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Fold and Live to Fold Again: Perspectives on Mass Torts

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I. Noteworthy Mass Tort Bankruptcy Cases and Decisions.

In the context of mass tort bankruptcies, a few recently filed cases have produced a number of interesting issues and rulings.

A. *In re Purdue Pharma, L.P.* (Bankr. S.D.N.Y., Case No. 19-23649).

1. The Bankruptcy Court's Confirmation Order.

Judge Robert D. Drain confirmed a plan (the "Confirmation Order") that included non-consensual third-party releases in favor of the Sacklers as part of a settlement with the following terms:

- The companies' assets to be divided among nine creditor trusts;
- Funds to be used to pay for opioid abatement and to compensate personal injury claimants;
- 100 million pages of documents produced in discovery to be held in the public domain;
- Purdue ceases to exist, replaced by a "public benefit company" owned by the trusts;
- The Sacklers to contribute $4.375 billion over a period of seven years; and
- The Sacklers to receive third-party releases for claims that are not derivative claims against Purdue.

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

Judge Drain's ruling can be found at *In re Purdue Pharma, L.P.*, 633 B.R. 53 (Bankr. S.D.N.Y. 2021).

2. Appeal of the Confirmation Order.

On appeal, Judge Colleen McMahon of the U.S. District Court for the Southern District of New York reversed and vacated the Confirmation Order, finding that the Bankruptcy Code does not authorize nonconsensual third-party releases. On the question of whether the Bankruptcy Code authorizes, explicitly or implicitly, nonconsensual third-party releases, Judge McMahon answered as follows:

"No. The Bankruptcy Code does not authorize a bankruptcy court to order the nonconsensual release of third-party claims against non-debtors in connection with the confirmation of a chapter 11 bankruptcy plan. The Confirmation Order fails to identify any provision of the Bankruptcy Code that provides such authority. Contrary to the bankruptcy judge's conclusion, Sections 105(a) and 1123(a)(5) & (b)(6), whether read individually or together, do not provide a bankruptcy court with such authority; and there is no such thing as 'equitable authority' or

‘residual authority’ in a bankruptcy court untethered to some specific, substantive grant of authority in the Bankruptcy Code. Second Circuit law is not to the contrary; indeed, the Second Circuit has not yet taken a position on this question.”

Judge McMahon’s decision can be found at *In re Purdue Pharma, L.P.*, 635 B.R. 26 (S.D.N.Y. 2021).

The Second Circuit granted the appellants’ petition for an expedited interlocutory appeal — oral argument took place on April 25, 2022, but no decision has yet been rendered.

After the appeal was filed, Judge Shelley Chapman, who was overseeing the mediation, announced a settlement had been reached under which the Sacklers would contribute $5.5 billion. Because of the pendency of the appeal, no plan has gone effective.

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

1. Background of the Case.

The ability of companies to use corporate structure and the chapter 11 process to manage mass tort liabilities was tested and limited by a recent Third Circuit decision.

Johnson & Johnson Consumer Inc. (“Old Consumer”), a wholly owned subsidiary of Johnson & Johnson (“J&J”), and the indirect parent company of LTL Management, LLC (“LTL” or the “Debtor”), sold the commonly-known health care product Johnson’s Baby Powder. It was later claimed that the talc-based powder caused lung disease, mesothelioma, and ovarian cancer, among other diseases. Prior to its chapter 11 filing, Old Consumer and J&J faced over 38,000 ovarian cancer actions, and over 400 mesothelioma actions, with payouts for talc-related verdicts and settlements totaling over $3.5 billion, and incurring over $1 billion in costs.

In an effort to manage its ever-increasing talc liabilities, LTL was formed as the product of a divisional merger process under Texas state law, the so-called “Texas Two-Step,” for the primary purpose of taking on the talc liabilities of Old Consumer. As a result of the merger, LTL and Johnson & Johnson Consumer Inc. (“New Consumer”) were formed; the former holding Old Consumer’s liabilities and a funding support agreement from its corporate parents, and the latter holding virtually all of the productive business previously held by Old Consumer.

Under the funding agreement, New Consumer and J&J are obligated to pay LTL for “any and all costs and expenses,” up to the value of New Consumer (excluding the talc liability that LTL incurs during its bankruptcy case), “including the cost of administering the Bankruptcy Case,” to the extent necessary.

On October 14, 2021, two days after completion of the divisional merger, LTL filed a petition for chapter 11 relief in the U.S. Bankruptcy Court for the Western District of North Carolina (“North Carolina Bankruptcy Court”). Following motions from various interested parties, including the talc claimants, and a show cause order, the North Carolina Bankruptcy Court transferred LTL’s chapter 11 case to the U.S. Bankruptcy Court for the District of New Jersey (the “Bankruptcy Court”), finding, among other things, that LTL’s connections to New Jersey were stronger than its connections to North Carolina.

2. Talc Claimants' Motion to Dismiss.

By December 1, 2021, various groups of talc claimants filed motions to dismiss, and joinders were filed shortly thereafter. The talc claimants argued that LTL's chapter 11 case was filed without a proper bankruptcy purpose and therefore lacked good faith under § 1112(b) of the Bankruptcy Code. The talc claimants also argued that:

- The convenient timing of the filing, just days after LTL was created, suggested the company was merely seeking some tactical litigation advantage, and was not pursuing a valid bankruptcy purpose;
- LTL was merely a special purpose vehicle used to employ the automatic stay for the benefit of its solvent parent;
- LTL had no business purpose and no employees apart from those seconded from J&J, and LTL's board, management, and employees all work for and are loyal to J&J;
- The corporate restructuring was intended to force claimants to face delay and to secure a "bankruptcy discount," "an obvious legal maneuver to impose an unfavorable settlement dynamic on talc victims;"
- The funding backstop suggests that LTL is not a company in financial distress, because certain terms of the agreement permitted LTL to compel J&J to deplete its available cash or pursue liquidation of New Consumer, with an enterprise value of $61 billion, to resolve talc-related claims; and
- The market capitalization of J&J ($450 billion) and J&J's "stellar credit rating" cut against arguments that LTL is in financial distress, because of the viability of its parent company.

3. The Bankruptcy Court's Decision.

In February 2022, the Bankruptcy Court held a five-day trial on the motions to dismiss. In an opinion denying the talc claimants' motions to dismiss, Judge Michael B. Kaplan held that LTL had filed its petition in good faith, and further ruled that the filing served a proper purpose because it sought to resolve the talc liabilities by creating a trust for the benefits of the claimants under § 524(g) of the Bankruptcy Code.

The Bankruptcy Court acknowledged (as did LTL) the practical advantage of filing a chapter 11 case to address the talc liabilities, including through the creation of a settlement trust. In determining whether LTL indeed had a valid bankruptcy purpose, the Bankruptcy Court separately considered whether there was a more equitable and beneficial path available to the talc claimants.

Judge Kaplan's decision was a full-throated defense of the bankruptcy process, based on the Bankruptcy Court's "strong conviction that the bankruptcy court is the optimal venue for redressing the harms of both present and future talc claims." The Bankruptcy Court addressed how the bankruptcy process offers better protections for talc claimants than those otherwise

available through the tort system, including by discussing the inadequacies of class actions and MDL coordination in providing timely and fair redress to talc claimants and their inability to protect future claimants.

The Bankruptcy Court acknowledged the funding agreement, but held that despite LTL's access to its corporate parent's funds, LTL was in financial distress and that, given the projected billion-dollar verdicts by talc claimants, the continued viability of LTL and the J&J companies absent the chapter 11 filing was questionable.

Finally, the Bankruptcy Court dismissed talc claimants' arguments concerning J&J's half-trillion-dollar market capitalization and stellar credit-rating as inapplicable because J&J had no legal duty to satisfy claims against its wholly owned or affiliated subsidiaries.

Judge Kaplan's decision can be found at *In re LTL Management, LLC*, 637 B.R. 396 (Bankr. D.N.J. 2022).

4. Third Circuit's Decision Reversing Bankruptcy Court's Decision.

The talc claimants filed a direct appeal of the Bankruptcy Court's denial of their motions to dismiss. On January 30, 2023, in an opinion authored by Judge Thomas L Ambro, a panel of the Third Circuit Court of Appeals issued an opinion reversing the ruling of the Bankruptcy Court and dismissing LTL's chapter 11 petition:

The Third Circuit held that dismissal is warranted because LTL's chapter 11 filing was not done in good faith because LTL was not in financial distress and therefore could not show that its chapter 11 filing served a valid purpose under § 1112(b).

Relying, in part, on prior Third Circuit precedent in *Integrated Telecom* and *SGL Carbon*, the Third Circuit stated that, even though a company need not be insolvent to reap the benefits and protections of the Bankruptcy Code, it must demonstrate that it is financially troubled, and that such financial troubles are immediate, to satisfy the good faith filing requirement. A debtor that does not suffer from financial distress cannot demonstrate its chapter 11 petition serves a valid bankruptcy purpose supporting good faith.

Here, the Third Circuit panel found that LTL's claimed financial troubles were not immediate enough to justify its petition, particularly in light of its access to its corporate parents' funding.

The Third Circuit disagreed with the Bankruptcy Court's acceptance of LTL's projections of future liabilities, finding that they were based on conjectures that were overstated, contradicted the record, and appeared to be "back-of-the-envelope forecasts of hypothetical worst-case scenarios." The Third Circuit took issue with the fact that Bankruptcy Court's projections of LTL's future liabilities ignored the possibility of meaningful settlement, as well as successful defense and dismissal, and assumed that all claims would go to and succeed at trial.

The Third Circuit also found that the Bankruptcy Court had "overemphasiz[ed] the relevance of Old Consumer's financial condition," and that the financial state of LTL should be tested independent of its pre-bankruptcy predecessor, Old Consumer, which no longer exists.

Finally, and critically, the Third Circuit found that the Bankruptcy Court had failed to consider the full value of LTL's backstop when judging its financial condition. The Third Circuit held that the funding agreement, which obligates J&J and New Consumer to satisfy LTL's talc-related costs and other expenses up to the value of New Consumer as of the petition date (estimated at $61.5 billion), provides ample financial support to LTL. Judge Ambro characterized LTL as a debtor that, having received such ample financial support, "then improperly sought shelter in a system designed to protect those without it."

Following the decision, several groups, including the Chamber of Commerce of the United States and the American Tort Reform Association, filed amicus briefs urging the Third Circuit to revisit its ruling, arguing that en banc review is necessary to bring clarity to the ruling.

The Third Circuit's decision can be found at *In re LTL Management, LLC*, 2023 U.S. App. LEXIS 2323 (3d Cir. Jan. 30, 2023).

C. *In re Aearo Technologies LLC* (Bankr. S.D. Ind., Case No. 22-02890).

1. Background of the Case.

Aearo Technologies and its affiliated debtors, each of which had been acquired by 3M in 2008, filed chapter 11 cases to resolve earplug and respirator/mask liabilities on July 26, 2022, in the U.S. Bankruptcy Court for the Southern District of Indiana. The cases are pending before Judge Jeffrey J. Graham, Case No. 22-02890.

- Earplug Claims: The debtors and 3M are defendants in multidistrict litigation centralized in the U.S. District Court for the Northern District of Florida, MDL No. 2885 (the "MDL"), involving over 230,000 claims generally alleging hearing injuries arising from the sale of noise-reduction earplugs, known as "Dual-Ended Combat Arms – Version 2" earplugs, and related claims. Only 19 of the pending claims have been tried to verdict with mixed results ranging from complete defense verdicts to individual plaintiff's verdicts of as much as $77.5 million. 3M had spent approximately $347 million in fees and costs defending against these earplug claims as of the petition date. The earplugs at issue were manufactured from approximately 2000 to 2015.

- Respirator/Mask Claims: The debtors face a smaller number of claims related to alleged personal injury from workplace exposure to asbestos, silica, coal mine dust or other occupational dusts in connection with the use of the debtors' mask and respirator products. The debtors have a $41-million accounting accrual for both product liabilities and defense costs related to these respirator/mask claims through 2050. Their exposure is limited to post-1996 claims due to certain liability-sharing arrangements with historical tortfeasors/previous owners.

Prior to filing for bankruptcy, the debtors negotiated a funding agreement with 3M to contribute $240 million to fund the administration of the debtors' chapter 11 cases and an additional $1 billion to establish one or more trusts to pay earplug and respirator/mask claims. In exchange, the debtors agreed to indemnify 3M and certain affiliates for all earplug and respirator/mask liabilities.

In the bankruptcy cases, the debtors initiated an adversary proceeding seeking to stay the earplug claims against certain 3M affiliates named in pending lawsuits. In August 2022, Judge Graham denied the debtors' motion for a preliminary injunction protecting nondebtor parent 3M from further litigation in the MDL. The Seventh Circuit subsequently granted the debtors' request for direct review of Judge Graham's denial.

On August 30, 2022, Judge M. Casey Rodgers, the district judge presiding over the MDL, ordered the parties to the MDL to participate in mediation. On September 8, 2022, Judge Graham entered an agreed order authorizing the debtors to participate in the MDL mediation, subject to certain conditions.

On January 18, 2023, Judge Rodgers issued an order that provided, among other things, that the mediation was at an impasse and terminated the mediation. Two days later, co-mediators Randi Ellis and retired Judge Christopher Sontchi "respectfully disagree[d] with the characterization of certain of the facts" in Judge Rodgers' mediation impasse order. The mediators specifically rejected allegations by certain creditors that the debtors and 3M were not acting in good faith and supported a continuation of the mediation.

2. CAE Committee's Motion to Dismiss.

In early February 2023, the official committee of unsecured creditors for tort claimants related to the use of Combat Arms Version 2 Earplugs (the "CAE Committee") filed a motion to dismiss the debtors' bankruptcy cases. The CAE Committee's argument rests almost entirely on the reasoning outlined in the Third Circuit's recent ruling in the *LTL Management* case dismissing the LTL case for a lack of "financial distress."

The CAE Committee argues that because the funding agreement with 3M was modeled after the LTL funding agreement and the Aearo debtors have consistently relied on LTL precedent, the Third Circuit's dismissal of LTL "knocks the props out from under these cases and requires their dismissal." Indeed, they go so far as to say "LTL" could be replaced by "Aearo" and the reasoning of the Third Circuit's opinion would work just as well.

The CAE Committee also relies heavily on a prior opinion issued by Judge Rodgers where the MDL court concluded that 3M put the Aearo debtors into bankruptcy "[n]ot because any of the entities was facing a bona fide threat of financial distress, and not due to managerial or operational difficulties that were jeopardizing the entities' continued viability," but rather because of "good old-fashioned forum shopping, solely — and admittedly — designed to evade dissatisfactory legal rulings and verdicts in the MDL, and to avoid potential liability of a non-debtor, 3M, in the tort system."

The CAE Committee made three primary arguments in its motion to dismiss:

1. *The Debtors Are Operationally Sound and Have No Need to Reorganize.*

The debtors operate an approximately $100-million business "sitting inside of a $35 billion conglomerate." As of the petition date, the ongoing earplug litigation had no impact on the debtors' business — according to the CRO, the debtors are operationally healthy and but for tort liabilities, the debtors "wouldn't have any reason to seek bankruptcy protection." Indeed, there

was no evidence of workforce distraction or managerial difficulties and, excluding the cost of administering the cases, the debtors have remained profitable during the pendency of the bankruptcy.

2. The Debtors Were Not, Are Not, and Cannot Be in Financial Distress.

The mass tort litigation faced by the debtors has not caused the kind of immediate financial distress to the debtors (or even 3M) for which the invocation of bankruptcy is made in good faith. In short, "[w]hile the Debtors invoke bankruptcy to (under)estimate the totality of all CAEv2 claims, as of the petition date, the Debtors had not paid a single penny in CAEv2 litigation expense or liability; the 16 adverse bellwether verdicts had all been appealed (and were bonded by 3M alone); even if the verdicts are affirmed and (in a change of status quo) collected from the Debtors, the Debtors had a near $1 billion receivable from 3M sufficient to pay them in full; and the Debtors were under zero operational and financial pressure as a result of the litigation."

Moreover, due to the funding agreement, the debtors ultimately face no risk from the earplug litigation because 3M is contractually obligated and financially able to furnish the funds necessary to pay creditor claims in these cases (and evidence suggests 3M is able to pay their obligations under the funding agreement).

3. The Bankruptcy Was Filed to Secure a Tactical Litigation Advantage.

While the Third Circuit did not reach this question, the CAE Committee argues that "bankruptcy cases that are filed to 'collaterally attack' the judgments of other courts and 'shop for a more favorable forum' should be dismissed because they are aimed at obtaining a tactical advantage in non-bankruptcy litigation, as opposed to pursuing a legitimate need to reorganize."

Indeed, the "record here – including the debtors' own statements and filings – compels the conclusion that 3M instigated these bankruptcy cases to change forums and escape adverse rulings by the MDL court, as well as to trigger a stay of non-bankruptcy litigation against non-debtor 3M . . . and disadvantage CAEv2 claimants in that litigation."

On these facts, the CAE Committee argues that the Aearo bankruptcy was not filed in good faith, noting that good faith is judged whether the case was filed to achieve "a legitimate reorganization objective within the scope of the Bankruptcy Code," rather than for "tactical reasons unrelated to reorganization."

The hearing on the motion to dismiss is scheduled to commence on April 19, 2023.

D. *In re HONX, Inc.* (Bankr. S.D. Tex., Case No. 22-90035).

1. Background of the Case.

HONX is the corporate successor to a Hess Corp. company that operated an oil refinery in the Virgin Islands ("HOVIC"). HONX has been in existence for 57 years, and its liabilities stem from the presence of asbestos in the refinery in the years of ownership between 1965 to 1998. In other words, this is not a spin off or divisive merger case. On April 28, 2022, HONX filed a

chapter 11 petition in the U.S. Bankruptcy Court for the Southern District of Texas. The case is pending before Judge Marvin Isgur, Case No. 22-90035.

As of the petition date, there were 580 asbestos-related lawsuits pending against the debtor. The purpose of the filing was to negotiate a § 524(g) trust and channeling injunction that would protect HONX and Hess. The debtor noted from the outset of the case that it intended to move for an estimation of its asbestos liability within 75 days. At the first day hearing, Judge Isgur also raised the prospect of a bar date for asbestos claimants.

While Hess has never owned or operated the refinery, or otherwise manufactured asbestos, claimants assert direct claims against Hess based on supplier and premises liability — i.e., that Hess facilitated the purchase of asbestos-containing materials for the refinery and exercised control over the refinery.

In 1998, HOVIC entered into a joint venture whereby it owned 50% of HOVENSA, which in turn took ownership and control of the refinery. HOVENSA filed for chapter 11 in 2015 and sold its assets (including the refinery), thereby divesting HOVIC of any interest in the refinery. In May 2020, Hess effectuated a corporate restructuring for efficiency reasons and to consolidate its corporate entities closer to its business operations, whereby HOVIC merged with a New York corporation (HONYC), which subsequently changed its name to HONX.

2. Debtor's Motion to Estimate.

In May 2022, the debtor filed a motion to authorize estimation of its aggregate liabilities for current and future asbestos claims asking the Court to determine the allowed claim amounts for pending and unknown future asbestos claims, to determine the estimate of the debtor's liability for asbestos claims, and any relevant adjustments based on a litany of factors.

In July 2022, the debtor, the unsecured creditors committee (the "UCC"), future claimants' representative (the "FCR"), Hess, and Burns Charest filed a stipulation containing an agreed-upon protocol for mediation to resolve the debtor's "present and future" asbestos claims. The parties requested the Honorable David R. Jones and Kenneth Feinberg as co-mediators. The mediation stayed all current litigation, including the debtor's estimation motion.

In November 2022, the UCC filed objections to the debtor's motion for estimation arguing against estimation, claiming that the process will result in expense and delay and not move the parties toward a confirmable plan which the UCC believed can only be accomplished through bellwether trials in the Virgin Islands. The UCC also argued the following:

- Estimation cannot be used to cap the amount of distributions by the debtor;
- Estimation cannot be used to determine Hess's liability (a non-debtor); and
- Estimation is not needed to avoid delay from liquidation of claims — liquidation would be done after confirmation.

In the event estimation was to be granted, the UCC cross-moved for the stay to be lifted to allow four bellwether trials to proceed, and for adjustment of the schedule to accommodate the same, pushing out the estimation trial by less than one month.

At a hearing on January 4, 2023, Judge Isgur explained his claims estimation process that differed substantially from the proposals provided by the debtor and the UCC/FCR. The ruling provides:

- For an estimation trial on May 10, 2023 solely on whether certain categories of asbestos claims have valid evidentiary support, a matter Judge Isgur referred to as the “fake claim issue” and a gating issue to determine the number of claims the debtor could be facing;

- Hess will have 30 days from a decision to make a firm funding commitment for an asbestos trust, which must be “mathematically” quantifiable, and, if such a commitment is not made timely, the debtor’s case would be dismissed;

- Once a commitment is made by Hess, the debtor has 21 days to file a § 524(g) plan incorporating Hess’s commitment, or the debtor’s case will be dismissed;

- The parties must submit briefs on whether the Court has authority to preclude from voting on a plan any claims estimated at zero in the “fake claims” estimation trial and, if so, whether those claimants would be bound by the plan’s channeling injunction; and

- For denial of the UCC’s cross-motion, finding no evidence that bellwether trials would be helpful.

Judge Isgur then identified the following four categories of claims to be reviewed at the estimation trial:

- Claims for which there is missing documentation of a medical diagnosis;

- Claims for which the diagnosis was the product of “mass recruitment” and was not made with reasonable medical standards or cannot be replicated;

- Claims that are barred by a prior settlement or release; and

- Future claims that cannot be attributed to the HONX refinery because so much time has passed that any evidence of disease would have already appeared.

3. UCC’s Motion to Dismiss.

In September 2022, the UCC filed a motion to dismiss the bankruptcy case (or convert it to chapter 7), arguing:

- Bad faith — the debtor has no assets or ongoing business and entered chapter 11 to obtain a litigation advantage for Hess;

- Substantial and continuing loss to the estate with no prospect of rehabilitation — the funding agreement with Hess was capped at $10 million and with no assets, the debtor cannot increase its value; and

- Failure to maintain appropriate insurance.

In its October 2022 reply in support of its motion to dismiss, the UCC additionally argued that four reasons compel dismissal of the debtor's bankruptcy case.

- The debtor has no prospect of satisfying the conditions of § 524(g):

  - There is no value at the debtor to be protected for future claimants, which is the purpose of a § 524(g) plan.

  - The trust will not be funded with securities/future payments/control of a reorganized debtor (at least not securities with any value), as required by § 524(g).

  - The funding agreement does not grant any meaningful right in the reorganized debtor which a trust can look to for future value.

    - Hess, at its own discretion, may refuse to fund a plan.

    - The funding agreement terminates at confirmation, and therefore provides no future value to the trust.

- The substantial and continuing loss to the estate with no prospect of rehabilitation.

- Hess is seeking an improper litigation advantage through the debtor's case.

- Hess seeks to have the factual validity of direct claims against it determined in the debtor's case, which is impossible, and therefore no confirmable plan will be supported by Hess.

On December 28, 2022, Judge Isgur issued an opinion denying the UCC's motion to dismiss the chapter 11 case. The opinion rejects the grounds for dismissal set forth by the UCC: bad faith, lack of reasonable likelihood of rehabilitation and failure to maintain insurance.

Judge Isgur found that the debtor's attempt to utilize § 524(g) of the Bankruptcy Code is a "hallmark purpose of chapter 11" that refutes the UCC's bad faith argument. He also noted that HONX was not created through a divisive merger and, instead, accrued its own asbestos liabilities and "did not inherit or absorb Hess's liabilities, which exist separate and apart."

Judge Isgur also rejected the UCC's second argument — that HONX lacks a reasonable likelihood of rehabilitation — concluding that "[t]here is no ongoing business requirement in the Code," and the UCC's argument would require dismissal of any chapter 11 liquidation proceeding. He ruled that "rehabilitation" in this context refers to a debtor's intent to "prevent a complete and total loss of value." HONX met that standard by obtaining a funding commitment from Hess, which is only available in bankruptcy.

Judge Isgur also found no substantial or continuing loss in light of Hess' funding commitment and rejected the debtor's lack of insurance coverage as a basis for dismissal.

On January 12, 2023, the UCC appealed Judge Isgur's decision denying its motion to dismiss arguing that Judge Isgur erred in concluding that the debtor's stated aim to pursue an asbestos claim channeling injunction under § 524(g) of the Bankruptcy Code was sufficient to deny the motion to dismiss.

4. Agreement in Principle Reached.

On February 3, 2023, the debtor, Hess, the UCC and asbestos claimants counsel filed a joint stipulation indicating that they "have reached an agreement in principle" regarding "various plan-related issues between them, including the Debtor's stated intention of seeking to confirm a chapter 11 plan that includes a section 524(g) trust and the existing Asbestos Claims." The stipulation does not provide details regarding the settlement.

By the stipulation, the parties ask the court to adjourn "all pending issues relating to the Case Management Order," the May 10 estimation trial and pending appeals in the district court. The parties also agreed not to object to the debtor's latest exclusivity extension motion.

The stipulation provides that the debtor shall file a plan, disclosure statement and related solicitation materials reflecting the proposed settlement within 60 days after the stipulation is approved. According to the stipulation, the plan will contain "a section 524(g) injunction and any additional typical protections for the Debtor and its affiliates and Hess and its affiliates" and "a standard exculpation for the Committee and its members." If the debtor timely files the plan, the parties will request a disclosure statement approval hearing be held on or before April 20, 2023.

At a status conference on February 6, 2023, Judge Isgur entered an order continuing the claims estimation hearing in light of a settlement in principle. No further details regarding the settlement are currently publicly available.

II. A Deeper Dive Into Third-Party Releases.

A. <u>The Nature of Third-Party Releases.</u>

- Estate claims vs. claims held by non-debtors
- Claims arising from the chapter 11 process vs. other claims
- Consensual vs. nonconsensual
- Asbestos (§ 524(g)) vs. non-asbestos cases

B. <u>Circuit Split on Nonconsensual Third-Party Releases.</u>

The general consensus of the circuit split regarding nonconsensual third-party releases has been as follows:

- Circuits supporting nonconsensual third-party releases under certain circumstances: The First, Second, Third, Fourth, Sixth, and Seventh Circuits.

- Circuits not permitting nonconsensual third-party releases: The Fifth, Ninth, and Tenth Circuits.

C. Aftermath of the *Purdue* Decision.

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

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

D. Third-Party Releases in the Ninth Circuit.

- *In re Lowenschuss*, 67 F.3d 1394 (9th Cir. 1995).
  - Section 524(e) precludes discharge of liabilities of non-debtors "without exception."
  - Section 524(e) controls over § 105(a), which other circuits have used.
  - Release at issue was very broad — for "all claims."
- *Blixseth v. Credit Suisse*, 961 F.3d 1074 (9th Cir. 2020).
  - Arose out of contentious litigation surrounding the bankruptcy of the Yellowstone Club.
  - Third-party releases related only to claims arising from the chapter 11 case (mostly with respect to hard-fought plan negotiation process).
  - The Ninth Circuit found that these releases were appropriate under § 524(e) because they did not relate to "such debt," i.e., the debtor's debt being discharged. Section 524(e) provides that "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt."

- *In re Astria Health*, 623 B.R. 793 (Bankr. E.D. Wash. 2021).
    - Bankruptcy of hospital owner/operator in Yakima; like *Blixseth*, contentious plan/settlement process, mainly with secured creditor turned DIP lender.
    - Judge Whitman L. Holt followed *Blixseth*'s reasoning that § 524(e) prevents the release of non-debtor co-obligors of the debtor from liability on a common claim being discharged (i.e., "such debt"), but does not apply to the release of other claims, such as those for causes of action arising out of the plan negotiation process.

E. Consensual Third-Party Releases.

- Opt-in vs. opt-out
    - *Compare In re PG&E Corp.*, Case No. 19-30088 (Bankr. N.D. Cal.) (for affirmative opt-in releases), *with In re Alpha Latam Mgmt., LLC*, Case No. 21-11109 (Bankr. D. Del.) (for opt-out releases).
- Who has standing/authority to opt in for a claimant?

Jane Kim

Jane Kim is the managing partner of Keller Benvenutti Kim, a San Francisco-based corporate bankruptcy and restructuring boutique law firm, where she represents debtors in possession, distressed companies, and other parties, in both in-court and out-of-court situations.

Jane's recent engagements include representing In-Shape Health Clubs, LLC, a premium regional fitness club chain in California, and Ravn Air Group, Inc., a regional airline in Alaska, in their respective chapter 11 cases filed in Delaware. Jane also serves as bankruptcy co-counsel for Pacific Gas & Electric Company in its chapter 11 case, the largest chapter 11 filing in the Northern District of California in over a decade, which emerged from bankruptcy in July 2020 through a confirmed, largely-consensual plan of reorganization.

Before moving to California and joining Keller Benvenutti Kim in 2014, Jane practiced in New York at the law firm Cleary Gottlieb for over a decade.

Jane received her JD from Harvard Law School in 2002 and her BA from Columbia College, Columbia University in 1999.

Jane is a fellow in the American College of Bankruptcy and has been recognized as a leading lawyer by numerous publications and organizations, including Chambers USA. She was named Lawyer of the Year in the 2023 edition of Best Lawyers and included on Global M&A Network's Annual Top 100 Restructuring Professionals in 2022 and the Daily Journal's list of Top Bankruptcy Lawyers of 2022. She is a frequent speaker on a wide range of bankruptcy-related subjects, including the intersection of bankruptcy and arbitration, mass torts bankruptcy cases, asset sales, and cross-border insolvency issues.

Malhar S. Pagay

Mr. Pagay is a business lawyer whose practice focuses on the development and implementation of strategic alternatives for and against distressed businesses. He has substantial experience representing chapter 11 debtors, trustees, unsecured creditors, creditors' committees, and other parties in the contexts of bankruptcy cases, adversary proceedings, commercial litigation, mediations, domestic and international business transactions, business reorganizations, and out-of-court corporate restructurings of debt. He has broad industry experience, including healthcare and life sciences, real estate, technology, retail, manufacturing, transportation, sports, and entertainment.

Mr. Pagay's recent representations include reorganizing the Ruby Tuesday casual-dining chain with over 200 restaurants through a debt-for-equity transaction with its secured lenders, implemented through a chapter 11 plan confirmed after only four months in bankruptcy; counseling technology entrepreneur Yueting "YT" Jia, the founder of mobility ecosystem company Faraday Future, in the successful restructuring of over $3 billion in debt held almost entirely by creditors located in the People's Republic of China (this representation was recognized at Global M&A Network's 13th Annual Turnaround Atlas Awards as "Cross-Border Turnaround of the Year"); advising a creditors' committee in connection with a successful hospital reorganization; and completing the sale through section 363 of the United States Bankruptcy Code of a $100 million Class A commercial office property over the objections of co-owners. He has served as principal counsel to China Export & Credit Insurance Corporation (SINOSURE) and its Chinese policyholders and clients in complex United States insolvency matters.

Mr. Pagay is a member of the firm's Healthcare Restructuring Group. He has lectured both in the United States and internationally regarding a variety of legal issues, including cross-border transactions and insolvencies. He has been named a "Super Lawyer" in the field of Bankruptcy & Creditor/Debtor Rights every year since 2009 in a peer survey conducted by Law & Politics and the publishers of *Los Angeles* magazine, an honor bestowed on only 5% of Southern California attorneys. Mr. Pagay holds an AV Preeminent Peer Rating (Martindale-Hubbell's highest recognition for ethical standards and legal ability). He has been listed among *The Best Lawyers in America* in the practice areas of Bankruptcy and Creditor Debtor Rights/Insolvency and Reorganization Law and Litigation – Bankruptcy. Mr. Pagay is a graduate of Yale University and received his J.D. from the University of Southern California.

Mr. Pagay is a partner in the Los Angeles office of Pachulski Stang Ziehl & Jones LLP.

Kimberly A. Posin

Kim Posin, a restructuring partner in the Los Angeles office of Latham & Watkins LLP, draws on more than two decades of experience to advise debtors and creditors on high-profile matters and on a range of restructuring related transactions.

Ms. Posin regularly represents corporate debtors, secured lenders, creditors, and other interested parties in all aspects of distressed situations, including:

- Chapter 11 bankruptcy proceedings
- Out-of-court restructurings
- Foreclosures
- Assignments for the benefit of creditors (ABC)
- Related disputes and litigation

Ms. Posin's clients range from name-brand global companies to Silicon Valley startups in a diverse range of industries. She leverages excellent problem-solving skills and Latham's global platform to help clients develop comprehensive plans to restructure and resolve distressed situations. She frequently handles matters in all of the major US jurisdictions, including Delaware, New York, and Texas.