42nd Annual Jay L. Westbrook BANKRUPTCY CONFERENCE

INTERSECTION OF MASS TORTS AND BANKRUPTCY

PANELISTS: HON. ROYAL FURGESON, U.S. DISTRICT JUDGE, RETIRED
GREGORY M. GORDON, PARTNER, JONES DAY
ADAM C. SILVERSTEIN, PARTNER, OTTERBOURG P.C.

Mass Torts & Bankruptcy The Year in Review (2023)

Non-Consensual Third Party Releases

- *In re Purdue Pharma, LP, et al.*, 2nd Cir., *cert. granted*, U.S. S. Ct.
- *In re Boy Scouts of America, et al.*, D. Del.

Dismissal

- *In re LTL Mgmt., LLC (LTL I),* 3rd Cir. & *In re LTL Mgmt., LLC (LTL II)*, Bankr. D.N.J.
- *In re Aearo Tech., LLC,* Bankr. S.D. Ind.
- *In re Bestwall LLC*, Bankr. W.D.N.C.
- *In re Aldrich Pump LLC/In re Murray Boiler LLC*, W.D.N.C.
- *In re Whittaker, Clark & Daniels, Inc.*, D.N.J.

Stay Protection/Preliminary Injunction

- *In re Aearo*, 7th Cir.
- *In re LTL II,* Bankr. D.N.J.
- *In re Bestwall LLC*, 4th Cir.

Settlement

- Out of bankruptcy: 3M (Combat Earplugs)
- In bankruptcy: Hess Oil (Asbestos)

Congressional Activity

- Senate Judiciary Committee, Sept. 19 Hearing: *Evading Accountability: Corp. Manipulation of Ch. 11 Bankr.*
- H.R. Committee on Oversight and Accountability, Sept. 13 Hearing: *Unsuitable Litigation: Oversight of Third-Party Litigation Funding*

Non-consensual Third Party Releases (2023)

BSA

- In March, the Dist. Ct. (D. Del.) affirmed the Confirmation Order granting non-consensual third party releases; that ruling is now on appeal to the 3rd Cir. The Dist. Ct. has denied a stay of "further implementation" of the Plan pending the S. Ct. decision in *Purdue.* Stay motions have been filed in the 3rd. Cir.
- Current 3rd Cir. law authorizes the granting of non-consensual third party releases in plans. *See In re Continental Airlines*, 203 F.3d 203 (3rd Cir. 2000); *In re Millenium Lab Holdings, II, LLC*, 945 F.3d 126 (3rd Cir. 2019)

Purdue Pharma

- In May, the 2nd Cir. reversed the Dist. Ct. (S.D.N.Y.) and affirmed a Confirmation Order, which granted non-consensual third party releases
- In July, the S. Ct. stayed the mandate and granted cert.: "Whether the Bankruptcy Code authorizes a court to approve, as part of a plan of reorganization under Chapter 11 of the Bankruptcy Code, a release that extinguishes claims held by nondebtors against nondebtor third parties, without the claimants' consent."
- In a textualist S. Ct., will non-consensual third party releases survive? Proponents rely on §§ 105 and 1123(b)(6)
- What are the implications of the S. Ct.'s ruling on the intersection of mass tort and bankruptcy?
- Can/will Congress supply a fix?

Dismissal (2023)

LTL I (J&J)

- In January, the 3rd Cir. reversed the Bankr. Ct. (D.N.J.) and dismissed the case for lack of good faith under § 1112(b)(2)
- "We start, and stay, with good faith. Good intentions—such as to protect the J&J brand or comprehensively resolve litigation—do not suffice alone. What counts to access the Bankruptcy Code's safe harbor is to meet its intended purposes. Only a putative debtor in financial distress can do so. LTL was not. Thus we dismiss its petition."
- In March, the 3rd. Cir. denied *en banc* rehearing. The Bankr. Ct. dismissed *LTL I* on April 4

LTL II (J&J)

- Filed the same day as *LTL I* was dismissed, asserting that there was "financial distress" and overwhelming creditor support
- A 4-day trial was conducted in June
- In August, the Bankr. Ct. (D.N.J.) granted dismissal*:* "[T]he evidentiary record fixed at trial does not establish sufficient 'imminent' or 'immediate' financial distress to satisfy the criteria enunciated by the Third Circuit in *In re LTL Mgmt., LLC*. 64 F.4th 84 at 102, 108 (3d Cir. 2023)."
- Dismissal has been appealed by the debtor and an ad hoc committee of supporting counsel

Dismissal (2013) cont'd

Aearo (3M)

- In June, the Bankr. Ct. (S.D. Ind.) dismissed the case for lack of good faith under § 1112(b)(2). "The Court ultimately finds [*LTL*'s] logic persuasive."
- "Admittedly, §1112(b) is not itself jurisdictional, but requiring a valid bankruptcy purpose and a debtor in need of bankruptcy protection protects this Court's jurisdictional integrity. Otherwise, a bankruptcy court risks becoming another court of general jurisdiction, which it most decidedly is not. Absent a Congressional intervention that clarifies if, when, and under what circumstances debtors involved in mass tort litigation may file for bankruptcy, the Court is unwilling to ignore that that the Aearo Entities – at least presently – enjoy a greater degree of financial security than warrants bankruptcy protection."
- Appeal in the 7th Cir. is being held in abeyance pending the global settlement announced in the MDL

Bestwall (Georgia Pacific)

- In July, the Bankr. Ct. (W.D.N.C.), after previously denying a motion to dismiss by the Official Committee of Asbestos Claimants (ACC) under § 1112(b), denied motions to dismiss the case by the ACC and others based on claimed lack of financial distress. The movants had argued that the Constitution's Bankruptcy Clause bars a filing by a non-distressed entity; the Bankr. Ct. disagreed.
- Also in July, while affirming a bankruptcy court preliminary injunction order that had been affirmed by the Dist. Ct. (W.D.N.C.), the 4th Cir. (by 2-1 majority) observed: ". . .[A]s the Third Circuit recognized in LTL Management, this Court applies a more comprehensive standard to a request for dismissal of a bankruptcy petition for lack of good faith; that is, the complaining party must show both 'subjective bad faith' and the 'objective futility of any possible reorganization.' . . . .The Claimant Representatives have made no showing to this Court of either required element.'"

Dismissal (2013) cont'd

Aldrich Pump/Murray Boiler (Trane Technologies)

- In May, the Official Committee of Asbestos Claimants and others moved to dismiss the cases on grounds similar to the ACC in *Bestwall* – *i.e.*, the debtors are not in financial distress and, thus, are barred from bankruptcy relief by the Bankruptcy Clause and/or under § 1112(b) as a bad faith filing
- The Committee also likened the Two-Step case to "new debtor syndrome" cases that have been dismissed
- The motion is fully briefed and argued, and under the consideration of the Bankr. Ct. (W.D.N.C.)

Whittaker, Clark & Daniels

- In June, the Bankr. Ct. (D.N.J.) denied the motion to dismiss filed by a South Carolina receiver, who had argued that the debtor's board of directors was divested of authority to file the petition once the receiver was appointed
- The Bankr. Ct. concluded: "Ultimately, this Court cannot conclude that the Receivership Order displaced the Board and/or divested it of its ability to file for bankruptcy under state law. Despite the Receiver's arguments to the contrary, he is unable to identify any South Carolina state law or language in the Receivership Order that provides for this relief. Moreover, even assuming that appointment of the Receiver established him as the sole entity with authority to file bankruptcy under state law, this Court determines that the circumstances weigh in favor of preserving the constitutional right to bankruptcy and, thus, warrant an exception to the general rule that state law determines who has authority to file bankruptcy for a corporation."

Title search: Intersection of Mass Torts and Bankruptcy

Also available as part of the eCourse
2023 Jay L. Westbrook Bankruptcy eConference

First appeared as part of the conference materials for the
42nd Annual Jay L. Westbrook Bankruptcy Conference session
"Intersection of Mass Torts and Bankruptcy"