The Dismissal of LTL and What Lies Ahead for Mass Tort Bankruptcy

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On January 30, 2023, the Third Circuit Court of Appeals (the "Court") issued its opinion (the "Opinion") dismissing the bankruptcy filing of LTL Management LLC ("LTL"), a subsidiary of Johnson & Johnson ("J&J") formed to use bankruptcy to resolve J&J's talc-related mass tort liability. The bankruptcy filing of LTL elicited intense criticism, with the complicated corporate restructuring used by J&J to place LTL in bankruptcy drawing the derisive moniker of the "Texas Two-Step." It also spawned a major copycat bankruptcy filing by a subsidiary of 3M, which tried to use a very similar strategy to manage its earplug-related mass tort liability through bankruptcy and thereby sidestep the massive multidistrict litigation pending against it. Finally, LTL's bankruptcy was a major impetus for the creation of the Harvard Law School Bankruptcy Roundtable's eight-part series on the Texas Two-Step and the future of mass tort bankruptcies.

The Opinion is likely not the last word on the future of mass tort bankruptcies—since J&J has already indicated it will appeal, it probably isn't even the last word on the fate of LTL. The Roundtable previously posted some concluding thoughts on the series highlighting several of the many great contributions made by academics around the country. Nevertheless, the issuance of the Opinion provides an opportunity for various contributors to the series, along with some new voices, to offer some additional viewpoints on this important decision. This post aims to summarize the Opinion, offer some thoughts on the effect of this Opinion on this case and mass tort bankruptcies more generally, and note some items that the Opinion avoids or overlooks.

<u>Summary of the Opinion (citations to 2023 U.S. App. LEXIS 2323 (3d Cir. Jan. 30, 2023))</u>:

Third Circuit precedent permits bankruptcy filings to be dismissed if they are not made in good faith. A bad faith filing is one that is at odds with the equitable purposes of bankruptcy—namely, preserving going concern value and maximizing the value of the bankruptcy estate. Opinion at *24-25. Rather than weighing in on the propriety of the Texas Two-Step, the Opinion's analysis "start[s], and stay[s], with good faith." Opinion at *7. To understand why the Court found the filing to have been made in bad faith, the Opinion begins by recounting the litigation history that ultimately led to the Texas Two-Step transaction undertaken by J&J, as well as its rationale for doing so.

Background:

For those who may not be familiar, J&J Consumer Inc. ("Old Consumer"), a wholly-owned subsidiary of J&J that sold Johnson's Baby Powder, faced thousands of lawsuits alleging that talc in its baby powder products caused mesothelioma, ovarian cancer, and other injuries. Following a multi-billion-dollar adverse verdict and the filing of thousands of similar suits, J&J undertook a corporate restructuring (the "Restructuring") to try to deal with its liabilities and minimize harm to the broader corporate group. The Restructuring eliminated Old Consumer by splitting it into two new entities: LTL and a newly-constituted J&J Consumer Inc. ("New Consumer"). New Consumer would hold almost all of the productive businesses of Old Consumer. LTL, meanwhile,

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would hold all of Old Consumer's talc liabilities, along with, crucially, a funding agreement (the "Funding Agreement"). The Funding Agreement, signed by New Consumer and the parent J&J, obligated these parties to pay LTL's talc-related liabilities up to an amount equal to the value of New Consumer. LTL estimated that the value of New Consumer, and thus the value of the Funding Agreement to LTL, was no less than $61.5 billion. Opinion at *5-6, 10, 15-17.

Two days after the Restructuring, LTL filed for bankruptcy, and one of its first moves following its filing was to convince the bankruptcy court to extend bankruptcy's automatic stay to nondebtor affiliates including J&J and New Consumer. Opinion at *17. This meant that actions against both LTL and all the nondebtor affiliates was paused, providing LTL with significant negotiating leverage against talc claimants and prompting the suits to dismiss LTL's bankruptcy filing that eventually led to the Opinion.

Good Faith in the Third Circuit:

The Bankruptcy Code does not expressly mention an absence of good faith as a reason for dismissing a bankruptcy filing. Instead, the Third Circuit (and many others) evaluate whether a filing is made in good faith by considering whether the filing was made for a valid bankruptcy purpose—such as preservation and maximization of value—and whether a filing is made solely to obtain a tactical litigation advantage. Opinion at *25. Expanding upon this, the Court described that its precedent requires "some degree of financial distress on the part of a debtor" for a filing to have been made in good faith, and that absent such distress, "there is no reason for Chapter 11 and no valid bankruptcy purpose." Opinion at *26-27. This would seem to make it challenging to use bankruptcy to resolve contingent mass tort liability, which often does not present immediate financial distress but can threaten a company's existence as such contingent liability grows. In fact, the Court noted in passing that uncertain future litigation liabilities and the possibility of customer flight presented by mass torts could factor into whether a debtor is experiencing financial distress. Nevertheless, it appeared to back away from this by saying that "[f]inancial distress must not only be apparent, but it must be *immediate enough* to justify a filing." Opinion at *29 (emphasis added).

The Court suggested that a good faith analysis requires a case-by-case evaluation of whether a given debtor faces immediate financial distress to determine if a bankruptcy filing is appropriate or premature. The need for this, the Court explained, arises from bankruptcy courts' unique powers to pause litigation, estimate claims, provide for future claimants, and otherwise "disrupt[] creditors' existing claims against the debtor." Opinion at *31. The Court left open the door for using bankruptcy to address mass tort liability "when financial distress is present," cataloging several well-known cases in which bankruptcy was an appropriate procedural mechanism for dealing with mass torts. Opinion at *32. But the Court highlighted that the measure of whether financial distress is present is a two-part test: "courts must always weigh not just the scope of the liabilities the debtor faces, but also the capacity it has to meet them." Opinion at *34. Thus, immediate financial distress requires a comparison of both the assets and liabilities on a company's balance sheet. With this test now set, the Court turned to an analysis of the particulars of LTL's bankruptcy filing to see whether LTL truly faced the type of imminent financial distress the Court announced is necessary for a bankruptcy filing.

LTL Was Not in Financial Distress:

The Court quickly rejected the possibility that it would need to consider the potential financial distress of both Old Consumer and LTL when evaluating whether LTL's bankruptcy filing should be dismissed. To begin, the Court analyzed LTL and Old Consumer through lens of entity separateness that forms the foundation of much corporate law. True, Old Consumer may have faced financial difficulties because of the suits described above; however, Old Consumer was eliminated as part of the Restructuring, and so is no longer relevant. Meanwhile, although LTL was saddled with Old Consumer's talc liabilities due to the Restructuring, it was also granted the "birth gift" of the Funding Agreement, Opinion at *35, a "right to cash that was very valuable, likely to grow, and minimally conditional." Opinion at *39. The question of imminent financial distress, the Court explained, applies to the entity that is *currently in bankruptcy*, not some entity that no longer exists. *See* Opinion at *35-37. This very same concept of entity separateness motivated J&J's decision to undertake the Restructuring in the first instance: J&J depended on being able to place talc liabilities into an entity that was separate from the productive parts of the business, and then only place that entity into bankruptcy. Opinion at *37. Following this logic, the Court looked only to LTL—the entity in bankruptcy—and only its assets and liabilities to decide whether the bankruptcy filing was made in good faith.

With this framework in mind, the Court turned to an analysis of whether bankruptcy was appropriate for *LTL*, instead of any other entity, finding that LTL was not in financial distress. The Court noted that the bankruptcy court failed to give sufficient weight to the value of the Funding Agreement when analyzing LTL's financial distress. Recall that under the Funding Agreement, New Consumer and J&J together agreed to provide at least $61.5 billion towards management of LTL's talc liabilities. Furthermore, the bankruptcy court focused too much on the impact of litigation costs incurred by *Old Consumer* on its continued financial viability when evaluating *LTL*'s distress, even though Old Consumer did *not* have the benefit of the Funding Agreement. Old Consumer's litigation costs and liabilities were massive when compared to Old Consumer's assets. However, their relative significance was far smaller when considering LTL's balance sheet, since LTL had access to the Funding Agreement. Put another way, the Funding Agreement was far more valuable than any asset that Old Consumer previously had, since it uniquely "gave LTL direct access to J&J's exceptionally strong balance sheet." Opinion at *39. The Court also indicated that it put little stock in LTL's projections, which were accepted by the bankruptcy court, that litigation expenses were so substantial as to imperil J&J's continued viability. Instead, the Court focused on J&J's litigation successes to date, which included settlements with a large number of claimants and a substantial number of favorable verdicts. "In this context, it becomes clear that, on its filing, LTL did not have any likely need in the present or the near-term, or even in the long-term, to exhaust its" rights under the Funding Agreement. Opinion at *44.

In a filing in the case, LTL said that there was no "imminent or even likely need" for it to "invoke the Funding Agreement to its maximum amount or anything close to it." Opinion at *45. Without such need, the Court found there was no way to say that LTL was insolvent. LTL's first-day declaration in its bankruptcy case noted that the company was formed to manage its talc liabilities while insulating New Consumer, the Court noted that it "cannot say there was any sign on the horizon it would be anything but successful in the enterprise." Opinion at *46. In short, LTL had the financial wherewithal to make payment on its talc liabilities (thanks to the Funding Agreement), and therefore had no business being in bankruptcy. If, in the fullness of time, LTL is able to show that its litigation liabilities are so substantial that the Funding Agreement cannot support their payment, then bankruptcy may be appropriate at that future date. But, put succinctly, "[a]t best the filing was premature." Opinion at *47. In the end, "Chapter 11 is appropriate only for entities facing financial distress," which was not the case for LTL. Opinion at *49. Therefore, LTL's bankruptcy filing was dismissed.

Takeaways:

Narrow Opinion:

While the Opinion will have profound consequences for LTL, J&J, and talc claimants, the opinion itself was fairly modest in its ambitions. It did not set out to say, in any definitive fashion, when bankruptcy law is appropriate for mass tort resolution or whether the Texas Two-Step could ever be an appropriate use of bankruptcy law. It never addressed the thorny issues that were raised by the language in the Texas statute that made the Two-Step possible, even though they seemed to immunize these reorganizations from fraudulent transfer attack. It also did not opine on whether successor liability might otherwise permit claimants to recover if the Two-Step was unwound. The Court was extremely focused on the facts in front of it, and the holding in this case may merely be seen as a finding that, on the facts of this particular case, it would be difficult for LTL to show financial distress *today* because of the value available to it under the Funding Agreement. In focusing on entity separateness, the Opinion could be construed to provide firm, albeit narrow, support for the fundaments of corporate law, rather than making any broad pronouncements on the appropriate uses of bankruptcy law. Finally, the Opinion can be read as a call not for action, but for more information—regarding the size of LTL's liabilities and the scope of the threat posed to J&J's business. The Court spoke highly of permitting the multidistrict litigation process to run its course, as doing so would "continue to sharpen all interested parties' views of mutually beneficial settlement values." Opinion at *43. In other words, the Opinion appears to endorse the view that aggressive use of bankruptcy in mass tort cases can heighten the risk of substantial undercompensation of tort victims (both present and future), and that the best corrective is to permit some amount of litigation to proceed.

Changing the Dance:

Some have argued that the Texas Two-Step could be an appropriate use of bankruptcy law, if it provides value to society by isolating, without limiting, mass tort liability and allowing the rest of an otherwise-profitable business to operate unimpeded. The Opinion largely puts paid to this view in the Third Circuit. However, the Court takes pains not to pronounce the Texas Two-Step dead, instead praising innovative lawyers who devised the strategy and explaining that a decision on the propriety of the Texas Two-Step "awaits another day and another case.". Opinion at *50-51. This leaves open the possibility that a nontraditional debtor could satisfy the Court's good-faith requirement. But what is actually left of the Texas Two-Step in the Third Circuit following this opinion?

As a positive development, going forward the Texas Two-Step likely can't be used to circumvent fraudulent transfer law in the Third Circuit. If a company were to transfer liabilities through a divisional merger under Texas law and simultaneously implement a funding agreement, a court in the Third Circuit would need to investigate the sufficiency of the funding agreement. If such a funding agreement is *insufficiently* large to cover a tortfeasor's liabilities, then the divisional merger would likely constitute a fraudulent transfer (because the recipient of the tort liability would have received less than reasonably equivalent value in exchange). *See* 11 U.S.C. § 548(b)(i).

Alternatively, if the funding agreement was *sufficiently* large to cover a tortfeasor's liabilities, then it would likely be impossible for the recipient of the tort liability to be considered insolvent. *See* Opinion at *45 (noting that the Funding Agreement itself provided that LTL, after the divisional merger, held "assets having a value at least equal to its liabilities . . ."). This creates a "heads-I-lose, tails-you-win" dynamic for prospective Texas Two-Step debtors, making it all but impossible to successfully file a Texas Two-Step bankruptcy case in the Third Circuit. This may be exactly the goal of the Opinion.

But the downside of this development is that it potentially makes *less* money available to claimants than would have been available had LTL's bankruptcy been permitted to proceed. The Court expressly noted the irony "that J&J's triple A-rated payment obligation for LTL's liabilities, which it views as a generous protection *it was never required to provide to claimants*, weakened LTL's case to be in bankruptcy." Opinion at *49 (emphasis added). The Court's insistence on entity separateness may have been logically coherent, but its consequence is that a tort claimant against LTL, Old Consumer, or New Consumer will now likely need to prevail on a veil-piercing, alter-ego, or other similar theory to get to J&J's much deeper pockets. Although the Court leaves the Texas Two-Step as a theoretical possibility, it has so completely changed the dance that it is likely no longer useful for either defendants or plaintiffs.

What Next for LTL?:

The legal effect of the Opinion is somewhat unclear. Whether an appeal would even be heard (either by the Third Circuit *en banc* or by the Supreme Court), let alone won, is anyone's guess. Assuming that the Opinion stands, it annuls the bankruptcy litigation stay against LTL. Opinion at *51. Presumably, since J&J and New Consumer benefitted from an extension of LTL's automatic stay to them as a corollary to LTL's bankruptcy, the Opinion also annuls the stay as applied to J&J and New Consumer. This means that attempts to bring J&J into various cases proceeding in the multidistrict litigation will likely be redoubled. It remains to be seen whether, as the Court implied, settlement may become more likely or trials will continue at a similar pace as a result. It also is unclear whether J&J may try to unwind the Reorganization or otherwise disavow the Funding Agreement, since at this moment J&J is likely subject to greater liability than it had been prior to the Reorganization. If it chose to unwind the Reorganization, it could leave tort victims worse off if they have less access to funding from J&J, and could create additional confusion regarding the consequence of an unwinding under both federal bankruptcy and Texas corporate law. Along these lines, if the funding agreement was disavowed, and LTL became insolvent as a result, could LTL have a (long-shot) fraudulent transfer claim against J&J or New Consumer? If so, it isn't clear that this would benefit tort victims, since scholars recognize that insiders (LTL's management consists largely of high-level executives from J&J) are often unwilling to pursue claims against themselves. Finally, an important, if underappreciated, aspect of J&J's Restructuring was to use bankruptcy to resolve consumer protection suits brought against the company by governments acting as parens patriae. States vigorously contested the extension of the automatic stay to claims they brought against J&J, and with the stay removed it is possible that states will resume assertion of their own interests—possibly at the expense of individual tort victims.

Overlooked or Avoided Items:

Impact on Forum and Venue Shopping:

LTL's bankruptcy is a prime example of the difficult questions of forum and venue shopping that are present in bankruptcy. Initially, following the Reorganization, LTL filed for bankruptcy in Charlotte, home to the Western District of North Carolina. The Court observed that this was likely done because the Fourth Circuit (of which the Western District of North Carolina is a part) has a more rigorous standard for dismissing a case not filed in good faith than that of many other circuits. Opinion at *18, 18 n.8. LTL's case was eventually transferred to the District of New Jersey, which is both the location of J&J's corporate headquarters and the situs of the multidistrict litigation pending against the company. Despite the transfer, however, the litigants lost their case to dismiss LTL's bankruptcy filing in the bankruptcy court. Indeed, the bankruptcy court noted in its opinion refusing to dismiss the case that since the case likely satisfied the good faith standards in the Fourth Circuit, it could not see how the case "suddenly morphs post-petition into a bad faith filing simply because the case travels 400 miles up I-95 to Trenton, New Jersey." *In re LTL Mgmt., LLC*, 637 B.R. 396, 406 (D.N.J. 2022). Now that it has traveled 35 miles down I-95 to Philadelphia, Pennsylvania, suddenly the filing is now a bad faith filing according to the Third Circuit.

This odyssey reinforces the importance of venue in bankruptcy. Recent bankruptcies such as that of Purdue Pharma have brought forum and venue shopping to the forefront once again, as bankruptcy cases (and the attorneys who file them) seek venues and judges willing to allow them to engage in controversial behavior. The short-term consequence may be on companies seeking to use the Texas Two-Step. They will be careful to avoid the Third Circuit as much as possible, which may be easier if any pending multidistrict litigation against such companies is not located in the Third Circuit. Moreover, courts continue to wrestle with whether the Texas Two-Step is an appropriate use of bankruptcy. The two instances that have rejected such a strategy so far—the Third Circuit in LTL and, in a case that bore many similarities to LTL, the bankruptcy filing of a subsidiary of 3M named Aearo that filed in the Seventh Circuit—appear to have believed the filings were either premature (LTL) or inappropriate given the status of the pending multidistrict litigation (3M/Aearo). However, it remains possible that a judge in another circuit may approve a Texas Two-Step filing, and indeed at least four such filings are currently pending in the Fourth Circuit. Bankruptcy's generous venue rules, in other words, make it more likely that parties will continue to use it as a procedural mechanism to resolve their mass tort liability.

This in turn raises the question of whether bankruptcy is actually the right method to use to manage mass tort liability. Proponents (including Judge Kaplan of the Bankruptcy Court for the District of New Jersey, whose decision last year permitting LTL's bankruptcy to proceed was overturned by the Opinion) highlight bankruptcy's ability to bring claims together and deal with them in a quick and equitable fashion. They also point to the lottery-like nature of serial mass tort litigation, with some victims obtaining huge verdicts, while others with similar injuries obtain far smaller verdicts or have their cases dismissed entirely. The tort system is also ill-equipped to deal with representation for future victims—those who may have been exposed to a toxic substance, but who may not manifest symptoms for many years, if at all. Too many early payments to present victims may leave future victims without recourse, and future victims may struggle to bring a claim if they cannot demonstrate a manifest harm at the time of their suit. Supporters of bankruptcy for mass tort management claim that it is better-designed to contend with these complex questions because of provisions requiring equitable distribution to similarly-situated victims and permitting the appointment of future claimant representatives. Opponents, meanwhile, question whether using bankruptcy to resolve mass torts is consistent with due process or broader concerns about fairness for tort victims. The very powers that permit bankruptcy to address claims open the possibility for abuse, compromising the value of victims' causes of action—which are recognized by courts as property rights—for less than fair value.

The Opinion tries to straddle this debate without deeply engaging with it, providing snippets of support for both views but giving little concrete guidance on the appropriateness of using bankruptcy law for dealing with mass torts. The Opinion also has almost nothing to say about the lottery-like results of the tort system, even though it appears to advocate for more litigation in order to obtain more information about the solvency of a debtor. Finally, the Opinion makes no direct mention of the ways that venue shopping contributed to the filing of mass tort bankruptcies, and does not appear to consider how the result in this case will affect future venue shopping efforts. It appears likely that the Opinion will do little to mitigate the trend of venue and forum shopping, and may in fact exacerbate it.

Institutional Capacity and Liquidation vs. Reorganization:

Bankruptcy scholarship recognizes the difficulty that courts have in establishing when companies should be liquidated and when they should instead be reorganized. This, in turn, has major implications for the efficiency of the bankruptcy system, since both a premature liquidation and an inappropriate reorganization can harm creditors, destroy jobs, and waste shareholder value. The Bankruptcy Code "conspicuously does not contain any particular insolvency requirement," the Court observed, largely in recognition these facts. Opinion at *28. Yet by affirming Third Circuit precedent that financial distress of some kind is required for bankruptcy, and expanding upon it to try to say that a court must weigh, on a case-by-case basis, whether a bankruptcy filing is premature, the Court potentially treads into challenging and risky territory.

Much corporate law is premised upon the idea that courts will not second-guess managers who follow the law and meet their fiduciary duties of care and loyalty. However, the Opinion potentially creates an exception to this rule when a company is considering bankruptcy. It seems to require judges to make decisions for companies about whether the liability they face truly constitutes an imminent and existential threat to the business, even though judges may have far less information or capacity to make such determinations than existing management. On the margins, this could delay bankruptcy filings when companies might actually be well-suited for bankruptcy, as a judge may determine (with their limited information and expertise) that a filing remains premature. Alternatively, by waiting to file, a company may exhaust so many of its resources defending against suits, all while shedding customers and being unable to invest in value-producing projects, that it might be forced to liquidate when an earlier reorganization filing may have instead saved the company.

It may be difficult to set the parameters of any test meant to weed out the use of bankruptcy as a strategic tool for reducing litigation liability. Nevertheless, the Court does not make much effort to do so. The Opinion provides very little guidance on how any requirement for financial distress or measurement of whether a filing is premature should take place. In fact, the Court did not remand the case to the bankruptcy court for additional factfinding on the issue of financial distress, instead making the determination itself. This is true even though the Court suggests that factfinding courts like the bankruptcy court are best-situated to weigh in on this question. *See* Opinion at *30. At the same time, there appears to be little guidance provided by the Court on how lower courts are to decide whether a company is financially distressed enough for a bankruptcy filing to be considered ripe. This could in turn create uncertainty not only in the mass tort context, but in more traditional bankruptcies as well, a development that is particularly troubling because of the Third Circuit's importance in setting corporate law. Lower courts are likely to struggle with how to apply this Opinion and its test for distress for some time to come.

Fiduciary Duties and the Status of Liability:

While the Opinion may encourage courts to second-guess the behavior of management in the lead-up to a bankruptcy filing, it will likely also alter the behavior of management well before any filing. Following the bankruptcy court's decision permitting LTL's bankruptcy filing to proceed, it was suggested that the fiduciary duties of managers of even solvent firms might henceforth require them to consider bankruptcy to spin off and isolate substantial mass tort liabilities. The Opinion likely forecloses the most direct version of this claim—if a firm is solvent and not facing imminent financial distress, it likely would not qualify for bankruptcy in the Third Circuit. By focusing on financial distress and entity separateness, the Opinion disincentivizes corporate groups from offering claimants access to assets beyond those of the tortfeasor. However, it would be too quick to say that the Texas Two-Step does not possibly affect management's fiduciary duties. Instead, management might now be required to consider more aggressive methods of structuring a company's affairs *ex ante* to address any liability it might reasonably anticipate it could incur *ex post*.

If bankruptcy remains a valid tool for managing mass tort liability so long as the tortfeasor is in imminent danger of financial distress, then management seeking to launch a new product might have a duty to structure the affairs of the corporate group to ensure access to the bankruptcy system. It could do this, for example, by containing any new product that might be launched within a ring-fenced SPE, and giving it only enough assets to ensure that it is able to conduct its affairs assuming there is no mass tort liability. Any profits generated could be immediately dividended to the parent company or to shareholders. Then, if the company's product does unfortunately harm consumers, and the company finds itself subject to mass tort liability, the ring-fenced SPE could seek bankruptcy protection and point to the fact that (by design) its liabilities far exceed its assets. The fiduciary duty, therefore, might be to ensure this is true *from the start*.

More than twenty-five years ago, Lynn LoPucki speculated that companies could arrange their affairs to make themselves judgment-proof. "There will be entities that own things and entities that do things," he explained. Bankruptcy-remote vehicles will be used to hold valuable assets, while operating companies "will not own anything, lest their judgment creditors have something to attach." Lynn LoPucki, *The Death of Liability*, 106 YALE L.J. 1, 28 (1996). The Opinion may well encourage this possibility, by shifting the timing of such a decision forward to before the liability is generated, rather than permitting companies to make this choice after liability has already been generated. If a company undertakes such a strategy, and is scrupulous in following corporate formalities, the Opinion's emphasis on entity separateness suggests that this type of arrangement would be respected. And if an argument could be made that bankruptcy is a more efficient method for dealing with mass tort liability than the alternatives available to a company, it may become necessary for management to consider such a strategy to comply with its fiduciary duties to a firm's owners.

In the end, the ones who might suffer most from this development would be individual tort victims. As I noted in analyzing the bankruptcy of Purdue Pharma—a very different case, but one in which the use of judgment-proofing strategies was an essential part of the ways that the Sacklers pressured individual victims into a settlement criticized by many—existing doctrines of corporate and bankruptcy law may be ill-equipped to protect consumers. Careful maintenance of entity separateness makes it difficult for fraudulent transfer law, veil-piercing, alter-ego, and other similar claims to successfully obtain payment from parent companies or other deep-pocketed parties. Meanwhile, the limitations of fraudulent transfer law—both in the way claims are brought and the statutes of limitations applicable to them—often make them a weak remedy. Dividends that occurred more than a few years ago might not be reclaimable by tort victims, while victims might need to painstakingly make fraudulent transfer claims on a transfer-by-transfer basis. If the Opinion pushes more potential mass tortfeasors to use judgment-proofing strategies earlier in the product development process, it may perversely end up markedly decreasing the funds available to compensate tort victims.

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The Opinion marks an important development for LTL, J&J, and perhaps most importantly, the individuals alleging injuries due to their use of talc-containing products. However, in many ways it leaves important questions unresolved, perhaps most important among them the continued role of bankruptcy law in addressing mass tort liability. As this area of law continues to evolve, the Harvard Law School Bankruptcy Roundtable looks forward to bringing together academics and practitioners to contribute to the conversation.