

## INSURANCE NEUTRALITY: AFFECTING AN INSURER'S RIGHT TO BANKRUPTCY STANDING

### ABSTRACT

*Asbestos, silica, benzene, and other mass tort-related claims have been forcing U.S. businesses into bankruptcy for decades. In response, Congress enacted Section 524(g) to the Bankruptcy Code which, in essence, discharges debtors of the obligation to litigate present and future mass tort claims. Specifically, a Chapter 11 debtor utilizing Section 524(g) may establish a settlement trust and an injunction which feeds current and future mass tort claims to the trust.*

*Liability insurance is often the principal asset of a trust established under Section 524(g). Accordingly, insurers are often affected by plans encompassing such a trust, impelling them to challenge the confirmation of such plans. Challenging the confirmation of a plan, however, requires a challenging insurer to meet the standing requirements established in the Constitution as well as those prescribed in the Bankruptcy Code—namely, Sections 1128 and 1109.*

*Turning to these standing requirements, the Third Circuit held in *In re Combustion Engineering* that, where a particular plan provides for insurance neutrality, insurers lack standing to challenge the plan. The court reasoned that insurance neutrality language preserves an insurer's pre-petition rights and defenses; therefore, the insurer faces no injury sufficient to satisfy the standing requirements. Subsequent cases, such as *In re Pittsburgh Corning Corporation*, *In re Leslie Controls* and *In re Congoleum Corporation* followed suit.*

*Most recently, however, the Third Circuit, in *In re Global Industrial Technologies* held that, notwithstanding the plan's insurance neutrality language, the insurers had standing to challenge the plan's confirmation. The court reasoned that, due to the "suspect" nature of the mass tort claims, the insurers may be faced with added administrative costs to investigate such claims. Accordingly, the court concluded that these added costs increased the insurers "quantum of liability" resulting in a "tangible disadvantage" sufficient to satisfy the standing requirements.*

*In disagreeing with this decision, the dissent in *Global Industrial Technologies* focused on the constitutional requirements for standing, the importance of precedent, and basic principles underlying the Bankruptcy Code and contract law. After examining the standing doctrine and the line of cases addressing the issue of insurer standing in the bankruptcy context, this Note sides with the *Global Industrial Technologies*' dissent. In taking this position, this Note contends that the *Global Industrial Technologies**

*court erred in granting the insurers standing in light of the plan's insurance neutrality. Finally, this Note establishes a two-prong test for courts to apply when confronted with the insurer standing issue. Notably, this test requires an exacting look into each reorganization plan—referencing a recent Ninth Circuit decision, In re Thorpe Insulation Co. Applying this test mollifies the concerns of all parties to a bankruptcy while, at the same time, accounts for the importance of precedent, the requirements for standing, and the fundamental principles underlying the Bankruptcy Code and contract law.*

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## I. INTRODUCTION

For decades, floods of mass tort-related claims have pushed businesses to the brink of insolvency, forcing them to resort to bankruptcy relief as a means to survive.<sup>1</sup> In response, Congress enacted Section 524(g) to the Bankruptcy Code ("Code"),<sup>2</sup> providing relief to debtors facing mass tort-related claims by effectively discharging them of the obligation to adjudicate present and future product liability claims.<sup>3</sup> Despite this relief,

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<sup>1</sup>See *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973) (representing the first successful asbestos lawsuit); Mark D. Taylor, *How Congress Can Solve The 'Great Asbestos Bankruptcy Heist'*, MEALEY'S ASBESTOS BANKR. REP. (Apr. 2005), available at [http://www.arentfox.com/pdf\\_notReady/asbestos\\_bankruptcy\\_report.pdf](http://www.arentfox.com/pdf_notReady/asbestos_bankruptcy_report.pdf) (indicating that as of 2005, over 70 companies have been forced into bankruptcy due to asbestos-related claims); Scott E. Blakeley, *Mass Tort Claims and Bankruptcy: Are You Selling To A Company On Credit That Is Vulnerable To Major Asbestos Litigation And Thus A Candidate For Chapter 11?*, BLAKELY LLP (May 2, 2011), <http://www.blakeylylp.com/content/2011/05/02/mass-tort-claims-and-bankruptcy-are-you-selling-to-a-company-on-credit-that-is-vulnerable-to-major-asbestos-litigation-and-thus-a-candidate-for-chapter-11> (explaining that in 2011 approximately 22 asbestos users filed Chapter 11 to stay mass asbestos litigation, including Babcock & Wilcox as well as Pittsburg Corning); THE DOW CHEMICAL COMPANY 2010 ANNUAL REPORT 117, available at <http://www.dow.com/investors/pdfs/annual-report-2010.pdf> (explaining that the undiscounted cost of resolving pending and future asbestos-related claims against Union Carbide and Amchem, excluding future defense and processing costs, through 2023 was estimated to be between \$952 and \$1.2 billion).

<sup>2</sup>11 U.S.C. § 524(g) (2006).

<sup>3</sup>See Mark D. Plevin, *Recent Developments Affecting Mass Tort Cases Insurance Neutrality*

reorganization plans established pursuant to Section 524(g) often adversely affect insurers' post-confirmation rights and defenses.<sup>4</sup> In an attempt to preserve these rights and defenses, debtors began drafting insurance neutrality<sup>5</sup> language in their respective reorganization plans.<sup>6</sup>

Insurance neutrality language, however, raises the issue of whether insurers have standing to challenge the confirmation of a plan when such language is included.<sup>7</sup> The Third Circuit first dealt with this issue in *In re Combustion Engineering, Inc.*, where the court held the presence of insurance neutrality language meant that insurers face no injury, thereby precluding their ability to challenge a plan's confirmation.<sup>8</sup> However, in a recent closely divided Third Circuit decision, *In re Global Industrial Technologies, Inc.*, the court held that, notwithstanding the plan's insurance neutrality language, the insurers had standing to challenge the plan's confirmation.<sup>9</sup>

The *Global Industrial Technologies* decision has generated great uncertainty in the area of insurer standing in bankruptcy proceedings.<sup>10</sup> As a result of the growing number of asbestos, benzene, silica, and other mass tort-related claims,<sup>11</sup> it is imperative that this uncertainty be resolved.

To provide context, this Note begins by discussing several pertinent legal concepts.<sup>12</sup> Second, this Note examines several decisions with respect to insurer standing in bankruptcy proceedings, including the controversial

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and *Insurer Standing* 1 (American Bankruptcy Institute, Mid-Atlantic Bankruptcy Workshop Aug. 5-6, 2005), available at <http://www.abiworld.org/committees/newsletters/masstorts/vol3num5/Plevin.pdf>.

<sup>4</sup>See *id.* at 1-2 (noting that several plan provisions may significantly affect the rights of insurers).

<sup>5</sup>For examples of insurance neutrality provisions, see *infra* Appendix I.

<sup>6</sup>See Plevin, *supra* note 3, at 11 (detailing the debtors' efforts to neutralize the insurers' agreements in *Combustion Engineering*).

<sup>7</sup>See *infra* Part III.

<sup>8</sup>*In re Combustion Eng'g, Inc.*, 391 F.3d 190, 216-20 (3d Cir. 2004).

<sup>9</sup>*In re Global Indus. Techs., Inc.*, 645 F.3d 201, 212-15 (3d Cir. 2011) (en banc).

<sup>10</sup>See David Carickhoff & Alan Root, *Standing in Bankruptcy Cases: Has the 3rd Circuit Expanded the Doctrine?*, DELAWARE BUSINESS COURT INSIDER (July 20, 2011), <http://www.blankrome.com/index.cfm?contentID=37&itemID=2538> ("It is likely that [*Global Industrial Technologies*] will be widely cited by parties with tenuous grounds for standing as a basis to be heard in bankruptcy proceedings, at least until such time as the bankruptcy courts have had the opportunity to interpret and apply the majority decision.").

<sup>11</sup>See, e.g., Roger G. Worthington, *Explosion of Unimpaired Claims, Uncaring Congress And Legal Loopholes Accelerate Asbestos Company Bankruptcies; Bankruptcy Courts Wrestle With Payout Ratio for Mesothelioma Victims Vs. Unimpaired*, Mesothelioma Empowerment (Feb. 18, 2002), [http://www.mesothel.com/asbestos-cancer/lawsuits/bankruptcies/bankrpt\\_essay.htm](http://www.mesothel.com/asbestos-cancer/lawsuits/bankruptcies/bankrpt_essay.htm) (noting the significant influx of asbestos claims as a result of law firm-sponsored mass screenings).

<sup>12</sup>See *infra* Part II.

*Global Industrial Technologies* decision.<sup>13</sup> Third, this Note analyzes the Third Circuit's reasoning in *Global Industrial Technologies*, and contends that, in light of the plan's insurance neutrality language, the court erred in granting the insurers standing.<sup>14</sup> Finally, in an attempt to resolve the issue of insurer standing in the bankruptcy context, this Note suggests that bankruptcy courts apply a two-prong test: first, as a threshold matter, the court must determine whether a particular plan is insurance neutral; and second, whether substantial evidence of "suspect circumstances" exists to warrant a more searching look into the plan's validity.<sup>15</sup>

This proposed standard serves several objectives: first, it remains consistent with the doctrine of standing; second, it preserves basic contract principles; third, it promotes efficiency in bankruptcy proceedings; and finally, it corresponds with the purpose underlying the Code.<sup>16</sup>

## II. BACKGROUND AND BASIC LEGAL CONCEPTS

The doctrine of standing, a threshold matter in every case,<sup>17</sup> promotes fairness, efficiency, and improves decision making by the courts.<sup>18</sup> This section discusses the standing requirements of potential litigants. Additionally, this section details the requirements for bankruptcy standing and the effects bankruptcy standing has on a debtor facing the unique complications associated with mass tort liability.

### A. Constitutional Requirements for Standing

In order to have standing to bring a matter before a federal court, three essential elements must be present:

First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest . . . . Second, there must be a causal connection between the injury and the conduct complained of . . . . Third, it must be "likely," as opposed to

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<sup>13</sup>See *infra* Part III.

<sup>14</sup>See *infra* Part IV.

<sup>15</sup>See *infra* Part V.

<sup>16</sup>See *infra* Part V.

<sup>17</sup>See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (referencing standing as a "threshold standing inquiry").

<sup>18</sup>See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES 61-62 (3d ed. 2006).

merely "speculative," that the injury will be "redressed by a favorable decision."<sup>19</sup>

In addition to the constitutional requirements for standing, a party seeking to challenge the confirmation of a reorganization plan must satisfy the requirements established in the Code.<sup>20</sup> The two pertinent standing provisions in the Code are Sections 1128 and 1109.<sup>21</sup> Section 1128 pertinently states that "[a] party in interest may object to confirmation of a plan."<sup>22</sup> Although the Code does not define "party in interest,"<sup>23</sup> Section 1109(b) provides several examples.<sup>24</sup> Section 1109(b), however, does not provide an exhaustive list, leaving courts to determine, on a case-by-case basis, whether a party seeking to challenge the confirmation of a plan has standing to do so.<sup>25</sup>

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<sup>19</sup>*Lujan*, 504 U.S. at 560-61 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976)). The Supreme Court articulated constitutional as well as prudential standing requirements. *Id.* at 559-60. Unlike the prudential limitations, the constitutional requirements cannot be statutorily circumvented. See *Chemerinsky*, *supra* note 18, at 63. Chemerinsky summarizes the prudential limitations as follows:

First, a party generally may assert only his or her own rights and cannot raise the claims of third parties not before the court. Second, a plaintiff may not sue as a taxpayer who shares a grievance in common with all other taxpayers. . . . Third, a party must raise a claim within the zone of interests protected by the statute in question.

*Id.* An injury in fact requires a "concrete and particularized" legal interest where the injury is "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). In *Lujan*, the court also noted that "particularized . . . mean[s] that the injury must affect the plaintiff in a personal and individual way." *Id.* at 560 n.1. The Court further clarified that "the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.'" *Id.* at 560-61 (quoting *Simon*, 426 U.S. at 41-42).

<sup>20</sup>See, e.g., *In re Teligent, Inc.*, 417 B.R. 197, 210 (Bankr. S.D.N.Y. 2009) (explaining that a party must establish that he or she has a direct financial stake in the outcome of the case).

<sup>21</sup>See *Plevin*, *supra* note 3, at 5-8 (discussing standing in bankruptcy cases). It is important to note that because Sections 1128 and 1109 operate in conjunction with the constitutional standing requirements, once these statutory requirements have been satisfied, a party is presumed to have met both the constitutional and prudential requirements. See *Teligent*, 417 B.R. at 210. Further, Section 1112(b) of the Code authorizes a court to dismiss a Chapter 11 case "on request of a party in interest." 11 U.S.C. § 1112(b) (2006). For purposes of this Note, a detailed discussion of Section 1112(b) is not warranted.

<sup>22</sup>11 U.S.C. § 1128(b) (2006).

<sup>23</sup>*Teligent*, 417 B.R. at 210.

<sup>24</sup>Section 1109(b) indicates 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) (2006).

<sup>25</sup>See, e.g., *In re Athos Steel & Aluminum, Inc.*, 69 B.R. 515, 519 (Bankr. E.D. Pa. 1987) ("Courts must determine on a case by case basis 'whether the prospective party in interest has a

Section 1109(b) has been extended to "anyone who has a legally protected interest that could be affected by a bankruptcy proceeding."<sup>26</sup> This requires a party to show it has "a direct financial stake in the outcome of the case."<sup>27</sup> At a minimum, "a claimant must demonstrate exposure to some actual or threatened injury."<sup>28</sup> Further, although Section 1109 is broadly construed,<sup>29</sup> courts have emphasized that an overly broad construction would frustrate "the goal of a speedy and efficient reorganization."<sup>30</sup>

### B. *The Relationship Between Standing, Section 524(g), and Insurance Neutrality Provisions*

Due to the increasing number of asbestos, benzene, silica, and other mass tort-related claims, several affected businesses have petitioned for Chapter 11 bankruptcy relief.<sup>31</sup> Despite petitioning for bankruptcy, debtors are still faced with a number of "unique problems and complexities associated with [mass tort] liability."<sup>32</sup> In order to ameliorate many of these complexities, Congress enacted Section 524(g) to the Code which, in essence, discharges debtors from litigating present and future mass tort liability claims.<sup>33</sup> In enacting Section 524(g), Congress acknowledged the purpose of Chapter 11—namely, to "facilitat[e] the reorganization and rehabilitation of [a] debtor as an economically viable entity."<sup>34</sup>

Pursuant to Section 524(g), debtors may establish a settlement trust and an injunction which feeds current and future mass tort-related claims to the trust.<sup>35</sup> Significantly, "[u]nder many plans, liability insurance (and/or the

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sufficient stake in the outcome of the proceeding so as to require representation." (quoting *In re Amatex Corp.*, 755 F.2d 1034, 1042 (3d Cir. 1985)).

<sup>26</sup>*In re James Wilson Assocs.*, 965 F.2d 160, 169 (7th Cir. 1992).

<sup>27</sup>*Teligent*, 417 B.R. at 210 (quoting *In re Ionosphere Clubs, Inc.*, 208 B.R. 812, 814 (Bankr. S.D.N.Y. 1997)).

<sup>28</sup>*Athos Steel & Aluminum*, 69 B.R. at 519.

<sup>29</sup>*See id.*

<sup>30</sup>*In re Pub. Serv. Co. of N.H.*, 88 B.R. 546, 554 (Bankr. D.N.H. 1988); *see also In re Ionosphere Clubs, Inc.*, 101 B.R. 844, 849-50 (Bankr. S.D.N.Y. 1989) (noting that Section 1109(b) should be broadly construed but limited to parties actually affected by the reorganization process).

<sup>31</sup>*See supra* note 1.

<sup>32</sup>*In re Combustion Eng'g, Inc.*, 391 F.3d 190, 234 (3d Cir. 2004). For example, one of the complexities associated with asbestos liability is the difficulty in determining individuals with future claims due to "the long latency period for asbestos" which causes many exposed individuals to not exhibit symptoms for several years. *See Taylor, supra* note 1.

<sup>33</sup>*See Taylor, supra* note 1; 11 U.S.C. § 524(g) (2006).

<sup>34</sup>*Combustion Eng'g*, 391 F.3d at 234.

<sup>35</sup>*See Edwin J. Harron & Sara Beth A.R. Kohut, Effective Insurance Neutrality Language Deprives Insurers of Standing in Delaware*, AM. BANKR. INST. J., Feb. 2011, at 32. *See also Combustion*, 391 F.3d at 234 ("Channeling asbestos-related claims to a personal injury trust relieves the debtor of the uncertainty of future asbestos liabilities.").

right to receive the proceeds of liability insurance) is the principal asset of the trust established under Section 524(g) of the Bankruptcy Code to pay [product liability] claims following confirmation of a plan."<sup>36</sup> In turn, insurers are often affected by plans utilizing Section 524(g) trusts, inciting them to challenge the confirmation of such plans.<sup>37</sup>

Challenging a plan, however, raises standing concerns, and courts have determined that, where a particular plan provides for insurance neutrality, insurers lack standing to challenge the plan.<sup>38</sup> The term insurance neutrality is not found in the Code<sup>39</sup> but is determined by looking at each reorganization plan on a case-by-case basis.<sup>40</sup> As discussed below, courts have struggled to define exactly what an insurance neutrality provision entails.

### III. STANDING AND INSURANCE NEUTRALITY IN THE THIRD CIRCUIT

#### A. *In re Combustion Engineering: An Insurance Neutral Plan*

After defending against asbestos-related mass tort claims for nearly forty years, Combustion Engineering (hereinafter "Combustion")<sup>41</sup> filed for bankruptcy, establishing a "pre-packaged" Chapter 11 bankruptcy plan that included a Section 524(g) trust.<sup>42</sup> The pre-packaged plan absolved

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<sup>36</sup>Plevin, *supra* note 3, at 1.

<sup>37</sup>*See id.* at 2.

<sup>38</sup>*See, e.g.,* Harron & Kohut, *supra* note 35, at 32 (citing *Combustion Eng'g*, 391 F.3d at 218).

<sup>39</sup>*See* Plevin, *supra* note 3, at 9 n.7.

<sup>40</sup>The presiding judge in *Leslie Controls* stated:

What I think [preservation of insurers' rights] comes down to is each case has to be judged on the facts of that case, and in this case, you have to look . . . at the plan provisions themselves, and determine whether in the context of what's going on in front of the Court, they truly—the provisions truly are neutral, they truly preserve the rights of the insurers under the policies and permit them to continue to dispute coverage if necessary.

Transcript of Record at 47, *In re Leslie Controls, Inc.*, 437 B.R. 493 (Bankr. D. Del. Oct. 26, 2010) (No. 10-12199).

<sup>41</sup>Combustion Engineering is partnered and associated with several separate entities; however, for purposes of this Note, these parties will be collectively referred to as "Combustion." For a list of entities associated with Combustion, *see In re Combustion Eng'g, Inc.*, 391 F.3d 190, 201 (3d Cir. 2004).

<sup>42</sup>*Id.* Further, a prepackaged plan is described as follows:

A pre-packaged plan (or "pre-pack") bankruptcy allows a debtor to obtain votes of its creditors on a plan of reorganization before actually filing a petition for Chapter 11 relief. At the time the debtor files for relief, it presents the bankruptcy court with a plan of reorganization and a tally of creditors' votes approving the plan. To gain approval, the plan must receive (1) a majority of votes by number by



Combustion of asbestos liability "by channeling asbestos claims against those entities to the post-confirmation bankruptcy trust."<sup>43</sup> Although several insurers objected to the plan, it nonetheless received approval by the necessary vote of the asbestos claimants.<sup>44</sup>

### 1. The Bankruptcy Court's Confirmation and Modification

The bankruptcy court confirmed Combustion's plan, holding that "the trust distribution procedures . . . did 'not change whatever rights the insurers had pre-petition regarding the payment of claims.' [And] '[a]lthough the [trust distribution procedures] do not provide for insurers to have a say in what claims are paid . . . the insurers did not have such input pre-petition.'"<sup>45</sup> Further, recognizing the importance of preserving the rights of the insurers, the bankruptcy court added a "super-preemptory provision"<sup>46</sup> which made "clear [that] the Plan did not alter the contractual rights of insurers under any insurance policy or settlement agreement."<sup>47</sup> Because the insurers' rights were not impaired, the bankruptcy court held that the insurers did not have a right to vote on the plan's confirmation.<sup>48</sup>

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class and (2) two-thirds of votes weighted by the amount of allowed claims for that class. 11 U.S.C. § 1126(c). In addition, if, as here, the plan contains a § 524(g) channeling injunction, it must be approved by 75% of the debtor's current asbestos claimants by number.

*Id.* at 201 n.4.

<sup>43</sup>*Id.* at 204.

<sup>44</sup>*Combustion Eng'g*, 391 F.3d at 201-02.

<sup>45</sup>*Id.* at 209 (citations omitted) (quoting *In re Combustion Eng'g, Inc.*, 295 B.R. 459, 473 (Bankr. D. Del. 2003)).

<sup>46</sup>The super-preemptory provision provides:

[N]otwithstanding anything to the contrary in this Order, the Plan or any of the Plan Documents, nothing in this Order, the Plan or any of the Plan documents (including any other provision that purports to be preemptory or supervening), shall in anyway [sic] operate to, or have the effect of, impairing the insurers' legal, equitable or contractual rights, if any, in any respect. The rights of insurers shall be determined under the Subject Insurance Policies or Subject Insurance Settlement Agreements as applicable.

*Id.* (quoting *Combustion Eng'g*, 295 B.R. at 494).

<sup>47</sup>*Id.*

<sup>48</sup>*Combustion Eng'g*, 391 F.3d at 209 (quoting *Combustion Eng'g*, 295 B.R. at 474) ("[T]he Plan expressly stated that 'the rights of insurers shall be determined under the subject insurance policies or subject insurance agreements as applicable and nothing in the Plan is to affect that.'").

## 2. District Court: Insurance Neutrality Leads to a Lack of Standing to Object to Plan Confirmation

Recognizing that prompt plan confirmation ensures the preservation of economic viability, the district court confirmed Combustion's plan and made two changes of its own.<sup>49</sup> These changes included an added "neutrality" provision and a modification to the super-preemptory provision, both of which further purported to "protect the debtor's and insurers' pre-petition rights."<sup>50</sup> The court held that, because the insurers' "pecuniary interests were not directly and adversely affected," the insurers lacked standing to object to confirmation of Combustion's plan.<sup>51</sup>

## 3. Third Circuit: The Plan Adequately Protects Insurers' Pre-Petition Rights and Defenses

The Third Circuit examined the super-preemptory and neutrality provisions in order to determine whether the insurers had standing to object to the confirmation of Combustion's plan.<sup>52</sup> The court held that the insurers had limited standing to object to the modifications made by the district court to the super-preemptory provision, but not to the addition of the neutrality provision.<sup>53</sup> Although the court rejected the district court's modifications to the super-preemptory provision, it resurrected the original super-preemptory provision as it was drafted by the bankruptcy court.<sup>54</sup> In upholding both provisions, the court found the plan to be insurance neutral because it adequately protected the insurers' pre-petition rights and defenses.<sup>55</sup>

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<sup>49</sup>*Id.* at 211-12.

<sup>50</sup>*Id.* at 202. The neutrality provision may be found *infra* Appendix I.

<sup>51</sup>*Id.* at 211 (internal quotation marks omitted).

<sup>52</sup>*Combustion Eng'g*, 391 F.3d at 216. It is noteworthy that the court applied "appellate standing," which in the bankruptcy context triggers the "persons aggrieved" standard. *Id.* at 214. The "persons aggrieved" standard is stricter than the standard used for Article III standing. *Id.* at 215.

<sup>53</sup>*See id.* at 217.

<sup>54</sup>*See Combustion Eng'g*, 391 F.3d at 217-18 ("[T]he Plan as originally drafted does not diminish the rights of insurers or increase their burdens under the subject insurance policies and settlements.").

<sup>55</sup>*Id.* at 216-18.

B. *The Aftermath of Combustion Engineering in the Bankruptcy Court*

1. *In re Pittsburgh Corning Corporation: Relying Upon Combustion Engineering to Draft an Insurance Neutral Plan*

Pittsburgh Corning Corporation (hereinafter "PCC"), another company forced into bankruptcy due to ensuing asbestos-related claims,<sup>56</sup> drafted a reorganization plan including insurance neutrality language similar to the plan confirmed in *Combustion Engineering*.<sup>57</sup> After examining PCC's plan, the bankruptcy court, relying upon the court's decision in *Combustion Engineering*, held the plan to be insurance neutral.<sup>58</sup> The court reasoned that PCC's plan "'broadly preserve[d] insurers' pre-petition rights under the subject insurance policies' and [permitted] the Objecting Insurers to 'dispute coverage under specific policies, and . . . raise any of the same challenges or defenses to the payment of claims available pre-petition.'"<sup>59</sup> Because the plan was deemed insurance neutral, the court held that the insurers lacked standing to object to the plan's confirmation.<sup>60</sup>

2. *In re Leslie Controls: Insurance Neutrality on a Case-by-Case Basis*

Similarly, Leslie Controls, Inc. (hereinafter "Leslie") relied upon the Third Circuit's decision in *Combustion Engineering*, by drafting its plan to preserve insurers' rights and defenses in post-confirmation coverage litigation (i.e., insurance neutrality language).<sup>61</sup> Turning to this language, the bankruptcy court "held that the plan's insurance neutrality provisions deprived insurers of standing to object to confirmation and precluded them from participating in the confirmation hearing."<sup>62</sup> The court also noted that insurance neutrality must be determined on a case-by-case basis and that

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<sup>56</sup>*In re Pittsburgh Corning Corp.*, 417 B.R. 289, 295-96 (Bankr. W.D. Pa. 2006).

<sup>57</sup>*Id.* at 316-17. For the pertinent insurance neutrality provisions from PCC's and Combustion's plans, see *infra* Appendix I.

<sup>58</sup>*Pittsburgh Corning*, 417 B.R. at 317.

<sup>59</sup>*Id.* (quoting *Combustion Eng'g*, 391 F.3d at 217).

<sup>60</sup>*See id.*

<sup>61</sup>*See* Leslie A. Davis & Mark D. Plevin, *Rest of the Story: Lessons from Leslie Controls*, AM. BANKR. INST. J., June 2011, at 48 ("Leslie claimed that the 'insurance-neutrality' provision was 'modeled after' language supposedly 'required by' the Third Circuit in *Combustion Engineering*, except that Leslie had revised the language supposedly to 'broad[e]n' the protections such language afforded to the insurers."). For the pertinent insurance neutrality provision in Leslie's plan, see *infra* Appendix I.

<sup>62</sup>Harron & Kohut, *supra* note 35, at 32 (emphasis omitted) (citing Transcript of Record at 45-49, *In re Leslie Controls, Inc.*, 437 B.R. 493 (Bankr. D. Del. Oct. 26, 2010) (No. 10-12199)).

"[t]he language of *Combustion Engineering* did not constitute 'magic words' that had to be reproduced exactly."<sup>63</sup>

### 3. *In re Congoleum Corporation*: Lacking Insurance Neutrality

Conversely, the district court in *In re Congoleum Corporation* affirmed the bankruptcy court's holding, which found that the plan at issue did not adequately protect the insurers' rights and defenses and therefore was not insurance neutral.<sup>64</sup> By reason of the plan's insurance neutrality deficiency, the court concluded that the insurers had standing to object to the plan's confirmation.<sup>65</sup>

#### C. *The Global Industrial Technologies' Decision*

In February 2002, Global Industrial Technologies and other related entities (hereinafter the "debtors") sought bankruptcy relief in order to account for the 235,000 asbestos related claims and 169 silica related claims then pending against them.<sup>66</sup> Pursuant to Section 524(g), the debtors' plan established separate channeling injunctions and trusts to handle both the silica and asbestos related claims.<sup>67</sup> Further, the debtors' plan included insurance neutrality language similar to the reorganization plan in *Combustion Engineering*.<sup>68</sup>

In order to procure the necessary number of votes to confirm its plan,<sup>69</sup> the debtors, *inter alia*, solicited silica claimants from a list obtained from

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<sup>63</sup>*Id.* at 60 (emphasis omitted) (citing Transcript of Record at 47, *In re Leslie Controls, Inc.*, 437 B.R. 493 (Bankr. D. Del. Oct. 26, 2010) (No. 10-12199)). Notably, the insurers appealed the bankruptcy court's decision; however, before the reviewing court reached a decision, the parties agreed that Leslie would modify its plan in exchange for the withdrawal of the insurers' appeal. *See Davis & Plevin, supra* note 61, at 49.

<sup>64</sup>*In re Congoleum Corp.*, 414 B.R. 44, 55-57 (D.N.J. 2009) (citing *In re Congoleum Corp.*, 2009 WL 499262, at \*2 (Bankr. D.N.J. Feb. 26, 2009)) (affirming that the plan lacked insurance neutrality under *Combustion Engineering* because it "failed to preclude the Debtors from using any express or implied findings from the Bankruptcy Court case in [subsequent coverage disputes]").

<sup>65</sup>*See id.* at 57. Additionally, the court called attention to the bankruptcy court's finding that the debtors' plan violated several provisions in the insurers' policies, namely, the anti-assignment and the cooperative provisions, constituting an injury in fact. *Id.* at 56-57 (citing *Congoleum Corp.*, 2009 WL 499262, at \*2).

<sup>66</sup>*See In re Global Indus. Techs., Inc.*, 645 F.3d 201, 204-05 (3d Cir. 2011) (en banc). It is important to note, however, that the debtors' reorganization plan "did not identify silica-related liability as a motivation for seeking bankruptcy relief." *Id.* at 205.

<sup>67</sup>*See id.*

<sup>68</sup>*Id.* at 205-06. For pertinent insurance neutrality provisions in the debtors' plan, *see infra* Appendix I.

<sup>69</sup>11 U.S.C. § 524(g)(2)(B)(ii)(IV)(bb) (2006) (requiring a seventy-five percent vote in favor

another company's bankruptcy petition.<sup>70</sup> This led to a surge in silica claims succeeding the plan's original drafting.<sup>71</sup> As a result, the debtors ultimately received the margin of votes necessary to confirm its plan.<sup>72</sup> The majority of these votes, however, were considered "suspect" as they were submitted by attorneys representing both silica and asbestos claimants.<sup>73</sup>

### 1. Bankruptcy Court and District Court: Due to Insurance Neutrality, Insurers Lack Standing

The insurers sought to object to the debtors' plan, claiming that the silica trust and injunction "were the products of collusion with the asbestos claimants' counsel."<sup>74</sup> In response to these allegations, the bankruptcy court required the silica claimants to provide additional information.<sup>75</sup> From those submissions, the court found over 4,600 silica claims to be of concern.<sup>76</sup>

Notwithstanding the speculative nature of these claims,<sup>77</sup> the bankruptcy court confirmed the debtors' plan, finding the silica trust and injunction to be necessary to the debtors' reorganization.<sup>78</sup> Furthermore, the court deemed the plan insurance neutral, consequently causing it to hold the insurers lacked standing to object to the plan's confirmation.<sup>79</sup> "The [c]ourt . . . reasoned that any potential financial harm arising out of the assignments was too speculative because [the insurers] had not contributed and were not required to contribute 'anything' to the . . . Silica Trust and would still be able to assert their coverage defenses and contractual rights . . . ."<sup>80</sup> The district court affirmed the bankruptcy court's approval of the debtors' plan and its conclusion that the insurers lacked standing to contest the plan's confirmation.<sup>81</sup>

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of the asbestos settlement trust in order to confirm a plan encompassing a Section 524(g) trust).

<sup>70</sup>*Global Indus. Techs.*, 645 F.3d at 206.

<sup>71</sup>*Id.*

<sup>72</sup>*Id.*

<sup>73</sup>*Id.*

<sup>74</sup>*Global Indus. Techs.*, 645 F.3d at 206-07 ("[T]he Bankruptcy Court . . . ordered the silica claimants to provide supplemental information regarding their silica-related diagnoses, their exposure to [the debtors'] silica products, and any prior diagnoses of or claims for asbestos-related diseases.").

<sup>75</sup>*Id.*

<sup>76</sup>*Id.* at 207.

<sup>77</sup>*See id.* at 207-08 (listing the opposing insurers' arguments attacking the validity of the silica claims).

<sup>78</sup>*Global Indus. Techs.*, 645 F.3d at 208.

<sup>79</sup>*See id.*

<sup>80</sup>*Id.*

<sup>81</sup>*Id.*

## 2. Third Circuit Majority: Insurers Have Standing to Object to the Plan's Confirmation

On appeal, the Third Circuit, en banc, granted the insurers standing to object to the confirmation of the debtors' plan.<sup>82</sup> The court based its decision on two rationales: (1) the plan substantially altered the insurers' "quantum of liability" that they would be called to absorb; and (2) the suspect nature of the silica claims threatened to undermine the integrity of the bankruptcy court.<sup>83</sup>

### a. *The "Quantum of Liability"*

A majority of the court held the debtors' plan was not "'insurance neutral' in the same sense as was the plan at issue in *Combustion Engineering*."<sup>84</sup> The court reasoned that the plan at issue in *Combustion Engineering* did not "materially alter the quantum of liability that the insurers would be called to absorb" because the extent of the insurers' liability was fairly predictable.<sup>85</sup> Conversely, the plan in *Global Industrial Technologies* increased silica claims by more than twenty-seven times the pre-petition liability exposure rate, creating "an entirely new set of administrative costs, including the investigative burden of finding any meritorious suits in the haystack of potentially fraudulent ones."<sup>86</sup>

Although the court recognized that the debtors' plan preserved the insurers' rights and defenses, it nonetheless granted the insurers standing.<sup>87</sup> The court reasoned that the added administrative costs ensuing from the substantial increase in silica claims constituted a "tangible disadvantage," similar to that found in *Clinton v. City of New York*.<sup>88</sup>

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<sup>82</sup>*Global Indus. Techs.*, 645 F.3d at 212-16.

<sup>83</sup>*See id.* at 212-15.

<sup>84</sup>*Id.* at 212.

<sup>85</sup>*Id.* ("[T]he pre-petition quantum of asbestos liability was known for four decades . . . and moving the pre-petition asbestos claims out of the tort system and into a trust system did not increase in any meaningful way the insurers' pre-petition exposure to asbestos liability.")

<sup>86</sup>*Global Indus. Techs.*, 645 F.3d at 212, 214.

<sup>87</sup>*See id.* at 213-14 (explaining that even if the insurers "never pay a single dollar of indemnity," the magnitude of the potential liability effectively made them parties in interest).

<sup>88</sup>*See id.* The court based its decision on *Clinton v. City of New York*, 524 U.S. 417 (1998), interpreting the case to hold that "a tangible disadvantage to the affected party can lead to standing." *Global Indus. Techs.*, 645 F.3d at 212-13.

b. *The Integrity of the Bankruptcy Court*

Additionally, the court focused on the suspect circumstances surrounding the silica claims.<sup>89</sup> While the court acknowledged that the bankruptcy court investigated the merits of the silica claims, it nevertheless held that, notwithstanding the bankruptcy court's findings, "a more searching review of [the insurers'] allegations of collusion between the debtors and counsel for the silica claimants is warranted."<sup>90</sup> The court subsequently remanded the case to the bankruptcy court to further investigate the legitimacy of the silica claims.<sup>91</sup>

3. *The Global Industrial Technologies' Dissent*

The dissent in *Global Industrial Technologies* analyzed three basic principles: (1) the constitutional requirements for standing, (2) the insurance neutrality of the debtors' plan, and (3) the principles underlying the Code.<sup>92</sup>

a. *The Constitutional Requirements for Standing*

The dissent argued that, by granting standing to "parties who have no injury, either actual or contingent, [the majority departs] from the well-established requisite of an injury in fact, and it has broad deleterious implications for the jurisprudence of Article III standing."<sup>93</sup> The dissent reasoned there was no evidence supporting a finding that the insurers incurred or would incur an injury as a result of the debtors' reorganization plan.<sup>94</sup> Furthermore, by misconstruing the standing doctrine, the dissent

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<sup>89</sup>See *id.* at 214. The court summarized the questionable legitimacy of the silica claims as follows:

Not to put too fine a point on it, the assertion is that [the debtors] sold out [the insurers] by setting up a system in which they would pay for newly ginned-up silica claims in exchange for the asbestos claimants casting their votes in favor of the [debtors'] Plan. It is a profoundly serious charge and not without record support. Moreover, it is a charge that apparently no one has an incentive to pursue, other than the insurers slated to provide coverage to the . . . Silica Trust.

*Id.*

<sup>90</sup>*Id.* at 215.

<sup>91</sup>See *Global Indus. Techs.*, 645 F.3d at 215 (stating that the bankruptcy court should more deeply examine the allegations to ascertain whether the silica trust and injunction are reasonable and necessary to the reorganization).

<sup>92</sup>See *id.* at 216-20 (Nygaard, J., dissenting).

<sup>93</sup>*Id.* at 216 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 n.2 (1992)).

<sup>94</sup>*Id.*

accused the majority of "uproot[ing] long held and traditional principles of standing."<sup>95</sup>

The dissent took particular concern with the majority's interpretation of *Clinton*, arguing that *Clinton* should not have been construed to include those who "present nothing more than a possibility of future impacts."<sup>96</sup> Moreover, by stating that the debtors' plan *might* have a "tangible disadvantage" on the insurers because of a *possible* future impact on the insurers' "quantum of liability," the majority "lowers . . . the threshold for injury in fact to include anyone who can conjure up the mere risk of a future business impact."<sup>97</sup>

b. *Insurance Neutrality: The Importance of Precedent and Basic Contract Principles*

The dissent also emphasized the importance of precedent, finding that the language in the debtors' plan mirrored the insurance neutrality language in *Combustion Engineering*; therefore, the insurers should not have had standing to object to the plan's confirmation.<sup>98</sup> The dissent took particular concern with the majority's reasoning for departing from *Combustion Engineering*; that namely, the "quantum of liability" was greater in *Global Industrial Technologies* than in *Combustion Engineering*.<sup>99</sup> The dissent argued that this distinction fails and that the majority's use of the "quantum of liability" should not have been considered in the analysis.<sup>100</sup> Rather, the majority should have found that the insurance neutrality language in the debtors' plan preserved the insurers' rights and defenses as they held in *Combustion Engineering*.<sup>101</sup>

Additionally, relying upon basic contract principles, the dissent asserted that the insurance neutrality language fully preserved the insurers' contractual rights; therefore, the insurers suffered no contractual injury.<sup>102</sup>

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<sup>95</sup>*Global Indus. Techs.*, 645 F.3d at 219. The dissent further argued that "[i]t has been stretched beyond the breaking point when, as here, the plaintiff alleges only an injury at some indefinite future time, and the acts necessary to make the injury happen are at least partly within the plaintiff's own control." *Id.* (quoting *Lujan*, 504 U.S. at 564 n.2).

<sup>96</sup>*Id.* at 218-19.

<sup>97</sup>*Id.* at 219.

<sup>98</sup>*Global Indus. Techs.*, 645 F.3d at 218 (citing *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 218 (3d Cir. 2004)).

<sup>99</sup>*Id.*

<sup>100</sup>*See id.*

<sup>101</sup>*Id.* ("*Combustion Engineering's* characterization of these provisions as insurance-neutral is integral to its holding and must be followed here.>").

<sup>102</sup>*See Global Indus. Techs.*, 645 F.3d at 217-18 (stating that insurance neutrality language



Moreover, the dissent argued that an insurance company's fear that their obligations might be greater than originally projected is not beyond the normal course of an insurers' business.<sup>103</sup> Therefore, such fear does not constitute an injury sufficient to satisfy the standing requirements.<sup>104</sup>

c. *The Bankruptcy Code: Promoting Efficiency While Facilitating a Company's Re-emergence*

The dissent also stressed that, in remanding the case, the majority compromised the efficiency of the bankruptcy court by requiring the court to re-examine an issue it had already investigated.<sup>105</sup> By the same token, the dissent averred that the majority's holding "ensures that bankruptcy courts will, henceforth, be burdened with determining whether sufficient injury exists among a broad new class of persons who, to obtain party in interest standing, may now allege only a fear that future business dealings with the reorganized entity may result in less profit than projected."<sup>106</sup>

Furthermore, the dissent argued that the majority's remand imposed additional costs on a debtor already on the brink of insolvency.<sup>107</sup> The dissent urged that imposing such costs frustrates the intent of the Code<sup>108</sup>—namely, to "facilitat[e] the reorganization and rehabilitation of [a] debtor as an economically viable entity."<sup>109</sup>

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"ensure[d] that the contractual relationship between the insurers and insured emerges post-reorganization unchanged.").

<sup>103</sup>*See id.* at 219. The dissent argued that:

[T]o say that an insurance company is worried that its risk for future indemnity obligations might be larger than it projected when it established the insurance policy is another way of describing the leitmotif of the insurance industry within its normal course of business. That, at some point in the future, the scope of coverage determined by an insurer at a policy's inception may include liabilities that the insurer failed to consider when it priced the policy is of no moment to the bankruptcy proceedings. Moreover, even if an insurer may incur costs in conducting claim evaluations and other expenses in litigating those they deny, none of this puts the insurer outside of the milieu in which it operates day to day.

*Id.*

<sup>104</sup>*See id.*

<sup>105</sup>The dissent emphasized that:

[F]rom a practical perspective, the majority's remand will needlessly delay an already protracted proceeding to rehash a record that is already complete, a move that may very well imperil financing on which the reorganized entity is relying to succeed. This contravenes the intent of the Bankruptcy Code, and seriously undermines a process authorized by Congress to address asbestos claims.

*Global Indus. Techs.*, 645 F.3d at 217.

<sup>106</sup>*Id.* at 219-20.

<sup>107</sup>*See id.* at 217.

<sup>108</sup>*See id.*

<sup>109</sup>*In re Combustion Eng'g, Inc.*, 391 F.3d 190, 234 (3d Cir. 2004).

IV. EVALUATION: *GLOBAL INDUSTRIAL TECHNOLOGIES* MISSED THE MARKA. *A Potential Increase in the "Quantum of Liability" Should Not Trigger Standing*

Insurer standing should not turn on a potential increase in the "quantum of liability." Rather, as was articulated in *Combustion Engineering* and its progeny, insurer standing should depend on a case-by-case determination of whether a debtor's plan is (or is not) insurance neutral.<sup>110</sup> Doing so serves several objectives: (1) it is in agreement with the doctrine of standing;<sup>111</sup> (2) it remains consistent with precedent;<sup>112</sup> (3) basic contract principles remain intact;<sup>113</sup> (4) efficiency in the bankruptcy court is preserved;<sup>114</sup> and (5) it is in harmony with the purpose of the Code—to facilitate a debtor's re-emergence as a successful business.<sup>115</sup>

## 1. Standing Requirements

The United States Constitution requires a claimant to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant."<sup>116</sup> This element is not satisfied, however, if a plan is deemed insurance neutral.<sup>117</sup> This is because the insurer retains all of its rights and defenses in future claim disputes; therefore, the insurer is contractually in the exact same position that it was in pre-petition.<sup>118</sup> This argument is further supported by the notion that the insurer should have accounted for any potential increases in administrative costs when it entered into a contractual relationship with the insured.<sup>119</sup> Failure to

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<sup>110</sup>See *supra* Part III.

<sup>111</sup>See *supra* Part II.

<sup>112</sup>See *supra* Part III.

<sup>113</sup>See *supra* Part III.C.3.b.

<sup>114</sup>See *supra* Part III.C.3.c.

<sup>115</sup>See *supra* Part III.C.3.c.

<sup>116</sup>*Valley Forge Christian Coll. v. Am. United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (quoting *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 99 (1979)).

<sup>117</sup>See *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 217-18 (3d Cir. 2004).

<sup>118</sup>See *id.* at 209 (finding the plan was modified to clarify that the insurer's rights had not been impaired); see also *In re Global Indus. Techs., Inc.*, 645 F.3d 201, 217-18 (3d Cir. 2011) (Nygaard, J., dissenting) (noting that it was clear from the plan's language that it intended to emulate the insurance neutrality provisions found in *Combustion Engineering*, and as a result the insurers rights remained intact).

<sup>119</sup>See *Global Indus. Techs.*, 645 F.3d at 219 (explaining the scope of coverage determined at the policy's inception may include liabilities the insurer failed to consider when it set the price of the policy). The dissent in *Global Industrial Technologies* maintained that "[i]t has been stretched

account for such losses is not an injury brought on by the insured; rather, this is merely a loss in which the insurer failed to anticipate.<sup>120</sup> Accordingly, courts should not be burdened by an insurers' failure to foresee such future losses.

## 2. Remaining Consistent with Precedent

Remaining consistent with precedent is an important practice because parties frequently base their future conduct on prior court decisions.<sup>121</sup> This concept becomes evident after examining the line of cases following *Combustion Engineering* where several debtors drafted reorganization plans in reliance upon the *Combustion Engineering* court's decision.<sup>122</sup> In *Global Industrial Technologies*, however, the court sought to distinguish its case from *Combustion Engineering* by adding the "quantum of liability" standard.<sup>123</sup>

This, however, is a distinction without a difference and, consequently, kicks open the door of uncertainty. This is because the insurance neutrality language used in *Global Industrial Technologies* mirrored the plan's language in *Combustion Engineering*, and by failing to precisely define the "quantum of liability,"<sup>124</sup> *Global Industrial Technologies* leaves both insurers and businesses with several questions. Debtors, for example, are left with uncertainty regarding the extent to which a plan may alter an insurer's future administrative costs before rendering that insurer a "party in interest."<sup>125</sup> Debtors may also question whether *Global Industrial Technologies* will extend standing to anyone who can "conjure up the mere risk of a future business impact," as the dissent in *Global Industrial Technologies* forecasted.<sup>126</sup>

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beyond the breaking point when, as here, the plaintiff alleges only an injury at some indefinite future time, and the acts necessary to make the injury happen are at least partly within the plaintiff's own control." *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 n.2 (1992)).

<sup>120</sup>Note that this calls into question the element of causation. *See supra* Part.II.A.

<sup>121</sup>*See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 834, 844 (1992) (emphasizing the importance of *stare decisis* and individuals' reliance on prior court decisions).

<sup>122</sup>*See supra* Part.III.B.

<sup>123</sup>*See Global Indus. Techs.*, 645 F.3d at 212-14.

<sup>124</sup>*See id.* at 212.

<sup>125</sup>*See Carickhoff & Root, supra* note 10 ("It is likely that this decision will be widely cited by parties with tenuous grounds for standing as a basis to be heard in bankruptcy proceedings, at least until such time as the bankruptcy courts have had the opportunity to interpret and apply the [*Global Industrial Technologies*] decision.")

<sup>126</sup>*See Global Indus. Techs.*, 645 F.3d at 219 (Nygaard, J., dissenting).

### 3. The Preservation of Basic Contract Principles

The basic principle underlying freedom of contract is that sophisticated parties should be free to negotiate with limited judicial intervention.<sup>127</sup> Accordingly, in an insurer-insured relationship, the parties have already negotiated and agreed upon the terms of their respective policies. The *Global Industrial Technologies* decision, however, threatens to undermine this basic contract principle by holding that, notwithstanding a valid insurance neutrality provision, an insurer may still have standing to object to the confirmation of a plan.<sup>128</sup> An insurance neutrality provision, by its very meaning, preserves the rights and defenses of an insurer.<sup>129</sup> Therefore, insurers should not be able to object to a plan's confirmation when the contractual relationship between the parties to the insurance contract remains intact.

### 4. Efficiency in the Bankruptcy Court

A fundamental principle underlying the standing doctrine is to promote efficiency within the court system.<sup>130</sup> The *Global Industrial Technologies* decision compromises this principle by extending standing to a new class of persons—namely, to those who claim "only a fear that future business dealings with the reorganized entity may result in less profit than projected."<sup>131</sup> This argument is particularly relevant in light of the growing number of companies forced into bankruptcy due to mass tort litigation.<sup>132</sup>

### 5. Facilitating a Company's Re-emergence

Finally, the "quantum of liability" approach further burdens debtors already on the verge of insolvency.<sup>133</sup> In so doing, this approach frustrates a

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<sup>127</sup>See 16B AM. JUR. 2D *Constitutional Law* § 641 (2009).

<sup>128</sup>See *supra* Part III.C.2.

<sup>129</sup>See *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 209 (3d Cir. 2004); see also *Global Indus. Techs.*, 645 F.3d at 217-18 (Nygaard, J., dissenting) (indicating that the contractual relationship between an insured and insurer remains intact when insurance neutrality language is included in a plan).

<sup>130</sup>See *supra* Part II.

<sup>131</sup>*Global Indus. Techs.*, 645 F.3d at 219-20 (Nygaard, J., dissenting); see also Carickhoff & Root, *supra* note 10 ("While it is unclear whether the majority decision will have the far-reaching consequences that the dissent predicts, the majority decision [in *Global Industrial Technologies*] certainly invites an expanded notion of standing.").

<sup>132</sup>See *supra* note 1 and accompanying text.

<sup>133</sup>See *supra* Part III.C.3.c.

fundamental principle of the Code—to "facilitat[e] the reorganization and rehabilitation of [a] debtor as an economically viable entity."<sup>134</sup>

B. *The Integrity of the Bankruptcy Court—A Fundamental Principle*

As the court noted in *Global Industrial Technologies*, parties should be granted standing when suspect circumstances threaten the integrity of the bankruptcy court.<sup>135</sup> This principle is "based on procedural due process concerns that implicate the integrity of the bankruptcy court proceeding as a whole."<sup>136</sup> Furthermore, this principle has been widely applied because suspect circumstances affect the rights of parties and the resolution of issues in a bankruptcy proceeding.<sup>137</sup> As an integral means of preserving the credibility of bankruptcy proceedings, this principle should continue to be enforced in subsequent cases.

In light of the Third Circuit's holdings in *Combustion Engineering* and *Global Industrial Technologies*, parties are left with uncertainty as to the effects insurance neutrality language will have on an insurer's ability to challenge the confirmation of a particular plan.<sup>138</sup> In an attempt to ameliorate some of these uncertainties, this Note provides a possible solution: a two-prong test that courts should use to determine whether an insurer has standing to challenge a reorganization plan established pursuant to Section 524(g).

From the outset, it is important to note that debtors, insurers, and courts are all affected by the standing doctrine and each has different concerns. Debtors, for example, want an efficient, expedient bankruptcy process to facilitate its potential re-emergence.<sup>139</sup> Additionally, debtors must be cognizant that foreclosing upon insurers' ability to challenge a bankruptcy plan will inevitably result in higher premiums in order to account for potential future losses.<sup>140</sup> Insurers, on the other hand, seek fairness in a bankruptcy proceeding and to avoid the burden of an avalanche of mass tort

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<sup>134</sup>*Combustion Eng'g*, 391 F.3d at 234.

<sup>135</sup>*See Global Indus. Techs.*, 645 F.3d at 214-15; Part III.C.2.b.

<sup>136</sup>*In re Congoleum Corp.*, 426 F.3d 675, 685 (3d Cir. 2005).

<sup>137</sup>*See, e.g., id.* (finding that the retention of special insurance counsel would affect both the insurers, because it involved the resolution of issues directly connected to them, and the fairness of the entire bankruptcy proceeding).

<sup>138</sup>*See supra* Part IV.A.2.

<sup>139</sup>*See supra* Parts IV.A.4-5.

<sup>140</sup>*See Global Indus. Techs.*, 645 F.3d at 214 (explaining that a "Plan-triggered explosion of new claims" creates a new set of administrative costs that are "enormous," including the investigation of meritorious suits).

claims.<sup>141</sup> This proposition is supported by the notion that, when debtors file for bankruptcy, the number of mass tort claimants often surges.<sup>142</sup> Further, bankruptcy courts seek to promote efficiency and fairness in bankruptcy proceedings in order to preserve the integrity of the bankruptcy court as a whole.<sup>143</sup>

## V. SOLUTION: A TWO-PRONG TEST TO DETERMINE INSURER STANDING

### A. *Step One: Is the Plan Insurance Neutral?*

The first step in this two-prong test is determining whether a particular reorganization plan is, in fact, insurance neutral. Establishing whether the language in a particular plan adequately preserves an insurer's rights and defenses must be done on a case-by-case basis, subject to abuse of discretion review.<sup>144</sup> Courts should make this determination with the principles of consistency and dependability in mind. Accordingly, courts should presume plans to be insurance neutral when debtors include language previously deemed insurance neutral.<sup>145</sup>

This is not to say that boilerplate insurance neutrality provisions should be automatically upheld if drafted into a particular plan. Rather, this merely implies that courts should only go so far as determining whether an insurer's post-confirmation contractual rights are in any way affected by a particular plan.<sup>146</sup> By the same token, courts should be loath to inquire into

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<sup>141</sup>See, e.g., Davis & Plevin, *supra* note 61, at 48 (indicating that the insurers in *Leslie Controls* were concerned that confirmation of the plan would result in their paying more claims at a faster rate than they would have to pay in the tort system).

<sup>142</sup>See, e.g., *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 203 (3d Cir. 2004) (finding that since Combustion's bankruptcy filing in 2002, asbestos claims against Combustion increased from 19,000 in 1990 to 79,000 in 2002).

<sup>143</sup>See *supra* Parts IV.A.3-4.

<sup>144</sup>See *supra* Part III.B.2. In *Deckard v. Interstate Batteries Corp.* (*In re Interstate Batteries Corp.*), the court explained that "the bankruptcy court abuses its discretion when it fails to apply the proper legal standard or bases its order on findings of fact that are clearly erroneous." 446 B.R. 336, 341 (W.D. Mo. 2011) (quoting *Stalnaker v. DLC, Ltd.*, 376 F.3d 819, 825 (8th Cir. 2004)). Determining whether a plan is insurance neutral depends upon the facts of each particular case. Therefore, this determination is subject to abuse of discretion review.

<sup>145</sup>See *infra* Appendix I for more guidance as to this inquiry.

<sup>146</sup>For example, in a recent Ninth Circuit decision, *In re Thorpe Insulation Co.*, the court was confronted with a plan established pursuant to Section 524(g) of the Code. 677 F.3d 869, 877 (9th Cir. 2012). The plan at issue in *Thorpe Insulation Co.* contained a section stating that it is "insurance neutral" because it preserves all "Asbestos Insurance Defenses." *Id.* at 878. In light of this language, the bankruptcy court and district court held that the plan was insurance neutral. *Id.* at 879. On appeal, the Ninth Circuit looked beyond the boilerplate insurance neutrality language, focusing on whether the plan at issue affected the insurers' "real world" post-confirmation

the "quantum of liability" of potential administrative expenses. This is because the quantum of liability inquiry leaves debtors with uncertainty when drafting reorganization plans.<sup>147</sup> In the same vein, any potential added administrative costs should have already been accounted for in the debtor's insurance policy.<sup>148</sup>

*B. Step Two: Is There Substantial Evidence of Suspect Circumstances Warranting a More Searching Look into the Plan's Merits?*

Courts have expressed that where suspect circumstances undermine the integrity of the bankruptcy court, a more searching look into the merits of a plan is warranted.<sup>149</sup> Step two of this analysis accounts for this principle by requiring courts to grant standing to insurers in order to challenge such suspect circumstances in bankruptcy proceedings. Further, in order to preserve fairness and efficiency in bankruptcy proceedings, the extent to which discovery is conducted in response to allegations of suspect circumstances should be limited by the bankruptcy court's discretion, only to be set aside for an abuse of the court's discretion.<sup>150</sup>

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contractual rights and defenses. *Id.* at 885-86. Notably, the court did not make reference to the Third Circuit's "quantum of liability" standard or discuss any potential administrative costs the insurers might face. In holding that the plan was not insurance neutral, the Ninth Circuit stated: "in apparent contradiction of the neutrality characterization, the plan includes four exceptions to the otherwise preserved defenses." *Id.* at 878. After examining the four exceptions, the *Thorpe Insulation Co.* court held the plan impacted the appealing insurers' post-reorganization rights and defenses. *Id.* at 887. In particular, the plan stated that a defense would not be permitted:

(a) that is based on the assertion that the transfer of the Asbestos Insurance Rights to the Trust . . . is invalid, unenforceable or otherwise breaches the terms of any Asbestos Insurance Policy, Asbestos Insurance Settlement, or any other agreement with any Asbestos Insurer, (b) that has been released, waived, altered or otherwise resolved, in full or in part, in any Asbestos Insurance Settlement, or any other agreement with any Asbestos Insurer, (c) to the extent affected by application of principles of res judicata, collateral estoppel, claim preclusion or issue preclusion, or (d) premised upon the commencement of Chapter 11 Cases under Section 301 of the Bankruptcy Code.

*Id.* at 878-79. The court proceeded to compare the plan at issue with the plan deemed insurance neutral in *Combustion Engineering*. In distinguishing the disputed plan in *Thorpe Insulation Co.* with the plan in *Combustion Engineering*, the Ninth Circuit held that "the plan in *In re Combustion Engineering* was vastly different. There, the plan explicitly preserved all insurance defenses except for the assignment clauses in the insurance contracts. Here, the plan contains exceptions to insurance defenses that go beyond the anti-assignment clause exception." *Id.* at 885 n.8.

<sup>147</sup>See *supra* Part IV.A.

<sup>148</sup>See *supra* Part IV.A.

<sup>149</sup>See *supra* Part IV.B.

<sup>150</sup>See *supra* note 144 for a discussion of the abuse of discretion standard of review. A bankruptcy court's decision to conduct further discovery is conditioned upon the facts of each case before the court. Accordingly, this decision to conduct further discovery is subject to abuse of discretion review.

## VI. CONCLUSION

The Third Circuit's decision in *Global Industrial Technologies* has effectively muddied the waters of judicial analysis with respect to insurer standing in the bankruptcy context. Specifically, debtors, insurers, and courts are left with several questions when confronted with a reorganization plan utilizing Section 524(g) of the Code. This uncertainty is of paramount concern, particularly in light of the growing number of bankruptcies caused by asbestos, silica, benzene, and other mass tort-related claims. The proposed two-prong test articulated in this Note attempts to mollify many of these concerns while accounting for the importance of precedent, the requirements for standing, and the fundamental principles underlying both the Code and contract law. Additionally, this test accounts for the different concerns of all parties to such a bankruptcy proceeding.

*Peter I. Tsoflias*



## APPENDIX I

*Combustion Engineering*—Pertinent Plan Provisions:

The super-preemptory provision as modified by the District Court:

[N]otwithstanding anything to the contrary in this Order, the Plan or any of the Plan Documents, nothing in this Order, the Plan or any of the Plan documents (including any other provision that purports to be preemptory or supervening), shall in any-way operate to, or have the effect of, impairing the insurers' legal, equitable or contractual rights, if any, *in respect of any claims (as defined by section 101(5) of the Bankruptcy Code)*. The rights of insurers shall be determined under the Subject Insurance Policies or Subject Insurance Settlement Agreements, *and under applicable law* (emphasis added to show District Court's changes).

*In re Combustion Eng'g, Inc.*, 391 F.3d 190, 216 n.25 (3d Cir. 2004).

The "neutrality" provision:

Nothing in the Plan or in the Confirmation Order shall preclude any Entity from asserting in any proceeding any and all claims, defenses, rights or causes of action that it has or may have under or in connection with any Subject Insurance Policy or any Subject Insurance Settlement Agreement. 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 and the Subject Insurance Settlement Agreements, including, but not limited to, any and all such claims, defenses, rights or causes of action based upon or arising out of Asbestos PI Trust Claims that are liquidated, resolved, discharged, channeled, or paid in connection with the Plan.

*Id.* at 216-17 n.26.

*Pittsburgh Corning Corporation*—Second Amended Plan of Reorganization:

[A]ny estimation of asbestos liabilities of the Debtor and/or PPG and/or Corning and/or any entity affiliated with or related to the Debtor, PPG or Corning that occurs in the context of this bankruptcy proceeding shall not be binding and shall have no collateral estoppel effect on the PPG Non-Participating Insurers, the Corning Plan Insurers or the Corning Insurers (collectively, the Insurers) or on the Corning Entities or the PPG Entities regarding the insurance coverage obligations of the Insurers in any coverage dispute or coverage litigation. The Insurers will not conduct any discovery related to such estimation in this Bankruptcy Case, nor shall the Insurers present any evidence or otherwise participate in any hearing or briefing in the Bankruptcy Case relating to such estimation (or voluntarily provide any information, assistance or cooperation or briefing relating to such estimation to anyone that is disputing that issue).

*In re Pittsburgh Corning Corp.*, 417 B.R. 289, 316 n.46 (Bankr. W.D. Pa. 2006) (internal quotation marks omitted).

*Leslie Controls*—Pertinent Plan Provisions:

(1) the forum for a coverage action is a nonbankruptcy court, (2) the neutrality provision can be used by either side in coverage litigation, (3) the parties are required to stipulate that the neutrality provision is binding upon them in coverage litigation and (4) "nothing in this proceeding could be used as evidence of any determination regarding the insurers' liability for coverage obligation or any claim."

Harron & Kohut, *supra* note 35 (emphasis omitted) (citations omitted) (citing Transcript of Record at 15-16, *In re Leslie Controls, Inc.*, 437 B.R. 493 (Bankr. D. Del. Oct. 26, 2010) (No. 10-12199)).

*Global Industrial Technologies*—Third Amended Plan of Reorganization:

4.4.1 No Preclusion from Asserting Claims, etc. Nothing in the GIT Plan, in any of the Plan Documents, or in the Confirmation Order shall preclude any Entity from asserting in any

proceedings any and all claims, defenses, rights, or causes of action that it has or may have under or in connection with any of the APG Silica Trust Policies, except claims, defenses, rights or causes of action held by an insurer that are based on or arise out of any "anti-assignment" provision(s) in such policies. Subject to the foregoing, and to the provisions of Section 4.4.2 and 4.4.3, nothing in the GIT Plan, in any of the Plan Documents, or in 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 APG Silica Trust Policies, including (but not limited to) any and all such claims, defenses, rights or causes of action based upon or arising out of any APG Silica Trust Claim that is liquidated, resolved, discharged, channeled or paid in connection with the GIT Plan.

4.4.2 No Impairment of Rights. Notwithstanding anything to the contrary in the GIT Plan, in any of the Plan Documents, or in the Confirmation Order, nothing in the GIT Plan, the Plan Documents or the Confirmation Order (including any other provision that purports to be preemptory or supervening) shall in any way operate to, or have the effect of, impairing any insurer's legal, equitable or contractual rights under the APG Silica Trust Policies in any respect other than the enforcement of any "anti-assignment" provision(s) in such policies. Subject to the foregoing, the rights of the insurers shall be determined according to the terms of the APG Silica Trust Policies, as applicable.

4.4.3 No Assertion of Preclusion, etc. Notwithstanding anything to the contrary in the GIT Plan, in any of the Plan Documents, or in the Confirmation Order, under no circumstances shall any person or Entity be permitted to assert issue preclusion or claim preclusion, waiver, estoppel, consent, or any other legal or equitable theory against any insurer under any APG Silica Trust Policy as to the existence, enforceability or amount of any APG Silica Claim or Demand on the basis of the submission, valuation, resolution and/or payment of any APG Silica Trust Claim by the APG Silica Trust. The submission of an APG Trust Claim by a claimant, and valuation, resolution and/or payment of an APG Silica Trust Claim by the APG Silica Trust, shall be wholly without

prejudice to any and all rights of the parties in all other contexts or forums, and shall not be deemed (unless otherwise determined by a Court of competent jurisdiction) to be a triggering event for liability under any APG Silica Trust Policy.

*In re* Global Indus. Techs., Inc., 645 F.3d 201, 217-18 (3d Cir. 2011) (citations omitted).