

No. 03-4212

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

IN RE KENSINGTON INTERNATIONAL LIMITED AND SPRINGFIELD ASSOCIATES, LLC,
PETITIONERS
(RELATED TO U.S. BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE)
(No. 00-3837)

ON PETITION FOR WRIT OF MANDAMUS TO JUDGE ALFRED M. WOLIN,
UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF NEW JERSEY,
SITTING BY DESIGNATION
IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

RESPONSE OF THE OFFICIAL COMMITTEE OF ASBESTOS PERSONAL INJURY
CLAIMANTS OF ARMSTRONG WORLD INDUSTRIES, INC., ET AL. TO THE STATEMENT
OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF ARMSTRONG WORLD
INDUSTRIES, INC., ET AL., IN CONNECTION WITH THE MANDAMUS PETITION FILED
BY KENSINGTON INTERNATIONAL LIMITED AND SPRINGFIELD ASSOCIATES, LLC.

DATED: DECEMBER 5, 2003

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COMMITTEE OF ASBESTOS CLAIMANTS

Respondent, the Official Committee of Asbestos Personal Injury Claimants of Armstrong World Industries, Inc. *et al.* (the "Asbestos Claimants Committee" or "ACC") in the cases pending before the United States Bankruptcy Court for the District of Delaware (the "Armstrong Bankruptcy Case"),¹ respectfully submits this Response to the Statement of the Official Committee of Unsecured Creditors of Armstrong World Industries, Inc., *et al.* in Connection with the Mandamus Petition Filed by Kensington International Limited and Springfield Associates, L.L.C. (the "Armstrong UCC Statement"). Far from providing any legitimate grounds for Judge Wolin's recusal in the Armstrong case, the Armstrong UCC Statement evidences clearly the tactical gamesmanship that motivates some parties in the bankruptcy cases before Judge Wolin to seek his removal from these cases. A brief discussion of the history of the Armstrong bankruptcy proceedings illustrates why this is so.

BACKGROUND AND ARGUMENT

The Armstrong UCC Statement contains no allegation that any action by Judge Wolin or his Advisors had any improper impact on the proceedings in the Armstrong Bankruptcy Case. It would be impossible for them to make such allegations, because the Armstrong Bankruptcy Case has been conducted

¹ *In re Armstrong World Industries, Inc., et al.*, Case Nos. 00-4471, *et al.* (RJN).

throughout without any litigation before Judge Wolin concerning asbestos personal injury liabilities.²

After over a year of negotiations, more than a year ago in October 2002, the Armstrong debtor and each of its creditor constituencies -- the ACC, the UCC and the Future Claimants' Representative ("FCR") -- reached agreement on the economic terms of a consensual Plan of Reorganization. Throughout the next ten months, the parties drafted and revised the consensual Plan and promulgated a Disclosure Statement that contained the UCC's recommendation that its constituency vote to accept the Plan. Armstrong and its creditors also worked to resolve the objections to Plan confirmation raised by other interested parties.

As the Court must be aware, during July, 2003, the Senate Judiciary Committee reported out to the Senate floor the so-called Fairness In Asbestos Injury Resolution Act of 2003 ("the FAIR Act" or "S. 1125"). On September 22, 2003, the last date for filing objections to confirmation, the UCC filed a "conditional" objection to the proposed Plan of Reorganization with the sole basis being that a piece of legislation very much like S. 1125, now languishing in the United States Senate, may pass the United States Congress and be signed into law by the President, and that when this happens, Armstrong's liability to asbestos

² In fact, the only significant litigation before Judge Wolin in the Armstrong Bankruptcy Case was litigation involving Armstrong's contractual disputes with the Center For Claims Resolution ("CCR"), which were resolved pursuant to the terms of a settlement agreement to which the Armstrong UCC was a party.

claimants will be far lower than its contribution to the Asbestos Personal Injury Trust under the proposed Plan. See Conditional Objection of Official Committee of Unsecured Creditors to Confirmation of Debtors' Fourth Amended Plan of Reorganization, filed September 22, 2003 (attached as Exhibit 1). Notwithstanding its conditional objection, the UCC continued to support the proposed Plan and filed no other objection to confirmation.

Only after the UCC's constituency, the unsecured commercial creditors, voted to reject the proposed Plan on October 31, 2003 did the Armstrong UCC withdraw its support for the Plan. At an October 31, 2003 omnibus hearing, the UCC requested a continuation of the confirmation hearing, which was scheduled to be held in mid-November, in light of the possibility of pending legislation. This request was summarily denied from the bench by Judge Randall Newsome, the Bankruptcy Judge assigned to the Armstrong case. After Judge Wolin voluntarily removed himself from any further role in the Armstrong proceedings on November 5, 2003 pending resolution of the In re Kensington Petition for Mandamus (see Armstrong UCC Statement, Exhibit D) the Armstrong UCC used this as yet another reason to renew its request for a continuation of the Confirmation Hearing. This request was again denied by Judge Newsome, who determined that he had the power to hear the issues to be litigated in a contested confirmation hearing even without the District Court's concurrent involvement.

The UCC then reneged on its agreement to support confirmation and raised several new (and untimely) objections which were the only objections to confirmation remaining when the Confirmation Hearing commenced. The principal thrust of the UCC objection was that (1) S. 1125 or something very much like it would be enacted during this Session of Congress ending December 31, 2004, and (2) the Plan did not take account for this change in law and was thus unfair. The Confirmation Hearing was held before Judge Newsome sitting alone on November 17 and 18, 2003. At the conclusion of the presentation of evidence and argument at the hearing, Judge Newsome rejected arguments based on whether legislation might or might not be enacted in the future, overruled all of the other UCC objections, and issued a ruling from the bench that he would recommend confirmation of the Armstrong Plan. See Transcript of Proceedings dated November 18, 2003 at 173-189 (Exhibit 2). Judge Newsome also stated that he will issue an Order recommending Confirmation and his Recommended Findings of Fact and Conclusions of Law in the near future. Id.

Given this background it is apparent that the Armstrong UCC's support of the Petitioners' request for Judge Wolin's recusal in the Owens Corning case and the extension of that recusal to the Armstrong proceedings is nothing more than a blatant attempt to obtain the very tactical advantage and delay of Plan confirmation that was summarily rejected by the Bankruptcy Court in the hope that legislation

might be enacted from which the UCC would benefit. This is not even a basis for appeal let alone review. The Armstrong UCC is obviously counting on the fact that a recusal of Judge Wolin would result in some delay while his replacement gets up to speed on the issues involved in asbestos bankruptcy cases. Thus Judge Wolin's recusal, far from being warranted on the merits, would allow the Armstrong UCC to obtain the very delay it sought unsuccessfully from the Bankruptcy Court. This Court should not countenance the use of pretextual tactics such as a wholly unsupported motion for recusal to allow a party to obtain an unfair advantage in a case that it has already lost on the merits.

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CONCLUSION

The Armstrong UCC Statement is nothing more than a blatant “me too,” provides no grounds for Judge Wolin’s recusal in any case, and is nothing more than a transparent attempt to delay and derail the final resolution of the confirmation of the Armstrong Plan of Reorganization.

DATED:

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