

Who Has Standing to Object to a Debtor's Reorganization Plan? Analyzing Section 1128(b)'s "Party in Interest" Bankruptcy Standing Requirement and the "Persons Aggrieved" Appellate Standing Test

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Introduction

In a decision with important implications for parties listed in debtor reorganization plans, the United States Court of Appeals for the Third Circuit recently reiterated its position that section 1128(b)¹ of the Bankruptcy Code (the "Code") should be interpreted broadly to permit any listed party whose rights might be implicated by a debtor's reorganization plan the ability to object to the plan's terms in bankruptcy court.² In its decision, the Third Circuit distinguishes between a party's right to object to a debtor's confirmation plan in bankruptcy court ("Bankruptcy Standing") versus that party's ability to appeal the debtor's confirmation ruling ("Appellate Standing").³ Because Section 1109(b)⁴ does not provide an exhaustive list of which parties may object to a debtor's reorganization plan,⁵ the Third Circuit's decision furthers the existing policy of the Federal Circuits of allowing liberal Bankruptcy Standing to permit wide participation and objection by those listed parties at the trial level to see whether a debtor's

¹ 11 U.S.C. § 1128(b) (2006).

² See *In re Global Indus. Technologies, Inc.*, 645 F.3d 201 (3d Cir. 2011).

³ *Id.* at 209.

⁴ 11 U.S.C. § 1109(b).

⁵ *In re Global Indus. Technologies, Inc.*, 645 F.3d at 210.

reorganization plan does in fact injure a listed party. Essentially, the Federal Circuits, as seen through the Third Circuit’s holding and definition of “party in interest,” hold that a contingent injury is sufficient to allow a party standing to object to a plan of reorganization in bankruptcy court.

Part I of this memo first provides an overview of Bankruptcy Standing by discussing how the Federal Circuits and bankruptcy courts interpret sections 1128(b) and 1109(b) of the Code to permit seemingly any party listed in a debtor’s confirmation plan the right to object to the plan’s terms. Part I then discusses and contrasts the heightened standards required for parties to have standing to appeal a bankruptcy court’s confirmation of a debtor’s reorganization plan. Next, Part II of this memo uses the Third Circuit’s recent decision in *In re Global Industrial Technologies* as a model to demonstrate how inclusive the Circuits intend for section 1109(b) to be by discussing the case’s facts, the arguments in favor of standing and those against, and the court’s holding. Finally, Part III discusses what practical effects such an inclusive reading of section 1109(b) by the Federal Circuits—a reading which seems to allow even parties with tenuous grounds for standing the right to object—might have on bankruptcy practitioners and bankruptcy courts.

I. Background Analysis: Bankruptcy Code Provisions and Party Standing

In order to best understand the Third Circuit’s analysis granting Bankruptcy Standing in *In re Global Industrial Technologies*, it is important to first discuss the two types of standing that parties face in the bankruptcy context: (1) Bankruptcy Standing under the Code and (2) Appellate Standing for bankruptcy cases.

A. Standing Under Sections 1128(b) and 1109(b)

Standing to object a confirmation of a debtor’s reorganization plan is governed by section 1128(b) of the Code, which provides that “part[ies] in interest may object to confirmation of a [reorganization] plan.”⁶ Section 1109(b) provides a non-exclusive list⁷ of those “part[ies] in interest [who] . . . may raise and may appear and be heard on an issue in a case under [chapter 11].”⁸ The Third Circuit has consistently interpreted section 1109(b)’s “party in interest” Bankruptcy Standing requirement very broadly, allowing any party who might be implicated by a debtor’s reorganization plan to object to the confirmation of such a plan at the trial level.⁹ In *In re Global Industrial Technologies*, the Third Circuit clarified its interpretation of “party in interest” by officially adopting¹⁰ the Seventh Circuit’s low threshold Bankruptcy Standing test, which defines “party in interest” as any party who “has a sufficient stake in the [bankruptcy] proceeding so as to require representation.”¹¹ In the absence of a clear Congressional definition of what parties are actually encompassed by the phrase “party in interest,” other Federal Circuits have similarly construed section 1109(b) broadly to provide parties listed in a debtor’s reorganization plan the right to at least be able to raise their objections against a debtor’s

⁶ 11 U.S.C. § 1128(b).

⁷ See *In re Global Indus. Technologies, Inc.*, 645 F.3d at 210.

⁸ 11 U.S.C. § 1109(b).

⁹ See, e.g., *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 214 n. 21 (3d Cir.2004) (construing section 1109(b) “to create a broad right of participation in Chapter 11 cases.”); *In re PWS Holding Corp.*, 228 F.3d 224, 249 (3d Cir.2000) (stating the purpose of § 1109(b) was intended to “confer[] broad standing at the trial level”); *The Pitt News v. Fisher*, 215 F.3d 354, 360 (3d Cir.2000) (holding parties in interest have standing if they can show a “personal stake in the outcome of [the] litigation); *In re Amatex Corp.*, 755 F.3d 1034, 1042 (3d Cir. 1985) (“[s]ection 1109(b) must be construed broadly to permit parties affected by a chapter 11 proceeding to appear and be heard.”); *Bowman v. Wilson*, 672 F.2d 1145, 1151 (3d Cir.1982) (noting that “[t]he contours of the injury-in-fact requirement, while not precisely defined, are very generous.”).

¹⁰ See *In re Global Indus. Technologies, Inc.*, 645 F.3d at 210–11.

¹¹ See *id.* See also *In re James Wilson Associates*, 965 F.2d 160, 169 (7th Cir. 1992).

reorganization plan at the trial level.¹² Bankruptcy courts similarly interpret section 1109(b).¹³ Such an inclusive reading of section 1109(b) by the Federal Circuits seems to suggest that courts are only able to determine whether a debtor's reorganization plan actually implicates and aggrieves the interests of those parties listed in a debtor's reorganization plan by allowing those listed parties the right to raise their legitimate objections in bankruptcy court.

B. Appellate Standing to Object a Debtor's Reorganization Plan

For a party to have Appellate Standing in a bankruptcy case after a debtor's reorganization plan has been confirmed, that party must meet a heightened "persons aggrieved" standard.¹⁴ Under this heightened standard, aggrieved parties must show that they have a distinct pecuniary interest in a debtor's reorganization plan and that the order of the bankruptcy court confirming a debtor's reorganization plan unfairly "diminishes their property, increases their burdens, or impairs their rights."¹⁵ Every Federal Circuit has adopted a heightened standard for Appellate Standing which requires a party to demonstrate that the party has a pecuniary interest

¹² See *Kaiser Aerospace & Elec. Corp. v. Teledyne Indus. (In re Piper Aircraft Corp.)*, 244 F.3d 1289, 1304 n. 11 (11th Cir.2001) (defining "party in interest" non-exclusively in § 1109(b)); *Hasso v. Mozsgai (In re La Sierra Fin. Servs.)*, 290 B.R. 718, 728 (9th Cir. BAP 2002) (providing non-exclusive "party in interest" list); *In re Summit Corp.*, 891 F.2d 1, 5 (1st Cir. 1989) ("Courts have generally construed the term "party in interest" as used in 11 U.S.C. § 1109(b) liberally").

¹³ See *Ault v. Emblem Corp. (In re Wolf Creek Valley Metro. Dist. No. IV)*, 138 B.R. 610, 615 (D. Colo. 1992); *In re River Bend-Oxford Assocs.*, 114 B.R. 111, 116 (Bankr. D. Md. 1990) ("[T]he concept of party in interest under the Bankruptcy Code for purposes of participation in the reorganization process should be interpreted flexibly to insure fair representation of all significantly impacted constituencies"); *In re Johns-Manville Corp.*, 36 B.R. 743, 754 (Bankr. S.D.N.Y. 1984) ("The concept of 'party in interest' is an elastic and broad one designed to give the Court great latitude to insure fair representation of all constituencies impacted in any significant way by a Chapter 11 case"), *aff'd*, 52 B.R. 940 (S.D.N.Y. 1985).

¹⁴ See *Gen'l Motors Acceptance Corp. v. Dykes (In re Dykes)*, 10 F.3d 184, 187 (3d Cir. 1993) (the "persons aggrieved" test now exists as a prudential standing requirement that limits bankruptcy appeals to persons "whose rights or interests are 'directly and adversely affected pecuniarily' by an order or decree of the bankruptcy court.").

¹⁵ *Id.*

in the bankruptcy proceedings.¹⁶ Although the Circuits interpret sections 1128(b) and 1109(b) very broadly to provide wide participation at the trial level, requiring a more heightened standard for Appellate Standing is necessary to ensure the continued efficiency of the bankruptcy courts.¹⁷

II. *In re Global Industrial Technologies* as a Model for Bankruptcy Standing

The Third Circuit’s opinion in *In re Global Industrial Technologies* provides a helpful analysis that explains how the Federal Circuits interpret section 1128(b)’s “party in interest” Bankruptcy Standing requirement.

A. The Facts of the Case

i. Global Industrial Technologies and A.P. Green Industries, Inc.

In 2002, Global Industrial Technologies (“GIT”) and its subsidiary company, A.P. Green Industries, Inc., (“APG” and collectively the “Debtors”), filed for chapter 11 protection in response to thousands of asbestos-related personal injury claims that had been filed against APG.¹⁸ APG had been a manufacturer and seller of refractory products and had used asbestos as an ingredient in its products until the mid 1970s.¹⁹ From the early 1980s until 2002, APG spent

¹⁶ *White v. Univision of Va., Inc. (In re Urban Broad. Corp.)*, 401 F.3d 236, 243–44 (4th Cir. 2005); *Gibbs & Bruns, L.L.P. v. Coho Energy, Inc. (In re Coho Energy Inc.)*, 395 F.3d 198, 202 (5th Cir. 2004); *Nangle v. Surratt-States (In re Nangle)*, 288 B.R. 213, 216 (B.A.P. 8th Cir. 2003); *Westwood Cmty. Two Ass’n v. Barbee (In re Westwood Cmty. Two Ass’n)*, 293 F.3d 1332, 1335 (11th Cir. 2002); *Lopez v. Behles (In re Am. Ready Mix, Inc.)*, 14 F.3d 1497, 1500 (10th Cir.1994); *Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d 498, 499 (6th Cir.1990); *Kane v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 843 F.2d 636, 642 (2d Cir. 1988); *Pignato v. Dein Host, Inc. (In re Dein Host, Inc.)*, 835 F.2d 402, 405 (1st Cir.1987).

¹⁷ *See In re DuPage Boiler Works, Inc.*, 965 F.2d 296, 297 (7th Cir.1992) (“The ‘person aggrieved’ test insures that bankruptcy proceedings are not unreasonably delayed by protracted litigation by allowing only those persons whose interests are directly affected by a bankruptcy court order to appeal.”); *In re Fondiller*, 707 F.2d 441, 443 (9th Cir. 1983) (“Efficient judicial administration requires that appellate review [in bankruptcy proceedings] be limited to those persons whose interests are directly affected.”).

¹⁸ *In re Global Indus. Technologies, Inc.*, 645 F.3d at 204–05.

¹⁹ *Id.* at 204.

approximately \$448 million to resolve over 200,000 asbestos-related personal injury claims filed against the company.²⁰ At the time the Debtors filed for chapter 11 in 2002, APG had an additional 235,000 asbestos claims pending against it, representing unpaid obligations of \$491 million.²¹

From 1977 to 2002, APG also dealt with twenty-three personal injury claims filed against it due to APG's use of silica in manufacturing a number of its products, resulting in \$312,000 in total settlements.²² At the time of the filing of the Debtors' chapter 11 petition in 2002, APG had only one silica-related claim pending against it, a class action consisting of 169 claims.²³ In the Debtors' plan of reorganization (the "Plan"), the Debtors did not identify their silica-related liability as being a motivation for their seeking bankruptcy relief, instead listing reprieve from the hundreds of thousands of asbestos-related claims pending against them as being their primary reason for seeking bankruptcy relief.²⁴

ii. The Debtors' Plan

In the Debtors' Plan, the Debtors sought to create two separate trusts that would assess and resolve the various asbestos and silica claims that were pending against APG.²⁵ Under the Plan's terms, the trusts were to be funded by the proceeds of certain assigned insurance policies which the Debtors believed would fully cover all liabilities facing APG.²⁶ Hartford Accident and Indemnity Company, First State Insurance Company, Twin City Fire Insurance, Century Indemnity Company, and Westchester Fire Insurance Company (collectively the "Insurers")

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 204–05.

²⁵ *Id.* at 205.

²⁶ *Id.* at 206.

were insurance companies whose coverage policies were assigned by APG to cover APG's silica-related trust.²⁷

In order for the Debtors' Plan to be approved and relieve them of their asbestos-related liability, the Debtors had to have their Plan approved by 75% of the then-current asbestos claimants.²⁸ In order to solicit the required votes from the outstanding asbestos claimants, the Debtors contacted different asbestos claimants' attorneys who had actions pending against APG.²⁹ Many of these asbestos attorneys also represented claimants who currently had silica-related claims pending against *other* companies but did not have any silica-related claims against APG.³⁰ After the Debtors contacted the claimants' asbestos attorneys, however, the number of silica-related claims outstanding against the Debtors suddenly ballooned to over 4,600.³¹ The majority hints of collusion between the Debtors and the asbestos claimants' attorneys, suggesting that the Debtors agreed to channel the asbestos attorneys' outstanding silica claims into its own silica fund in order for the asbestos claimants to vote in favor of the Debtors' Plan. In its opinion, the majority stated that a major reason for its reversal of the decisions below was for the bankruptcy court to ascertain more facts surrounding the collection of the additional silica claims against APG.³²

B. Arguments For and Against Standing and the Decisions Below

The Insurers objected to the terms of the Debtors' Plan, arguing that they would suffer injury under the Plan's terms because confirmation of the Plan would force the Insurers to provide coverage obligations to over 4,600 silica claims, whereas the Insurers would only have

²⁷ *Id.* at 205–06.

²⁸ *Id.* at 205. *See also* 11 U.S.C. § 524(g)(2)(B)(ii)(IV)(bb).

²⁹ *Id.* at 205.

³⁰ *Id.*

³¹ *Id.* at 207.

³² *Id.* at 215.

to provide coverage to 169 claims prepetition.³³ The Insurers further proffered that the Debtors had only obtained the outstanding silica claims as the result of collusion with the asbestos claimants' attorneys, and argued that they should be allowed the opportunity to at least challenge the Plan's terms in bankruptcy court to uphold the integrity of bankruptcy proceeding.³⁴ Using the language of 1109(b), the Insurers argued that they were "parties in interest" and therefore should have a right to object the Plan's confirmation under section 1128(b).

The Debtors, on the other hand, argued that the Insurers did not have standing to object because they had not suffered any injury under the Plan.³⁵ The Debtors' maintained that the Plan was insurance neutral,³⁶ meaning that the Plan did not materially alter the amount of liability that the Insurers would be forced to absorb post confirmation of the Plan.³⁷ Essentially, the Debtors argued that nothing in the Plan's terms precluded the Insurers from asserting their rights of coverage defenses against certain claimants. The Debtors stressed that the assignment of the Insurers' insurance policies to the trusts by itself did not require the Insurers to contribute indemnity funds to the trusts.³⁸ Rather, a claim would have to be successfully asserted against the Insurers before they would become liable for indemnity.³⁹ According to the Debtors, because the Plan was insurance neutral, the Insurers did not suffer any injury and therefore could not have Bankruptcy Standing to object to the terms of the Plan.⁴⁰

³³ *Id.* at 207.

³⁴ *Id.* at 206.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 212.

³⁸ *Id.* at 214

³⁹ *Id.*

⁴⁰ *See In re Combustion Eng'g, Inc.*, 391 F.3d 190 (3d Cir.2004) (discussing how "neutrality provision" protected pre-petition rights).

On November 14, 2007, the bankruptcy court confirmed the Debtors' Plan over the Insurers' objections.⁴¹ The bankruptcy court ignored any evidence suggestive of collusion on the parts of the Debtors and the asbestos claimants' counsel and recognized 4,626 unique silica claims to be at issue in the APG silica-related trust.⁴² In reaching its holding, the bankruptcy court held that the Insurers lacked Bankruptcy Standing to object to the Plan because the Insurers had not suffered any actual injury under the Plan's terms, the Plan was insurance neutral, and the Insurers' arguments that they would suffer financial harm were too speculative to grant them standing to object.⁴³ The district court affirmed, adding that the Insurers could not be parties in interest because they had not suffered actual injury under the Plan's terms, and therefore had not met the "exacting standard" that is required for Bankruptcy Standing.⁴⁴

C. The Third Circuit's Opinion

The Third Circuit reversed the decisions below and remanded the case back to the bankruptcy court.⁴⁵ In its majority opinion, the court stated that the district court had wrongly interpreted sections 1109(b) and 1128(b)'s "party in interest" Bankruptcy Standing requirement by holding that Bankruptcy Standing requires an "exacting standard" and actual injury.⁴⁶ The district court's misapplication of "party in interest" is likely what prompted the majority opinion to expressly differentiate between Bankruptcy Standing under the Code and Appellate Standing, which does in fact require an "exacting standard" and actual pecuniary injury. In its opinion, the

⁴¹ *Id.* at 208.

⁴² *Id.* at 207.

⁴³ *Id.* (holding Insurers' injury claims too speculative because Insurers were not required to contribute to the APG silica trust and would be able to assert coverage defenses if faced with putative obligations to reimburse the APG silica trust on silica-related claims).

⁴⁴ *Id.* at 216.

⁴⁵ *Id.*

⁴⁶ *Id.*

court stated that the “explosion of new [silica] claims”⁴⁷ placed the Insurers in a compromised position that should at least allow the Insurers an opportunity to raise their objections. The majority decision proffered that even if the Insurers never paid a single dollar in indemnity to the Debtors, the Debtors’ Plan would still expose the Insurers to significant administrative and investigative costs to identify the meritorious claims and separate them from those fraudulently filed ones.⁴⁸

In reaching its holding, the majority relied on the Supreme Court’s analysis in *Clinton v. City of New York*,⁴⁹ a case establishing that an injury’s having a contingent aspect does not necessarily make that injury incognizable.⁵⁰ Furthermore, the majority relied on the Court’s discussion in *Hartford Underwriters Ins. Co. v. Union Planters Bank*,⁵¹ in which the Court held “we do not read [section] 1109(b)’s general provision of a right to be heard as broadly allowing a creditor to pursue substantive remedies that other Code provisions make available only to other *specific parties*.”⁵² Essentially, the Court’s decision suggests that unless a Code provision specifically defines “party in interest” and limits participation to only certain parties within that provision, then “party in interest” should be interpreted broadly to allow those parties whose rights might be affected by a bankruptcy proceeding the right to participate in that proceeding. Because section 1128(b) does not define or limit 1109(b)’s “party in interest” to only a limited number of parties, section 1128(b) should therefore be interpreted broadly to allow all parties listed in debtor reorganization plans Bankruptcy Standing and the right to object when those parties’ rights might be implicated by such plans.

⁴⁷ *Id.* at 214.

⁴⁸ *Id.*

⁴⁹ *Clinton v. City of New York*, 524 U.S. 417 (1998).

⁵⁰ *See id.* at 432.

⁵¹ *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000).

⁵² *Id.* at 8 (emphasis added).

III. Practical Effects and Policy Considerations

Because the Third Circuit’s decision does not require that parties to a reorganization plan suffer actual injury under the terms of that plan, more parties affected by reorganization plans are likely to allege injury in order to contest a plan’s terms.⁵³ Bankruptcy practitioners should realize that they may have to consider the rights of even fairly attenuated parties, as the Federal Circuits’ broad interpretation of “party in interest” means that even those parties at least have the right to be heard in bankruptcy court. Although the Third Circuit’s decision may be beneficial to those parties listed in a debtor’s reorganization plan, this precedent—and the potential it creates to open the floodgates for parties to object—may prove to be burdensome to bankruptcy courts.⁵⁴

IV. Conclusion

In *In re Global Industrial Technologies*, the Third Circuit does not depart from its previous Bankruptcy Standing precedent, nor does the opinion provide an alternative or novel way of interpreting “party in interest” in section 1128(b). Nevertheless, the decision serves as an important reminder to debtors writing confirmation plans, to parties listed in reorganization plans under chapter 11, and to bankruptcy practitioners that although such liberal readings of 1128(b) might burden the dockets of the bankruptcy courts, the Federal Circuits are most interested in ensuring that bankruptcy courts confirm only those reorganization plans that are fair and equitable to all of the parties listed in such plans.

⁵³ In fact, the Ninth Circuit recently cited to the Third Circuit’s analysis in *In re Global Indus. Technologies, Inc.* and broadly interpreted section 1109(b) to reverse the district court and find that parties in interest should have had bankruptcy standing at the trial level. See *In re Thorpe Insulation Co.*, 2012 WL 178998 (9th Cir. Jan. 24, 2012).

⁵⁴ *Id.* at 219–20 (Nygaard, J., Dissenting) (“The majority’s detour from the standard analytic pathway for determining contingent injury ensures that bankruptcy courts will . . . be burdened with determining whether sufficient injury exists among a broad new class of persons.”)