OVER-THINKING RAMIFICATIONS OF THE DISMISSAL OF LTL MANAGEMENT LLC'S BANKRUPTCY

Hon. Judith K. Fitzgerald (Ret.)[*]

In the week since the United States Court of Appeals for the Third Circuit issued its highly anticipated decision in *LTL Management, LLC v. Those Parties Listed On Appendix A To Complaint, et al*., 2023 U.S. App. LEXIS 2323 (3d Cir. Jan. 30, 2023) ("*Opinion*"), requiring dismissal of the bankruptcy of LTL Management LLC ("LTL"), numerous commentaries have been published and many discussions have occurred regarding the import of the *Opinion*. Focusing on prior case law decided by the Third Circuit in 1999 in *In re SGL Carbon Corp*., 200 F.3d 154, 159-62 (3d Cir. 1999), the rudiment was simple: LTL had no need for bankruptcy relief as it was not in, and had no near-term prospect of, financial distress. Without attempting to expand LTL's situation to any other debtor, the Court determined that the need for some form of imminent and demonstrable financial relief is foundational to invoking bankruptcy jurisdiction.

In a thoughtful analysis leading to a fact-specific decision, the Court examined a single debtor and its new-found responsibility for talc-related injuries. LTL is not the typical mass tort defendant burdened by asbestos personal injury claims that has found a path into bankruptcy for the past forty years. Prior cases involved a debtor with an acknowledged toxic product putting its assets and liabilities up for scrutiny by creditors and a bankruptcy court. The claims primarily involved lung diseases and had supporting historical and largely undisputed epidemiological underpinnings. LTL, on the other hand, has never operated and has never admitted that "its" talc products caused any sort of personal injury, contending instead that cosmetic talc is safe to use. And as the Court noted, cosmetic talc claims do not yet have that multi-decades-long level of maturity in data collection. Thus, reading *LTL* expansively as impeding bankruptcy for future mass tort cases seems unwarranted.

Although practitioners may have preferred an analysis of the Texas Two-Step and guidance on whether it can ever be used as a tool to resolve mass tort problems in a bankruptcy context, the Court instead made a narrow ruling based on existing law and deferred the analysis of the Texas Two-Step to another day and another case. Rightfully so. Bankruptcy has been a remedy for debtors with mass tort liabilities for decades. But those debtors had obvious financial reasons for filing bankruptcy. Generally, they had on-going businesses that generated revenue but could not sustain the cost of addressing massive and mature legacy liabilities with the prospect of unknown future claims. Many had burned through substantially all their insurance defending claims. That pattern contrasts sharply with LTL's posture as a brand new entity with no business, no products, and no revenue from operations of its own.

While there may be legitimate business reasons to divide one company into multiple companies, there is no valid bankruptcy purpose for a solvent entity that can attend to its creditors without foreseeable financial difficulty to slough its liabilities into a new entity created solely to

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allow the solvent company backdoor access to the bankruptcy system. In its *Opinion*, the Court applied prior caselaw with respect to good faith to further refine an area of law that is of general applicability for bankruptcy practitioners. However, faced with the circumstances of the LTL bankruptcy, the Court found no need to go beyond detailing the debtor's lack of financial distress as demonstrating lack of good faith.

The apprehension that LTL puts too much of a burden on, without providing specific standards to, bankruptcy judges who are not intimately familiar with the nuances of a debtor's business to fathom whether financial distress exists or is threatening, when deciding motions to dismiss, is similarly not well-founded. Determining solvency and, ultimately, what a debtor must pay to creditors to meet the liquidation alternative test in confirming a plan, and undertaking other financial analyses such as adjudicating avoidance actions and estimating the amounts of claims, are bread and butter matters in bankruptcy courts. Bankruptcy judges make those decisions, case by case, based on evidentiary records, and their rulings are subject to appellate review.

After the *Opinion*, a debtor using a Texas Two-Step will know that evidence of imminent financial distress must be established and will be prepared to show it at the outset of the case, if it is not obvious from the bankruptcy petition and schedules. Debtor's counsel undoubtedly will devote many pages of their first day declarations and briefing to the factual bases and legal standards for evaluating financial difficulty. Those contesting that premise will likewise frame the opposite side of the issues for the court. And if a party believes the bankruptcy judge erred, there are up to three levels of review in which to challenge the findings.

The dystopian concern that *LTL* is a precursor to barring or hampering bankruptcy use by debtors plagued by imminent financial woes is misplaced. Publicly traded companies with billions of dollars of assets and mass tort liabilities have obtained bankruptcy relief. These companies have confirmed plans with channeling injunctions, 524(g) trusts, and substantial contributions from parents, affiliates, insurers, and others. As years of mass tort bankruptcies have shown, debtors' counsel have been creative and successful in using existing law to address mass tort liabilities.

Bankruptcy relief is available to those facing financial distress. But it is not a subterfuge for a solvent entity with no need for that relief trying to circumvent the requirements of Bankruptcy Code by machinations such as the Texas Two-Step. In *LTL*, the Third Circuit affirmed that principle.