when Grace has settled nearly all of its known PD Claims during the course of its bankruptcy." *In re W.R. Grace & Co.*, 446 B.R. 96, 144 n. 82 (Bankr.D.Del.2011); *see also Corestates Bank*, 202 B.R. at 46 (overruling an objection to the feasibility of a reorganization plan, even when objecting party put forth its own contrary witnesses testimony). As such, if AMH took issue with the feasibility of the Joint Plan, it should have presented credible contradictory evidence and witnesses of its own on this point before the Bankruptcy Court prior to confirmation of the Plan. Nothing in the record indicates that it was prevented from doing so. Thus, its objection to the Joint Plan's feasibility is overruled.

2. Montana's Feasibility Claims

***46** Montana FN75 avers that the Joint Plan is not feasible because its alleged indemnity and/or contribution claims purportedly cannot be discharged under the current terms of the Plan. Specifically, Montana asserts that it could potentially hold a claim against Grace valued up to $850 million, which it claims would require the need for further liquidation or reorganization of Grace. Thus, Montana argues that § 1129(a)(11) would be violated by these circumstances.

FN75. The Crown does not join Montana in this claim.

The Court first considers Montana's hypothetical $850 million FN76 future claim against Grace. This monetary figure appears to be derived from a line of questioning of Ms. Zilly by Montana's counsel at the Confirmation Hearing.FN77 It is a well established maxim, however, that mere "remarks by counsel are not evidence." *Shellenberger v. Summit Bancorp, Inc.*, 318 F.3d 183, 191 n. 11 (3d Cir.2003); *see also Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 210 (3d Cir.1992); *Edwards v. City of Phila.*, 860 F.2d 568, 575 (3d Cir.1988). Counsel never explained or provided a basis upon which the amount of its hypothetical claim was based. The relevance and reliability of this hypothetical assertion was never ascertained, and therefore this evidence was never formally introduced into the record. Absent the introduction of otherwise proper evidence or objective data to support its argument, Montana's reliance on this line of questioning is misplaced. *See In re B. Cohen & Sons Caterers, Inc.*, 124 B.R. 642, 647 n. 8 (E.D.Pa.1991).

FN76. Montana contends that it arrived at its current hypothetical $850 million claim amount by estimating that approximately 1,150 claimants could potentially bring suit against it, and that each claim is subject to a statutory maximum of $750,000 under Montana state law. Montana's appellate brief and the record are devoid of any explanation for its previous $750 million claim amount.

FN77. Specifically, Montana's counsel questioned Ms. Zilly about Grace's potential ability to pay a hypothetical $750 million non-dischargeable post-confirmation judgment upon the Effective Date of the Plan. The relevant line of questioning was as follows:

> Montana: Again, assuming a 750 million dollar non-dischargeable post-confirmation judgment, would Grace have the ability to pay that one year after the effective date?
>
> Ms. Zilly: Well, needless to say, I have not done the analysis, but you know, it's possible they might be able to pay it based on an accrual of cash as well as additional borrowings. But, you know, again, it's totally based on two assumptions which I have not put down on a piece of paper or figured out what the ramifications of those would be.
>
> Montana: So as you sit here today you're unable to determine that?
>
> Ms. Zilly: I think that's a fair statement.
>
> (*See* Conf. Hearing Trans.("Zilly testimony"), 10/13/09, at 157–58, JA 004476).

Additionally, this hypothetical claim remains mere conjecture at this point. Montana has provided no evidence indicating a "reasonable likelihood" that such a claim could actually be asserted against Grace's bankruptcy estate or when this would occur. *South Canaan Cellular*, 427 B.R. at 61. The mere " 'possibility of failure is not fatal' to confirmation." *Id.* at 62 (quoting 7 *Collier on Bankruptcy* ¶ 1129.02[11] (16th ed.2009)). The Court refuses to grant such a speculative and unsupported request.

Finally, even if Montana's reliance on this testimony was proper, its argument would still fail because it does not account for how its indemnity and contribution claims would be handled by the TDP. Under the terms of the Joint Plan, Montana's indirect claims for contribution and indemnity will be channeled to the PI Trust to await distribution. No payments will be made until Grace has successfully reorganized. Therefore, any claims asserted against Grace's bankruptcy estate at this time would not affect the viability of Reorganized Grace, or inevitably lead to liquidation or a second reorganization. Accordingly, Montana's objections to the Plan's feasibility are likewise overruled.

F. Equality of Treatment Among Creditors

" 'Equality of distribution among creditors is a central policy of the Bankruptcy Code.' " *In re Combustion Eng'g., Inc.*, 391 F .3d 190, 239 (3d Cir.2005) (quoting *Begier v. IRS*, 496 U.S. 53, 58 (1990)). This emphasis on the equality of distribution among creditors is highlighted within the requirements of 11 U.S.C. §§ 524(g) and 1123(a)(4) of the Code.

***47** Section 524(g) explicitly requires that an asbestos trust value and pay all "present claims and future demands that involve similar claims in substantially the same manner." 11 U.S.C. § 524(g)(B)(2)(ii)(V). The Third Circuit has expressly recognized the importance of equality of treatment among creditors under Chapter 11, stating that "a plan of reorganization [must] provide similar treatment to similarly situated claims." *Combustion Eng'g*, 391 F.3d at 239; *see also Grossman's*, 607 F.3d at 126 n. 12 (citing relevant provisions of Section 524(g)).

Similarly, a Chapter 11 reorganization plan must also meet the requirements of § 1123(a)(4) of the Code. Section 1123(a)(4) requires a plan to "provide the same treatment for each claim or interest of a particular class." 11 U.S.C. § 1123(a)(4). Federal caselaw construing this provision of the Code has interpreted equal treatment to mean that: (1) all class members must be subject to the same process for claim satisfaction, *In re Cent. Med. Ctr.*, 122 B.R. 568, 575 (E.D.Mo.1990); (2) all class members' claims must be of "equal value" through the application of the same pro rata distribution or payment percentage procedures to all claims, *In re Quigley Co., Inc.*, 377 B.R. 110, 116 (Bankr.S.D.N.Y.2007) ("[A]ll members of the class must receive equal value. In addition, each member of the class must pay the same consideration for its distribution."); *In re Adelphia Commc'ns, Corp.*, 361 B.R. 337, 362, 363 (Bankr.S.D.N.Y.2007); and (3) all class members must give up the same degree of consideration for their distribution under the plan. *Quigley*, 377 B.R. at 116–17. However, perfect or precise equality is not required—only approximate equality. *Id.* at 116; *In re Resorts Int'l, Inc.*, 145 B.R. 412, 447 (Bankr.D.N.J.1990) ("This is not to be interpreted as requiring precise equality of treatment, but rather, some approximate measure since there is no statutory obligation ... to quantify exactly what each class member is relinquishing[.]") (internal citation omitted).

The Third Circuit has instructed courts analyzing a reorganization plan's equality of distribution to "consider the bankruptcy scheme as an integrated whole in order to evaluate whether Plan confirmation is warranted." *Combustion Eng'g*, 391 F.3d at 241. In doing so, the structure of the reorganization plan must comply with the literal terms of the Code and should not "impermissibly discriminate" against certain claimants. *Id.* at 239. The Bankruptcy Court in the instant case found that Grace satisfied all these requirements in its proposed Joint Plan. However, several appellants, namely the Libby Claimants, BNSF, Montana, the Crown, and AMH, retain objections to the Plan on the grounds that it impermissibly discriminates against them. The Court considers each objection in turn below.

1. The Libby Claimants' Discrimination Claims

The Libby Claimants allege that the Joint Plan impermissibly discriminates against them in violation of §§ 524(g) and 1123(a)(4) in three ways: (1) the proposed trust distribution procedures ("TDP") set the bar too high for many Libby Claimants to qualify for more severe Disease Levels, and therefore obtain greater recovery; (2) the Joint Plan pays the Libby Claimants less than their prebankruptcy settlements; and (3) the structure of the Joint Plan discriminates against those claims covered by Grace's non-products insurance.

a. The TDP Criteria for Category IV–B

***48** Personal injury claims under the Joint Plan are categorized according to their nature (*i.e.*, the specific type of pleural disease suffered) and level of severity. These categorizations establish the amount of payment a claimant may obtain under Expedited Review—an accelerated form of claims-processing designed to encourage settlement and conserve resources through the establishment of different levels of pleural disease. The Joint Plan currently has eight asbestos-related "Disease Levels." Each Disease Level is defined by specific medical and compensation criteria derived from medical research and applicable tort system considerations. If a claimant meets the criteria for a specific Disease Level, he can obtain an automatic settlement offer—referred to in the Plan as a

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"Scheduled Value"—representing a set value associated with that particular level, multiplied by a payment percentage. Those suffering from "severe disabling pleural disease" are assigned Category IV–B under the Plan. The Libby Claimants assert that Category IV–B's criteria is discriminatory because it includes "add-ons" (*i.e.*, additional criteria to the standard diagnostic criteria) that make it very difficult for otherwise-eligible Libby residents to qualify for Category IV–B severe disabling pleural disease (and consequently greater compensation payments under the TDP). Thus, they allege that this disparate treatment violates §§ 524(g) and 1123(a)(4) because it does not provide the same treatment for each claim or interest among the asbestos personal injury claimants within Class 6.

In support of their argument, the Libby Claimants provide the Court with a myriad of statistics from a mortality study conducted by the Center for Asbestos–Related Disease ("CARD") in Libby, Montana. The CARD study attempts to show that the current categorizations under the Joint Plan would exclude significant percentages of Libby residents because they would not meet the heightened criteria of the add-ons. However, the Bankruptcy Court already addressed this evidence at the Confirmation Hearing, and found that the study was not reliable and did not follow accepted methodology.FN78 The Bankruptcy Court was in the best position to consider this evidence because it had the opportunity to hear the parties' testimony and review their extensive briefing over the course of the sixteen-day Confirmation Hearing. This Court agrees with the Bankruptcy Court's assessment that the study is unreliable, and sees no reason to re-open assessment of this already-disqualified evidence.

FN78. Specifically, it was brought to light that Appellants' expert witness that conducted the CARD study did not randomly select his sample, but rather drew his conclusions based on a select group of asbestos patients that he himself treated in Libby. The importance of random sampling in legal research and evidence is a topic that has been widely discussed in various law review and journal articles, and the Court need not opine on this point here. *See generally* Richard A. Berk, *An Introduction to Sample Selection Bias in Sociological Data,* 48 AM. SOC. REV. 386 (1983); Bert Black, James A. Jacobson, Edward W. Madeira, Jr., & Andrew See, *New Directions in Expert Testimony: Scientific, Technical, and Other Specialized Knowledge Evidence in Federal and State Courts,* SH007 A.L.I.-A.B.A. 115 (2002).

Additionally, the Court is not convinced that the Category IV–B criteria discriminates against the Libby Claimants because they have failed to establish that similar asbestos claims in Class 6 are not treated "in substantially the same manner" as required by § 524(g), or that the Joint Plan does not "provide the same treatment for each claim" as required by § 1123(a)(4). The different Disease Levels of the Joint Plan are designed to group similar claims together to ensure that claimants with similar profiles are treated uniformly. Here, individuals within Category IV–B are grouped together on the premise that they all suffer from "severe disabling pleural disease." This category is not exclusive to any geographic location, but rather includes all claims that qualify as severe disabling pleural disease. Appellants have not established that they will be treated differently under the plan (*i.e.*, discriminated against) from claimants in other geographic areas. Instead, their argument is that the specific criteria defining Category IV–B is discriminatory because fewer Libby residents are able to meet these standards. This argument fails, however, because it does not show how the criteria would be applied in a discriminatory manner under the Plan. Merely because fewer Libby Claimants qualify for inclusion within this heightened Disease Level does not mean that the Libby Claimants themselves will be treated differently from other claimants within Class 6. The Libby Claimants will have the same opportunity as all other asbestos claimants to establish the nature and severity of their diseases, and the TDP affords all claimants the equal opportunity to increase their amount of recovery if they can prove that they were exposed to Grace Asbestos more than any other asbestos type.FN79 Thus, the Court is satisfied that the distribution procedures of Category IV–B are not discriminatory and do not violate § 524(g) or § 1123(a)(4).

FN79. The Joint Plan takes into account the unique situation of the Libby Claimants in this litigation due to the fact that they were exposed to asbestos through multiple avenues. The Plan accounts for this by lessening the burden of production that the Libby Claimants must establish regarding their specific pleural diseases. Specifically, the TDP permits claimants at lower Disease Levels to bring subsequent claims if their diseases should progress to a more severe diagnosis (including the possibility of qualifying for Category IV–B several disabling pleural disease). Additionally, the Libby Claimants are not required to prove "significant occupational exposure" in order to qualify for additional recovery.

The Joint Plan also accounts for the Libby Claimants' situation through the application of an "Extraordinary Claim Value" multiplier under the TDP, discussed more fully, *infra.* If a personal injury claimant can establish that 75% or more of his asbestos exposure was traceable to Grace Asbestos, then he is entitled to an award of up to five times the set Scheduled Value. If a claimant can establish that 95% or more of his asbestos exposure can be traced to Grace Asbestos, then he is entitled to an award of up to eight times more than the Scheduled Value. These Plan provisions were designed specifically with the Libby Claimants' personal injury claims in mind.

***49** Finally, the Libby Claimants' discrimination argument also fails because of the Individual Review safeguard put in place by the Joint Plan. Under the Individual Review process, a personal injury claimant may still be able to recover up to the Maximum Value of his claim, even if he otherwise failed to meet the criteria to qualify for a specific Disease Level under Expedited Review. Individual Review was established to safeguard claims that are viable, but that may have otherwise slipped between the cracks of the eight Expedited Review categories. The Individual Review process allows claimants that are displeased with their recovery or categorization under Expedited Review to present their claims and any supporting evidence to a panel of trustees representing the asbestos trust. The panel may award such claimants liquidated settlements if it finds they are entitled to greater recovery or a higher categorization than they were given in Expedited Review.

The Libby Claimants allege that the Individual Review process itself is discriminatory because a significant percentage of Libby residents would not qualify for Category IV–B under Expedited Review, and would therefore be "shunted" to the as-of-yet undeveloped process of Individual Review "by reason of discriminatory medical criteria." (Libby Br. 20.) Again, this argument fails on the same grounds—Appellants have failed to show how exactly they would be treated differently than other similarly situated claimants. There is no evidence in the record indicating that the Libby Claimants in particular would be afforded different treatment during the Individual Review process. In fact, Individual Review would actually allow the displeased Libby Claimants the possibility to recover even *more* than they otherwise could under the structure of the Joint Plan. Merely because the process of Individual Review has not yet been fully developed does not mean that the trustees will make their review decisions in a discriminatory fashion. Therefore, the Court finds that Individual Review would cure any discrepancies that could possibly occur under Expedited Review, and that all similarly-situated claimants would be treated in substantially the same manner under the Joint Plan.[FN80]

FN80. The Libby Claimants also argue that the Individual Review process is discriminatory because it impermissibly delegates the Court's authority to a non-judicial entity—the panel of trustees representing the trust. In making their argument, the Libby Claimants rely heavily on the language of *In re G–I Holdings, Inc.,* 323 B.R. 583 (Bankr.D.N.J.2005). That case involved the confirmation of a debtor's proposed claims liquidations procedures under § 502(c) of the Bankruptcy Code, which would have allowed a non-judicial committee to determine actual distributions to individual claimants. The Libby Claimants' reliance on this case is incorrect because its holding is rooted in § 502 of the Code, which mandates that a court determine the validity and amount of claims. *See* 11 U.S.C. § 502(b) ("the *court* shall determine the amount of such claim ....") (emphasis added). In contrast, the case at hand deals with an asbestos trust under § 524(g) of the Code. Section 524(g) does not require that a court determine the amount and validity of claims, but rather authorizes the utilization of various "mechanisms" to do so. *See* 11 U.S.C. § 524(g)(2)(B)(ii)(V) (providing that "pursuant to court orders *or otherwise,* the trust will operate through mechanisms ... that provide reasonable assurance that the *trust* will value, and be in a financial position to pay, present claims and future demands") (emphasis added). Thus, *G–I Holdings* is factually distinct, and the Joint Plan's Individual Review process does not impermissibly delegate authority to a non-judicial entity.

In viewing the Joint Plan as an "integrated whole," the record shows that equality of distribution among creditors is satisfied here. The Court therefore affirms the Bankruptcy Court's finding that the claim processing mechanisms of the TDP comply with §§ 524(g) and

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1123(a)(4) of the Bankruptcy Code, and that the Libby Claimants have not proven any unfair discrimination.

b. Pre–Bankruptcy Settlements

The Libby Claimants also allege that the Joint Plan discriminates against them by paying them at a rate less than what Libby residents received in pre-bankruptcy settlements with Grace. Prior to filing for bankruptcy, the average asbestos-related lawsuit against Grace in Libby settled for approximately $268,000. The Libby Claimants allege that under the current structure of the Joint Plan, they stand to receive substantially less compensation. Grace counters that the personal injury claim values utilized by the Joint Plan reflect Grace's pre-bankruptcy settlement history, adjusted to bring them current. Under the Plan's structure, each of the eight designated Disease Levels has a Scheduled Value assigned to it that reflects nationwide settlement values obtained in the tort system. Appellants argue, however, that in order for the TDP to actually yield a Scheduled Value equivalent to the pre-bankruptcy settlement amounts in Libby, they would need to qualify for inclusion within Disease Level Category IV–B. As mentioned above, many Libby Claimants do not qualify for Category IV–B based upon the nature and severity of their pleural diseases. Thus, the Libby Claimants allege that Grace's valuations under the Joint Plan were "designed" to discriminate against them by having assigned Scheduled Values "far less than the [actual] tort system value of their claims." (Libby Br. 22.)

*50 Sections 524(g) and 1123(a)(4) only require that an asbestos trust value and pay "present claims and future demands that involve similar claims in substantially the same manner," 11 U.S.C. § 524(g)(B)(2)(ii)(V), and that a reorganization plan "provide the same treatment for each claim or interest of a particular class." 11 U.S.C. § 1123(a)(4). Although "procedures may vary somewhat between classes," all that is required by these provisions of the Code is that "the primary treatment is unquestionably the same for each claimant" within each class. *In re Dow Corning Corp.,* 244 B.R. 634, 669 (Bank.E.D.Mich.1999). Thus, in order to constitute discrimination, a reorganization plan would have to single out specific claimants within a class for disparate treatment.

The TDP values for asbestos personal injury claims under Grace's Joint Plan were set using national averages that reflected claimants' exposure to Grace Asbestos in all states, not just Montana. This was done to ensure uniform treatment among claimants nationwide and to conserve trust resources. Thus, the Joint Plan purports to lump together claimants that share similar diagnoses and levels of pleural disease severity so that similarly situated individuals receive the same treatment. Nothing in the record indicates that the Libby Claimants would be singled out for disparate treatment from others within Class 6. In fact, all the claimants within Class 6—including those from Libby and elsewhere—will have an equal opportunity to present their claims for categorization purposes under the Joint Plan. Each of these claimants will be analyzed under the same categorization criteria. Dependent upon the nature and severity of their disease, each will be assigned to a specific Disease Level associated with a specific dollar amount. Once liquidated, every payment within Class 6 will then be multiplied by the same payment percentage. Nothing in this process indicates that the Libby Claimants are earmarked for disparate treatment within Class 6. To the contrary, this procedure clearly indicates that the Libby Claimants will receive the same treatment as all other claimants within Class 6. This equality of treatment is all that is required by §§ 524(g) and 1123(a)(4).[FN81][FN82]

FN81. The Libby Claimants' discrimination argument also ignores the second clause of § 1123(a)(4), which states that disparate treatment of a claim is permissible if the holder of that claim "agrees to a less favorable treatment." 11 U.S.C. § 1123(a)(4). The initial compensation option available to the Libby Claimants under the Joint Plan is to seek an automatic settlement payment under Expedited Review—an entirely voluntary decision. If a claimant is unhappy with his categorization or amount of compensation received under Expedited Review, he can elect to pursue Individual Review. Therefore, even if the Expedited Review process did by some chance treat the Libby Claimants less favorably (and the Court finds that it does not), it is completely within a claimant's discretion whether or not to accept the settlement offer presented to him. Should a Libby Claimant accept such an offer rather than seeking Individual Review of his claim, he is thereby agreeing to the "less favorable treatment." *See In re Dow Corning Corp.,* 244 B.R. 634, 669 (Bank.E.D.Mich.1999) ("[A]ny claimant who selects settlement will have done so in a manner that complies with the second clause of § 1123(a)(4).") (internal citation omitted). Thus, the Libby Claimants' discrimination claim doubly fails on these grounds.

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FN82. The Scheduled Values assigned to each Disease Level under the Joint Plan are based on the premise that most asbestos claimants will be unable to exactly pinpoint the type of asbestos to which they were exposed. The structure of the Joint Plan therefore takes into account that these claimants can bring claims against several defendants in the tort system for their personal injuries related to asbestos, and can thereby obtain compensation from other defendants besides Grace. The Joint Plan also accounts for, however, the rare situation in which a claimant can pinpoint that he was predominantly exposed to Grace Asbestos and would be unlikely to recover damages from other defendants. In such a situation, an "Extraordinary Claims Value" multiplier is applied to the claimant's regular Scheduled Value under the TDP, entitling the claimant to obtain a claim up to eight times its Scheduled Value.

The Libby Claimants assert that the Extraordinary Claims Value multiplier discriminates against them because a claimant would need to show that he has "little likelihood of substantial recovery elsewhere" in order to obtain its benefit, and that the "Plan Proponents have long been aware that Libby Claimants assert claims against wrong-doers in addition to Grace." (Libby Br. 25.) Once again, the Libby Claimants have put forth a straw man argument—the requirement of proving a small likelihood of recovery from other tortfeasors applies equally to *all* claimants within Class 6 that wish to take advantage of the Extraordinary Claims Value multiplier. Nothing in the record indicates that the Libby Claimants would be the only members of Class 6 "disadvantaged" by this mechanism. Thus, their argument cannot stand.

c. Grace's Non–Products Insurance Coverage

As previously discussed, Grace's insurance provides it with both "products" and "non-products" coverage. Products coverage covers Grace's liability for injuries from manufactured asbestos-containing products, while non-products coverage applies to liabilities resulting from exposure to Grace Asbestos in particle form. The Libby Claimants hold non-product claims because their exposure to Grace Asbestos was primarily due to inhaling vermiculite from the Libby mine. Grace's products insurance includes aggregate limits on the total amount insurance companies are required to pay per claim. On the other hand, Grace's non-products coverage has no limit, but rather permits payment of an unlimited amounts of claims, provided that such claims do not exceed the per occurrence limit on the policy. According to Appellants, Grace's insurance covers 100% of its non-products claims, while only covering approximately 7% of its products claims as a result of the aggregate limitations. Appellants argue that, as non-products claimants, they hold "stronger insurance rights" than their product claimant counterparts because Grace's insurance permits greater coverage for its non-products claims. Essentially, Appellants' argument is that because Grace's insurance covers a greater percentage of its non-products than products claims, the non-product claimants are more important and are entitled to greater compensation. They argue that the two groups should not be held to the same standards, and that doing so results in discriminatory treatment.

***51** In order for the Libby Claimants to receive any additional compensation under Grace's insurance policy, they would first need to prove that they possess a right to the non-products insurance proceeds. As explained in detail above, the general rule of the Third Circuit is that insurance policies which provide liability coverage become part of the debtor's estate upon filing for bankruptcy. *See ACandS, Inc. v. Travelers Cas. & Sur. Co.*, 435 F.3d 252, 260 (3d Cir.2006); *First Fid. Bank v. McAteer*, 985 F.2d 114, 116 (3d Cir.1993). Thus, rights to Grace's insurance policies became property of Grace's bankruptcy estate when it filed for bankruptcy in April of 2001. Since the Libby Claimants were not named insureds under the policies, the Third Circuit rule makes clear that they did not hold rights to the non-products insurance.

Due to the fact that the Libby Claimants hold no direct rights to the insurance proceeds, the only other way that they could receive any additional insurance proceeds would be to show that they hold a particular interest in the policy. "While federal law defines the limits of what is property of the estate, it is state law which determines a debtor's interest in particular property." *In re Warrington*, 424 B.R. 186, 189 (Bankr.E.D.Pa.2010); *accord., Butner v. United States*, 440 U.S. 48, 54 (1979). Therefore, any insurance interests the Libby Claimants may hold must be analyzed under state law. Under Montana law, "the long-established rule" has been that "a direct action against an insurer does not lie until the liability of the insured has been established[.]" *Ulrigg v. Jones*, 274 Mont. 215, 224,907 P.2d 937, 943 (Mont.1995) (internal citations

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omitted).[FN83] Thus, the Libby Claimants must establish Grace's liability to them in order to attain any additional compensation.

FN83. According to the Libby Claimants, under Montana state law, their rights to the insurance proceeds vested at the time of their injuries. In making their argument, the Libby Claimants rely on the holding of *McLane v. Farmers Ins. Exch.*, 150 Mont. 116, 120, 432 P.2d 98, 100 (Mont.1967) (providing that an automobile accident victim's rights in his insurance policy vested either at the time of the accident or, alternatively, at the time of the implied waiver of the right to rescind). However, although the Libby Claimants' reading of *McLane* is correct, their reliance on it is misplaced.

As discussed in detail above, *McLane* dealt with an insurance policy regarding an automobile accident. The issue in that case was whether an insurance company's actions constituted an implied waiver of its right to rescind its coverage. *Id.* at 99. The plaintiff's liability was not at issue. Since *McLane* became law in 1967, no other case in Montana has cited it as legal authority for the position that a victim's rights to insurance proceeds vest at the time of the accident. In fact, subsequent Montana caselaw has established that automobile accident insurance holds a unique place in the state's legal landscape. Specifically, Montana has a "public policy" of protecting injured victims of automobile accidents by granting them payment of damages which are not in dispute without first executing a settlement agreement and final release. *See Ridley v. Guar. Nat. Ins. Co.*, 286 Mont. 325, 336, 951 P.2d 987, 993 (Mont.1997); *see also Dubray v. Farmers Ins. Exch.*, 307 Mont. 134, 137, 36 P.3d 897, 900 (Mont.2001). Given the unique position of automobile insurance proceeds under Montana state law, the Court declines to apply the holding of *McLane* to the non-automobile accident insurance case at hand.

The Libby Claimants, however, have failed to show this Court how Grace is liable to them. Instead, they merely repeat their blanket statement that "[u]nder state law the Libby Claimants have the right to collect from Grace's insurers," (Libby Br.28), without providing any direct evidence or legal citation as to why such liability is warranted. There has been no underlying judgment or settlement with Grace post-bankruptcy upon which liability may be premised. *See Lough v. Ins. Co. of N. Am.*, 242 Mont. 171, 173, 789 P.2d 576, 577 (Mont.1990) (indicating that liability may be established by an underlying settlement or judgment). Nor have the Libby Claimants asserted that Grace is liable to them based on a cause of action rooted in a Montana statute. *See Ulrigg*, 907 P.2d at 944 (providing that liability may be established if the Montana state legislature expressly creates a cause of action by statute). As a result, Appellants have not established Grace's liability under Montana state law, and thus do not have a right to any additional insurance proceeds.

In sum, the Libby Claimants have not established that the Joint Plan impermissibly discriminates against them. Rather, the Court is satisfied that the Joint Plan "provide[s] reasonable assurance that the trust will value, and be in a financial position to pay, present claims and future demands that involve similar claims in substantially the same manner." 11 U.S.C. § 524(g)(2)(B)(ii)(V). Therefore, the Bankruptcy Court's determination that the Joint Plan is not discriminatory toward the Libby Claimants is affirmed.

2. BNSF's Discrimination Claims

***52** BNSF also argues that some of its claims are treated substantially differently than other claims within the same class. Thus, BNSF asserts that the Joint Plan cannot be confirmed because it contravenes § 1123(a)(4) of the Bankruptcy Code, and its established procedure unfairly increases BNSF's administrative costs. Each argument is considered separately below.[FN84]

FN84. BNSF also alleges that the Joint Plan improperly classifies its claims within Class 6, claiming that "[t]he common-law claims of BNSF should have been separately classified based on disparate treatment [.]" (BNSF Br. 26 (internal capitalization omitted).) In making this argument, however, BNSF makes no mention of the relevant provision of the Bankruptcy Code, 11 U.S.C. § 1122(a), or any supporting caselaw. The Court refuses to make BNSF's argument for it. Therefore, based on a lack of evidence to the contrary, the Court affirms the Bankruptcy Court's finding that BNSF's claims are properly classified in Class 6.

a. Equal Treatment Under Section 1123(a)(4)

The current structure of the Joint Plan accounts for both direct and indirect claims against Grace. For all intents and purposes, direct claimants under the TDP are those individuals that directly suffered injuries from exposure to Grace Asbestos. Indirect claims against Grace are those claims that are derivative of Grace's liability, such as common-law indemnity and contribution claims, brought by co-defendants of Grace in the tort system. BNSF is an indirect claimant of Grace because it seeks indemnification and contribution from Grace for personal injury lawsuits it previously defended or will defend related to the Grace Asbestos that it transported by railroad from the Libby mine site.

Grace's PI Trust has established procedures to handle the payment of both direct and indirect claims. The matrix put forth by the TDP authorizes all direct claimants within Class 6 to receive Scheduled Values (or, if they meet the necessary prerequisites, Maximum Values) that purport to reflect the estimated value of their claims outside of bankruptcy. An indirect claimant's payment under the TDP depends on the claimant's relationship with a direct claimant. An indirect claimant must first prove that it paid all, or a significant portion, of a liability that Grace owed to a direct claimant. The indirect claimant can then pursue an indemnity and/or contribution claim against the trust. At this point, the indirect claimant assumes the same position as a direct claimant and is entitled to recover from the trust the same amount that a direct claimant could have recovered had it brought a direct claim against the trust itself.

As previously mentioned, the Joint Plan takes into account that several direct claimants may have been exposed to more than just one type of asbestos or may be unable to adequately trace their exposure to one specific type. In such instances, the Joint Plan reduces the amount of recovery such claimants can obtain from Grace because they can potentially recover from multiple asbestos manufacturers. Similarly, the Joint Plan also accounts for claimants that may be able to prove that they were predominantly exposed to Grace Asbestos. In this scenario, the individual would be entitled to receive "Extraordinary Claims Value" treatment, meaning that his actual award could be up to eight times its Scheduled Value. However, if an Extraordinary Claims Value claimant can additionally obtain recovery from a non-debtor, then the overall award is reduced to the Scheduled Value amount (or, in qualifying circumstances, the Maximum Value) on the premise that claimants should not be able to recover "more than once" for their injuries. The amount of indemnification and contribution that the non-debtor could receive from Debtor Grace in such instances, however, would be limited to the amount the direct claimant could have received directly from Grace.[FN85]

FN85. A step-by-step example is particularly helpful to understand this process. Suppose a hypothetical Libby Claimant brings a claim against BNSF for personal injuries related to its derivative liability for operation of the railroad in Libby, Montana. Debtor Grace would likely be a co-defendant in the litigation because the injuries would be connected to Grace Asbestos.

- Assume that the Libby Claimant prevails in the litigation and obtains an award in the amount of $400,000 (the same amount that has been established as the approximate base line for Libby Claimants suffering from severe pleural disease that can prove that they were exposed 95% or more to Grace Asbestos).

- Assume that BNSF initially pays the Libby Claimant this amount. Due to the fact that BNSF and Grace were co-defendants in the litigation, payment of this award would extinguish any subsequent claims that the Libby Claimant could have against Grace.

- BNSF would then seek indemnity and contribution from Grace in an amount representing Grace's share of the liability.

- Under the Plan, indirect claimants seeking indemnity and contribution step into the shoes of the former direct claimant to pursue their claims, and can recover the same amount the direct claimant could have recovered from the trust. In continuing with the aforementioned example, this means that BNSF would receive the same amount for its indirect claim as that which the Libby Claimant would have recovered directly from Grace's trust.

- Assume that the Libby Claimant can prove that he suffers from severe pleural disease and that the Scheduled Value of his claim would be $50,000 under the TDP. Further assume that the claimant, being from Libby, could prove that he was predominantly exposed to Grace Asbestos by more than 95%. In such a situation, the Extraordinary Claim Value would have entitled this hypothetical Libby Claimant to eight times the Scheduled Value of his claim ($400,000) had he directly pursued his claim against Grace.

• However, because the claimant could obtain additional recovery from another party (BNSF), his recovery would be limited to the Scheduled Value of the claim ($50,000) to avoid allowing double recovery.

• Thus, Grace would only indemnify BNSF for $50,000 because this is the amount that the Libby Claimant could have recovered directly from the trust.

***53** BNSF alleges that essentially all claims brought against it could be valued at the Extraordinary Claims Value level because its allegedly tortious actions primarily occurred in Libby, Montana. Thus, it claims that most creditors in Class 6 will receive awards roughly equal to their estimated value outside of bankruptcy, but "indirect claimants such as BNSF who make payment to Grace Exposure Claimants in the first instance and then assert common-law indemnity or contribution against the Debtor ... receive significantly reduced awards," thereby singling them out for disparate treatment under the Plan. (BNSF Br. 16.) In response, Grace claims that the Joint Plan as applied to BNSF does not discriminate against BNSF because the same process is used to handle all indirect claims made against the Grace trust.

At the outset, the Court notes BNSF appears to be solely challenging the Joint Plan on the grounds of disparate treatment based on its alleged common law indemnity and contribution rights.[FN86] Grace suggests that this Court need not even consider BNSF's alleged common law indemnity and contribution claims because this issue was not raised below before the Bankruptcy Court. In a footnote, BNSF asserts that "while not expressly using the word 'indemnity,' BNSF specifically argued [to the Bankruptcy Court] that its indirect claims, where derivative liability was imposed on BNSF, were being accorded disparate treatment." (BNSF Reply Br. 4 n. 1.) In a March 4, 2011 Memorandum Opinion and Order,[FN87] the Bankruptcy Court explicitly stated that:

FN86. BNSF also holds contractual indemnity rights in regards to any asbestos-related liability with Grace in Libby, Montana. Between 1938 and 1995, Grace and BNSF entered into several agreements, including various property leases, quit-claim deeds, right-of-way agreements, assignment contracts, and asset transfer agreements. Under the terms of these various agreements, Grace and BNSF agreed that Grace would fully indemnify BNSF for any and all asbestos-related claims asserted against BNSF, including defense costs. *See In re W.R. Grace & Co.,* 386 B.R. 17, 23–24 (Bankr.D.Del.2008); *In re W.R. Grace & Co.,* 446 B.R. 96, 125 n. 47 (Bankr.D.Del.2011). BNSF previously objected to treatment of its contractual indemnity rights under the Joint Plan. The Bankruptcy Court therefore amended the Joint Plan in December of 2010 by adding Section 5.14 to the TDP, entitled "BNSF TDP Claims," which covers "claims of BNSF seeking indemnification from Grace based upon an alleged contractual indemnity obligation." Under Section 5.14 of the TDP, BNSF's contractual indemnity claims will be channeled to the trust, where they will be reviewed, processed, and payment will be determined.

In its briefing submitted to this Court, BNSF recognizes that its objections based on contractual indemnity were resolved by the addition of Section 5.14. (*See* BNSF Br. 18 n. 3 ("To the extent BNSF's indirect claims falls within its contractual indemnity, it will be entitled to an award equal to its actual non-bankruptcy value. BNSF asserts that most of its indirect claims constitute contractual indemnity claims.").) In that very same footnote, BNSF also asserts that "[n]either the Debtors nor the other Plan Proponents, however, have admitted that the [contractual] indemnity agreements exist ... or are binding[.]" (*Id.*) Therefore, to the extent that any part of BNSF's present argument attempts to extend to its contractual indemnity rights, the Court finds that this issue was already addressed by the Bankruptcy Court's December 2010 Plan modification.

FN87. The final version of the Joint Plan was amended and confirmed on January 31, 2011. Therefore, any subsequent opinions and orders of the Bankruptcy Court only addressed any residual issues, but did not significantly alter the structure of the Joint Plan that is presently on appeal

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before this Court.

> BNSF cited no law in support of [a common law right to contribution], and did not mention it in its post-trial brief, or its pretrial statement. Furthermore, BNSF did not argue or address the issue of a common law right to contribution at the confirmation hearing ... At [a] hearing on March 2, 2011, BNSF referred to a "common law indemnity claim." This was the first mention by BNSF of a common law indemnity claim and to the extent BNSF meant "indemnity" in this statement as opposed to "contribution," its motion for reconsideration is denied as it never raised the issue before. To the extent BNSF meant to refer to a common law contribution claim, it has not pursued this.

In re W.R. Grace & Co., Bankr.No. 01–1139, 2011 WL 832940, at *1–2, n. 5 (Bankr.D.Del. Mar. 4, 2011). The Bankruptcy Court was in the best position to analyze the evidence before it, and appears to have resolved this issue with its aforementioned Memorandum Opinion and Order. Nevertheless, for the sake of clarity and to ensure comprehensive resolution of this issue, the Court will proceed to consider the merits of BNSF's disparate treatment claim.

As set forth above, in bankruptcy, equality of treatment among creditors in a Chapter 11 reorganization plan has two aspects: (1) all members of the class must receive equal value for their claims; and (2) each member of the class must pay the same consideration for distributions under the plan. *Quigley,* 377 B.R. 110, 116 (S.D.N.Y.2007). Equal value has been interpreted by the federal courts to mean that all class members' claims must be subject to the same process for claim satisfaction through the application of the same pro rata distribution and payment percentage procedures. *See In re Cent. Med. Ctr.,* 122 B.R. 568, 575 (E.D.Mo.1990); *In re Resorts Int'l, Inc.,* 145 B.R. 412, 447 (Bankr.D.N.J.1990). The Court finds that this requirement has been satisfied in the instant case. Pursuant to the TDP, all indirect claimants must first successfully establish that they have "paid in full the liability and obligation of the PI Trust to the individual claimant to whom the PI Trust would otherwise have had a liability or obligation," and that this payment would "forever and fully release[ ] the PI trust from all liability to the Direct Claimant." (Plan Ex. 4, § 5.6, JA 000305–307.) Under the Plan's outlined procedure, all indirect claimants will then step into the shoes of the direct claimant when bringing their indemnity and/or contribution claims against the trust. All indirect claimants' indemnity and/or contribution claims will be distributed in the amount that the direct claimant would have received had it made the demand against the trust itself. No indirect claimant under Grace's Joint Plan will take a different route—all claimants will follow the same track to recovery.

*54 Nevertheless, BNSF contends that equal value is not being accorded to its claims because most Class 6 claimants will receive the full non-bankruptcy value of their claims under the TDP, while BNSF is precluded from receiving the full value of its claims because the Joint Plan does not include the Extraordinary Claims Value when assigning a value to BNSF's claims.[FN88] BNSF's argument, however, suffers from a fundamental flaw: only direct claimants under the TDP can qualify for Extraordinary Claims Value treatment, and BNSF, as an indirect claimant, would therefore never be entitled to this valuation. In order to be eligible for the Extraordinary Claims Value multiplier, a claimant must show that his asbestos exposure "occurred predominantly as a result of working in a manufacturing facility of Grace during a period in which Grace was manufacturing asbestos-containing products at that facility, or ... was at least 75% the result of exposure to asbestos or an asbestos-containing product or to conduct for which Grace has legal responsibility." (TDP § 5.4(a), Ex 4, JA 000303.) Realistically, only a Libby resident or mine worker could qualify under this provision of the Joint Plan. BNSF and other indirect claimants would never be able to meet the definitional requirements to fall into this category. Accordingly, BNSF's contention is without merit.[FN89]

FN88. BNSF's argument fails to take into account that no creditors within Class 6 will likely be receiving 100% non-bankruptcy value for their claims under the TDP because the values assigned to claims under the trust only represent a rough average of the claim value outside of bankruptcy. In fact, BNSF expressly acknowledges this point in its briefing submitted to the Court:

> The intent in setting the Scheduled and Maximum Values for each category was to provide claim values "roughly equivalent" to what the asbestos-related claimant would have received in the tort system ... Although some asbestos PI claimants may have received higher awards in the tort system (perhaps due to favorable juries, access to more experienced and qualified lawyers, etc.), while others may have received

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lower awards in the tort system (perhaps for obverse reasons), the values scheduled in the TDP represent the "rough justice" value of the claims.

(BNSF Br. 14.) Thus, the full non-bankruptcy amount of a direct claimant's claim is not actually being paid by the TDP, but rather only a rough estimate of this amount. This point therefore further undercuts BNSF's argument.

FN89. The Crown made the same argument regarding access to the Extraordinary Claims Value multiplier. (*See* Crown Br. 26–27.) The Court overrules this objection to the Joint Plan for the same reasons that it rejects BNSF's claims above.

Finally, BNSF also claims that it is not receiving equal value for its claims under the Joint Plan because it might, at some uncertain point in the future, suffer a judgment or enter into a settlement with a direct claimant by which it would be required to pay a direct claimant more than the amount it could recover from the trust. This argument, however, fails to take into account that all indirect claimants in Class 6 run this risk, and that therefore they are all being treated the same. For example, suppose a Libby plaintiff suffering from severe disabling pleural disease brings a claim against the State of Montana on a failure to warn theory, and receives a $100,000 jury verdict in his favor. When seeking indemnity and/or contribution from Grace, Montana would recover from Grace's trust the exact amount the Libby resident could have recovered himself directly from the trust. Since the plaintiff suffered from severe disabling pleural disease, his claim under Category IV–B would be valued at $50,000. Moreover, being from Libby, the plaintiff could likely qualify for the Extraordinary Claims Value, thereby multiplying his Scheduled Value eight times its set amount—netting a $400,000 award. Given that the plaintiff could recover from both Grace and Montana, however, the Plan would limit his recovery to $50,000. Thus, Montana would only be indemnified by Grace for $50,000, and would remain responsible for the remainder of the plaintiff's jury verdict amount entered against it.[FN90] A lawsuit brought against BNSF would operate no differently—BNSF too would remain liable for the outstanding $50,000 in this hypothetical scenario. Thus, all indirect claimants are being treated equally under the Joint Plan, and are receiving equal value for their claims.

FN90. In fact, both Montana and the Crown raised this same argument, alleging that the TDP "results in disparate treatment particularly to a holder of an Indirect PI Trust Claim in the event that a judgment is entered against it in an amount in excess of the maximum value." (MN Br. 42–42.) (Crown Br. 28.) Nothing in the record indicates that Montana or the Crown are being treated differently than any other indirect claimant under the Joint Plan. For the same reasons set forth above regarding BNSF, the Court finds that the TDP applies the same process to all claims in Class 6, and that therefore all indirect claimants, including Montana and the Crown, are being treated equally under the Plan.

***55** In addition to ensuring that all class members receive equal value for their claims, "each member of the class must pay the same consideration for its distribution [under the plan]." *Id.; see also* *In re AOV Indus. Inc.,* 792 F.2d 1140, 1151–52 (D.C.Cir.1986) ("It is disparate treatment when members of a common class are required to tender more valuable consideration—be it their claim against specific property of the debtor or some other cognizable chose in action—in exchange for the same percentage of recovery."); *In re Resorts Int'l, Inc.,* 145 B.R. 412, 447 (Bankr.D.N.J.1990) (citing *AOV Indus.*). In extremely limited circumstances, federal courts have found that when a creditor has given up some unique claim in order to participate in a Chapter 11 plan, it has paid more consideration for its distribution and therefore suffered disparate treatment. *See* *AOV Indus.,* 792 F.2d 1140, 1151 (D.C.Cir.1986) (finding that a creditor received unequal treatment under a plan because it held "a unique, guaranteed claim," while all other creditors within the class merely held derivative, non-guaranteed claims). BNSF attempts to portray itself as having such a unique claim based on the premise that it is the only creditor in Class 6 that would not be independently liable to the direct claimant, but would still be held derivatively liable for Grace's sole tortious conduct in which it played no part.

This argument does not make legal sense, however, because for an action to proceed against BNSF, BNSF would have to bear at least some independent liability. If liability were solely based on Grace's actions alone and BNSF was not at least minimally independently liable to the plaintiff, then BNSF would be dismissed from the lawsuit altogether, and would never need to seek indemnity and/or contribution from Grace in the first place.[FN91] In light of this consideration, BNSF's assertion of a unique claim derails and can proceed no further. Rather, all simi-

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larly situated indirect claimants here are giving up the same degree of consideration—the possibility that they could receive a higher award in the tort system, or inversely, a lower award—in order to participate in the Joint Plan and receive a definitively set amount of distribution from the trust.FN92

FN91. It appears that BNSF has confused the concepts of "liability" and "indemnity." As explained above, BNSF would need to have at least a minimum percentage of fault in order for the lawsuit to proceed forward. It is possible, however, that BNSF could subsequently be awarded full indemnity for its indirect claim (in fact, this is what its contractual indemnity agreements with Grace were designed to do). Regardless of the phrasing of BNSF's argument, its claim is not uniquely situated from all others in Class 6, and BNSF therefore is not a victim of disparate treatment.

FN92. In fact, federal courts have afforded the equal consideration prong a more relaxed inquiry because determining each party's amount of consideration is an extremely amorphous process, particularly in Chapter 11 bankruptcy cases. *See* Quigley, 377 B.R. at 118–19 (recognizing that the parties' degrees of consideration were too indefinite to determine precisely); *AOV Indus.*, 792 F.2d at 1156 (Starr, J., dissenting) (describing problematic aspects of requiring equal consideration in bankruptcy cases); *Dow Corning*, 255 B.R. at 497–98 (same). The court in *Dow Corning* particularly highlighted this point in the context of a mass tort bankruptcy involving hundreds of unliquidated claims, stating that:

> Requiring a bankruptcy court to inquire as to the amount of consideration involved in each claim ... especially in a mass tort situation, would be unrealistic, unworkable, and an unduly burdensome position for the bankruptcy court to be in.
>
> *Id.* at 497.

Finally, the Court points out that if it were to award BNSF the Extraordinary Claims Value treatment for its common law indemnity and contribution claims, then it would actually be awarding BNSF *preferential* treatment to all other creditors within Class 6. As the Plan stands, all claimants are subject to the same process for distribution determination purposes. If BNSF were allowed to obtain Extraordinary Claims Value treatment, however, this would actually allow it to recover more from the trust than a direct claimant could since the direct claimant would remain subject to the Scheduled Value safety valve against double recovery. Section 5.6 of the TDP specifically seeks to avoid such unfairness, providing that: "In no event shall any Indirect Claimant have any rights against the PI Trust superior to the rights of the related Direct Claimant ... [including] timing, amount or manner of payment. In addition, no Indirect PI Trust Claim may be liquidated and paid in an amount that exceeds what the Indirect Claimant has actually paid to the related Direct Claimant." (Asbestos PI Trust Distribution Procedures ("TDP") § 5.6, Ex. 4, JA 000306.) Permitting BNSF to obtain the Extraordinary Claims Value would therefore not only directly contravene the Plan's requirements, but would also award favorable treatment to BNSF, which is expressly forbidden by the Code. FN93

FN93. Indeed, allowing BNSF to obtain this extra level of recovery would not only violate the equal treatment requirement of § 1123(a)(4), but would also run afoul of § 524(g)'s requirement to pay present and future claims the same amount in substantially the same manner under the same criteria. *See* 11 U.S.C. 524(g)(2)(B)(ii)V).

***56** Based on the above reasons, the Court affirms the Bankruptcy Court's finding that the Joint Plan treats BNSF equally in comparison to other creditors within Class 6, and does not unfairly discriminate against it. FN94

FN94. In its brief submitted to the Court, BNSF sporadically mentions that it is entitled to defense costs and attorney's fees from Grace. On this point, the Court affirms the Bankruptcy Court's holding that "[t]here is nothing in the Bankruptcy Code, and BNSF has pointed to no case law, that indicates that a plan must pay attorneys' fees incurred in connection with the underlying tort claims or indemnity or contribution claims arising from those torts." *In re W.R. Grace & Co.*, Bankr.No. 01–1139, 2011 WL 832940, at *1 (Bankr.D.Del. Mar. 4, 2011).

The Court notes, however, that BNSF's contractual indemnity agreements with Grace over the years allegedly called for Grace to fully indemnify BNSF for any asbestos-related liabil-

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ity, including the cost of defense and attorneys' fees. To the extent that BNSF's present argument is based on these contractual indemnity agreements, this would constitute a contract interpretation dispute that is beyond the confines of the present suit, and the Court need not opine on it any further here.

Moreover, BNSF also argues to this Court that BNSF's classification under the Joint Plan violates the Absolute Priority Rule, which provides that dissenting creditors will be paid in full, and that no creditor with a claim or interest that is junior to the claims of the dissenting creditor will get or retain anything under the plan. *See* 11 U.S.C. § 1129(b)(2)(B)(i)-(ii). BNSF's specific objection under the absolute priority rule is that its common law indemnity and contribution claims should have been separately classified because the Joint Plan treats them differently than the other creditors in Class 6, and that therefore, as a dissenting creditor, no creditor with a claim junior to its own should have retained anything under the Plan. However, given the Court's finding that BNSF's claims are no different than any others in Class 6, BNSF's absolute priority rule argument unravels and lacks merit.

b. Administrative Costs

Under the current structure of the Joint Plan, an indirect claimant asserting a claim against the trust must prove that it has paid in full Grace's liability and obligation to a direct claimant for which the trust would otherwise have had to provide payment. Additionally, the indirect claimant must obtain the direct claimant's agreement to forever and fully release Grace from related liability. If an indirect claimant cannot meet these requirements, Section 5.6 of the TDP provides that the indirect claimant may:

> request that the PI Trust review the Indirect PI Trust Claim individually to determine whether the Indirect Claimant can establish under applicable state law that the Indirect Claimant has paid all or a portion of a liability or obligation that the PI Trust had to the Direct Claimant ... If the Indirect Claimant can show that it has paid ... [the] liability or obligation, the PI Trust shall reimburse the Indirect Claimant the amount of the liability or obligation so paid.

(TDP § 5.6, Ex. 4, JA 000306.) BNSF asserts that in the event that it may not be able to satisfy these requirements and must instead pursue Individualized Review, it will unfairly face increased administrative costs that would not be imposed on other indirect claimants, thereby violating § 1123(a)(4).

BNSF has not, however, demonstrated how it would be burdened by more administrative costs than any other indirect claimant within Class 6. Rather, it is apparent that all indirect claimants within Class 6 would be required to prove the validity of their claim subject to the requirements of Section 5.6, and, if unable to meet these requirements, would be able to pursue their claim under Individualized Review.

Moreover, the Court notes that there is nothing discriminatory or unfair about requiring a claimant against the trust to prove the validity of its claim, or to seek release of the debtor—the one paying the indirect claimant—from future liability. Given Grace's financially precarious situation as a bankrupt debtor with limited funds, it must seek to protect itself from future liability and to conserve as many resources as it possibly can in order to meet its current and future obligations. The Court gently reminds BNSF not to bite the hand that feeds it, particularly in light of the fact that BNSF has not made a contribution to the trust like other indirect claimants, and will still be entitled to full indemnity per its contractual agreements with Grace.

The Court declines to deem the Joint Plan unfairly discriminatory based on the mere possibility of increased administrative costs. Administrative costs are a hurdle faced by corporations, law firms, and courts across the nation on a daily basis, and the Court has not been provided with any information that BNSF would be unable to handle this administrative inconvenience. As such, BNSF's challenge to the Joint Plan on these grounds is denied.[FN95]

FN95. Montana and the Crown also put forth similar arguments alleging that the TDP's restrictions on holders of indirect claims result in "increased costs that would be incurred by such tortured and bureaucratic processes" and that requiring indirect claimants to obtain a release from underlying direct claimants before recovering from the trust is discriminatory. (MN Br. 42) (Crown Br. 26.) Montana and the Crown's arguments fail for the same reason that BNSF's ar-

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guments failed. The Court reiterates its finding that there is nothing discriminatory or unfair about requiring a claimant against the trust to prove the validity of its claim, or to seek release of the debtor—the one paying the indirect claimant—from future liability. The Court extends the same reminder to Montana and the Crown that it did to BNSF, and also finds that Montana and the Crown are properly equipped to handle these administrative costs.

3. Montana and the Crown's Discrimination Claims[FN96]

FN96. For the most part, the Crown adopts the arguments of Montana (Crown Br. at 28 ("The Crown incorporates by reference as if fully set forth herein those arguments set forth in Part V of the Montana Opening Brief.").) The Crown does, however, put forth one additional argument that Montana does not make, and is considered separately in Part (c), *infra.*

*57 Montana and the Crown allege, *inter alia,* that the Joint Plan discriminates against them on account of: (1) the legal theory upon which their liability in this lawsuit is based; (2) the timing associated with the receipt of their payments from the trust; and (3) an apparent lack of equality of payment among creditors. Each argument is considered separately below.

a. Failure to Warn Liability

In order to have an indirect claim paid by the trust, the indirect claimant must first prove that it paid in full a liability or obligation to an individual or entity to whom Grace otherwise would have been liable.[FN97] Montana and the Crown aver that this requirement discriminates against them. Specifically, they assert that their alleged liability to direct claimants arises from a purported failure to warn about the dangers associated with Grace Asbestos—a claim for which they are independently liable and for which Grace would have no underlying liability. Thus, Grace would not have to reimburse Montana or the Crown for any amount that they paid to a claimant for such a claim under the Plan because Grace would not have otherwise been liable to the claimant. Montana and the Crown therefore ask this Court to amend the TDP "to make clear that indirect contribution and indemnity claims ... will receive payment, even if they do not result from an indirect claimholder[']s payment of a claim for which the Asbestos PI Trust would have been liable." (MN Br. 38–39.) For the following reasons, the Court declines to do so.

FN97. Section 5.6 of the TDP provides, in relevant part:

> Indirect PI Trust Claims ... shall be ... paid by the PI Trust ... if the holder of such claim [ ] establishes to the satisfaction of the Trustees that the Indirect Claimant has paid in full the liability and obligation of the PI Trust to the individual claimant to whom the PI Trust would otherwise have had a liability or obligation to.... To establish a presumptively valid Indirect PI Trust Claim, the Indirect Claimant's aggregate liability for the Direct Claimant's claim must also have been fixed, liquidated and paid fully by the Indirect Claimant[.]

(TDP § 5.6, Ex. 4, JA 000305–306.) *See also In re W.R. Grace & Co.,* 446 B.R. 96, 117 n. 30 (Bankr.D.Del.2011).

As noted by the Third Circuit, Appellants' potential liability here is based on a legal duty independent from Grace's liability. *See W.R. Grace & Co.,* 591 F.3d 164, 173 (3d Cir.2009) ("Montana's potential liability is based on an independent legal duty that Montana's Supreme Court has decided that the State, as sovereign, owes to its people, namely, a governmental duty to warn about hazards at Grace's site."). Thus, if the Court were to grant Montana and the Crown's request to amend the Plan, then Grace could be liable for the independent wrongdoing of third parties. Neither Montana nor the Crown point the Court to any legal authority that requires a debtor to reimburse third parties for wrongs for which the debtor is not responsible. This is because no such requirement exists. Montana and the Crown's argument, therefore, is legally incorrect.

Moreover, the record is devoid of any evidence indicating disparate treatment. Neither Appellant has convincingly shown how it would be disparately impacted by the Joint Plan's requirements for indirect claimants. Rather, it is evident that the same procedures are applied to and the same things are required of all indirect claimants within Class 6. The Court finds that both Montana and the Crown are required to give up equal degrees of consideration in order to benefit from the TDP and will be receiving equal value for their claims under the Plan. The TDP, therefore, does not impermissibly discriminate against

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either Montana or the Crown in violation of § 1123(a)(4).

***58** Finally, if Appellants were to prevail on this request, the entire central purpose of § 524(g) would be destroyed. As detailed at length above, § 524(g) "helps achieve the purpose of Chapter 11 by facilitating the reorganization and rehabilitation of the debtor as an economically viable entity." *In re Combustion Eng'g, Inc.,* 391 F.3d 190, 234 (3d Cir.2004). If the Court were to grant Montana and the Crown's request for an amendment, then Grace would never be able to successfully reorganize and resolve its asbestos liabilities. Moreover, due to the fact that Grace would have to make additional payments for these indirect claims, there would be less money available in the trust for future claimants. The Court will not grant an unfounded request that would have such a disadvantageous effect on the trust as a whole.

b. The Effect of Timing on Treatment of Creditor Claims

Montana and the Crown further allege that the Joint Plan discriminates against them on the basis of the timing of the payment of claims under the TDP. Under the terms of the Joint Plan, all finalized claims [FN98] are placed in a payment queue to await payment based upon the date the claim was finalized. Montana and the Crown contend that this "first-in, first-out" mechanism results in disparate treatment of their claims because, as indirect claimants, their claims take longer to process since they must first settle the underlying direct claims before they can assert their indirect claims against the trust. [FN99] (MN Br. 41.) Thus, they believe that they only way to afford all creditors equal treatment is to wait until all underlying direct claims have been settled against indirect claimants prior to making any distributions from the trust. (*Id.*)

> FN98. Claims are considered finalized if they have been paid in accordance with the terms of a settlement agreement or final court order.

> FN99. In making their argument, Appellants blend their improper classification and discriminatory treatment allegations. Essentially, Montana and the Crown assert that their claims are different from others in Class 6 because they are indemnity and/or contribution claims based on a failure to warn theory, and that, as holders of such claims, they are not treated equally with other claimants based on the timing associated with payment of indirect claims under the Plan.

> In *In re Congoleum Corp.,* 362 B.R. 167, 183–84 (Bankr.D.N.J.2007), the court stated that "the timing of a filing of a claim can bear on whether claims are similarly situated. At the same time, it [is] also emphasized that timing may not be the sole consideration and that the legal character of the claim remains the foremost consideration." *Id.* (discussing language in *Combustion Engineering*). The Court finds this passage particularly instructive in the present litigation. Even if the timing of indirect claims here was somehow discriminatory (and the Court finds that it is not), the legal character of Montana and the Crown's claims as indirect claims and their corresponding effect on Grace's bankruptcy estate should still remain the "foremost consideration" in the Court's analysis. It has already been decided that Montana and the Crown's claims are similarly situated to other claims in Class 6 on account of their effect on Grace's bankruptcy estate, and are therefore not unfairly discriminated against in any way. Having already decided this "foremost consideration," the Court likewise finds that the Plan does not unfairly discriminate against Appellants in relation to the timing of payment of their claims.

Once again, however, Appellants fail to show how this process would treat them differently than the other creditors within Class 6. Instead, it is evident that all claimants in Class 6—both direct and indirect—will be subjected to this same "first-in, first-out" process. The TDP also provides various protective mechanisms, such as the Payment Percentage requirement, that ensure that all Class 6 claims receive similar treatment, regardless of where they fall in the payment queue.[FN100] Merely because indirect claimants must first settle their underlying direct claims before they can assert their own claims against the trust does not indicate disparate treatment. It is worth repeating that the Court does not find that there is anything discriminatory about requiring claimants against the trust to prove the validity of their claims. To extinguish this requirement could, in fact, have the effect of producing *disparate* treatment among creditors in the same class.

> FN100. On this point, the Court credits the Confirmation Hearing testimony of the Asbestos PI FCR, Mr. David Austern. Mr. Austern is the legal representative that was independently ap-

> pointed by the Bankruptcy Court to protect the interests of future asbestos personal injury claimants in this litigation. When questioned about the possibility of the PI Trust running out of funds before it could pay indirect claims for indemnity and contribution, Mr. Austern testified that he did not believe that such a scenario was likely under the current structure of the Plan. (*See* Bankr.No. 01–1139, Doc. No. 23532, Trans. 9/17/09, at 70–71 ("Austern Testimony").) Thus, Montana and the Crown's basis for its objection—that the PI Trust may run out of funds before it can satisfy its indirect claims—is without merit.

Having found that treatment of Montana and the Crown under the Joint Plan does not run afoul of § 1123(a)(4), the Court likewise declines to adopt Appellants' suggestion that the TDP should wait until all underlying direct claims have been asserted and settled against indirect claimants before making payments from the trust. It would be entirely unreasonable, unfair, and unprecedented to require all claimants to await payment from the trust until all claims have been filed. Grace initially filed for bankruptcy in 2001. Its various creditors have been awaiting payment for their claims since at least that time. If the Plan was so amended, then litigation of this case could continue indefinitely. This is especially true when considering that many future personal injury claimants have not yet developed symptoms and therefore have not even begun the process of filing a claim against the trust. Moreover, litigation here may involve complex conflict of law issues related to interaction with Canada's international legal system that may take years to resolve. As noted by Judge Posner, then Chief Judge of the United States Court of Appeals for the Seventh Circuit, "[t]hese bankruptcy appeals have a tangled history, an unbelievable present, and no future." *Matter of New Era,* 135 F.3d 1206, 1208 (7th Cir.1998) (Posner, Chief J.). There comes a time when finality of litigation is needed. Having already been pending for twelve years, the time for finality has arrived in this case. Allowing otherwise would have detrimental effects for both Grace and its creditors, most especially the significant number of claimants suffering from deadly pleural disease.

c. Equality of Payment and Treatment of Claims in Different Classes Under the Joint Plan

***59** Finally, the Crown alleges that it is a victim of disparate treatment because, under the Joint Plan, American and Canadian ZAI property damage claims will not be treated equally since American claimants allegedly will receive greater payment for their claims. For present purposes, it is important to remember that property damage claims are afforded a different classification under the Joint Plan than the personal injury claims related to exposure to Grace Asbestos in Class 6. American Property Damage ("PD") ZAI claims are categorized in Class 7B, and Canadian ZAI PD claims are classified in Class 8.

The bankruptcy court in *In re Dow Corning,* 244 B.R. 634, 666 (Bankr.E.D.Mich.1999) faced a similar situation. In that case, several claimants affected or injured by purportedly defective breast implants sought recovery from a Chapter 11 debtor that was responsible for the manufacture and sale of the implants. *Id.* at 641–43. Under the debtor's reorganization plan, claimants were classified largely based on their country of citizenship. *Id.* at 641–42. Several foreign claimants asserted that they were unfairly discriminated against because the plan treated them differently from domestic claimants. *Id.* at 666. The court, however, declined to find disparate treatment on the premise that § 1123(a)(4) only pertains to the treatment of claims within the same class. *Id.* ("[T]hese objections misconstrue the import of § 1123(a)(4).... It does not require that claims legitimately classified in separate classes receive the same treatment.").

The holding of *Dow Corning* is directly applicable here. American ZAI PD claims are categorized in a completely different class than Canadian ZAI PD claims. As such, equal treatment of these claims is not required.[FN101] Moreover, the Court notes that both Class 7B and Class 8 are deemed impaired classes, and both classes are entitled to vote on the Plan. The only major difference between both classes is the amount and method of payment their respective claimants will receive. American ZAI PD claims will be paid in accordance with the ZAI Trust Distribution Procedures established by the class settlement. (*See* Joint Plan § 3.1.7(b)(ii).) Canadian ZAI PD claims will be paid according to the terms of the Amended and Restated CDN ZAI Minutes of Settlement. (*See id.* § 3.1.8(b)(i).) Although Canadian claimants may receive a different amount of payment according to their Settlement than American claimants, it is important to remember that equal treatment is not synonymous with equal payment. *See Dow Corning,* 244 B.R. at 670 ("[Section] 1123(a)(4) requires, not that class members receive equal payment, but equal treatment."); *see also In re Finova Grp., Inc.,* 304 B.R. 630, 637 (D.Del.2004) (stating that § 1123(a)(4) does not require parties to receive equal payment under a reorganization plan); *In re Cent. Med. Ctr., Inc.,* 122 B.R.

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568, 575 (Bankr.E.D.Mo.1990) (upholding a lottery system that resulted in awards of different recovery amounts to claimants because all claims were subjected to the same process). As such, the Court finds that the Crown has not suffered disparate treatment on these grounds.

FN101. Montana makes a similar argument, alleging that it has been unfairly discriminated against because Class 6 is impaired under the Plan, while other unsecured claims in different classes (specifically Class 5, Class 7A, and Class 9) are unimpaired (MN Br. at 35.) Given that § 1123(a)(4) only requires equality of treatment for creditors within the same class, Montana's argument is likewise without merit.

4. AMH's Discrimination Claims

***60** AMH claims that the Joint Plan does not treat it equally compared to other creditors in Class 7A. Under the Plan's terms, all creditors must resolve their claims against the PD Trust in federal bankruptcy court. By filing a proof of claim against the PD Trust, creditors agree to submit to the bankruptcy court's jurisdiction over their claims. AMH claims it is treated inequitably under the Plan because it is the only claimant in Class 7A that has been denied the right to pursue its claims in the forum of its choice—South Carolina state court.[FN102]

FN102. AMH also mentioned two other arguments in its appellate brief to this Court. It claims that other creditors in Class 7A receive superior treatment because their claims are: (1) already settled and awaiting payment, while AMH's claims remain in dispute; and (2) subject to alternative dispute resolution (ADR) procedures with lowered proof thresholds. (AMH Br. 46.)

As repeatedly stated throughout this Opinion, § 1123(a)(4) merely requires that all parties receive equal value for their claims and relinquish equal consideration in order to participate in the Plan, *see Quigley*, 377 B.R. at 116; and § 524(g) only requires that the trust utilize mechanisms that provide reasonable assurance that the trust will value and pay present and future claims in substantially the same manner. 11 U.S.C. § 524(g)(2)(B)(ii)(V). Neither Code provision makes any mention of disparity of treatment based on debtor-creditor settlements. In fact, whether or not other claimants in a given class under a bankruptcy reorganization plan have entered into settlements with the debtor or third parties is completely irrelevant to an inquiry into equality of treatment among creditors in the class. Therefore, AMH's first argument is without merit.

AMH's second argument is also lacking. Although AMH mentions that creditors in Class 7A are subject to different ADR procedures, this is where its argument ends. AMH has failed to present any evidence to the Court explaining these ADR methods or how they would result in different treatment of AMH's claims. It is a well-established maxim that, on appeal, courts need not address legal issues that have not been fully developed through proper briefing. *See Sw. Pa. Growth Alliance v. Browner*, 121 F.3d 106, 122 (3d Cir.1997). Thus, given that AMH failed to properly present this claim, the Court likewise declines to consider its merits.

As previously mentioned, in order to satisfy the equality of treatment requirements of § 1123(a)(4), all creditors in a given class must receive equal value for their claims and must pay the same degree of consideration for their distribution under the trust. *In re Quigley Co., Inc.*, 377 B.R. 110, 116 (Bankr.S.D.N.Y.2007). The Court finds that both prongs of the equal treatment test are satisfied here. All Class 7A claimants will receive equal value for their claims because they will all be subject to the procedure outlined in the 2009 Case Management Order ("CMO") for Class 7A Asbestos PD Claims. The CMO is a three-step process: (1) all creditors must first file a Proof of Claim against the trust; (2) within forty-five days, the Claim will either be discharged by the Bankruptcy Court or allowed to proceed forward in litigation; and (3) if allowed, the Claim will proceed to litigation. (*See* CMO, Ex. 25, JA 000804.) Nowhere in the CMO is there any mention that AMH would be the only claimant subject to this process. Rather, the opening line of the CMO is particularly telling here—it states that the purpose of the CMO is to "provide[ ] procedures for the resolution of *all* Class 7A Asbestos PD Claims [.]" (*See id.*) (emphasis added) Thus, the process put forth by the CMO ensures that all Class 7A claimants will receive equal value for their claims.

The second prong of the equal treatment test requires equal consideration. AMH essentially argues that the Joint

Plan requires it to give up more than any other claimant in order to participate in the TDP because it is the only claimant that has been denied a choice of forum to litigate its claims. This assertion, however, is incorrect. Rather, *all* Class 7A claimants that opt into the Plan and file Proofs of Claims against the trust are required to subject themselves to the Bankruptcy Court's jurisdiction. No creditors' claims in this class will be handled in any other forum, and AMH has presented no evidence that treatment of its claims would be any different. In fact, requiring all creditors to submit to federal bankruptcy jurisdiction is advantageous under these circumstances. In a case of this scale and complexity, it is helpful to have the same rules, procedures, and binding caselaw applied to all claims. [FN103] It is also helpful to solicit federal judges that specialize in bankruptcy to review such highly-technical claims and legal issues. This encourages unified decision-making and uniform treatment of claims. *See generally,* Alan N. Resnick, *Bankruptcy as a Vehicle for Resolving Enterprise–Threatening Mass Tort Liability,* 148 U. PA. L. REV.2045, 2050–51 (June 2000) (describing the benefits of having federal bankruptcy courts handle mass tort litigation related to asbestos liability).

FN103. The CMO provides that all claims in Class 7A will be governed by the Federal Rules of Bankruptcy Procedure, Federal Rules of Civil Procedure, Federal Rules of Evidence, applicable federal statutes, and any applicable federal local court rules.

***61** Moreover, even if AMH were somehow disadvantaged by the bankruptcy court forum, its argument would still fail because it does not consider the second clause of § 1123(a)(4)—that disparate treatment cannot occur when a claimant *agrees* to the less favorable treatment. *See* 11 U.S.C. § 1123(a)(4) ("[A] plan shall ... provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest[.]"). Here, AMH agreed to the federal bankruptcy court forum when it initially filed three Proofs of Claims against the PD Trust and chose to extensively litigate its class action claims before the Bankruptcy Court. This procedure in Chapter 11 bankruptcy cases is entirely legally permissible. *See Langenkamp v.. Culp,* 498 U.S. 42, 44 (1990) ("[B]y filing a claim against a bankruptcy estate the creditor triggers the process of allowance and disallowance of claims, thereby subjecting himself to the bankruptcy court's equitable power.") (internal citations and quotations omitted); *see also In re Winstar Commc'ns, Inc.,* 554 F.3d 382, 406 (3d Cir.2009) (citing *Langenkamp*). As such, AMH's claim doubly fails on these grounds.

Finally, the Court also finds that § 524(g) is satisfied under these circumstances because the trust utilizes mechanisms that will value and pay present and future claims in substantially the same manner. 11 U.S.C. § 524(g)(2)(B)(ii)(V). As previously mentioned, all claims that have not already been settled will be subject to the requirements put forth in the 2009 CMO, which apply to both present and future property damage claims. As such, all property damage claims in Class 7A will be treated in substantially the same manner.

Thus, for all the aforementioned reasons, and after careful consideration of the Plan as an integrated whole, the Court finds no disparate treatment in regards to the claims of the Libby Claimants, BNSF, Montana, the Crown, or AMH.

G. The Best Interest of the Creditors Test

In an effort to protect creditor interests in bankruptcy proceedings, Congress created a provision in the Bankruptcy Code that is commonly referred to as the "best interest of the creditors test." 11 U.S.C. § 1129(a)(7)(A)(ii). Under the test, every creditor to a Chapter 11 reorganization plan must receive at least the liquidation value of its claim under the plan as it would in a Chapter 7 proceeding against the debtor in order for the court to find the plan is in the creditors' best interest.[FN104] *In re Armstrong World Indus., Inc.,* 348 B.R. 136, 165–66 (Bankr.D.Del.2006); *In re Lisanti Foods, Inc.,* 329 B.R. 491, 500 (D.N.J.2005). The bankruptcy courts determine this liquidation value by "conjur[ing] up a hypothetical [C]hapter 7 liquidation that would be conducted on the effective date of the plan." *In re Affiliated Foods, Inc.,* 249 B.R. 770, 787 (Bankr.W.D.Mo.2000) (internal citations and quotations omitted). In the alternative, a creditor can individually waive the protection afforded by the best interests of the creditors test if it votes in favor of the plan's affirmation.[FN105] The purpose of the best interest of the creditors test is to ensure that creditors "are no worse off under a plan of reorganization than they would be with the Debtor in [C]hapter 7." *In re Kellogg Square P'ship,* 160 B.R. 343, 358 (Bankr.D.Minn.1993).

FN104. Chapter 7 of the Code addresses the liquidation of a bankruptcy estate. Chapter 11 addresses reorganization plans in bankruptcy proceedings.

FN105. A class vote, however, may not waive an individual creditor's right to this protection under the Code. *See Bank of Am. Nat'l Trust & Sav. Assoc. v. 203 N. LaSalle St. P'ship,* 526 U.S. 434, 442 n. 13 (1999); *In re Am. Family Enters.,* 256 B.R. 377, 403 (D .N.J.2000). Thus, an individual creditor is still guaranteed this protection even if its claim is included within a class under the plan that has voted as a whole in favor of the plan. *See In re Adelphia Commc'ns Corp.,* 361 B.R. 337, 367 (S.D.N.Y.2007). The Libby Claimants are members of Class 6, a majority of which voted in favor of the Joint Plan. In support of its argument, Grace cites the fact that the Libby Claimants were the only members of Class 6 that did not vote in favor of the Joint Plan. However, the best interest of the creditors test still requires the Court to pay due diligence to the Libby Claimants' individual claims, despite the fact that the rest of Class 6 voted in support of the Joint Plan.

***62** The Libby Claimants allege that the Bankruptcy Court erred in finding that the Joint Plan satisfied the test by: (1) failing to make a specific finding regarding the recovery amount the Libby Claimants would receive in a hypothetical Chapter 7 proceeding; (2) disregarding the evidence of the Libby Claimants' expected settlements and jury verdicts; and (3) failing to consider the Libby Claimants' right to recover from Grace's insurance policies in a hypothetical Chapter 7 case. The Court considers each argument individually below.

1. The Level of Specificity Required

The Libby Claimants allege that the Joint Plan fails to meet the best interests of the creditors test because the Bankruptcy Court did not identify the specific amount of their expected recovery under Chapter 7. Specifically, they claim that the Bankruptcy Court erred when it did not identify an exact percentage dividend that general unsecured creditors would receive in Chapter 7 liquidation.

Under the best interest of the creditors test, the plan proponent bears the burden of proof to establish by a preponderance of the evidence that its plan is within the creditors' best interests. *In re Briscoe Enters., Ltd. II,* 994 F.2d 1160, 1164 (5th Cir.1993). As mentioned above, in analyzing whether a plan is within the creditors' best interest, the court ascertains the liquidation value of creditors' claims by creating a hypothetical Chapter 7 liquidation. *Affiliated Foods,* 249 B.R. at 787. After determining this liquidation value, the court should then make "an independent finding, based on the evidence and arguments presented, whether creditors will receive as much under the plan as they would in a hypothetical Chapter 7 liquidation." *Id.* Bankruptcy courts should issue their findings based on the record adduced at trial. *See In re G–I Holdings, Inc.,* 420 B.R. 216, 265 (D.N.J.2005) (affirming bankruptcy court's finding that the reorganization plan satisfied best interest of the creditors test based on a liquidation analysis and other evidence submitted at confirmation hearing); *In re Armstrong World Indus., Inc.,* 348 B .R. 136, 165–66 (D.Del.2006) (finding reorganization plan was in the creditors' best interests based on evidence presented at confirmation hearing). Such independent findings must be based on proper evidence rather than "mere assumptions or assertions." *Adelphia,* 361 B.R. at 366. However, it is important to note that the valuation of claims in a hypothetical Chapter 7 liquidation is "not an exact science" because the process entails a considerable degree of speculation. *Affiliated Foods,* 249 B.R. 770 at 788 (citing *In re Sierra–Cal,* 210 B.R. 168, 172 (Bankr.E.D.Cal.1997)); *Adelphia,* 361 B.R. at 367 (quoting *In re Crowthers,* 120 B.R. 279, 297–98 (Bankr.S.D.N.Y.1900)); *In re PC Liquidation Corp.,* 383 B.R. 856, 868 (E.D.N.Y.2008) ("[T]he valuation of a hypothetical [C]hapter 7 liquidation is, by nature, inherently speculative[.]") (internal quotations and citations omitted). Thus, the court need only make a well-reasoned estimate of the liquidation value that is supported by the evidence on the record. It is not necessary to itemize or specifically determine precise values during this estimation procedure. Requiring such precision would be entirely unrealistic because exact values could only be found if the debtor actually underwent Chapter 7 liquidation. *Affiliated Foods,* 249 B.R. at 788.[FN106]

FN106. A finding by the Bankruptcy Court that all creditors would receive no less under the Joint Plan than under Chapter 7 liquidation is a finding of fact. *See PC Liquidation,* 383 B.R. at 868 (internal citations omitted). Thus, as discussed above in "Section II: Standard of Review," *supra,* the Court will analyze such findings under a "clearly erroneous" standard.

***63** At the Confirmation Hearing, Grace presented several witnesses that testified about the liquidation value of creditor claims under Chapter 7 in comparison to their recovery under the Chapter 11 Joint Plan. An expert wit-

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ness in mass tort bankruptcy liquidation testified that Grace's creditors stand to recover substantially more under the Joint Plan than through liquidation. FN107 Additionally, a claims estimation expert testified that the value of assets available for distribution to creditors was significantly higher under the Joint Plan than it would be under Chapter 7 liquidation.FN108 The Bankruptcy Court properly credited this testimony. The Libby Claimants did not rebut this evidence with their own contrary expert testimony, despite having ample opportunity to do so. In the absence of no contrary evidence, and based upon the well-reasoned and well-founded estimates presented at the Confirmation Hearing, the Bankruptcy Court properly found that creditors would receive as much, if not more, under the Joint Plan as they would in a hypothetical Chapter 7 liquidation. In addition, the Bankruptcy Court properly considered evidence indicating that under Chapter 7 liquidation, the nature of the asbestos liabilities in this case would be very uncertain and complex. The Bankruptcy Code requires nothing more. The Bankruptcy Court was not obligated to determine precise liquidation values. Therefore, Grace has met its burden of showing that the Joint Plan complies with § 1129(a)(7) and the Libby Claimants have failed to establish that the Bankruptcy Court's finding on this point was clearly erroneous. Accordingly, this contention is without merit.

FN107. At the Confirmation Hearing, Ms. Zilly estimated the value of Grace's assets to be between $2.1 and $2.5 billion under the Joint Plan, and between $1.05 and $1.25 billion in a hypothetical Chapter 7 liquidation. She testified that she discounted the liquidation value to account for the time pressures faced in liquidation proceedings and the probability that buyers would pay less than fair market value for Grace's assets since successor liability protection would not be available under Chapter 7, and Grace's subsidiaries would therefore be unwilling to contribute funds to the trust. Ms. Zilly also testified that determining Grace's liability in liquidation would be extremely uncertain because there are no mechanisms under Chapter 7 that achieve an orderly settlement of claims and liabilities as there are in reorganization plans under Chapter 11. The Court notes that her testimony was based upon her extensive experience with mass tort bankruptcies, and was supported by the evidence found on the record.

FN108. Dr. Mark Peterson was the only expert witness who testified at the Confirmation Hearing as to the value of Grace's personal injury liability in a hypothetical Chapter 7 liquidation. He estimated Grace's liability under the Joint Plan to be between $9.2 and $10.7 billion. He testified that without the procedural safeguards available under Chapter 11, Grace's liabilities would quickly surpass this amount because there likely would be a substantial acceleration of claims filed in response to a Chapter 7 filing deadline. Dr. Peterson's testimony was based on his own extensive experience, as well as his analysis of comparable situations that occurred in similar bankruptcy proceedings.

2. The Consideration of Evidence Concerning Tort System Values

The Libby Claimants allege that the Joint Plan also fails the best interest of the creditors test because they stand to recover more through jury trials and settlements in the tort system in a hypothetical Chapter 7 liquidation than under the Chapter 11 reorganization plan. They argue that the Bankruptcy Court should have considered the estimated amount that the Libby Claimants would be awarded through the tort system, as well as the estimated dividend percentage that would be paid to general unsecured creditors in Chapter 7. The Libby Claimants thus ask this Court to remand to the Bankruptcy Court to hold a hearing on this issue. For the reasons that follow, the Court declines to do so.

First, the Libby Claimants' claims are untimely. "Where a party had ample opportunity to produce evidence at trial, and failed to do so, a court should not permit that party to relitigate the case by presenting evidence previously ignored by the party." *Matter of Nelson Co.*, 959 F.2d 1260, 1267 (3d Cir.1992) (internal citations omitted); *see also In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 261–62 (3d Cir.2009) (stating that, absent exceptional circumstances, courts should not consider issues raised for the first time on appeal). The Libby Claimants had ample opportunity to produce evidence on this issue at the Confirmation Hearing, yet failed to do so. The only evidence presented at this time that addressed tort system values was the testimony of Grace's expert witness. Consideration of this issue is now untimely, and a remand to hold a hearing would be improper and a waste of judicial resources.

***64** Moreover, even if this argument were timely, remand is still unwarranted because the Libby Claimants

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fail to take into account the practical implications of what Chapter 7 liquidation would entail in this case. As the Bankruptcy Court properly noted, valuation of Grace creditors' claims under Chapter 7 is highly speculative due to the uncertainty associated with future claims related to latent pleural disease. These future claims are not and cannot yet be known. The Joint Plan accounts for this uncertainty in its proposed structure, and guarantees all claimants—both current and future—some degree of recovery. In contrast, a liquidation under Chapter 7 has no such reassurance in place. Rather, creditors' claims in a Chapter 7 proceeding would be put into a pool that would not distribute payments until all claims in the class were liquidated and all the assets were reduced to cash value. *See* In re Kiwi Int'l. Air Lines, Inc., 344 F.3d 311, 318 n. 6 (3d Cir.2005); *see also* In re Baker & Getty Fin. Servs., Inc., 106 F.3d 1255, 1259 n. 7 (6th Cir.2000). Given the latent nature of asbestos-related pleural disease, excessive time could pass until all future claims are ascertained.FN109 Thus, a Chapter 7 liquidation would need to be held open for a seemingly indefinite amount of time while all personal injury claimants pursued jury trials and settlements in the tort system. Such a process would result in inevitable delay and disparate—or, even worse, unavailable—recovery amongst personal injury claimants. Such uncertainty is certainly not within the creditors' best interests. In comparison, the procedural safeguards and guaranteed recovery mechanisms that are in place under the Joint Plan will allow personal injury claimants to receive at least as much—if not more—than they would in liquidation. Thus, it is evident to the Court that the guaranteed certainty of the Chapter 11 Joint Plan, as opposed to the high degree of uncertainty in a hypothetical Chapter 7 proceeding, is in the creditors' best interest.

> FN109. While the Libby Claimants assert that there would be no distribution to future claimants under Chapter 7, their assertion is summarily incorrect in light of the Third Circuit's recent decision in *Jeld–Wen, Inc. v. Van Brunt (In re Grossman's Inc.)*, 607 F.3d 114 (3d Cir.2010). *Grossman's* held that "claims" under the Bankruptcy Code arise "when an individual is exposed pre-petition to a product or other conduct giving rise to injury," even if the injury manifested after the petition date. *Id.* at 125; *see also* Eagle–Picher Ind., Inc., 203 B.R. 256, 275 (S.D.Ohio 1996) ("[I]t is appropriate to take the value of future Asbestos Personal Injury Claims into account for determining the Claims that would be required to be in a liquidation under chapter 7[.]"). Thus, contrary to the Libby Claimants' position, future asbestos personal injury claims would need to be taken into account in the instant litigation for Chapter 7 liquidation purposes.

Finally, the Libby Claimants contend that the best interest of the creditors test was violated because they stand to recover more through either settlements with a Chapter 7 trustee or jury verdicts against Grace outside the context of the asbestos trust. In making this argument, the Libby Claimants relied on previous pre-bankruptcy settlement amounts between Grace and Libby residents as a benchmark for their present estimated recovery in a jury trial or settlement. Their argument, however, suffers from a fundamental flaw—it compares settlement amounts obtained by *non-creditors* in the tort system years prior to Grace's bankruptcy petition to the claims of current *creditors* after Grace filed for bankruptcy. As its name implies, the best interests of the creditors test only applies to creditors. Thus, the Libby Claimants' reliance on pre-bankruptcy settlements with non-creditors is inapposite. Additionally, the Libby Claimants cannot prove that they would even be able to obtain settlements or jury verdicts equal in amount to those made pre-bankruptcy. These prior settlements and verdicts were rendered at a time when Grace was still a highly solvent and profitable company. Grace's present circumstances are obviously quite different. There is currently only a finite pool of funds available to pay all claims, and this pool would rapidly deplete if individual claimants each obtained a verdict or settlement in differing amounts. Unless fortunate enough to be among those claimants able to obtain a settlement or verdict early in the process, certain Libby Claimants may not even recover at all. Thus, the Libby Claimants' argument is without merit.

***65** For the above reasons, the Court declines to remand to the Bankruptcy Court for the purpose of obtaining a hearing on this issue.

3. Recovery From Grace's Insurers in a Hypothetical Chapter 7 Case

The Libby Claimants next contend that the Bankruptcy Court erred in failing to consider their alleged rights to recover compensation under Grace's insurance policies in a hypothetical Chapter 7 case. They allege that while they would be enjoined from pursuing insurance proceeds under Chapter 11, they could proceed directly against Grace's insurers under Chapter 7. Thus, they claim they would receive more recovery through Chapter 7 liquidation proceedings than under the Joint Plan, and that there-

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fore Grace's proposed reorganization plan is not within the creditors' best interest. For the following reasons, the Court respectfully disagrees with the Libby Claimants' position.FN110

FN110. At the outset, the Libby Claimants' initial assertion that "the Bankruptcy Court erred in *refusing* to consider [their] insurance rights under Chapter 7" and that the bankruptcy judge "did not appear to take issue with the need to consider [their] insurance rights" is incorrect. (Libby Br. 35) (emphasis added). The record is clear that the Bankruptcy Court carefully considered the Libby Claimants' arguments. Moreover, the Bankruptcy Court's Memorandum Opinion specifically discusses the Libby Claimants' alleged rights to Grace's insurance. *See In re W.R. Grace & Co.,* 446 B.R. 96, 127–28 (Bankr.D.Del.2011). Merely because the Bankruptcy Court ultimately rejected these arguments does not mean that they were not seriously considered. Such assertions misstate the Bankruptcy Court proceedings. Thus, the Court notes that the Bankruptcy Court did not "refuse" to consider the Libby Claimants' insurance argument, and declines to find that the best interest of the creditors test was violated on these grounds.

As already established above, the Libby Claimants have no direct right to Grace's insurance proceeds and thus can only prevail on their argument if Grace's liability to them is established. However, the Libby Claimants have failed to establish such liability in their briefing submitted to the Court, and "appellate courts should generally not address legal issues that the parties have not developed through proper briefing." *Sw. Pa. Growth Alliance v. Browner,* 121 F.3d 106, 122 (3d Cir.1997); *see also Conchatta, Inc. v. Evanko,* 83 Fed. App'x. 437, 441 (3d.Cir.2003); *Coastal Outdoor Adver. Grp., LLC v. Twp. of Union, N.J.,* 676 F.Supp.2d. 337, 350 n. 16 (D.N.J.2009) ("It is not this Court's job to make arguments on behalf of the Plaintiff[.]"). There has been no underlying judgment or settlement with the present Libby Claimants that occurred post-bankruptcy upon which liability may be premised. Nor have they provided any legal authority to explain how liability is established under these circumstances. Finally, there is no citation to or explanation provided of any provisions in Grace's insurance policies that indicate how and when insurance coverage would be applicable. Instead, the Libby Claimants merely outline a process for pursuing Grace's insurance, without actually showing this Court why they have a claim to it in the first place.FN111 Accordingly, the Court refrains from filling in the gaps of their argument.

FN111. The Libby Claimants outline a process for pursuing Grace's insurance policies in lieu of actually establishing Grace's liability to them. Under their proposed procedure, they assert that each Libby Claimant would first file a Proof of Claim in a Chapter 7 case, which would have the effect of establishing Grace's liability under 11 U.S.C. § 502(a). (Libby Br. 36.) However, this assertion is incorrect. Section 502(a) says nothing about liability, but rather merely states that "[a] claim or interest ... is deemed allowed, unless a party in interest ... objects." 11 U.S.C. § 502(a).

The next step in the Libby Claimants' proposed procedure is that, upon an objection by the Chapter 7 trustee, the extent of their claims would need to be determined by jury trial under 28 U.S.C. § 1411(a). Once again, however, this statutory provision makes no mention of liability, but rather only provides that Chapter 11 may not affect the right to a jury trial in personal injury and wrongful death cases. *See* 28 U.S.C. § 1411(a).

The final step in the Libby Claimants' proposed procedure is the assertion that the Libby Claimants could bring an independent lawsuit against Grace in a hypothetical Chapter 7 case because they would not be enjoined from doing so under the § 362 injunction. However, whether or not the Libby Claimants could actually obtain relief from the automatic stay afforded by § 362 does not establish *how* Grace is liable to them, but would merely allow them to proceed forward with their claim. As such, the Court rejects the Libby Claimants' proposed liability procedure.

The Libby Claimants spend the remainder of their argument attempting to show that they stand to recover more under Chapter 7 liquidation than under the Joint Plan. To properly address these assertions, a brief digression is needed to provide some background on the operation of Chapter 7 liquidation cases versus Chapter 11 reorganization plans in the context of the best interests of the creditors test. As already stated, the best interest of the

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creditors test requires a comparison of a creditor's Chapter 11 recovery amount to its hypothetical recovery under Chapter 7. Chapter 7 of the Code addresses the liquidation process of an insolvent debtor, in which the property of the bankruptcy estate is reduced to cash value in an attempt to satisfy the debtor's outstanding liabilities to its creditors. *See* Susan Power Johnston, Ivor Charles Wolk, & Anne–Louise Williams, *Basic Business Bankruptcy: Jurisdiction, Venue, Chapter 1 & Chapter 3 of the Bankruptcy Code,* 614 PLI/COMM. 43, 88 (1992). The purpose of Chapter 7 is to fairly distribute the debtor's assets among its creditors, and to give the debtor a fresh start through discharge in bankruptcy. *Id.* In comparison, Chapter 11 addresses debtor reorganization, a process that attempts to rehabilitate a business as a going concern rather than to liquidate it. *Id.* at 89. In Chapter 11 cases, the filing of a bankruptcy petition awards the debtor injunctive relief from current and future litigation so that the debtor has time to reorganize itself and emerge from bankruptcy as a going concern. *Id.*[FN112] Thus, in the present case, the Libby Claimants correctly assert that the automatic stay would prevent them from being able to directly pursue claims against Grace and its insurance under Chapter 11.

> FN112. Injunctive relief in Chapter 11 cases is initially available under 11 U.S.C. § 362. Section 362 applies to all cases filed under the Bankruptcy Code (except for the exceptions outlined in subsection (b) that are irrelevant here), regardless of the specific Chapter. In special circumstances under Chapter 11, supplemental injunctive relief may be available under other statutory provisions of the Code, such as the § 524(g) channeling injunction available in Chapter 11 asbestos bankruptcy cases.

***66** Injunctive relief under Chapter 7 would operate slightly differently in the instant case. After the filing of a Chapter 7 bankruptcy petition, an automatic stay against litigation would be put in place pursuant to 11 U.S.C. § 362(a).[FN113] The purpose of the automatic stay in this context is "to protect the debtor from an uncontrollable scramble for its assets in a number of uncoordinated proceedings in different courts, to preclude one creditor from pursuing a remedy to the disadvantage of other creditors, and to provide the debtor ... with a reasonable respite from protracted litigation [.]" *A.H. Robins Co., Inc.v. Piccinin,* 788 F.2d 994, 998 (4th Cir.1986) (internal citations omitted). The scope of protection afforded by the automatic stay is broad, barring any action that "would inevitably have an adverse impact on the property of the bankruptcy estate." *In re Prudential Lines, Inc.,* 119 B.R. 430, 432 (S.D.N.Y.1990) (internal citations and quotations omitted). Relief from the automatic stay is only available under certain limited circumstances specifically outlined in the Code. *See* 11 U.S.C. § 362(d)(1–4).

> FN113. Section 362(a) states, in relevant part:
>
> > [A] petition filed under section 301, 302, or 303 of this title ... operates as a stay, applicable to all entities, of:
> >
> > (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title; (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title; (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate; (4) any act to create, perfect, or enforce any lien against property of the estate; (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title; (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title; (7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and (8) the commencement or continuation of a proceeding before the United States Tax Court concerning a tax liability of a debtor that is a corporation for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.
>
> 11 U.S.C. § 362(a).

The Libby Claimants allege that they would be able to circumvent the injunction in a hypothetical Chapter 7 liquidation because "[i]t is routine for claimants to obtain relief from the automatic stay to pursue the debtor's insurance coverage." (Libby Br. 36.) FN114 However, none of the cases cited by the Libby Claimants stand for this proposition, nor do they lead to the conclusion that Chapter 7 liquidation would allow them to recover more under Chapter 7 than under the Joint Plan filed pursuant to Chapter 11. *See In re New Era, Inc.,* 135 F.3d 1206, 1210 (7th Cir.1998); *Admiral Ins. Co. v. Grace Indus., Inc.,* 409 B.R. 275, 278–79 (E.D.N.Y.2009); *In re Walker,* 151 B.R. 1006, 1008 (Bankr.E.D.Ark .1993) (citing *Green v. Welsh,* 956 F.2d 30, 35 (2d Cir.1992)). While it is true that the creditors in these cases were allowed to lift the automatic stay and proceed against discharged debtors in order to recover from their insurance, these cases all dealt with the lifting of the automatic stay to pursue a claim against the debtor itself, rather than directly against its insurance agency. *See Green,* 956 F.2d at 35 ("[W]e believe that § 524 permits a plaintiff to proceed *against a discharged debtor* solely to recover from the debtor's insurer. Applied here, this principle permits [the creditor] to continue her suit *against [the debtors]* to establish liability as a precondition to recovery[.]") (emphasis added); *Walker,* 151 B.R. at 1008 ("[I]t is permissible to continue prosecution *against a debtor* if such action is necessary to prove liability as a prerequisite to recovery[.]") (emphasis added). In the instant litigation, the Libby Claimants seek to pursue claims against Grace's insurance directly. Thus, the legal authority they cite does not support their argument that they should be permitted to circumvent the § 362(a) automatic stay to pursue claims against Grace's insurers, nor does it show the Court that the best interests of the creditors test has been violated.

FN114. The Court notes that the federal courts recognize four grounds upon which bankruptcy courts may enjoin suits against debtors and their assets and property. *See Piccinin,* 788 F.2d at 1003–04. In addition to two subsections of § 362, 11 U.S.C. § 105 and 28 U.S.C. § 1334 also permit federal courts to automatically stay litigation against insolvent debtors. Section 105 allows bankruptcy courts to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Code]," which has been interpreted to include enjoinment of litigation against the debtor. *See* 11 U.S.C. § 105; *In re Davis,* 730 F.2d 176, 184 (5th Cir.1984); *In re Otero Mills, Inc.,* 25 B.R. 1018, 1020 (D.N.M.1982) (internal citations omitted). Bankruptcy courts have also granted a stay against litigation pursuant to § 1334. *See* 28 U.S.C. § 1334; *Piccinin,* 788 F.2d at 1003 (internal citations omitted). Thus, the Court notes that in a hypothetical Chapter 7 liquidation of Grace, the bankruptcy court has wide discretion to grant an automatic stay under any of these statutory provisions. However, given that the Libby Claimants solely premised their argument upon § 362, the Court discusses only this statutory provision in depth in its application to the present case.

***67** In fact, it appears to be settled law that, in appropriate circumstances, § 362(a) gives courts the power to enjoin parties from proceeding against non-debtors. *See Piccinin,* 788 F.2d at 1001–07. Subsection (a)(3) of the statute directs a stay of any action against an entity from obtaining possession of or exercising control over the property of the bankruptcy estate. 11 U.S.C. § 362(a)(3). Insurance contracts and products liability policies are recognized to be within the statutory definition of "property" under § 362. *See id.* at 1001 (citing *In re Davis,* 730 F.2d at 184); *In re Johns Mansville Corp.,* 40 B.R. 219, 229 (S.D.N.Y.1984). It has been held that insurance policies related to the bankruptcy estate constitute "valuable property of a debtor, particularly if the debtor is confronted with substantial liability claims within the coverage of the policy in which case the policy may well be ... the most important asset of the debtor's estate," and that therefore "[a]ny action in which the judgment may diminish this 'important asset' is unquestionably subject to [the § 362(a)] stay[.]" *Piccinin,* 788 F.2d at 1001 (internal citations and quotations omitted). FN115 In the instant litigation, Grace's insurance policies certainly constitute an "important asset" of its bankruptcy estate that are entitled to § 362(a) injunctive relief. Without the coverage provided by its insurance, Grace would almost certainly be unable to satisfy its outstanding liabilities and claims filed against it. Chapter 7 proceedings would undoubtedly adversely impact Grace's bankruptcy estate because of the "uncontrollable scramble for its assets" by thousands of personal injury claimants in various courts nationwide. *See id.* at 998; *Prudential Lines,* 119 B.R. at 432. The avalanche of claims would inevitably lead to a logistical nightmare and a rapid decrease in Grace's available assets, with no certain way of knowing that any amount of recovery would be greater than that afforded under the Joint Plan. In the alternative, the predetermined and guaranteed recovery available under the Joint Plan would certainly be within Grace's creditors' best interests. As such, the Court finds that the best interest of the creditors test has not been violated on these grounds.

FN115. The Court recognizes that *Piccinin* dealt with a Chapter 11 proceeding. However, as explained above, *supra*, § 362 applies to cases filed under both Chapter 7 and Chapter 11 of the Bankruptcy Code. *See* 11 U.S.C. § 362(a) (stating that petitions filed under §§ 301, 302, and 303, provisions that address the commencement of bankruptcy petitions under the Code operate as an automatic stay); *see also* Johnston, *supra*, at 101–03 ("[T]he criteria for eligibility of an entity to a be a[C]hapter 11 debtor are the same as those to be a[C]hapter 7 debtor[.]"). Thus, the findings of *Piccinin* would be applicable in a hypothetical liquidation of Grace under Chapter 7.

Finally, even if the Libby Claimants could somehow circumvent the § 362 injunction under Chapter 7, their argument still fails because they have not successfully shown the Court that the amount they would recover under Chapter 7 would indeed be higher than that under Chapter 11. Under the best interests of the creditors test, courts should only consider "the dividend the creditor would receive from the [C]hapter 7 trustee—and only that amount—for comparison with the dividend available under the [Chapter 11] plan." *In re Dow Corning, Corp.*, 237 B.R. 380, 411 (E.D.Mich.1999) (citing 7 *Collier on Bankruptcy* ¶ 1129.03[7][b]). This means that in a liquidation proceeding, the Libby Claimants would be limited to the pro rata amount awarded to them by the Chapter 7 trustee.[FN116] The Court, however, is unable to determine that this pro rata distribution of funds would be in the creditors' best interest here because the Libby Claimants have not provided any information showing that such a recovery amount would be higher than recovery available under Chapter 11. No information has been provided to explain what circumstances would require Grace's insurers to make payments, the amount and extent of such coverage, or any limits on the policy coverage. The only mention of the application of Grace's insurance policies at all is in a footnote in the Libby Claimants' appellate brief generally listing certain sections of Grace's insurance policies with one of its insurers. No explanation accompanies the list that explains how or why the Libby Claimants would recover more under Chapter 7. Additionally, the Libby Claimants have failed to take into account the fact that Grace remains involved in litigation with its insurers over the scope and coverage of its policies. Therefore, they cannot definitively show that a Chapter 7 recovery amount would actually be greater because the extent of the policy coverage still remains largely unknown. Without such information available to it, the Court is unable to find that Chapter 7 liquidation would indeed be within the creditors' best interest.

FN116. 11 U.S.C. § 704(a)(1) provides that: "The trustee shall collect and reduce to money the property of the estate ... and close such estate as expeditiously as is compatible with the best interests of parties in interest[.]"

***68** For all the above reasons, the Court declines to find that the best interest of the creditors has been violated under the present circumstances. The Chapter 11 Joint Plan would clearly provide the Libby Claimants with the same, and likely even greater, amount of recovery than would be available in a hypothetical Chapter 7 liquidation of Grace. Moreover, the certainty and guaranty of at least some amount of recovery under the Joint Plan is of tremendous value, both monetarily and procedurally, to the Libby Claimants. Therefore, the Libby Claimants' objections are overruled and the findings of the Bankruptcy Court on this point are affirmed.

H. Impairment of Claims in Chapter 11 Reorganization Plans

The Bankruptcy Code requires a reorganization plan to specify which classes of claims and interests are "impaired" and "unimpaired." *See* 11 U.S.C. § 1123(a)(2–3); *In re Aleris Int'l, Inc.*, Bankr.No. 09–10478, 2010 WL 3492664, at *13–14 (Bankr.D.Del. May 13, 2010). Impairment of claims is governed by § 1124 of the Code, which provides that "a class of claims or interests is impaired under a plan unless, with respect to each claim or interest of such class, the plan ... leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest." 11 U.S.C. § 1124(1); *see also In re Combustion Eng'g, Inc.*, 391 F.3d 190, 216 n. 24 (3d Cir.2004); *In re Polytherm Indus., Inc.*, 33 B.R. 823, 828 (D.C.Wis.1983) ("Whether a class is impaired is determined by applying the tests prescribed in § 1124, which are designed to identify the classes of claims that are impaired; that is, materially and adversely altered by the plan."). The Third Circuit addressed the issue of impairment in Chapter 11 reorganization plans in *In re PPI Enters. (U.S.), Inc.*, 324 F.3d 197 (3d Cir.2003). The creditor in *PPI Enterprises* argued that his unsecured claim was impaired by the debtor's reorganization plan because his potential recovery was limited by § 502(b)(6) of the Bankruptcy Code. *Id.* at 202. In its discussion, the court stated that:

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> Each creditor has a set of legal, equitable, and contractual rights that may or may not be altered by bankruptcy. If the debtor's Chapter 11 reorganization plan does not leave the creditor's rights entirely "unaltered," the creditor's claim will be labeled as impaired under § 1124(1) of the Bankruptcy Code. If the creditor's claim is impaired, the Code provides the creditor with a vote that, depending on the value of the creditor's claim, may be sufficient to defeat confirmation of the bankruptcy plan.

Id. The court recognized that the Bankruptcy Code creates a presumption of impairment in favor of creditors, which can only be overcome if the reorganization plan leaves the creditor's nonbankruptcy rights completely unaltered. *Id.* at 203. The Third Circuit nonetheless found that the creditor's rights in *PPI Enterprises* were not impaired because § 1124(1) is only violated if the impairment results from the terms of the reorganization plan, and not from the application of provisions in the Bankruptcy Code. *Id.* at 204. Thus, courts should not use the Bankruptcy Code as "the relevant barometer for [determining] impairment," but rather should look to the terms of the reorganization plan itself as a potential source of limitation upon the legal, equitable, or contractual rights of a creditor. *Id.*

***69** In the instant case, both the Bank Lenders and AMH allege that their claims are impaired by the terms of the Joint Plan. The Court considers each Appellant's claims separately below.

1. The Bank Lenders' Claims[FN117]

> FN117. The Bank Lenders and the Unsecured Creditors Committee filed joint objections and appellate briefs. Thus, for ease of reference, the Court refers to these parties collectively hereinafter as the "Bank Lenders." To the extent that either party asserts a separate and independent claim, the Court will clarify this in this Memorandum.

The Bank Lenders hold unsecured claims against Grace. As described in detail above, under the Joint Plan, the Bank Lenders will receive 100% payment of their $500 million principal, as well as payment of post-petition interest set at a 6.09% rate that converted into a floating Prime Rate in 2006. The Bank Lenders' post-petition interest rate under the Joint Plan is greater than the federal judgment rate and the non-default rate set under their Credit Agreements with Grace, but less than the set default rate.[FN118] Grace claims, and the Bankruptcy Court found, that no event of post-petition default occurred, and that therefore the Bank Lenders are not entitled to the post-petition default interest rate. The Bank Lenders, however, maintain that Grace's bankruptcy filing *per se,* alleged failure to meet certain reporting requirements under the loan documents, and nonpayment of the principal and post-petition interest all constitute events of default under the Credit Agreements. Thus, the Bank Lenders contend that, as a matter of state contract law, they are entitled to the default interest rate specified in their contractual agreements with Grace, and that the Plan's failure to award them this legal contractual right to which they are allegedly entitled constitutes impairment.

> FN118. The non-default rate under the Credit Agreements is 5.77% and the federal judgment rate at the time of the bankruptcy filing was 4 .19%. Under the Term Sheet, the interest rate that would apply to the Bank Lenders' claims is 6.09%.

a. Entitlement to the Post-Petition Default Interest Rate

Before the Court can properly determine whether or not the Bank Lenders are impaired by the Joint Plan, it must initially determine whether they are entitled to the post-petition default interest rate under the Credit Agreements in the first place.[FN119] The logical first step here is that some event of *default* must have occurred in order for the Court to find that the Bank Lenders are entitled to the *default* post-petition interest rate. This requires a determination as to whether or not Grace's actions here constituted a "default" under the Credit Agreements entered into by the parties. Due to the fact that no specific Code provision explicitly defines what constitutes an "event of default," such an inquiry is governed by provisions in the parties' contract or agreement. *See In re F.C.C.,* 217 F.3d 125, 136 n. 6 (2d Cir.2000) (citing *In re NextWave Personal Commc'ns, Inc.,* 244 B.R. 253, 263 (Bankr.S.D.N.Y .2000) ("The existence of a default here depends upon an interpretation of the FCC's regulations[.]")). In this case, the parties outlined what would constitute an event of default in Section 10 of both the 1998 and 1999 Credit Agreements. The Bank Lenders claim that three events of default listed in Section 10 of the Credit Agreements occurred here as a result of Grace's actions: (1) the filing of Grace's own bankruptcy petition; (2) the alleged failure to adhere to certain reporting requirements contained in the parties' loan documents; and (3) the failure to pay the remaining principal and interest after Grace filed for bankruptcy.

> FN119. To be clear, this Section of the Court's Memorandum addresses the appeals related to the Bankruptcy Court's May 19, 2009 Memorandum Opinion finding that the Bank Lenders were not *entitled* to the post-petition default rate, *In re W.R. Grace & Co.*, Bankr.No. 01–1139, 2009 WL 1469831, at *1 (Bankr.D.Del. May 19, 2009). All other objections related to confirmation, such as whether the Bank Lenders' lack of entitlement to the default rate *constituted impairment*, were addressed in the Bankruptcy Court's January 31, 2011 Memorandum Opinion, *In re W.R. Grace & Co.*, 446 B.R. 96 (Bankr.D.Del.2011), and this Court's review of objections to this 2011 Opinion are addressed elsewhere in this Memorandum. By order of this Court dated March 25, 2011, the Bank Lenders' appeals of both these Bankruptcy Court decisions were consolidated into one action. (No. Civ. A. 11–199, Doc. No. 5, Stipulated and Agreed Order Consolidating Appeals and Granting Relief from the Standing Order On Mediation.) In that Order, the Court ordered the parties to jointly file combined briefs in support of their consolidated appeals. (*Id.* at 2.)

***70** The first alleged event of default which the Court considers is the filing of Grace's own bankruptcy petition. Section 10 of the parties' Credit Agreements contains a provision providing that in the event that Grace should file for bankruptcy, this action would constitute an event of default under the contract. This provision constitutes what is known as an "*ipso facto* " clause. *Ipso facto* clauses are contractual provisions which expressly state that upon a borrower's filing of a bankruptcy petition, the creditor may accelerate the payment of the entire unpaid balance due under the terms of the contract. *I.T.T. Small Bus. Fin. Corp. v. Frederique*, 82 B.R. 4, 6 (E.D.N.Y.1987). Prior to the adoption of the Bankruptcy Code in 1978, such *ipso facto* clauses were commonly enforced. See In *re Chateaugay Corp.*, No. Civ. A. 92–7054, 1993 WL 159969, at *5 (S.D.N.Y. May 10, 1993). Now, however, it is well-established that *ipso facto* clauses are unenforceable as a matter of law under the Bankruptcy Code. *See id* . (recognizing that "contract provisions ... alter[ing] the rights or obligations of a debtor as a result of the debtor's commencement of a case under the Bankruptcy Code" are unenforceable); *In re EBC I, Inc.*, 356 B.R. 631, 640 (Bankr.D.Del.2006) (internal citations omitted) (same); *In re Lehman Bros. Holdings, Inc.*, 422 B.R. 407, 414–15 (Bankr.S.D.N.Y.2010) ("It is now axiomatic that *ipso facto* clauses are, as a general matter, unenforceable.") (internal citations omitted); *In re Hutchins*, 99 B.R. 56, 57 (Bankr.D.Colo .1989) ("Bankruptcy default clauses are not favored and are generally unenforceable under the Bankruptcy Code."); *In re Rose*, 21 B.R. 272, 276–77 (Bankr.D.N.J.1982). This is because the whole purpose of filing for bankruptcy is to provide the debtor with a "fresh start," and enforcement of *ipso facto* clauses would punish debtors by negating this central purpose. *Rose*, 21 B.R. at 277.

The general prohibition against *ipso facto* clauses has its roots in two specific sections of the Bankruptcy Code: §§ 541(c) and 365(e)(1). Section 541(c) provides that, despite a contractual provision between the parties to the contrary, a debtor's interest becomes property of the bankruptcy estate upon the filing of a bankruptcy petition and the debtor does not lose the property due to its bankruptcy petition.[FN120] Section 365(e)(1) states that clauses in executory contracts [FN121] and unexpired leases that premise default upon a party's commencement of a bankruptcy action are unenforceable.[FN122] The Bank Lenders point out that the current dispute involves neither a forfeiture of the property of the estate nor an executory contract. As such, they allege that the general prohibition against *ipso facto* clauses does not apply to their claims. This argument, however, overlooks the fact that the ban on *ipso facto* clauses has been interpreted to be much broader than the confines of §§ 541(c) and 365(e)(1). Numerous courts have prohibited enforcement of *ipso facto* clauses on more general grounds not based on either statutory provision.[FN123] *See Riggs Nat'l Bank of Wash. v. Perry*, 729 F.2d 982, 984–85 (4th Cir.1984) ("This Court's enforcement of a default-upon-filing clause would clearly intrude upon th[e] policy" of giving debtors a fresh start in bankruptcy premised upon the automatic stay in § 362(d)(1)); *Rose*, 21 B.R. at 276–77 (finding that even though the contract in issue was non-executory, the bankruptcy default clause could still not be enforced because it was contrary to the central purpose of the Bankruptcy Code); *In re Perry*, 29 B.R. 787, 790–91 (D.Md.1983) (finding that an *ipso facto* clause in an installment contract that was non-executory was nonetheless impermissible); *In re Railway Reorganization Estate, Inc.*, 133 B .R. 578, '583 (Bankr.D.Del.1991) ("Today courts continue to read the Code's *ipso facto* sections broadly to effectuate code policy and in recognition that bankruptcy matters are also inherently proceedings in equity.") (internal quotations and citations omitted). Moreover, the legislative history of

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§ 365(e) itself appears to support this notion. The statements in the legislative history indicate that Congress recognized that *ipso facto* clauses generally have the effect of "hamper[ing] rehabilitation efforts" in bankruptcy. *See, e.g.,* H.R. REP. No. 95–959. 95th Cong. 1st Sess. 348–9 (1977); SEN. REP. No. 95–989, 95th Cong., 2d Sess. 59 (1978), U.S.CODE CONG. & ADMIN. NEWS 1978, p. 6304. Courts have interpreted this legislative history as "indicat[ing] that bankruptcy-default clauses are to be invalid in all types of contracts, without limitation.... The only congressional statement is clear that in most, if not all, instances, such clauses are not enforceable.... Thus, there is simply no reason to assume that Congress intended to make these clauses enforceable only in non-executory contracts." *Rose,* 21 B.R. at 276. As such, the Court agrees with the general trend of the federal courts that the prohibition against *ipso facto* clauses is not limited to actions based upon §§ 541(c) and 365(e). The Court therefore finds that the Bank Lenders cannot premise Grace's alleged default on the *ipso facto* clause in their Credit Agreements.

FN120. Section 541(c) provides that:

> (c)(1) [A]n interest of the debtor in property becomes property of the estate ... notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law—
>
> (A) that restricts or conditions transfer of such interest by the debtor; or
>
> (B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, ...
>
> (2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

11 U.S.C. § 541(c)(1–2).

FN121. An executory contract is a contract under which the obligation of both the bankrupt and the other party to the contract are so far underperformed that failure of either to complete performance would constitute a material breach excusing performance of the other. *Enter. Energy Corp. v. United States (In re Columbia Gas Sys., Inc.),* 50 F.3d 233, 239 (3d Cir.1995).

FN122. Section 365(e) provides, in relevant part, that:

> (e)(1) Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on—

* * *

> (B) the commencement of a case under this title[.]

11 U.S.C. § 365(e)(1)(B).

FN123. In support of their argument, the Bank Lenders rely heavily on *In re Anchor Resolution, Corp.,* 221 B.R. 330 (Bankr.D.Del.1998). As a decision of a bankruptcy court, the Court notes that the findings in this case are not binding upon it, but rather merely serve as persuasive authority. Regardless, the facts of *Anchor* are very different from those in the case at hand. While the bankruptcy court in that case did recognize the debtor's voluntary petition for bankruptcy as an event of default under the parties' two contracts at issue, *id.* at 336, *Anchor* involved a complicated arrangement between the debtor and note purchasers regarding a third-party financial institution loan that was secured by several of the notes. *Id.* at 333–34. Moreover, the actions of the debtor constituted both pre-petition and post-petition defaults under the contracts. *Id.* This is not the situation here, and *Anchor* is therefore distinguishable.

***71** The Court next considers the Bank Lenders' assertion that Grace's alleged failure to comply with certain reporting requirements under the Credit Agreements constituted an event of default. Specifically, the Bank Lenders allege that Grace failed to furnish each bank with certificates and other financial information as required by Section 8.2(a)-(c) of the Agreements, did not promptly

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give notice to appropriate parties as required by Section 8.7, and did not remedy these breaches within thirty days as required under the contract. Section 10 the Credit Agreements defines the events that would give rise to a default. Nowhere in this Section is there any mention of a requirement to furnish the aforementioned information to the banks or else risk defaulting under the contract. Section 10 is also devoid of any cross-reference to Sections 8.2 and 8.7, nor is there any mention of a thirty-day time window to remedy a breach. While Sections 8.2 and 8.7 may refer to such reporting requirements, they cannot be considered events of default unless they are explicitly mentioned in Section 10. In fact, the Credit Agreements themselves require this interpretation, as an "event of default" is specifically defined under the Agreements as "any of the events specified in Section 10." (*See* 1999 Credit Agreement, Section 1 Definitions, at D.I. 19322.) The failure to adhere to these reporting requirements therefore does not constitute a grounds for default under the Credit Agreements.[FN124]

FN124. The Court notes that Section 10 does, however, require that the *Bank Lenders* give Grace notice of the acceleration of the loan in the event of a default. (*See id.,* Section 10(B)(ii).) The record indicates that the Bank Lenders never provided Grace with any such notice. The Bank Lenders' demand for hypertechnical compliance with the Credit Agreements by Grace, therefore, is somewhat weakened in light of this fact.

The Court now turns to the question as to whether or not Grace's failure to pay the post-petition interest and its failure to repay the principal when the loans matured constituted events of default entitling the Bank Lenders to the default interest rate. The Bank Lenders contend that this constituted an event of default under the Credit Agreements, and that they therefore have a state law contractual right to the default rate. Grace responds that by virtue of its bankruptcy, it was precluded from paying the interest post-petition or from repaying the principal when it became due.

The record indicates that prior to its bankruptcy petition, Grace was current with its payment obligations to the Bank Lenders.[FN125] After Grace filed for bankruptcy in 2001, it stopped making these timely payments, and as a result there has been a delay in the payment of principal and interest ever since. While this delay in payment will continue until the Joint Plan is confirmed, such a delay resulting from the filing of a bankruptcy petition does not automatically constitute an event of default entitling the Bank Lenders to the higher default rate of interest set under the Credit Agreements.[FN126]

FN125. In Section III of their Appellate Brief, the Bank Lenders put forth as one of the issues presented on appeal that "1. The Bankruptcy Court erred in concluding that no defaults exist under the Credit Agreements on the basis that ... (d) the Bank Lender Group agreed that Grace did not owe any pre-petition interest on the Bank Lenders' claims under the Credit Agreements." (Bank Lender Br. at 6.) This is, however, where consideration of this issue ended. The Bank Lenders did not pursue their objection regarding pre-petition interest any further in their brief. In fact, other sections of their brief solely reference alleged post-petition defaults. (*See, e.g.,* Bank Lender Br. at 45, "Grace defaulted on its obligations dozens of times after it filed for bankruptcy in 2001 [.]") As repeatedly explained above, mere mention of an issue on appeal without adequate explanation or briefing is not enough, and the Court will not make their argument for them. *See Sw.* Pa. Growth Alliance v. Browner, 121 F.3d 106, 122 (3d Cir.1997). The Bankruptcy Court found that: "It is undisputed that there were no prepetition defaults with respect to the obligations to the Bank Lenders and so no prepetition interest is owed." *In re W.R. Grace & Co.,* Bankr.No. 01–1139, 2009 WL 1469831, at *2 (Bankr.D.Del. May 19, 2009). Absent the Bank Lenders' introduction of evidence to the contrary, this finding is therefore affirmed.

FN126. In support of their claim for the default rate, the Bank Lenders heavily rely on the case of *In re Chicago, Milwaukee, St. Paul & Pac. R.R.,* 791 F.2d 524 (7th Cir.1986), which held that an indenture trustee was entitled to accelerate payment when the debtor in question defaulted under the parties' contracts after declaring bankruptcy. *Id.* at 527. The Bank Lenders contend that the Bankruptcy Court "totally ignored" its reliance on this case. (*See* Bank Lender Br. at 54.) As an initial matter, this assertion is summarily incorrect and misstates the proceedings before the Bankruptcy Court. The record in fact indicates that the Bankruptcy Court did consider the holding of *Chicago,* but rejected it as unpersuasive authority and outside the Third Circuit's

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jurisdiction. (*See* Hearing Trans., 09/29/08, at 60, JA 036928) ("Counsel: I believe we cited that *Chicago* case in our brief. The Court: But I'm not in Chicago. Counsel: Correct, Your Honor. The Court: Okay. Counsel: We're not in the Seventh Circuit.") The Bankruptcy Court was properly within its discretion to do so, and this Court agrees with its reasoning. Nonetheless, the Court will address *Chicago* because the Bank Lenders continue to press the import of this case.

First, as the Bankruptcy Court made clear, *Chicago* is a *Seventh,* not *Third,* Circuit case and is therefore not binding upon either the Bankruptcy Court or this Court. Even more so, however, *Chicago* is a twenty-six year-old case based on the now defunct Bankruptcy Act, not the presently governing Bankruptcy Code. *See* Chicago, 791 F.2d at 525–26 ("In 1977 the railroad petitioned for reorganization under section 77 of the Bankruptcy Act, 11 U.S.C. § 205 (1952 ed.) (which has since been repealed but remains applicable to this proceeding[.]")). Today, the indenture trustee's declaration of default after the debtor filed its bankruptcy petition would violate the protection afforded by the § 362 automatic stay under the Bankruptcy Code. *See In re Optel, Inc.,* 60 Fed. App'x. 390, 394–95 (3d Cir.2003); *In re Metro Square,* Bankr.No. 4–88–2117, 1988 WL 86679, at *2 (Bankr.D.Minn. Aug. 10, 1988) ("[U]nder 11 U.S.C. § 362, the creditor is prevented from taking overt steps to accelerate the debt, including sending notices of default.") (internal citations omitted); *In re Payless Cashways, Inc.,* 287 B.R. 482, 488 (Bankr.W.D.Mo.2002). In fact, § 1124(2) of the Bankruptcy Code would allow the de-acceleration of the debt at issue in *Chicago.* *See* 11 U.S.C. § 1124(2). Thus, for the above cited reasons, this Court likewise declines to follow *Chicago* on this point of law.

When Grace filed for bankruptcy in 2001, its debtor—creditor relationship with the Bank Lenders was significantly altered. At this point, the Bankruptcy Code intervened and became applicable law which had to be considered by both parties to the contract moving forward. Section 363 of the Code "requires, as an element of basic fairness and due process, notice, a hearing and court approval before actions impacting vital interests [of the bankruptcy estate] may be taken." *In re NextWave Pers. Commc'ns, Inc.,* 244 B.R. 253,264 (Bankr.S.D.N.Y.2000).[FN127] This means that after Grace filed for bankruptcy, it could only use the available assets in its bankruptcy estate to continue making principal and interest payments in accordance with the terms of an implemented reorganization plan or pursuant to a court order issued after notice and a hearing according due process to all affected parties. *See* 11 U.S.C. § 363, *see also* *NextWave,* 244 B.R. at 275 ("It is fundamental in a Chapter 11 case that the pre-petition claims of all creditors, whether coming due pre-or post-petition, get paid only by court order or in accordance with a court-confirmed plan of reorganization ."). But the Joint Plan has not yet been confirmed, and the Bank Lenders never applied to the Bankruptcy Court for a court order seeking compelled payment of the post-petition principal and interest. As such, the Bankruptcy Code precluded Grace from continuing to make these post-petition payments. It follows that because the Bankruptcy Code was the reason that Grace did not make the post-petition principal and interest payments, then Grace should not be held to have defaulted under its contractual arrangement with the Bank Lenders for this reason. As noted by the *NextWave* Court, "[i]t is senseless to speak of a 'default' when, as a matter of bankruptcy law, the debtors had neither the authority nor the ability to make such payments absent notice and court approval." *Id.* at 276. To hold otherwise would punish Grace for seeking bankruptcy relief.

FN127. The Bankruptcy Court's reliance on this case is a source of significant dispute between the parties because it was ultimately vacated for lack of subject matter jurisdiction. Vacation of a decision only affects its binding authority on subsequent courts—the internal discussion remains useful for persuasive authority purposes. *See Brown v. Kelly,* 609 F.3d 467, 476–77 (2d Cir.2010); *Gutter v. E.I. DuPont de Nemours & Co.,* No. Civ. A. 95–2152, 2001 WL 36086589, at *6 (S.D.Fla.2001) ("[A] logical and well-reasoned decision, despite vacatur, is always persuasive authority, regardless of its district of origin or its ability to bind.") (internal citation omitted). In any event, *NextWave* was not binding upon the Bankruptcy Court in the first place because it was a decision from a bankruptcy court in the Southern District of New York. Thus, the use of this case as persuasive authority is entirely permissible under these circumstances, and this Court likewise gives effect to its persuasive reasoning.

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*72 Nonetheless, the Bank Lenders assert that Supreme Court precedent mandates that a debtor's "happenstance of bankruptcy" should not impair a creditor's state law rights. *Butner v. United States,* 440 U.S. 48, 55 (1979) (internal citation omitted). However, in *Butner,* the Supreme Court was careful to clarify the scope of its holding, narrowing its reach by stating that state law rights should not be impacted "[u]nless some federal interest requires a different result[.]" *Id.* In the context of bankruptcy, "Congress made a determination that an eligible debtor should have the opportunity to avail itself of a number of Code provisions which [may] adversely alter creditors' contractual and nonbankruptcy law rights." *In re PPI Enters. (U.S.), Inc.,* 228 B.R. 339, 344–45 (Bankr.D.Del.1998) (citing *In re Johns–Manville Corp.,* 36 B.R. 727, 735–37 (Bankr.S.D.N.Y.1984)). Courts have routinely recognized various sections of the Bankruptcy Code as countervailing federal interests that can lawfully alter state law contract rights. *See PPI Enters.,* 228 B.R. at 345 (providing examples of several Bankruptcy Code provisions that lawfully alter debtor—creditor contracts); *In re Hudson Shipbuilders, Inc.,* 794 F.2d 1051, 1058 (5th Cir.1986) (finding that federal bankruptcy law could override state contract law in the context of determining reasonableness of attorney's fees). Here, there are several such important federal interests: (1) the overarching bankruptcy principle rooted in § 362(a) that a debtor's bankruptcy filing should afford it a fresh start and grant it some temporary breathing room from its liabilities, based on state law or otherwise, until it can effectively reorganize; (2) the Bankruptcy Code's central objective of facilitating a debtor's reorganization, as evidenced by § 1123(a)(5)(G); and (3) the limits placed upon unsecured creditors in bankruptcy due to their unsecured status, found in § 502(b)(2) of the Bankruptcy Code. Thus, even if by some chance there was an event of default under the Credit Agreements, the interests of federal bankruptcy law at play here would nonetheless "require a different result" and could therefore permissibly alter any state law contractual rights that the Bank Lenders may have.

Under § 362(a) of the Code, a party filing for bankruptcy is automatically granted temporary relief from the assertion of any legal actions against it. See 11 U.S.C. § 362(a)(3); *see also In re Atl. Bus. & Cmty. Corp.,* 901 F.2d 325, 327 (3d Cir.1990). There is no question that the impact of this federal bankruptcy law can factually and legally alter prior contractual agreements between parties. *See NextWave,* 244 B.R. at 266 (stating that § 362 "ensures that contractual and State or Federal law rights and remedies ... will be precluded [or] held in abeyance" in order for the "ultimate objectives" of Chapter 11 reorganization to be realized). However, as evidenced by the legislative history of this statutory provision:

> *73 The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors.... [It] also provides creditor protection. Without it, certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors.

See H.R.Rep. No. 595, 95th Cong., 2d Sess. 340 (1977), *reprinted in* 1978 U.S.CODE CONG. & ADMIN. NEWS 6296. The statements in the statute's legislative history amplify the underlying public policy in federal bankruptcy law that a debtor's bankruptcy estate should be maximized for the benefit of both the debtor and all of its creditors. This policy is particularly important in reorganization cases, where the automatic stay is utilized to maintain the status quo and avoid piecemeal liquidation while the debtor formulates a reorganization plan. *See NextWave,* 244 B.R. at 266. If the Court were to give effect to the Bank Lenders' claim that Grace's failure to make the post-petition payments constituted an event of default, then it would encroach upon these fundamental principles rooted in § 362(a).[FN128] Having determined that there has been no event of default, the Bank Lenders have not satisfactorily explained how their request for a higher interest rate would not be detrimental to Grace and its other creditors by leaving the bankruptcy estate with fewer funds available to repay them. The underlying policy rationale of § 362(a) is an important federal interest here that the Court must consider and that, even in the event of a state law contractual default, could nonetheless compel a different result.

> FN128. The Bank Lenders rely on *AM–Haul Carting, Inc. v. Contractors Cas. & Sur. Co.,* 33 F.Supp.2d 235 (S.D.N.Y.1998) for the proposition that the § 362 automatic stay does not nullify a debtor's defaults on its obligations after bankruptcy. *AM–Haul* involved a dispute between a general contractor, subcontractor, and construction company. *Id.* at 238. The post-petition default in question was the subcontractor's failure to perform certain work on the construction project, as it was required to do under the contracts. *Id.* at 240. This case is distinguish-

able from *AM–Haul.* First, the contracts at issue significantly differ. This case involves complex financial loan contracts, not construction contracts between contractors and subcontractors. Moreover, *AM–Haul* did not deal with a massive Chapter 11 reorganization plan akin to Grace's Joint Plan. Most importantly, the default in *AM–Haul* was not an alleged failure to pay post-petition principal or interest payments, but rather a failure to perform physical work as required by the construction contract. There is nothing in the Bankruptcy Code that would have prevented the debtor in *AM–Haul* from performing physical work that it was required to do by contract, whereas here the ability to make post-petition payments would be affected by the Code. As such, the Court is not persuaded by the application of *AM–Haul* to the instant dispute.

A second federal interest at play here is the Bankruptcy Code's central objective of facilitating a debtor's reorganization. The whole point of filing a Chapter 11 bankruptcy petition is to loosen the financial noose that has been placed around the debtor's neck so that it can reassess its available assets and liabilities and proceed forward as a viable entity able to properly satisfy all of its creditors and outstanding obligations. Section 1123(a)(5)(G) of the Code facilitates this central objective of reorganization, providing that a debtor's reorganization plan shall "provide adequate means for the plan's implementation, such as ... curing or waiving any default." 11 U.S.C. § 1123(a)(5)(G). Although not explicitly defined, curing a default has been interpreted to mean the reversal of an event triggering the alleged default so as to return to pre-default conditions during the reorganization period. *See* NextWave, 244 B.R. at 268 ("The 'cure,' although not defined, is 'reversal' of the event that triggered the default and a return to a pre-default status quo.") (internal citations omitted); *In re Taddeo,* 685 F.2d 24, 26–27 (2d Cir.1982) (stating that "[c]uring a default commonly means taking care of the triggering event[.]"); *In re Charter Commc'ns,* 409 B.R. 649, 653 n. 3 (Bankr.S.D.N.Y.2009) (same). Thus, even if a contractual default occurred here, it would have to be cured or waived in order for the Joint Plan to be properly implemented. This means that the triggering event of default—for example, Grace's failure to pay post-petition interest—would be reversed and a return to the pre-default status quo would be required. This statutory section therefore serves as another example of an important federal interest—the facilitation of a debtor's reorganization—that could mandate a different result here and lawfully alter any state law contractual rights that the Bank Lenders may have.FN129

FN129. The Bank Lenders also make an argument for the post-petition default interest rate predicated on § 1124(2)(A), which provides that a claim can only be unimpaired if the reorganization plan "cures any such default that occurred before or after the commencement of the case." 11 U.S.C. § 1124(2)(A). The Bank Lenders argue that "[o]bviously, if a default must be cured, the default must necessarily exist." (Bank Lender Br. at 48.) In making this argument, however, the Bank Lenders undermine their other argument that federal bankruptcy law has no effect on their state law contractual rights under *Butner.* Section 1124(2)(A) basically provides that even if there has been a default according to state contract law, federal bankruptcy law requires that the event be cured. This statutory section is actually another example of a federal law provision that can lawfully affect otherwise applicable state law rights.

Moreover, the legislative history of § 1124(2) provides that: "The intervention of bankruptcy and the defaults represent a temporary crisis which the plan of reorganization is intended to clear away. The holder of a claim or interest who under the plan is restored to his original position, when others receive less or get nothing at all, is fortunate indeed and has no cause to complain." S.REP. NO. 989, 95th Cong., 2d Sess. 120 (1978), U.S.CODE CONG. & ADMIN. NEWS p. 5906. The statements in the legislative history nicely illuminate the present situation. Under Grace's Joint Plan, the Bank Lenders will be "restored to their original position"—they will receive full payment of the principal, plus interest set at a rate higher than both the federal judgment rate and non-default rate under the Credit Agreements. The rate of interest that the Bank Lenders will receive is also higher than the rate awarded to all other unsecured creditors in Class 9 under the Plan. As such, the Bank Lenders are "fortunate indeed." *Id.*

***74** Finally, § 502(b)(2) prohibits the allowance of unmatured interest as part of an allowed unsecured claim. It is well-established that when a debtor files for bank-

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ruptcy, the accrual of interest on its loans is suspended, and any subsequent claims brought by unsecured creditors for the amount of this "unmatured interest" is prohibited under § 502(b) of the Bankruptcy Code. *See* 11 U.S.C. § 502(b); FN130 *see also In re United Artists Theatre Co.,* 406 B.R. 643, 651 (Bankr.D.Del.2009). Thus, the general rule is that payment of *any* post-petition interest, whether at a default or non-default rate, on pre-petition unsecured claims is prohibited by the Bankruptcy Code. *See United Artists,* 406 B.R. at 651. Whereas there are exceptions to this general rule, none of them apply here. FN131 If interest on an unsecured claim is to be paid at all, it would only be "paid *on* an allowed claim ... rather than *as* an allowed claim." *In re Dow Corning,* 244 B.R. 678, 685 (Bankr.E.D.Mich.1999). Thus, if the Court were to allow Grace's failure to pay the post-petition interest to constitute an event of default, this would likewise eviscerate the federal bankruptcy interest of prohibiting payment of unmatured interest to unsecured creditors during the pendency of the debtor's bankruptcy. It is worth reiterating what exactly the Bank Lenders stand to receive here: an interest rate higher than both the federal judgment rate and the non-default rate under the contracts. This is crucial since, as unsecured creditors, the Bank Lenders could otherwise be subject to the general rule and possibly not recover *any* interest at all. Therefore, the § 502(b)(2) prohibition of payment of unmatured interest is a third example of an important federal interest which could—assuming the Bank Lenders could prove it—lawfully adversely affect creditor state law contractual rights. *See PPI Enters.,* 228 B.R. at 345 (listing § 502(b)(2) as a Code provision that clearly alters creditor contractual and nonbankruptcy law rights).

FN130. Section 502 states, in relevant part:

> (a) A claim or interest ... is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.
>
> (b) [I]f such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that—
>
> * * *
>
> (2) such claim is for unmatured interest[.]

11 U.S.C. § 502(a)(b)(2).

FN131. There are two exceptions to the general rule that would allow creditors to proceed against the debtor for the post-petition interest: (1) when a creditor is oversecured under § 506(b); and (2) under § 726(a)(5), when the debtor in interest has sufficient funds on hand to pay the interest after having satisfied all other allowed claims. Here, the § 506 exception does not apply because the Bank Lenders are *un* secured, not *over* secured, creditors of Grace. The § 726(a)(5) exception, on the other hand, provides that if the debtor in question is solvent, then creditors can be paid the post-petition interest "at the legal rate." 11 U.S.C. § 726(a)(5). The Bank Lenders claim that because Grace is solvent, this exception should apply and they should be entitled to the post-petition interest. Grace's solvency, however, was never determined. As such, this exception is inapplicable.

Based on all the above, the Court finds that the Bank Lenders are not entitled to the default post-petition interest rate because: (1) no event of default giving way to the default rate has actually lawfully occurred here, FN132 and therefore the Bank Lenders have no state law contractual right to the requested interest rate; and (2) even if state contract rights were present, they could lawfully be overridden under *Butner* in light of the significant federal interests involved here. Given that there has been no event of default, there likewise is no entitlement to the post-petition default rate. FN133 Therefore, the Bank Lenders' claim of entitlement to the default interest rate is denied, and, in accordance with the terms of the Joint Plan, they will be repaid the full principle balance of their claims, plus interest at the rates set forth in the Term Sheet (6.09% from the 2001 Petition Date through December 31, 2005, and thereafter at a floating Prime Rate).

FN132. The Bank Lenders also make the argument that, regardless of whether an event of default occurred under these circumstances, they are still entitled to a higher rate of interest because the principal loans matured during Grace's bankruptcy. The Bank Lenders state that a different Section of the Credit Agreements—Section 5.1(c)—governs when the loans have matured and provides a different interest rate (the

Alternate Base Rate plus 2%) that applies irrespective of Section 10. However, this higher interest rate is not available merely because the loans have matured. Rather, the higher interest rate is available if Grace has *failed to repay* the loans when they matured. As a factual and legal matter, Grace could not continue to repay the principal during the course of its bankruptcy. To now require it to pay a higher interest rate as a result of its bankruptcy petition would effectively be punishing Grace for seeking the bankruptcy relief to which it is lawfully entitled. As such, this objection is overruled.

FN133. On June 20, 2011, Appellants filed a Notice of Supplemental Authority with the Court (*See* Bankr.No. 11–199, Doc. 139). In this Notice, Appellants wished to inform the Court of a recent decision in the Southern District of New York, *In re General Growth Properties, Inc.,* 451 B.R. 323 (Bankr.S.D.N.Y.2011), that addresses very similar issues to those presently on appeal in this case. The Court takes note of Appellants' due diligence and careful attention here. Nonetheless, the Court finds *General Growth Properties* unpersuasive because there remain several key distinctions between that case and the one at hand. First, *General Growth Properties* held that a *secured* creditor was entitled to post-petition interest on its claim at the contractual default rate. *Id.* at 324. The Bank Lenders in the instant dispute hold *unsecured* claims. Second, in *General Growth Properties,* the clause in the contract including the event of default premised on the commencement of a voluntary bankruptcy case called for an immediate and automatic default and did not require the creditor to provide notice of the default to any party. As mentioned above, Section 10 of the Credit Agreements at issue here required the Bank Lenders to give Grace notice prior to calling the event of default and accelerating the debt. *Id.* Third, a significant portion of the court's analysis in *General Growth Properties,* including its citation to and reliance on Second Circuit precedent, was driven by the fact that the debtors in those cases were unquestionably solvent. *Id.* at 328. In fact, the debtor in *General Growth Properties* was *highly* solvent, and made such significant progress during the course of its reorganization that it was able to re-list its stock on the New York Stock Exchange even before emerging from bankruptcy. *Id.* at 325. This is certainly not the case here, where Grace's solvency remains an issue of hot dispute. Moreover, the *General Growth Properties* Court relied on several equitable considerations in arriving at its decision, including that the default rate would not constitute a "penalty" to the "exceedingly solvent" debtor, a lack of misconduct, and the fact that payment of the default interest would not inflict harm on other unsecured creditors or hamper the debtor's emergence from bankruptcy. *Id.* at 328–29. Such equitable considerations are not present in the instant case. Finally, the Court notes that the only case to discuss and rely *General Growth Properties* since it was filed, *In re Sw. Hotel Venture, LLC,* 460 B.R. 4, 35 (Bankr.D.Mass.2011), did so in the context of pre-petition events of default. Thus, the Court acknowledges the similarity between the instant case and *General Growth Properties,* but finds the two cases distinguishable.

b. Section 1124(1) and Alleged Impairment Under the Joint Plan

*75 Under § 1124(1), the presumption of creditor impairment is only overcome if the debtor's reorganization plan does not adversely alter any of the creditor's legal, equitable, or contractual rights. *See* 11 U.S.C. § 1124(1); *PPI Enters.,* 324 F.3d at 203; *In re Nickels Midway Pier, LLC,* 452 B.R. 156, 164 (D.N.J.2011). Having determined that the Bank Lenders have no right to the post-petition default interest rate in the first place, it follows that the Joint Plan cannot impair any of the Bank Lenders' legal, equitable, or contractual rights in violation of § 1124. It is only logical that there can be no impairment if there are no existing rights to impair.

Additionally, the Third Circuit in *PPI Enterprises* specifically provided that once a debtor files its bankruptcy petition, a creditor is only entitled to its rights under the Bankruptcy Code. *PPI Enters.,* 324 F.3d at 205. As such, any alleged impairment would have to "result[ ] from what the *plan* does, not what the [Bankruptcy Code] does." *Id.* at 204 (quoting *In re Am. Solar King Corp.,* 90 B.R. 808, 819–20 (Bankr.W.D.Tex.1988)) (emphasis in original). Applying this point of law to the instant case, any alleged impairment that the Bank Lenders may have experienced would have to be a consequence of the Joint Plan rather than application of various provisions of the Bankruptcy Code. The Joint Plan itself, however, does not alter any of the Bank Lenders' alleged rights. Instead, if

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the Court were to find any impairment here at all (which it does not), such impairment would solely stem from operation of the Bankruptcy Code, most notably the § 502(b)(2) prohibition against payment of unmatured, post-petition interest. In fact, the Court notes that the Third Circuit in *PPI Enterprises* found no impairment to the creditor's claim based on the application of a different subsection of the same exact statutory provision, § 502(b). *Id.* at 204 ("[W]e hold that where § 502(b)(6) alters a creditor's nonbankruptcy claim, there is no ... impairment under § 1124(1)."). It is unlikely that the Third Circuit meant to sift the statutory grains of sand here so finely—if it found no impairment on the basis of application of subsection (b)(6) to a creditor's claim, then it stands to reason that there likewise would be no impairment from the application of subsection (b)(2). Thus, the Court finds that where the Bankruptcy Code alters any alleged nonbankruptcy claims that the Bank Lenders may have, there is no alteration of legal, equitable, or contractual rights for the purposes of § 1124(1) impairment under *PPI Enterprises.* As such, the Bank Lenders' claims of impairment doubly fail for this reason.

c. Solvency and Impairment

A significant point of contention between the parties is Grace's solvency. The Bank Lenders contend that Grace is presumed to be solvent because equity will retain an interest under the Joint Plan since Grace's shareholders will still receive their shareholder interests. On this point, the Bankruptcy Court found that a presumption of post-petition default interest is payable to the Bank Lenders only if solvency has been established. *See In re W.R. Grace & Co.,* Bankr.No. 01–1139, 2009 WL 1469831, at *5 (Bankr.D.Del. May 19, 2009). On appeal, the Bank Lenders now allege that the Bankruptcy Court violated Third Circuit precedent in *PPI Enterprises* "when it held that the Bank Lenders' unsecured claims, while not being paid the full amount of interest due on them, were nevertheless not impaired because Grace had not been established solvent as a matter of fact." (Bank Lender Br. 20.) As an initial matter, this Court has already determined that the Bank Lenders are not entitled to the default rate of interest under the Credit Agreements. It follows that they therefore *are* being paid the full amount of interest—6.09% converted to floating Prime in 2006—owed on their general unsecured claims under the Joint Plan. This finding alone should end the inquiry. Nonetheless, due to the significant debate between the parties surrounding this issue, the Court pauses to opine on two points that are relevant to the Bank Lenders' argument.

***76** First, the Court will briefly comment on the issue of solvency. The Bankruptcy Court ultimately found that a determination of Grace's solvency could not be made as a matter of fact,[FN134] and that the Bank Lenders' arguments for a presumption of solvency were not supported by the record or operation of law. Contrary to the Bank Lenders' assertions that solvency "is not something that has to be proven by creditors" and that "it is automatic and taken as a given" under the present circumstances (Bank Lender Br. at 57), the law is clear that the burden was on them, as the objecting party, to prove solvency. *See In re Exide Techs.,* 303 B.R. 48, 58 (Bankr.D.Del.2003) (internal citations omitted). The Bankruptcy Court found that the Bank Lenders did not satisfy their burden and that there was insufficient evidence to render Grace solvent. Specifically, a review of the record indicates that, among other actions, the Bankruptcy Court heard extensive testimony from witnesses on behalf of both parties regarding Grace's solvency, conducted a careful review of relevant caselaw, and considered Grace's potential solvency under three different market accounting tests used to determine debtor solvency. Most notably, the Bankruptcy Court oversaw numerous estimation trials between the parties that sought to determine Grace's assets and liabilities, and the Bank Lenders failed to establish Grace's solvency during these proceedings.[FN135] After consideration of all the aforementioned evidence, the Bankruptcy Court held that Grace's solvency could not be established because a final determination of Grace's liabilities remains unknown. Rather than rehash what was already properly done in the first place, this Court notes that the Bankruptcy Court, which oversaw administration of Grace's bankruptcy estate for over ten years prior to rendering its decision, was in the best possible position to consider this evidence. The record clearly reflects that the Bankruptcy Court properly and carefully considered all testimony and evidence before it prior to making its decision. No abuse of discretion on its part is immediately apparent to this Court. The Bankruptcy Court's findings on the issue of solvency are therefore affirmed.[FN136]

FN134. The Bank Lenders claim that the Bankruptcy Court erroneously adopted a presumption of insolvency by relying on *Sierra Steel, Inc. v. Totten Tubes, Inc.,* 96 B.R. 275, 277 (9th Cir.B.A.P.1989). The Bank Lenders contend that *Sierra Steel* dealt with a preference action, not a Chapter 11 reorganization plan, and therefore the Bankruptcy Court's reliance on this case was improper. A careful reading of the Bankruptcy Court's Opinion indicates that it did not rely on

Sierra Steel to establish a presumption of insolvency, but rather merely cited to it to support its finding that a determination of solvency is a question of fact, not law. Thus, the Bank Lenders' objection on this point is without merit.

FN135. As part of what appears to be a tactical litigation strategy, the Bank Lenders withdrew from the estimation litigation. Nonetheless, the record indicates that the Bankruptcy Court repeatedly informed interested parties, including the Bank Lenders, that they would need to present evidence if they wished to pursue any claims based on Grace's solvency. Despite repeated invitations and opportunities, the Bank Lenders never did so.

FN136. The Bank Lenders also claim that the Bankruptcy Court improperly conflated the issues of plan feasibility and solvency. The Bankruptcy Court found that while a determination of Grace's solvency could not yet be rendered, it nonetheless held that the Joint Plan was feasible. The Bank Lenders contend that these two conclusions are "irreconcilable." (Bank Lender Br. at 40.)

The issues of solvency and plan feasibility are different, but nonetheless often interrelated. In order to confirm a reorganization plan, § 1129(a)(11) of the Code requires that the debtor establish that its plan "present[s] a workable scheme of organization and operation from which there may be reasonable expectation of success." Corestates Bank, N.A. v. United Chem. Techs., Inc., 202 B.R. 33, 45 (E.D.Pa.1996). Bankruptcy courts can consider a wide array of factors in determining whether or not a plan is feasible, including whether the reorganized debtor will emerge from bankruptcy as a solvent entity. *See In re Magnatrax Corp.*, Bankr.No. 03–11402, 2003 WL 22807541, at *7 (Bankr.D.Del. Nov. 17, 2003); *In re Duval Manor Assoc.*, 191 B.R. 622, 632 (Bankr.E.D.Pa.1996). Plan feasibility, however, only concerns a reorganized debtor's solvency *after* it undergoes reorganization and is set to emerge from bankruptcy. Whether or not the debtor is solvent prior to confirmation of the plan is irrelevant to the feasibility inquiry. Thus, it is possible that Grace could emerge from bankruptcy as a solvent entity after having undergone reorganization. Indeed, that is the goal here. A determination of Grace's solvency prior to this point, however, is unnecessary to render the Plan feasible. As such, the Bankruptcy Court's decisions regarding solvency and plan feasibility are reconcilable, and the Bank Lenders' objection on this point is without merit.

Second, the Bankruptcy Court did not run afoul of *PPI Enterprises*. It is true that in that case the Third Circuit found that "to be unimpaired, the claim must receive postpetition interest." *PPI Enters.*, 324 F.3d at 206, 207 (agreeing with bankruptcy court's analysis in *In re PPI Enterprises (U.S.), Inc.*, 228 B.R. 339, 352 (Bankr.D.Del.1998)). The Bank Lenders attempt to use this language to stand for the proposition that a claim will be considered impaired unless the creditor is paid postpetition interest *at the default rate.* This interpretation is not plausible, however, because *PPI Enterprises* did not address a creditor's right to a default interest rate specified in the parties' contracts.

*77 Moreover, the Bank Lenders claim that *PPI Enterprises* applies equally in solvent and insolvent debtor cases. But *PPI Enterprises* said nothing about insolvent debtors. Rather, the Third Circuit favorably cited to a footnote in a bankruptcy court decision which stated that "a solvent debtor must ... pay post-petition and pre-confirmation interest on a claim to have a class considered 'unimpaired.' " *In re Rocha*, 179 B.R. 305, 307 n. 1 (Bankr.M.D.Fla.1995). Therefore, *PPI Enterprises* at most stands for the proposition that a claim must receive *some* form of post-petition interest in a *solvent* debtor case to qualify as unimpaired. The Third Circuit did not provide that *insolvent* debtors must *always* pay post-petition interest, let alone at a contractual default rate, to their unsecured creditors. Thus, the Bankruptcy Court was correct to find that "[o]ur research has indicated, at best, a presumption of postpetition default interest payable to unsecured creditors only when solvency has been determined as a matter of fact[.]" *In re W.R. Grace & Co.*, Bankr.No. 01–1139, 2009 WL 1469831, at *5 (Bankr.D.Del. May 19, 2009). Its holding is therefore in line with—and not contrary to—the Third Circuit's holding in *PPI Enterprises.* As stated above, solvency has not been conclusively established here as a matter of fact.

Even if the Court were to assume that Grace was solvent,[FN137] for purposes of this discussion only, it still would not make a difference because *PPI Enterprises* does not stand for the proposition that unsecured creditors must receive post-petition interest at the contractual default rate in order to render their claims unimpaired. Rather, *PPI Enterprises* can at most be applied here to require the Bank Lenders to receive some form of post-petition interest, regardless of whether or not that interest is at the contractual rate of interest. Other cases, including the Bank Lenders' oft-cited *Chicago,* support this interpretation. *See* Chicago, 791 F.2d at 528 (providing that if the debtor is *solvent,* then "the task for the bankruptcy court is simply to enforce creditors' rights according to the tenor of the contracts that created those rights"); *In re Gencarelli,* 501 F.3d 1, 7 (1st Cir.2007) ("Let us be perfectly clear. This is a *solvent* debtor case and, as such, the equities strongly favor holding the debtor to his contractual obligations as long as those obligations are legally enforceable under applicable non-bankruptcy law."); *In re Dow Corning,* 456 F.3d 668, 672–73 (6th Cir.2006) (discussing contractual provisions for insurance in a solvent debtor cases) (emphasis added). Here, the Joint Plan is consistent with the Third Circuit's language in *PPI Enterprises:* even though the Bank Lenders have not established a right to the contractual default rate, they will nonetheless receive some post-petition interest—at a rate that is higher than both the non-default and federal judgment rate—in a case where solvency has not been established. This is all that *PPI Enterprises* requires.

FN137. Additionally, *PPI Enterprises* does not support the Bank Lenders' definition of solvency in this case. The Bank Lenders define solvency as "not balance sheet solvency," but "equity retaining value because it is only in that instance that an increase in one creditor's distributions will not diminish other creditors' recoveries[.]" (Bank Lender Br. 30.) *PPI Enterprises,* however, did not define solvency, and certainly did not hold that a debtor whose equity retains value under its reorganization plan impairs its creditors and must pay them post-petition interest. In fact, the Third Circuit agreed with the bankruptcy court's analysis below in *PPI Enterprises,* which had stated that, "[i]n large Chapter 11 cases, it is possible to have numerous leases rejected, the resulting claims capped pursuant to § 502(b)(6), and value retained by interest holders. Thus, Congress clearly contemplated value being given to equity holders even where creditors' nonbankruptcy law rights are materially adversely affected by the Code." *PPI Enterprises,* 228 B.R. 339, 346 (Bankr.D.Del.1998), *aff'd* 324 F.3d 197, 207 (3d Cir.2003). As such, the Bank Lenders' reliance on this case to support its definition of solvency as equity retaining value is misplaced.

*78 For all the above reasons, the Court therefore overrules the Bank Lenders' objections on the grounds that the Bankruptcy Court erred in concluding that: (1) no defaults exist under the Credit Agreements; (2) the Bank Lenders are not entitled to contractual default rate under the Credit Agreements; (3) the legal rate of interest is the federal judgment rate; (4) there was not enough evidence to find that Grace is solvent under these circumstances; and (5) the Joint Plan leaves the Bank Lenders' claims in Class 9 unimpaired under § 1124 of the Bankruptcy Code. The Bankruptcy Court's findings on these grounds are therefore affirmed.

2. AMH's Claims

a. Entitlement to Post–Petition Interest

Under Grace's Joint Plan, claims in Class 7 either fall into the traditional property damage category in Class 7A, or the American ZAI property damage category in Class 7B. Claims in Class 7A are further delineated as "resolved" claims or "unresolved" claims. Resolved claims are those that have already been settled through a settlement agreement reached by the parties or an appropriate court order, while unresolved claims are those that still remain in dispute. Both types of claims are subject to slightly different distribution procedures for payment,[FN138] but the Plan ultimately calls for all claims in Class 7A to be paid their full allowed amount. AMH's claims are traditional property damage claims and therefore fall within Class 7A. Moreover, its claims are unresolved because AMH has not yet reached an agreement with Grace.

FN138. Section 3.1.7(b) of the Joint Plan provides that resolved claims in Class 7A are to be paid in accordance with the appropriate settlement agreements, stipulations, or orders that have been put in place. Unresolved claims in Class 7A are to be paid pursuant to the procedures set forth in the Class 7A CMO.

AMH contends that this categorization of its claims is incorrect. Rather, AMH believes that its claims in Class 7A should be categorized as impaired because Class 7A claimants are not entitled to recover interest on their claims, thereby affecting their legal rights. In order to be impaired by the Joint Plan on these grounds, AMH would

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first need to show that it was entitled to the interest in some way. The general rule in bankruptcy is that "unsecured creditors are not entitled to recover post-petition interest." *In re Wash. Mut., Inc.,* Bankr.No. 08–12229, 2011 WL 4090757, at *29 (Bankr.D.Del. Sept. 13, 2011) (citing *United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd.,* 484 U.S. 365, 372–73 (1988)). An unsecured creditor can only circumvent this rule if the debtor at issue is found to be solvent. *Id.*

In the instant case, however, the issue of solvency was never determined, despite the Bankruptcy Court's willingness to do so. *See In re W.R. Grace & Co.,* 446 B.R. 96, 107 (Bankr.D.Del.2011) (stating that no party chose to pursue litigation regarding debtor solvency). Thus, the Court applies the general rule here, and finds that, as an unsecured creditor, AMH has no direct right to the post-petition interest, and its claims are therefore not impaired.[FN139]

FN139. AMH also asserts that Class 7A should be categorized as an impaired class because the Joint Plan denies it the ability to pursue its claims in its preferred forum in South Carolina. The Court already discussed this matter, *supra,* when addressing AMH's objection to the structure of the PD Trust. Given that the Court has already found that AMH was not denied a choice of forum since it willingly submitted itself to the Bankruptcy Court's jurisdiction, AMH's impairment argument on these grounds is rendered moot and the Court need not opine on it any further here.

Even if AMH could somehow show that it was entitled to the post-petition interest, its argument would still fail because its claims are not "materially and adversely" affected by the Joint Plan. *In re Polytherm Indus., Inc.,* 33 B.R. 823, 828 (D.Wisc.1983). Rather, the Plan provides that *all* claims in Class 7A will be paid 100% of the allowed amount. Moreover, the Class 7A Deferred Payment Agreement actually provides for payment of interest for all property damage claims that have been allowed against the trust. (*See* Deferred Payment Agreement (Class 7A PD), Ex. 27, JA 000859.) Therefore, AMH's objection further fails on these grounds. As such, the Court affirms the Bankruptcy Court's finding that AMH was properly categorized as a Class 7A unimpaired claimholder.

b. The Effect of Impairment on Voting Rights

*79 The distinction between impaired and unimpaired claims is important because only impaired classes have a right to vote to accept or reject a reorganization plan. *See Polytherm,* 33 B.R. at 828. Unimpaired claimholders, on the other hand, are "conclusively presumed to have accepted the plan, and [their] participation in or approval of the reorganization plan is not necessary for the plan to gain confirmation by the bankruptcy court." *In re Drexel Burnham Lambert Grp., Inc.,* 960 F.2d 285, 290 (2d Cir.1992) (internal citations and quotations omitted).

Moreover, § 524(g) has additional requirements in place for voting procedures under Chapter 11 reorganization plans related to debtor asbestos liability. Specifically, in order to accept the debtor's reorganization plan, the statute requires that all classes that are affected by the trust's distribution procedures must vote to accept the plan by a majority of at least 75%. *See* 11 U.S.C. § 524(g)(2)(B)(ii)(IV)(bb).

AMH alleges that its placement in an unimpaired class negatively impacts its voting rights. This contention, however, is without merit. Sections 6.1 and 6.3 of the Joint Plan provide that all impaired classes are entitled to vote on acceptance or rejection of the Plan, while all unimpaired classes are conclusively presumed to have voted to accept the Plan. The Plan recognizes, however, that Class 7 is actually one class split into two subclasses, with Class 7A categorized as an unimpaired class and Class 7B categorized as an impaired class. Section 524(g) would be violated if the two subclasses were treated differently for voting purposes. Cognizant of this fact, the Plan Proponents crafted the Joint Plan so that the votes of all claimants in Class 7 would be solicited and tabulated as one, single class. Therefore, even though Class 7A is categorized as an impaired class, the terms of the Joint Plan provide that it is still entitled to vote on the Plan's acceptance or rejection. Having already determined above that AMH's claims are properly categorized in Class 7A, AMH would thus still be allowed to vote. As such, its voting rights have not been negatively impacted.[FN140] To the contrary, the Class 7 voting rights indicate that the Plan Proponents and Bankruptcy Court meticulously scrutinized the terms of Plan to make sure that it complied with all provisions of the Bankruptcy Code. Thus, AMH's objection to the Joint Plan on these grounds is overruled.

FN140. In a separate but related argument, AMH argues Class 7A was improperly "lump[ed] together" with Class 7B for voting purposes, and that this "classification scheme" also negatively impacts its voting rights. First, the Court notes that claim classification and vote solicitation are two entirely distinct concepts under the Bankruptcy Code, and therefore the underlying premise of AMH's claim is incorrect. Regardless, it makes no difference whether Classes 7A and 7B were lumped together for voting purposes because Class 7A, independent of Class 7B, voted overwhelmingly in favor of the Plan. Thus, even if Class 7A would have voted separately upon acceptance or rejection of the Joint Plan, AMH's claims would still have been subsumed by a majority vote of Class 7A in favor of the Plan.

I. The Libby Claimants' Right to Trial by Jury Claims

The Libby Claimants assert that the Bankruptcy Court erred in confirming the Joint Plan because its present structure deprives them of their constitutional and statutory rights to a jury trial. As described above, the Joint Plan provides two forms of claims processing: Expedited Review and Individual Review. If a claimant is dissatisfied with the outcome of these two procedures, he can seek further review through mediation and non-binding arbitration. If the claimant is still dissatisfied after exhausting these options, he can then elect to have his claims liquidated in the tort system by jury trial. However, if a claimant elects to proceed to jury trial, his potential recovery under the Joint Plan is limited to the lesser of the amount of the jury verdict or the Maximum Value established by the TDP. The Libby Claimants allege that this "lesser-of" limitation on their recovery places an undue burden on the exercise of a constitutional right, as well as violating their statutory rights under 28 U.S.C. § 1411. The Court considers each argument separately below.

1. Rights Under the Seventh Amendment to the United States Constitution [FN141]

FN141. The Libby Claimants also allege that the Joint Plan violates their constitutional rights under the Montana Constitution. Normally, federal courts may abstain in favor of state court adjudication if there is an unresolved question of state law which only the state courts could authoritatively construe, and which may avoid the unnecessary decision of a federal constitutional issue. *R.R. Comm'n of Tex. v. Pullman Co.,* 312 U.S. 496 (1941); *Conover v. Montemuro,* 477 F.2d 1073, 1079 (3d Cir.1973). It is a well-established rule, however, that when a state constitutional provision essentially mirrors the portion of the federal Constitution at issue in a case, then the federal court need not abstain from deciding the case. *See Wisconsin v. Constantineau,* 400 U.S. 433, 439 (1971); *Stephens v. Tielsch,* 502 F.2d 1360, 1362 (9th Cir.1974) ("[I]t would entail wasteful duplication of effort to send cases back for state adjudication in the circumstances present here. Litigants would have two bites at the apple—first in state court, then in federal court—both on essentially the same constitutional claim."). The Supreme Court of Montana has held that the right to a jury trial under the Montana Constitution is "the same as that guaranteed by the Seventh Amendment." *Linder v. Smith,* 193 Mont. 20, 23, 629 P.2d 1187, 1189 (Mont.1981) (internal citations omitted). Thus, because the state and federal constitutional provisions are virtually identical, this Court need not abstain from deciding this case on *Pullman* abstention grounds.

***80** The Seventh Amendment to the United States Constitution guarantees the right to a jury trial in suits at common law.[FN142] "The heart of the [Seventh Amendment] is to decide what constitutes the province of the jury as trier of the facts[.]" *Pierre v. E. Air Lines,* 152 F.Supp. 486, 488 (D.N.J.1957). In *Granfinanciera, S.A. v. Nordberg,* 492 U.S. 33 (1989), the Supreme Court of the United States stated that suits at common law refer to "suits in which legal rights [are] to be ascertained and determined, in contradistinction to those where equitable rights alone [are] recognized [.]" *Id.* at 41 (internal citations and quotations omitted). The notion of "legal rights" within the meaning of the Seventh Amendment encompasses actions seeking monetary damages. *See Curtis v. Loether,* 415 U.S. 189, 195–96 (1974) (noting that damages are the "traditional form of relief offered in the courts of law"); *Dairy Queen, Inc. v. Woods,* 369 U.S. 469, 476–77 (1962) (stating that a complaint seeking monetary relief is "unquestionably legal" in nature); *In re G–I Holdings,* 323 B.R. 583, 601–02 (Bankr.D.N.J.2005) (same). While this Court has not previously ruled on the issue, it hereby agrees with and adopts the view of sister courts within the Third Circuit that have concluded that the claims of "asbestos claimants are legal in nature, and thus, they carry with [them] the Seventh Amendment guarantee of a jury trial" for the purpose of "liquidating their respective claims[.]" *G–I Holdings,* 323 B.R. at 605, 607 (internal quotations omitted). [FN143] Thus, while the Court acknowledges that Appellants have a constitutional right to a jury trial within this context, it finds that the Libby Claimants have not satisfactorily established that

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this constitutional right is infringed upon by the Joint Plan.

> FN142. U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States than according to the rules of the common law.").

> FN143. Although the facts of *G–I Holdings* are very similar to the instant case, the two cases differ as to what exactly a jury may consider under the respective plans. The debtor corporation in *G–I Holdings* proposed a scheme in which all asbestos personal injury claims would be liquidated through the application of a medical matrix. *G–I Holdings,* 323 B.R. at 588. Similar to Grace's Expedited Review procedure, the matrix provided seven Scheduled Disease Categories, each with a set recovery amount, established by a central committee as an expeditious method for resolving asbestos personal injury claims. *Id.* at 590–91. The *G–I Holdings* scheme allowed claimants to obtain jury trial review of the committee's decision in an Article III court. *Id.* at 595. However, the only issues which could be contested and reviewed by a jury were the disallowance of claims based on the failure to meet certain medical criteria, and the categorizations assigned to claims. *Id.* Moreover, the committee's decision could only be set aside if it was found to be arbitrary or capricious. *Id.* Thus, if a dispute arose during discovery or application of the matrix that did not address categorization or disallowance of a claim, that issue could not be appealed to a jury. Therefore, the *G–I Holdings* Court found that the scheme did in fact violate the asbestos claimants' Seventh Amendment rights. *Id*. at 607.
>
> In contrast, the Joint Plan in the instant litigation allows a jury to consider all disputes on appeal, not just certain issues. The jury can make its own findings de novo, rather than being limited to determining whether a committee acted arbitrarily or capriciously in making its decision. Most significantly, a claimant under the Joint Plan is not restricted from having a jury determine the amount of his recovery. Thus, based on these crucial differences between the two plans, the Court finds that *G–I Holdings* is distinguishable from the case at hand.

The Libby Claimants do not object to the Joint Plan because its structure and procedure for the liquidation of personal injury claims does not allow them to pursue their constitutional right to a jury trial. In fact, they acknowledge that they ultimately can obtain a jury verdict if they are dissatisfied with their categorizations or amounts awarded under Expedited Review, Individual Review, arbitration, and mediation. The Libby Claimants instead argue that the "cap" imposed by the asbestos trust—the lesser of the jury verdict or the Maximum Value established by the TDP—serves as a constructive limitation upon their constitutional right to a jury trial because a jury might not be the ultimate determinant of their award amount. The Libby Claimants do not cite to any legal authority to support this argument.

The general view of the federal courts, however, is that the *measuring* of damages by a jury constitutes a matter of "practice" rather than of "right," and that there "is no violation of the constitutional guarantee of a jury trial in the *limitation* of the amount of damages." *Pierre,* 128 F.Supp. at 488–89 (emphasis added.) The federal courts regularly uphold limitations on monetary relief in various analogous areas of federal litigation, primarily through the use of jury verdict caps [FN144] and fixed rules of compensation. [FN145] Their justification for doing so is rooted in the Re–Examination Clause of the Seventh Amendment.[FN146] The Third Circuit has held that such limits on compensation are constitutional because they do not require courts to "reexamine" jury verdicts within the meaning of the Seventh Amendment nor to impose their own factual determinations regarding what a proper award may be, but rather merely mandate that courts implement a legislative policy to reduce the amount recoverable to that which the legislature deems reasonable. *Davis v. Omitowoju,* 883 F.2d 1155, 1162 (3d Cir.1989). Thus, "[w]here it is the legislature which has made a rational policy decision in the public interest, as contrasted with a judicial decision which affects only the parties before it, it cannot be said that such a legislative enactment offends either the terms, the policy or the purpose of the Seventh Amendment." *Id.* at 1165.

> FN144. The litigation related to the September 11th Victim Compensation Fund ("9/11 Fund") is particularly analogous to the instant case. Un-

der the 9/11 Fund, victims of the terrorist highjackings and their families could file claims for compensation without having to prove fault or show a duty on the part of any defendant. *In re Sept. 11 Litigation,* 280 F.Supp.2d 279, 286 (S.D.N.Y.2003). Congress appointed a Special Master to determine the amount of victims' compensation, which was capped at $250,000 for non-economic damages and subject to various formulas and schedules for economic damages. *Id.* at 286, 287. Moreover, punitive damages were unavailable. *Id.* If claimants were dissatisfied with the amount granted to them by the Special Master, they could request a hearing to prove entitlement to a higher amount. *Colaio v. Feinberg,* 262 F.Supp.2d 273, 282 (S.D.N.Y.2002). If claimants remained dissatisfied after the hearing, they could then opt to pursue their claims in the normal tort litigation process, where the aggregate of their damages would be capped at the limits of the defendants' liability insurance. *Id.* Although the 9/11 Fund was not directly challenged on Seventh Amendment grounds, the district court held that its structure was "entitled to judicial respect" and "d [id] not infringe on [the] plaintiffs' constitutional and statutory rights." *Id.* at 290. In short, the Court notes the similarities between the structures of the Grace asbestos trust and the 9/11 Fund, and takes notice of the fact that this analogous fund was found to be constitutional by the Southern District of New York.

The federal courts have also regularly upheld caps on jury verdict amounts directly on Seventh Amendment grounds. This is particularly evident in the capping of jury verdicts in medical malpractice actions. *See Davis v. Omitowoju,* 883 F.2d 1155, 1159–65 (3d Cir.1989) (providing an extensive historical and legal analysis of the Seventh Amendment regarding caps on jury verdicts and ultimately finding that the cap in question did not violate the Constitution); *see also Gasperini v. Ctr. for Humanity, Inc.,* 518 U.S. 415, 429 n. 9 (1996) (recognizing that the courts of appeals regularly find that district court application of statutory caps on medical malpractice jury verdicts does not violate the Seventh Amendment); *Smith v. Botsford Gen. Hosp.,* 419 F.3d 513, 519 (6th Cir.2005) (finding that Michigan's cap on jury verdicts in medical malpractice actions does not violate the Seventh Amendment); *Boyd v. Bulala,* 877 F.2d 1191, 1196 (4th Cir.1989) (finding that Virginia's statutory cap on damages in medical malpractice actions does not run afoul of the Seventh Amendment); *Estate of McCall v. United States,* 663 F.Supp.2d 1276, 1299 n. 37 (N.D.Fla.2009) (noting that Seventh Amendment constitutional challenges to jury verdict caps in medical malpractice cases in Florida are rejected on a regular basis by the federal courts).

Aside from medical malpractice actions, the federal courts have also routinely recognized and upheld the constitutionality of jury verdict caps and fixed rules of compensation in a wide array of federal legislation, including, *inter alia,* limitations on: compensation for victims of natural disasters, wrongful death awards, personal injury awards, product liability awards, civil rights violations, and violations of international air transportation laws and regulations. *See, e.g., Hemmings v. Tidyman's Inc.,* 285 F.3d 1174, 1202 (9th Cir.2002) (holding that a cap on Title VII compensatory damages does not violate the Seventh Amendment); *Estate of Sisk v. Manzanares,* 270 F.Supp.2d 1265, 1277–78 (D.Kan.2003) (finding that capping award amounts in wrongful death cases does not "reexamine" a jury's verdict); *EEOC v. CEC Enterm't, Inc.,* No. Civ. A. 98–698, 2000 WL 1339288, at *21–22 (W.D.Wis. Mar. 14, 2000) (upholding jury verdict cap in employment discrimination setting); *Franklin v. Mazda Motor Corp.,* 704 F.Supp. 1325, 1330–35 (D.Md.1989) (finding that a cap on personal injury damages resulting from a defective automobile does not violate the Seventh Amendment); *Pierre v. E. Air Lines,* 152 F.Supp. 486, 489 (D.N.J.1957) ("This court opines that there is no conflict between the provision of limitation of liability in the Warsaw Convention and the VIIth Amendment to the Constitution.").

FN145. Legislative rules enacted by Congress that establish set levels and schedules of compensation are frequently utilized in the federal judicial system. The Seventh Amendment only requires that a jury make the factual findings regarding a plaintiff's particular grievance. *Pierre,* 152 F.Supp. at 488. Therefore, as long as the jury is the trier of facts in a given case, the court may apply a legislatively-enacted rule that controls the plaintiff's ultimate remedy without violating the Seventh Amendment. Bulala, 877 F.2d at 1196 ("If a legislature may completely abolish a cause of action without violating the right of trial by jury, we think it permissibly may limit damages recoverable for a cause of action as well.") (internal citation omitted). A common example is a congressionally-enacted statute authorizing the doubling or trebling of jury awards. The federal courts have found that a jury's factual findings are not disturbed in such cases, despite the fact that the jury did not set the ultimate amount of recovery. *See* Campos–Orrego v. Rivera, 175 F.3d 89, 95–96 (1st Cir.1999) (finding that a court's doubling of a jury's award in an employment discrimination case did not violate the Seventh Amendment).

FN146. U.S. CONST. amend. VII ("... no fact tried by a jury, shall be otherwise *reexamined* in any Court of the United States[.]") (emphasis added).

***81** In the instant case, when Congress enacted § 524(g), it made a policy decision to allow debtor corporations in asbestos-related bankruptcy proceedings to reorganize their corporate structure to be able to satisfy their current and future asbestos liabilities. *See In re Combustion Eng'g, Inc.*, 391 F.3d 190, 234 (3d Cir.2004). In doing so, it acted with the dual intent of benefitting both the debtor corporations, by allowing them to proceed forward as economically-viable entities, and the claimants, by ensuring that all are entitled to receive some level of compensation. 140 CONG. REC. S. 4523 (Apr. 20, 1994). Congress then authorized the appointment of legal representatives to oversee the management of the trust and ensure that the goals of § 524(g) are achieved.

Vested with this legislative authority, the legal representatives in the *Grace* litigation established the current structure of the Joint Plan, which allows for the determination of claimant compensation by a jury. By the same token, however, the legal representatives also established the challenged de facto cap on an individual's compensation. They made this well-reasoned decision, no doubt, to ensure that there would be enough money available for all present and future claimants' recovery—a decision directly in accordance with the legislative goals of § 524(g). Thus, the current structure of the Joint Plan would not require a "reexamination" of a jury's verdict in contravention of the Seventh Amendment. Rather, it merely involves implementation of a legislative policy. It is accordingly constitutionally sound on Seventh Amendment grounds.[FN147]

FN147. While a damage cap might raise a constitutional red flag if its fixed sum is so low as to be arbitrary or irrational, this would implicate due process concerns rather than the Seventh Amendment. Regardless, this is not at issue in the present case. The cap imposed by Grace's trust allows the Libby Claimants to obtain up to the Maximum Value of their claim—an amount determined to be fair after years of careful consideration by medical, government, and legal experts who sought to ensure uniformity of compensation and fund availability for all claimants.

Furthermore, the Libby Claimants are not required to participate in the asbestos trust pursuant to the Joint Plan. The benefit of the Joint Plan is that participants avoid unpredictable piecemeal litigation, thereby ensuring the availability of more funds for claimant compensation. In return for receiving the benefit of ensured compensation, plan participants are restricted to the structure of the TDP. The election to participate in the Joint Plan is, however, entirely voluntary. Claimants are not restricted from instead opting to bring an individualized lawsuit against Grace. Although the lawsuit would be stayed for a period of time due to the § 524(g) injunction, this temporary delay would not result in a Seventh Amendment violation since the case would still ultimately be tried before a jury. Thus, there is nothing preventing the Libby Claimants from exercising their Seventh Amendment rights through an independent jury trial in the tort system outside the context of the asbestos trust. The Libby Claimants may not, however, reap the benefits of *both* the Joint Plan and an independent jury trial—either they must wait to pursue an independent jury trial with the mere possibility of obtaining a larger jury verdict and the potential of an award less than the trust's Maximum Value, or they may elect to participate in the Joint Plan and its benefit of ensured, but limited, compensation. Under both options, the Appellants can pursue a jury verdict, thereby eliminating any Seventh Amendment concerns.

***82** Finally, the Libby Claimants' argument runs contra to § 524(g)'s explicit requirement to treat all "present claims and future demands that involve similar claims in substantially the same manner ." 11 U.S.C. §

524(g)(2)(B)(ii)(V). One of Congress' primary intentions in creating § 524(g) was to ensure uniform treatment of all claimants. If the Libby Claimants were not subject to the de facto cap on jury verdicts and judgments under the TDP, they would actually receive *preferential* treatment under the Plan in comparison to other similarly situated claimants within Class 6. Moreover, § 524(g) was also designed to ensure that present claimants do not exhaust all of the debtor's assets before future claimants have even manifested injuries. H.R.REP. NO. 103–835, at 41 (1994), reprinted in 1994 U.S.C.C.A.N. 3349; 140 CONG. REC. S4523 (Apr. 20, 1994) (statements of Senator Brown and Graham); *see also In re Grossman's, Inc.*, 607 F.3d 114, 126–27 (3d Cir.2010) (discussing legislative history of § 524). If the Libby Claimants were exempt from the cap on damages, not only would this result in non-uniform treatment among claimants, but it would also rapidly deplete available funds in the trust set aside for other current and future claimants. This treatment is exactly what § 524(g) was designed to prevent.

For all the above reasons, the Court finds that the Joint Plan does not violate the Libby Claimants' constitutional right to a trial by jury.

2. Statutory Rights Pursuant to Section 1411(a)

In conjunction with their constitutional claim, the Libby Claimants also assert that they have a statutory right to a jury trial pursuant to 28 U.S.C. § 1411(a). Section § 1411(a) states that causes of action arising under "[T]itle 11 do not affect any right to trial by jury that an individual has under applicable non-bankruptcy law with regard to a personal injury or wrongful death tort claim." 28 U.S.C. § 1411(a). As described in detail below, the Court finds that the Libby Claimants' statutory right to a jury trial has not been violated.

The Libby Claimants have three options available to them when deciding what course of action to follow regarding their recovery—none of which infringe upon their statutory rights to pursue a jury verdict. Under the first option, the Libby Claimants may elect to participate in the Joint Plan, and may choose to accept a set award established by the structure of the plan under Expedited Review, Individual Review, arbitration, or mediation. Although § 1411(a) provides that Title 11 actions should not *affect* the right to a jury trial in personal injury or wrongful death cases, this does not of course mean that such cases *must* be tried before a jury. *See In re Dow Corning Corp.*, 215 B.R. 346, 360 (Bankr.E.D.Mich.1997). For example, parties in a personal injury case may accept a settlement in lieu of going to trial, even though they have a right to pursue a jury verdict regarding their claims. *Id.* Similar to reaching a settlement, if a claimant under the Joint Plan in the instant litigation chooses this first option, he does so in lieu of a jury trial. Such a decision is entirely voluntary, and thus cannot be said to violate one's statutory right to a jury trial. Under the second option, a Libby Claimant can elect to participate in the Joint Plan, but may reject the proposed award and instead opt to pursue his claim through a jury trial in standard tort litigation. Once again, the individual is not precluded from having a jury hear his claims. The third and final option available to the Libby Claimants is the pursuit of a separate jury trial outside the context of the Joint Plan. This third option obviously does not run afoul of the jury trial right since the claimant himself opts to directly pursue a jury verdict. Therefore, the Court finds that none of the three options available to the Libby Claimants regarding their recovery violate their § 1411 statutory right to a jury trial.

***83** Finally, the Court provides some clarity on an issue raised by both parties—the apparent conflict between § 524(g) and § 1411(a). When briefing the Court on this issue, Grace argued that when two statutes such as § 524(g) and § 1411(a) conflict with one another, the statute that is later in time and more specific should control, which in the instant case is § 524(g). On the other hand, the Libby Claimants argued that § 1411(a) should control because it expressly provides for jury trial rights, whereas § 524(g) is silent on this point. At first glance, these two statutory provisions are seemingly in conflict. However, closer scrutiny reveals that the two provisions can be aligned with one another and, if possible, should be read in harmony. *See Morton v. Mancari*, 417 U.S. 535, 551 (1974) ("[W]hen two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."); *J.E.M. Agric. Supply, Inc. v. Pioneer Hi–Bred Int'l, Inc.*, 534 U.S. 124, 143–44 (2001) (same).

Section 1411(a) has been interpreted to be a statute that is "strictly procedural in nature" and that "come[s] into play only when a right to trial is established." *Dow Corning*, 215 B.R. at 360. *G–I Holdings* established that asbestos injury claims carry with them the guarantee of a jury trial for the purpose of claims liquidation in a bankruptcy proceeding. 323 B.R. 583, 607 (Bankr.D.N.J.2005). Thus, the Libby Claimants' right to a jury trial has been established and the requirements of § 1411(a) "come into play" at this point. Section 1411(a)

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provides that no part of Title 11 may affect an individual's right to a jury trial in personal injury and wrongful death claims. 28 U.S.C. § 1411(a). In the context of the instant litigation, this means that § 524(g) of Chapter 11 may not affect the jury trial right. At no point does § 524(g) explicitly mention the requirement of a jury trial. Rather, as described extensively above, § 524(g) provides authority for the creation of an asbestos personal injury trust to operate through various mechanisms to pay similar claims in substantially the same manner. 11 U.S.C. § 524(g)(2)(B)(ii)(V). Thus, so long as the "mechanisms" authorized by § 524(g) do not overrun the jury trial right guaranteed by § 1411(a), neither statutory provision has been violated. Therefore, both § 524(g) and § 1411(a) can be read in harmony with one another, and the requirements of both statutory provisions remain intact in the present case.

Based upon this Court's conclusions that the Libby Claimants' have not been deprived of either the constitutional or statutory rights to a jury trial, the Bankruptcy Court's holding on this point is affirmed.

J. The Fair and Equitable Test and The Absolute Priority Rule

Section 1129(a) of the Bankruptcy Code lists sixteen conditions that must be satisfied prior to a reorganization plan's confirmation under Chapter 11. FN148 Satisfaction of these conditions is mandatory, with the exception of subsection (a)(8), which addresses acceptance of the plan by impaired classes. *Corestates Bank, N.A. v. United Chem. Techs., Inc.,* 202 B.R. 33, 46–47 (Bankr.E.D.Pa.1996); *In re Yasparro,* 100 B.R. 91, 93 (Bankr.M.D.Fla.1989). This subsection is not mandatory because the Bankruptcy Code provides that even if an impaired class rejects the plan under section (a), the plan may nonetheless still be confirmed through the "cram-down" provisions of section (b) of the statute. *Id.; see also In re Phila. Newspapers, LLC,* 599 F.3d 298, 304 (3d Cir.2010) (Section 1129(b) provides circumstances under which a reorganization plan can be "crammed down the throats of objecting creditors") (internal citations and quotations omitted).

FN148. Section 1129(a)(1) states that a court can only confirm a reorganization plan if it "complies with the applicable provisions of this title." 11 U.S.C. § 1129(a)(1). Montana and the Crown objected to confirmation of the Plan on the ground that it violates this statutory provision. Section 1129(a)(1), however, is an "umbrella" statutory section that ensures compliance with other more specific sections of the Code. In particular, § 1129(a)(1) is predominantly aimed at ensuring compliance with § 1122 and § 1123, discussed *supra,* which address classification of claims and contents of the plan. *See In re TCI 2 Holdings, LLC,* 428 B.R. 117, 132 (Bankr.D.N.J.2010); *In re G–I Holdings, Inc.,* 420 B.R. 216, 258–60 (D.N.J.2009); *In re Texaco, Inc.,* 84 B.R. 893, 905 (Bankr.S.D.N.Y.1988). The Court has already discussed any objections raised pursuant to these particular statutory sections, *supra,* and therefore finds that Montana and the Crown's § 1129(a)(1) objections are also overruled.

***84** Section 1129(b) sets forth the fair and equitable test, which requires that a reorganization plan be fair and equitable to each non-accepting class of impaired claims or interests under the plan. Section 1129(b) provides, in relevant part, that:

> [I]f all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

11 U.S.C. § 1129(b)(1). Subsection (b)(2) of the statute goes on to set forth the nonexclusive requirements for meeting the fair and equitable test. One of these requirements is that the reorganization does not violate the absolute priority rule. The absolute priority rule is "a judicial invention that predated the Bankruptcy Code. It arose from the concern that because a debtor proposed its own reorganization plan, the plan could be 'too good a deal' for that debtor's owners." *In re Armstrong World Indus., Inc.,* 432 F.3d 507, 512 (3d Cir.2005) (quoting *Bank of Am. Nat'l Trust & Sav. Assoc. v. 203 N. LaSalle St. P'ship,* 526 U.S. 434, 444 (1999)). In its simplest terms, the absolute priority rule requires that "creditors of a debtor in bankruptcy reorganization receive payment of their claims in their established order of priority, and that they receive payment in full before lesser interests—such as those of equity holders—may share in the assets of the reorganized entity ." FN149 *Yasparro,* 100 B.R. at 95.

FN149. The absolute priority rule is codified in § 1129(b)(2), which states, in relevant part:

(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

* * * *

(B) With respect to a class of unsecured claims:

(i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property[.]

11 U.S.C. § 1129(b)(2)(B)(i-ii).

Several Appellants—specifically Montana, the Crown, BNSF, AMH,[FN150] and Garlock—contend that the Joint Plan runs afoul of the fair and equitable test of § 1129(b), and therefore also violates the absolute priority rule incorporated within that statutory section. These arguments, however, are all without merit because the fair and equitable test does not apply under the circumstances present in this case.

FN150. The Court recognizes that Appellant AMH has a slightly different claim than the other objecting parties because its claims fall within Class 7A, a subclass that is deemed unimpaired, but still entitled to vote under the terms of the Joint Plan due to the status of its counterpart, Class 7B, as an impaired class. Regardless, Class 7 as a whole voted in favor of the Joint Plan, and therefore the fair and equitable test also does not apply to AMH's claims.

It is a well-known legal rule in Chapter 11 reorganization litigation that "[u]nder § 1129(b), a finding that a plan is 'fair and equitable' is required only in the context of a cramdown[.]" *In re Dow Corning Corp.,* 244 B.R. 678, 693 (Bankr.E.D.Mich.1999) (internal citation omitted). There is, however, no opportunity for a cramdown in this case. A cramdown would only be possible if the plan could not be confirmed because an entire class of impaired creditors had voted against confirmation of the plan. *See In re Exide Techs.,* 303 B.R. 48, 78 (Bankr.D.Del.2003); *Corestates Bank,* 202 B.R. at 47; *In re Winters,* 99 B.R. 658, 663 (Bankr.W.D.Pa.1989). Nothing is being "crammed down the throats of the objecting creditors" here because all impaired classes entitled to vote—Class 6 (personal injury claimants), Class 7B (American ZAI claims), Class 8 (Canadian ZAI claims), and Class 10 (Equity Interests)—all voted overwhelmingly to accept the Joint Plan. *Phila. Newspapers,* 599 F.3d at 304. Specifically, Montana, the Crown, and BNSF all have indirect claims for indemnity and/or contribution arising from Grace's asbestos liability. It has already been established, *infra,* that these claims are properly classified within Class 6.[FN151] Class 6 voted 99.51% in number and 99.39% in dollar amount in favor of the Joint Plan. It is inconsequential that these Appellants object to the Plan on an individual basis because application of the fair and equitable test only depends on how an impaired class *as a whole* voted. *See Winters,* 99 B.R. at 663 ("Only after it is apparent that an impaired *class* objects is it necessary to determine whether or not the plan is capable of confirmation[.]") (emphasis in original); *see also In re United Marine, Inc.,* 197 B.R. 942, 948 (Bankr.S.D.Fla.1996) (a "lone dissenter" cannot rely on § 1129(b) to support its objection to the reorganization plan). As such, the fair and equitable requirements of § 1129(b) do not apply here because the impaired classes and interests in this case all voted to accept the Plan.

FN151. Montana, the Crown, and BNSF argue that their claims are distinct from other claims in Class 6, and that had they been classified as their own class under the terms of the Joint Plan, this class would have been impaired and voted against the Plan's confirmation. This argument, however, is unfounded. First, it is a *classification* argument governed by § 1122, and *not* the § 1129(b) fair and equitable requirement. Moreover, it is an entirely baseless claim since there is no separate class for these creditors' claims under the terms of the Joint Plan. The Court refuses to rule on the basis of a mere hypothetical that in no way adequately portrays the present structure of the Plan. Having already decided that Montana, the Crown, and BNSF's claims are properly classified in Class 6, *supra,* the Court need not opine on this matter any further here.

***85** Given that § 1129(b) does not apply to this case, the absolute priority rule likewise does not come into play here. The requirements of the absolute priority rule are subsumed within the rest of the cramdown requirements set forth in § 1129(b). *See Armstrong*, 432 F.3d at 512 (describing the codification of the absolute priority rule as one of the requirements of 1129(b)); *In re PWS Holding Corp.*, 228 F.3d 224, 237 (3d Cir.2000) (discussing the absolute priority rule as part of the many requirements set forth by § 1129(b)); *Yasparro*, 100 B.R. at 94 ("Section 1129(b)(2)(B) includes the absolute priority rule."). The absolute priority rule, therefore, only applies to confirmation of a plan that attempts to cram down an impaired class that voted against acceptance of the Plan. This is not an issue here.

Therefore, the Court finds that neither the fair and equitable test nor the absolute priority rule are violated under these circumstances. Accordingly, Appellants' objections on these points are overruled.[FN152]

> FN152. In their appellate brief, Montana and the Crown argue that the fair and equitable test has been violated because, *inter alia*, the Trust Advisory Committee ("TAC") "wields considerable control and influence over the trustees and the governance of the trust" that is "fundamentally unfair and inequitable" and an "impermissible conflict of interest." (Montana Br. at 46.) Although its objection is improper because the fair and equitable test does not apply here, the Court nevertheless pauses to comment on this particular objection.
>
> The TAC is a committee of attorneys enlisted for the purpose of protecting the rights of present personal injury claimants. It has been a feature of Chapter 11 asbestos litigation since the *Johns Manville* case. The TAC is a separate entity from the PI FCR—the individual appointed by the Bankruptcy Court for the purpose of representing the interests of future personal injury claimants. The TAC is also distinct from the U.S. Trustee(s) appointed to represent the trust. In fact, given that the Trustees are not usually attorneys with vast experience in asbestos litigation, the TAC was created with the intent to advise them and to further facilitate administration of the trust.
>
> As the Bankruptcy Court properly found, Appellants' objection on these grounds is entirely speculative. The record and the parties' appellate briefs are devoid of any evidence that the TAC has or will at some point engage in any improper conduct. Moreover, the Joint Plan has specific procedures in place to protect the parties' interests and avoid conflicts of interest. For example, the TAC and PI FCR are only involved in matters related to the general administration and implementation of the trust. The Trustees, not the TAC or PI FCR, determine whether a particular claim satisfies payment criteria and how those claims should be paid. The Trustees, in turn, hold fiduciary duties to all Trust beneficiaries. Furthermore, the TAC and PI FCR have identical consent rights, and both are limited. Neither may withhold consent unreasonably, and both must explain in written detail their objections to any course of action within thirty days. If a dispute remains as to consent rights, the issue is submitted to ADR and, in special circumstances, can proceed straight to the Bankruptcy Court. Finally, all TAC decisions are subject to oversight by the court.
>
> Based on all the above, the Court finds that not only are the procedures associated with the TAC fair and equitable, but are also devoid of a conflict of interest. There simply is no possibility for the TAC—one of many entities representing claimants' interests here—to wield considerable control and influence over governance of the trust. As such, Appellants' argument on these grounds is unfounded.

J. Garlock's Bankruptcy Standing

On June 5, 2010, Garlock filed its own petition for Chapter 11 bankruptcy. As a result, it was granted an automatic stay against litigation until it could successfully reorganize pursuant to 11 U.S .C. § 362. Additionally, since its bankruptcy petition relates to outstanding asbestos liabilities, Garlock received injunctive relief pursuant to a § 524(g) channeling injunction similar to the one in the instant litigation. Having filed for bankruptcy, Garlock left the realm of tort litigation and entered the enclosed sphere of bankruptcy proceedings. As such, Garlock is presently immune from having asbestos personal injury claims filed against it. Given its current status, the Bankruptcy Court found that Garlock lacked standing to object to Grace's Joint Plan. Nevertheless, Garlock contends that it satisfies the requirements for standing in the instant litigation, and therefore is entitled to substantively challenge the Joint Plan.

Standing is a "threshold question in every federal case, determining the power of the court to entertain suit." *Warth v. Seldin,* 422 U.S. 490, 498 (1975). There are two types of standing in the context of bankruptcy litigation: (1) bankruptcy standing; and (2) appellate standing. *In re Global Techs., Inc.,* 645 F.3d 201, 209 (3d Cir.2011) ("*GIT* "). Bankruptcy standing refers to a party's standing to object to confirmation of a plan before the bankruptcy court in the first instance, while appellate standing addresses the party's standing to challenge the substance of the bankruptcy court's decision on appeal. *Id.* Given that the Bankruptcy Court in the instant litigation found that Garlock lacked standing to challenge the Joint Plan in the first place, the Court need only address the implications of Garlock's bankruptcy standing in its discussion.

The Third Circuit recently clarified the scope of bankruptcy standing in *GIT,* providing that a party challenging a reorganization plan in bankruptcy court must meet both the constitutional requirements for standing under Article III of the U.S. Constitution, as well as the statutory standing requirements put forth by the Bankruptcy Code in 11 U.S.C. § 1109(b). *Id.* at 210. In so holding, the Third Circuit found that "Article III standing and standing under the Bankruptcy Code are effectively coextensive." *Id.* at 211 (internal citations omitted); *see also In re Black, Davis, and Shue Agency, Inc.,* Bankr.No. 1–06–bk–00051, 2011 WL 4619886, at *4 (Bankr.M.D.Pa. Sept. 29, 2011) (citing *GIT*); *In re Alcide,* 450 B.R. 526, 535 (Bankr.E.D.Pa.2011) ("The logical import of the Court of Appeals' statement is that a party that has constitutional standing is a party in interest under the Bankruptcy Code[.]").

***86** In order to have constitutional standing under Article III of the Constitution, a party must first satisfy three requirements. *See Bennett v. Spear,* 520 U.S. 154, 167 (1997); *Ne. Fl. Chapter of the Assoc. Gen. Contractors of Am. v. City of Jacksonville, Fl.,* 508 U.S. 656, 663 (1993). Specifically, the party seeking constitutional standing must show that it has: (1) suffered an "injury in fact" that is "real and immediate" and not merely "conjectural or hypothetical," *City of Los Angeles v. Lyons,* 461 U.S. 95, 102 (1983) (citations omitted); *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992); (2) that the injury is fairly traceable to the defendant's conduct, *Allen v. Wright,* 468 U.S. 737, 751 (1984); *United States v. Hays,* 515 U.S. 737, 743 (1995); and (3) that a favorable federal court decision is likely to redress the injury. *Linda R.S. v. Richard D.,* 410 U.S. 614, 617–18 (1973); *Warth v. Seldin,* 422 U.S. 490, 505–06 (1975); *Simon v. E. Ky. Welfare Rights Org.,* 426 U.S. 26, 45–46 (1976).

Similarly, § 1109(b) of the Bankruptcy Code governs the parties' standing to litigate their claims, and provides that "[a] party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter." 11 U.S.C. § 1109(b). In *GIT,* the Third Circuit adopted the Seventh Circuit's definition of a "party in interest" to mean "anyone who has a legally protected interest that could be affected by a bankruptcy proceeding." *GIT,* 645 F.3d at 210 (adopting *In re James Wilson Assoc.,* 965 F.2d 160, 169 (7th Cir.1992)). Since the Third Circuit's adoption of this definition, courts have found that "a party in interest in a bankruptcy case must have some legally protected interest that either has been adversely affected (thereby warranting judicial relief) or that is in actual danger of being adversely affected (if relief is not granted)." *In re Alcide,* 450 B.R. 526, 535 (Bankr.E.D.Pa.2011) (internal citations omitted).

In regards to the first element, Garlock alleges that, as a former, current, and potentially future co-defendant with Grace, it has suffered an injury in fact because its alleged rights to contribution and set-off would need to be asserted against the PI Trust rather than Grace itself, and that these claims would be less valuable under the terms of the Plan than they would be outside the context of bankruptcy. The objection is premised on the notion that Garlock would be entitled to seek contribution [FN153] from Grace for any tort judgments rendered in joint and several liability jurisdictions in which it paid more than its share of liability and for which Grace is also liable. Moreover, Garlock also claims that any set-off [FN154] rights it may have against Grace would be adversely affected because, upon confirmation of the Joint Plan, Garlock would need to direct such claims against the PI Trust.

> FN153. Contribution is a legal principle determining how judgment is allocated among joint tortfeasors. The methods of allocation are governed by state law, and generally arise in joint and several liability jurisdictions. "Contribution comes into force when one joint tortfeasor has discharged a common liability or paid more than its share of such liability, in which case the joint

tortfeasor is entitled to reimbursement from the other tortfeasors to the extent that its payment exceeded its own liability." *Exxonmobile Oil Corp. v. Lucchesi*, No. Civ. A. 03–1625, 2004 WL 1699203, at *3 (E.D.Pa. July 29, 2004).

FN154. Set-off is also a legal principle related to apportionment of judgments among joint tortfeasors. Set-off "provides that in a tort action where two or more tortfeasors are deemed to be liable for plaintiff's injuries, non-settling tortfeasors are entitled to a reduction of the final judgment award." *Weisbrot v. Schwimmer*, No. Civ. A. 97–2711, 2007 WL 2683642, at *3 (D.N.J. Sept. 7, 2007) (internal citations omitted).

***87** The Court, however, disagrees. When Garlock filed its own bankruptcy petition in June of 2010, it removed itself from the tort system and was granted § 362 injunctive relief. Most recently, on November 28, 2011, Garlock filed its own Joint Plan of Reorganization. (*See* Debtor's Joint Plan of Reorganization, Bankr.No. 10–31607 (Bankr.W.D.N.C.), Doc. No. 1664 ("Garlock's Plan").) In the terms of its own Plan, Garlock, just like Grace, has adopted § 524(g) as the primary statutory vehicle for litigation relief and corporate reorganization. Under § 524(g), and the terms of Garlock's Plan, all of Garlock's asbestos liabilities—both current and future—will be channeled to a trust akin to Grace's trust in the instant case.[FN155] This trust will assume Garlock's liabilities, and these claims will be settled in accordance with the terms set forth in Garlock's own plan of reorganization. Given its exit from the tort system and the filing of its own reorganization plan, Garlock will no longer be at risk of paying any joint and several jury verdicts, and therefore will have no reason to seek contribution or set-off from Grace or any other co-defendant. Thus, armed with the protective shield of its own asbestos trust and channeling injunction, Garlock has insulated itself from both its own liability, as well as any shared liability between it and Grace.

FN155. In making its argument, Garlock asserts that its standing in the instant litigation is not affected by its own bankruptcy filing because Garlock has not yet established its own asbestos trust, and, if it chooses to utilize a trust mechanism, may create a non-consensual trust that "actually litigates claims in the tort system." (Garlock Reply Br. 18.) Moreover, Garlock claims that, upon reorganization, it may choose to resolve its current asbestos liabilities but pass its future liabilities back into the tort system, or, in the alternative, may resolve its future asbestos liabilities but pass its current liabilities back into the tort system. Given the recent filing of Garlock's own reorganization plan, this argument is now both moot and without merit.

First, by filing for § 524(g) injunctive relief, the very terms of the statute require that a trust be implemented in conjunction with the channeling injunction. *See* 11 U.S.C. § 524(g)(2)(B)(I) ("[T]he injunction is to be implemented in connection with a trust[.]"). The two are not divisible from one another. Thus, when Garlock sought injunctive relief from its asbestos liability under the terms set forth in § 524(g), the statute clearly required that a trust be implemented at this point in time as well. Section 7.3 of Garlock's Plan directly addresses the creation and management of Garlock's own Asbestos Trust. (Garlock's Plan 20–22.) This Section provides that claims asserted against Garlock will be processed "in accordance with this Plan, the GST Asbestos Trust Agreement, the Claims Resolution Procedures, the CMO, and the Confirmation Order [.]" (*Id.* at 20.) Section 7.3 is noticeably devoid of any mention of a nonconsensual trust that would actually litigate claims in the tort system. Rather, the terms governing Garlock's Trust appear to be vastly similar to the terms governing Grace's PI Trust.

Second, Garlock's Plan recognizes both current and future asbestos claims. These claims have been classified in Class 4 and Class 5, respectively. Section 2.2 of the plan provides that both Classes 4 and 5 will be assumed by the trust, and will be processed and paid in accordance with the procedures set forth in Garlock's Plan. (*Id.* at 7, 8.) There is no mention that either current or future claims will be unresolved by Garlock's Plan and instead passed through back into the tort system.

Finally, one of the primary purposes of creating the trust and channeling injunction under § 524(g) is to "relieve[ ] the debtor of the uncertainty of future asbestos liabilities." *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 234 (3d

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> Cir.2005). There would be no point in Garlock receiving the protections afforded by § 524(g) merely so that it could resolve its current obligations without addressing its future asbestos liability. In fact, it is unlikely that Garlock could successfully reorganize if it failed to account for its future liabilities, and it is highly doubtful that any bankruptcy court would approve a reorganization plan that runs directly contra to this underlying principle. Garlock seems to have recognized this point because in its newly-minted Plan, all future asbestos claims are classified in Class 5. (Garlock's Plan 8.)
>
> As such, Garlock's claims are meritless, and the foundation of its argument here is undermined by the terms set forth in its new reorganization plan.

Moreover, if for some reason Garlock should return to the tort system and suffer a judgment for which it must pay a portion of Grace's liability, then this scenario would be accounted for under the present terms of Grace's Joint Plan. Any such claim by Garlock would fall within the definition of an Indirect PI Trust Claim under the terms of the Joint Plan, and would be paid according to the TDP.[FN156] However, the Court notes that any such claim is merely conjectural at this point in time. Garlock has presently made no claims against Grace's PI Trust, *see In re ACandS, Inc.,* Bankr.No. 02–12687, 2011 WL 4801527, at * 1 (Bankr.D.Del. Oct. 7, 2011), nor has it introduced any concrete evidence depicting a plausible scenario of how it could now return to the tort system and suffer such a judgment in the foreseeable future. Such hypothetical claims and demands would depend on Garlock being found liable alongside Grace, as well as it having paid Grace's liability to claimholders or future demand holders. This is extremely unlikely given the fact that Garlock is well underway with its own Chapter 11 reorganization. In short, Garlock has not identified how it has suffered any injury here, let alone one that is "real and immediate" and not merely "conjectural or hypothetical" at this point in time. *Lyons,* 461 U.S. at 102.

> FN156. Section 1.1(144) of the Plan further defines Indirect PI Trust Claims as:
>
> any Claim ... or Demand against the Debtors ... held by any Entity ... who has been, is, or may be a defendant in an action seeking damages for ... personal injuries ... to the extent caused or allegedly caused, directly or indirectly, by exposure to asbestos or asbestos-containing products for which the Debtors have liability ... [and] on account of alleged liability of the Debtors for payment, repayment, reimbursement, indemnification, subrogation, or contribution of any portion of any damages such Entity has paid or may pay to the plaintiff in such action[.] (Joint Plan § 1.1(144).) The Joint Plan outlines the procedures for payment of these Indirect PI Trust Claims in Section 5.6 of the TDP, which provides in relevant part, that:
>
> Indirect PI Trust Claims ... shall be ... paid by the PI Trust ... if the holder of such claim [ ] establishes to the satisfaction of the Trustees that the Indirect Claimant has paid in full the liability and obligation of the PI Trust to the individual claimant to whom the PI Trust would otherwise have had a liability or obligation ... To establish a presumptively valid Indirect PI Trust Claim, the Indirect Claimant's aggregate liability for the Direct Claimant's claim must also have been fixed, liquidated and paid fully by the Indirect Claimant[.]
>
> (TDP § 5.6, Ex. 4, JA 000305–306.) *See also In re W.R. Grace & Co.,* 446 B.R. 96, 117 n. 30 (Bankr.D.Del.2011).

The second and third elements of constitutional standing require that the party's injury be fairly traceable to the defendant's conduct, and that a favorable decision could likely redress the injury. *See Pa. Prison Soc'y v. Cortes,* 622 F.3d 215, 228 (3d Cir.2010) (citing *Friends of the Earth, Inc. v. Laidlaw Envt'l Serv. (TOC), Inc.,* 528 U.S. 167, 180–81 (2000)). These two elements are "closely related," and therefore "often overlap." *Toll Bros., Inc. v. Twp. of Readington,* 555 F.3d 131, 142 (3d Cir.2009) (citing *Pub. Interest Research Grp. of N.J., Inc. v. Powell Duffryn Terminals, Inc.,* 913 F.2d 64, 73 (3d Cir.1990)). The Third Circuit has held that under these two elements, "[i]t is sufficient for the plaintiff to establish that a 'substantial likelihood that the requested relief will remedy the alleged injury in fact.' " *Toll Bros.,* 555 F.3d at 143 (quoting *Vt. Agency of Natural Res. v. U.S. ex rel. Stevens,* 529 U.S. 765, 771 (2000)). Garlock fails to satisfy the requirements of both of these elements as well. Not only is there no sufficient injury here caused by Grace upon which to premise standing, but "there is not even a scintil-

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la of likelihood of injury [that such an] injury would or [even] could be relieved by [a] ruling ... from this [C]ourt." *In re Pittsburgh Corning, Corp.,* 453 B.R. 570, 581 n. 16 (relying on the language of *GIT* to show that Garlock "has not shown a specific, identifiable trifle of injury") (internal quotations omitted).

***88** In a similar vein, Garlock also has not satisfied § 1109(b)'s definitional requirements of a "party in interest" under the Bankruptcy Code. It does not fall within any of the examples provided by the Code as an example of a "party in interest." FN157 Moreover, under the new Third Circuit definition, Garlock has not identified any legally protected interest that could be affected by confirmation of Grace's Joint Plan. *GIT,* 645 F.3d at 201. As previously mentioned, when Garlock filed its own bankruptcy petition, the rules of the game changed significantly. Now, Garlock will resolve its asbestos liability in accordance with the terms of its own new reorganization plan, and without the ability to pursue Reorganized Grace as a co-defendant in the tort system. Garlock cannot now assert "some legally protected interest that either has been adversely affected (thereby warranting judicial relief), or that is in actual danger of being adversely affected." *Alcide,* 450 B.R. at 535. To the extent that Garlock could somehow obtain an Indirect Claim against Grace in the future—thereby establishing the requisite legally protected interest—the Joint Plan will pay this claim in accordance with the TDP. Garlock has introduced no evidence that the TDP would be unable to properly handle its claim in such a scenario.FN158 As such, Garlock likewise fails to establish that it has standing under the requirements set forth by the Bankruptcy Court.

FN157. Section 1109(b) lists examples of a party in interest as: "the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee[.]" 11 U.S.C. § 1109(b). Importantly, Garlock is not considered a creditor here because it has not yet filed a contribution or set-off claim against the PI Trust.

FN158. In fact, the evidence is to the contrary. The record indicates that prior to Garlock's bankruptcy petition, it was able to obtain substantial contribution in the amount of $625,950 in aggregate payments from various asbestos personal injury trusts based on three judgments that Garlock suffered in Maryland state court. (*See* Payments to Garlock on Indirect Claims as of July 31, 2009, Garlock Ex. 73, JA 017469).

Based on the above, the Court finds that Garlock lacks bankruptcy standing to challenge the confirmation of Grace's Joint Plan. If a party has no standing to appear in a suit, then the court need not consider the merits of its claims. *See Sierra Club v. Morton,* 405 U.S. 727, 741 (1972). Therefore, the Court need not reach any other issues presented in Garlock's appellate briefing, and the Bankruptcy Court's finding on this point is affirmed.FN159

FN159. In making its finding, the Bankruptcy Court held that: "Any objections raised by Garlock that the Joint Plan in this case alters its state court rights and remedies is [*sic*] moot because Garlock is no longer in the tort system and claims against it will not be addressed there. However, to the extent that other objectors raised similar issues, we address them [in conjunction with Garlock] below." *In re W.R. Grace & Co.,* 446 B.R. 96, 121 n. 40 (Bankr.D.Del.2011). Thus, any findings that the Bankruptcy Court may have made in regards to Garlock under these circumstances are likewise affirmed.

L. The Anti–Assignment Provisions in Insurance Policies

At differing points in time prior to Grace's bankruptcy petition, insurance companies AXA Belgium, GEICO, and Republic FN160 all issued high level excess general liability insurance coverage to Grace.FN161 It is undisputed that each policy contained an anti-assignment provision that purported to preclude Grace from assigning its rights and interests under the policies without garnering the insurers' consent to do so. AXA Belgium furthers claims that its policies contained provisions that required Grace to "cooperate" with it and prohibited settlements without its consent. (AXA Belgium Br. 10.) After Grace filed for bankruptcy in 2001, the Plan Proponents created an Asbestos Insurance Transfer Agreement ("the Transfer Agreement") as part of Grace's reorganization. Under the Transfer Agreement, Grace will assign all of its rights to and under the insurance policies to the PI Trust. FN162 The Transfer Agreement also states that all asbestos insurance entities, including the three objecting insurers, are to be bound by the assignment.FN163 GEICO, Republic, and AXA Belgium were not involved in the creation of the Transfer Agreement, and none of them consented to such an assignment. All three insurers objected to the assignment at the Confirmation Hearing. The Bankruptcy Court nonetheless authorized the assignment in its Confirmation

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Order confirming the Joint Plan. The Bankruptcy Court's decision to do so was rooted in the language of § 1123 of the Bankruptcy Code, which provides that, "[n]otwithstanding any otherwise applicable nonbankruptcy law, a plan shall ... provide adequate means for the plan's implementation, such as ... transfer of all or any part of the property to the estate to one or more entities, whether organized before or after the confirmation of such plan." 11 U.S.C. § 1123(a)(5)(B). In support of this decision, the Bankruptcy Court relied on the Third Circuit's decision in *In re Combustion Eng'g, Inc.*, 391 F.3d 190 (3d Cir.2005) and this Court's decision in *In re Federal–Mogul Global, Inc.*, 402 B.R. 625 (D.Del.2009) (Rodriguez, J., sitting by designation). The insurers now request that this Court deny affirmation of the Joint Plan on the grounds that the anti-assignment provisions in the insurance contracts were not complied with, and that applicable state insurance and contract law was thereby violated.[FN164] In response, Appellee [FN165] urges that the Bankruptcy Court's decision should be upheld because the clear import of § 1123(a) is that this statutory section preempts any nonconforming state law.

FN160. GEICO and Republic have jointly briefed and presented their claims. Thus, the Court considers their arguments together.

FN161. Each insurance company individually issued three high level excess general liability insurance policies to Grace.

FN162. Section 1 of the Transfer Agreement states, in pertinent part:

(a) [T]he Insurance Contributors hereby irrevocably transfer, convey, and grant the Asbestos PI Trust all of their Asbestos Insurance Rights, including, without limitation, any and all rights to Proceeds (the "Transfer"). The Transfer is made free and clear of all Encumbrances, liens, security interests, and claims or causes of action[.]

(*See* Asbestos Insurance Transfer Agreement ("Transfer Agreement") § 1(a), Exhibit 6, JA 025985.)

FN163. Section 7.15 of the Joint Plan provides the following:

(e) Each Asbestos Insurance Entity shall be bound by any Final Order, and related Court findings and conclusions that, under the Bankruptcy Code, the transfer of Asbestos Insurance Rights under the Asbestos Insurance Transfer Agreement is valid and enforceable against each Asbestos Insurance Entity notwithstanding applicable non-bankruptcy law or any anti-assignment provision in or incorporated into any Asbestos Insurance Policy, Asbestos In–Place Insurance Coverage, Asbestos Insurance Reimbursement Agreement or Asbestos Insurance Settlement Agreement.

(Joint Plan § 7.15(e).)

FN164. GEICO and Republic assert that, in the event that state law would apply to the current dispute, New York law would govern. The Court is not, however, interpreting the underlying insurance contracts here. Rather, the only issue presently before the Court is a federal question: whether anti-assignment provisions in party contracts that prohibit the assignment of insurance rights to a trust are superseded by the federal Bankruptcy Code? Even if state contract law were to be considered here, the Court nonetheless would not need to engage in a lengthy choice-of-law analysis given its present holding.

FN165. In regards to the insurance dispute, Debtor Grace is joined by the Official Committee of Asbestos Claimants and the Legal Representative for Future Asbestos Claimants in its response to the insurers' claims on appeal.

***89** The Court notes that the recent decision of *Federal–Mogul*[FN166] is directly analogous to this case.[FN167] The debtor in that case, Federal–Mogul Global Corporation ("FMC") also filed for Chapter 11 bankruptcy due to overwhelming debt it had accrued as a result of its asbestos liabilities. 402 B.R. 625, 628 (D.Del.2009). FMC's reorganization plan included an asbestos personal injury trust and § 524(g) injunction, much akin to the trust and channeling injunction in the case at hand. *Id.* at 629. Under the terms of FMC's plan, the debtor sought to assign the proceeds of several of its insurance policies to the asbestos personal injury trust. *Id.* The insurers objected on the grounds that anti-assignment provisions in their policies prevented FMC from making the assignment. *Id.* U.S. District Court Judge Rodriguez, sitting by designation,

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held that § 1123(a)(5)(B) of the Bankruptcy Code expressly preempted the anti-assignment provisions in the insurance policies, which thereby permitted the transfer of the insurance rights to the § 524(g) trust. *Id.* at 645. In arriving at this decision, Judge Rodriguez engaged in an extensive, thorough, and exemplary discussion and review of the constitutional history of the preemption doctrine, analogous and distinguishable federal caselaw both within the Third and other Circuits, the legislative history and statutory interpretation of several applicable provisions of the Bankruptcy Code, maxims of statutory construction, and public policy concerns. The Court credits and fully agrees with Judge Rodriguez's careful analysis of this issue.[FN168] Rather than rehash what has already been properly decided, this Court hereby expressly incorporates Judge Rodriguez's decision and analysis in *Federal–Mogul,* 402 B.R. 625 (D.Del.2009), parties and semantics notwithstanding, to the instant case. The Court therefore finds that § 1123(a)(5)(B) of the Bankruptcy Code expressly preempts the anti-assignment provisions in GEICO, Republic, and AXA Belgium's insurance policies, and that the transfer of these insurance rights and proceeds to the Asbestos PI Trust is permissible.

FN166. The Court notes that *Federal–Mogul* is currently pending on appeal before the Third Circuit. Oral argument on the case was heard on November 9, 2011. As of the date of the filing of this Memorandum Opinion, no decision regarding *Federal–Mogul* has yet been rendered by the Third Circuit.

FN167. In fact, the Court notes that the debtors in both *Federal–Mogul* and the instant litigation filed the same briefs before this Court and the Third Circuit, any semantic differences notwithstanding. (*See Grace Br.,* Case No. 11–199, Doc. No. 84; *FMC Br.,* Case No. 09–2230 (3d Cir.), Doc. No. 00319934031.) Moreover, GEICO and Republic liberally borrow from the insurers' briefs in *Federal–Mogul.* (*See GEICO/Republic Br.,* Case No. 11–199, Doc. No. 19; *Hartford Insurance Br.,* Case No. 09–2230 & 09–2231 (3d Cir.), Doc. No.00319954413.)

FN168. The Court likewise notes that every other court that has considered this and largely similar issues have also found that anti-assignment provisions in insurance policies are preempted by § 1123(a)(5)(B) of the Bankruptcy Code. *See Combustion Eng'g,* 391 F.3d 190, 218 n. 27 (3d Cir.2004); *In re Kaiser Aluminum Corp.,* 343 B.R. 88, 95 (D.Del.2006); *In re Congoleum Corp.,* Bankr No. 03–51524, 2008 WL 4186899 (Bankr.D.N.J. Sept. 2, 2008); *In re Pittsburgh Corning Corp.,* 417 B.R. 289, 313–14 (Bankr.W.D.Pa.2006); *In re W. Asbestos Co.,* 313 B.R. 456, 462 (Bankr.N.D.Cal.2004); *In re Babcock & Wilcox Co.,* Bankr.Nos. 00–10992–95, 2004 WL 4945985 (Bankr.E.D.La. Nov. 9, 2004); *OneBeacon Am. Ins. Co. v. A.P.I., Inc.,* No. Civ. A. 06–167, 2006 WL 1473004 (D.Minn. May 25, 2006).

Additionally, as recently as January 24, 2012, the Court of Appeals for the Ninth Circuit recognized the preemption of state law contractual rights in a bankruptcy setting in *In re Thorpe Insulation Co.,* No. Civ. A. 10–56542, 2012 WL 178998, at * 14 (9th Cir. Jan. 24, 2012). In *Thorpe,* the Ninth Circuit found that the anti-assignment clauses in the appellants' contracts were expressly preempted by § 541(c) of the Code. *Id.* The Ninth Circuit went on to find, however, that even if *express* preemption were not involved in this case, the anti-assignment provisions would nonetheless be *impliedly* preempted by § 524(g). *Id.* at * 15. In so holding, the Ninth Circuit stated:

Section 524(g) was specifically designed to allow companies with large asbestos-related liabilities to use Chapter 11 to transfer those liabilities, along with substantial assets, to a trust responsible for paying future asbestos claims.... Part of the "cornerstone" of the reorganization is contribution by the insurers to the trust.... For such reasons we hold that the anti-assignment provisions contained in the contracts between Appellants and Appellees stand as an obstacle to completion of a successful § 524(g) plan, and therefore are preempted by federal bankruptcy law.

Id. Thus, *Thorpe* further supports the increasing trend of the federal court system in preempting state law rights that purport to limit a debtor's rights in bankruptcy.

M. Residual Bank Lender Issues

The Bank Lenders raise various additional objections to confirmation of the Joint Plan. Most especially, they attempt to invoke two provisions of the Bankruptcy Code, §§ 1129(a)(7) and 1129(b), as support for their claim for the post-petition interest set at the default rate under the parties' Credit Agreements. The Court already addressed both these statutory sections elsewhere in this Memorandum in regard to other Appellants' objections. As previously noted, § 1129(a)(7) governs the best interests of the creditors test, while § 1129(b) encompasses the fair and equitable test and the absolute priority rule. The Court need not dwell on either objection, however, since the Third Circuit has made clear that both statutory sections only require payment of post-petition interest to unsecured creditors when the debtor in question is both impaired and solvent. *In re PPI Enters. (U.S.), Inc.*, 324 F.3d 197, 205 n. 14 (3d Cir.2003) ("An impaired creditor in a solvent debtor case can demand post-petition interest under the 'fair and equitable' test of § 1129(b)(2). 'Unimpaired' creditors have no such rights."); *see also Debentureholders Protective Comm. of Cont'l Inv.Corp. v. Cont'l Inv. Corp.*, 679 F.2d 264, 269 (1st Cir.1982). Given that the Court already found that the Bank Lenders are not impaired by the Joint Plan and affirmed the Bankruptcy Court's finding regarding their failure to establish Grace's solvency, their objections based on §§ 1129(a)(7) and 1129(b) are without merit. Nevertheless, the Court will briefly discuss the Bank Lenders' objections based on these Code provisions only in so much as they correlate to other remaining issues presented on appeal.

1. The Best Interests of the Creditors Test and Legal Rate of Interest Objections

***90** As previously discussed, the best interests of the creditors test requires that every creditor in a Chapter 11 reorganization plan receive at least the liquidation value under Chapter 11 as it would in a Chapter 7 liquidation. 11 U.S.C. § 1129(a)(7)(A)(i-ii); *see also In re Armstrong World Indus., Inc.*, 348 B.R. 136, 165–66 (D.Del.2006). In terms of the Bank Lenders' objections, if this case were to be liquidated under Chapter 7, then § 726(a)(5) of the Code would govern their post-petition interest claims. Section 725(a)(5) provides that a creditor shall receive interest on its claim "at the legal rate from the date of the filing of the petition." 11 U.S.C. § 726(a)(5); *see also In re Coram Healthcare Corp.*, 315 B.R. 321, 345–46 (Bankr.D.Del.2004). The statute itself does not define this terminology. There are, however, currently three approaches to determining the legal rate of interest. First is the state law approach, which provides that "if a contract exists between the debtor and creditor that establishes an interest rate on the outstanding balance" then that serves as the legal rate. *In re Beguelin*, 220 B.R. 94, 99 (9th Cir.B.A.P.1998); *In re Carter*, 220 B.R. 411, 415 (Bankr.D.N.M.1998); *In re Schoeneberg*, 156 B.R. 963, 972 (Bankr.W.D.Tex.1993). The second is the use of a specific state statute that sets the legal rate of interest. *See Beguelin*, 220 B.R. at 99 (citing *In re Shaffer Furniture Co.*, 68 B.R. 827, 831 (Bankr.E.D.Pa.1987)). The third approach is the federal judgment rate approach, under which the legal rate is established pursuant to 28 U.S.C. § 1961. *In re Godsey*, 134 B.R. 865, 867 (Bankr.M.D.Tenn.1991). The majority approach taken by most courts today is the federal judgment rate approach. *See Beguelin*, 220 B .R. at 99; *In re Cardelucci*, 285 B.R. F.3d 1231, 1235 (9th Cir.2002); *In re Best*, 365 B.R. 725, 727 (Bankr.W.D.Ky.2007); *In re Country Manor of Kenton*, 254 B.R. 179, 183 (Bankr.N.D.Ohio 2000); *In re Dow Corning, Corp.*, 237 B.R. 380, 394 (E.D.Mich.1999).

The Bankruptcy Court here favored this approach as well. The Bank Lenders now contend that this was erroneous and that the state law approach should apply, which they claim would entitle them to the default interest rate under the Credit Agreements. This objection is overruled.[FN169] The Bankruptcy Court was properly within its discretion to select the federal judgment rate approach, as the Third Circuit has not addressed the issue and various courts have put forth persuasive reasoning for using this approach.

> FN169. The Court likewise overrules the Bank Lenders' objection that the default interest dispute was not ripe in 2009.

In any event, it does not matter which of the three approaches would properly apply here because none of the three approaches would award the Bank Lenders the contractual *default* rate of interest. As discussed at length above, the Bank Lenders are not entitled to the default interest rate since no event of default occurred here in the first place. At the time of Grace's bankruptcy petition in 2001, the federal judgment rate was 4.19%. It has been recognized that the federal judgment rate is the *minimum* that must be paid to unsecured creditors under a plan to satisfy the best interests of the creditors test. *See In re Wash. Mut., Inc.*, Bankr.No. 08–12229, 2011 WL 57111, at *37 (Bankr.D.Del. Jan. 7, 2011) (citing *In re Coram Healthcare, Corp.*, 315 B.R. 321, 346 (Bankr.D.Del.2004)). But under the Term Agreement, the Bank Lenders will actually receive a rate—6.09% converted to a floating adjusted rate tied to the Prime—that is higher than the federal judgment rate. The Bank Lenders have not shown any equitable considerations as to why

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they would be entitled to a higher interest rate. *See* Coram Healthcare, 315 B.R. at 347 (recognizing that equitable considerations may be relevant to legal rate of interest analysis). Thus, the Court finds nothing erroneous in the Bankruptcy Court's decision to utilize the federal judgment rate as the appropriate measure here.

2. The Absolute Priority Rule Objections

***91** As stated above in reference to other Appellants' objections, the absolute priority rule requires a Chapter 11 reorganization plan to be fair and equitable with respect to an impaired, dissenting class of unsecured claims if (1) it pays the class's claims in full, or if (2) it does not allow holders of any junior claims or interests to receive or retain any property under the plan "on account of" 'such claims or interests. 11 U.S.C. § 1129(b)(2)(B)(i-ii); *Bank of Am. v. 203 N. LaSalle St. P'ship,* 526 U.S. 434, 441–42 (1999); *In re Armstrong World Indus., Inc.,* 432 F.3d 507, 512 (3d Cir.2005). In the context of equity, the absolute priority rule has been interpreted to mean that unsecured creditors must be paid the full amount of their allowed claims before equity can retain value under the plan. *See Armstrong,* 434 F.3d at 512; *In re Yasparro,* 100 B.R. 91, 95 (Bankr.M.D.Fla.1989) ("The absolute priority rule ... requires that creditors ... receive payment in full before lesser interests—such as those of equity holders—may share in the assets of the reorganized entity."); *In re Haskell Dawes, Inc.,* 199 B.R. 867, 869 (Bankr.E.D.Pa.1996). As discussed at length above, § 502(b) of the Bankruptcy Code precludes unmatured (*i.e.,* post-petition) interest from becoming part of a creditor's allowed claim because interest stops accruing on claims at the date of the filing of the bankruptcy petition. *See In re Oakwood Home Corps.,* 449 F.3d 588, 599 (3d Cir.2006); *In re Country Manor of Kenton, Inc.,* 254 B.R. 179, 182 (Bankr.N.D.Ohio 2000) ("[U]nmatured interest (*i.e.,* postpetition interest) does not, under any circumstance, become a part of that creditor's allowed claim.").

The Bank Lenders contend that the absolute priority rule is violated under the present circumstances because Grace's shareholders will retain value under the Joint Plan. The Court finds no such violation for several reasons. First, the rule only applies to unsecured creditors that are impaired by the terms of the plan, and the Court already determined that the Bank Lenders are not impaired. Second, the Bank Lenders will be paid the full amount of their allowed claims. Allowed claims do not include claims for unmatured, post-petition interest. As such, the Bank Lenders' allowed claims only consist of the principal and interest that was due as of the Petition Date. The Joint Plan will pay the Bank Lenders this amount in full prior to the shareholders receiving value under the Plan. The absolute priority rule is therefore not called into question under these circumstances.[FN170]

FN170. The Bank Lenders spend a significant portion of their argument discussing *In re Dow Corning,* 456 F.3d 668 (6th Cir.2006). The *Dow Corning* Court found that, under the facts of that case, the absolute priority rule required the unsecured creditors to receive payment of the post-petition interest. *Id.* at 679. That case, however, is distinguishable. The debtor's solvency in that case was undisputed, *id.* at 678, whereas here, Grace's solvency remains unknown. Application of the absolute priority rule is a more contentious matter and fact-specific inquiry when a debtor is insolvent or its solvency remains unknown. The Sixth Circuit even acknowledged this in its Opinion, stating that:

> Since solvent bankruptcy estates are somewhat of a rarity, it comes as no surprise that the majority of courts to consider whether to award default interest have done so in the context of an insolvent debtor. In those cases, bankruptcy courts have concluded that default interest need not be awarded in every instance for a plan to pass muster under § 1129(b)(1). Instead, bankruptcy courts analyze whether § 1129(b) requires the payment of default interest on a case-by-case basis.

Id. at 678–79. Thus, given the unknown nature of Grace's solvency at this point in time, *Dow Corning* is not directly applicable, and does not serve as a roadblock to plan confirmation under the circumstances at hand.

3. The Fair and Equitable Test and the Authority of the Committee to Bind the Bank Lenders

Section 1129(b) provides that a reorganization plan cannot be confirmed unless it does not "discriminate unfairly, and is fair and equitable" with respect to impaired classes of creditors that have rejected the plan. 11 U.S.C. 1129(b)(1). "[T]he decision for or against confirmation is placed squarely within the discretion of the judges and encompasses all their intrinsic perceptions of fairness and equity." *In re Horwitz,* 167 B.R. 237, 241 (Bankr.W .D.Okla.1994). When determining what rate of interest is fair and equitable to creditors, courts have considerably wide discretion and should consider the circumstances of each case individually. *See* Coram Healthcare, 315 B.R. at 346 ("[T]he specific facts of each case will determine what rate of interest is 'fair and equitable.' "); *In re* Dow Corning Corp., 244 B.R. 678, 692 (Bankr.E.D.Mich.1992) ("Given the case-specific nature of the fairness inquiry, then, it may well be that postpetition contractual interest is a matter which the Code leaves to the discretion of the courts.") (internal citation omitted).

***92** The Bank Lenders contend that, regardless of whether they are impaired or not, the equities of this case lead to the conclusion that the Joint Plan is not fair and equitable to them. Upon a consideration of the equities of this particular case, the Court still finds that the rate of interest that the Bank Lenders will receive under the Joint Plan is fair and equitable. The Bank Lenders have not established Grace's solvency, nor have they shown the Court why they are entitled to anything higher than the federal judgment rate of interest. Moreover, Grace claims that it repeatedly relied on the interest rate agreed upon in the Term Sheet when it adjusted its internal books and records, filed disclosures with the SEC, submitted monthly operating reports to the Bankruptcy Court, and as a baseline when it entered into settlements with other parties. The Bank Lenders did not make their demand for the higher interest rate known until after the Term Sheet was signed by all parties and finalized. Therefore, the Court finds that the fair and equitable test has been satisfied based on the facts and circumstances of this case. The Bank Lenders will receive the rate of interest specified in the Term Sheet—fairness and equity do not entitle them to anything more.

The Bank Lenders also assert that the fair and equitable test is violated because they are not bound by the terms of the 2005 and 2006 Letter Agreements. Specifically, they claim that these Agreements were entered into by the Committee, not the Bank Lenders, and that they therefore should not be bound by contracts to which they were not parties. The Bankruptcy Court rejected this argument, finding that Mr. Maher was authorized to act on behalf of and bind all general unsecured creditors in his capacity as Committee Chairperson and Administrative Agent for the Bank Lenders. *See* W.R. Grace & Co., Bankr.No. 01–1139, 2009 WL 1469831, at *6 n. 3 (Bankr.D.Del.2009). This Court agrees with the Bankruptcy Court. Testimony and evidence introduced at the Confirmation Hearing indicates that Mr. Maher made it clear that he was acting on behalf of all general unsecured creditors, including the Bank Lenders, when he entered into negotiations with Grace. The record also indicates that the 2005 Letter Agreement was modified for the sole benefit of the Bank Lenders to reflect increasing short-term interest rate trends in the market. A review of the record supports the notion that Mr. Maher only sought this modification to benefit the Bank Lenders because no other general unsecured creditors in Class 9 had their post-petition rates increased at this time. Indeed, the express language of the 2006 Letter Agreement makes this crystal clear: "[T]he Debtors agree to further amend the Joint Plan to modify the treatment of the Class of General Unsecured Creditors to provide that commencing January 1, 2006 the current 6.09% fixed, compounded quarterly, post-petition interest rate accruing for the Holders of Debtor's *pre-petition bank credit facilities* shall change to a floating Adjusted Base Rate, compounded quarterly." (Letter Agreement, dated Feb. 27, 2006 ("2006 Letter Agreement"), Ex. 18 to B.D.I. 22443, JA 010084–86.) If the modification was sought to benefit the Bank Lenders in the first place, it is logical to assume that they would be bound by it. To find otherwise would be fallacy.[FN171] The Bankruptcy Court's finding is therefore affirmed.

> FN171. The Bank Lenders' reliance on *In re* Kensington Int'l. Ltd., 368 F.3d 289 (3d Cir.2004) is likewise misplaced. In *Kensington,* the Third Circuit did not make a blanket statement that a creditor's committee does not retain authority to bind individual committee members. Rather, the holding of *Kensington* was specific to the facts of that case, and dealt with whether a district court judge must recuse himself from presiding over several bankruptcy cases, originally including the case at hand. The Third Circuit's discussion in relation to creditor committees dealt with the imputation of knowledge in the possession of counsel to the committee, not whether the committee chairperson generally had the authority to negotiate and act of behalf of the committee as a whole. The two cases that the Third Circuit cited as support in *Kensington* further support this notion, as they only discussed fiduciary duties owed to individual creditors versus an entire committee. *See In re* Drexel Burnham Lambert Grp., Inc., 138 B.R. 717, 722 (Bankr.S.D.N.Y.1992); *In re* Levy, 54 B.R. 805, 807 (Bankr.S.D.N.Y.1985).

4. Dissolution of the Unsecured Creditors Committee[FN172]

FN172. The Committee asserts this claim independently and separately from the Bank Lenders.

***93** Section 11.8 of the Joint Plan provides that the Committee may continue to exist and have the authority to participate in any appeals of an order confirming the Joint Plan that was in progress prior to the Effective Date of the Plan.[FN173] This Section further provides that the Committee shall cease to exist to provide its services or take actions in connection with any appeals if such actions are solely on behalf of certain creditors, rather than in the best interests of general unsecured creditors in Class 9 as a whole. [FN174] The Bankruptcy Court approved this Plan provision. On appeal, the Committee asserts that it should not be dissolved on the Effective Date of the Plan because the Bank Lenders may still have pending claims and the Committee should be entitled to take an active role in the litigation on their behalf.

FN173. Section 11.8 states, in relevant part:

> On the Effective Date, except as set forth below, ... the Unsecured Creditors' Committee ... shall thereupon be released and discharged of and from all further authority, duties, responsibilities, and obligations relating to or arising from or in connection with the Chapter 11 Cases, and those committees shall be deemed dissolved.... Further, after the Effective Date, the Unsecured Creditors' Committee ... shall continue in existence and have standing and capacity to (i) object to any proposed modification of the Plan, (ii) object to or defend the Administrative Expense Claims of Professionals employed by or on behalf of the Debtors or their estates, (iii) participate in any appeals of the Confirmation Order (if applicable), (iv) prepare and prosecute applications for the payment of fees and reimbursement of expenses, and (v) continue any adversary proceeding [ ], claim objection, appeal, or other proceeding that was in progress prior to the Effective Date.

(Joint Plan § 11.8.)

FN174. This "exception clause" provides that:

> Nothing in ... the foregoing sentence[s] shall be deemed to confer standing and capacity on the Unsecured Creditors' Committee ... to provide services or take action in connection with an adversary proceeding, claim objection, appeal or other proceeding that was in progress prior to the Effective Date where such services are for the benefit of an individual creditor or creditors and do not serve the direct interests of the creditor or equity interest class which such Entity is appointed to represent.

(Joint Plan § 11.8.)

The Court disagrees. At this point, all other general secured creditors are satisfied with their distribution from the Joint Plan and the Bank Lenders remain the only creditors in Class 9 that continue to pursue objections on appeal. The Committee astutely points out that in *Kensington,* the Third Circuit stated that "it is established that a Creditor's Committee owes a fiduciary duty to the unsecured creditors as a whole, not to the individual members" of the class. *Kensington,* 368 F.3d at 315. It cites to *Kensington* as support for its proposition that the Committee must continue to exist. What it has failed to realize, however, is that its citation to *Kensington* actually has the opposite effect here: if the Court permits the Committee to exist post-Effective Date, then the Committee may actually violate its fiduciary duty since at this point in time it would only continue to serve the interests of the Bank Lenders. Moreover, the record indicates that a majority of the Bank Lenders have retained their own very capable counsel to represent their legal interests, and nothing prevents the remaining Bank Lenders from likewise doing so. The Committee has provided no evidence that this independent representation by outside counsel has been ineffective in any way. To the contrary, it seems as though the Committee's work has been duplicative as a result of the Bank Lenders' well-qualified counsel.

While the Court credits the laudable work that the Committee has performed on behalf of all general unsecured creditors to date, it agrees with the Bankruptcy Court that there is no statutory basis for its continued existence after the Joint Plan becomes effective. The Committee's objection on this ground is therefore overruled.

V. CONCLUSION

For the foregoing reasons, the Settlement Agreement reached between Grace and the CNA Companies, as well as the Joint Plan, are affirmed. Having made this determination, the findings of the Bankruptcy Court and its

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judgment are also hereby affirmed, and the Joint Plan is confirmed in its entirety.

An appropriate Order follows.

ORDER

AND NOW, this 30th day of *January,* 2012, for the reasons expressed in the foregoing Memorandum Opinion, it is **ORDERED** that the Objections to the Settlement Agreement Between Appellee W.R. Grace & Co., *et al.* and the CNA Companies (Bankr.No. 01–1139, Doc. No. 26106) are **OVERRULED,** and the Settlement Agreement is **APPROVED.**

***94** It is **FURTHER ORDERED** that all Objections to the Joint Plan of Reorganization pursuant to Chapter 11 of the Bankruptcy Code of Appellee W.R. Grace & Co., *et al.* (Bankr.No. 01–1139, Doc. No. 21747, 26154, 26155) are **OVERRULED,** and the Joint Plan is **CONFIRMED** in its entirety.

It is **FURTHER ORDERED** that an injunction pursuant to 11 U.S.C. § 524(g) is hereby issued in accordance with the terms of the Joint Plan and attendant Plan documents and the recommended findings of fact, conclusions of law as expressed in the Bankruptcy Court's recommended Confirmation Order and the Bankruptcy Court's Memorandum Opinion Overruling Objections to the Joint Plan of Reorganization are approved in their entirety. The Joint Plan and its Asbestos PI and Asbestos PD Injunctions protect any person or entity that is an Asbestos Protected Party, a term defined in Plan Sections 1.1(51)(a) through (*l*) and as may be amended from time to time pursuant to the terms of the Joint Plan.

It is **FURTHER ORDERED** that Annexes I, II, and III attached to the Bankruptcy Court's Recommendation are incorporated herein by reference and approved, and the channeling injunction shall issue as to all Asbestos Protected Parties identified in Annex III.

D.Del.,2012.
In re W.R. Grace & Co.
--- B.R. ----, 2012 WL 310815 (D.Del.)

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EXHIBIT C

Subtopic III – Ethical Considerations

Newberg on Class Actions
Database updated November 2011
William B. Rubenstein, Alba Conte and Herbert B. Newberg

Chapter
15. Class Action Abuses and Legal Ethics

References

§ 15:12. Potential communications restrictions as affected by litigation stage—Precertification communications by class counsel

Before the trial court makes a determination regarding class certification, the class counsel may wish to notify absent class members of the commencement of the action for several reasons, such as the following:

(1) the filing of a class complaint tolls the statute of limitations, and this information would be of value to class members who may be uncertain how they may preserve their claims;

(2) in protracted litigation, when the court does not reach an early determination of the class issues, the class attorney may wish to notify absent class members, who may have learned of the action through attendant publicity, of the status of the litigation;

(3) because absent class members need not enter an appearance or intervene in the action, they are entitled to rely on the class action attorney to prosecute the litigation on their behalf; and

(4) communications with absent class members are appropriate as long as they are not considered abusive within the guidelines created by Gulf Oil Co v. Bernard.[1]

The class action attorney may wish to respond to inquiries from absent class members who learn, through publicity or otherwise, about the pending action. No solicitation problems arise when a class member initiates the communication. Class members may inquire about their legal rights, the nature of the class litigation, or the prospect that the attorney for the class will represent them personally in the litigation. It is not unusual or improper for the class counsel to accept absent class members as personal clients, after the filing of the class action complaint.

[FN1] Gulf Oil Co. v. Bernard, 452 U.S. 89, 101 S. Ct. 2193, 68 L. Ed. 2d 693, 31 Fed. R. Serv. 2d 509 (1981).

In the past, attempts to assess the commonality of issues through submissions of a questionnaire to absent class members or similar discovery were often stifled by a communications ban issued by the court which interfered with the ability of counsel to prepare the prosecution or defense of the action. Di Costanzo v. Chrysler Corp., 15 Fed. R. Serv. 2d 1248 (E.D. Pa. Mar 10, 1972). In this franchise antitrust class action, the court denied the plaintiff's motion for leave to communicate with certain potential class members, in accordance with a questionnaire and attached list. The court also entered a noncommunica-

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tion order adopted from the Manual of Complex Litigation's sample pretrial order (see § 15:7). Eight months later, the court denied class certification for lack of predominance of common issues. DiCostanzo v. Chrysler Corp., 57 F.R.D. 495 (E.D. Pa. 1972).

Cf. Equal Employment Opportunity Commission v. Singer Controls Co. of America, Appliance and Automotive Division, 80 F.R.D. 76 (N.D. Ohio 1978) (employment discrimination). The court permitted plaintiff to send a letter and questionnaire to certain women identified as former or present employees of defendant. The proposed communication was likely to develop probative and relevant data necessary to prove or disprove plaintiff's claims.

Different considerations exist in opt-in actions. See, e.g., Burt v. Manville Sales Corp., 116 F.R.D. 276 (D. Colo. 1987) (employment/ADEA). Named plaintiffs could conduct reasonable communications with putative class members in an ADEA action by former management employees.

This Court is without authority to issue notice to potential class members or take an active role in discovering or contacting potential plaintiffs. ... In an opt-in class situation, the Court need not protect the due process interests of non-joining parties, as they will not be bound by the outcome of the action.

Named plaintiffs are responsible for developing a Section 16(b) class. However, in the interest of avoiding barratry, the parties' conduct is also somewhat limited. Discovery directed solely toward establishing a class will not be allowed ... Discovery should proceed on the named plaintiffs' claims ... Reasonable communication with putative class members is proper ... We have no reason to doubt that contact with potential plaintiffs will proceed with complete professional responsibility.

Burt v. Manville Sales Corp., 116 F.R.D. 276, 278 to 279 (D. Colo. 1987) (emphasis in original).

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Chapter
15. Class Action Abuses and Legal Ethics

References

§ 15:14. Potential communications restrictions as affected by litigation stage—Precertification communications by party opposing class

In the absence of a local court rule or a pretrial order prohibiting or restricting communications by the defendants with absent class members, the defendants may continue to communicate in the ordinary course of business with members of the class, as long as they do not infringe on what some courts have characterized as the constructive attorney-client relationship that exists between counsel for class representatives and the members of the class.[1] In corporate and securities class action litigation, the defendants may communicate with shareholders concerning the pendency of the class action as a matter of course, in conjunction with the issuance of annual and quarterly reports to stockholders. The defendant may even comment on pending class litigation in a newspaper advertisement bought to clarify management's position on a pending tender offer.[2]

But courts may limit communications. In Rankin v. Board of Educ. Wichita Public Schools, U.S.D. 259,[3] upon motion by plaintiffs seeking certification of a class of students identified as speech-language impaired for an order prohibiting the defendant school entities from engaging in communications with the named plaintiffs or the prospective members of class, and sought curative notice at defendants' expense, the district court held that contact by the defendants with the named plaintiffs and the prospective class members was generally to be made through plaintiffs' counsel, except when necessary to provide services to the plaintiffs, and the defendants and their counsel would not be allowed to make any contact or communication which expressly referred to this litigation.

On May 27, 1997, U.S.D. 259 wrote a letter to the parents of selected pupils regarding speech-language services acknowledging that certain speech-language services were not provided in 1996 to 1997 for their children, and that compensatory speech-language services would be provided to make up for the missed services, possibly in the summer of 1997. The parents were asked to contact U.S.D. 259 if they wish to have such services provided, and the letter apologized for the fact that the services were not provided. The letter concludes by stating that the services will be provided during the 1997 to 1998 school year.

With respect to the presently named plaintiffs, although contact with them should generally be made through plaintiffs' counsel, the court believed that an exception to this ethical requirement should apply when necessary for the maintenance of services which were presently being provided to the plaintiffs, or in which the plaintiffs were currently enrolled. It would be very difficult, if not impossible, for the defendants to continue to provide services if all communications had to be made through counsel. With respect to prospective members of the class, the court found that plaintiffs failed to make the necessary showing that the May 27, 1997 letter was

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an abusive action that required protection from the court; the court did not find that a letter of apology and an offer to provide needed services, even if they are a subject of this litigation, was an abusive practice requiring the protection of the court. The letter made no reference to the litigation and does not even attempt to seek to discourage or prevent the recipients of the letter from participating in the lawsuit. Any prospective member of the class could choose to take advantage of defendants' offer and still choose to participate in this action should the class be certified.

The only possible concern with unlimited communication would be if the defendants sought to directly lobby the prospective members of the class action concerning their possible participation in the class action, should it be certified. Thus defendants and their counsel would not be allowed to make any contact or communication with them which expressly referred to this litigation. This provision would permit defendants to continue to communicate with prospective class members so long as the communication is made in the ordinary course of providing educational services to the students, even though such communications may necessarily implicate the subject matter of the litigation.

The court granted plaintiff's motion to limit defendant's contact with class members when the defendant wholesaler in a breach of contract action had three times contacted member hardware retailers, warning retailers not to join the class action, in Hardware, Inc. v. Cotter & Co.[4] The wholesaler would be prohibited from contacting potential class members with respect to the action until the date of trial or the date of an order denying the motion for class certification.

A defendant may attempt to threaten potential members with legal, economic, or political sanctions if they join in the class or initiate litigation. These tactics constitute a great abuse of the class action, and a court may properly enjoin such communications.[5]

When the communications can be shown to be abusive, the defendants may be ordered to retract their statements[6] and are subject to other sanctions. Solicitation of exclusions also poses ethical problems.[7]

[FN1] DR 7-104 of the Code of Professional Responsibility (1981) provided:
(A) During the course of his representation of a client a lawyer shall not:

(1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

(2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client.

Cf. Weight Watchers of Philadelphia, Inc. v. Weight Watchers Intern., Inc., 455 F.2d 770, 15 Fed. R. Serv. 2d 998 (2d Cir. 1972):
[W]e are unable to perceive any legal theory that would endow a plaintiff who has brought what would have

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been a "spurious" class action under former Rule 23 with a right to prevent negotiations of settlements between the defendant and other potential members of the class who are of a mind to do this; it is only the settlement of the class action itself without court approval that F. R. Civ. P. 23(e) prohibits.

Weight Watchers of Philadelphia, Inc. v. Weight Watchers Intern., Inc., 455 F.2d 770, 773, 15 Fed. R. Serv. 2d 998 (2d Cir. 1972).

Nesenoff v. Muten, 67 F.R.D. 500 (E.D. N.Y. 1974).

[FN2] TJ Adelman, Chairman of the Board and Acting Chief Executive Officer—Notice to All Stockholders of Great Western United Corp, N.Y. Times, Dec. 5, 1974, at 77. In commenting on recent events which substantiated the board's position that a tender offer to stockholders was inadequate, the notice provided in paragraph 7 as follows:

7. On November 22, 1974, Davis Cattle Co, Inc. filed an action against the Company and Great Western Sugar. The action seeks to proceed as a class action and alleges breach of the 1974 sugar beet contract between Great Western Sugar and various growers in violation of Section 10 of the Securities Exchange Act of 1934 in connection with the amount of the initial payment made by Great Western Sugar to the beet growers. The plaintiff seeks injunctive relief, restitution of monies received by the Company from Great Western Sugar since September 1, 1974, and damages of approximately $246,000,000 plus interest. The complaint relates primarily to the amount of the initial payment to growers, not to the total amount to be received by them for the market year pursuant to the sugar beet contract. The Company intends to vigorously defend the action and you should know that under normal court procedures this matter would not normally be adjudicated until after the growers would have received the major part of the money owed them pursuant to the contract.

[FN3] Rankin v. Board of Educ. Wichita Public Schools, U.S.D. 259, 174 F.R.D. 695 (D. Kan. 1997).

[FN4] Hampton Hardware, Inc. v. Cotter & Co., Inc., 156 F.R.D. 630 (N.D. Tex. 1994) (contract).

[FN5] In re International House of Pancakes Franchise Litigation, 1972 Trade Cas. (CCH) ¶73797, 1972 WL 519 (W.D. Mo. 1972). See also Ojeda-Sanchez v. Bland Farms, 600 F. Supp. 2d 1373 (S.D. Ga. 2009) (enjoining communications between party opposing putative class and putative class members when putative class members alleged that the opposing party had forced them to sign documents at their homes in Mexico during FLSA collective action).

[FN6] Weight Watchers of Philadelphia, Inc. v. Weight Watchers Intern., Inc., 55 F.R.D. 50 (E.D. N.Y. 1971).

[FN7] § 15:19.

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involving overlapping, duplicative, or competing suits in other federal courts or in state courts, the lawyers may stipulate to the appointment of a lead interim counsel and a steering committee to act for the proposed class. Such a stipulation leaves the court with the tasks of determining that the chosen counsel is adequate to serve as interim class counsel and making a formal order of appointment. Absent a stipulation, the court may need to select interim class counsel from lawyers competing for the role and formally designate the lawyer selected.

- *Whether and how to obtain information from parties and their counsel about the status of all related cases pending in state or federal courts, including pretrial preparation, schedules and orders, and the need for any coordinated activity.* Section 20.31 discusses coordination and other approaches to pending parallel litigation with state judges.
- *Whether any discovery is needed to decide whether to certify the proposed class.* See section 21.13. Precertification discovery permits the parties to "gather information necessary to make the certification decision," which "often includes information required to identify the nature of the issues that actually will be presented at trial."[744] To define the need for and appropriate limits on precertification discovery, it is useful to direct the parties to discuss these and related problems at the Rule 26(f) conference and to present a plan to the court at an early Rule 16 hearing. The judge can then put into place a schedule for determining the scope of discovery necessary to decide certification, as opposed to merits discovery. At such hearings, the judge should also inquire whether the parties contemplate precertification discovery from the potential class members, determine whether such proposed discovery fills a legitimate need, and make appropriate plans for the most cost-effective means of conducting it.

21.12 Precertification Communications with the Proposed Class

Rule 23(d) authorizes the court to regulate communications with potential class members, even before certification.[745] Such regulations, however, could

744. *See* Fed. R. Civ. P. 23(c)(1) committee note (setting a flexible time standard by providing that certification decisions should be made "at an early practicable time").

745. *In re* Sch. Asbestos Litig., 842 F.2d 671, 680 (3d Cir. 1988) ("Rule 23 specifically empowers district courts to issue orders to prevent abuse of the class action process.").

implicate the First Amendment.[746] Moreover, restrictions of this type may be difficult to implement given the ease and speed of communicating with dispersed groups. For example, many class actions attorneys establish Internet Web sites for specific class actions, in addition to using conventional means of communication, such as newspapers. Most judges are reluctant to restrict communications between the parties or their counsel and potential class members, except when necessary to prevent serious misconduct.[747]

Direct communications with class members, however, whether by plaintiffs or defendants, can lead to abuse.[748] For example, defendants might attempt to obtain releases from class members without informing them that a proposed class action complaint has been filed. If defendants are in an ongoing business relationship with members of a putative class, the court might consider requiring production of communications relating to the case. In appropriate cases, courts have informed counsel that communications during an ongoing business relationship, including individual releases or waivers, must be accompanied by notification to the members of the proposed class that the litigation is pending.[749]

Judicial intervention is generally justified only on a clear record and with specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties. Such intervention "should result in a carefully drawn order that limits speech as little as possible, consistent with the rights of the parties under the circumstances."[750] Even if the court finds that there has been an abuse, less burdensome remedies may suffice, such as requiring parties to initiate communication with potential class members

746. *See* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985).

747. Gulf Oil Co. v. Bernard, 452 U.S. 89, 101–02 (1981).

748. *See id.* at 99–100 & n.12; Kleiner v. First Nat'l Bank, 751 F.2d 1193 (11th Cir. 1985); Keystone Tobacco Co. v. U.S. Tobacco Co., 238 F. Supp. 2d 151 (D.D.C. 2002), *reconsideration denied*, 2003 U.S. District LEXIS 14653 (2003); Hampton Hardware Inc. v. Cotter & Co., 156 F.R.D. 630 (N.D. Tex. 1994).

749. Ralph Oldsmobile, Inc. v. Gen. Motors Corp., No. 99 Civ. 4567, 2001 WL 1035132, at *7 (S.D.N.Y. Sept. 7, 2001); *see also* 2 Geoffrey C. Hazard & W. William Hodes, The Law of Lawyering § 38.4, at 38-6 (3d ed. 2002) (copies of communications sent by defendants who have ongoing business relationships with potential class members relating to pending litigation should be given to opposing counsel).

750. *Gulf Oil*, 452 U.S. at 101–02. For an example of a limited ban on communications between a defendant and class members, see *Rankin v. Board of Education of Wichita Public Schools*, 174 F.R.D. 695, 697 (D. Kan. 1997) (ordering that "defendants and their counsel shall not make any contact or communication with [prospective class members] which expressly refers to this litigation"). Generally, more than just the potential for abuse is required to support issuance of a protective order. Basco v. Wal-Mart Stores, Inc., No. CIV.A.00-3184, 2002 WL 272384, at 3–4 (E.D. La. Feb. 25, 2002).

only in writing or to file copies of all nonprivileged communications with class members.[751] If class members have received inaccurate precertification communications, the judge can take action to cure the miscommunication and to prevent similar problems in the future.[752] Rule 23 and the case law make clear that, even before certification or a formal attorney–client relationship, an attorney acting on behalf of a putative class must act in the best interests of the class as a whole.[753]

Misrepresentations or other misconduct in communicating with the class may impair the fairness and adequacy of representation under Rule 23(a)(4), may affect the decision whether to appoint counsel under proposed Rule 23(g), and may be prohibited and penalized under the court's Rule 23(d)(2) plenary protective authority. Defendants and their counsel generally may communicate with potential class members in the ordinary course of business, including discussing settlement before certification,[754] but may not give false, misleading, or intimidating information, conceal material information, or attempt to influence the decision about whether to request exclusion from a class certified under Rule 23(b)(3). Ethics rules restricting communications with individuals represented by counsel may apply to restrict a defendant's communications contract with the named plaintiffs.[755]

751. *See Gulf Oil*, 452 U.S. at 104 n.20.

752. E.E.O.C. v. Mitsubishi Motor Mfg. of Am., Inc., 102 F.3d 869, 870–71 (7th Cir. 1996) (reciting district court action to cure precertification miscommunication regarding communications between employees and employer and to require prior notice to prevent future miscommunications); *Ralph Oldsmobile*, 2001 WL 1035132, at *7 (curative notice sent to members of the proposed class at the expense of defendant).

753. *See* Fed. R. Civ. P. 23(g)(2)(A) committee note; *cf.* 2 Hazard & Hodes, *supra* note 749, § 38.4, at 38-7 (indicating that the lawyer for the proposed class has a fiduciary obligation and owes class members "duties of loyalty and care").

754. *See Gulf Oil*, 452 U.S. 95 (after a class action had been commenced but before certification, defendant continued to deal directly with potential class members concerning an offer of settlement that had been earlier negotiated with the Equal Employment Opportunity Commission (EEOC)).

755. *See Ralph Oldsmobile*, 2001 WL 1035132, at *4, *7 (finding that defendant's failure to inform independent dealers about pending class actions was misleading and ordering defendant to send corrective notice to potential members of the proposed class); Hampton Hardware v. Cotter & Co., 156 F.R.D. 630, 634–35 (N.D. Tex. 1994) (court found abuse and issued protective order limiting communications after defendant contacted potential class members and encouraged them not to participate in the class action by stating that such participation would negatively impact the parties' ongoing business relationship); *see also infra* section 21.323 (other communications from class members). *See generally* Kleiner v. First Nat'l Bank of Atlanta, 751 F.2d 1193, 1202 (11th Cir. 1985) ("If the class and the class opponent are involved in an ongoing business relationship, communications from the class opponent may be coercive.") (quoting Note, *Developments in the Law—Class Actions*, 89 Harv. L. Rev. 1318, 1600 (1976)).

Disclosure Obligations Under Rule 2019

Rule 2019 was revised as of December 1, 2011.

Rule 2019 requires that "a verified statement setting forth the information specified in subdivision (c) of this rule shall be filed by every group or committee that consists of or represents, and every entity that represents, multiple creditors or equity security holders that are (A) acting in concert to advance their common interests, and (B) not composed entirely of affiliates or insiders of one another." Rule 2019(b)(1).

The revisions limit the effect of Rule 2019 in certain significant respects. Now there is a disclosure requirement where the group or committee represented is "acting in concert."

Revised Rule 2019 provides a carveout for a class action representative. Specifically, it provides that:

(b) DISCLOSURE BY GROUPS, COMMITTEES, AND ENTITIES.

(2) Unless the court orders otherwise, an entity is not required to file the verified statement described in paragraph (1) of this subdivision solely because of its status as:

. . . .

(C) a class action representative . . . .

Rule 2019(b)(2)(C).

Therefore, there is no automatic Rule 2019 disclosure requirement for class counsel. The rule appears to leave open the possibility that a court could require disclosure by class counsel.

Prior caselaw under 2019, as it related to class actions, is therefore of limited applicability.

ATTACHMENT A – RULE 2019

RULE 2019. DISCLOSURE REGARDING CREDITORS AND EQUITY SECURITY HOLDERS IN CHAPTER 9 AND CHAPTER 11 CASES (EFFECTIVE DECEMBER 1, 2011)

(a) Definitions. In this rule the following terms have the meanings indicated:

(1) "Disclosable economic interest" means any claim, interest, pledge, lien, option, participation, derivative instrument, or any other right or derivative right granting the holder an economic interest that is affected by the value, acquisition, or disposition of a claim or interest.

(2) "Represent" or "represents" means to take a position before the court or to solicit votes regarding the confirmation of a plan on behalf of another.

(b) DISCLOSURE BY GROUPS, COMMITTEES, AND ENTITIES.

(1) In a chapter 9 or 11 case, a verified statement setting forth the information specified in subdivision (c) of this rule shall be filed by every group or committee that consists of or represents, and every entity that represents, multiple creditors or equity security holders that are (A) acting in concert to advance their common interests, and (B) not composed entirely of affiliates or insiders of one another.

(2) Unless the court orders otherwise, an entity is not required to file the verified statement described in paragraph (1) of this subdivision solely because of its status as:

(A) an indenture trustee;

(B) an agent for one or more other entities under an agreement for the extension of credit;

(C) a class action representative; or

(D) a governmental unit that is not a person.

(c) INFORMATION REQUIRED. The verified statement shall include:

(1) the pertinent facts and circumstances concerning:

(A) with respect to a group or committee, other than a committee appointed under § 1102 or § 1114 of the Code, the formation of the group or committee, including the name of each entity at whose instance the group or committee was formed or for whom the group or committee has agreed to act; or

(B) with respect to an entity, the employment of the entity, including the name of each creditor or equity security holder at whose instance the employment was arranged;

(2) if not disclosed under subdivision (c)(1), with respect to an entity, and with respect to each member of a group or committee:

(A) name and address;

(B) the nature and amount of each disclosable economic interest held in relation to the debtor as of the date the entity was employed or the group or committee was formed; and

(C) with respect to each member of a group or committee that claims to represent any entity in addition to the members of the group or committee, other than a committee appointed under § 1102 or § 1114 of the Code, the date of acquisition by quarter and year of each disclosable economic interest, unless acquired more than one year before the petition was filed;

(3) if not disclosed under subdivision (c)(1) or (c)(2), with respect to each creditor or equity security holder represented by an entity, group, or committee, other than a committee appointed under § 1102 or § 1114 of the Code:

(A) name and address; and

(B) the nature and amount of each disclosable economic interest held in relation to the debtor as of the date of the statement; and

(4) a copy of the instrument, if any, authorizing the entity, group, or committee to act on behalf of creditors or equity security holders.

(d) SUPPLEMENTAL STATEMENTS. If any fact disclosed in its most recently filed statement has changed materially, an entity, group, or committee shall file a verified supplemental statement whenever it takes a position before the court or solicits votes on the confirmation of a plan. The supplemental statement shall set forth the material changes in the facts required by subdivision (c) to be disclosed.

(e) DETERMINATION OF FAILURE TO COMPLY; SANCTIONS.

(1) On motion of any party in interest, or on its own motion, the court may determine whether there has been a failure to comply with any provision of this rule.

(2) If the court finds such a failure to comply, it may:

(A) refuse to permit the entity, group, or committee to be heard or to intervene in the case;

(B) hold invalid any authority, acceptance, rejection, or objection given, procured, or received by the entity, group, or committee; or

(C) grant other appropriate relief.

ATTACHMENT B – REDLINE OF RULE 2019

RULE 2019. ~~REPRESENTATION OF~~DISCLOSURE REGARDING CREDITORS AND EQUITY SECURITY HOLDERS IN CHAPTER 9 ~~MUNICIPALITY~~ AND CHAPTER 11 ~~REORGANIZATION~~ CASES

(a) Definitions. In this rule the following terms have the meanings indicated:

(1) "Disclosable economic interest" means any claim, interest, pledge, lien, option, participation, derivative instrument, or any other right or derivative right granting the holder an economic interest that is affected by the value, acquisition, or disposition of a claim or interest.

(2) "Represent" or "represents" means to take a position before the court or to solicit votes regarding the confirmation of a plan on behalf of another.

(b) DISCLOSURE BY GROUPS, COMMITTEES, AND ENTITIES.

(a1) ~~Data Required.~~ In a chapter 9 ~~municipality~~ or ~~chapter~~ 11 ~~reorganization~~ case, ~~except with respect to a committee appointed pursuant to § 1102 or 1114 of the Code, every entity or committee representing more than one creditor or equity security holder and, unless otherwise directed by the court, every indenture trustee, shall file~~ a verified statement setting forth ~~(1)~~ the ~~name and address of the creditor or equity security holder; (2) the nature and amount of the claim or interest and the time of acquisition thereof unless it is alleged to have been acquired more than one year prior to the filing of the petition; (3) a recital of the pertinent facts and circumstances in connection with the employment of the entity or indenture trustee, and, in the case of a committee, the name or names of the entity or entities at whose instance, directly or indirectly, the employment was arranged or the committee was organized or agreed to act; and (4) with reference to the time of the employment of the entity, the organization or formation of the committee, or the appearance in the case of any indenture trustee, the amounts of claims or interests owned by the entity, the members of the committee or the indenture trustee, the times when acquired, the amounts paid therefor, and any sales or other disposition thereof. The statement shall include a copy of the instrument, if any, whereby the entity, committee, or indenture trustee is empowered to act on behalf of~~information specified in subdivision (c) of this rule shall be filed by every group or committee that consists of or represents, and every entity that represents, multiple creditors or equity security holders~~.~~ that are (~~A supplemental statement shall be filed promptly, setting forth any material changes in the facts contained in the statement filed pursuant to this subdivision.~~) acting in concert to advance their common interests, and (B) not composed entirely of affiliates or insiders of one another.

(2) Unless the court orders otherwise, an entity is not required to file the verified statement described in paragraph (1) of this subdivision solely because of its status as:

(A) an indenture trustee;

(B) an agent for one or more other entities under an agreement for the extension of credit;

(C) a class action representative; or

(D) a governmental unit that is not a person.

(c) INFORMATION REQUIRED. The verified statement shall include:

(1) the pertinent facts and circumstances concerning:

(A) with respect to a group or committee, other than a committee appointed under § 1102 or § 1114 of the Code, the formation of the group or committee, including the name of each entity at whose instance the group or committee was formed or for whom the group or committee has agreed to act; or

(B) with respect to an entity, the employment of the entity, including the name of each creditor or equity security holder at whose instance the employment was arranged;

(2) if not disclosed under subdivision (c)(1), with respect to an entity, and with respect to each member of a group or committee:

(A) name and address;

(B) the nature and amount of each disclosable economic interest held in relation to the debtor as of the date the entity was employed or the group or committee was formed; and

(C) with respect to each member of a group or committee that claims to represent any entity in addition to the members of the group or committee, other than a committee appointed under § 1102 or § 1114 of the Code, the date of acquisition by quarter and year of each disclosable economic interest, unless acquired more than one year before the petition was filed;

(3) if not disclosed under subdivision (c)(1) or (c)(2), with respect to each creditor or equity security holder represented by an entity, group, or committee, other than a committee appointed under § 1102 or § 1114 of the Code:

(A) name and address; and

(B) the nature and amount of each disclosable economic interest held in relation to the debtor as of the date of the statement; and

(4) a copy of the instrument, if any, authorizing the entity, group, or committee to act on behalf of creditors or equity security holders.

(d) SUPPLEMENTAL STATEMENTS. If any fact disclosed in its most recently filed statement has changed materially, an entity, group, or committee shall file a verified supplemental statement whenever it takes a position before the court or solicits votes on the confirmation of a plan. The supplemental statement shall set forth the material changes in the facts required by subdivision (c) to be disclosed.

(e) DETERMINATION OF FAILURE TO COMPLY; SANCTIONS.

(~~b~~1) ~~Failure To Comply; Effect.~~ On motion of any party in interest, or on its own ~~initiative~~motion, the court may ~~(1)~~ determine whether there has been a failure to comply with ~~the provisions of subdivision (a)~~any provision of this rule ~~or with any other applicable law regulating the activities and personnel of any entity, committee, or indenture trustee or any other impropriety in connection with any solicitation and, if it so determines, the court may refuse to permit that entity, committee, or indenture trustee to be heard further or to intervene in the case;~~.

(2) If the court finds such a failure to comply, it may:

(A) refuse to permit the entity, group, or committee to be heard or to intervene in the case;

~~(2) examine any representation provision of a deposit agreement, proxy, trust mortgage, trust indenture, or deed of trust, or committee or other authorization, and any claim or interest acquired by any entity or committee in contemplation or in the course of a case under the Code and grant appropriate relief; and (3~~B) hold invalid any authority, acceptance, rejection, or objection given, procured, or received by ~~an~~the entity, group, or committee ~~who has not complied with this rule or with § 1125(b) of the Code.~~; or

(C) grant other appropriate relief.

ATTACHMENT C – James M. Wilton and James A. Wright III, *Parsing and Complying with New Rule 2019*, XXX ABI Journal 8, 16, 82-83, October 2011.

Parsing and Complying with New Rule 2019

Written by:
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Existing Bankruptcy Rule 2019 is an old and until recently, little-used rule that grew out of Depression-era reforms under the Chandler Act to address abuses by equity protective committees that would acquire claims and represent the interests of third parties in negotiating reorganization plans in receivership and bankruptcy cases.[1] Over the past few years, parties have invoked the rule in several cases as a litigation tactic against *ad hoc* committees, informal groups of sophisticated investors who pool resources to advance their common interests in out-of-court restructurings and bankruptcy cases.


James M. Wilton

As might be expected from application of an old rule in new circumstances, courts have disagreed over whether to apply the rule to *ad hoc* committees.[2] Now, in a process well detailed in an article in the June 2011 *ABI Journal*,[3] the U.S. Supreme Court has approved an extensive revision and update to Bankruptcy Rule 2019 ("New Rule 2019").[4] This article discusses practical aspects of compliance with the new rule.

Who Must Comply with New Rule 2019?

New Rule 2019 expands in many respects, but contracts in others, the categories of parties required to comply with the rule. In general, New Rule

About the Authors

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2019 applies to (1) *ad hoc* committees or groups, (2) official committees appointed pursuant to 11 U.S.C. § 1102 or 1114 and (3) entities that represent multiple creditors or equity security-holders, if the represented creditors or equity security-holders are acting in concert to advance their common interests and are not composed entirely of affiliates or insiders of one another. The committees, groups and entities that may become subject to New Rule 2019 include the following:

Ad Hoc Committees or Groups

Resolving a split in court decisions under existing Rule 2019,[5] New Rule 2019 unambiguously applies to "every group or committee that consists of or represents...multiple creditors or equity security-holders that are (A) acting in

Practice & Procedure

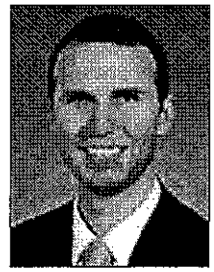
concert to advance their common interests and (B) not comprised entirely of affiliates or insiders of one another."[6] While clearly including within its sweep *ad hoc* committees of bondholders, the rule would also apply to other groups that have common interests and act in concert, such as informal committees or groups of landlords or trade creditors.

For two or more creditors to qualify as a committee or group subject to the rule, the rule would likely require that the creditors make joint decisions to be "acting in concert." On the other hand, it is unlikely that New Rule 2019 would apply to similarly situated creditors that independently retain the same counsel if the creditors do not communicate directly to coordinate decisions. It is also likely that similarly situated creditors that coordinate action through separate counsel and file separate motions or other court papers are not "acting in concert," because each creditor has acted independently and retains discretion to pursue or settle its separate litigation.

Official Committees

Unlike under the existing rule, official committees must comply with New Rule 2019, although with limited disclosure requirements as compared with *ad hoc* committees or groups.

Entities Covered by New Rule


James A. Wright III

As under existing Rule 2019, New Rule 2019 applies not only to committees but also to entities representing more than one creditor or equity security-holder. New Rule 2019 defines "represent" as "to take a position before the court or to solicit votes regarding the confirmation of a plan on behalf of another."[7] However, unlike the existing rule, New Rule 2019 requires disclosure by entities only if the creditors or equity security-holders represented are acting in concert to advance their common interests and do not consist entirely of affiliates or insiders of one another. As a result, the scope of New Rule 2019 is more limited in this respect than existing Rule 2019: Law firms, for example, will not fall under the scope of the rule if they represent more than one creditor in a case unless the clients are acting in concert.

New Rule 2019 exempts certain entities from automatic[8] compliance with the rule solely because of their status as (1) indenture trustees, (2) agents under credit agreements, (3) class-action representatives and (4) governmental units that are not persons.[9] These express exemptions create an implication that other categories of representatives must comply with New Rule 2019 in circumstances where the rule would otherwise apply.

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1 An excellent discussion of the legislative history of existing Rule 2019 is contained in Hon. **Christopher S. Sontchi**'s decision, *In re Premier Int'l Holdings Inc.*, 423 B.R. 58 (Bankr. D. Del. 2010).

2 *Compare In re Washington Mut.*, 419 B.R. 271 (Bankr. D. Del. 2009) (Walrath, J.) (holding that *ad hoc* committee was "committee" under Rule 2019); *In re Nw. Airlines Corp.*, 363 B.R. 701, 703 (Bankr. S.D.N.Y. 2007) (Gropper, J.) (same), *with In re Phila. Newspapers LLC*, 422 B.R. 553 (Bankr. E.D. Pa. 2010) (holding that *ad hoc* group is not "committee" under Rule 2019 where group did not represent interests of anyone other than its members); *In re Premier Int'l Holdings Inc.*, 423 B.R. 58 (Bankr. D. Del. 2010) (Sontchi, J.) (same); *In re Scotia Dev. LLC*, 2007 WL 1192137 (Bankr. S.D. Tex. Apr. 20, 2007) (same).

3 *See* Richard J. Corbi, Billy Hildbold and Jonathan M. Petts, "New Rule 2019: Distressed Investors, What Are You Holding?," *Am. Bankr. Inst. J.*, June 2011 at 14.

4 New Rule 2019 will take effect on Dec. 1, 2011, in cases filed after that date. The rule will also apply "insofar as just and practicable" to all proceedings then pending.

5 *See* n. 2.

6 New Rule 2019(b)(1).

7 New Rule 2019(a)(2).

8 The exemption applies "unless the court orders otherwise." *See* New Rule 2019(b)(2).

9 This exclusion would include the Pension Benefit Guaranty Corp. (PBGC), which is a governmental unit; *see Mansfield Tire & Rubber Co. v. PBGC (In re Mansfield Tire & Rubber Co.)*, 39 B.R. 974, 975 (N.D. Ohio 1983) (assuming PBGC to be governmental unit); *PBGC v. LTV Corp. (In re Chateaugay Corp.)*, 86 B.R. 33, 37 (S.D.N.Y. 1987) (same) and not a pension; 11 U.S.C. § 101(41) (expressly excluding "a guarantor of a pension benefit payable by or on behalf the debtor or an affiliate of the debtor" from Bankruptcy Code definition of "person").

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Law Firms. Law firms are accustomed to complying with existing Rule 2019. Because New Rule 2019 restricts compliance to situations where multiple clients are represented and are acting in concert, in most circumstances, law firms will no longer need to comply with the rule. For example, if a law firm represents two landlords in the bankruptcy of a national retailer and files similar motions for each client, Rule 2019 would likely not apply. However, if the two clients file a joint motion or otherwise act in concert, the law firm would be required to make a disclosure.

Financial Advisers and Investment Bankers. New Rule 2019 defines "represent" to include soliciting of votes regarding the confirmation of a plan on behalf of another. This covers common activities of financial advisers and investment bankers in bankruptcy cases. However, in the typical case where financial advisers and investment bankers represent only one entity or multiple debtors that are affiliates or insiders of one another, New Rule 2019 will not apply.

Unions. The legislative history of New Rule 2019 does not indicate a particular focus on unions in the rule-making process. New Rule 2019 does not exempt unions from the rule, and if a union takes a position before the court on behalf of the bargaining unit and its individual members as opposed the union as a party to the collective-bargaining agreement, the rule would appear to apply. Compliance with the rule, in particular requirements for disclosure of claims and other disclosable economic interests of union members under Rule 2019(c)(3), would be a substantial burden for unions.

What Must Be Done Initially to Comply with New Rule 2019?

The heart of New Rule 2019 is a requirement for the filing in chapter 9 and 11 cases of a verified statement by every group, committee or entity as to which the rule applies. The statement is verified and filed by the group, committee or entity, not by members of a group or committee or by creditors or equity security-holders that a group, committee or entity may represent. Nevertheless, the required statement must identify the members of the group or committee and represented parties and list all economic interests of these persons.[10]

Central to the disclosure requirement is the new concept of a "disclosable economic interest."[11] This defined term includes not only claims against and equity interests in a debtor, but also options, participations, pledges and liens, and derivative instruments or other rights in relation to the debtor, that are "affected by the value, acquisition or disposition of a claim or interest." Given the very broad definition of "claim" under the Bankruptcy Code, disclosable economic interests would include unliquidated, contingent, unmatured or disputed claims as well as rights to equitable remedies for breach of performance, if the breach gives rise to a right of payment.

Under New Rule 2019, official committees are required to disclose the name and address of each member of the committee and the nature and amount of all disclosable economic interests held in relation to the debtor as of the date the committee was formed. With respect to *ad hoc* committees or groups, the verified statement must contain: (1) "pertinent facts and circumstances" concerning the formation of the group or committee and the name of each entity at whose instance the group or committee was formed or for whom the group or committee has agreed to act, and (2) with respect to each member, (a) such member's name and address, (b) the nature and amount of all disclosable economic interests held in relation to the debtor as of the date the group or committee was formed[12] and (c) if the group or committee claims to represent any entity in addition to its members, the date of acquisition by quarter and year of each disclosable economic interest held by members, unless acquired more than one year before the bankruptcy petition date. In the unusual situation where the *ad hoc* committee represents[13] creditors or equity security-holders other than its members, the verified statement must also contain the name and address of the non-member parties represented, the nature and amount of all disclosable economic interests held by such represented parties as of the date of the statement and a copy of the instrument, if any, authorizing the representation.[14]

With regard to entities, Rule 2019 requires that the verified statement include (1) pertinent facts and circumstances concerning the employment of the entity, including the name of each creditor or equity security-holder at whose instance the employment was arranged; (2) the name and address of the entity; (3) the nature and amount of each disclosable economic interest held by the entity in relation to the debtor as of the date the entity was employed;[15] and (4) the name and address of creditors and equity security-holders represented by the entity, the nature and amount of all disclosable economic interests held by each such creditor or equity security-holder in relation to the debtor as of the date of the statement, and a copy of the instrument, if any, authorizing the entity to act on behalf of the represented creditors or equity security-holders.

When Must Disclosure Be Supplemented?

New Rule 2019 provides that if any fact disclosed in its most recently filed statement has changed materially, an entity, group or committee shall file a verified supplemental statement whenever it takes a position before the court or solicits votes on the confirmation of a plan. For example, if the composition of a group or committee has changed, a supplemental statement would need to be filed updating the membership of the group or committee.[16]

New Rule 2019 is less clear as to whether changes in the amounts or nature of disclosable economic interests of existing committee or group members

10 Although the rule is not specific, presumably a verified statement by a committee would be executed by the chair of the committee based on an inquiry to the members.

11 New Rule 2019(c)(1).

12 Unlike the situation with official committees, in many cases, an ad hoc committee will have formed many weeks or months prior to the bankruptcy petition date.

13 "Represent" is defined as "to take a position before the court...on behalf of another." New Rule 2019(a)(2).

14 New Rule 2019 applies to any *ad hoc* committee or group that "consists of or represents" multiple creditors. Therefore, the rule contemplates that *ad hoc* committees or groups may not, in every circumstance, represent their members. The distinction is meaningful. If an *ad hoc* committee or group represents its members, as with represented non-members, reporting of disclosable economic interests of members would be required as of the date that a 2019 statement is filed, not just the date the committee or group was formed. *Compare* New Rule 2019(c)(2)(B) *with* New Rule 2019(c)(3)(B).

15 New Rule 2019 requires only reporting of disclosable economic interests "with respect to an entity." Where the entity is a law firm, the rule would not require reporting of disclosable economic interests of members of the firm.

16 Although New Rule 2019 does not address the point, it is logical that reporting of disclosable economic interests of new members is required as of the date that the new member joins the committee or group, if the admission of a new member is determined to constitute a reformation of the committee or group. Counsel to an *ad hoc* committee or group will also need to determine if a reformation of the committee or group requires an update of disclosable economic interests of continuing members.

mandate the filing of supplemental statements. Supplemental verified statements are required only if facts disclosed in an original verified statement have changed. An initial verified statement for a group or committee definitively requires reporting of disclosable economic interests of its members "as of the date...the group or committee was formed."[17] A later acquisition or sale by a committee member of disclosable economic interests will not change facts as disclosed in the initial verified statement since the disclosure in the initial statement remains correct as of that date. Read literally, New Rule 2019 does not require the filing of supplemental statements as a result of changes in economic positions of members after the date of filing of an accurate initial statement.

Sanctions, Other Implications of Noncompliance

The sanctions provided in New Rule 2019 for noncompliance are substantially similar to those under the existing rule. Under the new rule, on a motion of any party in interest or on its own motion, the court may determine whether there has been a failure to comply with any provision of the rule. If the court finds a failure to comply, it may "(A) refuse to permit the entity, group or committee to be heard or intervene in the case, (B) hold invalid any authority, acceptance, rejection or objection, given, procured or received, by the entity, group or committee, or (C) grant other appropriate relief."[18]

New Rule 2019 does not expressly authorize sanctions against members of groups or committees subject to the rule or against creditors or equity securityholders represented by an entity, group or committee that has failed to comply with the rule, which makes sense. Members and entities represented by groups or committees are not directly subject to the rule and are not required to make any disclosures. For the same reason, verified statements under New Rule 2019 should not constitute admissions against interests in connection with any objections to proofs of claim later filed by members or entities represented by groups or committees or a ground for judicial estoppel or other equitable remedies.

Conclusion

New Rule 2019 has resolved the split in authority on whether the rule applies to *ad hoc* committees by making them expressly subject to the rule. As discussed, the new rule has also significantly changed who must make disclosures, when those disclosures are necessary, and what information must be disclosed. Because of the potentially significant penalties for failure to comply, practicing bankruptcy attorneys would be well served to become familiar with these new changes to an old disclosure regime. ■

17 New Rule 2019(c)(2)(B).

18 New Rule 2019(e)(2).

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<u>ATTACHMENT D – Richard J. Corbi, Billy Hildbold and Jonathan M. Petts, *New Rule 2019: Distressed Investors: What Are You Holding?*, XXX ABI Journal 5, 14, 76-77, June 2011.</u>

New Rule 2019: Distressed Investors, What Are You Holding?

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Editor's Note: *For more information on this topic, please see the updated Rules on page 10.*

Over the past 10 years, hedge funds and other distressed investors have become increasingly frequent participants in chapter 11 proceedings. To maximize their influence, distressed investors with similar interests in a bankruptcy case will often organize together in informal groups, known as "*ad hoc* committees."

Billy Hildbold

Ad hoc committees' participation has created certain procedural efficiencies and has also led to more competitive debtor-in-possession (DIP) financing terms because *ad hoc* committee members are often more willing to lend to debtors than traditional banks, but ad hoc committee members' aggressive pursuit of short-term returns and frequent use of derivatives and other "shorting" techniques can also give them different financial incentives from other creditors in their class and from the estate as a whole in some cases.

Concern for the lack of transparency in *ad hoc* committees' participation in bankruptcy proceedings has recently led to proposed amendments to Federal Rule of Bankruptcy Procedure 2019, which were approved by the Supreme Court on April 26, 2011. *Ad hoc* committees are required to broadly disclose their economic interests in the debtor, including debt and derivatives.

Current Rule 2019

Bankruptcy Rule 2019 currently requires, *inter alia*, that any "committee" representing more than one creditor or equity securityholder in a bankruptcy case to file a verified statement disclosing (1) the members it represents, (2) the amount and nature of each member's claims, (3) the dates the members acquired their claims and (4) the amounts paid for the claims.[1] The disclosure requirements of current Rule 2019 were conceived in the 1930s in response to the abuses of "protective committees" acting on behalf of bondholders in railroad reorganization cases.[2] Protective committees, however, faded into obscurity soon after the Rule's enactment.[3]

For many years, litigation arising out of strict compliance with Rule 2019 was rare. Instead, *ad hoc* committees customarily filed statements listing the group's membership and aggregate holdings, but not the individual holdings or trading histories of its members. Beginning in 2007, debtors sought to breathe new life into Rule 2019 by moving to enforce its plain terms with respect to *ad hoc* committees. The handful of decisions to consider whether an *ad hoc* committee is a "committee" under Rule 2019 are split,[4] with each camp finding that Rule 2019's plain language supports its view.[5]

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Calls for Reform of Rule 2019

Jonathan M. Petts

Northwest Airlines,[6] *Washington Mutual*[7] and other cases applying Rule 2019 to *ad hoc* committees led the distressed investment community to call for reforms to Rule 2019. Distressed investors' push for change was met head on by a proposal from Hon. **Robert E. Gerber**, in a letter to the Bankruptcy Rules Committee[8] whose proposal Hon. **Robert D. Drain** adopted and expanded on in his own letter to the Bankruptcy Rules Committee.[9] These countervailing views led to vigorous debate and testimony about the appropriate changes necessary to obviate the problems created by compliance with or failure to comply with Rule 2019. As expected, the sides had vastly different views about the reforms, but all parties agreed that Rule 2019, as then enacted, needed to change.

Feature

Some in the distressed-investment community sought the outright repeal of Rule 2019,[10] asserting that as written, it unfairly singled out *ad hoc* committees and reduced their bargaining position by requiring them to disclose the price paid for their investment, as well as by requiring them to potentially disclose proprietary investment strategies. For these reasons, they believed that creditors were less likely to create *ad hoc* committees and participate in the bankruptcy

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1 Fed. R. Bankr. P. 2019.

2 *In re Premier Int'l Holdings Inc.*, 423 B.R. 58, 65-66 (Bankr. D. Del. 2010) (discussing origin of Rule 2019's predecessor rule under former Bankruptcy Act).

3 *Id.* at 73.

4 *Compare In re Nw. Airlines Corp.*, 363 B.R. 701, 703 (Bankr. S.D.N.Y. 2007) (Gropper, J.) (*ad hoc* committee was "committee" under Rule 2019, requiring disclosure of individual holdings and trading histories of members); *In re Washington Mut.*, 419 B.R. 271 (Bankr. D. Del. 2009) (Walrath, J.) (same) *with In re Scotia Dev. LLC*, 2007 WL 1192137 (Bankr. S.D. Tex. Apr. 20, 2007) (*ad hoc* group is not "committee" under Rule 2019 where group did not represent interests of anyone other than its members); *In re Premier Int'l Holdings Inc.*, 423 B.R. 58 (Bankr. D. Del. 2010) (Sontchi, J.) (same); *In re Phila. Newspapers LLC*, 422 B.R. 553 (Bankr. E.D. Pa. 2010) (same).

5 *Compare Washington Mut.*, 419 B.R. at 275 (*ad hoc* group of noteholders represented by shared counsel filing joint pleadings was committee representing more than one creditor under "the plain language of Rule 2019"), *with Phila. Newspapers*, 422 B.R. at 566 (steering group of prepetition lenders was not "committee" under Rule 2019 because "ordinary meaning" of word "committee" is "a body appointed by a larger body for some specific purpose" and steering group did not represent any persons other than its members).

6 *In re Nw. Airlines Corp.*, 363 B.R. 701 (Bankr. S.D.N.Y. 2007).

7 *In re Washington Mut.*, 419 B.R. 271 (Bankr. D. Del. 2009).

8 Hon. Robert E. Gerber, Letter to the Federal Rules Advisory Committee, dated Jan. 9, 2009, www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK%20Suggestions%202008/08-BK-M-Suggestion-Gerber.pdf.

9 Hon. Robert D. Drain, Letter to the Federal Rules Advisory Committee, dated Jan. 13, 2009, www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK%20Suggestions%202008/08-BK-N-Suggestion-Drain.pdf.

10 Report of the Business Bankruptcy Committee Special Task Force on Bankruptcy Rule 2019, Dec. 12, 2008, www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK%20Suggestions%202008/08-BK-P-Suggestion-ABA%20Section%20of%20Business%20Law%20(Baxter).pdf.

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process, which may have been the most efficient, economically sound basis for their participation.

Others in the distressed-investment community, citing the same concerns, sought a diametrically opposite approach for reform of Rule 2019. These distressed-investor groups believed that fairness should be achieved through expansion of Rule 2019's reach to any party in interest who filed a pleading in the case. In addition, these members of the distressed-investment community suggested a tiered system of disclosure that would require increasing levels of disclosure based on a creditor, creditor group or committee's participation level in the bankruptcy case, to include the official unsecured creditors' committee.

On the other hand, Judge Gerber argued for more directed disclosure so that parties in interest, as well as the bench, could consider and better understand the motivations of those coming before the court and asserting a position in the case.[11] Although he recognized the benefits that distressed investing could play in a debtor's recovery and the potential for cash infusion into distressed companies, he also feared that the pressure of high-stakes distressed investment had led to and might continue to lead to distressed investors' nefariously advancing personal agendas and gaming for a decline in the estate to maximize their returns over what was best for the estate and the creditor body as a whole.[12]

As examples, Judge Gerber expressed concerns over creditors holding "short" positions: selling the investment before actually purchasing it in hopes that its value will drop and the creditor can purchase it on the market at a later date for a lower price. Also, derivatives and credit-default swaps were a concern of Judge Gerber, who believed these now-common investments gave creditors an opportunity to participate in the case without "skin in the game." As he put it, "[d]erivatives are securities or instruments whose value turns on the value of another security or instrument... Credit-default swaps will at least usually result in a situation where an alternative entity bears the economic risk, or will reap the rewards, that would otherwise be borne or enjoyed by the original creditor."[13]

Judge Drain added that the repeal of Rule 2019 could lead to confusion in the settlement process, which he referred to as the primary activity in bankruptcy cases.[14] He articulated that it would make it much more difficult to know "who the other side is," meaning that parties might think that they are negotiating with an entire body of creditors, resulting in the withdrawal of a pleading, only to have another creditor file a similar pleading, purporting not to have been represented by the settling group. Additionally, Judge Drain showed concern about the pressures put on counsel who represented distressed investors to seek positive results for their clients—results that may be attainable, in some cases, only by misleading the court and other creditors as to the distressed investor's real intentions (a gain for the client that would come at the cost of violating ethical and professional duties). Judge Drain believed that Rule 2019 helped to alleviate some of those result-oriented influences by requiring the disclosure of an investor's position, which would dissuade parties from attempting to mislead the court when their standing as a creditor was already known.

Judge Gerber's proposed amendments sought to modernize Rule 2019 so that disclosure would provide a level of transparency to not only the court, but to all parties in interest, as well as, ultimately allow for the best interests of the estate to come through. He provided the committee with a thorough list of changes that would require the disclosure of the creditor's position, whether short or long, as well as whether the creditor maintained any derivatives or default swaps. Essentially, he sought to require creditors to disclose any position that would result in their gain should the estate's value diminish. Judge Gerber also argued that the rule was under-inclusive and sought to require disclosure by a much larger population of creditors, believing that his above-stated concerns were not limited to *ad hoc* committees alone but also applied to any creditors that possessed investments that profited from the demise of the estate. These suggestions, as well as testimony before the advisory committee, ultimately led to a compromise by the Federal Rules Committee, announcing a rule that incorporated suggestions from both sides.

Amended Rule 2019

The amendments to Rule 2019 establish the "who, what, when and how" of disclosure by hedge funds and other distressed investors actively participating in chapter 11 and 9 proceedings.[15] Amended Rule 2019 clarifies prior confusion among courts by making clear that Rule 2019's disclosure requirements do apply to *ad hoc* committees. Under subdivision (b)(1) of the amended rule, a verified statement must be filed by "every entity that represents multiple creditors or equity security holders that are (A) acting in concert to advance their common interests," except for official committees of unsecured creditors or equityholders.[16]

Amended Rule 2019 also clarifies the scope of disclosure required of *ad hoc* committees. Under subdivision (c)(2), committees and groups subject to Rule 2019 must file a verified statement with the court, listing each member of the committee and any "disclosable economic interest" held by the member in relation to the debtor and acquired within a year of the petition date.[17] The term "disclosable economic interest" is defined broadly under subdivision (a)(1) to include any claim, option and derivative instrument or "other right or derivative right granting the holder an economic interest that is affected by the value, acquisition or disposition of a claim or interest."[18] Thus, under the amended Rule 2019, *ad hoc* committees will be required to disclose credit-default swap positions and other interests that formerly were not disclosed to courts under customary practice. *Ad hoc* committees' duty to disclose these interests applies not only at the outset of a bankruptcy case but throughout a case in which it is actively participating, because subdivision (d) generally requires the filing of a supplemental verified statement whenever "any fact

11 National Bankruptcy Conference, Letter to the Bankruptcy Rules Advisory Committee, dated Dec. 10, 2008, www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK%20Suggestions%202008/08-BK-P-Suggestion-ABA%20Section%20of%20Business%20Law%20(Baxter).pdf.

12 *Id.* at 2-3.

13 *Id.* at 8.

14 Hon. Robert D. Drain, Letter to the Federal Rules Advisory Committee, dated Jan. 13, 2009, at 1.

15 A copy of Amended Rule 2019 is available at www.uscourts.gov/RulesAndPolicies/FederalRulemaking/PendingRules/SupremeCourt042611.aspx.

16 Amended Rule 2019(b)(1).

17 Amended Rule 2019(c)(2)(B)-(C).

18 Under subdivision (c)(2), a verified Rule 2019 statement must also list the date of acquisition of each member's disclosable economic interests by quarter and year.

disclosed in its most recently filed statement has changed materially."[19]

Significantly, amended Rule 2019 has softened the treatment of *ad hoc* committees from that under the initial proposed amendments to Rule 2019 in two important respects. First, amended Rule 2019 does not include language requiring *ad hoc* committees to disclose the purchase price of their members' claims. The rules committee's notes to subsection (c)(1) do state that "nothing in this rule precludes either the discovery of that information or its disclosure when ordered by the court pursuant to authority outside of this rule."[20] Thus, disclosure of the purchase prices and specific trading information of *ad-hoc* committee members may be still be ordered by a court pursuant to its inherent powers or obtained by other discovery means such as Rule 2004 in certain cases. Second, the amended Rule has deleted the enhanced sanctions provisions for failure to comply with Rule 2019 found in the initial proposed amendments.

19 Amended Rule 2019(d).

20 Committee Note to Amended Rule 2019, Subdivision (b)(2).

Conclusion

The substance of amended Rule 2019 represents a compromise between the interests of advocates of greater transparency in claims trading and those of distressed-debt investors seeking to protect proprietary trading information. As such, the amendments may alleviate concerns for chilling the involvement of distressed investors in chapter 11 cases. ■

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ATTACHMENT E – In re Premier Int'l Holdings, 423 B.R. 58 (Bankr. D. Del. 2010)

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As of: Apr 10, 2012

In re: PREMIER INTERNATIONAL HOLDINGS, Inc., et al., Debtors.

Chapter 11, Case No. 09-12019 (CSS) Jointly Administered, Re Docket No. 1283

UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE

423 B.R. 58*; *2010 Bankr. LEXIS 98*; *63 Collier Bankr. Cas. 2d (MB) 614*; *52 Bankr. Ct. Dec. 183

January 20, 2010, Decided

CASE SUMMARY:

PROCEDURAL POSTURE: In this Chapter 11 case, the Official Committee of Unsecured Creditors filed a motion to compel an informal committee of bondholders to comply with *Fed. R. Bankr. P. 2019* by disclosing information about their claims against the debtor.

OVERVIEW: There were multiple committees in this case, including an informal committee of bondholders. The issue before the court was whether the informal committee was a committee representing more than one creditor under *Fed. R. Bankr. P. 2019*. If so, the members of the informal committee would be subject to the disclosure requirements set forth in that rule. The court held that, under the plain meaning of the rule's language, such a group was not a "committee" because it was a self-appointed subset of a larger group and, in order for a group to constitute a committee under *Rule 2019*, it would need to be formed by a larger group either by consent, contract, or applicable law -- not by "self-help." In addition, the legislative history behind *Rule 2019* and its predecessor supported the court's interpretation based upon plain meaning. In so ruling, the court respectfully declined to follow the holding in two recent cases addressing the virtually identical question: *In re Washington Mutual, Inc. et al., 419 B.R. 271 (Bankr. D. Del. 2009)*; and *In re Northwest Airlines Corp. et al., 363 B.R. 701 (Bankr. S.D.N.Y. 2007)*.

OUTCOME: The court denied the motion of the official committee to compel an informal bondholders committee to comply with *Fed. R. Bankr. P. 2019*.

LexisNexis(R) Headnotes

Bankruptcy Law > Committees > General Overview
Governments > Legislation > Interpretation

[HN1] The United States Bankruptcy Court for the District of Delaware finds that, under the plain meaning of *Fed. R. Bankr. P. 2019*, an informal committee of bondholders is not a "committee representing more than one creditor" and, thus, its members need not make the disclosures required by *Fed. R. Bankr. P. 2019*. In addition, the legislative history behind *Rule 2019* and its predecessor, Rule 10-211 under Chapter X of the Bankruptcy Act, supports the Court's interpretation based upon plain meaning. In so ruling, the Court respectfully declines to follow the holding in two recent cases addressing the virtually identical question: *In re Washington Mutual, Inc. et al., 419 B.R. 271 (Bankr. D. Del. 2009)*; and *In re Northwest Airlines Corp. et al., 363 B.R. 701 (Bankr. S.D.N.Y. 2007).*

Governments > Legislation > Interpretation
[HN2] Contemporary Supreme Court jurisprudence establishes that the purpose of statutory interpretation is to determine congressional intent. To that end, the starting point is to examine the plain meaning of the text of the statute or rule. When a statute's language is plain, the sole function of the courts, at least where the disposition by the text is not absurd, is to enforce it according to its terms. Additionally, the Supreme Court has repeatedly stated that the United States Congress says in a statute what it means and means in a statute what it says there. Notwithstanding the foregoing, applying the plain meaning of the statute or rule is the default entrance -- not the mandatory exit. If the text is ambiguous, the Court must use other canons of statutory construction, including legislative history where available. Moreover, regardless of whether the text is plain or ambiguous, it is appropriate to identify, if possible, a congressional purpose consistent with the Court's interpretation.

Governments > Legislation > Interpretation
[HN3] Ambiguity in a statute does not arise merely because a particular provision can, in isolation, be read in several ways or because a Code provision contains an obvious scrivener's error. Nor does it arise if the ostensible plain meaning renders another provision of the Code superfluous. Rather, a provision is ambiguous when, despite a studied examination of the statutory context, the natural reading of a provision remains elusive. In such situations of unclarity, where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived, including pre-Code practice, policy, and legislative history.

Bankruptcy Law > Committees > General Overview
[HN4] In Chapter 11 cases, *Fed. R. Bankr. P. 2019* requires every "committee representing more than one creditor or equity security holder" to file a verified statement containing certain disclosures. The rule requires each member of a committee to disclose: (1) the member's name and address; (2) the nature and amount of the member's claim or interest and the time of acquisition thereof; (3) the name or names of the entity or entities at whose instance, directly or indirectly, the committee was organized or agreed to act; and (4) with reference to the organization or formation of the committee, the amounts of claims or interests owned by the members of the committee, the times when acquired, the amounts paid therefor, and any sales or other disposition thereof. *Fed. R. Bankr. P. 2019(a).*

Bankruptcy Law > Committees > General Overview
[HN5] In the event that a court determines that there has been a failure to make the required disclosures under *Fed. R. Bankr. P. 2019*, the court may (1) refuse to permit the committee to be heard further or to intervene in the case; (2) examine any representation provision of a deposit agreement, proxy, trust mortgage, trust indenture, or deed of trust, or committee or other authorization, and any claim or interest acquired by any committee in contemplation or in the course of a case under the Code and grant appropriate relief; and (3) hold invalid any authority, acceptance, rejection, or objection given, procured, or received by a committee who has not complied with this rule or with *11 U.S.C.S. § 1125(b). Fed. R. Bankr. P. 2019(b).*

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[HN6] A "committee" is a body of two or more people appointed for some special function by, and usually out of a (usually larger) body. The use of the word "appointed" clearly contemplates some action be taken by the larger body. Thus, a self-appointed subset of a larger group -- whether it calls itself an informal committee, an ad hoc committee, or by some other name -- simply does not constitute a committee under the plain meaning of the word. In order for a group to constitute a committee under *Fed. R. Bankr. P. 2019* it would need to be formed by a larger group either by consent, contract or applicable law -- not by "self-help." This construct is supported by the rule's applicability to indenture trustees, which are delegated with certain rights and obligations on behalf of all holders of the debt by operation of contract, i.e., the indenture. Similarly, official committees *11 U.S.C.S. § 1102* (although exempted from *Rule 2019*) receive their authority from federal law, i.e., the Bankruptcy Code.

Bankruptcy Law > Committees > General Overview
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[HN7] The meaning of "represent" is to take the place of another; be a substitute in some capacity for; act or speak for another by a deputed right. A deputed right is one that is assigned to another person. Thus, the plain meaning of "represent" contemplates an active appointment of an agent to assert deputed rights. It is black letter law that a person cannot establish itself as another's agent such that it may bind the purported principal without that principal's consent unless the principal ratifies the agent's actions.

Bankruptcy Law > Committees > General Overview
Governments > Legislation > Interpretation

[HN8] Under the plain meaning of the *Fed. R. Bankr. P. 2019* phrase "a committee representing more than one creditor," a committee must consist of a group representing the interests of a larger group with that larger group's consent or by operation of law.

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For SFO Noteholders Informal Committee: Howard A. Cohen, Drinker Biddle & Reath LLP, Wilmington, DE; Ira S. Dizengoff, Abid Qureshi (Argued), Shaya Rochester, Akin Gump Strauss Hauer & Feld LLP, New York, NY.

For Fidelity Management & Research Co.: Bonnie Steingart, Fried, Frank, Harris, Shriver & Jacobson LLP, New York, New York.

JUDGES: Sontchi, J.

OPINION BY: Sontchi

OPINION

[*60] **OPINION**

1

1 This Opinion constitutes the Court's findings of fact and conclusions of law pursuant to *Federal Rule of Bankruptcy Procedure 7052*.

INTRODUCTION

The issue before the Court is whether an "informal committee" of bondholders in this case is a "committee representing more than one creditor" under *Rule 2019 of the Federal Rules of Bankruptcy Procedure*. [**2] If so, the members of the informal committee would be subject to the disclosure requirements set forth in that rule.

[HN1] Under the plain meaning of the rule's language, such a group is not a "committee representing more than one creditor" and, thus, its members need not make the disclosures required by *Rule 2019*. In addition, the legislative history behind *Rule 2019* and its predecessor, Rule 10-211 under Chapter X of the Bankruptcy Act, supports the Court's interpretation based upon plain meaning. In so ruling, the Court respectfully declines to follow the holding in two recent cases addressing the virtually identical question: *In re Washington Mutual, Inc., et al., 419 B.R. 271 (Bankr. D. Del. 2009)*; and *In re Northwest Airlines Corp., et al., 363 B.R. 701 (Bankr. S.D.N.Y. 2007)*.

JURISDICTION

This Court has subject matter jurisdiction under *28 U.S.C. § 1334(b)*. Venue is proper in this district under *28 U.S.C. §§ 1408* and *1409(a)*. This is a core proceeding under *28 U.S.C. § 157(b)(2)*.

STATEMENT OF FACTS

I. The Debtors And Their Capital Structure

The Debtors filed Chapter 11 on June 13, 2009. They own and operate 20 amusement parks throughout North America, 18 of which operate under the well-known [**3] "Six Flags" name. For purposes of the motion before the Court, the ownership and debt structure is simple. [2]

2 Of course, in reality, it is much more complex.

These findings of fact are purposefully simplified and are made solely for purposes of deciding the motion before the Court.

Six Flags, Inc. ("SFI") is the corporate parent. SFI owns Six Flags Operations Inc. ("SFO"), which, in turn, owns Six Flags Theme Parks, Inc. ("SFTP"). SFI is a holding company. The Debtors conduct virtually all of their operations through SFO. SFTP owns, either directly or indirectly, all of the Debtors' theme parks.

As of September 30, 2009, the Debtors had approximately $ 2.42 billion in aggregate debt plus approximately $ 39 million in unsecured trade debt. The Debtors' secured debt totals approximately $ 1.1 billion. SFTP is the borrower under the secured facility and SFO is a guarantor. SFI is not a guarantor of the secured debt.

SFO issued approximately $ 400 million in notes (the "SFO Notes"). SFI, in turn, is the issuer of approximately $ 870 million in notes (the "SFI Notes"). In addition, SFI is a guarantor of the SFO Notes.

[*61] **II. The Committees**

There are three committees involved in this case. The Official [**4] Committee of Unsecured Creditors (the "Official Committee") was formed in June, 2009. As set forth more fully below, the Official Committee has opposed both the Initial Plan and the Revised Plan.

The Informal Committee of SFO Noteholders was formed in early September, 2009, although its largest member, Avenue Capital Management II, L.P. ("Avenue"), had been active in the case from its inception. The members of the Informal Committee of SFO Noteholders hold approximately 95% of the outstanding SFO Notes. Both Avenue and the Informal Committee of SFO Noteholders have opposed the Initial Plan and support the Revised Plan.

The *Ad Hoc* Committee of SFI Noteholders was formed in early October, 2009. At last count, its members hold approximately 67% of the outstanding SFI Notes. The *Ad Hoc* Committee of SFI Noteholders has opposed the Initial Plan and the Revised Plan.

III. The Course Of Events

From 1998 through 2005, the Debtors amassed over $ 2.4 billion in debt. Commencing in late 2005, the Debtors began attempting to deleverage their balance sheet. The Debtors achieved limited success but, by early 2009, it became clear more significant action was needed. In Spring, 2009, the Debtors were negotiating [**5] with their major creditors, including Avenue Capital Management II, L.P. ("Avenue"). Avenue was and is a participant in the pre-petition secured facility, the largest holder of the SFO Notes, and a significant holder of the SFI Notes. The Debtors and Avenue were attempting to reach an agreement for a pre-negotiated Chapter 11 in which the SFO Notes would be converted into the bulk of the equity in the reorganized debtors and the pre-petition secured facility would be reinstated. Unfortunately, negotiations between the Debtors and Avenue reached an impasse.

Immediately thereafter, the Debtors switched horses and entered into a plan support agreement with the "Participating Lenders" under the secured facility. Pursuant to the plan support agreement, in July, 2009, the Debtors filed their Initial Plan. Under the Initial Plan, the holders of the Debtors' secured debt were to convert their claims into 93% of the equity in reorganized SFI and a new term loan in the amount of $ 600 million. The holders of allowed unsecured claims against SFO, including the SFO Noteholders, were to receive 6% of the equity in reorganized SFI. The holders of allowed unsecured claims against SFI, including the [**6] SFI Noteholders, were to receive 1% of the equity in reorganized SFI. The Initial Plan was opposed by all three committees.

From September through November, 2009, the Debtors continued their negotiations with Avenue and the Informal Committee of SFO Noteholders. Those negotiation resulted in the Revised Plan. Under the Revised Plan, the holders of the Debtors' secured debt would be paid in full in cash out of the proceeds of: (i) an exit term loan in the amount of $ 650 million; and (ii) a rights offering in the amount of $ 450 million. The rights offering would be available to holders of allowed unsecured claims against SFO, including the SFO Noteholders, provided such holder votes in favor of the Revised Plan and is an accredited investor. Avenue has agreed to "back stop" the rights offering, i.e., pay the shortfall, in the event that the Debtors fail to raise the full $ 450 million. Ultimately, the participants in the rights offering will receive approximately 70% of the equity in reorganized SFI.

Apart from the rights offering, the holders of allowed unsecured claims against [*62] SFO, including the SFO Noteholders, will convert their claims into approximately 23% of the equity in reorganized [**7] SFI. The holders of allowed unsecured claims against SFI, including the SFI Noteholders, will convert their claims into approximately 7% of the equity in reorganized SFI. The Revised Plan is supported by the Informal Committee of SFO Noteholders and opposed by both the Official Committee and the *Ad Hoc* Committee of SFI Noteholders. A confirmation hearing on the Revised Plan is scheduled for March, 2010.

IV. The Motion To Compel

On December 29, 2009, the Official Committee filed the Motion Of The Official Committee Of Unsecured Creditors To Compel The SFO Noteholders Committee To Comply With *Federal Rule Of Bankruptcy Procedure 2019* (the "Motion to Compel"). Through the Motion to Compel, the Official Committee seeks an order compelling the members of the Informal Committee of SFO Noteholders to comply with *Rule 2019* by disclosing the amount of each of their respective claims (current and previously held) against each debtor, the dates such claims were acquired, the amounts paid for the claims, and the dates and circumstances of any subsequent disposition of the claims. The Official Committee further requests that, unless and until the disclosures are made, the Court bar the participation [**8] of the Informal Committee of SFO Noteholders in this case. The Official Committee has not filed a similar motion requesting disclosures by the *Ad Hoc* Committee of SFI Noteholders.

In support of the Motion to Compel the Official Committee argues that the rule should be "strictly enforced" to require the requested disclosure. In addition, the Official Committee argues that enforcement of *Rule 2019* is essential under the facts and circumstances of this case.

> Here, the SFO Noteholders Committee has affirmatively chosen to assume a central role in these cases; first seeking to terminate exclusivity to propose their own plan, and then striking a deal whereby the Debtors adopted and agreed to champion the SFO Plan. The Committee believes the Debtors' complicity in pushing the SFO Plan is based, at least in part, on the Debtors' acceptance of contemporaneous representations by the SFO Noteholders Committee that it represented the interests of holders of SFI Notes. And while the SFO Noteholders Committee has failed to disclose to the court prior holdings and dispositions of SFI Notes, the Committee believes the members of the SFO Noteholders Committee were engaged in transactions to save themselves [**9] from the negative treatment they were negotiating to impose on SFI Notes under the SFO Plan. At the same time the Debtors' management was failing to protect the rights of SFI Noteholders, the SFO Noteholders Committee was apparently securing management support through offers of continued employment and significant ownership stakes in the to-be-reorganized companies.
>
> Given the central role of the SFO Noteholders Committee has chosen to play in these cases, and the likely role it will play in trying to force confirmation of the SFO Plan over the objections of the committee and other unsecured creditors, it is critical for the Court and the Committee to be able to fairly evaluate the SFO Noteholder[s] Committee's credibility and motives in these cases, including through an understanding of: (a) the financial incentives created through debt holdings at multiple levels of the Debtors' capital structure; (b) the veracity of claims to have been acting consistent with the interests of holders of SFI Notes during the negotiation of [*63] the SFO Plan; and (c) the securing of the Debtors' acquiescence to the SFO Plan through benefits promised to senior management. [3]

3 Motion Of The Official Committee [**10] Of Unsecured Creditors To Compel The SFO Noteholders Committee To Comply With *Federal Rule Of Bankruptcy Procedure 2019* [D.I. 1283], pp. 9-10.

The Informal Committee of SFO Noteholders opposed the Motion to Compel and the Court held a hearing on January 8, 2010. At the conclusion of the hearing, the Court ruled from the bench, setting forth its reasoning and denying the Motion to Compel. On January 11, 2010, the Court entered an order denying the Motion to Compel and indicating that the Court would issue an opinion further explaining the basis for its ruling.

ANALYSIS

I. Under The Plain Meaning Of *Rule 2019 Of The Federal Rules Of Bankruptcy Procedure* The SFO Noteholders Informal Committee Is Not A "Committee Representing More Than One Creditor."

A. Statutory Interpretation

[HN2] "[C]ontemporary Supreme Court jurisprudence establishes that the purpose of statutory interpretation is to determine congressional intent." [4] To that end, the starting point is to examine the plain meaning of the text of the statute or rule. [5] As the Supreme Court observed in *Hartford Underwriters Ins. Co. v. Union Planters Bank*, "when a statute's language is plain, the sole function of the courts, at least where the [**11] disposition by the text is not absurd, is to enforce it according to its terms." [6] Additionally, the Supreme Court has repeatedly stated that "[t]he United States Congress says in a statute what it means and means in a statute what it says there." [7]

4 Hon. Thomas F. Waldron and Neil M. Berman, *Principled Principles of Statutory Interpretation: A Judicial Perspective After Two Years of BAPCPA, 81 AM. BANKR. L.J. 195, 211 (2007).*
5 *Id. at 229* ("Statutory analysis . . . must start with the text at issue to determine if its meaning can be understood from the text."). *See also Connecticut Nat. Bank v. Germain, 503 U.S. 249, 253, 112 S. Ct. 1146, 117 L. Ed. 2d 391 (1992)* ("When the words of a statute are unambiguous, then, this first canon is also the last: the judicial inquiry is complete.").
6 *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 7, 120 S. Ct. 1942, 147 L. Ed. 2d 1 (2000). See also United States v. Ron Pair Enters., 489 U.S. 235, 240, 109 S. Ct. 1026, 103 L. Ed. 2d 290 (1989)*; *Caminetti v. United States, 242 U.S. 470, 485, 37 S. Ct. 192, 61 L. Ed. 442 (1917)* ("It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the lawmaking body which [**12] passed it, the sole function of the courts is to enforce it according to its terms.").
7 *Hartford Underwriters Ins. Co., 530 U.S. at 6* (quoting *Connecticut Nat. Bank, 503 U.S. at 254*).

Notwithstanding the foregoing, applying the plain meaning of the statute or rule is the default entrance -- not the mandatory exit. [8] If the text is ambiguous, the Court must use other canons of statutory construction, including legislative history where available. [9] Moreover, regardless of whether the text is plain or ambiguous, it is appropriate to identify, if possible, a congressional purpose consistent [*64] with the Court's interpretation. [10]

8 *Waldron and Berman at 232.*
9 *See Price v. Delaware State Police Fed. Union (In re Price), 370 F.3d 362, 369 (3d Cir. 2004)* ("Thus, [HN3] ambiguity does not arise merely because a particular provision can, in isolation, be read in several ways or because a Code provision contains an obvious scrivener's error. Nor does it arise if the ostensible plain meaning renders another provision of the Code superfluous. Rather, a provision is ambiguous when, despite a studied examination of the statutory context, the natural reading of a provision remains elusive. In such situations of [**13] unclarity, 'where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived,' including pre-Code practice, policy, and legislative history.") (internal citations omitted).
10 *Lamie v. U.S. Trustee, 540 U.S. 526, 539, 124 S. Ct. 1023, 157 L. Ed. 2d 1024 (2004)* ("Though we find it unnecessary to rely on the legislative history behind the 1994 enactment of *§ 330(a)(1)*, we find it instructive that the history creates more confusion than clarity about the congressional intent. History and policy considerations lend support both to petitioner's interpretation and to the holding we reach based on the plain language of the statute.").

B. The Provisions of *Rule 2019 of the Federal Rules of Bankruptcy Procedure*

[HN4] In Chapter 11 cases, *Rule 2019 of the Federal*

Rules of Bankruptcy Procedure requires every "committee representing more than one creditor or equity security holder. . ." [11] to file a verified statement containing certain disclosures. [12] The rule requires each member of a committee to disclose:

(1) the member's name and address;

(2) the nature and amount of the member's claim or interest and the time of acquisition thereof;

(3) the name or names of the entity or entities at whose [**14] instance, directly or indirectly, the committee was organized or agreed to act; and

(4) with reference to the organization or formation of the committee, the amounts of claims or interests owned by the members of the committee, the times when acquired, the amounts paid therefor, and any sales or other disposition thereof. [13]

11 The rule also applies to any indenture trustee (unless otherwise ordered by the Court) as well as any entity representing more than one creditor or equity security holder.
12 *Fed.R.Bankr.P. 2019(a).*
13 *Id.*

[HN5] In the event that the Court determines that there has been a failure to make the required disclosures, the court may (1) refuse to permit the committee to be heard further or to intervene in the case; (2) examine any representation provision of a deposit agreement, proxy, trust mortgage, trust indenture, or deed of trust, or committee or other authorization, and any claim or interest acquired by any committee in contemplation or in the course of a case under the Code and grant appropriate relief; and (3) hold invalid any authority, acceptance, rejection, or objection given, procured, or received by a committee who has not complied with this rule or with *§ 1125(b)* [**15] of the Code. [14]

14 *Fed.R.Bankr.P. 2019(b).*

C. The Plain Meaning Of "A Committee Representing More Than One Creditor."

The question here is whether the SFO Noteholders Informal Committee is "a committee representing more than one creditor." If so, its members are subject to *Rule 2019*. The starting point of the analysis or "default entrance" is plain meaning. [15]

15 *Waldron and Berman at 232.*

[*65] [HN6] A "committee" is a "body of two or more people *appointed* for some special function by, and usu. out of a (usu. larger) body." [16] The use of the word "appointed" clearly contemplates some action be taken by the larger body. [17] Thus, a *self-appointed* subset of a larger group -whether it calls itself an informal committee, an *ad hoc* committee, or by some other name -- simply does not constitute a committee under the plain meaning of the word. In order for a group to constitute a committee under *Rule 2019* it would need to be formed by a larger group either by consent, contract or applicable law -- not by "self-help." This construct is supported by the rule's applicability to indenture trustees, which are delegated with certain rights and obligations on behalf of all holders of the debt *by operation of contract,* [**16] *i.e., the indenture.* Similarly, official committees under *section 1102 of the Bankruptcy Code* (although exempted from *Rule 2019*) receive their authority *from federal law, i.e., the Bankruptcy Code.*

16 I OXFORD SHORTER ENGLISH DICTIONARY 464 (6th ed. 2007) (emphasis added).
17 "Appoint" means "[a]ssign or grant authoritatively (a thing to a person)." *Id.* at 104.

[HN7] The meaning of "represent" is: "take the place of (another); be a substitute in some capacity for; act or speak for another by a deputed right." [18] A deputed right is one that is assigned to another person. [19] Thus, the plain meaning of "represent" contemplates an active appointment of an agent to assert deputed rights. It is black letter law that a person cannot establish itself as another's agent such that it may bind the purported principal without that principal's consent unless the principal ratifies the agent's actions. [20]

18 II OXFORD SHORTER ENGLISH DICTIONARY 2537.
19 I OXFORD SHORTER ENGLISH DICTIONARY 652.
20 *Restatement (Third) of Agency §§ 1.01, 1.02, 3.01, 3.03, 4.01* and *6.11* (2006).

Thus, [HN8] under the plain meaning of the phrase "a committee representing more than one creditor," a committee must consist of a group representing [**17] the interests of a larger group with that larger group's consent or by operation of law. As the SFO Noteholders

Informal Committee does not represent any persons other than its members either by consent or operation of law, it is not a "committee" under *Rule 2019* and, thus, its members need not make the disclosures required under the rule.

Although the Court's determination of the plain meaning of the text is determinative, it is appropriate to review the legislative history of *Rule 2019* as a "reality check" on the Court's interpretation of the rule. 21

21 *Lamie, 540 U.S. at 539.*

II. The Legislative History Of Rule 2019 Of The Federal Rules Of Bankruptcy Procedure Supports The Holding That The SFO Noteholders Informal Committee Is Not A "Committee Representing More Than One Creditor" Under The Rule. 22

22 This recitation relies ***heavily*** on three books: DAVID A. SKEEL, JR., DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA (2001), DOUGLAS G. BAIRD, ELEMENTS OF BANKRUPTCY (4th ed. 2006); and JACOB I. WEINSTEIN, THE BANKRUPTCY LAW OF 1938: THE CHANDLER ACT (1938).

Rule 2019 was promulgated in connection with the adoption of the Bankruptcy Code in 1978. For all intents and purposes, it is identical [**18] to Rule 10-211 under former Chapter X of the Bankruptcy Act. Rule 10-211 itself was adopted as part of an extensive overhaul of corporate reorganization [*66] practice in the 1930's. At first blush, the legislative history appears to support holding that the SFO Noteholders Official Committee is, indeed, a "committee representing more than one creditor." However, upon a careful review of the facts and circumstances leading to the rule's adoption as well as its intended purpose, it is clear that the informal and *ad hoc* committees *as they exist today* are very different from the "protective committees" that were the target of the reforms in the 1930's. Thus, the legislative history supports the Court's finding based upon the plain meaning of *Rule 2019*.

A. Equity Receiverships

(1) Overview

Although the applicable legislative history occurred over 70 years ago with the adoption of Rule 10-211, to understand Congress's action one must go back even further to the equity receivership practice that began in the 1890's.

Corporate reorganization as we know it today has its genesis in the railroad failures of the late 19th century. The periodic collapse of the railroads led to the first true reorganizations, [**19] which were called equity receiverships. Because the railroads were the nation's first large corporations, the courts did not have any existing mechanism in place for dealing with a railroad failure. As a result, reorganizers and courts cobbled together a new device from two powers that did have an established common-law pedigree: the courts' equitable authority to appoint receivers to preserve the value of a debtor's property; and the right of a mortgage holder to foreclose on mortgaged property if the debtor defaults.

The "classic" equity receiverships involved railroads whose tracks crossed several state lines, and which had issued common stock, preferred stock, and several different mortgage bonds to raise money over the years. Typically, the mortgage bonds were secured by different segments of the railroad. If the railroad encountered financial distress and failed to make the requisite interest payments on its bonds, a creditor would first file a "creditor's bill" asking the court to appoint a receiver to oversee the defaulting railroad's property. The principal reason for appointing a receiver was that putting the receiver in place technically shifted control of the railroad's [**20] assets to the receiver and out of the reach of prying creditors. If a creditor tried to obtain a lien against railroad property, for instance, the receiver would simply ask the court for an injunction.

The next step was to file a second "bill," the foreclosure bill. In form, the foreclosure bill asked the court to schedule a sale of property. In reality, the sale would be put off for months, often years, while the parties negotiated over the terms of a reorganization plan.

In the meantime, the investment banks that had underwritten the railroad's bonds would quickly form a *"protective committee"* to represent bondholders in the negotiations. If the firm had issued more than one class of bonds, several committees might be formed; and there might also be committees of common stockholders and preferred stockholders. The virtue of forming a committee was that it centralized the bargaining process and theoretically gave thousands of widely scattered bondholders a champion.

To ensure their authority, the committee representatives asked investors to "deposit" their bonds (or stock, for a stockholders committee) with the committee. By depositing their bonds investors gave the committee complete [**21] control over the bonds for the duration of the negotiations with [*67] one limitation, bondholders would have the right to withdraw their bond if they disapproved of the plan that the committee negotiated on their behalf.

The goal of the negotiations was to rework the railroad's capital structure, reducing its obligations so that it could get back on track financially after the receivership. Once there was an agreement on a plan, the committees were combined to form a single committee called the *reorganization committee.* It was the reorganization committee that purchased the railroad's assets at the foreclosure sale. Since the reorganization committee had all of the deposited securities at its disposal and could bid the face value of the securities as a substituted for cash, no one else bothered to bid at the auction.

As soon as the reorganization committee purchased the assets, it transferred them to a shell corporation that had been set up for just this purpose. The stock and other securities of the new corporation were then distributed to the old investors on the terms laid out in the reorganization plan.

(2) The Problem Of Insiders And Holdouts

The equity receivership process was an extremely [**22] clever adaptation of common law principles to a previously nonexistent problem. It resulted in an efficient reorganization of railroads and other corporations but it had at least two serious, related problems. First, the process was controlled by and for the benefit of insiders. Second, there was unequal treatment of holdouts.

The committees controlling the reorganization process were generally dominated by Wall Street investment firms working in concert with existing management. Dissenting creditors and stockholders had virtually no ability to participate in the process let alone to thwart the proposed reorganization. Moreover, the return for consenting creditors, i.e., committee members and depositors, was superior to that of non-consenting creditors.

Consider an example where the bondholders who did not participate through one of the committees would receive ten cents on the dollar, while those who did participate would get fifty cents on the dollar. The response of the committees to any complaint of disparate treatment was that the dissenters could have chosen to receive fifty cents on the dollar by depositing their bonds with the protective/reorganization committee. The dissenters [**23] would argue, in turn, that the reorganization imposed by the committees forced the dissenters to choose between the lesser of two evils. Either their claims would be cashed out at ten cents on the dollar at a fictitious foreclosure sale or they would have to submit to whatever terms the committees dictated. None of the individual bondholders had enough of an investment in the railroad to go through the effort necessary to keep the committees from doing whatever they pleased. As a result, insiders remained in control of the process and ended up in control of the railroad.

In response, courts started setting "upset prices" for foreclosure sales in railroad reorganizations. The upset price was the lowest bid a court would accept at the sale. If the bid or bids came in under this amount, the court would simply prohibit the sale from going through. In theory, dissenting investors were the ones who benefited, since the upset price assured them that they would receive no less than their share of the specified amount. But, the courts were concerned that if the upset price were too high it would make reorganization more difficult. As a result, they set the upset prices extremely low, often at [**24] 10 to 80 percent less than the current market value of the bonds. The effect of [*68] the upset price was to force nearly everyone to agree to the reorganization, since the upset price was an unattractive alternative.

B. The SEC Report

In 1933 and 1934, respectively, Congress codified the equity receivership process for railroads [23] and corporations. [24] Much to the chagrin of critics, the law, did not address what they perceived to be the improper dominance of "protective committees" controlled by insiders and Wall Street. The seeds of reform, however, were planted in an obscure provision of the Securities Exchange Act of 1934, which instructed the SEC to investigate and to report on the protective committees. [25]

23 Act of March 3, 1933, chap. 204, 47 Stat. 1474 (1933).

24 Act of June 7, 1934, chap. 424, 48 Stat. 211 (1934).
25 Securities Exchange Act of 1934, Public Law No. 73-291, sec. 211, 48 Stat. 881, 909 (1934).

Future Justice William Douglas, who was very critical of the existing equity receivership practice recently codified by Congress, was appointed to conduct the investigation and report its results. It was widely known at the time that receivership proceedings were dominated by the Wall [**25] Street investment bankers who set up and ran the protective committees used to effect a reorganization. It was not so much their dominance that drew the reformers' ire, though this surely was contributing factor, as the extent to which the bankers and lawyers seemed to further their own interests rather than those of their clients. In 1937, the SEC issued its four-volume report, which attacked the Wall Street banks and bankruptcy bar at every turn.

For example, the report asserted that the bankers paid themselves generous fees for running the reorganization, including a substantial underwriting fee when the firm used new securities to its old investors. In addition, the report noted that lawyers received their fees before anyone else was paid, and, because the cases sometimes lasted several years, those fees might run to millions of dollars. [26] The report also asserted that bankers and lawyers were compromised by their relationship, which usually predated bankruptcy, with the managers of the troubled firm. Rather than vigorously pursuing litigation against managers who had mismanaged the firm the bankers and lawyers simply "looked the other way." [27]

26 In 1937, $ 10 million was worth [**26] approximately $ 150 million in today's dollars.
27 Two examples of the criticism described by Professor Skeel in *Debt's Dominion* were:

> 'Management and bankers seek perpetuation of [their] control for the business patronage it commands,' the report complained. 'which they take themselves or allot to others, as they will. They seek also to perpetuate the control in order to stifle careful scrutiny of the past history of the corporation. Thereby, claims based on fraud or mismanagement are stilled.'
>
> ***
>
> '[C]ounsel fees frequently constitute the largest single item on the list of reorganization fees,' the report noted. 'The vice is that the bar has been charging all that the traffic will bear. It has forsaken the tradition that its members are officers of the court, and should request and expect only modest fees.'

Skeel, ch. 4 at 111.

The SEC's attack resonated deeply at a time when much of the public viewed Wall Street with suspicion. The SEC report concluded that ousting managers in favor of an independent trustee and curbing the role of Wall Street professionals was necessary to loosen Wall Street's stranglehold on large-scale corporate reorganization. [*69] The criticisms in the SEC Report of the [**27] long-standing equity receivership practice that was codified by Congress in 1933 and 1934 bore fruit in the Chandler Act of 1938. [28]

28 Act of June 22, 1938, chap. 575, 52 Stat 840 (1938). Interestingly, Congress did not amend the codified equity receivership system for railroads.

C. The Chandler Act of 1938 and Rule 10-211

The Chandler Act was passed in 1938 after strong lobbying in its favor by the SEC and William Douglas (then Chairman of the SEC) in particular. The result was a seismic change in corporate reorganization -- the adoption of Chapter X of the Bankruptcy Act.

The purpose of the Chandler Act was succinctly stated by a member of its drafting committee.

> *The outstanding innovations in chapter X are concerned with . . . the elimination of the domination of management and self-serving inner groups*. Congressional investigation and the exhaustive researches of the Commission have uncovered and focused attention upon many abuses inherent in such domination and control. New machinery has been designed to eliminate the control of the

> reorganization proceeding by management and underwriters, and to vest such control in the actual parties in interest-the creditors and stockholders. Provision [**28] has been made for searching examinations into the past activities of management and underwriters, also the dissemination of authentic information, the democratization of the formulation of plans, the scrutiny, supervision and control by the court of the formulation, consideration and submission of plans for acceptance, the regulation of the representation of creditors and stockholders, and the more active participation of the indenture trustee. [29]

29 WEINSTEIN at 192 (emphasis added).

The defining element of Chapter X was the mandatory appointment of a trustee in any case where the liabilities exceeded $ 250,000. [30] Unlike the equity receivership process where management continues to operate the business and the banks operate the reorganization, the business and the bankruptcy case were turned over to the trustee. Chapter X also put the power to formulate a reorganization plan squarely in the hands of the trustee -- not the creditors. [31]

30 Chapter X, *§ 156.*
31 *Id.* at *§§ 167* and *169.*

Neither the company's bankers nor its attorneys were eligible to serve as the trustee, who was required to be "disinterested." [32] The definition of disinterested specifically excluded underwriters of the debtor's [**29] securities. [33] In addition, attorneys were similarly required to be disinterested. [34] These provisions were clearly targeted at Wall Street banks and their lawyers. Critics complained that the law ensured that the process and the business would be run by someone who knew nothing of the debtor's business.

32 *Id.* at *§ 156.*
33 *Id.* at *§ 158.*
34 *Id.*

In addition to the power it vested in the mandatory trustee, the new law included a variety of other measures aimed at the Wall Street banks. One source of the bankers' influence had been their informational advantage. As the underwriter of a debtor's securities, the firm's bank knew who all of its security holders were and, as [*70] a result, had an enormous head start when it came time to organize a protective committee on their behalf. The underwriter had a list (or could easily compile one) of all the investors who held a class of bonds it had underwritten. If the corporation ran into trouble, the bank knew whom to contact and how to contact them as it tried to round up investors to form a protective committee. Lacking this access, outside groups faced a substantial disadvantage if they wished to set up a competing committee. By refusing to share the [**30] list, banks made it very difficult for their competition. The new law cut through this arrangement by authorizing the court to insist that the bankers divulge the list. [35]

35 *Id.* at *§ 165.*

Even more dramatic were the new requirements for soliciting votes on a reorganization plan. Chapter X prohibited anyone from soliciting either the acceptance of a plan, or the right to accept a plan, until *after* the court entered an order approving the plan in question. [36] To appreciate how dramatically this altered the traditional process, recall that the whole point of the protective committee process had been to "solicit . . .the right to accept a plan" by lining up "deposits" before the bargaining began. Under long-standing practice, the bank would contact the troubled firm's outstanding bondholders and ask them to deposit their securities with a protective committee. If one deposited the bonds, the bondholder was giving the protective committee the right to accept a reorganization plan on her behalf. In effect, Chapter X completely reversed the timing of the process. Whereas the protective committee approach assumed that security holders would commit to the process first and that the parties *then* [**31] would negotiate the terms of the reorganization, the new law required that the plan be proposed and approved by the court before anyone could commit to it. [37] As a result, nothing the Wall Street banks might do before bankruptcy could have any effect.

36 *Id.* at §§ 174-176.
37 *Id.*

Included in the reforms was the adoption of section 211 of Chapter X, which provides:

> Every person or committee, representing

more than twelve creditors or stockholders, and appearing in the proceeding, and every indenture trustee appearing in the proceeding, shall file a sworn statement containing --

> (1) a copy of every instrument under which any such representative is empowered to act on behalf of creditors or stockholders;
>
> (2) the pertinent facts and circumstances in connection with the employment of such person or indenture trustee, and, in the case of a committee, the names of the persons who, directly or indirectly, arranged for such employment or at whose instance, directly or indirectly, the committee was organized or formed or agreed to act;
>
> (3) the amounts of claims or stock owned by such person, the members of such committee or such indenture trustee, when acquired, the amounts paid therefor, and any sales [**32] or any other disposition thereof, at or about the time of such employment of such person or the organization or formation of such committee or the appearance of the indenture trustee;
>
> (4) the claims or stock represented by such person or committee and the amounts thereof, a statement that [*71] each holder acquired his holding more than one year before the filing of the petition, otherwise, the time of acquisition. [38]

38 *Id.* at § 211.

Rule 10-211 was adopted to implement section 211 by requiring disclosure relating to the solicitation and formation of protective committees. For example, subsection (a)(1) and (2) require disclosure of the committee members and their holdings, i.e., exactly who are the creditors controlling the reorganization. Subsection (a)(3) requires disclosure of the person or persons behind the formation of the committee -- most likely a Wall Street bank and its lawyers. Subsection (a)(4) requires disclosure of the members' trading activity and the details of the deposit arrangement by which the committee obtained sufficient clout to control the process. Similarly, the remedy section of the rule was designed to enforce the new limitations on solicitation by Wall Street banks. [**33] [39] In short, Rule 10-211 was one of the procedural mechanisms for implementing and enforcing the strict limitations imposed on protective committees by the Chandler Act.

39 Section 211 did not specifically provide for a violation of its terms.

The practical result of the adoption of the Chandler Act was as its critics predicted -the virtual cessation of corporate reorganization in bankruptcy. Within a few years, the Wall Street banks and their capital had exited the field. Cases under Chapter X were few and far between for the next 40 years. What reorganization activity that did exist was usually done under Chapter XI (designed for small businesses) because that chapter did not require the appointment of a trustee.

D. Rule 2019

Corporate reorganization was, once again, overhauled in 1978. Some of the concepts and policies from the Chandler Act were adopted in the Bankruptcy Code. The mixture in the new Bankruptcy Code of elements of the old equity receivership practice, Chapter

X and XI of the Bankruptcy Act, and brand new concepts led to some inconsistencies in the new law and rules. Among those was the adoption of old Rule 10-211 as *Rule 2019 of the Federal Rules of Bankruptcy Procedure*.

Notwithstanding [**34] the significant changes between Chapter X of the Bankruptcy Act and Chapter 11 of the Bankruptcy Code, *Rule 2019* was adopted almost whole cloth from Rule 10-211. Set forth below is the text of Rule 10-211 marked to show the changes made upon its adoption as *Rule 2019*.

[EDITOR'S NOTE: TEXT WITHIN THESE SYMBOLS [O> <O] IS OVERSTRUCK IN THE SOURCE.]

(a) Data required

> [O> Every person <O]In a chapter 9 municipality or chapter 11 reorganization case, except with respect to a committee appointed pursuant to *§ 1102* or *1114* of the Code, every entity or committee representing more than one creditor or [O> stockholder, <O]equity security holder and, unless otherwise directed by the court, every indenture trustee, shall file a [O> signed <O]verified statement [O> with the court <O] setting forth (1) the [O> names <O]name and [O> addresses <O]address of [O> such creditors <O]the creditor or [O> stockholders <O]equity security holder; (2) the nature and [O> amounts <O]amount of [O> their claims <O]the claim or [O> stock <O]interest and the time of acquisition thereof unless [O> they are <O]it is alleged to have been acquired more than one year prior to the filing of the petition; (3) a recital of [**35] the pertinent facts and circumstances in connection with the employment of [O> such person <O]the entity or indenture trustee, and, in the case of a [*72] committee, the name or names of the [O> person <O]entity or [O> persons <O]entities at whose instance, directly or indirectly, [O> such <O]the employment was arranged or the committee was organized or agreed to act; and (4) with reference to the time of the employment of [O> such person or <O]the entity, the organization or formation of [O> such <O]the committee, or the appearance in the case of any indenture trustee, [O> a showing of <O] the amounts of claims or [O> stock <O]interests owned by [O> such person <O]the entity, the members of [O> such <O]the committee or [O> such <O]the indenture trustee, the times when acquired, the amounts paid therefor, and any sales or other disposition thereof. The statement shall include a copy of the instrument, if any, whereby [O> such person <O]the entity, committee, or indenture trustee is empowered to act on behalf of creditors or [O> stockholders. <O]equity security holders. A supplemental statement shall be filed promptly, setting forth any material changes in the facts contained in the statement [**36] filed pursuant to this subdivision.

(b) Failure to comply; effect

> [O> The court on its own initiative or on application or <O]On motion of any party in interest[O> (1) may <O] or on its own initiative, the court may (1) determine whether there has been a failure to comply with the provisions of subdivision (a) of this rule or with any other applicable law regulating the activities and personnel of any [O> person <O]entity, committee, or indenture trustee or any other impropriety in connection with any solicitation and, if it so determines, the court may refuse to permit that [O> any such person <O]entity, committee, or indenture trustee to be heard further or to intervene in the case; (2)[O> may <O] examine any representation provision of a deposit agreement, proxy, trust mortgage, trust indenture, or deed of trust, or committee or other authorization, and any claim or [O> stock <O]interest acquired by any [O> person <O]entity or committee in contemplation or in the course of a case under the [O> Act <O]Code and grant

> appropriate relief[O> pursuant to the Act <O]; and (3) [O> may <O]hold invalid any authority[O> or <O], acceptance, rejection, or objection given, procured, or received [**37] by an entity[O> person <O] or committee who has not complied with [O> subdivision (a) of <O]this rule or with [O> Rule 10-304. <O]*§ 1125(b)* of the Code.

As is readily apparent, there is not a single substantive difference between Rule 10-211 and *Rule 2019*. Every change is made (i) to modernize style (e.g., excluding the antiquated use of "such"), (ii) to adapt to changes in definitions (e.g., changing "stock" to "interest"), or (iii) to reference the new operative provisions (e.g., inserting references to Chapters 9 and 11).

E. Application Of The Legislative History To Informal And *Ad Hoc* Committees Such As The SFO Noteholders Committee

The nub of the question is how the legislative history of Rules 10-211 and *2019* applies to the informal and *ad hoc* committees of today and, more specifically, the Informal Committee of SFO Noteholders. Certainly there are parallels between the "protective committees" under equity receivership and the informal committees of today. For example, both are usually composed of Wall Street banks and institutional investors. Both are formed for the purpose of obtaining leverage in the reorganization that would not be available to disparate creditors. Both are [**38] involved in the negotiation and formulation of a plan of reorganization.

The differences, however, far outweigh the similarities. The "protective committees" [*73] that were the target of the reforms under the Chandler Act were able to control completely the entire reorganization -- from inception to formulation to solicitation to implementation. They were granted the authority to negotiate on behalf of and to bind creditors through the use of deposit agreements. They were so intimately involved with management so as to be virtually in control of the business. They could force disparate treatment of similarly situated creditors. Finally, they were able "to steal" the company for an inadequate "upset price" at a foreclosure sale by credit bidding their debt.

The informal and *ad hoc* committees of today have none of these expansive powers. Indeed, the Chandler Act so effectively curbed the power of protective committees that they virtually ceased to exist within a few years of the Act's passage. Rule 10-211 was, for all intents and purposes, superfluous almost immediately after its passage. There was nothing left to regulate. [40]

> 40 This may help explain the paucity of cases related to Rule 10-211.

The [**39] Bankruptcy Code continues to limit the powers of committees, albeit in other ways. For example, the debtor is given exclusive authority to propose and to solicit a plan of reorganization; claims and interests may only be classified with substantially similar creditors; creditors in the same class must be treated equally; a trustee or examiner can be appointed for cause. Even if an informal committee were to try to exercise the powers formerly available to protective committees, it would be prevented by the Bankruptcy Code. Thus, *Rule 2019* is also, for all intents and purpose, superfluous -- the problem it was designed to address by requiring certain disclosures simply no longer exists. [41]

> 41 The Court is well aware that it must be cautious in interpreting a statute such that some or all of it are a nullity. *Pennsylvania Dept. of Public Welfare v. Davenport, 495 U.S. 552, 562, 110 S. Ct. 2126, 109 L. Ed. 2d 588 (1990)* (expressing "deep reluctance" to interpret statutory provisions "so as to render superfluous other provisions in the same enactment"). Nonetheless, the Court is compelled to reach its conclusion that *Rule 2019* is superfluous based upon the extensive legislative history, the [**40] clear purpose behind the Chandler Act and Rule 10-211 and the changes implemented in the Bankruptcy Code. Moreover, the Court reiterates that the primary basis for its holding is the plain meaning of *Rule 2019*.

In any event, the Informal Committee of SFO Noteholders has not attempted to invoke the powers previously wielded by protective committees. Certainly, the committee has actively participated in the reorganization process both pre-petition and post-petition. The committee vigorously opposed the Debtors' Initial Plan and now vigorously supports the Revised Plan that it negotiated post-petition. But, the Informal Committee of SFO Noteholders has gone no farther. It doesn't have the ability to bind its members -- they can vote any way they please. It cannot force disparate treatment of the SFO creditors. The list goes on. Based upon the legislative history, *Rule 2019* is not intended to nor does it apply to the Informal Committee of SFO Noteholders in this case.

III. The Case Law To The Contrary Is Not Persuasive

Two separate bankruptcy courts recently addressed virtually the identical issue presented here. Those courts found that informal committees, such as the SFO Noteholders Informal [**41] Committee in this case, are "committees" under *Rule 2019*.

The issue was first addressed in the *Northwest Airlines* bankruptcy, in which [*74] the Court held that a self-styled *Ad Hoc* Committee of Equity Security Holders was a committee under *Rule 2019*. [42] The Court did not examine the plain meaning of "committee" in its analysis. Rather, it focused on the actions and representations of the *ad hoc* committee as well as the legislative history of *Rule 2019*.

42 *In re Northwest Airlines, Inc., et al., 363 B.R. 701 (Bankr. S.D.N.Y. 2007)* ("*Northwest I*").

As to the former point, the Court noted that the *ad hoc* committee repeatedly referred to itself as a committee and its members acted in concert through the committee. [43] Moreover, the Court noted that "[b]y appearing as a 'committee' . . . the members *purport* to speak for a group and *implicitly* ask the court and other parties to give their positions a degree of credibility appropriate to a unified group with large holdings." [44]

43 *Id. at 703*.
44 *Id.* (emphasis added).

As to the latter point, i.e., legislative history, the Court discussed "the influential study in the 1930's by William O. Douglas for the Securities and Exchange Commission centered on the [**42] perceived abuses of unofficial committees in equity receiverships and the corporate reorganization." [45]

45 *Id. at 704. See also In re Northwest Airlines, Inc., et al., 363 B.R. 704, 707-8 (Bankr. S.D.N.Y. 2007)* ("*Northwest II*") (examining legislative history).

More recently, a member of this Court addressed a closely related issue in the *Washington Mutual, Inc.* (or "*WaMu*") bankruptcy. [46] The *WaMu* Court begins its analysis by examining the plain meaning of *Rule 2019*. [47] However, the issue in *WaMu* was not that considered here, i.e., whether an *ad hoc* committee could constitute a "committee" under *Rule 2019*. Indeed, the *WaMu* Court assumed as much, stating that "[t]he Rule requires disclosure from any entity or *[unofficial]* committee representing more than one creditor or equity security holder." [48] The opinion actually addresses the related question of whether the self-styled "group" in that case was, in fact, an "*ad hoc* committee." [49] The Court decided it was and, thus, *Rule 2019* was implicated.

46 *Washington Mutual, Inc., et al., 419 B.R. 271 (Bankr. D. Del. 2009)*.
47 *Id. at 274-75*.
48 *Id. at 274* (bracketed language in original).
49 *Id. at 275* ("[T]he Court finds that although the WMI Noteholders [**43] Group call themselves a Group, they are in fact acting as an *ad hoc* committee . . .").

The *WaMu* Court then turns to an endorsement of the holdings in *Northwest I* and *II*, and a recitation of the legislative history. [50] As in *Northwest*, the Court focuses its examination of legislative history on the SEC report. Finally, the Court notes that the Advisory Committee on Bankruptcy Rules has recommended changes to *Rule 2019* to require disclosure of all types of a committee member's economic interests such as whether the committee member also holds a "short" position in the claims or equity that forms the basis for membership on the committee. [51]

50 *Id. at 275-79*.
51 *Id. at 279-80*.

This Court respectfully disagrees for a number of reasons with the holdings in these cases. First, the *Northwest* Court did not address what this Court believes is the required analysis under the rules of statutory construction -whether under the [*75] plain meaning of the words a self-appointed subgroup of creditors with neither the authority nor consent of the larger group constitutes a "committee" under *Rule 2019*. As noted earlier, this Court holds that under the plain meaning of the rule such a group is not a "committee." [**44] [52] The *WaMu* Court, in turn, does not specifically analyze whether an *ad hoc* committee is a "committee" under the rule but, rather, assumes that it is. Thus, *WaMu* is not applicable to the issue before this Court. [53]

52 *Supra* at 8-12.

53 Notwithstanding the conclusion that *WaMu* is inapplicable, the Court will continue to analyze the case.

Second, as discussed above, this Court disagrees with its sister Court's interpretation of the legislative history of *Rule 2019*. A thorough examination of the history surrounding the adoption of *Rule 2019*'s predecessor, Rule 10-211, reveals the flaw in the parallel drawn by those Courts between the "protective committees" of the 1930's and the "informal" and "*ad hoc*" committees prevalent in today's reorganization practice. [54]

54 *Supra* at 13-28.

Third, this Court believes it is a mistake to focus on the conduct and role of the *ad hoc* committee to determine whether it is a committee under *Rule 2019*. *Rule 2019* is a prophylactic rule designed to provide information to the Court and others at the inception of a case to preserve the integrity of the reorganization process to follow. It is turning the rule on its head to await events before determining whether to [**45] require disclosures that were meant to be made prior to the occurrence of these events. Any definition of "committee" under *Rule 2019* must be sufficiently clear and objective so as to require its applicability from the inception of the case or the primary purpose of the rule will be frustrated.

The problem of awaiting developments before determining (if at all) that an informal or *ad hoc* committee is a "committee" under the rule is illustrated by the facts in this case. Here, the Official Committee, by filing its motion, is clearly engaged in a litigation tactic to apply pressure on it current adversary, the Informal Committee of SFO Noteholders, as well as attempting to make an "end run" around a previous ruling denying the Official Committee's request for discovery seeking virtually the same information. This conclusion is made self-evident by the fact that the Official Committee has not sought application of *Rule 2019* to its current ally, the *Ad Hoc* Committee of SFI Noteholders.

Fourth, the *Northwest* Court held that *Rule 2019* is applicable where an *ad hoc* committee has appeared in a case as "the formal organization of a group of creditors holding similar claims, who have elected to [**46] consolidate their collection efforts . . ." [55] The Court than applied this holding to the *ad hoc* committee at issue. [56] Nonetheless, the committee in the *Northwest* case was not formally organized. [57] The *Northwest* Court held, in effect, that all *ad hoc* committees qualify as "committees' under *Rule 2019*. This ignores the requirement of formal organization set forth in *Wilson*. [58] There is nothing formal in a legal [*76] sense in an *ad hoc* or informal committee. As discussed above, a formal committee requires the consent of the governed either by contract or operation of law. In no way can a group *purporting* to speak on behalf of others and *implicitly* requesting third parties to treat them as a representative of the larger group, be considered a "formal" committee.

55 *Northwest I, 363 B.R. at 703* (quoting *Wilson v. Valley Electric Membership Corp., 141 B.R. 309, 314 (E.D. La. 1992))*.

56 *Id.* ("That is exactly the situation in this case . . .").

57 *Id. at 701-02*.

58 *Wilson, 141 B.R. at 314*.

Finally, the *WaMu* Court identifies in support of its holding a proposed change to *Rule 2019* to expand the required disclosure based the possibility that a creditor may hold other economic interests such that the creditor, [**47] while purporting to act on behalf of other similarly situated creditors, would have an incentive to work against the interest of those creditors. [59] While noting that the problem of perverse incentives and hidden agendas could apply to any creditor, the *WaMu* Court was clearly most concerned with the operation of informal and *ad hoc* committees.

> [T]he unique problems associated with collective action by creditors through *ad hoc* committees or groups requires disclosure for those groups in particular. Collective action of creditors through the use of an *ad hoc* committee or group is a form of leverage, wherein the parties utilize other group members' holdings to obtain a greater degree of influence on the case. This enables theoretically better returns than if creditors were to act individually in a case. This is especially true, for example, where a group or committee controls one-third of a class of claims, which might allow the group to block confirmation of a plan. [60]

59 *WaMu, 419 B.R. at 279-80.*

60 *Id. at 280.*

The existence of a proposed rule expanding the disclosures required of those already subject to the rule is of no moment with regard to whether the rule applies in the first place. [**48] Moreover, this Court believes that there is nothing neither nefarious nor problematic, in and of itself, in disparate parties banding together to increase their leverage. Indeed, enabling such is one of the primary rationales for the existence of the Bankruptcy Code.

Thus, with the utmost respect, this Court disagrees with the holdings in *Northwest* and *WaMu*.

CONCLUSION

For the foregoing reasons, by Order of the Court dated January 11, 2010, the Court denied the Motion of the Official Committee of Unsecured Creditors to Compel the SFO Noteholders Committee to Comply with *Federal Rule of Bankruptcy Procedure 2019*.

Dated: January 20, 2010

Sontchi, J.

5-23 Moore's Federal Practice - Civil § 23.124

Moore's Federal Practice - Civil

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Volume 5: Analysis: Civil Rules 23-23.2
Volume 5 Analysis: Civil Rules 23-23.2
Chapter 23 Class Actions
G. APPOINTMENT OF COUNSEL AND AWARD OF FEES

5-23 Moore's Federal Practice - Civil § 23.124

§ 23.124 Counsel Fees Must Be Claimed by Means of Rule 54(d) Motion

[1] Procedure for Claiming Fees Is Uniform Regardless of Whether Claim for Fees Results From Law Providing for Fee Award or From Contract for Legal Services

The sole means for counsel to obtain an award of attorney's fees or reimbursement of nontaxable costs in a class action is through the filing of a motion under Rule 54(d)(2): [1]

- **Basis for fee award does not change procedure.** The Rule 54(d)(2) motion procedure applies without regard to whether the moving counsel's alleged right to a fee award or to reimbursement for nontaxable costs is founded in an agreement between the applying counsel and one or more of the beneficiaries of the judgment in the class action, counsel's equitable right to compensation for the creation of a fund for the benefit of the members of the class, or a fee-shifting statute. [2]

- **Status of counsel seeking fee award is irrelevant.** The Rule 54(d)(2) procedure applies to any motion for an award of fees by anyone seeking fees. It applies to awards sought by the attorney who was appointed class counsel. It also applies to awards sought by other attorneys who may have done work on behalf of the class prior to certification of the class, whose work may have produced a beneficial result for the class, but who were not appointed class counsel. It also applies to applications for fee awards on behalf of counsel representing objecting members of the class with respect to proposed settlements and fee motions of other counsel, if those efforts benefitted the class. [3]

In class actions, Rule 54(d)(2) is "subject to the provisions of" Rule 23(h), [4] and the two rules must be read in tandem. Rule 54(d)(2) applies in all types of actions and does not address important issues that are peculiar to class actions. Therefore, the Rule 54(d)(2) procedures must be supplemented by reference to the provisions of Rule 23(h). [5]

Under Rule 23(h), the the Rule 54(d)(2) procedure can be used to seek attorney's fees and reimbursement for nontaxable costs in any "certified class action." [6] Because certification is the lone prerequisite, Rule 54(d)(2) is applicable to a wide range of cases--from cases involving a simultaneous motion for class certification and application for approval of a settlement through cases that have proceeded through a trial on the merits. [7]

Rule 54(d)(2) procedure does not apply when the controlling substantive law provides for the prevailing party to recover attorney's fees and costs *as part of the damages award.* When substantive law makes fees and costs part of damages, the amount of attorney's fees and costs to be awarded is not a matter of post-trial procedure, but must be determined by the finder of fact at the trial. [8]

[2] Court Must Set Time for Filing Fee Motions

In a class action, the court must set a deadline for the filing of motions seeking attorney's fees or reimbursement of nontaxable costs. [9] The more general, Rule 54(d)(2) deadline of "14 days after the entry of judgment" [10] does not apply in class actions. By its terms, Rule 23(h) requires the court to set a specific deadline that is tailored to the facts of the case. [11]

Specific, court-set deadlines for fee motions must be set by the court in each class action because a strict 14-day limit could not possibly accommodate the varying factual situations in which motions for fees may be made in class actions. In class actions, counsel moving for fees must give notice of the motion to *all* parties and, for motions made by class counsel, counsel must also give some form of reasonable notice to all class members (*see* [3], *below*). [12] Those procedures will take time. When an action has been settled and the court must approve the settlement agreement, the court should generally direct that any motions for fees or nontaxable costs be filed at a time that will permit inclusion of information concerning the fee motions in the Rule 23(e) notice to the class concerning the proposed settlement. [13] Even in cases involving settlements, however, there may be situations in which later deadlines for filing of fee motions would be appropriate. For example, counsel for parties opposing a proposed settlement could not realistically be expected to file a motion for fees or costs until after they have made the grounds of their objection known and have received a ruling that is beneficial to the interests of the class as a whole--events that will not occur until well Rule 23(e) notice of the proposed settlement agreement. Very late deadlines for filing fee motions would be appropriate as well for motions for fees and costs for counsel who benefit the class as a whole by successfully opposing class counsel's request for fees and costs. The court should not set deadlines any later than is absolutely necessary, however. The drafters have suggested that, even in cases litigated to judgment, the court should assess all of the circumstances and set a time limit that will permit both reasonable notice to the class and prompt resolution of any fees motion. [14]

[3] Counsel Seeking Fees Must Serve Fee Motion

[a] All Parties Are Entitled to Normal Motion Service

Counsel who file a Rule 54(d)(2) motion for attorney's fees in a class action (*see* [1], *above*) must give notice of that motion to all parties. [15] Because no rule provides otherwise, [16] that service must be on the attorney of record for every party represented by an attorney (unless the court orders that the party be served directly), [17] and must be made by one of the means authorized for service of motions under Rule 5(b). [18] Those methods of service are analyzed extensively in Ch. 5, *Serving and Filing Pleadings and Other Papers.*

[b] Court May Set Requirements for Reasonable Notice to Class Members for Fee Motions Made by Class Counsel

Members of a class have a right to receive reasonable notice of any motion that class counsel makes for an award of attorney's fees or for reimbursement of nontaxable costs. [19] Class members' notice rights do not depend on whether the fee or cost award is to come from a common fund created in the course of the litigation for the class's benefit or from some other source. [20]

The Rule does not specify the method for notifying class members of fee motions made by class counsel. The notice to class members need not be the same, formal type of notice of motion that the moving attorney must serve on the parties. The court need only direct notice to the class "in a reasonable manner." [21] The drafters of the Rule 23(h) suggest that, when the parties seek court approval of a settlement under Rule 23(e), the notice of the settlement (*see* § 23.162) and the notice of the fee motion should be combined. Indeed, the drafters suggest that the type of notice class counsel must give to class members of fee and cost requests is the same type of notice that parties must give class members of proposed settlements. In other words, the notice of fee or cost requests need not be either formal notice of a motion under Rule 5(b) or the "best notice practicable" as is required for the certification order. Class counsel only needs to give class members notice by any method that is "reasonable," and "the court may calibrate the notice to avoid undue expense." [22]

The Rule does not specify the content of the notice that class counsel must give the class concerning class counsel's fee motions. That matter, too, should be subject to the court's discretion, so long as the notice includes information sufficient to provide a basis for class members to exercise their right to object to the motion. [23]

The Rule also does specify how much notice class counsel must give to class members of fee motions. Nonetheless, for notice of counsel's fee motion to be "reasonable," [24] class counsel must give it sufficiently far in advance of the determination of the motion to permit class members to prepare and file meaningful objections to the claim for fees and nontaxable costs.

The Private Securities Litigation Reform Act contains requirements for fee claims that apply in securities fraud cases. The PSLRA requires that any proposed or final settlement agreement published or disseminated to the class include a statement of the amount of fees and costs counsel seeks from the settlement fund, with a brief explanation supporting the fees and costs sought. [25]

[4] All Parties and Class Members Have Standing to Object to Fees Request

Any class members may object to a request for attorney's fees. In addition, any party from whom payment is sought may object to any fees request that seeks payment from that party. [26] Class members and parties are most likely to object to fees requests only in situations in which they have standing to do so. For instance, class members are most likely to object when the right to payment of fees arises from the creation of a common fund for the benefit of the class. In that circumstance, any fees award will reduce the common fund. Class members have standing to object to a request for an award of fees that may reduce their recovery. More broadly, because class counsel must act for the benefit of the class as a whole, [27] class members probably always have standing to object to any order concerning class counsel, including any request for fees, regardless of the source of the fees. Similarly, defendants are likely to object to fees requests by class counsel only when the request is made in a case in which the fees are paid by virtue of a fee-shifting statute. In that circumstance, any defendant who may become liable to pay attorney's fees has standing to object to the request. By contrast, members who have opted out of the class, or nonsettling defendants who will not be affected by any fees award made in connection with a settlement, do *not* have standing to object to a fees request. [28]

The Rule does not address the timing for objecting to fees requests. [29] Nonetheless, just as the court should set a deadline for making fees motions, the rule contemplates that the court will set a deadline for objections to fees requests. A court needs a deadline to manage the rights of parties and class members to object and still resolve fee motions in a prompt and efficient manner. Any objection deadline set by the court should provide the eligible parties with an adequate opportunity to review all of the materials that may have been submitted in support of the motion and, in an appropriate case, conduct discovery concerning the fees request. [30] Failure to allow a sufficient period for objections "borders on a denial of due process because it deprives objecting class members of a full and fair opportunity to contest class counsel's fee motion." [30.1]

The court may allow an objecting party to take discovery relevant to its objections. The court should not authorize that discovery automatically, nor should the court permit discovery to proceed without limits. The party seeking discovery must justify the need for it in each particular case. The court must weigh the need for information against the cost and delay that the proposed discovery would entail. Because discovery rights exist to provide information to make and resolve objections on fee motions, the need for discovery will vary with the amount of information provided in the motion itself. The more information provided in the motion, the less the need for discovery. [31]

[5] Rule 23's Fees Procedures Do Not Create or Regulate Right to Fees

[a] Fees Are Generally Matter of Substantive Law

Rule 23 does not provide any independent basis for awarding attorney's fees or reimbursing a party or its counsel for nontaxable costs. Any right to an award of fees or costs must come from the substantive law applicable to the case. [32]

There are two generally applicable bases in substantive law for awards of attorney's fees and nontaxable costs to a prevailing party or to that party's counsel:

- **Statutes provide for fee-shifting.** Although, in most cases, parties must pay their own attorney's fees, a number of fee-shifting statutes change this normal rule. Those statutes give victims of the conduct proscribed by the statutes the right to recover their attorney's fees and costs from the defendant if they prevail in civil actions for damages. [33]

- **Creation of common fund that benefits class.** A second substantive basis for awards of attorney's fees and nontaxable costs is founded on the equitable principles of quantum meruit and unjust enrichment. When a common fund is created through an attorney's efforts and there is no applicable fee-shifting statute, the attorney is entitled to an award of reasonable fees from the fund. [34]

[b] There Are Two Commonly Accepted Methods of Measuring Fees Awards

[i] Percentage-of-Funds Method

There are two broadly-accepted methods for determining the amount of a reasonable award of attorney's fees. The first of those methods is known as the "percentage-of-funds" approach. Rule 23 does not affect the court's selection of one or the other of the two approaches to setting a reasonable attorney's fee. [35] When the court uses the percentage-of-funds approach, fees are calculated on the basis of a percentage of the value of a fund. The size of the percentage is adjusted upwards or downwards from a presumptive starting point, depending on a number of relevant factors (*see* [6][b][iii], *below*). [36]

The percentage-of-funds approach is appropriate when an action results in the creation of a common fund for the benefit of the class (*see* [a], *above*). [37] Most courts have ruled that district courts have discretion to use either the percentage-of-funds method or its alternative, the lodestar approach (*see* [ii], *below*), in determining fees in common-fund cases. [38] The Second Circuit, while adhering to the rule that district courts have discretion to choose the method of calculation, has noted that the trend in common fund cases is toward the percentage method. The percentage method, the Second Circuit observed, directly aligns the interests of the class and class counsel and provides a powerful incentive for the efficient prosecution and early resolution of the litigation. The lodestar method, in contrast, creates a disincentive to early settlements, tempts lawyers to run up their hours, and compels district courts to perform line-item fee audits. [38.1]

In diversity cases, however, when the party's or counsel's entitlement to an award of attorney's fees depends on state law, the choice of method for determining the amount of fees (and the factors to be considered in employing that method) is a matter of state law. *See* Ch. 124, *The Erie Doctrine and Applicable Law* .

[ii] Lodestar Approach

There are two general methods for determining the amount of a reasonable award of attorney's fees. The second and more common of the two methods for determining the amount of a reasonable fees award in class actions is the "lodestar" approach. Under the lodestar approach or method, the court determines the number of hours reasonably expended by counsel on the case and multiplies that number by a reasonable hourly rate, to obtain the "lodestar." [39] Rule 23 does not determine whether a court should select the percentage-of-funds method (*see* [i], *above*) or lodestar approach to setting a reasonable attorney's fee. [40]

The lodestar approach is mandatory in cases in which the class's right to recover damages arises from a federal fee-shifting statute. [41] Generally, fee shifting statutes entitle a party to recover reasonable attorney's fees as part of the party's damages. [42] Therefore, the amount of fees and costs calculated under a federal fee-shifting statute is an amount that is awarded to the party rather than to counsel. The court need not require that the party pay the attorney the full or exact amount of the damages awarded to the party by the fee-shifting statute. A number of courts have ordered class counsel to be paid a different sum, including one calculated under the percentage-of-funds method (*see* [i], *above*). [43] Counsel has no right to insist either on the exact amount awarded to the party under the lodestar approach or to insist on any other amount, including one calculated on a percentage-of-funds method. For example, it is not abuse of discretion for a court to refuse to make an award under the percentage-of-funds approach when class counsel has already received the amounts awarded to the class as its reasonable attorney's fees, the amount calculated under the lodestar approach in accordance with the applicable fee-shifting statute. [44]

[6] Court Must Ensure That Fee Awards Are "Reasonable"

[a] Court Must Determine What Is "Reasonable" Regardless of Agreements of Parties

Any award of attorney's fees or an award for reimbursement of nontaxable costs in an action certified as a class action must be reasonable in amount. [45] Fee-shifting statutes and common-fund caselaw generally authorize only recovery of "reasonable" fees and costs. [46] However, whether the requested award is the result of a settlement or judgment on the merits, the court may not simply accept an agreement of the parties as to the fees to be awarded. The court must assess the reasonableness of the award independently. [47] The same is true as to any award of nontaxable costs. When an award includes nontaxable costs, the court must determine the reasonableness of those costs independently. [48]

Rule 23(h) is not the sole source of authority for the proposition that an attorney representing or conferring a benefit on the class may collect only reasonable fees. General **ethics** rules applicable in federal courts would require the same result. The majority of federal district courts have adopted "dynamic conformity" local rules on **ethics,** making the **ethics** standards of the district court conform to the **ethical** rules of the jurisdiction in which the district court sits (*see* Ch. 802, *Structure of Rules Governing Attorney Conduct in Federal District Courts* , § 802.02). Other district courts have local rules that either adopt the ABA Model Rules directly (*see* § 802.03), or set unique **ethical** standards in their local rules (*see* § 802.04). A universally accepted **ethical** standard, enshrined in ABA Model Rule 1.5, is that no attorney may charge or collect an unreasonable fee. [52] Therefore, in most cases, the requirements of Rule 23(h) limiting compensation of attorneys to reasonable fees will supplement and be interpreted in a manner consistent with general **ethical** obligations. However, given the wide variety of local **ethical** standards, this is not necessarily always the case; and when there is a conflict, the **ethical** requirements of Rule 23 will prevail over any local **ethical** standards rule (*see* Ch. 801, *Federal Law Governing Attorney Conduct* , § 801.05[1]). [53] For further discussion of the **ethical** standards governing attorney conduct in federal courts, see Volume 30 of this treatise authored by Professors Judith A. McMorrow and Daniel R. Coquillette and entitled *The Federal Law of Attorney Conduct.*

The courts' main concern in reviewing a fee application is to prevent attorneys from sacrificing a class's interests to maximize their own compensation. [54] The Ninth Circuit has ruled that, when fees are sought on the basis of a percentage-of-fund recovery, the parties may not fix the amount of fees in a settlement agreement because that procedure improperly limits a court's right to fix a reasonable amount of fees independently of the agreement of the parties. In a settlement agreement, the court must review the agreement, including any provisions related to fees, and assure itself that the agreement is "fair, reasonable, and adequate." [55] However, court review of proposed settlements is a take-it-or-leave-it affair (*see* § 23.168). The court may not reject the *portion* of a settlement agreement that sets fees, fix another amount as the reasonable fees in the case, and still approve the settlement. Thus, specifying an amount of fees in a settlement agreement limits the court's review of those fees for reasonableness. That is not acceptable in percentage-of-fund fee award cases because, in those cases, the amount of fees deducted from the common fund affects the amount awarded to class members. There is an inherent conflict of interest between class counsel and the class members. Because of that conflict, the court should have complete freedom in determining the reasonableness of percentage-of-fund fees awards, and may not be limited in its review of them as part of an overall settlement, when its review is on a take-it-or leave-it basis. According to the Ninth Circuit, a court abuses its discretion in approving a settlement agreement with that type of provision in it. [56]

The Fifth Circuit has held that the district court has an independent duty not only to ensure that fees are reasonable but, when multiple counsel are involved, to ensure that the fee award is divided fairly among counsel. In one case, the parties had reached a settlement that provided for a $6.875 million lump-sum fee award. The court approved the fee award and appointed a five-member committee to allocate the award among approximately 32 law firms and 79 plaintiffs' attorneys who had worked on the case. The committee consisted of co-lead counsel and three other plaintiffs' attorneys. The court accepted the committee's recommended split after an ex parte hearing at which other plaintiffs' attorneys were not present, and without sworn testimony or affidavits as to the accuracy or fairness of the proposed fee allocation. It was not error to use a fee committee of plaintiff's counsel to recommend how to divide up an aggregate fee award. However, the appointment of a committee does not relieve a district court of its nondelegable responsibility to closely scrutinize the attorney's fee allocation. Thus, the Fifth Circuit held that the district court erred by abdicating its responsibility to ensure that individual awards were fair and reasonable. The record lacked factual information essential to a fairness analysis and failed to show that the district court had actually performed an adequate review of the division. Moreover, the district court had sealed the records pertaining to fees and placed a gag order on the attorneys. Sealing the record was error because it protected no legitimate privacy interest that would overcome the public's right to be informed. Accordingly, the Fifth Circuit vacated the fee award and remanded for the district court to determine, on an adequate factual record and without sealing or ex parte communications, the adequacy of the committee's recommended allocation. [56.1]

[b] Factors Considered in Determining Whether Award Is Reasonable

[i] Overall Factors, Regardless of Calculation Method

There are a number of factors that a court may consider in determining what is and what is not a "reasonable" award of fees and costs. Those factors include:

- **Fee agreements.** When a court determines the size of an attorney's fees award, it is appropriate for it to consider any agreements between class counsel and class representatives about fees and expenses, as well as any agreements among the parties regarding the fee motion. Those agreements are relevant to what is "reasonable" even though no one may obtain attorney's fees and expenses through attempts to enforce such agreements outside of normal, Rule 54(d)(2) fees motions. Rule 54(d)(2) fee motions are the exclusive vehicle for obtaining an attorney's fee and expense award in a class action case. [57] Nonetheless, as proof of the relevance of fee-related agreements, Rule 54(d)(2) expressly permits the court to require the moving party to disclose any agreements relating to "fees for the services for which the claim is made." [58] There are many reasons why these agreements and their terms are relevant to whether the fees and expenses requested in the motion are "reasonable." The most obvious example would be an agreement by the opposing party not to oppose a fee application up to a certain amount. The existence of this type of agreement and its terms could certainly have significance in an analysis whether the fee motion requests a reasonable award. [59]

- **Value of non-monetary benefits conferred on class.** A court should take into account any non-monetary benefits obtained for the class, such as injunctive or declaratory relief. In injunctive or declaratory relief actions, any monetary relief obtained for the class may not be the sole, or even the most significant, factor in the determination of the amount of the attorney's fees that should be awarded to class counsel. [60] On the other hand, when fees are sought on a percentage-of-fund basis, courts consider non-monetary benefits as relevant only the court's selection of the appropriate percentage of the fund to award to counsel. Courts are reluctant to allow speculation about the monetary value of injunctive or declaratory relief in setting the amount of the common fund itself. [61]

- **Amount of fees charged by other attorneys in case.** One measuring stick that courts should consider in determining the reasonableness of fee requests is the fees charged by class counsel or other attorneys for representing individual claimants or objectors in the case. Courts look to provide fee equity among counsel representing the class and counsel representing class members. [62]

In a diversity case, when a party's or counsel's entitlement to an award of attorney's fees is dependent on state law, the choice of the method for determining the amount to be awarded and the factors to be considered in making the award are matters of state law. *See* Ch. 124, *The Erie Doctrine and Applicable Law* .

[ii] Factors Applicable to Lodestar Approach

When a fee award is computed using the lodestar approach, the court's multiplication of the reasonable number of hours counsel devoted to the matter by the reasonable hourly rate for each lawyer results in a reasonable award almost by definition. The lodestar figure, therefore, enjoys a strong presumption that it is reasonable. [63]

When courts award attorney's fees using the lodestar approach in cases that do not involve a federal fee-shifting statute, as, for example, when a court exercises its discretion to use the lodestar approach rather than the percentage-of-funds method in a common-fund case (*see* [i], *above*), the lodestar figure may be adjusted upward or downward through the use of a multiplier. The factors that courts generally consider in determining whether to use a multiplier and, if so, how large it should be, include all or some of the so-called *Johnson* factors, named after the Fifth Circuit opinion in which they were first enunciated. They include: [64]

- The time and labor the applicants devoted to the matter.
- The novelty and difficulty of the questions presented.
- The skill required to resolve the issues necessary to a successful conclusion for the class.
- The extent to which the matter precluded counsel from accepting other employment.
- The customary fees charged in the relevant area for similar representation.
- Whether counsel's representation in the matter was on a fixed or contingent fee basis.
- The time limitations that counsel worked under.
- The amount involved and results obtained.
- The experience, reputation, and ability of the attorneys.
- The undesirability of the case.
- The nature and length of the attorney's professional relationship with the client.
- The size of awards made in similar cases.

The *Johnson* factors are not an exhaustive list of the indicia of reasonableness. Nor are they all necessarily applicable in every reasonableness determination. Courts may consider any factor that is indicative of reasonableness and need not explicitly consider any listed factor that is not pertinent because of the particular circumstances of the case. [65]

When a court awards attorney's fees under a federal fee-shifting statute, a court will rarely, if ever, apply the *Johnson* factors or any other factors that would enhance the size of the award beyond that called for by the lodestar calculation. Upward adjustments of the lodestar are permissible only when the federal fee-shifting statute in question permits it and, even then, the party advocating an enhancement bears a heavy burden of persuasion. [66] An applicant seeking an enhancement to the lodestar amount must produce "specific evidence" that supports the award. [66.1] Because the lodestar figure itself includes most, if not all, of the relevant factors constituting a reasonable attorney's fee, and an enhancement may not be awarded based on a factor subsumed in the lodestar calculation, an enhancement may be awarded only in rare and exceptional circumstances. [66.2] Thus, a court may not enhance the lodestar figure on the basis of the results obtained, [67] the novelty and complexity of the issues presented, [68] or the contingent nature of the litigation. [69] Delays in the receipt of payment resulting from making the award at the conclusion of the litigation, rather than periodically, as lawyers usually bill and collect their hourly rate fees, may be accounted for by the use of fee rates that are current as of the date of the award, rather than the rates that were effective when the lawyers performed the specific tasks the hours represent, or by factoring in an interest adjustment. [70] The Supreme Court has suggested that enhancement might be appropriate in three unusual circumstances. First, when the method used in determining the hourly rate does not adequately measure the attorney's true market value, as demonstrated in part during the litigation, the district court should adjust the hourly rate in accordance with specific proof linking the attorney's ability to a prevailing market rate. Second, when the attorney's performance includes an extraordinary outlay of expenses and the litigation is exceptionally protracted, an enhancement might be allowed, such as by applying a standard rate of interest to the outlay of expenses. Third, there may be extraordinary circumstances in which an attorney's performance involves an exceptional delay in the payment of fees. An enhancement may be appropriate based on unanticipated delay, particularly when the delay is unjustifiably caused by the defense. Generally, however, these matters are a normal part of litigation and are subsumed in the lodestar figure and, therefore, enhancement must be reserved for unusual cases. Further, any enhancement must be calculated using a method that is reasonable, objective, and capable of being reviewed on appeal. [70.1] A downward adjustment from the lodestar figure in federal fee-shifting cases, on the other hand, may be necessary when the prevailing party achieved only moderate success. [71]

In diversity cases, when the party's or counsel's entitlement to an award of attorney's fees depends on state law, the choice of the method of determination of the amount the court will award and the factors the court will consider in making the award are also matters of state law. *See* Ch. 124, *The Erie Doctrine and Applicable Law* .

[iii] Factors Applicable to Percentage-of-Funds Method

Some courts have adopted a percentage "benchmark" that is presumptively reasonable as a measure of attorney's fee awards in common-fund cases. [72] Some of those courts require substantial justification for an adjustment of a fee award to a level above or below the benchmark. [73] Other courts adopting benchmarks have permitted adjustments to fee awards above or below the benchmark level through the use of specifically identified factors, such as the *Johnson* factors (*see* [ii], *above*). [74] Other courts have eschewed the use of benchmarks altogether on the ground that benchmarks could too easily become a substitute for the required thorough and detailed review of every fee application. [75]

Some courts reviewing the reasonableness of a percentage-of-fund attorney's fee award employ the *Johnson* factors (*see* [ii], *above*). [76] Others use a list of factors that is specifically tailored to the percentage-of-funds method: [77]

- The size of the fund created and the number of persons benefitted.
- The presence or absence of substantial objections by members of the class to the settlement terms or to the fees requested by counsel.
- The skill and efficiency of the attorneys involved.
- The complexity and duration of the litigation.
- The risk of nonpayment.
- The amount of time counsel devoted to the case.
- The amount of awards in similar cases.

However, the factors included in any list do not exhaust the indicia of reasonableness. Nor are they all of the listed factors necessarily applicable in every reasonableness determination. Courts may consider any factor that is indicative of reasonableness and need not explicitly consider any listed factor that is not pertinent because of the particular circumstances of the case. [78]

Some courts have suggested that one of the best methods for measuring reasonableness it to cross-check the reasonableness of a percentage-of-funds award by comparing that award with a hypothetical award calculated using the lodestar approach. [79]

The size of the fund created by the efforts of counsel is an appropriate consideration. When a large benefit to the class is achieved, a large fee award is reasonable. Nevertheless, a district court does not abuse its discretion in awarding a smaller-than-usual percentage in cases involving massive recovery, if the award is reasonable considering all the circumstances and all the appropriate factors. [79.1]

In securities fraud class actions (*see generally* § 23.190 et seq.), the Private Securities Litigation Reform

Act (PSLRA) requires that the total attorney's fees and expenses awarded by the court to the plaintiff's counsel may not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class, regardless of the method for computing the amount of the fee and expense award. [80] That statutory standard does not seem to differ significantly from the principles applicable in cases not governed by the PSLRA. The PSLRA was intended to give the court flexibility in determining what is reasonable on a case-by-case basis. This topic is discussed further in § 23.192[3].

In diversity cases, when the party's or counsel's entitlement to an award of attorney's fees depends on state law, the choice of the method of determination of the amount to be awarded and the factors to be considered in making the award are also matters of state law. See Ch. 124, *The Erie Doctrine and Applicable Law* .

[7] Court May Hold Evidentiary Hearing on Fees Motion

A court may hold a hearing on the motion for an award of fees, [82] but need not always do so. [83] Some courts have suggested, however, that there must be a hearing whenever a party genuinely and reasonably disputes a significant fact relied on in the calculation of the amount of the fee sought. [84]

The form and extent of any hearing necessarily depends on the circumstances of the case. [85] Nonetheless, that does not mean that the procedures in each case should be established on an ad hoc basis. Rule 54 permits district courts to adopt local rules establishing consistent procedures for attorney's fees motions by which issues relating to fee awards may be resolved without extensive evidentiary hearings. [86]

[8] Court Must Find Facts and State Conclusions of Law on Fees Motions

In ruling on a motion for an award of attorney's fees and nontaxable costs, a court must make findings of fact and state its conclusions of law. The findings and conclusions must comply with the requirements of Rule 52(a). [87] In addition, the court should make a record that sets out the factors the court considered in making its reasonableness determination, that explains how each factor resulted in any upward or downward adjustment of amounts requested, and that illustrates how the court arrived at the final amount awarded. [88]

[9] Court May Refer Fee Matters to Special Master or to Magistrate Judge

A court may refer issues related to the amount of attorney's fees to be awarded to a master or to a magistrate judge, as expressly authorized by Rule 54(d)(2)(D). [89] Rule 54(d)(2)(D) permits the court to refer issues relating to the reasonable value of services provided by attorneys to a master without regard to the normal prerequisites for appointment of a master that are contained in Rule 53(a)(1). [90] Therefore, fees motions may be referred to a master even in the absence of a preliminary finding of consent by the parties, the existence of an exceptional condition, the ministerial nature of the task, or the unavailability of a district judge or magistrate judge of the district to address the issue in a timely and effective manner. [91] Rule 54(d)(2)(D) also permits the court to refer a motion for attorney's fees to a magistrate judge for treatment as a dispositive matter under Rule 72(b). [92]

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Procedure > Justiciability > Standing > General Overview

Civil Procedure > Federal & State Interrelationships > Erie Doctrine

Civil Procedure > Class Actions > Certification

Civil Procedure > Class Actions > Judicial Discretion

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

FOOTNOTES:
Footnote 1. Fed. R. Civ. P. 23(h)(1); Fed. R. Civ. P. 54(d)(2)(A) ("A claim for attorney's fees and

related nontaxable expenses must be made by motion ...").

Footnote 2. Fed. R. Civ. P. 23, advisory committee note of 2003 (reproduced verbatim at § 23App.07 [2]).

Footnote 3. Fed. R. Civ. P. 23, advisory committee note of 2003.

Footnote 4. Fed. R. Civ. P. 23(h)(1).

Footnote 5. Fed. R. Civ. P. 23, advisory committee note of 2003.

Footnote 6. Fed. R. Civ. P. 23(h).

Footnote 7. Fed. R. Civ. P. 23, advisory committee note of 2003.

Footnote 8. Fed. R. Civ. P. 54, advisory committee note of 1993 (reproduced verbatim at § 54App.06 [2]).

Footnote 9. Fed. R. Civ. P. 23(h)(1) (claims for award of attorney's fees and nontaxable costs must be made by motion filed "at a time set by the court").

Footnote 10. *See* Fed. R. Civ. P. 54(d)(2)(B)(i) (in non-class action cases, motion for award of attorney's fees and nontaxable costs must generally be filed within 14 days of entry of judgment).

Footnote 11. *See* Fed. R. Civ. P. 23(h)(1) ("A claim for an award must be made by motion ... at a time the court sets.").

Footnote 12. Fed. R. Civ. P. 23(h)(1).

Footnote 13. Fed. R. Civ. P. 23, advisory committee note of 2003 (reproduced verbatim at § 23App.07 [2]).

Footnote 14. Fed. R. Civ. P. 23, advisory committee note of 2003.

Footnote 15. Fed. R. Civ. P. 23(h)(1).

Footnote 16. *See* Fed. R. Civ. P. 5(a)(1) (Fed. R. Civ. P. 5 governs service of every paper except initial complaint and summons "[u]nless these rules provide otherwise").

Footnote 17. *See* Fed. R. Civ. P. 5(b)(1).

Footnote 18. *See* Fed. R. Civ. P. 5(b)(2).

Footnote 19. Fed. R. Civ. P. 23(h)(1).

Footnote 20. Fed. R. Civ. P. 23, advisory committee note of 2003 ("notice is required in all instances").

Footnote 21. Fed. R. Civ. P. 23(h)(1).

Footnote 22. Fed. R. Civ. P. 23, advisory committee note of 2003 ("the provision regarding notice to the class is parallel to the requirements for notice under Rule 23(e)").

Footnote 23. **Class members should have sufficient information to object meaningfully.** *See, e.g.,* Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 286 (7th Cir. 2002) (insufficient information "paralyzes objectors").

Footnote 24. *See* Fed. R. Civ. P. 23(h)(1).

Footnote 25. *See* 15 U.S.C. §§ 77z-1(a)(7)(C), 78u-4(a)(7)(C).

Footnote 26. Fed. R. Civ. P. 23(h)(2).

Footnote 27. *See* Fed. R. Civ. P. 23(g)(4).

Footnote 28. Fed. R. Civ. P. 23, advisory committee note of 2003.

Footnote 29. *See* Fed. R. Civ. P. 23(h)(2).

Footnote 30. **Court should set reasonable deadline for objections.** Fed. R. Civ. P. 23, advisory committee note of 2003; *see* Archdiocese of Milwaukee Supporting Fund, Inc. v. Mercury Interactive Corp. (In re Mercury Interactive Corp. Sec. Litig.), 618 F.3d 988, 993-995 (9th Cir. 2010) (class members must be allowed opportunity to examine fee motion and inquire into bases for various charges, although appropriate time frame will vary from case to case; quoting **Moore's**).

Footnote 30.1. **Full and fair opportunity to examine and oppose motion.** Archdiocese of Milwaukee Supporting Fund, Inc. v. Mercury Interactive Corp. (In re Mercury Interactive Corp. Sec. Litig.), 618 F.3d 988, 993-995 (9th Cir. 2010) (district court erred in setting deadline for objections to fee award at time before motion for fee award had been filed; this schedule denied class full and fair opportunity to examine and oppose motion for fees).

Footnote 31. Fed. R. Civ. P. 23, advisory committee note of 2003.

Footnote 32. Fed. R. Civ. P. 23, advisory committee note of 2003 (reproduced verbatim at § 23App.07 [2]).

Footnote 33. *See, e.g.,* 7 U.S.C. § 18(d) (prevailing plaintiff in private suit to enforce CFTC reparation award may recover reasonable attorney's fees); 15 U.S.C. § 15 (persons injured by violation of antitrust laws may recover reasonable attorney's fees incurred in private suit for damages resulting from violation); 42 U.S.C. § 1973 *l* (e) (prevailing plaintiff in private suit for damages caused by violation of Voting Rights Act of 1965 may recover reasonable attorney's fees); 42 U.S.C. § 1988 (in certain circumstances prevailing plaintiffs in actions brought for damages under various civil rights laws may recover reasonable attorney's fees).

Footnote 34. **Fee award from common fund created by attorney's efforts is proper to prevent unjust enrichment.** *See, e.g.,* Boeing Co. v. Van Gemert, 444 U.S. 472, 478, 100 S. Ct. 745, 62 L. Ed. 2d 676 (1980) ("a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole. ... The doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense. Jurisdiction over the fund involved in the litigation allows a court to prevent this inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit."); Mills v. Electric Auto-Lite Co., 396 U.S. 375, 392-394, 90 S. Ct. 616, 24 L. Ed. 2d 593 (1970) (person who receives benefit as result of attorney's efforts should pay reasonable attorney's fee incurred in connection with creation of that benefit); Central R.R. & Banking Co. v. Pettus, 113 U.S. 116, 124, 5 S. Ct. 387, 28 L. Ed. 915 (1885) (when efforts of attorneys create fund against which both named and unnamed creditors may make claims for purpose of satisfying debts owed to them, attorneys are entitled to award of reasonable attorney's fees from that fund); Trustees v. Greenough, 105 U.S. (15 Otto) 527, 532-533 , 26 L. Ed. 1157 (1881) (beneficiary of trust who sued trustees for breach of trust and rescued assets of trust from their breaches of fiduciary obligations created fund for other beneficiaries and was entitled to recover reasonable attorney's fees from that fund).

Footnote 35. Fed. R. Civ. P. 23, advisory committee note of 2003 (reproduced verbatim at § 23App.07 [2]).

Footnote 36. **Percentage-of-fund method defined.**

3d Circuit See, e.g., In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 819 n.38 (3d Cir. 1995) (percentage-of-recovery method resembles contingent fee in that it awards variable percentage of amount recovered for class as attorney's fee).

9th Circuit See, e.g., Staton v. Boeing Co., 327 F.3d 938, 968 (9th Cir. 2003) ("As its name suggests, under the percentage method, the court simply awards the attorneys a percentage of the fund" [internal quotation marks omitted]).

Footnote 37. **Percentage-of-fund is appropriate in common-fund cases.** *See* Blum v. Stenson, 465 U.S. 886, 900 n.16, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984) (in calculating attorney's fees award under common fund doctrine, reasonable attorney's fees are percentage of fund bestowed on class).

1st Circuit See In re 13 Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig., 56 F.3d 295, 307-308 (1st Cir. 1995) (percentage-of-funds approach is proper method of awarding attorney's fees in class action that resulted in creation of common fund for benefit of class); *but see* Weinberger v. Great N. Nekoosa Corp., 925 F.2d 518, 526 (1st Cir. 1991) (lodestar may be better approach when there is no true "common fund").

2d Circuit See, e.g., Goldberger v. Integrated Res., Inc., 209 F.3d 43, 47 (2d Cir. 2000) (percentage-of-funds method is available to court, but court has discretion to use lodestar approach).

3d Circuit See, e.g., In re Cendant Corp. Prides Litig., 243 F.3d 722, 732 (3d Cir. 2001) ("The percentage-of-recovery method is generally favored in cases involving a common fund, and is designed to allow courts to award fees from the fund 'in a manner that rewards counsel for success and penalizes it for failure.' ").

5th Circuit In re Combustion, Inc., 968 F. Supp. 1116, 1135 (W.D. La. 1997) (although Fifth Circuit law allows use of either lodestar or percentage-of-fund methods in common fund cases, most district courts in circuit use percentage-of-funds method).

7th Circuit See In re Cont'l Ill. Sec. Litig., 962 F.2d 566, 572-573 (7th Cir. 1992) (attorney should be awarded market rate, which is percentage of fund).

8th Circuit See, e.g., Petrovic v. Amoco Oil Co. 200 F.3d 1140, 1157 (8th Cir. 1999) (percentage-of-funds method is appropriate method for awarding attorney's fees in common fund case).

9th Circuit See, e.g., Staton v. Boeing Co., 327 F.3d 938, 968 (9th Cir. 2003) (court may use percentage-of-funds method in awarding attorney's fees in class action when common fund is created for class's benefit).

10th Circuit Brown v. Phillips Petroleum Co., 838 F.2d 451, 454 (10th Cir. 1988) (percentage-of-funds is proper method of calculating fee in common fund cases).

11th Circuit Camden I Condo. Ass'n v. Dunkle, 946 F.2d 768, 774 (11th Cir. 1991) ("in this circuit, attorney's fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class").

D.C. Circuit Swedish Hosp. Corp. v. Shalala, 1 F.3d 1261, 1271 (D.C. Cir. 1993) ("we join the Third Circuit Task Force and the Eleventh Circuit, among others, in concluding that a percentage-of-the-fund method is the appropriate mechanism for determining the attorney fees award in common fund cases").

Footnote 38. **Courts have discretion to apply either percentage or lodestar approach.**

1st Circuit See, e.g., In re 13 Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig., 56 F.3d 295, 307 (1st Cir. 1995) (courts may use either lodestar or percentage-of-recovery method).

2d Circuit Goldberger v. Integrated Res., Inc., 209 F.3d 43, 50 (2d Cir. 2000) (both lodestar and percentage-of-funds methods are available to court, so use of lodestar approach was not abuse of discretion).

6th Circuit See, e.g., Rawlings v. Prudential-Bache Props., Inc., 9 F.3d 513, 516 (6th Cir. 1993) .

7th Circuit See, e.g., Harman v. Lyphomed, Inc., 945 F.2d 969, 975 (7th Cir. 1991) .

8th Circuit See, e.g., Johnston v. Comerica Mortgage Corp., 83 F.3d 241, 244-246 (8th Cir. 1996) (court may use either lodestar or percentage-of-funds method of computing attorney's fee award in common fund cases).

9th Circuit Powers v. Eichen, 229 F.3d 1249, 1256 (9th Cir. 2000) (courts have discretion in common fund cases to use either lodestar approach or percentage-of-funds method in computing attorney's fees award).

10th Circuit See, e.g., Brown v. Phillips Petroleum Co., 838 F.2d 451, 454 (10th Cir. 1988) .

Footnote 38.1. **Trend toward percentage method.** Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 121 (2d Cir. 2005) (district court was within its discretion in using percentage method); *see also* In re Rite Aid Corp. Sec. Litig., 396 F.3d 294, 300 (3d Cir. 2005) (percentage-of-recovery method is usually favored in common fund cases because it rewards counsel for success and penalizes counsel for failure).

Footnote 39. **Lodestar defined.** *See, e.g.,* Perdue v. Kenny A. ex rel. Winn, -- U.S. --, 130 S. Ct. 1662, 176 L. Ed. 2d 494, 501, 505 (2010) ("the lodestar method produces an award that *roughly* approximates the fee that the prevailing attorney would have received if he or she had been representing a paying client who was billed by the hour in a comparable case." [emphasis in original]); City of Burlington v. Dague, 505 U.S. 557, 559, 112 S. Ct. 2638, 120 L. Ed. 2d 449 (1992) .

Footnote 40. Fed. R. Civ. P. 23, advisory committee note of 2003 (reproduced verbatim at § 23App.07 [2]).

Footnote 41. **Lodestar approach mandatory in federal fee-shifting cases.** *See, e.g.,* Gisbrecht v. Barnhart, 535 U.S. 789, 802, 122 S. Ct. 1817, 152 L. Ed. 2d 996 (2002) ("the lodestar method today holds sway in federal-court adjudication of disputes over the amount of fees properly shifted to the loser in the litigation"); City of Burlington v. Dague, 505 U.S. 557, 562, 112 S. Ct. 2638, 120 L. Ed. 2d 449 (1992) (lodestar approach is "guiding light" of fee-shifting jurisprudence); Blum v. Stenson, 465 U.S. 886, 900 n.16, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984) ("Unlike the calculation of attorney's fees under the 'common fund doctrine,' where a reasonable fee is based on a percentage of the fund bestowed on the class, a reasonable fee [under a statute] reflects the amount of attorney time reasonably expended on the litigation.").

1st Circuit See, e.g., Coutin v. Young & Rubicam P.R., Inc., 124 F.3d 331, 337 (1st Cir. 1997) ("The lodestar method is the strongly preferred method by which district courts should determine what fees to award prevailing parties in actions that fall within the ambit of section 1988.").

2d Circuit See, e.g., Quaratino v. Tiffany & Co., 166 F.3d 422, 425 (2d Cir. 1999) (starting point for determining reasonableness of application for award of attorney's fees to successful plaintiff in action brought under Title VII is lodestar).

3d Circuit See, e.g., Public Interest Research Group of N.J., Inc. v. Windall, 51 F.3d 1179, 1185 (3d Cir. 1995) (proper starting point for determination of reasonableness of fee award to prevailing party in case covered by fee-shifting statute is lodestar).

4th Circuit See, e.g., Rum Creek Coal Sales, Inc, v. Caperton, 31 F.3d 169, 174 (4th Cir. 1994) (starting point for evaluating reasonableness of fee request in civil rights action is reasonable number of hours multiplied by reasonable hourly rate).

5th Circuit See, e.g., Migis v. Pearle Vision, Inc., 135 F.3d 1041, 1047 (5th Cir. 1998) (starting point for calculation of reasonable attorney's fees to be awarded prevailing party in

Title VII case is product of reasonable hours lawyers expended on case and reasonable hourly rate for each lawyer).

7th Circuit See, e.g., Spellan v. Board of Educ. for Dist. 111, 59 F.3d 642, 645 (7th Cir. 1995) (to award reasonable attorney's fees to prevailing party in civil rights action, court must begin by multiplying reasonable hours counsel spent on matter by reasonable hourly rate).

8th Circuit See, e.g., Casey v. City of Cabool, 12 F.3d 799, 805 (8th Cir.1993) (starting point for award of reasonable attorney's fees in suit brought under § 1983 is reasonable number of hours multiplied by reasonable hourly rate).

9th Circuit See, e.g., Ferland v. Conrad Credit Corp., 244 F.3d 1145, 1149 n.4 (9th Cir. 2001) (when attorney's fees are to be awarded under fee-shifting statute, court "must calculate awards for attorneys' fees using the 'lodestar' method").

10th Circuit See, e.g., Robinson v. City of Edmond, 160 F.3d 1275, 1281 (10th Cir. 1998) (reasonable attorney's fees awarded under Civil Rights Attorney's Fees Awards Act must be determined using lodestar approach).

11th Circuit See, e.g., Kay v. Apfel, 176 F.3d 1322, 1324-1325 (11th Cir. 1999) (starting point for determining reasonable attorney's fees to be awarded to successful claimant of benefits under Social Security Act is product of reasonable hours spent on matter and reasonable hourly rate).

D.C. Circuit See, e.g., Trustees of Hotel & Rest. Employees v. JPR, Inc., 136 F.3d 794, 801 (D.C. Cir. 1998) (attorney's fees awarded to successful plaintiffs in action brought under ERISA should be calculated using lodestar approach).

Footnote 42. *See, e.g.,* 7 U.S.C. § 18(d) (prevailing party in civil suit to collect unpaid reparation award entered by CFTC may recover reasonable attorney's fees as part of its costs); 15 U.S.C. § 15 (prevailing party in civil suit to recover damages suffered as result of violation of antitrust laws may recover reasonable attorney's fees as part of its costs); 42 U.S.C. § 1973 *l* (e) (prevailing party in civil suit to recover damages resulting from violation of right to vote guaranteed by 14th or 15th Amendment may recover reasonable attorney's fees as part of its costs); 42 U.S.C. § 1988 (prevailing party in civil suit to recover damages resulting from violations of various civil rights statutes may, under certain conditions, recover reasonable attorney's fees as part of its costs).

Footnote 43. **In statutory fee-shift case, other methods, including percentage-of-funds, may govern how much is actually paid to counsel.**

7th Circuit See, e.g., Florin v. Nationsbank, 34 F.3d 560, 564 (7th Cir. 1994) (percentage-of-funds method of calculating reasonable attorney's fees "properly control a case which is initiated under a statute with a fee-shifting provision, but is settled with the creation of a common fund").

9th Circuit See, e.g., Staton v. Boeing Co., 327 F.3d 938, 967-969 (9th Cir. 2003) (recovery of attorney's fees calculated as percentage of fund awarded to class is proper even when there is applicable fee-shifting statute).

Footnote 44. **No abuse of discretion in refusing to make different award from lodestar award granted to party.** *See, e.g.,* Brytus v. Spang & Co., 203 F.3d 238, 245-247 (3d Cir. 2000) (percentage method of calculating reasonable fees may be appropriate in both settled and litigated cases in which statutory fees are available).

Footnote 45. Fed. R. Civ. P. 23(h) ("the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement.").

Footnote 46. Fed. R. Civ. P. 23, advisory committee note of 2003 ("This subdivision authorizes an award of "reasonable" attorney fees and nontaxable costs. This is the customary term for measurement of fee awards in cases in which counsel may obtain an award of fees under the "common fund" theory that applies in many class actions, and is used in many fee-shifting statutes"); *see* Perdue v. Kenny A. ex rel. Winn, -- U.S. --, 130 S. Ct. 1662, 176 L. Ed. 2d 494, 505 (2010) (in cases involving fee-shifting statutes, "reasonable" fee is fee that is sufficient to induce capable attorney to undertake representation of meritorious claim).

Footnote 47. **Court must make independent determination of reasonableness of award of attorney's fees.** *See* Fed. R. Civ. P. 23, advisory committee note of 2003 ("Whether or not there are formal objections, the court must determine whether a fee award is justified and, if so, set a reasonable fee").

> *1st Circuit See, e.g.,* Weinberger v. Great N. Nekoosa Corp., 925 F.2d 518, 523 (1st Cir. 1991) (citing **Moore's**); In re Fleet/Norstar Sec. Litig., 935 F. Supp. 99, 107 (D.R.I. 1996) (because proposed settlement was approved, attorney's fees application for plaintiffs' class counsel must be reviewed).

> *3d Circuit See, e.g.,* In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 819 (3d Cir. 1995) (thorough judicial review of fee applications is required in all class action settlements).

> *5th Circuit See, e.g.,* Piambino v. Bailey, 610 F.2d 1306, 1328 (5th Cir. 1980) ("the District Court abdicated its responsibility to assess the reasonableness of attorneys' fees proposed under a settlement of a class action, and its approval of the settlement must be reversed on this ground alone").

> *9th Circuit See, e.g.,* Staton v. Boeing Co., 327 F.3d 938, 969-972 (9th Cir. 2003) (court abused its discretion in approving settlement that fixed amount of fees awarded); Powers v. Eichen, 229 F.3d 1249, 1256 (9th Cir. 2000) ("The district court abuses its discretion when it uses a mechanical or formulaic approach that results in an unreasonable reward").

Footnote 48. **Court must make independent determination of reasonableness of nontaxable costs.** Fed. R. Civ. P. 23, advisory committee note of 2003; *see, e.g.,* Case v. Unified Sch. Dist. No. 233, 157 F.3d 1243, 1258-1259 (10th Cir. 1998) (trial court properly reviewed application for award of nontaxable costs for reasonableness and reduced or eliminated those costs applicant did not show were reasonable).

Footnote 52. *See* ABA Model Rules, Rule 1.5.

Footnote 53. *See* Fed. R. Civ. P. 83(a)(1) (local rules must conform to requirements of nationwide Federal Rules of Civil Procedure).

Footnote 54. **Independent court determination of fee awards precludes conflicts of interest.** *See, e.g.,* Evans v. Jeff D., 475 U.S. 717, 732-734, 106 S. Ct. 1531, 89 L. Ed. 2d 747 (1986) ("the possibility of a tradeoff between merits relief and attorney's fees" is often implicit in class action settlement negotiations, because "[m]ost defendants are unlikely to settle unless the cost of the predicted judgment, discounted by its probability, plus the transaction costs of further litigation, are greater than the cost of the settlement package").

> *1st Circuit See, e.g.,* Weinberger v. Great N. Nekoosa Corp., 925 F.2d 518, 524 (1st Cir. 1991) (danger that lawyers might urge class settlement at low figure or less than optimal basis in exchange for "red-carpet" treatment for fees).

> *2d Circuit See, e.g.,* In re "Agent Orange" Prod. Liab. Litig., 818 F.2d 216, 224 (1987) (test to be applied is whether, at time fee agreement is reached, class counsel are placed in position that might endanger fair representation of their clients).

3d Circuit See, e.g., In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 820 (3d Cir. 1995) (there is especially acute need for close judicial scrutiny of fee arrangements).

9th Circuit See, e.g., Zucker v. Occidental Petroleum Corp., 192 F.3d 1323, 1327 (9th Cir. 1999) ("In a class action ... [t]he absence of individual clients controlling the litigation for their own benefit creates opportunities for collusive arrangements in which defendants can pay the attorneys for the plaintiff class enough money to induce them to settle the class action for too little benefit to the class (or too much benefit to the attorneys, if the claim is weak but the risks to the defendants high)").

Footnote 55. *See* Fed. R. Civ. P. 23(e)(2).

Footnote 56. Staton v. Boeing, Co., 327 F.3d 938, 969-972 (9th Cir. 2003) ("The parties' all-or-nothing approach imposes pressure to approve otherwise acceptable and desirable settlements in spite of built-in attorneys' fees provisions. While this same dynamic may exist where fees can be justified on a statutory fee basis, the more precise lodestar standards for adjudging the reasonableness of such fees, summarized above, make the influence of such pressure much less forceful. We hold, therefore, that in a class action involving both a statutory fee-shifting provision and an actual or putative common fund, the parties may negotiate and settle the amount of statutory fees along with the merits of the case, as permitted by *Evans*. In the course of judicial review, the amount of such attorneys' fees can be approved if they meet the reasonableness standard when measured against statutory fee principles. Alternatively, the parties may negotiate and agree to the value of a common fund (which will ordinarily include an amount representing an estimated hypothetical award of statutory fees) and provide that, subsequently, class counsel will apply to the court for an award from the fund, using common fund fee principles. In those circumstances, the agreement as a whole does not stand or fall on the amount of fees. Instead, after the court determines the reasonable amount of attorneys' fees, all the remaining value of the fund belongs to the class rather than reverting to the defendant").

Footnote 56.1. **Court has nondelegable duty to ensure that fee award is allocated fairly among counsel.** In re High Sulfur Content Gasoline Prods. Liab. Litig., 517 F.3d 220, 227-230 (5th Cir. 2008) .

Footnote 57. Fed. R. Civ. P. 23(h)(1).

Footnote 58. Fed. R. Civ. P. 54(d)(2)(B)(iv).

Footnote 59. Fed. R. Civ. P. 23, advisory committee note of 2003 (reproduced verbatim at § 23App.07 [2]).

Footnote 60. Fed. R. Civ. P. 23, advisory committee note of 2003.

Footnote 61. **Value of non-monetary benefits considered in setting percentage of recovery, but not value of fund.** *See, e.g.,* Staton v. Boeing Co., 327 F.3d 938, 974 (9th Cir. 2003) ("Precisely because the value of injunctive relief is difficult to quantify, its value is also easily manipulable by overreaching lawyers seeking to increase the value assigned to a common fund. We hold, therefore, that only in the unusual instance where the value to individual class members of benefits deriving from injunctive relief can be accurately ascertained may courts include such relief as part of the value of a common fund for purposes of applying the percentage method of determining fees ... . When this is not the case, courts should consider the value of the injunctive relief obtained as a 'relevant circumstance' in determining what percentage of the common fund class counsel should receive as attorneys' fees, rather than as part of the fund itself.").

Footnote 62. Fed. R. Civ. P. 23, advisory committee note of 2003.

Footnote 63. **Lodestar figure has strong presumption of reasonableness.** Perdue v. Kenny A. ex rel. Winn, --U.S. --, 130 S. Ct. 1662, 176 L. Ed. 2d 494, 505 (2010) (lodestar method yields fee that is presumptively sufficient); Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 565, 106 S. Ct. 3088, 92 L. Ed. 2d 439 (1986) .

Footnote 64. ***Johnson* factors for adjusting lodestar figure in cases besides federal statutory fee-shift cases.** Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-719 (5th Cir. 1974) .

1st Circuit See, e.g., Coutin v. Young & Rubicam P.R., Inc., 124 F.3d 331, 337 n.3 (1st Cir. 1997) (courts should use *Johnson* factors in adjusting lodestar award of attorney's fees).

2d Circuit See, e.g., LeBlanc v. Fletcher, 143 F.3d 748, 764 (2d Cir. 1998) (court may adjust lodestar figure up or down through use of numerous factors, such as those set out in *Johnson*).

3d Circuit See, e.g., Public Interest Research Group of N.J., Inc. v. Windall, 51 F.3d 1179, 1185 n.8 (3d Cir. 1995) (when enhancements or reductions in lodestar figure are appropriate, courts commonly refer to *Johnson* factors for assessment of amount).

4th Circuit See, e.g., Barber v. Kimbrell's, Inc., 577 F.2d 216, 226 (4th Cir. 1978) (courts should use list of factors that is comparable to *Johnson* factors in evaluating reasonableness of request for enhancement of attorney's fees when they are determined through lodestar approach).

5th Circuit Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-719 (5th Cir. 1974) .

6th Circuit See, e.g., Paschal v. Flagstar Bank, FSB, 297 F.3d 431, 435 (6th Cir. 2002) (court may use *Johnson* factors when evaluating reasonableness of fee request).

7th Circuit See, e.g., Spellan v. Board of Educ. for Dist. 111, 59 F.3d 642, 645 (7th Cir. 1995) (court may adjust lodestar figure upwards or downwards using *Johnson* factors).

11th Circuit See, e.g., Kay v. Apfel, 176 F.3d 1322, 1327-1328 (11th Cir. 1999) (courts may adjust lodestar figure using *Johnson* factors).

Footnote 65. **Listed factors not exhaustive or necessarily applicable.** *See, e.g.,* Arnold v. Burger King Corp., 719 F.2d 63, 67-68 (4th Cir. 1983) (*Johnson* factors are not exhaustive list in awarding reasonable attorney's fees; some factors may not be applicable and others may be pertinent in specific cases).

Footnote 66. **Upward adjustment is rare in federal statutory fee-shift case.** City of Burlington v. Dague, 505 U.S. 557, 562-567, 112 S. Ct. 2638, 120 L. Ed. 2d 449 (1992) ("We have established a 'strong presumption' that the lodestar represents the 'reasonable' fee ... and have placed upon the fee applicant who seeks more than that the burden of showing that 'such an adjustment is *necessary* to the determination of a reasonable fee.' ").

Footnote 66.1. **Specific evidence required.** Perdue v. Kenny A. ex rel. Winn, -- U.S. --, 130 S. Ct. 1662, 176 L. Ed. 2d 494, 506 (2010) ("This requirement is essential if the lodestar method is to realize one of its chief virtues, i.e., providing a calculation that is objective and capable of being reviewed on appeal.").

Footnote 66.2. **Lodestar figure may be enhanced only in rare and exceptional circumstances.** Perdue v. Kenny A. ex rel. Winn, -- U.S. --, 130 S. Ct. 1662, 176 L. Ed. 2d 494, 505-506 (2010) (lodestar figure could not be enhanced based on quality of attorney's performance or results obtained).

Footnote 67. **No adjustment for good results obtained in federal statutory fee-shift case.** Blum v. Stenson, 465 U.S. 886, 900 & n.16 (1984) ("Because acknowledgment of the 'results obtained' generally will be subsumed within other factors used to calculate a reasonable fee, it normally should not provide an independent basis for increasing the fee award").

Footnote 68. **No adjustment for novelty and complexity of issues in federal statutory fee-shift**

case. Blum v. Stenson, 465 U.S. 886, 898-899 & n.16 (1984) (novelty and complexity will be reflected either in increase in number of hours or, for especially experienced attorneys who would thus expend fewer hours, in increased hourly rates).

Footnote 69. **No adjustment for contingent nature of litigation in federal statutory fee-shift case.** City of Burlington v. Dague, 505 U.S. 557, 562-567, 112 S. Ct. 2638, 120 L. Ed. 2d 449 (1992) (enhancement to reflect contingent nature of litigation would duplicate considerations already taken into account in determining reasonable number of hours and reasonable rate).

Footnote 70. **Delay accounted for by use of current rates.** *See, e.g.,* Missouri v. Jenkins, 491 U.S. 274, 283-284, 109 S. Ct. 2463, 105 L. Ed. 2d 229 (1989) (court may account for delays in payment by using current rather than historical fee rates or otherwise).

Footnote 70.1. **Circumstances in which enhancement might be appropriate.** Perdue v. Kenny A. ex rel. Winn, -- U.S. --, 130 S. Ct. 1662, 176 L. Ed. 2d 494, 506 (2010) ("there is a 'strong presumption' that the lodestar figure is reasonable, but that presumption may be overcome in those rare circumstances in which the lodestar does not adequately take into account a factor that may properly be considered in determining a reasonable fee.").

Footnote 71. **Downward adjustment for moderate success permitted in federal statutory fee-shift case.** *See, e.g.,* Hensley v. Eckerhart, 461 U.S. 424, 436, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983) (when prevailing party's level of success is so low that number of hours reasonably spent on litigation is not satisfactory measure for use in making fee award, court should revise lodestar figure downward).

Footnote 72. **Presumptively reasonable percentage.**

9th Circuit See, e.g., Staton v. Boeing Co., 327 F.3d 938, 968 (9th Cir. 2003) ("This circuit has established 25% of the common fund as a benchmark award for attorney fees.").

11th Circuit See, e.g., Camden I Condo. Ass'n, Inc. v. Dunkle, 946 F.2d 768, 774-775 (11th Cir. 1991) (courts should use 20%-30% range as benchmark in setting percentage for fee awards in common fund cases).

D.C. Circuit See, e.g., Swedish Hosp. Corp. v. Shalala, 1 F.3d 1261, 1271-1272 (D.C. Cir. 1993) (20%-30% is presumptively reasonable award in percentage-of-funds cases).

Footnote 73. **Substantial justification for adjustment beyond "benchmark" required.** *See, e.g.,* Paul, Johnson, Alston & Hunt v. Graulty, 886 F.2d 268, 272 (9th Cir. 1989) (courts must support deviation from 25% benchmark by pointing to unusual circumstances).

Footnote 74. **Adjustment of benchmark permitted on showing of good cause.** *See, e.g.,* Waters v. International Precious Metals Corp., 190 F.3d 1291, 1294 (11th Cir. 1999) (adjustment of benchmark of 20%-30% based on *Johnson* factors is permissible).

Footnote 75. **Benchmarks eschewed.** *See, e.g.,* Goldberger v. Integrated Res., Inc., 209 F.3d 43, 52 (2d Cir. 2000) ("a theoretical construct as flexible as a 'benchmark' seems to offer an all too tempting substitute for the searching assessment that should properly be performed in each case").

Footnote 76. ***Johnson* factors employed.**

2d Circuit See, e.g., Goldberger v. Integrated Res., Inc., 209 F.3d 43, 47, 53-54 (2d Cir. 2000) (list of factors that is case specific, but resembles *Johnson* factors, is used to measure reasonableness of percentage-of- funds fee award); *see also* Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 121-124 (2d Cir. 2005) (court must consider six factors to determine reasonableness of common fund fee: (1) time and labor expended by counsel; (2) magnitude and complexities of litigation; (3) risk of litigation; (4) quality of representation; (5) requested fee in relation to settlement; and (6) public policy considerations).

6th Circuit See, e.g., Paschal v. Flagstar Bank, FSB, 297 F.3d 431, 435 (6th Cir. 2002) (court may use *Johnson* factors when evaluating reasonableness of fee request).

9th Circuit See, e.g., Vizcaino v. Microsoft Corp., 290 F.3d 1043, 1051 (9th Cir. 2002) (court properly determined reasonable lodestar attorney's fees award as cross check to determine reasonableness of percentage-of-funds award).

10th Circuit See, e.g., Rosenbaum v. MacAllister, 64 F.3d 1439, 1445 (10th Cir. 1995) (*Johnson* factors must be used to determine reasonableness of attorney's fee award when percentage-of-funds method is used).

Footnote 77. **List tailored to percentage-of-funds method.** *See, e.g.,* Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 n.1 (3d Cir. 2000) .

Footnote 78. **Listed factors not exhaustive or necessarily applicable.** *See, e.g.,* Arnold v. Burger King Corp., 719 F.2d 63, 67-68 (4th Cir. 1983) (*Johnson* factors are not exhaustive list in awarding reasonable attorney's fees; some factors may not be applicable and others may be pertinent in specific cases).

Footnote 79. **Suggested cross-check of percentage method against lodestar approach.**

2d Circuit See, e.g., Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 121-124 (2d Cir. 2005) (lodestar method used as cross-check to help determine reasonableness of result reached by percentage method).

3d Circuit See, e.g., In re Rite Aid Corp. Sec. Litig., 396 F.3d 294, 300 (3d Cir. 2005) (regardless of method used to calculate fees, it is sensible for court to use second method as cross-check); Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 n.1 (3d Cir. 2000) (courts may properly cross check percentage awards at which they arrive against lodestar award method).

9th Circuit See, e.g., Vizcaino v. Microsoft Corp., 290 F.3d 1043, 1051 (9th Cir. 2002) (court properly determined reasonable lodestar attorney's fees as cross-check to determine reasonableness of percentage-of-funds award).

Footnote 79.1. **Sliding-scale percentage depending on size of award.** *Compare* Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 121-124 (2d Cir. 2005) (even though counsel's efforts merited extraordinary fee in case resulting in settlement of $3.05 billion, district court did not abuse its discretion in awarding fee of $220,290,160, about 7.2 percent) *with* In re Rite Aid Corp. Sec. Litig., 396 F.3d 294, 302-303 (3d Cir. 2005) (in case resulting in settlement of $126.6 million, district court did not abuse its discretion when it did not compute fee award using "declining percentage sliding scale," in which fee award percentage decreases with size of settlement, in light of counsel's skillful management of case and rich settlement they achieved).

Footnote 80. 15 U.S.C. §§ 77z-1(a)(6), 78u-4(a)(6).

Footnote 82. Fed. R. Civ. P. 23(h)(3).

Footnote 83. **Hearing may not be necessary.** Fed. R. Civ. P. 23, advisory committee note of 2003 (reproduced verbatim at § 23App.07[2]); *see, e.g.,* Robinson v. City of Edmond, 160 F.3d 1275, 1286 (10th Cir. 1998) (court need not hold hearing on request for attorney's fees in absence of request or when issues are adequately developed through briefs, affidavits, and depositions).

Footnote 84. **Hearing required whenever substantial factual dispute arises.** *See, e.g.,* Planned Parenthood v. Attorney Gen. of N.J., 297 F.3d 253, 265 n.5 (3d Cir. 2002) (when fee award is to be made under lodestar approach and parties disagree concerning level of "reasonable" rate, court must hold evidentiary hearing to determine reasonable market rates).

Footnote 85. Fed. R. Civ. P. 23, advisory committee note of 2003.

Footnote 86. Fed. R. Civ. P. 54(d)(2)(D).

Footnote 87. Fed. R. Civ. P. 23(h)(3); *see* Fed. R. Civ. P. 52(a).

Footnote 88. **Court findings must explain decision.** *See, e.g.,* Hensley v. Eckerhart, 461 U.S. 424, 437, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983) (district court should "provide a concise but clear explanation of its reasons" for its conclusions regarding an attorney's fee award).

3d Circuit See, e.g., Planned Parenthood v. Attorney Gen. of N.J., 297 F.3d 253, 266 (3d Cir. 2002) (court must provide clear and concise explanation of reasons for its fee award).

7th Circuit See, e.g., Spellan v. Board of Educ. for Dist. 111, 59 F.3d 642, 646-647 (7th Cir. 1995) (court must create record concerning its fee decision sufficient to permit appellate court to conduct meaningful review).

9th Circuit See, e.g., Powers v. Eichen, 229 F.3d 1249, 1256-1258 (9th Cir. 2000) (district court abused its discretion when fee was determined through use of percentage-of-funds method by awarding 30% fee rather than 25% benchmark without indicating its reasons for doing so in sufficient detail to permit appellate court to conduct meaningful review).

10th Circuit See, e.g., Brown v. Phillips Petroleum Co., 838 F.2d 451, 456 (10th Cir. 1988) (when court awards percentage-of-funds attorney's fees, it must explain its decision in making award in sufficient detail that appellate court may conduct meaningful review).

11th Circuit See, e.g., Camden I Condo. Ass'n, Inc. v. Dunkle, 946 F.2d 768, 774-775 (11th Cir. 1991) (when court selects percentage of fund to be awarded as attorney's fees, it must state all factors on which it relied in making selection and how each affected the selection).

Footnote 89. Fed. R. Civ. P. 23(h)(4); *see* Fed. R. Civ. P. 54(d)(2)(D).

Footnote 90. Fed. R. Civ. P. 54(d)(2)(D).

Footnote 91. *See* Fed. R. Civ. P. 53(a)(1).

Footnote 92. Fed. R. Civ. P. 54(d)(2)(D); *see* Fed. R. Civ. P. 72(b).

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