



Case & Project Experience

NERA's Role in *In RE: W.R. Grace & Co., et al* United States Bankruptcy Court

Summary

W.R. Grace & Co. ("Grace") has spent nearly a decade in Chapter 11 bankruptcy, attempting to gain approval of a reorganization plan that would satisfy all claimants and creditors. NERA Senior Vice President Dr. Denise N. Martin assisted Grace during the bankruptcy proceedings with assessing the likelihood and scope of future property damage (PD) claims related to the Zonolite Attic Insulation (ZAI) group of claimants, as well as other asbestos PD claims.

Background

Grace is a global specialty chemicals and materials company that mines, produces, and markets vermiculite products. Historically, the company produced ZAI, which may contain trace amounts of a naturally occurring asbestos. Prior to 2000, Grace had faced a substantial but relatively stable volume of asbestos claims, which were resolved primarily through negotiated settlements. In 2000, however, the litigation environment changed with an unexpected 81% increase in claims. The rise in case filings and settlement demands, which showed no signs of returning to historic levels, increased the risk that Grace would not be able to resolve its pending and future asbestos claims under the current state court systems.

On 2 April 2001, Grace voluntarily filed for reorganization under Chapter 11 of the United States Bankruptcy Code in the US Bankruptcy Court for the District of Delaware. At the time of the filing, the company faced more than 129,000 personal injury claims. Over the next several years, thousands of additional claims and lawsuits were filed and negotiations with various stakeholders continued, as Grace worked to develop a plan of reorganization that would appease all stakeholders and the Bankruptcy Court.

The ZAI claims were among the most contested of all claimant groups. In November 2008, Grace agreed to pay \$60 million into a PD trust to settle product liability claims brought on behalf of thousands of homeowners who may have been exposed to ZAI. Grace also agreed to pay contingency funds of up to \$80 million in additional payments if the fund were to be depleted in less than 25 years. Anderson Memorial Hospital (AMH), on behalf of the asbestos PD claims (excluding the US ZAI PD claims), then brought separate action against Grace, seeking to be certified as a class, arguing that the proposed plan of reorganization did not adequately provide for them. However, Judge Judith Fitzgerald of the US Bankruptcy Court for the District of Delaware denied the asbestos PD claimants their motion to pursue claims in the tort system, ruling that the dispute should be resolved in bankruptcy court.

NERA's Role

During the Bankruptcy Court proceedings, NERA Senior Vice President Dr. Denise N. Martin was retained by Grace to assess whether the company was likely to be subject to substantial future PD demands, arising out of the same or similar conduct or events that allegedly gave rise to PD claims covered under three sections of Grace's bankruptcy reorganization plan: Class 7B, Class 8, and Class 7A.

Class 7B involved asbestos-related PD claims in the US related to ZAI; Class 8 involved asbestos-related PD claims in Canada related to ZAI; and Class 7A (the claims in the AMH action) pertained to asbestos-related PD claims related to all other Grace products not covered in Class 7B or Class 8. Dr. Martin also examined whether the actual amounts, numbers, and timing of such future demands could be determined.

In her testimony, Dr. Martin noted that, although Grace had received over 20,000 claims alleging asbestos-related PD from ZAI, the EPA estimated that as many as 52 million houses may contain or have contained ZAI in the US. In addition, Grace had received 10 asbestos-related PD lawsuits that were filed as class actions in Canada, compared to the Canadian government's estimate that 242,000 Canadian homes contained ZAI. Finally, Grace had received fewer than 5,000 PD cases or claims compared with Dr. Martin's estimate that in the period during which Grace's non-ZAI asbestos-containing products were sold, over 450,000 building projects involved steel frame buildings, schools, churches, or auditoriums (the type of buildings which might have used a Grace asbestos-containing product). Therefore, Dr. Martin argued, for the ZAI and other asbestos-related PD claims, Grace had received claims for just a fraction of potential future demands. Given this historical activity, as well as estimates of the number of buildings involved and the PD claims experience of other defendants, Dr. Martin concluded that Grace was likely to be subject to substantial future PD demands for payment arising out of the same or similar conduct or events that gave rise to the ZAI and other PD claims. She also identified a variety of factors that would introduce risk and uncertainty into any forecast of such claims, rendering indeterminate their amounts, numbers, and timing.

The Result

Judge Fitzgerald overruled AMH's objections, crediting Dr. Martin's testimony regarding the likelihood of demands, noting that the provision for PD demands (a \$37 million reserve) was prudent and enhanced Grace's ability to reorganize. On 31 January 2011, Judge Fitzgerald found the Joint Plan to be consistent with the best interests of creditors and issued an order recommending that the US District Court for the District of Delaware approve the Plan (District Court approval is necessary due to the nature of the asbestos and personal injury claims). The order sets the company on a path towards emergence from Chapter 11 after nearly a decade under court protection.

Expert Involved

Dr. Denise N. Martin, Senior Vice President

In the area of mass torts, Dr. Martin has estimated the future personal injury and property damage claims likely to be brought against defendants involved in asbestos, silica, benzene, diacetyl, medical products, tobacco, food contamination, and construction products litigation. This work led her to co-author the reference text *Estimating Future Claims: Case Studies from Mass Tort and Product Liability*, and to be asked to provide Senate testimony related to proposed national asbestos tort reform. Dr. Martin earned her MA and PhD in economics from Harvard University, where she specialized in industrial organization and international trade.

About NERA

NERA Economic Consulting (www.nera.com) is a global firm of experts dedicated to applying economic, finance, and quantitative principles to complex business and legal challenges. For over half a century, NERA's economists have been creating strategies, studies, reports, expert testimony, and policy recommendations for government authorities and the world's leading law firms and corporations. We bring academic rigor, objectivity, and real world industry experience to bear on issues arising from competition, regulation, public policy, strategy, finance, and litigation.

NERA's clients value our ability to apply and communicate state-of-the-art approaches clearly and convincingly, our commitment to deliver unbiased findings, and our reputation for quality and independence. Our clients rely on the integrity and skills of our unparalleled team of economists and other experts backed by the resources and reliability of one of the world's largest economic consultancies. With its main office in New York City, NERA serves clients from more than 25 offices across North America, Europe, and Asia Pacific.

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