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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Case No. 04-15739 (SMB)
	Chapter 11
QUIGLEY COMPANY, INC.	
	Dist. Ct. Civil Action No. 1:06-cv-03077 (KMW) (DFE)
Debtor.	

ACE INSURERS' OBJECTION TO THE MOTION OF QUIGLEY AND PFIZER FOR AN ORDER PARTIALLY WITHDRAWING THE REFERENCE TO ENABLE THE DISTRICT AND BANKRUPTCY COURTS TO SIT JOINTLY AT THE CONFIRMATION HEARING

The "ACE Insurers"[1] hereby object to the motion (the "Motion") of Quigley

[1] The "ACE Insurers" are Century Indemnity Company, Insurance Company of North America, Highlands Insurance Company, Westchester Fire Insurance Company, Central National Insurance Company of Omaha, through its managing general agent Cravens Dargan & Co., Pacific (continued…)

Company, Inc. (the "Debtor") and Pfizer Inc. (collectively, the "Movants") requesting this Court to partially withdraw the reference of the Debtor's Chapter 11 case to permit this Court to: (i) preside jointly with the Bankruptcy Court at the confirmation hearing with respect to Debtor's plan of reorganization (the "Plan"); (ii) enter the permanent injunctions under § 524(g) of the Bankruptcy Code in connection with confirmation of the Plan; and (iii) issue or affirm an order confirming the Plan under § 524(g)(3)(A) of the Bankruptcy Code.

The Motion should be denied. No provision of the Bankruptcy Code, the Judicial Code, or any other statute or rule permits a bankruptcy judge and a district judge to preside jointly at a single confirmation hearing. Movants' proposal is therefore an invitation to error, which would prolong this bankruptcy case and be costly to the estate. Apart from the lack of any statutory authorization for the procedure proposed by Movants, it would be unworkable as a practical matter for a bankruptcy judge and a district judge to preside jointly at a single confirmation hearing – as experience in other asbestos bankruptcy cases demonstrates.

BACKGROUND

I. BANKRUPTCY JURISDICTION BACKGROUND

Title 28 of the U.S. Code (the "Judicial Code") confers jurisdiction over bankruptcy cases upon the district courts. *See* 28 U.S.C. § 1334(a)-(b). A district court is authorized by statute to refer "any or all cases under title 11 and any or all proceedings arising

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Coast, and Motor Vehicle Casualty Company through its managing general agent Cravens Dargan & Co., Pacific Coast. Certain of the ACE Insurers are creditors of the estate, having filed proofs of claim against Quigley which have not been objected to. All of the ACE Insurers issued insurance to Pfizer, which Quigley and Pfizer each assert is obligated to provide coverage for asbestos claims. By agreement with Quigley, the ACE Insurers' deadline for filing objections to the Plan has been extended to and including May 5, 2006.

under title 11 or arising in or related to a case under title 11" to the "bankruptcy judges for the district." 28 U.S.C. § 157(a). This Court, by standing order dated July 10, 1984, automatically refers all bankruptcy cases to the bankruptcy court. Pursuant to this 1984 standing order, Quigley's bankruptcy case was referred to the bankruptcy court.

Once a bankruptcy case is referred to the bankruptcy court, the power of bankruptcy judges to issue rulings and decisions depends on the nature of the particular matter. First, bankruptcy judges have authority to "hear and determine . . . all core proceedings," and they "may enter appropriate orders and judgments" in such matters, subject to appellate review by the district court. *See* 28 U.S.C. §§ 157(b), 158. "[C]onfirmations of plans" is specifically listed as a "core proceeding." 28 U.S.C. § 157(b)(2)(L).

Second, with respect to matters that are not "core proceedings," bankruptcy judges may "hear" such proceedings and submit proposed findings of fact and conclusions of law to the district court. 28 U.S.C. § 157(c)(1). Any final order or judgment in the matter shall be entered by the district judge following de novo review of "those matters to which any party has timely and specifically objected." *Id.* Because plan confirmation is explicitly a "core" proceeding, the power of bankruptcy judges in non-core proceedings is not directly pertinent to the Motion.

Once a bankruptcy case is referred to the bankruptcy court, there are only two paths by which a district court may exercise jurisdiction over a core bankruptcy proceeding. First, the district court has the power to withdraw the reference from the bankruptcy court. Under 28 U.S.C. § 157(d), the "district court may withdraw, in whole or in part, any case or proceeding referred under this section…for cause shown." 28 U.S.C. § 157(d). The law makes clear that once the reference is withdrawn, "the matter [is] decided from the beginning by the

district court." In re Int'l Nutronics, 28 F.3d 965, 969 (9th Cir. 1994). The bankruptcy court ceases to have any involvement in the matter once the reference is withdrawn.

The second way in which a district court may exercise jurisdiction over a core bankruptcy matter is on appeal from a bankruptcy court's final order or judgment. *See* 28 U.S.C. § 158 (appeals from final orders and judgments); Fed. R. Bankr. P. 8001-8020 (rules applicable to appeals of core bankruptcy matters to the district courts). This path assumes, of course, that the matter was tried in the bankruptcy court without the involvement of the reviewing district court.

Accordingly, there is no basis for "shared" or "joint" jurisdiction over a particular core bankruptcy proceeding. Either (i) the matter has been referred to the bankruptcy court and not withdrawn, in which case the bankruptcy court has jurisdiction to try and decide the matter, and the district court's involvement comes, if at all, upon appeal from the bankruptcy court, or (ii) the matter has been withdrawn from the bankruptcy court, in which case the matter is tried in the first instance in the district court, with the bankruptcy court having no involvement whatsoever.

Movants are requesting that this Court adopt a procedure that is not authorized by any of these provisions, or any other provision of law. Tellingly, the Motion is devoid of citation to any statute or rule purporting to authorize the bankruptcy court and district court to "simultaneously preside" over a "unitary" confirmation hearing. (Motion at p. 1; Brief in Support of Motion ("Br.") at 3.) As demonstrated above, Congress established a statutory scheme under which core bankruptcy matters would be tried and decided in the bankruptcy court or the district court, but not both at the same time.

II. STATUTORY BACKGROUND: THE REQUIREMENTS OF § 524(g).

The special asbestos trust provision of the Bankruptcy Code, located in 11 U.S.C. § 524(g), was designed so that asbestos defendants and those having derivative liability for claims against such asbestos defendants could achieve a permanent resolution of their liability for not only current asbestos claims, but also future asbestos claims (termed "demands" by the statute, *see* § 524(g)(5)). *See* In re Combustion Eng'g, Inc., 391 F.3d 190, 234 (3d Cir. 2004).

The Code does this by authorizing issuance, as part of an order confirming a Chapter 11 plan, of a "channeling injunction" that "channels" future claims away from the debtor to a trust established pursuant to the requirements of § 524(g). *See, e.g.*, *id.* at 234-5. Such "channeling injunctions" enable qualifying debtors to resolve the future asbestos-related demands of persons who do not presently hold "claims" (as defined in § 101(5) of the Code) by allowing such demands to be "channeled" to a trust that is designed to pay such demands in the same way that similar present claims are paid. Section 524(g) also permits certain future claims against qualifying ***non***-debtors to be cut-off as well, if such claims are derivative of the claims against the debtor. 11 U.S.C. § 524(g)(4)(A)(ii); Combustion Engineering, 391 F.3d at 234.

In view of the extraordinary nature of the relief afforded by § 524(g), particularly with respect to terminating the rights of absent future claimants, Congress provided that, to be valid and enforceable, the confirmation order relating to a plan of reorganization seeking a channeling injunction must be "issued or affirmed by the district court that has jurisdiction over the reorganization case." 11 U.S.C. § 524(g)(3)(A). In other words, the channeling injunction will not be valid and enforceable if it is neither issued nor affirmed by an Article III district judge.

Congress' use of the phrase "issued or affirmed by the district court" is perfectly

consistent with the bankruptcy jurisdiction scheme described above. If the district court withdraws the reference of the confirmation hearing, it may "issue" the confirmation order if it concludes that the requirements of §§ 1129(a) and 524(g) of the Bankruptcy Code have been satisfied.[2] If the district court does not withdraw the reference, the bankruptcy court would "issue" the confirmation order and the district court may "affirm" it on appeal.

ARGUMENT

NO PROVISION OF LAW ALLOWS A DISTRICT COURT AND A BANKRUPTCY COURT TO PRESIDE JOINTLY OVER A SINGLE CONFIRMATION HEARING

As demonstrated above, the Judicial Code does not authorize bankruptcy judges and district judges to sit together at a single confirmation hearing. If a matter is referred to the bankruptcy judge and the reference is not withdrawn, then the bankruptcy judge has the power to conduct the hearing and issue a final order – and the district judge's sole permissible role is to act as a reviewing court, on appeal from any final order entered by the bankruptcy judge. If the district judge withdraws the reference, then the bankruptcy judge has no role to play in the hearing – the district judge has the power and responsibility to conduct the hearing and issue the confirmation order.

Movants' proposal cannot be squared with these statutory requirements. If this Court withdraws the reference in order to conduct the confirmation hearing, the bankruptcy judge is not permitted to have any role in the hearing. By contrast, if the bankruptcy judge is to

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[2] Because the "channeling injunction" authorized by § 524(g) supplements the discharge granted to debtors whose Chapter 11 plans are confirmed, an asbestos debtor seeking issuance of a § 524(g) channeling injunction must separately satisfy the ordinary confirmation requirements of § 1129(a). *See, e.g.*, Combustion Engineering, 391 F.3d at 234.

have a role in the confirmation hearing, then this Court's sole permissible role would be to sit as an appellate court, reviewing the bankruptcy court's proceedings under the standards set forth in Bankruptcy Rule 8013.

Under Movants' proposal, it is entirely unclear what roles this Court and the bankruptcy court would each be serving during the confirmation hearing, or where one court's responsibility would end and the other's begin. For example, if this Court would be responsible for conducting the hearing, ruling on objections, and issuing the confirmation order, what would the bankruptcy judge be doing during the hearing? And if the bankruptcy judge were responsible in the first instance for these matters, why is it necessary for this Court to also preside at the hearing?

Movants argue that this Court and the bankruptcy court should preside jointly at the confirmation hearing in order to avoid this Court having to conduct the confirmation hearing all over again to determine whether to issue or affirm the confirmation order. (Br. at 10-11.) But Movants' argument entirely misconstrues the proper roles of the bankruptcy court and the district court under the Judicial Code. If the confirmation hearing is conducted by the bankruptcy judge, then this Court would not "repeat the process" of hearing "extensive testimony, cross-examination, and physical evidence." (Br. at 11, 10.) Rather, the record would be assembled and transmitted to this Court for review (Fed. R. Bankr. P. 8006, 8007), and appellate briefs would be filed (Fed. R. Bankr. P. 8009, 8010). This Court would not conduct a new confirmation hearing but, instead, would hear an appellate oral argument (Fed. R. Bankr. P. 8012). Following oral argument, this Court would conduct an appellate review of the record created during the confirmation hearing and consider whether to affirm the bankruptcy judge's

order under the standards of Rule 8013.[3]

Although § 524(g) states that a channeling injunction must be "issued or affirmed" by the district court, it does not purport to override the provisions of 28 U.S.C. §§ 157 and 158 regarding how bankruptcy matters can be brought to the district court. In fact, § 524(g) perfectly dovetails with the existing statutory scheme established by the Judicial Code: if the district court withdraws the reference to conduct the confirmation hearing itself, then it would "issue" the confirmation order and channeling injunction; by contrast, if the reference remains in the bankruptcy court, the district court would "affirm" the confirmation order and channeling injunction issued by the bankruptcy court. Nothing in § 524(g) provides that these Judicial Code provisions can be bypassed to promote Movants' sense of "judicial economy." (Br. at 11.)

If speed and efficiency are most important to Movants, they should ask this Court to withdraw the reference as to the confirmation hearing – in which case the hearing will be conducted entirely by this Court, without any involvement by the bankruptcy court. If, on the other hand, Movants believe it is important that the experience and expertise of the bankruptcy court be available during the confirmation hearing, they should withdraw this motion and let the confirmation hearing proceed under the sole control of the bankruptcy judge – and then, if the bankruptcy court orders the plan confirmed, ask this Court to affirm the

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[3] Movants' argument appears to confuse the statutory provisions relating to "core proceedings" such as a confirmation hearing with those applicable to non-core proceedings. In non-core proceedings, the district court is required to conduct a de novo review of those matters to which a party has timely and specifically objected. 28 U.S.C. § 157(c)(1); Fed. R. Bankr. P. 9033. Such de novo review may, but is not required to, involve the taking of additional evidence. Fed. R. Bankr. P. 9033(d). There is no provision in the portion of the Bankruptcy Rules pertaining to appellate review of final orders or judgments in core bankruptcy matters for the district court to hear additional evidence on appeal.

confirmation order and channeling injunction. But there is no statutory support for the hybrid procedure Movants propose here.

MOVANTS' PROPOSED PROCEDURE WOULD NOT LEAD TO ANY EFFICIENCY SAVINGS OR JUDICIAL ECONOMY

Movants argue that the procedure they ask this Court to adopt would promote efficiency and judicial economy – but nothing could be farther from the truth.

First, Movants' procedure virtually ensures that the confirmation hearing would be conducted twice – once now, and a second time after any resulting confirmation order is reversed on appeal for failure to comply with the requirements of the Judicial Code. Movants breezily advise this Court that "[t]he creditors of Quigley's estate have voted in the requisite numbers and amounts to accept the Plan" (Br. at 2), but do not disclose that, so far, more than ten separate parties – including asbestos claimants, secured creditors, and insurers – have objected to Quigley's plan. These objections are not merely technical in nature, but attack the good faith of the plan and assert that if the votes are properly tallied, Quigley in fact does ***not*** have the requisite votes to confirm the plan. As a result of these heated objections, the chances are quite high that the confirmation hearing will be a contested hearing, followed by a slew of appeals if the plan is confirmed. Given this reality, considerations of efficiency and judicial economy would counsel this Court to choose a path that hews closely to the jurisdictional rules set out by Congress, rather than an inventive path that needlessly creates appellate issues.

Second, there are major practical problems with what Movants propose. Suppose, for a moment, that this Court and the bankruptcy court did, in fact, preside jointly at the confirmation hearing. Which judge would rule on objections? What if both judges ruled on a particular objection, but disagreed on their ruling – how would the dispute be resolved, and when – during the hearing, or on appeal?

And the problems would not end once the hearing is over. If the bankruptcy judge issues the confirmation order, would it then be appealed to the same district judge who presided jointly with the bankruptcy judge at the confirmation hearing? That would put this Court in the unprecedented and entirely improper position of reviewing, on appeal, its own rulings. Nor would the problems be solved if any appeal went to another district judge, since there is no statutory predicate to allow one district court to exercise appellate review over the rulings of another. And if the bankruptcy judge's confirmation order could not properly be appealed to the district court, how would any appeals reach the Court of Appeals, given that circuit courts do not have jurisdiction over rulings by bankruptcy judges serving as trial judges? *See* 28 U.S.C. § 158(d).[4]

These concerns are hardly theoretical, as experience demonstrates.

In In re J.T. Thorpe Co., No. 02-41487 (Bankr. S.D. Tex.), the bankruptcy judge and district court judge jointly presided at the confirmation hearing. Just as Movants propose now, the district court had partially withdrawn the reference to consider whether to enter a § 524(g) permanent injunction and whether to issue or affirm the order confirming a plan of reorganization and left the remaining issues under the jurisdiction of the bankruptcy court. (*See*

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[4] If this Court rather than the bankruptcy court were to issue the confirmation order following a hearing at which the two courts jointly presided, other questions would be raised, such as: why was the bankruptcy judge presiding over a confirmation hearing at which it had no responsibility? Bankruptcy judges are not permitted to play a "master" role in core proceedings such as confirmation hearings. *See, e.g.*, Order Declining To Adopt Report And Recommendation Of Bankruptcy Judge To Withdraw Reference, In re Western Asbestos Co., No. 03-0989-MJJ (N.D. Cal. Sept. 25, 2003) (Exh. A hereto). If the roles of the two courts were divided in some manner – *e.g.*, the bankruptcy judge deciding if the § 1129(a) confirmation requirements were met, and this Court deciding if the separate requirements of § 524(g) were satisfied – the same problems arise, namely: how could this Court (or any other judge of this Court) properly exercise appellate jurisdiction over the bankruptcy judge's rulings given that this Court jointly presided at the hearing?

Exh. B). Later, the bankruptcy court issued a confirmation order (Exh. C) and, during the ten-day bankruptcy appeal period, the district court issued a separate confirmation order (Exh. D). The bankruptcy court's confirmation order was appealed to the district court, where it was assigned to the same judge who presided at the confirmation hearing. The appellants then moved to recuse the district judge from hearing the appeal of a bankruptcy court order issued following a hearing at which the district judge herself had presided. At the same time, the appellants appealed the district court's confirmation order to the Fifth Circuit. As a result, the same hearing was on appeal to two different courts at the same time. Ultimately, the Fifth Circuit had to exercise its extraordinary mandamus power to try to bring some order to the confusion. *See* In re American Motorists Ins. Co., No. 03-20112 (5th Cir. Feb. 18, 2003) (Exh. E).

A similar mishmash could result here. The Court could avoid all these problems by adhering to the statutory dictates and following the lead of most courts in asbestos bankruptcy matters – either decline to withdraw the reference, leaving the confirmation hearing in the capable hands of the bankruptcy judge, or withdraw the reference and conduct the confirmation hearing in this Court in the first instance, without the bankruptcy judge having any involvement. [5]

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[5] Movants note that in some asbestos bankruptcy cases, bankruptcy judges and district judges have sat jointly at confirmation hearings. In the vast majority of asbestos bankruptcy cases, however, bankruptcy judges conduct the confirmation hearing by themselves, with the district court later deciding whether to affirm any channeling injunction issued under § 524(g). A sampling of such cases includes: In re Combustion Eng'g, Inc., 391 F.3d 190 (3d Cir. 2004), *rev'g* In re Combustion Eng'g, Inc., 295 B.R. 459 (Bankr. D. Del. 2003) (bankruptcy court sat separately at confirmation hearing; on appeal, district court affirmed channeling injunction recommended by bankruptcy court; district court order reversed on appeal); In re Armstrong World Indus., Inc., 432 F.3d 507 (3d Cir. 2005), *aff'g* In re Armstrong World Indus., Inc., 320 B.R. 523 (D. Del. 2005) (bankruptcy court sat separately at confirmation hearing; district court reversed bankruptcy court's (continued…)

CONCLUSION

This Court should reject Movants' attempt to bring confusion and chaos to what should be an orderly procedure. The Judicial Code clearly sets out what should happen here: either this Court should withdraw the reference and try the confirmation hearing itself, or it should deny the motion to withdraw the reference and consider the bankruptcy court's rulings on appeal. It should not accept Movants' invitation to create an extra-statutory procedure that, rather than promote efficiency and economy, would foster completely avoidable appellate issues and preclude the very efficiencies Movants claim they want to obtain.

Movants' motion for partial withdrawal of the reference should be denied.

DATED: May 3, 2006

Respectfully submitted,

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recommendation of confirmation, and circuit court affirmed the district court's ruling); In re A.P.I., Inc., No. 05-30073 (Bankr. D. Minn.) (bankruptcy court sat separately at confirmation hearing; its confirmation order is presently on appeal to the district court); In re Babcock & Wilcox Co., No. 00-10992 (Bankr. E.D. La.) (bankruptcy court sat separately at confirmation hearing; its confirmation order was later affirmed by the district court); In re Kaiser Aluminum Corp., No. 02-10429 (Bankr. D. Del.) (bankruptcy court sat separately at confirmation hearing; its confirmation order is presently on appeal to the district court); In re Western Asbestos Co., No. 02-46284-86, (Bankr. N.D. Cal.) (bankruptcy court sat separately at confirmation hearing; its confirmation order was affirmed on appeal). Alternatively, this Court could follow the lead of In re Fuller-Austin Insulation Co., 1998 WL 812388 (D. Del. Nov. 10, 1998), and conduct the confirmation hearing itself, without any involvement by the bankruptcy judge.

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