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BANKRUPTCY  
INSTITUTE

# 2019 Mid-Atlantic Bankruptcy Workshop

## ABI Talks

**Teresa C. Kohl, Moderator**

*SSG Capital Advisors, LLC; West Conshohocken, Pa.*

### Current Issues in Mass Tort Bankruptcy Cases

**Erin R. Fay**

*Bayard, P.A.; Wilmington, Del.*

### Tips for Building Your Practice, Branding Yourself and Becoming a Happier Restructuring Professional Along the Way

**Adam G. Landis**

*Landis Rath & Cobb LLP; Wilmington, Del.*

### How to Navigate Generational Communications

**Heather K. Lennox**

*Jones Day; Cleveland*



# Tips for Building Your Practice, Branding Yourself and Becoming a Happier Restructuring Professional in the Process

Adam G. Landis

15<sup>th</sup> Annual ABI Mid-Atlantic Bankruptcy Workshop

August 1-3  
Hershey, PA

LANDIS  
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COBB LLP



## Building Your Practice

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RATH &  
COBB LLP



## Mid-Atlantic Bankruptcy Workshop

AUGUST 1-3, 2019 • HOTEL HERSHEY • HERSHEY, PA



### Get Smart!



Clients pay you because you ARE smart, but you also have to GET smart!

You Know The Law

You Know the Restructuring Practice

You Need to Learn Your Clients' Businesses and Industries

You Can't Fake Knowledge or Interest

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## Mid-Atlantic Bankruptcy Workshop

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### The 3 Ways to Increase Productivity and Revenue as a Lawyer

#### 1. Bill More Hours

- Don't you already bill enough hours?



#### 2. Raise Your Rates

- Isn't there a limit to what clients will pay?



#### 3. Leverage

- Here's where the fun is!
- Surround yourself with people who are smarter than you
- Teach them to do what you do and go do something else!



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# Branding Yourself

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# Branding Yourself

# HOT SAUCE!

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## Branding Yourself

### Who Do You Want to Be In The Restructuring Practice?

Restructuring Combines the Best of Transactional and Litigation Practices and Skills

- Learn them both
- Know where your skills and interests are strongest
- Know what you enjoy doing and what you are good at
- Adopt the best traits you see in others
- Bring your own, unique perspective into every engagement
- Become your own you in the restructuring world







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# Becoming a Happier Restructuring Professional

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# Becoming a Happier Restructuring Professional

- Understand the Rule of Thirds
- Never do anything at midnight that you wouldn't do at 7 in the morning
- Rake the river – it never really stops

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## Becoming a Happier Restructuring Professional

And, Of Course, Hot Sauce!



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**Selected Current Issues in Mass Tort Bankruptcy Cases:  
Future Claims Representative Appointments  
Erin Fay, Bayard, P.A.**

In mass tort asbestos cases where a channeling injunction under section 524(g) of the Bankruptcy Code will be used, the Bankruptcy Code provides that the court shall appoint a future claims representative (a “FCR”). In such cases, the FCR is a critical constituent that is deeply involved in negotiating the chapter 11 plan, the trust that will administer asbestos injury claims, and the related trust distribution procedures. Notwithstanding its apparent awareness of the need for a FCR in such cases, Congress devoted 34 words of guidance regarding FCR appointment:

as part of the proceedings leading to issuance of such injunction [i.e., a channeling injunction in a chapter 11 plan confirmed in an asbestos mass tort bankruptcy case], the court appoints a legal representative for the purpose of protecting the rights of persons that might subsequently assert demands of such kind

11 U.S.C. § 541(g)(4)(B)(i).

This is in stark contrast to other portions of the Bankruptcy Code that lay out specific standards and requirements for other types of legal representatives, including certain advisors to a debtor, trustee, and creditors committee. *See* 11 U.S.C. § 327 (requiring certain advisors to a debtor or trustee to be “disinterested”); 11 U.S.C. § 101(14) (defining “disinterested person”); 11 U.S.C. § 1103 (requiring attorneys and accountants retained by a creditors’ committee to not represent any other entity with an adverse interest to the case).

Despite the paucity of guidance provided in the Bankruptcy Code, for many years courts often applied the disinterestedness standard when approving FCR appointments. *See In re Leslie Controls, Inc.*, Case No. 10-12199 (CSS) (Bankr. D. Del. Aug. 9, 2010), Transcript at 70:15-71:4; *Fed. Ins. Co. v. W.R. Grace (In re W.R. Grace)*, Case No. 04-844 (RLB), 2004 WL 5517843, \*7 (D. Del. Nov. 24, 2004); *In re UNR Indus., Inc.*, 46 B.R. 671 (Bankr. N.D. Ill. 1985).

Recently, the Office of the United States Trustee (the “UST”) has raised substantive and procedural concerns related to FCR appointments. In particular, the UST challenged FCR appointments in at least four recent cases: *In re Duro Dyne National Corp., et al.*, Case No. 18-27963 (MBK) (Bankr. D.N.J.); *In re The Fairbanks Co.*, Case No. 18-41768 (PWB) (Bankr. N.D. Ga.); *In re Maremont Corp.*, Case No. 19-10118 (KJC) (Bankr. D. Del.); *In re Imerys Talc America, Inc., et al.*, Case No. 19-10289 (LSS) (Bankr. D. Del.).<sup>1</sup>

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<sup>1</sup> In certain of these cases certain of the debtors’ insurers also objected to the proposed FCR appointments. In *Duro Dyne* and *Imerys*, the standing of the insurers was challenged and the courts determined that the applicable insurers had standing. *See Duro Dyne*, Case No. 18-27963 (MBK) (Bankr. D.N.J. Oct. 17, 2018), Transcript at 9:12-14; *Imerys*, Bench Ruling on Motion to Appoint James L Patton, Jr. as the Legal Representative for Future Talc Personal Injury Claimants (hereinafter “FRC Ruling”), at p. 2-4 (May 8, 2019) (available at <http://www.deb.uscourts.gov/judges-info/opinions>).



In each case, the UST’s objections related to the independence of the proposed FCR, potential conflicts of interest alleged to result from work in other asbestos trusts, prior engagements with other professionals that commonly participate in mass tort asbestos cases, prepetition work with the applicable debtor, and the potential promise of continued employment by the post-confirmation asbestos claims trust.

Although the bankruptcy court in each case appointed the requested FCR,<sup>2</sup> the courts reviewed and applied different legal standards:

<b>Case</b>	<b>Standards Considered</b>	<b>Standard Applied</b>
<b><i>Duro Dyne Nat. Corp.</i></b>	1) Disinterestedness 2) Appearance of Impropriety	Disinterestedness
<b><i>The Fairbanks Co.</i></b>	1) Disinterestedness 2) Guardian ad litem	Guardian ad litem
<b><i>Maremont Corp</i></b>	1) Disinterestedness 2) Disinterestedness plus	Disinterestedness
<b><i>Imerys Talc America, Inc.</i></b>	1) Disinterestedness 2) Disinterestedness plus 3) Appearance of Impropriety 4) Guardian ad litem	Guardian ad litem

The disinterestedness standard is set forth in section 101(14) of the Bankruptcy Code and does not merit significant additional discussion. As to the guardian ad litem standard, the courts applying that standard considered whether the FCR candidate was (i) disinterested, (ii) qualified, (iii) objective, (iv) independent, and (v) loyal to protecting the interests of the future claimants. *See In re Fairbanks Co.*, 2019 WL 1752774, at \*1, \*5 (Bankr. N.D. Ga. Apr. 17, 2019).

However, even in applying different standards, the courts often looked to the same indicia regarding the proposed FCR’s ability to serve, including positively considering the candidates’ prior experience. Many of the courts further expressed skepticism regarding any required showing of efficacy given the subjective nature of such inquiry and the obvious difficulty of applying such a consideration at the outset of a case. *See Duro Dyne*, Case No. 18-27963 (MBK) (Bankr. D.N.J. Oct. 17, 2018), Transcript at 17: 3-21. Finally, all of the courts were dismissive of arguments related to any potential conflict on account of prepetition services by the FCR for the applicable debtor. Moreover, the *Duro Dyne* and *Imerys* courts aptly recognized that if prepetition service was disabling, pre-negotiated cases – a valuable and efficient tool for resolving bankruptcy cases

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<sup>2</sup> In *Fairbanks*, the originally requested FCR was replaced with a different FCR, who was ultimately approved.

- would no longer be an option. *See Duro Dyne*, Case No. 18-27963 (MBK) (Bankr. D.N.J. Oct. 17, 2018), Transcript at 21: 5-13; *Imerys*, FRC Ruling at p. 10-11 (May 8, 2019).

Finally, as to the procedure for appointment of a FCR, the *Fairbanks* and *Imerys* courts addressed the issue. These courts similarly determined that any party can propose a FCR and that the court must independently review the proposed candidates. *See Fairbanks*, 2019 WL 1752774, at \*5; *Imerys*, FRC Ruling at p. 4-6 (May 8, 2019).