Mid-Atlantic Bankruptcy Workshop

Mass Torts

Laura Davis Jones, Moderator
Pachulski Stang Ziehl & Jones LLP | Wilmington, Del.

Derek C. Abbott
Morris, Nichols, Arsht & Tunnell LLP | Wilmington, Del.

Jennifer A. Christian
ASK LLP | New York

Hon. J. Kate Stickles
U.S. Bankruptcy Court (D. Del.) | Wilmington

Charles J. Sullivan
Bond, Schoeneck & King, PLLC | Syracuse, N.Y.

CONCURRENT SESSION

2023

MASS TORTS – BEYOND THE HEADLINES
ABI MID-ATLANTIC BANKRUPTCY WORKSHOP
AUGUST 7-9, 2023/BEDFORD, PA

Hon. J. Kate Stickles - U.S. Bankruptcy Judge (D. Del.)
Derek C. Abbott - Morris, Nichols, Arsht & Tunnel LLP
Jennifer A. Christian - ASK LLP
Charles A. Sullivan – Bond, Schoeneck & King, PLLC
Laura Davis Jones, Moderator - Pachulski Stang Ziehl & Jones LLP

Mass Torts – Beyond the Headlines

1. Stay of Actions Against Non-Debtors
2. Releases
3. Futures Claims Representatives
4. Select Insurance Issues

2023 Mid-Atlantic Bankruptcy Workshop
Mass Torts Panel
Stay of Actions Against Non-Debtors
August 8, 2023

I. Context
   a. In the context of mass tort chapter 11 cases, frequently there are non-debtors that have potential liability as tortfeasors arising from the same facts and circumstances that underly the potential liability of the debtor. Such non-debtors often include entities who ultimately may be protected by a channeling injunction arising under the debtor's plan of reorganization.
   b. Often, such claims are contingent, disputed and unliquidated. The claimant may have commenced an action seeking a judgment against the debtor, a non-debtor or both. Whether the debtor is named in the action is usually a function of whether the action was commenced before or after the petition date in the debtor's chapter 11 case.
   c. The non-debtor may have common-law rights of contribution and indemnity, or contractual rights of indemnity against the debtor.
   d. In many cases, the debtor and non-debtor each may have rights to coverage under the same policy or policies of insurance.
   e. Given the complexity of mass tort chapter 11 cases, it is not unusual for such cases to remain pending for multiple years.
   f. While the automatic stay of 11 U.S.C. § 362(a) applies to actions or proceedings against the debtor, it might not extend to actions or proceedings against non-debtors. Therefore, while the debtor's chapter 11 case is pending confirmation, the debtor or the applicable non-debtors may consider seeking relief from the bankruptcy court to stay or enjoin actions against such non-debtors.

II. Motivation to Stay Actions Against Non-Debtors
   a. **Debtors**. Debtors that face potential liability along with non-debtor joint tortfeasors seek to avoid:
      i. diversion and dissipation of shared insurance resources
      ii. distraction from the reorganization efforts of key personnel of the debtor
      iii. prejudice to the debtor in the form of collateral estoppel, issue preclusion, record taint, and inconsistent judgments
      iv. incurring unnecessary professional fees and expenses related to monitoring and protecting the debtor's interests (even as a non-party)
   b. **Non-Debtor Joint Tortfeasors**. Non-debtor joint tortfeasors seek to avoid the difficulty associated with defending an action without the involvement of the debtor, who may be the primary tortfeasor, and may have in its possession or control the evidence necessary to defend the action.
   c. **Other Creditors**. In addition to providing a debtor with a critical breathing spell, the automatic stay protects the creditors of the debtor by "avoiding wasteful, duplicative, individual actions by creditors seeking individual recoveries from the debtor's estate, and by ensuring an equitable distribution of the debtor's estate."

Deutsche Bank Trust Co. Ams. v. Large Private Beneficial Owners (In re Tribune Co. Fraudulent Conveyance Litig.), 818 F.3d 98, 108 (2d Cir. 2016). For this and other reasons, some committees in mass tort cases have led efforts to enter into voluntary standstill agreements relating to litigation against non-debtors (see part VI, below).

III. Authority of the Bankruptcy Court to Stay Actions against Non-Debtors.

a. **Jurisdiction**

i. District courts "have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." *28 U.S.C. § 1334(b)*. In turn, district courts may refer "any and all proceedings arising under title 11 or arising in or related to a case under title 11" to bankruptcy courts within the district. *28 U.S.C. 157(a)*. Therefore, "a bankruptcy court may not enjoin proceedings between third parties unless those proceedings arise in or under or are related to the underlying bankruptcy." *In re: W.R. Grace & Co.*, 591 F.3d 164, 175 (3d Cir. 2009).

ii. The question of whether the automatic stay of 11 U.S.C. § 362(a) ("Section 362(a)") applies to an action against a non-debtor falls squarely within the court's "arising under" jurisdiction. *In re: Brier Creek Corp. Ctr. Assocs. Ltd.*, 486 B.R. 681, 685 (Bankr. E.D.N.C. 2013).

iii. Injunctions pursuant to 11 U.S.C. § 105(a) ("Section 105(a)") fall within the Court's "arising in" jurisdiction. *Manville Corp. v. Equity Sec. Holders Comm. (In re Johns–Manville Corp.)*, 801 F.2d 60, 64 (2nd Cir.1986).

iv. Courts also may have "related to" jurisdiction to stay an action if that action "might have any conceivable effect on the bankruptcy estate" *In re: Roman Cath. Diocese of Syracuse, New York*, 628 B.R. 571, 577 (Bankr. N.D.N.Y. 2021).

v. Procedural Considerations

1. Where a debtor seeks to confirm the applicability of the automatic stay of Section 362(a), it may do so through a motion in the Bankruptcy Court without a separate adversary proceeding.
2. Where an injunction is sought under Section 105(a), an adversary proceeding must be commenced in accordance with Federal Rule of Bankruptcy Procedure 7001(7). *In re: Residential Capital, LLC*, 480 B.R. 529, 538 (Bankr. S.D.N.Y. 2012).

b. **Statutory Bases**. Orders of bankruptcy courts that stay or enjoin litigation against non-debtors typically are predicated on either Section 362(a) or Section 105(a). While applications under those sections often overlap, they are distinct forms of relief. *In re: Philadelphia Newspapers, LLC*, 407 B.R. 606, 611 (E.D. Pa. 2009) (noting that courts often conflate the analysis of Section 362(a) and Section 105(a), which "[leads] to confusion").

IV. Automatic Stay of Section 362(a).

a. **Applicable Provisions of Section 362(a).** Motions seeking to confirm the application of Section 362(a) to actions against non-debtors frequently are based upon subsections (1) and (3).

i. Section 362(a)(1) prohibits the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case, or to recover a claim against the debtor that arose before the commencement of the case; and

ii. Section 362(a)(3) prohibits any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate.

b. **Section 362(a)(1).** The automatic stay of Section 362(a)(1) is generally limited to debtors in bankruptcy, and bankruptcy courts recognize the application of the stay to actions against non-debtors only in very limited circumstances.

i. Second Circuit

1. "[T]he automatic stay can apply to non-debtors, but normally does so only when a claim against the non-debtor will have an immediate adverse economic consequence for the debtor's estate." *Queenie, Ltd. v. Nygard International*, 321 F.3d 282, 287 (2d Cir. 2003). Examples include: (i) claims to establish an obligation where the debtor is the guarantor; (ii) claims against the debtor's insurer; (iii) actions in which there is such an identity of interest between the debtor and a non-debtor defendant "that the debtor may be said to be the real party defendant." *Id.* (*quoting A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 999 (4th Cir.1986)).
2. However, if the debtor is a named party in a proceeding or action, then the automatic stay applies to the continuation of such a proceeding or action (under Section 362(a)(1)), and to the enforcement of an earlier judgment in that proceeding or action (under Section 362(a)(2)) in its entirety and not just with respect to those aspects of a proceeding or action that a court might perceive to adversely affect the debtor or its estate. *Bayview Loan Servicing LLC v. Fogarty (In re: Fogarty)*, 39 F.4th 62 (2d Cir. 2022).

ii. Third Circuit/Fourth Circuit

1. Both the Third and Fourth Circuits recognize that the automatic stay under § 362(a)(1) can extend to third parties where "unusual circumstances" exist. *See A.H. Robins Co.*, 788 F.2d at 999; *McCartney v. Integra Nat. Bank N.*, 106 F.3d 506, 510 (3d Cir. 1997) (adopting A.H. Robbins Co.).
2. Such "unusual circumstances can be found where (i) the non-debtor and debtor enjoy such an identity of interests that the suit of the non-debtor is essentially a suit against the debtor; or (ii)

the third-party action will have an adverse impact on the debtor's ability to accomplish reorganization." *In re Philadelphia Newspapers, LLC*, 407 B.R. 606, 616 (E.D. Pa. 2009).

c. **Section 362(a)(3)**. If an action against a non-debtor constitutes an act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate, the automatic stay might apply.
   i. Insurance Policies.
      1. In *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 92-93 (2d. Cir. 1988), the Second Circuit recognized that insurance proceeds are property of a debtor's estate, and that Section 362(a)(3) bars actions against non-debtors to obtain such proceeds.
      2. In *A.H. Robbins Co.*, the Fourth Circuit found that Section 362(a)(3) stays actions against non-debtor co-insureds that could necessitate the non-debtors drawing from the same insurance proceeds that a debtor may claim. *A.H. Robbins Co.*, 788 F.2d at 1001-02. *See also In re: Circle K Corp.*, 121 B.R. 257, 259-61 (Bankr. D. Ariz. 1990) (staying actions against non-debtors who may be entitled to indemnification under or be additional insureds pursuant to a shared insurance policy).
      3. Debtors facing mass tort liability have made the argument that because (a) they share insurance coverage with non-debtors, and (b) continuation of actions against those non-debtors may negatively impact the insurance coverage available to the debtor, thus dissipating an estate asset, continued prosecution of actions against non-debtors would be a violation of Section 362(a)(3). *See, e.g. In re: Diocese of Buffalo, N.Y.*, 618 B.R. 400, 407 (Bankr. W.D.N.Y. 2020) (holding that, subject to the debtor meeting its burden of proving the existence of joint insurance coverage, claims against non-debtors may be stayed under section 362(a)(3) "where any recovery will dissipate estate [insurance] assets"). *But see In re: The Roman Catholic Diocese of Rockville Centre, New York*, 651 B.R. 622, 643-44 (Bankr. S.D.N.Y. 2023) (Court declined to find that Section 362(a)(3) stayed continuation of actions against co-insured non-debtors).

V. Injunctions of Actions against Non-Debtors under Section 105(a).
   a. Section 105(a) provides that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."
   b. In the Third Circuit, an injunction under section 105(a) is governed by the preliminary injunction standard generally applicable in non-bankruptcy contexts. *See In re: Philadelphia Newspapers, LLC*, 407 B.R. at 617. The factors for the court to consider include: (1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant will be irreparably injured by denial of the relief; (3) whether granting preliminary relief will result in

even greater harm to the nonmoving party; and (4) whether granting the preliminary relief will be in the public interest. *McTernan v. City of York, Pa.*, 577 F.3d 521, 527 (3d Cir. 2009).

c. In the Second Circuit, "[t]here does not appear to be any controlling authority requiring courts to consider the traditional injunction factors when imposing an injunction pursuant to section 105(a). *In re Roman Catholic Diocese of Rockville Ctr., New York*, 651 B.R. at 650 (quoting *In re: Calpine Corp.*, 365 B.R. 401, 409 (S.D.N.Y. 2007) (noting that "the Second Circuit has declined to enunciate an explicit test for when an injunction should issue" under section 105).
   i. "To enjoin claims against non-debtors under § 105(a), a bankruptcy court must find that the claims 'threaten to thwart or frustrate the debtor's reorganization efforts,' and that the injunction is 'important' for an effective reorganization." *In re: The 1031 Tax Group, LLC*, 397 B.R. 670, 684 (Bankr. S.D.N.Y. 2008).
   ii. Other cases from within the Second Circuit apply the traditional preliminary injunction standard under Bankruptcy Rule 7065. *See, e.g. In re: Calpine Corp.*, 365 B.R. at 409. The factors include (a) the likelihood of a successful reorganization, (b) irreparable harm to the debtor, (c) balance of harms weighing in favor of the debtor, and (d) balancing the public interest in successful bankruptcy reorganizations with other competing societal interests. *Id.* at 410-414; see also *In re: The Roman Catholic Diocese of Syracuse, New York*, 628 B.R. at 579-584 (after applying *Calpine* factors, court granted preliminary injunction under Section 105(a) enjoining actions against non-debtors); *See also In re: The Diocese of Buffalo*, N.Y., 618 B.R. at 408. *But see In re: Roman Catholic Diocese of Rockville Ctr., New York*, 651 B.R. at 650 (after applying *Calpine* factors, court denied the debtor's preliminary injunction motion).

VI. Consensual Standstill of Litigation against Non-Debtors

a. Upon the filing of a mass tort case that involves claims against the debtor and non-debtor joint tortfeasors, it is common for the debtor, the creditors committee, and the applicable non-debtors to enter a standstill agreement that pauses all litigation against the covered non-debtors for a period of time.
b. Such standstill agreements are often memorialized in the form of a stipulation that is filed and so-ordered by the court. As partial consideration for the standstill, such agreements often provide for informal discovery from the non-debtor parties.

2023 Mid-Atlantic Bankruptcy Workshop
Mass Tort Panel
Releases
August 8, 2023

1. **Pre-2000s and early 2000s** (and even now), courts were divided on whether granting third party releases (over objection or without affirmative consent) are permissible. Some courts staunchly opposed third party releases, such as the Ninth Circuit (*In re American Hardwoods*), primarily citing Code section 524(3). Some jurisdictions though, like the Third Circuit and the Second Circuit, allowed for nonconsensual third party releases in special circumstances. Generally speaking, in prior times (and now), determining the permissibility and scope of third party release provisions in Chapter 11 plans is a case-specific inquiry whose outcome varies based on the jurisdiction and debtor's circumstances.

   • Third party releases were justified by proponents early on for a number of reasons, including that such releases can incentivize and facilitate third party contributions to fund the plan and reorganization (in exchange for releases), and can be critical in reaching settlements in complex disputes, which settlements may facilitate the plan and reorganization.

2. As an example, the Third Circuit from early on was a "permissive" jurisdiction. In the **Continental Airlines case** in 2000, the Third Circuit refused to issue a bright line rule on the propriety of third party releases, but favorably looked at other cases (including in the Second Circuit and Fourth Circuit) adopting a permissive approach to third party releases. Around this time, third party releases were becoming more commonplace in plans in large Chapter 11 cases.

   • Per Continental, nonconsensual third party releases must be (i) fair, (ii) necessary to the reorganization, (iii) supported by specific factual findings, and (iv) given in exchange for fair value. Additional considerations include whether there is (a) an identity of interest between the debtor and the third party, (b) substantial contribution by the nondebtor of cash or other assets to the reorganization, (c) little likelihood of success of the reorganization without the injunction, (d) an agreement by a substantial majority of creditors to support the injunction, and (e) provision in the plan for payment of substantially all of the class or classes affected by the injunction.

   • Cases like Continental provided authority for nondebtor releases that are fair and necessary, but Continental did not provide specific guidance for structuring such releases.

   • Similar views on nonconsensual releases held by other courts:

   • Pre-dating Continental, ***Menard-Sanford v. Mabey (In re A.H. Robins Co., Inc.)***, 880 F. 2d 694 (4th Cir. 1989). The Fourth Circuit upheld plan releases of the debtors' liability insurers and officers and directors, relying primarily upon the bankruptcy court's section 105(a) equitable powers. In the court's view, section 524(e) should not be literally

construed in every case to restrict the equitable powers of the bankruptcy court. The court deemed this conclusion appropriate, particularly in light of the facts: the plan was overwhelmingly approved; the plan, together with other safeguards, gave late claimants a second chance to recover; certain parties were able to opt out of the settlement to retain rights against certain non-debtors; and the reorganization hinged upon the non-debtor discharges. "We leave questions concerning cases in which § 524(e) does apply for another day."

3. **Development of more rigorous scrutiny:** With events like the 2001 collapse of Enron (which highlighted corporate accounting fraud and malfeasance and deceptive business practices) and the 2002 passage of the Sarbanes-Oxley Act, it can be argued that many courts, including in more permissive jurisdictions, became more wary of third party releases. And, as the other speakers will talk about, more recently there have been important cases like Purdue rejecting nonconsensual third party releases.

4. During this earlier period, many courts began more **heavily scrutinizing third party releases.**

• After Continental, ***In re Dow Corning Corp.***, 280 F. 3d 648 (6th Cir. 2002). The Sixth Circuit held that "under certain circumstances, a bankruptcy court may enjoin a non-consenting creditor's claim against a non-debtor to facilitate a Chapter 11 plan of reorganization." But in that case, the Sixth Circuit found the bankruptcy court had failed to make sufficiently particularized factual findings with regard to the "unusual circumstances" test; for example, conclusory statements not specifying the releasees' contributions to the reorganization.

The debtors' plan provided for a $2.35 billion fund for the payment of personal injury claimants and certain other creditor groups, funded by the insurers, shareholders and cash reserves, in exchange for broad third party releases. The Dow Corning court reasoned that (1) the Bankruptcy Code does not explicitly prohibit or authorize a bankruptcy court to enjoin a non-consenting creditor's claims against a non-debtor to facilitate a reorganization plan; (2) bankruptcy courts have broad equitable authority under section 105(a) to modify creditor-debtor relationships; (3) section 1123(b) (permitting a plan to "include any . . . appropriate provision not inconsistent with the applicable provisions of this title") gives bankruptcy courts substantial discretion to approve of plans; and (4) section 524(e) only explains the effect of a debtor's discharge and does not prohibit the release of a non-debtor.

Factors favoring the enjoinment of non-consenting creditor' claims against non-debtors: (i) there is an identity of interests between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate; (ii) the non-debtor has contributed substantial assets to the reorganization; (iii) the injunction is essential to reorganization, namely, the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor; (iv) the impacted class, or classes, has overwhelmingly voted to accept the plan; (v) the plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction; (vi) the plan provides an opportunity for those claimants who choose not to

settle to recover in full and; and (vii) the bankruptcy court made a record of specific factual findings that support its conclusions.

- Another example, in the 2011 **Washington Mutual case**, Judge Walrath denied a third party release in favor of noncontributing officers and directors. The WAMU court provided a separate analysis for each group of non-debtors proposed to be released, explaining that a specific analysis of releases was necessary, both with respect to the parties and the claims being released.

The court applied the Master Mortgage factors (Bankr. W.D. Mo.), noting that a director or officer's potential indemnification claim against a debtor is simply an inadequate basis for a release, and that to hold otherwise would "justify releases of directors and officers in every bankruptcy case."

- Broadly speaking, some permissive jurisdictions became more rigorous, rejecting conclusory opinions supporting third party releases and requiring more specific factual evidentiary findings. Commonly, the cases allowing third party releases during this period interpreted section 524(e) as only a provision explaining the effects of a debtor's discharge and not as a limitation on a bankruptcy court's authority to grant third party releases, and relied on Code section 105(a) (authorizing the court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]").

- Another example, ***In re Aradigm Commc'ns, Inc.***, 519 F. 3d 640 (7th Cir. 2008): The Seventh Circuit joined various other circuits in permitting nonconsensual third party releases in plans. The case revolved around the cell service provider-debtor's purchase and financing of personal communication services licenses from the FCC. In the debtor's first Chapter 11, the FCC cancelled the licenses. The debtor also received financing from Telephone and Data Services (TDS), who agreed to repay the FCC the debt owed on the licenses if the FCC reinstated the licensees. Although the FCC did not originally reinstate the licenses, in the later *FCC v. Next-Wave Personal Communications Inc.* case, the Supreme Court ruled the FCC could not legally cancel licenses simply because a communication company files bankruptcy. Thus, the FCC was required to reinstate the debtor's licenses, which caused the debtor to file a second Chapter 11 case to tie up loose ends. The plan confirmed by the bankruptcy court contained a release protecting TDS from all liability "in connection with" the reorganization except willful misconduct. On appeal, the Seventh Circuit found that the release was necessary and appropriate because the release was narrowly drawn and TDS was making a substantial contribution (including a large DIP facility) that was necessary for the debtor's reorganization to be successful. "This is not 'blanket immunity' for all times, all transgressions, and all omissions. Nor does the immunity affect matters beyond the jurisdiction of the bankruptcy court or unrelated to the reorganization itself.... TDS cannot use this limitation as a way of skirting the FCC's regulations regarding the use, possession, or transfer of the licenses."

The court followed earlier Seventh Circuit decisions interpreting section 524 merely to preserve non-debtor third party obligations in the absence of a court ruling specifically addressing the third party's obligations. The court reasoned that because section 524(e) does not include the words "shall" or "will" it does not prevent the court from making a

specific ruling altering third party liability. The court then held a bankruptcy court has affirmative power to release a non-debtor third party from its obligations to a creditor, because bankruptcy courts are meant to have broad equity powers under sections 105(a) and 1123(b)(6) in ensuring the success of a reorganization. It is perhaps debatable as to how rigorous the judicial requirements were in Aradigm, highlighting the mixed case law and lack of clarity/specificity in plan release cases during this period.

5. Over the years, however, debtors and other interested parties began developing **other third party release mechanisms**, which have been approved of in some jurisdictions.

- **Voting for the plan:** Many courts have viewed a creditor's vote for the plan as constituting affirmative consent by the creditor to the third party release.

- **Consent by silence / lack of objection:** In a number of cases, plans have included provisions that creditors who do not object to the third party release are deemed to have consented to the release.

- **Opt in / opt out election:** Many courts have approved, as applicable, plan provisions requiring a creditor to "opt in" to the third party release (i.e., affirmatively consent to the release), or to "opt out" of the third party release (i.e., if the creditor does not opt out, it is deemed to have consented to the release).

    - Under an **opt out** plan, a creditor or equity holder typically receives a ballot, or a notice of nonvoting status in lieu of a ballot, which provides the opportunity to opt out. Those who do not check an opt out election box and return the ballot or notice (or otherwise submit another objection to the release) are deemed to have granted consent for the third party release. Many courts reason that clear and conspicuous directions on the solicitation materials about how to opt out and the consequences of not doing so indicate that parties who do not take these steps have manifested their consent to the release.

    - On the other hand, some courts have required creditors or equity holders to affirmatively **opt in** – typically by returning a ballot or notice with the opt in election selected by the creditor or equity holder. These courts reason that inaction cannot be a sufficient manifestation of consent, especially since many creditors and equity holders receive little or no recoveries under the plan and may not appreciate that bankruptcy documents from a debtor could result in their release of claims against third parties.

In re: Purdue Pharma L.P. No. 22-110-bk (L), 2023 U.S. App. (2d Cir. May 30, 2023)

Second Circuit found that Bankruptcy Code § 105(a) and § 1123(b)(6) "jointly" provide the statutory basis for nonconsensual releases of third party claims against non-debtors:

- Section 1123(b)(6) permits the inclusion of "any other appropriate provision: in a plan so long as it is "not inconsistent" with other sections of the Bankruptcy Code.

- In tandem with § 105(a), § 1123(b)(6) confers upon bankruptcy courts "*a residual authority* consistent with the traditional understanding that bankruptcy courts, as courts of equity, have broad authority to modify creditor-debtor relationships."

- In enacting § 524(g) (which prohibits discharge of a non-debtor), Congress expressly intended not to change the pre-existing powers of bankruptcy courts.

The Second Circuit identified **seven factors**:

1. Identity of Interests Between Debtors and Released Parties
2. Factual and Legal Overlap Between Claims Against Debtors and Settled Third-Party Claims
3 and 4. Releases are Essential to Reorganization & Proper in Scope
5. Substantial Contribution to the Reorganization
6. Overwhelming Approval by Creditors
7. Fair Payment of Enjoined Claims

2023 Mid-Atlantic Bankruptcy Workshop
Mass Torts Panel
Future Claims Representatives
August 8, 2023

1. What is a Future Claims Representative?
    a. A future claims representative is a person who is appointed by the court to represent and protect the interests of persons with future unknown claims in a mass torts bankruptcy case. *See Wright v. Owens Corning*, 679 F.3d 101, 108 n.7 (3d Cir. 2012).
2. The Role of the FCR
    a. Protects the due process rights of persons that in the future may make demands.
    b. Considered a party in interest and has broad authority to appear and be heard.
    c. May retain professionals, including attorneys, financial advisors and experts, all paid for by the estate.
3. Johns-Manville
    a. Asbestos bankruptcy case where the debtor wanted to discharge its past and future asbestos liability.
    b. However, asbestos has a long latency period, where injuries may not manifest until decades after exposure.
    c. Judge Lifland developed the concept of a future claims representative to represent the interests of future claimants and the concept was instrumental in resolving the case.
    d. The Court relied on various Bankruptcy Code provisions, including a bankruptcy court's broad equitable powers under Section 105(a) of the Bankruptcy Code.
4. Subsequent to Johns-Manville, Congress Enacted Section 524(g) of the Bankruptcy Code
    a. Section 524(g) codified the format Judge Lifland utilized in Johns-Manville for addressing future claims in asbestos cases.
    b. Section 524(g) is limited in its applicability to asbestos cases only. *See* 524(g)(2)(B)(i)(I).
    c. Section 524(g) contemplates the creation of a trust under a chapter 11 plan to pay asbestos claims and the issuance of an injunction - referred to as a "channeling injunction" - to prevent asbestos claimants from suing the debtor and certain related parties, such as its insurance companies. All claims based upon asbestos-related injuries are channeled to the trust.
    d. Section 524(g)(4)(B) provides that the bankruptcy court must appoint "a legal representative for the purpose of protecting the rights of" future claimants in the chapter 11 case—i.e., a future claims representative. It also directs the court to determine that the terms of the injunction are "fair and equitable" with respect to future claimants in light of the benefits provided to the trust by the beneficiaries of the injunction. *See* 11 U.S.C. § 524(g)(4)(B)(i) and (ii).

e. Section 524(g) was enacted in response to concerns that a mechanism established in bankruptcy to pay asbestos claims could be depleted by the payment of present asbestos claims before future claimants manifest any signs of illness.

5. Bankruptcy Courts Have Expanded The Use of Future Claims Representatives Beyond the Asbestos Context
   a. Typically, bankruptcy courts will rely on Sections 105(a) and 1109(b) of the Bankruptcy Code as the statutory authority for appointing a future claims representative outside of the asbestos context.
   b. Sexual abuse cases
      i. It has been recognized that survivors of childhood sexual abuse may repress their memories of the abuse for many years.
      ii. Bankruptcy courts have appointed future claims representatives in sexual abuse cases. *See, e.g., In re Boy Scouts of America,* No. 20-10343-LSS (Bankr. D. Del.) (Dkt. No. 486); *In re Roman Catholic Archbishop of Portland in Oregon*, No. 04–37154–ELPLL, 2005 WL 148775, at *1 (Bankr. D. Or. Jan. 10, 2005); *In re USA Gymnastics*, No. 18-09108-RLM-11 (Bankr. S.D. Ind.) (Dkt. No. 516).
      iii. In the *Boy Scouts* case, the court appointed a future claims representative in a limited capacity -- to represent survivors who were sexually abused after the debtor had filed for bankruptcy and they did not file a proof of claim form by the bar date; and either (a) were not eighteen years old by the bar date; or (b) were not aware of the sexual abuse because they repressed their memory of it, if the concept of repressed memory is recognized by the highest court of the jurisdiction where the abuse occurred. *See* Appointment Order, Dkt. No. 486, at ¶4.
   c. Opioid cases
      i. Opioid addiction has a very short latency period. It takes only a "couple of weeks" to get addicted to opioids. John Hopkins Medicine, *Opioid Addiction*, https://www.hopkinsmedicine.org/opioids/science-of-addiction.html#:~:text=How%20addictive%20are%20opioids%3F,you%20will%20not%20become%20addicted . And an overdose occurs "minutes to hours after the drug was used." Boston University School of Medicine: Clinical Addiction Research & Education (CARE) Unit, *Overdose Education*, https://www.bumc.bu.edu/care/research-studies/project-recover/overdose-education/#:~:text=Overdose%20(OD)%20happens%20when%20a,%2C%20coma%2C%20and%20then%20death.
      ii. In *In re Purdue Pharma L.P.*, No. 19-23649 (SHL) (Bankr. S.D.N.Y. 2019), one of the first opioid manufacturer cases, the debtors did not seek the appointment of a future claims representative. Rather, the debtors established a claims bar date, and to address any future claims, a limited fund was set aside that would revert to the present victims' trust to the extent the fund was unused after a period of time. *See* Twelfth Amended

Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. and Its Affiliated Debtors, Dkt. No. 3726, at § 5.7(f); Findings of Fact, Conclusions of Law, and Order Confirming the Twelfth Amended Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. and its Affiliated Debtors, Dkt. No. 3787, at § R.R.(c)–(d).

iii. In *In re Mallinckrodt plc*, No. 20-12522 (JTD) (Bankr. D. Del. 2020), the debtors sought the appointment of a future claims representative. A number of parties objected to the appointment, but consented to allowing the future claims representative to be involved in mediation regarding allocation matters. The future claims representative's appointment order was ultimately entered after mediation concluded. *See* Order Appointing Roger Frankel, as Legal Representative for Future Opioid Personal Injury Claimants, Effective as of the Petition Date (Dkt. No. 2813).

iv. In *In re Endo Int'l plc*, No. 22-22549- JLG (Bankr. S.D.N.Y. 2022), the debtors sought the appointment of a future claims representative and one was appointed on certain conditions agreed to with the official committee of opioid claimants, namely modifications to the order that were intended to, among other things, constrain the definition of a Future Claimant and give the official committee and other parties the right to go back to the court to seek further modifications to such definition. The revised order also contained various other modifications to ensure that parties would not be able to use such order (or the appointment of a future claims representative) for various other purposes in the cases. *See* Order (I) Appointing Roger Frankel as Future Claimants' Representative, Effective as of the Petition Date; and (II) Granting Related Relief (Dkt. No. 318).

6. Standard for Appointment of Future Claims Representatives in Asbestos Bankruptcy Cases
   a. The first circuit court to rule on the standard for appointment of a future claims representative was the U.S. Court of Appeals for the Third Circuit in *In re Imerys Talc America, Inc.*, 38 F.4th 361 (3d Cir. 2022).
   b. In *Imerys*, the Third Circuit ruled that a future claims representative in an asbestos case must be more than merely a "disinterested person". Instead, a future claims representative must be not only free of conflicts of interest, but also fulfill fiduciary duties to future claimants, including duties of undivided loyalty and honesty.

Select Insurance Issues in Mass Tort Bankruptcy Cases

Insurance Neutrality

- Initially developed in response to questions regarding standing of insurers to be heard in connection with plans of reorganization.
- While not required, many plans or TDPs contain "insurance neutrality" provisions that are the subject of much debate.
- The intent of such language is to make clear that an insurer's rights and obligations under the policies, as well as those of the debtor policy holder, remain undisturbed by the plan and TDP.
- Notwithstanding decades of litigation about such language, it is still the subject of objections and argument as insurers try to eliminate any impact of the plan on their claims process, while plaintiffs look to bolster their chances of prevailing in coverage litigation.

Proofs of Claim

- Code and rules seem to be based on a notice pleading concept and give proofs of claim prima facie validity unless objections are lodged.
- Trend in mass tort cases is for insurers that may face potential liability seek to require greater specificity and detail in an effort to bolster their ability to assert coverage defenses.
- Resulting tension leads to fights about more specific bespoke proof of claim forms for mass tort cases.
- Insurers also suggest that lawyers should not be able to sign PoCs, instead seeking to require that the actual claimants sign to reduce the potential for fraud.

Other Issues

- Insurers argue that bar dates artificially inflate claims
  - Broad advertising campaigns by claim aggregators
  - Alleged susceptibility for fraud
  - Accelerated filing of claims versus historical occurrence of claims
- Trust Distribution Procedures
  - Quantum of proof necessary for a claim to be paid
  - Insurer participation in claims allowance process
  - Anti-fraud provisions

Selected articles and cases

- https://www.policyholderperspective.com/2023/01/articles/insurance-coverage/liability-insurance-in-mass-tort-bankruptcy-cases-a-brief-primer/#:~:text=The%20role%20of%20insurance%20in%20mass%20tort%20bankruptcy%20cases&text=Insurance%20often%20is%20one%20of,funding%20for%20the%20settlement%20trust
- **Insurance Coverage Disputes and Settlement Strategies in Mass Tort Bankruptcies** by Practical Law **Bankruptcy** & Restructuring
- https://news.bloomberglaw.com/us-law-week/insurers-misuse-proof-of-claim-forms-in-mass-tort-bankruptcy-cases
- RESOLVING MASS TORT LIABILITY THROUGH BANKRUPTCY 37th Annual Southeastern Bankruptcy Law Institute April 14-16, 2011 By: Adam Paul Sarah Hiltz Seewer Noah Jeffrey Ornstein Kirkland & Ellis LLP 300 North LaSalle Street Chicago, IL 60654 (312) 862-2000
- https://restructuring.weil.com/insurance/other-peoples-money-revisited-or-when-do-insurers-have-standing-to-challenge-a-bankruptcy-plan/
- Lindsey Simon, Bankruptcy Grifters , 131 Yale L.J. 1154 (2022), Available at: https://digitalcommons.law.uga.edu/fac_artchop/1420
- https://www.swissre.com/reinsurance/property-and-casualty/p-c-claims-reinsurance/better-in-bankruptcy-insurers.html
- https://www.jdsupra.com/legalnews/liability-insurance-in-mass-tort-6633316/

Faculty

Derek C. Abbott is a partner with Morris, Nichols, Arsht & Tunnell LLP in Wilmington, Del., and a member of its Business Reorganization & Restructuring Group. He also chairs the firm's *pro bono* committee and sits on the firm's recruiting committee Mr. Abbott has represented *Fortune 1000*, local, international and other organizations as lead or Delaware counsel in bankruptcy proceedings and litigation on behalf of debtors, creditors, official and *ad hoc* committees and transactional case constituents. He regularly works with debtors in possession and exit-financing lenders, as well as outside and inside counsel, turnaround professionals, crisis-management firms, and investment and non-investment bank professionals. Mr. Abbott also frequently serves as a mediator in matters related to insolvency and distressed businesses, including both adversary proceedings and case-dispositive matters. In addition, he has served as an expert witness in matters involving restructuring and bankruptcy matters both domestically and internationally. Mr. Abbott's recent client representations include AT&T Inc., General Motors Corp., Quality Care Properties, Philips International, Viacom Inc., TD Bank and Nortel Networks. He has been recognized by *Chambers USA, The Best Lawyers in America, Law & Politics* magazine and *Delaware Super Lawyers*. In 2016, he was invited to join the 28th Class of Fellows of the American College of Bankruptcy, and in 2018, he was presented with the Delaware State Bar Association's Access to Justice Commitment Award, which recognized his commitment to *pro bono* work throughout his career. In 2011, he received the Caleb R. Layton III Service Award, presented by the judges of the U.S. District and Bankruptcy Courts for the District of Delaware. Mr. Abbott is a member of the American and Delaware State Bar Associations, Turnaround Management Association and ABI, and is a frequent speaker. He also serves as legal counsel for a variety of indigent clients through Delaware Volunteer Legal Services. Mr. Abbott received his B.S. in human factors psychology in 1987 from the U.S. Military Academy at West Point and his J.D. with honors from the University of North Carolina School of Law in 1995, where he was an editor of the *North Carolina Law Review*.

Jennifer A. Christian is a partner at ASK LLP in New York, and her practice focuses on representing indenture trustees, secured and unsecured creditors (including trade creditors), asset-purchasers, liquidating trustees, and other major constituencies in chapter 11 and chapter 7 bankruptcy cases and other proceedings. She has more than 15 years of bankruptcy and creditors' rights experience. Prior to joining ASK LLP, Ms. Christian was counsel at Thompson & Knight LLP and an associate at Kelley, Drye & Warren LLP and Bryan Cave LLP. Prior to entering private practice, she clerked for two years for the Chief Judge of the U.S. Bankruptcy Court for the Western District of New York in Rochester. Ms. Christian is admitted to practice law in New York and Connecticut, and before the U.S. District Courts for the Southern, Eastern and Western Districts of New York. She received her B.A. in political science from the State University of New York – College at Geneseo and interned at both the Monroe County District Attorneys' Office and the White House, where she worked in the Office of the Legal Counsel to the Vice President of the United States. She received her J.D. from St. John's University School of Law in 2000 with honors and participated in its first-ever Bankruptcy LL.M. program, and she won the Springer Legislative Award for Excellence in Legislative Advocacy and the CALI Excellence for the Future Scholastic Awards in Trusts & Estates and Legislative Advocacy. She interned for Hon. James L. Garrity, Jr. of the U.S. Bankruptcy Court for the Southern District of New York.

Laura Davis Jones is a named partner and management committee member of Pachulski Stang Ziehl & Jones LLP in Wilmington, Del., and is the managing partner of the firm's Delaware office. She gained national recognition as debtor's counsel in the *Continental Airlines* bankruptcy case and has represented numerous debtors, creditors' committees, bank groups, acquirers and other significant constituencies in national chapter 11 cases and workout proceedings. Ms. Jones participates as a speaker at national bankruptcy and litigation seminars, and she has authored numerous articles. She was named "Deal Maker of the Year" by *The American Lawyer* in 2002, which also has profiled her. Ms. Jones has been named continuously by her peers as one of the *The Best Lawyers in America*" and as one of the "Best Lawyers in Delaware," and was selected as one of the top 10 lawyers in Delaware by *Delaware Super Lawyers*. She is a Fellow of the American College of Bankruptcy and a *Chambers USA* "Star Individual," the highest honor a lawyer can receive. Ms. Jones has been recognized in the *K&A Restructuring Register* and the *Lawdragon 500* since their inception, has been named repeatedly to the *International Who's Who of Insolvency and Restructuring Lawyers*, and is AV-rated by Martindale-Hubbell. In 2018, she received the prestigious "Women Leadership" award at Global M&A Network's Turnaround Atlas Awards, which honors the achievement of influential women leaders in the restructuring and turnaround communities. She started her career as a judicial law clerk in the U.S. Bankruptcy Court for the District of Delaware. Ms. Jones is admitted to practice in Delaware and the District of Columbia. She received her undergraduate degree from the University of Delaware and her J.D. from Dickinson School of Law, where she was on the board of editors and business manager for the *Dickinson Law Review* and served on the Appellate Moot Court Board.

Hon. J. Kate Stickles is a U.S. Bankruptcy Judge for the District of Delaware in Wilmington, appointed on April 6, 2021. Previously, she was member of Cole Schotz P.C.'s Bankruptcy and Corporate Restructuring Department in its Wilmington, Del., office and practiced in the areas of corporate bankruptcy, insolvency and creditors' rights, having represented debtors, official committees, creditors, examiners and trustees in chapter 11 cases. Judge Stickles has been named in *Chambers USA: America's Leading Lawyers for Business* since 2010 and has been listed in *The Best Lawyers in America* and in *Delaware Super Lawyers* in the area of Bankruptcy and Creditor-Debtor Rights Law. She served as counsel to chapter 11 debtors in a variety of industries, including manufacturing and distribution, telecommunications, health care and media, in some of Delaware's most significant bankruptcy cases. Judge Stickles has published in, and served as a contributing editor for, the *ABI Journal* and has also published in *The Americas Restructuring and Insolvency Guide*, the ABI Bankruptcy Litigation Committee eNewsletter and the ABI Commercial Fraud Committee eNewsletter. Judge Stickles is active in the Bankruptcy Section of the Delaware State Bar Association, having served as the Section's chair (2010-11), vice chair Commercial Bankruptcy (2009-10) and secretary (2008-09). She is also a member of the Delaware Views from the Bench Advisory Board and the International Women's Insolvency & Restructuring Confederation (IWIRC), for which she served as director-at-large from 2010-11. Judge Stickles received her B.A. in political science and communications from Western Maryland College and her J.D. from Temple University School of Law.

Charles J. Sullivan is a member of Bond, Schoeneck & King, PLLC in Syracuse, N.Y., and co-chairs the firm's business restructuring, creditors' rights and bankruptcy practice. He has more than 30 years of experience as a financial restructuring and bankruptcy attorney. Mr. Sullivan represents debtors, lenders, official committees, asset-purchasers, landlords and trustees in bankruptcy proceedings, financial reorganizations, workouts and commercial litigation. He also is an experienced business and transactional lawyer. Mr. Sullivan is a frequent speaker on a variety of business and bankruptcy law

topics. He is a member New York State, Onondaga County and Central New York Bankruptcy Bar Associations, an associate member of the Northeast Cooperative Council, a member of the executive board's Tax and Accounting Committe of the National Council of Farmer Cooperatives, and a statutory draftsperson of the Colorado Cooperatives Act and Amendments to the New York Abandoned Property Law. Mr. Sullivan is listed in *The Best Lawyers in America* for Bankruptcy and Creditor/Debtor Rights/Insolvency and Reorganization Law, Corporate Law and Litigation - Bankruptcy from 2010-23, as "Lawyer of the Year" in *Syracuse Corporate Law* in 2017, 2019, 2021 and 2023, and in *New York Super Lawyers* for Business and Corporate in 2022. He received his B.A. *cum laude* in 1989 from St. Lawrence University and his J.D. *magna cum laude* in 1992 from the University at Buffalo School of Law, where he served as head Note and Comment editor for the *Buffalo Law Review*