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QUALITY, NOT QUANTITY: THE IMPLICATIONS OF REDEFINING INSURANCE NEUTRALITY IN *IN RE GLOBAL INDUSTRIAL TECHNOLOGIES, INC.*

Abstract: On May 4, 2011, in *In re Global Industrial Technologies, Inc.*, the U.S. Court of Appeals for the Third Circuit held that non-creditor insurance companies had standing to challenge a debtor's Chapter 11 plan of reorganization. In so holding, the court redefined the concept of insurance neutrality. Whereas typically the court examines the text of a plan to determine its effects on an insurer's rights, *Global Industrial Technologies* suggests that insurance neutrality in a mass-tort liability context depends on any post-petition increase in claims asserted. This Comment argues (1) that the new quantitative measure adopted by the court is an ineffective measure of insurance neutrality and (2) that the court should not rely on a third party to protect the integrity of the bankruptcy process, but should assume that responsibility itself through its sua sponte right to intervene.

INTRODUCTION

In Chapter 11 bankruptcy proceedings, a debtor's plan of reorganization affects many parties other than the debtor itself.¹ Thus, standing is a critical issue in bankruptcy proceedings, as it determines an entity's ability to ensure that its voice is heard before a plan is finalized.²

When a debtor is facing mass tort liability, the question of standing becomes particularly relevant to the debtor's insurers.³ The Bankruptcy Code (the "Code") allows a debtor's reorganization plan to include a trust and channeling injunction, which together require all current and future mass tort claims to be brought against a dedicated pool of assets instead of against the company.⁴ Without this system, the debtor

¹ Christopher W. Frost, *Noncreditor "Party in Interest" Standing in the Bankruptcy Courts*, BANKR. L. LETTER, July 2011, at 1, 1.

² See *id.*

³ See Leonard P. Goldberger, *Last Man Standing: Insurers' Participation in Plan Confirmation Process*, AM. BANKR. INST. J., Nov. 2008, at 30, 30.

⁴ See 11 U.S.C. § 524(g) (2006); *In re Global Indus. Techs., Inc.*, 645 F.3d 201, 205 n.10 (3d Cir. 2011); *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 201 (3d Cir. 2004); Mark D. Plevin et al., *The Future Claims Representative in Prepackaged Asbestos Bankruptcies: Conflicts of*

would be subject to indefinite tort claims and would have difficulty reorganizing.⁵ These trusts may be partially funded with the debtor's insurance policies.⁶ Although the insurance company is not a creditor in that situation, it is liable for coverage of any claims that are successfully asserted against the trust.⁷ Accordingly, insurance companies have a particular interest in being able to challenge reorganization plans that include mass tort trusts and channeling injunctions.⁸

Section 1109(b) of the Code expressly gives standing to certain parties with direct interests in the proceeding, such as the debtor, trustees, and creditors.⁹ Parties not explicitly given standing must satisfy requirements both under Article III of the Constitution and under the Code.¹⁰ An insurer whose policy has been assigned to a mass tort trust does not fall into any of the groups which are conferred standing by section 1109(b).¹¹ Thus, an insurer must have Constitutional and Code standing to challenge the confirmation of a plan.¹²

Constitutional standing requires that a party "demonstrate an injury in fact that is concrete, distinct and palpable, and actual or imminent."¹³ Additionally, the injury must be related to the challenged action and be correctable.¹⁴ Code standing is granted to a party in interest.¹⁵

In 2010, interpreting Code and Constitutional standing requirements as coextensive, the U.S. Court of Appeals for the Third Circuit, in *In re Global Industrial Technologies, Inc.*, held that a group of insurance

Interest, Strange Alliances, and Unfamiliar Duties for Burdened Bankruptcy Courts, 62 N.Y.U. ANN. SURV. AM. L. 271, 271 (2006).

⁵ Plevin et al., *supra* note 4, at 276.

⁶ See Alan N. Resnick, *Bankruptcy as a Vehicle for Resolving Enterprise-Threatening Mass Tort Liability*, 148 U. PA. L. REV. 2045, 2084 (2000).

⁷ See Frost, *supra* note 1, at 1.

⁸ See Goldberger, *supra* note 3, at 30.

⁹ 11 U.S.C. § 1109(b) ("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.")

¹⁰ See *Global Indus. Techs.*, 645 F.3d at 210 ("[A] party must, in the first instance, meet the requirements for standing that litigants in all federal cases face under Article III of the Constitution. . . . Standing in bankruptcy cases is also governed by the terms of 11 U.S.C. § 1109(b) . . .").

¹¹ See 11 U.S.C. § 1109(b); Frost, *supra* note 1, at 1–2.

¹² See *Global Indus. Techs.*, 645 F.3d at 210; Frost, *supra* note 1, at 1–2.

¹³ *Global Indus. Techs.*, 645 F.3d at 210 (internal quotation marks omitted).

¹⁴ *Id.*

¹⁵ See *id.* at 211 ("[T]he Bankruptcy Code expressly provides that parties in interest 'may object to confirmation of a plan.'" (quoting 11 U.S.C. § 1128(b))).

companies whose policies had been assigned to the proposed trust suffered an injury, and thus had standing to object to the reorganization plan.¹⁶ Specifically, the court held that because the plan called for the creation of a trust to resolve silica-related claims, it resulted in a significant increase in the number of claims asserted, and therefore was not insurance neutral.¹⁷ Even though the insurers had not yet contributed any money to the trust, the court held that they had suffered an injury sufficient to warrant standing in the bankruptcy proceeding.¹⁸ This approach to insurance neutrality differed from the standard used by the U.S. Court of Appeals for the Third Circuit in 2004, in *In re Combustion Engineering, Inc.*, where the court only looked at the plan's language and not the plan's effect on the number of claims.¹⁹ A significant factor in the *Global Industrial Technologies* decision was the suspected collusion between the debtor and the claimants' counsel during the solicitation of confirmation votes.²⁰

This Comment argues that a post-petition increase in the number of claims against a trust is an ineffective measure of injury and should not determine whether a plan is insurance neutral.²¹ Additionally, this Comment argues that courts should not rely on third parties to raise issues of wrongdoing; instead, bankruptcy courts should protect the integrity of their proceedings.²² Part I of this Comment provides a brief overview of how the bankruptcy process provides relief for corporations facing mass tort claims.²³ Part II discusses the Third Circuit's treatment of insurance neutrality in *Global Industrial Technologies* and how that treatment differs from the previous approach taken in *Combustion Engineering*.²⁴ Finally, Part III outlines issues with finding injury based on an

¹⁶ *Id.* at 211, 213–14. The court's decision to interpret Code standing and Constitutional standing as coextensive was influenced by the purpose of 11 U.S.C. § 1109(b): to "encourag[e] and promot[e] greater participation in reorganization cases." *See id.* at 211 (quoting *In re Amatex Corp.*, 755 F.2d 1034, 1042 (3d Cir. 1985)). Under this rationale, to require more stringent standards for Code standing than for Constitutional standing would frustrate that goal. *See id.*

¹⁷ *Id.* at 212.

¹⁸ *See id.* at 213–14.

¹⁹ *See* 391 F.3d at 218.

²⁰ *See Global Indus. Techs.*, 645 F.3d at 214 (noting that because the insurers were the only parties with the incentive to assert claims of collusion against the debtor and claimants' counsel, standing was particularly appropriate).

²¹ *See infra* notes 83–102 and accompanying text.

²² *See infra* notes 103–118 and accompanying text.

²³ *See infra* notes 26–38 and accompanying text.

²⁴ *See infra* notes 39–77 and accompanying text.

increase in claims asserted, and proposes an alternate way that the courts should combat collusion in the plan voting process.²⁵

I. OVERVIEW OF THE BANKRUPTCY PROCESS IN MASS TORT LIABILITIES

Section 524(g) of the Code allows for a reorganization plan to contain a trust and channeling injunction specifically in cases of asbestos-related tort claims (a “section 524(g) plan”).²⁶ Section 105(a) of the Code allows such a system to be set up for other types of mass-liability torts (a “section 105(a) plan”).²⁷ Although the two systems are similar, they have slightly different requirements that must be met before the reorganization plan can be confirmed by the bankruptcy court.²⁸ Under both systems, the debtor must obtain votes in favor of the plan from all classes of creditors.²⁹ Yet, when seeking confirmation of a section 524(g) plan, a debtor must also obtain approval from seventy-five percent of the current asbestos claimants.³⁰ In contrast, a section 105(a) plan has no such requirement; instead, the debtor must demonstrate that the injunction and trust are both necessary and appropriate.³¹

To obtain the requisite votes, the debtor must negotiate with the claimants’ counsel.³² The nature of the mass tort liability industry is that typically a very small number of firms represent a large number of claimants.³³ Thus, any of these firms may have enormous power to prevent a plan from being approved by the bankruptcy court because they likely represent a large number of the creditor votes that are required for confirmation.³⁴

²⁵ See *infra* notes 78–118 and accompanying text.

²⁶ 11 U.S.C. § 524(g) (2006).

²⁷ See 11 U.S.C. § 105(a); *Global Indus. Techs.*, 645 F.3d at 205 n.10 (explaining that the Bankruptcy Code has been interpreted to allow trusts and channeling injunctions for mass tort liabilities in non-asbestos claims).

²⁸ See *Global Indus. Techs.*, 645 F.3d at 205–06; *Combustion Eng’g*, 391 F.3d at 201 n.4.

²⁹ 11 U.S.C. § 1126(c). See *Dish Network Corp. v. DBSD N. Am. Inc. (In re DBSD N. Am., Inc.)*, 634 F.3d 79, 106 (2d Cir. 2011) (explaining that for each class of creditors, both a majority of the total number of creditors as well as a number of creditors representing at least two-thirds of the total value of the claims must vote in favor of the reorganization plan).

³⁰ 11 U.S.C. § 524(g) (2) (B) (ii) (IV) (bb); *Combustion Eng’g*, 391 F.3d at 201 n.4.

³¹ See 11 U.S.C. § 105(a); *Global Indus. Techs.*, 645 F.3d at 206. To satisfy this requirement, a party must demonstrate “with specificity that the . . . [i]njunction is both necessary to the reorganization and fair.” *Global Indus. Techs.*, 645 F.3d at 206.

³² See *In re Congoleum Corp.*, 426 F.3d 675, 680 (3d Cir. 2005).

³³ *Global Indus. Techs.*, 645 F.3d at 205 n.8; Plevin et al., *supra* note 4, at 284.

³⁴ See Plevin et al., *supra* note 4, at 285.

When the debtor files for relief, it submits the proposed plan as well as a tally of the creditors' votes.³⁵ The bankruptcy court then holds a plan confirmation hearing.³⁶ At the hearing, parties who have standing are able to offer support or objections for consideration.³⁷ Finally, the bankruptcy court either confirms or denies the reorganization plan.³⁸

II. REDEFINING INSURANCE NEUTRALITY

Insurance neutrality refers to the impact that a proposed reorganization plan has on the insurance company.³⁹ Specifically, a plan is insurance neutral if it does not put the insurance company in a less-favorable position than it was pre-petition.⁴⁰ If a plan is not insurance neutral, an insurer has suffered an injury and, consequently, will have standing in the confirmation hearing.⁴¹ Thus, what a court considers to be insurance neutral will determine whether an insurer is able to participate in the bankruptcy proceeding.⁴²

The assignment of an insurance policy to a trust does not, by itself, require the insurers to contribute indemnity funds to the trust.⁴³ Instead, a claim must be successfully asserted against the trust before an insurer becomes liable for indemnity under the policy.⁴⁴ Because insurers do not contribute any money at the time the trust is established, injury does not arise from a present financial loss.⁴⁵ Instead, the courts must look deeper into the reorganization plan to determine whether it is insurance neutral.⁴⁶ In May 2011, in *Global Industries*, the Third Cir-

³⁵ *Combustion Eng'g*, 391 F.3d at 201 n.4.

³⁶ See Eric D. Green et al., *Prepackaged Asbestos Bankruptcies: Down but Not Out*, 63 N.Y.U. ANN. SURV. AM. L. 727, 731 (2008).

³⁷ 11 U.S.C. § 1109(b) (2006); see *Global Indus. Techs.*, 645 F.3d at 210.

³⁸ See Resnick, *supra* note 6, at 2064.

³⁹ See *In re Global Indus. Techs., Inc.*, 645 F.3d 201, 212 (3d Cir. 2004).

⁴⁰ See *id.* "Pre-petition" refers to the period before the bankruptcy petition is filed. See Green et al., *supra* note 36, at 744.

⁴¹ See Jason W. Harbour & Tara L. Elgie, *Insurance Neutrality: Will Global Industrial Technologies Have a Major Impact?*, AM. BANKR. INST. J., July/Aug. 2011, at 48, 49 (noting that the existence of an insurance neutral reorganization plan results in a denial of standing).

⁴² Compare *Global Indus. Techs.*, 645 F.3d at 212–14 (finding that the reorganization plan was not insurance neutral and thus the insurers did have standing), with *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 218 (3d Cir. 2004) (finding that the reorganization plan was insurance neutral such that the insurers did not have standing).

⁴³ See *Global Indus. Techs.*, 645 F.3d at 214.

⁴⁴ See *id.*

⁴⁵ See *id.*

⁴⁶ See Harbour & Elgie, *supra* note 41, at 48–49.

cuit altered its approach for determining insurance neutrality.⁴⁷ Section A of this Part explains the textual approach that the court has historically used; Section B describes the new, quantitative method recently implemented.⁴⁸

A. Combustion Engineering: A Textual Approach to Insurance Neutrality

In *Combustion Engineering*, the Third Circuit considered whether a group of insurers had standing, on appeal, to challenge the bankruptcy court's confirmation of a reorganization plan.⁴⁹ Although this case discussed appellate standing and not bankruptcy standing, the discussion of insurance neutrality is applicable to both types of standing.⁵⁰

The reorganization plan in *Combustion Engineering* included an assignment of the debtor's insurance policies to a trust established under section 524(g) of the Code.⁵¹ In relation to the assignment, the plan provided that all parties would retain the rights given to them under the insurance policies.⁵² The court found that the insurers did not have standing, based on the language of the reorganization plan.⁵³ Because the plan affirmed the pre-petition contractual provisions of the policy, it neither impaired the insurers' rights nor increased their burdens.⁵⁴ Accordingly, the court held the plan was insurance neutral and therefore did not constitute an injury giving rise to appellate standing to challenge the addition of the provision.⁵⁵ Essentially, the court based their determination of insurance neutrality on whether the text of the plan itself affected the insurance company and its rights.⁵⁶

⁴⁷ See *Global Indus. Techs.*, 645 F.3d at 212.

⁴⁸ See *infra* notes 49–56 and accompanying text; *infra* notes 57–77 and accompanying text.

⁴⁹ 391 F.3d at 218.

⁵⁰ See *Global Indus. Techs.*, 645 F.3d at 209–10 & n.23 (explaining that the test for appellate standing is more stringent than the test for standing in the underlying bankruptcy proceeding).

⁵¹ 391 F.3d at 201; see 11 U.S.C. § 524(g) (2006).

⁵² *Combustion Eng'g*, 391 F.3d at 216–17 & n.26 (“Nothing in the Plan or the Confirmation Order shall be deemed to waive any claims, defenses, rights or causes of action that any Entity has or may have under the provisions, terms, conditions, defenses and/or exclusions contained in the Subject Insurance Policies . . .”).

⁵³ *Id.* at 218.

⁵⁴ *Id.*

⁵⁵ *Id.* (“[T]he neutrality provision . . . protects the pre-petition rights and obligations of both the debtor and the insurers. . . [Thus it] does not impair their rights or increase their burdens under the subject insurance policies. We conclude, therefore, the . . . [i]nsurers . . . have no appellate standing . . .”).

⁵⁶ See *id.*

B. Global Industrial Technologies: *Going Beyond the Text*

In 2002, Global Industrial Technologies, Inc. and related entities (collectively, the “Debtors”) were forced into bankruptcy.⁵⁷ Before filing, the Debtors had resolved over 200,000 asbestos claims and had about 235,000 additional asbestos claims pending.⁵⁸ The Debtors also had one silica-related class action suit pending, consisting of 169 claims.⁵⁹ The Debtors only acknowledged the asbestos claims, not the silica claims, as a reason for seeking relief.⁶⁰ The proposed plan of reorganization included an asbestos claims trust and channeling injunction under section 524(g) of the Code, as well as a trust and channeling injunction for the silica-related claims under section 105(a) of the Code.⁶¹ The Debtors intended to fund the silica trust by assigning certain insurance policies to it.⁶² The plan contained a provision just like that in *Combustion Engineering*, keeping the insurers’ contractual rights and obligations under the policies intact.⁶³

The Debtors solicited confirmation votes from law firms who represented both current asbestos claimants and individuals with silica-related tort claims against other companies.⁶⁴ This solicitation resulted in a significant increase in the number of silica-related tort claims asserted against the Debtors.⁶⁵ In fact, 5125 votes for the plan were submitted on behalf of individuals claiming that the Debtors were responsible for their silica-related injuries.⁶⁶ Each of the 5125 claimants were represented by a firm that also represented asbestos claimants, and 4039 of the claimants were represented by one of five law firms.⁶⁷

At the confirmation hearing, the insurers objected to the proposed plan, arguing that the silica trust was neither necessary nor appropriate for the Debtors’ reorganization under the meaning of section 105(a) of the code.⁶⁸ Additionally, the insurers questioned the integrity

⁵⁷ *Global Indus. Techs.*, 645 F.3d at 204–05.

⁵⁸ *Id.* at 204.

⁵⁹ *Id.*

⁶⁰ *Id.* at 205.

⁶¹ *Id.*; see 11 U.S.C. §§ 105(a), 524(g) (2006).

⁶² *Global Indus. Techs.*, 645 F.3d at 205.

⁶³ See *id.* at 206; *Combustion Eng’g*, 391 F.3d at 216 n.26 (explaining that the neutrality provision in the plan provides that the “claims, defenses, rights or causes of action” available under the insurance policy are to remain available to the insurer).

⁶⁴ *Global Indus. Techs.*, 645 F.3d at 205.

⁶⁵ *Id.* at 206.

⁶⁶ *Id.* This number is to be compared with the 169 individuals asserting silica-related claims before the plan of reorganization was proposed. *Id.* at 204.

⁶⁷ *Id.* at 206.

⁶⁸ *Id.*

of the bankruptcy proceeding, specifically asserting that the Debtor had bargained with the claimants' counsel to pay for counterfeit silica claims in exchange for asbestos claimants' confirmation votes.⁶⁹

The Third Circuit found that the insurance companies did have standing to object to the reorganization plan.⁷⁰ Although the court did not overturn its previous decision in *Combustion Engineering*, it expanded the idea of insurance neutrality.⁷¹ Instead of looking at the text of the plan, the court relied on the increase in silica claims to justify a finding that the plan was not insurance neutral.⁷² The court reasoned that the administrative costs resulting from increased potential liability constituted an injury, even if the insurer was never indemnified for a single claim.⁷³ Although previously the court had defined insurance neutral as not affecting an insurer's rights, it now defined the term as not materially altering the "quantum of liability" to which an insurer was exposed.⁷⁴ In effect, the court changed the focus of the insurance neutrality inquiry from the substance of the proposed plan to the number of claims asserted.⁷⁵

Although the court engaged in a discussion of insurance neutrality, a large motivating factor behind its decision was the non-frivolous allegation of collusion.⁷⁶ Because both the claimants and Debtors had an interest in increasing the size of the trust, the court reasoned that the insurers were the only party with an incentive to pursue the charge of collusion.⁷⁷

⁶⁹ *Id.*

⁷⁰ *Global Indus. Techs.*, 645 F.3d at 216 (holding that the insurers met the requirements for both Constitutional standing and Code standing).

⁷¹ Compare *Global Indus. Techs.*, 645 F.3d at 212 (finding that a plan is insurance neutral when it "does not materially alter the quantum of liability that the insurers would be called to absorb"), with *Combustion Eng'g.*, 391 F.3d at 218 (finding that the plan was insurance neutral because it did not "impair [the insurers'] rights or increase their burdens under the subject insurance policies").

⁷² See *Global Indus. Techs.*, 645 F.3d at 212.

⁷³ *Id.* at 214.

⁷⁴ See *id.* at 212; *Combustion Eng'g.*, 391 F.3d at 218.

⁷⁵ Compare *Global Indus. Techs.*, 645 F.3d at 212 (concluding that insurance neutrality depends on whether the number of claims asserted increased post-petition), with *Combustion Eng'g.*, 391 F.3d at 218 (concluding that insurance neutrality depends on whether the insurer's rights and responsibilities under the original insurance policy are affected).

⁷⁶ See *Global Indus. Techs.*, 645 F.3d at 214.

⁷⁷ See *id.* (noting that the insurers were the only party with an incentive to assert a charge of collusion); see also *In re Congoleum Corp.*, 426 F.3d 675, 687 (3d Cir. 2005) (finding that the insurers had standing, in part, because the insurers were the only parties with incentives to raise the issue of an ethical violation).

III. EXAMINING THE RATIONALE FOR REDEFINING INSURANCE NEUTRALITY TO FIND STANDING

The Third Circuit relied on both definitional and policy rationales to support insurer standing in *Global Industrial Technologies*.⁷⁸ First, it asserted a definitional rationale by concluding that a sudden increase in the number of claims asserted against an insurer means that the insurer is suffering an injury.⁷⁹ This Comment argues, however, that the difference in the number of pre-petition and post-petition claims is not an accurate measure of whether an insurer has been harmed, particularly when there is no threat of collusion.⁸⁰

Second, the court used a policy rationale by stating that granting standing to the only party with an incentive to assert issues of abuse protects the integrity of the bankruptcy proceeding.⁸¹ This Comment argues, however, that it would be more effective and appropriate for the court to combat collusion and other threats to the integrity of the bankruptcy process through its own motions, rather than to grant standing to third parties to do so.⁸²

A. *The Quantum of Liability Is an Ineffective Measure of Insurance Neutrality*

The Third Circuit's quantum of liability standard is an ineffective benchmark for determining whether an insurer has suffered injury.⁸³ Insurance companies are unique in that their business is based entirely on risk-assessment.⁸⁴ Insurers do not have perfect information about the clients they choose to insure; accordingly, each insurance policy necessarily involves a risk that the client may incur a loss which the insurance company will have to cover.⁸⁵ Insurers are cognizant of this risk and expect to incur losses on some policies.⁸⁶ This lack of perfect information prevents insurers from knowing exactly which policies will incur losses.⁸⁷ As a result, insurance companies distribute the risk by

⁷⁸ See 645 F.3d 201, 215 (3d Cir. 2011).

⁷⁹ *Id.* at 214.

⁸⁰ See *infra* notes 83–97 and accompanying text.

⁸¹ See *Global Indus. Techs.*, 645 F.3d at 215.

⁸² See *infra* notes 103–118 and accompanying text.

⁸³ See *infra* notes 83–97 and accompanying text.

⁸⁴ See ROBERT E. KEETON & ALAN I. WIDISS, *INSURANCE LAW: A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND COMMERCIAL PRACTICES* 8 (1988); Thomas R. Foley, *Insurers' Misrepresentation Defense: The Need for a Knowledge Element*, 67 S. CAL. L. REV. 659, 673 (1994).

⁸⁵ See KEETON & WIDISS, *supra* note 84, at 12.

⁸⁶ See Foley, *supra* note 84, at 673.

⁸⁷ See KEETON & WIDISS, *supra* note 84, at 12.

grouping clients into pools based on common characteristics, and pricing each pool with the knowledge that some clients within the pool will incur losses.⁸⁸

The quantum of liability standard imposed by the Third Circuit implies that an increase in exposure to liability injures the insurer.⁸⁹ Even if the claims were to be realized, a loss on a particular policy, no matter how large, is not necessarily an “injury” to an insurance company.⁹⁰ An insurer’s ability to spread losses over all members of a particular group means that suffering a loss on one particular policy does not necessarily harm that insurer, if the premiums charged to others compensate the insurer for that loss.⁹¹

Even assuming that an increase in claims does constitute an injury, the quantum of liability test remains ineffective.⁹² Future claimants are able to assert claims against the trust; the Third Circuit’s test for injury, however, does not take that type of liability into account.⁹³ Both asbestos and silica claims can lie dormant for long periods of time; thus, it is not uncommon for illnesses—and subsequently claims—to arise long after the bankruptcy has terminated.⁹⁴

In fact, using the quantum of liability as a measure of injury would actually be detrimental to an insurer when the number of future claim-

⁸⁸ See *id.* at 12–13.

⁸⁹ See *Global Indus. Techs.*, 645 F.3d at 213–14.

⁹⁰ See Foley, *supra* note 84, at 673 (noting that “[i]nsurers are able to spread the relatively few large losses over a large number of premium-paying individuals or entities”). An increase in exposure to liability means that there are more claims being asserted against the trust. See *Global Indus. Techs.*, 645 F.3d at 213–14. Even though some administrative costs arise from the increase in exposure, losses from the claims are not realized until those claims are successfully asserted against the trust and survive coverage defenses. See *id.*

⁹¹ See Foley, *supra* note 84, at 673. For instance, assume that an insurer has issued ten policies and has set the premiums based on the expectation that it will suffer \$1000 in losses. See *id.* If one policyholder incurs liability valued at \$750, the insurance company is not harmed, even though it is paying for that particular loss, because it priced the group of policies with the expectation of covering a greater loss than was actually incurred. See *id.*

⁹² See *infra* notes 93–97 and accompanying text.

⁹³ See *Global Indus. Techs.*, 645 F.3d at 212; Plevin et al., *supra* note 4, at 271 (defining future claimants as “persons who were exposed to asbestos pre-petition but who have not yet developed any asbestos-related condition”).

⁹⁴ See Plevin et al., *supra* note 4, at 276; Peter Tipps, *The Lead Paint Debate: Why Control Is Not an Element of Public Nuisance*, 50 B.C. L. REV. 605, 635 (2009). The bankruptcy court appoints a representative for the future claimants to ensure that their interests are protected throughout the petition process. See Plevin et al., *supra* note 4, at 280. Although the process is imperfect, it does provide trust access to claimants whose illnesses will not mature until after the bankruptcy has ended. See *generally id.* (explaining the role of a future claims representative and problems within the current system).

ants far outweighs the number of current claimants.⁹⁵ Relying on the number of claims at the time the petition is filed would not accurately reflect the insurer's potential liability.⁹⁶ As a result, the insurer would not be able to participate in the bankruptcy proceeding, even though the plan may actually harm the insurer once the future claimants emerge.⁹⁷

The approach to defining insurance neutrality laid out in *Combustion Engineering* more accurately assesses whether an insurer has been injured.⁹⁸ Focusing on the relationship between the insurer's pre-petition and post-petition rights ensures that the original bargain made by the debtor and insurer is upheld.⁹⁹ Furthermore, this approach is more consistent with insurance industry practice, because it allows the insurer to accurately absorb the costs of using risk valuation as a money-making tool.¹⁰⁰ Additionally, an inquiry into the contractual rights of the insurer better captures the injury that would occur from current and future claims.¹⁰¹ Although it is impossible to determine how many claims will be asserted in the future, the *Combustion Engineering* definition of insurance neutrality allows the court to analyze the rights that the insurer will have when those claims are asserted.¹⁰²

B. *The Court, Not the Insurers, Should Protect the Integrity of Bankruptcy Proceedings*

The court should protect the integrity of bankruptcy proceedings, and not rely on third parties to do so.¹⁰³ Not only is the existence of a third party with standing uncertain, particularly in mass tort liability cases, but also it is the court's responsibility to prevent abuses of process.¹⁰⁴ Accordingly, section 105(a) of the Code expressly gives the bankruptcy court the power to exercise such authority.¹⁰⁵ Under this statute,

⁹⁵ See *infra* notes 96–97 and accompanying text.

⁹⁶ See Plevin et al., *supra* note 4, at 271.

⁹⁷ See *Global Indus. Techs.*, 645 F.3d at 212; Plevin et al., *supra* note 4, at 271.

⁹⁸ See 391 F.3d 190, 218 (3d Cir. 2004); *infra* notes 99–102 and accompanying text.

⁹⁹ See *Combustion Eng'g*, 391 F.3d at 218.

¹⁰⁰ See Foley, *supra* note 84, at 673.

¹⁰¹ See Plevin et al., *supra* note 4, at 276.

¹⁰² See *Combustion Eng'g*, 391 F.3d at 218; Plevin et al., *supra* note 4, at 271–72.

¹⁰³ See *infra* notes 104–118 and accompanying text.

¹⁰⁴ See *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991).

¹⁰⁵ 11 U.S.C. § 105(a) (2006) (“No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary. . . . to prevent an abuse of process.”).

the court is able to take a range of actions on its own, from issuing civil sanctions to dismissing the case entirely.¹⁰⁶

From a practical perspective, relying on third parties to assert concerns of procedural integrity is problematic.¹⁰⁷ To object to any wrongdoing, an insurer whose policy is being used to fund a trust needs to satisfy the quantum of liability test to establish standing.¹⁰⁸ It is possible, however, that the integrity of the bankruptcy proceeding could be compromised, without a subsequent increase in the number of claims.¹⁰⁹ For instance, if an agreement were made in favor of future claimants, either by the current claimants' counsel expecting future business, or by the future claimants' representative, there would be no immediate increase in claims.¹¹⁰ In such a situation the insurer may still have an incentive to assert integrity concerns because of the potential for heightened exposure to liability, just as in *Global Industrial Technologies*.¹¹¹ Yet, because there would be no difference in the number of pre- and post-petition claims, the quantum of liability test would not be satisfied and thus the insurer would not have standing to assert any objections.¹¹²

From a policy perspective, the bankruptcy court should be responsible for taking appropriate measures to ensure that the process is not being abused.¹¹³ Exploitation of the judicial process harms not only the individual parties to the case, but the legal institution as a whole.¹¹⁴ Thus, the court has a duty to ensure that the integrity of the court system is not compromised.¹¹⁵ From an efficiency standpoint, the court is in the best position to prevent such abuses.¹¹⁶ The court is the only entity that is present in every case, and can serve as a consistent, diligent

¹⁰⁶ See Michael L. Cook & Robert L. Ordin, *Bankruptcy Litigation Manual* § 2.03 (2011) ("Several courts have . . . interpreted the . . . language to allow such dismissals on the court's own motion."). See generally Catherine E. Vance, *Attorney Liability: Sources of Bankruptcy Court Sanctioning Authority*, SM048 ALI-ABA 165 (2006) (explaining the nature and source of the bankruptcy court's sanctioning authority).

¹⁰⁷ See *infra* notes 108–112 and accompanying text.

¹⁰⁸ See *Global Indus. Techs.*, 645 F.3d at 212.

¹⁰⁹ See *id.*

¹¹⁰ See Plevin et al., *supra* note 4, at 276.

¹¹¹ See 645 F.3d at 214.

¹¹² See *id.* at 212.

¹¹³ 11 U.S.C. § 105(a) (2006); *Chambers*, 501 U.S. at 44 ("This 'historic power of equity. . . ' is necessary to the integrity of the courts[;] for 'tampering with the administration of justice. . . is a wrong against the institutions set up to protect and safeguard the public.'" (quoting *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245–46 (1944))).

¹¹⁴ *Chambers*, 501 U.S. at 44.

¹¹⁵ See *id.*

¹¹⁶ See *id.* at 43.

eye over all proceedings.¹¹⁷ Similarly, the court's expertise and familiarity with the bankruptcy process makes it best suited to notice any impropriety which may be occurring.¹¹⁸

CONCLUSION

The Third Circuit in *Global Industrial Technologies* struggled to determine whether an insurer whose policies had been assigned to a trust to fund mass tort claims should have standing in the underlying bankruptcy proceeding. Although the court's revision of the previous test for insurance neutrality and subsequent finding of standing may have made sense in this specific case, the new standard may be problematic in future cases. Instead, the court should return to the more balanced *Combustion Engineering* definition of insurance neutrality to better determine when an insurance company is actually injured under the meaning of the Constitution and the Code. Similarly, the Third Circuit should encourage the bankruptcy court to use their sua sponte power under the Code as a means of ensuring that the bankruptcy process is free of abuse instead of allowing reliance on other parties to assert such concerns.

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¹¹⁷ See *id.*

¹¹⁸ See *id.* at 43–44.

