AMERICAN BANKRUPTCY INSTITUTE

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Mass-Tort Cases: Recurring Issues

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CONCURRENT SESSION

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Automatic Stay – Extension of Preliminary Injunction to Prepetition and Post-Petition Litigation

- Statutory Vehicles to Enjoin Suits Between Non-Debtors: § 362 v. § 105
    - Debtors in mass tort cases routinely seek to freeze or enjoin litigation between non-debtor third parties pursuant to either § 362, § 105 or a combination of the two. The specific statutory predicate has practical significance.
        - A stay of litigation pursuant to § 362 is "automatic," in theory requiring no court order (J&J announced a stay of all talc litigation in an 8-K after filing LTL in bankruptcy before seeking any relief).
        - An injunction halting litigation pursuant to § 105 is not automatic and requires satisfaction in court of the 4-prong test applicable to injunctions (i.e., likelihood of success (in bankruptcy, a reorganization), irreparable harm, a balance of equities and public interest favoring relief).
    - Though § 362(a)(1) applies only to automatically stay suits against the Debtor, the Supreme Court has recognized that a bankruptcy court has jurisdictional authority to enjoin actions against non-debtors. *See Celotex Corp. v. Edwards*, 514 U.S. 300 (1995).
    - There is not unanimity among the circuits over whether a stay "extension" to non-debtors may be predicated solely on § 362(a)(1), or alternatively requires an exercise of a Court's equitable authority under § 105(a), alone or in combination with §362(a).
    - Circuit Courts that have addressed "extensions" of the automatic stay to non-debtors differ in their approach to the issue:
        - Majority rely on the standard set out by Fourth Circuit in *Robins v. Piccinin*, which held that the automatic stay under § 362(a)(1) may be extended to a non-debtor third party under "unusual circumstances," namely, where there is an "identity of interests" between the debtor and a non-debtor third party. *A.H. Robins Co. v. Piccinin*, 788 F.2d 994 (4th Cir. 1986); *see also McCartney v. Integra Nat'l Bank N.*, 106 F.3d 506, 510 (3d Cir. 1997); *Reliant Energy Servs., Inc. v. Enron Canada Corp.*, 349 F.3d 816 (5th Cir. 2003); *Nat'l Bank of Arkansas v. Panther Mountain Land Dev., LLC (In re Panther Mountain Land Dev., LLC)*, 686 F.3d 916 (8th Cir. 2012); *Oklahoma Federated Gold and Numismatics, Inc. v. Blodgett*, 24 F.3d 136 (10th Cir. 1994). Not all Circuits following *Robins* have made clear if authority for stay extension is § 362(a) alone or § 362(a) and §105 in combination.
        - Second Circuit utilizes an approach similar to *Robins* that looks to immediate, adverse impact on the estate/ability to reorganize to determine if stay protection should be extended to non-debtors. *Queenie Ltd. V. Nygard Int'l*, 321 F.3d 282 (2d Cir. 2003).
        - Others, including the Ninth Circuit, do not follow *Robins*, and instead rely *exclusively* on a bankruptcy court's authority to enter a preliminary injunction under § 105(a). *Solidus Networks, Inc. v. Excel Innovations, Inc. (In re Excel*

Innovations, Inc.), 502 F.3d 1086 (9th Cir. 2007). Sixth Circuit's approach is similar. *See Amedisys, Inc. v. Nat'l Century Fin. Enters., Inc. (In re Nat'l Century Fin. Enters., Inc.)*, 423 F.3d 567 (6th Cir. 2005).

- Flowing from this open question are at least two others.
  - Jurisdiction: What is the basis for the bankruptcy court's jurisdiction to stay non-debtor actions? If strictly exercise of § 362, falls within Court's "core" authority. This was recent ruling in *LTL* in DNJ. But if §105(a) (alone or with §362(a)) is needed to extend the stay, jurisdiction must fall under "related to" jurisdiction, as § 105 does not confer an independent basis for jurisdiction.
  - Burden: What is the Debtor/movant's burden in seeking a stay extension? If equitable, in whole or part, would likely be a clear showing standard, as is otherwise required for § 105(a) preliminary injunction.

- Manufacturing of "Identity of Interests," "Impact on the Estate" and "Related To Jurisdiction"
  - The *Robins* inquiry—essentially looking for impact on estate—has created an opening, particularly in the mass-tort context, for non-debtor parent entities, affiliates, directors and officers to "manufacture" estate impact though indemnities, shared insurance, and promised (but not necessarily operative) funding via funding agreements.
  - Recent cases in New Jersey (via North Carolina) and Texas provide examples of identities with the debtor can be manufactured:
    - *LTL* (Bankr. D.N.J.)
      - In October 2021, Johnson & Johnson ("J&J") and its subsidiary Johnson & Johnson Consumer Inc. ("Old JJCI") faced approximately 40,000 lawsuits by victims suffering from cancer caused by J&J's baby powder and other talc-related products.
      - "Texas Two Step"
        - J&J caused its sub, Old JJCI, to undertake a series of transactions using the Texas divisive merger statute, which resulted in its termination and the formation of two new entities: LTL and New JJCI.
        - LTL was allocated Old JJCI's talc liabilities but only certain limited assets and rights under a funding agreement.
        - New JJCI was allocated all of Old JJCI's other assets, including those related to consumer health products and other liabilities.
        - Two days after its formation, LTL filed for bankruptcy in the Western District of North Carolina and the case was transferred to the District of New Jersey bankruptcy court.
      - LTL sought a stay, and injunctive relief as to, talc-related tort actions against some 670 non-debtor entities, including J&J.

- The Official Committee of Talc Claimants and others filed motions to dismiss LTL's case as a bad faith filing.
- The Court entered opinions and orders denying the motions to dismiss and granting LTL's stay/injunctive relief motion.
- The rulings are now on direct appeal to the Third Circuit.

▪ *Infowars* (Bankr. S.D. Tex.)

- Pre-petition, families of children killed in Sandy Hook Elementary School massacre filed defamation lawsuits in Texas and Connecticut against InfoWars and its founder Alex Jones.
- Shortly before damages trial against Jones, debtors filed bankruptcy petitions.
- Debtors are three of Jones' entities holding intellectual property and contract rights related to InfoWars.
- Plaintiffs moved to dismiss the bankruptcy cases, arguing the cases were filed so that InfoWars and Jones could take advantage of the automatic stay.
- The plaintiffs have recently changed course by dropping the debtors as defendants in the defamation suits so that they could continue pursuing claims against Jones in State Court.

▪ *Honx* (Bankr. S.D. Tex.)

- Honx is a subsidiary of the global energy company Hess Corporation and is a successor to a corporation that operated an oil refinery in St. Croix from 1965 until 1998.
- Since 1998, the company has remained non-operational with minimal assets.
- After 2016, it continued its corporate existence solely to manage alleged asbestos liabilities.
- Hess and Honx are the subjects of asbestos litigation by a class of roughly 1,000 plaintiffs.
- Honx filed bankruptcy to confirm a plan with a 524(g) channeling injunction.
- Honx entered into a funding agreement with Hess, which provides that Hess would advance funds to satisfy administrative expenses and commit proceeds to fund a trust provided litigation against it was stayed.
- The Bankruptcy Court extended the automatic stay to Hess.

o At present, no court has announced a clear limiting principle for this kind of use of the bankruptcy court's powers. However, whether "manufacturing" is acceptable as a way to satisfy a test meant for "unusual circumstances" may be heard by the Third Circuit in *LTL*. No other circuit has yet weighed in.

o Interplay of Motions to Dismiss and Extension of the Stay/Preliminary Injunction

- A divisional merger (*i.e.*, "Texas 2-Step") allows a corporation to take advantage of the benefits afforded in bankruptcy without the direct burdens of a bankruptcy. Specifically, the Texas 2-step allows a company with significant liabilities to file a shell company with limited assets, but still reap the benefits of the bankruptcy stay if it can successfully obtain an extension of the stay or an injunction of all litigation against it. (*See LTL*).

- Courts in North Carolina and now in New Jersey have seen these divisional merger cases in the last few years. Opponents of these cases often both file a motion to dismiss the case as a bad faith filing and object to any request to extend the stay/preliminary injunction to non-debtors. The existence and terms of a funding agreement have been keys to both of these motions and there is a potential tension between the two. The funding agreement is a key fact relied upon by the debtor to support the good faith of the filing and argument that there is no harm to the creditors because funding is being provided to replace the transfer of assets as part of the divisional merger. On the other hand, creditors objecting to the extension of the stay/preliminary injunction can point to the terms of the funding agreement when arguing against a preliminary injunction because there will be no harm to the estate. Even if litigation continues against third parties and such third parties assert indemnification claims against the estate (a typical argument for extending the stay) there is still no harm to the estate because payment of such claims will be funded by a non-debtor under the funding agreement. *LTL* is a case in point.

- Overlap with Non-Consensual Third-Party Releases:
    - Channeling Injunction/Release Under § 524(g).
        - Scope of channeling injunction under § 524(g) - § 524(g) enumerates and limits the parties who can benefit from a channeling injunction.
        - Can a preliminary stay extension/injunction during an asbestos case be broader than an ultimate injunction under § 524(g)?

Third-Party Releases

- What's at stake—ability to reorganize certain mass-tort debtors:
    - If a debtor has insurance, monetizing it (in a manner other than case-by-case adjudication in the tort system) will be impossible without the ability to give insurers finality from claims.
    - Often there will be potential defendants with overlapping claims to debtor assets (e.g., insurance) or that have claims against the debtors related to the underlying tort (e.g., indemnity agreements) — *e.g.*, D&Os.
    - Monetary contributions from potential defendants might be necessary for a successful reorganization.
    - Without the ability to get releases, these entities will (rationally) hold onto their assets/rights.
- What are we *not* talking about:
    - Debtors' ability to release claims against third parties, including veil-piercing claims; bankruptcy law treats such "derivative claims" as estate property.
- Statutory authority for third-party releases:
    - Section 524(g) of the Bankruptcy Code expressly grants authorization for non-debtor releases in the asbestos context.
    - Under section 1123(b)(3)(A) of the Bankruptcy Code, a plan of reorganization "may provide for the settlement or adjustment of any claim or interest belonging to the debtor or to the estate."
    - Under section 1123(b)(6), a plan may "include any other appropriate provision not inconsistent with the applicable provisions of this title."
    - Section 105's "catch-all" provision is often cited as authority, as it authorizes the court to issue "any order, process, or judgment that is necessary or appropriate to carry out the provisions of [chapter 11]."
    - However, section 524(e) states that the "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."
    - So the basic question is whether 524(e) prohibits third-party releases such that they cannot be authorized under 1123(b) or 105(a).
- Circuit split:
    - Courts are split on the permissibility of third-party releases.

- The minority view held by the Fifth, Ninth, and Tenth Circuits prohibits such third-party releases (without the consent of the releasing party). *Bank of N.Y. Tr. Co.* v. *Official Unsecured Creditors' Comm. (In re Pac. Lumber Co.)*, 584 F.3d 229 (5th Cir. 2009); *Resorts Int'l, Inc.* v. *Lowenschuss (In re Lowenschuss)*, 67 F.3d 1394, 1401-02 n.6 (9th Cir. 1995).
    - Particularly in the Fifth Circuit, there might be litigation over what counts as consent — *e.g.*, can failing to vote on a plan be consent?
- The majority view, held by the Second Circuit and Third Circuit, among others (Third, Eleventh), has *allowed* third-party releases in certain circumstances. *In re Continental Airlines*, 203 F.3d 203 (3d Cir. 2000); *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 141 (2d Cir. 2005).
- Courts frequently look to the following non-exhaustive list of factors in determining the propriety of such releases:
    - Whether there is identity of interest between the debtor and the third-party;
    - Whether the third-party has made a substantial contribution to the debtor's reorganization;
    - Whether the release is essential to the debtor's reorganization;
    - Whether a substantial majority of creditors support the release; and
    - Whether the plan provides for the payment of all or substantially all of the claims in the class or classes affected by the release.

    In re Zenith Elecs. Corp., 241 B.R. 92 (Bankr. D. Del. 1999); *In re Master Mortgage Inv. Fund, Inc.*, 168 B.R. 930, 935 (Bankr. W.D. Mo. 1994).

- Jurisdiction over released claims:
    - "The release of most third-party claims against a non-debtor touches the outer limit of the Bankruptcy Court's jurisdiction" — "related-to" jurisdiction. *In re Purdue Pharma*, No. 21-cv-07532-CM, slip op. at 82 (S.D.N.Y. Dec. 16, 2021).
    - The reach of "related-to" jurisdiction varies by circuit, but both the Second and Third Circuits analyze whether the claim "could conceivably have any effect on the estate being administered in bankruptcy." *Pacor Inc.* v. *Higgins*, 743 F.2d 984, 994 (3d Cir. 1984); *see also In re Cuyahoga Equip. Corp.*, 980 F.2d 110, 114 (2d Cir.1992) ("outcome might have any conceivable effect on the bankrupt estate").
        - Third Circuit test is slightly narrower — "related to" jurisdiction cannot be triggered by potential contribution or indemnity claims unless those claims arise from a contract that provides for "automatic" liability by the debtor.

- Constitutional authority:
    - In determining whether a bankruptcy court has constitutional authority to enter non-consensual, third-party releases, courts look to *Stern* v. *Marshall*, 564 U.S. 462 (2011).
    - Third Circuit has ruled that bankruptcy court has constitutional authority to approve a plan containing third-party releases where "the existence of the releases and injunctions" are "integral to the restructuring of the debtor-creditor relationship." In essence, if the releases are essential to the plan, the court's jurisdiction to confirm the plan gives it constitutional authority to approve the releases. *In re Millennium Lab Holdings II, LLC*, 945 F.3d 126, 139 (3d Cir. 2019), cert. denied sub nom. *ISL Loan Tr.* v. *Millennium Lab Holdings II, LLC*, 140 S. Ct. 2805 (2020).
    - Judge McMahon rejected this analysis in *Purdue* and it will be interesting to see if Courts follow the Third Circuit's *Millennium Lab* reasoning.
    - As a practical matter, it is becoming common in mass tort cases for debtors to seek an "affirmation order" from a district court before the plan goes effective, which is intended to short-circuit any constitutional challenges. (This idea is drawn from 524(g), which requires such an order.)
    - Other Due Process challenges may be brought — *e.g.*, lack of notice of the bankruptcy — but have not gotten much traction to date.
- *Purdue* district court decision:
    - Judge McMahon's recent decision in *Purdue Pharma* from the Southern District of New York overturning confirmation of the debtors' chapter 11 plan of reorganization due to the presence of non-consensual, third-party releases has put a renewed spotlight on this area of bankruptcy law.
    - As background, the Purdue Pharma bankruptcy proceedings were precipitated by a "tsunami" of litigation resulting from the company's allegedly false marketing of OxyContin as non-addictive, among other alleged wrongful actions.
    - Various creditor committees agreed to support the debtors' plan of reorganization, which provided non-consensual, third-party releases of derivative and non-derivative claims to various members of the Sackler Family, the owners of Purdue Pharma.
    - Judge McMahon pointed to Section 524(g) as the only statutory basis for supporting non-consensual releases of third-party direct claims against non-debtors, as opposed to section 105's "catch-all" provision.
        - After a lengthy textual analysis and review of the legislative history of passage of section 524(g), Judge McMahon concluded that section 524(g) was meant to apply only in the asbestos context and it was within Congress' purview, not a bankruptcy court's, to decide if it should expand this third-party release relief outside the asbestos context.

- Of note, Judge McMahon held that only *direct* claims—those that arise out of a separate and independent duty this is imposed by statute on individuals who personally participate in unlawful conduct—were within the purview of her holding.
    - Derivative claims—those that seek to recover from a third party on the basis of a debtors' own conduct (e.g., veil-piercing)—were not being attacked as beyond the power of the bankruptcy court.
- Judge McMahon's decision is currently on appeal in front of a Second Circuit panel.

- Relevance of Section 524(g) to non-asbestos cases:
    - While section 524(g) applies in the asbestos context only, courts have applied section 105 coupled with the concepts underlying section 524(g)—namely, permanent releases and a channeling injunction—to non-asbestos-related claims. *In re Dow Corning Corp.*, 280 F.3d 648 (6th Cir. 2002) (silicone implant claims); *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 293 (2d Cir. 1992) (securities claims); *In re Am. Family Enters.*, 256 B.R. 377, 427 (D.N.J.2000) (deceptive business practice claims).
    - In passing 524(g), Congress included a provision that was not codified that made clear that its express authorization of non-debtor releases in the asbestos context should not be read to withdraw any authority that bankruptcy courts may have to grant non-debtor releases.

- Non-Debtor Release Prohibition Act of 2021
    - On July 28, 2021, United States Senators Elizabeth Warren (D-Mass.), Dick Durbin (D-Ill.), and Richard Blumenthal (D-Conn.), and United States Representatives Jerrold Nadler (D-N.Y.) and Carolyn B. Maloney (D-N.Y.) introduced the *Nondebtor Release Prohibition Act of 2021*, which seeks to amend the Bankruptcy Code to:
        - (i) eliminate the use of non-consensual third-party releases in chapter 11 plans,
        - (ii) limit "section 105" injunctions to stay lawsuits against third parties to a period no greater than 90 days after the commencement of a bankruptcy case; and
        - (iii) provide a ground for dismissing a bankruptcy case commenced by a debtor that was formed within 10 years prior to such case via a divisional merger.
    - On November 3, 2021, the House Judiciary Committee passed the *Nondebtor Release Prohibition Act of 2021* by a vote of 23-17. A full House vote has not yet been scheduled. The bill also remains in the Senate Judiciary Committee.

- Public policy considerations:
    - Benefits associated with approval of third-party releases:
        - Facilitate plan confirmation

        - Achieve "true peace" and avoid expensive and extended litigation.

    - Drawbacks associated with approval of third-party releases:

        - Altering third-party rights in bankruptcy proceeding unfair to claimants.

        - Binds claimants not in favor of releases.

        - Parties obtaining releases frequently do so at a discount to value of potential claims that could be asserted outside of bankruptcy.

- How to determine what constitutes a "substantial contribution" sufficient to justify a third-party release:

    - Bankruptcy courts have emphasized that "substantial contribution" is "necessarily fact specific" and must be approached on a case-by-case basis.

    - There is some inconsistency regarding what constitutes substantial contribution and whether a tangible financial contribution is required for a non-debtor to obtain a release.

        - No substantial contribution has been found in cases where third parties were merely fulfilling fiduciary duties and did not provide cash or anything else of tangible value. *In re Wash. Mut., Inc.*, 442 B.R. 349 (Bankr. D. Del. 2011).

        - Substantial contribution has been found where noteholders contributed $56 million in plan funding, which permitted the debtors to repay in full all creditors other than the noteholders and make a significant distribution to the debtors' shareholders. *In re Coram Healthcare*, 315 B.R. 321, 335 (Bankr. D. Del. 2004).

Insurance Neutrality vs. Non-Neutrality

- Insurance neutrality language is included in a plan of reorganization in an effort to protect an insurer and debtor's prepetition rights under subject insurance policies.
    - Insurers frequently seek to challenge confirmation of plans implementing section 524(g) trusts given that insurance policies are significant assets transferred to the trusts.
    - Neutrality provisions are intended to preclude an insurer from pursuing such a challenge and have been used to argue that insurers lack standing to do so. *See In re Combustion Eng'g, Inc.*, 391 F.3d 190, 234 (3d Cir. 2004).
- In contrast, insurance non-neutrality is helpful in that it:
    - 1. Bring finality to issues of causation and coverage;
    - 2. Provides for more certainty of recovery; and
    - 3. Facilitates settlements.

Estimation

- Section 502(c) of the bankruptcy code grants statutory authority for the claims estimation process, providing, in relevant part, that: "[t]here shall be estimated for purpose of allowance under this section—(1) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay to the administration of the case . . . ."
    - Section 502(c) has been used to provide a bankruptcy judge with authority to estimate the value of tort claims for purposes of the negotiation and confirmation of a reorganization plan.
- When is estimation needed? When is it not?
    - For some mass tort cases, there is a need to estimate total liability. The effect of estimation is in essence to cap a necessary parties' exposure such that its assets above the estimate is free and clear.
- In certain situations, estimation is not necessarily required.
    - E.g. if the mass tort damages will be covered by insurance or if the case is proceeding as a liquidating estate, estimation may not necessarily be required.
- What data is useful to have to achieve an appropriate estimation?
    - Nature of claims, number of claims, medical damages, among others.
- Use and misuse of bellwether trial awards.
    - In non-bankruptcy mass tort cases, will typically have bellwether trials which move forward and serve as estimates for a larger sample set of cases.
    - These bellwether trials can lead to variable results:
        - E.g. could have 30 bellwether trials, with 10 coming out in favor of the plaintiffs and 20 in favor of the defendants.
- Use of professionals, in particular the future loss representative and his/her advisors.
- Actuarial considerations, including (of late) choice of discount rates:
    - How do you take the present value of statistical exposure?
    - In a world with high interest rates, if a mass tort event has caused injuries expected to manifest over 30 years, and interest rates go up by 2%, you cut settlement values substantially.
- Mediation and its limits:

- While some form of mediation is always present in the mass tort context, frequently, deals are cut outside of the deal room.
- Mediators often fail to take into account the complex dynamics of mass tort negotiations.
- Mediation brief and litigation estoppel:
  - Highly involved mediation report put together and, frequently, no settlement reached. Parties frequently argue that creation of mediation report estops the other party from litigating because "you never unlearn what you knew."

- Setting standards for allocation of estimation amount among victims:
  - Does the estimation prejudge an allocation? Is there an extent to which it should?

Venue Basics

- A Debtor can file for bankruptcy relief in any district (28 USC 1408):
    - in which it is incorporated, maintains a residence, has its principal place of business, or principal assets; or
    - in which the debtor's affiliate, general partner, or partnership bankruptcy case is pending.
- The expansive nature of this venue provision has created "magnet districts," which see a large percentage of the large and middle market bankruptcy filings and, as a result, control the evolution of chapter 11 bankruptcy law.
    - These magnet district include the bankruptcy courts for the District of Delaware, the Southern District of Texas, the Southern District of New York and the Eastern District of Virginia.
- On June 28, 2021, Representatives Zoe Lofgren (D-Calif.) and Ken Buck (R-Colo.) introduced the Bankruptcy Venue Reform Act of 2021 ("BVRA") in the House of Representatives in an attempt to limit forum-shopping.
    - Senator Elizabeth Warren (D-Mass.) and John Cornyn (R-Texas) introduced an equivalent bill in the Senate.
- If passed, the BVRA would ensure that filings only take place in a jurisdiction in which a debtor's "principal assets" or "principal place of business" are located.
    - A debtor would no longer be permitted to file simply on the basis of their state of incorporation.

Venue Transfer

- Transfer of venue is governed by 28 U.S.C. 1412, which provides that a district court may transfer a case "in the interest of justice or for the convenience of the parties."
- Issues concerning manufacturing of venue:
    - *In re Winn–Dixie Stores, Inc.,* Case No. 05–11063 (RDD) (Bankr. S.D.N.Y. April 12, 2005).
    - *In re Patriot Coal Corp*., 482 B.R. 718 (Bankr. S.D.N.Y. 2012).
        - Judge Chapman observed that "nothing in our jurisprudence requires the Court to condone every strategy devised by clever lawyers to outsmart statutory purpose and language."

Forum Shopping

- Circuit split on proprietary of non-consensual third-party releases drives filings to certain jurisdictions.
    - Majority of courts (First, Second, Third, Fourth, Sixth, Seventh, Eighth, and Eleventh Circuits) allow for the release of claims against non-debtor third parties.
    - Minority of courts (Fifth, Ninth, and Tenth Circuits) prohibit non-debtor third-party releases.
- Developing law on use of the Texas Two-Step:
    - The Texas two-step is a corporate maneuver that involves an entity (Entity A) spinning off a unit (Entity B) and transferring Entity A's tort liabilities into Entity B.
    - Entity B is then put into bankruptcy to manage that liability without exposing Entity A's assets to bankruptcy.
        - Recent examples of cases where the debtor employed the Texas Two-Step include:
            - BestWall in the Western District of North Carolina;
            - DBMP in the Western District of North Carolina;
            - Aldrich Pump in the Western District of North Carolina;
            - Paddock Enterprises in the Western District of North Carolina; and
            - Johnson & Johnson/LTL in the District of New Jersey.
    - Various parties-in-interest have challenged bankruptcy filings based on the Texas Two-Step, arguing that, pursuant to section 1112(b), such filings were filed "in bad faith."
        - In determining whether a filing was made "in bad faith," most courts apply a totality of the circumstances test, which looks to the following non-exhaustive list of factors:
            - 1. Whether the debtor has one asset, such as a tract of undeveloped or developed real property;
            - 2. Whether the secured creditors' liens encumber the tract;
            - 3. Whether there are typically no employees other than the principals;
            - 4. Whether the debtor has little or no cash flow;

- 5. Whether no available sources of income are available to sustain a reorganization plan;

- 6. Whether few, if any, unsecured creditors exist (and whose claims are relatively small);

- 7. Whether property has been scheduled for foreclosure due to lack of debt payments;

- 8. Whether bankruptcy was filed as the last option to prevent loss of property; and

- 9. Whether allegations are made of wrongdoing by the debtor or its principals.

In re Little Creek Dev. Co., 779 F.2d 1068 (5th Cir. 1986).

- When not a standalone tort bankruptcy, tendency to appoint Official Committees of Tort Claimants in addition to (other GUC) UCCs.

- Possible emerging resistance to adjudicating class actions and mass torts in Southern District of Texas – cases having to run simultaneously in bankruptcy court and trial court.

Judge Shopping

- Even within a specific jurisdiction, there is controversy around the selection of specific judges within that jurisdiction.
    - A notable recent example was Purdue Pharma's filing in White Plains.
        - Purdue filed in White Plains based on one of its affiliate's locations (without having significant business in White Plains) in order to have its proceeding heard in front of Judge Drain.
        - According to one study, Judge Drain heard 62% of all "mega" cases in the Southern District of New York during the most recent two-year period studied. (*See* Adam J. Levitin, "Purdue's Poison Pill: The Breakdown of Chapter 11's Checks and Balances," in Texas Law Review, Vol. 100 (2022)).

- To remedy this judge shopping, the Southern District of New York has adopted a new rule that ensures that "mega" Chapter 11 cases are assigned randomly to judges.

Investments of Underlying Trust Assets

- Critical to capture rising rates for benefit of creditors.
    - At creation, *Mallinckrodt* trust had significant amount of funds and was created in context of rising interest rates.
    - Trust invested funds in treasuries, which will create a significant return for general unsecured creditors.
- Consideration of appropriateness of longer-term investments.
    - Ability to capture interest rates up front but risk of capital loss if sold prior to maturity when interest rates continue to go up.
- What to invest in?
    - Only bank deposits? Treasuries? Money funds and investment grade corporates?

Treatment of Government Claims in Mass Tort Cases

- Significant number of bankruptcy and non-bankruptcy data points from opioids resolutions.
    - Examples: *Mallinckrodt*, *Perdue Pharma, Teva Pharmaceuticals, McKesson Corporation*.
- Strong holdout power because of police powers exception.
    - Section 362(b)(4) of the Bankruptcy Code provides that the filing of a bankruptcy petition "does not operate as a stay of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police and regulatory power."
    - Example: *Perdue Pharma*
- Inability of government entities to sit on official committees impacts negotiation structure.
- In *Perdue Pharma* and *Mallinckrodt*, the government claimants were parties to a restructuring support agreement.
    - What will a *non*-RSA case look like?

Faculty

Saul Burian is a managing director with Houlihan Lokey and head of its Real Estate, Lodging & Leisure Group in New York, where he specializes in advising public and private companies and creditor groups in complex restructurings, financings and other transactions. He also specializes in raising capital for troubled businesses and often represents debtor and creditor constituencies in pre-packaged, pre-negotiated and other bankruptcy proceedings. Mr. Burian has been involved as an advisor in a wide range of restructuring transactions, including Answers.com, Barneys New York, CEVA Logistics, Constellis Holdings LLC, Extended Stay America, HealthSouth, Infrastructure & Energy Alternatives, JCPenney, J.Crew, Kaisa Group Holdings, Le Cirque, Lehman Brothers, Mallinckrodt Pharmaceuticals, Mark IV Automotive, MSR Hotels & Resorts Inc., Nine West Holdings, NPC International, Party City, Payless Shoes, Pinnacle Agriculture, Plymouth Industrial REIT, Production Resource Group, Purdue Pharma, RCS Capital, Sears Holdings, Transeastern Properties Inc., TriMark, Toys "R" Us and Winn-Dixie stores. He has experience in restructuring CDO- and CMBS-structured products, repurchase agreements and other complex real estate financing vehicles. In addition, he has advised investors in acquiring distressed assets and is a frequent speaker on restructuring, M&A and real estate topics. Before joining Houlihan Lokey, Mr. Burian was a partner in the New York law firm of Kramer Levin Naftalis & Frankel, where he specialized in creditors' rights and bankruptcy. During his 12 years at Kramer Levin, he represented a broad spectrum of clients who were often the primary at-risk constituencies in in- and out-of-court restructurings and bankruptcies, including bank lenders, debtors, creditors' committees and secondary purchasers of distressed indebtedness. Mr. Burian received his B.A. in economics with honors from Yeshiva University and his J.D. from Columbia Law School, where he was a Harlan Fiske Stone Scholar.

Matthew Dundon is the principal of Dundon Advisers LLC in White Plains, N.Y., and founded the firm in 2016. He has been a global credit, litigation and distressed investment leader for more than 13 years, having served as research head at Miller Tabak Roberts Securities from 2006-10 and portfolio manager at Pine River Capital and Advent Capital from 2010-16, and has been involved in dozens of litigation-intensive investments and trading opportunities. Mr. Dundon was a corporate finance lawyer and analyst from 1998-2006. He received his B.A. from the University of California at Berkeley and his J.D. from the University of Chicago.

Eric B. Fisher is a partner with Binder & Schwartz LLP in New York, where he focuses his practice on bankruptcy litigation and other complex commercial disputes. He has led trial teams to success in numerous high-stakes bankruptcy litigations, and has represented creditors' committees and trusts in multibillion-dollar disputes with large financial institutions. He also has won notable victories against loan originators and sellers in mortgage-backed-securities litigation. Mr. Fisher has served as lead counsel in bench and jury trials in the Southern District of New York and other trial courts; argued numerous appeals before the Second Circuit and other appellate courts, including successfully arguing an issue of first impression before the Delaware Supreme Court; and litigated cases in a variety of alternative dispute resolution forums, including AAA, JAMS and FINRA. Previously, Mr. Fisher served as an assistant U.S. attorney in the Southern District of New York from 1999-2002, where he represented the U.S. in bankruptcy, civil rights, employment and regulatory matters. He has also counseled clients in business breakup, dissolution and buyout situations. Mr. Fisher current-

ly serves as co-chair of the Federal Bar Council's Bankruptcy Litigation Committee. He received his B.A. *magna cum laude* in 1992 from Yale University and his J.D. in 1995 from Columbia University School of Law, where he was a Harlan Fiske Stone Scholar.

Richard G. Mason is a senior partner with Wachtell, Lipton, Rosen & Katz in New York and chairs the firm's Restructuring and Finance Department. Over the course of his 35-year career, he has had leading roles in many of the largest and most complex bankruptcies and out-of-court restructurings in the U.S. and elsewhere, including, most recently, Delphi Corp., Kerzner International, Energy Future Holdings, Bristow Helicopters, Hawker Beechcraft, Puerto Rico Electric Power Authority (PREPA), LATAM Airlines and Boy Scouts of America. Mr. Mason is the vice chair of the National Bankruptcy Conference, whose primary purpose is to advise Congress on bankruptcy law; a Fellow in the American College of Bankruptcy; a co-author of *Collier's Bankruptcy Practice Guide* and a speaker on insolvency subjects at prominent institutions around the world. *Chambers USA Guide to America's Leading Business Lawyers* and *K&A Restructuring Register* list him as one of the leading restructuring lawyers in the U.S., and *Who's Who Legal* recently named him a Global Elite Thought Leader in Restructurings & Insolvency. Mr. Mason co-chairs the Bankruptcy and Reorganization Group of the UJA Federation of New York's Lawyers Division. He received his B.S. *magna cum laude* in economics in 1983 from Virginia Commonwealth University, where he was inducted into the Phi Kappa Phi honor fraternity, and his J.D. *cum laude* in 1987 from New York University, where he was a member of the Order of the Coif and was on the staff of the *Annual Survey of American Law*.

Hon. John K. Sherwood is a U.S. Bankruptcy Judge for the District of New Jersey in Newark, appointed in June 2015. In private practice, he had more than 25 years of experience in bankruptcy and debtor/creditor matters, including related litigation. Some of his noteworthy engagements were Ocean Place Development Resort (counsel to debtor), MagnaChip Semiconductor Finance Co. (counsel to creditors' committee), Quebecor World (USA) Inc. (litigation counsel), Le Nature's Inc. (counsel to creditors' committee) and the City of Detroit (counsel to union). Judge Sherwood was president of the New Jersey Bankruptcy Lawyers Foundation from 2008-13 and an active member of ABI and the Turnaround Management Association. He was selected by *Chambers USA* from 2013-14 as one of America's Leading Lawyers for Business, and he was recognized in *The Best Lawyers in America* (2012-15) for his work in bankruptcy and in *Super Lawyers* (2006, 2009-14), where he was featured in the bankruptcy section and corporate counsel edition. Judge Sherwood received his undergraduate degree from James Madison University in 1983 and his J.D. in 1986 from Seton Hall University School of Law.

Adam C. Silverstein is a senior partner in the Litigation Department of Otterbourg P.C. in New York, which represents major creditors (both creditor committees and senior creditors) in some of the largest and most complex bankruptcies around the country, including *In re LTL Management LLC* (co-counsel to the Official Committee of Talc Claimants), *In re Purdue Pharma LP* (co-counsel to the Ad Hoc Committee of Governmental and Other Contingent Litigation Claimants, *In re Mallinkrodt PLC* (co-counsel to the Ad Hoc Committee of Government Entities Holding Medicaid Rebate Claims) and *In re JC Penney Co. Inc.* (counsel to Senior Secured Revolving Line Lenders). He is often called upon to lead the firm's litigation efforts on behalf of those creditors, including, currently, in *In re LTL Management LLC*, where he has been active on behalf the Official Committee

of Talc Claimants in opposing preliminary injunctive relief. During his 30 years of practice, Mr. Silverstein has accumulated varied experience first-chairing jury and non-jury trials through to verdict, including numerous trials in bankruptcy court, litigating arbitrations through award and confirmation, and arguing appeals in federal and state courts. He is a member of ABI, the New York City Bar Association and the New York State Bar Association. Mr. Silverstein received his B.A. from Cornell University and his J.D. from the University of Pennsylvania (Carey) Law School.

Cullen Drescher Speckhart is chair of Cooley LLP's business restructuring & reorganization practice in Washington, D.C., and focuses her practice on corporate restructuring and financial litigation across a broad range of industries. She represents debtors, creditors, creditors' committees, trustees and foreign representatives. Ms. Speckhart has represented clients in some of the largest bankruptcy cases filed, including *In re Mallinckrodt PLC*, in which she represents the official committee of unsecured creditors; *In re Ascena Retail Group*, in which she represents the debtors; *In re Le Tote*, in which she represents the official committee of unsecured creditors; *In re 24 Hour Fitness*, in which she represents the official committee of unsecured creditors; *In re Toys R Us Inc.*, in which she served as co-counsel to the official committee of unsecured creditors; *In re Circuit City Stores Inc.*, in which she served as co-counsel to the debtors; *In re White Birch Paper Company* and *Bear Island Paper Company*, in which she served as counsel to the Canadian monitor; *In re Workflow Management Inc.*; *In re USA Discounters Ltd.*; *In re Eastman Kodak Co.*; *In re Noranda Aluminum Inc.*; *In re Health Diagnostic Laboratory Inc.*; *In re The Gymboree Corp.* and *In re Windstream Holdings Inc.* She also has led numerous engagements in the energy sector, representing clients in various roles, including *In re Foresight Energy LP*; *In re Alpha Natural Resources Inc.*; *In re Arch Coal Inc.*; *In re Patriot Coal Co.*; *In re James River Coal Co.*; *In re Armstrong Energy Inc.*; *In re Cloud Peak Energy Inc.*; *In re Westmoreland Coal Inc.*; *In re Cambrian Holding Inc.*; *In re Blackjewel LLC* and *In re Peabody Energy Corp.* In addition to her work in significant bankruptcy matters, Ms. Speckhart provides tactical guidance to corporations in all aspects of solvency strategy, contingency planning, risk-mitigation and portfolio improvement through acquisitions and sales of assets and other distressed transactions. She has presented to national audiences on various legal considerations, including those surrounding corporate insolvencies, banking technologies and regulatory compliance. In 2021, Ms. Speckhart was named Restructuring Lawyer of the Year by Global M&A Network's 13th Annual Turnaround Atlas Awards. In 2017, she was selected to ABI's inaugural "40 Under 40" list, and in 2015, she co-authored ABI's *Chapter 15 for Foreign Debtors*. Ms. Speckhart serves on the advisory board of the Institute for Restructuring Studies at the University of Pennsylvania. Before entering private practice, she clerked for Hon. Stephen C. St. John, Chief Judge of the U.S. Bankruptcy Court for the Eastern District of Virginia. During law school, Ms. Speckhart was the first-prize winner of ABI's inaugural Bankruptcy Law Student Writing Competition and the first law student ever to receive the Thatcher Prize for Excellence, which is presented annually to a William & Mary graduate student of outstanding scholarship, service and character. She received her B.A. in politics and economics from Georgetown University and her J.D. from the College of William & Mary, Marshall-Wythe School of Law.

Rachel C. Strickland is a partner and co-chair of the Business Reorganization & Restructuring Department at Willkie Farr & Gallagher LLP in New York, and a member of the firm's Executive Committee. She routinely advises distressed companies and financial and strategic investors in complex chapter 11 cases, bankruptcy acquisitions and out-of-court restructurings. She also regularly advises mass tort claimants and currently leads the firm's mandate as special litigation and corpo-

rate counsel to the Official Committee of Talc Claimants in the Imerys Talc America chapter 11 cases. She also has represented the North American Refractories Company Asbestos Personal Injury Settlement Trust (NARCO), a perpetual asbestos personal-injury settlement trust formed pursuant to NARCO's bankruptcy plan for many years. Ms. Strickland has been recognized for more than 10 years by *Chambers USA*, and in 2021 she was named an "Outstanding Restructuring Lawyer" by *Turnarounds & Workouts* and as one of the "Notable Women in Law" by *Crain's New York*. In 2018, she was invited to become part of the Thirtieth Class of Fellows of the American College of Bankruptcy. Ms. Strickland received her B.A. in 1994 from Michigan State University and her J.D. in 1998 from New York University School of Law.