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June 20, 1983 .

Ira Millstein, Esq.
Weil, Gotshal & Manges
767 Fifth Avenue
New York, NY 10153

RE: Manville Reorganization

Dear Ira:

As you know, I represent W. R. Grace & Co. in connection with the Manville reorganization. Grace's interests vis-a-vis Manville would be served either by dismissal of the proceedings or by a so-called global solution, but probably not by any result in between those two poles. By a global solution I mean a program which dedicates Manville's available cash flow to claims for as long as necessary, is binding on holders of future claims and limits the exposure of co-defendants on future claims.

Based on remarks made by you, Ellen Werther and Mick McConnell at various times, it seems that you all agree this would be the ideal outcome but that you have concluded that future claims cannot, as a matter of law, be discharged in Chapter 11. If that is your position, then I am very concerned that Owens-Illinois will not press hard enough for the global solution and will be too ready to accept something less.

A "future claim", as we use that term in these proceedings, refers to the rights held by a person who has been tortiously exposed to asbestos but in whom no injury from such exposure is yet manifest. The narrow legal issue is whether such rights constitute a "claim" within the meaning of §101(4)(A) of the Bankruptcy Code. As I understand it, the argument that such rights are not claims asserts that they are not claims against which state statutes of limitations have begun to run, that it is not possible to afford the holders of those claims due process in the context of the Manville reorganization and that Congress did not intend that such rights be treated as claims.

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I think the third assertion is a mere tautology and the first is superficial. Certainly the purpose of the bankruptcy definition of claim, to define those who have the right to share in the distribution of the bankrupt's assets, is very different from a state-law definition whose purpose is to define the point in time when a injured person may fairly be expected to assert his rights in court. The constitutional problem is much more serious but, I think, far from hopeless. Despite the decision in UNR and Amatex, it seems to me far too early to assume that the courts, faced with the consequences of excluding future claims, will refuse to fashion some acceptable way of affording notice and an opportunity to be heard. A constitutional argument could, after all, be made to cut more than one way, because the ~~interests of holders of future claims will be seriously affected by any disposition of Manville's assets in bankruptcy.~~ It seems to me that a good argument can be made that any such disposition is wrongful as to future claims unless they are afforded adequate notice and an opportunity to be heard. This is quite a different argument than the one based on the feasibility requirement of §1129(a)(11). That argument would certainly be irrelevant in a Chapter 7 liquidation and it might well be possible to formulate a Chapter 11 plan which avoids it.

It is not my object to persuade you that future claims are entitled to be treated as claims in bankruptcy. My more limited goal is to persuade you that a decision against inclusion of future claims is far from inevitable and that, accordingly, an early surrender on that issue is not warranted. In that context you might bear in mind that, if the plaintiffs do hold out against making a substantial provision for future claims, it will be far easier to cram down a plan against them under §1129(b) if future claims are included within §101.

I would be happy to pursue these ideas further with you, at your convenience.

Very truly yours,


Peter A. Fine

PAF:tb

cc: A. J. Marchetta, Esq.
Neil Danaher, Esq.
Arthur C. Olick, Esq.