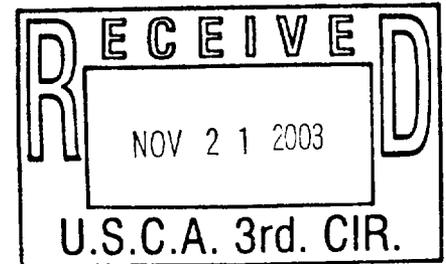


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No. 03-4212



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

In re KENSINGTON INTERNATIONAL LIMITED
AND SPRINGFIELD ASSOCIATES, LLC,

Petitioners.

**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**

**BRIEF OF WASHINGTON LEGAL FOUNDATION
AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS**

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November 21, 2003

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed.R.App.P. 26.1, the Washington Legal Foundation states that it is a corporation organized under § 501(c)(3) of the Internal Revenue Code. It has no parent corporation and no stock owned by a publicly held company.

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IDENTITY AND INTERESTS OF *AMICI CURIAE*

The interests of *amicus curiae* Washington Legal Foundation (WLF) are more fully set forth in their attached motion for leave to file an *amicus curiae* brief in support of Petitioners. WLF is a public interest law and policy center based in Washington, D.C. WLF devotes a substantial portion of its resources to ensuring both that the nation's court system is administered fairly and that it is perceived by the general public as being administered fairly.

INTRODUCTION

As the Court is well aware, federal and state courts have been inundated in recent years by tort suits seeking compensation for damages incurred due to asbestos exposure. Hundreds of thousands of suits have been filed, yet analysts predict that up to 700,000 more cases will be filed by 2050. At least 50 major corporations have been driven into bankruptcy by asbestos litigation. Numerous courts have recognized the difficulty that the judiciary has had in keeping up with the "elephantine mass of asbestos cases." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999). In particular, this Court has observed that the huge number of claims -- many filed by individuals with relatively minor injuries -- is interfering with the courts' ability to resolve the claims of "the sick and dying, their widows and survivors," who "should have their claims addressed first." *In re Collins*,

233 F.3d 809, 812 (3d Cir. 2000), *cert. denied*, 532 U.S. 1066 (2001).

As the number of asbestos suits has increased, so too have charges that the court system is being abused by a relatively small number of plaintiffs' lawyers who bring massive numbers of lawsuits for the primary purpose of generating legal fees and without regard to the merits of their claims. *See, e.g.*, S. Rep. 108-118, Senate Judiciary Committee Report on The Fairness in Asbestos Injury Resolution Act of 2003 (July 30, 2003) at 81 (additional views of Senator Kyl). Plaintiffs' lawyers counter that those charges are false and are being advanced by large corporations as a means of avoiding liability for injuries they caused and for which they should be held liable.

The acrimonious public debate that has surrounded asbestos litigation thus makes it especially important that the courts avoid any appearance that they are favoring one side over the other. The general public will quickly lose faith in the courts as institutions capable of dispensing justice in an even-handed fashion if it comes to believe that judges are deciding asbestos cases on some basis other than a dispassionate application of the law to the relevant evidence.

STATEMENT OF THE CASE

WLF hereby adopts by reference the Statement set forth in the Petition and

in Kensington International Limited's and Springfield Associates, LLC's (the "Creditors") October 29, 2003 Supplement to the Petition.

In brief, in an October 10, 2003 motion to recuse filed in U.S. Bankruptcy Court for the District of Delaware, the Creditors alleged that Judge Alfred Wolin's impartiality in the Owens Corning bankruptcy proceedings might reasonably be questioned in light of his employment of David R. Gross and C. Judson Hamlin as close advisors in those proceedings over the past two years.¹ The Creditors alleged that Judge Wolin's employment of Messrs. Gross and Hamlin at the same time that they were actively engaged as advocates (on behalf of future asbestos claimants) in a closely related bankruptcy case involving G-I Holdings, Inc. ("G-I") called into question his impartiality.

On October 23, 2003, Judge Wolin issued an Order staying all proceedings related to the recusal motion, including all discovery, "until further Order of the Court." The Creditors filed their Petition the next day. The Petition seeks an order directing Judge Wolin to recuse himself from the Owens Corning bankruptcy. Alternatively, the Petition seeks an order directing Judge Wolin to withdraw his October 23 order suspending briefing and discovery on the recusal

¹ The Creditors hold more than \$275 million in aggregate principal amount of indebtedness of Owens Corning.

motion and instead to allow expedited discovery and an expedited briefing and hearing schedule.

On October 28, 2003, Judge Wolin issued a "Case Management Order and Order to Show Cause" concerning the recusal motion. That Order directed Judge Wolin's five court-appointed advisors (including Messrs. Gross and Hamlin) to file affidavits with the court, listing occasions on which those individuals provided advice/assistance in connection with the Owens Corning bankruptcy and the G-I bankruptcy. The Order further directed that by November 28, 2003 any interested party could file a brief showing cause why the recusal motion "should be denied without further proceedings"; or alternatively, why further proceedings (including discovery) should take place. Judge Wolin did not set a hearing date on his Order to Show Cause and directed that the October 23 stay remain in place (except for the filing of the specified briefs and affidavits).

On October 30, this Court stayed all district court and bankruptcy court proceedings in the Owens Corning bankruptcy, except for the filing of affidavits specified in Judge Wolin's October 28 order. The Court modified its stay on November 3, 2003, clarifying that the stay applied only to those proceedings pending solely before Judge Wolin and directing interested parties to respond to

the Petition by November 21, 2003.

SUMMARY OF ARGUMENT

WLF has reviewed the material set forth in the Separate Appendix attached to the "Emergency Petition for a Writ of Mandamus" filed by the Creditors.

Based on that material, WLF has concluded that Judge Wolin's impartiality might reasonably be questioned in light of his employment of Messrs. Gross and Hamlin as advisors in five jointly administered bankruptcy cases for the past two years. WLF supports the Petition without regard to whether Judge Wolin has displayed any partiality in his rulings to date. Recusal is warranted because Judge Wolin's employment of Messrs. Gross and Hamlin at the same time that they were actively engaged as advocates in a closely related bankruptcy case casts a long shadow over every ruling that Judge Wolin has made or will make in the Owens Corning bankruptcy proceedings. In order to ensure continued public confidence in the judiciary, the Court should disqualify Judge Wolin from those proceedings; anything less is insufficient to restore the appearance of impartiality.

The Court should rule now, rather than awaiting a ruling from Judge Wolin on the recusal motion pending before him. The facts set forth in irrefutable court records and confirmed in material part by the advisors' affidavits already suffice

to require recusal. Thus, it makes little sense to withhold judgment and await a nearly inevitable second mandamus petition. Moreover, Judge Wolin's response to the recusal motion suggests that he is unlikely to rule quickly; given the importance of the issues raised in the Owens Corning bankruptcy and the other asbestos-related bankruptcy proceedings pending before Judge Wolin, it is of utmost importance that the recusal issue be resolved as soon as possible. The need for early resolution has been heightened by the recent filing of a motion (filed by parties unrelated to the Creditors) to recuse Judge Wolin from the W.R. Grace & Co. bankruptcy and the possibility that recusal motions will be filed in the other consolidated proceedings.

ARGUMENT

I. JUDGE WOLIN'S IMPARTIALITY MIGHT REASONABLY BE QUESTIONED IN LIGHT OF HIS EMPLOYMENT OF ADVISORS WITH CONFLICTED INTERESTS

Messrs. Gross and Hamlin have been employed by Judge Wolin as advisors in the consolidated bankruptcy proceedings (including the Owens Corning bankruptcy) since December 28, 2001. In the ensuing 22 months, they have devoted hundreds of hours to these cases. According to Judge Wolin, their employment has been "necessary for the efficient administration of these very

large mass-tort chapter 11 cases," and they "occupy[] a unique position in the [five consolidated asbestos bankruptcy cases] not shared by other persons employed in these cases." *See* Order dated March 19, 2002 (attached to the Affidavit of Gina M. Najolia as Exhibit D) at 2, App. 55. For example, Judge Wolin recently directed Mr. Gross, in his capacity as a court-appointed advisor, to establish "Working Committees" that are charged with "explor[ing] resolution of issues common to each of the five proceedings"; Mr. Gross and Prof. Francis E. McGovern were directed to establish the Committees "in such number and with such membership as they shall deem most effective." *See* Order dated September 12, 2003. According to his November 14, 2003 affidavit, Mr. Hamlin in five separate instances reviewed appeals from the bankruptcy court to Judge Wolin and submitted draft opinions to Judge Wolin for his consideration; at least one of those appeals involved Owens Corning. Hamlin Affidavit, ¶¶ 11, 13. Mr. Gross and Mr. Hamlin have repeatedly provided advice to the Court on an *ex parte* basis.

At the same time that Messrs. Gross and Hamlin have served as paid advisors to Judge Wolin in these proceedings, they have represented future asbestos claimants in Chapter 11 proceedings involving G-I Holdings Inc. G-I is

similarly situated to Owens Corning and the four other debtors in these consolidated proceedings (the "Debtors"). G-I was a leading manufacturer of asbestos building products, and the thousands of claims filed against G-I by those allegedly exposed to its asbestos products drove it into bankruptcy. Because claimants routinely assert asbestos claims against multiple manufacturers, many claimants in the G-I proceedings have also asserted claims against the Debtors. Similarly, one can reasonably assume that many future claimants in the G-I proceedings are future claimants in these consolidated proceedings.

As the Creditors have spelled out in detail in their Petition (at 11-13), Mr. Gross's and Mr. Hamlin's representation of future claimants in the G-I bankruptcy has required them to become partisan advocates on issues that have come before Judge Wolin in the consolidated proceedings and/or will arise in the coming months. From the standpoint of this Petition, WLF finds it particularly disturbing that, in papers filed in the G-I bankruptcy, they have challenged the logic and propriety of the analysis employed by Dr. Letitia Chambers, G-I's expert on evaluating asbestos claims. *Id.* at 12-13. Because Dr. Chambers also serves as the claims expert and consultant to the Official Committee of Unsecured Creditors in the Owens Corning bankruptcy, Messrs. Gross and Hamlin have had

(and will continue to have) a strong interest in advising the Court to discredit Dr. Chambers's testimony.

Federal law requires a United States judge to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). Based on the facts discussed above, WLF concludes that an objective observer might reasonably question Judge Wolin's impartiality if he continues to preside over this matter. This Court has made clear that "a judge's participation in a case must never reach the point where it appears, *or is even perceived to appear*, that the judge is aligned with any party in the pending litigation."

Alexander v. Primerica Holdings, Inc., 10 F.3d 155, 166 (3d Cir. 1993)

(emphasis added). Because Judge Wolin over a two-year period has employed close advisors in the consolidated proceedings at the same time that the advisors espoused views (as partisan advocates in another asbestos-driven bankruptcy proceeding) on issues that are hotly contested in the consolidated proceedings, it is likely that a sizable portion of the general public will perceive that Judge Wolin is aligned with those parties whose views coincide with the advisors' views in the G-I bankruptcy.

WLF is not, of course, privy to any of the private communications between

Judge Wolin and Messrs. Gross and Hamlin. Although they were hired to "occupy[] a unique position" in the consolidated proceedings, including the provision of legal advice on a broad range of issues, it is always possible that none of that advice touched on any issue in which (by virtue of their G-I employment) they had partisan interests. But that is largely beside the point. It is eminently reasonable for an objective observer to assume that the private communications between Judge Wolin and Messrs. Gross and Hamlin *did* touch on those issues, and that Judge Wolin's views have been colored thereby.²

² In his November 3, 2003 Response to the Petition, Judge Wolin states that he "has had no communications and possesses no knowledge regarding any aspect of" the G-I bankruptcy; and, in particular, that he has "never discussed the substance of [the G-I] case with any of the Court Appointed Advisors." Response at 10. Accordingly, Judge Wolin is not in a position to determine whether his discussions with Messrs. Gross and Hamlin have touched on issues relevant to the G-I bankruptcy. In his affidavit, Mr. Gross states, "I have not discussed with Judge Wolin, in any manner or form, any legal issue or factual issues before the Court or likely to come before the Court in any of the five bankruptcies assigned to Judge Wolin, or, indeed, in the *G-I Holdings* case." Gross Affidavit ¶ 10. That assertion seems implausible on its face; indeed, given that Mr. Gross has billed hundreds of thousands of dollars for his work as an advisor to Judge Wolin on the five consolidate bankruptcies, one would hope and expect that he has shared with Judge Wolin at least some of his thoughts on relevant legal issues. In his affidavit, Mr. Hamlin states, "I have never discussed any substantive or procedural issues in the G-I Holdings Inc. bankruptcy with Judge Wolin or any of the other court advisors, except of course my counsel, Mr. Gross." Hamlin Affidavit ¶ 14. The affidavit is silent, however, regarding whether any of the legal issues Mr. Hamlin discussed with Judge Wolin are relevant to issues that have arisen or may arise in the G-I case.

Because an objective observer will never know what information was actually conveyed to Judge Wolin during these private communications, the law requires that the issue of whether his "impartiality might reasonably be questioned," 28 U.S.C. § 455(a), be judged based not on what actually transpired, but on what an objective person might reasonably assume took place. As the Fifth Circuit explained:

The statute requires the judge to disqualify himself if a reasonable person, knowing all the circumstances, would harbor doubts about his impartiality. But knowledge of all the facts implies only knowledge of those that are objectively ascertainable. The term cannot, as suggested by counsel, extend to what happens in the judge's chambers or to his actual virtue because, were that so, the test would not be the appearance of impartiality but the absence of actual prejudice.

Hall v. Small Business Admin., 695 F.2d 175, 179 (5th Cir. 1983) (citations omitted).³

Judge Wolin appears to have been aware of Messrs. Gross's and Hamlin's

³ Moreover, as Judge Wolin's October 28 order indicates, he hired Messrs. Gross and Hamlin as advisors with an expectation that their private communications would be kept confidential. WLF finds unseemly the notion that courts should decide conflict-of-interest claims by delving into the substance of confidential discussions between a judge and his advisors, regardless whether the judge is willing to waive confidentiality after the fact. The Ninth Circuit, in examining conflict claims, has explicitly disapproved examining whether a judge received confidential information during private conversations. *In re County of Los Angeles*, 223 F.3d 990, 993 n.2 (9th Cir. 2000).

partisan participation in the G-I bankruptcy proceeding prior to the filing of the motion to recuse.⁴ Even if Judge Wolin was unaware of that participation, § 455 requires recusal; protecting the court system from even the appearance of impropriety, not the assignment of blame, is the object of § 455:

Protecting important institutional values against the appearance of partiality does not require us to affix blame. Rather, the appropriate -- and the only -- inquiry to which we must respond is whether a reasonable person, knowing all the acknowledged circumstances, might question the district court judge's continued impartiality.

Alexander, 10 F.3d at 164 (citation omitted). The appearance of impropriety in this case requires recusal, regardless whether Judge Wolin was to blame for creating that appearance.

The situation confronting the Court is remarkably similar to the situation it faced in *In re School Asbestos Litigation*, 977 F.2d 764 (3d Cir. 1992). In that

⁴ Mr. Gross asserted in his affidavit that Judge Wolin was aware: "At all relevant times, Judge Wolin was aware of my representation of Mr. Hamlin in *G-I Holdings*." Gross Affidavit ¶ 8. The following statement in Judge Wolin's response to the Petition tends to support Mr. Gross's assertion:

Because a Futures Representative and his counsel cannot be appointed in a bankruptcy without court approval, the involvement of Gross and Hamlin in *In re G-I Holdings, Inc.* must likewise have been public by virtue of their appointment in that case.

November 3, 2003 Response by the District Court Judge, at 5.

case, the district judge attended a scientific conference on diseases caused by inhaling asbestos; he was interested in learning more about the subject because he had a significant amount of asbestos litigation on his docket. Conference organizers paid the judge's lodging expenses and waived his registration fee. Unbeknownst to the judge, the conference was organized by the plaintiffs' bar, and "the views expressed [at the conference] were overwhelmingly consistent with the plaintiffs' position" in asbestos liability litigation. *Id.* at 780. Of the 18 expert trial witnesses identified by plaintiffs' lawyers in asbestos liability litigation pending before the judge, 13 spoke at the conference. *Id.* The Court held that these circumstances created an appearance of partiality that disqualified the judge from continuing to hear the case, even though he had attended the conference without knowing that he would be receiving a biased "preview" of evidence to be presented by the plaintiffs at trial. *Id.* at 782. In granting a writ of mandamus, the appeals court stated:

Congress enacted subsection 455(a) precisely because "people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges." *Liljeberg v. Health Services Acquisitions Corp.*, 486 U.S. 847, 864-65 (1988). *In high profile cases such as this one, the outcome of which will in some way affect millions of people, such suspicions are especially likely and untoward.* A reasonable person might suspect that Judge Kelly's plaintiff-subsidized attendance at the "preview" of the plaintiffs' case would have predisposed him toward

the plaintiffs' position. Alternatively, others may reasonably believe that because he now knows that the plaintiffs indirectly paid his way, he might be angry at them for compromising him and might overreact to their prejudice. . . . We underscore that we are not intimating that Judge Kelly actually harbors any illegitimate pro-plaintiff bias. The problem, however, is that regardless of his actual impartiality, a reasonable person *might* perceive bias to exist, and this cannot be permitted.

Id. (emphasis added). Once Judge Kelly learned the facts that created an appearance of partiality, he was required to disqualify himself immediately. *Id.* at 784.

Judge Wolin faces a similar dilemma in light of his employment of advisors with such an obvious bias. Even if -- contrary to Mr. Gross's affidavit -- Judge Wolin was unaware of that bias until the motion for recusal was filed, there is little doubt that a reasonable observer might suspect that Judge Wolin is predisposed toward the position of future asbestos claimants in the consolidated proceedings as a result of the counsel he has received from Messrs. Gross and Hamlin during the past 22 months.

In his November 21, 2003 Supplemental Response, Judge Wolin states:

Given that [*ex parte* meetings between Judge Wolin and interested parties] occurred on a regular basis without complaint and given that the December 20, 2001 case management conference alerted all concerned that *ex parte* meetings were part of the District Court's case management plan, it strikes a discordant note that the conduct of *ex parte* conferences would be the ground for a recusal.

Supplemental Response by the District Court Judge, at 3.

Judge Wolin's response misses the mark. The appearance of impropriety has not arisen primarily because of Judge Wolin's *ex parte* discussions with various parties.⁵ Rather, it has arisen because Judge Wolin hired, as close advisors, two partisans who stand to gain based on how he rules on disputed matters that are at issue in the Owens Corning bankruptcy. It goes without saying that many of the meetings between a judge and his advisors will take place without all parties being present; but the public has a right to expect that those advisors will not have conflicting interests.

II. THE COURT SHOULD GRANT THE PETITION RATHER THAN AWAITING A RULING BY JUDGE WOLIN ON THE RECUSAL MOTION PENDING BEFORE HIM

Judge Wolin has not yet ruled on the Creditor's October 10, 2003 motion to recuse him from the Owens Corning bankruptcy. Nonetheless, in light of the importance of the issues and the unusual circumstances surrounding this case, WLF urges the Court to address the merits of the Petition without awaiting a ruling from Judge Wolin.

⁵ The frequency of such *ex parte* meetings is nonetheless a cause for some concern, even in large-scale bankruptcy proceedings with hundreds of parties. At the very least, WLF would urge that official transcripts be maintained of all such meetings.

First, the disputed issues raised by the Petition are largely legal in nature. The affidavits submitted by Messrs. Gross and Hamlin confirm that there are virtually no disputes regarding the facts necessary to mandate recusal. There appears to be no disagreement that: (1) Messrs. Gross and Hamlin were appointed as advisors to Judge Wolin in the Owens Corning bankruptcy (and four other consolidated bankruptcy proceedings) in December 2001; (2) Mr. Hamlin was appointed as the representative of future claimants in the G-I bankruptcy proceedings in October 2001, and his application to retain Mr. Gross as one of his attorneys was approved in January 2002; and (3) by virtue of their positions in the G-I proceedings, Messrs. Gross and Hamlin have been required to take partisan positions on issues that also have arisen and/or are likely to arise in the Owens Corning proceedings. Given the absence of any *material* issues of fact, district court proceedings will not serve to flesh out the record in a useful way and thus there is little reason to delay consideration of the Creditors' claims until after Judge Wolin has ruled.⁶

⁶ In their affidavits, Messrs. Gross and Hamlin insist, of course, that none of their private conversations with Judge Wolin have involved the G-I proceedings. But as noted above, Petitioners allege that an appearance of impropriety has arisen without regard to the actual substance of those private conversations. Thus, the affidavits of Messrs. Gross and Hamlin provide no basis for the Court to delay its ruling on the recusal issue.

Second, Judge Wolin's responses to the motion to dismiss suggest that he is insufficiently cognizant of the need for an expeditious ruling on the recusal motion. As this Court has made clear, "Ordinarily, it will be the better practice to rule on the disqualification motion" before ruling on other pending motions. *In re School Asbestos Litigation*, 977 F.2d at 784 n.26. While "litigation proceedings need not grind to an absolute halt every time a party files a motion for disqualification," it is preferable to defer other substantive decisions until the merits of the disqualification motion can be addressed. *Id.* But instead of giving high priority to the motion, Judge Wolin's immediate response was to impose a stay on all motion-related discovery and briefing. The stay on discovery is still in effect. Moreover, Judge Wolin's October 28 Order to Show Cause bars briefing on whether the uncontested facts are sufficient to require recusal; rather, the Order directs interested parties to file briefs by November 28, addressing whether (in light of the affidavits filed by Judge Wolin's advisors) the motion should be denied "without further proceedings." The Order sets no date for oral argument or a ruling on the Order to Show Cause, and makes clear that discovery (as well as briefing on whether the recusal motion should be *granted*) will only be permitted if and when Judge Wolin determines that the motion should not be

denied "without further proceedings."

This delay in addressing the merits of the recusal motion is particularly unfortunate in light of the significant public interest in speedy resolution of issues surrounding the asbestos litigation crisis, and the major corporate bankruptcies that that crisis has engendered. It would serve the interests of no one if the Court were to defer its consideration of Judge Wolin's recusal until after Judge Wolin has ruled on the motion before him. Any such action would significantly delay ultimate resolution of the recusal issue, a delay that undoubtedly will delay final resolution of the bankruptcy proceedings. Indeed, the legitimacy of *any* substantive ruling in those proceedings will quite properly be subject to question for so long as the issue of Judge Wolin's recusal remains unresolved.

Moreover, the recusal issue is not confined to the Owens Corning bankruptcy proceedings. On November 14, 2003, a group of creditors in the W.R. Grace & Co. bankruptcy proceedings filed a motion to recuse Judge Wolin from those proceedings as well; the motion is based on substantially the same grounds as is the Petition, as well as additional troubling facts that the W.R. Grace & Co. creditors have brought to light. The W.R. Grace & Co. creditors are unrelated to the Creditors in these proceedings. By addressing the merits of

the Petition, the Court can resolve once and for all the propriety of Judge Wolin's continued involvement in all five of the asbestos-related bankruptcy proceedings assigned to him by this Court.

III. THE REQUIRED REMEDY FOR VIOLATION OF § 455 IS DISQUALIFICATION OF THE COURT FROM THE CONSOLIDATED PROCEEDINGS

Because the facts set forth in the Petition establish that Judge Wolin's impartiality "might reasonably be questioned," 28 U.S.C. § 455 requires that the motion to recuse be granted. No lesser remedy would be sufficient to return the appearance of impartiality to these proceedings.

Indeed, § 455 is couched in mandatory terms. "Section 455 . . . clearly requires that judges *shall* disqualify themselves where such a taint appears, rather than attempt creative, alternative remedies such as disqualification of witnesses." *In re School Asbestos Litigation*, 977 F.2d at 783. Accordingly, dismissing Messrs. Gross and Hamlin as court advisors would be an inadequate remedy under the statute. Moreover, such a remedy would do nothing to eliminate the reasonable suspicion that the advice dispensed to date by the two advisors would predispose Judge Wolin toward the position of future asbestos claimants, nor would it address concerns raised by Judge Wolin's willingness to appoint advisors

apparently known to him to have conflicting interests.⁷

In analogous situations involving law firms in which one of the partners is conflicted, case law is unanimous that law firms may not avoid the taint by taking steps to cordon off the partner *after* his/her conflict comes to light. Rather, under such circumstances, the law firm's disqualification is *mandatory*, regardless that the firm, after the fact, establishes a "Chinese Wall" to ensure that the partner does not participate in the matter in which (s)he has a conflict. *See, e.g., Smith v. Whatcott*, 757 F.2d 1098, 1101-02 (10th Cir. 1985). Nor is the law firm's taint removed if the conflicted lawyer leaves the firm. *Asyst Technologies, Inc. v. Empak, Inc.*, 962 F. Supp. 1241 (N.D. Cal. 1997). Similarly, the appearance of partiality created by Judge Wolin's hiring of Messrs. Gross and Hamlin will not be eliminated if the two advisors resign.

Nor is the issue affected by the fact that Judge Wolin over the past several

⁷ WLF does not mean to suggest that a court may never retain advisors with expertise in the field in which advice is to be provided. While some expert advisors may previously have formed opinions on issues likely to come before the court, the use of such experts does not necessarily create an appearance of partiality so long as they do not actively represent parties in other proceedings who have a vested interest in the court's resolution of those issues. *See Techsearch, L.L.C. v. Intel Corp.*, 286 F.3d 1360, 1376-81 (Fed. Cir. 2002), for a list of guidelines for use by district courts in appointing "neutral" technical advisors in cases raising complex scientific issues.

years has devoted extraordinary resources to these complicated and protracted proceedings. While a recusal at this late date would require a new judge to traverse the same learning curve, that result is required by the terms of § 455. *In re School Asbestos Litigation*, 977 F.2d at 784 (rejecting arguments that remedies short of recusal were appropriate because they would avoid delays and the inefficient use of judicial resources in light of the six years devoted to the case by Judge Kelly).

Nor can there be any claim that the parties to these proceedings have somehow waived the right to object to the appearance of partiality created by Judge Wolin's employment of conflicted advisors. The Creditors state that they only recently learned of the advisors' conflicting interests. Petition at 2. Thus, they brought the issue to Judge Wolin's attention as soon as they were able to do so.⁸ More importantly, whether the Creditors should have known of the conflicting interests at an earlier date has no bearing on the mandate imposed by § 455, which requires a judge *sua sponte* to disqualify himself any time "his

⁸ Neither Judge Wolin nor the affidavits of Messrs. Gross and Hamlin dispute that point. Mr. Hamlin asserts that his and Mr. Gross's work as advisors to Judge Wolin was disclosed in the G-I proceedings. Hamlin Affidavit ¶ 8. But neither affidavit asserts that their partisan involvement in the G-I proceedings was disclosed in either the Owens Corning bankruptcy or any of the other four consolidated asbestos-related bankruptcies assigned to Judge Wolin.

impartiality might reasonably be questioned." The statute was enacted not just for the benefit of one set of creditors in the Owens Corning bankruptcy proceedings, but also for the benefit of everyone with an interest in the fair administration of justice -- the Debtors, their employees and stockholders, other claimants, and the public at large. The interests of all those individuals and entities in a judicial system that operates without any suspicion of partiality will not be vindicated unless the Petition is granted.

CONCLUSION

The Washington Legal Foundation respectfully requests that the Court grant the Petition for a Writ of Mandamus, and order Judge Wolin to recuse himself; or, alternatively, order Judge Wolin to allow expedited discovery and an expedited briefing schedule and hearing on the recusal motion pending before him.

Respectfully submitted,

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Dated: November 21, 2003

CERTIFICATE OF COMPLIANCE

I am an attorney for *amici curiae* Washington Legal Foundation (WLF), *et al.* Pursuant to Fed.R.App.P. 32(a)(7)(C), I hereby certify that the foregoing brief of WLF is in 14-point, proportionately spaced CG Times type. According to the word processing system used to prepare this brief (WordPerfect 6.0), the word count of the brief is 4,876, not including the corporate disclosure statement, table of contents, table of authorities, certificate of service, and this certificate of compliance.

Richard A. Samp

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of November, 2003, copies of the brief of *amicus curiae* WLF in support of the Petition were placed in the U.S. Mail, first-class postage prepaid, addressed to each of the 368 individuals included in the 2002 Owens Corning Service List (attached).

Richard A. Samp