PRESENTED AT

The University of Texas School of Law

39th Annual Jay L. Westbrook Bankruptcy Conference
November 5-6, 2020
Austin, TX

Mass Tort Bankruptcies

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In recent years, there has been a resurgence of mass tort bankruptcies. This resurgence, however, is notably different from prior cases like A. H. Robbins, Dow Corning and Johns-Manville. In order to understand where mass tort bankruptcy cases are going, one needs to understand some of the genesis of these cases. The following article provides a broad overview of the landscape of mass tort claims, including an abbreviated history of major cases and the defining tools the bankruptcy court utilizes in managing these unique dockets.

I. First Wave of Mass Torts

a. Asbestos-related Claims

The first wave of mass torts arrived in the mid-1980's as plaintiffs began to file asbestos cases. 37,000 asbestos claims were filed as of 1985; in 2002, that number surpassed 730,000.[3] Developments in diagnosis and health sciences paired with an aggressive plaintiff's bar led to the traditional tort claims process being utterly overwhelmed. The onset of the tidal wave of mass tort asbestos claims in bankruptcies arose in *Johns-Manville*.[4]

Johns Manville Corporation was a manufacturing company founded for the purpose of creating asbestos products for insulation and construction uses. Unsurprisingly, the company faced such a large number of asbestos-related claims that in 1982 they filed a voluntary petition under Chapter 11. At the time, the bankruptcy court simply lacked the instruments and procedures to facilitate resolution against such a litany of claims. As such, the courts were in turmoil for years before creating the case law precedent for many mass tort bankruptcies today. According to the debtor's plan for reorganization, the bankruptcy estate would create a post-confirmation trust which would handle all proceedings against future claimants. The debtor would not face further litigation according to the discharge granted under the confirmed plan. However, by 1980, the $2.5 billion dollar trust had been emptied due to a design flaw in the trust: according to the trust's terms, all claimants were permitted to return to the tort system to litigate their claims 120 days after filing a claim against the trust.

b. Dalkon Shield

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[3] Deborah R. Hensler, Asbestos Litigation in the United States: A Brief Overview 3 (1991); *See* Rand Institute, Asbestos Litigation, at xxiv (2005).

[4] *In re Joint E. and S. Dist. Asbestos Litig.*, 129 B.R. 710 (E.D.N.Y. 1991), *vacated on procedural grounds*, 982 F.2d 721 (2d Cir. 1992).

A.H. Robins patented and manufactured an intrauterine device (IUD) called the Dalkon Shield. Unfortunately, the contraceptive device caused an array of serious injuries, including pelvic infection, infertility, unintended pregnancy, and death. Although A.H. Robins eventually took the product off the market, the avalanche of lawsuits that followed would send the company into Chapter 11.[5]

Bearing in mind the lessons from *Johns-Manville*, the bankruptcy court created procedures which actively promoted orderly resolution of claims.[6] Specifically, the court mandated that the claimants provide information regarding their use of the Dalkon shield, the names of doctors and clinics visited, and the alleged injury. If the claimants provided information that met pre-determined minimum criteria, they were entitled to compensation from the plan trust. Utilizing these procedures and free exchange of pertinent information, the court reduced administrative costs and simultaneously handled thousands of claims.

c. Silicone Implants

In the early 1990's, Dow Corning Corporation became inundated with lawsuits regarding their silicone-based products. Although Dow Corning attempted to resolve this wave of lawsuits out of the bankruptcy court, they filed for Chapter 11 after the unexpectedly high number of claims.[7] During the course of the bankruptcy, Dow Corning filed a motion for summary judgment, which objected to the claims by alleging no scientific evidence existed linking their silicone breast implants to the injuries claimed. During the pendency of that motion, Dow Corning reached a consensual plan of reorganization. Per the plan, mechanisms were created that would permit claimants of unsettled claims to pursue resolution in a controlled litigation environment. For those who did not seek contested litigation, the plan set forth terms providing for fair compensation.

II. Key Mass Tort Bankruptcy Concepts

a. Jurisdiction and Authority

In itself, the term "mass tort" is defined as an event or series of related events that injures a large number of people or causes damage to their property.[8] Therefore, mass torts can be characterized by widespread claims arising often from disparate locations and varying points in time. The breadth of the universe of mass torts therefore invites jurisdictional issues. However, for reasons to be stated below, the bankruptcy courts are particularly well-equipped to address these types of concerns. Over time, the bankruptcy court system has developed methods to simplify and expedite resolution of these masses of claims.

One of the key sources of statutory authority for consolidation of these related claims comes from section 28 U.S.C. § 157(b)(2) which permits bankruptcy judges to "hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under

[5] *A.H. Robins v. Piccinin*, 788 F.2d 994 (4th Cir. 1986).
[6] *See* Smith, supra note 3, at 1636.
[7] *In re Downing Corp.*, 215 B.R. 346, 348 (Bankr. E.D. Mich. 1997).
[8] *See* Advisory Comm. on Civil Rules and Working Group on Mass Torts, Report on Mass Tort Litigation, 10, app. D, at 1 (1999).

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First appeared as part of the conference materials for the
39th Annual Jay L. Westbrook Bankruptcy Conference session
"Mass Tort Bankruptcies"