

Case No. 03-4212
IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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In re: KENSINGTON :
INTERNATIONAL LIMITED :
and SPRINGFIELD :
ASSOCIATES, LLC, : (Bankruptcy Case No. 00-03837)
 : (Owens Corning, et al.)
Petitioners, :
_____ :

**SUR-REPLY BY THE DISTRICT COURT JUDGE TO THE PETITION FOR A WRIT
OF MANDAMUS, PURSUANT TO THE INVITATION OF
THE COURT OF APPEALS**

TO THE HONORABLE JUDGES OF THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT GREETINGS:

The District Court accepts the invitation of the Court of Appeals to file a Sur-Reply. Undoubtedly, the District Court and its method of case management has very recently become a lightning rod of contention in a well orchestrated effort to oust the District Court from any further role in these jointly administered estates. Notwithstanding the attempt of some to disassemble the progress that has been made to date, and much has been accomplished, the case management methods and means employed by the District Court are worthy of defense despite the institutional pain associated with the pending petitions.

There exists a fundamental difference between the tort system and the Bankruptcy system as to claim disposition. The

tort system tends to destroy corporate viability through devastatingly high verdicts while the Bankruptcy system seeks to preserve the corporate estate. Accordingly, the case management approach between the two systems is manifestly different because the ultimate goals are different.

Each of the jointly administered chapter 11 estates voluntarily chose the Bankruptcy arena because of their lack of success in the tort system. The fundamental premise of their petitions is that to continue in the tort system would have spelled doom for the future existence of their respective corporations. Moreover, the tort system is governed by State Law and each claimant is entitled to a jury trial. With approximately 1,000,000 claims under supervision, the prospect of claim disposition by jury trials is a daunting proposition.

It is apparent to the District Court that personal injury claim disposition requires a collective rather than individual approach. The representatives of the asbestos claimants assert that those corporations that opt to test theories of causation in the Bankruptcy context are engaged in an attempt to rewrite and revise history and ignore 40 years of litigation experience as well as their own history of claim resolution.

Given this background, it was necessary for the District Court to gain knowledge of each of the jointly administered corporations. Through the disclosure of proprietary information

it was strikingly apparent to the District Court that a one shoe approach would not fit all concerned.

While the issue of conflicted advisors has been previously addressed in other filings, the issue of ex parte conferences with a lack of transparency is a significant issue likewise worthy of reply. Beyond what was stated in the District Court's Supplemental Response dated November 21, 2003, it was the expressed intent of the District Court to provide access to any and all interested parties free of the constraint of damning admissions in a public arena. Much of the information provided to the Court was proprietary in nature. With the current turbulence and volatility that exists in financial markets, information associated with asbestos claims has the tendency to severely punish a corporate offender. The Court was sensitive to the need for privacy of disclosure even at the expense of transparency.

The District Court's concern for the receipt and protection of proprietary and sensitive information was not a mere academic exercise. The diminution in the value of shareholders equity, the lack of access to financial markets or a downgrade in financial status are real world concerns. When a Maryland Jury returned an adverse verdict against Haliburton its stock plummeted 6 points. More demonstrative than the Haliburton experience was the precipitous loss of shareholder value

encountered by Sealed Air Corporation when it was accused of fraudulently acquiring W.R. Grace's Cryovac division. With the loss of an interlocutory motion, Sealed Air sustained a shareholder equity loss of several billion dollars. A stock that traded at \$37.00 within approximately 4 days traded at \$14.00. Sealed Air then and now trades on the New York Stock Exchange and has approximately 84 million shares out standing. With the District Court's intervention and use of traditional and non-traditional case management methods this case resolved itself on the eve of trial. The W.R. Grace estate is approximately \$1 billion richer and a share of Sealed Air currently sells in the neighborhood of \$53.00 per share.

In the preparation of this sur-reply, the District Court has exercised restraint to protect proprietary and sensitive information provided to it through its joint administration of the assigned Chapter 11 estates. The District Court will not address specific allegations contained in affidavits of what it may have said or done on any specific occasion. Case management is an evolutionary process and a change in direction is not an uncommon occurrence.

The District Court will not belabor the Circuit Court of Appeals with a lengthy sur-reply. Nor will the District Court unduly repeat matters contained in its prior filings. The means and the methods employed by the District Court were not

inadvertent nor surreptitiously engaged in. At the inception of its first contact with the jointly administered estates the District Court forthrightly announced its intention to participate in ex parte conferences as a method of case management.

The District Court does not apologize for its case management means and methods. As Court conference records indicate, ex parte interviews with the Court were eagerly sought and granted. Moreover, the requests for ex parte meetings by others far outdistanced similar requests initiated by the District Court. In addition, no adverse consequence has occurred to any jointly administered estate through the exercise of ex parte conferences.

Overhanging this Court's administration of the Chapter 11 estates has been the specter of national legislation. Through the Fairness in Asbestos Injury Resolution Act of 2003, corporations anticipate that a national trust and revised illness criteria with caps on recovery will preserve greater shareholder equity. The prospect of this legislation has impeded the efforts of the District Court to gain closure of the USG and W.R. Grace estates. Thus, any lack of progress in those estates is the product of expectation that they will fair more favorably in the legislative arena than in the judicial arena.

The District Court through this Sur-Reply has attempted to

be non-adversarial. At stake is a philosophy of case management. The Circuit Court of Appeals with its experienced members will have to determine whether transparency supercedes non-disclosure of proprietary information. The reach of this decision extends beyond these jointly administered estates and will have a profound impact on how members of the District Court, in the future, case manage sensitive and complex litigation.

The Court will respond directly only to one point raised by petitioners in their response. Petitioners would put the burden on the Court of providing affirmative notice to thousands of parties-at-interest of the alleged conflict of interest of its advisors. This argument takes as its premise the very contention that underpins the application to this Court and the Motion to Recuse - that the advisors are in fact conflicted.

If they are not conflicted, an issue the Court has not ruled upon despite the assumptions inherent in the petitioners' argument, how is the Court to know whether such a notice is necessary. By way of example, Mr. David Gross is counsel to the defendants in the nationally reported product liability litigation against gun manufacturers. Should the Court have made a public disclosure of this separate product liability representation so that the asbestos plaintiffs could have evaluated the possibility of bias arising therefrom? What limiting principle would petitioners have the courts adopt in

this situation to determine when notice would be necessary?

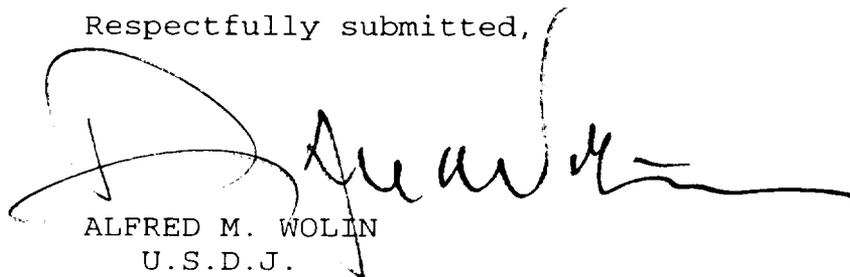
In any event, petitioners raise the issue, understandably, to direct attention away from their eleventh-hour nature of their attack on this Court's jurisdiction over these chapter 11 cases. The identity of the Court Appointed Advisors was made public in the appointment order. There was no attempt to conceal their appointment nor the scope of their retention. This Court has never denied access to any party to raise an issue of concern, as the petitioners well know. The Advisors are very prominent and their activities relevant to this proceeding are in the public record. If a party had a concern over their bona fides, and accepting for the moment petitioners' claim of ignorance of the facts, it would have been possible with a modicum of effort to lay bare the entire careers of Messrs. Gross and Hamlin. Without pre-judging the ultimate merits of the application, neither this Court nor the Court of Appeals should ignore the implications of the timing of the Petition and the Motion to Recuse.

The District Court declines the opportunity to participate in oral argument on December 12, 2003. It is a concern for the solemnity and dignity of each Court that drives this decision.

While in the normal course of events the District Court should be the initial decision maker as to its recusal, here, the extraordinary procedural path that these petitions have followed and the volumes of materials that have accompanied the petitions

suggest that a potential remand is unnecessary. This Court joins with others and respectfully recommends that the Court of Appeals decide the merits of this Court's continued involvement without further delay. Notwithstanding this recommendation, the District Court is prepared to accept a remand and to dispose of it without delay should the Court of Appeals find that the record is insufficient.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'A. Wolin', written over the typed name and title.

ALFRED M. WOLIN
U.S.D.J.

December 5, 2003