United States Court of Appeals

for the

Third Circuit

Case No. 22-2003

In re: LTL MANAGEMENT LLC,

Debtor,

*OFFICIAL COMMITTEE OF TALC CLAIMANTS,

Appellant.

*(Amended per Court's Order dated 06/10/2022)

DIRECT APPEAL FROM THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF NEW JERSEY IN CH. 11 NO. 21-30589 AND ADV. PRO. NO. 21-03032

BRIEF OF CERTAIN BANKRUPTCY LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF DEBTOR-APPELLEE

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INTEREST OF *AMICI CURIAE*[1]

The amici curiae, whose names and affiliations are set forth in the attached Appendix, are nationally-recognized professors of law (collectively, the "Law Professors") who teach courses and seminars in corporate governance, business law, and bankruptcy law and reorganization. The Law Professors have published numerous articles and treatises on the subject of business reorganizations and mass tort bankruptcies, provided testimony to Congress on various bankruptcy matters, and maintain a professional interest in ensuring that this Court is appropriately informed about how the bankruptcy framework is uniquely suited to address the issues affecting mass tort plaintiffs and defendants. The Law Professors' vast experience and authorship in this area of law are critically relevant to the above-referenced appeal. The Law Professors submit this brief to explain that the circumstances surrounding the filing of this bankruptcy case do not reflect a lack of good faith, and that the Bankruptcy Court did not err in denying Appellants' motion to dismiss the case.

[1] All parties have consented to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29, Amici state that no counsel for a party authored this brief in whole or in part. No person other than Amici or their counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

Mass torts create a unique scale of harm and liabilities, and fairly addressing them poses substantial challenges to the U.S. legal system, particularly when the universe of all potential plaintiffs cannot be identified at a given point in time.[2] Litigation in state and federal courts of general jurisdiction (including multi-district litigation) has encountered various resolution obstacles, including (i) high transaction costs, (ii) protracted proceedings that extend for years, (iii) the inability to offer comprehensive settlement of all claims, (iv) failure to protect future claimants, and (v) insufficient means to protect parties from open-ended liability.[3] In contrast, for the past five decades, the United States Bankruptcy Code and bankruptcy courts have provided plaintiffs with substantial claims and debtors with finite resources an efficient and expeditious process to resolve their differences and create meaningful settlement funds for both current and future mass tort claimants.[4] The bankruptcy process offers a comprehensive response to collective action

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[2] *See* Samir D. Parikh, *The New Mass Torts Bargain*, 91 FORDHAM L. REV. ___ (forthcoming 2022), available at https://ssrn.com/abstract=3649611.

[3] *See id*.

[4] *See, e.g., In re Mallinckrodt PLC*, 639 B.R. 837, 850 (Bankr. D. Del. 2022); *In re PG&E Corp.*, *617 B.R. 671*, *673* (Bankr. N.D. Cal. 2020); *In re Owens Corning*, No. 00-3837, 2006 Bankr. LEXIS 2856, at *1 (Bankr. D. Del. Oct. 19, 2006); *In re A. H. Robins Co.*, 88 B.R. 742, 747 (E.D. Va. 1988); *In re Dow Corning Corp*., 211 B.R. 545, 562 n.16 (Bankr. E.D. Mich. 1997); *In re Johns-Manville Corp*., 68 B.R. 618, 627 (Bankr. S.D.N.Y. 1986).

problems that often preclude resolution of complex disputes. Mass tort cases present the most daunting collective action problems and often times require the unique tools that only the bankruptcy process provides.[5]

Recent debate about mass tort restructurings overlooks this history and the ways in which the bankruptcy system can facilitate consensual and beneficial outcomes in many mass tort cases.[6] Moreover, bankruptcy allows similarly situated plaintiffs to receive similar recoveries. The bankruptcy process ensures that claims arising out of the same nucleus of facts do not receive wildly divergent recoveries—a result customarily seen when mass tort cases are resolved through other non-bankruptcy venues, including jury trials in disparate jurisdictions.[7] Recent debate about these cases further overlooks simple process objectives. The primary objectives in resolving mass tort cases should be to (a) provide plaintiffs a fair and reasonable recovery under the circumstances and (b) attain that recovery on the

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[5] *See* Samir D. Parikh, *Scarlet-Lettered Bankruptcy: A Public Benefit Proposal for Mass Tort Villains*, 117 NW. U. L. REV. ___ (forthcoming 2022), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4005503.

[6] *See* Samir Parikh, *Bankruptcy is Optimal Venue for Mass Tort Cases*, LAW360 (Feb. 28, 2022), https://www.law360.com/articles/1468363/bankruptcy-is-optimal-venue-for-mass-tort-cases.

[7] *See generally, e.g., In re WR Grace & Co.*, 729 F.3d 332, 343 (3d Cir. 2013) ("Equality of distribution among creditors is a central policy of the Bankruptcy Code."); *Begier v. IRS*, 496 U.S. 53, 58 (1990) (same).

shortest possible timeline.[8] The prospect of a meaningful and prompt resolution instead of endless courtroom delays can be transformative to current victims facing staggering health care costs.[9] The Hon. Michael Kaplan of the Bankruptcy Court properly addressed these important objectives in denying dismissal of the Debtor's bankruptcy case.

In seeking dismissal of this bankruptcy case, the Official Committee of Talc Claimants (the "TCC") challenged the bankruptcy filing of the Debtor, a subsidiary of Johnson & Johnson ("J&J") created through a divisional merger, which allocated roughly tens of billions of alleged talc liabilities to the Debtor in exchange for a funding agreement that gave the Debtor access to up to $60 billion in value for the potential benefit of creditors.[10] In finding that the divisional merger followed by a chapter 11 petition did not constitute a bad faith filing, Judge Kaplan noted that "the Debtor seeks to employ the tools provided by Congress under the Bankruptcy Code (the imposition of the automatic stay and the channeling injunctions provided by § 105 and § 524(g)) to attain a bankruptcy resolution of its mass tort liabilities."[11] Resolution of tort liabilities through a bankruptcy filing constitutes a valid

[8] *See* Parikh, *supra* note 6.
[9] Samir Parikh, *Mass Exploitation*, 170 U. PA. L. REV. ONLINE 53, 65 (Feb. 2022).
[10] *See In re LTL Mgmt., LLC*, 637 B.R. 396, 404 (Bankr. D.N.J. 2022).
[11] *Id.* at 426.

bankruptcy purpose by facilitating "the participation of all parties in interest . . . in a single forum with an aim of reaching a viable and fair settlement."[12] Judge Kaplan further noted that, "[the] Debtor filed this case to resolve the potentially crippling costs and financial drain associated with defending—over the next several decades—tens of thousands (if not hundreds of thousands) of personal injury claims with a multi-billion dollar exposure to Debtor and non-debtor affiliates."[13] As opposed to "hinder[ing] and delay[ing] talc claimants," Judge Kaplan concluded that "a global resolution of these claims though the bankruptcy may indeed accelerate payment to cancer victims and their families."[14]

The Law Professors submit that the totality of the circumstances in this case demonstrates the Debtor's bankruptcy filing should not be dismissed as a bad faith filing. Third Circuit precedent *required* Judge Kaplan to evaluate the totality of circumstances to consider what would happen if the bankruptcy case was dismissed.[15] Judge Kaplan correctly focused on tools available to both the Debtor and creditors under the Bankruptcy Code, and why those tools make the bankruptcy system the optimal venue for resolving competing creditors' claims to a potentially

[12] *Id.* at 414.
[13] *Id*. at 427.
[14] *Id.*
[15] *Mem'l Corp. v. BEPCO, LP (In re 15375 Mem'l Corp.)*, 589 F.3d 605, 618 (3d Cir. 2009).

finite set of assets. Here, the Law Professors submit, as Judge Kaplan held, that dismissal of the bankruptcy case would likely lead to worse outcomes for stakeholders in the Debtor's estate. Indeed, any *per se* rule that provides a debtor who undertakes a divisional merger and next files for bankruptcy protection does so in bad faith is fundamentally at odds with the Third Circuit's totality-of-the circumstances test to determine a good faith bankruptcy filing.

In this vein, and as further discussed herein, the fact that a debtor has undertaken a divisive merger prior to filing for bankruptcy should not – by itself – support a dismissal for a bad faith filing. Divisive mergers have been undertaken for decades and are codified into law in many states. There is nothing inherently illegal, inequitable, or fundamentally improper about the technique. Naturally, any technique can be abused, but the fact that a technique *could possibly* be abused should not preclude parties from pursuing a legitimate execution.[16]

A divisive merger and its accompanying agreements can provide a debtor and its creditors access to the same – or even greater – financial resources enjoyed outside of bankruptcy. And the bankruptcy process can significantly reduce administrative and legal costs and remove various barriers to resolution. The benefits to the creditor collective are clear. Further, a divisive merger that actually defrauds

[16] *See* Parikh, *supra* note 6.

or otherwise disadvantages creditors can be addressed through the well-developed remedies available under the Bankruptcy Code by a jurist extremely experienced in adjudicating these types of claims. The argument that dismissal must be required if a divisive merger precedes a bankruptcy filing is misguided. This Court should undertake a more qualitative assessment focused on whether the Debtor has met the applicable good faith standard in availing itself of the bankruptcy system to resolve its mass tort liability. Hyperbole should not cloud the debate.

ARGUMENT

I. THE DEBTOR'S USE OF THE BANKRUPTCY PROCESS PROVIDES BENEFITS TO ALL STAKEHOLDERS COMPARED TO CONTINUING MASS TORT LITIGATION OUTSIDE OF BANKRUPTCY.

Bankruptcy courts in the Third Circuit engage in a fact-intensive inquiry into the totality of the circumstances to determine whether a debtor has filed a bankruptcy petition in good faith.[17] In this case, the Debtor's bankruptcy filing advanced two legitimate bankruptcy purposes, both of which are consistent with public policy: (i) equality of distribution and (ii) preventing a race to the courthouse. Indeed, federal bankruptcy courts are the optimal venue for addressing unique problems created by cases that involve both present and future mass tort claims. Without bankruptcy

[17] *Mem'l Corp.*, 589 F.3d at 618.

resolution, the uncertainty of future liability could prevent otherwise viable companies from productively carrying on their businesses and undertaking projects or asset sales that could create value and facilitate a cooperative resolution.[18]

Appellants miss the mark by focusing on one of the means (a divisional merger) used in preparing for a bankruptcy filing instead of the ultimate purpose of a bankruptcy filing.[19] When used appropriately, a divisional merger preceding a bankruptcy filing can provide a mechanism to resolve mass tort claims, and isolate – but by no means eliminate – the mass tort liability for resolution independent of the other operations of the business.[20]

For that reason, a corporation may undertake a divisive merger prior to filing for bankruptcy to assist in liability management and offer legally recognized protections to all stakeholders, including creditors, employees and shareholders. This act, in and of itself, should not constitute a basis to dismiss a case as a bad faith filing. In fact, such a result would be unprecedented. Divisive mergers have been

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[18] Anthony Casey and Joshua Macey, *[Texas Two-Step and the Future of Mass Tort Bankruptcy Series] A Qualified Defense of Divisional Mergers*, Harvard Law School Bankruptcy Round Table (June 28, 2022), https://blogs.harvard.edu/bankruptcyroundtable/2022/06/28/texas-two-step-and-the-future-of-mass-tort-bankruptcy-series-a-qualified-defense-of-divisional-mergers/.

[19] *Id.*

[20] *Id.*

undertaken for decades, and are legal in several states including Texas, Arizona, Pennsylvania, and Delaware. The Law Professors are unaware of any bright-line rule mandating dismissal of a bankruptcy case based on a *prima facie* lawful corporate transaction the debtor executed prepetition. A rule that denies divisive-merger entities access to federal bankruptcy courts would be a radical step in the wrong direction, with no legal or practical justification.

a. Bankruptcy Offers Powerful Tools for Mass Tort Claimants.

Dating back to the *Johns-Manville* asbestos bankruptcy in the 1980s, chapter 11's uniquely powerful tools have offered "a structured system to manage multiple liabilities and ha[ve] provided a forum for companies with massive liabilities to attempt to do so."[21] Permitting the Debtor to use these tools and continue in bankruptcy would thus be consistent with this precedent and best ensure all present and future tort claimants share in distributions equally through a court-administered claims process. These tools include, among others: centralization of claims, the automatic stay, the broad reach of bankruptcy jurisdiction, claims estimation, extensive disclosure requirements, appointment of a future claims representative with fiduciary duties, and the chapter 11 plan process.[22] Bankruptcy offers a

[21] Report of the National Bankruptcy Review Commission 315 (Oct. 20, 1997).
[22] *See* Parikh, *supra* note 2 at pages 29-31.

comprehensive response to collective action problems that often preclude resolution of complex disputes. Mass tort cases present the most daunting collective action problems and often times require the unique tools that only the bankruptcy process provides.

First, bankruptcy provides mechanisms to centralize tort claims to allow an efficient, uniform, and evenhanded approach to the assessment and resolution of all claims against a debtor.[23]

Second, section 362's automatic stay halts the litigation tsunami that squanders resources that should ultimately go to victims.[24] It likewise provides a debtor (and potentially other affiliated entities) with a necessary breathing spell to afford it the opportunity to strategically implement its reorganization process and propose a corresponding plan.[25]

Third, the bankruptcy court's wide-ranging jurisdiction under 28 U.S.C. § 1334 allows for the aggregation of state and federal claims held by both current and future claimholders. Further, bankruptcy courts enjoy jurisdiction over claims

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[23] *See In re Federal–Mogul Global Inc*., 684 F.3d 355, 359 (3d Cir. 2012) ("Bankruptcy has proven an attractive alternative to the tort system for corporations because it permits a global resolution and discharge of current and future liability, while claimants' interests are protected by the bankruptcy court's power to use future earnings to compensate similarly situated tort claimants equitably.").

[24] *See* Parikh, *supra* note 6.

[25] *See generally In re Amatex Corp*., 107 B.R. 856, 870 (E.D. Pa. 1989).

against, among, or between third parties that may increase available assets for the debtor's creditors.[26]

Fourth, Bankruptcy Code section 502(c) authorizes a bankruptcy court – either alone or together with a district court – to estimate the value of contingent claims subject to pending litigation against a debtor, often within a matter of months.[27]

Fifth, Bankruptcy Code section 1109(b) authorizes a bankruptcy court to appoint a representative with fiduciary duties to protect the interests of future claimants as "parties in interest."[28]

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[26] *See In re Badogna*, 331 F. App'x 962, 965 (3d Cir. 2009) ("Bankruptcy courts have jurisdiction to adjudicate claims 'arising under' Title 11 or 'arising in' a Title 11 bankruptcy case (collectively, 'core' claims), as well as those 'related to' a bankruptcy case.").

[27] *See In re Stone Webster, Inc.*, 279 B.R. 748, 809 (Bankr. D. Del. 2002) ("The purpose of an estimation proceeding is to avoid delays that may arise from waiting to fix the value of contingent claims."); *see also In re Choice ATM Enters.,* 2015 Bankr. LEXIS 689, at *17 (Bankr. N.D. Tex. Mar. 4, 2015) ("Section 502(c) and its legislative history make clear that Congress intended bankruptcy courts to handle disputes . . . in an expedited manner to accomplish the goals of preserving going-concern value for the benefit of not just debtors, but their creditors as well."); *see also, e.g., In re POC Props., LLC*, 580 B.R. 504, 508 (Bankr. E.D. Wis. 2017) (bankruptcy court estimated claims for purposes of distribution under the chapter 11 plan); *Denke v. PNC Bank, N.A (In re Denke)*, 524 B.R. 644, 654 (Bankr. E.D. Va. 2015) (bankruptcy court estimated unsecured deficiency claims).

[28] *See In re Johns-Manville Corp.*, 36 B.R. 743, 749 (Bankr. S.D.N.Y. 1984) ("Future claimants are undeniably parties in interest to these reorganization proceedings pursuant to the broad, flexible definition of that term. . . . The drafting of 'party in

Finally, a debtor's treatment of a particular class of claims is delineated in a plan of reorganization, which is accompanied by a court-approved disclosure statement and voted on by all allowed claim holders. Such a plan would include current tort claimants and other creditors, and is subject to input from a future claimants representative and oversight from statutory committees, the United States Trustee, and the bankruptcy court.[29]

In sum, the bankruptcy process reduces transaction costs by centralizing litigation, offering the means – including mediation and claim estimation – to achieve an expedited global settlement, and enjoying the statutory flexibility to efficiently resolve claims held by both current and future claimants. Instead of potentially waiting a decade for a recovery, mass tort creditors may be able to vote on a settlement offer within 18 months.[30] To this end, this bankruptcy case's

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interest' as an elastic concept was designed for just this kind of situation."); *In re Imerys Talc America*, Case No. 19-10289 (LSS), (Bankr. D. Del. 2019) [Docket No. 503 at 10] (a future claimants' representative's "loyalties must lie with the demand holders for whom he acts as a fiduciary, that is—the future claimants"); *see also Jones v. Chemetron Corp.*, 212 F.3d 199, 209–10 (3d Cir. 2000) (recognizing that future claimants "may require some voice" in the reorganization process and therefore qualify as "parties in interest" under section 1109(b) of the Bankruptcy Code).

[29] *See generally, e.g.*, *In re Armstrong World Industries, Inc*., 348 B.R. 136, 205 (D. Del. 2006).

[30] *See* 11 U.S.C. § 1121(b), (d) (providing a debtor has the exclusive right to propose a chapter 11 plan for the first 120 days, which may be extended by the bankruptcy court "for cause" up to the statutory maximum period of 18 months).

objectives are entirely consistent with those sought by other mass tort bankruptcies: to provide plaintiffs a fair, equitable, and expedited recovery for their meritorious claims, and offer a defendant with potentially limited funds[31] a single and efficient forum for resolution.

b. The Propriety of Any Given Divisive Merger Can Be Assessed Under Applicable Law in a Bankruptcy Case.

Parties' arguments that any bankruptcy case filed following a divisive merger constitutes *per se* bad faith mandating dismissal disregard the holistic nature of the bad-faith inquiry and overlook the myriad legal tools bankruptcy courts have to assess the merits of any divisive merger. A bankruptcy court can evaluate the merits of challenges to divisive mergers under both state and federal fraudulent transfer law,[32] through veil-piercing, or other equitable remedies such as substantive

[31] In this case, even before the divisional merger, there were limited funds available to pay creditors. While J&J as an enterprise may have significant resources, as a matter of general corporate law, a parent entity is not liable if alleged tortious conduct can only be traced to agents of a subsidiary. *See generally Min Wu v. Jafco Foods, Inc.*, No. BER-L-7317-20, at *5 (N.J. Super. Feb. 25, 2022) ("Even a parent corporation is not routinely liable for the torts of the subsidiary.").

[32] *See, e.g., DBMP LLC v. Those Parties Listed on Appendix A to Complaint (In re DBMP LLC)*, Nos. 20-30080, 20-03004, 2021 Bankr. LEXIS 2194, at *59-60 (Bankr. W.D.N.C. Aug. 10, 2021) (denying asbestos claimants' lift stay motion, which the Court commented was "the functional equivalent" of a motion to dismiss and further noting that " . . . [W]hile there have been many arguments made suggesting that the Divisional merger was a fraudulent transfer, etc. at present, there is no pending action in this case that challenges the transaction . . . . Instead, [the

consolidation.[33] There are well-developed bodies of law in all these areas that bankruptcy courts are experienced in applying. These issues, however, are irrelevant for purposes of assessing good faith at the outset of a chapter 11 mass tort bankruptcy. A bright-line rule that a prepetition divisive merger necessitates dismissal of an entire bankruptcy case is inappropriate.

II. THE ALTERNATIVES TO BANKRUPTCY ARE INEFFICIENT AND OFTEN RESULT IN WORSE OUTCOMES FOR KEY CREDITORS.

A divisive merger and its accompanying agreements can provide a debtor and its creditors access to the same – or even greater – financial resources enjoyed outside of bankruptcy.[34] Further, as noted above, the bankruptcy process can significantly reduce administrative and legal costs and remove barriers to resolution. The ultimate result is a forum that can be optimal for resolving many mass tort cases.

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asbestos claimants] seek dismissal of the case, but indirectly."); *In re Bestwall LLC*, 605 B.R. 43, 50-51 (Bankr. W.D.N.C. 2019) (denying the motion to dismiss the bankruptcy case filed by the Official Committee of Asbestos Claimants upon noting that the case was not "objectively futile," and further finding that the court would "ultimately have to rule on Bestwall's good faith, albeit in a different context, at confirmation.").

[33] *See In re Owens Corning*, 419 F.3d 195, 199 (3d Cir. 2005) (noting substantive consolidation is an "equitable remedy" in which bankruptcy courts may substantively consolidate the assets and liabilities affiliated entities, but declining to impose such remedy in the instant case).

[34] *See generally In re LTL Mgmt., LLC*, 637 B.R. at 423 ("With Debtor's chapter 11 filing, this Court now has jurisdiction and oversight over the bankruptcy estate, which controls LTL's rights under the Funding Agreement, and can ensure that Debtor pursues its available rights against J&J and New JJCI.").

Proponents of the view that a divisive merger bankruptcy filing is *per se* in bad faith typically champion bankruptcy alternatives, *e.g.*, class certification and multi-district litigation ("MDL"), as preferred substitutes for the bankruptcy process. But while class-action litigation and the MDL process have their place, they suffer from numerous drawbacks that generally render them inferior alternatives to bankruptcy, especially for cases involving future mass tort claims.

a. Class Certification Under Federal Rule of Civil Procedure 23.

Although class certification under Federal Rule of Civil Procedure 23 is an oft-praised resource for resolving large pools of claims involving unified causation elements, the procedure cannot be used for many mass tort cases.[35] Specifically, Rule 23 class certification is not available for personal injury, mass tort cases that present too many individual issues surrounding causation and damages. In *Amchem Products v. Windsor*, 521 U.S. 591, 597 (1997) and *Ortiz v. Fibreboard Corp*., 527 U.S. 823, 821 (1999), the Supreme Court limited the class action resolution option for the vast majority of mass tort cases, holding that proposed asbestos claimant classes did not satisfy the requirements of common issue predominance and adequacy of representation, and that the mandatory settlement class was not certifiable on a limited

[35] *See* Parikh, *supra* note 6.

fund theory under Federal Civil Procedure Rule 23(b)(1)(B).[36] Since then, federal courts have reached a consensus: Most personal injury, mass tort cases present too many individual issues surrounding causation and damages to satisfy Rule 23's predominance and superiority requirements.[37] Moreover, from a practical standpoint, class certification is not a viable tool for resolving all claims against a defendant unless a settling defendant allows some form of future claims to return to the tort system. Mass torts present unique latency issues. Tortious conduct has occurred but a plaintiff's injury may not manifest for decades. In this regard, future plaintiffs cannot have a role in a purported class action; they cannot opt out because future plaintiffs have no notice of class settlements, and the Supreme Court has held that courts cannot bind future plaintiffs to class settlements in light of due process.[38] In contrast, the bankruptcy

[36] *Id.*
[37] *Id.*
[38] *Ortiz*, 527 U.S. at 846 ("[A] mandatory settlement-only class action with . . . future claimants compromises their Seventh Amendment rights without their consent." Moreover, they "implicate the due process 'principle . . . that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.'"); *see also* Sergio Campos and Samir D. Parikh, *Due Process Alignment in Mass Restructurings*, 91 FORDHAM L. REV. ___ (*forthcoming* 2022), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4088836.

system, as discussed above, has been used to resolve mass tort liabilities, including future claims, since the 1980s.

b. The MDL Process.

The MDL process under 28 U.S.C. § 1407 has distorted outcomes for parties involved in mass tort disputes.[39] While the MDL process produces success stories, like Volkswagen's "clean diesel" litigation,[40] the process has now evolved in ways that can undermine effective resolution of mass tort cases, especially ones involving future mass tort claims and where liability is disputed.

First, the overwhelming majority of victims in MDL cases do not receive their day in court. According to the 2018 statistics, approximately 156,511 MDL actions were pending in front of 48 transferee district courts as of September 30, 2018.[41] From 1968 through September 30, 2018, transferee courts had received and resolved approximately 516,593 cases.[42] Of these civil actions, only 16,728 were remanded for trial.[43] In other words, only 3% of transferred cases escaped MDL capture; 97%

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[39] *Id.*
[40] *Volkswagen "Clean Diesel" Marketing, Sales Practices, and Product Liability Litigation*, 15-MD-2672-CRB (JSC).
[41] *See* Parikh, *supra* note 2, at 26 (citing U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., MDL STATISTICS REPORT– DISTRIBUTION OF PENDING MDL DOCKETS BY ACTIONS PENDING 6 (2018)).
[42] *Id.*
[43] *Id.*

of transferred cases are resolved in MDL courts by dispositive motion or settlement.[44]

Second, unlike the bankruptcy process, there are no statutory requirements that an MDL court review or assess the integrity of a settlement process or any settlement reached by the parties, leading to a lack of judicial oversight. There is also a lack of transparency, as confidentiality agreements invariably prevent publication or an assessment of settlement details. In contrast, bankruptcy settlements are subject to judicial approval under Bankruptcy Rule 9019, and plan settlements in mass tort cases are subject to rigorous disclosure rules as well as the confirmation requirements of Bankruptcy Code section 1129.

Third, MDLs can primarily resolve only current federal claims; state claims and claims of future victims fall outside the MDL process.[45] This stands in stark contrast to the bankruptcy court process, which can resolve ostensibly all claims against a mass tort debtor.

Fourth, the MDL process can be protracted and meandering—a significant departure from the speed with which bankruptcy cases are often resolved. [46] In *In re Patenaude*, 210 F.3d 135, 146 (3rd Cir. 1999), for example, transferred cases

[44] *Id*.
[45] *See* Parikh, *supra* note 6.
[46] *Id.*

languished before the MDL judge for seven years. The plaintiffs sought to have the cases remanded, asserting that pre-trial proceedings had been resolved years before.[47] Their objections fell on deaf ears.[48] The plaintiffs petitioned the Third Circuit for a writ of mandamus to remand their cases for trial.[49] The Third Circuit denied the writ because, in its estimation, pretrial proceedings were "ongoing" even after 7 years.[50]

Bankruptcy, by contrast, affords constituents greater flexibility and promotes accelerated resolution. Specifically, a bankruptcy judge has broad discretion to intervene and adjust the process to address various deficiencies. MDL judges do not enjoy this flexibility. Although parties can consent to conduct all proceedings before an MDL court, notably, the MDL statute prevents MDL judges from even trying a case, and compelling a settlement is the only means to effectuate any meaningful recovery for claimants.[51] Beyond giving judges more procedural discretion, the

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[47] Parikh, *supra* note 2.
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *See* 28 U.S.C. § 1407(a); *In re DePuy Orthopaedics, Inc.*, 870 F.3d 345, 348 (5th Cir. 2017) ("An MDL court can conduct pretrial proceedings but cannot try a case that it would not be able to try without its MDL status." Moreover, "[f]ederal law limits an MDL court's jurisdiction over a transferred case to pretrial proceedings and provides that once those are completed, the MDL court must remand the transferred case to the district from which it was transferred.").

bankruptcy rules limit the time in which a debtor may exclusively propose a plan of reorganization.[52] The possible termination of exclusivity incentivizes a debtor to move quickly to secure consensual resolution.

CONCLUSION

Though controversial, divisive mergers are a legal technique. A prepetition divisive merger should not – by itself – support a bad faith dismissal of a case. In denying dismissal of the Debtor's bankruptcy case, Judge Kaplan was required to undertake a qualitative assessment of the circumstances surrounding the Debtor's bankruptcy filing. In doing so, Judge Kaplan correctly concluded that dismissal of the bankruptcy case would push plaintiffs out of the optimal venue for resolving mass tort cases like the Debtor's and plunge them into a perilous alternative plagued by protracted litigation, diminished recoveries, and inequitable distributions. For these reasons and those explored above, the Bankruptcy Court's judgment should be affirmed.

[52] *See supra* note 30.

Dated: August 22, 2022

Respectfully submitted,

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CERTIFICATION OF ADMISSION TO BAR

I, Peter Friedman, certify as follows:

1. I am member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

2. Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.

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By: *<u>/s/ Peter Friedman</u>*
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Dated: August 22, 2022

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) because this brief contains 4,565 words—no more than half the length of the parties' principal briefs—excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Local Rule 29.1(b).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

3. This brief complies with the electronic filing requirements of Local Rule 31.1(c) because the text of this electronic brief is identical to the text of the paper copies, and the Vipre Virus Protection, version 3.1 has been run on the file containing the electronic version of this brief and no viruses have been detected.

Dated: August 22, 2022

/s/ *Peter Friedman*
Peter Friedman

CERTIFICATE OF SERVICE

I certify that on this 22nd day of August, 2022, the foregoing was served on all parties or their counsel of record through the CM/ECF system.

/s/ Peter Friedman
Peter Friedman

Counsel for Amici Curiae