

In re Thorpe Insulation Company: The Non-Settling Insurers Strike Back

February 24, 2012 by [Timothy T. Brown](#) and [Joseph Zujkowski](#)

On January 24, 2012, Judge Ronald M. Gould of the U.S. Court of Appeals for the Ninth Circuit held that an appeal filed by certain insurance companies with respect to a plan confirmation order was not moot and that such insurance companies had standing to object to the plan, notwithstanding the Debtors' contention that the plan was "insurance neutral" because it did not affect insurer's legal rights. The Ninth Circuit remanded the plan confirmation to the Bankruptcy Court for further consideration. This decision highlights the fact that a plan of reorganization can be reopened after confirmation, to deal with certain issues, including concerns raised by insurers. [In re Thorpe Insulation Company](#), Case No. 10-56543 (9th Cir. 2012).

The Debtors financial problems stemmed from Thorpe's involvement in the distribution and repair of asbestos insulation products between 1948 and 1972. Since 1948, Thorpe's insurers had paid over \$180 million defending or indemnifying Thorpe. Due to the seemingly endless onslaught of asbestos-related claims, Thorpe and its affiliates were filed for bankruptcy protection in October 2007.

In May 2008, the Debtors filed a plan of reorganization centered around the section 524(g) of the Bankruptcy Code, which sets forth unique provisions for the resolution of present and future asbestos claims. Specifically, the plan called for the creation of an asbestos trust and the issuance of multiple, sweeping injunctions that barred present claimants and future claimants from asserting asbestos related claims, including claims for contribution, against the Debtors and directly or indirectly liable third parties (e.g. the Debtors' insurance companies). Such claims were channeled under the plan to a "Trust Advisory Committee" which was tasked with overseeing claims allowance and valuation and directing distributions from asbestos trust. However, the injunctions only protected the insurers with whom the Debtors had reached a settlement. Moreover, although the plan was allegedly insurance neutral, the plan expressly limited the insurance defenses available to the "Non-Settling Insurers."

Without providing the Non-Settling Insurers the opportunity to be heard, the bankruptcy court confirmed the Debtors' plan on February 1, 2012. The bankruptcy court reasoned that because the plan was insurance neutral, the Non-Settling Insurers did not have standing to object to the plan. On appeal, the district court affirmed the plan. The Non-Settling Insurers appealed, arguing that they had standing to object to the plan and to appeal. In response, the Debtors argued that the issue was moot because the plan had been confirmed, assets had been transferred to the asbestos trust, and the asbestos trust had made distributions to claimants. Furthermore, the Debtors argued that the Non-Settling Insurers lacked standing to contest the plan because the plan was insurance neutral.

The court rejected the Debtors' mootness argument because the court could provide relief to the Non-Settling insurers by reversing confirmation or requiring modification of the plan. The court also rejected the Debtors' equitable mootness argument. The court reasoned that (i) the Non-Settling Insurers had sought but not obtained a stay prior to confirmation; (ii) because less than half the of the \$600 million in settlement proceeds had been distributed to the asbestos trust, the plan was not substantially consummated; (iii) the plan could be

altered in a way that does not inequitably impact third party interests; and (iv) if the plan violated the Non-Settling Insurers' legal rights, the bankruptcy court had the power and discretion to fashion an equitable remedy.

Finally, the court reversed the bankruptcy court finding that plan was insurance neutral, and found that the Non-Settling Insurers had standing to object to the plan. The court reasoned that the Non-Settling Insurers were parties-in-interest under section 1109(b) of the Bankruptcy Code with standing to object because the insurance defense limitations contained in the plan could have a material economic impact on the Non-Settling Insurers. Accordingly, the court remanded the case with instructions to allow the Non-Settling Insurers to present their objections.

This decision is worth noting for two reasons. First, it demonstrates that unless a plan is truly insurance neutral, insurance companies can play a spoiler role at confirmation by raising insurance related objections that must be resolved or litigated. Second, the decision illustrates that even though a debtor's plan has been confirmed and distributions have been made, courts can still step in and modify the plan, potentially in material ways, in appropriate circumstances.