, without explaining or justifying his estimate.[515]

Reorganization Plan

Within a week of Judge Merhige's estimation ruling, American Home Products (AHP) made an offer to merge with Robins. It agreed to fund a claims resolution facility with an up-front cash payment of $2.3 billion, stock expected to be worth $700 million to go to Robins's shareholders, and a payment of approximately $56 million to unsecured commercial creditors.[516] AHP insisted that all codefendant liability be discharged; in exchange, Robins family members would contribute $10 million,[517] and Aetna would pay an additional $425 million in cash and insurance into the trust, a part of which would provide payment for claims filed after the bar date.[518]

This offer became the heart of the reorganization plan soon agreed to by Robins, the claimants' committee, and the other interested parties. Several of its terms bear noting here. The settlement payment was both a ceiling and a floor on the debtor's obligations to the tort claimants; the full fund—but no more[519]—would be paid to the claimants, and there

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513. *See* Sobol, *supra* note 482, at 181 ("The witnesses simply made the assumptions that would support the result favored by their employer.").

514. *See Robins*, 88 B.R. at 747.

515. *See id.*

516. *See* Sobol, *supra* note 482, at 200–08, 239 n.8; McGovern, *supra* note 490, at 685.

517. *See* Sobol, *supra* note 482, at 221–22.

518. *See In re* A.H. Robins Co., 880 F.2d 709, 721–22 (4th Cir. 1989).

519. *See* Menard-Sanford v. Mabey (*In re* A.H. Robins Co.), 880 F.2d 694, 697 (4th Cir. 1989).

would be no provision to refund any surplus to the debtor.[520] No effort was made in the reorganization plan to limit attorneys' fees.[521] Recovery for consortium claims by family members of Dalkon Shield users was allowed,[522] but recovery of punitive damages was not.[523] Judge Merhige, in confirming the plan, retained authority to supervise the trust.[524]

Vote and Confirmation

The reorganization plan agreed upon by Robins and the official committees was now put before the creditors and interest holders for approval. Disclosure materials, approved by the court, were mailed to each tort claimant (the vast majority of whom were not represented by counsel) to provide a basis for deciding to vote for or against the plan. The disclosure statement was 261 pages long and, according to the Fourth Circuit, contained a "thorough summary of the complex plan in terms that almost anyone could understand."[525] The disclosure statement repeatedly noted the $2.475 billion total value of claims estimated by the court and indicated to claimants that the amount made available under the plan would suffice to pay all claims in full.[526] It did not, however, offer any basis for estimating how much money individual claimants could expect to receive.[527] The Fourth Circuit upheld the adequacy of disclosure on appeal, concluding that "any specific estimates may well have been

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520. *See* Georgene M. Vairo, *Georgine, The Dalkon Shield Claimants Trust, and the Rhetoric of Mass Tort Claims Resolution*, 31 Loy. L.A. L. Rev. 79, 151 (1997) ("The Plan provided that if funds remained after the last timely and late claims were paid, the remaining Trust corpus would be paid to the claimants on a pro rata basis.").

521. *See* Bergstrom v. Dalkon Shield Claimants Trust (*In re* A.H. Robins Co.), 86 F.3d 364, 370 (4th Cir. 1996).

522. *See* Vairo, *supra* note 499, at 633 (noting that the trust paid $300 to nonusers who elected the quickest settlement method).

523. *See In re* A.H. Robins Co., 88 B.R. 742, 753 (E.D. Va. 1988), *aff'd sub nom.* Menard-Sanford v. Mabey (*In re* A.H. Robins Co.), 880 F.2d 694 (4th Cir. 1989).

524. *See id.* at 751–52.

525. Menard-Sanford v. Mabey (*In re* A.H. Robins Co.), 880 F.2d 694, 696 (4th Cir. 1989). *See also Robins*, 88 B.R. at 748–49 (listing all of the disclosure materials sent to claimants, other creditors, and interest holders).

526. *See* Sobol, *supra* note 482, at 230. Because the court's estimate of $2.475 billion was stated in terms of being "payable over a reasonable period of time" (*see Robins,* 88 B.R. at 747), a lump-sum payment of less than that total amount would be sufficient to fully fund the trust.

527. *See Menard-Sanford*, 880 F.2d at 697; Sobol, *supra* note 482, at 230.

more confusing than helpful and certainly would be more calculated to mislead."[528]

Although the plaintiffs' bar substantially opposed the plan, more than 94% of the tort claimants who voted supported it.[529] Less clear was whether the "two-thirds in amount" requirement of section 1126(c) of the Bankruptcy Code was satisfied. Judge Merhige, following a precedent set in the *Johns-Manville* bankruptcy and subsequently followed in other mass tort bankruptcies, rejected individual valuation of claims as impractical and instead valued each tort claim at one dollar.[530] This procedure survived on appeal: The Fourth Circuit found it, at most, harmless error.[531]

On July 26, 1988, the district court confirmed the debtor's reorganization plan,[532] and that order was affirmed on appeal.[533] In confirming the plan, the district court also approved a settlement of the Dalkon Shield claimants' class action litigation against Aetna; the approval was a condition precedent of the reorganization plan.[534] Confirmation of the plan discharged all Dalkon Shield liability of Robins family members and corporate officers in return for a $10 million payment.[535] The district court upheld this broad release, reasoning that the various releases and

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528. *Menard-Sanford*, 880 F.2d at 697. The court of appeals explained that the value of each claim depended on a variety of factors, thus precluding an accurate prediction in the disclosure statement of individual recoveries. Furthermore, the court noted, "There is no requirement in case law or statute that a disclosure statement estimate the value of specific unliquidated tort claims." *Id.*

529. *See id.* at 698. Of the approximately 195,000 Dalkon Shield claimants, 139,605 (or 72%) cast votes on the reorganization plan. *See id.* at 697–98.

530. *See In re* A.H. Robins Co., 88 B.R. 742, 747 (E.D. Va. 1988), *aff'd sub nom.* Menard-Sanford v. Mabey (*In re* A.H. Robins Co.), 880 F.2d 694 (4th Cir. 1989). Judge Merhige concluded that "[a]ny attempt to evaluate each individual claim for purposes of voting on the Debtor's Plan of Reorganization would, as a practical matter, be an act of futility, and would be so time consuming as to impose on many, many deserving claimants further intolerable delay all not only to their detriment, but to the detriment of the financial well being of the estate as well." *Id.*

531. *See Menard-Sanford*, 880 F.2d at 698 & n.3 ("We remain convinced, in view of the 94.38% affirmative vote, that had a weighted voting system been practicable and utilized, the required two-thirds in amount would have approved the Plan.").

532. *See Robins*, 88 B.R. at 751 (Judges Merhige and Shelley sitting jointly).

533. *See Menard-Sanford*, 880 F.2d at 696.

534. *See Robins,* 88 B.R. at 747 n.1.

535. *See* Sobol, *supra* note 482, at 221–22.

injunctions were "necessary and essential to avoid irreparable harm to the estate."[536]

Aftermath: Trust Performance

The process of administering payment to the Dalkon Shield victims was handled by a Claims Resolution Facility (CRF) administered by trustees appointed and overseen by Judge Merhige.[537] The CRF was fully funded in 1989 and appears to have completed all payments by the end of 1998, some nine years ahead of schedule.[538] Total administrative costs were $700 per claim, or 6% of the fund, which resulted in a savings of some $250 million over the amount that had been projected for trust administration.[539] The trust earned $850 million through investments.[540] Enough money was left over after full payment of all timely claims that late claims were paid in full,[541] and claimants who did not select the flat-sum option (Option 1) received additional pro rata payments, in lieu of punitive damages, projected to equal 100% of their initial payments.[542]

The efficiency of the CRF's operation was made possible in part by a distribution system that strongly encouraged claimants to accept the basic $725 "Option 1" payment available to all Dalkon Shield users. Under that option, selected by more than 132,000 claimants and designed for "quick clearing" of low-value claims, claimants were required to file only

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536. *Robins,* 88 B.R. at 751.

537. *See* Vairo, *supra* note 499, at 630. Several months after confirmation of the plan, Judge Merhige granted in part a motion filed by a group of plaintiffs' attorneys to remove the original trustees because of their delay in setting up the CRF. Judge Merhige removed three trustees and retained two; his order was upheld on appeal to the Fourth Circuit. *See id.* at 632–33; *In re* A.H. Robins Co., 880 F.2d 779 (4th Cir. 1989). In a separate opinion issued the same day, the Fourth Circuit upheld Judge Merhige's continuing supervision of the trust so long as he did not interfere with the trust's day-to-day operation. *See* Official Dalkon Shield Claimants' Comm. v. Mabey (*In re* A.H. Robins Co.), 880 F.2d 769, 776 (4th Cir. 1989).

538. *See* Vairo, *supra* note 520, at 155 (writing as of September 1997 and predicting completion of payments by the end of 1998).

539. *See id.* at 126, 153. Costs had been projected to be 15% of the fund. *See id.* at 126–27.

540. *See id.* at 127.

541. *See id.* at 150. The trust accepted late claims until June 1994. Over 33,000 of such claims were received and deemed to be valid. The trust paid out almost $150 million to the holders of those claims. *See id.*

542. *See id.* at 154.

a form affidavit attesting to Dalkon Shield use and a Dalkon-Shield-related injury.[543] Those who declined the Option 1 payment faced significant procedural hurdles and delays. "Option 2" was selected by fewer than 18,000 claimants. It was designed for claimants with strong medical proof of Dalkon Shield use and of Dalkon-Shield-related injury, but with serious alternative causation problems.[544] These claimants were required to present their medical proof, and they received payment pursuant to a "relatively low" payment scale, ranging from $850 to $5,500.[545] "Option 3" was designed for claimants with "serious and provable Dalkon Shield injuries."[546] These claimants were made settlement offers based on historical settlement amounts; if they rejected the offers, they could choose to participate in a settlement conference, and if a settlement was not then reached, they were entitled to binding arbitration or a trial.[547] Approximately 49,000 claimants selected Option 3, 40,000 of whom initially accepted the settlement offer. Another 1,300 Option 3 claimants agreed to settle after the settlement conference.[548]

Of the remaining Option 3 claimants, as of September 1997, fewer than 100 of them had gone to trial or arbitration, and fewer than 100 claims were still pending. The remaining claimants who had initially rejected the settlement offer eventually agreed to settle after participating in a subsequently added alternative dispute resolution process.[549] The average award to claimants who litigated their claims was $53,585.[550]

Party Structure

The Chapter 11 proceedings were initiated by the debtor, A.H. Robins Company, Inc. The U.S. trustee appointed three official committees in the bankruptcy: one to represent the Dalkon Shield claimants (initially

543. *Id.* at 134. Under Option 1, nonuser claimants, such as husbands of Dalkon Shield users, received a flat payment of $300.

544. *See id.* at 631. *But see* Kenneth R. Feinberg, *The Dalkon Shield Claimants Trust*, 53 Law & Contemp. Probs. 79, 106–07 (1990) (describing Option 2 as "intended to provide moderate, standardized payments to individuals with relatively mild injuries," which were expected to be the "bulk of Dalkon Shield claims").

545. Vairo, *supra* note 520, at 136.

546. *Id.*; *see also* Feinberg, *supra* note 544, at 108–09.

547. *See* Vairo, *supra* note 520, at 136–37.

548. *See id.* at 137.

549. *See id.* at 154.

550. *See id.* at 145.

consisting of thirty-eight members, but later reduced to five), one to represent the other unsecured creditors, and one to represent the equity security holders.[551] A future claims representative was also appointed. Another active participant in the reorganization proceedings was the debtor's insurer, Aetna Casualty and Insurance Company. Although Judge Merhige denied a motion by claimants to replace the debtor-in-possession with a trustee, he did appoint Ralph Mabey, a former Utah bankruptcy judge, to serve as examiner in the case. Among his other duties, Mabey was directed "'to evaluate and suggest proposed elements of a plan of reorganization,'"[552] "to investigate the amount of insurance coverage available to Robins . . . and to report on the propriety of the settlement between Aetna and Robins in the Coverage Litigation."[553]

Attorneys

Robins was represented throughout the bankruptcy proceedings by the Richmond firm of Mays & Valentine. It initially retained Murphy, Weir & Butler as its national bankruptcy counsel, but replaced that firm with Skadden, Arps, Slate, Meagher & Flom after the company was held in civil contempt for causing payments of prepetition debts to be made to some of its non-tort creditors, contrary to the terms of a court order.[554] The claimants' committee was represented by Murray Drabkin, of Cadwalader, Wickersham & Taft. The future claims representative, Stanley Joynes, was himself an attorney and was not permitted to retain additional counsel.[555] Robert Miller, of Bishop, Liberman & Cook, represented the equity security holders' committee, and Harold Novikoff, of Wachtell, Lipton, Rosen & Katz, represented the unsecured creditors' committee. Aetna was represented in the bankruptcy by John Harkins, of Pepper, Hamilton & Sheetz. Joseph Friedberg, of Minneapolis, repre-

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551. Robins family members, who held a controlling interest in the company, participated in the proceedings through counsel for the debtor as well as their own bankruptcy counsel. The equity security holders' committee therefore represented non-family shareholders. *See* McGovern, *supra* note 490, at 681.

552. Official Comm. of Equity Sec. Holders v. Mabey, 832 F.2d 299, 301 (4th Cir. 1987) (quoting appointment order).

553. *In re* A.H. Robins Co., 88 B.R. 742, 744 (E.D. Va. 1988), *aff'd sub nom.* Menard-Sanford v. Mabey (*In re* A.H. Robins Co.), 880 F.2d 694 (4th Cir. 1989).

554. *See* Sobol, *supra* note 482, at 90, 92–95, 137.

555. *See supra* note 484.

sented the Dalkon Shield claimants in the *Breland* class action suit against Aetna.

Terms of the Reorganization Plan

The district court confirmed Robins's Sixth Amended and Restated Plan of Reorganization on July 26, 1988;[556] its order was affirmed by the Fourth Circuit.[557] The centerpiece of the plan was the establishment of a trust that was represented to be sufficient to pay Dalkon Shield claimants in full.[558] The Dalkon Shield Claimants Trust was to be funded primarily by a cash contribution from American Home Products, the company that made the successful bid to acquire Robins. AHP agreed to make a $100 million "start up" payment upon confirmation of the plan by the district court, even if the confirmation was appealed. That money was to be used to establish a claims resolution facility and to commence Option 1 payments and payments of previously liquidated claims while appeals were pending.[559] If no appeals were filed or upon successful completion of any appeals, AHP agreed to pay the balance owed, $2.155 billion, to the claimants trust.[560] In addition to AHP's cash contribution, the trust was to be funded by a $75 million payment by Aetna[561] and a $5 million payment by members of the Robins family.[562] Besides cash payments to the trust, the plan and the *Breland* settlement made available Aetna insurance policies for payment of Dalkon Shield claims. These policies consisted of a $250 million excess policy to be used to pay timely claims and $100 million in outlier policies to pay late claims.[563] The trust was fully funded by December 15, 1989, following the Fourth Circuit's affirmance of the plan confirmation.[564]

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556. *See Robins*, 88 B.R. at 751 (Judges Merhige and Shelley sitting jointly).

557. *See* Menard-Sanford v. Mabey (*In re* A.H. Robins Co.), 880 F.2d 694 (4th Cir. 1989).

558. *See, e.g., Robins*, 88 B.R. at 751 ("The payments into the Trusts . . . are sufficient to pay all Allowed Dalkon Shield Personal Injury Claims, Allowed Dalkon Shield Liquidated claims and costs and expenses of the Trusts in full.").

559. *See* Vairo, *supra* note 499, at 632.

560. *See* Sobol, *supra* note 482, at 311.

561. *See In re* A.H. Robins Co., 880 F.2d 709, 722 (4th Cir. 1989).

562. *See* Sobol, *supra* note 482, at 221–22 & n.15.

563. *See* Menard-Sanford v. Mabey (*In re* A.H. Robins Co.), 880 F.2d at 700–01 & n.6; Sobol, *supra* note 482, at 202–03, 218.

564. *See* Sobol, *supra* note 482, at 311.

A second trust was also established by the plan. This Other Claimants Trust was to be funded by a $45 million payment by AHP and an additional $5 million payment by the Robins family. This trust provided a means of reimbursing codefendants who, having been found liable for Dalkon Shield injuries, had a right of contribution or indemnification from Robins. Any funds remaining in the trust in the sixth year of operation would be transferred to the Dalkon Shield Claimants Trust.[565]

As previously noted, the plan called for the disallowance of claims for punitive damages, but it provided for the possibility of a pro rata distribution of surplus funds after all timely and late claims had been paid in full. Thus, the plan eliminated the possible reversion of any trust funds to the reorganized debtor. As a result, it was hoped that any incentive on the company's part to oppose or delay payments to claimants would be eliminated.[566] The plan recognized and provided for claims of nonusers with derivative injuries,[567] and it included provisions for payment of claims filed after the bar date (including claims of future claimants who had been unaware of any injuries prior to the filing deadline).[568]

An important aspect of the plan from the reorganized debtor's point of view was the protection against further liability of not only Robins, but also nondebtor parties. AHP was insistent upon such a global peace provision so that it could avoid future indemnity claims and so that it could put behind it the negative publicity caused by Dalkon Shield litigation.[569] Included in the protection provided by the expansive release and injunctive provisions were corporate officers, directors, attorneys, and claimants' health care providers (for Dalkon-Shield-related claims only).[570] The plan was also conditioned on the district court's approval of the *Breland* settlement with Aetna, which to a large extent released the insurance company from further Dalkon Shield liability.[571]

The plan's treatment of other creditors and interest holders was less complex. The plan provided for cash payment in full to the commercial unsecured creditors, which apparently held some $27 million in trade

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565. *See id.* at 222 n.15; Vairo, *supra* note 499, at 630.

566. *See* Sobol, *supra* note 482, at 202.

567. *See* Vairo, *supra* note 499, at 633.

568. *See infra* notes 588–91 and accompanying text.

569. *See* Sobol, *supra* note 482, at 221–22.

570. *See* Vairo, *supra* note 499, at 629–30.

571. *See* Sobol, *supra* note 482, at 219, 335 (noting that approximately 3,000 class members who were permitted to opt out of the *Breland* settlement could still sue Aetna).

debt and some $29 million in unsecured bank debt.[572] Robins's shareholders were to receive shares of AHP stock, which at the time of plan confirmation were worth approximately $700 million. By the time the plan was consummated, however, the stock that was distributed to the shareholders according to the plan's terms had a value of $916 million, $385 million of which went to members of the Robins family.[573]

Negotiation History[574]

Both the debtor and the tort claimants expected to emerge from the reorganization owning and controlling the company. As it happened, neither group did so; a third party, American Home Products, purchased Robins. For the tort claimants, failure to gain ownership was not itself a major disappointment, since they were principally concerned with maximizing their recovery by whatever means. But for the debtor's directors—particularly members of the Robins family, controllers of the business since its creation over ninety years earlier—loss of the company was most likely a bitter defeat.

The company had taken the position that its debts did not exceed its assets, worth roughly $2 billion. Indeed, more than a year into the bankruptcy, when the number of claimants had mushroomed from fewer than 10,000 to nearly 200,000, Robins's board of directors remained reluctant to approve a $700 million settlement offer to the tort claimants, believing that the offer was too generous.[575] As time went on, however, circumstances led the debtor to increase its offer by proposing to borrow to the hilt, sell junk bonds, and secure letters of credit from banks of possibly questionable stability. It turned out that these proposals were not sufficient to achieve a plan that the other parties would accept. The proposed reorganization plan—the first of six filed by Robins—would have created a reversionary trust fund for Dalkon Shield claimants of up to $1.75 bil-

572. *See id.* at 239 n.8. Another source refers to $100 million of unsecured commercial debt. *See* McGovern, *supra* note 490, at 685.

573. *See* Sobol, *supra* note 482, at 286.

574. The only detailed source of information about the plan negotiations and bidding process in the *Robins* bankruptcy is the Sobol book. The account in text is drawn from Sobol, *supra* note 482, at 136–64, 198–208, 221–23.

575. *See id.* at 142.

lion, to be paid over a period of years. It was immediately rejected by the tort claimants, the future claims representative, and the examiner.[576]

The examiner, former bankruptcy judge Ralph Mabey, played a crucial role in the negotiations leading to settlement. He concluded that neither a debtor-financed plan nor an auction of the company without the cooperation of management would provide adequate funds to fairly compensate the tort claimants. Therefore, he began energetically pursuing a third option, finding another company willing to purchase the debtor company and finance the settlement on terms that all the key parties would accept. In furtherance of this strategy, he moved successfully on several occasions for an extension of the debtor's exclusivity period.

Although the first outside purchase offer was made in February 1987, the bidding war did not heat up until the court announced its $2.475 billion estimate of the company's tort claim liability on December 12, 1987. In the weeks that followed, counteroffers came fast and furious as three different pharmaceutical and consumer products corporations—AHP, Rorer, and the French-owned Sanofi—struggled to win the support of Robins, the claimants' committee, the shareholders, the future claims representative, and Aetna. The last offer before the court's estimate was announced (made by Rorer) was for $1.55 billion (present value) for the claimants' trust, plus $720 million worth of stock for the shareholders.[577] By the time AHP's winning bid was accepted by Robins on January 19, 1987, the present value of the offer to the tort claimants had risen by $750 million, to $2.3 billion, whereas the shareholders' recovery had declined slightly to $700 million in stock.[578]

During the two and a half years between Robins's bankruptcy filing and the agreement on the terms of a reorganization plan, a number of fundamental issues had to be resolved among the key parties to the bankruptcy and the bidders for the company. In the early stages of negotiations, there was disagreement over whether there would be a ceiling on any trust established for the Dalkon Shield claimants, as the company insisted, or whether the company's liability would remain without limit, as the claimants' committee desired. The company prevailed on that issue, after it turned out that the allowable claims that a trust would have

576. *See id.* at 154–57.
577. *See id.* at 162, 164.
578. *See id.* at 207 & n.20.

to compensate numbered almost 200,000.[579] After it was decided that the trust would have a ceiling, it then had to be determined whether it would also have a floor. In other words, the parties were in disagreement over whether all amounts placed in trust would be distributed to Dalkon Shield claimants, regardless of the total liquidated liability, or whether any unspent amounts would revert to the reorganized company. Eventually, the claimants' committee's position prevailed; AHP's winning bid was for a nonreversionary trust, and any surplus funds were to be distributed to claimants in lieu of punitive damages.

Other issues that had to be negotiated along the way to a settlement included the following:

- how the trust would be financed—by sale of the company or by self-financing, and by lump-sum payment or payments to the trust over a period of time;
- how much of the total pie would be distributed to shareholders;
- what the terms of the sale of the company to any outside bidder would be—whether existing management would be retained or replaced and whether the company would be kept intact or parts would be sold off; and
- what role any financial contribution by Aetna would play—whether it would be relied upon to provide funding to meet the estimated amount of liability or would provide an additional cushion above that amount to protect against the possibility that the court had underestimated the total liability.

Once the basic financial agreement was reached and AHP's offer had been accepted by the principal parties, two important issues remained to be resolved. At AHP's insistence, the plan created a global peace, discharging all Dalkon-Shield-related claims, including those against Aetna (by virtue of the *Breland* settlement) and against the debtor's individual officers, directors, and attorneys. Furthermore, to gain Stanley Joynes's support, treatment of future claimants was enhanced by the inclusion of provisions that reclassified certain future claims filed after the bar date as timely and that permitted recovery for the others on a subordinated ba-

579. *See id.* at 140 ("[Given] the massive, and totally unexpected, number of Dalkon Shield injury claims that had been filed in response to the bar date notice[,] [a]n open-ended plan, under which Robins would make payment to a trust out of earnings until all claims had been satisfied, could no longer be seriously supported.").

sis. With these issues decided, the support of every relevant actor in the bankruptcy was secured.

Handling of Future Claims

As noted earlier, Judge Merhige appointed Stanley Joynes as representative of the future Dalkon Shield claimants. He was a young attorney with little bankruptcy experience and apparently no prior experience with the Dalkon Shield litigation, and thus his appointment was somewhat surprising. It appears, however, that he was an effective advocate for the interests of those claimants who at the time of the bankruptcy were unaware of any Dalkon-Shield-related injury but who were nevertheless to be affected by the reorganization.[580]

One issue concerning the impact of the bankruptcy on future claimants involved the imposition of a bar date for the filing of claims. The district court set April 30, 1986, as the date by which claimants had to return postcards indicating their intent to file a claim.[581] Joynes opposed the application of this deadline to future claimants, both because of possible ambiguity in the wording of the notice and because of the seeming impossibility of providing effective notice to persons who do not yet know they have been injured.[582] Judge Merhige rejected these arguments, and at least initially it appeared that any claimant who did not submit a claim by the bar date would not be entitled to receive any compensation under the plan.[583]

Another issue concerning the effect of the bankruptcy on the interests of future claimants involved the operation of the automatic stay. As interpreted by Judge Merhige, the automatic stay prevented a claimant who became aware of her Dalkon-Shield-related injury after Robins filed for bankruptcy from suing the company if the Dalkon Shield was inserted

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580. *See id.* at 110–12.

581. *See* Vancouver Women's Health Collective Soc'y v. A.H. Robins Co., 820 F.2d 1359, 1360 (4th Cir. 1987).

582. *See* Sobol, *supra* note 482, at 112.

583. Indeed, the return of a postcard claim by April 30, 1986, was a necessary but not sufficient step in the claims process. Those who indicated by returning a card that they intended to file a claim then had to complete a two-page questionnaire. Over 100,000 claims were disallowed because of the failure to return a completed questionnaire. *See In re* A.H. Robins Co., 862 F.2d 1092 (4th Cir. 1988) (upholding two-step claim-filing process).

prior to bankruptcy.[584] This ruling meant that such claimants had to look to the bankruptcy proceedings for compensation from Robins.

These two rulings, along with the determination that future claims would be discharged upon confirmation of the plan,[585] could have resulted in the unfair treatment of numerous future claimants. For example, a woman who had a Dalkon Shield inserted in the late 1970s and by 1986 had manifested no injuries might have paid no attention to notices concerning the bar date, either being unaware that her IUD was a Dalkon Shield or not believing that she had a claim to pursue against Robins.[586] If she then discovered in 1987 that she was infertile as a result of her use of the Dalkon Shield, she would be unable to sue Robins outside of bankruptcy because of the automatic stay, and she would be too late to file a claim seeking compensation in the bankruptcy. At the end of the proceedings, her claim would be discharged, and she would lose her right to recover from Robins or the trust.

Fortunately, as a result of the parties' negotiations, the plan was eventually amended to provide a more equitable treatment of future claimants.[587] The following language, which was supported by the future claims representative, was added to the plan: "Appropriate evidence of a first manifestation of injury subsequent to April 30, 1986, and either lack

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584. *See* Grady v. A.H. Robins Co., 839 F.2d 198, 199 (4th Cir. 1988).

585. Initially, the district court and Fourth Circuit declined to rule on whether future claimants held dischargeable claims. *See id.* at 199, 203 ("We emphasize, as did the district court, that we do not decide whether or not Mrs. Grady's claims or those of the Future Tort Claimants are dischargeable in this case."). It became clear in the course of the bankruptcy, however, that discharge of future claims was an important component of the global peace that Robins was seeking and that any purchaser of the company would insist upon. *See* Vairo, *supra* note 520, at 127. In the end, the confirmation order made clear that all Dalkon Shield claims were discharged, regardless of when injury became known to the claimant, so long as insertion of the IUD occurred before the commencement of Robins's bankruptcy. *See In re* A.H. Robins Co., 88 B.R. 742, 752 (E.D. Va. 1988), *aff'd sub nom.* Menard-Sanford v. Mabey (*In re* A.H. Robins Co.), 880 F.2d 694 (4th Cir. 1989) ("Any person now or hereafter asserting any right to payment against Robins based upon or in any manner arising from any Dalkon Shield, held a dischargeable claim against Robins at the commencement of the case if the Dalkon Shield to which such asserted claim relates was inserted before the commencement of the case.").

586. *See* Sobol, *supra* note 482, at 107.

587. Had the plan not been amended, late-filed claims would have been disallowed and would have received nothing. *See Robins*, 88 B.R. at 753 ("Unless reinstated pursuant to the Plan, claims filed after the bar date established by the Court should be disallowed.").

of actual knowledge of the bar date or lack of knowledge of Dalkon Shield use shall constitute 'excusable neglect.'"[588] Future claimants, then, who missed the bar date because of excusable neglect, as defined by the plan, were treated as having timely claims. However, the excusable-neglect provision did not cover all future claimants who might have missed the bar date. For example, a woman who knew she had used a Dalkon Shield but, because she had not manifested any injury prior to the bar date, did not understand that she needed to file a claim would not meet the excusable-neglect provision. She would still be deemed a late filer. The plan was expanded in several respects to provide more generous treatment of these claimants as well. Insurance policies issued by Aetna were made available by the *Breland* settlement with the insurance company and used to pay late and nonfiling claimants.[589] Furthermore, the plan provided that late claims would be paid by the trust on a subordinated basis to the extent funds were available.[590] In the end, there was enough money to pay late claims in full.[591]

Notice Procedure and Content

A major, worldwide effort was made to give notice of the establishment of a bar date for filing Dalkon Shield claims against Robins in the bankruptcy proceedings. In the United States, ads were placed in eight leading magazines and in 233 newspapers. Announcements were also made on network and cable television over a three-week period. Outside the United States, the attempt to reach potential claimants was made by holding press conferences in sixteen countries and by sending press releases and public service announcements to the media, public health officials, and American embassies in ninety countries. This notification effort cost approximately $4.5 million.[592] Challenges to the adequacy of this

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588. Sobol, *supra* note 482, at 223 (quoting reorganization plan) (internal quotation marks omitted).

589. *See* Menard-Sanford v. Mabey (*In re* A.H. Robins Co.), 880 F.2d 694, 700–01 (4th Cir. 1989) (explaining that as a result of the *Breland* settlement, claimants who failed to meet the filing deadline would be paid "by the two Outlier policies issued by Aetna which provide for $100,000,000 to pay such claims").

590. *See* Vairo, *supra* note 520, at 150.

591. *See id.* ("[I]t became apparent that the Trust would have sufficient funds to pay not only all timely claims, but also all late claims.").

592. *See* Vancouver Women's Health Collective Soc'y v. A.H. Robins Co., 820 F.2d 1359 (4th Cir. 1987).

notice by the claimants' committee on behalf of foreign claimants and by the future claims representative were rejected.[593]

Over 300,000 persons responded to the notice campaign by filing a postcard claim by the bar date. All of the initial respondents were then sent a two-page questionnaire, which they were told they "'must complete and return . . . as soon as possible.'"[594] Separate deadlines were set for the return of completed questionnaires by U.S. and foreign claimants.

When the debtor moved to disallow all claims for which a completed questionnaire was not returned by the deadline, the court ordered that a notice be sent to all such claimants indicating that they still had an opportunity to file a questionnaire and to explain why they had not met the original deadline. The notice informed claimants that their claims would be disallowed without further notice if they did not return a completed questionnaire by a newly established deadline. It further stated the following: "'WARNING[:] If you do not return this completed form by the deadline shown, you will never be able to obtain compensation for any claim you have or may hereafter have against A.H. Robins Co. arising out of the use of the Dalkon Shield.'"[595]

The court subsequently sent notice of disallowance of claims to all claimants who failed to file a questionnaire by the second deadline. That notice, however, informed the recipients that the court would reconsider the disallowance if they submitted a request for reconsideration by a specified date.[596]

At the time of voting on the reorganization plan, the following materials were sent to each claimant:

- the 261-page disclosure statement (previously approved by the court) with a copy of the plan attached;
- notice of the confirmation hearing;
- the order approving the disclosure statement;
- the court's order temporarily allowing and estimating at $1 each (for voting purposes only) the Dalkon Shield claims;
- letters from the court, the official committees, and the debtor; and
- a ballot.

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593. *See id.*; Sobol, *supra* note 482, at 112 & n.10.
594. *In re* A.H. Robins Co., 862 F.2d 1092, 1093 (4th Cir. 1988).
595. *Id.* at 1094 (quoting notice).
596. *See id.*

Of the approximately 195,000 Dalkon Shield claimants, 139,605 voted on the plan.

Notice of the terms of the proposed *Breland* settlement with Aetna was also included in the package of plan confirmation materials sent to all eligible Dalkon Shield claimants. Separate notice of the proposed settlement was mailed to class members who were not eligible to vote in the bankruptcy and was published in newspapers throughout the United States in May 1988.[597]

Approval and Review Process

Following court approval and dissemination of the disclosure statement, creditors and interest holders were given the opportunity to vote on Robins's reorganization plan. All classes either voted to accept the plan or were deemed to accept it because they were unimpaired as defined by section 1124 of the Bankruptcy Code.[598] The court therefore had to consider whether all the requirements of section 1129(a) for consensual confirmation were satisfied.

Sitting jointly, Judges Merhige and Shelley conducted a confirmation hearing and confirmed the plan. They held that the plan would "afford all creditors payment in full" and that it met the best-interests test, because each creditor would receive "not only . . . as much as the amount that such holder would receive or retain if Robins were liquidated under Chapter 7 of the Bankruptcy Code on that date but substantially more."[599] The court upheld the scope of the releases and channeling injunction, which extended to parties other than the debtor, based on the consideration provided by members of the Robins family and by Aetna pursuant to the *Breland* settlement. The court's finding that the plan was feasible was premised on its continuing supervision over the trusts, authority retained by the court in order "to assure the accuracy of the Court's estimate, the full payment of all Dalkon Shield personal injury claims and allowed Dalkon Shield liquidated claims and to reduce the threat of personal liability of the Trustees and personnel of the Trusts."[600]

597. *See* Sobol, *supra* note 482, at 255.

598. *See In re* A.H. Robins Co., 88 B.R. 742, 750 (E.D. Va. 1988), *aff'd sub nom.* Menard-Sanford v. Mabey, 880 F.2d 694 (4th Cir. 1989).

599. *Id.* at 751.

600. *Robins,* 88 B.R. at 752.

A group of Dalkon Shield claimants who had voted against the plan appealed, challenging the district court's approval of the disclosure statement, the voting procedure, the feasibility finding, and the injunction protecting parties other than Robins. The Fourth Circuit affirmed the district court's confirmation of the plan in all respects.[601] In so ruling, the court of appeals held that the disclosure statement was not required to provide estimated ranges of recovery for specified Dalkon Shield injuries and that the district court had not committed reversible error by estimating, for voting purposes, each Dalkon Shield claim at $1.

The Fourth Circuit also rejected challenges to the district court's best-interests and feasibility rulings, which rested in part on Judge Merhige's estimation of the debtor's Dalkon Shield liability. In particular, the court held that Judge Merhige had not erred by failing to explain the basis for his determination that the liability amounted to $2.475 billion. The finding was not clearly erroneous, reasoned the court of appeals, because it was supported by evidence produced at the estimation hearing; Aetna's expert had estimated the liability at $2.2 to $2.3 billion.[602] The court of appeals held that Judge Merhige "would have been quite justified" in accepting that figure, and thus the claimant–appellants should not "complain about the district court's arrival at a somewhat higher figure."[603]

Finally, the Fourth Circuit upheld the plan's injunction prohibiting continued Dalkon Shield litigation against parties other than Robins, including Aetna, Robins's directors, and attorneys for both companies. The court held that approval of this protection for nondebtor parties was within the equitable powers of the district court acting as bankruptcy court, which had concluded that such injunctive relief was necessary to facilitate the reorganization.[604]

Following the Fourth Circuit's affirmance of the plan confirmation, the claimant–appellants sought certiorari on the issue of the legality of the injunction protecting nondebtor parties. The Supreme Court denied

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601. *See* Menard-Sanford v. Mabey, 880 F.2d 694 (4th Cir. 1989).

602. *See id.* at 700. Other sources state that Aetna's expert testified that her estimate of liability was "$2.2 billion to $2.5 billion," *Robins*, 88 B.R. at 747, or "$2.5 billion," Sobol, *supra* note 482, at 187.

603. *Menard-Sanford*, 880 F.2d at 700.

604. *See id.* at 701–02.

certiorari; Justice White noted his dissent.[605] The following month, the merger of Robins and American Home Products occurred, and the reorganization plan was consummated.[606]

Attorneys' Fees

The information about the *Robins* bankruptcy that was available to me does not provide a complete account of the cost of achieving a successful reorganization. Only certain costs are revealed. Counsel for the claimants' committee, Murray Drabkin and the Cadwalader firm, were paid over $6 million in fees and expenses.[607] The debtor's various lawyers and other professionals received more than $28 million for their fees and expenses, and attorneys and other professionals retained by the equity committee received "additional millions."[608] No information is available about fees and costs paid to counsel and professionals retained by the unsecured creditors' committee, to the future claims representative, or to the examiner. The cost of the data-gathering process that preceded the claims estimation is reported to have been $5 million.[609]

In addition to the lawyers who were retained by the debtor and official committees in the bankruptcy proceedings, there were almost 11,000 lawyers who were retained by individual Dalkon Shield claimants to assist them in obtaining recovery from the trust.[610] Neither the reorganization plan nor the trust documents imposed any limitation on the attorneys' fees to be paid to these lawyers; compensation was initially governed by individually negotiated contingent-fee or other arrangements worked out between attorney and client.[611]

When it turned out that the trust held sufficient funds to provide a pro rata surplus payment to all claimants who had not selected the Option 1 $725 payment, Judge Merhige imposed a 10% cap on attorneys' fees for recovery of these additional amounts. He reasoned that any fees

605. *See* Menard-Sanford v. A.H. Robins Co., 493 U.S. 959 (1989).

606. *See* Sobol, *supra* note 482, at 286.

607. *See id.* at 76 & n.8.

608. *Id.* at 111–12.

609. *See* McGovern, *supra* note 490, at 686.

610. *See* Bergstrom v. Dalkon Shield Claimants Trust (*In re* A.H. Robins Co.), 86 F.3d 364, 371 (4th Cir. 1996).

611. *See id.* at 370 ("The appellants-attorneys have not been restricted in any way in collecting their contingent fees from their clients on all payments heretofore made through CRF.").

greater than that amount would be unreasonable, given that no additional efforts were required of claimants or their attorneys in order to receive the surplus payment.[612]

Twenty-nine attorneys subject to the 10% cap appealed to the Fourth Circuit. They argued that the district court lacked jurisdiction to enter such an order, that the procedure the court followed in entering the order violated due process, that the order improperly modified a confirmed reorganization plan and trust agreement, and that the cap was not supported by the evidence or consistent with existing precedent concerning the reasonableness of fees. The Fourth Circuit rejected all the appellants' arguments, characterizing their challenge to the order and their appeal as "wonderful examples of chutzpah."[613] Among other things, the court of appeals pointed out that over 10,000 attorneys had accepted the 10% cap[614] and that the 29 attorneys who were challenging it had "already received fees in excess of $90,000,000 on claims that have been paid to their clients in excess of $270,000,000."[615] Even with the 10% cap, the appellants were likely to recover another $20 million or more in fees.[616]

Assessment

Differing opinions have been expressed about the extent to which the *Robins* bankruptcy was successful in achieving a fair resolution of the Dalkon Shield litigation. Some praise it as having provided "for the quick, efficient and fair resolution of hundreds of thousands of claims" in a manner that also "preserve[d] individual autonomy."[617] Others, however, question the legitimacy of its claims estimation process[618] or criti-

612. *See id.*

613. *Id.* at 377.

614. *See id.*

615. *Id.* at 367.

616. *See id.*

617. Vairo, *supra* note 520, at 156; *see also* Feinberg, *supra* note 544, at 110 (noting that the *Robins* bankruptcy put an end to the Dalkon Shield litigation, provided a "large percentage of the plaintiffs" with prompt compensation, and allowed "the courts and parties . . . [to] avoid the protracted and costly process of litigating thousands of individual cases").

618. *See In re* Dow Corning Corp., 211 B.R. 545, 600–01 & n.60 (Bankr. E.D. Mich. 1997) (suggesting that it would "truly be a miracle" if the *Robins* estimate of liability turned out to be accurate and that such a result might be explained by either "pure luck"

cize the payout scheme as one that undermined the "right of women with serous injuries to be paid in accordance with a jury determination of the value of their claims."[619] In the final analysis, both points of view may be correct, for the *Robins* bankruptcy appears to be one that, on balance, achieved a good outcome but exhibited some flaws in the process leading to that result.

The judicial treatment of the future Dalkon Shield claims is one aspect of the case that might be criticized. As far as the district court and court of appeals rulings were concerned, women who had exhibited no symptoms prior to the bar date but who later manifested Dalkon-Shield-related injuries could have been left with no means of recovery against Robins, the trust, and perhaps others because of their failure to file timely proofs of claim. Although it is debatable whether the language of the bar date notice was sufficiently clear about the need of those with no injury to file, the future claims representative's argument about the difficulty of attracting the attention of seemingly healthy users of the Dalkon Shield is persuasive. It is understandable that someone with no manifest injuries might have paid little or no attention to the notices about a need to file claims against Robins or might have failed to investigate whether her previously inserted IUD was in fact a Dalkon Shield. Accordingly, even if future claims were properly included in the bankruptcy, fairness of treatment of such claims called for an exception from the bar date for such claimants, as has been provided in other bankruptcies. The courts, however, were apparently prepared as a general matter to hold future claimants to the bar date, and only the parties' negotiations resulted in a more equitable treatment.

Compounding the district court's harsh treatment of future claimants was its refusal to allow the relatively inexperienced lawyer appointed to be the future claims representative to hire counsel of his own. The likelihood of novel legal issues having to be resolved was great, and Joynes had secured the agreement of an eminent bankruptcy scholar to assist him at a modest hourly rate. Given the impact of the bankruptcy on the future claimants, the court should have approved the retention of counsel by their representative.

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or "careful[] engineer[ing] by the court to guarantee that the unexplained estimation would, in the end, prove 'accurate'").

619. Sobol, *supra* note 482, at 342.

The district court's failure to give any explanation of the basis for its estimate of the Dalkon Shield liability is another way in which the bankruptcy proceedings were flawed. The court's bare announcement of a number following a hearing in which experts' estimates ranged from $800 million to $7 billion risked undermining the confidence that any party might reasonably have had in the accuracy of that forecast. Moreover, because the court failed to set forth the factors taken into account in reaching the $2.475 billion estimate, it was impossible to obtain appellate review of the validity of the court's method of calculating the value of Dalkon Shield claims, a failing that the Fourth Circuit was willing to accept.

A more fundamental question might be raised about the treatment in the reorganization proceedings of the Dalkon Shield claimants who had been seriously injured and who outside of bankruptcy would have sued and most likely recovered substantial damages. Litigation by such claimants precipitated the bankruptcy, yet as a result of the imposition and wide noticing of the bar date, the large majority of claims in the bankruptcy were of low dollar value because of limited injuries or causation problems. The interests of the two types of claimants are arguably distinct: The small-dollar claimants were primarily interested in the ease of collection and were willing to accept minimal amounts, and the high-dollar claimants were interested in obtaining in a timely manner a recovery of the substantial sums needed to redress serious injuries. By classifying both types of claims together and valuing them all equally for voting purposes, the possibility arose that the small-dollar claimants' voices drowned out those of the seriously injured claimants. Perhaps as a result, a payout procedure was devised that placed an emphasis on swift payment of the multitude of Option 1 claimants. Although the trust completed its work earlier than expected, the 100 or so Option 3 claimants still awaiting resolution of their claims in 1997 and not receiving compensation until the end of 1998 were forced to wait thirteen years from the commencement of Robins's bankruptcy before receiving compensation for their serious injuries. Undoubtedly, along the way there were some other seriously injured claimants who got tired of waiting and went ahead and selected a more expeditious and less generous payout option from the trust.

For these and other reasons, the *Robins* bankruptcy proceedings were not perfect. But the imperfections in the process should not cause one to

lose sight of the significant achievements of the reorganization. In less than three years, a consensual plan was arrived at that allowed a successful business to continue under new ownership, freed from the burden of continued mass litigation, and a trust was established that compensated almost 200,000 claimants at some level for the Dalkon-Shield-related injuries they suffered. Although three years may not seem especially expeditious, when one considers the novelty of a number of the legal issues that had to be resolved, the extensiveness of the data-gathering process that was undertaken, and the accumulated ill will among the parties that had to be overcome, the successful completion of the reorganization in that amount of time is commendable and is a tribute to the district court's vigorous oversight.

The operation of the claimants' trust, while again subject to criticism in some respects, also represents an achievement of this bankruptcy. The establishment of an array of options was an attempt to address some of the potential distinctions among the claims in a cost-efficient manner. The trust was also remarkable in its payment of all claims, timely and late, in the full liquidated or compromised amounts, and then in the distribution of an equal amount to Options 2 and 3 claimants in a pro rata distribution of surplus funds. With administrative costs of 6% of the fund, this compensation was provided with much greater efficiency than ever could have been achieved by means of ordinary litigation.

The *Robins* bankruptcy therefore stands as a possible model for courts and policy makers to consider. Its chief features included a negotiated, consensual plan made possible by the sale of the company on terms acceptable to all the key parties and the resulting establishment of a trust funded by the acquiring company and cushioned by contributions of the debtor's insurer. The diligent work of a court-appointed examiner and a database expert also contributed to the successful outcome.

In re Dow Corning Corporation

The Dow Corning Corporation was formed in 1943 by the two companies that have remained its sole shareholders, Dow Chemical Company and Corning Incorporated. The goal of the joint venture was to develop and produce silicones and silicone products. The undertaking proved quite successful: The company had sales of nearly $2 billion in 1994 and a net income of $238 million in 1997.

In 1964 Dow Corning began selling a new product, silicone gel breast implants. The new implants were substantially less dangerous than the previously used technique of direct silicone injection, and nearly 2 million women eventually received them for reconstructive or cosmetic purposes. Dow Corning was the largest producer, accounting for almost half of all silicone breast implants sold. The company also supplied raw materials to several competing breast implant manufacturers. Dow Corning ceased marketing silicone implants in March 1992, two months before the FDA ordered the implants taken off the market.

Although silicone implants never accounted for more than one percent of Dow Corning's sales, they gave rise to thousands of lawsuits against the company by recipients who alleged that the implants caused them serious health problems. After an attempt to settle the breast implant litigation on a global basis collapsed,[620] Dow Corning sought relief in the bankruptcy court. Four and a half years later, a plan of reorganization providing up to $2.35 billion (present value) for silicone gel breast implant recipients was confirmed.

Nature of Litigation and Litigation Maturity

Concerns about the health risks posed by silicone gel breast implants emerged slowly. The first successful breast implant suit against Dow Corning was not brought until 1977, and as late as 1991 only 137 such suits had been filed. Some women alleged that the silicone implants caused them to incur systemic diseases, ranging from specific conditions, such as lupus, rheumatoid arthritis, fibromyalgia, and atypical connective tissue disease, to general problems, such as fatigue, aches and pains, insomnia, and memory loss. While scientific evidence of disease causation had not been clearly established,[621] damaging internal documents came

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620. *See* Tidmarsh, *supra* note 198, at 77–78.

621. Subsequent studies raised even greater doubts about disease causation. In June 1999, the Institute of Medicine issued the results of a study that concluded that there was "no definitive evidence linking breast implants to cancer, immunological diseases, neurological problems, or other systemic diseases" and that "women with breast implants are no more likely than other women to develop these systemic illnesses." Statement of Stuart Bondurant, M.D., Institute of Medicine News Conference, *available at* http://www4.nationalacademies.org/news.nsf/fc340309c47ale43852567460067595e/4d754b4701851a81852567970043ea7e?Open Document (June 21, 1999). A scientific expert panel appointed by Judge Pointer in the MDL proceedings, reporting in November 1998, similarly found no link between silicone implants and serious disease. *See* Jay Reeves, *No Implants-Disease*

to light suggesting that the company continued to market silicone implants despite its lack of data regarding the long-term safety of the product. Furthermore, it was clear that many women experienced problems with rupture, hardening, or leakage of the implants.[622]

Several multimillion-dollar verdicts, combined with growing attention from the media and the FDA, triggered an avalanche of lawsuits. In 1992, 3,000 breast implant suits were filed against Dow Corning, and another 8,000 were filed a year later. Fewer than 20 individual claims were ever resolved, and the disease-causation issue remained unsettled, leaving the breast implant litigation at a relatively immature stage.[623]

With other breast implant manufacturers also facing massive exposure, the Judicial Panel on Multidistrict Litigation consolidated all of the federal cases before Judge Sam Pointer, Jr., of the Northern District of Alabama, in June 1992.[624] Less than two years later, the parties emerged with a global settlement that promised $4.2 billion for implant victims, up to $2 billion of which was to be paid by Dow Corning.[625] That settle-

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Link?, available at http://more.abcnews.go.com/sections/living/dailynews/breastimplants981201.html (Dec. 10, 1998). These reports were released too late to influence the Dow Corning reorganization plan directly.

622. Although not life-threatening, these complications can result in pain, disfigurement, or infection, frequently requiring surgery. Causation of these local medical problems appears well established. *See* Bondurant statement, *supra* note 621; *see also Study Sees Hazards in Breast Implants, But No Major Illness,* News & Observer (Raleigh, N.C.), June 22, 1999, at 1A (reporting Institute of Medicine panel members' findings that 24% of women who received silicone implants required repeat surgery for rupture, hardening, or infection).

623. *See* Tidmarsh, *supra* note 198, at 76 ("[T]he *Silicone Gel* litigation was an immature tort" at time of global settlement.), 88 (referring to silicone gel litigation's "immature status and the lack of good information about claim numbers, settlement values, and science"). *But see* Lindsey v. Dow Corning Corp. (*In re* Silicone Gel Breast Implant Prods. Liab. Litig.), No. CV 92-P-10000-S, 1994 WL 578353, at *1 (N.D. Ala. 1994) (referring to "massive discovery efforts, involving the production and review of millions of pages of documents and the taking of hundreds of depositions," while also noting that the decided cases failed to "provide a reliable basis for any statistical extrapolation or prediction"); Thomas Willging, *Individual Characteristics of Mass Torts Case Congregations: A Report to the Mass Torts Working Group,* Report on Mass Tort Litigation app. D at 54 (1999) (classifying silicone gel breast implant litigation as "relatively mature").

624. *In re* Silicone Gel Breast Implant Liab. Litig., 793 F. Supp. 1098 (J.P.M.L. 1992).

625. *See In re* Dow Corning Corp., 187 B.R. 919, 922 (E.D. Mich. 1995) (reciting history of the failed settlement attempt); *see also* Tidmarsh, *supra* note 198, at 79–81 (describing 1994 settlement terms). The breast implant global settlement was approved by

ment eventually collapsed, however. The manufacturers were faced with more than eight times the number of claims they had anticipated, as well as rising numbers of individual claims brought outside the settlement.[626]

Unable to negotiate a new settlement, Dow Corning found itself forced to choose between individual litigation and Chapter 11. By early 1995, it faced over 19,000 individual suits and 45 class actions, a total of 36,000 individual claims. Its defense costs the previous year had exceeded $200 million. With some 90 breast implant cases set to proceed in state court and its liability insurers denying coverage, Dow Corning decided to seek bankruptcy protection.

History of the Bankruptcy Proceedings

On May 15, 1995, Dow Corning filed its Chapter 11 petition in the U.S. Bankruptcy Court for the Eastern District of Michigan.[627] The case was assigned to Judge Arthur J. Spector.

In the early weeks of the case, the U.S. trustee appointed official committees to represent the tort claimants, the unsecured (commercial) creditors, and, upon order of the bankruptcy court,[628] physicians with claims against the debtor. No representative of the interests of future claimants was appointed. Appointed to the tort claimants' committee were eight plaintiffs' attorneys (including Elizabeth Cabraser, Margaret Moses Branch, Stanley Chesley, and Ralph Knowles, who were also members of the plaintiffs' steering committee in the MDL proceedings before Judge Pointer) and one implant recipient.

Judge Spector overturned the claimants' committee appointments, concluding that section 1102 of the Bankruptcy Code requires actual creditors, rather than their lawyers, to serve and that the attorney members of the committee faced conflicting duties to their clients, on the one hand, and to the tort claimants as a whole, on the other.[629] His decision

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Judge Pointer approximately one year after his approval of the Mentor settlement. *See supra* note 214 and accompanying text.

626. Collapse of the original global settlement did not serve to terminate settlement efforts in the MDL consolidated proceedings. Following Dow Corning's bankruptcy filing, Judge Pointer approved a revised settlement involving five manufacturers who were parties to the original global settlement. *See* Tidmarsh, *supra* note 198, at 78, 81–82.

627. *In re* Dow Corning Corp., No. 95-20512 (Bankr. E.D. Mich. filed May 15, 1995).

628. *See In re* Dow Corning Corp., 194 B.R. 121, 146 (Bankr. E.D. Mich. 1996), *rev'd on other grounds,* 212 B.R. 258 (E.D. Mich. 1997).

629. *See id.* at 138.

was later reversed by the district court, however.[630] Judge Hood held that the bankruptcy court's sua sponte removal of the committee members constituted error, because the U.S. trustee possessed the exclusive authority to appoint the members of the official committees and because section 1102 nowhere indicated that only creditors could serve on committees. Furthermore, the district court noted, the claimants themselves would face the same conflicts as the attorney members allegedly faced.[631]

The Debtor's Strategy for Resolving Breast Implant Claims

Dow Corning had a three-stage strategy for resolving the breast implant claims in bankruptcy. The first stage involved getting all of the pending claims consolidated before the bankruptcy court. Next, the debtor envisioned one supertrial on the issue of disease causation. Finally, the value of any surviving claims would be estimated, and that estimate would provide a basis for reaching a settlement.[632] Dow Corning set about implementing this strategy almost immediately after filing its bankruptcy petition. In the summer of 1995, the debtor sought the transfer of all pending breast implant cases (most of them then before Judge Pointer as part of the MDL proceedings) to the Eastern District of Michigan. The district court granted this motion insofar as it related to claims pending against the debtor.[633]

In a more controversial move, the debtor also sought the transfer to the Eastern District of Michigan of all cases pending against its shareholders, Dow Chemical Company and Corning Incorporated. Both corporations were important secondary targets of the breast implant plaintiffs, and each was subject to many past and pending claims not covered by the automatic stay. Corning had successfully defended itself in every implant case brought against it, but Dow had a mixed record in court. Although it had won many cases on summary judgment, it had lost others, once suffering a $14.1 million jury verdict. Both shareholders were

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630. *See In re* Dow Corning Corp., 212 B.R. 258 (E.D. Mich. 1997).

631. *See id.* at 261.

632. *See In re* Dow Corning Corp., 187 B.R. 919, 923 (E.D. Mich. 1995) (describing debtor's strategy).

633. *See id.* at 933, 934.

eager to ride the debtor's coattails into bankruptcy court for a global solution.[634]

The district court, accepting the recommendation of the bankruptcy court, denied jurisdiction over the claims against the shareholders, holding that the claims against them did not come within the "related to" prong of bankruptcy jurisdiction.[635] The Sixth Circuit reversed that decision, pointing to the existence of joint liability insurance policies as well as claims for contribution and indemnification.[636] On remand, Judge Hood still declined to bring the shareholder cases before her court, now invoking mandatory and discretionary abstention "globally" as to all the cases against nondebtor defendants.[637] The Sixth Circuit issued a writ of mandamus, ordering the district court to transfer the claims against Dow Chemical Co. and Corning Inc. to the Eastern District of Michigan.[638] Ultimately, then, all the implant cases against the debtor and its shareholders were consolidated in the district where Dow Corning's bankruptcy case was pending.

The debtor's efforts to impose the next stage of its strategy—the winnowing of claims through resolution of the disease-causation issue prior to estimation—proved less successful. The district court first rebuffed this effort in September 1995, when Judge Hood ruled that a causation trial would not precede estimation.[639] In February 1996, the debtor filed motions before the bankruptcy court urging it to appoint a panel of scientific experts to evaluate the scientific evidence of causation, to hold a

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634. Other breast implant codefendants also sought to have the claims pending against them transferred to the Eastern District of Michigan. *See* Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers (*In re* Dow Corning Corp.), 86 F.3d 482, 486 (6th Cir. 1996). Codefendants other than Dow Corning's shareholders were eventually unsuccessful in this effort. *See* Lindsey v. Dow Corning Corp. (*In re* Dow Corning Corp.), 113 F.3d 565, 572 (6th Cir. 1997) (denying non-shareholder manufacturers' petition for writ of mandamus challenging district court's decision to abstain from hearing claims against them).

635. *See In re* Dow Corning Corp., 187 B.R. 919, 932 (E.D. Mich. 1995), *rev'd*, 86 F.3d 482 (6th Cir. 1996) ("[C]laims involving the Shareholders are not related to the bankruptcy action before the Court.").

636. *See Lindsey*, 86 F.3d at 486.

637. *See In re* Dow Corning Corp., No. 95-CV-72397-DT, 1996 WL 511646 (E.D. Mich. July 30, 1996).

638. *See* Lindsey v. Dow Corning Corp. (*In re* Dow Corning Corp.), 113 F.3d 565, 572 (6th Cir. 1997).

639. *See In re* Dow Corning Corp., 187 B.R. at 929.

single causation trial, and then to conduct an estimation hearing. These motions were denied by Judge Spector.[640]

Finally, in April 1997, the debtor tried to force the causation issue by filing what it styled an "Omnibus Disease Objection to Breast Implant Claims," paired with a motion for summary judgment. Judge Spector declined to rule on either, arguing that, because the district court possessed far more expertise in ruling on *Daubert* issues, that would be a preferable forum for ruling in the first instance on the debtor's motions.[641] The district court agreed to withdraw the reference to consider the disease objection and the summary judgment motion, but never issued a ruling. Ultimately, Dow Corning's determined efforts to force a causation trial prior to settlement were in vain.

Notice and Bar Date

On August 7, 1996, the court set bar dates for filing proofs of claim: Domestic implant claimants were required to file by January 15, 1997, and foreign claimants, by February 14, 1997.[642] Judge Spector also approved an $8 million notice campaign to inform potential claimants of the filing deadline. Notice was accomplished through television and print advertising, direct mail (to 844,000 potential claimants and other parties in interest), public relations initiatives, and other means.[643] Over 500,000 breast implant claimants responded to the notice campaign. The tort claimants' committee argued that registrations filed pursuant to the MDL global settlement should be treated as informal proofs of claim as well, subject to amendment after the bar date, but this argument was rejected by the Sixth Circuit.[644]

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640. *See In re* Dow Corning Corp., 211 B.R. 545, 603 (Bankr. E.D. Mich. 1997).

641. *See In re* Dow Corning Corp., 215 B.R. 526, 530 (Bankr. E.D. Mich. 1997) ("Considering that there are perhaps hundreds of thousands of claims potentially worth billions of dollars riding on the determination, this is no time for a novice.").

642. *See In re* Dow Corning Corp., 211 B.R. at 554.

643. *See id.*

644. *See* Official Committee of Tort Claimants v. Dow Corning Corp. (*In re* Dow Corning Corp.), No. 97-1177, 1998 WL 180594, at *4–*5 (6th Cir. Apr. 6, 1998). The court noted that many of the registrations did not identify Dow Corning and, furthermore, that all MDL registrants had been mailed a notice of the bankruptcy bar date and a form for making a proof of claim. *See id.* at *1, *3. The actual number of potential claimants thus disqualified cannot be discerned from sources available to me.

In its order confirming the reorganization plan, the bankruptcy court ruled that claims filed after the applicable bar date but prior to confirmation would be treated as timely.[645]

Settlement

On the debtor's initiative, the Chief Justice of the United States in June 1997 assigned Judge Pointer to "presid[e] over all breast implant and non-breast implant personal injury claims arising out of the reorganization of the Dow Corning Corporation and cases against the shareholders of the Dow Corning Corporation that have been transferred to the Eastern District of Michigan."[646] Judge Pointer and Judge Hood worked together in exercising jurisdiction over the breast implant litigation.[647]

In November of that year, Judge Pointer appointed Professor Francis McGovern to act as a mediator. McGovern, who had served as a special master in the MDL proceedings, began to meet with representatives of the tort claimants, the debtor, and the shareholders. These meetings bore fruit in July 1998, when the parties emerged with an agreement on the basic terms of the settlement. These terms included the payment of up to $3.17 billion over 16 years ($2.35 billion in present value) by Dow Corning to satisfy the breast implant claims. This agreement provided the

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645. *See* Order Confirming Amended Joint Plan of Reorganization as Modified at 5, *In re* Dow Corning Corp., No. 95-20512 (Bankr. E.D. Mich. Nov. 30, 1999).

646. Amended Joint Disclosure Statement With Respect to Amended Joint Plan of Reorganization at 48, *In re* Dow Corning Corp., No. 95-20512 (Bankr. E.D. Mich. Feb. 4, 1999) (quoting Designation and Assignment of a Chief United States District Judge for Service in Another Circuit (June 27, 1997)). Judge Pointer's appointment was made pursuant to 28 U.S.C. § 292(d), which authorizes the Chief Justice to designate and temporarily assign a district judge of one circuit to serve in another circuit, either in a district court or the court of appeals, if either the chief judge or the circuit justice of the circuit to which the appointment is made certifies that a need exists. According to the disclosure statement, the debtor filed a motion with the chief judge of the Sixth Circuit seeking the required certificate of necessity.

647. *Cf.* John F. Nangle, *Bankruptcy's Impact on Multidistrict Litigation: Legislative Reform as an Alternative to Existing Mechanisms,* 31 Ga. L. Rev. 1093, 1111 (1997) ("[M]ere assignment of the multidistrict judge . . . to the district in which the bankruptcy is pending will be of limited utility in the absence of cooperation from that district's bankruptcy and district judges. From the transferee court's perspective such cooperation is essential in working out such matters as the degree of his or her involvement in the overall bankruptcy case . . . ."). The precise terms of the allocation of authority between Judges Pointer and Hood were not revealed by any documents available to me.

basis for the reorganization plan, which was jointly proposed by the debtor and the tort claimants' committee, and which was eventually confirmed by the bankruptcy court.

Vote

The court approved the joint disclosure statement in February 1999 and set the voting period for March 15–May 14, 1999.[648] The disclosure statement and ballot were mailed to 570,000 claimants and creditors. Both the tort claimants' committee and the debtor strongly urged acceptance of the new plan. Over 110,000 domestic breast implant claimants voted.

In the end, 95.5% of domestic breast implant claimants voted to accept the plan. Five voting classes of creditors failed to accept it. One class of foreign breast implant claimants rejected the plan, because creditors in that class holding less than the required two-thirds in amount of claims voted to accept. As has been done in other recent mass tort bankruptcies, the court assigned equal weight to each tort claim. Also failing to accept the plan were the class of unsecured (non-tort) claims, the class of prepetition judgment claims, the class of government payer claims, and the class of personal injury claims that arose from the use of long-term contraceptive implants manufactured by Dow Corning.[649] Later, two of the rejecting classes—foreign breast implant claims and prepetition judgment claims—switched their votes to support the plan after it was modified prior to confirmation to enhance their treatment.

Confirmation

The confirmation hearing commenced on June 28, 1999, and concluded on July 30, 1999. Objections to confirmation of the plan came from many directions and were based on numerous grounds. Several parties challenged the plan under the best-interests-of-creditors requirement, arguing that certain tort claimants would fare worse under the plan than they

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648. Order Approving Amended Joint Disclosure Statement, Setting Hearing on Confirmation of the Plan, and Establishing Deadlines for Voting on the Plan and Filing Objections to Confirmation of the Plan, *In re* Dow Corning Corp., No. 95-20512 (Bankr. E.D. Mich. Feb. 4, 1999).

649. *See* Final Report, *available at* http://www.implantclaims.com/finalcount.htm (last visited Oct. 5, 2000).

would in a Chapter 7 liquidation.[650] The unsecured commercial creditors' committee objected that the plan permitted payment to settling tort claimants without any ruling by the court on its objections to the claims.[651] Others raised objections based on the plan's asserted lack of good faith.[652]

The two most substantial objections to the plan challenged the plan's classification scheme and its third-party release provisions. Three distinct challenges to classification were raised: (1) that the plan impermissibly classified dissimilar domestic implant claims within a single class,[653] (2) that it improperly placed into separate classes foreign implant claims that were substantially similar to domestic implant claims,[654] and (3) that it impermissibly provided different treatment for claims in the same class.[655] The plan's provisions releasing the debtor's shareholders, Dow Chemical and Corning, were challenged as being inconsistent with both the Bankruptcy Code and principles of equity.[656]

On November 30, 1999, Judge Spector issued findings of fact and conclusions of law[657] and a separate order confirming the reorganization plan.[658] This ruling was supplemented by a series of opinions that Judge Spector issued on December 1, 2, and 21, 1999. As explained in more detail below, Judge Spector rejected most of the objections that had been raised and found that the plan complied with all of the statutory provisions required for confirmation by means of a cramdown. He found that the plan satisfied the best-interests test, that it was proposed in good faith, and that it properly classified claims. He did, however, rule that, in order to comply with traditional principles of equity, the plan had to be

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650. *See In re* Dow Corning Corp., 244 B.R. 721, 726 (Bankr. E.D. Mich. 1999), *rev'd on other grounds,* 2000 WL 1701419 (E.D. Mich. Nov. 13, 2000).

651. *See id.* at 749.

652. *See In re* Dow Corning Corp., 244 B.R 673, 675 (Bankr. E.D. Mich. 1999).

653. *See In re* Dow Corning Corp., 244 B.R 634, 652, 655 (Bankr. E.D. Mich. 1999).

654. *See id.* at 656.

655. *See id.* at 666–73.

656. *See In re* Dow Corning Corp., 244 B.R. 721, 735–45 (Bankr. E.D. Mich. 1999).

657. *See* Findings of Fact and Conclusions of Law Regarding Confirmation of the Joint Plan of Reorganization, *In re* Dow Corning Corp., No. 95-20512 (Bankr. E.D. Mich. Nov. 30, 1999).

658. *See* Order Confirming Amended Joint Plan of Reorganization as Modified, *In re* Dow Corning Corp., No. 95-20512 (Bankr. E.D. Mich. Nov. 30, 1999), *aff'd,* 2000 WL 1701419 (E.D. Mich. Nov. 13, 2000).

interpreted so as to preserve claims against nondebtor parties, such as Dow Chemical and Corning, by the personal injury claimants who had not voted to accept the plan.[659] He also accepted the arguments of the unsecured commercial creditors that, in order to be crammed down as to them, the plan had to be amended to provide for the payment of interest at the contract rate.[660]

Both the plan proponents and objectors appealed Judge Spector's confirmation rulings to the district court. U.S. District Judge Denise Page Hood held hearings on the appeals in April 2000 and issued an opinion just as this monograph was about to go to press.[661] In a victory for plan proponents, Judge Hood affirmed the confirmation of the plan[662] and reversed the bankruptcy court's interpretation of the plan as preserving claims against nondebtor parties by those who did not vote for the plan.[663]

Party Structure

The Chapter 11 proceedings were initiated by the debtor, Dow Corning. Three official committees were appointed to represent the tort claimants, the unsecured commercial creditors, and the physician claimants. No one was appointed to represent future tort claimants. Even though the debtor's shareholders, Dow Chemical and Corning, were not debtors in bankruptcy, breast implant lawsuits pending against them were transferred to the Eastern District of Michigan, where Dow Corning's bankruptcy case was brought.

Attorneys

Barbara Houser, of Sheinfeld, Maley & Kay, represented the debtor in the bankruptcy proceedings. The tort claimants' committee was represented by Kenneth Eckstein, of Kramer, Levin, Naftalis & Frankel. Eight of the committee's members were plaintiffs' attorneys, including some of the members of the MDL plaintiffs' steering committee (Elizabeth Cabraser, Margaret Moses Branch, Stanley Chesley, and Ralph Knowles). Jeffrey

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659. *See In re* Dow Corning Corp., 244 B.R at 745.

660. *See In re* Dow Corning Corp., 244 B.R 678, 696 (Bankr. E.D. Mich. 1999).

661. *See In re* Dow Corning Corp., No. 99-CV-73941-DT, 2000 WL 1701419 (E.D. Mich. Nov. 13, 2000).

662. *See id.* at *2.

663. *See id.* at *23, *37.

Schwartz, of Benesch, Friedlander, Coplan & Arnoff, represented the physicians committee, and Donald Bernstein, of Davis, Polk & Wardwel, represented the commercial creditors' committee.

Terms of the Reorganization Plan

Treatment of Breast Implant Claims

The joint reorganization plan provides for payment by Dow Corning of up to $2.35 billion (present value) to meet tort claims. These payments will be made to a settlement facility in annual installments for sixteen years, and an initial payment of $985 million will be made upon consummation of the plan. As described below, a portion of these funds paid into the settlement facility will be devoted to a litigation fund and will be used to resolve all litigated personal injury claims. The balance of the funds will remain available to pay settling claims. The plan projects payment of two-thirds of the settling claims within four years. From the claimants' perspective, this proposed payment by Dow Corning compares favorably to its share of the failed 1994 global settlement.[664]

In many respects, however, the terms of the plan appear to reflect the tort claimants' deteriorating bargaining position on disease causation. The plan establishes only a ceiling, not a floor, on the debtor's obligations. Thus, Dow Corning could end up paying less than the $2.35 billion amount.[665] Some settling claimants are eligible to receive a premium payment if there are sufficient funds to make all "base" payments in full, however.[666] As interpreted by the district court on appeal,[667] confirmation of the plan extinguishes all breast implant claims against the sharehold-

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664. Under the proposed reorganization plan, Dow Corning will pay up to $3.172 billion over sixteen years. Under the 1994 global class action settlement, the company agreed to pay $2.02 billion over thirty years and make additional payments to plaintiffs who chose to opt out of the nonmandatory class.

665. *See, e.g.,* Special Note to Breast Implant and Other Personal Injury Claimants (Dow Corning disclosure letter) at 1, *In re* Dow Corning Corp., No. 95-20512 (Bankr. E.D. Mich.) ("In the event that the amounts found to be owing to claimants from the fund are less than the $2.35 billion ceiling, Dow Corning will have to pay only those lesser amounts.").

666. Premium payments are potentially available only on settled claims for disease or implant rupture, not on claims for implant removal or claims of individuals who choose to litigate.

667. *See In re* Dow Corning Corp., No. 99-CV-73941-DT, 2000 WL 1701419, at *23, *37 (E.D. Mich. Nov. 13, 2000).

ers, despite the fact that neither corporation is making any payments into the settlement facility.[668] Claims against the officers and directors of Dow Corning and of its shareholders are released without additional consideration. Recovery for punitive damages is barred, and no separate settlement compensation is provided for consortium claims.

A maximum of $400 million of the fund is set aside for payment of litigated claims, an amount that may be reduced if the settlement fund proves inadequate. The plan indicates that after confirmation of the plan, all breast implant claimants will be sent a "participation form" on which they are to indicate whether they elect to settle their claims or litigate their claims against the litigation facility. All claimants not responding within 180 days of the effective date of the plan shall be deemed to have elected settlement. After the deadline for claimants to specify whether they intend to opt out of settlement and pursue litigation, the litigation facility will seek a hearing on common issues, including whether there is sufficient admissible evidence to permit a jury trial on the question whether silicone causes systemic disease. The debtor retains control over the litigation facility.[669]

Under the confirmed plan, settling claimants have several options for payment, all of which are subject to an annual payout cap. They receive $20,000 if they experienced an implant rupture. They receive $5,000 if they have their implants removed. They receive an amount ranging from $10,000 to $250,000 if they have suffered from certain diseases, depending upon the severity. These amounts are reduced substantially for foreign claimants.[670] Claimants not currently suffering from any covered

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668. In consideration for the discharge, the shareholders have agreed to provide the debtor up to $300 million in credit if needed for making payments to the claimants' fund. They also agreed to a settlement regarding joint insurance policies.

669. Under the plan, a litigation facility will be established to handle the resolution of nonsettling claims. It will be under the jurisdiction of the U.S. District Court for the Eastern District of Michigan, which will have to approve the case-management order specifying the procedures for resolving litigated claims. The reorganized debtor will appoint the board of directors responsible for operating the litigation facility.

670. Settling claimants from other countries will receive either 60% or 35% of the recovery amounts of similarly situated U.S. claimants, depending on the country of residence. *See* Special Note to Breast Implant and Other Personal Injury Claimants (Dow Corning disclosure letter) at 3, *In re* Dow Corning Corp., No. 95-20512 (Bankr. E.D. Mich.). This reduction is said to be reflective of the "lower compensation generally paid for tort claims outside of the United States." Answers by the Tort Claimants Committee

disease can bring claims during the next fifteen years if they contract such diseases, or they can waive that right for $2,000. Settlement claims will be processed by the claims office already in operation under the multidistrict breast implant settlement.

Treatment of Other Unsecured Claims

The joint reorganization plan proposes to pay unsecured, nontort claims (amounting to $1.3 billion including interest) in full. Holders of such claims are to receive 24% of their claim in cash, and senior notes for the balance. The terms of the notes will require payment of the principal and interest at the end of ten years.

The plan proposes to pay the seven holders of prepetition judgment claims as follows: Following the reorganization plan confirmation, the appeal processes will be completed for each lawsuit. If a resolution favorable to the claimant is ultimately reached, the claimant will be paid in cash and senior notes in the same manner as the unsecured, nontort creditor class. If the appeal results in a reversal and remand for trial, the claim will be handled in the same manner as other litigated tort claims.

Negotiation History

Sources available to me do not provide any information about the history of the negotiations leading up to the settlement between Dow Corning and the tort claimants' committee and the resulting filing of a joint plan of reorganization.

Handling of Future Claims

As defined by the joint reorganization plan, "breast implant claim" includes "all Claims (including Claims asserted by or on behalf of Claimants with Unmanifested Claims and Unborn Breast Implant Claimants) . . . now or hereafter asserted against the Debtor . . . based upon or in any manner related to . . . a Breast Implant." (The term *breast implant* is defined to require sale or distribution by the debtor.)[671] The plan therefore affects persons who hold future claims, having not yet manifested any

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and Dow Corning Corporation to Frequently Asked Questions at 11, *In re* Dow Corning Corp., No. 95-20512 (Bankr. E.D. Mich.).

671. Amended Joint Plan of Reorganization at 2, *In re* Dow Corning Corp., No. 95-20512 (Bankr. E.D. Mich. Feb. 9, 1999).

injury. No representative for future claimants was appointed in the bankruptcy case, however.

Under the plan, a claimant who had or will have her implants removed after December 31, 1990, and within ten years of when the plan goes into effect, is eligible to receive the $5,000 explantation payment.[672] To receive payment for a ruptured implant, the claimant must submit documentation of the rupture by the second anniversary of the effective date of the plan.[673] Accordingly, there may be some future claimants who will not be able to receive payment for explantation or rupture, because their claims will arise after the respective deadlines. For persons with Dow Corning implants who have not yet manifested any disease, there are two options. They can elect an "expedited release" payment of $2,000, which has the effect of waiving the right to receive a disease payment in the future. Their other option is to decline the $2,000 payment and reserve the right to seek compensation for disease during the next fifteen years.[674]

Notice Procedure and Content

In 1996 notice of the bar date for tort claims was provided by means of television and print advertising, direct mail, and public relations efforts. Notice was mailed to some 844,000 potential claimants,[675] a task made somewhat easier by the existence of a list of claimants to whom notice was sent in the MDL settlement proceedings.[676] It appears that over 500,000 breast implant claimants either filed proofs of claim themselves or had claims filed on their behalf by one of Dow Corning's codefendants.[677]

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672. *See* Special Note to Breast Implant and Other Personal Injury Claimants (Dow Corning disclosure letter) at 2, *In re* Dow Corning Corp., No. 95-20512 (Bankr. E.D. Mich.).

673. *See id.*

674. *See id.*; *see also* Answers by the Tort Claimants Committee and Dow Corning Corporation to Frequently Asked Questions at 10, *In re* Dow Corning Corp., No. 95-20512 (Bankr. E.D. Mich.).

675. *See* Amended Joint Disclosure Statement With Respect to Amended Joint Plan of Reorganization at 46, *In re* Dow Corning Corp., No. 95-20512 (Bankr. E.D. Mich. Feb. 4, 1999).

676. *See* Tidmarsh, *supra* note 198, at 84.

677. *See* Official Comm. of Tort Claimants v. Dow Corning Corp. (*In re* Dow Corning Corp.), No. 97-1177, 1998 WL 180594, at *2 (6th Cir. Apr. 6, 1998) ("Dow represents

Prior to voting and the confirmation hearing, disclosure statements and ballots were mailed to everyone who had filed a proof of claim or had had a claim filed by someone else (including other manufacturers) on their behalf. Along with the disclosure effort, a document giving answers to frequently asked questions was sent to claimants, and a Web site was established by the tort claimants' committee. The committee also conducted a series of meetings around the country and several telephone conference calls to provide information about the proposed plan and to answer claimants' questions. In addition, Dow Corning and the claimants' committee established an information center with a toll-free number to answer questions about the voting process and the plan.[678]

Approval and Review Process

Following the bankruptcy court's approval of the disclosure statement, creditors and shareholders were given an opportunity to vote on the plan. Twenty of the twenty-five classes that were eligible to vote on the plan voted to accept it.[679] Almost 113,000 creditors in Class 5—domestic breast implant claims—voted on the plan; of that number 95.5% voted to accept it. Because all claims were valued equally, that result meant that a majority in number of those voting, representing at least two-thirds in amount of claims held by those voting, had voted favorably. All other classes of breast implant claims voted to accept the plan, except for one class of foreign implant claims, whose 65.8% favorable vote was just shy of the two-thirds in amount requirement for acceptance.

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in its appellate brief that over 500,000 persons have filed formal proofs of claim alleging breast-implant related injuries."). The disclosure statement, however, refers to lower numbers of breast implant claims. *See* Amended Joint Disclosure Statement at 52–53 (estimating 135,000 domestic breast implant claims, some 40,000 foreign breast implant claims, and approximately 150,000 claims resulting from use of an implant manufactured by someone other than the debtor). The difference between the two figures may result from the number of so-called Rule 3005 claims, that is, claims filed by codefendants on behalf of nonfiling breast implant recipients, since the disclosure statement expressly excludes those claims from its count.

678. *See* Special Note to Breast Implant and Other Personal Injury Claimants (Dow Corning disclosure letter) at 4, *In re* Dow Corning Corp., No. 95-20512 (Bankr. E.D. Mich.).

679. The results of the voting on the Dow Corning plan, broken down by classes, can be found at http://www.implantclaims.com/finalcount.htm (last visited Oct. 5, 2000).

In addition to that class of foreign implant claims, four other classes voted to reject the plan:

1. the unsecured (nontort) creditors (71% voted favorably but represented only 10.7% of the total amount of the claims held by those voting);
2. the prepetition judgment creditors (only two of the four voting creditors approved the plan);
3. holders of government payer claims (only 37.5% voted favorably); and
4. the class of personal injury claimants asserting injuries owing to long-term contraceptive implants manufactured by the debtor (Norplant) (53.5% in number and amount voting to accept).

Although two of the classes that voted to reject the plan—foreign breast implant claims class 6.2 and the class of prepetition judgment claims—later supported it in light of amendments that were made to the plan, three classes remained in opposition, and thus the plan had to be crammed down.

Four months after the conclusion of the confirmation hearing, at which a number of objections to confirmation were raised, Judge Spector issued an order confirming the joint plan as amended.[680] Also on November 30, 1999, he issued findings of fact and conclusions of law, and thereafter he issued separate opinions addressing classification and good-faith objections that had been raised, as well as three separate opinions upholding the cramdown of the plan with respect to the three classes that had voted to reject it. A month later, on December 21, 1999, Judge Spector issued his final confirmation opinion, which addressed the best-interests-of-creditors test, feasibility, and the plan's compliance with the applicable provisions of the Bankruptcy Code.

Several parties had objected on the ground that the plan failed to satisfy the best-interests-of-creditors test. They argued that two provisions of the plan, the $400 million cap on the litigation facility and the bar on punitive damages, would cause some tort claimants who had not voted to accept the plan to fare worse under the plan than they would in a Chapter 7 liquidation. Judge Spector rejected these arguments. The transaction

680. *See* Order Confirming Amended Joint Plan of Reorganization as Modified, *In re* Dow Corning Corp., No. 95-20512 (Bankr. E.D. Mich. Nov. 30, 1999), *aff'd,* 2000 WL 1701419 (E.D. Mich. Nov. 13, 2000).

costs of individually liquidating each claim in Chapter 7 would not leave sufficient funds to allow any recovery of punitive damages, he concluded.[681] And given the unavailability of punitive damages, the court further reasoned that the $400 million available to pay litigated claims was more than adequate to pay claimants at least as much as they would have received in a Chapter 7 liquidation. Judge Spector projected on the basis of expert testimony offered by the plan proponents at the confirmation hearing that only 7,513 class members would opt to litigate their claims, and that the average award would be $11,700. Thus, he calculated that the funds needed by the litigation facility amounted to some $83 million in present value, barely a fifth of the available fund.[682]

The unsecured creditors' committee had argued that the plan impermissibly allowed payment to settling breast implant claimants even though the court had never ruled on the committee's objections to those claims. Judge Spector rejected the argument that, in doing so, the plan improperly denied the committee its right to object to the allowance of the claims. Such a right arises only if the debtor fails to object, the court stated. Here, Dow Corning did object to the breast implant claims, and indeed such objections are preserved as to those claimants choosing to litigate.[683]

The court rejected all objections that the plan had not been proposed and formulated in good faith. The court stated that the "[p]lan was proposed in a legitimate effort to rehabilitate a solvent but financially-distressed corporation, besieged by massive pending and potential future product liability litigation against it," an objective that the court concluded was consistent with the good-faith requirement.[684] Judge Spector further observed that the breast implant litigation against Dow Corning "threatened its vitality by depleting its financial resources and preventing its management from focusing on core business matters." Thus, Dow Corning was "exactly the type of debtor for which Chapter 11 was enacted."[685] Finally, the court stated that "the Plan was the result of intense arms length negotiations between parties represented by competent

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681. *See In re* Dow Corning Corp., 244 B.R. 721, 728 (Bankr. E.D. Mich. 1999), *rev'd on other grounds,* 2000 WL 1701419 (E.D. Mich. Nov. 13, 2000).

682. *See id.* at 731.

683. *See id.* at 751.

684. *In re* Dow Corning Corp., 244 B.R. 673, 676–77 (Bankr. E.D. Mich. 1999).

685. *Id.* at 677.

counsel who were guided by an experienced court-appointed mediator and the findings and recommendations of highly qualified experts."[686]

With respect to objections concerning the plan's classification of breast implant claims, Judge Spector ruled that "all breast-implant claims . . . are substantially similar" and thus there was nothing improper about placing all domestic breast implant claims in a single class.[687] The court also rejected the contrary argument made by certain separately classified foreign claimants that their claims were required to be classified with the domestic claims. Following circuit precedent, Judge Spector held that separate classification of substantially similar claims is permissible so long as it was not done for an impermissible reason. In this case, the proponents' evidence that the foreign claims were likely to receive lower damages awards if the claims were litigated established a legitimate reason for their separate classification, as did the debtor's judgment that foreign claimants would accept lower settlement offers.[688] Finally, the court rejected the classification-related objection that the plan did not treat equally all claims in a class. Judge Spector held that only approximate equality of treatment of claims in a class was required. Moreover, the court noted that distinctions in treatment within a class are permitted with respect to consenting creditors, and under the terms of this plan class members remain free to reject settlement and to litigate their claims against the litigation facility.[689]

Judge Spector held that the plan could be crammed down as to the three dissenting classes. With respect to the class of unsecured commercial creditors, the court accepted the objection of the Official Committee of Unsecured Creditors that, because the debtor was solvent, to be "fair and equitable" the plan had to provide for the payment of postpetition, preconfirmation interest on their claims at the contract rate.[690] Accordingly, Judge Spector confirmed the plan conditioned on its amendment to provide interest to Class 4 at the required rate, which the proponents had previously agreed to should the court rule as it did.[691]

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686. *Id.*

687. *In re* Dow Corning Corp., 244 B.R. 634, 658 (Bankr. E.D. Mich. 1999).

688. *See id.* at 658–64.

689. *See id.* at 666–73.

690. *See In re* Dow Corning Corp., 244 B.R. 678, 696 (Bankr. E.D. Mich. 1999).

691. *See id.*

The only significant confirmation setback for the plan proponents concerned the release of claims against nondebtor third parties, including the debtor's shareholders—Dow Chemical Co. and Corning Inc. Judge Spector concluded that the plan must be interpreted so as to preserve the rights of those claimants who had not voted to accept the plan to sue nondebtor parties.[692] The court concluded that although the Bankruptcy Code neither prohibits nor affirmatively sanctions involuntary third-party releases,[693] such releases must be consistent with traditional equitable principles. Judge Spector found that forcing a release of nondebtor third parties on nonconsenting creditors is "an 'extraordinary' remedy, one which is 'unheard of in any other context.'"[694]

Both proponents and objectors appealed the confirmation rulings. The district court affirmed the bankruptcy court's order confirming the reorganization plan, but reversed the court's ruling that the plan had to be interpreted so as to preserve the claims of nonconsenting claimants against nondebtor parties.[695]

Attorneys' Fees

The confirmed plan limits the fees of attorneys for individual settling claimants. No attorneys' fees will be paid on settling claims for implant removal or disease-claim waiver. For all other settlement payments, fees will be capped at 10% of the first $10,000 recovered, 22.5% of the next $40,000, and 30% of any settlement amount in excess of $50,000. Attorneys' fees for litigated claims are not limited.

Assessment

Because the district court issued its opinion just as this monograph was about to go to press and further appeals may be taken, the final word on the *Dow Corning* bankruptcy may not have been heard. The observations noted herein are therefore somewhat preliminary in nature, since the ultimate outcome of the bankruptcy could be changed by subsequent events.

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692. *See In re* Dow Corning Corp., 244 B.R. 721, 745 (Bankr. E.D. Mich. 1999).

693. *See id.* at 740.

694. *Id.* at 745 (quoting Grupo Mexicano de Desarrollo v. Alliance Bond Fund, Inc., 119 S. Ct. 1961, 1969 (1999)).

695. *See In re* Dow Corning Corp., No. 99-CV-73941-DT, 2000 WL 1701419 (E.D. Mich. Nov. 13, 2000).

A notable difference between the *Dow Corning* bankruptcy and most other mass tort bankruptcies was the consolidation of litigation involving nondebtor defendants in the district where Dow Corning's bankruptcy was pending. Although eventually only the cases pending against Dow Corning's shareholders were consolidated in the Eastern District of Michigan, the Sixth Circuit's interpretation of bankruptcy's "related to" jurisdiction would have allowed (absent abstention by the district court) suits against unrelated codefendants to be transferred as well.

The possibility of using the bankruptcy of one codefendant to provide the basis for the consolidation of suits against all the defendants to a particular mass tort litigation is both promising and troubling at the same time. The promising aspect is that, once the cases are transferred to a single district, the possibility exists, not just for consolidated pretrial proceedings, but for an aggregated disposition, such as a consolidated trial on causation or a global estimation proceeding. Tremendous efficiencies can be achieved, particularly in cases in which, as in the *Dow Corning* case, a judge already deeply involved with the particular litigation is assigned to preside over the cases. On the other hand, this efficiency is gained at a cost to individual plaintiffs' autonomy. When a defendant files for bankruptcy and thus makes available potentially all of its assets to satisfy the claims of its creditors, there is justification for preventing individual creditors from proceeding in the forums of their choice and instead requiring them to participate in the collective proceeding. The justification is less compelling, however, with respect to codefendants who have not invoked the protection (and risks) entailed in filing for bankruptcy.

Regarding the handling of the *Dow Corning* bankruptcy itself, the absence of a future claims representative raises concerns. The confirmed plan included breast implant recipients with unmanifested injuries in the various classes of implant claimants, and their claims against Dow Corning were discharged as a result of the confirmation. Because Dow Corning stopped selling silicone gel breast implants in 1992, it may be that most resulting harms had become manifest prior to the 1999 confirmation. Nevertheless, the plan does contain provisions for the treatment of future claims, including the option to receive $2,000 for waiving the right to receive a disease payment in the future and deadlines for seeking compensation for explantation, ruptured implants, or disease claims that have not been waived. With no one designated to represent

the separate interests of future claimants specifically, a claimant whose implants cause her injury sometime in the future may be able to successfully challenge the fairness of binding her to the options imposed on her by this plan. Claimants whose rights are going to be affected by the bankruptcy should have a voice in the proceedings, either by direct voting or through a representative appointed for those who, because of lack of present injury, will be unable to perceive the significance of the bankruptcy to them.

A final and positive point that bears noting is the care with which the bankruptcy court considered the objections to confirmation. A lengthy confirmation hearing was conducted, at which numerous objections were aired. After several months of deliberation, the bankruptcy judge issued an order confirming the plan; the order was supported by written findings of fact and conclusions of law and six lengthy opinions. One significant objection (to the scope of the release of claims by nonconsenting creditors) was upheld (although that ruling was later reversed on appeal), and detailed explanations of the reasons for rejecting other objections were given. These opinions provide assurance to litigants that their objections were heard and considered, and provide a basis for careful appellate review.

Appendix: Case Summaries

The following chart summarizes the major characteristics of each case studied.

Characteristic	*Eagle-Picher*	*Mentor*	*AcroMed*	*UNR*	*A.H. Robins*	*Eagle-Picher Bankruptcy*	*Dow Corning*
Product	Asbestos	Breast implant	Orthopedic bone screw	Asbestos	Birth control device	Asbestos	Breast implant
Resolution method	Fed. R. Civ. P. 23(b)(1)(B) class action	Fed. R. Civ. P. 23(b)(1)(B) class action	Fed. R. Civ. P. 23(b)(1)(B) class action	Chapter 11 bankruptcy reorganization	Chapter 11 bankruptcy reorganization	Chapter 11 bankruptcy reorganization	Chapter 11 bankruptcy reorganization
Approval of settlement or confirmation of plan	No; proceedings not completed	Yes	Yes	Yes	Yes	Yes	Yes
Presiding judicial officer	District judge	District judge (MDL)	District judge (MDL)	Bankruptcy judge	Bankruptcy and district judges	Bankruptcy judge	Bankruptcy and district judges (MDL)
Use of auxiliary personnel	Special masters	None	None	Examiner	Examiner, court-appointed expert	Mediator	Mediator
Number of class members/ claimants	Not determined	Less than 48,000[a]	More than 6,200[b]	More than 275,000[c]	Approximately 199,000[d]	More than 162,000[e]	More than 500,000[f]
Litigation maturity	Mature	Relatively immature	Relatively immature	Mature	Mature	Mature	Relatively immature

Characteristic	*Eagle-Picher*	*Mentor*	*AcroMed*	*UNR*	*A.H. Robins*	*Eagle-Picher Bankruptcy*	*Dow Corning*
Duration of proceeding[g]	5 months	4 months	10 months	82 months	35 months	70 months	55 months
Composition of class(es)	Present and future claimants	Present and future claimants	Present and future claimants	Present and future claimants	Present and future claimants	Present and future claimants	Present and future claimants
Subclasses or separate classes of tort claimants	None	None	None	None	None	One class of asbestos and lead injury claims; separate classes for asbestos property damage and other product liability	One class of domestic breast implant claims and six classes of foreign breast implant claims
Inclusion of derivative claims within resolution	Unclear; probably included spouses and codefendants	Spouses, co-defendants, health benefit providers	Spouses, co-defendants, health care providers	Spouses and codefendants	Spouses and codefendants	Spouses and codefendants	Spouses, co-defendants, health care providers
Total compensation for tort claimants	$505 million over 20 years	$25.8 million over three years	$100 million over one year	Stock worth $150 million	$2.735 billion (fully paid upon completion of appeals)	Stock and additional assets worth over $730 million	Up to $3.17 billion over 16 years
Type of payout administration	Not ever determined	Joint claims facility (with other breast implant defendants)	Settlement fund administered by claims administrator	Trust, utilizing joint claims facility	Trust, utilizing claims resolution facility	Trust, utilizing joint claims facility	Settlement facility and litigation facility

Characteristic	*Eagle-Picher*	*Mentor*	*AcroMed*	*UNR*	*A.H. Robins*	*Eagle-Picher Bankruptcy*	*Dow Corning*
Treatment of commercial creditors	Full payment anticipated	Full payment	Full payment	Payment of 59% of claim value	Full payment	Payment of approximately 33% of claim value	Full payment (in cash and senior notes)
Treatment of shareholders	Retention of interests anticipated	Retention of interests	Retention of interests	Receipt of 8% of stock of reorganized corporation	Receipt of stock in reorganized corporation worth $916 million	Elimination of interests; receipt of no value	Retention of interests in reorganized corporation
Representation of present tort claimants	Three court-appointed counsel	MDL plaintiff steering committee	MDL plaintiffs' legal committee	Asbestos-related plaintiffs committee (seven asbestos plaintiffs' attorneys)	Dalkon Shield claimants' committee (three claimants—two of them lawyers—and two plaintiffs' attorneys)	Injury claimants' committee (ten plaintiffs' attorneys)	Tort claimants' committee (eight plaintiffs' attorneys and one implant recipient)
Representation of future claimants	One court-appointed counsel	No separate representation	No separate representation	Legal representative of putative asbestos-related claimants	Future claims representative	Future claims representative	No separate representation

Characteristic	*Eagle-Picher*	*Mentor*	*AcroMed*	*UNR*	*A.H. Robins*	*Eagle-Picher Bankruptcy*	*Dow Corning*
Extent of notice	Sent by telephone and fax to asbestos plaintiffs' attorneys and codefendants; newspaper ads	Mailed to over 52,000 potential class members, lawyers, and doctors; published in *USA Today*	Mailed to 7,000 persons and advertised in national publications	Not revealed by available sources; disclosure statement and ballot mailed to unknown number of asbestos claimants	Notice of bar date published widely; disclosure statement and ballot mailed to 195,000 tort claimants	Notice of bar date published widely and mailed to all known asbestos claimants and attorneys; disclosure statement and ballot sent to 162,000 claimants or their lawyers	Notice of bar date published widely, announced on TV, and mailed to 844,000 potential claimants; disclosure statement and ballot mailed to over 500,000 claimants
Objections to settlement approval or confirmation	Two representatives of present claimants and many asbestos plaintiffs' attorneys	Thirty-one class members; support groups, health care providers, and implant manufacturers	Objections filed on behalf of 52 class members and by health care providers, the United States, and a non-settling codefendant	Objections filed by former employees and possibly others	Objections filed by a group of Dalkon Shield claimants	Objections filed by a commercial creditor, shareholders, and an asbestos plaintiff's attorney	Objections filed by unsecured creditors' and physician creditors' committees, certain groups of domestic and foreign breast implant claimants, and the United States
Vote by tort claimants	None	None	None	Plan approved by over 96% of asbestos claimants who voted	Plan approved by over 94% of Dalkon Shield claimants who voted	Plan approved by over 96% of asbestos and lead personal injury claimants who voted	Plan approved by 95.5% of domestic implant claimants who voted

Characteristic	*Eagle-Picher*	*Mentor*	*AcroMed*	*UNR*	*A.H. Robins*	*Eagle-Picher Bankruptcy*	*Dow Corning*
Determination of value of tort claims	No	No	No	Unsecured creditors, tort claimants, and future claims representative negotiated a ratio	Judge estimated Dalkon Shield claims to have value of $2.475 billion	Judge estimated asbestos claims at $2.5 billion; plan based on compromised value of $2 billion	No
Determination of value of company	No	No	Expert testified to worth of $104 million (without litigation); no judicial finding	No	Company sold as part of reorganization for over $3 billion	No	No
Length of fairness or confirmation hearing	Not held	Two hours	Conducted over the course of four days	Completed in one day	Completed in one day	Completed in one day	Conducted over the course of three weeks
Method of confirmation	Not applicable	Not applicable	Not applicable	Consensual	Consensual	Cramdown	Cramdown
Scope of release or discharge	Not ever determined	Mentor and affiliated companies	AcroMed, Medical Advisory Panel members, insurers, raw material suppliers, shareholders, and treating physicians (product liability claims)	UNR and affiliated companies, plus settling insurers	A.H. Robins, health care providers (for Dalkon Shield claims only), and insurer (pursuant to separate settlement)	Eagle-Picher, affiliated companies, and insurers	Dow Corning and shareholders, settling insurers, and settling health care providers

Characteristic	*Eagle-Picher*	*Mentor*	*AcroMed*	*UNR*	*A.H. Robins*	*Eagle-Picher Bankruptcy*	*Dow Corning*
Payment of counsel for class or official committee	To be paid from settlement fund	Expenses of $310,000 paid from settlement fund; fees channeled to MDL fund	Payment channeled to MDL fund	Paid as an administrative expense	Paid as an administrative expense	Paid as an administrative expense ($17.6 million)	Paid as an administrative expense
Limits on awards of individual attorneys' fees	Early proposed agreement limited fees to 25%	10%	No contingent fees for attorneys retained post-settlement	Not known	No limit on original payments; 10% cap on surplus payments	No limit imposed	No fees for implant removal or disease waiver; for other settling claims, percentage limits imposed
Appeals of settlement approval or confirmation	Not applicable; mandamus petitions filed following conditional certification	None	Several appeals taken, but all eventually withdrawn	Appeal by Bloomington workers; confirmation not overturned on appeal	Appeal by group of Dalkon Shield claimants who had voted against the plan; confirmation affirmed by Fourth Circuit	Appeal by commercial creditor; later dismissed by stipulation	Plan confirmation affirmed by district court; further appeals may be taken

a. This was the number of persons who indicated by registration or communication with the claims office or by filing a proof of claim in the *Bioplasty* bankruptcy that they might have received a breast implant manufactured by either Mentor or Bioplasty.

b. This was the number of persons who registered with the plaintiffs' legal committee as having a possible claim against AcroMed. The court noted that more than 100,000 persons had received AcroMed pedicle screws.

c. This was the number of claims received and processed by the trust by the end of 1997.

d. This was the number of persons who filed claims with the trust.

e. This was the number of persons who filed proofs of claim in the bankruptcy by the bar date.

f. This was the number of persons who filed claims (or had claims filed on their behalf) by the bar date.

g. For the class actions, the duration is measured from the initiation of the limited fund class action proceedings to the certification of the class and approval of the settlement. For the bankruptcies, it is measured from the filing of the bankruptcy petition to the confirmation of the plan.

The Federal Judicial Center

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The Director's Office is responsible for the Center's overall management and its relations with other organizations. Its Systems Innovation & Development Office provides technical support for Center education and research. Communications Policy & Design edits, produces, and distributes all Center print and electronic publications, operates the Federal Judicial Television Network, and through the Information Services Office maintains a specialized library collection of materials on judicial administration.

The Judicial Education Division develops and administers education programs and services for judges, career court attorneys, and federal defender office personnel. These include orientation seminars, continuing education programs, and special-focus workshops. The Interjudicial Affairs Office provides information about judicial improvement to judges and others of foreign countries, and identifies international legal developments of importance to personnel of the federal courts.

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