AMERICAN BANKRUPTCY INSTITUTE

2022 Bankruptcy Battleground West

Mass Tort Bankruptcies in Review

Jane Kim
Keller Benvenutti Kim LLP | San Francisco

Mark D. Plevin
Crowell & Moring LLP | San Francisco

Kimberly A. Posin
Latham & Watkins LLP | Los Angeles

Hon. Deborah J. Saltzman
U.S. Bankruptcy Court (C.D. Calif.) | Los Angeles

CONCURRENT SESSION

2022

ABI Bankruptcy Battleground West
Mass Tort Bankruptcies in Review
Presented by: Judge Deborah Saltzman, Jane Kim, Mark Plevin and Kim Posin

Third-Party Releases

I. The nature of third-party releases

   a. Estate claims vs. claims held by non-debtors

   b. Claims arising from the chapter 11 process vs. other claims

   c. Consensual vs. non-consensual

II. Circuit split on non-consensual third-party claims:

   a. The general consensus of the circuit split has been:

      i. First, Second, Third, Fourth, Sixth, and Seventh Circuits: support third-party releases under certain circumstances

      ii. Fifth, Ninth, and Tenth Circuits: non-consensual third-party releases not permitted

III. *In re Purdue Pharma, L.P.*, 633 B.R. 53 (Bankr. S.D.N.Y. 2021), *rev'd and vacated*, 2021 U.S. Dist. LEXIS 242236 (S.D.N.Y. Dec. 16, 2021)

   a. Bankruptcy Judge Drain confirmed a plan that included non-consensual third party releases in favor of the Sacklers as part of a settlement with the following terms:

      i. Companies' assets to be divided among 9 creditor trusts

      ii. Funds to be used to pay for opioid abatement and to compensate personal injury claimants

      iii. 100 million pages of documents produced in discovery to be held in the public domain

      iv. Purdue ceases to exist, replaced by a "public benefit company" owned by the trusts

      v. Sacklers to contribute $4.375 billion over a period of 7 years

      vi. Sacklers to receive third-party releases for claims that are not derivative claims against Purdue

   b. In confirming the Plan, Judge Drain found that the third-party releases are a necessary part of the plan

c. On appeal, District Judge McMahon reversed and vacated the Confirmation Order, finding that the Bankruptcy Code does not authorize nonconsensual third-party releases:

i. Does the Bankruptcy Code authorize, explicitly or implicitly, non-consensual third-party releases?

ii. "No. The Bankruptcy Code does not authorize a bankruptcy court to order the nonconsensual release of third-party claims against non-debtors in connection with the confirmation of a chapter 11 bankruptcy plan. The Confirmation Order fails to identify any provision of the Bankruptcy Code that provides such authority. Contrary to the bankruptcy judge's conclusion, Sections 105(a) and 1123(a)(5) & (b)(6), whether read individually or together, do not provide a bankruptcy court with such authority; and there is no such thing as 'equitable authority' or 'residual authority' in a bankruptcy court untethered to some specific, substantive grant of authority in the Bankruptcy Code. Second Circuit law is not to the contrary; indeed, the Second Circuit has not yet taken a position on this question." 2021 Lexis 242236, *133-34.

d. The Second Circuit granted the appellants' petition for an expedited interlocutory appeal – oral argument to take place April 25, 2022.

e. On the heels of *Purdue,* District Court Judge Novak in Richmond, Va., vacated a confirmation order with non-consensual third-party releases, finding such releases to be overly broad and finding that such third party releases were beyond the constitutional authority of bankruptcy courts to grant in a final order. *Patterson v. Mahwah Bergen Retail Group, Inc.*, 2022 U.S. Dist. LEXIS 7431 (E.D. Va. Jan. 13, 2022).

a. On February 3, 2022, Bankruptcy Judge Dorsey confirmed the plan of another opioid debtor, Mallinckrodt PLC, finding that the third-party releases in that case, "which include a vast number of persons and entities beyond Debtors," were permissible under Third Circuit law. *In re Mallinckrodt PLC*, No. 20-12522 (Bankr. D. Del. Feb. 3, 2022). The court noted that "[t]he Opioid Releases are referred to as non-consensual because the opioid claimants were not given the opportunity to opt out but are nonetheless bound." The court concluded, "because the Opioid Releases are integral to the success of Debtors' Plan, I have the jurisdictional authority to approve them as both fair and reasonable." The court also stated, "While I am cognizant of the objection by the U.S. Trustee that Section 524(e) of the Code should be read to preclude non-debtor releases, I disagree with the notion that releases are the equivalent of a discharge."

IV. Third-party releases in the Ninth Circuit

a. *In re Lowenschuss*, 67 F.3d 1394 (9th Cir. 1995)

i. Section 524(e) precludes discharge of liabilities of non-debtors "without exception."

ii. 524(e) controls over section 105(a), which other circuits have used.

iii. Release at issue was very broad – "all claims"

b. *Blixseth v. Credit Suisse*, 961 F.3d 1074 (2020)

i. Arose out of contentious litigation surrounding the bankruptcy of the Yellowstone Club

ii. Third-party releases related only to claims arising from the chapter 11 case (mostly with respect to hard-fought plan negotiation process)

iii. Ninth Circuit found that these releases were appropriate under section 524(e) because they didn't relate to "such debt," i.e., the debtor's debt being discharged. 524(e) provides that "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."

c. *In re Astria Health*, 623 B.R. 793 (Bankr. E.D. Wash. 2021)

i. Bankruptcy of hospital owner/operator in Yakima; like *Blixseth*, contentious plan/settlement process, mainly with secured creditor turned DIP lender.

ii. Judge Holt followed *Blixseth's* reasoning that 524(e) prevents the release of non-debtor co-obligors of the debtor from liability on a common claim being discharged (i.e., "such debt"), but does not apply to the release of other claims, such as those for causes of action arising out of the plan negotiation process.

V. Consensual third-party releases

a. Opt-in versus opt-out (*see, e.g., In re PG&E Corporation*, Case No. 19-30088 (Bankr. N.D. Cal.), for affirmative opt-in releases, vs. *In re Alpha Latam Management*, Case No. 21-bk-11109 (Bankr. Del.), for opt-out releases)

b. Who has standing/authority to opt in for a claimant?

Solicitation of Votes and Master Ballots

I. *In re Imerys Talc America, Inc., et al,* Case No. 19-10289 (LSS) (Bankr. D. Del.)

a. Background:

i. Debtors previously were in the business of mining, processing, selling, and distributing talc

ii. historically the sole supplier of cosmetic talc to Johnson & Johnson (J&J)

iii. prior to filing for bankruptcy, there were approximately 13,800 pending lawsuits asserting ovarian cancer claims and approximately 850 pending lawsuits asserting mesothelioma claims against the Imerys debtors arising from talc exposure

b. Case Background:

i. Petition date – February 13, 2019

ii. Initial plan of reorganization filed on May 15, 2020; supported by Tort Claimants Committee (TCC) and Future Claimants' Representative (FCR)

iii. Disclosure statement order entered on January 27, 2021 and allowed for the use of master ballots

iv. Voting deadline (subject to extension) was March 25, 2021

v. Three law firms (Bevan & Associates, Williams Hart and Trammel) that submitted master ballots sought to change their votes from rejecting the plan to accepting the plan after March 25, 2021

vi. Significant discovery was sought by several interested parties with respect to the voting process

vii. Final voting declaration was filed by the balloting agent on May 7, 2021 affirming that, after taking into account requested vote changes, 79.83% of over 62,500 votes accepted the plan

c. Voting Related Motions:

i. On June 8, 2021, claimants represented by Arnold & Itkin (A&I) filed a motion to disregard all of the vote changes for failure to comply with Bankruptcy Rule 3018 (A&I Motion)

1. Motion opposed by: Imerys debtors, Bevan, Imerys SA, FCR, TCC and Williams Hart

ii. On June 25, 2021, claimants represented by Bevan filed a motion to affirm vote changes (Bevan Motion)

    1. Motion opposed by: Aylstock, A&I, certain insurers, and J&J

iii. On August 12, 2021, claimants represented by Williams Hart filed a motion to affirm vote changes (WH Motion)

    1. Motion opposed by: Aylstock, A&I, certain insurers, and J&J

iv. On September 3, 2021, J&J filed a motion to designate all votes submitted by Bevan, Williams Hart and Trammel (J&J Motion)

    1. Motion opposed by: Williams Hart, Imerys debtors, TCC, FCR and Bevan

v. Hearings held on June 22 and September 20, 2021. Mr. Bevan and Mr. Boundas of Williams Hart testified.

vi. Opinion issued by the Court on October 13, 2021 [Docket No. 4239]

    1. A&I Motion

        a. Granted as to Trammel (1670 votes)

        b. Moot as to Bevan and Williams Hart

    2. Bevan Motion

        a. Denied and original ballot rejecting Plan deemed to be withdrawn (15,719 votes)

        b. Rule 3018 standard likely met

        c. "[T]he evidence raises significant questions of whether any of Bevan & Associates' clients have a claim against any Debtor"

        d. "Master Ballots seem to be commonplace in mass tort bankruptcies. At Debtors' request, and without objection by any party-in-interest, as part of the Solicitation Procedures I approved the use of a Master Ballot. Simultaneously, and again without objection, I temporarily allowed the claims of Direct Talc Personal Injury Claims (which are unliquidated and disputed claims) at $1.00 for voting purposes. The result was that law firms submitted at least eighty-five Master Ballots. In order for Master Ballots to work, great trust is placed in the plaintiff's bar.

With respect to Bevan & Associates, the evidence shows that such trust was not well-placed. It is true that Direct Talc Personal Injury Claims will be channeled to a trust for liquidation, but a lawyer filing a Master Ballot still has the obligation to ensure that he only votes on behalf of clients who have a claim against Debtors. Indeed, embedded in the defined term is the requirement that a person must have been exposed to Debtors' talc. And, in signing the Master Ballot, the attorney certifies that each client he votes for has a Direct Talc Personal Injury Claim." [footnotes omitted]

e. "I agree that plans of reorganization, including the Imerys Plan, are complicated documents. But, it is counsel's job to make the plan understandable and (if counsel is not empowered to vote for the client) to provide advice on whether to accept or reject the plan. This is the second time this year in a mass tort case that counsel was suggested that these types of cases are too complicated for individuals to comprehend. To paraphrase my previous response: 'I don't buy it.'"

3. WH Motion

   a. Granted (493 votes)

4. J&J Motion

   a. Moot with respect to Trammel and Bevan

   b. Denied with respect to Williams Hart

d. Relevant materials with respect to the Imerys bankruptcy proceedings can be found at: https://cases.primeclerk.com/ImerysTalc/.

II. *In re Boy Scouts of America*, Case No. 20-10343 (LSS) (Bankr. D. Del.)

a. Petition date – February 18, 2020

b. Original plan of reorganization filed on February 18, 2020

c. Disclosure statement/solicitation procedures motion filed on March 2, 2021

d. Disclosure statement/solicitation procedures hearings held September 21 - 29, 2021

e. Following the disclosure statement hearings, the BSA debtors proposed, among other changes:

i. the following revisions to the master ballot:

1. The firm submitting a master ballot must certify to one of the following options with respect to submission of the master ballot:

a. Option (a) Certification: The firm shall distribute the Solicitation Package (without a Ballot) to each of its clients and ask each client to provide his or her affirmative vote to accept or reject the plan (along with any other responsive election to be reflected on the exhibit to the master ballot) and the firm shall record the affirmative responses on the master ballot and reflect that the vote and other responses were collected by means of an Option (a) Certification. A firm may not rely on providing any of its clients negative notice when completing the master ballot on behalf of any client if such client did not affirmatively respond with an express answer for each applicable election. Each firm shall collect the responses through customary and accepted practices in accordance with applicable rules of professional conduct (including telephone, email, and other standard communication methods) from each client and shall submit a log of responses it has received with its master ballot, which may be subject to discovery. If a client provides his or her responses orally or via telephone, the firm shall contemporaneously maintain a record of the responses of the firm's clients, and shall include these responses with the log; or

b. Option (b) Certification: If the firm has the authority under a power of attorney to vote to accept or reject the plan (in addition to the other elections under the master ballot) on behalf of its clients, the firm shall complete the master ballot in accordance with the power granted to the firm and reflect that the vote and other elections were collected by means of an Option (b) Certification. For any clients whose elections on the master ballot were completed by utilizing the Option (b) Certification, the firm shall supply the power(s) of attorney concurrently with the master ballot that provided the firm with the authorization to act on behalf of such client(s).

2. Each firm must also file a verified statement with the Court pursuant to Bankruptcy Rule 2019 prior to or concurrently with the submission of its master ballot containing the following: (i) the

facts and circumstances concerning the firm's representation of clients in the chapter 11 cases; (ii) a list of the names, addresses, and claim numbers of all clients; and (iii) an exemplar of the engagement letter used to engage the clients. Pricing, compensation amounts or percentages, and personal identifying information of claimants may be redacted.

3. Attorneys shall certify *under penalty of perjury* that, among other things, he or she has the authority under applicable law to vote to accept or reject the Plan on behalf of the clients who are listed on the exhibit to the master ballot.

4. Master ballot certifications also require the attorney to certify that he or she conducted the diligence necessary to form a reasonable belief that each of the clients is a holder of a Class 8 Direct Abuse Claim as of the Voting Record Date.

ii. the following revisions to the solicitation procedures:

1. After the Voting Deadline, a ballot may only be withdrawn or modified *pursuant to an order of the Court authorizing such withdrawal or modification*.

2. *Subject to Bankruptcy Rule 3018(a),* a voter may withdraw a valid Ballot by delivering a written notice of withdrawal to the Solicitation Agent before the Voting Deadline – the withdrawal must be signed by the party who signed the Ballot.

3. Any deadline extensions or waivers must be memorialized in the Voting Report and in a notice filed with the Court with the justification for the change. Such changes shall be accepted if parties in interest do not object within 5 days.

f. Disclosure statement order (including the forgoing proposed revisions) was entered on September 30, 2021 [Docket No. 6438]

g. Substantial discovery took place in the run-up to the confirmation order concerning whether the solicitation and balloting procedures were followed.

h. Relevant materials with respect to the *Boys Scouts of America* bankruptcy proceedings can be found at: https://cases.omniagentsolutions.com/?clientId=CsgAAncz%252b6Yclmvv9%252fq5CGybTGevZSjdVimQq9zQutqmTPHesk4PZDyfOOLxIiIwZjXomPlMZCo%253d.

"Texas Two-Step" Venue Transfer/Appointment of Tort Committee

1. *In re LTL Management LLC,* Case No. 21-30589 (MBK) (Bankr. D.N.J.)

    a. Background

        i. The LTL chapter 11 case was precipitated by the filings of thousands of cosmetic talc lawsuits against LTL predecessor ("Old JJCI") and J&J.

        ii. The LTL Debtor was created two days before it filed for bankruptcy, in a transaction colloquially known as the "Texas two-step."

            1. Texas law authorizes "divisive mergers," in which a Texas domestic business entity (OldCo) can divide "into two or more new domestic entities" (GoodCo and BadCo). With such a divisive merger, the dividing company must adopt a plan of merger allocating its assets and liabilities to the two resulting entities. The plan of merger must also provide "for the payment and discharge of each liability and obligation" allocated to the resulting entities. Tex. Bus. Orgs. Code Ann. §§ 1.002(55)(a), 10.003(1) and (3).

            2. The separate existence of the dividing entity ceases after the merger, and "all liabilities and obligations" of the dividing entity automatically "are allocated to one or more of the . . . new organizations in the manner provided by the plan of merger." Except as otherwise provided, "no other . . . entity . . . created under the plan of merger is liable for the debt or other obligation." Tex. Bus. Orgs. Code Ann. § 10.008(a).

            3. Here, a J&J subsidiary ("Old JJCI") redomesticated in Texas and then divided into two Texas companies: "New JJCI" (GoodCo) received most of Old JJCI's assets and liabilities (*i.e.*, its ongoing business), while LTL (BadCo) received Old JJCI's talc liabilities and limited assets.

            4. LTL then redomesticated itself in North Carolina, and filed bankruptcy two days after being created.

        iii. Prior to filing for bankruptcy in North Carolina, Old JJCI incurred nearly $1 billion in defending personal injury lawsuits relating to alleged talc exposure, nearly all of which was spent in the last five years.

        iv. In the months prior to the petition date, Old JJCI was paying from $10 million to $20 million in defense costs on a monthly basis. In addition, Old JJCI paid approximately $3.5 billion in indemnity in connection with settlements and verdicts.

    b. Case Background

i. Motion of Bankruptcy Administrator to appoint an Official Committee of Talc Claimants filed on October 28, 2021.

    1. Over fifty responses received by the Bankruptcy Administrator

    2. 11 TCC members proposed

    3. Several objections and responses were filed seeking an expansion or change in the composition of the TCC

    4. Order entered by NC Court on November 8, 2021 granting the relief sought in motion (the TCC Order)

ii. Motions to transfer venue:

    1. Motion of Bankruptcy Administrator to transfer venue from North Carolina to New Jersey filed on October 25, 2021

        a. TCC letter in support filed on November 8, 2021

    2. Order to appear and show cause why venue should not be transferred to another district filed by the NC Court on October 26, 2021

        a. "Venue is arguably proper in this judicial district since the Debtor was a North Carolina entity on the filing date, if only for two days. However, nearly all the assets and employees of the Debtor, New JJCI, and the Debtor's ultimate parent, J&J, are located in New Jersey. The Debtor has a mailing address of 501 George St., New Brunswick, NJ 08933. Moreover, New JJCI and J&J are both headquartered in New Jersey. The only employees of the Debtor are employees of Johnson & Johnson Services, Inc., a New Jersey corporation, that have been seconded to the Debtor. These employees continue to work in New Jersey. The only assets the Debtor owns in North Carolina are a bank account with $6 million in cash and other intangible assets, including membership interests in a North Carolina limited liability company and the rights to a funding agreement. The Debtor, which only existed for two days before filing this case, set up these assets primarily for the purpose of filing bankruptcy in this district. The Debtor conducts no other business in North Carolina.

            Furthermore, according to the materials filed by the Debtor in this case and the evidence presented at first day hearings, few, if any, of the talc-related claims against the Debtor are pending in the Western District of North Carolina.

Approximately 35,000 cases (of approximately 38,000), the overwhelming number of cases against the Debtor, are pending in federal multi-district litigation in New Jersey. In re: Johnson & Johnson Talcum Power Products Marketing, Sales Practices and Products Liability Litigation, Case MDL No. 2738, in the District of New Jersey, Case No. 16-02738. In addition, two other interested parties in this case, Imerys Talc America, Inc. and Cyprus Mines Corporation, are in bankruptcy proceedings currently pending in the District of Delaware. The Debtor's predecessor and J&J are substantial litigants in those bankruptcy cases.

Lastly, in considering whether to transfer venue, the court must also consider its own judicial resources and pending docket. This case is highly complex and will command a great deal of court time. There are currently five other mass tort bankruptcies pending in this district, all involving the controversial "Texas Two Step" divisional merger stratagem. This is a two-judge district, with one judge conflicted out of this and several other of these cases. Thus, this court has limited judicial resources to devote to this case."

3. Motion of MDL plaintiffs' steering committee to transfer venue to New Jersey filed on October 29, 2021

4. Motion of A&I to transfer venue to Delaware or, if not to that district, to New Jersey filed on November 3, 2021

5. On November 16, 2021, the NC Court entered an Order transferring the case to the district of New Jersey [Docket No. 416]

    a. In entering the Order, the Court considered a number of factors, including:

        i. The overwhelming number of ovarian cancer cases against the Debtor (approximately 35,000 of approximately 38,000) are pending in the MDL in New Jersey and the MDL judge and other interested parties have devoted significant time and resources over the past five years litigating in New Jersey.

        ii. The Cyprus and Imerys cases are pending nearby in Delaware. An insurance coverage action is pending in New Jersey.

        iii. The Debtor's headquarters, mailing address, employees and most potential witnesses are in New

Jersey. The only physical asset in North Carolina is a bank account with $6 million.

iv. The case is less than a month old.

v. "[T]he Debtor is not just forum shopping; the Debtor is manufacturing forum and creating a venue to file bankruptcy."

vi. New Jersey is a two-judge district with limited resources to devote to highly complex cases.

iii. Notice of reconstitution of TCC

1. On December 23, 2021, the US Trustee filed a notice reconstituting and amending the TCC and appointing a TCC I (9 members; made up mainly of ovarian cancer claimants) and a TCC II (7 members; made up mainly of mesothelioma claimants).

2. The LTL Debtor filed a motion seeking to invalidate the US Trustee's notice.

3. A&I filed a motion to vacate the appointment of TCC II.

4. On January 20, 2022, the NJ Court issued an opinion granting the motions and striking the US Trustee's notice:

a. The TCC Order is the law of the case. The TCC Order established a single official talc claimants committee and fixed its composition by identifying its members by name.

b. The case is in an unusual procedural posture having been transferred from a Bankruptcy Administrator district in North Carolina to a US Trustee district in New Jersey.

c. The US Trustee violates the law of the case doctrine and the NJ Court is obligated to vacate the notice and re-establish the original TCC.

d. The NJ Court did not make any determinations as to the appropriateness of two committees or whether the US Trustee has authority to seek reconstitution of the TCC and the formation of an additional committee.

e. Judicial review of a US Trustee's committee decisions is available if the circumstances so warrant. Such decisions are reviewed under an "arbitrary and capricious" or "abuse of discretion" standard of review. The US Trustee took the

position that he was not required to disclose or make any record regarding his reasoning, rationale or conclusions behind the notice. Without such information, the court cannot properly evaluate the objections raised.

f. Section 105 permits the court to disband any committee if the facts and law so warrant.

5. On January 26, 2022, the NJ Court entered an order granting the motions, striking the US Trustee's notice, reinstating the original TCC and determining that TCC I and TCC II "shall remain in full force and effect through March 8, 2022." [Docket No. 1273]

c. Texas Two-Step litigation

i. *LTL* is one of five pending bankruptcy cases that were created via "Texas two-steps" or similar transactions: *Aldrich Pumps* (whose OldCo was Ingersoll-Rand); *Murray Boiler* (whose OldCo was Trane U.S. Inc.); *DBMP* (whose OldCo was CertainTeed); and *Bestwall* (whose OldCo was Georgia-Pacific). All five of these cases involved asbestos liabilities, and were filed in the bankruptcy court in Charlotte, North Carolina (although *LTL* was transferred to New Jersey).

ii. Tort claimants, who are concerned that the debtor's (BadCo) assets and funding rights pale compared to the enterprise value of the company they were suing before the divisive merger, are vigorously challenging the Texas two-step maneuver on various grounds. Bankruptcy courts are just beginning to address the issues raised by the claimants, and none of the issues have yet reached federal district or circuit courts. The challenges that have been launched to date include:

1. *The transaction is a classic fraudulent conveyance*. Claimants are seeking standing to bring lawsuits in bankruptcy court seeking to avoid the divisive merger transaction as a fraudulent transfer of assets, since (they say) it was purposefully designed to hinder tort claimants from recovering the full measure of damages to which they are entitled from the pre-division enterprise.

2. *The debtor's bankruptcy case was not filed in good faith and should be dismissed*. Claimants are moving to dismiss the bankruptcy cases as "bad faith filings," arguing that it cannot be a proper bankruptcy purpose to limit tort claimant recoveries through intentionally fraudulent transactions

3. *The debtor should be substantively consolidated with GoodCo*. For example, the claimants in *LTL* argue that it would be equitable to substantively consolidate the debtor (BadCo) with new JJCI (GoodCo) since, before the Texas two-step, the companies actually

were a single company, treated by creditors as such. The same facts may support other claimant arguments based on "alter ego" and "successor liability" doctrines, seeking to accomplish the same goal of holding GoodCo liable for the tort liabilities assigned to the debtor.

4. *Debtor's request for a preliminary injunction to protect its non-debtor affiliates should be rejected*. At the outset of each case, the debtor seeks entry of a preliminary injunction barring claimants from filing or continuing tort lawsuits against the debtor's affiliates, including GoodCo, OldCo, the ultimate parent company, and all other non-debtor affiliates. The entry of a preliminary injunction is viewed as a precursor to entry of a permanent channeling injunction once the plan is confirmed. In *LTL*, the bankruptcy court initially declined to enter the debtor's requested preliminary injunction, thus leaving GoodCo and J&J exposed to continuing talc litigation, then put in place a limited, 60-day "bridge" injunction so that the case would not be "on fire" when it was received by the New Jersey bankruptcy judge to whom the case was being transferred.

5. *Attacks on the adequacy of the funding arrangement*. Typically, OldCo and GoodCo put in place a funding arrangement to help BadCo pay the tort claims. But claimants attack the funding arrangements offered to the debtor on at least three grounds: (A) the funding agreement was not reached in an arms' length transaction, because it was formulated pre-petition by OldCo without input from the debtor or claimants; (B) the funding agreement is illusory, because it is structured to leave the decision to provide funding to GoodCo's and OldCo's discretion, the debtor is not sufficiently independent to enforce the agreement against GoodCo, and claimants have no right to enforce the funding agreement; and (C) the amount of the funding arrangement is not adequate to pay the claims, leading to a battle between the claimants and the debtor over the estimated amount of the pending and future tort claims.

iii. These attacks are at various stages in the cases noted above.

d. Relevant materials with respect to the *LTL* bankruptcy case can be found at: https://dm.epiq11.com/case/ltl/info.

Faculty

Jane Kim is a partner with Keller & Benvenutti LLP in San Francisco, where she represents debtors in possession, distressed companies and other parties in both in-court and out-of-court situations. Her recent engagements include representing In-Shape Health Clubs, LLC, a premium regional fitness club chain in California, and Ravn Air Group, Inc., a regional airline in Alaska, in each of their chapter 11 cases filed in Delaware. She also serves as bankruptcy co-counsel for Pacific Gas & Electric Co. in its chapter 11 cases. Previously, Ms. Kim practiced in New York with Cleary Gottlieb for over a decade. She is a Fellow in the American College of Bankruptcy and has been recognized as a leading lawyer by publications and organizations, including *Chambers USA*, *Super Lawyers*, *Benchmark Litigation California* and *Lawdragon*'s list of the 500 Leading U.S. Bankruptcy and Restructuring Lawyers. Ms. Kim received her B.A. from Columbia College at Columbia University in 1999 and her J.D. from Harvard Law School in 2002.

Mark D. Plevin is a partner with Crowell & Moring LLP in San Francisco, where he litigates and tries cases in the bankruptcy and insurance coverage areas. He has had lead counsel roles on behalf of both U.S. and international insurers in some of the nation's most important asbestos bankruptcy and other mass tort bankruptcy cases. He also litigates major insurance coverage cases and handles trials and appeals in both bankruptcy and insurance matters. In the asbestos bankruptcy area, Mr. Plevin served as lead trial counsel for several insurers in the Plant Insulation, Thorpe Insulation, Federal-Mogul and W.R. Grace confirmation hearings. He is currently acting in a leading role for several insurers in the Imerys Talc America, Kaiser Gypsum and Aldrich Pumps asbestos bankruptcy cases. In addition, Mr. Plevin represents insurers in bankruptcy cases involving mass torts besides asbestos, such as opioids, sexual abuse by priests and others, silica, defective products and liability for wildfires. Outside the mass tort area, he represents both debtors and creditors in non-mass tort bankruptcy cases throughout the country. Mr. Plevin's creditor representations have included manufacturing companies, banks, airlines, consulting firms, insurance companies, shopping center owners and health care providers. He has litigated a broad range of bankruptcy matters, including plan-confirmation objections, automatic stay issues, issues concerning the sale and disposition of significant assets, claim objections, estimation proceedings, motions to appoint trustees, avoidance actions, approvals of settlements, and bankruptcy court jurisdiction and venue issues. In addition to litigating, he counsels bankruptcy clients in pre-litigation situations, including negotiating prepackaged bankruptcy plans, and with respect to receiverships and corporate dissolutions. Mr. Plevin has repeatedly been named one of the top lawyers in both the bankruptcy and insurance fields by *Chambers USA* in both California and the District of Columbia. He also has repeatedly been listed in *The Best Lawyers in America* for both bankruptcy and creditor/debtor rights/insolvency and reorganization law and insurance law, in the *Guide to the World's Leading Insolvency & Restructuring Lawyers* and the *Guide to the World's Leading Insurance and Reinsurance Lawyers*, and as a *Washington, D.C. Super Lawyer* in the field of Bankruptcy and Creditor/Debtor Rights. In 2015, he won the D.C. Bankruptcy Litigation Attorney of the Year category for the 6th Annual Global Law Experts Awards. Mr. Plevin regularly speaks on bankruptcy, insurance and litigation topics. Before starting law school, he was sports director of WCDB-FM and WSUA-AM in Albany, N.Y., where he did play-by-plays of college basketball, football, soccer and NHL hockey. Mr. Plevin received his B.A. in economics *summa cum laude* from the State University of New York at Albany and his J.D.

from the University of Virginia School of Law, where he was admitted to the Order of the Coif and worked on the *Virginia Law Review*.

Kimberly A. Posin is a restructuring partner with Latham & Watkins in Los Angeles and has two decades of experience advising debtors and creditors on high-profile matters and on a range of restructuring related transactions. She regularly represents corporate debtors, secured lenders, creditors and other interested parties in all aspects of distressed situations, including chapter 11 bankruptcy proceedings, out-of-court restructurings, foreclosures, assignments for the benefit of creditors, and related disputes and litigation. Ms. Posin's clients range from name-brand global companies to Silicon Valley startups in a diverse range of industries. She frequently handles matters in all of the major U.S. jurisdictions, including Delaware, New York and Texas. Ms. Posin received her B.S. in 1999 from the University of Southern California and her J.D. in 2002 from the University of California, Berkeley School of Law (Boalt Hall).

Hon. Deborah J. Saltzman is a U.S. Bankruptcy Judge for the Central District of California in Los Angeles and Santa Barbara, appointed on March 18, 2010, and also hears cases in the Northern Division in Santa Barbara. As a member of the Ninth Circuit Bankruptcy Education Committee, she welcomes the opportunity to participate in bankruptcy education programs. She also currently serves on the Ninth Circuit Wellness Committee. Prior to her appointment to the bench, Judge Saltzman practiced bankruptcy law in Los Angeles, representing debtors, secured and unsecured creditors, asset-purchasers, creditors' committees and landlords in chapter 11 and out-of-court restructurings, as well as related financing transactions and litigation. She received her B.A. in 1991 from Amherst College Phi Beta Kappa and her J.D. in 1996 from the University of Virginia School of Law.