Jaunty Judicial Debates

Thomas M. Horan, Moderator
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Resolved: Setting bar dates in every chapter 11 case should be mandatory.

Pro: Hon. Jeffery A. Deller
U.S. Bankruptcy Court (W.D. Pa.); Pittsburgh
Con: Hon. Cecelia G. Morris
U.S. Bankruptcy Court (S.D.N.Y.); Poughkeepsie

Resolved: Prepayment premiums should be allowed in bankruptcy.

Pro: Hon. Thomas J. Catliota
U.S. Bankruptcy Court (D. Md.); Greenbelt
Con: Hon. John J. Thomas
U.S. Bankruptcy Court (M.D. Pa.); Wilkes Barre, Pa.

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OUTLINE OF BAR DATES IN BANKRUPTCY CASES

Hon. Jeffery A. Deller, Chief Judge
U.S. Bankruptcy Court for the Western District of Pennsylvania

1. Philosophy of Deadlines
    a. History of the term
        i. The term "deadline" arose from the spacial boundary line imposed upon prisoners which, if crossed, would result in death
        ii. The meaning of the term "deadline" began to be used in the early 1900's to refer to "time deadlines" when used by newspapers requiring the submission of stories in time to be printed
    b. The meaning of "deadline" requires additional references
        i. To whom the deadline applies (its "subjects")
        ii. The time period to which the deadline applies (the "trigger")
        iii. The action required prior to the trigger (the "activity")
        iv. SUBJECT'S deadline for doing ACTIVITY is TRIGGER
    c. Deadlines require consequences
        i. SUBJECT's deadline for doing ACTIVITY in order to avoid CONSEQUENCE is TRIGGER
    d. Any inquiry into a deadline requires a determination of whether exceptions apply
        i. SUBJECT's deadline for doing ACTIVITY in order to avoid CONSEQUENCE is TRIGGER unless EXCEPTION
    e. Although legal deadlines require references to time and often may be calculated mathematically, deadlines are inherently arbitrary
        i. They are pragmatic human contrivances designed to accomplish necessary results
        ii. Legal deadlines are no less arbitrary than other deadlines (such as, for example, basketball's "shot clock" or hockey's "buzzer")
    f. Analyzing deadlines must be undertaken by a search for their *pragmatic purpose* rather than any intrinsic *truth* or *justice*

2. A statute of limitation is the quintessential legal deadline
    a. Policies Behind Statutes of Limitation
        i. Fairness
            1. Allows potential defendants to be secure in knowing the scope of their obligations
            2. Allows society to move forward in its business, social, and political processes
            3. Ensures that defendants are able to defend themselves with accurate evidence

            a. Absent a deadline, a clever plaintiff may gather evidence in support of a claim and lie in wait while defendant's memory fades and evidence is lost, disposed of, and destroyed
        ii. Ensuring Courts Have Sufficient Evidence to Decide Cases
            1. "Time is constantly destroying the evidence of rights."[1]
            2. Courts charged with accurately deciding controversies must have sufficient evidence to achieve their purpose
        iii. Encouraging Diligence
            1. Diligence benefits the judicial system and society at large
            2. "Normative" attribute of diligence
                a. Society should be able to put the past to bed and move on with future development
            3. "Realistic" attribute of diligence
                a. A plaintiff holding a valid claim is unlikely to delay seeking a remedy

3. Bar Dates in Bankruptcy Cases
    a. Bar dates operate as a strict statute of limitation in bankruptcy cases
    b. Purposes/policies behind bar dates
        i. As bar dates are a subset of statutes of limitation, the general policies behind statutes of limitation apply
        ii. Bar dates also promote purposes/policies unique to bankruptcy
            1. Speed and Efficiency
                a. The Bankruptcy Rules expressly require a "just" and "speedy" determination of bankruptcy cases and proceedings
                b. Prolonged stays in bankruptcy serve neither creditors nor debtors
            2. Finality
                a. Absent a bar date for filing claims, a debtor will not know the universe of its creditors and therefore cannot craft a plan of reorganization
                b. Debtors will not know whether they have sufficient funds to pay an unknown pool of claims
                c. Creditors will not know whether their recovery will be diluted by outstanding and unfiled claims
                d. An estate cannot be fully administered absent a bar date
            3. Debtor rehabilitation
                a. Absent the ability to formulate a plan for reorganization, a debtor cannot be rehabilitated

[1] Wood v. Carpenter, 101 U.S. 135, 139 (1879).

b. Unless a debtor knows of and confirms a plan to treat its preexisting debt, a debtor cannot achieve a "fresh start"

c. Policies against bar dates
    i. Claims should be adjudicated on the merits and public policy disfavors adjudication on procedural grounds
    ii. Procedural impediments can disallow redress for meritorious claims, and society expects that every right has a remedy
    iii. No amount of notice is sufficient for future toxic tort claimants whose illness is unmanifested and claims are unknown not only to the debtor but also to claimants themselves

4. Known Creditors and Future Claimants
    a. Notice
        i. Adequate notice to insure due process is an essential element of any statute of limitations or bar date
        ii. Actual notice required for "known" creditors and constructive notice often deemed sufficient for "unknown" creditors
    b. Unmanifested Claims
        i. Asbestos injuries are unique in that the illness may not manifest for 50 years
        ii. Claimants may have been exposed but show no signs of illness as of the petition date

5. Do Future and/or Unmanifested Claimants Hold "Claims"?
    a. Claim is defined broadly in section 101(5)
        i. Congressional intent was to insure "all legal obligations of the debtor, no matter how remote or contingent, will be dealt with in the bankruptcy case"[2]
    b. Claims arise according to the law of the Third Circuit "when an individual is exposed pre-confirmation to a product or other conduct giving rise to an injury that underlies a 'right to payment' under the Code.[3]

6. Setting Bar Dates for Unmanifested Claims
    a. Bankruptcy Rule 3003(c)(3) states that the "court ***shall*** fix . . . the time within which proofs of claim or interest may be filed."

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[2] Laura B. Bartell, Due Process for the Unknown Future Claim in Bankruptcy—Is This Notice Really Necessary?, 78 Am. Bankr. L.J. 339, 340-41 (2004), citing S. Rep. No. 95-989, 9rth Cong., 1st Sess. (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5808, and H.R. Rep. No. 95-595, 95th Cong. 1st Sess. (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 6266.

[3] Wright v. Corning, 679 F.3d 101, 107 (3d Cir. 2012) *cert. denied*, 133 S. Ct. 1239 (2013), citing Jeld-Wen, Inv. v. Van Brunt (In re Grossman's Inc.), 607 F.3d 114, 125 (3d Cir. 2010).

b. In re Energy Future Holdings Corp., 522 B.R. 520 (Bankr. D. Del. 2015) (J. Christopher Sontchi)
    i. Facts
        1. Debtor was producer of nuclear and electric power and historically used asbestos in operations
        2. Although Debtor had annual asbestos liabilities of approximately $3 million, they were not the cause of the bankruptcy
        3. Debtor was not inclined to pursue 524(g) channeling injunction to address future asbestos liabilities
    ii. Issue
        1. Debtor sought to establish bar date for unmanifested asbestos claims
        2. Personal injury law firms objected arguing (i) given the latency period for asbestosis publication notice violates claimants' due process rights, and (ii) asbestos liabilities must be addressed through a personal injury trust pursuant to section 524 of the Bankruptcy Code
    iii. Holding
        1. Personal injury law firms lacked standing
        2. Bankruptcy Rule 3003(c)(3) is mandatory (court shall set a bar date) whereas section 524 is permissive (court may issue a channeling injunction)
        3. Unmanifested claims arose prior to petition date
        4. Unmanifested claimants are "unknown" creditors whose claims *may* be discharged and for whom notice by publication *may* satisfy due process
        5. Court established a bar date for all claims, including unmanifested claims

7. Due Process & Late-Filed Claims
    a. Bankruptcy Rule 3003(c)(3) provides that a court "for cause shown may extend" the time by which claims must be filed
    b. Excusable neglect and lack of adequate notice have given rise to findings of sufficient "cause" to permit late-filed claims
    c. Courts must look at sufficiency of constructive notice to determine whether unmanifested claims are discharged

Is a Claims Bar Date Always Mandatory? (Against the Bar Date)

By Hon. Cecelia G. Morris

I. Issue Presented

Whether individuals with unmanifested pre-petition claims should be subject to a claims bar date even though they do not currently have an injury?

This "debate" contemplates the "fairness" of applying claims bar dates to those persons who were injured at the time of filing of a chapter 11 petition but will not manifest any symptoms of the injury until several years or even decades after the plan is confirmed.

This issue recently arose in Delaware in a chapter 11 case in front of Judge Sontchi: *In re Energy Futures Holdings Corp*.

II. *Energy Futures*

A. Background on how this issue arose

Debtors produce nuclear and electric power. Power plants of this kind produce extreme heat necessitating the use of asbestos in the asbestos-laden materials and products in the plants. In addition to having asbestos in the plant and equipment, workers who built and maintained the plants would wear clothing, such as coats, aprons, mitts, and masks, containing asbestos. Exposure to asbestos was "virtually unavoidable" in power plants built prior to 1980. Debtors scheduled 392 asbestos-related cases against them.

Despite this, the asbestos litigation did not cause Debtors' bankruptcy. Debtors estimate that their asbestos related expenses average around $3 million annually.

Debtors do not believe they will use the channeling injunction feature used in most asbestos cases and codified in § 524(g).

Debtors filed a motion asking the Court to set a bar date for *all* claims. Personal Injury Law Firms, referred to as "PI Law Firms" in the decision,

representing over 125 asbestos claimants objected to this motion on behalf of claimants with unmanifested injuries (referred to in the decision as "Unmanifested Claimants"). The PI Law Firms argued: (1) because asbestos-related injuries may not be diagnosed for up to 50 years after exposure, publication notice does not satisfy the requirements of due process for an entire class of claimants that are "so unknown as to be unknown even to themselves; and (2) asbestos liabilities must be addressed through the creation of an asbestos personal injury trust.

The Court found that the PI Law Firms did not have standing to object on behalf of the Unmanifested Claimants as they did not represent the claimants. However, the Court went on to discuss the more important issue of whether to make the bar date applicable to these claimants.

After considering the case law, discussed below, the Court set a bar date for all claims, including those of the Manifested Claimants.

III. Relevant Law

A. Bankruptcy Rule 3003

Bankruptcy Rule 3003(c)(3) provides:

"Time for Filing. The court shall fix and for cause shown may extend time within which proofs of claim or interest may be filed. Notwithstanding the expiration of such time, a proof of claim may be filed to the extent and under the conditions stated in Rule 3002(c)(2), (c)(3), and (c)(4)."

B. Purpose

The purpose of the bar date is to identify those making claims against the bankruptcy estate, and the general amount of the claims.

The Bar Date is usually strictly observed.

The Bar Date helps secure the prompt and effectual administration of and **settlement of the estate.**

C. *In re Grossman's Inc.*: Whether an asbestos claim may be discharged?

1. *Grossman's* overturned the Third Circuit's prior holding that under the Bankruptcy Code claims did not arise until a cause of action accrued under applicable non-bankruptcy law—in other words, when a claimant possessed a right to payment. I*n re M. Frenville Co., Inc.*, 744 F.2d 332 (3d Cir. 1984) *overruled by Jeld-Wen, Inc. v Van Brunt (In re Grossman's Inc.)*, 607 F.3d 114 (3d Cir. 2010).
2. In *Grossman's*, the Third Circuit discussed a non-comprehensive list of factors for courts to consider in determining whether an asbestos claim has been discharged by a plan of reorganization.
    a. the circumstances of the initial exposure to asbestos,
    b. whether and/or when the claimants were aware of their vulnerability to asbestos,
    c. whether the notice of the claims bar date came to their attention,
    d. whether the claimants were known or unknown creditors,
    e. whether the claimants had a colorable claim at the time of the bar date, and
    f. other circumstances specific to the parties, including whether it was reasonable or possible for the debtor to establish a trust for future claimants as provided by § 524(g).

D. *In re Wattern S.S. Corp.*: Whether adequate notice is given to asbestos claimants?

1. The bankruptcy court held that publication notice could not cure inadequate notice to asbestos claimants, even if claimants read the publication notice in the local newspaper, because the notice failed to notify the claimants of the nature of their claims.
2. On appeal, the district court vacated the bankruptcy court opinion and remanded for the bankruptcy court to make factual determinations concerning such questions as when the seamen

manifested disease symptoms, and the reasonableness of the notice to particular individuals or groups.

3. The district court created several groups of claimants which were each accorded a certain type of notice:
    a. (i) former seamen who were known to be actual or potential claimants (all those who the debtor knew had manifested signs of illness) were entitled to actual personal notice;
    b. (ii) actual or potential claimants who could not be personally identified with reasonable effort were entitled to notice reasonably calculated, under all the circumstances, to apprise them of their claims and the opportunity to file their claims (such as publication); and
    c. (iii) potential future claimants (those who had not manifested any detectable signs of disease when the notice of the bar date was given) were not discharged in the bankruptcy proceeding.
4. Thereafter, on remand, the bankruptcy court held that only asbestos claimants whose injury manifested prior to the bar date were barred from asserting claims against the debtor. *Waterman Steamship Corp. v. Aguiar (In re Waterman S.S. Corp.)*, 141 B.R. 552 (Bankr. S.D.N.Y. 1992) *vacated*, 157 B.R. 220 (S.D.N.Y. 1993).

E. *In re Placid Oil Co.* Whether unmanifested asbestos claimants are known creditors?

1. The Fifth Circuit Court of Appeals held that an unknown asbestos creditor's pre-petition claims were discharged by the debtor's constructive notice and that, even though the notice did not contain asbestos-specific claim information, such notice was not substantially deficient. *Williams v. Placid Oil Co. (In re Placid Oil Co.)*, 753 F.3d 151, 153 (5th Cir. 2014).
2. Placid Oil Company ("Placid") owned and operated a large natural gas production and processing facility. Placid filed for bankruptcy

and the bankruptcy court established a bar date by which potential creditors were required to file claims. On three occasions, Placid published a notice of bar date in *The Wall Street Journal*.

3. Placid's notice of bar date informed creditors of the existence of the bankruptcy case, their opportunity to file proofs of claim, relevant deadlines, consequences of not filing a proof of claim, and how proofs of claim should be filed. Thereafter, the bankruptcy court confirmed Placid's plan of reorganization. The confirmation order provided that all claims against Placid that arose on or before the confirmation date were forever discharged except for Placid's obligations under its plan which did not address potential future asbestos liability.
4. Several years after entry of the confirmation order, certain claimants brought an action against Placid. More specifically, the claimants were a former Placid employee and his children whose wife/mother became ill (several years after confirmation of Placid's plan) and passed-away as a result of her exposure to asbestos when laundering her husband's work clothing. Thereafter, Placid filed a motion to reopen its bankruptcy case and commenced an adversary action asking the court to determine whether the asbestos claims were discharged.
5. Prior to Placid's plan confirmation, no asbestos-related claims had been filed against Placid and these claimants had not yet filed their claims. Furthermore, as of the Fifth Circuit ruling, Placid had not been held liable in any asbestos lawsuits nor had it paid any money to settle an asbestos case
6. The Fifth Circuit held that the asbestos claimants were "unknown" stating: "policy concerns specific to bankruptcy weigh heavily against defining known creditors as those with merely foreseeable claims. Bankruptcy offers the struggling debtor a clean start. In the interests of facilitating this recovery and balancing due process considerations, the courts have established a practical limit to the debtor's duty to notify creditors: Actual notice is required only for "known" creditors."

F. *In re Chemtura Corp.*: Whether notice can be adequate when a claimant is not aware of the injury until after the bar date and confirmation?

1. *In re Chemtura Corp.* involved tort claims based on the debtor's production and sale of diacetyl, a butter flavoring ingredient used in food products. Exposure to diacetyl may lead to lung disease. At the time the debtor filed for bankruptcy, it faced fifteen diacetyl lawsuits involving approximately fifty plaintiffs. During the bankruptcy, the debtor requested the bankruptcy court establish a bar date for all creditors, including diacetyl claimants. Although contested by counsel to the diacetyl claimants, the bar date was approved by the bankruptcy court.
2. The bankruptcy court reasoned, in its oral ruling: "The objections represent alternative perspectives as to how the debtors' Chapter 11 case should be run. And that's not a satisfactory basis for objection on a motion of this character. Their suggestion that even though this isn't an asbestos case that the filing of this case wasn't asbestos or tort liability driven and the debtors aren't seeking a channeling injunction – I should nevertheless require or expect the debtors to craft a plan with a 524(g) injunction or other claims channeling mechanism. It's inconsistent with the concept of Section 1121 of the Code which gives the debtors the exclusive right to propose a plan during the period authorized by law, subject to the rights of parties in interest who oppose extensions of the debtors' exclusive period or to seek the termination of that right. At this juncture, the debtors are free to propose a plan to meet their needs and concerns and the concerns of what they believe will satisfy their unsecured creditor community. . . . [T]he diacetyl litigants have to understand that this case, with billions of dollars of debt to be satisfied, can't be run for their convenience or strategic preferences. . . . I need simply find, and I do find, as a factor, mixed question of fact and law, that a bar date is necessary and appropriate here. The debtors and their major creditor constituencies – and by that I mean at the least the creditors' committee – need to know the universe of potential claims that

must be satisfied. Frankly, to suggest otherwise is ludicrous." *Gabauer v. Chemtura Corporation (In re Chemtura Corp.)*, 505 B.R. 427, 428 (S.D.N.Y. 2014).

3. After the bar date had passed, and after the bankruptcy plan was confirmed, nine claimants filed state court law suits against the debtors alleging injuries caused by exposure to diacetyl. The debtors moved the bankruptcy court to enforce the discharge injunction. The bankruptcy court found, in an oral ruling, that the claims were discharged and enjoined the claimants from further prosecuting their suits.
4. The diacetyl claimants then appealed. The sole issue on appeal was whether the diacetyl claimants received constitutionally adequate notice of the bar date because they did not know they had diacetyl-induced illnesses until after the bar date and plan confirmation. The district court concluded that the notice of the bar date was sufficient to bar the diacetyl claimants.

G. *In re Specialty Products Holding Corp.*

1. When faced with establishing a bar date in *In re Specialty Products*, former Judge Walsh stated that he was "inclined" to direct that a bar date be established, inclusive of asbestos claims. However, the Court never entered an order establishing a bar date due to a settlement between the parties after the hearing noted. In addition, it is of note that the Court had: (i) appointed a future claimants' representative; and (ii) conducted an estimation trial and determined that the debtors' asbestos liability was approximately $1.66 billion.

H. *Wright v. Owens Corning*

1. In *Wright v. Owens Corning*, the Third Circuit held that constructive notice was sufficient to bar unknown claims.

G. *In re New Century TRS Holdings, Inc.*

1. The District Court distinguished New Century from Owens Corning by stating "unknown claimants in the instant proceeding were given a mere 39 days' notice by a single publication. That single publication was presented in The Wall Street Journal, certainly a newspaper with a national distribution, but not one—like USA Today—that necessarily enjoys a broad circulation among less than sophisticated, focused readers. The court concludes that the adequacy of the notice provided in this case has not been meaningfully explored and likely was not reasonably calculated to apprise appellants of the bar date. The court concludes that "[d]ue process affords a re-do" under the circumstances of this case."
2. In effect, the court held that, although publication notice is sufficient due process for unknown creditors, in *New Century*, the publication notice was insufficient. The debtors in *New Century* have appealed the District Court decision to the Third Circuit.

III. Is it fair to set a bar date for Unmanifested Claimants?

A. Publication Notice of an Asbestos-Related Bar Date is Insufficient for Future Claimants Who are Unaware or Unknowing of Their Injuries

1. Even if an Unmanifested Claimant sees this notice, how can he/she realistically be expected to file a proof of claim if there is not an injury yet?
2. Publication notice cannot satisfy the constitutional requirements of due process for future claimants. The uniquely long latency period—up to 50 years—associated with asbestos diseases means that individuals who will later become sick have no present knowledge that they will later develop a potentially fatal disease.
    a. That is, unlike potential creditors who may be unknown to a debtor but who are aware of their claims and for whom publication notice is effective, future claimants are unknown to themselves.

B. There Can Be No Due Process for Future Claimants in the Absence of a Future Claimants' Representative to Advocate Their Interests

1. Unmanifested Claimants can never have their voices heard because without an injury they do not have standing to object---they do not know whether they will ever have a claim. Once the injury appears, it will be too late.
2. In the seminal *Johns-Manville* case, Judge Lifland found that future claimants were parties in interest under section 1109(b) of the Bankruptcy Code and as parties whose interests were to be affected by a Chapter 11 case, they had to be afforded an opportunity to be heard. *In re Johns-Manville Corp*., 36 B.R. 743, 747 (Bankr. S.D.N.Y. 1984).
3. The Johns-Manville court found that future claimants were entitled to a "separate and distinct representative" to participate in the formulation of the plan.
4. Importantly, the court issued its ruling in a jurisdiction that held that a claim arises upon exposure, as opposed to manifestation of an asbestos-related disease, specifically finding that legal conclusion to be "totally unrelated to the status of future claimants as parties in interest." The court then appointed a future claimants' representative to represent their interests in connection with the case and endowed him with the powers and responsibilities of a committee.
5. The enactment of section 524(g), codifying the procedures and relief provided in the Johns-Manville case, confirms the need for an advocate to protect the rights of future claimants in a bankruptcy case, particularly where their rights are at issue.

C. Asbestos Claims may only be Addressed by Section 524(g) or a Pass- Through Plan

1. In enacting section 524(g), Congress developed a statutory scheme that aimed at preserving the due process rights of future claimants while providing a debtor with comprehensive, enterprise-wide resolution of its present and future asbestos liability. *See In re W.R.*

Grace & Co., 729 F.3d 311, 320 (3d Cir. 2013) ("§ 524(g) permits all asbestos-related claims against the debtor to be channeled to a trust, and thus it relieves the debtor of the uncertainty of future asbestos liabilities[.] By removing that uncertainty and allowing the debtor to emerge from bankruptcy free of all asbestos liability, § 524(g) facilitates the company's ongoing viability, which in turn provides the trust with an evergreen source of funding to pay future claims.")

2. The attempted discharge of a future claimant through establishment of a bar date is inconsistent with the statutory scheme established by section 524(g), and inconsistent with the Bankruptcy Code's animating principle of equal distribution to similarly situated creditors.
3. And critically, it would deny future claimants due process: "Congress created the § 524(g) trust mechanism in order to protect the due process rights of people who had been exposed but not yet affected, and who might not manifest injury until a time when all available compensation had been paid out to people who got sick faster." *In re W.R. Grace & Co.,* 729 F.3d 332, 341 (3d Cir. 2013)

E. Catch-22: If Unmanifested Claimants filed claims wouldn't their claims be expunged for no injury? Or estimated at $0?

1. What is the alternative for these Unmanifested Claimants. Let's assume for a moment that someone who worked at the plant and was exposed to asbestos (but had no injury and was currently in a state of perfect health) filed a claim against the Debtors alleging a claim for an asbestos related injury that had not yet manifested.
2. Wouldn't that claim be objected to? And rightfully so. The claimant hasn't alleged an injury and without an injury there is no claim.
3. Of course, hypothetically speaking, unmatured and unliquidated claims are allowed under the Code but practically speaking, wouldn't that claim be expunged for lack of documentation or estimated at $0 for lack of injury? So what are Unmanifested Claimants supposed to do?

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
ENERGY FUTURE HOLDINGS CORP., *et al.*,[1]	)	Case No. 14-10979 (CSS)
Debtors.	)	(Jointly Administered)
	)	**Re: D.I. 1682, 1791, 1796, 1804**

DEBTORS' SUPPLEMENTAL BRIEF IN SUPPORT OF BAR DATE WITH RESPECT TO ASBESTOS CLAIMS

[1] The last four digits of Energy Future Holdings Corp.'s tax identification number are 8810. The location of the debtors' service address is 1601 Bryan Street, Dallas, Texas 75201. Due to the large number of debtors in these chapter 11 cases, which are being jointly administered, a complete list of the debtors and the last four digits of their federal tax identification numbers is not provided herein. A complete list of such information may be obtained on the website of the debtors' claims and noticing agent at http://www.efhcaseinfo.com.

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The above-captioned debtors and debtors in possession (collectively, the "Debtors") file this supplemental brief in support of the Debtors' motion to set a bar date with respect to all asbestos claims.[1] In response to the Court's request for supplemental briefing on the question of whether a bar date for asbestos claims is permissible, and in further support of the Debtors' Motion and Reply, the Debtors respectfully state as follows.

Preliminary Statement

1. The Debtors seek to set a bar date for all "claims," as that term is defined in section 101(5) of the Bankruptcy Code. That includes unmanifested asbestos claims. Setting a bar date and running a claims process is a routine and fundamental step in a chapter 11 case: it provides important information about a debtor's outstanding liabilities; it forces potential claimants to bring their claims in a common forum; and it provides a debtor with the ability to evaluate and, where appropriate, to challenge claims. These steps are vital to the debtors and other parties in interest.

2. The PI Law Firms do not deny any of these fundamental principles. Rather, the PI Law Firms assert that this Court should create new law by establishing a blanket rule that excepts a single group of creditors from the bar date and claims process in every case. The PI Law Firms' proposed blanket rule would force all debtors with potential unmanifested asbestos claims to choose between a channeling injunction under section 524(g) of the Bankruptcy Code or "ride-through" treatment that completely excepts such claims from the bankruptcy process. Because that choice is in fact a Hobson's Choice of no choice at all, and is at odds with established caselaw from this Circuit requiring that examination of due process under a bar date

[1] The Debtors incorporate by reference the arguments made in the *Debtors' Reply in Support of Bar Date With Respect to Asbestos Claims* [D.I. 1804] (the "Reply"). Capitalized terms that are used but not defined herein shall have the meanings ascribed in the Reply.

structure be conducted on a case-by-case, fact-intensive, *post hoc* basis, the PI Law Firms' arguments must fail.

3. Specifically, the PI Law Firms' proposed blanket rule is inconsistent with the fact-intensive, case-by-case, *post hoc* due process analysis established by *In re Grossman's*, 607 F.3d 114, 127–28 (3d Cir. 2010) (holding that a bar date could be established for unmanifested asbestos claims and remanding for a fact-specific due process analysis) and *Wright v. Corning (In re Owens Corning)*, 679 F.3d 101, 108 & n.7 (3d Cir. 2012) (discussing and reaffirming *Grossman's* and the Third Circuit's refusal to establish bright line rules in the due process context). Individuals' prospective due process challenges to the discharge of claims pursuant to the bar date are not ripe. *See Hodel v. Virginia Surface Min. and Reclamation Ass'n, Inc.*, 452 U.S. 264, 293 (1981) (holding that takings claim was not ripe for adjudication and noting that "'ad hoc, factual inquiries' must be conducted with respect to specific property, and the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances").

4. Similarly here, any due process analysis "must be conducted with respect to specific [claimants], and the particular [factual circumstances and notice provided] relevant in the unique circumstances." *Id.* Moreover, the PI Law Firms would require the Debtors to determine at this early stage of these chapter 11 cases to either permit unmanifested asbestos claims to ride through (*i.e.*, reinstatement), completely excepting such claims from the bankruptcy process, or to seek a channeling injunction under section 524(g) of the Bankruptcy Code. Forcing the Debtors to make that decision at this stage of the chapter 11 cases is inconsistent with the well-settled principle that the Debtors have an exclusive period to formulate and seek confirmation of a plan of reorganization that treats all claims against the Debtors. *See* 11 U.S.C. § 1121; *In re Chemtura*, No. 09-11233 (REG), Hr'g Tr. at 27:21–30:11 (Bankr.

S.D.N.Y. Aug. 17, 2009) (holding that claimants' efforts to require a debtor with future claims to address those future claims in a certain way would be "inconsistent with the concept of Section 1121 of the Code which gives the debtors the exclusive right to propose a plan."). By contrast, and consistent with the Third Circuit's binding decisions in *Grossman's* and *Owens Corning*, the Debtors merely seek to subject unmanifested asbestos claims to precisely the same treatment, precisely the same obligations, and precisely the same defenses to discharge, as any other claim.

5. The PI Law Firms' objections suffer from a fundamental flaw: they attempt to have this court determine due process prospectively, contrary to settled law. *Grossman's* makes clear that due process analysis in the context of a barred claim is a ***retrospective***, case-by-case determination, not a prospective blanket finding. *See also Hodel*, 452 U.S. at 293 (holding that fact-intensive constitutional claims are generally not ripe for adjudication prospectively); *In re Lear Corp.*, 2012 WL 443951, at *9 (Bankr. S.D.N.Y. Feb. 10, 2012) (holding that due process complaints were premature in the bar date context).

6. In contrast, the Debtors are not seeking such a blanket finding from this Court. Indeed, as this Court noted at the August 13 hearing, setting a bar date today does not determine the outcome of future questions regarding whether particular claims are discharged or whether a particular creditor has received due process.[2] Ultimately, when those specific questions are raised, the Debtors must then show that due process has been satisfied. The PI Law Firms' objections at the bar date setting stage are thus misplaced. Accordingly, the Debtors respectfully

[2] In the interest of streamlining the issues for resolution, the parties have agreed to limit the September 16th and 17th hearing, and the scope of this briefing, to the question of whether a bar date can be set for unmanifested asbestos claims. Per the parties' agreement, the proposed form of notice with respect to present but unidentified asbestos claims and unmanifested asbestos claims will be addressed separately and adjourned to a later hearing.

request that the Court overrule the Objection and hold that all asbestos claims may be subject to a bar date.[3]

Argument

I. Setting a Bar Date is a Fundamental Aspect of the Bankruptcy Process From Which No Group of Creditors Should Be Universally Excepted.

7. Setting a bar date "contributes to one of the main purposes of bankruptcy law, securing, within a limited time, the prompt and effectual administration and settlement of the debtor's estate." *In re Smidth & Co.*, 413 B.R. 161, 165 (Bankr. D. Del. 2009) (*citing Chemetron Corp. v. Jones*, 72 F.3d 341, 346 (3d Cir. 1995) (*citing Katchen v. Landy*, 382 U.S. 323, 328 (1966)). "The bar date is critically important to the administration of a successful chapter 11 case, and the reorganization process: [a] bar order serves the important purpose of enabling the parties to a bankruptcy case to identify with reasonable promptness the identity of those making claims against the bankruptcy estate and the general amount of the claims." *In re Keene Corp.*, 188 B.R. 903, 907 (Bankr. S.D.N.Y. 1995) (*citing First Fidelity Bank, N.A. v. Hooker Invs., Inc. (In re Hooker Invs., Inc.)*, 937 F.2d 833, 840 (2d Cir. 1991)).

8. The PI Law Firms argue that unmanifested asbestos claims should be excepted from the "critically important" part of the chapter 11 process because, in their view, the special concerns of asbestos claims require them to be treated differently. That position is inconsistent with *Grossman's*, which held that the bar date applied to an unmanifested asbestos claim and

[3] This Court has entered orders establishing bar dates for all other claims. *See Interim Order Authorizing the Debtors to (A) Maintain and Administer Customer Programs and Customer Agreements, (B) Honor Prepetition Obligations Related Thereto, (C) Pay Certain Expenses on Behalf of Certain Organizations, (D) Fix the Deadline to File Proofs of Claim for Certain Customer Claims, and (E) Establish Procedures for Notifying Customers of Commencement of the Debtors' Chapter 11 Cases, Assumption of the Customer Agreements, and the Bar Date for Customers Claims* [D.I. 307] (setting a bar date for certain customer claims); *Order (A) Setting Bar Dates for Filing Non-Customer Proofs of Claim and Requests for Payment Under Section 503(b)(9) of the Bankruptcy Code, (B) Approving the Form of and Manner for Filing Non-Customer Proofs of Claim and Requests for Payment Under Section § 503(b)(9) of the Bankruptcy Code, and (C) Approving Notice Thereof* [D.I. 1866] (setting a general bar date).

remanded for due process evaluation. *See In re Grossman's*, 607 F.3d at 127–28. The Third Circuit reaffirmed that case-by-case approach in *Owens Corning*. *See In re Owens Corning*, 679 F.3d at 108 & n.7 (discussing and reaffirming *Grossman's*). Those decisions are controlling here. Moreover, the PI Law Firms' position is inconsistent with Congress's decision to broadly define "claims" in section 101(5) of the Bankruptcy Code. Congress could have excepted unmanifested claims from the definition of "claim," or could have excepted such claims from the bar date process, had it chosen to do so. Unmanifested asbestos claims could also potentially have been excepted from the bar date process through the process used to amend the Bankruptcy Rules. That authority is ultimately left with the Supreme Court (subject to congressional veto) under the Rules Enabling Act, 28 U.S.C. § 2071 *et. seq.*, however, not with individual courts. Neither Congress nor the Supreme Court elected to except unmanifested claims from the bar date process as the PI Law Firms now suggest.

9. Additionally, the PI Law Firms' proposed blanket rule does not square with the Bankruptcy Code's prohibition against unfair discrimination. *See* 11 U.S.C. § 1129(b)(1) (prohibiting unfair discrimination in cramdown context). Indeed, the result of the PI Law Firms' argument is that, unless a debtor seeks relief under section 524(g) of the Bankruptcy Code, unmanifested asbestos claims are entitled to reinstatement—recovery in full—in every case, regardless of the treatment of other creditors. Congress knows how to require that certain classes of claims be treated more generously than other classes of claims. *See*, *e.g.*, 11 U.S.C. § 507(a) (establishing priorities for certain categories of prepetition claims). Indeed, Congress knows how to provide for such treatment specifically with respect to personal injury claims. *See* 11 U.S.C. § 1171(a) (providing that certain personal injury claims against railroad debtors are treated as administrative expenses regardless of when they arise). To be sure, there are cases where asbestos claims are carved out from a bar date process and allowed to ride through the

chapter 11 process unaffected.[4] But there is a fundamental difference between finding that discrimination is fair under the particular circumstances in a particular case (or there simply being no objection to such treatment) on the one hand, and establishing a blanket rule that *requires* discrimination in favor of asbestos claimants in all cases, on the other hand.

10. The availability of section 524(g) relief as an alternative avenue to address future claims does not solve this problem. As the Debtors explained in their Reply, and setting aside the fact that the Court is not addressing the discharge issue in connection with approving a bar date, section 524(g) supplements, rather than supplants, the discharge. 11 U.S.C. § 524(g)(1)(A) ("After notice and a hearing, a court that enters an order confirming a plan of reorganization under chapter 11 may issue, in connection with such order, an injunction in accordance with this subsection *to supplement* the injunctive effect of a discharge under this section.") (emphasis added) . It follows that section 524(g) cannot serve as a basis to prohibit the setting of a bar date. Indeed, the enacting legislation for section 524(g) of the Bankruptcy Code provided the following rule of construction: "Nothing in [the provisions implementing section 524(g)] shall be construed to modify, impair, or supersede any other authority the court has to issue injunctions in connection with an order confirming a plan of reorganization." Pub. L. No. 103-394, § 111(b) (Oct. 22, 1994).

11. Additionally, the asbestos bar should not be entitled to dictate the terms of a plan of reorganization by forcing the Debtors to seek relief under section 524(g) of the Bankruptcy Code. Indeed, such a rule would effectively ignore the Debtors' period of plan exclusivity. *See* 11 U.S.C. § 1121. This point was illustrated in a contested bar date hearing in *Chemtura*. *Chemtura* involved tort claims based on exposure to diacetyl, a chemical compound with a

[4] *See*, *e.g.*, *In re Dana Corp.*, No. 06-10354 (BRL), Disclosure Statement at 66–67, ECF No. 6669 (Bankr. S.D.N.Y. Oct. 23, 2007) (providing that asbestos personal injury claims would be reinstated).

manifestation period considerably lower than asbestos, but where issues with misdiagnosis or lack of diagnosis also existed. *In re Chemtura*, No. 09-11233 (REG), Hr'g Tr. at 27:21–30:11 (Bankr. S.D.N.Y. Aug. 17, 2009) (describing potential that a manifested claim could take years to be diagnosed as diacetyl-related). Certain parties objected to the proposed bar date arguing that the exposure claims were being treated improperly, claimants were not being provided due process, and the debtors there should establish section 524(g)-like relief with respect to diacetyl claims. *Id.* at 17:17–18:4 (objector arguing that no plan was on file to address future and unknown diacetyl claims and asserting that, as a result, setting a bar date would be premature). The court overruled the objection, and specifically stated that "requir[ing] or expect[ing] the debtors to craft a plan with a 524(g) injunction or other claims channeling mechanism" would be "inconsistent with the concept of Section 1121 of the Code which gives the debtors the exclusive right to propose a plan." *Id.* at 52:17–53:11. The court further noted that it was "puzzled by the notion that the objectors advocate . . . that no bar date should be set at all" because "[t]he debtors and their major creditor constituencies . . . need to know the universe of potential claims that must be satisfied. Frankly, to suggest otherwise is ludicrous." *Id.* at 54:16–55:6.

12. Notably, a group of claimants challenged the discharge of diacetyl claims in *Chemtura*. The district court, affirming the bankruptcy court, held that the bar date process in *Chemtura* was sufficient to discharge future diacetyl claims. *See Gabauer v. Chemtura Corp. (In re Chemtura Corp.)*, 505 B.R. 427, 430 (S.D.N.Y. 2014). The claimants argued that the publication notice was insufficient to discharge their claims because (a) they did not know they were sick during the bar date process[5] and (b) due process could not be satisfied in the absence of section 524(g)-like protections and a future claims representative because the debtors had

[5] The claimants acknowledged that "*some* of the [claimants] *may* have had non-diagnostic symptoms, such as shortness of breath, cough, or wheezing." Brief of Appellants at 8. It is not clear whether other claimants were asymptomatic, *i.e.*, their claims had not manifested at all.

pending diacetyl claims during the cases and an expectation that future claims would be brought. *Id.*, Case No. 13-cv-02023, Brief of Appellants, ECF No. 7, at 16–17, 21–25. The district court distinguished *In re Waterman Steamship Corp.*, 157 B.R. 220 (S.D.N.Y. 1993), which the claimants in *Gabauer* and the PI Law Firms here rely on for the proposition that publication notice is insufficient for future creditors where a debtor is aware of the claims, on the basis that the publication notice contained enough specific information to put future creditors on notice. *Gabauer*, 505 B.R. at 430-31 (identifying specific language in the plant-specific notice that called attention to future claims).

13. Ultimately, *Grossman's*, *Owens Corning*, *Chemtura*, and the language of the Bankruptcy Code itself lead to an inescapable conclusion: asbestos claims, including unmanifested claims, should be treated precisely like any other claim. The PI Law Firms should not be permitted to force the Debtors to either reinstate such claims or seek relief under section 524(g) of the Bankruptcy Code.

II. Setting a Bar Date Under These Circumstances Is Not Unique.

14. The PI Law Firms assert that a bar date has never been set for unmanifested claims where a debtor knew of its potential asbestos liability. The PI Law Firms are wrong. In *Placid Oil*, the court of appeals noted that the debtor knew of potential asbestos liability when it declared bankruptcy. 753 F.3d 151, 153 (5th Cir. 2014) (noting that "[b]y the early 1980s, Placid was aware, generally, of the hazards of asbestos exposure and, specifically, of [the claimant's] exposure in the course of [the claimant's] employment"). Yet, the Fifth Circuit held that a generic national publication notice with *no specific reference to asbestos* satisfied due process with respect to barring unmanifested claims. *Id.* at 158. The PI Law Firms may attempt to distinguish *Placid Oil* on the basis that there was not pending asbestos litigation, but in evaluating whether to set a bar date or whether claims should be discharged, there is no basis to

draw a bright line between parties who knew of potential asbestos exposure and those who happen to have been sued for such exposure. In either case, the debtor is aware of potential future claims. *See Alderwoods Gr'p Inc. v. Garcia*, 420 B.R. 609, 623 (Bankr. S.D. Fla. 2009) (holding that publication notice in that case was insufficient where "although no formal claims had been filed against [the debtor] before the Effective Date of the plan . . . [the debtor] was aware of [the predicates for claims] that existed at the time.").

15. The PI Law Firms may also rely on *Waterman*, *In re Chateaugay Corp.*, 2009 WL 367490 (Bankr. S.D.N.Y. Jan. 14, 2009), *Castleman v. Liquidating Tr.*, 2007 WL 2492792 (N.D.N.Y. Aug. 28, 2007), and *Alderwoods* for the blanket proposition that a bar date cannot be set for future claims because such claims cannot be discharged when a debtor faces pending litigation. As an initial matter, these cases were decided in the *discharge* context, not in the context of setting a bar date. Indeed, bar dates were set for future claims in each case. In *Chateaugay* and *Castleman*, the courts found that claims could be discharged; in *Waterman* and *Alderwoods*, the courts ultimately determined that certain claims could not be discharged, but only after engaging in precisely the sort of fact-intensive analysis required by *Grossman's* and *Owens Corning*. Thus, those cases support the setting of a bar date and a future case-by-case analysis of due process issues.

16. To the extent *Waterman*, *Chateaugay*, *Castleman*, and *Alderwoods* are proffered as support for a blanket rule that due process for future claims cannot be satisfied if there is pending litigation and no future claims representative, such a categorical approach is inconsistent with the case-by-case approach required by *Grossman's* and *Owens Corning*. Nor would such a categorical approach be good law in the district in which *Waterman* and *Chateaugay* were decided: the same argument was advanced in *Gabauer*, where a bar date was set *and* the district court, on appeal, held that future claims had been discharged. 505 B.R. at 427. The Debtors are

not asking the Court to rule on due process or discharge today, but even if they were, *Waterman*, *Chateaugay*, *Castleman*, and *Alderwoods* do not alter the case-by-case approach established by *Grossman's* and *Owens Corning*.

17. Ultimately, the PI Law Firms' proposed blanket rule would have significant implications for the bankruptcy process—and not solely in the context of asbestos claims. Bar dates without carveouts for asbestos claims have, in fact, been entered in cases where some asbestos claims were listed on the debtors' schedules and statements. *See*, *e.g.*, *In re Furniture Brands Int'l, Inc.*, No. 13-12329 (CSS), ECF No. 350 (Bankr. D. Del. Oct. 10, 2013) (bar date applicable to all claims, asbestos litigation referenced in schedules); *In re Ormet Corp.*, No. 13-10334 (MFW), ECF No. 250 (Bankr. D. Del. Apr. 23, 2013) (same); *In re Overseas Shipholding Gr'p, Inc.*, No. 12-20000 (PJW) (Bankr. D. Del. Apr. 10, 2013) (bar date applicable to all claims, schedules included at least one pending asbestos litigation, and an asbestos law firm filed a proof of claim asserting 3,500 asbestos claims that were ultimately disallowed as time-barred); *In re Lyondell Chem. Co.*, No. 09-10023 (REG) (Bankr. S.D.N.Y. Apr. 16, 2009) (bar date applicable to all claims, asbestos claims referenced in schedules).[6] Given that asbestos claims are sometimes identified as personal injury claims, it is likely that there are other such cases.

18. Notably, in *In re Solutia Inc.*, No. 03-17949 (PCB), ECF No. 1475 (Bankr. S.D.N.Y.), asbestos claims were specifically addressed in the bar date motion and order. Legacy tort claims ultimately rode through the bankruptcy process in *Solutia*, but the *heavily negotiated* settlement that resulted in that treatment, which was unique to the "spin off" factual scenario presented in *Solutia*, was struck *after* the bar date was set. As discussed in the Reply and at the August 13 hearing, *Specialty Products* progressed the same familiar arc discussed above: the

[6] Because of the voluminous nature of the materials cited herein, such orders are not attached to this brief. Copies of these materials are available upon request of the Debtors' counsel.

court approved a bar date, but a plan was ultimately proposed that did not rely on the bar date. *Solutia* and *Specialty Products* each stand for the proposition that a debtor should be allowed to *set* a bar date and negotiate the resolution of claims against it simultaneously.

19. Moreover, the logical extension of the PI Law Firms' argument is that any debtor that has potentially harmful products in the stream of commerce—anything that could lead to any future injury, as long as the debtor is aware of that potential injury—would be required to carve out future claims from the bar date and claims process, regardless of the facts of any particular situation and regardless of the level of process provided. Such a blanket prohibition would also infect free and clear findings in sales under section 363 of the Bankruptcy Code. *See*, *e.g.*, *In re Grunman Olson Indus., Inc.*, 467 B.R. 694, 708–09 (S.D.N.Y. 2012) (applying categorical approach that is inconsistent with *Grossman's* and *Owens Corning* to hold that free and clear findings did not prevent a future claimant from bringing a successor liability claim against a purchaser).

20. Congress, rather than the courts, is the appropriate branch of government to enact a sweeping rule that would effectively invalidate bar dates set in previous cases and have fundamental implications for the bankruptcy process as a whole in future cases. Unless Congress establishes such a rule, the courts should engage in the case-by-case analysis required by *Grossman's* and *Owens Corning*.

III. Due Process Should Not Be Determined Prospectively.

21. Under *Grossman's*, an unmanifested asbestos claim is a "claim" subject to the bar date process. 607 F.3d at 125 (holding that prepetition exposure to asbestos gave rise to a claim notwithstanding the fact that injuries had not manifested). The PI Law Firms' asserted basis to avoid a bar date for such claims is that due process with respect to unmanifested asbestos claims can never be satisfied by publication notice. Such a ruling would create new law and would be

inconsistent with the case-by-case, fact-intensive, *post hoc* analysis required by *Grossman's* and *Owens Corning*. *In re Grossman's*, 607 F.3d at 127–28 (remanding for due process evaluation and enumerating a non-exhaustive list of factors); *In re Owens Corning*, 679 F.3d at 108 & n.7 (reaffirming refusal to establish bright line rules in the due process context); *see also In re Lear Corp.*, 2012 WL 443951, at *9 ("[Claimants'] contentions that they did not receive constitutionally adequate notice of the Bar Dates are not ripe for decision. The question of adequacy of notice is a separate issue from the question whether a party possessed a 'claim.' *If a party who has a 'claim' asserts lack of adequate notice of the applicable Bar Date, its recourse should ordinarily be to request permission to file a late proof of claim. . . .* [I]f any of the [claimants] desire to file a late proof of claim and assert a right to do so because of constitutionally inadequate notice, nothing in this decision precludes such action.") (emphasis added) (*citing Chemetron Corp. v. Jones*, 72 F.3d 341, 349–50 (3d Cir. 1995) (affirming that publication notice was sufficient but remanding for additional consideration of whether excusable neglect standard had been satisfied)).

22. Underscoring that a case-by-case, fact-intensive, *post hoc* analysis is required, a Delaware district court recently reversed a bankruptcy court order that prospectively blessed the due process provided by a publication notice. *See In re New Century TRS Holdings, Inc.*, _ F. Supp. 2d _, 2014 WL 4100749 (D. Del. Aug. 20, 2014) (holding that, on the particular facts at bar, "the adequacy of the notice provided [] has not been meaningfully explored and likely was not reasonably calculated to apprise appellants of the bar date").

23. Not all unmanifested claimants will be similarly situated. Indeed, a large number of potential claimants will receive direct notice based on the Debtors' search of their records. The Debtors ultimately shoulder the risk that a later court holds that a particular claimant was not afforded due process under the particular circumstances. But the factual differences among

potential claimants preclude any prospective ruling that due process cannot be satisfied with respect to unmanifested asbestos claims as a matter of law.

WHEREFORE, the Debtors respectfully request that the Court overrule the Objection, enter the bar date order, and grant such other relief as it deems necessary and proper under the circumstances.

Dated: September 9, 2014
Wilmington, Delaware

/s/ Jason M. Madron

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
ENERGY FUTURE HOLDINGS CORP., et al.,	)	Case No. 14-10979 (CSS)
	)	
	)	(Jointly Administered)
Debtors.	)	Re: Docket No. 1682

OPINION

Before the Court is a Bar Date Motion (as defined below) through which the above-captioned debtors and debtors in possession (the "Debtors") request the Court to establish a bar date for claims of unknown persons that have yet to manifest any sign of illness from exposure to asbestos ("Unmanifested Claimants" and "Unmanifested Claims").[1] The Unminifested Claimants were (allegedly) exposed to asbestos at one of the Debtors' facilities prior to the petition date, yet, as of the date hereof, do not know, even with appropriate due diligence, that they will become ill, due to the potential for a long latency period between asbestos exposure and illness. The Debtors have requested that a bar date be established for these Unmanifested Claims. As set forth in detail, *infra*, the Court will establish a bar date for *all* prepetition claims, including Unmanifested Claims.

[1] The Debtors and the PI Law Firms, defined *infra*, have limited the scope of the issue before the Court to whether the Court should enter a bar date for unmanifested claims. There is no dispute over the establishment of a bar date for any other claims, including manifested claims arising from asbestos exposure. The parties have agreed to address the requirements of the content and scope of the notice required for the bar date at a later time.

JURISDICTION

This Court has jurisdiction over this matter pursuant to 28 U.S.C. sections 157 and 1334. Venue is proper in this District pursuant to 28 U.S.C. sections 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. section 157(b)(2). The Court has the judicial authority to enter a final order.

STATEMENT OF FACTS

A. Procedural History

On April 29, 2014, each of the Debtors filed a voluntary petition with the court under Chapter 11 of the Bankruptcy Code. The Debtors are operating their businesses and managing their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

On July 23, 2014, the Debtors filed a motion seeking a bar date for prepetition claims (the "Bar Date Motion").[2] Thereafter, certain asbestos personal injury law firms filed an objection to the Bar Date Motion.[3] The Debtors filed a reply to the PI Law Firm's Objection in which the Debtors modified its bar date request, thus narrowing the issues to those discussed below. At a hearing on August 13, 2014, the Court heard the Bar Date Motion. At the conclusion of the hearing, the Court approved the Bar Date Motion as it related to non-asbestos claims and continued the Bar Date Motion (solely as it related to

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[2] D.I. 1682.

[3] D.I. 1796. The objectors are Gori Julian & Associates, P.C., Simmons Hanley Conroy, Paul Reich & Meyers, P.C., Kazan McClain, Satterley & Greenwood, a Professional Law Corporation, and Early, Lucarelli, Sweeney & Meisenkothen (collectively referred to herein as the "PI Law Firms"). The PI Law Firms represent over 125 asbestos claimants.

asbestos claims) to a hearing scheduled for September 16, 2014.[4] Thereafter, the Court authorized additional briefing, which was filed on September 9, 2014.[5] Shortly before the September 16th hearing, the Office of the United States Trustee announced that it would solicit asbestos claimants to determine whether an asbestos claims committee should be formed.[6] In light of the potential for the formation of an asbestos committee, the Court granted a final continuance of this matter. Thereafter, on October 27, 2014, the United States Trustee formed a statutory committee of unsecured creditors whereon two of the five members are asbestos claimants (the "E-side Committee").[7] The Court heard argument solely as it related to the establishment of a bar date for unmanifested asbestos claims on the continued date of October 28, 2014. Thereafter, the Court took this matter under advisement. To date, neither the E-side Committee nor the T-side Committee have

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[4] Although the Court made some preliminary rulings at the August 13, 2014, hearing, the Court subsequently decided to hear the asbestos bar date issue *de novo* at the hearing scheduled for September 16, 2014.

[5] *See* D.I. 1983 and 1984.

[6] The United States Trustee had previously appointed a committee of unsecured creditors (the "T-side Committee"). *See* D.I. 420. None of the members of the T-side Committee, however, are asbestos claimants.

The T-side Committee is composed of creditors of Energy Future Competitive Holdings Company LLC ("EFCH"), EFCH's direct subsidiary, Texas Competitive Holdings Company LLC ("TCEH"), TCEH's direct and indirect subsidiaries, and EFH Corporate Services Company. This committee represents the interests of the unsecured creditors of the aforementioned debtors and no others.

[7] D.I. 2570. The E-side Committee is composed of creditors of Energy Future Holdings Corp.; Energy Future Intermediate Holding Company, LLC; EFIH Finance, Inc.; and EECI. This committee represents the interests of the unsecured creditors of the aforementioned debtors and no others.

submitted any position papers with regard to the issue raised herein. The only pending objection is that of the PI Law Firms.

B. Factual History Related to Bar Date Motion and Asbestos Claims

According to the PI Law Firms, both nuclear and electric power generation produces extreme amounts of heat. The presence of this heat necessitates the installment of insulation throughout power plants including in the walls, wires, pipes, boilers and generators. As such, historically, power plants were depositories of asbestos and asbestos-laden materials and products. In addition to its presence throughout the plant and equipment, workers responsible for building and maintaining the plants and equipment would wear insulated clothing or gear to do their jobs. For years, these pants, coats, aprons, mitts and masks contained asbestos. Asbestos exposure was virtually unavoidable in power plants built prior to 1980. EECI, one of the Debtors, was at one time known as Ebasco, which was at various times affiliated with Boise Cascade, Halliburton and Raytheon Corporation (all of which have had asbestos-related personal injury liability).

The Debtors scheduled 392 asbestos-related cases against the Debtors, including approximately 121 cases being defended (20 of which are related to the Debtors' electricity generation activities) and approximately 270 cases where the Debtors have rejected indemnification demands. The Debtors believe that litigation and settlement expenses incurred in connection with asbestos claims against the Debtors are not

material. The Debtors estimate that their asbestos expenses average up to $3 million annually.[8] The Debtors further believe that their restructuring is unlikely to be driven by asbestos claims or result in a channeling injunction under section 524(g) of the Bankruptcy Code. The Debtors assert that the purported asbestos claims against the Debtors, like all of the Debtors' liabilities, reflect a point of due diligence for parties participating in the ongoing marketing process of EFH Corp. Thus, the Debtors and potential bidders seek to use the tools available in the Bankruptcy Code to gather information regarding their outstanding liabilities and to bar *all* "claims" that are not properly and timely filed.

The Debtors filed the Bar Date Motion seeking to establish October 27, 2014, as the "General Bar Date" in these cases for all claims;[9] as the hearing on the asbestos bar date was scheduled on October 28, 2014, the Debtors are seeking authority to establish such date in the future. The PI Law Firms object to any bar date that would apply to Unmanifested Claims. The PI Law Firms advance two main arguments: (i) because

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[8] Tr. Hr'g Aug. 13, 2014 71:14-16 (D.I. 1945). *Compare* Declaration of Paul Keglevic, Executive Vice President, Chief Financial Officer, and Co-Chief Restructuring Office of Energy Future Holdings Corp., *et al.*, in Support of First Day Motions at ¶ 21 (estimating $36 billion in assets, $49 billion in liabilities, including funded indebtedness, and $5.9 billion in consolidated annual revenues for the year ending December 31, 2013).

[9] On the petition date, the Debtors filed a motion seeking approval and continuation of its customer programs (the "Customer Programs Motion," D.I. 31). The Customer Programs Motion sought authority to, among other things, establish the Customer Claims Bar Date (as defined in the Customer Programs Motion) as the deadline by which each customer (including governmental units asserting claims solely in their capacities as customers of the Debtors) must file its proof of claim against any of the Debtors. The Court approved the Customer Programs Motion and established October 27, 2014, as the Customer Programs Bar Date. D.I. 307.

asbestos-related injuries may not be diagnosed for up to 50 years after exposure, publication notice does not satisfy the requirements of due process for an *entire class of claimants that are so unknown as to be unknown even to themselves*; and (ii) asbestos liabilities are best (and, indeed, must be) addressed through the creation of an asbestos personal injury trust.

LEGAL DISCUSSION

A. The PI Law Firms Lack Standing to Object to the Bar Date Motion

Section 1109(b)[10] allows a creditor to be heard on any issue in a bankruptcy case. It does not, however, change the general principle of standing that a party may assert only its own legal interests and not the interests of another.[11] The Third Circuit has described a party-in-interest as "'anyone who has a legally protected interest that could be affected by a bankruptcy proceeding.'"[12]

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[10] Section 1109(b) states:

> A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issues in a case under this chapter.

11 U.S.C. § 1109(b).

[11] *In re ANC Rental Corp., Inc.*, 278 B.R. 714, 719 (Bankr. D. Del. 2002) (citations omitted). *See also Matter of James Wilson Associates*, 965 F.2d 160, 169 (7th Cir. 1992) ("We think all the section [1109(b)] means is that anyone who has a legally protected interest that could be affected by a bankruptcy proceeding is entitled to assert that interest with respect to any issue to which it pertains, thus making explicit what is implicit in an *in rem* proceeding—that everyone with a claim to the *res* has a right to be heard before the *res* is disposed of since that disposition will extinguish all such claims.").

[12] *In re Global Indus. Technologies, Inc.*, 645 F.3d 201, 210 (3d Cir. 2011) (adopting and quoting the test from *Matter of James Wilson Associates*, 965 F.2d 160, 169 (7th Cir. 1992)).

This ruling is limited to Unmanifested Claims. The PI Law Firms do not represent any Unmanifested Claimants nor do the PI Law Firms have a legally protected interest independent of their potential, future clients.[13] While the Unmanifested Claimants would have standing to object to the bar date at issue herein;[14] the Court finds that the PI Law Firms do not have standing to raise an objection to the Bar Date Motion.

Although the PI Law Firms do not have standing to object to the Bar Date Motion and, thus, there is no pending objection to the motion, given the due process concerns in play, the Court, in exercising its independent review, will consider the PI Law Firms' arguments in determining whether to establish a bar date for Unmanifested Claims.

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[13] *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) ("We have adhered to the rule that a party generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." (citations and internal quotation marks omitted)); *Fieger v. Ferry*, 471 F.3d 637, 648 (6th Cir. 2006) ("As a general matter, a plaintiff must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. However, the Supreme Court has delineated exceptions to its prudential limitation on third party standing, and has allowed plaintiffs to assert the rights of a third party where practical obstacles prevent a party from asserting rights on behalf of itself. To fit within this exception, a plaintiff must show three elements: first, injury in fact; second, a close relationship with the third party whose rights he asserts; and third, that the third party has no forum to protect its own interests." (citations and internal quotation marks omitted)).

[14] As a predicate to discussing the unmanifested claimants' right to counsel, the court in *In re Johns-Manville Corp.*, 36 B.R. 743 (Bankr. S.D.N.Y. 1984), analyzed whether unmanifested claimants had standing to appear and be heard under section 1109(b). The *Johns-Manville* Court found that

> . . . a resolution of the interests of the future claimants is a central focus of these reorganization proceedings. Any plan emerging from this case which ignores these claimants would serve the interests of neither the debtor nor the creditor constituencies in that the central short and long-term economic drain on the debtor would not have been eliminated.

Id. at 746. As a result, the potential future claimants were found to have standing. *Id.* at 747-57.

B. Why Establish a Bar Date?

Bankruptcy Rule 3003(c)(3) provides:

> Time for Filing. The court **shall** fix and for cause shown may extend time within which proofs of claim or interest may be filed. Notwithstanding the expiration of such time, a proof of claim may be filed to the extent and under the conditions stated in Rule 3002(c)(2), (c)(3), and (c)(4).[15]

"A bar date serves the important purpose of enabling the parties to a bankruptcy case to identify with reasonable promptness the identity of those making claims against the bankruptcy estate, and the general amount of the claims, a necessary step in achieving the goal of successful reorganization. It is akin to a statute of limitations, and must be strictly observed."[16] This rule "contributes to one of the main purposes of bankruptcy law, securing, within a limited time, the prompt and effectual administration and settlement of the debtor's estate."[17]

> Absent the setting of a bar date, a Chapter 11 case could not be administered to a conclusion. There would be no time established for the filing of claims. But it is essential to the bar date mechanism that notice be given to creditors consistent with the demands of due process, for as provided in Rule 3003(c)(2), a creditor who fails to file a claim within the time allowed is precluded from being treated as a creditor and from both voting on a plan and receiving a distribution from estate property. Failure to give notice consistent with due process surely constitutes cause under Rule 3003(c)(3). A

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[15] Bankr. R. 3003(c)(3) (emphasis added).

[16] *In re Victory Mem'l Hosp.*, 435 B.R. 1, 4 (Bankr. E.D.N.Y. 2010) (internal quotation marks and citations omitted).

[17] *In re Smidth & Co.*, 413 B.R. 161, 165 (Bankr. D. Del. 2009) (citations omitted).

> failure to do so would require that the filing of late claim be permitted.[18]

Furthermore, "[t]he objectives of finality and fixing the universe of claims permeate the law of bankruptcy, and in achieving those ends, the setting of a bar date is no more unfair, assuming reasonable notice, than is a statute of limitations, a finality concept firmly embedded in our legal system generally. Tort claimants can have their right to pursue their claims foreclosed if they fail to take action before the expiration of a statute of limitations. It is no more unfair to require that they here take action before expiration of the bar date."[19]

C. The Unmanifested Claims Arose Prior to the Petition Date

In the Third Circuit, a "'claim' arises when an individual is exposed pre-petition to a product or other conduct giving rise to an injury, which underlies a 'right to payment'

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[18] *In re Waterman S.S. Corp.*, 59 B.R. 724, 726 (Bankr. S.D.N.Y. 1986). *See also In re Drexel Burnham Lambert Grp. Inc.*, 151 B.R. 674, 679 (Bankr. S.D.N.Y. 1993) *aff'd sub nom. In re Drexel Burnham Lambert Grp., Inc.*, 157 B.R. 532 (S.D.N.Y. 1993) ("The issuance of the claims bar date is an essential feature of the reorganization process because it provides a date certain after which a plan can be negotiated, formulated, and eventually confirmed. The bar date is much more than a means to limit claims; it provides finality to a process that will ultimately lead to the rehabilitation of the debtor and the payment of claims under a plan of reorganization." (citations omitted)); *In re Best Products Co., Inc.*, 140 B.R. 353, 357 (Bankr. S.D.N.Y. 1992) ("The bar order then is not a mere procedural gauntlet, but an integral step in the reorganization process. A personal injury claimant is given no special dispensation. The claimant must comply with the Code, the Federal Rules of Bankruptcy Procedure, and court orders for claims handling procedures before there is a valid bankruptcy claim ripe for liquidation by the district court or the court where such claim arose." (citations omitted)). *But see In re Eagle-Picher Indus., Inc.*, 137 B.R. 679, 680-81 (Bankr. S.D. Ohio 1992) ("A bar date in a Chapter 11 case is by no means an absolute, as the court may extend the bar date 'for cause shown,' B.R. 3003(c)(3), a matter left to the sound discretion of the bankruptcy court." (citations omitted)).

[19] *In re Eagle-Picher Indus., Inc.*, 137 B.R. 679, 682 (Bankr. S.D. Ohio 1992). However, the *Eagle-Picher Industries* court did **not** establish a bar date for unmanifested claimants. *Id.* at 680 ("Future claimants, of course, would not be affected by a bar date, for they are as a class inherently unknown and unknowable."). Furthermore, the *Eagle-Picher Industries* Court further noted that it scheduled a valuation of the debtor's asbestos liability when it rendered its decision to establish a bar date. *Id.* at 680 n.1.

under the Bankruptcy Code."[20] In *Grossman's*, the Third Circuit applied this rule in holding that a claimant's pre-petition exposure to a product, such as asbestos, gives rise to the claim, even though the injury manifests after the reorganization.[21] The Third Circuit then stated that this does not necessarily mean that a claimant's claims are discharged by the plan confirmed in the case. Rather, due process considerations could revive a claim.[22] In other words, inadequate notice would preclude discharge of a claim in bankruptcy.[23]

As the Unmanifested Claimants, if any, were exposed to asbestos prior to the Debtors' petition date, any claims against the Debtors flowing from that exposure, i.e., the Unmanifested Claims, arose prior to the petition date.

D. Would The Discharge of the Unmanifested Claims Be Consistent With Due Process?

The heart of the issue before the Court is whether the discharge of the Debtors' liability for Unmanifested Claims would be consistent with due process. If the nature of

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[20] *Jeld-Wen, Inc. v. Van Brunt (In re Grossman's Inc.)*, 607 F.3d 114, 125 (3d Cir. 2010) (citing 11 U.S.C. § 101(5)). *Grossman's* overturned the Third Circuit's prior holding that under the Bankruptcy Code claims did not arise until a cause of action accrued under applicable non-bankruptcy law—in other words, when a claimant possessed a right to payment. *Matter of M. Frenville Co., Inc.*, 744 F.2d 332 (3d Cir. 1984) *overruled by Jeld-Wen, Inc. v Van Brunt (In re Grossman's Inc.)*, 607 F.3d 114 (3d Cir. 2010).

[21] *Grossman's*, 607 F.3d at 125. *Wright v. Corning*, 679 F.3d 101, 107 (3d Cir. 2012) *cert. denied*, 133 S. Ct. 1239, 185 L. Ed. 2d 177 (2013) ("We thus restate the test announced in *Grossman's* to include such exposure and hold that a claim arises when an individual is exposed *pre-confirmation* to a product or other conduct giving rise to an injury that underlies a "right to payment" under the Code." (emphasis supplied)).

[22] *Grossman's*, 607 F.3d at 125.

[23] *Id.* at 126 ("Without notice of a bankruptcy claim, the claimant will not have a meaningful opportunity to protect his or her claim.") (citations omitted).

the claims is such that due process dictates that discharge is unavailable then there is no point in undergoing the expense and confusion of establishing a bar date. However, if discharge might be available then establishment of a bar date could be appropriate as a first step in the Debtors' pursuit of such a discharge.

In *Grossman's*, the Third Circuit discussed a non-comprehensive list of factors for courts to consider in determining whether an asbestos claim has been discharged by a plan of reorganization:

> Whether a particular claim has been discharged by a plan of reorganization depends on factors applicable to the particular case and is best determined by the appropriate bankruptcy court or the district court. In determining whether an asbestos claim has been discharged, the court may wish to consider, *inter alia*, the circumstances of the initial exposure to asbestos, whether and/or when the claimants were aware of their vulnerability to asbestos, whether the notice of the claims bar date came to their attention, whether the claimants were known or unknown creditors, whether the claimants had a colorable claim at the time of the bar date, and other circumstances specific to the parties, including whether it was reasonable or possible for the debtor to establish a trust for future claimants as provided by § 524(g).[24]

In short, such claims *may* be discharged on a case by case basis under the totality of the circumstances.

Section 523(a)(3)(A) of the Bankruptcy Code provides that a creditor's claim may be discharged upon the bankruptcy plan's confirmation if the "creditor had notice or

[24] *Id*. at 127-28.

actual knowledge of the case in time for . . . timely filing."[25] Due process requires that notice be "reasonably calculated, under all the circumstances, to inform interested parties of the pendency" of a proceeding.[26]

The level of notice required by the Due Process Clause depends on whether a creditor is "known" or "unknown." A debtor must provide actual notice to all "known creditors" in order to discharge their claims.[27] Known creditors include both claimants actually known to the debtor and those whose identities are "reasonably ascertainable."[28] "A creditor's identity is reasonably ascertainable if that creditor can be identified through reasonably diligent efforts. Reasonable diligence does not require impracticable and extended searches. The requisite search for a known creditor, instead, usually requires only a careful examination of a debtor's books and records."[29] By contrast, the debtor need only provide "unknown creditors" with constructive notice by publication.[30] Constructive notice must be "reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present

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[25] 11 U.S.C. § 523(a)(3)(A).

[26] *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

[27] *City of New York v. New York, N.H. & H.R. Co.*, 344 U.S. 293, 295–97 (1953).

[28] *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 489–90 (1988). *See also In re W.R. Grace & Co.*, 316 F. App'x 134, 137 (3d Cir. 2009).

[29] *In re W.R. Grace & Co.*, 316 F. App'x 134, 137 (3d Cir. 2009) (citations omitted).

[30] *Chemetron Corp. v. Jones*, 72 F.3d 341, 346 (3d Cir. 1995) (citations omitted).

their objections."[31] "Publication in national newspapers is regularly deemed sufficient notice to unknown creditors, especially where supplemented . . . with notice in papers of general circulation in locations where the debtor is conducting business."[32]

As the Unmanifested Claimants are "unknown" creditors, the issue becomes whether due process can be satisfied by publication notice. Discussion of the evolving case law on that point follows:

i. In re Waterman S.S. Corp.

In *In re Waterman S.S. Corp.*,[33] the court considered the question of adequate notice to seamen who had been exposed to asbestos on the debtor's vessels. The bankruptcy court held that publication notice could not cure inadequate notice to asbestos claimants, even if claimants read the publication notice in the local newspaper, because the notice failed to notify the claimants of the nature of their claims.[34] On appeal, the district court vacated the bankruptcy court opinion and remanded for the bankruptcy court to make

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[31] *Id.* at 348 (citation and internal quotation marks omitted). *Wright v. Owens Corning*, 679 F.3d 101, 108 (3d Cir. 2012) *cert. denied*, 133 S. Ct. 1239, 185 L. Ed. 2d 177 (U.S. 2013) (citations and internal quotation marks omitted).

[32] *Chemetron Corp.*, 72 F.3d at 349-49 (citations omitted*); In re Best Products Co., Inc.*, 140 B.R. 353, 358 (Bankr. S.D.N.Y. 1992) ("It is impracticable . . . to expect a debtor to publish notice in every newspaper a possible unknown creditor may read.").

[33] *Waterman Steamship Corp. v. Aguiar (In re Waterman S.S. Corp.)*, 141 B.R. 552 (Bankr. S.D.N.Y. 1992) *vacated*, 157 B.R. 220 (S.D.N.Y. 1993).

[34] *Id.* at 559 ("[N]o future Asbestosis Claimant who, by definition, had yet to manifest any detectible injury prior to confirmation, could be deemed to have relinquished substantive rights when, even if that individual had read the 'notice,' those individuals would have remained completely unaware that their substantive rights were affected.").

factual determinations concerning such questions as when the seamen manifested disease symptoms, and the reasonableness of the notice to particular individuals or groups.[35] The district court created several groups of claimants which were each accorded a certain type of notice: (i) former seamen who were known to be actual or potential claimants (all those who the debtor knew had manifested signs of illness) were entitled to actual personal notice; (ii) actual or potential claimants who could not be personally identified with reasonable effort were entitled to notice reasonably calculated, under all the circumstances, to apprise them of their claims and the opportunity to file their claims (such as publication); and (iii) potential future claimants (those who had not manifested any detectable signs of disease when the notice of the bar date was given) were not discharged in the bankruptcy proceeding.[36] Thereafter, on remand, the bankruptcy court held that *only* asbestos claimants whose injury manifested prior to the bar date were barred from asserting claims against the debtor.[37]

ii. In re Placid Oil Co.

In *In re Placid Oil Co.*,[38] the Fifth Circuit Court of Appeals recently held that an unknown asbestos creditor's pre-petition claims were discharged by the debtor's constructive notice and that, even though the notice did not contain asbestos-specific

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[35] *In re Waterman S.S. Corp.*, 157 B.R. 220, 222 (S.D.N.Y. 1993).

[36] *Id.*

[37] *Waterman Steamship Corp. v. Aguiar (In re Waterman S.S. Corp.)*, 200 B.R. 770, 777 (Bankr. S.D.N.Y. 1996).

[38] *Williams v. Placid Oil Co. (In re Placid Oil Co.)*, 753 F.3d 151, 153 (5th Cir. 2014).

claim information, such notice was not substantially deficient.[39] Placid Oil Company ("Placid") owned and operated a large natural gas production and processing facility. Placid filed for bankruptcy and the bankruptcy court established a bar date by which potential creditors were required to file claims. On three occasions, Placid published a notice of bar date in *The Wall Street Journal*. Placid's notice of bar date informed creditors of the existence of the bankruptcy case, their opportunity to file proofs of claim, relevant deadlines, consequences of not filing a proof of claim, and how proofs of claim should be filed. Thereafter, the bankruptcy court confirmed Placid's plan of reorganization. The confirmation order provided that all claims against Placid that arose on or before the confirmation date were forever discharged except for Placid's obligations under its plan which did not address potential future asbestos liability. Several years after entry of the confirmation order, certain claimants brought an action against Placid. More specifically, the claimants were a former Placid employee and his children whose wife/mother became ill (several years after confirmation of Placid's plan) and passed-away as a result of her exposure to asbestos when laundering her husband's work clothing. Thereafter, Placid filed a motion to reopen its bankruptcy case and commenced an adversary action asking the court to determine whether the asbestos claims were discharged.

Prior to its bankruptcy, Placid was aware of the hazards of asbestos exposure and of the claimant-employee's exposure in the course of his employment. However, prior

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[39] *Id*. at 152-53.

to Placid's plan confirmation, no asbestos-related claims had been filed against Placid and these claimants had not yet filed their claims. Furthermore, as of the Fifth Circuit ruling, Placid had not been held liable in any asbestos lawsuits nor had it paid any money to settle an asbestos case. The Placid claimants argued that the method and substance of Placid's notice were insufficient on due process grounds and, as a result, their claims were not discharged. The Fifth Circuit disagreed.

The Fifth Circuit held that the asbestos claimants were "unknown" stating:

> policy concerns specific to bankruptcy weigh heavily against defining known creditors as those with merely foreseeable claims. Bankruptcy offers the struggling debtor a clean start. In the interests of facilitating this recovery and balancing due process considerations, the courts have established a practical limit to the debtor's duty to notify creditors: Actual notice is required only for "known" creditors. We decline today to alter this limit.[40]

The Fifth Circuit reasoned that, although Placid knew of the dangers of asbestos and the claimant's exposure, such information suggesting only a risk to the claimant does not make the claimant a known creditor.[41] The *Placid Oil* court continued that Placid had no specific knowledge of any actual injury to the claimant prior to its bankruptcy;[42] in other words "[p]arties with merely foreseeable claims are not 'known' creditors."[43] The Fifth

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[40] *Id.* at 157.

[41] *Id.*

[42] *Id.*

[43] *Id.* at 158.

Circuit reasoned that, in addition, Placid did not know of any instances of asbestos-related injury or illness prior to confirmation.[44]

As the debtor was not required to provide actual notice, the Fifth Circuit then turned to the issue of whether the published notice should have referred specifically to potential asbestos claims. The Fifth Circuit held:

> that because a bar date notice need not inform unknown claimants of the nature of their potential claims, Placid's notices were substantively sufficient to satisfy due process. Placid's notice informed claimants of the existence of the bankruptcy case, the opportunity to file proofs of claim, relevant deadlines, consequences of not filing a proof of claim, and how proofs of claim should be filed. We decline to articulate a new rule that would require more specific notice for unknown, potential asbestos claimants.[45]

In effect, *Placid Oil* holds that (i) asbestos claims can be discharged with all other pre-petition claims, even when a claimant is a future and/or unknown claimant; (ii) an asbestos claimant is unknown when their claim is "merely forseeable;" (iii) publication is sufficient due process to notify unknown claimants; and (iv) publication notice does not need to specifically mention the possibility of asbestos claims.

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[44] *Id*. at 157 ("Press clippings about widely-known, but general, risks of asbestos exposure do not establish that Placid knew of any specific injury to its employees or any asbestos-related claim." (footnote excluded)).

[45] *Id.* at 158 (footnotes excluded). *See also In re Chicago, Rock Island and Pac. R.R. Co.*, 90 B.R. 329 (N. D. Ill. 1987). After the bar date, a former employee brought suit on a claim arising from asbestos-related injuries. The employee claimed that he was a known creditor because the company knew its employees were exposed to asbestos. The court held that "in the absence of any indication that a particular claim would ensue," the employee was an unknown creditor and publication notice would suffice. *Id.* at 331.

In *Placid Oil*, one of the Fifth Circuit Court Judges filed a dissent, which was concerned almost exclusively with the issue of "whether a latent asbestos claim of an asbestos-exposed, but not yet knowingly injured, person is dischargeable in bankruptcy and, if so, under what circumstances."[46] The dissent likened a bar date for unmanifested asbestos claims to whether a class action under Rule 23(b)(3) should include individuals who had been exposed to asbestos but had not yet manifested injuries.[47] In *Amchem Products, Inc. v. Windsor*, which the dissent cited, the Supreme Court ruled that the class as certified failed to satisfy Rule 23's predominance and adequacy-of-representation requirements.[48] However, in *Amchem*, the Supreme Court mentioned the impediments to the provision of adequate notice to unmanifested victims of asbestos exposure:

> Many persons in the exposure-only category, the [Third Circuit] Court of Appeals stressed, may not even know of their exposure, or realize the extent of the harm they may incur. Even if they fully appreciate the significance of class notice, those without current afflictions may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out.
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> Family members of asbestos-exposed individuals may themselves fall prey to disease or may ultimately have ripe claims for loss of consortium. Yet large numbers of people in this category—future spouses and children of asbestos victims—could not be alerted to their class membership. And

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[46] *Id.* at 160. The dissent acknowledged that this issue was not briefed by the parties; however, the dissent reasoned that the panel owed a duty to oversee orderly development of the Fifth Circuit jurisprudence. *Id.*

[47] *Id.* at 160-161 (*citing Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997)).

[48] *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 622-28 (1997).

> current spouses and children of the occupationally exposed may know nothing of that exposure.
>
> Because we have concluded that the class in this case cannot satisfy the requirements of common issue predominance and adequacy of representation, we need not rule, definitively, on the notice given here. In accord with the Third Circuit, however, . . . we recognize the gravity of the question whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous.[49]

The dissent continued that "[u]nknown, future claimants, even if they receive notice of a bankruptcy proceeding, are often unable to recognize that their rights will be affected by the bankruptcy, for instance because they are unaware that the debtor has exposed them to toxic substances or because they have yet to manifest any injuries by the time the debtor files for bankruptcy."[50] The dissent ultimately concluded that "constructive notice by publication to asbestos-exposed individuals with unmanifested or latent mesothelioma, without appointment of a representative for such future claimants, does not satisfy due process."[51]

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[49] *Id.* at 628 (*citing Georgine v. Amchem Products, Inc.*, 83 F.3d 610 (3d Cir. 1996) *aff'd sub nom. Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997)).

[50] *Placid Oil Co.*, 753 F.3d at 161.

[51] *Id.* at 164. Notwithstanding the dissent's conclusion, it is important to note that there is a difference between class certification and a bar date. There are numerous statutory provisions and policy considerations in connection with establishment of a bar date (discussed *infra*) that are not in play in the class action context.

iii. In re Chemtura Corp.

In re Chemtura Corp. involved tort claims based on the debtor's production and sale of diacetyl, a butter flavoring ingredient used in food products.[52] Exposure to diacetyl may lead to lung disease. At the time the debtor filed for bankruptcy, it faced fifteen diacetyl lawsuits involving approximately fifty plaintiffs.[53] During the bankruptcy, the debtor requested the bankruptcy court establish a bar date for all creditors, including diacetyl claimants. Although contested by counsel to the diacetyl claimants,[54] the bar date was approved by the bankruptcy court.[55] The bankruptcy court reasoned, in its oral ruling:

> The objections represent alternative perspectives as to how the debtors' Chapter 11 case should be run. And that's not a satisfactory basis for objection on a motion of this character. Their suggestion that even though this isn't an asbestos case that the filing of this case wasn't asbestos or tort liability driven and the debtors aren't seeking a channeling injunction – I should nevertheless require or expect the debtors to craft a plan with a 524(g) injunction or other claims channeling mechanism. It's inconsistent with the concept of Section 1121 of the Code which gives the debtors the exclusive right to propose a plan during the period authorized by law, subject to the rights of parties in interest who oppose extensions of the debtors' exclusive period or to seek the termination of that

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[52] *Gabauer v. Chemtura Corporation (In re Chemtura Corp.)*, 505 B.R. 427, 428 (S.D.N.Y. 2014).

[53] *Id.* at 429.

[54] Counsel to certain diacetyl claimants argued that certain individuals would not know that they had a diacetyl-induced disease because of the latency period of the disease and delays related to diagnosis of the disease. *In re Chemtura Corp.* (Bankr. S.D.N.Y. 09-11233), Transcript of Hr'g Aug 17, 2009, 28:9-30:6.

[55] *Id.* at 429. Although the bankruptcy court did not issue an opinion related to its ruling, the hearing transcript was provided by the Debtors. *See* D.I. 1984 (Excerpt of Transcript of August 17, 2009 Hearing).

> right. At this juncture, the debtors are free to propose a plan to meet their needs and concerns and the concerns of what they believe will satisfy their unsecured creditor community.
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> . . .
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> [T]he diacetyl litigants have to understand that this case, with billions of dollars of debt to be satisfied, can't be run for their convenience or strategic preferences.
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> . . .
>
> I need simply find, and I do find, as a factor, mixed question of fact and law, that a bar date is necessary and appropriate here. The debtors and their major creditor constituencies – and by that I mean at the least the creditors' committee – need to know the universe of potential claims that must be satisfied. Frankly, to suggest otherwise is ludicrous.[56]

Thereafter, the debtors mailed direct notice of the bar date to all known creditors and publication of both general notices and "site-specific" notices for unknown creditors.[57] The "site-specific" notices contained information about the exposure to diacetyl and identified, specifically, to whom the debtors supplied, sold and distributed the product.[58]

After the bar date had passed, and after the bankruptcy plan was confirmed, nine claimants filed state court law suits against the debtors alleging injuries caused by exposure to diacetyl. The debtors moved the bankruptcy court to enforce the discharge injunction. The bankruptcy court found, in an oral ruling, that the claims were

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[56] *In re Chemtura Corp.* (Bankr. S.D.N.Y. 09-11233), Transcript of Hr'g Aug 17, 2009, 52:20-53:11; 54:13-15; and 54:23-55:6.

[57] *Chemtura Corp.*, 505 B.R. at 429.

[58] *Id.*

discharged and enjoined the claimants from further prosecuting their suits. The diacetyl claimants then appealed. The sole issue on appeal was whether the diacetyl claimants received constitutionally adequate notice of the bar date because they *did not know* they had diacetyl-induced illnesses until after the bar date and plan confirmation.[59] The district court concluded that the notice of the bar date was sufficient to bar the diacetyl claimants.[60] Distinguishing *Waterman Steamship Corp.*, the district court reasoned that the publication notice informed the claimants that (i) they may have been exposed to diacetyl while working at the plant, (ii) they might have been injured by that exposure, (iii) they might have a claim even if their injury had not yet manifested itself and (iv) they would lose their rights to recover on that claim if they do not file a claim by the bar date.[61] In other words, the district court found that the published notice contained enough specific information to put future claimants on adequate notice, i.e. the published notice was reasonably calculated, under all circumstances, to apprise the claimants of the pendency of the action and afforded them an opportunity to present their claims.[62] Thus, the claims were discharged.[63]

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[59] *Id.* at 430 ("In essence, Appellants argue that, while the Notice may have been adequate as to people with reason to know that they might have diacetyl-related claims, it was inadequate as to Appellants because they 'had not yet been diagnosed with a diacetyl-induced disease' and thus had no reason to know that they might have claims.")

[60] *Id.*

[61] *Id.* at 431.

[62] *Id.* (citation omitted).

[63] It bears noting that lung disease caused by diacetyl had a latency of approximately five (5) months – in comparison asbestos related illness can have a latency of approximately 40 years. As latency periods are

iv. In re Specialty Products Holding Corp.

Recently, when faced with establishing a bar date in *In re Specialty Products*,[64] former Judge Walsh stated that he was "inclined" to direct that a bar date be established, inclusive of asbestos claims.[65] However, the Court never entered an order establishing a bar date due to a settlement between the parties after the hearing noted.[66] In addition, it is of note that the Court had: (i) appointed a future claimants' representative;[67] and (ii) conducted an estimation trial and determined that the debtors' asbestos liability was approximately $1.66 billion.[68]

v. Wright v. Owens Corning

In *Wright v. Owens Corning*,[69] the Third Circuit recently held that constructive notice was sufficient to bar unknown claims. In the *Owens Corning* bankruptcy case, the bankruptcy court set a bar date for April 2002. The bar date notice was published twice in *The New York Times*, *The Wall Street Journal*, and *USA Today*, among other publications. The bar date motion specifically identified claims relating to "'the sale, manufacture,

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vastly diverse, the diacetyl claimants may have had a better understanding of their exposure versus an asbestos claimant who may have been exposed years/decades prior to the notice.

[64] Del. Bankr. 10-11780.

[65] *In re Specialty Products Holding Corp.*, Del. Bankr. 10-11780, Tr. Hr'g Nov 5, 2013, 40:8-11 (D.I. 4286).

[66] *See generally*, docket in Del. Bankr. 10-11780.

[67] Del. Bankr. Case No. 10-11780 (D.I. 449) (appointing a legal representative for future claimants).

[68] *Id.* at D.I. 3852 and 3853 (opinion and order regarding asbestos liability).

[69] *Wright v. Owens Corning*, 679 F.3d 101 (3d Cir. 2012), *cert. denied*, 133 S. Ct. 1239, 185 L. Ed. 2d 177 (U.S. 2013).

distribution, installation and/or marketing of products by any of the Debtors, including without limitation . . . roofing shingles. . . .'"[70] The *Owens Corning* debtors also published notice of the disclosure statement hearing and notice of the confirmation hearing, both of which referred to the effect of confirmation on holder of claims. Thereafter, several plaintiffs brought claims against the reorganized debtors related to defective roof shingles. The claimants did not know the roof shingles were defective until well after the bankruptcy case, the attendant bar date, and plan confirmation. The former debtors filed a motion for summary judgment, arguing that the plaintiffs' claims were discharged under the plan and confirmation order. After determining that the plaintiffs had claims under the Bankruptcy Code, the Third Circuit held that, under *Grossman's*, the debtors' notices were sufficient as to most unknown claimants.[71]

vi. In re New Century TRS Holdings, Inc.

Finally, in *In re New Century TRS Holdings, Inc.*,[72] the bankruptcy court established a bar date, which included actual notice to known creditors and published notice in the

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[70] *Id.* at 103.

[71] *Id.* at 108. Although in *Owens Corning*, the Third Circuit allowed a "re-do" because at the time of Owens Corning's confirmation *Frenville* was the law of the Third Circuit and under *Frenville* the plaintiffs did not have claims against the debtors (whereas under *Grossman's* the plaintiffs did have claims). As the claimants in *Owens Corning* would be affected retroactively by *Grossman's*, the Third Circuit held that their claims were not discharged when the "notice to those persons was with the understanding that they did not hold claims." *Id.* Under the reasoning of the decision, however, absent the *Frenville* issue, the claims would have been barred.

[72] *White v. Jacobs (In re New Century TRS Holdings, Inc.)*, Civ. No. 13-1719, 2014 WL 4100749 (D. Del. Aug. 19, 2014).

national edition of *The Wall Street Journal* as well as *The Orange County Register*. The debtors in that case had business operations throughout the United States and had more than one million customers/borrowers. The *New Century* debtors did not consider the borrowers' potential claims but were concerned about the potential for unknown claims asserted by former employees. As such, the debtors did not consider the borrowers in connection with the question of notice. After the bar date, several borrowers filed claims against the debtors. In response to claims by various borrowers, the *New Century* trustee/plan administrator filed a motion seeking determination that the debtors complied with the order establishing a bar date and provided constructive notice of the bar date by publication that satisfied the requirements of due process for unknown creditors, including borrowers. The bankruptcy court enforced the bar date against the borrowers, finding that the *New Century* debtors complied with the order establishing a bar date and published notice that was reasonably calculated to apprise interested parties nationwide of the bar date and afforded them the opportunity to file claims. The borrowers appealed.

Although the District Court noted that publication notice satisfied the requirements of due process for unknown creditors, the court looked at the facts and circumstances to determine whether notice was reasonably calculated, "'under all the circumstances [in *New Century*] to apprise the interested parties of the pendency of the

action and afford them an opportunity to present their objections.'"[73] The District Court distinguished *New Century* from *Owens Corning:*

> unknown claimants in the instant proceeding were given a mere 39 days' notice by a single publication. That single publication was presented in *The Wall Street Journal*, certainly a newspaper with a national distribution, but not one—like *USA Today*—that necessarily enjoys a broad circulation among less than sophisticated, focused readers. The court concludes that the adequacy of the notice provided in this case has not been meaningfully explored and likely was not reasonably calculated to apprise appellants of the bar date. The court concludes that "[d]ue process affords a re-do" under the circumstances of this case.[74]

In effect, the court held that, although publication notice is sufficient due process for unknown creditors, in *New Century*, the publication notice was insufficient. The debtors in *New Century* have appealed the District Court decision to the Third Circuit.[75]

vii. Summary of the Case Law

The decision in *Waterman S.S. Corp.* and the dissent in *Placid Oil* stand for the proposition that publication notice is insufficient to provide adequate notice and, thus, due process, to claimants whose injuries and associated claims have not manifested as of the bar date. As such, those claims cannot be discharged.[76] Under the majority opinion

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[73] *Id.* at *6 (*quoting Owens Corning*, 679 F.3d at 108).

[74] *Id.* (footnotes omitted; *quoting Owens Corning*, 679 F.3d at 108).

[75] *White v. Jacobs (In re New Century TRS Holdings, Inc.)*, D. Del. Case No. 13-vc-1719, D.I. 20.

[76] The *Placid Oil* dissent cites to the Supreme Court's opinion in *Amchem Products, Inc. v. Windsor* in support of its conclusion. While it is true that the Supreme Court identified "the gravity of the question whether...notice sufficient under the Constitution…could ever be given to legions so unselfconscious and

in *Placid Oil* and the decision in *Chemtura*, on the other hand, such claims may be discharged, provided that notice is adequate.[77] Finally, the Third Circuit's opinion in *Owens Corning* and the decision in *New* Century are consistent with *Placid Oil* and *Chemtura*. While under both cases the notice was deemed insufficient, neither court took exception with the underlying proposition that notice *could* be sufficient to enforce a bar date and, thus, discharge, against unmanifested claims.

As the Unmanifested Claimants are "unknown" creditors, the issue is whether due process can be satisfied by publication notice. Although the case law reaches disparate conclusions, the weight of the developing authority holds that publication notice *may* be sufficient to satisfy due process and, thus, would allow for the discharge of the Unmanifested Claims. As a discharge of some or all of the Unmanifested Claims may be available to the Debtors, the Court must now turn to whether to establish a bar date.

E. The Court Will Establish a Bar Date For Unmanifested Claims

The Court is faced with whether to establish a bar date for Unmanifested Claims. These are the claims of persons that were exposed to asbestos pre-petition but have not yet manifested any signs of illness. These are claimants that do not know that they have an asbestos related injury. Indeed, they are *unknown* to themselves, let alone the Debtors.

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amorphous" as the holders of unmanifested asbestos claims, it did so in *dicta* and specifically declined to decide the issue.

[77] The oral observation in *Speciality Products* that the Court was inclined to establish a bar date seems to support the holdings in *Placid Oil* and *Chemtura* but, as the issue was not actually decided and, ultimately, was moot, its persuasive authority is nominal.

As a mixed question of law and fact, however, the Court finds that a bar date should be established for all claims, including Unmanifested Claims.

i. Facts of These Cases

In these cases, the Unmanifested Claimants, if any, were exposed to asbestos prior to the Debtors' petition date and, as a result, have claims against the debtors. The posture of these cases is different, however, from much of the case law discussed above. Here, the Debtors are seeking a bar date. No plan has been filed and no discharge is being sought. The ultimate treatment of the Unmanifested Claims is not before the Court. The sole issue is whether to establish a bar date for those claims.

Here, the Court is not looking back to determine if adequate due process was given to an unknown claimant.[78] In the look-back cases, courts have the benefit of knowing the contents of the notice, the number of times the notice was published, and in which publications the notice was published. In fact, in a look-back scenario, courts have the benefit of knowing the terms of the plan and whether, in fact, there are Unmanifested Claimants. Obviously, this Court does not have this information (as above stated, the Debtors agreed to narrow the issues herein to whether a bar date may be established for Unmanifested Claimants; the issues related to content and scope of the notice have been

[78] *See, e.g., Placid Oil Co.*, 753 F.3d 151; *New Century TRS Holdings*, 13-1719, 2014 WL 4100749; *Chemtura Corp.*, 505 B.R. 427.

continued). The posture of this issue is akin to the bankruptcy court's ruling in *Chemtura Corp.*[79] As such, the Court must consider what it does know.

The Debtors did not file these cases as a result of asbestos or tort liability. In fact, the Debtors estimate that, annually, their prior pay-out on behalf of asbestos claims is less than 0.05% of the Debtors' consolidated annual revenues. While the Court is sympathetic to all asbestos victims, the Court cannot allow this case to be run for the potential victims' convenience or strategic gains. The Court must consider *all* of the Debtors' creditors. Furthermore, as noted above, the E-side Committee has not taken a position with respect to this issue.[80] The Debtors and their constituents must be allowed to assess all of the claims against the Debtors' estates in order to formulate a plan of reorganization.

ii. Statutory Interpretation

The PI Law Firms argue that a bar date for the Unmanifested Claims is not required and that the only way to deal with those claims is through a channeling injunction under section 524(g) of the Bankruptcy Code. The plain meaning of the Bankruptcy Code and Rules, however, lead to the opposite conclusion. First, Bankruptcy Rule 3003(c)(3) states: "[t]he court **shall** fix . . . the time within which proofs of claim or interest may be filed."[81] The term used is "shall" rather than "may." Although the court

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[79] *Chemtura Corp.* (Bankr. S.D.N.Y. 09-11233), Transcript of Hr'g Aug 17, 2009, 52:20-53:11; 54:13-15; and 54:23-55:6.

[80] *See, e.g., In re Chemtura Corp.* (Bankr. S.D.N.Y. 09-11233), Transcript of Hr'g Aug 17, 2009, 52:20-53:11; 54:13-15; and 54:23-55:6.

[81] Fed. R. Bankr. Pro. 3003(c)(3).

in *Eagle-Picher Industries*, discussed *supra*, said that a bar date in a chapter 11 case is "by no means absolute, as the court may extend the bar date 'for cause shown' . . . [it is a matter left to the sound discretion of the bankruptcy court,"[82] this Court does not agree. Bankruptcy Rule 3003(c)(3) says "shall" and "may extend" – it does not say that establishment of a bar date is discretionary altogether. The Supreme Court has held that "[i]t is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another."[83] "May" is used several other times in Rule 3003[84] and "[w]hen the same [provision] uses both 'may' and 'shall,' the normal inference is that each is used in its usual sense—the one act being permissive, the other mandatory."[85] Furthermore, the clear language of Rule 3003(c)(3), if given effect, cannot be said to defeat the plain purpose of the Bankruptcy

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[82] *In re Eagle-Picher Indus., Inc.*, 137 B.R. at 681. *In re Congoleum Corp.*, No. Bankr. 03-51524, 2008 WL 314699, at *3 (Bankr. D. N.J. Feb. 4, 2008) (holding that "this Court is satisfied that it has the discretion to either set or decline to set a bar date for proofs of claim.").

[83] *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537, 114 S. Ct. 1757, 1761, 128 L. Ed. 2d 556 (1994) (citations and internal quotations omitted). *See also Escoe v. Zerbst*, 295 U.S. 490, 493 (1935) (The word "shall" is generally construed to be mandatory in its meaning.) *But see Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (U.S. 1983) ("It is a well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute . . . .").

[84] *See, e.g.*, Fed. R. Bankr. R. 3003(c)(1) ("Any creditor or indenture trustee may file a proof of claim . . ."); 3003(c)(5) ("An indenture trustee may file a claim . . . ").

[85] *Barbieri v. RAJ Acquisition Corp. (In re Barbieri)*, 199 F.3d 616, 620 (2d Cir. 1999) (internal quotation marks omitted) (*quoting Anderson v. Yungkau*, 329 U.S. 482, 485, 67 S. Ct. 428, 430, 91 L. Ed. 436 (1947) (further citations omitted)).

Code nor its component sections.[86] In fact, as discussed *supra*, the establishment of a bar date is consistent with the goals of the Bankruptcy Code.[87]

Second, section 524(g) of the Bankruptcy Code states: "After notice and hearing, a court that enters an order confirming a plan of reorganization under chapter 11 **may** issue, in connection with such order, an injunction in accordance with this subsection to supplement the injunctive effect of a discharge under this section."[88] The formation of a trust pursuant to section 524 is permissive; furthermore, such consideration is not undertaken until confirmation of a plan of reorganization. **If** establishment of an injunction under section 524(g) is the *only* way to satisfy due process **then** Congress would have made section 524(g) mandatory in cases in which asbestos related liabilities

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[86] *Byrum v. IRS (In re Byrum)*, 139 B.R. 498, 500 (C.D. Cal. 1992) (considering *Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (U.S. 1983)).

[87] *Carchman v. Nash*, 473 U.S. 716, 743 n. 11 (1985):

> When interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions, and give to it such construction as will carry into execution the will of the Legislature. . . .

Id. (citations and internal quotation marks omitted).

[88] 11 U.S.C. § 524(g)(1)(A) (emphasis added). A section 524(g)'s trust mechanism may be used if it "is likely to be subject to substantial future demands for payment arising out of the same or similar conduct or events that gave rise to the claims that are addressed by the injunction." 11 U.S.C. § 524(g)(2)(B)(ii)(I). Furthermore, "[a] § 524(g) injunction is *only* appropriate where the debtor is likely to be subject to significant future demands." *In re WR Grace & Co.*, 729 F.3d 332, 338 (3d Cir. 2013) (emphasis added). "Section 524(g) provides a mechanism that allows companies to handle overwhelming present and future asbestos liability through a trust created in conjunction with a Chapter 11 bankruptcy plan." *Id.* at 339 (citation omitted).

or claims arise and would have carved unmanifested claims out of Bankruptcy Rule 3003(c)(3). In short, a channeling injunction is not required.

As a result of the plain meaning of Bankruptcy Rule 3003 and section 524 of the Bankruptcy Code, the Court finds that a bar date must be established for all claims, including Unmanifested Claims, even though the Court may later extend such bar date for cause shown.

iii. Policy Considerations

The only issue before the Court is whether a bar date may be established. It would be inconsistent with the concept of section 1121 of the Bankruptcy Code, which initially gives the debtors the exclusive right to propose and to solicit a plan of reorganization,[89] for the PI Law Firms, the Unmanifested Claimants or this Court to dictate plan terms, including whether to forego discharge of the Unmanifested Claims or to require a section 524(g) injunction.[90] At this juncture, exclusivity is still in place and the Debtors may propose a plan to meet their needs and concerns, as well as the concerns of their constituencies. As such, the Court cannot consider whether a section 524(g) injunction ought to be established in the Debtors' plan of reorganization, whether the Court should estimate the Debtors' asbestos exposure, or whether the Court should appoint a futures

[89] Subject to the rights of parties in interest who oppose extensions of the debtors' exclusive period or to seek the termination of that right to propose a plan during the period authorized by law.

[90] *See In re Chemtura Corp.* (Bankr. S.D.N.Y. 09-11233), Transcript of Hr'g Aug 17, 2009, 52:20-53:11; 54:13-15; and 54:23-55:6.

representative. That being said, however, the Court will consider such proposals as they are presented to it. Until such matters are raised by motion or the filing of a plan, however, the Court is mindful that the Debtors have exclusive control over whether to submit a plan of reorganization and the terms thereof. As such, the Court will not impose any proposed treatment for such plan that is still in the early stages of negotiation.

CONCLUSION

As set forth above, the Court will grant the Debtors' Bar Date Motion and will establish a bar date for Unmanifested Claimants. Pursuant to the agreement of the parties, an order establishing the bar date and specifying notice thereof will be entered after further proceedings before the Court.

BY THE COURT:

Christopher S. Sontchi
United States Bankruptcy Court

Dated: January 7, 2015

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
ENERGY FUTURE HOLDINGS CORP., *et al*.,[1]	Case No. 14-10979 (CSS)
Debtors.	(Jointly Administered)
	Re: D.I. 1682, 1791, 1796, 1804

SUPPLEMENTAL BRIEF OF THE PERSONAL INJURY LAW FIRMS IN OPPOSITION TO THE IMPOSITION OF A CLAIMS BAR DATE AFFECTING PRESENT AND FUTURE ASBESTOS PERSONAL INJURY CLAIMANTS

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Dated: September 9, 2014

[1] The last four digits of Energy Future Holdings Corp.'s taxpayer identification number are 8810. The location of the debtors' service address is 1601 Bryan Street, Dallas, TX 75201. Due to the large number of debtors in these Chapter 11 cases, for which joint administration has been granted, a complete list of the debtors and the last four digits of their federal tax identification numbers is not provided herein. A complete list of such information may be obtained on the website of the debtors' claims and noticing agent at http://www.efhcaseinfo.com.

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The PI Law Firms,[2] by and through their undersigned counsel, hereby file this supplemental brief in opposition to the Debtors' motion to impose a claims bar date for asbestos personal injury claimants. In support, the PI Law Firms respectfully state as follows:

PRELIMINARY STATEMENT

The Debtors' Motion for Entry of an Order (A) Setting Bar Dates for Filing Non-Customer Proofs of Claim and Requests for Payment Under Section 503(b)(9) of the Bankruptcy Code, (B) Approving the Form of and Manner for Filing Non-Customer Proofs of Claim and Requests for Payment Under Section 503(b)(9) of the Bankruptcy Code, and (C) Approving Notice Thereof (the "Motion") requests that this Court impose a bar date on present and future asbestos personal injury claims.

The Debtors' plan fails to satisfy the constitutionally-mandated due process rights of present and future asbestos personal injury claimants. Future asbestos personal injury claimants cannot be treated similarly to other personal injury tort claimants. Congress recognized this important distinction when it passed legislation creating Section 524(g) of the Bankruptcy Code. Because asbestos-related injuries may not diagnosed for up to fifty years after exposure, establishing a bar date violates due process by cutting off the rights of thousands of potential claimants who do not even know that they have a claim. While courts have accepted publication as providing constructive notice to creditors unknown to a debtor, publication does not satisfy the requirements of due process for an entire class of claimants that are so unknown as to be unknown even to themselves.

[2] The PI Law Firms are Gori Julian & Associates, P.C., Simmons Hanly Conroy, LLC, Paul Reich & Meyers, P.C., Kazan, McClain, Satterley & Greenwood, a Professional Law Corporation, and Early, Lucarelli, Sweeney & Meisenkothen.

Because a bar date for future asbestos creditors cannot satisfy the requirements of due process, the establishment of a bar date will not advance the progress of these cases. Asbestos liabilities are best addressed as Congress intended, through the creation of an asbestos personal injury trust.[3] Accordingly, the Debtors' motion should be denied.

PUBLICATION NOTICE WILL DENY DUE PROCESS OF LAW TO FUTURE ASBESTOS PERSONAL INJURY CLAIMANTS

A. Publication Notice of an Asbestos-Related Bar Date is Insufficient for Future Claimants Who are Unaware or Unknowing of Their Injuries.

Due process is a threshold requirement in bankruptcy cases. *See Greater Am. Land Res., Inc. v. Town of Brick, N.J.*, C.A. No. 11-5308, 2012 WL 1831563, at *4 (D.N.J. May 17, 2012) ("Due process is also an important consideration in bankruptcy proceedings."); *In re MMH Auto. Grp., LLC*, 385 B.R. 347, 372 (Bankr. S.D. Fla. 2008) ("While I recognize that speed is essential to the success of most bankruptcy cases, . . . expediency does not trump due process."); *In re AMF Bowling Worldwide, Inc.*, 278 B.R. 96, 101 (Bankr. E.D. Va. 2002) ("Without proper notice, a party cannot be held as having relinquished a known claim or right as that party would not have knowledge of its claim to be able to release it.").

The United States District Court for the District of Delaware recently addressed the critical due process considerations that must be evaluated when setting a bar date. *See White v. Jacobs (In re New Century TRS Holdings, Inc., et al.*), Civ. No. 13-1719-SLR, 2014 WL 4100749 (D. Del. Aug. 19, 2014) (reversing the Bankruptcy Court's determination that adequate notice had been provided in connection with a bar date order). In *White*, the *pro se* plaintiffs

[3] Pursuant to an agreement between the parties, the scope of this brief is limited to addressing the issue of whether the Court should enter a bar date for asbestos claimants. Should the Court enter a bar date order, the parties have agreed to address the requirements of the content and scope of the notice required at a later hearing. The PI Law Firms assert that due process notice cannot be provided to future asbestos claimants and that the Debtors' proposed bar date notice and notice plan fail to provide adequate notice to present asbestos personal injury claimants.

contended that the debtors' bar date notice, published just once in *The Wall Street Journal* and *The Orange County Register*, did not provide adequate constructive notice of the bar date. The District Court noted that "whether adequate notice has been provided depends on the circumstances of a particular case," *id.* at *4, and concluded that "the adequacy of the notice provided in this case has not been meaningfully explored and likely was not reasonably calculated to apprise appellants of the bar date." *Id.* at *6. The Court concluded that the debtors' publication notice was insufficient. *Id.*

Here, the Debtors improperly ask that this Court establish a bar date expressly and specifically intended to cut off claims of persons who have not yet manifested any asbestos-related injury, persons who will someday suffer a loss when a family member in the future develops an asbestos-related disease, and even those who do not yet have the relationships that will result in a claim against the Debtors, such as future spouses or unborn children (collectively, "future claimants"). With one exception in a case that settled before a bar date order was entered, no court has ever so ruled.[4]

A bar date has significant consequences. An unscheduled creditor who fails to file a proof of claim or interest by the bar date "shall not be treated as a creditor with respect to such claim for the purposes of voting ***and distribution***." Federal Rule of Bankruptcy Procedure 3003(c)(2) (emphasis added). Therefore, and as stated by this Court at the initial hearing on the

[4] *See* 11/5/2013 Hr'g Tr. 40:8-13, *In re Specialty Prods. Holding Corp.*, Case No. 10-11780 [D.I. 4286] (Bankr. D. Del.) (Walsh, J.) ("Well, I'm inclined to direct that a bar date be established, including asbestos claims.") (attached as Ex. A to Corrected Objection of Certain Asbestos Claimants to the Motion [D.I. 1796]). The PI Law Firms respectfully submit that Judge Walsh's ruling was in error. Further, there are two important distinctions between *Specialty Products* and these cases: (1) the *Specialty Products* court appointed a future claimants' representative, *see* Case No. 10-11781 [D.I. 449] (appointing Eric D. Green as Legal Representative for Future Claimants); and (2) the *Specialty Products* court had already conducted an estimation trial and determined that the debtors' asbestos liability was approximately $1.166 billion. *See* Case No. 10-11780 [D.I. Nos. 3852 & 3853] (opinion and order entered determining asbestos liabilities).

Debtors' Motion, implicit in the imposition of a bar date is a determination that adequate notice ***can*** be provided to the creditors whose claims are the subject of the bar date. *See* Hr'g Tr. 94:11-15, *In re Energy Futures Holding Corp., et al.*, (Bankr. D. Del. Aug. 13, 2014) (Sontchi, J.) [D.I. 1945] (emphasis added).[5]

Because this case involves unknown creditors to whom the Debtors are unable to provide direct notice, the Debtors propose to provide notice through publication in a variety of newspapers and trade magazines. Motion [D.I. 1682], at ¶ 21 ("[T]he Debtors propose to publish the Bar Date Notice, modified for publication . . . on one occasion in each of the publications listed in Exhibit 4 to Exhibit A attached hereto."). But publication notice cannot satisfy the constitutional requirements of due process for future claimants.[6] The uniquely long latency period—up to 50 years—associated with asbestos diseases means that individuals who will later become sick have no present knowledge that they will later develop a potentially fatal disease. That is, unlike potential creditors who may be unknown to a debtor but who are aware of their claims and for whom publication notice is effective, future claimants are *unknown to themselves*.[7]

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[5] "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Although constructive notice may be used to satisfy the requirements of providing due process notice to unknown creditors, "[i]nadequate notice is a defect which precludes discharge of a claim in bankruptcy." *See Chemetron Corp. v. Jones*, 72 F.3d 341, 346 (3d Cir. 1995).

[6] Even Judge Walsh's inclination to establish a bar date had not progressed to addressing the quantity or quality of notice to be required in order to satisfy the due process rights of future asbestos claimants. Although no order has been – or will be – entered establishing a bar date in *Specialty Products*, the details regarding the type of publication notice plan that would be purportedly adequate due process for future claimants was one issue still open when the parties settled the case.

[7] *See, e.g.*, *In re Flintkote Co.*, 486 B.R. 99, 124-25 (Bankr. D. Del. 2012) (noting asymptomatic individuals do not themselves know if they will suffer from an asbestos-related injury or be entitled to a payment based on manifestation of asbestos-related injury); *see also In re Chance Indus., Inc.*, 367 B.R. 689, 708 (Bankr. D. Kan. 2006) (citing Laura B. Bartell, *Due Process for the Unknown Future Claim in Bankruptcy—Is this Notice Really Necessary?*, 78 AM. BANKR. L.J. 339 (2004) ("notice by publication is an exercise in futility as applied to creditors

Continued…

Further, "even if identified, many [asbestos claimants] may not come forward to participate in a proceeding whose potential effect on them is remote." Frederick Tung, *The Future Claims Representative in Mass Tort Bankruptcy: A Preliminary Inquiry*, 3 CHAP. L. REV. 43, 53 (2000). Such a decision is not tantamount to a knowing waiver of a known right. *See* Yair Listokin and Kenneth Ayotte, *Protecting Future Claimants in Mass Tort Bankruptcies*, 98 NW. U. L. REV. 1435, 1449 (2004). Instead, it arises, for at least two reasons, from a lack of ability to make a reasoned decision based on the information presently available to the potential future claimant. First, concrete information receives a "greater-than-warranted emphasis in decision making, as compared to more abstract information." *Id*. (citing Thomas A. Smith, *A Capital Markets Approach to Mass Tort Bankruptcy*, 104 YALE L.J. 367 (1994) and various studies he describes within the article). And second, uncertainty surrounds the potential claim. *Id*. at 1450. Because only some of those exposed to asbestos will develop an asbestos-related injury, those who do not have a present injury simply will not file a proof of claim.

Indeed, in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 628 (1997), the Supreme Court recognized the practical unlikelihood that every individual with incidental exposure to asbestos would realize that he or she could someday develop an asbestos disease and make a reasoned decision about whether to take part in the proceeding, stating that "those without current afflictions may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out." *Id.* at 628 ("Impediments to the provision of adequate notice . . . rendered highly problematic any endeavor to tie to a settlement class persons with no perceptible

….Continued
who are not only unknown to the Debtor, but are also unknown to themselves"). The constraints of due process do not permit the normal chapter 11 process to be used to discharge the asbestos claims of persons not yet ill, who cannot be given notice, and who would not know what compensation to seek. *In re Plant Insulation Co*., 469 B.R. 843, 852 (Bankr. N.D. Cal. 2012), *aff'd*., 485 B.R. 203 (N.D. Calif. 2012).

asbestos-related disease at the time of the settlement," and certain claimants "may not even know of their exposure, or realize the extent of the harm they may incur . . . [or] may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out.").[8]

In short, "when an individual cannot recognize that he or she has a claim in a bankruptcy case and, therefore, cannot make a decision about how to assert that claim, that person is functionally or constructively 'incompetent' for purposes of the bankruptcy case." Laura B. Bartell, *Due Process for the Unknown Future Claim in Bankruptcy—Is This Notice Really Necessary?*, 78 AM. BANKR. L.J. 339, 366 (2004).

B. There Can Be No Due Process for Future Claimants in the Absence of a Future Claimants' Representative to Advocate Their Interests.

"[F]uture interests are best protected 'by requiring that fair and just recovery procedures be made available to future claimants and by ensuring that they receive vigorous and faithful representation.'" *See Findley v. Falise (In re Joint E. & S. Dist. Asbestos Litig.*), 878 F. Supp. 473, 565 (E.D.N.Y. & S.D.N.Y. 1995) (*quoting Ivy v. Diamond Shamrock Chems. Co.* (*In re Agent Orange Prod. Liability Litig*.), 996 F.2d 1425, 1435 (2d Cir. 1993)).

Federal Rule of Civil Procedure 17, made applicable by Rules 7017 and 9014 of the Federal Rules of Bankruptcy Procedure, provides for appointment of guardians in federal court.

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[8] Debtors have previously requested that this Court ignore the Supreme Court's *Amchem* teachings as non-binding *dicta*. The Third Circuit, however, has previously instructed courts to be mindful of relevance of all aspects of a Supreme Court opinion:

> [W]e should not idly ignore considered statements the Supreme Court makes in dicta. The Supreme Court uses dicta to help control and influence the many issues it cannot decide because of its limited docket. Appellate courts that dismiss these expressions [in dicta] and strike off on their own increase the disparity among tribunals (for other judges are likely to follow the Supreme Court's marching orders) and frustrate the evenhanded administration of justice by giving litigants an outcome other than the one the Supreme Court would be likely to reach were the case heard there.

Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery, 330 F.3d 548, 561 (3d Cir. 2003) (internal citations omitted).

A court has the discretion to appoint a guardian if a party is found to be incompetent under the laws of the state of his or her domicile, Fed. R. Civ. P. 17(b)[9], and under Rule 17(c), a court may appoint a general guardian, a committee, a conservator, or "a like fiduciary" to represent the incompetent person's interests.

In the seminal *Johns-Manville* case, Judge Lifland found that future claimants were parties in interest under section 1109(b) of the Bankruptcy Code and as parties whose interests were to be affected by a Chapter 11 case, they had to be afforded an opportunity to be heard. *In re Johns-Manville Corp.*, 36 B.R. 743, 747 (Bankr. S.D.N.Y. 1984). The *Johns-Manville* court found that future claimants were entitled to a "separate and distinct representative" to participate in the formulation of the plan. *Id.* at 749. Importantly, the court issued its ruling in a jurisdiction that held that a claim arises upon exposure, as opposed to manifestation of an asbestos-related disease, *id*. at 752,[10] specifically finding that legal conclusion to be "totally unrelated to the status of future claimants as parties in interest." *Id.* at 750.[11] The court then appointed a future claimants' representative to represent their interests in connection with the case and endowed him with the powers and responsibilities of a committee.

[9] Many states model their guardianship statutes on the Uniform Guardianship and Protective Proceedings Act ("UGPPA"). The most recent version defines "Incapacitated person" as "an individual who, for reasons other than being a minor, is unable to receive and evaluate information or make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate technological assistance." UGPPA § 102(5) (1998) (emphasis added). A representative for such person is appointed by the courts.

[10] The court compared this to the Seventh Circuit's decision in *In re UNR Industries, Inc.*, 725 F.2d 1111 (7th Cir. 1984) and the bankruptcy court's decision in *In re Amatex Corp.*, 30 B.R. 309 (Bkrtcy. E.D. Pa. 1983). However, the Third Circuit overturned *Amatex* aligning Third Circuit law with the *Manville* case line on the issue. *See In re Amatex Corp.*, 755 F.2d 1034 (3d Cir. 2985).

[11] The court also added support for the position, stating "the majority of jurisdictions date the statute of limitations from the point of manifestation of the disease should not have the unintended effect of barring those who have not as yet manifested a disease from asserting their status as parties in interest in this bankruptcy proceeding." *Id*. at 752.

During the same period the bankruptcy court in *Johns-Manville* was considering the unique plight of future claimants, courts in the Third Circuit were also recognizing the need for a representative to represent the interests of future claimants (an "FCR"). *See generally In re Amatex Corp.*, 755 F.2d 1034, 1043 (3d Cir. 1985) (future claimants require their own representative). In *Amatex*, the debtor sought the appointment of a *guardian ad litem* to represent the interests of unknown prospective claimants who might assert claims in the future. The lower courts ruled that future claimants did not hold claims under the Bankruptcy Code, and were therefore not creditors. *Id*. at 1036. In reversing, however, the Third Circuit ruled that future claimants, who presently did not know that they would become sick in the future, were nevertheless parties in interest who needed "a voice in proceedings that will vitally affect their interests." *Id.* at 1043. The Court concluded that "[u]nder the functional approach, the denial of the appointment of a legal representative for future claimants should be recognized as being tantamount to a denial of such individuals' request to intervene[.]" *Id.* at 1040. After recognizing that future claimants had a practical stake in the outcome of the proceedings, because any failure to provide for them may fatally undermine a plan of reorganization or prejudice their position, the court concluded future claimants were "sufficiently affected by the reorganization proceedings to require some voice in them." *Id*. at 1042.

The subsequent enactment of section 524(g), codifying the procedures and relief provided in the *Johns-Manville* case, confirms the need for an advocate to protect the rights of future claimants in a bankruptcy case, particularly where their rights are at issue. 11 U.S.C. § 524(g). Indeed, the legislative history directly addresses the treatment of future claimants and emphasizes that their interests and due process rights must be protected. Congress was "concerned that full consideration be accorded to the interests of future claimants, who, by

definition, do not have their own voice." 140 Cong. Rec. H10752-01, H10765 (Oct. 4, 1994). "[A] central element of the [Manville] case was how to deal with future asbestos claimants – those who were not yet before the court, because their disease had not yet manifested itself. The parties in the Manville case devised a creative solution to help protect the future asbestos claimants, in the form of a trust . . . ." *Id*. Although a future claimants' representative has no power to bind future claimants, the FCR provides a voice for this otherwise unrepresented interest.

Ever since, the appointment of an FCR has been the mechanism used by bankruptcy courts to ensure that the interests of future asbestos claimants are represented, even in liquidation and non-mass tort bankruptcies. *See, e.g., In re Motors Liquidation*, Case No. 09-50026, Order Pursuant to Sections 105 and 1109 of the Bankruptcy Code Appointing Dean M. Trafelet as Legal Representative for Future Asbestos Personal Injury Claimants [D.I. 5459] (Bankr. S.D.N.Y. Apr. 8, 2010).

C. Establishment of an Asbestos Bar Date Would Not Achieve Any Legitimate Reorganizational Objective in this Case.

Establishment of a bar date for future claimants will not advance the Debtors' reorganization. There are only two potential methods for addressing a debtor's future asbestos liability: establishment of a section 524(g) trust, or a pass-through plan.

An FCR, properly exercising his or her fiduciary duty, would almost certainly seek an estimation of the Debtors' asbestos liability as the only established method for assessing the Debtors' liability for future asbestos claims. The estimated future liability would then form the basis of any treatment proposed by the Debtors under a plan. Presumably the Debtors would then seek to benefit from the broad protection available under § 524(g).

In enacting section 524(g), Congress developed a statutory scheme that aimed at preserving the due process rights of future claimants while providing a debtor with comprehensive, enterprise-wide resolution of its present and future asbestos liability. *See In re W.R. Grace & Co.*, 729 F.3d 311, 320 (3d Cir. 2013) ("§ 524(g) permits all asbestos-related claims against the debtor to be channeled to a trust, and thus it relieves the debtor of the uncertainty of future asbestos liabilities[.] By removing that uncertainty and allowing the debtor to emerge from bankruptcy free of all asbestos liability, § 524(g) facilitates the company's ongoing viability, which in turn provides the trust with an evergreen source of funding to pay future claims.") (internal quotations omitted).

Alternatively, if the Debtors were to propose a pass-through plan, a bar date would not benefit the case since it would neither inform nor limit the amount of the Debtors' asbestos liability.

In short, the attempted discharge of a future claimant through establishment of a bar date is inconsistent with the statutory scheme established by section 524(g), and inconsistent with the Bankruptcy Code's animating principle of equal distribution to similarly situated creditors. And critically, it would deny future claimants due process: "Congress created the § 524(g) trust mechanism in order to protect the due process rights of people who had been exposed but not yet affected, and who might not manifest injury until a time when all available compensation had been paid out to people who got sick faster." *In re W.R. Grace & Co.*, 729 F.3d 332, 341 (3d Cir. 2013) (citation omitted).[12]

[12] *See also In re Flintkote Co.*, 486 B.R. 99 (Bankr. D. Del. 2012):

> The purpose of §524(g) is to provide those whose illnesses manifest post-petition, regardless of pre- or post-petition exposure, with a fund for recovery equivalent to what currently ill claimants will be paid. Section 524(g) thus removes the risk that the size of payment in compensation for injuries will depend on how quickly a victim gets sick or manifest an injury. It is impossible to

Continued…

Even in a recent liquidating chapter 11 case in which asbestos claims were alleged to be relatively *de minimis*, a bankruptcy court recognized the necessity of estimating a debtor's asbestos liability so that present and future claimants may be fairly treated. *See In re Budd Co.*, 512 B.R. 910, 914 (Bankr. N.D. Ill. 2014) ("At some point during these proceedings, the amount of the asbestos liability will have to be estimated. The Court agrees with the Movant that any legitimate estimate of asbestos liability should be rendered with the help of research by an expert with experience in actuarial science or other expertise.").

D. None of the Decisions in Grossman's*,* Wright*, or* Placid *Support the Proposition that Due Process Notice Can be Provided To Future Claimants*

The Third Circuit's decision in *JELD-WEN, Inc. v. Van Brunt (In re Grossman's, Inc., et al.)*, 607 F.3d 114 (3d Cir. 2010), does not support imposing a bar date in these chapter 11 cases. Rather, the purpose of *Grossman's* was to overrule the oft-criticized case of *Avellino & Bienes v. M. Frenville Co. (Matter of Frenville Co.)*, 744 F.2d 332 (3d Cir. 1984), and establish a new rule as to when a claim arises under the Bankruptcy Code; it was *not* to provide an alternative to Section 524(g) regarding the discharge of future asbestos claims in bankruptcy. In fact, *Grossman's* was not filed as an asbestos bankruptcy case; at the time it was commenced, there were no pending asbestos claims against it, and therefore the Third Circuit observed that

….Continued

include all individuals who are asymptomatic in the "known, exposed category" because those individuals, themselves, do not know that they might become ill and thus, hold a right to payment, contingent on manifesting an illness. Without the existence of a trust to handle future demands, when asymptomatic individuals eventually manifest an injury, the debtor may no longer have available funds with which to compensate them.

Id. at 124-25. The Ninth Circuit has stated that Section 524(g) articulates Congress' "clearer standard for weighing the equities in the context of an asbestos-related bankruptcy," requiring courts to "attentively evaluate" the relative positions of two groups before issuing an injunction: the future asbestos claimants and the nondebtor injunction beneficiaries. *In re Plant Insulation Co.*, 734 F.3d 900, 912 (9th Cir. 2013) (overturning confirmation order on basis that reorganization plan failed to satisfy certain provisions of Section 524(g), including requirement that trust be able to own majority of debtor's equity).

Grossman's could not have sought a channeling injunction under section 524(g) since that Bankruptcy Code provisions only apply to companies that have been sued for asbestos damages prior to the petition date. *Grossman's*, 607 F.3d at 117, 127-128 & n.13.[13]

Both because *Frenville* was the prevailing law in the Third Circuit at the time that the bar date was entered in *Grossman's* and because no asbestos claims had been asserted against *Grossman's* until after its confirmation, the *Grossman's* bankruptcy court was not presented with the issue of whether future asbestos claimants could be provided with notice of a bar date that would satisfy the requirements of due process.

Similarly, the Third Circuit's later opinion in *Wright v. Owens Corning*, 679 F.3d 101 (3d Cir. 2012), *cert. denied sub nom*. *Corning v. Wright*, 133 S. Ct. 1239 (2013), does not support the imposition of an asbestos bar date. The holding in *Wright* is quite narrow and extends the *Grossman's* analysis to post-petition, pre-confirmation conduct or exposure. *Id.* at 107. Further, the *Wright* court issued its holding in the context of upholding a discharge injunction against a class claimant in a product warranty class action; the claim in *Wright* was not asbestos-related. Thus, *Wright* did not address the issue of due process notice to future asbestos claimants. In fact, *Wright* recognized the importance generally of due process for non-asbestos future claimants by stating:

> Given our reliance on the exceptional circumstances created by the retroactive application of *Grossman's*, we express no opinion on the broader issue of whether discharging unknown future claims comports with due process.

Id. at 109, n.7.

[13] Importantly, the Third Circuit recognized that the due process implications of discharging asbestos claims had been addressed by Section 524(g). *Id.* at 127 (citing *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 234, n.45 (3d Cir. 2005)). The Third Circuit remanded the case to the district court for a determination of due process. *Id.* at 128. However, following the district court's remand to the bankruptcy court, the case settled without reaching such a determination. *See* Adv. Proc. No. 07-51602 (PJW), Final Order of Dismissal of Action With Prejudice [D.I. 73].

In their Response, the Debtors cite to *In re Placid Oil Co.*, 753 F.3d 151 (5th Cir. 2014), as supporting this Court's ability to discharge asbestos-related personal injury claims. Like *Grossman*'s, *Placid* was not an asbestos bankruptcy. Placid filed for bankruptcy protection in 1986 and the bankruptcy court imposed a January 1987 bar date for all claims (with publication notice for unknown claims in *The Wall Street Journal*). Placid's plan was confirmed in 1988. Prior to confirmation, no asbestos claims had ever been asserted against Placid. *Id.* at 153. In 2004, plaintiff sued Placid in state court, alleging that his wife's 2003 death was caused by mesothelioma she contracted washing plaintiff's clothes. Accordingly, in *Placid*, neither the Fifth Circuit (nor the bankruptcy court) addressed the issue of establishing a bar date intended to bar future asbestos claimants.

In ruling that plaintiff's claims against Placid were discharged by the 1988 confirmation order, the Fifth Circuit noted that section 524(g) was not passed until 1994, and agreed that section 524(g) would never have applied in the debtor's bankruptcy case, even assuming it was law, because Placid had never been subjected to asbestos-related claims pre-petition. *See* 753 F.3d at 158 n.7.

Citing to prior Fifth Circuit case law on publication notice for unknown creditors, due process *outside of Section 524(g)* only required direct notice to creditors where "specific information that reasonably suggests both the claim for which the debtor may be liable and the entity to whom he would be liable." *See id.* at 155. Therefore, *Placid* does not support imposition of a bar date for unknown future claimants.

E. Because Asbestos Claims may only be Addressed by Section 524(g) or a Pass-Through Plan, Bankruptcy Courts Generally Decline to Set an Asbestos Bar Date, and No Benefit Can Be Derived Through a Bar Date in This Case

Other bankruptcy courts faced with similar asbestos-related issues have declined to impose bar dates. *See, e.g.*, *In re Congoleum Corp.*, No. 03-51524, 2008 WL 314699, at *4

(Bankr. D.N.J. Feb. 4, 2008) (denying bondholders' motion for bar date covering asbestos claims); *In re Lloyd E. Mitchell, Inc.*, 373 B.R. 416, 423 (Bankr. D. Md. 2007) (overruling insurance companies' objections and approving voting procedures in which no bar date was set and asbestos claims were temporarily allowed for voting purposes without a proof of claim); *Official Comm. of Asbestos Claimants of G-I Holdings, Inc. v. Heyman*, 277 B.R. 20, 34 n.8 (S.D.N.Y. 2002) (noting that "in many asbestos bankruptcies, no bar date [is] ever set"); *see also In re Eagle-Picher Indus., Inc.*, 137 B.R. 679, 680 (Bankr. S.D. Ohio 1992) ("After careful consideration, we have reached the conclusion that while such bar dates are commonly set in Chapter 11 cases, *upon good cause shown the court may dispense with one in a given case*.") (emphasis added).

Entry of a bar date serves no legitimate reorganizational goal in this case. In addition to the impossibility of providing due process notice to future claimants, the expense and futility associated with providing notice to those with diagnosed illnesses but who have not yet brought suit is an expensive and difficult endeavor. Specialized notice for the population of present but unknown asbestos claimants is necessary because the presently injured population is comprised of individuals in very different circumstances. There will be injured individuals who have just learned that they have an injury, such as lung cancer, and may not yet be aware that asbestos could have caused or contributed to their injury. There will be individuals who have developed an injury that they may be aware was or could have been caused by asbestos but who are fighting for their lives and have not retained counsel or even contemplated pursuing compensation for their injury. There will be individuals who have lost a family member to an asbestos disease who have not yet retained counsel. There will be individuals who have retained counsel but have

not yet identified that the Debtors have some connection with their asbestos exposure. These are only some examples of the complexities presented by this population.

And, at the conclusion of such a process, either a trust will be established or the plan will provide for a pass-through of asbestos claims, in either event rendering a bar date a wasteful and futile effort.

CONCLUSION

WHEREFORE, the PI Law Firms respectfully requests that the Court: (a) deny the Motion with respect to asbestos claimants, or, in the alternative, (b) enter a bar date with respect to present asbestos claimants, if at all, only as part of an order that provides targeted and appropriate notice of an asbestos bar date to present claimants; and (c) grant such other just, proper, and equitable relief.

Dated: Wilmington, Delaware
September 9, 2014

Respectfully submitted,

MONTGOMERY McCRACKEN WALKER & RHOADS LLP

/s/ Natalie D. Ramsey

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:	:	
	:	Chapter 11
ENERGY FUTURE HOLDINGS	:	
CORP., et al.,	:	Case No. 14-10979(CSS)
	:	
Debtors.	:	(Jointly Administered)
_____	:	

United States Bankruptcy Court
824 North Market Street
Wilmington, Delaware

October 28, 2014
12:07 PM - 1:24 PM

B E F O R E :
HON CHRISTOPHER S. SONTCHI
U.S. BANKRUPTCY JUDGE

ECR OPERATOR: LESLIE MURIN

HEARING re Joint Motion of CSC Trust Company of Delaware as Indenture Trustee, and Certain EFIH 10% First Lien Noteholders, for Confirmation that the Automatic Stay Does Not Apply or, Alternatively, for Limited Relief from the Automatic Stay, Solely Regarding Rescission of Acceleration [D.I. 473; filed May 15, 2014]

HEARING re Application of Energy Future Holdings Corp., et al., for Entry of an Order Authorizing the Debtors to Retain and Employ PricewaterhouseCoopers LLP as Internal Audit, Information Security, and Tax Consultants Effective Nunc Pro Tunc to the Petition Date [D.I. 654; filed May 29, 2014]

HEARING re Application of Energy Future Holdings Corp., et al., for Entry of an Order Authorizing the Debtors to Retain and Employ Richards, Layton & Finger, P.A. as Co-Counsel Effective Nunc Pro Tunc to the Petition Date [D.I. 659; filed May 29, 2014]

HEARING re Application of the Official Committee of Unsecured Creditors for an Order Under Bankruptcy Code Sections 328(a) and 1103(a) and Bankruptcy Rules 2014(a) and 2016(b) Approving the Employment and Retention of Polsinelli PC Nunc Pro Tunc to May 13, 2014, as Co-Counsel to the Official Committee of Unsecured Creditors [D.I. 1698; filed

July 25, 2014]

HEARING re Application of the Official Committee of Unsecured Creditors of Energy Future Holdings Corp., et al., for Entry of an Order Pursuant to Sections 328(a) and 1103(a) and Bankruptcy Code Authorizing the Employment and Retention of FTI Consulting, Inc. as Financial Advisor Effective as of May 19, 2014 [D.I. 1699; filed July 25, 2014]

HEARING re Application of the Official Committee of Unsecured Creditors of Energy Future Holdings Corp., et al., for Entry of an Order (A) Approving the Employment and Retention of Lazard Freres & Co. LLC as Investment Banker Effective as of May 14, 2014, (B) Waiving Certain Time-Keeping Requirements Pursuant to Local Rule 2016-2(h), and (C) Granting Related Relief [D.I. 1700; filed July 25, 2014]

HEARING re Motion of Energy Future Holdings Corp., et al., for Entry of an Order Authorizing the Debtors to Reject Certain Executory Contracts, Effective Nunc Pro Tunc to October 7, 2014 [D.I. 2334; filed October 7, 2014]

HEARING re Motion of energy Future Holdings Corp., et al., for Entry of an Order Approving the Debtors' Agreement to

Certain Tax Adjustments [D.I. 2336; filed October 7, 2014]

HEARING re Motion of Energy Future Holdings Corp., et al., for Entry of an Order Authorizing (A) Rejection of a Certain Unexpired Lease between Luminant Generation Company LLC and U.S. Gypsum and (B) Abandonment of Certain Property, Each Effective as of November 25, 2014 [D.I. 2338; filed October 7, 2014]

HEARING re Motion of Energy Future Holdings Corp., et al., for an Entry of an Order Authorizing and Approving Procedures for Settling Certain Prepetition Claims and Causes of Action Brought by or Against the Debtors in a Judicial, Administrative, Arbitral or Other Action or Proceeding [D.I. 2340; filed October 7, 2014]

HEARING re Application of Energy Future Holdings Corp., et al., for an Order Authorizing the Debtors to Retain and Employ Balch & Bingham LLP as Special Counsel for Certain Environmental Matters, Effective Nunc Pro Tunc to October 1, 2014 [D.I. 2344; filed October 7, 2014]

HEARING re Motion of the Official Committee of Unsecured Creditors for an Order Regarding Creditor Access to Information and Setting and Fixing Creditor Information

Sharing Procedures and Protocols Under 11 U.S.C. §§ 105(a), 107(b), and 1102(b)(3)(a) [D.I. 2361; filed October 9, 2014]

HEARING re Application of Energy Future Holdings Corp., et al., for Entry of an Order Authorizing the Debtors to Retain and Employ Deloitte & Touche LLP as Independent Auditor Effective Nunc Pro Tunc to the Petition Date [D.I. 656; filed May 29, 2014]

HEARING re Motion of Energy Future Holdings Corp., et al., for Entry of an Order (A) Setting Bar Dates for Filing Non-Customer Proofs of Claim and Requests for Payment Under Section 503(b)(9) of the Bankruptcy Code, (B) Approving the Form of and Manner for Filing Non-Customer Proofs of Claim and Requests for Payment Under Section 503(b)(9) of the Bankruptcy Code, and (C) Approving Notice Thereof [D.I. 1682; filed July 23, 2014]

HEARING re Notice of Assumption of Certain Executory Contracts and Unexpired Leases and Related Relief Thereto [D.I. 2311; filed October 3, 2014]

HEARING re Application of Energy Future Holdings Corp., et al., for Entry of an Order Authorizing the Debtors to Retain and Employ Ernst & Young LLP as Providers of Tax Advisory

and Information Technology Services Effective Nunc Pro Tunc to the Petition Date [D.I. 655; filed May 29, 2014]

Transcribed by: Dawn South

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P R O C E E D I N G S

THE CLERK: All rise.

THE COURT: Please be seated. Good afternoon.

MR. SASSOWER: Good afternoon, Your Honor. For the record Edward Sassower --

THE COURT: The others -- the others come and go, Mr. Sassower, but it's you and me and Ms. Doré.

(Laughter)

MR. SASSOWER: We shall persevere together, Your Honor.

THE COURT: All right.

MR. SASSOWER: Your Honor, having been in court for 8 of the last 15 business days I think I'm going to dispense with the typical status report because you're pretty up to speed on our status.

THE COURT: Yes.

MR. SASSOWER: We've got a pretty short agenda for today. We have the asbestos bar date and then a couple of retention issues that we'll touch on.

So with that I'll yield the podium to my partner, Chad Husnick.

THE COURT: Okay. Thank you.

MR. SASSOWER: Excuse me. My partner Brian Schartz.

THE COURT: All right. Thank you.

MR. SCHARTZ: Good afternoon, Your Honor, Brian Schartz from Kirkland & Ellis for the debtors.

Very quickly I want to talk first about an item that we put as a status conference item on the agenda, it's item number 16 --

THE COURT: Right.

MR. SCHARTZ: -- which is a kind of a weird place to put it, it's the retention of Ernst & Young in connection with state law tax services and information technology services that they provide to the debtors.

We actually filed a withdrawal of that application late last night, and that was in response to a whole host of conversations that we've had with the United States Trustee's Office as well as Peter Gilhuly from Latham who represents Ernst & Young.

And what I would like to just note on the record today is that what we're going to do with Ernst & Young is there is a whole host of sort of non-professional services that they've provided the debtors with respect to information technology, cyber security, it's not auditor work, it's not accountant work, it's not tax work, it's not attorney work, it's not anything like that, the debtor is going to continue that in the ordinary course.

There is small subset of professional services related to tax work that we're not quite sure what we're

going to do yet, and so we withdrew the application without prejudice, we're exploring alternatives, and we may or may not file something in the future with respect to that. But for the time being we're just going let it sit as it was with respect to the vendor services.

THE COURT: Okay. Anyone wish to be hard? Mr. Schepacarter?

MR. SCHEPACARTER: Good afternoon, Your Honor. Richard Schepacarter for the United States Trustee.

Despite the fact that the matter -- that the motion has been -- or the application has been withdrawn what I would sort of -- I guess I want to clarify the record to a certain extent is that there are maybe some issues that are still going on and we're reserving all of our rights to don't look at that situation, whatever it may be.

THE COURT: All right.

MR. SCHEPACARTER: Thank you, Your Honor.

THE COURT: Uh-huh.

MR. GILHULY: Your Honor, Peter Gilhuly of Latham & Watkins on behalf of Ernst & Young.

THE COURT: Good afternoon.

MR. GILHULY: Your Honor, Mr. Schartz, he referenced the work that is more of the -- the kind of vendor work, the non-professional work is a very -- a huge majority of the work, it's well over 90 percent of the work

that we're talking about here, and given the U.S. Trustee's objections and our discussion we kind of came to the resolution that we should put kind of the disputed part, something that may come back to you in some form, but because the vast majority of it we kind of reached resolution of we were okay with withdrawing the application and coming back to you with this in the future, if necessary.

THE COURT: All right. Thank you.

MR. GILHULY: Thank you.

MR. SCHEPACARTER: Not to belabor the point, Your Honor, Richard Schepacarter for the United States Trustee.

With respect to Mr. Gilhuly's comments, not to go through the history of it, but if you recall we filed an objection to the application.

So based on what I think the work that's been done there may still need to be some additional follow up of some sort to -- I guess to endeavor to figure out exactly what needs to be done.

So like I said, we're reserving all of our rights with respect to whether they file an application or don't file an application or the like, so.

THE COURT: Is there a dispute that the IT services, et cetera, are -- need to be retained or is that --

MR. SCHEPACARTER: I don't think -- I don't know that the issue has been resolved yet on that, and we'll discuss -- I'll discuss that again with Mr. Gilhuly after today's hearing.

THE COURT: Well, I assume the services are continuing, so.

MR. SCHEPACARTER: Understood.

THE COURT: All right.

MR. SCHEPACARTER: And there's other services that are continuing as well, so we're -- like I said, we're going to reserve all of our rights on that just to make sure that all of what's been needed to be done needs to be done.

THE COURT: All right.

MR. SCHEPACARTER: All right.

MR. GILHULY: Your Honor, her application was filed in May -- late May, and due to the exigencies of this case it's in fact continued a number of times. Obviously that's a dangerous position for a -- for working at the level we're working, and we had, you know, a series of conversations and agreed as late as this weekend to withdraw our -- you know, have the application withdrawn with the understanding that we had this agreement.

So, I'm a little concerned with Mr. Schepacarter's comments, because we can't -- Ernst & Young can't continue at this rate with a dispute about this. I had understood

that it was resolved, that was the conversation, it was essentially a deal.

MR. SCHEPACARTER: I'll leave it at this. All our rights are reserved and I just confirmed that with Mr. Schartz, so I just -- we'll leave it at that, Your Honor. Is that --

THE COURT: I don't think that satisfies Mr. Gilhuly.

MR. SCHEPACARTER: Okay. Let's --

THE COURT: Do you want to pass this?

MR. SCHEPACARTER: Yeah, let's pass this and then let's -- we'll talk after -- after today's hearing or later on in the hearing.

THE COURT: Well, let's deal with it today, so.

MR. SCHEPACARTER: Yes, we'll deal with it today, that's what I'm saying, we'll talk to him about it.

THE COURT: All right, we'll pass it over now, and --

MR. SCHEPACARTER: As a matter of fact --

THE COURT: -- at some point we'll take a recess and you can discuss it further.

MR. GILHULY: We're going step outside right now, so.

THE COURT: Okay. What's next?

MR. SCHARTZ: With apologizes aside we had

(indiscernible - 12:14:13) view on that, but we'll clarify it.

The next one is Deloitte's retention application, which I still need to work through a couple of items on the order with Ms. Schwartz from the U.S. Trustee's Office. We're very close to having that done.

Deloitte is the company's formal auditor so they sign all of the auditor payments at the end of the year, obviously very important given this time of year that we get Deloitte retained. I think we're extremely close on resolving that order.

We did file just this morning a supplemental declaration from Randy Stocks of Deloitte who's a partner at Deloitte. In case Your Honor didn't see it I have a copy for you to bring up, but I think if you just give me a moment with Ms. Schwartz we will clean up the order and have something to present for you at the end of this hearing.

THE COURT: All right. I did not read the declaration, but --

MR. SCHARTZ: Would you like me to hand up a copy?

THE COURT: Yeah, why don't you hand me up a copy.

We'll pass this as well so you can continue to hopefully button down the order by the end of the hearing.

MS. SCHWARTZ: Your Honor, we have no objection in form to the retention of Deloitte, we're just going over the

form of the order.

THE COURT: Okay. And that was my impression from the status line --

MS. SCHWARTZ: Okay.

THE COURT: -- on the agenda.

MR. SCHARTZ: Correct.

(Pause)

THE COURT: Okay.

MR. SCHARTZ: Thank you, Your Honor.

With that I'll pass the podium to Mr. Husnick to cover the asbestos stuff. Thank you.

THE COURT: You're welcome.

MR. HUSNICK: Good afternoon, Your Honor. Chad Husnick, Kirkland & Ellis on behalf of the debtors.

Your Honor, the item on the agenda that I'm responsible for is the debtors' motion to establish a bar date. Excuse me.

As you may remember the Court previously entered an order granting a portion of the relief for the bar date motion that related to non-asbestos claims, and as to asbestos claims we've basically agreed to adjourn the hearing to the following omnibus, and there's been a couple of subsequent adjournments.

The issues that remain -- and I thought it would be helpful to take just a couple of moments to try and

clarify what I think is being addressed and what's open.

Your Honor, the first issue -- I don't think the plaintiffs' law firms contest that a bar date can be set for identified plaintiffs, that is plaintiffs who know of their injuries and have been identified by the debtors, and they don't contest the form of notice for those identified plaintiffs.

The second subset of plaintiffs would be individuals who have suffered asbestos-related illness or injury but have not yet been identified or have not yet sued the debtors. These are the so-called present but unidentified claims. With respect to this category of claims I believe the plaintiffs' law firms agree that they can be barred but that the form of notice that the debtors proposed is insufficient.

What we agreed prior to the hearing with Your Honor's indulgence is to bifurcate this hearing to address the notice issues at a subsequent hearing altogether such that if Your Honor concludes that unmanifested claims are also able to be barred -- and I'll get to that issue in a second -- that you'd address the noticing issues with both present but unidentified claims and unmanifested claims in a single hearing where we talk about notice.

If that's okay with Your Honor then what would be before Your Honor today is a single legal question as to

whether it's appropriate for the Court to set a bar date for unmanifested or future asbestos claims.

On that issue, Your Honor, we believe there's been two rounds of briefing, we both -- both parties filed supplemental briefs, one round of oral argument at the August 13th hearing. I'm not going to repeat all of the arguments that I made at the August 13th hearing, but I do think it's helpful in light of the two- or three-month delay that I resummarize some of those arguments and try and package them in a way that I think answers this fairly straightforward question.

Your Honor, just to refresh Your Honor's memory on the size of the asbestos -- potential asbestos liability here, there's a small number of cases relative to the overall size of these cases, in fact we have fewer than 400, and around 8- to 900 from the beginning of the debtors' records total, but there's only 371 to be specific that remain pending as of today and that were scheduled in the debtors' schedules and statements.

The debtors have spent less than $30 million as far as their records go on asbestos-related costs, that includes costs of settlements, et cetera, and this is in stark contrast of the over $40 billion of debt that we're dealing with in this case, and we've never exceeded $4.2 million in a single year.

I think the reason that those stats are relevant is because there is a different process in the bankruptcy -- in the bankruptcy rules and in the Code for dealing with asbestos claims. Section 524(g) is not the exclusive way to address unmanifested asbestos claims.

In a case such as this where the debtor never manufactured or sold asbestos, the asbestos liabilities may not be necessary, it may not even be possible in light of the statutory structures under 524(g) to satisfy that requirement and ultimately avail -- the debtors to avail themselves of that additional due process protection that's afforded by 524(g).

What the PI law firms urge this Court to do is to find that there's blanket rule against a Bankruptcy Court issuing a bar date order that applies to future claimants, and that's future asbestos claimants specifically.

I think Your Honor appropriately highlighted at the last hearing that the affect of such a decision would be far broader than just asbestos claimants, to the extent that there are other types of future claims.

For example --

THE COURT: But --

MR. HUSNICK: Go ahead.

THE COURT: -- you keep saying future claims, and I think that's deceptive. When I think of future claims I

think of claims that arise post-discharge, but you're talking about claims that arise pre-discharge or prepetition even when you use the term future claims.

MR. HUSNICK: Correct. I should stick with the term unmanifested, because I think it's the more appropriate way of describing it post Grossmans. So I will do so.

So what the plaintiffs' rule -- or what the plaintiffs' law firms have urged this Court to do is establish a blanket rule that says no unmanifested claim can ever be subject to a bar date, and I'd submit that that blanket rule is completely inconsistent with the cases, with the Bankruptcy Code, and the bankruptcy rules.

Specifically Bankruptcy Rule 3003 provides that the Bankruptcy Court shall establish a bar date for filing proofs of claim, and we cited various cases in our briefs, including Grynberg 986 Fed. 2d 367 from the Tenth Circuit holding that 2003(c)(3) is not an optional provision, it's mandatory. And what it assents to under 2003 is claims.

And as we know from the Grossmans' decision in Owens Corning in the Third Circuit that the definition of claims was necessarily meant to be broad and necessarily includes the unmanifested claims that we're discussing here today.

Judge Walrath also addressed the mandatory nature of 3003 in a case called International Aluminum Corp. I have

a copy of the transcript here, Your Honor. That's at 10 -- case number 10-1003.

In that case, Your Honor, Judge Walrath in addressing an assertion that a bar date was optional said, "I'm not really sure" -- "I'm not really" -- "I'm not sure there really is stated discretion to set a bar date." She noted to set a bar date is actually not the exact language, but that's what was intended. She noted that there may be discretion in prepacks, but that "Rule 3003 says the Court shall fix the time within which proofs of claims may be filed." And she went on to say, "So, I think clearly the rule is that a bar date has to be set by a court in a Chapter 11 case." And I do have a copy of the transcript if Your Honor would like to review it.

The takeaway from that decision and other decisions is that it's mandatory under the bankruptcy rules, which then turns to Section 524(g), and whether 524(g) and the provisions that are in the language of that code section give any indication that that section is the exclusive mechanism for Bankruptcy Courts to deal with asbestos claims or unmanifested asbestos claims, and I submit it is not.

Specifically 524(g) says that it is meant to supplement the discharge, not supplant the discharge, and the discharge that we're referring to is the other -- the discharge otherwise available under Section 524 and 1141 of

the Bankruptcy Code. This language is not a mistake and the legislative history for 524(g) also makes clear that 524(g) shall not be construed to modify, impair, or supersede any other authority the Court has to issue injunctions in connection with an order confirming a plan of reorganization.

If Congress intended to supplant the normal bar date process and discharge provisions it undoubtedly would have chosen a different word than the word "supplant." And I can give you various examples which I'm sure Your Honor is familiar with of various other code sections where Congress is very explicit about overriding other provisions on the Code.

To do as the plaintiffs' law firms urge you to do, Your Honor, I submit is an improper role for the judiciary to override the permissive nature of the 524(g) injunction. And Owens Corning and Grossmans both support the fact that a particular barred claimant -- whether a particular barred claimant receives sufficient due process is appropriately addressed at a fact intensive post-hoc analysis.

Your Honor, in fact if you look at footnote 7 of the Owens Corning decision it's important that the court -- the third circuit in the case -- observed that it was not establishing a bright line rule in remanding that case, that due process could never be afforded to unmanifested claims.

Instead it just highlighted that it's an issue that may need to be addressed on a case by case basis going forward.

Your Honor, that decision was then -- has then condition firm in a recent Delaware District Court decision in the New Century TRS Holdings bankruptcy -- or bankruptcy case. That's 2014 Westlaw 4100749 from August of 2014.

In that decision, Your Honor, the Bankruptcy Court had made a decision that a particular process for giving notice to claimants was sufficient to satisfy due process concerns on a prospective basis, and the District Court there reversed, and while it found in that case that ultimately that the notice given in that particular case was not sufficient it reversed the Bankruptcy Court's prospective decision that notice was sufficient.

So the answer there I think is completely consistent with Owens Corning and Grossmans where the courts are to look at due process on a post-hoc basis.

That also comports with Supreme Court precedent that addressing a due process issue today would not be right for the Court to consider.

Finally, Your Honor, I just want to summarize.

I think establishing a blanket rule would not only be inconsistent with the Code, the case law of bankruptcy practice, but it's also inconsistent with fundamental premise and bankruptcy code jurisprudence, that is the

notion of exclusivity.

The plaintiffs' law firms establish or argue in their supplemental brief that there's only two ways to deal with asbestos plaintiffs' claims. Either you can establish a 524(g) injunction to address unmanifested claims or you can let them ride through entirely in the bankruptcy process. That's not what Congress intended, that's not what they stated, and what Congress stated in 524(g), and that's not the law. Such a law would be inconsistent with the anti-discrimination principals underlying the Chapter 11 of the Bankruptcy Code and it would be inconsistent with well-settled bankruptcy practice.

Finally, the last thing I would point out is we heard oftentimes I think at the oral argument as well as in each set of briefs that this is the first time that a Bankruptcy Court will ever establish a bar date for asbestos claims.

We came forward in the Fifth Circuit's decision in Placid Oil and said that that's untrue. We then heard that Placid Oil, Your Honor, was arguably limited to its facts, because in Placid Oil the debtor had resolved the asbestos claim prior to filing its schedules and statements.

While that may be true the court did observe that the debtor was aware in Placid Oil of the -- the potential existence of asbestos claims. And while it didn't schedule

any existing claims at that time it certainly had knowledge of the potential for exposure when it had previously settled, and that is discussed in the decision -- in the Placid Oil decision.

But I also, Your Honor, want to highlight for the Court that that is not the first or probably the last time in which a debtor will file a Chapter 11 case that also has asbestos exposure. Furniture Brands International Ormet (ph) Crop., Overseas Ship Holding Group, these are all cases, Your Honor, where they scheduled asbestos claims and ultimately sought and obtained a bar date with respect to all claims, not excluding any specific category of claims, and ultimately the case moved on. So it's not a first time. These are post-Grossmans cases and certainly, Your Honor, I think that that premise is just untrue.

Your Honor, in light of all that I think that -- and the statements that we've made bar date is a fundamental portion of this process, it's time to get started. We have served notice of the bar date to all other claimants and we need to get started on addressing the remaining asbestos issues. We believe it's entirely appropriate under the law to establish a bar date.

Thank you.

THE COURT: Thank you.

MS. RAMSEY: Good afternoon, Your Honor. Natalie

Ramsey, Montgomery, McCracken Walker & Rhoads on behalf of five personal injury law firms.

Your Honor is probably aware that yesterday the United States Trustee's Office appointed a committee consisting of two asbestos creditors and three other creditors. One employee retirement creditor and two creditors I understand are noteholders. That committee has not had an opportunity to employ counsel yet. We do believe that the issues before the Court should be addressed by an official committee.

We had reached out to the debtors in advance of the appointment late last week and asked whether they would consent to move this hearing, and we understood from the Court's remarks at a prior hearing that absent the debtors' consent it was the Court's intention to move forward today, but I do feel obligated before proceeding with the argument to ask the Court whether it would be appropriate to push this hearing off and further adjourn it until the official committee has an opportunity to employ counsel and can be heard on this issue.

THE COURT: No, I'm not going to continue the hearing absent the debtors' consent. This has been out there for quite some time and the Court can only wait so long, and I understand it took some time to form that committee, but I'm comfortable proceeding today as I

previously ruled in early September.

MS. RAMSEY: Okay, Your Honor.

With that let me start by saying that the bar date order sought by the debtors today is extraordinary.

What we said at the last hearing, Your Honor, on page 81 of the transcript was that we were aware of absolutely no court that had ever entered an order prospectively in a case in which a debtor had asbestos liabilities where the bar date was entered intentionally seeking to discharge and bar those future claims. And that remains true.

The proposed bar date order here presents fundamental constitutional due process issues in a unique context. The individuals whose rights are at issue are not aware that they have an injury, and even in the exercise of appropriate due diligence, if they went to a doctor today they would not be diagnosed as having an injury. Because of the latency period associated with asbestos injuries they may not manifest an injury for up to 50 years after exposure.

We're aware of only one court that has directly considered the issue that is before the Court today, namely whether a bar date that is designed specifically to require individuals who develop an asbestos injury in the future as a result of exposure to asbestos used by the debtors before

their bankruptcy case can satisfy the requirement that a bar date provide adequate notice to that population of exposure only individuals, individuals who are unaware -- may be unaware of their exposure, they're certainly unaware of the severe harm that may ultimately result, and they're unable to recognize that their rights can be affected by this bankruptcy.

That case, Your Honor, is In re: Specialty Holdings Corporation where Judge Walsh found the bar date order could be entered because of the Third Circuit's decision In re: Grossmans, but no order was entered in that case because it was settled before the proceeding associated with the bar date order had concluded.

The only guidance that Judge Walsh gave the parties with respect to his reasoning was a reference to Grossmans stating on the record "that Grossmans changed everything."

We respectfully contend that his decision was in error and that Grossmans did not reach and does not support the conclusion that future claimants can be subject to a bar date.

In Grossmans the Court of Appeals reversed the heavily criticized Fenz Bill (ph) decision and adopted a prepetition relationship test as the test to be applied in connection with determining whether a claim exists for

purposes of Section 1015 of the Code. But the facts of Grossmans are important, and so is the Court's dicta in that case.

Grossmans filed its case in 1997, its case progressed quickly, and it confirmed a plan in December of that same year. Grossmans provided notice by publication of a deadline for filing proofs of claim. No proof of claim was filed by the individual, Ms. Van Brunt (ph), who ultimately brought the case that ended up on appeal.

Ms. Van Brunt had purchased products containing asbestos from Grossmans in 1977, but her injuries did not manifest unless 2006, and in 2007 she died from mesothelioma.

At the time of its bankruptcy though Grossmans had never been subject to an asbestos claim. There's nothing in the records that indicates that Grossmans was aware that it had the possibility of ever being pursued on the basis of an asbestos-related claim. There were no claims pending even as of the date that the plan was confirmed, and these are important facts that the court looked to that underlie the Grossmans' decision.

As a result of those facts when Grossmans published its bar date it did not specifically intend to reach a known population of individuals who would or may have -- might have claims in the future against it as a

result of specific prepetition conduct or products.

The court in Grossmans makes a special note that the due process protections of Section 524(g) were therefore unavailable in that case because there was no prepetition history of asbestos.

The Court goes on to identify as of one of the criteria that it asked the lower court to consider in looking at the issue of whether Ms. Van Brunt was given due process notice by the bar date notice that was published in that case, whether it was reasonable or possible for the debtor to establish a trust for future claimants as provided for in Section 524(g). That's at pages 125 and 126.

The court was very cognizant of the due process issues when it remanded the determination to the District Court with respect to her due process saying any application of the test for discharge to be applied cannot be divorced from the fundamental principals of due process. Notice is an elementary and fundamental requirement of due process in any proceeding which is to be accorded finality. Citing Melane (ph).

Without notice of a bankruptcy claim the claimant will not have a meaningful opportunity to protect his or her claim. This issue has arisen starkly in the situation presented by persons with asbestos injuries that are not manifested until years or even decades after exposure.

There are therefore two critical takeaways from the Grossmans case that are important here.

Number one, the case did not deal with the circumstance like the one here where the debtors have a history of asbestos litigation and settlements.

And number two, the Third Circuit was very concerned about the due process issues for this particular type of claimant, these unmanifested claimants.

The debtors in contrast have an established history of asbestos litigation. They list among their ordinary course professionals five separate asbestos litigation firms. The five firms today represent -- account for about 160 claims against EFH and its subsidiaries according to the debtors' statement.

In the hearing that took place on August 13th and again today the debtors have represented that there are approximately 391, I think was the number, of pending claims against the debtor, and that they have an asbestos history of settlement.

The debtors responded to certain discovery served by the PI law firms by indicating that they have power plants related to discontinued operations in 537 locations in 40 states. They also provided a list of 25 power plants that relate to the debtors' power generation activities that were in operation in or after 1950.

So while Judge Walsh found that Grossmans changed everything, it's our contention instead that 524(g) of the Code changed everything as it relates to debtors that have an asbestos litigation history.

The debtors here contend that the amount of their asbestos liability is relatively de minimis, and in this case, a case this large, that is certainly true; however, even with 30 billion in historical liability and by just multiplying out up to 2050, which is the anticipated time frame set by epidemiologists with regard to how long manifestations of asbestos injuries will continue, the -- assuming that the debtors' liability history remains stagnant you would come to an estimate of between 75- and 170 million in asbestos liability.

According to the published report by Rand there's 17 active trusts that have 170 million or less in established trust funds for the payment of asbestos liabilities, and quickly looking down the list there are at least 10 or 15 of those trusts that have assets of $40 million or less.

So although this may be a small issue with regard to the debtors' overall liability picture, for asbestos claimants it is not de minimis, this is not a de minimis asbestos picture.

To go on with the Third Circuit authority, Your

Honor, the decision in Wright (ph) which followed Grossmans did not address asbestos, it instead dealt with non-asbestos shingles. And the factual backdrop of those cases were that asbestos personal injury claims were channeled to an asbestos PI trust that was established under the Owens Corning bankruptcy case.

For our purposes we think that the Court ought to focus also on footnote 7 of that opinion which says:

"Given or reliance on the exceptional circumstances created by the retroactive application of Grossmans, we express no opinion on the broader issue of whether discharging unknown future claims comports with due process."

That brings us then to the Court of Appeals decision in W.R. Grace where it addressed the statutory construction argument about whether the words "claim" as used in 1015 and "demand" as used in Section 524(g) are mutually exclusive.

Quoting extensively from the Bankruptcy Court's decision in Flintcoat the Third Circuit noted with approval the Bankruptcy Court's analysis that Congress created 524(g) as a (indiscernible - 12:42:28) mechanism in order to protect the due process rights of people who had been exposed but not yet affected and who might not manifest an injury until a time when all available compensation had been

paid out to people who got sick faster.

Therefore Section 524(g) improves a quality of treatment among claimants, which is a critical fundamental aspect of bankruptcy jurisprudence.

The Court of Appeals goes on to state, and we think the Court should pay particular attention to this language as well, that if all property damage, which was the type of asbestos injury at issue in the appeal in the W.R. Grace case, has occurred and those harmed can be notified the ordinary claims process could arguably meet Congress's objectives of promoting equal treatment of claimants and allowing manufacturers to handle asbestos liability in on orderly and streamline process.

What the court was saying was that it was distinguishing the situation here where you cannot provide due process notice, we would contend, to the situation that -- that it was facing in -- that they argued in W.R. Grace and ultimately what the court decided was that future property damage claims were also going to be treated by the trust as established by the plan in W.R. Grace and that that was the mechanism that was designed to meet the due process standard. That's at page 342 of the W.R. Grace opinion, and we believe it's very telling with respect to what the Third Circuit would do in a situation like this.

The other case that the debtors rely on

extensively in their pleadings, Your Honor, is the Placid Oil decision out of the Fifth Circuit, which is not only non-binding on this Court, but also we believe very distinguishable on its facts. And if the Court reviews the specific language of Placid and the reasons why it reached the decision it did it's clear that it was not addressing the issues that are being raised here.

Placid was also a pre-524(g) case. Placid filed in 1986, the bar date was established in 1988, the case was confirmed in 1988.

The facts are in Placid that Placid was aware that there was asbestos on its premise and it was aware that the plaintiff in this case, Mr. Williams, worked for Placid. To that extent it arguably was aware that there was a potential liability.

The issue that was being addressed in Placid Oil was whether or not Mr. Williams was a known creditor entitled to direct notice as opposed to an unknown creditor entitled to publication notice. For whatever reason that was the way that the issue was framed, that was the way that the issue went to the Fifth Circuit.

The court is clear in reaching its determination in Placid that it's very focused on the fact that the debtor has no asbestos history, it had never been sued preconfirmation, and even though it reflects that there were

cases -- asbestos cases that were asserted against the debtor post-confirmation it makes a point -- the majority makes a point of saying that Placid had never been found liable in any of those cases and had never settled a single claim.

There's also evidence that Mr. Williams was -- had testified that he was aware of the bankruptcy case.

The facts in that case therefore do not lead to the conclusion that the debtors would contend that it does, and in fact the decent in that case is very telling. The decent states that it decents because it believes that its duty is to correct the Bankruptcy Court's constitutional errors as well as its misreading of pertinent case law, but that the court does not address that he says twice because of the plaintiff's failure to adequately brief those issues.

So the constitutional issues were not being addressed in that case, and Judge Dennis goes on to criticize the court by saying that it should be looking to make sure that the jurisprudence in that circuit is correct and appropriate, it should be policing that, not just making rulings, he contends, on the basis of issues that do not present the more important considerations.

He goes on to write a lengthy decent with respect to due process and concludes by saying:

"And some constructive notice by publication to

asbestos exposed individuals with unmanifested or late mesothelioma without appointment of a representative for such future demands does not satisfy due process."

As the Court said in Melane:

"We have before indicated in reference to notice by publication that great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact."

And, Your Honor, that leads me to my next point, which is a matter of fundamental fairness.

Bar dates are intended to provide the debtor with a certain amount of certainty, and the publication notice and the court's agreement that publication notice can satisfy the requirement of due process in certain circumstances is designed to balance the interests. The interest of the debtor in achieving finality, the interest of unknown creditors in being able to come forward and protect their rights in the bankruptcy case.

Those purposes are not being achieved by the proposed bar date here. This is a bar date that would act as a gotcha. This is a bar date that would be implemented as to people who would be completely unable to identify their rights to come in and protect their rights because they don't know they have rights, they don't in fact under applicable non-bankruptcy law have a right to do anything at

this point, and that is why the courts have fashioned, starting with Mansville and going forward, and also in the class action context in cases such as Amchem (ph), the solution of appointment of a future claimant's representative to represent the interest of these people.

And with respect to determination we're trying to get a handle around what your future liability might be for unmanifested asbestos claimants.

What the courts have done is conduct estimation trials. Estimation trials that are not unique -- by the way the trials may be unique to bankruptcy -- but the concept of estimating future liability in this context is not unique, it's done all the time for financial reporting purposes, it's done all the time for SEC purposes, and in bankruptcy cases it is the most reliable method found so far to allow a debtor to assess what its future liability is.

The reason that that leads into 524(g) is having determined an appropriate figure or an estimate, the best estimate possible of what the future liability is going to be, the debtor is then in a position of appropriately equitably distributing its assets among the present claimants and the future asbestos diseased claimants, the currently unmanifested claimants.

In doing that there is little reason, assuming that a debtor can otherwise satisfy the requirements of

524(g), why the debtor wouldn't seek 524(g) protection so that in exchange for funding an appropriate fund to satisfy the claims of those individuals, that the debtor can also walk away without any overhang of future liability. Congress has set up this system carefully and it has worked for the debtors that have utilized it.

I wanted to touch also on what the debtors' proposed bar date would necessarily lead to and why it is futile.

If you imagine a circumstance where a certain number of individuals, either because they're hypochondriacs or because they're more astute than other people, would in fact file some sort of protective place holder claim, what would they say? Well, okay, we were exposed, we don't have an injury, we have no idea what injury we might manifest in the future, so we have no way of valuing that injury. What are the debtors going to do with that?

Well the only way then to try to put some value on that hypothetical limited group of claims would be to try to estimate them in some fashion, and that's going to have to take place if they're going to do the it on an individual basis before the District Court, and what a strange proceeding that would be, or if it's going to be done in some sort of aggregate basis it's going to require the same types of estimation testimony by epidemologists, by

statisticians, but econometric experts that you would have in a regular estimation trial. It simply doesn't have an end that makes sense in that. There's a lot of money and effort that would be put into something that would ultimately not be useful.

And there has never been a circumstance yet where any debtor has emerged from bankruptcy with an asbestos overhang that has felt comfortable not going back and securing the protections of 524(g). So it doesn't seem to make any sense.

With respect to present claimants, Your Honor, and with respect to those -- including those claimants who have present manifested injury that have not sued we do not contest that those -- that group of asbestos creditors could be subject to an appropriate bar date on appropriate notice. And to that extent the debtors could include individuals who have manifested injury we would believe in a bar date. Again we question the need or efficacy of that, but we certainly don't question whether or not that can legally be done consistent with the notions of due process.

I wanted to also just bring a couple of other points to the Court's attention again. One is the language in Amchem Products versus Wenzer (ph). The debtors have contended that that is dicta, and it is dicta, but Third Circuit authority says that dicta from the Supreme Court

should not be taken lightly.

The Third Circuit affirming the language used by -- I'm sorry -- the Supreme Court affirming language used by the Third Circuit in determining that it was not possible to approve a class action settlement, including future claims, noted that:

"Impediments to the provision of adequate notice the Third Circuit emphasized rendered highly problematic any endeavor to tie a settlement class persons with no perceptible asbestos-related disease at the time of settlement.

Many persons in the exposure in that category the Court of Appeals stressed may not even know of their exposure or realize the extent of harm that may occur. Even if they fully appreciate the significance of class notice, those without current afflictions may not have the information or foresight needed to decide intelligently whether to stay in or opt out.

Family members of asbestos exposed individuals may themselves fall fray to disease or may ultimately have ripe claims for loss of consortium, yet large numbers of some people in this category, future spouses and children of asbestos victims, could not be alerted to their class membership and current spouses and children of the occupationally exposed may know nothing of that exposure."

That is particularly the case, Your Honor, as the asbestos case law is developing, and what courts are saying more and more is secondary exposure. Just as the court in Placid dealt with, they're dealing with exposures by often the wives of occupationally exposed individuals who contracted asbestos disease through doing their husband's laundry and who have no other -- no other asbestos history.

And so it appears clear in those cases that that is the only way that those individuals could have contracted an asbestos disease.

The debtors contend that a bar date is mandatory, but we are -- we can cite the Court to any number of cases where an asbestos bar date was not entered.

In Babcock and Wilcox Company in the Eastern District of Louisiana the court declined to enter a bar date. In re: Congolium (ph) in the District of New Jersey. In W.R. Grace Judge Fitzgerald actually did impose a bar date, but said on the record that the process had been a nightmare and that she would never do it again. And in fact in Specialty Products had made statements to the debtors that she was disinclined to enter a bar date, which the debtors then did not pursue until her retirement when the case was reassigned to Judge Walsh.

Your Honor, the future claimants are unrepresented here. We feel compelled to come forward because there is no

committee or FCR in place to address this issue, because in the few cases that the debtors have cited where it appears that there has been some asbestos history by the debtor and a bar date has been established, there is no evidence in the record that we can locate in any of those cases that anyone came forward and raised this issue with the court. We believe it's an important question.

And that brings me to one of my last two points.

One is that the debtors contend that the Third Circuit has established a post-hoc analysis for purposes of due process. We disagree with that contention.

What the Court of Appeals did in Grossmans was all it could do, which is having concluded that at the time that the debtors entered the bar date notice the bar date notice due process determination appeared correct based upon what they knew at the time, but the court was concerned about whether that particular future asbestos claimant had received due process, and that issue was remanded to the district court.

In New Century, Your Honor, Judge Robinson specifically says:

"The Court concludes that the adequacy of the notice provided in this case has not been meaningfully explored and likely was not reasonably calculated to apprise appellants of the bar date.

The Court concludes that due process affords a redo under the circumstances of this case."

Your Honor, at the first hearing the Court said that it believed that it needed to make at least a preliminary determination that due process could be satisfied in connection with the entry of a bar date. We agree with that, that the Court is required to make up front a determination with respect to whether or not it is possible, consistent with due process, to notice unmanifested future claims, and whichever way the Court rules it will be the first ruling of record on this issue.

I'd like to conclude, Your Honor, with reference to two decisions out of the Southern District of New York and the Second Circuit.

In the case of Gremon (ph) Olson Industries, Your Honor, the court concluded "that because parties holding future claims cannot possibly be identified and thus cannot be provided with notice of the bankruptcy, courts consistently hold that for due process reasons their claims cannot be discharged by Bankruptcy Court orders."

In that case, Your Honor, there's a discussion of Johns Mansville Corp. case out of 2010 before the Second Circuit, and I want to end by quoting that language, Your Honor.

"In Johns Mansville the Second Circuit rejected

the argument that bankruptcy provides a special remedial scheme that creates an exception to the principal of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.

As the court explained, the Supreme Court has previously held that where a special remedial scheme exists expressively foreclosing successive litigation by non-litigants as for example in bankruptcy or probate, legal proceedings may terminate preexisting rights but only if the scheme does not -- is otherwise consistent with due process."

Quoting Marcus versus Wilks (ph).

Thank you, Your Honor.

THE COURT: Thank you.

MR. HUSNICK: Your Honor, I'll be very brief, just a couple points.

First, just addressing the fact that this is not extraordinary relief. Debtors seek bar dates in almost every single case. I gave you a list of cases where asbestos claims had been scheduled. I personally worked on the Masonite case where we brought -- I believe we received like 3,500 claims and we ultimately emerged from bankruptcy and dealt with them through the claims process through the

claims objection process. So to say, Your Honor, that there's never been a case where there's been a bar date and known asbestos liabilities is simply untrue.

Nothing in 3003 distinguishes by the way cases where a debtor is aware of the potential for asbestos liability from cases where the debtor is not aware.

So all of the attempts to distinguish the cases like Placid Oil and the other cases that we reference where courts have addressed this issue are simply distinctions without a difference.

The post-hoc analysis is appropriate, and that's exactly what the District Court held in New Century.

And, Your Honor, finally I just want to address 524(g), because I think one issue that's -- that's ripe in the court today is well, if the bar date works and 524(g) works then why would one pursue one over the other? And I think the answer is pretty clear. Section 524(g) is a procedural safe harbor that the debtors can use to take -- to effectively address with finality any due process concerns.

The decision in W.R. Grace, and this is the Third Circuit decision, effectively concluded that claims are subsumed by the term demands under Section 524(g). So I always draw this little chart demands are greater than claims. And that's relevant because in the language of

524(g), and if you actually satisfy all of the procedural hurdles under 524(g), you pick up that entire body of claims that Your Honor when you asked me why I was using the term future versus unmanifested, and I'm very happy that you pointed that out to me, because in a 524(g) circumstance not only would unmanifested claims get picked up, but future claims would get picked up as well, and that's why Congress implemented 524(g), to give debtors a procedural safe harbor.

But, Your Honor, again, just the final thing I'll say, there is nothing in the plain language of 524(g) that says that that's the only mechanism by which a debtor can deal with asbestos liability. They may be taking some procedural due process risk in that post-hoc challenge, but there's nothing that says it's exclusive.

With that, Your Honor, I'm done, unless you have any questions.

THE COURT: I do not. Thank you.

All right, I'm going to take a recess before I rule on -- on this issue.

Before I do that do we have something we can put on the record on the other open issues? Mr. Gilhuly?

MR. GILHULY: Thank you, Your Honor.

Your Honor, we had a long discussion in the hallway with both the U.S. trustee representatives. We've

understood for some time that they had serious issues on our 327 application. Tried to work them out with them, and I thank them for their professionalism in that process.

We decided the best cause -- course of action for us was to withdraw our application and proceed as a vendor for the IT and securities services that we believe are not -- don't constitute professional or personal services. Those services are identified in the statements of work which have been attached to our application, and we've discussed them with the U.S. Trustee.

We understand that to the extent that we deviate from the services identified in that application, that the U.S. Trustee reserves all of its rights.

But that's how we're going to proceed forward, and I believe the matter is resolved with that.

THE COURT: All right. Any further comment? All right, I hear none. Fine. Thank you.

How are we on the order? The Deloitte.

MR. SCHARTZ: Your Honor, Brian Schartz for the debtors.

We are very close on the order. I think what we'll do is just finish the discussion with Ms. Schwartz after this hearing and we'll submit it to the clerk through Richards, Layton.

THE COURT: Through certification?

MR. SCHARTZ: Yeah, exactly.

THE COURT: Okay. That's --

MS. SCHWARTZ: It's just two minor changes, Your Honor.

THE COURT: Okay. That's fine. Okay.

All right, we'll take a short recess then.

(Recess at 1:06 p.m.)

THE CLERK: All rise.

THE COURT: Please be seated.

I'm trying to think how to put it. In a -- you know, you thought you were going to get an answer and you're not, so that's -- I'm going to disappoint everybody. I'm going to take the matter under advisement. And once I decide on that I will, if necessary, we'll go to step two, which will be what the actual procedures would be.

So, I'm going to take the matter under advisement.

UNIDENTIFIED SPEAKER: Thank you, Your Honor.

THE COURT: You're welcome.

UNIDENTIFIED SPEAKER: Thank you.

THE COURT: Anything else? Very good, thank you.

We're adjourned.

(A chorus of thank you)

(Whereupon, these proceedings concluded at 1:24 p.m.)

* * * * *

C E R T I F I C A T I O N

I, Dawn South, certify that the foregoing transcript is a true and accurate record of the proceedings.

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11th Annual Mid-Atlantic Bankruptcy Workshop

Resolved: Prepayment Premiums Should Be Allowed In Bankruptcy

Pro: Hon. Thomas J. Catliota
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I. Introduction[1]

In almost every commercial loan agreement, there exists a provision that governs the repayment of debt prior to its scheduled maturity date. These provisions are typically known as make-whole provisions ("MWP's") or prepayment penalties, and are designed to compensate the lender for the loss of interest payments it would have received had the borrower continued to service the debt through the maturity date of the loan.

Two forms of MWPs have been developed by lenders to determine the amount of prepayment penalty due. The first form is known as a fixed prepayment fee. A fixed prepayment fee permits a borrower to repay its debt prior to maturity in exchange for a fixed sum. The fixed fee can be calculated as a specific dollar amount, or, more typically a percentage of the outstanding principal loan balance. If the payment is determined to be a percentage of the outstanding principal loan balance that percentage can either (i) stay the same throughout the term of the loan or (ii) decline or disappear as the loan gets closer to the maturity date. The second form of MWP is known as the yield maintenance formula. Unlike fixed fees, yield maintenance formulas are intended to estimate actual damages to the lender from prepayment. Various forms of the yield maintenance formula have been created. For instance, one formula provides that the lender's makewhole is equal to "the difference between (a) the interest income the lender would have earned had the contract been performed, and (b) the interest income the lender would be deemed to have earned by timely mitigating its damages."[2] A second way used to estimate actual damages is by fixing the lender's reinvestment rate *ex ante.*[3] In cases where the damages are determined *ex ante*, the parties typically fix the reinvestment rate at the rate of

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[1] The ABI would like to acknowledge the substantial contribution of Ethan Meredith of the George Mason University School of Law to these materials.

[2] Scott K. Charles and Emil A. Kleinhaus, *Prepayment Clauses in Bankruptcy,* 15 Am. Bankr. Inst. L. Rev. 537, 544 (2007).

[3] *Id.*

interest that could be obtained through investment of a U.S. Treasury note of a maturity similar to the relevant loan.[4] While other means to calculate damages *ex ante* exist they are relatively rare compared to the usage of the Treasury rate. While both types of MWPs are common, courts tend to be more likely to enforce a MWP when it reflects actual loss sustained by the lender as opposed to a fixed fee that is more arbitrary in nature.[5]

A variety of issues have become prevalent with MWPs, but two issues seem to predominate. The first is whether the claim for a MWP will be allowed under §502(b). The second is whether the claims is subject to, and meets, the reasonableness standard of §506.

With respect to the first issue, the primary dispute deals with the conflicting distinctions of MWPs as either a claim for unmatured interest or liquidated damages. Pursuant to Bankruptcy Code §502(b)(2), if a court that determines that a MWP is a claim for unmatured interest, the claim must be disallowed. Perhaps largely because of the Code's disallowance of such claims for unmatured interest, most courts have displayed a willingness to allow these claims under the guise of liquidated damages. However, MWPs are generally allowed as liquidated damages under state law, serving as protection to the creditor under §502(b)(1). Thus, when an agreement expressly provides for a MWP upon prepayment or default, it would appear that other creditors have little ground on which to base an objection.

Section 506(b) provides that a secured creditor is entitled to interest and reasonable fees, costs and other charges to the extent it is oversecured. Thus to the extent a secured creditor seeks payment of the MWP from the proceeds of its collateral, it may need to meet the reasonableness standard of § 506(b). Courts differ on whether that standard differs from the analysis applied under §502(b).

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[4] *Id.*
[5] *Id.*

II. Case Law Overview

a. Delaware Cases

- ***In re School Specialty, Inc.*, No. 13-10125, 2013 WL 1838513 (Bankr. D. Del. Apr. 22, 2013).**

In *School Specialty*, the interim financing order stipulated as to the principal amount due to the oversecured lender under a partially-drawn $70 million term loan, which included a $23.7 million early payment fee.[6] In analyzing the MWP, the bankruptcy court first looked to applicable state law to determine the enforceability of such an agreement. Under New York law, which governed the agreement, MWPs were analyzed similarly to liquidated damage provisions. New York law provided that liquidated damages are enforceable when (1) actual damages are undeterminable and (2) the amount was not "plainly disproportionate" to the possible loss.[7] The Court also noted the desire to not interfere with parties' agreements absent overreaching or other unconscionable conduct.[8]

To determine whether the fee was disproportionate, the court considered whether (1) the MWP was calculated so that the lender received its bargained-for yield and (2) the MWP resulted from an arm's-length transaction between sophisticated parties.[9] While the MWP was 37% of the term loan (an amount that raised concern), the Court ultimately reasoned that the standard for "plainly disproportionate" was in relation to the lender's possible loss, not the term loan itself.[10] The Court further rejected all §502(b)(2) objections, stating that the full amount of

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[6] *In re School Specialty, Inc.*, 2013 WL 1838513 (Bankr. D. Del. Apr. 22, 2013).
[7] *Id.*
[8] *Id.* at *3.
[9] *Id.*
[10] *Id.*

the MWP matured at the time of the party's breach of the agreement.[11] Finally, the Court noted that a valid MWP claim obviates the duty to mitigate.[12]

- ***In re Trico Marine Services*, 450 B.R. 474 (Bankr. D. Del. 2011).**

In *Trico*, the Debtor issued approximately $18.9 million in unsecured notes for the construction of two supply ships.[13] The unsecured notes were governed by an indenture that included a MWP.[14] Although unsecured, the notes were guaranteed by the U.S. Secretary of Transportation, on behalf of the Maritime Administration ("MARAD"), which was then secured by a first priority lien on the two supply vessels.[15] The Court first ruled that the MWP was, in fact, liquidated damages rather than unmatured interest.[16] However, the Court further ruled that the MARAD guarantee only applied to the principal and interest due on the notes, and thus the noteholders only held unsecured claims to the distribution of the Debtor's estate.[17]

b. New York Cases

- ***In re AMR Corp.*, 485 B.R. 279 (Bankr. S.D.N.Y. 2013); *aff'd, In re AMR Corp.*, 730 F.3d 88 (2d Cir. 2013).**

In *AMR*, the Court denied payment of a MWP to bondholders under three indentures, but the decision was based solely on contract interpretation rather than any perceived impermissibility of MWPs generally.[18] While the parties' agreement expressly provided for an automatic acceleration of the debt due to a bankruptcy filing, the agreement also unambiguously excused the Debtor from paying the MWP in such circumstances.[19] Refusing to accept any of the indenture trustee's arguments, the Court first recognized the enforceability of self-operative

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[11] *Id.* at *4.
[12] *Id.* at *5.
[13] *In re Trico Marine Services*, 450 B.R. 474, 476-77 (Bankr. D. Del. 2011).
[14] *Id.*
[15] *Id.*
[16] *Id.* at 481
[17] *Id.* at 483-84.
[18] *In re AMR Corp.*, 485 B.R. 279, 303 (Bankr. S.D.N.Y. 2013); *In re AMR Corp.*, 730 F.3d 88 (2d Cir. 2013).
[19] *AMR*, 730 F.3d at 100.

automatic acceleration provisions.[20] Further, the Court ruled that the indenture trustee could not rescind the debt's automatic acceleration (in order to call upon the MWP) as the filing of the bankruptcy simultaneously triggered the automatic acceleration *and* the automatic stay, which protected the Debtor from any attempts to rescind the debt's acceleration.[21]

- ***In re Chemtura Corp.*, 439 B.R. 561 (Bankr. S.D.N.Y. 2010).**

In *Chemtura*, the Debtor's reorganization plan proposed partial payoffs to two classes of its noteholders: $50 million to noteholders with MWPs (42% of the amount payable if the MWPs were found enforceable) and $20 million to noteholders with no-call provisions (39% of the amount payable if the no-call provisions were found enforceable) for potential claims for breach of the provisions.[22] While the Debtor's solvency allowed the Court to rule in favor of the plan regardless of the merits, the Court employed a two-prong analysis: (1) Was the provision triggered and is the award appropriate?; (2) Does the claim result from a breach of MWP or no-call?[23]

The initial prong of the analysis first requires that the Court determine whether there was an actual prepayment before the maturity date or if there was a change in the maturity date.[24] If the MWP was triggered or the no-call was in fact breached, the Court then determines whether damages were appropriate under state law.[25] The Court makes this determination by considering if the damages were a true estimation of lost interest or if they were simply used to penalize the Debtor.[26]

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[20] *Id.* at 101.
[21] *Id.* at 102-03.
[22] *In re Chemtura Corp.*, 439 B.R. 561 (Bankr. S.D.N.Y. 2010).
[23] *Id.* at 600-03.
[24] *Id.*
[25] *Id.*
[26] *Id.*

The second prong considers the applicability of the MWP or no-call under federal bankruptcy laws.[27] Regarding no-call provisions, the Court suggested that damages for breach should be calculated *even if* the no-call provision itself is disallowable.[28] Finally, the Court sided with the minority view that MWPs were truly only proxies for unmatured interest.[29] However, the Court concluded that §502(b)(2) should not be applicable when the debtor is solvent, and rather the MWPs applicability "should be an issue of state court alone."[30]

- ***In re Calpine Corp. ("Calpine I")*, 365 B.R. 392 (Bankr. S.D.N.Y. 2007); *aff'd as modified by HSBC Bank USA, Nat'l Ass'n. v. Calpine Corp. ("Calpine II")*, No. 07-3088, 2010 WL 3835200 (S.D.N.Y. Sept. 15, 2010).**

In *Calpine*, the Debtor corporation issued three classes of secured notes with different terms and interest: two classes contained a no-call provision that was effective until the final two years of the agreement, at which time an MWP applied; and one class contained a no-call provision that was effective for the entire duration of the agreement.[31] While a bankruptcy filing was agreed as an event of default, the notes were ambiguous regarding MWPs in the event of repayment due to acceleration of the debt.[32] Upon its bankruptcy filing, the Debtor wished to refinance and repay the outstanding notes while the no-call provision was still in effect.[33]

The Court first ruled that the Debtor was allowed to repay the notes, notwithstanding the no-call provisions, as such provisions were unenforceable under bankruptcy law.[34] The District Court affirmed this ruling.[35] However, the District Court reversed the lower court's award of expectation damages, where the lower court had reasoned that the noteholders' "expectation of

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[27] *Id.* at 604.
[28] *Id.*
[29] *Id.* at 605.
[30] *Id.*
[31] *In re Calpine Corp. ("Calpine I")*, 365 B.R. at 395-96 (Bankr. S.D.N.Y. 2007); *aff'd as modified by HSBC Bank USA, Nat'l Ass'n. v. Calpine Corp. ("Calpine II")*, No. 07-3088, 2010 WL 3835200 (S.D.N.Y. Sept. 15, 2010).
[32] 365 B.R. at 398
[33] *Id.* at 396.
[34] *Id.* at 398.
[35] 2010 WL 3835200.

an uninterrupted payment stream had been dashed."[36] In reversing, the District Court held that a claim for expectation damages under an unenforceable contract provision in bankruptcy ultimately equaled a claim for unmatured interest – not liquidated damages.[37]

- ***In re Solutia Inc.*, 379 B.R. 473 (Bankr. S.D.N.Y. 2007).**

In *Solutia*, the Debtor corporation filed for bankruptcy, which automatically accelerated some of the Debtor's senior secured notes.[38] The notes further provided specific dates on which the Debtor was to pay principal and interest, many of which were after the bankruptcy filing.[39] Subsequent to the automatic acceleration, the Noteholders sent the Debtor a "Notice of Rescission of Acceleration," waiving all defaults and declaring the notes decelerated.[40]

The Court, rejecting the Noteholders arguments, ruled that the attempted deceleration of the Debtor's debt was a deliberate attempt to receive more money through interest, which violated the automatic stay.[41] While the secured notes provided the Noteholders with the option for immediate payment at the expense of any future interest, the Court found that no expectation damages were to be awarded.[42] Relying on the plain language of the notes, the Court reasoned that sophisticated parties must still expressly contract for a MWP.[43]

III. Analysis

a. Pros

A primary tenet of determining the applicability of MWPs relies on the provision's enforceability under state law. Thus most cases analyzing MWPs in bankruptcy have engaged in a state-law liquidated damages analysis. Most – if not all – states do in fact permit MWPs as

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[36] *Id.* at *3.
[37] *Id.* at *5.
[38] *In re Solutia Inc.*, 379 B.R. 473, 477-80 (Bankr. S.D.N.Y. 2007).
[39] *Id.*
[40] *Id.* at 480.
[41] *Id.* at 483.
[42] *Id.*
[43] *Id.* at 484.

liquidated damages, and courts should (and mostly do) respect that enforceability. Because states often limit MWPs to those based reasonably on expected future losses (most often under yield maintenance formulas), debtors are still protected from overreaching creditors basing MWPs on overreaching, punitive fees. The permissibility of MWPs under state law may not be the sole element considered, but as recognized in *Chemtura*, it is the role of the bankruptcy court to enforce the creditors' contractual rights and, especially in cases of solvent debtors or oversecured creditors, the effect of MWPs should be resolved by state law alone.[44]

In some cases, courts have found that the only type of MWP that is enforceable as a liquidated damages clause is one based on a formula that closely approximates actual damages.[45] In other cases, courts have sustained MWPs as valid liquidated damages clauses regardless of whether they are based on a formula that approximates actual damages.[46] The line of reasoning used in these cases stems from findings that damages resulting from MWPs of a large loan are difficult to determine in advance and the amount stipulated in the loan agreement was not plainly disproportionate to the lenders possible loss. In concluding that damages are difficult to discern, one court relied upon a prior decision, which had identified multiple variables that make a lender's losses difficult to pin down, including: "rate of return, duration of the loan, risk, extent and realizability of collateral, and the other obvious uncertainties inherent in this particular contract [that] combined to make it difficult to foresee, at the time the contract was executed, the extent of damages which might arise from the breach of the loan agreement."[47]

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[44] *See Chemtura*, supra n. 29.
[45] *A.J. Lane,* 113 B.R. 821, 829 (Bankr. D. Mass. 1990).
[46] *In re United Merchants and Manufacturers, Inc.* 674 F.2d 134 (2d Cir. 1982).
[47] *Id.* at 143.

Pursuant to §506(b), oversecured creditors may collect additional interest and fees from their secured collateral to the extent reasonable. While undersecured creditors can claim MWPs, their claim only receives unsecured treatment in the distribution of the estate.[48]

The caveat with courts' allowance of MWPs is the strict requirement of unambiguous language. When faced with determining a claim for expectation or liquidated damages under a MWP, the secured indentures/notes must contain explicit language of both the terms of default and subsequent automatic acceleration of the principal and interest.[49] The importance of respecting the contract rights of sophisticated parties should not be viewed lightly, but neither should the long-held requirement that the contract must be unambiguous and subject to reasonable interpretation.

b. Cons

The central criticism of MWPs naturally revolves around its blurred distinction between unmatured interest and liquidated damages. While many courts tend to favor MWPs as liquidated damages under state law analysis, the calculated premium may yield the expectation damages of unmatured interest. The argument for liquidated damages relies on the "make-whole amount" to be wholly separate from unmatured interest. However, a minority of courts state their belief that the damages truly just put "lipstick on a pig." As stated in *Calpine II* and *Chemtura*, the majority's interpretation of MWPs really only serves as a proxy for the creditors' unmatured interest.[50]

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[48] *See Trico*, supra n. 16.
[49] *See Trico*, supra n. 16; *See also AMR*, supra n. 18; *See also Solutia*, supra n. 42.
[50] *See Calpine II*, supra n. 36; *See also Chemtura*, supra n. 28.

Lien on Me

By Elan A. Gershoni and Tally M. Wiener

Acceleration and Prepayment Fees

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Interest-bearing promissory notes and bond indentures typically contain a number of provisions that protect a lender from the consequences of a borrower's nonpayment or early repayment. Acceleration clauses provide that upon the borrower's default, the lender may unilaterally accelerate the entire outstanding indebtedness to be immediately due. In other words, if the borrower defaults on its obligations, it immediately owes the entire amount of the unpaid debt, even though the subject loan was not set to mature until a later date. Other provisions protect lenders' rights when borrowers wish to prepay, such as no-call clauses, which forbid prepayment, and prepayment or make-whole clauses, which allow a borrower to prepay its obligations for a fee.

Until recently, there was scant published case law analyzing the enforceability and interplay of no-call, prepayment, and acceleration clauses in the context of bankruptcy cases. Over the past few years, however, a body of case law has developed that clarifies parties' rights under these provisions. Before analyzing the recent guidance given by the U.S. Courts of Appeals for the Second and Fifth Circuits, we provide an overview of enforcement issues arising in bankruptcy.

Enforceability and Damages for Breach of No-Call Provisions

Specific Enforceability of No-Call Provisions

In order to protect their expected profit from a loan, lenders might include no-call provisions in lending documents that prevent a borrower from prepaying its obligations. Borrowers who find it economically efficient to prepay their debts have fought to have these provisions found to be not specifically enforceable. In *Calpine*,[1] the U.S. District Court for the Southern District of New York affirmed the bankruptcy court's determination that no-call provisions are not enforceable in bankruptcy cases.

The debtors had issued multiple series of secured notes containing no-call provisions prohibiting repayment prior to April 1, 2007. They initiated bankruptcy cases in late 2005, and in early 2007 sought to incur post-petition financing to prematurely refinance the subject obligations. The noteholders objected to early repayment on the basis that it violated the no-call provision. Ultimately, the district court held that no-call provisions are not specifically enforceable in bankruptcy cases and that borrowers are entitled to prematurely repay their obligations despite any prohibitions in the lending documents.

Damages for Breach of No-Call Provisions

After affirming the bankruptcy court's decision that no-call provisions are not specifically enforceable in bankruptcy cases, the next issue before the *Calpine* court was whether the noteholders were entitled to any monetary damages for the borrowers' prepayment and contractual breach. In reversing the bankruptcy court, the district court held that the noteholders were not entitled to any monetary damages for breach of the no-call provision. The court reasoned that any damages for breach of a no-call provision are essentially claims for unmatured interest, which are not allowable in bankruptcy cases pursuant to § 502(b)(2) of the Bankruptcy Code.

To the contrary, in *Premier Entertainment Biloxi*,[2] the U.S. Bankruptcy Court for the Southern District of Mississippi held that noteholders and bondholders are entitled to unsecured claims for breach of contract damages when a debtor breaches a no-call provision, even if the no-call provision is not specifically enforceable. The court elaborated that "the nonbreaching party is not deprived of a monetary remedy just because no-call provisions are not subject to the remedy of specific performance in bankruptcy cases." The court ultimately awarded the lenders their "actual damages," calculated as the difference, at the time that the debt was repaid, between the present value of the expected interest payments at the contract rate and the market rate, plus post-payment interest at the federal rate.

Enforcement of Prepayment Provisions in Bankruptcy Cases

Unlike no-call provisions, prepayment clauses authorize a borrower to prematurely repay its outstanding obligations in exchange for paying a fee. Determining whether these fees are future interest payments, liquidated damages or something else is particularly important in the bankruptcy context as it could determine whether they are allowable at all. As previously discussed, the dis-

1 *HSBC Bank USA, Nat'l Ass'n v. Calpine Corp. (In re Calpine)*, 2010 WL 3835200 (S.D.N.Y. 2010); *aff'g In re Calpine Corp.*, 365 B.R. 392 (Bankr. S.D.N.Y. 2007).

2 *Premier Entertainment Biloxi LLC v. U.S. Bank Nat'l Ass'n (In re Premier Entertainment Biloxi LLC)*, 2010 WL 3504105 (Bankr. S.D. Miss. 2010).

tinction is significant because to the extent that a court determines that prepayment fees are claims for unmatured interest, they are not allowable.

In *Trico Marine*,[3] the U.S. Bankruptcy Court for the District of Delaware held that prepayment fees should be construed as liquidated damages and not as unmatured interest. In adopting the majority position, Hon. **Brendan Linehan Shannon** reasoned that prepayment fee obligations are fully matured obligations pursuant to a contract. Stated differently, since the fee becomes payable at the time of the prepayment, any such fee is not "interest" merely because it might be based on calculations of expected future interest.

Similarly, in *School Specialty*,[4] the U.S. Bankruptcy Court for the District of Delaware held that prepayment fees are a form of liquidated damages. In that case, the creditors' committee had objected to a lender's claim for a prepayment fee, arguing that it was an unenforceable penalty and was actually a claim for unmatured interest. The lender responded that the fee was not a penalty, but was instead liquidated damages calculated to compensate it for the expected value of future interest payments. Hon. **Kevin J. Carey** concluded that "prepayment provisions and early termination fees are analyzed under the standards applicable to liquidated damages," and that a liquidated damages provision is enforceable when actual damages are difficult to determine and the sum stipulated is not "plainly disproportionate" to the possible loss. Judge Carey also warned that courts should be hesitant to interfere with parties' agreements. After determining that the liquidated damages provision was enforceable, the court also determined that regardless of whether the reasonableness requirement of § 506(b) of the Bankruptcy Code applies, the fee was reasonable and the payment was not disallowable as unmatured interest.

Intersection of Acceleration and Prepayment Provisions

Last year, the U.S. Court of Appeals for the Second Circuit analyzed whether a lender is entitled to a prepayment fee after the underlying debt is accelerated due to the borrower's bankruptcy filing in the *American Airlines* bankruptcy case.[5] The subject indentures provided that the outstanding indebtedness was accelerated upon the borrower's bankruptcy filing. However, the indentures also contained a clause that specifically excluded the entitlement to a prepayment fee when the underlying debt was accelerated due to a bankruptcy filing. In affirming the lower courts' decisions, the Second Circuit relied on this contractual exclusion to hold that the debtor could redeem the bonds without paying the prepayment fee.

The U.S. Court of Appeals for the Fifth Circuit Court also recently weighed in on the construction of acceleration and prepayment clauses. In *Denver Merchandise*,[6] the court ratified the principle that a lender's entitlement to a prepayment premium upon acceleration of a debt is to be determined by the express language of the underlying loan documents. In *Denver Merchandise*, the debtor executed a promissory note containing both acceleration and prepayment clauses. The acceleration clause provided that upon the borrower's failure to make any required payment within 10 days of its due date, the entire principal balance, interest, default interest, "other sums, as provided in this Note," and "all other moneys agreed or provided to be paid by Borrower in this Note" were immediately due and payable. The note also contained a prepayment clause that, in pertinent part, provided that the borrower could prepay its outstanding obligation on the condition that it paid a "prepayment consideration." The clause also stated that the prepayment consideration was due "whether the prepayment is voluntary or involuntary (including ... in connection with [the] Lender's acceleration of the unpaid balance of the Note)."

Lenders must pay close attention to acceleration and make-whole clauses in their loan documents to ensure that they clearly and unambiguously contemplate and protect their expected economic interests — or risk having any ambiguity interpreted against them.

After the borrower initiated a bankruptcy case, the lender filed a proof of claim seeking the entire outstanding balance under the loan, based on acceleration, plus the prepayment fee. The debtor objected to the claim to the extent that it included the prepayment fee, arguing that the fee was only payable upon an actual prepayment and that, in any event, the fee was not payable if prepayment was due to acceleration. The lender asserted that taken together, the acceleration and prepayment clauses entitled the lender to a prepayment fee upon acceleration. The district court affirmed the bankruptcy court's decision to sustain the debtor's objection.

On appeal, the U.S. Court of Appeals for the Fifth Circuit stated that the issue before it was a "straightforward question of contract interpretation." The court began its analysis with the principle that parties are free to expressly provide in any lending instrument for which a borrower is obligated for a prepayment fee upon the acceleration of the underlying indebtedness. The court held that absent such an express provision, "a lender's choice to accelerate acts as a waiver of the right to a prepayment fee," with the exception that a court may impose the prepayment fee if the borrower defaults to avoid additional interest.

After reviewing the note with a focus on the terms of the acceleration and prepayment clauses, the court determined

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3 *In re Trico Marine Servs. Inc.*, 450 B.R. 474 (Bankr. D. Del. 2011).
4 *In re School Specialty Inc.*, 13-10125 (KJC), 2013 WL 1838513 (Bankr. D. Del. 2013).
5 *U.S. Bank Trust Nat'l Ass'n v. AMR Corp. (In re AMR Corp.)*, 2013 WL 4840474, 730 F.3d 88 (2d Cir. 2013).
6 *Bank of New York Mellon v. GC Merchandise Mart LLC (In re Denver Merchandise Mart Inc.)*, 740 F.3d 1052 (5th Cir. 2014).

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that the prepayment fee was not owed because the fee was only payable upon an actual prepayment (there was no payment after acceleration here) and because the note did not contain language that "would deem *the* prepayment to have been made in the event of acceleration for any reason." In emphasizing the latter rationale, the court compared contractual language providing that "[t]he [borrower] agrees that if the [lender] accelerates the ... principal sum ... the [borrower] waives any right to prepay said principal sum ... without premium *and agrees to pay a prepayment premium*." Ultimately, the court held that a lender waives its right to a prepayment fee when it accelerates a borrower's obligations under the note, absent an express provision that the fee is payable upon acceleration.

Takeaways

Courts are eschewing *per se* rules that prepayment fees are or are not owed upon acceleration of an underlying debt and are instead focusing on the express terms of the loan documents to make those determinations. Absent carefully crafted contractual provisions stating that prepayment fees are due upon acceleration, regardless of whether the acceleration is caused by a bankruptcy filing or other default, a court is unlikely to determine that a prepayment fee is owed.

To protect their right to collect make-whole premiums, lenders would be well advised to craft loan documents that expressly require the payment of a prepayment fee any time an outstanding obligation is repaid before the maturity date, and that spell out in specific and unambiguous language the triggers for a prepayment fee, including in the event of acceleration and regardless of whether the borrower makes any payment pursuant thereto. In addition, lenders can preserve their rights to prepayment fees by timely satisfying conditions precedent. Lenders must pay close attention to acceleration and make-whole clauses in their loan documents to ensure that they clearly and unambiguously contemplate and protect their expected economic interests — or risk having any ambiguity interpreted against them. abi

Financial Statements

By Geraldine Ponto and Ferve E. Ozturk

Getting the Whole Make-Whole

Momentive *and* Energy Future Holdings *Consider Equity*

Editor's Note: *ABI's Secured Credit Committee hosted an ABILive webinar in Sepember 2014 that discussed points presented in this article. Recordings are available for purchase at cle.abi.org.*

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A make-whole premium is a lump-sum payment that becomes due under a financing agreement when repayment occurs before the stated maturity date, thereby depriving the lender of all future interest payments bargained for under the agreement.[1] As bond-financing arrangements increasingly use make-whole premiums, the question of whether and when claims for make-whole premiums are allowable in bankruptcy has become more prominent. Two recent decisions shed light on this issue.

On Sept. 9, 2014, Hon. **Robert D. Drain** of the U.S. Bankruptcy Court for the Southern District of New York entered a bench ruling denying the noteholders' claims against the debtors, Momentive Performance Materials Inc. and its affiliates, for the payment of make-whole premiums.[2] The ruling followed on the heels of the Aug. 5, 2014, decision by Hon. **Christopher S. Sontchi** of the U.S. Bankruptcy Court for the District of Delaware granting an indenture trustee discovery on the debtors' solvency in connection with the noteholders' claims to a make-whole premium in the reorganization case of *Energy Future Holdings Corp.*(*EHF*).[3]

Case law precedent prior to *Momentive* and *EHF* instructed that courts look strictly to the language of the parties' contract in determining whether a make-whole premium is allowable.[4] However, both of these rulings make it clear that the court will look beyond the four corners of the contract and consider equitable factors when the debtor's solvency is at issue. Going forward, these decisions could affect how the holders of bond debt and lenders litigate the right to make-whole premiums, and they could reshape how conventional language in bond indentures is drafted. All parties involved in bond-debt transactions would be wise to review these rulings and watch for further guidance from the expected-merits decision in *EHF*.

Momentive Decision Summary

In *Momentive*, the indenture trustees of certain "first and 1.5 lien notes" (the "notes") sought payment of a contractual "make-whole" premium and, alternatively, asserted a common-law claim for damages based on the debtors' payment of their notes before the stated maturity date.[5] Judge Drain began his analysis with the language of the indentures and form of the notes. Paragraph 5 of the form dealt with voluntary redemption and provided that "prior to October 15, 2014, the Issuer may redeem the Notes at its option ... at a redemption price equal to 100% of the principal amount of the Notes redeemed, plus the Applicable Premium as of, and accrued and unpaid interest."[6] The indenture trustees argued that the debtors' proposed treatment of the notes under the chapter 11 plan, providing for a payoff by issuing replacement notes, entitled the trustees to the "applicable premium" as defined in the indentures, which was equal to the make-whole amount.

The court rejected the indenture trustees' argument, finding that the indentures required the lender to forfeit its right to make-whole consideration resulting from the debtor's acceleration of the balance of the loan.[7] The court noted there was no "clear and unambiguous clause ... with sufficient clarity" that provided for a make-whole payment after acceleration in section 6.02 of the indenture.[8] Section 6.02 stated that upon the debtors' bankruptcy, "the principal of, *premium, if any*, and interest on all Notes shall *ipso facto* become and be immediately due and payable."[9] The court held that the language did not entitle the noteholders to a claim for the applicable premium (the make-whole amount) following automatic acceleration of the debt.[10] Reference to the "premium, if any," to be paid on prepayment was "not specific enough" to require payment of a make-whole premium post-acceleration.[11]

Next, the court turned to the trustees' alternative argument that in lieu of a make-whole premium, they were entitled to a claim for damages for the debtors' violation of the indentures' no-call provisions. However, the court held that such a claim would be disallowed as unmatured interest under § 502(b)(2) of the Bankruptcy Code.[12] The court

1 *See* Geraldine Ponto and Ferve Ozturk, "Make-Whole Premiums Get to 'Pass Go' in Bankruptcy Court," BakerHostetler Executive Alert (Sept. 27, 2013) (defining make-whole premiums).
2 *See In re MPM Silicones LLC*, No. 14-22503, 2014 WL 4436335 (Bankr. S.D.N.Y. Sept. 9, 2014) ("*Momentive*").
3 *See CSC Trust Co. of Delaware v. Energy Future Intermediate Holdings Co. LLC, et al. (In re Energy Future Holdings Corp.)*, 513 B.R. 651 (Bankr. D. Del. Aug. 5, 2014).
4 *See, e.g., In re School Specialty Inc.*, No. 13-10125, 2013 WL 1838513 (Bankr. D. Del. April 22, 2013); *In re AMR Corp.*, 485 B.R. 279 (Bankr. S.D.N.Y. 2013); *aff'd*, 730 F.3d 88 (2d Cir. 2013).
5 2014 WL 4436335 at *11.
6 *Id.*
7 *Id.* at *12.
8 *Id.* at *13.
9 *Id.* (emphasis added).
10 *Id.* at *14.
11 *Id.* at *15.
12 *Id.* at *17. This ruling parts ways with *In re Trico Marine Servs. Inc.*, 450 B.R. 474, 480-82 (Bankr. D. Del. 2011), which provides that liquidated-damages clauses, like clauses providing for make-whole premiums, necessarily cannot be unmatured interest.

suggested that the result could be different in the case of a solvent debtor.[13]

Finally, the court denied the trustees' effort to lift the automatic stay so that the debtors could rescind the automatic acceleration of the notes, and thus revive the make-whole premium. Relying on the Second Circuit's decision in *AMR*,[14] which squarely addressed that issue, Judge Drain ruled that post-acceleration rescission is not permitted absent clear language in the indenture.[15]

EFH Decision Summary

Momentive determined issues that are presently in dispute before the Delaware bankruptcy court in the *EFH*. In *EFH*, the indenture trustee for senior secured notes issued by the debtors sought payment of a $665 million make-whole premium in connection with a proposed refinancing of the notes.[16] The language of the applicable provisions of the indentures closely tracks the language in the *Momentive* indentures. As was the case in *Momentive*, the *EFH* indentures had an applicable premium due on voluntary redemption, along with a clause providing that automatic acceleration entitled the noteholders to principal and accrued but unpaid interest, and a "premium, if any."[17] Hence, commentators view *Momentive* as a trailblazer for Judge Sontchi's decision in the *EFH* make-whole litigation.

In the Aug. 5, 2014, discovery ruling,[18] Judge Sontchi ruled that the question of the debtors' solvency or insolvency was relevant to the make-whole dispute and granted the indenture trustee discovery on the debtors' solvency. He reasoned that the debtors' solvency had a bearing on whether the court would strictly enforce the terms of the contract or apply equitable principles to adjust the parties' obligations,[19] stating that "even in bankruptcy, a solvent debtor cannot escape its contractual obligations, but an insolvent debtor may rely on equitable principles to argue [that] the premium should be reduced or not paid."[20]

The first step in the court's analysis as to whether the trustee was entitled to a make-whole premium was a review of the language of the indenture. The court could only allow the trustee a make-whole amount if the right to such a claim were clear under the indenture. If it was clear, the court would then consider the debtors' solvency as bearing on the amount of the premium that would have to be paid.[21] If the debtors were solvent, the court would "enforce the terms of the contract under state law." If the debtors were insolvent, however, the court reasoned that "the equities of the case may require the Court to distribute the limited pie in a different fashion."[22]

13 *Id.*
14 *Id.* at *23 (citing *AMR*, 730 F.3d 88).
15 *Id.* at *23.
16 *See* Complaint, *CSC Trust Co. of Delaware v. Energy Future Intermediate Holdings Co. LLC, et al. (In re Energy Future Holdings Corp.)*, Adv. Pro. No. 14-50363, ECF No. 1 (Bankr. D. Del. filed May 15, 2014).
17 *See* Energy Future Intermediate Holding Co. LLC and EFIH Finance Inc. 6.875 Percent Senior Secured Notes Due 2017 (First Lien) Indenture dated as of Aug. 14, 2012, section 6.02 ("If any Event of Default (other than an Event of Default specified in clause (6) or (7) of Section 6.01(a) hereof) occurs and is continuing under this Indenture, the Trustee or the Required Holders of at least 30% in aggregate principal amount of the outstanding Required Debt may declare the principal of, and premium, if any, interest, Additional Interest, if any, and any other monetary obligations on all the then outstanding Notes to be due and payable immediately.); Energy Future Intermediate Holding Co. LLC and EFIH Finance Inc. 11 Percent Senior Secured Second-Lien Notes Due 2021 (Second Lien) Indenture dated as of April 25, 2011, section 6.02 (substantively identical).
18 *In re Energy Future Holdings Corp.*, 513 B.R. 651.
19 513 B.R. at 657-62.
20 *Id.* at 658 (collecting cases and citing Scott K. Charles and Emil A. Kleinhaus, "Prepayment Clauses in Bankruptcy," 15 *ABI Law Review* 537, 582-83 (2007), *available at* http://lawreview.abi.org/sites/default/files/Articles/2007/charles.pdf).
21 513 B.R. at 660-61.
22 *Id.* at 660.

Discussion

Momentive and *EFH* taken together further lay the groundwork to guide clients on whether and when make-whole premiums are allowable in bankruptcy. In particular, *Momentive* clarifies the issue of whether automatic acceleration can ever constitute a voluntary redemption. Following *AMR* and *In re Solutia Inc.*,[23] the court answered this question with a resounding "no." That result will likely influence the outcome in *EFH*, which involves similar automatic-acceleration provisions, and may shut the tap on arguments in favor of treating automatic acceleration as voluntary redemption.

The *Momentive* decision also adds to the precedents, including *AMR*, that held that a party cannot lift the automatic stay to rescind an acceleration provision to salvage a claim to a make-whole premium when the contract does not clearly provide for a make-whole premium post-acceleration. These decisions also reaffirm the importance of drafting indenture language that will hold up to strict scrutiny of the contractual terms and give effect to the parties' deal. *Momentive* and the *EFH* discovery ruling follow the analysis set by the Delaware bankruptcy court in the *School Specialty* reorganization case[24] and the Second Circuit in the *AMR* reorganization case,[25] which narrowly interpreted the plain language of the indentures.[26] Judge Sontchi indicated that his review would start with the plain language of the indentures. In light of *Momentive*, the prognosticators are buzzing that this will result in a favorable ruling for the debtors in *EFH* in denying the payment of the make-whole premium.

The prospect of the courts applying equitable principles to adjust contractual terms where a debtor is insolvent adds a new layer to the discussion. The *Momentive* court's consideration of the debtor's solvency in determining that damages for breach of no-call provisions might be available, despite the Bankruptcy Code's bar of allowing unmatured interest, might affect the court's analysis in *EFH*, which appears to involve a solvent debtor. Likewise, Judge Sontchi's ruling in the discovery dispute that equitable principles may pertain to determine the amount of an allowed make-whole claim if the debtor is insolvent takes a different approach from *School Specialty*, which contained no discussion whatsoever on the role of equity.[27]

These rulings suggest that in cases with insolvent debtors (which are more common than solvent debtors), even clearly drafted language that provides for the make-whole premium regardless of the debtor's solvency may nonetheless be adjusted by courts applying equitable principles. This may complicate the process of negotiating the language of note indentures, the cost of the transactions to the issuers and the consideration that will be required to do a deal, and the strategy in attempting to enforce make-whole premiums. Judge Sontchi's ruling on the merits of the *EFH* dispute, and future cases involving insolvent debtors facing make-whole claims, will add to the discussion. abi

23 379 B.R. 473 (Bankr. S.D.N.Y. 2007).
24 *See School Specialty*, 2013 WL 1838513.
25 *See AMR*, 730 F.3d 88.
26 *See School Specialty*, 2013 WL 1838513, at *2-*3 (allowing make-whole premium when indenture unambiguously provided for premium); *AMR*, 730 F.3d at 100-02 (denying make-whole premium when "plain language" of indenture provided that bankruptcy filing triggered acceleration of debt but did not require payment of make-whole amount).
27 However, *School Specialty* appeared to involve a solvent debtor, which might explain why the court did not find it necessary to determine the application of equitable principles. *See School Specialty Inc.*, Form 10-K (Annual Report), filed July 9, 2014, for the period ending April 26, 2014, *available at* www.edgar-online.com, at 22 (suggesting that company is solvent as of date of filing of form).