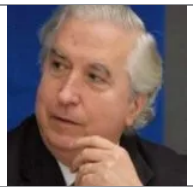

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The Mass Tort Claimants' Bargain

By Daniel J. Bussel January 1, 2024

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The bankruptcy system has long been the last, best hope for firms seeking to resolve overwhelming mass-tort liabilities. The seminal case, *Manville,* resolved legacy asbestos liabilities through debtor and third-party funding of a claimant trust and an order channeling all *Manville* asbestos liabilities, present and future, to that trust for administrative resolution and payment. Congress subsequently ratified and codified the *Manville* approach in section 524(g) of the Bankruptcy Code as a template for dealing with mass asbestos liabilities. That elaborate template authorizes, conditions, and limits channeling orders in specific ways and applies only to mass-asbestos cases.

We are at the tail end, finally, of the mass-asbestos problem, but there is no end in sight of non-asbestos mass tort liabilities in a wide variety of cases ranging from opioids to child sexual abuse. In *The Mass Tort Claimants' Bargain*, I chart a path forward for a robust, broadly applicable template for mass-tort resolution that addresses the critiques spawned by the recent wave of non-asbestos mass-tort cases.

Third-Party Releases: Linchpin for Mass-Tort Resolution

Although these cases have been highly controversial, bankruptcy courts have engaged with them by adapting 524(g)'s template to non-asbestos mass-tort problems, selectively incorporating or diluting various aspects of 524(g) in an effort to facilitate a global resolution. In these cases, nonconsensual non-debtor releases of mass tort liabilities have been a pillar of the proposed chapter 11 plans. In effect, non-debtors obtain bankruptcy discharges (for mass-tort liabilities only), without subjecting themselves to the full rigors of chapter 11. Those releases have become a flashpoint for controversy. The United States is challenging their lawfulness before the U.S. Supreme Court in *Harrington v. Purdue Pharma L.P.* Much expert analysis suggests that the Court will significantly narrow, or perhaps reject, bankruptcy-court authority to issue channeling orders functioning as nonconsensual third-party releases. We are thus at an inflection point in defining a bankruptcy-based solution to overwhelming non-asbestos mass liabilities: Humpty-Dumpty is on the precipice and if he does fall we will have the opportunity to reimagine and rebuild a mass tort resolution process on a sounder and fairer basis.

That path will require a well-regulated post-*Harrington* revival of third-party releases for bankruptcy is to remain a viable forum for mass tort resolution.

Untethering Financial Restructuring and Mass Tort Resolution

Solving mass-tort problems may not require a concurrent financial restructuring of an otherwise healthy company. Joining these two complex processes (mass tort resolution and financial restructuring) magnifies the cost and complexity of both with no corresponding benefit. Two-step bankruptcy avoids unnecessarily tethering a global financial restructuring to a mass-tort case.

The two-step should not relieve the primary tortfeasor of any liability to claimants at all. It adds a defendant (the tortfeasor's newly created affiliate); it does not, or should not, subtract one. The new defendant is merely a vehicle for commencing a mass tort bankruptcy solution to the primary tortfeasor's mass tort liability. Step one of the two-step, the divisive merger, permits the tortfeasor to invoke bankruptcy's collective resolution process without

declaring bankruptcy itself; it does not relieve it of any liability until successful confirmation of a plan channeling that liability to a trust under established standards, including, most importantly, consent of an overwhelming majority of affected claimants. Administrative resolution imposed pursuant to the genuine consent of most affected claimants may be "silencing litigation." But if it efficiently and fairly compensates individual claims in a way that effects a rough justice acceptable to a vast consenting majority of similarly situated claims – a goal the tort system cannot attain through uncoordinated individual adjudications – I'm all for it.

Reimagining Mass Tort Resolution Post-*Harrington*

Under current practice, the move from the tort system and multidistrict litigation (MDL) to chapter 11 shifts leverage to the mass-tort defendant. Some of that shift is inherent in any administrative collective resolution. For example, eliminating tort law's individual jury trials and punitive damage assessments reduces claimant leverage. It is difficult, however, to imagine an administrative process that would preserve these random shocks that systematically operate to increase defendants' risk of extreme outcomes in individual cases. Processes can be created that will allow for damage assessments consistent with historical settlements and median jury verdicts in like cases. But individual claimants' rights to jury trials or punitive damages will not survive the chapter 11 process or any plausible collective resolution.

But there are other aspects of modern chapter 11 practice that shift leverage to defendants unnecessarily. Defendants with substantial operating businesses that file for chapter 11 relief suffer significant harm to their businesses from direct costs, loss of competitive advantages, and loss of nimbleness as their operations become subject to court supervision. Two-step bankruptcy mitigates those deadweight costs by keeping non-mass tort constituents and valuable operating assets out of bankruptcy. But it also reduces the pressure on the primary tortfeasor to settle. That shifts the balance of power towards the defendant in the bankruptcy negotiation.

Bankruptcy venue rules also favor the defendant. Plaintiffs initially select the forum in tort litigation. The MDL process shifts the forum to a consolidated court selected by the neutral MDL panel. But defendants control bankruptcy venue, and they have not only a wide choice of venue but, in some situations, the ability to select a particular bankruptcy judge. Bankruptcy judges have wide-ranging discretion over case administration and the ability to shape not only bargaining but also the terms of the plan itself.

Moving past the two-step and venue selection, numerous procedural asymmetries favor defendants in chapter 11 and drive down the value of the global tort settlements in bankruptcy. Another source of leverage is the debtor's ability to manufacture and manipulate the consent of the claimant class through bankruptcy's classification and voting process. By exploiting intra-class conflicts through classification and voting rules, debtors can systematically disadvantage the most severely injured claimants with the strongest claims while nominally obtaining "overwhelming" consent to the settlement.

Finally, insurance has become central to mass tort chapter 11 practice. Defendants' insurance assets are major sources of trust funding, often the most significant source. Yet those assets come encumbered by myriad uncertainties. Absent settlement on terms agreeable to the insurers, the estate and its successor trust can be mired in years of complex coverage litigation with uncertain results. Mass-tort chapter 11 needs an efficient mechanism for marshalling and liquidating liability-insurance assets for the benefit of the tort claimants.

These are all considerable challenges. We should embrace rather than repudiate chapter 11 as a device for managing mass-torts. But in doing so we must face up to these challenges.

All these challenges do not exist in every case. Sometimes, futures are not an issue. Sometimes, nonconsensual third-party releases are unnecessary. Insurance may not always be an important factor. Even if insurance funding is critical, all the insurance may be settled, eliminating non-settled insurer issues. Sometimes, intra-claimant conflicts may be resolved without separate classification and separate settlements. But for a general framework for resolving mass-tort cases collectively through bankruptcy, all these issues are on the table.

The Mass Tort Claimants' Bargain

My article is a thought experiment imagining the best possible bankruptcy-based solution to a wide variety of mass-tort problems from scratch. In working through this thought experiment, it became apparent that third-party releases and Texas two-steps were part of the solution rather than the problem. They are procedural techniques for isolating and bringing finality to the mass-tort problems of solvent defendants with mass-tort liability that should be embraced, regulated, and incorporated within a collective resolution process that honors the claimants' substantive economic rights by appropriately balancing the interests of claimants and defendants and realizing the administrative efficiencies inherent in collective resolution. The "bargain," of course, is wholly hypothetical: It is a process that rational, fully informed tort claimants and defendants would agree to, if they could, ex ante and behind the veil of ignorance. The goal is to preserve the basic non-bankruptcy economic rights of the claimants while substituting an efficient collective administrative process to realize those substantive rights. That entails altering procedure dramatically and in ways that are inconsistent with otherwise applicable law, while preserving the basic economics and replicating the balance of power that exists outside of bankruptcy. Collective resolution, for example, should not forfeit insurance assets available to satisfy tort victims outside of bankruptcy. Moreover, collective proceedings notoriously create opportunities for

holdouts. Class consent, carefully regulated and measured, must be substituted for individual consent to practically implement a global resolution.

So far Congress has abdicated its role in setting those parameters, and courts have only imperfectly filled the gap. It is time to step up.

This post comes to us from Professor Daniel J. Bussel at the University of California, Los Angeles – School of Law. It is based on his recent article, "The Mass Torts Claimants' Bargain," available here.

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