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Johnson & Johnson's Dance With Bad Faith: A Look at How Large Corporations Utilize the Bankruptcy Code to Avoid Liability From Mass Tort Claims

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JOHNSON & JOHNSON'S DANCE WITH BAD FAITH: A LOOK AT HOW LARGE CORPORATIONS UTILIZE THE BANKRUPTCY CODE TO AVOID LIABILITY FROM MASS TORT CLAIMS

ABSTRACT

Since Congress enacted the current Bankruptcy Code in 1978, large corporations have strategically used bankruptcy law to evade liability in mass tort claims. This Note examines three case studies illustrating such attempts. The first case involves Johnson & Johnson, which tried to use the so-called "Texas Two-Step" maneuver to circumvent liability for 38,000 pending talc-related lawsuits linked to injuries caused by its well-known Baby Powder. The second case is the Purdue Pharma bankruptcy. Purdue Pharma, the pharmaceutical manufacturer responsible for creating OxyContin, faces thousands of claims for strict liability, negligence, and failure to warn. The issue here is whether the Sackler family, in exchange for high contributions to the company's Chapter 11 plan funding agreement, can receive third-party protections from liability. The third case involves 3M, which attempted to put its subsidiary, Aearo, into bankruptcy to resolve hundreds of thousands of pending lawsuits for hearing loss caused by defective combat earplugs. Bankruptcy courts must analyze the immediacy of these companies' financial distress, which may be granted protection under their respective Chapter 11 plans, and whether each company's filings were made in good faith. Additionally, bankruptcy judges must determine whether they have the authority to grant such protections. This Note argues that these bankruptcy strategies must be dismissed as bad faith filings and further asserts that a solution protecting tort claimants and providing amended legislation is required.

INTRODUCTION

In October 2021, Johnson & Johnson faced more than 38,000 individual lawsuits related to its well-known talc-based Baby Powder.[1] Yet, they were all paused. Why? Bankruptcy. Bankruptcy law was created to discharge and provide a fresh start to the "honest but unfortunate debtor."[2] Bankruptcy dockets have seen an eclectic array of debtors, ranging from small family-owned businesses to large corporations to notable persons and entities, such as the town of Mammoth Lakes in California, rapper 50 Cent, and Rudy

1. *In re* LTL Mgmt., LLC, 637 B.R. 396, 401 (Bankr. D.N.J. 2022).

2. *Process - Bankruptcy Basics,* U.S. CTS, https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/process-bankruptcy-basics (last visited Apr. 17, 2024) [hereafter *Bankruptcy Basics*].

Giuliani.[3] Filing for bankruptcy can be a significant turning point, either saving a business or a home or, in the case of Johnson & Johnson, operating as a tactical maneuver to evade liability in mass tort claims. When Congress adopted the current Bankruptcy Code in 1978, it likely did not anticipate corporate debtors using it in such a manner, but many familiar names have used bankruptcy courts as fora to remedy mass litigation, including the Boy Scouts of America, USA Gymnastics, the Catholic Church, and, of course, Johnson & Johnson.[4]

This Note will first focus on large corporations' use of bankruptcy as a legal strategy to avoid mass tort litigation. Specifically, the strategy is categorized as a "divisive merger" by the Texas Business Organizations Code, or as headlines have nick-named it, the "Texas Two-Step."[5] The maneuver allows a parent corporation to separate and pass off assets and liabilities, including pending litigations, to a newly formed subsidiary.[6] Subsequently, the new entity files for bankruptcy, allowing the parent company to continue operations without interference from the legal battles inherited by the subsidiary.[7] Johnson & Johnson is this divisive merger's most recent and well-known dance partner. In a matter of days, the parent company created a new subsidiary, LTL Management LLC, dedicated to housing the thousands of civil suits knocking on Johnson & Johnson's front door.[8] LTL filed for bankruptcy in late 2021, pausing all pending proceedings and leaving victims and their families in a two-year waiting room.[9]

However, the Texas-Two step is not the only creative move that debtors and their attorneys have taken to avoid mass litigation. This Note will compare Johnson & Johnson's divisive merger strategy with Purdue Pharma and the Sackler family's third-party release maneuvers. Additionally, this Note will explore 3M's unsuccessful attempt to extend protection under

3. *See* Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 5 (1995); Louis Sahagun, *Mammoth Lakes Files for Bankruptcy over $43-Million Judgment,* L.A. TIMES (July 2, 2012, 12:00 AM), https://www.latimes.com/local/la-xpm-2012-jul-02-la-me-mammoth-lakes-20120703-story.html; Simon Hattenstone, *50 Cent on Love, Cash and Bankruptcy: 'When There Are Setbacks, There Will Be Get-Backs'*, THE GUARDIAN (May 4, 2020, 1:00 AM), https://www.theguardian.com/music/2020/may/04/50-cent-on-love-cash-and-bankruptcy-when-there-are-setbacks-there-will-be-get-backs; Luc Cohen, *Giuliani Seeks Bankruptcy After $148 Million Judgment in Defamation Case*, REUTERS (Dec. 21, 2023, 2:06 PM), https://www.reuters.com/legal/giuliani-seeks-bankruptcy-after-148-mln-judgment-defamation-case-filing-2023-12-21/.

4. *See In re* Boy Scouts of Am., 642 B.R. 504 (Bankr. D. Del. 2022); *In re* USA Gymnastics, 624 B.R. 443 (Bankr. S.D. Ind. 2021); *In re* Diocese of Buffalo, N.Y., 623 B.R. 354 (Bankr. W.D.N.Y. 2020); *In re* LTL Mgmt., LLC, 637 B.R. at 396.

5. TEX. BUS. ORGS. CODE ANN. §§ 10.003(1), (3); Akiko Matsuda, *Texas Two-Step Bankruptcies Carry On Despite Setbacks*, WALL ST. J. (Sept. 20, 2023, 8:05 PM), https://www.wsj.com/articles/texas-two-step-bankruptcies-carry-on-despite-setbacks-80733a51.

6. TEX. BUS. ORGS. CODE ANN. §§ 10.003(1), (3).

7. *Id.*

8. *In re LTL Mgmt.*, 637 B.R. at 401–02.

9. *Id.*

Aearo's bankruptcy case. The Sackler family—who founded and owned Purdue Pharma, the notorious pharmaceutical manufacturer responsible for creating OxyContin—played a "special role" in igniting the opioid epidemic.[10] By 2001, lawsuits against Purdue Pharma for strict liability, negligence, and failure to warn flooded court dockets, and, in 2014, individual members of the Sackler family were named as defendants.[11] The Sackler family used Purdue Pharma's bankruptcy filing as protection. Likewise, 3M, Aearo's parent company, sought similar refuge under Aearo's bankruptcy case from the mass influx of claims arising from faulty earplugs that caused hearing damage.[12] 3M is yet another example of a large, solvent corporation wanting to use the bankruptcy process to settle thousands of claims.

From asbestos to the opioid epidemic, mega-corporations have sought refuge from liability by filing for Chapter 11, capitalizing on the temporary protection of the automatic stay while consolidating the claims to be discharged under the Bankruptcy Code. At first blush, this approach appears to be an effective and efficient way to ensure that all victims are paid equitably upon distribution under the plan—but only when done in good faith. However, this Note will argue that this strategy, when done in bad faith, provides not only grounds for dismissal under Section 1112(b) of the Bankruptcy Code but also qualifies the dishonest debtor to be banned from future filings.[13]

Part I of this Note will detail important bankruptcy statutes and rules, including the automatic stay provision, and explain the intricacies of the Texas Two-Step maneuver. Part II will address a case study of Johnson & Johnson and its use of the Texas Two-Step to avoid litigation. Part III shifts to a study of Purdue Pharma and the Sackler family's attempts to evade liability through non-consensual third-party releases. Part IV will cover Aearo's bankruptcy filing and request for a supplemental stay to extend liability protection for pending tort litigation to its parent company, 3M. Part V will argue that Johnson & Johnson's use of the Texas Two-Step maneuver is an indication of a bad-faith bankruptcy filing and advocates not only for the dismissal of the case under Section 1112(b) of the Bankruptcy Code but also for the imposition of a temporary ban on the company for future filings.

10. Patrick Keefe, *The Sackler Family's Plan to Keep Its Billions*, NEW YORKER, (Oct. 4, 2020) https://www.newyorker.com/news/news-desk/the-sackler-familys-plan-to-keep-its-billions.

11. *See* Wethington v. Purdue Pharma LP, 218 F.R.D. 577 (S.D. Ohio 2003) (plaintiffs claimed that Purdue Pharma engaged in misleading marketing practices, knew of the drug's harmful nature, and was therefore liable for the harm caused by the addictive drug and for failing to properly warn); *In re* Purdue Pharma, L.P., 635 B.R. 26, 49 (Bankr. S.D.N.Y. 2021).

12. *See In re* Aearo Techs. LLC, 642 B.R. 891 (Bankr. S.D. Ind. 2022).

13. *See* 11 U.S.C. § 1112(b).

I. BACKGROUND OF U.S BANKRUPTCY LAW

A. CHAPTER 11 & THE AUTOMATIC STAY

In the 1970s, with fiscal crises looming large and bankruptcy on "the front burner," Congress "undertook substantial, system-wide reform" by enacting the Bankruptcy Reform Act of 1978, commonly known as the Bankruptcy Code.[14] Bankruptcy was, and still is, widely used, as it "hit the magic one million mark" in 1996, sparking the creation of additional amendments and reforms.[15] America was changing, credit card debt was rising, and bankruptcy became the glowing exit sign above the door of insolvency. However, the "world in which bankruptcy laws are made has shifted dramatically" since the creation of the Bankruptcy Code, and bankruptcy law is continuing to be used in new and innovative ways.[16]

The Bankruptcy Code now provides six individual and unique types of cases, which include Chapter 7, Chapter 9, Chapter 11, Chapter 12, Chapter 13, and Chapter 15.[17] Chapter 11 bankruptcy cases, entitled "Reorganization," are commonly filed by "commercial enterprises that desire to continue operating a business and repay creditors concurrently through a court-approved plan of reorganization."[18] Chapter 11 filings are unique because they allow a business to continue operating as a going concern while restructuring its debts.[19] The underlying hope is that the "failing business [will] be reshaped into a successful operation."[20] Some companies that file under Chapter 11 reemerge "stronger than ever," and some, like Enron and the Lehman Brothers, do not come back at all.[21]

An important aspect of bankruptcy law that makes filing significantly more appealing to debtors is the protections afforded by an automatic stay.[22] The automatic stay acts as a shield, locking the parties in place, freezing legal proceedings, and preventing creditors from pursuing collections during the reorganization process.[23] Beyond temporarily averting foreclosures, evictions, and utility disconnections, the automatic stay also pauses any civil

14. Elizabeth Warren, *The Changing Politics of American Bankruptcy Reform*, 37 OSGOODE HALL L. J. 189, 190 (1999).

15. *Id.* at 195.

16. *Id.* at 204.

17. *Bankruptcy Basics*, *supra* note 2.

18. *Id.*

19. *Chapter 11 - Bankruptcy Basics,* U.S. CTS, https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics#:~:text=A%20case%20filed%20under%20chapter,court%20approval%2C%20borrow%20new%20money., (last visited June 4, 2024).

20. Elizabeth Warren & Jay L. Westbrook, *The Success of Chapter 11: A Challenge to the Critics*, 107 MICH. L. REV. 603, 604 (2009).

21. Adam Hayes, *8 Bankrupt Companies That Came Back*, INVESTOPEDIA (June 2, 2020), https://www.investopedia.com/articles/personal-finance/051115/7-bankrupt-companies-came-back.asp.

22. *See* 11 U.S.C. § 362.

23. *Id.*

proceedings against the debtor, including mass tort claims.[24] For example, the automatic stay will provide its shield if the debtor files for Chapter 11 and has 38,000 pending civil suits for cancer-causing talc liability.[25] When utilized in good faith, the automatic stay provides valuable time for the debtor to organize their recovery plan. However, when abused, it appears more like a free pass to evade court appearances and paying damages.

When imagining a typical debtor filing for bankruptcy, one would probably envision piles of outstanding bills and an insolvent debtor unable to pay them. However, insolvency does not equal bankruptcy. The Bankruptcy Code does not require the debtor to be insolvent at the time of filing because the overarching goal of bankruptcy law is to facilitate the debtor's rescue, recovery, and reorganization.[26] The absence of an insolvency requirement underscores bankruptcy's role as a proactive measure; it acts as a lifebuoy, offering support to debtors struggling to navigate financial challenges. However, a bankruptcy court may dismiss a case, specifically a Chapter 11 petition, "for cause" under Section 1112(b) of the Bankruptcy Code, which provides a list of failures and abuses for which dismissal is proper, such as "gross mismanagement of the estate" and "failure to comply with an order of the court."[27] Courts have held that "Chapter 11 imposes a good-faith obligation" and that "bad faith" filings—such as filing for the sole purpose of avoiding litigation or as a litigation tactic—although not included in Section § 1112(b)'s enumerated list, may still serve as "cause" for dismissal.[28]

Mass tort litigation is characterized by numerous individual claims arising from a common harm, such as sexual abuse, asbestos exposure, or drug addiction.[29] For example, the Catholic Church of Buffalo, New York, faced more than 900 individual claims for sexual abuse.[30] When a bankruptcy is discharged, Section 524 of the Bankruptcy Code allows a debtor to resolve current and future mass tort liabilities by establishing and funding a trust from which such claims are to be paid.[31] This mechanism benefits not only present claimants but also future claimants who have not yet come forward or discovered their developing injuries.

B. TEXAS TWO-STEP

The Texas Two-Step has emerged recently as a strategic method for steering mass litigation into bankruptcy courts. Large corporate debtors have

24. *See id.* § 362(a)(1).
25. *See id.*
26. *See id.* § 109.
27. *See In re* SGL Carbon Corp., 200 F.3d 154, 162 (3d Cir. 1999); 11 U.S.C. § 1112(b).
28. *See In re SGL Carbon Corp.*, 200 F.3d at 160.
29. *See In re* Diocese of Buffalo, N.Y., 633 B.R. 185, 188 (Bankr. W.D.N.Y 2021).
30. *Id.* at 188.
31. 11 U.S.C. § 524(g).

attempted to settle mass lawsuits in this manner, which allows them to utilize the benefits of bankruptcy while shielding their corporate parent from losing value.[32] The genesis of the Texas Two-Step dates back to the enactment of the Texas Business Organizations Code (BOC) in 2003, with mandatory application starting in 2010.[33] The BOC applies to all businesses incorporated under the laws of Texas, regardless of their formation date, and consolidates into one code provisions from other business-related statutes, including the Texas Business Corporation Act.[34] The BOC broadly defines a merger as not only the *combination* of entities but also as "the *division* of a domestic entity into two or more new domestic entities," ultimately laying the foundation for the divisive merger.[35] To understand the intricacies of this legal maneuver, it is crucial to recognize that, according to the BOC, a parent company's creation of a new subsidiary is considered a "merger."

In the initial phase of the Texas Two-Step, the parent company executes a divisive merger, splitting it into two separate entities.[36] Then, as required by Texas law, the parent allocates assets and liabilities between itself and the newly formed subsidiary.[37] Once the merger takes effect, the BOC allows for proceedings, assets, and liabilities, including pending mass tort claims, to be vested in the newly formed entity.[38] Texas law further provides that each party of the merger is not liable for the debts of the other party.[39] The second stage of the Texas Two-Step occurs when the newly formed company, now carrying prescribed liabilities and pending litigation, files for bankruptcy.[40] This strategy protects the parent company from creditors and tort claimants attempting to reach its assets, allowing the business to maintain normal operations. It is important to note the existence of a "funding agreement," typically established between the parent and its new subsidiary, which "purports not to diminish the recovery which creditors would have received had the divisive merger not occurred."[41] Whether the funding agreement actually contains sufficient and equitable funds for recovery "goes to the heart of the controversy."[42]

The combination of the divisive merger and filing for bankruptcy provides large corporations facing mass tort litigation with a clever defense

32. *See In re* LTL Mgmt., LLC, 637 B.R. 396, 425–26 (Bankr. D.N.J. 2022).

33. *Business Organizations Code FAQs*, TEX. SEC'Y OF STATE, https://www.sos.state.tx.us/corp/bocfaqs.shtml (last visited June 4, 2024).

34. *Id.*

35. TEX. BUS. ORGS. CODE ANN. § 1.002(55)(A) (emphasis added).

36. *See* Matsuda, *supra* note 5.

37. TEX. BUS. ORGS. CODE ANN. §§ 10.003(1), (3).

38. *Id.* § 10.008.

39. *Id.*

40. *See* Norman N. Kinel, *The "Texas Two-Step" Firestorm: This Is No Dance!*, SQUIRE PATTON BOGGS (Feb. 21, 2022), https://www.restructuring-globalview.com/2022/02/the-texas-two-step-firestorm-this-is-no-dance/.

41. *Id.*

42. *Id.*

strategy, which can block tort claimants from accessing the parent's assets and receiving their day in court.[43] A company can incorporate in Texas merely to utilize the available law and to create a divisive merger, but where is the line drawn between doing so in good or bad faith? Courts are aware that they must uphold good faith for bankruptcy filings, and to do so, they look to "whether the petition serves a valid bankruptcy purpose" and "whether the petition is filed merely to obtain a tactical litigation advantage."[44] The use of the Texas Two-Step, particularly when dedicating pending tort claims to a subsidiary that promptly files for bankruptcy, can potentially be viewed as acting in bad faith, especially from the perspective of tort claimants. Furthermore, the divisive merger seems like the first step in a tactical plan for companies to steer clear of litigation, liability, and settlement payouts. While this maneuver may be seen as innovative, it raises significant ethical and legal concerns.

Only a few businesses thus far have successfully executed the Texas Two-Step operation. For instance, *In re Bestwall LLC* provides an early example of the Texas Two-Step in action.[45] There, Georgia-Pacific—a large manufacturer of insulation, plaster, and compound—had a "decades-long history of asbestos litigation," stemming from products containing asbestos sold both before and after its acquisition of Bestwall Gypsum Co. (Bestwall).[46] Given the extensive litigation, Georgia-Pacific underwent restructuring on July 31, 2017, executing a divisive merger that separated the company.[47] The pre-merger Georgia-Pacific entity ceased to exist and was split into two new companies, one of which, Bestwall, inherited the asbestos liabilities.[48] By September 30, 2017, Bestwall had "approximately 64,000 asbestos-related claims pending against [it] and . . . projected that tens of thousands of additional claims would continue to be filed or asserted against it every year through at least 2050."[49]

After the merger was complete, Bestwall relocated to North Carolina and, on November 2, 2017, filed a voluntary Chapter 11 bankruptcy petition in the U.S. Bankruptcy Court for the Western District of North Carolina, disclosing assets that included $32 million in cash, $145 million in equity securities, and "all contracts . . . related to its asbestos-related litigation."[50] Claimants brought suit seeking to dismiss the case, but Chief Judge Beyer ruled in favor of Bestwall, holding that the bankruptcy court had jurisdiction over the debtor's restructuring plan and that Bestwall had the resources to

43. *See In re* LTL Mgmt., LLC, 637 B.R. 396, 422 (Bankr. D.N.J. 2022).
44. *In re* Integrated Telecom Express, Inc., 384 F.3d 108, 120 (3d Cir. 2004).
45. *See In re* Bestwall LLC, 606 B.R. 243 (Bankr. W.D.N.C. 2019).
46. *Id.* at 247–48.
47. *Id.* at 248.
48. *Id.*
49. *Id.*
50. *Id.* at 246, 248.

reorganize and resolve its asbestos claims.[51] As a result, those who attempted to sue the company for cancer-related claims had their "lawsuits frozen for nearly five years."[52] This set the stage for Johnson & Johnson to enter a similar legal dance.

In June of 2023, *In re Bestwall LLC* returned to court on appeal.[53] The U.S. Court of Appeals for the Fourth Circuit affirmed the lower court's ruling, allowing Bestwall's bankruptcy case to proceed.[54] In his dissenting opinion, Judge King stated that because of the Texas Two-Step, "major and fully solvent business corporations have managed to . . . obtain shelter from sweeping tort litigation without having to file for bankruptcy themselves. It is precisely that sort of manipulation of the Bankruptcy Code . . . that lies at the heart of this important appeal."[55] Currently, Georgia-Pacific, the billion-dollar parent company, can continue to reap the benefits of Bestwall's bankruptcy without bearing any of the associated burdens.

II. CASE STUDY: JOHNSON & JOHNSON

A. HISTORY OF J&J & TALC

Established in 1886, Johnson & Johnson (J&J) has been a pioneering force in the medical industry, with notable creations including the first mass-produced sterile surgical supplies.[56] Evolving into a global leader in healthcare, J&J has more than 250 subsidiaries across its consumer health and pharmaceutical sectors and brought in $93.8 billion of worldwide sales in 2021.[57] With an extensive product portfolio that includes well-known household items such as Listerine, BAND-AID, Neutrogena, Windex, and Tylenol, among others, J&J does not appear to be facing financial distress or the need for bankruptcy.[58] While these common household products have been a staple under the average American sink, it is worth noting that Baby Powder, once a familiar item in bathroom cabinets, has recently undergone changes.

51. *See id.* at 243.

52. Brian Mann, *Rich Companies are Using a Quiet Tactic to Block Lawsuits: Bankruptcy*, NPR (April 2, 2022, 7:00 AM), https://www.npr.org/2022/04/02/1082871843/rich-companies-are-using-a-quiet-tactic-to-block-lawsuits-bankruptcy.

53. *See In re* Bestwall LLC, 71 F.4th 168 (4th Cir. 2023).

54. *Id.* at 185.

55. *Id.* at 186. (King, R., dissenting).

56. *Our Story*, JOHNSON & JOHNSON, https://ourstory.jnj.com/our-beginning#experience-our-beginning-ch-3-2 (last visited June 4, 2024).

57. *Johnson & Johnson Reports Q4 and Full-Year 2021 Results*, JOHNSON & JOHNSON (Jan. 25, 2002), https://www.jnj.com/johnson-johnson-reports-q4-and-full-year-2021-results.

58. *Our Products,* JOHNSON & JOHNSON, https://www.jnjcanada.com/explore-our-brands (last visited Feb. 14, 2024).

JOHNSON'S® Baby Powder (J&J's Baby Powder), first introduced in 1894, was designed "with parents in mind."[59] Although advertised as a "formula [that] glides over your baby's skin," the powder, now discontinued on J&J's website, gained immense popularity among women, who used it primarily around their pubic area to manage moisture and odor.[60] The main ingredient of J&J's Baby Powder was talc.[61] Talc is a "naturally occurring mineral, mined from the earth" known for its soft texture and, now, its link to asbestos.[62] Asbestos, also a "naturally occurring" mineral, is highly carcinogenic and has been known to contaminate talc during the mining process.[63]

Asbestos has been mined since the late 1800s and has found use in various products, ranging from insulation to vehicle brake pads.[64] Over the last century, millions of American workers exposed to asbestos have been diagnosed with cancers, including mesothelioma, lung cancer, larynx cancer, and ovarian cancer.[65] There is evidence that J&J was aware of the potential presence of harmful asbestos in its Baby Powder, but instead of changing the formula or mining process, the company did nothing at all.[66]

In 2022, Casey Cep, a staff writer at *The New Yorker*, published an article spotlighting J&J's talc litigation and its legal defense strategies.[67] Cep wrote about Deane Berg, a physician assistant from South Dakota, who used J&J's Baby Powder for over thirty years.[68] Berg was diagnosed with serous carcinoma—the most common type of ovarian cancer—and later discovered talc in one of her ovaries.[69] Once in remission, Berg brought "what would

59. *Timeline of Our Story*, *Johnson's Baby Powder*, JOHNSON & JOHNSON, https://ourstory.jnj.com/johnson's-baby-powder (last visited June 4, 2024).

60. *Baby Powder*, JOHNSON'S, https://www.johnsonsbaby.com/baby-products/johnsons-baby-powder (last visited June 4, 2024).

61. *Id.*

62. *Talc*, FDA (Dec. 7, 2022), https://www.fda.gov/cosmetics/cosmetic-ingredients/talc.

63. *Id.*

64. *Asbestos Exposure and Cancer Risk*, NAT'L CANCER INST. (Nov. 29, 2021), https://www.cancer.gov/about-cancer/causes-prevention/risk/substances/asbestos/asbestos-fact-sheet.

65. *Id.*

66. *See* Jef Feeley, *J&J's Controversial Prison Testing Resurfaces in Baby Powder Lawsuits*, BLOOMBERG (March 7, 2022, 1:30 PM), https://www.bloomberg.com/news/articles/2022-03-07/j-j-s-controversial-prison-testing-resurfaces-in-baby-powder-lawsuits?leadSource=uverify%20wall. Over fifty years ago, Johnson & Johnson conducted an experimental test on ten prisoners in Pennsylvania, mostly black men, who were paid $10 to be injected with asbestos so the company could compare the effects to talc. *Id.*

67. *See* Casey Cep, *Johnson & Johnson and a New War on Consumer Protection*, THE NEW YORKER (Sept. 12, 2022), https://www.newyorker.com/magazine/2022/09/19/johnson-johnson-and-a-new-war-on-consumer-protection.

68. *Id.*

69. *See* Cep, *supra* note 67; Berg v. Johnson & Johnson Consumer Cos., Inc., 983 F. Supp. 2d 1151, 1161 (D.S.D. 2013). Pathologist Dr. Godleski, expert witness, found nineteen particles of talc in Berg's left ovary and testified that these particles do not occur naturally in the body and should not have been there. *Id.*

become the first baby-powder lawsuit against Johnson & Johnson to ever make it to trial."[70] On November 19, 2013, Judge Karen E. Schreier, District Judge for the United States District of South Dakota, found that "substantial evidence exist[ed] to sustain Berg's negligent products liability action" and ruled in her favor on the claim of negligent failure to warn.[71] Additionally, Judge Schreier noted that studies linking talc to ovarian cancer dated back to 1971, which displayed J&J's awareness "of all literature regarding talc use and cancer at all times."[72] Despite the significant victory, Berg did not receive any damages in the settlement, as her goal was to warn other women about the potential risks associated with J&J's Baby Powder.[73] She found solace "in the knowledge that . . . she had made it easier for future plaintiffs to fare better."[74] Subsequently, talc claims against J&J surged. What began as "a limited number of isolated cases" prior to 2010 climbed to 1,300 by the end of 2015 and has now grown to more than 38,000 pending cancer complaints against J&J.[75]

B. J&J'S TEXAS TWO-STEP & THE BANKRUPTCY FILING

Prior to the bankruptcy petition and divisive merger, a subsidiary of J&J, Johnson & Johnson Consumer Inc. (Old JJCI), "assumed responsibility for all claims alleging that J&J's talc-containing Johnson's Baby Powder caused ovarian cancer and mesothelioma."[76] The surge in talc-related lawsuits and financial strains imposed by sizable settlements led Old JJCI to undertake a series of transactions on October 12, 2021.

Using the Texas BOC, Old JJCI "engaged in a series of transactions" that separated the company into two new entities: LTL Management LLC (LTL) and Johnson & Johnson Consumer Inc. (New JJCI).[77] This maneuver aimed to "globally resolve talc-related claims through a chapter 11 reorganization without subjecting the entire Old JJCI enterprise to a bankruptcy proceeding."[78] As a result, LTL was given Old JJCI's talc-related liabilities with an obligation to pay "all costs and expenses up to the value of New JJCI," which consisted of $373 million in assets and a $2 billion trust.[79] On October 14, 2021, just two days after the divisive merger, LTL completed phase two of the Texas Two-Step by filing for bankruptcy in the U.S. Bankruptcy Court for the Western District of North Carolina, a very

70. *See* Cep, *supra* note 67.
71. *Berg*, 983 F. Supp. 2d at 1162.
72. *Id.* at 1154.
73. *See* Cep, *supra* note 67.
74. *Id.*
75. *In re* LTL Mgmt., LLC, 637 B.R. 396, 401 (Bankr. D.N.J 2022).
76. *Id.*
77. *Id.*
78. *Id.* at 402.
79. *Id.*

corporate-friendly jurisdiction.[80] The case was ultimately transferred to the District of New Jersey after the North Carolina bankruptcy court ruled that J&J "picked the wrong place to file a chapter 11 case to try to resolve thousands of injury claims."[81] The case took a positive turn for J&J when it reached Judge Kaplan at the U.S. Bankruptcy Court for the District of New Jersey.[82]

Judge Kaplan held that despite New JJCI incorporating in Texas to leverage the state's divisive merger statute just days before filing for bankruptcy, its filings contained "no improprieties or failures to comply with the Texas statute's requirements for implementation and that the interests of present and future talc litigation creditors have not been prejudiced."[83] In other words, so long as New JJCI adhered to the established laws, any concerns about unfair play or strategic advantage were deemed irrelevant. Additionally, the court extended the protections of the automatic stay to the non-debtor parent company, J&J, to halt the ongoing influx of litigation that could affect LTL's reorganization.[84] Judge Kaplan held that the court had jurisdiction to extend the protection of the stay, and, due to the intertwined identity and relationship of the parties, along with the possibility of adverse impacts on LTL's ability to reorganize, "unusual circumstances" existed to warrant such extension.[85] This holding was rooted in Section 105 of the Bankruptcy Code, which gives bankruptcy courts the power to provide certain relief not prescribed by the Code.[86]

As LTL and J&J found relief behind the protective shield of the automatic stay, individuals affected by talc-related issues were forced to wait and could "only get more desperate as they face[d] medical expenses and [came] closer to their own deaths."[87] Hanna Wilt, who filed a lawsuit against J&J in January 2020, accused the company of knowing about the cancer risks associated with J&J's Baby Powder and withholding this information from customers.[88] Wilt died in February 2022 at the age of 27 before her case was heard in court.[89]

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80. *Id.* at 400.

81. Andrew Scurria & Jonathan Randles, *J&J Talc Bankruptcy Case Move to New Jersey From North Carolina*, WALL ST. J. (Nov. 10, 2021), https://www.wsj.com/articles/north-carolina-judge-moves-j-j-talc-bankruptcy-to-new-jersey-11636572841.

82. *In re LTL Mgmt.*, 637 B.R. at 399.

83. *Id.* at 422.

84. *In re* LTL Mgmt., LLC, 640 B.R. 322, 342 (Bankr. D.N.J. 2022).

85. *Id.* at 335, 342.

86. 11 U.S.C. § 105.

87. Brian Mann, *J&J Tried to Block Lawsuits from 40,000 Cancer Patients. A Court Wants Answers*, NPR (Sep. 27, 2022), https://www.npr.org/2022/09/19/1123567606/johnson-baby-powder-bankruptcy-lawsuits. Attorney Jeffrey Lamken told NPR that talc victims are dying as they are waiting for their day in court due to bankruptcy delays. *Id.*

88. Mann, *supra* note 52.

89. *Id.*

C. NO GOOD FAITH OR FINANCIAL DISTRESS

Judge Kaplan's holding was appealed to the U.S. Court of Appeals for the Third Circuit, where Judge Ambro struck down J&J's Texas Two-Step maneuver.[90] Claimants argued there was no business purpose for LTL's bankruptcy filing and that it was only intended to cause delays and secure a "bankruptcy discount" for unfavorable pending settlements.[91] Bankruptcy law was intended to repair the insolvent debtor who filed in good faith, not to safeguard a solvent corporation.[92] In fact, that is exactly what Judge Ambro stated when he dismissed the case: "[A]bsent financial distress, there is no reason for Chapter 11 and no valid bankruptcy purpose."[93] J&J was a healthy corporation without a balance sheet problem that bankruptcy could address or remedy. J&J created LTL to appear insolvent, with bankruptcy as its plan from the start. Furthermore, LTL, being only a few days old when it filed for bankruptcy, lacked essential elements for a bona fide reorganization. The company had "no business, no operations, no employees, no funded debt, and no assets," and thus, should not, in good faith, need to reorganize for a fresh start.[94]

Insolvency is not a prerequisite for bankruptcy, but there must be clear financial distress, and it must "not only be apparent, but it must be immediate enough to justify a filing."[95] Judge Ambro recognized the significance and "need for early access to bankruptcy relief to allow a debtor to rehabilitate its business before it is faced with a hopeless situation," especially in the light of mass tort litigation.[96] However, bankruptcy's powers should be reserved for companies teetering on financial catastrophe, not handed out on the basis of "good intentions—such as to protect the J&J brand or comprehensively resolve litigation."[97]

The Court of Appeals for the Third Circuit held that since LTL was not in financial distress, "it cannot show its petition served a valid bankruptcy purpose and was filed in good faith under Code § 1112(b)."[98] Therefore, Judge Kaplan "abused [his] discretion in denying the motions to dismiss."[99] LTL, staffed by employees from J&J, was created to protect its parent company with a fund that acted like "an ATM disguised as a contract."[100] Because of the dismissal, J&J could not move and settle the thousands of claims against the company from trial court to bankruptcy court. Thus, the

90. *See In re* LTL Mgmt., LLC, 64 F.4th 84 (3d Cir. 2023).
91. *In re* LTL Mgmt., LLC, 637 B.R. 404 (Bankr. D.N.J 2022).
92. *See* 28 U.S.C. § 3302.
93. *In re LTL Mgmt.,* 64 F.4th at 101.
94. Kinel, *supra* note 40.
95. *In re LTL Mgmt*., 64 F.4th at 102.
96. *Id.*
97. *Id.* at 93.
98. *Id.* at 110.
99. *Id.* at 111.
100. *Id.* at 109.

automatic stay on litigation was lifted, finally providing claimants with the "chance to prove to a jury of their peers" that their injuries were caused by J&J's Baby Powder.[101]

When J&J first filed in the U.S. Bankruptcy Court for the District of New Jersey, Judge Kaplan ruled that if the use of the Texas Two-Step "as a foundation for chapter 11 filings conflicts with Texas' legislative scheme and goals, it can be repealed or modified. Until such time that there is legislative action, I am not prepared to rule that use of the statute as undertaken in this case, standing alone, evidences bad faith."[102] Judge Ambro stated that "some may argue any divisional merger to excise the liability and stigma of a product gone bad contradicts the principles and purposes of the Bankruptcy Code. But even that is a call that awaits another day and another case."[103] Courts seem reluctant to address the Texas Two-Step head-on. There may even be another clever move waiting in the wings. The dismissal of LTL's bankruptcy case may have beat around the bush, but it is a start.

III. CASE STUDY: PURDUE PHARMA

A. HISTORY OF PURDUE PHARMA & OXYCONTIN

Purdue Frederick Company was founded in 1892 and originally sold earwax removers and laxatives until 1952, when the Sackler brothers, all of whom were physicians, bought and grew the business with their innovative pain medications.[104] At the time, the medical and pharmaceutical industries were growing rapidly, and so was the Sackler family's wealth. Patrick Keefe, a staff writer for *The New Yorker*, quoted in his article, "The Family That Built an Empire of Pain," that the Sackler family could strategically create a new drug, have it tested, and "secure favorable reports on the drug from the various hospitals with which they [had] connections."[105] The Sackler family could easily gain consumer trust through hospitals and by planting advantageous articles to promote their drugs.[106] The influential family was ranked by Forbes in 2020 as the thirtieth wealthiest family in America, with an estimated net worth of $10.8 billion.[107] Put simply, the Sackler family was exceedingly resourceful, influential, and powerful.

101. *Id.* at 111.
102. *In re* LTL Mgmt., LLC, 637 B.R. 396, 427–28 (Bankr. D.N.J. 2022).
103. *In re LTL Mgmt.*, 64 F.4th 84 at 111.
104. Ronald Chow, *Purdue Pharma and OxyContin – A Commercial Success But a Public Health Disaster*, 25 HARV. PUB. HEALTH REV. 1, (2019).
105. Patrick Keefe, *The Family That Built an Empire of Pain*, THE NEW YORKER (Oct. 23, 2017), https://www.newyorker.com/magazine/2017/10/30/the-family-that-built-an-empire-of-pain.
106. *Id.*
107. *Sackler Family*, FORBES, https://www.forbes.com/profile/sackler/?list=families&sh=2834338e5d63 (last visited June 4, 2024).

Richard Sackler became heavily involved in the family businesses and the development of OxyContin, which launched in 1995.[108] Purdue Pharma aggressively promoted the drug and trained the company's sales representatives to falsely claim that the risk of addiction was low, and, in turn, those representatives were rewarded with substantial bonuses and other incentives.[109] Although Purdue Pharma entered into a plea agreement with the United States in 2007 admitting to falsely advertising OxyContin as non-addictive, revenues continued to climb—jumping from $48 million in 1996 to $3 billion in 2010—and so were prescriptions, dosages, and deaths.[110] The CDC reported that from 1999 to 2021, nearly 280,000 Americans died from an opioid related overdose.[111] By 2019, Purdue Pharma was facing thousands of lawsuits brought by victims and the estates of victims who had overdosed from the addictive drug.[112] As a result of the "tsunami of litigation," Purdue filed for bankruptcy, which provided the automatic stay to quiet the winds.[113]

B. PURDUE PHARMA BANKRUPTCY CASE

When Purdue Pharma originally filed for bankruptcy in September 2019, the intention was to reorganize under Chapter 11 and to handle the mass litigation of existing and future OxyContin claims.[114] Creditors, Purdue Pharma, and the Sackler family came together to negotiate a payout plan to resolve the claims and fund "opioid relief and education programs that could provide tremendous benefit to the consuming public at large," which was approved by a majority vote.[115] However, many voted against the plan's confirmation, including eight states and 2,683 personal injury claimants.[116]

Purdue Pharma did not attempt the Texas Two-Step maneuver. Rather, the Sackler family tried another tactic to avoid liability. After Purdue's 2007 plea agreement, the Sackler family was aware that the lawsuit storm was coming. Richard Sackler sent an email stating, "I've been told by Silbert that I will be [sued] and probably soon."[117] The Sackler family began distributing cash—roughly $10.4 billion from Purdue Pharma company accounts between 2008 and 2017—and placed the funds in offshore accounts and companies owned by the Sacklers or into spendthrift trusts, which are

108. Chow, *supra* note 105.
109. *Id.*
110. *Id.*
111. *Opioid Overdose*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Aug. 23, 2023), https://www.cdc.gov/drugoverdose/deaths/opioid-overdose.html.
112. *In re* Purdue Pharma, L.P., 635 B.R. 26, 34–35 (Bankr. S.D.N.Y. 2021).
113. *Id.* at 35.
114. *Id.*
115. *Id.*; *see* 11 U.S.C.A. § 1126. Under the Bankruptcy Code, a plan must be approved by a supermajority vote of the debtor's creditors. *Id.*
116. *In re Purdue Pharma,* 635 B.R. at 35.
117. *Id.* at 56.

untouchable by the bankruptcy estate.[118] Once the money was safe and the Sackler family was well situated, they resigned from Purdue's board and management, significantly affecting its "solvency cushion" as it faced mass litigation and costly settlements.[119] The distribution of cash was at a time when the Sackler family was closely tied to the business and was "aware of the risk of opioid-related litigation claims."[120]

A major part of the Sacklers' negotiation of the reorganization plan is that every member of the family would be immune from civil litigation and subsequently protected under the bankruptcy filing as a third party.[121] However, the Sackler family "aren't themselves bankrupt. But they are expected to piggyback on the bankruptcy of their insolvent drug company."[122] Although the Sacklers agreed to pay a $6 billion ticket for the protection, many critics and victims claimed "that [the] payment, while substantial, doesn't achieve the kind of justice and accountability" for which they had hoped.[123] Albeit at a hefty price, the Sackler family could escape liability for the "current and future civil claims against them over the company's prescription opioid business."[124]

C. THE SACKLER FAMILY'S THIRD-PARTY RELEASE

A third-party release grants non-filing parties the benefits of bankruptcy, freeing them from claims and liability, but, in this case, at a considerable cost. The Sackler family, third parties to Purdue Pharma's bankruptcy case, originally agreed to pay $4.3 billion "to resolve widespread litigation" in exchange for third-party protection, which later increased to $6 billion.[125] Judge Drain, bankruptcy judge for the U.S. Bankruptcy Court for the Southern District of New York, initially approved of the plan and the Sacklers' third-party protection.[126] Judge Drain stated, "I firmly believe that I have subject matter jurisdiction, . . . that I have the power to issue a final confirmation order under Article III of the Constitution, and that there is a sufficient source of power in the Bankruptcy Code itself," citing Section 105(a) of the Bankruptcy Code.[127]

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118. *See id.* at 36.
119. *Id.*
120. *Id.* at 55.
121. *Id.* at 36.
122. Mann, *supra* note 52.
123. *Id.*
124. Jan Hoffman, *Sacklers and Purdue Pharma Reach New Deal with States Over Opioids*, N.Y. TIMES (Mar. 3, 2022), https://www.nytimes.com/2022/03/03/health/sacklers-purdue-oxycontin-settlement.html.
125. Dietrich Knauth et al., *Sacklers to Pay $6 Billion to Settle Purdue Opioid Lawsuits,* REUTERS (Mar. 4, 2022), https://www.reuters.com/business/healthcare-pharmaceuticals/sacklers-will-pay-up-6-bln-resolve-purdue-opioid-lawsuits-mediator-2022-03-03/.
126. *In re* Purdue Pharma L.P., 633 B.R. 53, 115 (Bankr. S.D.N.Y. 2021).
127. *Id.* at 105.

However, on appeal, Judge McMahon, district judge for the U.S. District Court for the Southern District of New York, cited *Ortiz v. Fibreboard Corporation* in her opinion, noting

> that a fund which is "limited" only because the contributing party keeps a large portion of its wealth (*a la* the Sacklers) is "irreconcilable with the justification of necessity in denying any opportunity for withdrawal of class members whose jury trial rights will be compromised, whose damages will be capped, and whose payments will be delayed."[128]

Additionally, Judge McMahon disagreed with Judge Drain and held that "the Bankruptcy Code does not authorize a bankruptcy court to order the non-consensual release of third-party claims against non-debtors" and that Section 105 does not provide a bankruptcy court with such authority.[129] The confirmation order was vacated temporarily.

On appeal to the U.S. Court of Appeals for the Second Circuit, Judge Lee held that there is, in fact, statutory authority within bankruptcy law that allows third-party protection of the non-bankrupt Sacklers.[130] The court found that Section 105(a), coupled with Section 1123(b)(6), gives a bankruptcy court the authority to grant such a release.[131] The court considered multiple factors, including the overlap between claims against Purdue Pharma and the Sacklers, the essentialness of the releases to the reorganization, the Sacklers' contribution to the reorganization, and creditor approval.[132] Like the Texas Two-Step, this does not seem to align with the overarching intent of bankruptcy—to provide a fresh start to an honest but unfortunate debtor from burdensome debts. The Sacklers, like J&J, were not in financial distress, however, they positioned themselves with enough leverage to determine Purdue's bankruptcy fate.

Many thought the saga ended here, as legal experts predicted a successful appeal to the Supreme Court was unlikely. However, certiorari was granted to address "[w]hether the Bankruptcy Code authorizes a court to approve, as part of a plan of reorganization under Chapter 11 of the Bankruptcy Code, a release that extinguishes claims held by nondebtors against nondebtor third parties, without the claimants' consent."[133] The United States Trustee Program challenged Judge Lee's ruling, claiming the "agreement violated federal law by guaranteeing such wide-ranging legal immunity for the

128. *In re* Purdue Pharma, L.P., 635 B.R. 26, 98 (Bankr. S.D.N.Y. 2021) (quoting Ortiz v. Fibreboard Corp., 527 U.S. 815, 860 (1999)).

129. *Id.* at 78.

130. *In re* Purdue Pharma L.P., 69 F.4th 45, 85 (2d Cir. 2023).

131. *Id.* at 72–73.

132. *Id.* at 79–82.

133. *See* Jan Hoffman, *Sacklers Can Be Shielded from Opioid Liability, Appeals Court Rules*, N.Y. TIMES (May 30, 2023), https://www.nytimes.com/2023/05/30/health/sacklers-purdue-liability-bankruptcy.html; Harrington v. Purdue Pharma L.P., 144 S. Ct. 44 (2023) (mem.).

Sacklers."[134] As of now, the Supreme Court is divided on determining the Sacklers' liability and the destiny of the fund that so many victims and their families rightfully deserve and have been eagerly awaiting.[135]

During oral arguments, Justice Amy Coney Barrett questioned how this ruling could affect other victims of mass torts, such as the victims of the Boy Scouts of America and the Catholic Church, both of which have also utilized third-party releases.[136] Justice Ketanji Brown Jackson considered whether the releases were the only way to "compensate opioid victims" but noted that the Sackler family "took the assets from the company, which started the set of circumstances in which the company now doesn't have enough money to pay the creditors."[137] There is a fine line between moral and financial justice. In this case, it does not seem like there can be both.

Judge McMahon stated in her opinion that if a third party is to enjoin, the third party cannot be just anyone—rather, it is limited to "those who have a particular relationship to the debtor, including owners, managers, officers, directors, employees, insurers, and financiers."[138] The relationship between the Sackler family and Purdue Pharma is particular because it can be argued that the Sackler family was the puncture that caused Purdue Pharma's boat to sink—should this be allowed? This maneuver, although much different than the Texas Two-Step, is just another kind of dance for large corporations or wealthy families to avoid litigation.

Is bankruptcy the right place for this? Are bankruptcy judges equipped to handle mesothelioma, sexual abuse, tinnitus, and opioid addiction? According to the Second Circuit, Sections 105(a) and 1123(b)(6) bestow bankruptcy courts with the power to allow "other appropriate provisions not inconsistent with the applicable provisions of this title" into a plan—including third-party releases, which are not explicitly authorized.[139] Should the Bankruptcy Code empower bankruptcy courts to grant non-debtor third parties, like the Sacklers, immunity from fraud and misconduct? If the Supreme Court allows the plan to go through, Congress should be prepared to take action to safeguard the future of bankruptcy and the protections it provides for honest but unfortunate debtors as the Code continues to be stretched and utilized in innovative ways.

134. Abbie VanSickle, *Supreme Court Appears Split over Opioid Settlement for Purdue Pharma*, N.Y. TIMES (Dec. 4, 2023), https://www.nytimes.com/2023/12/04/us/politics/supreme-court-purdue-pharma.html.

135. *Id.*

136. *Id.*

137. *Id.*

138. *In re* Purdue Pharma, L.P., 635 B.R. 26, 92 (Bankr. S.D.N.Y. 2021).

139. *In re* Purdue Pharma L.P., 69 F.4th 45, 72–73 (2d Cir. 2023).

IV. CASE STUDY: 3M & AEARO

The Aearo case is another example of a parent company attempting to shelter in the shadow of its subsidiary's bankruptcy case. However, unlike J&J, the company was unsuccessful from the outset.[140] Aearo manufactured and sold "custom noise, vibration, thermal, and shock protection, primarily serving the aerospace, commercial vehicle, heavy equipment, and electronic industries"—bringing in $108 million in direct sales in 2021.[141] In the late 1990s, Aearo designed and manufactured earplugs, specifically the Combat Arms Earplug Version 2 (CAEv2), which were sold to the United States military and civilian consumers.[142] In April 2008, 3M acquired Aearo and up-streamed most of its business, including profit from the CAEv2 earplugs.[143] 3M, Aearo's parent company, famously known for inventing the Post-it note, had $35 billion in net sales in 2021 and is undoubtedly solvent.[144]

On July 15, 2022, the United States Judicial Panel on Multidistrict Litigation reported that there were more than 290,000 claims against the CAEv2 earplugs, alleging the product "manufactured, distributed and sold by the Aearo Entities and/or 3M were defective, resulting in hearing loss and related hearing defects."[145] On July 26, 2022, facing millions of dollars in legal fees, 3M put its Aearo subsidiary in the hands of the bankruptcy court and asserted that it would fund a $1 billion settlement trust to resolve a majority of the CAEv2 claims, far less than what financial analysts estimated the fund to be worth.[146]

Claimants sought to hold liable not just the Aearo subsidiary; they were also pursuing the parent company, 3M—both of which were quite financially secure.[147] There was no Texas Two-Step, no movement of money into offshore accounts or spendthrift trusts, as in the cases of J&J and the Sackler family. Aearo sought to implement the same bankruptcy protection that Judge Kaplan provided J&J from LTL, but the court refused to extend the automatic stay protection to 3M while its subsidiary's bankruptcy case proceeded.[148] Judge Graham of the U.S. Bankruptcy Court for the Southern District of Indiana held that the litigation against 3M would not cause the

140. *See In re* Aearo Techs. LLC, 642 B.R. 891 (Bankr. S.D. Ind. 2022).
141. *Id.* at 896.
142. *Id.*
143. *Id.* at 896–97.
144. *Id.* at 896.
145. *Id.* at 897.
146. *Id.* at 896, 898.
147. *Id.* at 897. ("The Aearo Plaintiffs and 3M are co-defendants in the MDL and in approximately 2,000 lawsuits pending in the state courts of Minnesota . . . most, though not all, of the claims filed in the Pending Actions assert that 3M and Aearo are jointly and severally liable. Some of the claims, however, have been asserted against only 3M.").
148. *Id.* at 912.

debtor, Aearo, "irreparable harm" or an inability to reorganize and pay its creditors.[149]

On June 9, 2023, Judge Graham dismissed the case entirely, finding that Aearo's filing was premature and that because the company was a "financially healthy debtor with no impending solvency issues to remain in bankruptcy," the filing exceeded jurisdictional boundaries.[150] This dismissal will push Aearo and 3M into "waves of litigation" that may "rapidly and unequivocally present a significant change in circumstances"—more frankly, bringing the companies back into bankruptcy court.[151] Importantly, the court noted that "the slope here is exceedingly steep and slippery."[152] Section 1112(b) of the Bankruptcy Code requires that a debtor obtain a justifiable bankruptcy purpose for relief and that good faith should be measured by the validity of such purpose.[153] Otherwise, as Judge Graham warns, "a bankruptcy court risks becoming another court of general jurisdiction, which it most decidedly is not."[154] He continues by stating that "[a]bsent a Congressional intervention that clarifies if, when, and under what circumstances debtors involved in mass tort litigation may file for bankruptcy," the court will not ignore a debtor's financial prosperity when or if bankruptcy protections are granted.[155] Aearo has since appealed.

Currently, 3M has agreed to pay $6.01 billion to settle claims for around 240,000 eligible claimants.[156] Some financial analysts argue that this amount falls short of their $10 billion prediction for the settlement.[157] Moreover, 3M is no stranger to litigation, settlements, and cleaning up its mess—the company is currently facing a $10.3 billion settlement for perfluoroalkyl and polyfluoroalkyl substance pollution, both of which have been linked to cancer and hormonal dysfunctions.[158] Bankruptcy courts are not "come one, come all," and financially healthy companies should not be provided with shortcuts or exceptions to clean up their wrongdoings and benefit from bankruptcy's powers.

149. *Id.* at 904.

150. *In re* Aearo Techs. LLC, No. 22-02890-JJG-11, 2023 WL 3938436, at *21–22 (Bankr. S.D. Ind. 2023).

151. *Id.* at *22.

152. *Id.*

153. *See id.* at *14.

154. *Id.* at *21.

155. *Id.*

156. Brendan Pierson, *3M Agrees to Pay $6 Billion in US Military Earplug Lawsuit Settlement*, REUTERS (Aug. 29, 2023, 2:15 PM), https://www.reuters.com/legal/3m-co-agrees-pay-6-billion-earplug-lawsuit-settlement-2023-08-29/.

157. *Id.*

158. Clark Mindock, *3M's $10.3 Billion PFAS Settlement Gets Preliminary Approval*, REUTERS (Aug. 30, 2023, 8:23 PM), https://www.reuters.com/legal/government/us-states-withdraw-objections-3ms-103-billion-pfas-settlement-2023-08-29/.

V. ARGUMENT

A. TEXAS TWO-STEP IS GROUNDS FOR A BAD FAITH DISMISSAL UNDER SECTION 1112 OF THE BANKRUPTCY CODE

It is important to understand the difference between Purdue Pharma's bankruptcy filing and J&J's Texas Two-Step maneuver. Some claimants will want large payouts for medical bills; others simply want to see Purdue Pharma and J&J go down in flames. There are advantages to handling these cases in bankruptcy court—it allows all claims to be treated together and fairly. Without bankruptcy, opioid victims would continue to file, the first claims getting out with big wins by a speedy trial, and others left to levy on Purdue Pharma's assets until there is nothing left. Bankruptcy court allows the claims to be handled together in the same forum, which saves time and money and provides organization and certainty. In comparison, J&J maneuvered its way into bankruptcy court to ensure it did so at the price it wanted.

Attorneys representing cancer patients assert that "the civil court system, not the bankruptcy court, is the proper venue for establishing the corporation's liability."[159] Bankruptcy courts were designed and equipped to handle debtors and creditors; civil court systems were constructed for negligence, misconduct, and failure to warn. Is our legislature prepared to commingle these laws? In both J&J's and Purdue Pharma's bankruptcy cases, the bankruptcy court turned to Section 105 of the Bankruptcy Code to issue relief not explicitly authorized under the Code's text.[160] Judge Lee of the Second Circuit upheld the use of Section 105 when he permitted the Sackler family's third-party protection.[161] However, Judge Ambro of the Third Circuit denied and dismissed J&J's bankruptcy case entirely, citing a lack of imminent financial distress.[162] Section 105 should not empower bankruptcy courts to reach outside of and beyond the Bankruptcy Code's explicit language to allow a sufficiently solvent debtor to settle its claims under the efficiencies of Chapter 11. Purdue Pharma, on the other hand, was in financial distress, and the bankruptcy court properly invoked Section 105 to provide relief under unique and complicated circumstances.

Judge Kaplan wrote in his LTL opinion that "bankruptcy courts offer a unique opportunity to compel the participation of all parties in interest (insurers, retailers, distributors, claimants, as well as Debtor and its affiliates) in a single forum with the aim of reaching a viable and fair settlement," especially regarding asbestos claims.[163] The Bankruptcy Code, as Judge

159. Mann, *supra* note 87.

160. *See In re* LTL Mgmt., LLC, 640 B.R. 322, 335 (Bankr. D.N.J. 2022); *In re* Purdue Pharma L.P., 69 F.4th 45, 72–73 (2d Cir. 2023).

161. *See In re Purdue Pharma L.P.*, 69 F.4th at 72–73.

162. *See In re* LTL Mgmt., LLC, 64 F.4th 84 (3d Cir. 2023).

163. *In re* LTL Mgmt., LLC, 637 B.R. 396, 414 (Bankr. D.N.J. 2022).

Graham mentioned when dismissing the Aearo case, needs congressional intervention to instruct when and under what circumstances mass torts are allowed in the bankruptcy courts and who can be involved and protected.

Corporate law carefully watched how the J&J case unfolded. In Casey Cep's article for *The New Yorker*, University of Georgia Law School professor Elizabeth Chamblee Burch stated that "[w]e're clearly seeing a strategy here to get the closure every company wants: ending all the state and federal lawsuits at once, reassuring their shareholders everything's fine."[164] It seems fair to predict that large corporations will continue to use bankruptcy courts for "cheaper, faster way[s] out of mass torts."[165] Some may face leniency similar to Judge Kaplan's, and others may receive a stricter denial similar to Judge Graham's holding in 3M. Regardless of the number and severity of the claims, these cases should be prudently analyzed under a good faith standard. That is difficult, however, in the absence of a precise definition for what "good faith" means within the context of bankruptcy.

Acting in good faith may be defined as maintaining a high level of honesty and faithfulness.[166] In the context of bankruptcy, where debtors are expected to act in good faith by fulfilling certain requirements like paying fees and providing necessary information, good faith implies an honest representation of the circumstances and intentions leading to the filing. On a smaller scale, debtors usually file for circumstances beyond their control—perhaps mounting medical bills, an unfortunate gambling problem, or the impacts of a global pandemic. However, J&J and the Sackler family, having knowledge of the harm their products caused, arguably played a significant role in creating the circumstances that led them to bankruptcy's door. But bankruptcy does not, and should not, let everyone in.

The Bankruptcy Code does not explicitly state that a "bad faith" filing is "for cause," but many courts have interpreted the statute to mean that "Chapter 11 bankruptcy petitions are subject to dismissal under 11 U.S.C. § 1112(b) unless filed in good faith" to protect against abuse.[167] Good faith "ensures that the Bankruptcy Code's careful balancing of interests is not undermined by petitioners whose aims are antithetical to the basic purposes of bankruptcy."[168] Additionally, courts have carefully considered whether the filing serves a valid bankruptcy purpose and if the filing was merely to obtain a tactical litigation advantage.[169] If the purpose of bankruptcy is to assist an insolvent debtor, then allowing large corporations not in immediate financial

164. Cep, *supra* note 67.

165. *Id.*

166. *See Good Faith*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/good_faith (last visited June 4, 2024).

167. *Dismissals of Bankruptcies Filed in Bad Faith: What's the Standard?*, 23 AM. BANKR. INST. J. 26 (2004); *In re* Integrated Telecom Express, Inc., 384 F.3d 108, 118 (3d Cir. 2004).

168. *In re* Integrated Telecom Express, Inc., 384 F.3d 119 (3d Cir. 2004).

169. *Id.* at 120.

distress to utilize the system is counterintuitive to the Bankruptcy Code's purpose—to provide a fresh start to the "honest but unfortunate debtor."[170] Furthermore, it should be clear that when a solvent debtor strategically positions itself to avoid mass tort litigation, it is intentionally seeking a tactical litigation advantage.

J&J, assisted by skilled lawyers, engaged in a series of incorporations and reincorporations across various states, strategically aiming for an outcome favorable to the company's reputation and financial interests. Such a convoluted process raises questions about the honesty and good faith of the filing. Following the company's legal roadmap, it was evident that the direct way to bankruptcy was closed, so J&J tried to find another route. Judge Ambro clearly stated, "[A]bsent financial distress, there is no reason for Chapter 11 and no valid bankruptcy purpose."[171] If there is no valid bankruptcy purpose, there is no good faith. There is an encouragement to file early so that a company may continue its business while resolving its litigation, but there is a "fine line" difference between filing early and filing without a purpose.[172] A company's financial distress, or lack thereof, is "vital to good faith."[173] Judge Ambro also explained that "mass tort liability can push a debtor to the brink. But to measure the debtor's distance to it, courts must always weigh not just the scope of liabilities the debtor faces, but also the capacity it has to meet them."[174] J&J had the capacity, and the Sackler family took it away and held it hostage.

If J&J's lack of financial distress was a requirement for a good faith filing, when do these maneuvers teeter into bad faith and abuse? Chapter 11 bankruptcy petitions filed in bad faith are subject to dismissal in order to protect against abuse, but courts have differing interpretations of what kind of abuse that entails.[175] Abuse occurs when the debtor has gone too far. In *Carolin Corporation v. Miller*, for example, the Fourth Circuit Court of Appeals stated that the bad faith inquiry is implemented to determine whether the debtors' motivation is "to abuse the reorganization process" and "to cause hardship or to delay . . . merely for the purpose of invoking the automatic stay, without an intent or ability to reorganize his financial activities."[176] Those who filed lawsuits against J&J found themselves "caught in [a] legal maze," which is a direct result of J&J's attempt to delay litigation.[177] Courts have historically found bad faith to live in mismanagement, failure to

170. *See Bankruptcy Basics*, *supra* note 2.
171. *In re* LTL Mgmt., LLC, 64 F.4th 84, 101 (3d Cir. 2023).
172. *Id.* at 102.
173. *Id.* at 103.
174. *Id.* at 104.
175. *In re Integrated Telecom Express, Inc.*, 384 F.3d 118 (3d Cir. 2004).
176. Carolin Corp. v. Miller, 886 F.2d 693, 702 (4th Cir. 1989).
177. Mann, *supra* note 52.

disclose, and fraud, but the Texas Two-Step is something new that should be considered.

There was a risk in allowing LTL's bankruptcy case to proceed: "[T]he floodgates would open for any company subject to mass tort litigation to slough off its responsibility via a Texas Two-Step."[178] Participants in our legal system, especially plaintiffs, should have confidence in the tort litigation system to address their claims; otherwise, individual rights are jeopardized. The Texas Two-Step remains uncharted territory for courts, as they have "no clear precedent" to guide them.[179] The issue of whether the divisive merger, utilized on its own, can serve as grounds for dismissal due to a bad faith filing has not yet been adjudicated.[180] However, if employing such a tactic is deemed to be demonstrative of bad faith, should there be corresponding consequences or penalties?

B. SOLUTION: BANKRUPTCY BAN & LEGISLATION

In July 2023, LTL, for the second time, failed to resolve its talc litigation in bankruptcy court.[181] Initially, Judge Kaplan showed leniency toward J&J's bankruptcy strategy, but when the case returned to his court, he dismissed the filing, holding that J&J filed in bad faith.[182] Once again, there was no imminent financial distress—iconically stating that "this Court smells smoke, but does not see the fire."[183] Judge Kaplan further explained that "[w]hen one smells smoke, the wise course of action is to get out of the house and call for help. However, as it stands now, in gauging financial distress, observing smoke may not be enough—one must see flames."[184] LTL and J&J did not make any new developments the second time around, there were no major resolutions, and plaintiffs were still waiting.[185] Judge Kaplan "close[d] the door of chapter 11," for now.[186]

J&J stated that it will attempt to appeal and will "vigorously defend itself against lawsuits that are 'specious and lack scientific merit.'"[187] But how long can this defense continue? J&J has spent the last few years trying to convince the courts, the public, and its victims that "a company worth a half-trillion dollars is bankrupt."[188] This type of repeated action should be seen as bad

178. Kinel, *supra* note 40 (quoting Motion to Dismiss for Claimant, *In re* LTL Mgmt. LLC, 638 B.R. 291 (2023) (No. 21-30589 (MBK))).
179. *Id.*
180. *Id.*
181. *See In* re LTL Mgmt., LLC, 652 B.R. 433, 456 (Bankr. D.N.J. 2023).
182. *Id.* at 436.
183. *Id.* at 448.
184. *Id.* at 444.
185. *Id.* at 449.
186. *Id.*
187. Dietrich Knauth, *J&J Effort to Resolve Talc Lawsuits in Bankruptcy Fails a Second Time*, REUTERS (July 31, 2023, 7:29 AM), https://www.reuters.com/legal/jj-effort-resolve-talc-lawsuits-bankruptcy-fails-second-time-2023-07-28/.
188. *Id.* (internal quotation marks omitted).

faith. Plato, in *The Republic*, proposed that "a right or just action can be defined as one which flows naturally from a just disposition. In other words, whether an action is 'good' or 'bad' depends on the outcome."[189] Between the Texas Two-Step and the multiple failed attempts at filing for bankruptcy, J&J is merely wasting time and congesting the bankruptcy court system. If J&J believes so strongly that the claims lack merit, it should assert such a defense in civil court.

A fair solution would be to ban J&J from filing for bankruptcy for a predetermined period.[190] In order to prevent a third, similarly corrupt filing, claimants urged Judge Kaplan to block J&J from seeking bankruptcy protection "for at least 180 days."[191] A filing ban could provide plaintiffs with an opportunity to be heard in civil court, under civil law, without the automatic stay creating undue delays and limitations. Given that J&J has filed and refiled, nothing will stop the company from doing so again, creating even more setbacks for resolution. However, Judge Kaplan stated that "he was not inclined to block future bankruptcy filings because circumstances could change in the next six months," insisting that he does not "have a crystal ball."[192] This is not a matter of predicting the future; it is an issue of crying bankruptcy once, crying bankruptcy twice, and still, there is no bankruptcy to be found. J&J is the boy who cried bankruptcy and should reap the consequences of abusing and stalling the system. Imposing a temporary ban as a consequence of repetitive filing would compel the company to actively work toward a resolution instead of prolonging the situation. Although this ban was rejected, courts should consider such measures in the future, especially if J&J attempts to file again without genuine financial distress.[193]

The Bankruptcy Code witnessed substantial amendments with the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act in 2005, triggered by concerns regarding the ease with which individual debtors could potentially "abuse" the system.[194] It is again time for the Bankruptcy Code to be amended, as there are gaps and ambiguities that Congress must address. As such, Congress should consider legislation that would sharpen the blurred lines and limits on what is permissible in these

189. *In re LTL Mgmt.*, 652 B.R. at 436 (citing PLATO, THE REPUBLIC bk. IV, at 443–44 (c. 370 B.C.E.).

190. Dietrich Knauth, *J&J Talc Cancer Plaintiffs Want 6-Month Ban on Further Bankruptcy Filings*, REUTERS (Aug. 2, 2023, 4:31 PM), https://www.reuters.com/legal/jj-talc-cancer-plaintiffs-want-6-month-ban-further-bankruptcy-filings-2023-08-02/.

191. *Id.*

192. *Id.*

193. Dietrich Knauth, *Judge Rejects 6-Month Bankruptcy Ban for J&J's Talc Subsidiary*, REUTERS (Aug. 11, 2023, 6:34 PM), https://www.reuters.com/legal/litigation/judge-rejects-6-month-bankruptcy-ban-jjs-talc-subsidiary-2023-08-11/.

194. Judith Benderson, *Introduction: A History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, U.S. ATT'YS' BULL. July 2006, at 1.

unique bankruptcy filings, especially regarding mass tort litigation, divisive mergers, and third-party releases.

Section 524(g) of the Bankruptcy Code was passed by Congress in 1994 and governs third-party claims in cases involving injuries arising from the manufacture and sale of asbestos.[195] Although asbestos continues to be severely harmful and relevant, as seen in the J&J case, there are other circumstances that may be as critical, especially on the mass tort scale. The statute calls for updated clarity, especially now that the Bankruptcy Code is not only being read by bankruptcy judges in bankruptcy courts.[196]

What is good faith in this modern context? How should financial distress be measured? How should the size of a funding agreement be determined? Should third parties benefit from bankruptcy protection when they clearly were the cause of a company's insolvency? The answers to these questions belong in court and deserve to be challenged, but it is hard to score when the goalposts keep moving. Congress must enact new legislation. Modern life is changing, and new problems require new laws. Common sense suggests that a newly created subsidiary, formed only hours before filing for bankruptcy, should not be able to do so in good faith. The Bankruptcy Code must be amended to explicitly reflect this understanding.

The Bankruptcy Code is now being stretched and used in ways other than how it was commonly utilized when the Bankruptcy Reform Act of 1978 was enacted.[197] The Code governs relationships between debtors and creditors when the debtor can no longer pay its debts, and now the Code must be updated with language to handle relationships between debtors and creditors and the thousands of mass tort claimants. The J&J, Purdue Pharma, and 3M cases seemed to have outgrown the same bankruptcy law that governs individuals and small family-owned businesses. Bankruptcy law should be able to govern the current sizeable scale and help resolve mass tort claims, but there must be legislation that provides more color to the grey areas of law. Where is the line that corporations cannot cross?

CONCLUSION

Claimants undoubtedly lack the same resources available to large corporations. Regulations are therefore needed to offset the power these monolithic entities hold and to protect the rights of plaintiffs turned claimants. Judge Ambro, in concluding his opinion dismissing J&J's case, expressed a desire "not to discourage lawyers from being inventive and

195. 11 U.S.C. § 524(g)(2)(B)(i)(I).

196. *See In re* Purdue Pharma, L.P., 635 B.R. 26, 26 (Bankr. S.D.N.Y. 2021). This opinion was written by Judge McMahon on appeal from an order of the United States Bankruptcy Court for the Southern District of New York. *Id.* The district court judge ruled differently than the bankruptcy court judge. *Id.*

197. *See* Tabb, *supra* note 3, at 32–34.

management from experimenting with novel solutions."[198] And indeed, the legal maneuvers in these cases are strategic and creative, but questions arise from a public policy perspective: Do J&J and the Sackler family have "unclean hands?" Is it fair for companies and plaintiffs to play the same game with different rules?

Courts will likely face more sophisticated strategies as other corporations emulate J&J's tactics, but these are challenges the judicial system should be prepared to address. Allowing larger corporations to gain an advantage via maneuvers like the Texas Two-Step could adversely impact "class members whose jury trial rights will be compromised, whose damages will be capped, and whose payments will be delayed."[199] Despite these cases finding their way into bankruptcy courts and being governed by the Code, the core involves thousands of victims, many of whom have lost loved ones or are seeking recognition and accountability for the harms they have endured. If courts allow large corporations to protect their assets and to escape liability, who will protect the claimants?

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198. *In re* LTL Mgmt., LLC, 64 F.4th 84, 111 (3d Cir. 2023).

199. *In re Purdue Pharma*, 635 B.R. at 98.

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