4-2004

The A.H. Robins Bankruptcy

Jeb Gerth

Ed Meade

Ryan Russell

The A.H. Robins Bankruptcy

Workouts and Reorganizations

April 20, 2004

Jeb Gerth
Ed Meade
Ryan Russell

The A.H. *Robins* Bankruptcy

This paper addresses the A.H. Robins Company ("Robins") chapter 11 bankruptcy proceedings in an attempt to understand how the chapter 11 process works in the context of a mass tort case and who benefits from its structure. Part I offers a short factual introduction of the A.H Robins Company and describes the Dalkon Shield, an intrauterine device (IUD) that caused Robins' downfall. Part II introduces Judge Merhige, notes the circumstances leading to Robins' chapter 11 filing, and examines the tools used by Judge Robert Merhige and Robins to shape the Robins bankruptcy proceeding. In Part III, the paper addresses the key innovations developed by Judge Merhige during the pendency of the case that allowed for the confirmation of the plan of reorganization. Part IV is a summary of the confirmed plan of reorganization. In Part V, the paper asks, and attempts to answer, the following question: who, among the large group of players, benefited from the Robins bankruptcy? Finally, Part VI serves as a conclusion, noting the final outcome of the Robins bankruptcy as well as the potential legacy the Robins bankruptcy may have on future chapter 11 cases.

I. FACTUAL BACKGROUND

The story of the A.H. Robins bankruptcy, one of the largest and most influential mass tort bankruptcies to date, began in 1866, when Albert Hanley Robins opened a small apothecary shop in downtown Richmond Virginia.[1] For the first fifty years, the A.H. Robins enterprise remained a small, unincorporated business primarily engaged in the sale of patent medications (i.e. over the counter medications).[2] When Edwin Claiborne Robins, Sr., who graduated from the Medical College of Virginia in Richmond

[1] SHELDON ENGELMAYER & ROBERT WAGMAN, LORD'S JUSTICE 6 (1985).
[2] *Id.*

with a degree in pharmacy, took control of the company, he sought to expand and grow the business by acquiring drugs and other products that could be distributed on a much larger scale.[3] In 1970, in a rush to beat competitors, the now incorporated A.H. Robins purchased the Dalkon Shield without conducting any meaningful independent research on the new IUD, which was marketed by its inventors as the best contraceptive device on the market.[4]

Hugh Davis, a gynecologist on the faculty of John Hopkins Medical School, and Irwin Lerner, an electrical engineer and part time inventor, developed the Dalkon Shield in 1968 in response to dissatisfaction with the Pill and concern for population explosion in the general populace.[5] Davis and Lerner intended to create an IUD that would be more effective than other IUDs. More specifically, the Dalkon Shield was designed so that it would not be expelled from the patient's body after insertion, which was a common problem with previous IUDs.

The Dalkon Shield differed from other IUDs in many ways. Most importantly, the Dalkon Shield used a multifilament tail string while previous models used a monofilament version. The function of a tail string is to alert examining physicians and patients to the presence of an IUD and ease the removal process.[6] The Dalkon Shield's tail string was composed of hundreds of tiny nylon fibers surrounds by a nylon sheath.[7] Davis and Lerner hoped that the multifilament tail string and sheath apparatus would solve the problem associated with other IUDs: breakage of the monofilament tail string.

---

[3] RICHARD B. SOBOL, BENDING THE LAW 4 (1991).
[4] *Id.* at 5.
[5] *Id.* at 1.
[6] *Id.* at 2.
[7] *Id.*

Thus, in theory, the multifilament design was intended to protect women. Unfortunately, the Dalkon Shield tail string did not conform to the designers' expectations.

A basic understanding of female anatomy is required to understand the negative consequences of the multifilament tail string. The Dalkon Shield, like other IUDs, was inserted into the patient's uterus, which is a sterile environment. (Figure 1). The tail string of the IUD would pass through the cervix (the neck-shaped opening to the uterus) into the bacteria-filled vagina. The cervix includes a cervical plug, which produces white cells and acts as a protective shield to defend the sterile uterus from bacteria that would otherwise move into the uterus.

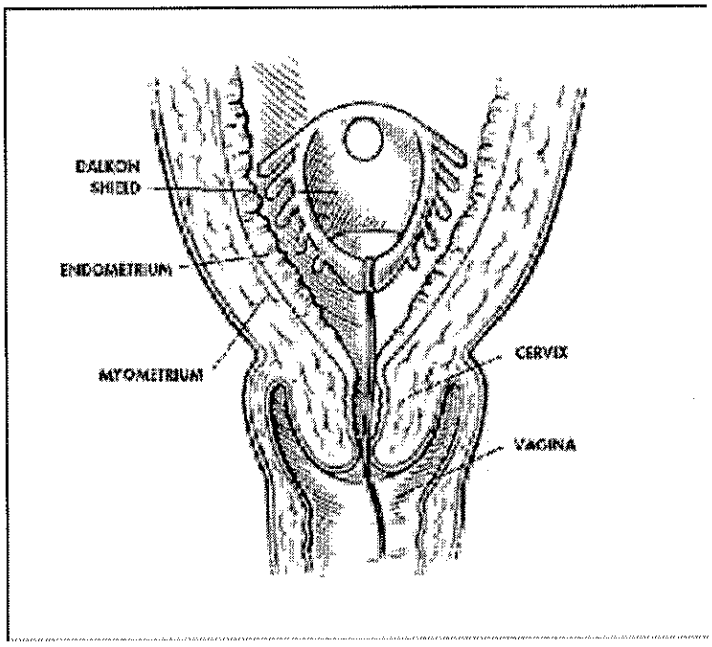

Figure 1[8]

Due to the multifilament tail string and surrounding nylon sheath, the Dalkon Shield wicked bacteria-laced fluids from the vagina into the sterile uterus, which resulted

[8] Yahoo! Health, What Was the Dalkon Shield?, *at* http://health.yahoo.com/health/centers/women/00018535 (last visited Apr. 15, 2005).

in various infections, including Pelvic Inflamatory Disorder (PID). One author explained the reason for the wicking process and resulting injuries:

> For two reasons the sheath[, which was designed to prevent the wicking effect,] did not do its job. First, inexplicably, Davis and Lerner failed to seal its ends. Fluid from the vagina could enter the open end at the bottom of the sheath and wick up past the knots to the open end at the top inside the uterus. Indeed, the nylon sheath made the problem of wicking worse because it shielded the bacteria inside the sheath from the antibacterial action of the mass of viscous fluid in the cervix known as the cervical plug. Second, the sheath developed holes either in the initial tying process or as a result of decomposition after the IUD was in place. These holes allowed the bacteria to escape into the uterus without even reaching the top of the string.[9]

Robins was oblivious to these design flaws when it purchased the Dalkon Shield on June 12, 1970, because it relied exclusively on a misleading study that was conducted by one of the Shield's inventors, Hugh Davis.[10] *Post hoc* reviews of Davis's report indicate that his study was flawed in several ways, which resulted in overestimation of the efficiency of the device in preventing pregnancy.[11] Furthermore, Davis never revealed that he had a pecuniary interest in the Shield, even though he was a substantial owner of the rights to the device.[12]

Prior to purchasing the Shield, Robins had no experience with contraceptive devices, but it recognized the potential profit it could glean from the new contraption.[13] Although Robins might be able to claim ignorance of the flaws and place primary blame on Davis, Robins consistently refused to publicize any negative information related to the Shield that it did receive. For example, a Robins official issued an "operation report," based on information from Irwin Lerner, who discussed the possible wicking effect from

---

[9] SOBOL, supra note 3, at 4.
[10] *Id.* at 5.
[11] *Id.* at 3.
[12] *Id.*
[13] *Id.* at 5.

the tail string.[14] Robins took no action except to stifle some Robins' employees' efforts to make the information public.[15] The company, instead of preventing a catastrophe, aggressively advertised the product and quickly captured the dominant share in the IUD market.[16] Robins, then, was blamed for the mass septic abortions ("a spontaneous or therapeutic/artificial abortion complicated by a pelvic infection"[17]), uterine infections, including PID[18], sterility, and even death that were attributed to use of the Dalkon Shield.[19] Even after Robins was forced to discontinue sales in the United States in 1974 based on scientific evidence of design flaws, it continued to market its product in foreign countries.[20]

There was an enormous backlash from Robin's hasty acquisition, aggressive advertising campaign, and refusal to acknowledge potential harmful effects:

> By 1975, several hundred suits had been filed against Robins claiming damages for a long list of injuries associated with use of the Dalkon Shield: death related to septic abortion, nonfatal septic abortion, pelvic inflammatory disease with or without hysterectomy or other infertility, perforation of the uterus or embedment of the device requiring surgical

---

[14] *Id.* at 7.
[15] *Id.*
[16] *Id.* at 6-7.
[17] Emedicine, Septic Abortion, *at* http://www.emedicine.com/emerg/topic10.htm (last visited Apr. 15, 2005).
[18] "PID is an infection of the reproductive organs (the fallopian tubes, uterus, ovaries, and other related structures). It usually begins with an infection of the cervix, caused by GONORRHEA and genital chlamydial infections, two common STD's. If the infection of the CERVIX is not treated with antibiotics, the bacteria can migrate upward from the CERVIX into the upper genital tract. This can then spread the infection to the endometrium and to the fallopian tubes, uterus, ovaries, and abdomen. You can become infertile as a result of PID. In fact, more than 100,000 women experience infertility each year as a consequence of PID." For College Women, Pelvic Inflammatory Disorder, *at* http://www.4collegewomen.org/fact-sheets/pid.html (last visited Apr. 15, 2005).
[19] SOBOL, supra note 3, at 9. Subsequent research indicates that the Dalkon Shield's tail string might not have been the cause of all of the medical issues attributed to it at the time.
[20] *Id.* at 10. Robins, in fact, did not discontinue distribution of the Dalkon Shield into foreign markets until it was on the verge of bankruptcy and the number of tort claims was enormous. *Id.*

> removal, ectopic (extrauterine or tubal) pregnancies[[21]] with resulting abortions, and birth defects.[22]

The company defended the lawsuits by blaming the doctors for improper insertion procedures and claiming that the women's medical history or sexual behavior were the proximate cause of the injuries.[23] Robins did not realize the real ramifications of the lawsuits until juries began granting injured women large punitive damages along with sizeable compensatory awards.[24] These verdicts also alarmed Aetna Casualty & Surety Company ("Aetna"), Robins' insurer.

The number of lawsuits against Robins grew exponentially and the company continued to defend each case. Some judges, most notably Miles Lord, a Federal District Court judge for the district of Minnesota, believed Robins' behavior *vis-à-vis* the Dalkon Shield was egregious and unscrupulous, and the tide began to turn.[25] Judge Lord consolidated twenty-three Dalkon Shield cases so that the factual issues would not have to be litigated for each one.[26] This was disturbing to Robins because they had previously defended by pointing the finger at the injured woman, but the consolidated trials would result in the jury recognizing that the each injured plaintiff shared only one characteristic: she used a Dalkon Shield.[27]

More importantly, perhaps, was Judge Lord's favorable rulings for the plaintiffs on discovery issues.[28] Lord ordered depositions of key Robins' executives, including

---

[21] Pregnancy in which the fertilized ovum implants on any tissue other than the endometrial lining of the uterus. Advanced Fertility Clinic of Chicago, Ectopic Pregnancy, *at* http://www.advancedfertility.com/ectopic.htm (last visited Apr. 15, 2005).
[22] SOBOL, supra note 3, at 11.
[23] *Id.*
[24] *Id.* at 15.
[25] *Id.* at 17.
[26] *Id.*
[27] *Id.*
[28] *Id.* at 18.

Robins Junior and Senior and production of ten categories of documents, including studies that Robins performed on the Dalkon Shield that had never been introduced into evidence in any case.[29] Robins appealed Judge Lord's decision and quickly negotiated settlements for all the cases before him.[30] In fact, Robins was so anxious to rid itself of Judge Lord that they paid more to settle claims than the plaintiffs had demanded in their complaints.[31] Judge Lord's influence in the Dalkon Shield litigation culminated in a statement from the bench in which he chastised Robins Junior and Senior, who were present, for not doing more to end the suffering they had caused.[32] In response, Robins brought an action for judicial misconduct, which resulted in the Court of Appeals ordering that the statement be stricken from the record.[33] Robins could not "unring the bell;" lawyers and victims were instilled with a new-found zeal and impetus to bring Robins to justice.[34]

When another federal district judge adopted Lord's discovery order verbatim, Robins' attorneys knew that they needed to find a more favorable forum to resolve the Dalkon Shield litigation. They sought sanctuary in the comfortable confines of their home jurisdiction of Richmond Virginia in front of Judge Robert Merhige.

II. SETTING THE STAGE: THE ROBINS BANKRUPTCY TAKES SHAPE

Robert Mehrige was a New York attorney before relocating to Richmond and eventually being appointed to the federal district court in 1967.[35] Merhige was active in the Richmond community and prided himself on his ability to resolve complicated cases

---

[29] *Id.*
[30] *Id.* at 19.
[31] *Id.*
[32] *Id.* at 20.
[33] *Id.* at 21.
[34] *Id.*
[35] *Id.* at 25.

by encouraging settlements between the parties.[36] Judge Merhige utilized the tools available to him under the law as well as unorthodox, informal discussions with attorneys to facilitate settlements between the parties.[37] As one commentator observed, "Merhige will decide on a solution, however unorthodox, that seems sensible to him and then shrewdly and effectively use the many tools available to a federal judge to achieve it."[38] Judge Merhige's handling of the Robins bankruptcy proved that this reputation is well deserved.

In 1982, as a result of unusual jurisdictional issues[39], a group of Dalkon Shield cases were transferred from the federal district court for Minnesota to Judge Mehrige's court in Richmond, Virginia.[40] Robins then tried to seize the advantage in the Dalkon Shield litigation by certifying a mandatory class action on the issue of punitive damages in Merhige's court.[41] Robins was certain that it could survive if it could limit its total liability for punitive damages and only concern itself with compensatory claims.[42] One way to reach its goal was to certify a mandatory class action on the issue of punitive damages. If it was successful, then injured tort claimants could bring an action for compensatory damages at any time, but Robins' total liability for punitive damages would be determined in a class action, thereby creating a limited fund available to resolve

---

[36] *Id.* at 31.
[37] *Id.* at 25, 32.
[38] *Id.* at 25.
[39] Under the federal venue statute, "[a] civil action founded solely on diversity of citizenship may . . . be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought." 28 U.S.C. § 1391(a). Based on this statute, a plaintiff's attorney, who represented approximately two hundred Dalkon Shield plaintiffs who resided in various states, could not bring an action anywhere except Virginia, Robins' state of residence, if he wanted to represent all of the injured women together. *Id.*
[40] SOBOL, supra note 3, at 25.
[41] *Id.* at 37.
[42] *Id.*

punitive damage awards.[43] Robins tried to certify a mandatory class action on the issue of punitive damages in the Ninth Circuit, but was unsuccessful.[44] When Mehrige denied Robins' motion on the grounds of collateral estoppel (a legal doctrine that precludes a court from determining an issue that has been previously determined by a court of competent jurisdiction), Robins sought the aid of an agreeable plaintiff's attorney named Joseph S. Friedburg, who had shown some interest in consolidating all cases in Richmond, Virginia.[45]

With Friedberg on board, Robins began *ex parte* communications (generally prohibited communications between counsel and the court when opposing counsel is not present[46]) with Judge Merhige regarding a potential consolidation and Robins' desire to avoid bankruptcy proceedings.[47] Some believe that Merhige played an inappropriate role in trying to convince other federal courts to transfer their cases to him.[48] Robins' attempt at class certification would eventually fail, but that would not remove Merhige from the Dalkon Shield litigation because Robins would choose him as the judge that would preside over their reorganization.

---

[43] *Id.* Robins supported its motion for class certification on the theory that there was a limited fund available to pay punitive damages claims. Robins argued that, if punitive damages issues were not consolidated, the limited fund would be depleted by the first plaintiffs and the later plaintiffs would receive nothing. *Id.*

[44] *See In re* N. Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig. v. A.H. Robins Co., 693 F.2d 847 (9th Cir. 1982). The court, citing FRCP 23, explained that the four prerequisites to class certification are (1) numerosity (i.e. there are so many members of the class that joinder is impracticable), (2) there are common questions of law or fact, (3) "the claims or defenses of the representative parties are typical of the clams or defenses of the class," and (4) the representative parties can fairly and adequately represent the class. *Id.* at 849. The court held that class certification on the issue of punitive damages under FRCP 23(a) was inappropriate in the Robins case because the commonality, typicality, and adequacy of representations requirements were not met. *Id.* at 850-51.

[45] SOBOL, supra note 3, at 43.

[46] BLACK'S LAW DICTIONARY, p. 597 (7th ed. 1999).

[47] SOBOL, supra note 3, at 44-48.

[48] *Id.* at 48.

A. Judge Merhige and "Administrative Order No. 1"

Robins recognized that Merhige would be an affable, agreeable arbitrator, which is why Robins adamantly attempted to certify a class action in his court. When that failed, Robins knew that Merhige was the best candidate for the position of bankruptcy judge when Robins filed for relief under chapter 11. Normally, a federal district judge will not preside over bankruptcy administrations because federal law vests concurrent jurisdiction of most bankruptcy proceedings in the bankruptcy judge of the federal district.[49] In fact, most federal district courts have blanket orders transferring all bankruptcy cases directly to the bankruptcy judge.[50] Richmond was no exception.[51] To circumvent the standing order, Robins took "Administrative Order No. 1" directly to Merhige the day that it filed for bankruptcy protection.[52] A key provision in the Order was that Judge Merhige would retain control over the Robins' bankruptcy.[53] Merhige signed the order on the same day.[54] Several years later, Judge Merhige commented to the New York Times that the allure and complexity of the Robins bankruptcy actually persuaded him not to retire, which he planned to do before the case was presented to him.[55]

In another unusual arrangement, Bankruptcy Judge Blackwell N. Shelley would sit next to Merhige on the bench throughout the proceeding to educate Merhige on Bankruptcy law.[56] In essence, then, Merhige took the case away from a qualified judge

---

[49] 11 U.S.C. § 157(a).
[50] SOBOL, supra note 3, at 60.
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.* at 63.
[56] *Id.*

and then requested that the qualified judge act as a bankruptcy expert throughout the proceedings.

B. Insider Control of the Process: Declining to Appoint a Trustee and the Use of the Exclusivity Period

Robins believed that Judge Merhige, as a staunch supporter of the Richmond community, would try to limit Robins' total liability so that the company could emerge from chapter 11 with the same owners and managers.[57] Robins' prognostication appeared accurate when Merhige declined to appoint a trustee in the Robins bankruptcy, thereby allowing the Robins executives to remain in control and continue to draw their substantial salaries.[58]

Early in the proceedings, a United States attorney in Richmond, who was representing the IRS (one of Robins' creditors) in the bankruptcy proceeding, filed a motion with Merhige to appoint a trustee.[59] Acknowledging that Merhige might appoint a trustee based on Robins' unscrupulous pre-bankruptcy behavior and the fact that Robins had made multiple preferential payments to trade creditors and insiders, Robins determined that it would defend itself by blaming its attorneys.[60] Robins quickly moved for authorization to employee Skadden, Arps, Slate, Meagher & Flom as its bankruptcy counsel to replace Murphy, Weir & Butler, its then-present representatives.[61] Also, Robins' general counsel conveniently announced his early retirement on the same day that Robins' announce that Murphy, Weir & Butler's services were no longer needed.[62]

---

[57] *Id.* at 61.
[58] *Id.* at 95.
[59] *Id.* at 89.
[60] *Id.* at 91.
[61] *Id.* at 90.
[62] *Id.*

Merhige, although chastising Robins' executive for their behavior, allowed Robins to make preferential payments to its key suppliers, distributors, promoters and outsourced research and development groups during the pendency of the case while the injured tort victims received nothing.[63] In the end, although 11 U.S.C. §1104(a) provides that "the court shall order the appoint of a trustee – for cause, including fraud, dishonesty, incompetence or gross mismanagement," Judge Merhige held that the appointment of a trustee would do more harm than good, even though he recognized that Robins' management should be sanctioned for their part in the post-petition preference payments.[64] In spite of their egregious behavior, Robins' executive maintained their control over the company; Merhige, however, did appoint an examiner, who, primarily, was supposed to oversee Robins' collection of preference payments but eventually became a more important figure in the development of a plan of reorganization.[65]

Robins also received support from Merhige based on his granting extensions of the exclusivity period. In fact, Robins did not file its first plan of reorganization until April 1987, twenty months after it filed for relief.[66] Merhige then extended the exclusivity period to allow Robins to file six amendments to its plan, which was finally confirmed in July 1988.[67] Based on the extensions, Robins was the only party in the bankruptcy proceeding that was able to propose a plan of reorganization, a fact that would eventually allow Robins' equity holders to receive value in derogation of the

---

[63] *Id.* at 96.
[64] *Id.* at 95.
[65] *Id.* Merhige appointed former bankruptcy judge Ralph Mabey as the examiner. Initially, Mabey would oversee Robins' collection of preference payments. In the end, however, Mabey would become a key intermediary between Merhige and the parties in the process of formulating a plan of reorganization.
[66] *Id.* at 136.
[67] *Id.*

absolute priority rule.[68] ("[The Representative of the Dalkon Shield Committee] was prepared to support a plan of reorganization that modified the absolute priority rule, in recognition of the power of management and the shareholders to prolong the chapter 11 case if he did not."). Indeed, equity was provided for under the reorganization plan in the form of stock in American Home Products ("AHP"), the company that would eventually purchase Robins as part of the merger agreement between Robins and AHP.[69]

Apparently, the absolute priority rule notwithstanding, equity often shares in the distribution under a reorganization plan, even where the debtor is insolvent.[70] While in some cases, equity is allowed to participate in the distribution because of legitimate questions as to whether equity does have some right to distribution, in many cases, attorneys involved in reorganization negotiations involving an insolvent debtor have reported that "'consensual plans' [are] highly desirable and that to obtain those consents 'everybody has to get something.'"[71] According to LoPucki and Whitford, another articulation of this idea is that "equity distributions" are the "price of peace."[72]

C. Judicial Power and Section 105 of the Bankruptcy Code

Regardless of any bias, Merhige made it abundantly clear that he would find the means to reach the end that he desired. One way to achieve his goal was to surround himself with individuals that *he* trusted; instead of allowing the represented parties to choose their representatives. For example, early in the proceedings, the plaintiff's attorneys, who represented injured women against Robins before it filed for bankruptcy,

---

[68] *Id.* at 144
[69] *See* Debtor's Sixth Amended and Restated Plan of Reorganization § 5.05, In re A.H. Robins Co. (No. 85-01307-R), *in* Sixth Amended and Restated Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code (Mar. 28, 1988) [hereinafter Plan].
[70] Lynn M. LoPucki & William C. Whitford, *Bargaining Over Equity's Share in the Bankruptcy Reorganization of Large, Publicly Held Companies*. 139 U. Pa. L. Rev. 125, 144 (1990).
[71] *Id.*
[72] *Id.*

battled for control of the Claimant's Committee, which would represent the interests of the injured women in the Robins' bankruptcy.[73] Judge Merhige had hand-picked an attorney named Murray Drabkin as his choice for the claimant's committee expert.[74] When Drabkin and the claimant's committee proved to be incompatible, Merhige dissolved the claimant's committee and Drabkin remained an active and important voice in the proceedings.[75]

The claimant's committee, who stood to gain from personal involvement in the bankruptcy case, challenged Merhige's order by filing a motion to disqualify Merhige on the grounds of bias or the appearance of impropriety.[76] The dissolved committee members provided evidence of pre-petition *ex parte* communications between Merhige and members of the Robins family, as well as evidence that Merhige was biased against certain members of the now-dissolved committee.[77] Merhige, of course, denied the motion.[78]

From the very beginning of the proceedings, Merhige stretched the discretionary authority of federal judges under the Bankruptcy Code to reach a "global peace" settlement that would resolve all of the Dalkon Shield claims. With the aid of 11 U.S.C. § 105, which confers broad discretionary authority on Bankruptcy Judges[79], Judge Merhige developed an innovative new formula for mass-tort bankruptcies. Indeed, as discussed below, many of the disputes in the formulation of the plan of reorganization

---

[73] SOBOL, supra note 3, at 69.
[74] *Id.* at 71.
[75] *Id.* at 80.
[76] *Id.* at 80.
[77] *Id.* at 80-81.
[78] *Id.* at 81.
[79] "The court may issue any order, process, or judgment,. That is necessary or appropriate to carry out the provision of this title." 11 U.S.C. §105(a).

involved defining the outer limits of a bankruptcy judge's equitable powers under section 105.

III. INNOVATIONS IN THE PLAN AND CONTROVERSIAL LEGAL DECISIONS

The Bankruptcy Code does not provide an extensive set of rules for dealing with mass-tort bankruptcies. On the contrary, the Bankruptcy Code is comprised of standards that are malleable to the exigencies of the particular circumstances and provisions that provide bankruptcy judges with broad discretionary power to resolve complicated issues that are not specifically addressed in the Code. In reaching a "global peace settlement," Judge Merhige took full advantage of the loose bankruptcy standards available to him and received staunch support from the Forth Circuit Court of Appeals when any of the parties challenged his rulings. Each of Merhige's controversial rulings was necessary to effectuate his goal of a plan of reorganization that would resolve all of the issues related to the Robins bankruptcy. Although Merhige made dozens of controversial rulings while presiding over the Robins case, the most innovative and controversial of them were (A) his decision to extend the automatic stay to Robins co-defendants, (B) his use of third-party channeling injunctions, (C) the claims resolution facility (i.e., the Dalkon Shield Trust and its administration), and (D) his treatment of future tort claimants (those that filed after the final deadline for filing claims).

A. Extension of the Automatic Stay

One of the major innovations in the A.H. Robins case was the extension of the automatic stay to cover claims against all co-defendants of A.H. Robins during the pendency of the case. Robins requested the extension on the basis that claims against

third-parties were actually claims against assets of the Robins bankruptcy estate.[80] Any payments made by third parties would either (1) be paid out by Aetna, Robins' insurer, or (2) require Robins to indemnify the third-party.[81] As another justification, Robins argued that cases against co-defendants would divert the attention of Robins' key personnel, who would have to respond to discovery requests, deposition requests, and testify at trials.[82] Of course, halting all of the pending litigation would also ensure that Robins would not have to comply with discovery orders that might expose incriminating information about the company's attitude toward the dangers of the Dalkon Shield. Regardless of its reasons, Robins wish was granted when Merhige approved the injunction, which was appealed to the Forth Circuit Court of Appeals.

In *A.H. Robins v. Piccinin*, 788 F.2d 994, 999 (4th Cir. 1986), the Fourth Circuit Court of Appeals, reviewing Merhige's extension of the stay to all Robins co-defendants, noted that the automatic stay normally does not apply to co-defendants: section 362(a)(1) is "generally said to be available only to the debtor, not third party defendants or co-defendants." The court noted that that the automatic stay is available to non-debtor co-defendants if there are "unusual circumstances:"

> However, ... 'there are cases [under 362(a)(1)] where a bankruptcy court may properly stay the proceedings against non-bankrupt co-defendants' but, . . . in order for relief for such non-bankrupt defendants to be available under (a)(1), there must be 'unusual circumstances' and certainly '"[s]omething more than the mere fact that one of the parties to the lawsuit has filed a Chapter 11 bankruptcy must be shown in order that proceedings be stayed against non-bankrupt parties."' This 'unusual situation,' it would seem, arises when there is such identity between the debtor and the third-party defendant that the debtor may be said to be the real party

[80] SOBOL, supra note 3, at 63.
[81] *Id.*
[82] *Id.* at 64.

> defendant and that a judgment against the third-party defendant will in effect be a judgment or finding against the debtor.[83]

The Fourth Circuit also concluded that, "actions 'related to' the bankruptcy proceedings against the insurer or against officers or employees of the debtor who may be entitled to indemnification under such policy or who qualify as additional insureds under the policy are stayed under section 362(a)(3).[84] In addition, the Fourth Circuit noted that section 105 of the Code "'empowers the bankruptcy court to enjoin parties other than the bankrupt' from commencing or continuing litigation."[85]

As a final justification for extending the stay, the Fourth Circuit stated that "the bankruptcy court under its comprehensive jurisdiction as conferred by section 1334, 28 U.S.C., has the 'inherent power of courts under their general equity powers and in the efficient management of the dockets to grant relief' to grant a stay."[86] In *Robins*, the stay was extended, not only to Aetna, Robins' insurance company, and Robins' directors, the stay also extended to actions against doctors who may have faced malpractice suits related to the Dalkon Shield.[87] In *Piccinin*, however, the Fourth Circuit noted that the stay had only been challenged as to several insiders, and all of these individuals were entitled to indemnification under the corporate by-laws and the statutes of Virginia, or under an express contract of indemnification.[88]

Although the Code does not explicitly provide for a stay of actions against a debtor's co-defendants, Judge Merhige's exercise of discretionary power was within the

---

[83] A.H. Robins Co. v. Piccinin, 788 F.2d 994, 999 (4th Cir. 1986) (quoting *Johns-Manville Sales Corp.*, 26 B.R. 405, 410 (S.D.N.Y. 1983)).
[84] *Id.* at 1001.
[85] *Id.* (quoting *In re Otero Mills, Inc.*, 25 B.R. 1018, 1020 (D.N.M. 1982)).
[86] *Id.* at 1003 (quoting Williford v. Armstrong World Indus., Inc., 715 F.2d 124, 127 (4th Cir. 1983).
[87] *See* Georgene Vairo, *Mass Torts Bankruptcies: The Who, the Why and the How*, 78 Am. Bankr. L.J. 93, 112-13 (Winter 2004).
[88] *Piccinin*, 788 F.2d at 1007.

spirit of section 105. The extension of the stay to Robins' co-defendants was necessary in order to avoid those co-defendants from circumventing the automatic stay by suing individuals who would have been indemnified by Robins. In essence, the estate would have been responsible for any liability of the co-defendants. As a result of the extension of the stay, injured tort claimants were denied the opportunity to seek immediate funds from Robins' co-defendants who would then have had a claim for indemnity. "[T]he National Women's Health Network filed a motion asking Judge Merhige to require Robins to establish an emergency fund during the bankruptcy to reimburse women with unresolved Dalkon Shield claims for the costs of medical procedures related to the restoration of fertility."[89] Judge Merhige issued an order creating the emergency treatment fund; however, the order was appealed by the Official Committee of Equity Security Holders.[90] The Fourth Circuit reversed Merhige's order.[91] Thus, during the pendency of the bankruptcy case, women in need of immediate fertility treatment were neither provided a fund from which to recover nor allowed to proceed with their claims against Robins' co-defendants.

B. Third Party Channeling Injunctions

While the extension of the automatic stay to non-debtors "marked the first appearance of the policy of 'global peace,'" this policy was most notably furthered by the use of third party channeling injunctions. As noted by Vairo:

> [A]lthough the automatic stay in the A.H. Robins case extended to parties other than the debtor, to obtain true global peace, such parties needed to be bound by the result of the A.H. Robins reorganization.
>
> . . .

[89] SOBOL, supra note 3, at 129. By 1987, the establishment of an emergency fund was supported by Robins, Mabey, and Drabkin and was looked upon favorably by Judge Merhige. *Id.*
[90] Official Comm. of Equity Security Holders v. Mabey, 832 F.2d 299 (4th Cir. 1987).
[91] *Id.*

> The Code empowers federal courts to issue 'any order, process or judgment that is necessary or appropriate to carry out the provisions of this title.'[92]

In *A.H. Robins v. Mabey*, 880 F.2d 694 (4th Cir. 1989), the Fourth Circuit Court of Appeals addressed the district court's confirmation of the AHP Plan and issuance of third party channeling injunctions. The Fourth Circuit ultimately concluded that the court had the power to enjoin suits against entities other than the debtor. The appellants in this appeal raised the argument that such a third party channeling injunction was prohibited by section 524(3) of the Code, which states in pertinent part:

> Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.[93]

The court noted that some courts have concluded that this section results in the bankruptcy court having no power to "discharge liabilities of a nondebtor pursuant to the consent of creditors as a part of a reorganization plan."[94] Significantly, the Ninth Circuit Court of Appeals held that section 524 prohibited a bankruptcy court from issuing a channeling injunction because there is no substantive distinction between a permanent injunction and a discharge.[95] The *American Hardwoods* court stated, "A discharge under section 524(a)(2) does not void *ab initio* a liability. Rather, section 524 constructs a legal bar to its recovery. A discharge is in effect a special type of permanent injunction."[96] The Tenth Circuit Court of Appeals has reached the same conclusion with essentially the

---

[92] Vairo, *supra* note 87, at 116 (quoting 11 U.S.C. § 105(a)).
[93] 11 U.S.C. § 524(e).
[94] *Mabey*, 880 F.2d at 702 (citing Underhill v. Royal, 769 F.2d 1426, 1432 (9th Cir. 1985); Union Carbide Corp. v. Newboles, 686 F.2d 593 (7th Cir. 1982)).
[95] *In re* Am. Hardwoods, Inc., 885 F.2d 621, 626 (9th Cir. 1989).
[96] *Id.* This interpretation has support in the language of section 524(a): "A discharge in a case under this title . . . operates as an injunction against the commencement or continuation of an action . . .." 11 U.S.C. § 524(a).

same reasoning.[97] In reaching this conclusion, both the Ninth and Tenth Circuits have noted that the "bankruptcy court's supplementary equitable powers [under the Code] may not be exercised in a manner that is inconsistent with the other, more specific provisions of the Code."[98]

In contrast, the Fifth Circuit Court of Appeals has held that channeling injunctions are not barred by section 524. "Although section 524 has generally been interpreted to preclude release of guarantors by a bankruptcy court, the statute does not by its specific words preclude the discharge of a guaranty when it has been accepted and confirmed as an integral part of reorganization."[99] The Fourth Circuit chose to follow the lead of the Fifth Circuit. After addressing the cases demonstrating a split in the circuits, the *Mabey* court stated:

> We find the language used by the Fifth Circuit persuasive. Whatever the result might be as to the application of § 524(e) in other cases, we do not think that section must be literally applied in every case as a prohibition on the power of the bankruptcy courts, as appellants would have us apply it here. In this situation where the Plan was overwhelmingly approved, where the Plan in conjunction with insurance policies provided as a part of a plan of reorganization gives a second chance for even late claimants to recover where, nevertheless, some have chosen not to take part in the settlement in order to retain rights to sue certain other parties, and where the entire reorganization hinges on the debtor being free from indirect claims such as suits against parties who would have indemnity or contribution claims against the debtor, we do not construe § 524(e) so that

---

[97] *In re* Western Real Estate Fund, Inc., 922 F.2d 592, 601 (10th Cir. 1990) ("Accordingly, we follow the Ninth Circuit's lead in *In re American Hardwoods, Inc.*, 885 F.2d at 621 and hold that while a temporary stay prohibiting a creditor's suit against a nondebtor (in *American Hardwoods,* the bankrupt's guarantor) during the bankruptcy proceeding may be permissible to facilitate the reorganization process in accord with the broad approach to nondebtor stays under section 105(a) outlined above, the stay may not be extended post-confirmation in the form of a permanent injunction that effectively relieves the nondebtor from its own liability to the creditor.").

[98] *Id.*; *see American Hardwoods, Inc.*, 885 F.2d at 626 ("We therefore conclude that the specific provisions of section 524 displace the court's equitable powers under section 105 to order the permanent relief sought by American.").

[99] Republic Supply Co. v. Shoaf, 815 F.2d 1046, 1050 (5th Cir. 1987).

it limits the equitable power of the bankruptcy court to enjoin the questioned suits.[100]

The split among the circuits comes down to whether the equitable powers of the bankruptcy court to issue permanent (in this case, "channeling") injunctions is limited by the specific language of section 524 addressing the affect of a discharge against the debtor. The Fourth Circuit allowed the bankruptcy judge's general equity powers under section 105 to trump the more specific language of section 524. Interestingly, two years earlier in the same case, the Fourth Circuit Court of Appeals was confronted with an order by Judge Merhige establishing an emergency treatment fund for women needing immediate medical care for Dalkon Shield-related illness.[101] The Fourth Circuit, though "sympathize[ing] with the district court's concern for the Dalkon Shield claimants," concluded that no statutory authority existed to allow Judge Merhige permit a distribution to unsecured creditors prior to a confirmed plan.[102] The Fourth Circuit noted: "While the equitable powers emanating from § 105(a) are quite important in the general bankruptcy scheme, and while such powers may encourage courts to be innovative, and even original, these equitable powers are not a license for a court to disregard the clear language and meaning of the bankruptcy statutes and rules."[103]

Whatever distinctions the Fourth Circuit drew between prohibiting a judge from establishing an emergency fund for injured women and allowing a judge to

---

[100] *Id.*

[101] Official Comm. of Equity Security Holders v. Mabey, 832 F.2d 299, 299-300 (4th Cir. 1987).
[102] *Id.*
[103] *Id.* at 302.

effectively discharge Robins Sr., Robins Jr. and other Robins insiders from liability for their own tortuous conduct, the fact remains that the Fourth Circuit's decisions in the case allowed innovation in the effort to reach global peace while not allowing similar innovations to protect the interests of injured women seeking treatment during the pendency of the case.

C. The Claims Resolution Facility

At the heart of the Robins reorganization were the Dalkon and Codefendants Trusts (the "Trusts"). These two trusts worked in tandem with the third party channeling injunctions and the discharge of Robins' liabilities pursuant to the reorganization plan. The channeling injunctions were designed to "channel" the claims to these trusts and all claims against Robins were also directed to the trusts. Thus, the Trusts were a critical part of the overall reorganization plan.

In essence, the creation of the Trusts was an effort to create a compensation system other than the traditional tort system. As noted by George Rutherglen, "[t]he challenge . . . was to devise procedures that could serve as a credible substitute for litigation without its attendant costs."[104]

1. The Estimation Process

Creating a trust from which to compensate tort claimants required the court to estimate the total value of all Dalkon Shield claims. "The estimation process itself did not require an accurate determination of the value of each claim, but only of all claims

[104] GEORGE A. RUTHERGLEN, THE SEPTEMBER 11TH VICTIM COMPENSATION FUND AND THE LEGACY OF THE DALKON SHIELD CLAIMANTS TRUST 19 (University of Virginia Law School Public Law and Legal Theory Working Paper Series, Working Paper No. 20, 2005) *available at* http://law.bepress.com/uvalwps/uva_publiclaw/art20.

collectively. Overestimates of the value of some claims could be offset by underestimates of the value of others."[105]

The estimation process included expert appraisals from five parties: Robins, the Equity Committee, Unsecured Creditors Committee, Aetna, and the Claimant's Committee.[106] Judge Merhige held a hearing on the estimation of total liability to the injured tort claimants, but then resolved the issue based more on the practicalities of the case than on the evidence introduce at the hearing.[107] In the end, Merhige estimated Robins' total liability as the midpoint of the proposed estimates, $2.475 billion, which coincided with Aetna's estimation of total liability.[108] In the end, the trust was able to make payments to all claimants and remained solvent until it was terminated in 2000.[109]

2. Claimant Options

The Dalkon Trust provided claimants three options. According to Vairo, the chairperson of the Dalkon Trust, the purpose of Option 1 "was to permit the quick disposition of low-valued claims."[110] Dalkon Shield users who provided an affidavit stated that they had indeed used the Dalkon Shield and that they had suffered injury were entitled to $725, non-users (such as husbands) were entitled to $300. The purpose of Option 2 was "to provide payment to claimants with good medical proof of Dalkon Shield use and good medical proof of a Dalkon Shield associated injury, but whose medical records revealed serious alternative causation problems."[111] "The purpose of Option 3 was to provide settlement offers based on the pre-petition historical settlement

[105] *Id.* at 10.
[106] SOBOL, *supra* note 3, at 183.
[107] *Id.* at 196.
[108] *Id.* at 197.
[109] Vairo, *supra* note 87.
[110] *Id.* at 118.
[111] *Id.*

amounts for claimants with serious and provable Dalkon Shield injuries."[112] Even within Option 3, there were incentives for claimants to settle. Claimants opting for Option 3 "submit[ted] medial evidence of use, injury, and causation."[113] The trust took this evidence and made a "best and final" offer to the claimant.[114]

> Claimants were induced to accept this offer for two reasons: first, as its name implies, it was non-negotiable; and second, the trust waived fewer and fewer defenses as the claim went on to arbitration or litigation. If the claimant did not immediately accept this offer, she faced three different choices: ADR (a form of expedited arbitration), full arbitration, or litigation. As the procedures became more elaborate and the potential recoveries greater, the trust waived fewer and fewer defenses, until, in litigation, it waived no defenses at all. These graduated increases in the hurdles that claimants had to clear forced them to give careful consideration to the trust's settlement offer.[115]

This procedure can be viewed as having both positive and negative effects. One of the most fundamental positive effects was the relatively low transactional costs of operating the trust. Operating expenses "amount[ed] to less than 6.9% of the amounts paid to claimants."[116] When attorney's fees are included, "of all the money that passed through the Dalkon Trust, no more than 25% was consumed in direct transaction costs, leaving claimants with a net recovery of over 75% of the amounts expended."[117] Overall attorney's fees for claimants to the Trusts remained low for at least two reasons: (1) The claims procedure was designed so that woman could make a claim without retaining an attorney, and many in fact chose to pursue their claims without representation[118] and (2) "the district court unilaterally cut the contingent fees payable on the pro rata distribution to 10%, on the ground no additional effort was necessary by the attorneys to assure that

---

[112] *Id.*
[113] Rutherglen, *supra* note 104, at 21.
[114] *Id.*
[115] *Id.*
[116] Rutherglen, *supra* note 104, at 23.
[117] *Id.*
[118] *Id.*

their claimants received these payments."[119] Regarding claimants pursuing claims without the assistance of attorneys, Rutherglen notes that, at least in some cases, unrepresented women faired better than those that retained counsel.[120]

D. The Bar Date and Future Claims

Robins knew that, if it was to emerge from bankruptcy as a viable entity, its total liability to tort claimants needed to be determined in the bankruptcy proceeding. If Robins was forced to defend tort claimants in subsequent proceedings, the bankruptcy process would prove to be ineffective and it could easily find itself in the midst of another expensive bankruptcy proceeding. "Rule 3003 of the Bankruptcy Rules provides that the court shall fix a date (the "bar date") by which creditors must file their claims."[121] Merhige, by order, provided a date certain by which all claims must be received. After a nation-wide publication of the bankruptcy proceeding and claims process, approximately 195,000 claims were filed against Robins.[122] Merhige, astonished and impressed by the amount of claims, rebuked the claimants committee when it argued that the amount of claims by foreign women was significantly disproportionate to the number filed by American women.[123] Robins, although disappointed by the magnitude of claims against it, now had a finite amount of claims that could be valued so that it would not suffer indefinite litigation from injured Dalkon Shield claimants, assuming it could handle the problem of future tort claimants.

---

[119] *Id.* (citing *In re* A.H. Robins, Gergstrom v. Dalkon Shield Claimants Trust, 86 F.3d 364, 375-77 (4th Cir. 1996)).
[120] Rutherglen, *supra* note 104, at 25. Out of the 87% of Option 3 claimants that decided to accept the Trust's "best and final" offer, "the claimants who decided to represent themselves ultimately did better in the settlement process than those represented by counsel. The Option 3 offers to represented claimants averaged $36,500. Taking away a contingent fee of at least 30%, these claimants recovered significantly less than unrepresented claimants, who received an average of $31,300 not reduced by any fees." *Id.*
[121] SOBOL, *supra* note 3, at 97.
[122] *Id.* at 106.
[123] *Id.* at 101.

1. *Grady v. A.H. Robins* and the Treatment of Future Claims

A central aspect of facilitating "global peace" requires that all claims, both present and future, be dealt with in the reorganization. A plan of reorganization only discharges claims that have arisen prior to confirmation. 11 U.S.C. § 1141(d)(1)(A). The issue of future Dalkon Shield claimants came before the Fourth Circuit Court of Appeals in 1988 in the case of *Grady v. A.H. Robins*, 839 F.2d 198 (4th Cir. 1988). Rebecca Grady had a Dalkon Shield inserted some time before Robins filed its petition.[124] On August 21, 1985, Robins filed its petition and on that same day, Grady was admitted to the hospital, complaining of abdominal pain, fever and chills.[125] On August 28, 1985 Grady had the Dalkon Shield surgically removed.[126] On November 14, 1985, Grady was readmitted to the hospital, where she was diagnosed with pelvic inflammatory disease and a hysterectomy was performed.[127] Grady filed suit in district court on October 15, 1985.[128] Grady filed a motion in the bankruptcy court arguing that her claim did not arise before the filing of the petition and was therefore not subject to the automatic stay.[129] Grady relied primarily on *Matter of M. Frenville Co., Inc.*,[130] a Third Circuit Court of Appeals decision in which the court determined that a claim arises when the claim accrues under state law. Grady argued that, under California law, a claim does not accrue

[124] Grady v. A.H. Robins, 839 F.2d 198, 199 (4th Cir. 1988).
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] 744 F.2d 332 (3d Cir. 1984).

"until the injured person knows or by the exercise of reasonable diligence should have discovered the cause of the injury when that injury results without perceptible trauma."[131]

The Fourth Circuit, falling in line with majority of the Circuit Courts speaking on the issue, declined to adopt *Frenville*'s treatment of claims, instead holding that Grady's claim arose prior to Robins' filing and existed as a "contingent" claim falling within the purview of section 101(5)(A).

A condition precedent to confirmation of the AHP Plan was an order discharging Robins from "all claims and debts arising before the Confirmation Date." Disclosure Statement at 22. Based on the decision of the Fourth Circuit Court of Appeals, the AHP Plan treated all claims equally, whether present or future.

2. The Power of the Bankruptcy Judge Regarding Future Claims

In the context of the participation of a future claimants representative ("FCR") in a chapter 11 case, the bankruptcy judge retains a significant amount of control. Generally, the official appointments in bankruptcy are made by the U.S. Trustee.[132] Regarding most appointments, "the U.S. Trustee appoints the creditors' committee . . . and the committee and debtor choose their own attorneys and other professionals."[133] This comports with the general formulation of the bankruptcy judge as a judicial figure

---

[131] *Id.* at 201 n.4. The Third Circuit Court of Appeals' treatment of claims in *Frenville* has met with disapproval from all of the other Circuit Courts of Appeal addressing the issue. *In re* Baldwin-United Corp. Litigation, 765 F.2d 343, 348 n. 4 (2d Cir.1985) (in which the court declines to routinely accept *Frenville*); *In re* Wheeler, 137 F.3d 299, 300 (5th Cir. 1998) (applying a pre-petition relationship test); *In re* Jastram, 253 F.3d 438, 442 (9th Cir. 2001) (noting that the definition of "claim" is exceedingly broad and that this breadth is "critical in effectuating the bankruptcy code's policy of giving the debtor a 'fresh start.'" (quoting Calif. Dept. of Health Serv. v. Jensen *(In re* Jensen*)*, 995 F.2d 925, 929-30 (9th Cir. 1993)); *In re* Parker, 313 F.3d 1267, 1270 (10th Cir. 2002) ("Pursuant to [the reasoning of the Fourth Circuit in *Robins*], we hold that the malpractice claim here arose on the date it allegedly occurred, which was prior to the filing of the debtor's petition."). The Fourth Circuit Court of Appeals goes as far as to say that no court outside of the Third Circuit has applied the *Frenville* analysis of claim.

[132] *See* Frederick Tung, *The Future Claims Representative in Mass Tort Bankruptcy; A Preliminary Inquiry*, 3 CHAP. L. REV. 43, 67-68 (2000).

[133] *Id.* at 67-68.

and not as an administrator, as has been the case under the Act.[134] Indeed, "this role for the U.S. Trustee was created expressly for the purpose of removing the judge from the administrative aspects of bankruptcy cases."[135] According to Tung: "Prior to the inception of the U.S. Trustee program, judicial involvement with appointments and supervision of appointees led to (i) appointees either feeling or appearing beholden to judges, (ii) judges developing feelings of personal responsibility for the success or failure of their cases."[136]

In contrast, though the U.S. Trustee typically recommends an individual to serve as the FCR, the court may approve or disapprove after notice and a hearing, and has "final say" over the appointment "as well as the terms of that appointment."[137] The judge can define the PCR's powers and duties and also maintains control over professional fees and the retention of professionals.[138]

Tung analyzes the preferences of bankruptcy judges that they would likely seek to maximize with their control over the FCR, concluding that a primary preference is for successful reorganization.[139]

In *Robins*, the court agreed to the appointment of a FCR, "but the judge chose a surprisingly junior person for the task, given the size of the case and the caliber and experience of other lawyers involved."[140] In addition, the court did not allow Stanley

---

[134] *See* George W. Kuney, *Hijacking Chapter 11*, 21 EMORY BANKR. DEV. J. 19, 38 (2004).
[135] Tung, *supra* note 132, at 68.
[136] *Id.*
[137] *Id.* at 67.
[138] *Id.*
[139] *Id.* at 70.
[140] *Id.*

Joynes, the FCR, to retain Vern Countryman as a bankruptcy expert, despite Countryman's willingness to work for a "remarkably low hourly rate."[141]

IV. SUMMARY OF THE PLAN

A. Introduction

All of Judge Merhige's innovations played prominent roles in the final product: the confirmed plan. A.H. Robins Company ("Robins") filed its *Sixth Amended and Restated Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code*[142] (the "Disclosure Statement") as well as its *Sixth Amended and Restated Plan of Reorganization*[143] (the "Plan") on March 28, 1988.[144] The Plan had two primary goals: (1) full compensation for all creditors, especially Dalkon shield personal injury claims, and (2) releasing Robins, its successors, and its co-defendants from any liability related to the Dalkon shield. In short, these goals would be accomplished through (a) the creation of two claimants' trusts that would compensate those with personal injury, contribution, or indemnification claims against Robins that arose from use of the Dalkon shield,[145] (b) the merger of Robins into a subsidiary of American Home Products Corp. ("AHP") (the "Merger"),[146] (c) the use of most of the merger proceeds to fund the two claimants'

---

[141] *Id.* Vern Countryman graduated from the University of Washington Law School in 1942. Countryman clerked for Justice William O. Douglas from 1942 to 1943. In 1947, he began teaching at Yale Law School, and in 1964, he joined the faculty at Harvard Law School. Countryman was known among bankruptcy scholars as a "towering figure" in bankruptcy. David A. Skeel, Jr., *Vern Countryman and the Path of Progressive (and Populist) Bankruptcy Scholarship* 113 HARV. L. REV. 1075, 1076-77 (March 2000). Countryman is most known for his definition of executory contracts, first introduced in a law review article in 1973. Vern Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 MINN. L. REV. 439, 460 (1973).

[142] Sixth Amended and Restated Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code (Bankr. E.D. Va. Mar. 28, 1988) (No. 85-01307-R) [hereinafter Disclosure Statement].

[143] Plan, *supra* note 69.

[144] *In re* A.H. Robins Co., 88 B.R. 742, 748 (E.D. Va. 1988). The district court approved the Disclosure Statement by an order dated April 1, 1988. *Id.*

[145] Plan, *supra* note 69, §§ 5.01-5.02.

[146] Agreement and Plan of Merger Dated as of March 21, 1988, among A.H. Robins Company, Incorporated, American Home Products Corporation and AHP Subsidiary (9) Corporation, In re A.H.

trusts,[147] and (d) the issuance of an injunction that largely made the two claimants' trusts the only possible sources of recovery for Dalkon shield related claims.[148]

B. Treatment of the Creditors

After classifying the claims and interests, the Plan listed those classes that would not be impaired[149] and those that would.[150] The two largest classes of claims in monetary terms, the Dalkon Shield Personal Injury Claims (Class 3A) (the "Injury Claims") and the Dalkon Shield Other Claims (Class 3B) (the "Other Claims"),[151] were also two of the impaired classes.[152] The Injury Claims consisted of claims asserted by persons who were or represented users of the Dalkon shield (the "Injury Claimants").[153] The Other Claims consisted of claims asserted by persons who were not and did not represent users of the Dalkon shield, but who nonetheless had a Dalkon shield related claim against Robins—

Robins Co. (No. 85-01307-R), *in* Sixth Amended and Restated Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code [hereinafter Merger Agreement]; Disclosure Statement, *supra* note 142, at 29-34; Plan, *supra* note 69, § 6.01

[147] Plan, *supra* note 69, §§ 5.01-5.02.

[148] Disclosure Statement, *supra* note 142, at 43; Plan, *supra* note 69, § 8.04.

[149] The classes not impaired by the Plan consisted of: (1) Class 1: Claims entitled to priority under section 507(a) of the Bankruptcy Code, (2) Class 2: Secured claims, (3) Class 4: General unsecured claims not allocated to any other class, (4) Class 5: Claims of former Robins employees for retirement and disability benefits, (5) Class 6: Robins' obligations under a loan agreement between Robins and Puerto Rico Industrial, Medical, and Environmental Pollution Control Facilities Financing Authority, which was assigned to Central Fidelity Bank, N.A., and (6) Class 7: Claims of Robins' subsidiaries against Robins. Plan, *supra* note 69, §§ 4.01-4.06.

[150] The classes impaired by the Plan consisted of: (1) Class 3A: Dalkon Shield Personal Injury Claims (i.e., claims asserted by or on behalf of Dalkon Shield users), (2) Class 3B: Dalkon Shield Other Claims (i.e., claims asserted by persons who are not and do not represent Dalkon Shield users), (3) Class 8: Robins' obligations under various unsecured pre-commencement loans made between Robins and various financial institutions, (4) Class 9: Robins $6.9 million obligation to members of the plaintiff class in the Ross class action for securities fraud, (5) Class 10: The interests of persons holding Robins common stock, and (6) Class 11: The interests of persons holding Robins common stock options. Plan, *supra* note 69, §§ 5.01-5.06.

[151] Liquidation Analysis, Assumptions, and Methodologies, In re A.H. Robins Co. (No. 85-01307-R), *in* Sixth Amended and Restated Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code (Mar. 28, 1988) [hereinafter Liquidation Analysis]. The liquidation analysis anticipated that the Dalkon Shield Personal Injury Claims would total $2.475 billion and that the Dalkon Shield Other Claims would total $73 million. *Id.* at 3. The third largest claim—chapter 11 administrative costs—were estimated at $45 million. *Id.*

[152] Plan, *supra* note 69, §§ 5.01-5.02.

[153] *See* Plan, *supra* note 69, §§ 1.37, 1.41, 1.69.

for example, indemnification of doctors, hospitals, and Robins' officers and directors (the "Other Claimants").[154] The Plan provided for the creation of two trusts to compensate both groups.[155]

1. The Other Claimants Trust

To compensate the Other Claimants, the Plan provided that, on the Merger's effective date, Robins would create a trust (the "Other Claimants Trust") and contribute $45 million to it.[156] The Plan also provided that, after the Merger's effective date, an additional $5 million would be jointly contributed to this trust by E.C. Robins Sr. and E.C. Robins Jr. (the "Robins family").[157] Additional financial resources would be generated through the investment of these principle amounts.[158] Other claimants with valid claims assumed by the Other Claimants Trust will receive full payment of their claims following consummation of the plan plus interest from January 1, 1988.[159] The trust is governed by three impartial trustees,[160] and the court is given sufficient power over the trustees such that its approval is required before the trustees may appoint successor trustees and the court may remove trustees for good cause.[161] In addition, the court has the right to be fully informed regarding the trust's activities and to supervise trust administration.[162] If the trustees determine that the available funds are not necessary

---

[154] Disclosure Statement, *supra* note 142, at 35; *See* Plan, *supra* note 69, §§ 1.37, 1.40, 1.63, 1.69.
[155] Plan, *supra* note 69, §§ 5.01-5.02.
[156] Plan, *supra* note 69, § 5.02.
[157] Disclosure Statement, *supra* note 142, at 1; Plan, *supra* note 69, §§ 5.02, 6.08. The Plan requires this contribution to be made "on the fifteenth day following the date that financial results covering at least thirty calendar days of post-Merger combined operations of AHP and Robins . . . have been published." Plan, *supra* § 6.08.
[158] *See* Dalkon Shield Other Claimants Trust Agreement § 4.02, In re A.H. Robins Co. (No. 85-01307-R), *in* Sixth Amended and Restated Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code [hereinafter OCT Agreement].
[159] Disclosure Statement, *supra* note 142, at 48; OCT Agreement *supra* note 158, §§ 5.01-5.02.
[160] OCT Agreement *supra* note 158, §§ 3.01-3.02.
[161] *Id.* §§ 3.03-3.04.
[162] *In re* A.H. Robins Co., 88 B.R. 742, 752 (E.D. Va. 1988); OCT Agreement *supra* note 158, § 4.05.

to satisfy the Other Claims, the trustees will transfer the assets of the Other Claimants Trust to the Claimants Trust at a rate of $10 million per year beginning on the sixth anniversary of the consummation of the Plan.[163] Finally, the trust automatically terminates at the earlier of (1) the date on which the purposes of the Other Claimants Trust have been fulfilled or (2) December 31, 2008, unless the court allows an extension.[164]

2. The Claimants Trust

a. *Funding the Claimants Trust*

To compensate the Injury Claimants the Plan provided that, on the Merger's effective date, Robins would create a second trust (the "Claimants Trust").[165] This Claimants Trust would have a much larger amount of capital than the Other Claimants Trust. Under the Plan, Robins would contribute: (1) a start up payment of $100 million in cash (the "Start Up Payment") to be paid thirty-one days after the confirmation date if the effective date of the merger did not occur with in thirty days following the confirmation of the Plan;[166] (2) a cash payment of $2.255 billion, less the Start Up Payment, if any, (the "Primary Payment") to be paid on the Merger's effective date;[167] and (3) all of its rights under any unused insurance policies that are assignable without cancellation or reduction of coverage.[168]

---

[163] Disclosure Statement, *supra* note 142, at 11, 49; OCT Agreement *supra* note 158, § 6.03; Plan, *supra* note 69, § 5.01.
[164] OCT Agreement *supra* note 158, § 6.03.
[165] Plan, *supra* note 69, § 5.01.
[166] *Id.* §§ 5.01, 6.07.
[167] *Id.* § 5.01. This payment would actually be made by AHP on Robins' behalf. Merger Agreement, *supra* note 146, § 6.12(b).
[168] Plan, *supra* note 69, § 5.01.

Financial resources would also be provided by Aetna Life and Casualty Co. ("Aetna"), Robins' products liability insurer.[169] These resources would be provided to settle Robins' claims for unused insurance and class action claims brought against Aetna in a separate proceeding by Dalkon Shield users (the "Breland Case").[170] Aetna's settlement of the Breland Case (the "Breland Settlement") plays a central part in the workings of the Plan and will be discussed in greater detail below. Aetna's contribution to the Claimants Trust was dependent on whether the Breland Settlement was approved by the court and upheld after all appeals.[171] If the Breland Settlement were approved and upheld, Aetna would contribute $75 million in cash[172] and $350 million in insurance coverage[173] to the Claimants Trust.[174] Yet, if the Breland Settlement were approved by the court but not upheld on appeal, Aetna would contribute to the Claimants Trust only $100 million in insurance coverage.[175]

---

[169] Disclosure Statement, *supra* note 142, at 1; Plan, *supra* note 69, §§ 5.01, 6.06.

[170] Disclosure Statement, *supra* note 142, at 1. The Breland Case was an action against Aetna by seven Dalkon Shield claimants who alleged injuries caused by the Dalkon Shield. *In re* A.H. Robins Co., 85 B.R. 373, 374 (E.D. Va. 1988). Later this case was consolidated with another case brought by the Official Dalkon Shield Claimants' Committee against Aetna seeking contribution for any damages paid to Dalkon Shield claimants by Robins as well as defense costs and legal expenses. *Id.* at 375. Thus, the Breland action came to involve three of the bankruptcy's major players—Aetna, Robins, and the Dalkon Shield claimants. If the Robins reorganization were to succeed this action would have to be settled.

[171] Disclosure Statement, *supra* note 142, at 1, 9-11; Plan, *supra* note 69, § 6.06.

[172] Of this cash payment, $50 million would be contributed by Aetna directly to the Claimants Trust and $25 million would be contributed by Aetna through Robins' post-Merger successor. Disclosure Statement, *supra* note 142, at 10.

[173] Of this insurance coverage, $250 million in coverage would be available to the Claimants Trust if it runs out of money to pay claims properly payable by the trust. Disclosure Statement, *supra* note 142, at 3, 9-11. The remaining $100 million in coverage would be available first to pay Dalkon shield personal injury claims that could not properly be paid by the Claimants Trust (like late claims). *Id.* If this coverage was not needed for such claims, it could be used by the Claimants Trust if the trust needed it to pay claims properly payable by the trust. *Id.*

[174] Disclosure Statement, *supra* note 142, at 1, 9-11; Plan, *supra* note 69, § 6.06.

[175] Disclosure Statement, *supra* note 142, at 1, 9-11; Plan, *supra* note 69, § 6.06. Of this insurance coverage, $50 million in coverage would be available to the Claimants Trust if it runs out of money to pay claims properly payable by the trust. Disclosure Statement, *supra* at 3, 9. The remaining $50 million in coverage would be available first to pay Dalkon shield personal injury claims that could not properly be paid by the Claimants Trust (like late claims). *Id.* If this coverage was not needed for such claims, it could be used by the Claimants Trust if the trust needed it to pay claims properly payable by the trust. *Id.*

Additional capital would be contributed to the Claimants Trust by the Robins Family and possibly the Other Claimants Trust. The Robins family would contribute $5 million in cash to the Claimants Trust after the Merger's effective date, just as they did with the Other Claimants Trust.[176] The Other Claimants Trust could also contribute to the Claimants Trust if the trustees of the Other Claimants Trust decide that the assets of the Other Claimants Trust are not needed to pay the Other Claims.[177] If such a decision were made, the trustees would transfer $10 million in cash per year beginning on the sixth anniversary of the consummation of the Plan until all of the Other Trust's funds were transferred.[178] All of these contributions would give the Claimants Trust assets totaling a maximum of $2.735 billion and a minimum of $2.585 billion, excluding interest income, with which to pay Injury Claims.[179]

b. *Governing the Claimants Trust*

The Claimants Trust was created "to assume any and all liabilities of Robins, its successors in interest . . . and any of their Affiliates . . . and to satisfy fully, fairly and expeditiously as practicable, all Dalkon Shield Personal Injury Claims."[180] As the Claimants Trust pursued this goal it would be administered by five trustees under the supervision of the court.[181] As with the Other Claimants Trust, the court would have the right to remove trustees for good cause, influence the appointment of successor trustees,

---

[176] Plan, *supra* note 69, §§ 5.01, 6.08. This contribution must be made on the same date as the contribution to the Other Claimants Trust. *Id.* § 6.08.
[177] Disclosure Statement, *supra* note 142, at 11, 49; OCT Agreement *supra* note 158, § 6.03; Plan, *supra* note 69, § 5.01.
[178] Disclosure Statement, *supra* note 142, at 11, 49; OCT Agreement *supra* note 158, § 6.03; Plan, *supra* note 69, § 5.01.
[179] Disclosure Statement, *supra* note 142, at 12.
[180] Claimants Trust Agreement § 2.02, In re A.H. Robins Co. (No. 85-01307-R), *in* Sixth Amended and Restated Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code [hereinafter CT Agreement].
[181] *Id.* § 3.01, 3.03, 3.04, 4.05.

be informed regarding the trust's progress.[182] The trustees were given "the power to take any and all actions as . . . are necessary . . . to effectuate the purposes of the Trust."[183] The powers included the power to invest the trust's assets; deal with and settle Dalkon shield personal injury claims; employ experts, appoint officers, and hire employees; and, most importantly, to "supervise and administer the Claims Resolution Facility."[184] The Claimants Trust would automatically terminate when its purpose had been fulfilled or on December 31, 2008, whichever occurred first.[185]

c. *The Claimants Trust and the Claims Resolution Facility*

The trustees of the Claimants Trust are required to compensate Injury Claims as directed by the Claims Resolution Facility (the "CRF").[186] The purpose of the CRF is "to provide all persons full payment of valid claims at the earliest possible time."[187] The Claimants Trust, through the CRF, does this by giving each Injury Claimant four options to choose from.[188] The first three options provide the claimant the possibility of receiving progressively more money, but each requires progressively more information and effort on the part of the claimant.[189] The fourth option allows the claimant to defer his or her decision, thus opening the way toward recovering money for injuries that

---

[182] *Id.*
[183] *Id.* § 4.03.
[184] *Id.*
[185] *Id.* § 6.03.
[186] *Id.* § 5.01(a).
[187] Dalkon Shield Trust Claims Resolution Facility 1, In re A.H. Robins Co. (No. 85-01307-R), *in* Sixth Amended and Restated Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code [hereinafter CRF].
[188] *Id.* at 1-4; Disclosure Statement, *supra* note 142, at 5-6.
[189] CRF, *supra* note 187, at 1-4; Disclosure Statement, *supra* note 142, at 5-6.

reveal themselves in the future.[190] These options are also open to non-user claimants, such as the husbands or children of Dalkon shield users.[191]

i. OPTION ONE

According to Georgene Vairo, a former chairperson of the Claimants Trust,[192] "[t]he purpose of Option 1 was to permit the quick disposition of low-valued claims."[193] Under the CRF, Option One was to provide "a payment which is sufficiently large to attract claimants with *de minimis* claims, but not so large as to exceed the cost of processing the claims through options 2 and 3."[194] An Injury Claimant who selects Option One simply states under oath that she used a Dalkon Shield and was injured by that use.[195] After giving such an oath, the clamant would receive a lump-sum payment, the amount of which would depend upon whether the claimant was a user or non-user claimant.[196] These payment amounts were not set forth in the CRF; instead, they were to be set by the trustees.[197] Later, the trustees set the amounts at $725 for users and $300 for non-users, such as husbands.[198] By the end of the trust over 132,000 Option One claimants had received a total of $90 million.[199]

---

[190] CRF, *supra* note 187, at 4; Disclosure Statement, *supra* note 142, at 6.
[191] CRF, *supra* note 187, at 1.
[192] Georgene M. Vairo, *The Dalkon Shield Claimants Trust, and the Rhetoric of Mass Tort Claims Resolution*, 31 LOY. L.A. L. REV. 79, 79 n.a1 (1997).
[193] Vairo, *supra* note 87, at 118.
[194] CRF, *supra* note 187, at 1.
[195] CRF, *supra* note 187, at 1-2; Disclosure Statement, *supra* note 142, at 5.
[196] CRF, *supra* note 187, at 1.
[197] *Id.*
[198] Vairo, *supra* note 87, at 118. Husbands of Dalkon shield users could have claims for loss of consortium, wrongful death, or survival.
[199] *Id.*

ii. Option Two

The CRF required the trustees to develop a schedule of specified payment amounts for various common Dalkon shield injuries.[200] "The purpose of Option 2 was to provide payment to claimants with good medical proof of Dalkon Shield use and good medical proof of a Dalkon Shield associated injury, but whose medical records revealed serious alternative causation problems."[201] An Injury Claimant selecting Option Two was required to: (1) attest to the specific injury or injuries caused by the Dalkon shield, (2) answer, under oath, additional questions concerning Dalkon shield use and injury, (3) provide medical evidence proving Dalkon shield use, and (4) provide medical evidence proving that the claimed injury actually occurred.[202] Once this information was provided, the claimant would receive a payment corresponding to the claimant's injury as provided in the payment schedule.[203] The payment schedule developed by the trustees "ranged from $850 to $5500, depending on the severity of the injury."[204] Because of the relatively low payment range and the more stringent evidence requirements, only 18,000 claimants chose Option Two.[205]

iii. Option Three

"The purpose of Option 3 was to provide settlement offers based on the pre-petition historical settlement amounts for claimants with serious and provable Dalkon Shield injuries."[206] Claimants selecting Option Three were required to complete an information form and send it along with all medical records concerning Dalkon shield use

---

[200] CRF, *supra* note 187, at 2; Disclosure Statement, *supra* note 142, at 5.
[201] Vairo, *supra* note 87, at 119.
[202] CRF, *supra* note 187, at 2; Disclosure Statement, *supra* note 142, at 5.
[203] CRF, *supra* note 187, at 2; Disclosure Statement, *supra* note 142, at 5.
[204] Vairo, *supra* note 192, at 136.
[205] *Id.*
[206] Vairo, *supra* note 87, at 119.

and injuries allegedly caused by such use to the Claimants Trust.[207] The trust would then study the records and the claim before making a settlement offer.[208] The claimant would have the option of accepting that offer or making a counteroffer.[209] If an agreement was not reached, the trust would make an "in-depth review" of the claim, which might involve requests for additional information and the claimant's voluntary attendance at a settlement conference or alternative dispute resolution process.[210] If this stage failed to produce an agreement, the claimant was required to either go to binding arbitration or to court.[211] "Approximately 49,000 claimants initially elected Option 3. Payments ranged from $125 to over $2 million."[212] Over 40,000 claimants accepted the trust's initial offer, thus about 27% rejected the initial offer and participated in the subsequent stages of the Option Three process.[213] Out of this 27%, about 1300 claimants accepted offers that resulted from settlement hearings, over 6,000 accepted offers produced through alternative dispute resolution, and less than 200 claimants participated in binding arbitration or litigation. [214]

iv. OPTION FOUR

The purpose of Option Four was to allow claimants who were concerned about possible future injuries to delay consideration of their claim.[215] This would allow claimants to receive money for injuries that did not reveal themselves until some future

---

[207] CRF, *supra* note 187, at 2; Disclosure Statement, *supra* note 142, at 5.
[208] CRF, *supra* note 187, at 2-3; Disclosure Statement, *supra* note 142, at 5.
[209] CRF, *supra* note 187, at 2-3; Disclosure Statement, *supra* note 142, at 5.
[210] CRF, *supra* note 187, at 3; Disclosure Statement, *supra* note 142, at 5.
[211] CRF, *supra* note 187, at 3-4; Disclosure Statement, *supra* note 142, at 6. If the claimant chooses to make the Claimants Trust a defendant in court, no punitive damages will be permitted. *Id.* at 6.
[212] Vairo, *supra* note 87, at 120.
[213] *Id.*
[214] *Id.* at 120-21.
[215] CRF, *supra* note 187, at 4; Disclosure Statement, *supra* note 142, at 6.

date.[216] If the claimant had already suffered an injury, however, he or she could not delay consideration of his or her claim for more than three years.[217] Thus, Option Four gave claimants sufficient time to fully assess their injuries, while at the same time giving the Claimants Trust confidence in the fact that it would be able to process all claims involving existing injuries within a foreseeable period of time.

v. Additional Provisions: Late Claims, Priority, & Payments in Lieu of Punitive Damages

The CRF also provided for the consideration of Dalkon shield personal injury claims for which proofs of claim were not sent prior to the court imposed April 30, 1986 deadline ("Late Claims").[218] Under the CRF provisions, holders of Late Claims ("Late Claimants") are permitted to submit their claims to the Claimants Trust.[219] The trust is then tasked with considering those claims within a reasonable amount of time to determine "whether excusable neglect or other valid legal cause exists for treating and considering such Late Claims as and with Timely Claims."[220] In making this determination the trust was to consider the following factors: (1) whether the Late Claim is based upon an injury that did not manifest itself until after the deadline, (2) whether the Late Claimant had actual knowledge of the deadline, (3) whether the Late Claimant had actual knowledge of Dalkon shield use prior to the deadline, and (4) whether the Late Claimant acted diligently to pursue the Late Claim.[221] Based on these factors the trust was to come to a conclusion regarding each Late Claim and send a report of this conclusion along with all of the information provided by the Late Claimant to the

---

[216] CRF, *supra* note 187, at 4; Disclosure Statement, *supra* note 142, at 6.
[217] CRF, *supra* note 187, at 4; Disclosure Statement, *supra* note 142, at 6.
[218] CRF, *supra* note 187, at 6-7; Disclosure Statement, *supra* note 142, at 6.
[219] CRF, *supra* note 187, at 6.
[220] *Id.*
[221] *Id.* at 6-7.

court.[222] The court would then hold a hearing and make the final decision as to whether the Late Claim would be treated as a timely clam.[223] All claims, both timely claims and Late Claims, were to be compensated according to the following priority schedule: (1) the trust's assets would first be used to compensate timely claims, including Late Claims deemed to be timely, according to the four option system described above; (2) after the timely claims were paid, trust assets would then be used to compensate Late Claims; and finally (4) to the extent funds remain after paying all of these claims, the remaining funds (not including Aetna insurance) would be paid (in lieu of punitive damages) to all Injury Claimants, both timely and late, on a pro rata basis.[224]

C. Treatment of Robins and its Co-Defendants

The Robins bankruptcy case involved many parties and there were many defendants in the pre-bankruptcy Dalkon shield litigation.[225] The Plan was designed so that all pending and future Dalkon shield claims would be channeled way from Robins and its co-defendants and toward the two trusts.[226] This channeling was accomplished through sections 8.01 through 8.04 of the Plan.[227] Section 8.01 provided that upon confirmation of the Plan, Robins' liability on all claims and debts would be extinguished completely and immediately.[228] Under section 8.02, Robins was also vested with all property of the bankruptcy estate free and clear of all claims, liens, or any other interests of creditors and equity security holders.[229] Section 8.03 provided that all persons,

---

[222] *Id.* at 7.
[223] *Id.*
[224] *Id.* at 6.
[225] Georgene M. Vairo, *The Dalkon Shield Claimants Trust: Paradigm Lost (or Found)?*, 61 FORDHAM L. REV. 617, 629 (1992).
[226] *Id.*
[227] Plan, *supra* note 69, §§ 8.01-8.04.
[228] *Id.* § 8.01.
[229] *Id.* § 8.02.

including Robins, the successor corporation, and their affiliates, that "have held, hold, or may hold" claims or Robins common stock "will be deemed to have forever waived . . . all rights and claims . . . against any Person."[230] "Person" is defined by the Plan to include, without limitation, "the Trusts . . . , [Robins], AHP, the Successor Corporation, any of their respective Affiliates, and any present or former officer, director, agent, attorney, or employee of or for [Robins], AHP, the Successor Corporation, or any of their respective Affiliates, and Aetna."[231] Finally, section 8.04 states that the confirmation order will grant an injunction permanently enjoining

> all Persons . . . who have held, hold, or may hold Claims . . . from commencing or continuing in any manner any action or other proceeding of any kind with respect to any such Claim . . . against [Robins], its shareholders, the Successor Corporation, any of the Affiliates thereof (including without limitation, AHP), the Trusts or any other Person or the property of [Robins], the Successor Corporation, any Affiliates thereof, or of any other Person.[232]

Similar language protected these same parties from

> the enforcement, attachment, collection, or recovery by any manner or means of any judgment, award, decree, or order . . .[,] [the] creat[ion], perfect[ion], or enforc[ement] [of] any encumbrance of any kind . . .[,] [the] assert[ion] [of] any setoff, right of subrogation, or recoupment of any kind against any obligation . . .[, and] any act, in any manner, in any place whatsoever, that does not conform to or comply with the provisions of the Plan.[233]

Thus, through these sections and the creation of the Claimants Trust and the Other Claimants Trust, Robins and its co-defendants were made effectively immune from further liability related to the Dalkon shield controversy; therefore, creating what came to be called "global peace."[234]

---

[230] *Id.*
[231] *Id.* § 1.68.
[232] *Id.* § 8.04.
[233] *Id.*
[234] Vairo, *supra* note 225, at 629.

D. Prerequisites for the Plan's Consummation

1. The Merger

The key element of the Plan was the Merger between Robins and an AHP subsidiary created specifically for the acquisition. The effective date of this Merger was described by the Plan as the "Consummation Date,"[235] and this date was usually the earliest that a party to the Plan was obligated to fulfill its responsibilities under the plan.[236] Therefore, the effective date of the Merger played a key role in the timing of the entire Plan's implementation. American Home Products was the acquiror.[237] AHP is a Delaware corporation with interests in "pharmaceuticals, over-the-counter medicines, food products, household products, and housewares."[238] Its interest in Robins was a product of AHP's desire to expand its share of the health care market.[239] The Merger agreement basically provides that Robins would merge into a subsidiary of AHP ("AHP Sub") and cease to exist.[240] AHP Sub would continue as a Delaware corporation, and its name would be changed to "A.H. Robins Company, Incorporated."[241] Robins common stock holders would receive AHP common stock in exchange for their shares.[242] Upon the Merger's effective date, AHP would contribute $2.255 billion to the Claimants Trust on behalf of Robins.[243] Thus, the Merger was a prerequisite to the Plan's success because without completion of the Merger the Claimants Trust could not compensate Injury Claimants. Before the Merger could go forward, however, two important conditions had

---

[235] Plan, *supra* note 69, § 1.33.
[236] Robins, Aetna, and the Robins Family were not obligated to contribute any funds to the two trusts until the after Plan's consummation date. *Id.* §§ 5.01, 5.02, 6.06, 6.08.
[237] Merger Agreement, *supra* note 146, at 1.
[238] Disclosure Statement, *supra* note 142, at 29.
[239] *Id.*
[240] Merger Agreement, *supra* note 146, § 2.1.
[241] *Id.* §§ 2.1, 2.5(a).
[242] *Id.* § 2.6.
[243] *Id.* § 6.12.

to be met: (1) court approval of the Breland Settlement and (2) confirmation of the Plan.[244]

2. The Breland Settlement

The Breland settlement arose from the "the Breland action," an action against Aetna by seven Dalkon Shield claimants who alleged injuries caused by the Dalkon Shield.[245] These plaintiffs sued in both their individual capacities and as representatives "of all other persons who claim damages, injuries, or potential injuries arising from the use of the Dalkon Shield."[246] They sought compensatory and punitive damages against Aetna "on theories of negligence, strict product liability, conspiracy, RICO, and an 'insurance conspiracy' relating to the conduct of Aetna in connection with its providing products liability insurance to Robins."[247] In December 1986, the Breland action was certified as a class action with two classes: Class A, consisting of all Dalkon Shield claimants who filed proofs of claim by the court imposed deadline, and Class B, consisting of all Dalkon Shield claimants who were eligible to file proofs of claim but did not do so in time.[248]

On August 19, 1987 the Official Dalkon Shield Claimants' Committee (the "Committee") brought its own action against Aetna seeking contribution for any damages paid to Dalkon Shield claimants by Robins as well as defense costs and legal expenses.[249] Aetna counter claimed, arguing that in the event Aetna is liable to Robins for contribution, Robins would be liable to Aetna for contribution for those same

---

[244] *Id.* § 7.1(f)-(g).
[245] *In re* A.H. Robins Co., 85 B.R. 373, 374 (E.D. Va. 1988).
[246] *Id.*
[247] *Id.* at 375.
[248] *Id.* at 378.
[249] *Id.* at 375.

payments.[250] On October 15, 1987 this action was consolidated with the Breland action.[251] Thus, the Breland action came to involve three of the bankruptcy's major players—Aetna, Robins, and the Dalkon Shield claimants. If the Robins reorganization were to succeed this action would have to be settled.

After extensive negotiations a settlement agreement was drafted.[252] In the settlement agreement, the Dalkon Shield claimants agreed that the terms of the agreement would establish full and final disposition of their claims against Aetna.[253] All members of both Classes A and B would be deemed to waive all their claims against Aetna.[254] Members of Class A, however, would have the right to participate in the Claims Resolution Facility ("CRF") procedure provided by the Plan.[255] In addition, members of Class B would also have the right to participate in the CRF procedure if they submitted a court approved form by a deadline to be determined by the court.[256] Those members of Class B who failed to submit this form would be barred from receiving any payments pursuant to the agreement.[257] In return, Aetna agreed to make financial contributions to the two claimants trusts.[258] The Breland settlement was approved by the district court on

---

[250] *Id.*
[251] *Id.*
[252] *Id.* at 380.
[253] Stipulation and Settlement Agreement between Aetna Casualty and Surety Company and Plaintiffs 5 (Feb. 1, 1988) (on file with Inventory of the Dalkon Shield Claimants Trust Collection, MS 00-4, Subseries 1: CRL 1024, Box 13, Special Collections, University of Virginia Law Library) [hereinafter Breland Settlement].
[254] *Id.* at 18-19.
[255] *Id.*
[256] *Id.* at 17.
[257] *Id.*
[258] *Id.* at 6-9. Aetna would contribute $75 million in cash. Disclosure Statement, *supra* note 142, at 10. Of this cash payment, $50 million would be contributed by Aetna directly to the Claimants Trust and $25 million would be contributed by Aetna through Robins' post-Merger successor. *Id.* In addition, Aetna would contribute $350 million in insurance coverage to the Claimants Trust. Disclosure Statement, *supra* note 142, at 3, 9-11. Of this insurance coverage, $250 million in coverage would be available to the Claimants Trust if it runs out of money to pay claims properly payable by the trust. *Id.* The remaining $100 million in coverage would be available first to pay Dalkon shield personal injury claims that could not properly be paid by the Claimants Trust (like late claims). *Id.* If this coverage was not needed for such

July 26, 1988,[259] affirmed by the Fourth Circuit on June 16, 1989,[260] and certiorari was denied by the United States Supreme Court on November 6, 1989.[261] This satisfied one of the Merger's two conditions precedent.

3. Confirmation of the Plan

On March 28, 1988 Robins filed the sixth and final version of the disclosure statement and its plan of reorganization.[262] After notice and a hearing the district court concluded that the disclosure statement contained adequate information as defined in § 1125 of the Bankruptcy Code, and issued an order to this effect on April 1, 1988.[263] Robins then distributed copies of the Disclosure Statement, the Plan, and ballots for the purpose of voting to reject or accept the Plan to all claimants, creditors, and equity holders.[264] The classes impaired under the plan—Class 3A (Dalkon Shield Personal Injury Claims), Class 3B (Dalkon Shield Other Claims), Class 8 (Financial Institution Claims), Class 9 (Securities Claims), Class 10 (Common Stock Interests), and Class 11 (Common Stock Options Interests)—all accepted the Plan.[265] In its description of the vote the court stated that "The Plan has been accepted overwhelmingly."[266] For example, 72% of Dalkon Shield Personal Injury Claims class voted and 94.38% of these voted to accept the Plan.[267] In addition, 97.91% of the members of the Dalkon Shield Other

---

claims, it could be used by the Claimants Trust if the trust needed it to pay claims properly payable by the trust. *Id.*

[259] *In re* A.H. Robins Co., 88 B.R. 755, 763 (E.D. Va. 1988).
[260] *In re* A.H. Robins Co., 880 F.2d 709, 752 (4th Cir. 1989).
[261] Anderson v. Aetna Cas., 493 U.S. 959 (1989).
[262] *In re* A.H. Robins Co., 88 B.R. 742, 748 (E.D. Va. 1988).
[263] *Id.*
[264] *Id.*
[265] *Id.* at 750.
[266] *Id.*
[267] *Id.*

Claims class voted to accept the Plan.[268] For its part, the court concluded that "Robins solicited acceptances of the Plan in good faith" and that the "Plan encompasses each of the § 1129 requirements and each has been addressed."[269] The court then issued an order confirming the Plan on July 26, 1988.[270] This order of confirmation was affirmed by the Fourth Circuit on June 16, 1989.[271] The United States Supreme Court denied certiorari on November 6, 1989.[272] Now that both the Breland settlement and the Robins Plan were safely final, the merger between Robins and the AHP subsidiary could proceed. This occurred on December 15, 1989 with the closing of the merger.[273] On that date, $2.23 billion was transferred to the Dalkon Shield Claimants Trust.[274] Thus, the execution of the Plan was finally set into motion.

V. WHO WON THE CASE?

But the question remains: who won the Dalkon Shield litigation? Was it the tort claimants, involuntary, unsecured creditors who are supposed to be the primary beneficiaries of the Chapter 11 process?[275] Was it Robins' equity holders, who would have walked away with nothing in a chapter 7 liquidation? Was it the numerous attorneys, experts, and other professionals that received remunerations from the bankruptcy estate as administrative priority, thereby receiving compensation for their post-bankruptcy contributions to the estate in derogation of the tort claimants who drove Robins to bankruptcy? A cursory examination of the Robins bankruptcy might lead to the conclusion that, judging by the broad acceptance of the AHP Plan and the successful

---

[268] *Id.*
[269] *Id.* at 750-51.
[270] *Id.* at 755.
[271] *In re* A.H. Robins Co., 880 F.2d 694, 696 (4th Cir. 1989).
[272] Menard-Sanford v. A.H. Robins Co., 493 U.S. 959 (1989).
[273] Vairo, *supra* note 87, at 118.
[274] *Id.*
[275] *See* Kuney, *supra* note 134, at 21.

history of the Trusts, everybody won. A more thorough examination reveals that this conclusion may not be warranted. The best analysis requires an analysis of the effect of the bankruptcy on the interested parties: the tort claimants, the insiders, and the professionals.

A. The Tort Claimants

Regarding the benefits of the reorganization and the establishment of the Trusts to tort claimants, the Trusts ultimately made distributions to all claimants and remained solvent until all claims had been paid and it was terminated in 2000.[276] As noted by Rutherland, claimants to the Dalkon Trust, as a whole, recovered over 75% of the amounts expended with less than 23% of the Trust funds being used for administrative expenses and attorney's fees.[277] In contrast, "before the reorganization proceedings in the *A.H. Robins* case, approximately 37% of the amounts paid by A.H. Robins actually went to Dalkon Shield claimants. The remainder went to attorneys and experts."[278] These figures demonstrate substantial evidence of an overall gain by tort claimants as a class. These figures, of course, address the tort claimants in the aggregate and do not address any individual's claim.

Plaintiff's attorneys who represented injured claimants who chose option 3, with its potential benefit of a larger settlement, were of "[t]he prevailing opinion . . . that in many cases the trust's early option 3 offers are below, sometimes significantly below, the settlement levels in the period before the bankruptcy."[279] Furthermore, "the trust, under

---

[276] *See* Vairo, *supra* note 87.
[277] Rutherland, *supra* note 104, at 24.
[278] *Id.* (citing SOBOL, *supra* note 3, at 142).
[279] SOBOL, *supra* note 3, at 314.

Judge Merhige's auspices, [] adopted policies intended to discourage litigation."[280] This fact, some believe, persuaded tort victims to accept offers of settlement that were lower than they could have received if they adjudicated the issue of damages before a judge or arbitration board.[281] This perception is supported by the trust's policy of only paying its offered amount even if the injured claimant was awarded a higher amount through litigation.[282] The claimants that were awarded damages in excess of the trust's settlement offer would only receive the difference between the offer and the excess amount once the trust determined that it had enough funds to pay all other claimants.[283] Critics of the trust argue that claimants' right to file suit was significantly impaired by the policies of the trust.[284] Of course, the tort victims also lost their ability to pursue claims against potentially liable third parties because of the channeling injunction and they also lost the opportunity to receive punitive damages.

B. The Insiders

The Robins family and equity holders faired better under the plan of reorganization than it would have had Robins been liquidated; the insiders were able to secure a more favorable position based on the negotiation element of chapter 11 and the court's continued extension of the exclusivity period. Insiders were able to use the exclusivity period as leverage to negotiate a consensual plan, thereby avoiding strict application of the absolute priority rule, which would have prevented them from receiving anything. Under the AHP Plan, equity received stock in AHP valued at $700

---

[280] *Id.*
[281] *Id.* at 315.
[282] *Id.*
[283] *Id.*
[284] *See id.* at 318.

million.[285] Furthermore, the insiders were relieved of any future liability for their own potentially tortuous conduct due to the channeling injunctions.[286] Thus, the insiders emerged from chapter 11 in a much better position than they would have had the case proceeded under chapter 7 or if the court applied the absolute priority rule.

C. The Professionals

The total amount spent on attorneys and professionals engaged in the Robins bankruptcy is uncertain. "Ultimately, counsel and other professionals (investment advisors and accountants) for Robins alone would be paid fees and expenses in excess of $28 million. Additional millions were spent on counsel and other professionals for the equity committee . . .."[287] Of course the attorneys and other professionals benefited from both the size and duration of the case. Due to the magnitude of the case and the significant amounts of money involved, the costs of professionals was not as significant was it would have been in a case with a more limited estate.

VI. CONCLUSION: THE FINAL OUTCOME IN ROBINS AND THE EFFECT OF ROBINS ON FUTURE CHAPTER 11 CASES

There are many indicators suggesting that the Robins bankruptcy was successful and that the innovations from the case, good or bad, have become generally accepted.

A. Cases following in Robins' Footsteps

As is evident in the structure of the Exide Trust, the Dalkon Trust's structure of tiered options geared toward encouraging settlement and allowing distribution to claimants without the necessity of an attorney has been borrowed.

---

[285] Disclosure Statement, *supra* note 142, at 40.
[286] A.H Robins v. Mabey, 880 F.2d at 702.
[287] SOBOL, *supra* note 3, at 111.

B. The National Bankruptcy Review Commission Report of 1997

In addition, the National Bankruptcy Review Commission (the "NBRC") issued the National Bankruptcy Review Commission Report (the "Report") in 1997. Significantly, the Report suggests amending the Code to expressly provide for many of the procedures used by the *Robins* court.

First, the NBRC suggests that section 101(5) be amended to include the following definition:

> "Mass future claim" should be defined as a claim arising out of a right to payment, or equitable relief that gives rise to a right to payment that has or has not accrued under nonbankruptcy law that is created by one or more acts or omissions of the debtor if:
>
> 1) the act(s) or omission(s) occurred before or at the time of the order for relief;
>
> 2) the act(s) or omission(s) may be sufficient to establish liability when injuries ultimately are manifested;
>
> 3) at the time of the petition, the debtor has been subject to numerous demands for payment for injuries or damages arising from such acts or omissions and is likely to be subject to substantial future demands for payment on similar grounds;
>
> 4) the holders of such rights to payments are known or, if unknown, can be identified or described with reasonable certainty; and
>
> 5) the amount of such liability is reasonably capable of estimation.
>
> The definition of "claim" in section 101(5) should be amended to add a definition of "holder of a mass future claim," which would be an entity that holds a mass future claim.[288]

According to the accompanying discussion, this definition would make clear that "mass future claims can be dealt with in the bankruptcy process as 'claims,' not as some other

[288] I N.B.R.C. Rep. Ch. 2 p. 315 § 2.1.1 Definition of Mass Future Claim.

type of interest."[289] In addition, "[t]he proposed definition clarifies that the time at which a mass future claim 'arises' is determined by the timing of the debtor's conduct, not by the claimant's discovery of the injury or an interim relationship between the parties."[290] Significantly, the NBRC's recommended definition of mass future claim reflects the holding of the Fourth Circuit Court of Appeals in *Grady* and forecloses the possibility of a court applying the accrual test as formulated in *Frenville*.

Second, the Report also recommends amending section 524 to expressly authorize bankruptcy courts to issue channeling injunctions. I N.B.R.C. Rep. According to the Report:

> Channeling injunctions serve an appropriate and beneficial role in the equitable treatment of mass future claimants. The channeling injunction reinforces the effect of the discharge while it clearly directs claimants toward a specific fund. At the same time, if a mass future claims representative releases the third-party liability of an insurer in exchange for the insurer's contribution, a channeling injunction can be used to bring insurance proceeds into the estate for administration on behalf of the claimants. Without the imposition of the channeling injunction, claimants might attempt to pursue individual suits against defendants, unwinding the benefits of collective action and equality of treatment, which is a particularly detrimental result if the trust is to be financed with stock or payments from the reorganized entity. The channeling injunction is therefore critical to the structure of the overall mass future claims Proposal.[291]

The NBRC's statement of the justification of channeling injunctions directly references the circumstances under which the *Robins* channeling injunctions were ordered including the necessity of such an injunction in order to bring insurance proceeds into the common fund.

---

[289] *Id.*
[290] *Id.*
[291] *Id.*

Finally, the Report also recommends amending the Code to expressly provide for a FCR in the mass tort bankruptcy context.[292]

C. Critical Approval of Robins-like Use of Bankruptcy to Resolve Mass Tort Liability

Several commentators have written approvingly about using bankruptcy as the preferred forum for dealing with mass tort liability. Vairo suggests that the bankruptcy system is the appropriate forum because the bankruptcy system "seeks to provide equality of distribution to creditors in a proceeding that encompasses the interests of all parties while mitigating the effect that a huge mass tort liability may have on the worth of the business."[293] Vairo cites, as difficulties with the bankruptcy system, uncertainty regarding future claims and channeling injunctions. Of course these "problems" would be resolved were the Code amended to reflect the recommendations of the NBRC as noted above. Vairo can hardly be considered an objective scholar, given her position as the chairperson of the Dalkon Trust.

Another commentator, Alan N. Resnick, has also stated that the bankruptcy system is an appropriate system with which to address mass tort liability.[294] Much of Resnick's article is a comparison of the bankruptcy system to the class action system (including the limited fund class action), generally highlighting the relative advantages of the bankruptcy system. Resnick ultimately cites the NBRC Report, concluding that the bankruptcy system would function more effectively were it amended according to the NBRC Proposal (and several suggestions of his own).

---

[292] *See* I N.B.C.R. Rep. Ch. 2 § 2.1.2.
[293] Vairo, *supra* note 87, at 98.
[294] *See* Alan N. Resnick. *Bankruptcy as a Vehicle for Resolving Enterprise-Threatening Mass Tort Liability*, 148 U. PA. L. REV. 2045, 2049 (June 2000).

Regardless of the positive critical treatment of the Robins bankruptcy, the Robins case was still conducted with bias and driven by the Robins insiders. As discussed, supra, Judge Merhige's discretionary authority under section 105 and Robin's power to control the pace of the bankruptcy through the exclusivity period resulted in a drawn out process in which those who were most culpable walked away with $700 million and no further liability. If the process could be streamlined so that judicial discretion was limited and the insiders could not control the process (i.e. through a forced liquidation early in the proceedings), then the creditors, including present and future tort claimants, would could have captured the maximum value of their claims. Instead, attorneys, other professionals, and those largely responsible for the injuries at the heart of case reaped a great benefit from the chapter 11 bankruptcy process.