Managing Mass Tort Claims Through Chapter 11: An Analysis of Multiple Case Studies

Alex K. Berger
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Abstract
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Keywords
“Texas Two-Step,” mass tort, chapter 11, Johnson and Johnson - LTL Management LLC, Georgia-Pacific - Bestwall LLC, Saint-Gobain - DMBP LLC, and Trane Technologies -Aldrich Pump LLC

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MANAGING MASS TORT CLAIMS THROUGH CHAPTER 11: AN ANALYSIS OF
MULTIPLE CASE STUDIES

By

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ABSTRACT

In July 2017, Georgia-Pacific executed a “Texas Two-Step” to move all pending mass tort liabilities into Bestwall LLC prior to filing it for bankruptcy. Since Bestwall LLC’s bankruptcy filing, Johnson and Johnson, Saint-Gobain, and Trane Technologies have all implemented similar mass tort management strategies. Through individual analyses of the LTL Management LLC, Bestwall LLC, DMBP LLC, and Aldrich Pump LLC bankruptcy cases, this thesis explores how chapter 11 bankruptcy is being used to manage mass tort liability claims, the impact chapter 11 law has on tort liability resolutions, and the role of Congress in regulating a corporation’s ability to manage mass tort claims through chapter 11. Key findings include: the presiding Judge plays a critical role in determining case progression, chapter 11 may uniquely benefit debtors over mass tort claimants, and Congress should wait to legislate until a corporation’s ability to manage mass tort claims through chapter 11 is established.

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INTRODUCTION

In July 2021, it was first reported that Johnson and Johnson, a large medical device, pharmaceuticals, and consumer packaged goods company, was considering a bankruptcy plan that would involve offloading liabilities, arising from claims that their baby powder products were linked to mesothelioma, into a newly formed entity, and filing that entity for bankruptcy (Spector, DiNapoli, Levine 2021). LTL Management LLC, the newly formed entity shouldering all of Johnson and Johnson’s outstanding baby powder claims (talc-related), noted in their First Day Declaration, that the motivation behind the corporate reshuffle was to “enable [Johnson and Johnson] to globally resolve talc-related claims through a chapter 11 reorganization without subjecting the entire Old JJCI enterprise to a bankruptcy proceeding” (Reorg 2021). Jones Day, debtor’s counsel, furthered in the filing that a “key objective of this restructuring was to make certain that the Debtor has the same, if not greater, ability to fund the costs of defending and resolving present and future talc-related claims as Old JJCI did prior to the restructuring” (Reorg 2021). While Jones Day’s messaging on behalf of newly formed LTL Management suggests that the creative corporate restructuring of Johnson and Johnson into a Goodco worth billions and a Badco shouldered with liabilities is to the advantage of pending mass tort claims, basic reasoning suggests that the creative corporate restructuring runs counter to the interests of the mass tort claimants. The partitioning of Johnson and Johnson into a Goodco and Badco is relatively expensive from a transaction costs perspective. Assuming Johnson and Johnson is a fairly adept economic actor as their market cap of $479B and 136-year history suggests they are, it seems likely there is an unstated strategy behind the corporate partition that does not involve benefitting the mass tort claimants (Companies Market Cap 2022). One possible motivation for Johnson and Johnson’s creative corporate partition is that they believe forcing mass tort claims into the
chapter 11 regime is to the advantage of the filer and will thereby result in lower ultimate payouts. Senator Durbin, chair of the Senate Judiciary Committee, along with fellow Senators Warren and Blumenthal, seemed to believe this in their November 10, 2021 letter to Johnson and Johnson CEO Alex Gorsky where they asked a number of questions related to the creation of LTL Management LLC (Committee on the Judiciary 2021).

The creative partitioning of Johnson and Johnson and its relevance to pending mass tort claims has received considerable interest, partly because it serves as a seemingly blatant example of a large corporation leveraging superior resources to the harm of innocent and gravely affected tort claimants. Johnson and Johnson’s pending bankruptcy is, however, much more than just financial journalism click-bait and ought to be viewed not as a standalone story but as part of an ongoing series. Along with Johnson and Johnson, Georgia-Pacific, Saint-Gobain, and Trane Technologies have all attempted dividing into a Goodco and Badco and filing the Badco saddled with mass tort claims for chapter 11 protections (Warfield 2021). This thesis will explore the relevance and impact of creative corporate partitioning on mass tort claims and claimants in the cases of Johnson and Johnson - LTL Management LLC, Georgia-Pacific - Bestwall LLC, Saint-Gobain - DMBP LLC, and Trane Technologies - Aldrich Pump LLC.

Understanding the impact of creative corporate partitioning via chapter 11 on mass tort claims and claimants is important as it will help inform both if and what legislative solutions are necessary. On November 3, 2021, the House Judiciary Committee voted 23 - 17 in favor of H.R.4777, an act “to amend title 11, United States Code, to prohibit non consensual release of a non debtor entity’s liability to an entity other than the debtor, and for other purposes” (Nadler 2021). While this proposed bill is most relevant to the issue of third-party releases in the pending Purdue Pharma and Sackler family bankruptcy case, it serves as an indication that Congress is
open to considering ways to revise the chapter 11 bankruptcy code in light of potential corporate abuses in recent high-profile cases. Senator Durbin's comments in February 2022 that “when you have massively profitable companies using [creative corporate partitioning] maneuver[s] to avoid accountability to dying cancer victims, it’s clear that corrective action is needed” further confirms the likelihood that Congress will draft legislation relevant to the Johnson and Johnson, Georgia-Pacific, Saint-Gobain, and Trane Technologies cases in upcoming sessions (Smyth 2022). While Congress is likely to take up the issue of creative corporate partitioning in cases involving mass tort claims, it is not clear what legislation, if any, is actually necessary as well as what the actual effects of creative corporate partitioning through chapter 11 are on mass tort claims and claimants. This thesis will seek to further the literature regarding the effects of creative corporate partitioning through chapter 11 on mass tort claims and claimants as well as clarify the relevance and role of Congress.

Specifically, this thesis will use the case studies of LTL Management LLC, Bestwall LLC, DMBP LLC, and Aldrich Pump LLC to explore how creative corporate partitioning via chapter 11 is being used by debtors and parent companies to manage mass tort claims and claimants. The goal of this analysis is to help further an understanding of the overarching questions of (1) how chapter 11 bankruptcy is being used by debtors and non-debtors to manage tort liability claims, (2) what impact the involvement of chapter 11 law has on tort liability resolutions, and (3) what role Congress ought to play, if any, in regulating a corporation’s ability to manage mass tort claims through chapter 11.
LEGAL CONTEXT

The creative corporate partitioning central to the LTL Management LLC, Bestwall LLC, DMBP LLC, and Aldrich Pump LLC bankruptcies is known as a “Texas Two-Step” (Levitin 2021). To execute a “Texas Two-Step,” a company saddled with tort liabilities, potentially arising from talc, asbestos, benzene, Roundup, etc., transforms into a Texas corporate entity. That new entity then completes a “divisive merger” where the original company partitions into a Goodco, with much of the healthy assets, and a Badco, with the tort liabilities. The Badco then converts into a separate entity, for corporate governance and venue purposes, and files for chapter 11 protections (Levitin 2021). The theorized value of a “Texas Two-Step” to corporations facing mass tort claims is that tort claimants are funneled into the chapter 11 process as creditors of Badco where recoveries are less than they would have been otherwise and Goodco is able to continue profitable operations free from any / all mass tort claims (Levitin 2021). The key to a “Texas Two-Step” is that the Texas Business Organization Code, in addition to the usual definition of bringing together originally disparate entities, includes “the division of a domestic entity into two or more new domestic entities or other organizations” in the definition of a “merger" (Chavez, Kirincic, Scales 2021). Texas, along with Delaware, are the only two states that view and tolerate typical mergers and “divisive mergers” under the same legal framework; Texas is especially unique as Delaware only provides for “divisive mergers” for LLCs (Levitin 2021). Texas’ unique corporate governance decision to include “divisive mergers” under the definition of a merger is especially relevant as Texas Business Organizations Code – BUS ORG § 10.008. Effect of Merger – states that a “merger [takes place] without…any transfer or assignment having occurred” (Findlaw 2021). The hope of corporations performing a “Texas Two-Step” is to legally skirt any form of asset transfer so that their creative corporate
partitioning into a Goodco and Badco cannot be credibly challenged as a fraudulent transfer 
(Levitin 2021).

A fraudulent transfer or conveyance is defined as one in which a debtor’s assets are 
transferred out of the estate in a way that unfairly places the assets beyond the reach of creditors 
(Cadden & Fuller LLP, n.d.). When creditors can prove such a transfer has occurred and the 
trustee and/or court agrees, the assets are clawed back and the transfer is made void. This is an 
area of bankruptcy code that has recently received intense interest as debtors have acted 
opportunistically to the benefit of certain creditors (ex. IP transfers in Cirque du Soleil case). 
While there are certain transaction costs involved in voiding a previously executed transfer, 
fraudulent transfer law seems to be relatively available and protective of creditors. If, however, 
Texas’ fraudulent transfer law or any other jurisdiction’s fraudulent transfer law were to defer to 
BUS ORG § 10.008. Effect of Merger, typical protections which allow creditors to fight 
transactions that place assets unfairly beyond their reach would be unavailable (Levitin 2021). At 
present, the law remains unsettled as it is not obvious whether or not any bankruptcy jurisdiction 
would defer to BUS ORG § 10.008. Effect of Merger and find what otherwise looks like a 
fraudulent conveyance as protected from creditor challenge. The literature in this area is limited 
with the exception of a Baylor Law Review article from 2010 titled The Efficient Merger: When 
and Why Courts Interpret Business Transactions to Trigger Anti-Assignment and Anti-Transfer 
Provisions which considers if this type of definitional deference would ever be granted (Haines 
2010).

If mass tort claims cannot be decoupled from large chapter 11 filings, and mass tort 
claims and claimants are being directly impacted by “Texas Two-Steps” in the case studies of 
LTL Management LLC, Bestwall LLC, DMBP LLC, and Aldrich Pump LLC, there is clear
support for Congress to strengthen fraudulent transfer law across U.S. bankruptcy jurisdictions. Some theorized potential policy changes to fraudulent transfer law include, “longer statutes of limitations, a statutory step doctrine, treble damages for actual (deliberate) fraudulent transfers, aiding and abetting liability, and criminal penalties for actual fraudulent transfers (which will mean that lawyers cannot ethically counsel such transactions)” (Levitin 2021).

Tort Law is designed to allow affected parties to receive compensation for losses (ECB: Attorneys at Law 2017). For an equilibrium outcome to be reached, one in which compensation for losses is at least equal to the value of the losses themselves, it is reasonable that tort claimants need to be on level footing with their counterparties. Whether or not the general legal mechanisms available to claimants allow for this is an interesting question, but is beyond the scope of this thesis. The question that does fall within the realm of this thesis is whether the involvement of chapter 11 weighs on ultimate mass tort resolutions or if mass tort claimants need not fear “Texas Two-Steps” and chapter 11 at all.

One hypothesis which motivates this research effort is that mass tort claimants are materially worse off in “Texas Two-Step” chapter 11 processes than they would be in a non-chapter 11 setting. It is somewhat obvious that mass tort claimants are worse off if bankruptcy jurisdictions defer to BUS ORG § 10.008. Effect of Merger and rule against any fraudulent conveyance claims, forcing all recoveries to come from Badco. It is, however, also possible that the lack of certainty regarding the liability of Goodco, as well as delayed claim resolutions, is enough, even without ultimate deference to Texas Business Organization Code, to make mass tort claimants materially worse off in even marginally successful “Texas Two-Steps” than they would be in traditional settings. One of the key goals of this thesis is to use the case studies of LTL Management LLC, Bestwall LLC, DMBP LLC, and Aldrich Pump LLC to begin
to shed light on this hypothesis. Furthering an understanding of this hypothesis will directly contribute to addressing the overarching questions of (1) how chapter 11 bankruptcy is being used by debtors and non-debtors to manage tort liability claims, (2) what impact the involvement of chapter 11 law has on tort liability resolutions, and (3) what role Congress ought to play, if any, in regulating a corporation’s ability to manage mass tort claims through chapter 11.

The intersection of mass tort and chapter 11 has become an increasingly important topic in the past few years as large companies, such as Johnson and Johnson and Georgia-Pacific, at the advice of counsel, have sought to manage mass tort claims through chapter 11. Unfortunately, chapter 11 was not designed with mass tort in mind. Furthermore, the literature regarding the intersection of mass tort and chapter 11 remains limited. Along with informing potential policy solutions, this thesis has the academic goal of furthering the scholarship on the intersection of mass tort and chapter 11.
CASE STUDIES

Johnson and Johnson - LTL Management LLC

Case Summary

On October 14, 2021, counsel for LTL Management LLC filed an informational brief in anticipation of their upcoming chapter 11 case. In the brief, LTL Management’s counsel noted that they were filing the “chapter 11 case to resolve permanently all mass tort claims relating to [Johnson and Johnson’s] cosmetic talc products in a manner that is efficient and equitable to all parties, including current and future claimants” (United States Bankruptcy Court Case No. 21-30589 Doc. 3 2021, 4). LTL Management LLC, the talc liability “Texas Two-Step” spinoff of Johnson and Johnson, found themselves on the brink of filing for chapter 11 due to ongoing allegations that Johnson and Johnson’s “100+ year old talc products contain asbestos and cause cancer” (United States Bankruptcy Court Case No. 21-30589 Doc. 3 2021, 4). While Johnson and Johnson has adamantly stated that these allegations lack scientific support and has prevailed in the majority of tried cases, counsel furthered in the filing that “due to the well-documented abuses that occur in the state court tort system and an inability to secure review by the U.S. Supreme Court – Old JJCI and J&J were subject intermittently to extraordinary judgements, including a $4.69 billion verdict – the fifth largest personal injury verdict in the history of the United States” (United States Bankruptcy Court Case No. 21-30589 Doc. 3 2021, 4-5). In the eyes of Johnson and Johnson, “if only a small fraction of the pending cases continued to yield such inconsistent and excessive awards, the assets available to pay current and future claimants could have been exhausted” (United States Bankruptcy Court Case No. 21-30589 Doc. 3 2021, 5). Thus, Johnson and Johnson completed a “Texas Two-Step” and filed LTL Management LLC for chapter 11 protections as a way to manage the mass tort liabilities by means of the chapter 11
regime. At the date of filing, Johnson and Johnson was facing “roughly 38,000 lawsuits” claiming “the company’s baby powder was contaminated with cancer-causing asbestos” (Mann 2021). Additionally, Johnson and Johnson had “incurred nearly $1 billion in defense costs on account of cosmetic talc litigation…[and made] payments for settlement and verdicts [of] approximately $3.5 billion (United States Bankruptcy Court Case No. 21-30589 Doc. 3 2021, 9).

Case Analysis

Of the four cases, LTL Management LLC has received the most coverage. For a casual observer, it is easy to suspect malfeasance when “the largest pharmaceutical company in the world,” on the heels of producing a widely adopted COVID-19 vaccine, files for partial bankruptcy (Povtak 2022). While it seems exceedingly likely that Johnson & Johnson weighed the impact of reputational damages prior to executing their “Texas Two-Step” and placing their asbestos liabilities into LTL Management, it is not clear that Johnson and Johnson anticipated the extent of the backlash they would face. The combination of an insufficient period of time since filing and the disruption in proceedings due to COVID-19 make a pre and post “Texas Two-Step” profitability and goodwill analysis of Johnson and Johnson largely meritless. If the number of “Texas Two-Step” mass tort bankruptcies grows, it is worth revisiting a pre and post “Texas Two-Step” profitability and goodwill analysis. This analysis could be executed via a regression discontinuity design by comparing similar firms, some of which undergo a “Texas Two-Step” mass tort bankruptcy and some of which remain in the traditional mass tort setting, both before and after the “Texas Two-Step” group files their individual Badcos for bankruptcy. This analysis would help explain whether the type of bad press Johnson and Johnson has received for filing a partial bankruptcy in light of mass tort asbestos litigation actually flows through to financial statements. Parsing this data would also allow for an exploration of whether
a firm’s place on the continuum of purely B2B to purely B2C matters when deciding whether to continue to fight claimants in traditional mass tort settings or move the fight into the chapter 11 ring.

While LTL Management is the most recent of the four “Texas Two-Step” debtors facing mass tort claims to file for bankruptcy, as a result of the case’s mass appeal, it has largely assumed the role of the bellwether case. The Judges presiding over Bestwall LLC, DMBP LLC, and Aldrich Pump LLC have all indicated in court filings that they are watching rulings related to LTL Management LLC carefully; the following lengthened case analysis reflects this fact. To date, there have been three key decisions in the LTL Management case that reveal, in part, how chapter 11 bankruptcy is being used by debtors and non-debtors to manage tort liability claims and the impact that the involvement of chapter 11 law has on tort liability resolutions.

The first key decision in the LTL Management LLC case came on November 10, 2021 when North Carolina Bankruptcy Judge Craig Whitley ruled that LTL Management LLC’s bankruptcy case should be moved to New Jersey. At the time of the ruling, Judge Whitley’s decision was viewed as a major blow to Johnson and Johnson’s “Texas Two-Step” strategy as “other companies [had] used the [North Carolina] bankruptcy court to set up compensation trusts for tort liabilities” (Bronstad 2021). While there lacked precedence for this type of trust in New Jersey, all three of the preceding chapter 11 mass tort cases had been filed successfully in North Carolina. While not the focus of this thesis, the fact that four similarly situated debtors, all represented by Jones Day, opted to file for chapter 11 protections in North Carolina, serves as further evidence that “venue shopping” remains alive and well. Judge Whitley’s decision to reassign LTM Management LLC to New Jersey “hinged on two factors: the fact that Johnson & Johnson is headquartered in New Jersey and the fact that a substantial amount of the country’s
talc litigation is happening there” (Levin Papantonio Rafferty, n.d.). Both of these reasons are likely to be cited in support of other creditors attempting to fight “venue shopping” and have their cases instead heard in neutral chapter 11 jurisdictions. Additionally, LTL Management’s decision to file for chapter 11 protection in North Carolina and only have their case eventually heard in New Jersey due to a surprisingly successful venue challenge reveals that, while in the traditional tort setting claimants have a high degree of control over the venue in which they choose to file their claims, in the chapter 11 arena it is the debtor that largely decides the venue (Perkins 2018).

The second key decision in the LTL Management case came on February 25, 2022 when New Jersey Bankruptcy Judge Michael Kaplan ruled against a motion put forward by the Official Committee of Talc Claimants which argued that LTL Management’s case was not filed “in good faith” and thereby not pursuant to the standard set forth in section 1112(b) of the Bankruptcy Code (Kinel 2022). Judge Kaplan’s ruling extinguished any belief that the strategy of managing mass tort claims through chapter 11 would recede as quickly as it emerged. Instead, Judge Kaplan offered “a passionate defense of the ability of bankruptcy courts to effectively adjudicate mass tort cases as well as a whole-hearted stamp of approval of the Texas Two-Step strategy as implemented by [Johnson and Johnson] under the particular facts of its case” (Kinel 2022). In Judge Kaplan’s decision, he noted that to determine “whether the “Debtor is pursuing a valid bankruptcy purpose through this chapter 11 proceeding also requires the Court to examine a far more difficult issue—whether there is available to Debtor and the tort claimants a more beneficial and equitable path toward resolving Debtor’s ongoing talc-related liabilities (United States Bankruptcy Court Case No. 21-30589 Doc. 1572 2022). In response to the question, Judge Kaplan offered the court’s “strong conviction that the bankruptcy court is the optimal venue for
redressing the harms of both present and future talc claimants” (United States Bankruptcy Court Case No. 21-30589 Doc. 1572 2022, 19). In further support of his ruling, Judge Kaplan noted the standard set forth in *SGL Carbon Corp* to determine whether a case has been filed in good faith. In *SGL Carbon Corp*, the court established that the standard for determining good faith filings is that “[a]ll parties acknowledge that the general focus must be (1) whether the petition serves a valid bankruptcy purpose and (2) whether the petition is filed merely to obtain a tactical litigation advantage” (Kinel 2022). In light of the standard, Judge Kaplan easily found a valid bankruptcy purpose in the LTL Management LLC filing as he had “little trouble finding that the [Debtor’s] chapter 11 filing serves to maximize the property available to satisfy creditors by employing the tools available under the Bankruptcy Code” (United States Bankruptcy Court Case No. 21-30589 Doc. 1572 2022, 15).

Two key findings that further supported Judge Kaplan’s decision to reject the motion put forth by the Official Committee of Talc Claimants were that: “there is no evidence that Debtor or its predecessor manufactured a limited fund by undervaluing or limiting assets…Rather, the Court finds that any such limited fund is the product of overwhelming potential talc liabilities, which far exceed Debtor’s (and Old [Johnson and Johnson’s]) capacity to satisfy through current available assets” and “that the true leverage remains where Congress allocated such leverage, with the tort claimants who must approve of any plan employing a § 524(g) trust by a 75% super majority. In filing this chapter 11, Debtor faces a risk that good-faith negotiations will not produce the consensus necessary to confirm a plan” (United States Bankruptcy Court Case No. 21-30589 Doc. 1572 2022, 23, 32).

Several important considerations arise from Judge Kaplan’s ruling that the LTL Management LLC case was filed in good faith. First, per the *SGL Carbon Corp* standard, how
ought “general focus” and “valid” be defined and interpreted? The choice of “general focus” over “sole focus” seems to suggest that a petition, which is filed to obtain a litigation advantage, should be upheld so long as the petition also serves a valid bankruptcy purpose. If “general focus” is interpreted in the cases of firms seeking chapter 11 protections in the face of mass tort claims to mean 51% of the reason for the petition, then a petition from a firm facing mass tort claims must be upheld as a legitimate filing so long as at least 51% of the reason behind the petition can be attributed to a valid bankruptcy purpose. Even if 49% of the reason behind the petition is merely to obtain a tactical litigation advantage over tort claimants, as long as the majority of the reason can be credited to a valid bankruptcy purpose, the petition must be upheld. Additionally, if “valid” is interpreted to mean allowing for the resolution of all pending claims on firm assets while emerging from bankruptcy with the greatest remaining amount of assets possible, the fiduciary duty of management to shareholders suggests that perhaps a petition filed merely to obtain a tactical litigation advantage is a “valid” bankruptcy purpose if not a legal responsibility. Judge Kaplan’s justification for his ruling against the Official Committee of Talc Claimants reveals that limited case law exists to help answer questions related to what is and is not a “good faith filing” in the case of a firm facing mass tort claims filing for chapter 11 protections.

A second key consideration that arises from Judge Kaplan’s ruling is what the standard for how much to fund Badco is versus what it ought to be. In the case of LTL Management LLC, Judge Kaplan’s reasoning is “any such limited fund is the product of overwhelming potential talc liabilities” (United States Bankruptcy Court Case No. 21-30589 Doc. 1572 2022, 15). Per this reasoning, a Badco is not sufficiently funded if it reaches a certain threshold – perhaps a percentage of outstanding claims or the present value of a perpetuity valued based on yearly
payments leading up to bankruptcy – but rather is sufficiently funded so long as potential liabilities seem large and are much greater than Badcos funding amount. This understanding, apparent in the LTL Management LLC case, reveals how firms planning on undergoing a “Texas Two-Step” and filing Badco for bankruptcy are only incentivized to fund Badco at a level that is acceptable to the court, not at a level that is directly based on outstanding claims or previous payments.

Judge Kaplan’s response to the potential for a debtor to manage mass tort claims favorably via chapter 11 is likely the same one offered in the LTL Management LLC ruling that “tort claimants must [ultimately] approve of any plan employing a § 524(g) trust by a 75% super majority” (United States Bankruptcy Court Case No. 21-30589 Doc. 1572 2022, 32). At face value, this seems like a reasonable defense of mass tort claimants leverage in a chapter 11 setting. However, the leverage of claimants is potentially limited due to the leverage of time afforded to debtors. If mass tort claimants exercise their right and reject a payment plan in an effort to hold-out for a better deal, due to the stay provisions granted via chapter 11, the time at which Badco makes any payments gets pushed out. While a traditional firm, one in which the goal is ongoing operations and not just mass tort liability management, would be incentivized to exit bankruptcy and thereby be willing to negotiate in good faith with mass tort claimants, there is no obvious reason a Badco, created from a “Texas Two-Step” is not actually incentivized to drag-on bankruptcy as long as possible. In fact, it is only when the present value of future outflows is less than the expected present value of delayed future outflows that a Badco would even be willing to agree to a deal with mass tort claimants. Thus, the LTL Management LLC case reveals that it is possible that claimants’ vote of approval is largely meaningless so long as Badco is able to avoid a bad faith filing and claimants value some payments over none at all.
The third key decision in the LTL Management LLC case came in April 2022 when Judge Kaplan ruled that a particular class-action lawsuit related to non-baby powder asbestos exposure could proceed independently of the ongoing case as “the proposed lawsuit was different enough from the cosmetic talc cases” (Povtak 2022). While this ruling received much less coverage than the venue change and bad faith filing rulings, it is still important as it exposes a potential clink in the chapter 11 armor otherwise afforded to Badcos facing mass tort claims. One of the advantages Johnson and Johnson sought by moving their mass tort claims into chapter 11 was the ability to group claims together. If executing a “Texas Two-Step” and filing Badco for bankruptcy fails to completely separate Goodco from all existing mass tort claims and does not even allow Badco to face the claims as a group, the incentive to copy Johnson and Johnson’s tactics are limited.

**Georgia-Pacific - Bestwall LLC**

*Case Summary*

Bestwall LLC “traces its history to the Bestwall gypsum business” that Georgia-Pacific, a large materials and manufacturing company, owned by Koch Industries, purchased in 1965 (United States Bankruptcy Court Case No. 17-31795 Doc. 24 2017, 3). From 1965 to 1977, Bestwall, as a division of Georgia-Pacific, “used asbestos in its joint compound products” (United States Bankruptcy Court Case No. 17-31795 Doc. 24 2017, 3). The asbestos content in the products (chrysotile asbestos) was 3-5% by weight (United States Bankruptcy Court Case No. 17-31795 Doc. 24 2017, 3). While Bestwall LLC admits to manufacturing products containing asbestos, they note in filings that their “joint compound only represented about 1.5% of all asbestos-containing products manufactured and sold in the United States” and that their
products did not contain amphibole asbestos, a more potent type of asbestos (United States Bankruptcy Court Case No. 17-31795 Doc. 24 2017).

Bestwall LLC claims in their informational brief that “until the late 1990s, companies that produced large amounts of amphibole asbestos products…paid the overwhelming majority of asbestos-related claims” (United States Bankruptcy Court Case No. 17-31795 Doc. 2 2017, 4). Bestwall during this period on average paid “about $6 million per year in defense and indemnity (settlements and judgements)” (United States Bankruptcy Court Case No. 17-31795 Doc. 2 2017, 3). Bestwall LLC further claims that as large defendants were forced to file for bankruptcy and exit the tort system, plaintiffs began to increasingly claim exposure to companies/products not in bankruptcy (United States Bankruptcy Court Case No. 17-31795 Doc. 2 2017, 4-5). From 2012 to 2016, Bestwall LLC estimates that it was named in 70-80% of all U.S. filed mesothelioma cases and total defense and indemnity costs for 2015, 2016, and 2017 were $184 million, $174 million, and $200 million, respectively (United States Bankruptcy Court Case No. 17-31795 Doc. 2 2017, 5).

To manage approximately 64,000 pending claims, Georgia-Pacific completed a “Texas Two-Step” on July 31, 2017 (United States Bankruptcy Court Case No. 17-31795 Doc. 2 2017, 8). On November 2, 2017, Bestwall LLC filed for chapter 11 bankruptcy protections in Judge Beyer’s Western District of North Carolina United States Bankruptcy Court (United States Bankruptcy Court Case No. 17-31795 Doc. 2 2017.). As of April 2022, Bestwall LLC’s chapter 11 bankruptcy case remains pending.

**Case Analysis**

Filed in 2017, Bestwall LLC was Jones Day’s first attempt at utilizing a “Texas Two-Step” to allow a client facing mass tort liabilities the opportunity to separate the otherwise
healthy firm from the ongoing liabilities. The first key challenge to the filing came from the Official Committee of Asbestos Claimants who sought to have the case dismissed from the chapter 11 setting due to their claim that the filing was not consistent with the standard set by the fourth circuit in *Carolin Corp v. Miller* which states “a court may dismiss a Chapter 11 filing as a bad faith filing only when the bankruptcy reorganization is both (i) objectively futile and (ii) filed in subjective bad faith (United States Bankruptcy Court Case No. 17-31795 Doc. 891 2019, 4). Judge Beyer ruled against the motion for dismissal, finding that “attempting to resolve asbestos claims through 11 U.S.C. § 524(g) is a valid reorganizational purpose, and filing for Chapter 11, especially in the context of an asbestos or mass tort case, need not be due to insolvency” (United States Bankruptcy Court Case No. 17-31795 Doc. 891 2019, 5). Judge Beyer further noted in the decision that “the moving party ‘has the burden of proof to establish cause for dismissal’” and the burden for dismissal of a chapter 11 case in the fourth circuit is exceedingly high as “it is better to risk proceeding with a wrongly motivated invocation of Chapter 11 protections whose futility is not immediately manifest than to risk cutting off even a remote chance that a reorganization effort so motivated might nevertheless yield a successful rehabilitation” (United States Bankruptcy Court Case No. 17-31795 Doc. 891 2019, 4). The Official Committee of Asbestos Claimants’ unsuccessful motion to dismiss Bestwall LLC’s bankruptcy petition and Judge Beyer’s decision reveal just how high the standard for dismissal is in chapter 11 cases, including cases involving mass tort claims.

The second relevant issue in the Bestwall LLC case involves Georgia-Pacific’s funding of the qualified settlement fund (QSF). While Georgia-Pacific “paid almost $2.9 billion to settle more than 400,000 claims” prior to the 2017 bankruptcy filing, Bestwall LLC’s “original asbestos trust, funded by Georgia-Pacific, was worth just $175 million” (Povtak 2020). After
extensive negotiation, Georgia-Pacific pledged $1 billion to fund Bestwall LLC’s QSF (Povtak 2020). While $1 billion pales in comparison to Georgia-Pacific’s prior settlement payments and outstanding mass tort claims, the increase in funding reveals that mass tort claimants do have some opportunity to advocate for greater payments in the chapter 11 setting. The funding increase also raises questions regarding the relationship between Georgia-Pacific (Goodco) and Bestwall LLC (Badco). If a “Texas Two-Step” is viewed as a mechanism in which the transfer of assets does not occur but rather the creation of two new independent entities transpires, then it is not obvious that Goodco owes anything more than a moral obligation to increase funding to Badco. Instead, it falls upon the court to determine if a bad faith filing has occurred or not. In the case that a bad faith filing has not occurred, further legal analysis is necessary to determine whether or not mass tort claimants in the Badco bankruptcy have a legal right to call upon Goodco to increase QSF funding in Badco. The circumstances surrounding Georgia-Pacific’s increased pledge to Bestwall LLC’s QSF suggest chapter 11 grants this right to mass tort claimants. However, the filings themselves fail to actually establish mass tort claimants legal right through chapter 11 to call upon Goodco to increase QSF funding in Badco.

Saint-Gobain - DMBP LLC

Case Summary

Saint-Gobain’s main business is the design, manufacturing, and distribution of building materials (Bloomberg, n.d.). In 1976, Saint-Gobain acquired 57% of CertainTeed (Saint-Gobain in North America,. n.d.). From 1962 to 1993, CertainTeed manufactured and sold Asbestos Cement (AC) Pipe (United States Bankruptcy Court Case No. 20-30080 2020, 4). The AC Pipe that CertainTeed sold “contained between 10% and 20% asbestos by weight” (United States
The majority of the asbestos fiber used was from chrysotile and 10-15% was from crocidolite (United States Bankruptcy Court Case No. 20-30080 Doc. 22 2020, 4).

As Jones Day, counsel to DMBP LLC, writes in their informational brief, “in the 1990's, [Saint-Gobain] spent less than $10 million per year in indemnity to resolve mesothelioma claims” (United States Bankruptcy Court Case No. 20-30080 Doc. 24 2020, 4). Saint-Gobain also sought to band together with other defendants during this period as a “primary cost-avoidance strategy” (United States Bankruptcy Court Case No. 20-30080 Doc. 24 2020, 4). As Jones Day notes, following the Amchem and Ortiz Supreme Court decisions which made it “clear that class actions were not a viable option for achieving global resolutions of current and future asbestos claims,” many large asbestos defendants excised the tort system and sought chapter 11 protections (United States Bankruptcy Court Case No. 20-30080 Doc. 24 2020, 16). Following the exit of a number of large asbestos defendants from the tort system, Jones Day notes that Saint-Gobain’s annual defense and indemnity costs ranged over the period of 2002-2019 from $80 million to $160 million (United States Bankruptcy Court Case No. 20-30080 Doc. 24 2020, 16).

On October 23, 2019, Saint-Gobain performed a “Texas Two-Step” to create the new entity of DMBP LLC. On January 23, 2020, DMBP LLC filed for chapter 11 protections in Judge Craig Whitley’s Western District of North Carolina bankruptcy court (United States Bankruptcy Court Case No. 20-30080 Doc. 24 2020). As of April 2022, DMBP LLC’s chapter 11 case is still pending in Judge Whitley’s North Carolina bankruptcy court.
Case Analysis

The first key issue raised by the Official Committee of Asbestos Personal Injury Claimants (ACC) in the DBMP LLC case was whether or not the automatic stay on asbestos-related litigation against both DMBP LLC and CertainTeed ought to remain in place given the contention around the petition. On August 10, 2021, Judge Whitley ruled that while “DBMP was created…[as] a vessel designed to ferry Old CertainTeed’s asbestos liabilities into bankruptcy,” litigation against CertainTeed was still not allowed to resume (United States Bankruptcy Court Case No. 20-30080 Doc. 972 2021, 26). Judge Whitley further caveated the ruling by speculating “that allocating CertainTeed’s asbestos liabilities to DBMP appears to have ‘a material, negative effect on the asbestos creditors’ ability to recover on their claims’” (Scurria 2021). Judge Whitley’s reluctant decision to uphold the stay seems to reveal that the legal protections granted to debtors managing mass tort claims in chapter 11 are sometimes greater than what might otherwise be desirable.

The second key issue in the DBMP LLC case revolves around the ACC’s lawsuit to consolidate the assets of CertainTeed LLC (Goodco) with DBMP LLC (Badco). In March 2022, Judge Whitley “gave the green light for [the ACC] to proceed with a lawsuit to consolidate the assets of building material maker CertainTeed LLC with those of its bankrupt spinoff unit, DBMP LLC” (Nani 2022). This lawsuit is still pending, but reveals another potential clink in the playbook of managing mass tort claims via chapter 11. If Judge Whitley ultimately rules in favor of the ACC and allows for the assets of Goodco and Badco to be reconsolidated, the advantages promised by a “Texas Two-Step” are all but mute. Additionally, if this decision were to be upheld at the circuit level, the role of Congress in legislating how debtors are and are not able to manage mass tort liabilities in chapter 11 would be greatly reduced.
Trane Technologies - Aldrich Pump LLC

Case Summary

Trane Technologies is an industrial goods manufacturer primarily engaged in the industrial and commercial products sector (Global Data, n.d.). Over Trane Technologies’ corporate history, it came to control the wholly-owned subsidiaries of Aldrich Pump and Murray Boiler. Aldrich Pump’s asbestos litigation “surrounds its manufacture of pumps and compressors that incorporated metal piping through which liquids or gasses flowed” (United States Bankruptcy Court Case No. 20-30608 Doc. 5 2020). The pipes used in the pumps and compressors made use of gaskets that, until roughly 30 years ago, almost exclusively used chrysotile asbestos fiber (United States Bankruptcy Court Case No. 20-30608 Doc. 5 2020, 8). Murray Boiler’s asbestos litigation arises from its sale of heating and cooling equipment (United States Bankruptcy Court Case No. 20-30608 Doc. 5 2020, 9). Murray Boiler’s heating and cooling equipment, similar to Aldrich Pump, also used asbestos-containing gaskets (United States Bankruptcy Court Case No. 20-30608 Doc. 5 2020, 9).

During the 1990s, prior to many large defendants exciting the tort system, “Aldrich and Murray [collectively] paid less than $4 million to settle the mesothelioma claims brought against them” (United States Bankruptcy Court Case No. 20-30608 Doc. 5 2020, 10). In their information brief, Jones Day, as the Debtor’s counsel, cites these small payments during the 1990s as a “clear indication that the Debtor’s products were not the likely cause of, or significant contributor to, the occurrence of mesothelioma” (United States Bankruptcy Court Case No. 20-30608 Doc. 5 2020, 10). Following the exit of a number of large asbestos defendants from the tort arena, Jones Day asserts that due to the “endless search for the solvent bystander,” the number of mesothelioma claims against both Aldrich and Murray began to increase rapidly
Prior to filing for chapter 11 bankruptcy, Aldrich and Murray were roughly spending a combined $100 million per year on asbestos-related issues.

On May 1, 2020, Trane Technologies followed the “Texas Two-Step” playbook to separate asbestos liabilities related to Aldrich and Murray from their otherwise healthy legacy business. On June 18, 2020, Aldrich Pump LLC, including Murray Boiler LLC as a named debtor, filed for chapter 11 protections in Judge Craig Whitley’s Western District of North Carolina Bankruptcy Court.

Case Analysis

In September 2021, it appeared as if Aldrich Pump LLC would be the first of the four “Texas Two-Step” bankruptcies to reach resolution. Through a negotiation with “a representative for individuals with future asbestos claims,” Aldrich Pump LLC agreed to fund their asbestos trust with “an initial lump-sum case payment of $540 million” (Yerak 2021). As “the official committee of asbestos claimants didn’t participate in the talks” and the agreement ultimately requires bankruptcy court approval, the deal has since stalled out. The case has instead turned to focus on the official committee of asbestos claimants' push for a “‘substantive consolidation,’ which would merge the assets of debtors Aldrich Pump LLC and Murray Boiler LLC with those related to industrial manufacturer Trane Technologies” (Nani 2022). Similar to the ACC’s push in the DBMP LLC case which also appeared before Judge Whitley, the motion, which would effectively nullify the “Texas Two-Step” maneuver previously employed by Trane Technologies, has been given the go ahead to proceed.
Aldrich Pump LLC serves as an example of mass tort claimant’s ability to vote against any plan employing a § 524(g) trust as discussed by Judge Kaplan in the LTL Management LLC case. The case also serves as an example of how when mass tort claimants choose to reject a plan involving a § 524(g) trust, payment is delayed even further if not indefinitely. Judge Whitley’s decision to allow the “substantive consolidation” lawsuit to continue, consistent with the DBMP LLC case, however, suggests that the ultimate viability of a “Texas Two-Step” strategy may currently hinge on what court the case is being heard in.
CONCLUSION

The fundamental questions motivating this thesis are (1) how chapter 11 bankruptcy is being used by debtors and non-debtors to manage tort liability claims, (2) what impact the involvement of chapter 11 law has on tort liability resolutions, and (3) what role Congress ought to play, if any, in regulating a corporation’s ability to manage mass tort claims through chapter 11. As the cases of Johnson and Johnson - LTL Management LLC, Georgia-Pacific - Bestwall LLC, Saint-Gobain - DMBP LLC, and Trane Technologies - Aldrich Pump LLC all still remain in chapter 11 bankruptcy, all case study-based conclusions described in this thesis ought to be viewed as preliminary and requiring of further analysis if/when any of the four cases reach resolution.

A key finding in this thesis is that across all four case studies, the playbook on how to manage mass tort claims in chapter 11 remains highly consistent. At the most basic level, in each case, an original firm facing mass tort claims executed a “Texas Two-Step” divisional merger to separate into a Goodco and a Badco. The Badco shortly thereafter filed for chapter 11 protections with the stated goal of reaching an equitable and final resolution regarding all outstanding tort liability claims. The majority of divergence in case progression arises not from different strategies employed by the debtor, but rather from the presiding Judge’s differing rulings on relatively similar motions. So long as observers and involved parties are uncomfortable with how debtors and non-debtors are able to manage tort liability claims in chapter 11, Congress has a role to play in clarifying how bankruptcy judges ought to rule on largely similar motions.

The greatest limitation of this thesis, a result of none of the case studies having reached resolution as well as a limited universe of four case studies, is that drawing empirical conclusions on the impact the involvement of chapter 11 law has on tort liability resolutions is impossible.
The case studies appear to reveal, explored in depth in the LTL Management LLC case, that chapter 11 advantages Badcos over mass tort claimants as Badcos have a potential incentive to drag-on cases while claimants are more clearly incentivized to reach a resolution. This preliminary finding suggests that tort liability resolutions are likely to be either smaller or paid-out much later when negotiated in the chapter 11 setting in comparison to when negotiated in a traditional mass tort setting. This is a potential topic for further research if/when there exist chapter 11 mass tort cases that have reached resolution.

This thesis has also sought to explore what role Congress ought to play, if any, in regulating a corporation's ability to manage mass tort claims through chapter 11. If the “Texas Two-Step” approach proves resilient to both bad faith filings, as suggested by the case studies, and substantive consolidation lawsuits, which remain unsettled in the case studies, then Congress will likely have a role to play in ensuring mass tort claimants are not being unfairly treated in the chapter 11 setting. However, if there is an agreement at the circuit level that either the “Texas Two-Step” approach does constitute a bad faith filing or substantive consolidation lawsuits should be upheld, there will be no problem for Congress’ new legislation to address. This thesis believes a more reasonable approach for Congress to take is to wait to legislate a corporation’s ability to manage mass tort claims in chapter 11 until it is clear that ability even exists. In the case that the ability does exist, further quantitative study regarding the impact of the involvement of chapter 11 law on tort liability resolutions is necessary to clarify the appropriate legislative role of Congress.
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