YOUNG CONAWAY STARGATT & TAYLOR, LLP
Attorneys at Law

Top 10 Developments in 2013 Affecting Asbestos Bankruptcies and Settlement Trusts

In 1994, Congress enacted 11 U.S.C. § 524(g), enabling companies plagued with overwhelming asbestos liabilities to reorganize by establishing a post-confirmation settlement trust to resolve their asbestos liabilities. Twenty years later, bankruptcy cases involving asbestos liabilities and the settlement trusts established through them continue to be a source of much legislative debate and litigation.

In 2013, Congress and numerous state legislatures considered legislation seeking disclosures of claimant information from asbestos-settlement trusts in the interest of transparency and from tort-suit plaintiffs in the interest of fairness in litigation. Disclosure was also an issue in the courts, as debtor Garlock Sealing Technologies sought information to use in its own bankruptcy proceeding. The year saw long-time debtors Global Industrial Technologies and Quigley emerge from bankruptcy, while debtors Pittsburgh Corning and W.R. Grace inched closer to emerging. Meanwhile, the debtors in the more recently filed Bondex case litigated the estimated amount of their asbestos liabilities.

We summarize below our list of the top 10 developments from 2013 affecting asbestos bankruptcies and settlement trusts.

10. Federal and state legislative efforts sought transparency from settlement trusts

U.S. House passes FACT Act; Senate refers it to committee

After a similar bill failed to gain traction in 2012, the Furthering Asbestos Claims Transparency (FACT) Act, H.R. 982, was introduced in the U.S. House of Representatives on March 6, 2013. The bill would amend 11 U.S.C. § 524(g) by requiring a trust established pursuant to that section to (1) file quarterly reports with the bankruptcy court detailing "each demand the trust received from, including the name and exposure history of, a claimant and the basis for any payment from the trust made to such claimant" but not including confidential medical records, and (2) produce information related to payment and "demands for payment" from the trust to "any party" in litigation concerning liability for asbestos exposure upon written request. A subcommittee and later the full Judiciary Committee held public hearings on the FACT Act before favorably reporting the bill to the full House on May 21. The Act was brought up on the floor of the House and passed on November 13. Upon receipt in the Senate, the bill was referred to the Committee on the Judiciary, where it remains.

State legislatures consider bills requiring disclosure of asbestos-trust claims

While Congress considered amending the Bankruptcy Code to require disclosure of trust-claimant information, several states considered legislation to require tort-system plaintiffs to disclose and produce information and documents pertaining to claims they have submitted to asbestos settlement trusts. Some of the bills would permit an asbestos defendant to move to stay a plaintiff's case on the basis that the plaintiff can file claims against asbestos trusts identified by the defendant; the plaintiff could then file those trust claims or respond to the motion, with the court to determine the merits of filing the additional trust claims.

Additionally, some of the bills would establish presumptions that the trust-claim information and materials are relevant to the tort action, discoverable, and not privileged. Certain of the bills provide for verdict set-offs based on amounts the plaintiff may recover from an asbestos trust. A version of the bill considered in Wisconsin would permit the plaintiff to object to discovery of the trust-claim materials essentially by providing a privilege log and, if the plaintiff serves a work history on the defendants, would require the defendants to provide any documents or other information from other lawsuits in the defendants' possession or control relating to any employer or job site included in the work history during the period identified by the plaintiff.

Among the states to consider this legislation were Illinois (H.B. 153, 98th Leg., Reg. Sess.); Louisiana (H.B. 481, 2013 Reg. Sess.)(died in committee); Michigan (H.B. 4917, 2013-2014 Sess.); Mississippi (H.B. 529, S.B. 2373, 2013 Reg. Sess.) (died in committee); New York (A.B. 7930, 2013-2014 Sess.); Ohio (H.B. 380, 129th Sess.) (enacted); Pennsylvania (H.B. 1150, 2013 Sess.); South Carolina (S.B. 773, 120th Leg., 2d Sess.); Texas (H.B. 2545, 83rd Leg., Reg. Sess.); and Wisconsin (A.B. 19, S.B. 13, 2013-2014 Sess.).

9. Debtor Garlock was granted access to Rule 2019 statements

The United States District Court for the District of Delaware reversed the Bankruptcy Court's denial of motions filed by debtor Garlock Sealing Technologies, LLC, seeking access to Rule 2019 statements filed in nine asbestos-related bankruptcy cases. *In re Motions for Access of Garlock Sealing Techs., LLC*, 488 B.R. 281 (D. Del. 2013). The District Court held that Garlock had standing as a member of the public to seek access to the statements, which it determined are "judicial records" that are "filed" with the bankruptcy court and therefore are subject to a presumptive right of access (that the appellees failed to rebut). The District Court also found that Garlock's plan to use the statements for an estimation proceeding in its own bankruptcy case was proper and the privacy of the claimant information could be protected through appropriate limitations. Accordingly, the District Court found "good cause" to modify the Bankruptcy Court's orders to permit Garlock access subject to certain restrictions on use and disclosure of the information in the statements.

As a related matter, during 2013 the United States Bankruptcy Court for the Western District of North Carolina held a 17-day trial on the estimation of Garlock's liability for mesothelioma claims that culminated in a decision estimating liability at $125 million. *See In re Garlock Sealing Techs., LLC*, 504 B.R. 71 (Bankr. W.D.N.C. 2014). Acknowledging that other courts have looked to a debtor's tort-system settlement history to estimate asbestos liability, the court found that that history was not a reliable indicator of Garlock's liability because Garlock's settlement history was inflated by defense costs and tainted. Specifically, the court found that, as other major asbestos defendants left the tort system by filing for bankruptcy protection and establishing settlement trusts, some plaintiffs and their attorneys withheld evidence of exposure to products of those other defendants and delayed filing trust claims until after recovering from Garlock.

8. Debtor Flintkote prevailed in its quest for arbitration with certain of its insurers

The United States District Court for the District of Delaware granted the motions of the Flintkote Company to compel two of its insurers to arbitrate disputes regarding their obligation to provide coverage for asbestos liabilities. *The Flintkote Co. v. Indemnity Marine Assurance Co.*, Nos. 13-935-LPS and 13-103-LPS, 2013 U.S. Dist. LEXIS 140986 (D. Del. Sept. 30, 2013). Flintkote, along with its subsidiary Flintkote Mines Limited, has been in bankruptcy since 2004. The Flintkote plan of reorganization pursuant to 11 U.S.C. § 524(g) was confirmed by the Delaware Bankruptcy Court on December 21, 2012, and is currently on appeal in the District Court.

Flintkote sought arbitration under a general liability insurance policy that involved Indemnity Marine insurance company and its corporate parent, Aviva PLC; the Wellington Agreement, which Flintkote and other asbestos defendants and insurers, including Indemnity Marine, had entered in 1985 to resolve coverage disputes; and a 1989 agreement between Flintkote and Aviva. The Wellington Agreement required alternative dispute resolution for coverage issues, while the 1989 agreement required resolution through litigation. After six years of unsuccessful mediation and failure to agree on an arbitration agreement, Flintkote sued Aviva (and later Marine Indemnity) in Delaware (the "Delaware Action") and moved to compel arbitration, while Aviva sued Flintkote in California (the "California Action") and moved to dismiss the Delaware case or transfer it to California. The California Court stayed the California Action pending the Delaware Court's ruling on Aviva's motions.

The Delaware District Court found that Flintkote and Indemnity Marine were both signatories to the Wellington Agreement and Indemnity Marine's coverage responsibilities were covered by the plain language of its "broad" and "expansive" arbitration provision. The court also found that Aviva should be compelled to arbitrate based on estoppel. Although Aviva was not a signatory to the Wellington Agreement and the 1989 agreement expressly rejected ADR, Aviva had exploited the Wellington Agreement to its advantage during mediation, Aviva's conduct and statements caused Flintkote to believe the parties were negotiating under the Wellington ADR provisions, and Flintkote had detrimentally relied upon that belief. Accordingly, the Court granted Flintkote's motions to compel arbitration and denied as moot the insurers' motions for summary judgment and to dismiss or transfer.

Several months later, the United States District Court for the Northern District of California found that interests of comity, consistency, and judicial economy warranted dismissal of the California Action. *Aviva PLC v. The Flintkote Co.*, No. CV 13-00711 SI, 2013 U.S. Dist. LEXIS 165907 (N.D. Cal. Nov. 21, 2013). After the court in the Delaware Action granted Flintkote's motion, Aviva appealed that decision and requested that the California Action remain stayed during the appeal. Flintkote then renewed its motion to dismiss the California Action.

The court in the California Action found dismissal without prejudice was warranted because the California and Delaware Actions involved the same issues. Also, Aviva would have the opportunity to resolve in arbitration all issues raised in the California Action; could, if its appeal succeeded, seek dismissal or transfer in Delaware; and would have "a full opportunity to vindicate its rights in that court."

7. Ninth Circuit Court of Appeals reversed confirmation of Plant Insulation plan

The Ninth Circuit Court of Appeals reversed the Northern District of California District and Bankruptcy Courts' decisions confirming Plant Insulation Company's reorganization plan pursuant to 11 U.S.C. § 524(g). *Fireman's Fund Ins. Co. v. Plant Insulation Co. (In re Plant Insulation Co.),*734 F.3d 900 (9th Cir. 2013). Certain of Plant's non-settling insurers objected to the plan on the basis that it did not satisfy section 524(g) because the plan did not fully protect their contribution-claim rights and did not meet the statute's requirements regarding the trust's ownership of equity in the reorganized debtor.

Having transferred its business operations to Bayside Insulation and Construction, Inc., in 2001, Plant's insurance policies were its only remaining assets of value when Plant sought bankruptcy protection in 2009. Plant's plan proposed to fund an asbestos settlement trust with those insurance assets and provided for the trust to purchase equity in reorganized Plant after it merged with Bayside. Because the plan would permit asbestos claimants to pursue claims in the tort system, the plan also provided certain protections for Plant's non-settling insurers, including a judgment-reduction credit for equitable contribution claims they may have had against a settling insurer. Agreeing with the lower courts, the Court of Appeals concluded that section 524(g), by its express terms, permits injunctions that cover non-settling insurer contribution claims and does not require that such claims be fully compensated.

The Court of Appeals also found that the plan satisfied section 524(g)(2)(B)(i)(II), which requires a trust be "funded" with securities of the reorganized debtor. Under the plan, the trust would pay $2 million for 40% equity in Bayside worth approximately $500,000, and receive a warrant to purchase an additional 11% of the company at the price set in the original sale and a $250,000 note secured by stock. The plan satisfied the statute because the trust would receive a stake, albeit one of uncertain value, in the reorganized debtor.

However, the plan did not satisfy the statute with respect to the contingencies it placed upon the trust's abilities to obtain control of the reorganized company pursuant to section 524(g)(2)(B)(i)(III). The Court of Appeals noted that the statute evinces intent that the trust must have a meaningful ability to acquire "voting shares" in the reorganized debtor's business when such control will benefit asbestos claimants. The plan's specified contingencies were deficient in several respects. Providing the trust a right to purchase additional shares was insufficient because the trust will have insufficient resources to pay claims and the fixed price was quadruple the current equity value. Additionally, obtaining shares upon default on a $250,000 note was insufficient because the value of such shares would be negligible. Accordingly, the court reversed and remanded the case.

Following remand, the plan proponents made certain revisions to the Plant plan, including reducing the price the Trust must pay to purchase shares sufficient to obtain control over Bayside to one dollar. On February 28, 2014, the Bankruptcy Court confirmed the revised plan.

6. Global Industrial Technologies plan was confirmed after remand

The Bankruptcy Court for the Western District of Pennsylvania confirmed the plan of Global Industrial Technologies, Inc., and certain of its affiliates who had been in bankruptcy since 2002. *In re Global Industrial Techs., Inc.*, No. 02-21626-JKF, 2013 Bankr. LEXIS 594 (Bankr. W.D. Pa. Feb. 13, 2013). As part of confirmation, the court issued injunctions pursuant to 11 U.S.C. §§ 524(g) and 105 in connection with establishment of separate trusts to resolve the debtors' liability for personal injury claims based on exposure to asbestos and silica.

The court's findings of fact and conclusions of law included findings in accordance with a 2011 remand order from the Third Circuit Court of Appeals, which had reversed the Bankruptcy Court's previous confirmation of the debtors' plan in 2007. *See In re Global Indus. Techs.*, 645 F.3d 201 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 551 (U.S. 2011). The Court of Appeals had concluded there was record support for certain objecting insurers' allegations that counsel for the debtors and claimants had colluded to inflate silica claims against the debtors. The Bankruptcy Court determined, after conducting a "more searching review" as directed by the Court of Appeals, that the evidence "conclusively and overwhelmingly establishes that there was no collusion, no fraud, and no improper solicitation of votes."

5. Pittsburgh Corning plan was confirmed and reconsideration denied

After previous versions of the plan had been twice denied confirmation, and after two years of negotiations and amendments to address the concerns of the court and certain objecting parties, the Bankruptcy Court for the Western District of Pennsylvania confirmed the plan of reorganization of Pittsburgh Corning Corporation pursuant to 11 U.S.C. §524(g). *In re Pittsburgh Corning Corp.*, No. 00-22876-JKF, 2013 Bankr. LEXIS 2124 (Bankr. W.D. Pa. May 24, 2013).

The court overruled the objections (on the merits and for lack of standing) of Garlock Sealing Technologies, Inc., which challenged the structure of the asbestos settlement trust and certain provisions of the trust distribution procedures, including those relating to confidentiality of claim submissions and indirect claims. The court also overruled the objections of Mt. McKinley Insurance Company and Everest Reinsurance Company (collectively, "MMIC"), finding that they lacked standing because the plan does not harm them, and that the trust and its distribution procedures contained reasonable criteria and provisions for resolving the asbestos claims that will be channeled to the trust.

The Honorable Judith K. Fitzgerald had presided over the case since Pittsburgh Corning's bankruptcy filing in 2000. Following her retirement in May 2013, the bankruptcy case was assigned to Chief Bankruptcy Judge Thomas Agresti, who granted in part and denied in part a motion by MMIC for reconsideration of the confirmation order. *In re Pittsburgh Corning Corp.*, No. 00-22876-TPA, 2013 Bankr. LEXIS 4782 (Bankr. W.D. Pa. Nov. 12, 2013). MMIC sought reconsideration on five grounds, among which was the court's reopening of the record shortly before confirmation to admit two affidavits from the debtor's shareholders. The affidavits were intended to show that none of the entities that were to be protected by the channeling injunction were limited partnerships, which are not authorized to be protected under § 524(g). Rejecting

MMIC's contentions, the court found that Judge Fitzgerald had raised the issue as part of her duty to be satisfied that all requirements for confirmation were met.

However, the court agreed with MMIC that amendments to plan exhibits regarding the limited-partnership issue rendered the scope of the channeling injunction confusing, but found it sufficient to "make a clarifying statement on the scope of the injunction" in its order on MMIC's motion.

The Pittsburgh Corning bankruptcy case is now pending in the District Court, where the plan proponents' motion to have the confirmation order affirmed has been consolidated with an appeal filed by MMIC.

4. Quigley emerged from bankruptcy and its parent Pfizer had moderate success challenging liability as an "apparent manufacturer"

On July 2, 2013, the United States Bankruptcy Court for the Southern District of New York confirmed the reorganization plan of Quigley Company, Inc., pursuant to 11 U.S.C. § 524(g). [The unreported confirmation order is available upon request] The court had denied confirmation of a previous version of the plan in 2010, finding the plan was not proposed in good faith, the process had been manipulated by Quigley's parent Pfizer Inc., and Pfizer's contribution was substantially less than the benefit it would receive from the channeling injunction that would be issued in connection with the plan. Under the confirmed plan, Pfizer's contribution includes $260 million in cash, certain insurance assets, forgiveness of certain secured and unsecured claims of Pfizer exceeding $33 million, and 100% of the common stock of Reorganized Quigley, all of which will be used to fund an asbestos settlement trust. The District Court affirmed confirmation of the plan on July 30.

Several weeks before confirmation, the United States Supreme Court had denied certiorari to Pfizer's appeal in *Pfizer Inc. v Law Offices of Peter G. Angelos* (*In re Quigley Co.)*, 676 F.3d 45 (2d Cir. 2012), cert. denied, 133 S.Ct. 2849. In that decision, the Second Circuit Court of Appeals held that a preliminary injunction mirroring 11 U.S.C. § 524(g)(4) did not bar claims against Pfizer under an "apparent manufacturer" theory. The Supreme Court had invited briefs from the appeal parties and the Solicitor General before denying the petition for certiorari.

Nonetheless, the United States District Court for the Western District of Washington found that Pfizer was not liable under an "apparent manufacturer" theory for placing its logo on products sold by Quigley, in *Turner v. Lockheed Shipbuilding Co.*, No. C13-1747-TSZ, 2013 U.S. Dist. LEXIS 184958 (W.D. Wash. Dec. 13, 2013). The District Court concluded that the Washington Supreme Court would adopt the apparent-manufacturer theory set forth in the Restatement (Second) of Torts § 400, but would apply it only to a defendant that "put[] out [the] chattel" and played a role in the distribution or supply of the product beyond allowing its name to be placed on the product. Because there was no evidence that Pfizer put out the product at issue, Pfizer was not liable.

The court also concluded that, even if Washington were to apply § 400 to a non-distributor, the plaintiff failed to establish a genuine issue of fact as to whether Pfizer put out the product as its own. While certain product labels and other items included the Pfizer logo, the

court found that the items identified Quigley as the manufacturer and indicated its subsidiary relationship with Pfizer, which was insufficient to suggest that Pfizer manufactured the product.

3. Third Circuit decisions set the stage for W.R. Grace to emerge from bankruptcy

Three decisions from the Third Circuit Court of Appeals helped pave the road for the W.R. Grace debtors to emerge from bankruptcy on February 3, 2014. The Court of Appeals affirmed the Delaware District and Bankruptcy Courts' decisions to confirm the W.R. Grace plan of reorganization pursuant to 11 U.S.C. § 524(g). The plan channels Grace's present and future asbestos liabilities to a $3 billion personal-injury trust and a $210 million property-damage trust for resolution.

The Court of Appeals issued two opinions overruling objections to the plan's treatment of property-damage claims and contribution and indemnity claims. In both opinions, the Court of Appeals emphasized that Congress intentionally built breadth into section 524(g) (and the related Bankruptcy Code definitions of "claim" and "demand") to encompass all asbestos-related claims (regardless of when they arose and which theory of liability is raised) against a debtor to serve the dual purposes of providing equitable treatment for present and future claimants and facilitating a fresh start for corporations burdened with asbestos liability. In a third opinion, the court held that third-party objector Garlock Sealing Technologies, LLC, lacked standing to object to confirmation of Grace's plan. A related appeal involving claims by a bank-lender group was dismissed in 2014 based upon a settlement filed with the court in December.

Trust is appropriate to address property-damage claims

In *In re W.R. Grace & Co.*, 729 F.3d 332 (3d Cir. 2013) (precedential), the Court addressed issues relating to current and future property-damage claims. Anderson Memorial Hospital, the only property-damage claimant that had not settled with Grace by the time of confirmation, objected to the plan's formation of a property-damage trust. Because all property damage allegedly caused by Grace's asbestos activities existed prior to the bankruptcy, AMH argued that there could be no future property-damage claims. AMH cited to *In re Grossman's, Inc.*, 607 F.3d 114 (3d Cir. 2010), which held that a claim arises upon exposure to products/conduct that gives rise to injury underlying a right to payment, and the Bankruptcy Code's "mutually exclusive" definitions of "claim" and "demand." Additionally, AMH argued that the plan unfairly deprived AMH of its state-court forum and instead forced it to seek relief from the property-damage trust, while future claimants can litigate their claims before the District Court (potentially through jury trials).

The Court of Appeals held that the plan satisfied section 524(g) because Grace is likely to face substantial future property-damage demands. The Court credited Grace's expert's testimony that future claims would be made, and "conclude[d] that property damage future claims can exist as a matter of law." Relying on the statutory language and *In re Flintkote Co.*, 486 B.R. 99 (Bankr. D. Del. 2012), the Court found that literal application of the Code's terms "claim" and "demand" would contravene the congressional intent behind section 524(g) to provide a debtor relief from all asbestos liability (including property-damage claims) while providing equitable protection to all claimants (including future claimants). Moreover, section 524(g) explicitly

authorizes the creation of a trust for asbestos property-damage claims. Although AMH argued the trust was a pretext to avoid litigation because claims would be paid the full allowed amounts, the Court found the trust was necessary to ensure compensation would be available for future claimants. Additionally, AMH had submitted to Bankruptcy Court jurisdiction by filing a proof of claim and failed to show how that jurisdiction disadvantaged its recovery. Accordingly, the Court found that the plan did not discriminate against AMH. The Court also found the plan was proposed in good faith and was feasible under 11 U.S.C. § 1129(a).

Contribution and indemnification claims are properly channeled under Section 524(g)

In *In re W.R. Grace & Co.*, 729 F.3d 311 (3d Cir. 2013 (precedential), the State of Montana and Her Majesty Queen Elizabeth II in Right of Canada (the "Crown") objected to the plan's treatment of their contribution and indemnification "requests" based on lawsuits against them for allegedly failing to warn their citizens of risks posed by certain products and activities of Grace. Montana and the Crown argued that their "requests" were not "claims" or "demands" that could be channeled under section 524(g) because they arose from alleged failures to warn and not personal injury, wrongful death or property damage actions.

The Court of Appeals found that the "requests" were "claims" or "demands" based on (1) the text and broad intent of section 524(g) to "include *all* potential asbestos-related liability" and (2) the Court's prior holdings in *Grossman's* and *Wright v. Owens Corning*, 679 F.3d 101 (3d Cir. 2012) that a claim arises upon pre-confirmation exposure to products/conduct giving rise to an injury that underlies a right to payment. Because, at base, the actions sought (indirectly) recovery stemming from Grace's asbestos-related liabilities, the "requests" fell within the broad category of "any claim or demand" that could be channeled under the statute. For similar reasons, the Court held that certain claims of Montana and the Crown were properly classified with direct personal injury claims. The Court further found that certain of the trust distribution procedures, including those governing indirect claims, were not discriminatory but provided for equal treatment of claimants. Finally, the Court rejected the argument that the plan was not "fair and equitable" to future claimants because Montana and the Crown did not challenge the reasonableness of trust funding but the lack of certainty in the distribution amounts and procedures. The Court indicated that such uncertainty is anticipated by section 524(g) and irrelevant to the "fair and equitable" standard.

Co-defendant Garlock failed to establish standing

In a related decision, the Court of Appeals affirmed the Delaware District and Bankruptcy Courts' holdings that Garlock lacked standing to object to the reorganization plan of W.R. Grace. *W.R. Grace & Co.*, 532 Fed. Appx. 264 (3d Cir. 2013) (not precedential). Frequently named as a co-defendant prior to Grace's bankruptcy, Garlock argued it had contribution and setoff rights with respect to Grace that gave it standing to challenge whether Grace's plan complied with 11 U.S.C. §524(g). The Court of Appeals noted that Garlock asserted no current claim against Grace, there was no evidence that Garlock ever sought contribution/setoff with respect to Grace in the past, and there was no evidence that, during Grace's bankruptcy, Garlock suffered a judgment giving rise to a contribution claim against Grace. Accordingly, the court found that Garlock's alleged injuries were only speculative and

"contingent on the occurrence of events that may never happen, and indeed may never have happened previously[.]" On September 5, the Court of Appeals issued an order denying Garlock's petition for rehearing by the panel and the court en banc.

2. Bondex's liability for asbestos claims was estimated at $1.1 billion

In *In re Specialty Products Holding Corp.*, No. 10-11780-JKF, 2013 Bankr. LEXIS 2051 (Bankr. D. Del. May 20, 2013), the Delaware Bankruptcy Court estimated the pending and future mesothelioma-related claims against the debtors at $1.1 billion net present value for purposes of crafting a plan that will fund a settlement trust pursuant to 11 U.S.C. § 524(g).

The debtors, former manufacturers of asbestos-containing joint compound, estimated that the net present value of asbestos claims ranged from $300 million to $575 million, while the Asbestos Creditors' Committee estimated the value of the claims at $1.255 billion and the Future Claimants' Representative at $1.1 billion. The debtors advanced a number of arguments attacking the medical science and the exposure evidence on which the claims against them were premised and attempting to apportion liability among the debtors and their affiliates based on suggested exposure "eras." They also relied on an estimation methodology that deducted from the historical settlement amounts certain "implicit defense costs," which the debtors argued represented not liability but an effort to avoid legal fees and thus inflated the "true" value of the asbestos claims.

The court declined to adopt the debtors' novel estimation methodology, reasoning that because claims were appraised by debtors and by plaintiffs on what would have been a fair resolution in the absence of bankruptcy, settlements are the best indication of the value of claims, and the debtors cannot unilaterally subtract their "implicit defense costs" from the settlement values that both parties had accepted. It also rejected apportionment because the claims spanned the proposed eras and the debtors and their affiliates had always dealt with claims collectively.

Instead, the court credited the traditional approaches advocated by the Committee and the Future Claimants' Representative, according to which the estimated value is derived from the number of claims, the percentage of claims paid, and the average settlement value of a claim when it is paid. The court substantially adopted the Future Claimants' Representative's estimate because it corrected for the fact that the debtors' database undercounted the number of prepetition claims, and because that estimate was derived from the most up-to-date claims-forecasting model and accounted for non-occupational exposure (which was significant given the home use of the debtors' products). The Future Claimants' Representative is Eric D. Green who is represented by Young Conaway. His estimation expert is Thomas Vasquez, Ph.D., of Analysis Research Planning Corporation.

The debtors subsequently appealed the Bankruptcy Court's estimation opinion to the Delaware District Court. On February 7, 2014, the District Court certified the order estimating the debtors' asbestos liability for direct review by the Court of Appeals for the Third Circuit, holding that the proper estimation of asbestos liabilities is a matter of public importance and that guidance on the matter would materially advance the bankruptcy case. *Specialty Products Holding Corp. v. Official Committee of Asbestos Personal Injury Claimants (In re Specialty*

Products Holding Corp.), No. 13-1244-SLR, 2014 U.S. Dist. LEXIS 15682 (D. Del. Feb. 7, 2014).

1. United States Bankruptcy Judge Judith K. Fitzgerald retired

A review of the asbestos-bankruptcy developments in 2013 would not be complete without bidding a fond farewell to the Honorable Judith K. Fitzgerald, who retired at the end of May. For more than 25 years, Judge Fitzgerald served as a Bankruptcy Judge for the United States Bankruptcy Court for the Western District of Pennsylvania. She also sat by designation in the Bankruptcy Courts for the District of Delaware, the Eastern District of Pennsylvania, and the District of the U.S. Virgin Islands.

A significant part of Judge Fitzgerald's legacy will be her influence on asbestos-bankruptcy cases because she presided over more of those cases than any other single judge. In addition to the Bondex, Flintkote, Global Industrial Technologies, Pittsburgh Corning, and W.R. Grace matters discussed in this update, she also presided over the asbestos-bankruptcy cases of A-Best Products, ABB Lummus Global, ACandS, Armstrong World Industries, Combustion Engineering, Federal-Mogul Global, Kaiser Aluminum, Mid-Valley (Halliburton), North American Refractories, Owens Corning, Swan Transportation, United States Gypsum, and United States Mineral Products.

Following Judge Fitzgerald's retirement, the asbestos-bankruptcy cases that were pending before her were reassigned to judges within the respective jurisdictions from which they originated. Although certain changes became apparent in the second half of 2013, it remains to be seen how the dispersion of those cases and subsequently filed cases will affect the landscape for reorganizations pursuant to 11 U.S.C. § 524(g).

Judge Fitzgerald is now a professor of law at Indiana Tech Law School.