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Show Me the Money: How Bankruptcy Courts Could Become the Most Equitable Mass Tort Forum

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Abstract

The Texas Two-Step has emerged as a dangerous bankruptcy maneuver for companies to defend against mass tort liability. The process allows a company to allocate all of its tort liability to a newly created company which then files for bankruptcy. The Bankruptcy Code provides instantaneous benefits for that new company, which tort victims are left unable to proceed with their claims. This has resulted in an inequitable process, and outcomes, for those victims as seen by the recent Johnson & Johnson Texas Two-Step. While this process is unjust, it has raised an interesting question: could a bankruptcy court become the best place for these mass tort cases? This Note proposes that yes, bankruptcy courts could become the most equitable mass tort forum through a statutory expansion of 11 U.S.C. § 524(g). 11 U.S.C. § 524(g) was enacted to tackle the asbestos crisis and could be modified to enable an equitable and efficient forum for mass tort victims across industries.

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* Candidate for J.D., May 2024, Washington and Lee University School of Law. I would like to extend my sincerest appreciation and gratitude to everyone who helped me throughout the Note writing process. I would particularly like to thank my faculty advisor Caleb Chaplain, as well as the Honorable Rebecca B. Connelly, for their incredible support and feedback during the writing process. I would also like to thank all of my friends and family for their patience and encouragement along the way.

I. Introduction

"Why reach for anything else?" asked a former slogan for Johnson's Baby Powder.[1] It turns out, however, that Johnson and Johnson ("J&J") executives had a pretty good idea of why consumers should be reaching for other products.[2]

Despite corporate executives' insider knowledge that talc-based baby powder contained trace amounts of a toxic material, J&J never disclosed this to the Food and Drug Administration ("FDA") or its customers.[3] The result? Decades of advertising which lead to countless women using the cancer-causing product.[4]

It seemed as though J&J would face the music following a 2013 trial in which a jury found the company negligent in the first case to claim that regular use of Johnson's Baby Powder for feminine hygiene caused ovarian cancer.[5] This verdict spawned a cascade of similar lawsuits, including a $4.7 billion verdict against the company in 2018.[6] So, what was one of the most profitable companies in the world to do? When faced with over 38,000 claims pending against the company, J&J created a new company, LTL Management, LLC ("LTL"), and allocated all its tort liability to this new company.[7] Riddled with liability and lacking any assets

1. *See* Rahul Panchal, *List of 22+ Best Johnson and Johnson Brand Slogans*, BENEXTBRAND (curating a list of former Johnson and Johnson slogans which date back to 1886) [perma.cc/W5XW-YTFQ].

2. *See* Samir D. Parikh, *Mass Exploitation*, 170 U. PA. L. REV. 52, 55 (2022) (describing a pair of reports presented to J&J executives which identified carcinogenic materials in J&J baby powder).

3. *See id.* at 56 (finding that not only did J&J not disclose their findings, but further encouraged the use of the product specifically advising women to apply the powder to their perineal area).

4. *See id.* at 55 (describing the decades of internal documentation acknowledging the risks associated with talc powder which were not conveyed in advertising materials).

5. *See* Berg v. Johnson & Johnson Consumer Cos., 987 F.Supp. 2d 1151, 1153 (D.S.D. 2013) (finding for Berg on her negligent products liability claims yet not awarding damages).

6. *See* Jef Feeley, *Johnson & Johnson Talc Verdict Cut in Half to $2.1 Billion by State Court*, DETROIT NEWS (June 23, 2020) (explaining that although there was an initial $4.7 billion jury verdict, the total payout was cut to $2.1 billion) [perma.cc/94LT-T7R9].

7. *See In re* LTL Mgmt., LLC, 636 B.R. 610, 616 (Bankr. D.N.J. 2022) (discussing how the legacy company, referred to as Old JJCI, was split into New

outside of a funding agreement, LTL filed for bankruptcy.[8] The impact of the bankruptcy filing was twofold, firstly all pending claims against J&J, including the liability of which was transferred to LTL, were halted. And secondly, all civil trials were haphazardly consolidated into a chapter 11 case, which generally involves a restructuring, rather than a liquidation, in which the debtor emerges from bankruptcy as an operating entity.[9]

Through a combination of state law and federal bankruptcy protections, J&J attempted to exploit the Bankruptcy Code in order to take control over the mounting liability it was facing.[10] J&J is not alone in this scheme—companies facing mass tort liability have been favoring bankruptcy courts due to the increased control they have in the process.[11] It makes sense that they would, because this process favors debtor-corporations and protects their interests. But what about the victims of these mass torts?

This Note argues that while the above-described process dubbed the "Texas Two-Step" is an abusive process, bankruptcy court could still serve as the most equitable forum for victims of mass tort litigation as bankruptcy law provides an outcome that protects present and future tort victims' top priority: damages which will allow them to be made whole.[12] For this to happen,

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JJCI and LTL, intending to resolve talc-related claims without subjecting the entire Old JJCI enterprise to a bankruptcy proceeding).

8. *See id.* at 616 (describing the additional funding agreement which obliged the parent company to pay any and all costs and expenses that LTL incurred during its bankruptcy case).

9. *See* James Lockhart, *Construction and Application of 11 U.S.C.A. § 1112(b)(4)(A), Providing for "Reasonable Likelihood of Rehabilitation" that Chapter 11 Debtor Must Have in Order for Substantial or Continuing Losses to Estate Not to Provide "Cause" for Dismissal or Conversion of Case*,

94 A.L.R. Fed. 2d 491, § 1 (discussing how a bankruptcy court considering whether to convert or dismiss a chapter 11 case must consider, amongst other factors, if there is a reasonable likelihood of rehabilitation which would put the debtor back in good operating condition).

10. *See* Parikh, *supra* note 2, at 57 (depicting this process as enabling corporations to file for bankruptcy on their own terms and enabling an exploitation of statutory loopholes which seizes many of the benefits of the Bankruptcy Code with few of the costs being borne by the corporation).

11. *See id.* at 58 (describing the rise of this process in recent years with multiple mass tort defendants relying on this process).

12. *See* Samir D. Parikh, Written Statement of Samir D. Parikh Regarding Mass Restructurings and Divisive Mergers (Before the Subcommittee on Federal

Congress must expand a key section of the Bankruptcy Code, 11 U.S.C. § 524(g) ("§ 524(g)"), to encompass a wider range of mass tort litigation.

In Part II, this Note provides a necessary backdrop of bankruptcy fundamentals which lead to the development of the Texas Two-Step. The Texas Two-Step process is akin to a codified bankruptcy procedure under § 524(g) for asbestos-related claims.

In Part III, this Note explores the historical inspiration for § 524(g). Part IV describes notable protections guaranteed to victims of mass torts through § 524(g), beginning with the events which lead to its inception, its current framework, and key differences between § 524(g) and the Texas Two-Step.

Part V proposes that when used correctly, bankruptcy courts can be a more equitable forum for victims of mass torts than alternatives such as class action lawsuits and multidistrict litigation. This Part explores the drawbacks of class action lawsuits and multidistrict litigation for mass tort victims.

Part VI proposes changes to the Bankruptcy Code which would allow bankruptcy courts to serve as the optimal forum. Namely, this Note argues in favor of an expansion of § 524(g) to provide necessary protections for the victims of mass tort cases while simultaneously promoting the policy objectives of the Bankruptcy Code, including the efficiency of centralization, balancing the interests of all parties, effective reorganization, and perhaps most saliently maximizing the payout to creditors. Through the expansion of § 524(g), victims are guaranteed a voice in, and a vote necessary to approve, the settlement process.[13] Victims would have clearly defined rights and processes in place which would allow victims to participate and protect their own

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Courts, Oversight, Agency Action, and Federal Rights) (Feb. 8, 2022) (stating that bankruptcy as a venue can best ensure a meaningful recovery for plaintiffs).

13. *See* 11 U.S.C. § 524(g)(2)(B)(ii)(IV)(bb) (requiring a class of claimants whose claims are to be addressed by the trust to be established and requiring that class vote by at least 75% of those voting in favor of the plan under the current statute); *id.* § 524(g)(4)(B)(i) (mandating the appointment of a future claims representative to protect the rights of persons that might subsequently assert demands under the current statute).

rights.[14] Furthermore, victims would be assured that the trust will be adequately funded through the protections in place in § 524(g).[15] Through the proposed expansion of § 524(g), bankruptcy courts would be able to provide a voice for victims[16] and an outcome that protects the victims' top priority: damages which will allow them to be made whole.

II. An Introduction to Bankruptcy and the Texas-Two Step

For those unfamiliar with the Bankruptcy Code, it may seem inconceivable that an extremely profitable corporation could file for bankruptcy protection. In fact, the concept of bankruptcy acting as a protective mechanism may seem unnatural. This Part first introduces key components, and advantages, of a chapter 11 bankruptcy. Then this Part describes the Texas Two-Step, a process which allows entities to access the benefits of a chapter 11 bankruptcy without exposing all of its assets to the bankruptcy proceeding.

A. A Typical Chapter 11 Reorganization

Similar to all bankruptcy proceedings, a chapter 11 bankruptcy case is governed by the Bankruptcy Code.[17] Chapter 11 generally involves a restructuring, rather than a liquidation, in which the debtor emerges from bankruptcy as an operating

14. *See id.* § 1103 (detailing the powers and duties of committees which includes the ability to investigate the debtor's affairs relevant to the formulation of the plan and to participate in the formulation of a plan).

15. *See id.* § 524(g)(2)(B)(ii)(V) (requiring the trust to operate through mechanisms which provide reasonable assurance that the trust will value and be in a financial position to pay present and future claims in substantially the same manner); *id.* § 524(g)(2)(B)(iii) (entitling the trust to majority of the voting shares of the debtor, parent corporation of such debtor, and subsidiary of each such debtor); *id.* § 524(g)(2)(B)(i)(II) (mandating the trust is to be funded in whole or in part by the securities of debtors involved in such plan which includes an obligation to make future payments including dividends).

16. *See id.* § 524(g)(2)(B)(ii)(IV)(bb) (setting forth the voting requirements for approval).

17. *See id.* §§ 1101–1195 (governing the rules of a restructuring-based bankruptcy proceeding).

entity.[18] Although chapter 11 proceedings are available to many categories of debtors,[19] they are most often used by business entities.[20]

A chapter 11 proceeding may be commenced voluntarily by a debtor or involuntarily by the creditors of the debtor.[21] Notably, there are no requirements that a business be insolvent or unable to pay their debts as they mature for chapter 11 eligibility.[22]

One underlying objective of chapter 11 cases is that the assets of a particular enterprise are best used by the enterprise so that the value of the business as a going concern can be preserved.[23] Another primary objective of chapter 11 proceedings is to ensure equality of distribution among similarly situated creditors.[24] The following discussion gives a high-level overview of the important

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18. *See Chapter 11 – Bankruptcy Basics*, U.S. CTS. (referring to chapter 11 bankruptcy as "reorganization" bankruptcy and noting that the debtor may typically "continue to operate its business") [perma.cc/D65Y-E9LD]; *But see id.* § 1112 (allowing for a chapter 11 to be dismissed or converted to a chapter 7 at any time on request of a party in interest and after notice and a hearing).

19. *See id.* § 109(d)

Only a railroad, a person that may be a debtor under chapter 7 of this title (except a stockbroker or a commodity broker), and an uninsured State member bank, or a corporation organized under section 25A of the Federal Reserve Act, which operates, or operates as, a multilateral clearing organization pursuant to section 409 of the Federal Deposit Insurance Corporation Improvement Act of 1991 may be a debtor under chapter 11 of this title.

20. *See Annual Number of Chapter 11 Bankruptcy Cases Filed in the United States from 2007 to 2021, by Debtor*, STATISTA (Oct. 19, 2022) (showing that in 2021 of the nearly 5,000 chapter 11 cases filed, 4,366 of them were filed by businesses) [perma.cc/94XD-VLAF].

21. *See* 11 U.S.C. §§ 301–303 (describing who may commence a chapter 11—a debtor under said chapter, an individual that may be a debtor under such a chapter jointly with such individual's spouse, or the entities who hold claims against the debtor).

22. *See In re* Johns-Manville Corp., 36 B.R. 727, 730 (Bankr. S.D.N.Y. 1984) (discussing that neither 11 U.S.C. § 109, nor any other provision relating to voluntary petitions by companies, contains any requirement for a business to be insolvent).

23. *See* MARGARET HOWARD & LOIS R. LUPICA, BANKRUPTCY CASES AND MATERIAL 731 (6th ed. 2016) (observing that the immediate liquidation of a business rarely serves a corporate debtor and that reorganization under the Bankruptcy Code can assist a struggling business).

24. *See* John D. Ayer et al., *An Overview of the Automatic Stay*, XXII AM. BANKR. INST. J. 10 (Dec. 2004) (stating that these are the two primary objectives of chapter 11, and mechanisms such as the automatic stay can help further these objectives throughout the bankruptcy proceeding).

components of a chapter 11 proceeding which further those objectives.

1. The Importance of the Automatic Stay

An "automatic stay" is provided to debtors through § 362(a) of the Bankruptcy Code.[25] The automatic stay is a self-executing injunction which suspends nearly all activities of almost all creditors regarding financial obligations of the debtor.[26] The automatic stay operates as a "shield" that protects debtors from creditor pressure during a bankruptcy proceeding.[27]

The automatic stay is especially integral in the context of a chapter 11 proceeding as it furthers the objective to preserve the going concern of the entity and to assure equality in distribution amongst similarly situated creditors.[28]

This "shield" is seen as being one of the benefits of chapter 11 proceedings and is highly desirable to mass tort defendants.[29] The automatic stay will halt collections actions, including enforcement by individuals who have received jury awards in already decided cases.[30] Furthermore, any pending litigation will be similarly

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25. 11 U.S.C. § 362(a).

26. *See* HOWARD, *supra* note 23, at 145 (detailing the automatic nature of the automatic stay, where any action a creditor takes in violation of the automatic stay is voidable even though the creditor may be unaware at that point of the bankruptcy filing).

27. *See id.* at 146 (pointing out that the shield of the automatic stay can be used defensively in order to prevent dispossession or even offensively as a means of extracting a future benefit from a party to whom the debtor owes a prepetition debt).

28. *See id.* at 68 (describing the automatic stay as persevering the going concern value by preventing creditors from picking apart the debtor one asset at a time, while simultaneously ensuring that there is an equality of distribution by preventing the seizure of assets by one creditor before other creditors have their claims addressed).

29. *See* Mark Henricks & Mitch Strohm, *Chapter 11 Bankruptcy: What You Need to Know*, FORBES (Feb. 18, 2022) (stating that the automatic stay is amongst the benefits of chapter 11 in addition to being able to sell previously encumbered assets to raise money and the potential to get out from burdensome leases and other contracts) [perma.cc/W9UL-8US8].

30. *See* 11 U.S.C. § 362(a) (barring the enforcement against the debtor or property of the estate of a judgment obtained before the commencement of the bankruptcy case).

halted, effectively putting a pause on all tort claims facing the entity.[31]

2. The Role of the Debtor in Possession

Upon filing a voluntary petition for relief under chapter 11, the debtor automatically assumes an additional identity known as the "debtor in possession."[32] The debtor in possession is able to keep possession and control of its assets while undergoing a reorganization under chapter 11.[33] This is different from chapter 7, for example, where a trustee is appointed to oversee the debtor's estate.[34] The debtor in possession has many of the powers and duties of a trustee, such as the right, with the court's approval, to employ attorneys, accountants, and other professional persons to assist the debtor during its bankruptcy case.[35] Allowing the debtor to retain control helps to further the value of the business as a going concern, as the debtor and its prepetition management are often seen as the most qualified individuals to oversee the business through its restructuring.

31. *See id.* (barring the commencement or continuation of judicial action or proceedings against the debtor that was or could have been commenced before the commencement of the bankruptcy case).

32. *See* 11 U.S.C. § 1101 (defining the debtor in possession role as a debtor serving as trustee in the bankruptcy case).

33. *See Chapter 11 – Bankruptcy Basics*, *supra* note 18 (discussing that while the debtor in possession is able to retain control of its assets, this role comes with the responsibilities of a trustee as the debtor in possession is required to account for property, examine and object to claims, and file informational reports).

34. *See id.* (discussing the rare occasions in which a trustee will be appointed in a chapter 11 case, as well as the appointing of a trustee if a chapter 11 is converted to a chapter 7).

35. *See id.* (relaying the functions and powers of the debtor in possession and comparing those roles to those of a trustee in cases under other chapters).

3. Retention of Control & Continued Operation

Typically, in a chapter 11 case, the entity's current management continues to manage and operate the business.[36] This retention of control by management serves two policy-driven purposes: (1) current management is the most knowledgeable about the needs of the business and are best suited to guide it into a profitable future; and (2) since the managers are likely to retain their positions, they may be more willing to commence a chapter 11 case before the business becomes too troubled to be saved.[37]

4. Effects of Discharge

The chapter 11 debtor must file a plan of reorganization.[38] The ultimate objective of any chapter 11 case is the confirmation of such a plan.[39] The plan is the document that sets forth the terms of the reorganization.[40] Confirming a plan of reorganization involves a confirmation hearing under § 1128 of the Bankruptcy Code[41] and the votes of any impaired classes of creditors.[42] In order to confirm the plan of reorganization, the court must find, among other things that: (1) the plan is feasible; (2) it is proposed in good faith; and (3) the plan and the proponent of the plan are in

36. *See* HENRY J. SOMMER & RICHARD LEVIN, 7 COLLIER ON BANKRUPTCY ¶ 1100.06 (16th ed. 2022) (discussing the presumption that the debtor will remain in possession of the business).

37. *See id.* (discussing how this policy is furthered through the role of the debtor as the debtor in possession).

38. *See Chapter 11 – Bankruptcy Basics*, *supra* note 18 (stating that the debtor has a 120-day period with the exclusive right to file a plan of reorganization under 11 U.S.C. § 1121(b), which may be extended or reduced by the court, and following the exclusivity period a creditor may file a competing plan).

39. *See* 11 U.S.C. § 1123 (requiring the contents of the plan of reorganization to include, amongst other information, classes of claims, the treatment of classes of claims, and adequate means for the plan's implementation).

40. *See id.* § 1129(a) (setting out the requirements that a plan must meet in order to be confirmed, many of which are triggered only if a creditor does not consent to the plan).

41. *See id.* § 1128 (enabling a party in interest to object to confirmation of a plan).

42. *See id.* § 1126 (allowing impaired creditors to vote on the plan and presuming that unimpaired creditors have accepted the plan).

compliance with the Bankruptcy Code.[43] Following the confirmation of a chapter 11 bankruptcy plan, the debtor is bound by its provisions.[44]

After confirmation of a bankruptcy plan, § 1141(d)(1) generally provides that a debtor is discharged from any debt that arose before the date of confirmation.[45] The discharge of debt effectuates the fresh start which drives many corporations to file a plan of reorganization.[46]

All of these components work together to enable a corporate reorganization, which is a crucial step in the Texas Two-Step.[47]

B. What is a Texas Two-Step?

The so-called "Texas Two-Step" is a controversial bankruptcy maneuver.[48] The Texas Two-Step involves a two-part process that begins with Texas corporate law.[49] Under Chapter 1 of the Texas Business Organizations Code, a merger may include "the division of a domestic entity into two or more new domestic entities or other

43. *See Chapter 11 – Bankruptcy Basics*, *supra* note 18, (stating that the court must be satisfied that there has been compliance with all the other requirements of confirmation found in 11 U.S.C. § 1129).

44. *See id.* (explaining that a discharge creates new contractual rights which replace or supersede pre-bankruptcy contracts and obligations).

45. *See* 11 U.S.C. § 1141(d)(1) (stating that the confirmation of the plan does not discharge a debtor that is a corporation from specific types of debts including money owed to a domestic governmental unit, for taxes, customs duties, etc.).

46. *See* HOWARD, *supra* note 23, at 621 (finding that the ability to have a fresh start is a driving motivator for many seeking bankruptcy protections).

47. *See* Michael A. Francus, *Texas Two-Stepping Out of Bankruptcy*, 120 MICH. L. REV. ONLINE 38, 40 (June 2022) (discussing the two-part process necessary in a Texas Two-Step which includes filing for reorganization under chapter 11 of the Bankruptcy Code).

48. *See* Samantha Goldstein, *The Texas Two-Step: A Controversial Bankruptcy Dance*, UNIV. MIAMI L. REV. BLOG (May 3, 2022) (describing the Texas-Two Step process as widely controversial, with many viewing it as allowing for massively profitable corporations to delay mass tort litigations and force tort victims from having their day in court) [perma.cc/Z2Z5-YBQT].

49. *See* Francus *supra* note 47, at 40 (describing the Texas law which allows for the first half of the Texas Two-Step, the divisive merger, in which a division of a corporation is treated as a merger).

organizations."[50] In a divisive merger, an existing business can allocate assets and liabilities as it wishes among two new businesses.[51] Step one of the Texas Two-Step involves a legacy business which is often riddled with mass tort liability dividing itself into two new businesses: one with assets ("AssetCo") and one with all of the liabilities facing the legacy business ("LiabilityCo").[52] The two new businesses may take additional steps at this point to ensure that these are two separate entities.[53]

From there, LiabilityCo, the company which solely exists to eat the liabilities of the legacy business, will file for chapter 11 bankruptcy.[54] There is a large concentration of filings by these types of chapter 11 bankruptcies in the Fourth Circuit, taking advantage of the stringent bad faith requirements.[55]

Chapter 11 of the Bankruptcy Code has two separate good faith requirements: (1) under § 1129(b)(3) every plan of reorganization must be proposed in good faith; and (2) courts have consistently found that the prosecution of a chapter 11 in "bad faith" may constitute cause for dismissal or conversion under § 1112(b).[56]

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50. *See* TEX. BUS. ORGS. CODE § 1.002(55)(A) (defining "merger" as the division of a domestic entity into two or more new domestic entities or organizations or into a surviving domestic entity and one or more new domestic or foreign entities or non-code organizations); *see also id.* §§ 10.001-.0010 (providing the general provisions of a merger under Texas state law).

51. *See* Francus, *supra* note 47, at 40 (noting that the creation of a new business with assets and a new business with any existing liabilities then allows for the liability-riddled company to enter into bankruptcy proceedings in federal courts).

52. *See id.* (using terms of art to describe the two new companies: AssetCo and LiabilityCo).

53. *See* Adam Levitin, *The Texas Two-Step: The New Fad in Fraudulent Transfers*, CREDIT SLIPS (Jul. 19, 2021) (describing how both of the successor businesses can convert into any type of entity they want, allowing for flexibility with corporate governance and venue) [perma.cc/W6KQ-NNCG].

54. *See* Francus, *supra* note 47, at 40 (describing the second half of the Texas Two-Step, in which LiabilityCo enters into bankruptcy proceedings with the end goal being the successful completion of a chapter 11 bankruptcy plan resulting in a discharge from current and future liabilities).

55. *See id.* at 46–47 (discussing the Fourth Circuit as the venue of choice in the Texas Two-Step process, specifically the Western District of North Carolina).

56. *See* Paul D. Leake, *Making the Case for a "Good Faith" Chapter 11 Filing*, JONES DAY (Dec. 2005) (discussing the good faith filing requirement as being an

Even though all the circuits agree that bad faith may constitute cause for dismissal, each circuit considers bad faith differently.[57] Importantly, the Fourth Circuit requires a subjective finding of bad faith plus objective futility, a test which

> obviously contemplates that 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.[58]

The Fourth Circuit's approach stands out from other circuits.[59] For example, the Eleventh Circuit's approach does not inquire into whether a debtor has any realistic means of successfully reorganizing.[60]

The significance of this difference can be seen in the recent Third Circuit update to the Johnson & Johnson Texas Two-Step.[61] The LTL bankruptcy case was originally filed in North Carolina, where the bankruptcy court rejected their effort to "manufacture

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integral part of the chapter 11 balancing process, which considers both the debtor's and the creditors' interests) [perma.cc/6HFX-YCH7].

57. *See* Kathleen Mullins, *Bad Faith Constitutes Cause for Dismissal of a Bankruptcy Case*, AM. BANKR. INST. BLOG (discussing how 11 U.S.C. § 1112(b) mandates that a court shall dismiss or convert a case for cause, which courts have interpreted to include bad faith, but however the analysis for what constitutes bad faith is not explained within the context of § 1112(b) and therefore is subjected to different analyses amongst the circuit courts) [perma.cc/6T89-MWYJ].

58. *See* Carolin Corp. v. Miller, 886 F.2d 693, 701 (4th Cir. 1989) (discussing the stringent test of justification for threshold denials of chapter 11 relief, which allows for the continuation of a chapter 11 case even if there is a subjective finding of bad faith in filing if futility cannot also be found).

59. *See* Mullins, *supra* note 57, (listing different approaches for determining bad faith as cause for dismissal, including the Sixth Circuit's bad faith determination as a totality of the circumstances test and the Eleventh Circuit's approach which does not inquire into whether a debtor has any realistic means of successfully reorganizing).

60. *See In re* Phoenix Piccadilly, Ltd., 849 F.2d 1393, 1394 (11th Cir. 1988) (dismissing a chapter 11 filing found to be filed in bad faith, resulting in a lower bar for a Chapter 11 to be dismissed, as the possibility of a successful reorganization does not transform a bad faith filing into one undertaken in good faith).

61. *See In re* LTL Mgmt., LLC, 58 F.4th 738, 753 (3d Cir. 2023) (applying the Third Circuit bad faith analysis to the J&J Texas Two-Step).

venue" and take advantage of the Fourth Circuit's bad faith standard.[62] The case was transferred to the Bankruptcy Court for the District of New Jersey, where a battle erupted over the issue of filing in good faith.[63] While the bankruptcy court held that LTL filed its bankruptcy petition in good faith, the Court of Appeals for the Third Circuit disagreed.[64] The Third Circuit's good faith considerations rely on only two factors: (1) whether the petition serves a valid bankruptcy purpose; and (2) whether it is filed merely to obtain a tactical litigation advantage.[65] Most importantly, a valid bankruptcy purpose, at least in the Third Circuit, assumes a debtor in financial distress.[66]

As mentioned earlier, a funding agreement existed between LTL and J&J which ensured that J&J would provide funding for any settlement trust created out of the bankruptcy proceeding.[67] The Third Circuit considered the value of this financial backstop, estimated at $61.5 billion, and held that because J&J had agreed to fund the settlement trust, LTL was not a debtor in financial distress.[68]

The Third Circuit recognized the irony of this decision.

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62. *See id.* at 751 (determining that a preference to be subject to the Fourth Circuit's two-prong bad faith standard could not justify its filing in North Carolina).

63. *See id.* (listing the different parties who moved to dismiss LTL's petition as not filed in good faith as including the Official Committee of Talc Claimants, Arnold & Itkin LLP on behalf of talc claimants it represented, and two other law firms which also represented talc claimants).

64. *See id.* at 763 (holding that because LTL was not in financial distress it cannot show its petition served a valid bankruptcy purpose and was filed in good faith under 11 U.S.C. § 1112(b)).

65. *See id.* at 754 ("Valid bankruptcy purposes include 'preserv[ing] a going concern' or 'maximiz[ing] the value of the debtor's estate.'").

66. *See id.* ("Our precedents show a debtor who does not suffer from financial distress cannot demonstrate its Chapter 11 petition serves a valid bankruptcy purpose supporting good faith.").

67. *See id.* at 749 ("Ultimately, the restructuring created two new entities, LTL and New Consumer . . . . It also featured the creation of a Funding Agreement, which had Old Consumer stand in momentarily as the payee, but ultimately (after some corporate maneuvers) gave LTL rights to funding from New Consumer and J&J.")

68. *See id.* at 762 (finding that the value and quality of the funding agreement made it untenable to find that that LTL was in financial distress).

> J&J's triple A-rated payment obligation for LTL's liabilities, which it views as a generous protection it was never required to provide to claimants, weakened LTL's case to be in bankruptcy. Put another way, the bigger a backstop a parent company provides a subsidiary, the less fit that subsidiary is to file.[69]

The Third Circuit ultimately remanded with instructions to dismiss LTL's chapter 11 petition.[70]

LTL's chapter 11 petition was dismissed, and within only a matter of two hours and eleven minutes LTL filed a new chapter 11 petition in the District of New Jersey.[71] The new petition treated the Third Circuit's decision as a roadmap, and made a few significant changes in their filing: (1) the new LTL bankruptcy petition followed a termination of the 2021 Funding Agreement and executed a new 2023 Funding Agreement which only guaranteed financial funding upon the confirmation of a chapter 11 plan, eliminating the financial backstop that the Third Circuit had taken issue with; (2) assets of the subsidiary changed with the highly valuable Consumer Products Division no longer present in LTL's schedules; and (3) a trust funded in the amount of $8.9 billion on a net present value basis.[72] LTL additionally submitted a Debtor's Statement Regarding Refiling of Chapter 11 Case, which along with other statements filed with the court claimed that approximately 58,392 claimants were in support of the second bankruptcy filing.[73] The statement further claimed that

> Bankruptcy is the only forum in which future claims can be resolved and all these laudable goals can be realized . . . . [a]bsent

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69. *Id.* at 763.

70. *See id.* at 764 (stating that dismissing this case annuls the litigation stay).

71. *See In re* LTL Mgmt., LLC, 652 B.R. 433, 439 (Bankr. D. N.J. 2023) ("This Court entered an order dismissing the initial chapter 11 bankruptcy case on April 4, 2023 . . . Approximately two hours later, Debtor initiated the instant bankruptcy case . . . .").

72. *Litigation Update: LTL Management's Chapter 11 Bankruptcy*, FEDERALIST SOC'Y (May 11, 2023) (summarizing the differences between the original LTL filing of 2021, and the second LTL bankruptcy filing) [perma.cc/69VS-HDX8].

73. *See* Debtor's Statement Regarding Refiling of Chapter 11 Case at 2, *In re* LTL Mgmt., LLC, 652 B.R. 433 (Bankr. D. N.J. 2023) (No. 23-12825) (stating a belief that the second bankruptcy filing will "permanently, equitably and efficiently resolve all its current and future talc-related claims").

bankruptcy, the Debtor and the claimants would once again be subject to substantial cost, uncertainty and delay of litigating each claimant's case in the tort system. Future claimants would be at risk of receiving lower payments or no payments at all. And the talc litigation would continue for decades. Renewed litigation of talc claims in the tort system is in no parties interests and would untenable, unsustainable and inequitable.[74]

While LTL purports that this is the proper forum for an equitable outcome, the second bankruptcy filing has been faced with criticism. In an information brief, the Ad Hoc Committee of Certain Talc Claimants shared their views:

> Over the past eighteen months, hundreds of victims of J&J's talc products have died waiting for justice to be done and their cases to returned to the civil justice system for trials by juries of their peers. The Debtor's new filing, with its request to again stay all litigation against non-debtor J&J and other non-debtor defendants, is deliberately intended to forestall that return [of talc claims to the civil justice system for trials] – all to the mortal prejudice and sanctionable injustice of the talc victims.[75]

The second bankruptcy filing was dismiss on July 28, 2023, once again due to a lack of financial distress.[76] As stated by Judge Kaplan, "[s]imply put, the Debtor does not meet the more exacting gateway requirement implemented by the Circuit with respect to 'good faith' under 11 U.S.C. § 1112(b), which would allow LTL to take advantage of the tools available under the Bankruptcy Code to resolve its present and future talc liabilities."[77]

How did we get here? What inspired this type of bankruptcy maneuver, which uses a trust settlement mechanism to resolve mass tort claims? The answer is a white, flaky substance which transformed both bankruptcy and mass tort litigation.

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74. *Id.* at 4.

75. Informational Brief of the Ad Hoc Committee of Certain Talc Claimants Regarding Second Bankruptcy Filing by LTL at 2, *In re* LTL Mgmt., LLC, 652 B.R. 433 (Bankr. D. N.J. 2023) (No. 23-12825).

76. *See In re* LTL Mgmt., LLC, 652 B.R. 433, 448 (Bankr. D. N.J.) ("At the time of filing, LTL had assets valued at approximately $380 million, with approximately $14.5 million in cash . . . [and] most importantly, the Debtor was contractually entitled to a funding backstop . . . having a value approaching $30 billion – exceeding the projected near term and aggregate talc liability.").

77. *Id.* at 436.

III. Asbestos, Johns-Manville, and a Novel Use of the Bankruptcy System

The Texas Two-Step described above is not the first time that bankruptcy courts have used trust settlement mechanisms in order to handle mass tort cases.[78] This Part explores the history of this type of maneuver, which was developed following the asbestos crisis.[79]

This Part first discusses the history of asbestos and its use cases. Next, this Part will look at one of the most prominent manufacturers of asbestos, Johns-Manville, and the mass tort liability which lead to the organization's chapter 11 bankruptcy.[80] This Part concludes with a discussion revolving around the Manville Trust, which was a novel settlement trust created to handle the mass tort liability facing the company.[81]

A. The "Miracle Substance" with Deadly Consequences

Asbestos is a flaky, white or blue mineral which occurs naturally in rock and soil around the world.[82] The origins of asbestos use can be traced back to the Stone Age, with some believing that asbestos use began as early as 4000 B.C. for wicks

78. *See In re* Johns-Manville Corp., 68 B.R. 618, 621 (Bankr. S.D.N.Y. 1986) ("One of the most innovative and unique features of the Manville Plan of Reorganization (the 'Plan') is the establishment of two Trusts out of which all asbestos-related claims will be paid.").

79. *See id.* (discussing the settlement process which included a trust injunction which would payout claims of victims).

80. *See* Lester Brickman, *Asbestos Litigation & Tort Law: Trends, Ethics, & Solutions: On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 PEPP. L. REV. 33, 54 (2003) (stating that the 16,000 claims facing Johns-Manville resulted in the company declaring bankruptcy).

81. *See In re* Johns-Manville Corp., 68 B.R. at 621 (describing the Asbestos Health Trust which was initially funded with $815 million in cash, receivables and insurance proceeds in addition to annual infusions of $75 million per year).

82. *See* Daniel King, *History of Asbestos*, ASBESTOS.COM (May 24, 2022), (stating that asbestos occurs naturally on every continent in the world) [perma.cc/9SAM-3QZ2].

in candles.[83] Asbestos was introduced to the commercial market in the late-nineteenth century where it was endorsed as a "miracle substance" due to its wide range of uses.[84] Those uses ranged from automotive parts, tiling in buildings, and cement to a variety of textiles.[85] However, in the early twentieth century evidence began to emerge that this "miracle substance" came at a price for those mining and manufacturing asbestos and asbestos products.[86] In 1900, Dr. H. Montague Murray, a London physician, performed a post-mortem examination on a thirty-three-year-old man who was the last survivor of a group of ten men who worked in an asbestos-textile factory.[87] Much to his surprise, Dr. Murray found spicules of asbestos in the man's lung tissue.[88] From this finding, Dr. Murray established a presumptive connection between the man's occupation and the disease that killed him: asbestos.[89] Dr. Murray's finding occurred thirty years before a similar autopsy helped recognize asbestos lung disease in the United States.[90]

The first documented death from asbestosis, the chronic lung disease caused by inhaling asbestos fibers, appeared in medical literature in 1924 and resulted in an extensive investigation in the

83. *See id.* (describing archeological findings of debris and fibers dating back 750,000 years ago).

84. *See* Christopher F. Edley Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion Dollar Crisis*, 30 HARV. J. LEGIS. 383, 387 (1993) (describing the favorable endorsement asbestos received upon introduction due to its ability to withstand fire, corrosion, and acid, to be woven into textiles, to bind rockets together, and more).

85. *See* Daniel King, *Asbestos Products*, ASBESTOS.COM (Sep. 30, 2022) (demonstrating the wide use of asbestos in commercial and industrial products, ranging from brake pads to textiles resistant to heat and corrosive elements) [perma.cc/5D7F-RMM3].

86. *See* Edley, *supra* note 84, at 388 (showing the emergence of scientific literature regarding the risk of asbestos to asbestos workers began in the 1930s).

87. *See* PAUL BRODEUR, OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL 11 (1985) (discussing the examination of a man who worked for fourteen years in the carding room of an asbestos-textile factory).

88. *See id.* (describing the autopsy that helped establish modern knowledge of asbestosis, a potentially deadly disease which results from asbestos exposure).

89. *See id.* (establishing that the heavy scarring in the lungs was due to asbestos exposure and was significant enough to have deadly consequences for the first recorded victim of asbestosis).

90. *See id.* (illustrating the lack of investigation into asbestos-related diseases by parties within the United States).

United Kingdom.[91] Following the asbestosis death, British Parliament enacted legislation requiring safety measures such as exhaust ventilation and dust suppression in asbestos-textile factories, as well as instituting periodical medical examinations for workers in certain capacities within asbestos-textile industries.[92]

Although some of the adverse health effects of asbestos were known in the early twentieth century, it wasn't until the 1960s that asbestos-related diseases were fully understood.[93] There is a significant latency period associated with such diseases, which often require decades to pass before generating epidemiological evidence of the risks asbestos and asbestos products pose to humans.[94]

There was a lack of similar actions taken in the United States by both the government and manufacturers, which has prompted some to believe that senior executives of American asbestos producers took active steps to suppress knowledge of the risks associated with manufacturing asbestos in order to protect profits.[95] Of those manufacturers, Johns-Manville Corp. ("Johns-Manville") was one of the largest and notably took no efforts to improve manufacturing conditions.[96]

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91. *See id.* at 13 (describing the work of Dr. W.E. Cooke, an English physician, who performed a post-mortem examination of a woman who worked in an asbestos factory for thirteen years).

92. *See id.* (demonstrating the action taken in Britain to improve the conditions of asbestos factories following a year-long examination finding that more than 25% of asbestos workers examined in Britain showed evidence of pulmonary fibrosis).

93. *See* Malcolm Ross & Robert P. Nolan, *History of Asbestos Discovery and Use and Asbestos-related Disease in Context with the Occurrence of Asbestos Within Ophiolite Complexes*, *in* OPHIOLITE CONCEPT AND THE EVOLUTION OF GEOLOGICAL THOUGHT 447 (2003) (stating that asbestos-related diseases such as asbestosis, lung cancer, and mesothelioma weren't fully understood in their connection to asbestos until the 1960s).

94. *See* Edley, *supra* note 84, at 388 (describing the ten to forty years that it can take for asbestos-related diseases to emerge).

95. *See* BRODEUR, *supra* note 87, at 74 (concluding that for fifty years asbestos manufacturers were aware of the risks posed to workers and conspired to withhold this information).

96. *See* Peta Spender, *Blue Asbestos and Golden Eggs: Evaluating Bankruptcy and Class Actions as Just Responses to Mass Tort Liability*, 25 SYDNEY L. REV. 223, 226 (2003) (stating that from the 1920s until the 1970s, Johns-Manville was both the largest manufacturer and the largest supplier in the United States of asbestos products).

Regardless of any conspiracy or coverup of early detection of asbestos-related risks, the mass commercialization of asbestos products resulted in devastating outcomes. While asbestos comes in many forms and has been transformed into a variety of products, all forms of asbestos are carcinogenic to humans.[97] This makes mere exposure to asbestos a risk. The exact death toll for asbestos-related deaths is unknown,[98] but asbestos has continued its deadly legacy into the twenty-first century with over 39,000 Americans dying from asbestos-related diseases every year.[99]

B. Johns-Manville: Oh, How the Mighty Have Fallen

Johns-Manville's long history with the "miracle substance" asbestos traces back over 160 years to 1858.[100] Throughout the twentieth century, Johns-Manville dominated the United States domestic market and even saw rapid expansion abroad.[101] This domination resulted in significant profits. Between 1925 and 1973, Johns-Manville's annual sales increased from $40 million to over $1 billion.[102]

These profits, however, were not without consequence as Johns-Manville began facing asbestos-based litigation as early as

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97. *See Asbestos: Elimination of Asbestos-related Diseases*, WHO (Feb. 15, 2018) (explaining how both the main forms of asbestos, blue asbestos and white asbestos, as well as other less common forms can be cancer causing) [perma.cc/Z2E8-EN8G].

98. *See Mapping the Deadly Toll of Asbestos-State by State, County by County*, ASBESTOS NATION (2022) (stating that there is no known exact death toll due to asbestos) [perma.cc/Y7MG-FN2B].

99. *See id.* (estimating that over an 18-year period, from 1999 to 2017, between 236,981 and 277,654 Americans died from asbestos exposure).

100. *See* Matt Mauney, *Johns Manville*, ABESTOS.COM (2022) (tracing Johns-Manville's history with asbestos to 1858 when the company began manufacturing fire-resistant roofing) [perma.cc/WL68-3SHW].

101. *See* Craig Calhoun & Henryk Hiller, *Coping with Insidious Injuries: The Case of Johns-Manville Corporation and Asbestos Exposure*, 35 SOC. PROBS. 162, 164 (1988) (reporting Johns-Manville's statement in 1982 that they were the largest asbestos processor and the largest asbestos-cement manufacturer in the free world).

102. *See* Mark Kunkler, *The Manville Corporation Bankruptcy: An Abuse of the Judicial Process?*, 11 PEPP. L. REV. 150, 164 (1983) (describing Johns-Manville as a leader in the asbestos production and manufacturing industry and the company's growth to becoming the world's largest single producer of asbestos).

1933.[103] These early suits provided formal notice to the company of the asbestos-related health risks facing their workers. Notably, Johns-Manville settled each case.[104]

This initial litigation push was only the tip of the iceberg. Following the unionization of asbestos workers, there was a shift from individual workers filing claims to mass reporting of asbestos-related injuries.[105]

The pace of litigation against Johns-Manville increased rapidly throughout the decades, especially following the Fifth Circuit's opinion in a 1973 case, *Borel v. Fibreboard Paper Products Corp*.[106] In this opinion, the Fifth Circuit held that asbestos manufacturers could be held strictly liable for injuries resulting from asbestos exposure.[107] *Borel* provided a clear avenue for plaintiffs to recover from asbestos manufacturers and producers.[108]

Following *Borel*, the pace of litigation against Johns-Manville increased further.[109] In 1982, three cases were filed every hour of

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103. *See* Spender, *supra* note 96, at 226 (describing early litigation the company faced brought by eleven employees alleging injuries caused by exposure to asbestos).

104. *See id.* (describing the minutes of a Johns-Manville board of directors meeting on April 24, 1933, in which the settlement of the initial claims was discussed and it was determined that the settlement was contingent on the express condition that the plaintiffs' attorney's agreement to not bring similar claims against the company in the future).

105. *See id.* (noting how the presence of unions facilitated a mass-reporting of asbestos-related injuries which helped to develop the extensive epidemiological data, as well as provide access to lawyers who were gaining expertise in asbestos-related lawsuits).

106. *See* Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1081 (5th Cir. 1973) (reviewing a case brought by an industrial insulation worker who sued various manufacturers for a breach of duty in failing to warn of the dangers associated with handling asbestos).

107. *See id.* at 1103 (holding that the longstanding tort principle holding a person liable for the foreseeable harm caused by his own negligence applies to the manufacturer of products and implies a duty to warn of foreseeable dangers associated with the manufactured products which extends to all users and consumers as well as the workers involved in the manufacturing of said products).

108. *See* Kunkler, *supra* note 102, at 166 (indicating that workers prior to this decision had often been frustrated in attempts to obtain a remedy from state workman's compensations plans and how *Borel* provided a more successful alternative).

109. *See* Joshua M. Silverstein, *Overlooking Tort Claimants' Best Interests: Non-Debtor Releases in Asbestos Bankruptcies*, 78 UMKC L. REV. 1, 7 (2009)

the business day.[110] Johns-Manville was not alone in experiencing the influx of litigation; quickly the entire legal system was overwhelmed by complex cases.[111] As a result of near constant litigation, on August 28, 1982, Johns-Manville filed for reorganization under chapter 11 of the Bankruptcy Reform Act of 1978.[112]

C. The Creation of the Manville Trust

The Manville Plan of Reorganization was met with controversy, as Johns-Manville had sufficient financial resources to meet its existing obligations to current tort claimants and commercial creditors.[113] However, Johns-Manville forged ahead with this strategy as its management hoped to resolve all its asbestos obligations, including unknown future claims.[114]

The Johns-Manville reorganization plan was faced with the unique balancing act of providing relief to current asbestos victims, without exhausting the resources necessary to do so for future

(stating that by the early 1980s, Johns-Manville was a defendant in approximately 12,500 lawsuits, brought by over 16,000 plaintiffs with new parties filing claims at a rate of 425 per month).

110. *See* Spender, *supra* note 96, at 227 (describing reports of asbestos-related cases against Johns-Manville as resulting in over 16,500 cases outstanding against the company in 1982, with an average disposition cost of $20,000).

111. *See* Silverstein, *supra* note 109, at 10–11 (finding that the number of cases introduced complex aggregation and joinder issues, as well as having complications due to the long latency period and widespread use of asbestos resulting in questions not easily answered surrounding causation, proof, statute of limitations, and collateral estoppel).

112. *See* Spender, *supra* note 96, at 227 (stating that after a projected total asbestos liability of more than $1 billion at the time, Johns-Manville decided to restructure the company pursuant to the applicable bankruptcy statutes).

113. *See id.* at 228 (finding that there was a novel premise to this bankruptcy, as the company was not insolvent at the time of filing, but instead that the company was entitled to bankruptcy protections due to the continuing trends in asbestos litigation making it necessary to assess both present and future liability).

114. *See* Silverstein, *supra* note 109, at 11 (describing this tactic as creating an unusually large and complicated bankruptcy process in which unknown future claimants were considered as a part of the chapter 11 reorganization plan).

victims.[115] As such, the Manville Personal Injury Settlement Trust ("the Manville Trust" or "Trust") was established in 1988 as a part of the company's chapter 11 reorganization process.[116] This Trust balanced the interests of claimants and Johns-Manville, as the company was able to continue business operations and generate profits while financing the Manville Trust to provide compensation for victims of asbestos-related diseases.[117] The Manville Trust became the largest claims resolution mechanism in the country. The Trust accumulated approximately $3 billion in cash and Manville securities.[118]

The Manville Trust was created through a novel process which allowed the corporation "to provide a means of satisfying Manville's ongoing personal injury liability while allow[ing] Manville to maximize its value by continuing as an ongoing concern."[119] While the future claimants did not technically have claims associated with the ongoing personal injury liability, their consideration was justified through a finding of their status as "parties in interest" under § 1109(b) of the Bankruptcy Code.[120] The Bankruptcy Court then issued a channeling injunction, which

115. *See In re* Johns-Manville Corp., 36 B.R. 743, 744 (Bankr. S.D.N.Y. 1984) (detailing the need for accountability to future claimants who have a compelling interest for there to be a meaningful resolution to the Johns-Manville asbestos-related health problem).

116. *See* Frank J. Macchiarola, *The Manville Personal Injury Settlement Trust: Lessons for the Future*, 17 CARDOZO L. REV. 583, 584 (1996) (stating the Manville Personal Injury Settlement Trust was formed by the parties and the bankruptcy court to compensate present and future victims equitably).

117. *See id.* (finding that the Manville Trust helped to protect the corporation from financial and actual destruction through its radical use of bankruptcy protection).

118. *See A History of Asbestos and the Manville Trust Fund*, WASH. POST (Nov. 1990) (describing the initial funding of the trust, which has paid out more than $1.1 billion to settle more than 23,000 claims with an estimated 130,000 other claims pending) [perma.cc/L8V9-C6B3].

119. *See* Kane v. Johns-Manville Corp., 843 F.2d 636, 640 (2d Cir. 1988) (describing the purpose of the Manville Trust which, in order to be fulfilled, required the balancing of plaintiffs' interests with the ability for the company to continue in operation).

120. *See* Georgene M. Vairo, *Mass Torts Bankruptcies: The Who, the Why, and the How*, 78 AM. BANKR. L.J. 93, 101 (describing a motion in which other parties moved to appoint a legal guardian for future claims because despite their interests not qualifying as claims as defined by the Bankruptcy Code, they were still parties in interest).

channeled all asbestos-related personal injury claims to the Trust.[121]

The Manville Trust was designed to equitably compensate all asbestos personal injury victims and was funded by proceeds from Johns-Manville's settlements with insurers, stock of the reorganized Manville Corporation, and the Trust having the right to receive up to 20% of Manville's yearly profits.[122] However, in doing so, the Manville Trust established a mandatory process for individuals to go through to receive compensation for asbestos-related injuries. The terms of the Manville Trust required individuals with asbestos-related diseases to first try to settle their claims through settlement offers with the Manville Trust's representatives.[123] If a settlement was not reached, then the claimant was free to elect an alternative dispute resolution mechanism.[124] This was a completely novel process, which set the stage for the creation § 524(g).[125]

IV. The Creation and Protections of § 524(g)

The Manville Trust inspired the framework for a portion of the Bankruptcy Code, § 524(g). [126] This Part begins by describing the evolution of the Manville Trust into § 524(g), and the limitations of this code section. Next, this Part discusses the protections guaranteed to claimants in this codified version of the Manville

121. *See* Kane, 843 F.2d at 639 (allowing for the success of the Manville Trust as a claim resolution mechanism, as there would have been no protection from future tort lawsuits without this channeling injunction).

122. *See id.* at 640 (demonstrating the multiple sources of funding contributing to the Manville Trust, with the goal of compensating all future claimants).

123. *See id.* at 639 (creating a channeling injunction which ensured that asbestos claims could only be asserted against the Manville Trust and Manville's operating entities).

124. *See id.* at 640 (including mediation, binding arbitration, or traditional tort litigation with the claimant being able to collect from the Manville Trust the full amount of compensatory damages that were awarded but not punitive damages).

125. *See* 140 CONG. REC. 27,692 (1994) (statement of Rep. Jack B. Brooks) (stating that the procedure of § 524(g) is modeled on the trust injunction process from the Johns-Manville case).

126. *See id.* (proposing a process which would consider what was a central element of the Johns-Manville case: how to deal with future claimants).

Trust. These protections enable § 524(g) to be an equitable forum for mass tort claimants who were harmed by asbestos manufacturers.[127]

A. The Codification of the Manville Trust Process Through § 524(g)

Following the confirmation of the Johns-Manville bankruptcy plan, similarly situated asbestos companies hoped to establish a similar trust and channeling injunction mechanism.[128] Following controversy in both the courts and in Congress regarding the power of bankruptcy courts to issue channeling injunctions such as the one necessary for the Manville Trust to be successful, § 524(g) was enacted.[129] According to Congress, the goal of § 524(g) was to "strengthen the Manville . . . trust/injunction mechanisms and to offer similar certitude to other asbestos/trust injunction mechanisms that meet the same kind of high standards with respect to the rights of claimants."[130] This desire was in part due to the perceived benefits that all parties in the process received.[131] Benefits for victims of asbestos-related injuries include: the appointment of a fiduciary to the trust to represent interests of future claimants, the requirement that 75% of present claimants

127. *See id.* ("The Committee has approved . . . the bill in order to . . . similar certitude to other asbestos trust/injunction mechanisms that meet the same kind of high standards with respect to regard for the rights of claimants, present and future . . . .").

128. *See* Sander L. Esserman & David J. Parsons, *The Case for Broad Access to 11 U.S.C. § 524(g) in Light of the Third Circuit's Ongoing Business Requirement Dicta in Combustion Engineering*, 62 NYU ANN. SURV. AM. L. 187, 191 (2006) (describing several other asbestos companies attempting to enact a similarly funded trust into which all future claims would be directed through the channeling injunction process).

129. *See id.* (depicting the debate surrounding the channeling injunction and the need for Congressional action to stabilize the controversy).

130. *See* 140 CONG. REC. 27,692 (1994) (statement of Rep. Jack B. Brooks) (discussing the desire to create greater certitude regarding the validity of the trust/injunction mechanism through explicit requirements and exceptional precautions).

131. *See id.* (describing the enactment of the Manville Trust as being a creative solution benefiting present and future claimants as well as the corporation).

vote in favor of the bankruptcy plan and trust, and protections for future claimants.[132] For the corporation involved, they are able to ensure ongoing business was not hindered by doubts regarding future liabilities, and the ability to release third-party liability.[133]

B. The Protections in Place in § 524(g)

Currently, the language of § 524(g) only allows for companies faced with asbestos liabilities to benefit from the trust/injunction mechanism.[134] When such a company wishes to take advantage of § 524(g), they must meet the following criteria and determinations by the court:

> After notice and hearing, a court that enters an order confirming a plan of reorganization under chapter 11 may issue, in connection with such an order, an injunction in accordance with this subsection to supplement the injunctive effect of a discharge under this section.[135]

In other words, there must be a chapter 11 reorganization in order for the settlement trust mechanism to even be available to a business. Under this section, there must be a trust established that will assume the liabilities of a debtor named as a defendant in personal injury, wrongful death, or property damage actions for damages allegedly caused by the presence of or exposure to asbestos or products that contain asbestos.[136] The trust must be "funded in whole or in part by the securities of one or more debtors involved in [the chapter 11] plan and by the obligation . . . to make

132. *See* Esserman, *supra* note 128, at 189–90 (depicting procedures that are in place in § 524(g), which can be inferred to provide protections for victims of asbestos-related injuries).

133. *See* 4 COLLIER ON BANKRUPTCY ¶ 524.07 (16th ed. 2022) (describing procedures in place in § 524(g) that can be inferred to be beneficial for the corporations taking advantage of this bankruptcy proceeding).

134. *See* 11 U.S.C. § 524(g)(2)(B)(i)(I) (stating in plain language that this is a process for debtors who are named as a defendant in a personal injury, wrongful death, or property-damage actions seeking recovery for damages allegedly caused by asbestos or asbestos-containing products).

135. *Id.* § 524(g)(1)(A).

136. *See id.* § 524(g)(2)(B) (establishing the terms of the trust which would then allow for a channeling injunction to be ordered).

future payments, including dividends."[137] The trust must be entitled to become owner, upon certain contingencies, of a majority of the voting shares of each debtor, the parent corporation of any debtor, and a subsidiary of each debtor that is also a debtor in bankruptcy.[138]

The court must then make a series of determinations including: that there is a need for the trust injunction, that "a separate class or classes of the claimants whose claims are to be addressed by a trust described in clause (i) is established and votes, by at least 75 percent of those voting, in favor of the plan", and that the plan "provide[s] reasonable assurance that the trust will value, and be in a financial position to pay, present claims and future demands that involve similar claims in substantially the same manner."[139] The court must then appoint a legal representative for the purpose of protecting the rights of future claimants.[140]

Lastly, the court must determine that the injunction is fair and equitable to future claimants, in light of the benefits provided to each debtor or third party protected by the injunction.[141] Through these procedures, the interests of present and future claimants are adequately, and mandatorily, protected.

This process may seem familiar, because the Texas Two-Step is effectively an ad hoc version of the Manville Trust and similar trusts to come out of § 524(g), albeit without the asbestos litigation. Recall that § 524(g) only applies to asbestos-related liabilities, making the codified process unavailable to other industries.[142] That also means that the protections for claimants which are codified in § 524(g) are not available throughout the Texas Two-

137. *Id.* § 524(g)(2)(B)(i)(II).

138. *See id.* § 524(g)(2)(B)(i) (describing the requirements of a reorganization plan, including the assumption of liability, the funding, the ownership, and the use of assets and income for the organization).

139. *Id.* § 524(g)(2)(B)(ii).

140. *See id.* § 524(g)(2)(B)(ii)(V) (requiring a use of mechanisms that will provide reasonable assurance that the trust will value and be in a financial position to pay present and future demands that involve similar claims in substantially the same manner).

141. *See id.* § 524(g)(4)(B)(ii) (requiring that the court find that the plan was confirmed, and it is fair and equitable in accordance with the requirements of section 1129(b)).

142. *See id.* § 524(g) (permitting for trust injunction-based solutions for asbestos manufacturers and suppliers).

Step process.[143] For bankruptcies considered to be Texas Two-Steps, the debtors are able to enjoy the benefits of § 524(g) without the costs.[144]

For victims of mass torts whose claims are forced into the Texas Two-Step maneuver, there are no statutes requiring any protections such as the 75% voting threshold that must be cleared before victim classes can be deemed to have accepted a proposed plan under § 524(g). While some Texas Two-Step cases have appointed a future claimants' representative, there is no statutory requirement like there is for asbestos-related future tort claimants.[145] The trust created under § 524(g) is funded in whole or in part by the securities of at least one debtor involved in the chapter 11 case, with the § 524(g) trust being entitled to become owner of a majority of the voting shares of each debtor or parent company if the trust is not adequately funded.[146] There is no such protection for future funding required through the current Texas Two-Step process, instead judges have the discretion to determine the funding on a case-by-case basis.

V. Ending the Texas Two-Step Is Not Enough

There was legislation proposed which would put an end to the abusive Texas Two-Step.[147] However, this Note proposes that the bankruptcy system can become the most equitable place for mass tort cases to be handled through the expansion of § 524(g) which would provide necessary protections for the victims of mass tort

143. *See id.* (including protections for claimants such as required votes for plan approval and securities-based funding).

144. *See* Samir D. Parikh, *Bankruptcy Is Optimal Venue for Mass Tort Cases*, LAW360 (Feb. 28, 2022) (discussing the benefits for debtors including one convenient forum for resolving mass tort liabilities, an expediated court process, providing shareholders with leverage in settlement negotiations, third-party releases, and confining the liability to LiablityCo with monetary contributions coming from nondebtor parties) [perma.cc/8WYM-M4SD]

145. *See* 11 U.S.C. § 524(g)(4)(B)(i) (mandating a legal representative who will protect the rights of persons that might subsequently asserts demands of such kind).

146. *See id.* § 524(g)(2)(B)(i)(III) (requiring this type of protection which helps protect against future insolvency of the trust).

147. *See* H.R. 4777, 117th Cong. § 4 (2021) (ending the Texas Two-Step by requiring bankruptcy courts to dismiss a case if the debtor or a predecessor of the debtor was subject of a divisional merger).

cases while promoting the policy objectives of the Bankruptcy Code, including the efficiency of centralization, balancing the interests of all parties, effective reorganization, and perhaps most saliently maximizing the payout to creditors.

A. Prior Proposals for § 524(g) as a Reaction to the Texas Two-Step

Remember that the divisive merger is enabled by Texas state law,[148] with the newly formed business entity filing for bankruptcy in federal bankruptcy court.[149] Congress reacted to the Texas Two-Step, with the introduction of H.R. 4777 which purported to end the Texas Two-Step.[150]

H.R. 4777, known as the "Nondebtor Release Prohibition Act of 2021" was first introduced on July 27, 2021, and died on January 3, 2023.[151] The proposed bill had a key component which would have drastically impacted the Texas Two-Step.

The bill proposed a ban on divisional mergers through the insertion of a new section under § 524 which would read:

> On a request of a party in interest, and after notice and a hearing, the court *shall dismiss* a case under this chapter if the debtor or a predecessor of the debtor was the subject of, or was formed or organized in connection with a divisional merger . . . .[152]

148. *See* TEX. BUS. ORGS. § 1.002(55)(A) (enabling a divisional merger which is a crucial aspect to the Texas Two-Step).

149. *See* Francus, *supra* note 47, at 40 (explaining how once a business is divided under Texas state law that the liability-riddled company enters into bankruptcy proceedings in federal courts).

150. *See* H.R. 4777, 117th Cong. (2021) (introduced in order to prohibit crucial incentives of the Texas Two-Step such as a nondebtor release, an application of the automatic stay to a nondebtor, and allowing a company formed through a divisional merger to file for bankruptcy under chapter 11 of the Bankruptcy Code).

151. *See* S. 2497, 117th Cong. (2021) (introducing an identical bill on the same date in the Senate).

152. *See* H.R. 4777, 117th Cong. § 4 (2021) (prohibiting a key incentive of the Texas Two-Step, as companies would no longer be able to separate the entirety of their assets from the bankruptcy proceeding).

This proposed addition to § 524 went on to address other equivalent transfers which would be banned.[153] The divisional merger is a key step of the Texas Two-Step and without it, entities would not have the same incentives to enter into a chapter 11 proceeding.

On October 27, 2021, the House Judiciary Committee, led by Chairman Jerrold Nadler (D-NY) and Chairwoman of the Committee on Oversight and Reform Carolyn B. Maloney (D-NY), met to markup H.R. 4777.[154] Chairman Nadler and Chairwoman Maloney issued a joint statement prior to the markup which provided insight on the purpose driving H.R. 4777.[155]

> The bankruptcy process is supposed to provide a fresh start, not a license for the powerful—from the Sackler family to Johnson & Johnson—to deprive the people they've harmed of the rights and remedies they deserve. Yet, for far too long, nondebtor releases have become weapons used by corporate insiders to evade responsibility for their actions. This behavior is unconscionable and Congress must put an end to it. Next week, the House Judiciary Committee will markup our legislation, the Nondebtor Release Prohibition Act, which will ban this abusive practice—as well as a new tactic known as a 'divisional merger'— and restore fairness to our nation's bankruptcy system.[156]

153. *See id.* (prohibiting entities that have been created within the 10-year period preceding the date of the filing of the bankruptcy petition through processes which have the intent or foreseeable effect of separating material assets from material liabilities and allocating all or a substantial portion of those liabilities to the debtor).

154. *See* Press Release, Comm. on Oversight & Accountability Democrats, House Judiciary Committee to Markup Nondebtor Release Prohibition Act of 2021, House Committee on Oversight and Accountability Democrats (Oct. 22, 2021) (describing the legislation as prohibiting the use bankruptcy practices which have helped members of the Sackler family, the people and institutions which enabled Larry Nassar, and other who escape accountability through bankruptcy proceedings) [perma.cc/Z69A-LMQH].

155. *See id.* (characterizing the attempted use of a divisional merger by J&J as an abuse of the bankruptcy system).

156. *See id.* (depicting the Nondebtor Release Prohibition Act of 2021 as eliminating the use of nondebtor releases ensuring that victims get to decide how they want their cases handled in order to expand access to justice for those harmed by bad actors).

While Chairman Nadler and Chairwoman Maloney find the Texas Two-Step to be an abusive practice, some scholars challenge this perspective.[157] Samir D. Parikh testified on the topic before the Subcommittee on Federal Courts, Oversight, Agency Action, and Federal Rights on February 8, 2022.[158] While he characterizes the Texas Two-Step as unorthodox, he finds that there is "nothing illegal, inequitable, or fundamentally improper about it."[159] Parikh advocated against a blanket rule that would deny divisive-merger entities access to federal bankruptcy court, backed by the availability of checks and balances.[160]

The validity and morality of the Texas Two-Step is still being debated but there has already been one clear attempt by Congress to put a stop to this practice as the enactment of H.R. 4777 would have culled the ability to participate in a Texas Two-Step.

However, even if similar legislation to H.R. 4777 is enacted in the future, this should not be the end of the use of bankruptcy courts as a means to handle mass tort litigation. Bankruptcy courts could still be the optimal venue for mass tort proceedings through the use of the 11 U.S.C. 524(g) trust-injunction processes. This would require an expansion of this process to allow for the participation of other industries beyond asbestos manufacturers.

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157. *See Abusing Chapter 11: Corporate Efforts to Side-Step Accountability Through Bankruptcy Before the Subcomm. on Fed. Cts., Oversight, Agency Action, & Fed. Rts.,* 117th Cong. 6 (2022) (written statement of Samir D. Parikh, Professor of L., Lewis & Clark L. Sch.) (Feb. 8, 2022) [hereinafter *Abusing Chapter 11*] ("There is a fair amount of hyperbole surrounding mass tort bankruptcies. The reality is far less salacious . . . . To the extent that a divisive merger is an attempt to defraud creditors, bankruptcy courts have extensive experience to rectify this type of abuse.").

158. *See id.* (arguing that although there is a possibility for abuse, this should not preclude parties from pursuing a legitimate execution of a divisive merger which results in the commencement of a chapter 11 case).

159. *See id.* (noting that divisive mergers have been undertaken for decades and are legal in a number of states including Texas, Arizona, Pennsylvania, and Delaware).

160. *See id.* (looking to already existing checks such as attacking divisive mergers that seek to defraud creditors under fraudulent transfer law).

B. Lack of Alternative Venues

The primary goal for mass tort cases should be to provide deserving plaintiffs, both present and future, with the means to be made whole.[161] In order to assess if bankruptcy courts are the proper venue to reach this objective, it is important to consider potential alternatives.

1. Class Action Lawsuits

Rule 23 of the Federal Rules of Civil Procedure ("Rule 23") outlines the eligibility requirements for class action lawsuits. Under Rule 23, a class can be certified for the sole purpose of settlement,[162] which aligns with the primary objective of mass tort resolution.

Under Rule 23(a) the four threshold requirements that are applicable to all class action lawsuits are: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation.[163] Rule 23 does allow for subclasses to be created in order to manage the litigation and comply with the aforementioned requirements.[164]

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161. *See Abusing Chapter 11*, *supra* note 157, at 1 (finding the main objective to be recovery in a speedy timeline and consistent recoveries amongst similar claims).

162. *See* FED. R. CIV. P. 23 (permitting a class proposed for purposes of settlement which requires individual notice to all members who can be identified through reasonable effort).

163. *See* FED. R. CIV. P. 23(a)

> One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

164. *See* FED. R. CIV. P. 23(c)(4) ("When appropriate, an action may be brought or maintained as a class action with respect to particular issues."); *see also* Bates v. United Parcel Serv., 204 F.R.D. 440, 442 (N.D. Cal. 2001) (explaining that if the court divides the class into subclasses that each subclass must independently meet the requirements for maintenance of a class action).

The commonality component mandates that there are "questions of law or fact common to the class."[165] In other words, "the key inquiry is not whether the plaintiffs have raised common questions, 'even in droves,' but rather whether class treatment will 'generate common answers apt to drive the resolution of the litigations.'"[166] This results in a qualitative analysis, rather than a quantitative test, which necessitates only a single issue common to all members of the class.[167]

This commonality requirement is one aspect which may limit the ability for mass tort claimants to move forward as a class. In *Ebert v. General Mills*,[168] a proposed class of residents who claimed harm from ground-based hydrocarbon contamination all suffered in varying amount and to different degrees of harm.[169] The Eighth Circuit determined a class should not be certified because common issues did not predominate over the individual issues of each claimant.[170]

Once the initial Rule 23(a) threshold requirements are met, a class must show that the class action can be maintained under Rule 23(b).[171] There are three ways to maintain a class: (1) showing that prosecuting separate actions would create a risk of establishing incompatible standards of conduct or a risk that adjudications with respect to individual class members would be

165. *See* FED. R. CIV. P. 23(a)(2) (requiring a common contention, which if resolved can resolve an issue that is central to the validity of each claim).

166. *See* Abdullah v. U.S. Sec. Assocs., Inc., 731 F.3d 952, 957 (9th Cir. 2013) (emphasizing the importance of a common contention between claims which, once determined, could generate a common answer that could drive the resolution of the class action litigation).

167. *See In re* Am. Med. Sys., Inc., 75 F.3d 1069, 1079–80 (6th Cir. 1996) (finding that this requirement, along with the impracticability of joinder requirement, together form the underlying conceptual basis which supports class action lawsuits).

168. 823 F.3d 472 (8th Cir. 2016).

169. *See id.* at 476 (describing the same chemical substance, TCE, which was released with vastly different outcomes based on other factors such as length of exposure and proximity).

170. *See id.* at 481 (finding that while a single determination could impact the class as a whole in a broad sense, the claims were too highly individualized for a single determination to advance the efficiencies necessary and apply to the entire class).

171. *See* FED. R. CIV. P. 23(b) (dictating the three possibilities by which class actions can be maintained).

dispositive of the interests of the other members not parties to the adjudication or would substantially impair their ability to protect their interests; (2) indicating that judgments in individual lawsuits would adversely affect the rights of other members of the class; or (3) establishing that questions of law or fact common to the class predominate over questions affecting the individual members, and that a class action is superior to other methods available for adjudicating this controversy.[172]

Mass tort litigation does not fit into the first two categories due to the nature of the desired recovery: damages. The third category poses similar difficulties, as predominance may be difficult to demonstrate in mass tort cases due to individual stakes being high and existing disparities amongst class members.[173]

A significant case that sheds further light on the limited availability of class action lawsuits is *Amchem Products v. Windsor*.[174] *Amchem Products* concerned a proposed class of individuals adversely affected by past exposure to asbestos products.[175] This class was certified by the district court but on appeal the Third Circuit held that the class failed to satisfy the predominance standard derived from Rule 23(b)(3).[176] The intersection of the commonality requirement of Rule 23(a) and the predominance standard of Rule 23(b)(3) was critical to the Third Circuit's decision, which found that there was a distinction between mass torts involving a single accident and the type of mass tort being presented.[177] Uncommon questions regarding the

172. *Id.*

173. *See In re* Am. Int'l Grp. Sec. Litig., 689 F.3d 229, 240 (2d Cir. 2012) (stating that predominance can be difficult to demonstrate in mass tort cases, unlike consumer or securities fraud, due to the individual stakes being high and there being large disparities among class members).

174. 521 U.S. 591 (1997).

175. *See id.* at 597 (describing the class as consisting of hundreds of thousands, if not millions, of individuals who were affected by past exposure to asbestos products manufactured by one or more of 20 companies).

176. *See id.* at 610 (discussing the stringent standard which requires that the questions common to the class under Rule 23(a) predominate over other questions).

177. *See id.* at 609 (finding a difference between mass torts involving a single accident and mass torts in which individuals were exposed to different products, in different ways, over different periods, and for different amounts of time which results in vastly different degrees and types of harm).

different periods of exposure, injury types, etc. lead to factual differences that "translated into significant legal differences."[178]

Amchem Products together with other case law[179] has resulted in a general consensus amongst courts: most personal injury mass torts cases cannot satisfy the requirements of Rule 23.[180]

2. Multidistrict Litigation Issues

Multidistrict litigation ("MDL") created under 28 U.S.C. § 1407 is similarly inadequate to handle mass tort cases.[181] The multidistrict litigation process enables a streamlined process for pretrial matters.[182] Following the conclusion of pretrial proceedings, the cases are remanded to the districts where they were originally filed.[183] There are, however, limitations in the MDL process which make it a flawed solution to push mass tort

178. *See* Georgine v. Amchem Prods., 83 F.3d 610, 627 (3d Cir. 1996) (finding that the differences in exposure and impact will lead to disparate applications of legal rules including causation, comparative fault, and types of remedies making this type of case unsuitable for class-action certification).

179. *See, e.g.*, Ortiz v. Fibreboard Corp., 527 U.S. 815, 856–65 (1998) (creating further limitations on the applicability of class action lawsuits in the context of mass tort claims).

180. *See Abusing Chapter 11*, *supra* note 157, at 1 (discussing how bankruptcy courts are the optimal venue for mass tort cases in part because there is a lack of alternative venues due to limitations making class action lawsuits difficult to pursue in this context).

181. *See id.* (finding that despite multidistrict litigation being created in an effort to address the loss of Rule 23's applicability to mass tort cases, the multidistrict litigation process is not ideal for mass tort cases).

182. *See* 28 U.S.C. § 1407 (creating multidistrict litigation in which a civil action involving one or more common questions of fact are pending in different districts that they can be transferred to any district for coordinated or consolidated pretrial proceedings).

183. *See id.*

Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: *Provided, however,* That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

resolution forward.[184] Perhaps most significantly, MDL focuses on federal claims currently pending, generally setting both state claims and the claims of future victims outside of the process.[185]

Furthermore, it is important to recognize that the MDL process has a settlement focus.[186] This settlement focus is achieved with "scant appellate scrutiny or legislative oversight."[187] However, unlike the process within § 524(g), there are no statutory requirements guiding claims or the settlement process.[188] The settlements themselves, unlike the trust injunction of § 524(g), require no court approval.[189] The effect is a process that "live[s] in the shadows."[190]

> MDL lacks many of Rule 23's fundamental safeguards that ensure process integrity, and victims rarely receive their "day in court" through this process. Most troubling, MDL – which has repeatedly been described as a "black hole" – can be extremely protracted and is plagued by backroom deals, the details of which remain hidden from the public.[191]

In the case of Johnson & Johnson, most of the over 38,000 ovarian cancer actions were consolidated in federal multidistrict

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184. *See Abusing Chapter 11*, *supra* note 157, at 3 (acknowledging that while multidistrict litigation has resolved many complex disputes, it has evolved in a manner which undermines the resolution model for many mass tort cases).

185. *See* 28 U.S.C. § 1407 (allowing for civil actions pending in district courts to be transferred the multidistrict litigation process, which is limited to claims which have been able to enter the federal process which in some cases includes state law claims).

186. *See* Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71, 73 (2015) (introducing current judicial practices which feed systemic pathologies including dictatorial attorney hierarchies which fail to adequately represent the spectrum of claimants' diverse interests).

187. *See id.* (finding that there is a juxtaposition of power and impotence amongst the multidistrict litigation transferee judges, with the other side of the scale considering how judges can be relatively powerless to police the private settlements that they themselves encourage).

188. *See id.* at 72 (finding that transferee judges who usher cases toward settlement are rarely subjected to any appellate scrutiny or legislative oversight).

189. *See Abusing Chapter 11*, *supra* note 157, at 3 (finding that most courts do not undertake inquiries which review or assess the integrity of the settlement process or of the settlement itself).

190. *See id.* (discussing the lack of oversight in multidistrict litigation which differs from that of the bankruptcy process).

191. *Id.*

litigation in New Jersey prior to the Texas Two-Step maneuver.[192] The dismissal of LTL Management's chapter 11 will likely result in thousands of cases having no other option than to return to multidistrict litigation.

VI. Instead of Kicking Out, Expand the Reach of § 524(g)

The current abuses of the Texas Two-Step make it an inequitable process for mass tort victims, both current and future.[193] However, as demonstrated above, there is not an alternative venue that would ensure the same equitable result that a bankruptcy proceeding has been able to do for asbestos victims. The question then becomes: where should these non-asbestos related mass tort cases be handled?

Bankruptcy courts would be able to provide an outcome that protects the victims' top priority: damages which will allow them to be made whole.[194] The prioritization of protecting damages available to victims is in line with the previously mentioned policy objectives of the Bankruptcy Code, maximizing the payout to creditors and balancing the interests of all parties. There is already a process in place, albeit currently limited to asbestos claims, which allows for a trust-injunction process which protects victims, allows the continued operation and financing of the corporation, and has been used for decades to provide equitable remedies: § 524(g). Furthermore, this expansion would further other policy objectives of the Bankruptcy Code which include: (1) the efficiency of centralization; and (2) effective reorganization.

Removing the current limitations surrounding § 524(g), namely the asbestos industry requirement, would allow other industries and other industries' victims to access the same

192. *See In re* LTL Mgmt., LLC, 58 F.4th 738, 746 (3d Cir. 2023) (discussing the existing actions against J&J as well as the expectation for thousands more actions to be brought in decades to come).

193. *See* Jamie Smyth, *US Lawmakers Plan Bill to Outlaw "Texas Two-Step" Bankruptcy Ploy*, FIN. TIMES (Feb. 28, 2022) (discussing a belief that the Texas Two-Step is a corporate bankruptcy abuse and has become a "get out of jail free card" for many of the wealthiest companies faced with tort liability) [perma.cc/2N4J-2TU3].

194. *See Abusing Chapter 11*, *supra* note 157, at 1 (stating that bankruptcy as a venue can best ensure a meaningful recovery for plaintiffs).

equitable process. This can be done by replacing the industry specific criteria with the already existing requirements of § 524(g).[195] This would enable a more equitable process, which outweighs the drawbacks.

A. The Expansion of § 524(g)

The current language of § 524(g) contains the following language, which restricts the applicability of the section:

> The injunction is to be implemented in connection with a trust that, pursuant to the plan of reorganization—(I) is to assume the liabilities of a debtor which at the time of entry of the order for relief has been named as a defendant in personal injury, wrongful death, or property-damage actions seeking recovery for damages allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products . . . .[196]

In order to open this section of the Bankruptcy Code to mass tort victims of any industry, the statute should delete the portion of the statute which states "allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products . . . ."[197]

However, in order to ensure this process is opened up to mass tort victims and defendants who would benefit from a settlement trust via § 524(g), there needs to some framework to determine when this statute should apply.

The existing statute provides a framework for determining which asbestos manufactures qualify for the trust injunction process.[198] This framework could be applied broadly, to any industry, and it would adequately screen entities to determine if they could participate in this process. Furthermore, § 524(g) provides the following language:

> [S]ubject to subsection (h), the court determines that (I) the debtor is likely to be subject to substantial future demands for

195. *See* 11 U.S.C. § 524(g)(2)(B)(ii) (outlining requirements of a debtor, the type of claims, and the process which must be met in order for this type of trust injunction to be approved by a bankruptcy court).

196. *Id.* § 524(g)(2)(B)(i).

197. *Id.*

198. *See id.* § 524(g) (providing a trust settlement mechanism for asbestos manufacturers).

> payment arising out of the same or similar conduct or events that gave rise to the claims that are addressed by the injunction; (II) the actual amounts, numbers, and timing of such future demands cannot be determined; (III) pursuit of such demands outside the procedures prescribed by such plan is likely to threaten the plan's purpose to deal equitably with claims and future demands . . . .[199]

This provision could be applied to other industries in order to determine the applicability of § 524(g). With the current Texas Two-Step process, there is no such requirements regarding the potential for future demands, the types of demands facing the company, or the impact of any potential future demands. This also varies from multidistrict litigation, which does not consider future claims nor is there any standardized process for assessing existing claims.[200] However, by taking advantage of the already existing language which has vetted asbestos manufacturers in the past, the statute will be fully equipped to analyze companies attempting to settle mass tort claims in bankruptcy courts.

By applying the already existing framework to other industries, the benefits of § 524(g) can be opened to victims in a wide range of industries, while still ensuring that this process is one that makes sense for the claims facing the business.

B. The Benefits for Victims- Maximization of the Payout to Claimants and Ensuring Participation

Expanding § 524(g) would provide an equitable forum for the victims of mass torts and ensure that both present and future plaintiffs have the means to be made whole.

Under the protections of § 524(g), victims can be sure that there will not be widely divergent recoveries.[201] With individual tort claims, there are a number of factors which could, and often do, lead to massive discrepancies in how different victims are

199. *Id.* § 524(g)(2)(B)(ii).

200. *See Abusing Chapter 11*, *supra* note 157, at 3 (describing MDL as streamlining existing pretrial matters as a stop along the path to resolution).

201. *See id.* at 4 (describing processes which enables this lack of widely divergent recoveries such as allowing victims to vote on the valuation, and the judge determining the total value of all claims).

compensated for similar injuries.[202] In Samir D. Parikh's statement before the Subcommittee on Federal Courts, Oversight, Agency Action, and Federal Rights he explained how "[s]ome victims may secure enormous recoveries through jury trials; others will receive nothing even though all these claims emerge from a similar nucleus of facts. This litigation option is slow, highly speculative, and resource intensive."[203]

However, when bankruptcy courts are used to handle mass tort cases the courts are authorized to identify claims and estimate the value of the claims. Furthermore, victims are allowed to participate in this process and advocate for the valuation they believe is just.[204] Victims are integral to this process, with there being a statutory requirement that in order for the bankruptcy plan to be approved, at least 75% of the class of claimants must vote affirmatively.[205] Furthermore, the process is subjected to mandated court reviews.[206]

This process ensures that victims have a voice in the settlement process. Additionally, there are clearly defined rights and processes in place which allow victims to participate and protect their own rights.

Other protections in § 524(g) ensure adequate funding for the settlement trust through requirements that the trust is funded by the securities of one or more of the debtors involved in the plan and that the trust will operate through mechanisms which provide reasonable assurance that the trust will value and be in a financial position to pay present claims and future demands in substantially

202. *See id.* at 1 (stating that when mass tort cases are resolved through jury trials across the country that similar claims can result in vastly different outcomes).

203. *Id.* at 2.

204. *See id.* at 4 ("Bankruptcy allows these creditors to vote on whether they believe that the debtor's proposal is the best offer they can secure. In fact, victims – as a collective – could choose to reject the debtor's offer.").

205. *See* 11 U.S.C. § 524(g)(2)(B)(ii)(IV)(bb) (requiring a class of claimants whose claims are to be addressed by the trust to be established and necessitating 75% of those voting to vote in favor of the plan for the plan to be confirmed).

206. *See id.* § 524(g) (outlining the procedures that must be met in order for a successful plan to be confirmed).

the same manner.[207] Additionally, this process provides assurances that the entity responsible will keep functioning,[208] which is necessary to provide money into the trust which will be used to pay both present and future victims.

This sentiment was expressed by the Official Committee of Talc Claimants ("Talc Claimants") regarding the Johnson & Johnson Texas-Two Step. In a reply brief in the original LTL bankruptcy filing the Talc Claimants stated that:

> LTL's emphasis on § 524(g) under-scores the evasion [of Bankruptcy Code requirements]. Section 524(g)(2)(B)(i)(II) requires trusts to be funded with "securities of the [debtor]," including rights to "dividends." "In essence, the reorganized company becomes the goose that lays the golden egg by remaining a viable operation and maximizing the trust's assets to pay claims." Combustion Eng'g, 391 F.3d at 248 (citing 140 Cong. Rec. S4521-01, S4523 (Apr. 20, 1994) (Sen. Heflin)). Had Old JJCI entered bankruptcy, any trust would have been funded with securities of JJCI—an actual, productive goose. By making LTL the debtor, J&J swaps in a different goose—one incapable of producing eggs, that at most can assert contractual rights against another goose outside bankruptcy.[209]

This perfectly encapsulates the difference in funding available to victims in a Texas Two-Step compared to a § 524(g) proceeding. The proposed legislation, H.R. 4777, would put an end to the ability to swap the metaphorical geese. Instead, if § 524(g) were expanded beyond asbestos liability, the defendant entity would have to enter into chapter 11 bankruptcy and fund the trust. The Talc Claimants further commented that "LTL's reliance on § 524(g) only underscores how the restructuring deprived talc creditors of the equity in a real company that § 524(g) would otherwise require."[210]

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207. *See id.* § 524(g)(2)(B) (requiring for the trust to be funded by securities of one or more debtors, and that the trust is to be entitled upon specified contingencies to a majority of the voting shares).

208. *See* Czyzewski v. Jevic Holding Corp., 580 U.S. 451, 455 (2017) (describing a chapter 11 as allowing a debtor and creditor to negotiate a plan that will govern the distribution of assets and often keeps the business operating as a going concern).

209. Reply Brief for Appellant Official Committee of Talc Claimants at 6, *In re* LTL Mgmt., LLC, 58 F.4th 738 (3d Cir. 2023) (No. 22-2003).

210. *See id.* at 22 (believing that the "high standards" and "explicit requirements" seen in Johns-Manville which are now encompassed in § 524(g) are not upheld in J&J's Texas Two-Step).

The funding-based assurances are not the only way in which future victims are considered. Within § 524(g) is a statutorily mandated advocate as a part of the process, whose purpose is to protect the rights of persons who might subsequently assert demands which would be paid by the trust.[211] This enables future victims to have more than just access to the means to be made whole; it also ensures that there they have a voice in the process.

Victims are further able to benefit from this process as they will experience a shorter timeline and reduced legal fees.[212] This process also eliminates much of the guesswork that exists in other potential forums such as MDL.[213]

C. The Furtherance of Other Policy Objectives of the Bankruptcy Code

Additional policy objectives of the Bankruptcy Code include the efficiency of centralization as well as an effective reorganization.[214] One purpose of all bankruptcy law is to provide a collective forum for sorting out the rights of various claimants against the debtor.[215] The expansion of the § 524(g) would allow for exactly that. This process would consolidate all present and future

211. *See* 11 U.S.C. § 524(g)(4)(B)(i) ("[A]s part of the proceedings leading to issuance of such injunction, the court appoints a legal representative for the purpose of protecting the rights of persons that might subsequently assert demands of such kind . . . .").

212. *See Abusing Chapter 11*, *supra* note 157, at 4 (finding that mass tort cases handled in bankruptcy courts experience a speed premium).

213. *See id.* (finding that the multidistrict litigation process lives in the shadows, with settlement not requiring court approval, and including confidentiality agreements).

214. *See* Lockhart, *supra* note 9, § 2 ("[T]he purpose of Chapter 11 is rehabilitation . . . the rehabilitation of which requires an ongoing business . . . .").

215. *See* Thomas H. Jackson, *Of Liquidation, Continuation, and Delay: An Analysis of Bankruptcy Policy and Nonbankruptcy Rules*, 60 AM. BANKR. L.J. 399, 402–03 (1986) (discussing how there is a need for bankruptcy law to constrain individual debtors in order to ensure cooperation in order to avoid the "common pool" problem in which individuals race to have their claims settled first resulting in a shrinking of the pie available for equitable distribution).

actions through the injunction issued in accordance with § 524(g)(1)(B).[216]

Furthermore, this process would allow for effective reorganization for business entities. An objective of a chapter 11 reorganization is to preserve the going concern of the entity, which helps to incentivize business entities to participate in the process.[217] A chapter 11 bankruptcy is a necessary prerequisite for § 524(g),[218] and with the expansion of § 524(g) there would be incentives for both businesses and victims to engage in this process.

D. Potential Drawbacks, Why They Are Outweighed

The use of the bankruptcy system to handle mass torts has been critiqued, with concerns resolving around a loss of autonomy for victims, as well as a lack of accountability for perpetrators.

Concerns of a loss of autonomy for victims may fail to consider the substantial role victims play in the voting process. Without victim approval, the bankruptcy plan will not be confirmed.[219] While there is not the same day in court that individual litigation may provide, this holds true for any consolidation of tort claims.[220] Despite this, victims still get to be an active part of the settlement process ensuring that the outcome addresses their own concerns and desires.

The second concern, a lack of accountability for perpetrators, would be less present in this forum than in the Texas Two-Step. There would be no splitting of companies, and rather the entity itself would have to file for chapter 11 bankruptcy. Furthermore,

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216. *See* 11 U.S.C. § 524(g)(1)(B) (mandating requirements for the injunction, the trust created, and the type of debtor who is eligible under this provision).

217. *See* HOWARD, *supra* note 23, at 731 (describing how a chapter 11 can come in and assist a struggling business and preserve the value of the entity).

218. *See* 11 U.S.C. § 524(g)(1)(A) ("After notice and hearing, a court that enters an order confirming a plan of reorganization under chapter 11 may issue . . . an injunction in accordance with this subsection . . . .").

219. *See id.* § 524(g)(2)(B)(ii)(IV)(bb) (requiring a class of claimants whose claims are to be addressed by the trust to be established and necessitating 75% of those voting to vote in favor of the plan for the plan to be confirmed).

220. *See Abusing Chapter 11*, *supra* note 157, at 1 (stating that the multidistrict litigation process does not allow for a day in court).

individuals could be held responsible outside of this process,[221] allowing for further accountability to be sought.

VII. Conclusion

Bankruptcy courts could become the most equitable forum for mass tort litigation through the expansion of § 524(g). Mass tort defendants would be able to benefit from various chapter 11 components and mass tort victims would be ensured clearly defined rights and means of participation in the settlement process. These clearly defined rights and means of participation would not be available in other alternative venues, making bankruptcy courts the optimal venue to protect the rights of present and future victims.

221. *See* 11 U.S.C. § 524(g)(1)(B) (defining the scope of the injunction as enjoining legal action for the purpose of directly or indirectly collecting payment with respect to any claim or demand subject to the plan of reorganization, which would not include the pursuit of any criminal charges or other forms of legal action).