

# **RESOLVING MASS TORT LIABILITY THROUGH BANKRUPTCY**

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Bankruptcy courts have offered refuge to companies seeking to resolve mass tort liability for almost 30 years.<sup>1</sup> The automatic stay, the discharge, and the ability to bind holders of future claims in certain circumstances are attractive features of bankruptcy for companies struggling under the weight of massive tort liabilities who may be looking to define their liabilities at a reasonable and manageable sum. Filing for bankruptcy is not a company's only option, however, and the decision to file for chapter 11 protection should be made only after thorough consideration of all alternatives.

In that spirit, this article *first* outlines certain common non-bankruptcy methods used by companies to address mass tort liability. *Second*, this article discusses the features of bankruptcy that grant a debtor protection from claims, such as the automatic stay and the discharge, and the parameters for determining whether an obligation is subject to those protections, including the recent Third Circuit decision *Jeld-Wen, Inc. v. Van Brunt (In re Grossman's)*.<sup>2</sup> *Third*, this article discusses how bankruptcy allows a debtor to establish and channel its mass tort claims into a trust for the benefit of existing claims and, in certain circumstances, claims that may arise in the future, thereby enabling an enterprise to emerge from bankruptcy with a stronger balance sheet, more manageable debt load, and a higher degree of certainty with respect to the company's future liabilities.

## **I. NON-BANKRUPTCY MEANS OF RESOLVING MASS TORT CLAIMS**

Mass torts typically involve a product with a latent quality that injures or sickens people. Noteworthy examples include asbestos, medical devices, defective automobile parts or systems,

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<sup>1</sup> See, e.g., *Kane v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 843 F.2d 636 (2d Cir. 1988) (bankruptcy case filed in 1982 to deal with massive asbestos liabilities).

<sup>2</sup> *Jeld-Wen, Inc. v. Van Brunt (In re Grossman's)*, 607 F.3d 114 (3rd Cir. 2010), overruling *In re M. Frenville Co.*, 744 F.2d 332 (3d Cir. 1985).

or contaminated food products. In some cases, catastrophic events, such as an explosion, a terrorist attack or an oil spill, give rise to mass torts.

No matter what the genesis, the typical “mass tort” involves numerous claims that are dispersed over a broad geographic area.<sup>3</sup> The lack of uniformity among claimants and the varying legal systems and standards governing them pose significant hurdles to potential mass tort defendants. While bankruptcy may be an option for enterprises whose tort liabilities threaten to overwhelm their bottom line, it is not the only option. Outside of the bankruptcy context, mass tort claims are generally resolved by one of the following means: (1) case-by-case litigation; (2) multi-claimant class action litigation; or (3) negotiated settlement. Also, a company or, under special circumstances, the government may establish a trust to which present and future mass tort claims are channeled and from which claims are paid.

**Case-by-case litigation.** Each individual who believes he or she has been injured by a company’s products or actions has the potential to file a lawsuit to seek redress for that injury. Each plaintiff has the initial choice of forum and may choose theories of liability based on the particular facts and the applicable jurisdiction. The larger the reach of a defendant’s operations and business, the more states and districts will likely have jurisdiction, resulting in a defendant having to defend lawsuits in multiple jurisdictions and according to a multitude of state-specific legal standards and procedures. Moreover, because of an overlap in issues presented in individual cases, repetition is inevitable and costly, and may lead to inconsistent results. Because of the unpredictability of jury verdicts, “lottery-like outcomes” can result, resulting in otherwise similarly situated plaintiffs receiving vastly different recoveries.<sup>4</sup> And plaintiffs who

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<sup>3</sup> Douglas G. Smith, *Resolution of Mass Tort Claims in the Bankruptcy System*, 41 U.C. DAVIS L. REV. 1613, 1615 (April 2008).

<sup>4</sup> *Id.* at 1629.

obtain early judgments for material amounts may unfairly “receive a windfall at the expense of future claimants who may suffer from disease, but will no longer be able to obtain full compensation from companies whose resources have been depleted.”<sup>5</sup> Faced with the high costs of multiple lawsuits in various jurisdictions, and the potential for varied litigation results, defendants may be more likely to look to settle, rather than litigate, individual lawsuits or file for bankruptcy to obtain the protection of the automatic stay and negotiating leverage that the Bankruptcy Code provides (as discussed below).

**Class Action.** Federal Rule of Civil Procedure 23 (“Rule 23”) provides the framework for the federal class action lawsuit. Rule 23 provides that “[o]ne or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.”<sup>6</sup> Rule 23 was designed to be “a tool for organizing group litigation” for the “vindication of the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.”<sup>7</sup> Still, some suits are not amenable to resolution as class actions where the requirements of Rule 23, such as identity of

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<sup>5</sup> *Id.* at 1628.

<sup>6</sup> *See* FED. R. CIV. P. 23. In order for a class to be certified, the filing party bears the burden to show that Rule 23(a) is satisfied, meaning that there is numerosity, commonality, typicality, and fair and adequate representation of the class. In addition, the representative party must show that “prosecuting separate actions by or against individual class members would create a risk of: (a) inconsistent or varying adjudications that would establish incompatible standards of conduct for the party opposing the class; or (b) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests.” FED. R. CIV. P. 23(b)(1).

<sup>7</sup> Joseph F. Rice & Nancy Worth Davis, *The Future of Mass Tort Claims: Comparison of Settlement Class Action to Bankruptcy Treatment of Mass Tort Claims*, 50 S.C. L. REV. 405, 413, 416 (1998-99).

interests and commonality, cannot be satisfied.<sup>8</sup> For instance, the Supreme Court has rejected the certification of a class of plaintiffs who “were exposed to different asbestos-containing products, in different ways, over different periods, and for different amounts of time, resulting in disabling disease for some plaintiffs and no physical injury for others, [thereby failing to satisfy] the commonality element of Rule 23(b)(3) ....”<sup>9</sup> These issues are especially acute in the product liability mass tort context as there may be myriad different exposures and diseases associated with the particular product. From the defendant’s perspective, a class action may involve lower litigation costs and increases the consistency of results across the plaintiff pool as compared to a collection of individual law suits. On the other hand, a class action will aggregate all claims and, therefore, will trade lower transaction costs for the risk of higher ultimate judgment costs. Thus, a class action is no “cure all” as it may still render the defendant corporation insolvent.

**Negotiated Settlement.** Seeking to avoid the high costs, lengthy delays and personal strains associated with litigation, claimants many times attempt to settle out of court. Avoiding the cost and uncertainty of litigation may prove similarly attractive for would-be defendants. Moreover, depending on the similarities among individual claimants and their willingness to participate, a defendant may be able to negotiate with a group of claimants as a whole, streamlining the process of achieving a resolution. This is a somewhat common approach to settlements in the mass tort context as typically there are a small number of law firms that represent a vast majority of claimants. This approach may result in claimants with the most

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<sup>8</sup> See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) (denied certification absent showing of commonality and identity of interests); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (denying certification absent showing of common issue predominance and adequacy of representation). After these back-to-back decisions denying class certification, many companies perceived class certification of asbestos claims as unattainable, thus leading to “a particular surge in bankruptcies.” See Alan Calnan & Byron G. Stier, *Perspectives on Asbestos Litigation: Overview and Preview*, 37 SW. U. L. REV. 459, 463 (2008).

<sup>9</sup> *Amchem*, 521 U.S. at 624.

severe injuries receiving less than they would receive in an individual lawsuit, and plaintiffs with weaker cases “free riding” on the backs of plaintiffs with stronger cases. In addition, parties to a settlement often execute a non-disclosure agreement, providing both the plaintiff and defendant confidentiality.

Notwithstanding the economies that a group of claimants might achieve by approaching negotiations *en masse*, claimants still may pursue litigation to catalyze or influence settlement negotiations, and defendants may respond in kind, for similar reasons. Consequently, considerable time and money may be expended on both sides of the dispute before parties come to the table. And defendants may ultimately refuse to settle for fear that doing so will embolden future claimants that are not party to the settlement.

**Out-of-Court Trust.** A company may also seek to address its mass tort liabilities outside of bankruptcy by establishing a trust or escrow facility, mirroring in part a litigation trust created by a debtor under the Bankruptcy Code (discussed below), against which present and future claimants may find recourse.<sup>10</sup>

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<sup>10</sup> In very unique cases, the United States government has funded and authorized payment for mass tort claims from a special trust. See Linda S. Mullenix & Kristen B. Stewart, *The September 11<sup>th</sup> Victim Fund: Fund Approaches to Resolving Mass Tort Litigation*, 9 CONN. INS. L.J. 121, 133-140 (Fall 2002) (chronicling Congress’ creation of trusts to establish a mandatory no-fault tort compensation scheme for vaccine manufacturers and nuclear power plant developers, and creation of benefit systems for longshoreman, coal miners, and veterans injured by Agent Orange in Vietnam). Most notably, the United States government created the 9/11 Victims Fund shortly after the September 11, 2001 terrorist attacks to preserve the United States air transportation system and “provide compensation to any individual (or relatives of a deceased individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2001.” See Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42 (2001), reprinted in 2001 U.S.C.A.N. (115 Stat.) 230). See also Mullenix & Stewart, *supra*, at 123, 127. Victims were permitted to opt out of the fund’s payment scheme and sue airlines directly, but the airlines’ potential liability was statutorily capped at insurance limits. See Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (2001); Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 154 (March 2003). The 9/11 Victims Fund has since been expanded to cover victims of the 1993 world trade center bombing, the 1995 Oklahoma City bombing, 1998 embassy bombings in West Africa, and the 2001 anthrax attacks. Mullenix & Stewart, *supra* at 128.

## II. **JOHNS-MANVILLE: THE ADVENT OF BANKRUPTCY AS A SOLUTION TO MASS TORT LIABILITY**

The use of bankruptcy to resolve mass tort liability began in reaction to a court decision that opened the doors for litigation against asbestos manufacturers. In 1973, the Fifth Circuit held that asbestos manufacturers could be liable for plaintiffs' exposure to asbestos under a strict liability theory for failure to warn such plaintiffs of dangers associated with asbestos.<sup>11</sup> Soon after that decision, approximately 20,000 lawsuits arguing a strict liability theory were filed against asbestos manufacturers.<sup>12</sup> By 2002, approximately 730,000 individuals had filed asbestos claims, and the number of claims has continued to grow.<sup>13</sup>

One target of the wave of asbestos liability claims was Johns-Manville Corporation. Manville was the world's largest miner of asbestos, a distributor of asbestos, and a manufacturer of products that contained asbestos.<sup>14</sup> By the early 1980s, "Manville had been named in

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<sup>11</sup> *Borel v. Fibreboard*, 493 F.2d 1076, 1091-1092 (5<sup>th</sup> Cir. 1973), *cert. denied* 419 U.S. 869. The plaintiff was an insulation worker who initiated suit on October 20, 1969 against 11 manufacturers of asbestos insulation materials that he used during his working career alleging negligence, gross negligence and strict liability for failure to warn. The jury found all defendants jointly and severally liable on a strict liability theory and awarded damages of \$58,534.04. The court held that "there is ample evidence in the record that the danger of inhaling asbestos, including the disease of asbestosis, was widely recognized at least as early as the 1930's. An expert witness, Dr. Hans Weill, testified that prior to 1935 there were literally 'dozens and dozens' of articles on asbestos and its effect on man." *Id.* at 1092. In the wake of *Borel*, plaintiff lawyers in several states successfully challenged the exclusivity of workers' compensation for asbestos manufacturers' employees, freeing these workers to seek damages in tort. Deborah Hensler et al., *Asbestos in the Courts: The Challenge of Mass Toxic Tort Litigation*, RAND INST. FOR CIV. JUST., R-3324-ICJ, 19 (1985).

<sup>12</sup> Stephen J. Carroll et al., *Asbestos Litigation*, RAND INST. FOR CIV. JUST., MG-162-ICJ, 1 (2005).

<sup>13</sup> Smith, *supra* note 3, at 1618.

<sup>14</sup> *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 639 (2d Cir. 1988). *See also* Marianna Smith, *Resolving Asbestos Claims: The Manville Personal Injury Settlement Trust*, 53-AUT LAW & CONTEMP. PROBS. 27, 29 (1990). "In the 1970s, asbestos claims focused largely on the Johns-Manville Corp., which had mined most of the asbestos in the US and was by far the leading manufacturer of asbestos-containing materials. (Johns-Manville stopped producing commercial asbestos products in 1974.) By 1982, lawsuits against Manville numbered more than 16,500, with more than 400 being filed each month. By the time of the bankruptcy filing in August 1982, Manville had already tried or settled more than 3,570 claims at an average disposition cost of \$20,000. Projections at the time for total number of claims against Manville were 35,000-200,000, resulting in a total future liability of at least \$1 billion." *Id.* Throughout the 1980s, the number of asbestos-related claims being filed continued to increase dramatically. "From 1980 to 1984, approximately 10,000 cases were filed, a four-fold increase from the preceding five-year period." Deborah Hensler, *Fashioning a National Resolution of*

approximately 12,500 [ ] suits brought on behalf of over 16,000 claimants[, and] new suits were being filed at a rate of 425 per month.”<sup>15</sup> Even though the company’s operations were financially sound (in 1981, it reported \$60 million in profits on \$2.2 billion in sales),<sup>16</sup> it faced an estimated \$2 billion in potential tort liability.<sup>17</sup> In 1982, Manville filed for bankruptcy not because of a “present inability to meet debts but rather the anticipation of massive personal injury liability in the future,”<sup>18</sup> thus becoming the first corporation to use the bankruptcy court as a forum to address mass torts liability.

The chapter 11 plan in *Manville* contained several novel features to address the then-unique issues associated with its mass tort-induced bankruptcy. Most significant of these features was the formation and funding of a litigation trust, together with the issuance of an injunction that barred the filing of asbestos personal injury claims against the estate and the reorganized debtors. The effect of these measures was to “channel” all asbestos claims to the trust, the assets of which comprised the only source of recovery for the asbestos claimants.<sup>19</sup> And because the injunction covered then-current claimants as well as unknown future claimants, it enabled the company to operate post-reorganization free from the specter of future liability.

While highly innovative, the *Manville* trust did not, however, meet all of the goals for which it was put in place. It permitted claimants who did not receive a settlement offer within

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*Asbestos Personal Injury Litigation: A Reply to Professor Brickman*, 13 CARDOZO L. REV. 1967, 1971 (April 1992).

<sup>15</sup> *Kane*, 843 F.2d at 639.

<sup>16</sup> Kenneth Pasquale & Arlene G. Krieger, *Combustion Engineering and the Interpretation of Section 524(g)*, 2007 NORTON’S ANN. SURV. BANKR. LAW Part I § 4, (Sept. 2007).

<sup>17</sup> *Kane*, 843 F.2d at 639.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 639-41.



120 days of submitting a claim to sue the trust in the court system.<sup>20</sup> Not all claimants were extended settlement offers within that time period. Accordingly, the trust was forced “to litigate on several fronts at once and thereby expend resources that could have been used to compensate claimants.”<sup>21</sup> Manville’s trust was also plagued by large plaintiffs’ attorneys’ fees.<sup>22</sup> These flaws led to modifications in the procedures for distributions from the *Manville* trust as well as in the structure of litigation trusts established in subsequent bankruptcy cases.<sup>23</sup>

Congress reacted to the *Johns-Manville* case by codifying in section 524(g) of the Bankruptcy Code the concept of channeling asbestos claims to a litigation trust, as discussed below.

### **III. TREATMENT OF MASS TORT CLAIMS IN BANKRUPTCY**

The Bankruptcy Code and Bankruptcy Rules provide a defendant certain advantages in resolving mass tort claims that are unavailable outside of bankruptcy. Section 362 of the Bankruptcy Code provides for an automatic stay of all prepetition litigation, providing the defendant—now a debtor in possession—time and peace of mind to develop a strategy to manage its mass tort liability.<sup>24</sup> The debtor may use the bankruptcy court as a forum to obtain an estimation of the size of its mass tort liability. And through the debtor’s plan of reorganization approved by the bankruptcy court, the debtor may compromise its claims for less than full consideration and exchange uncertain litigation results for fixed liabilities and a defined funding

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<sup>20</sup> See *History of the Trust*, Official Website for the Manville Personal Injury Settlement Trust, available at <http://www.mantrust.org>.

<sup>21</sup> Smith, *supra* note 3, at 1635.

<sup>22</sup> *Id.*

<sup>23</sup> See *History of the Trust*, *supra* note 22; see also *In re Dow Corning Corp.*, 211 B.R. 545, 599 (Bankr. E.D. Mich. 1997) (“The failure of the traditional [trust] model, which was first crafted in *Johns-Manville*, is widely recognized.”).

<sup>24</sup> 11 U.S.C. § 362(a)(1).

obligation. The debtor also may address future claims, even if unknown at the time of the bankruptcy filing, as part of the bankruptcy case.<sup>25</sup> Many mass tort defendants have chosen bankruptcy to avail themselves of these tools; to illustrate the point, more than 70 corporations have filed for bankruptcy to better manage their asbestos liability since 1982.<sup>26</sup>

#### **A. Protection from Creditors.**

The automatic stay under section 362 of the Bankruptcy Code is one of the most powerful tools available to a company that files for bankruptcy. The automatic stay arises by operation of law upon the commencement of the bankruptcy case and protects a debtor from a broad range of collection activities, including any action or proceeding “to recover a claim against the debtor that arose before the commencement” of the bankruptcy case.<sup>27</sup> At a minimum, the stay gives the debtor “breathing room” while it considers how to resolve its claims and restructure its obligations. Ordinarily, the automatic stay only applies to the debtor and its property. Because of the significant power and protection of the automatic stay, however, many entities related to the debtor often seek its protections. “The arguments usually advanced for extending the stay are that suits against codefendants would hamper the debtor’s ability to reorganize by creating inconsistent decisions and that decisions against a third party might ‘in effect be a judgment against [the debtor].’”<sup>28</sup> Extending the automatic stay to non-debtor

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<sup>25</sup> Moreover, bankruptcy judges are often inclined to drive parties toward a negotiated resolution under the penumbra of the Bankruptcy Code to avoid protracted litigation and achieve closure. And the Bankruptcy Code itself is drafted to apply constant pressure on parties to reach consensus, for instance, by limiting the exclusive period during which only a debtor may file a chapter 11 plan or by enabling a debtor to “cram down” a plan over the objections of non-consenting creditors. Bankruptcy, thus, presents for many companies the influences necessary to orchestrate a negotiated resolution amongst disparate stakeholders.

<sup>26</sup> Frances E. McGovern, *The Evolution of Asbestos Bankruptcy Trust Distribution Plans*, 62 N.Y.U. ANN. SURV. AM. L. 163, 163-64 (2006).

<sup>27</sup> 11 U.S.C. § 362(a)(1).

<sup>28</sup> Rice & Davis, *supra* note 7, at 436.

entities, while difficult, is more common in bankruptcies involving mass torts, given the sheer number of claims and possible defendants.

Another key benefit of bankruptcy is the ability to discharge claims, the lynchpin to a chapter 11 debtor's fresh start. Confirmation of a plan discharges all debts or claims that arose before the date of confirmation of the plan.<sup>29</sup>

The common element of the automatic stay and the discharge is that they help a debtor manage their "claims," which the Bankruptcy Code defines as including "(A) a right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment...."<sup>30</sup> The interpretation of the Bankruptcy Code's definition of "claim" is critical in mass tort cases, where events giving rise to harm (such as exposure to a hazardous substance) may have occurred prepetition, but the harm may not manifest until during or even after the would-be defendant's bankruptcy case.

## **B. What is a "Claim"?**

Courts generally apply two different tests to construe the meaning of "claim" to determine when a claim arose and whether or not the claim would be subject to the automatic stay and the discharge: the "prepetition relationship theory" test and the "conduct test." The prepetition relationship test states that in order for a claim to exist, there must be "some

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<sup>29</sup> 11 U.S.C. § 1141(d)(1). The Bankruptcy Code refers to discharge in the context of both debts and claims. Specifically, section 1141 provides that the chapter 11 discharge applies "whether or not - (i) a *proof of claim* based on *such debt* is filed or deemed filed under section 501 of this title; (ii) *such claim* is allowed under section 502 of this title; or (iii) the holder of *such claim* has accepted the plan . . . ." 11 U.S.C. § 1141(d)(1)(A) (emphasis added); *see also*, discussion, *infra*, of *In re Grossman's*, 607 F.3d at 127-128 (discussing certain factors which the bankruptcy court might consider to determine whether a claim would be discharged).

<sup>30</sup> 11 U.S.C. § 101(5).

prepetition relationship, such as contact, exposure, impact, or privity, between the debtor's prepetition conduct and the claimant to create a bankruptcy claim."<sup>31</sup> Under this test, a claim exists only if it arises from the debtor's conduct, and if the claimant also had some pre-petition relationship with the debtor. The requisite relationship is minimal, generally requiring only that the holder of a claim be identifiable to the debtor. Though small, this additional step puts limits around the universe of individuals who could assert a cause of action against the debtor and enables the debtor to formulate its plan with more certainty. The Eleventh Circuit applies this standard.<sup>32</sup> The Ninth Circuit applies its own version of this test: the claim must be within the "fair contemplation" of the parties at the time of the bankruptcy case, which is determined in part on the relationship between the parties pre-petition.<sup>33</sup>

Another approach is known as the conduct theory, which states that a claim arises in bankruptcy at the time the conduct of the debtor giving rise to the claim occurs.<sup>34</sup> As applied by the Fourth Circuit, the conduct test states that a right to payment and, therefore, a "claim" for bankruptcy purposes, arises when the debtor's conduct giving rise to the alleged liability occurred.<sup>35</sup>

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<sup>31</sup> Rice & Davis, *supra* note 7, at 408 n.9 (citing *Epstein v. Official Comm. of Unsecured Creditors (In re Piper Aircraft Corp.)*, 58 F.3d 1573, 1577 (11th Cir. 1995)).

<sup>32</sup> *In re Piper Aircraft Corp.*, 58 F.3d at 1577.

<sup>33</sup> *See In re Jensen*, 995 F.2d 925, 930 (9th Cir. 1993).

<sup>34</sup> *See Grady v. A.H. Robins Co.*, 839 F.3d 198, 202 (4th Cir. 1988).

<sup>35</sup> *See, e.g., id.* The conduct test often leads to disputes regarding which conduct actually gave rise to a particular claim. This can become especially difficult for product liability claims, where the conduct giving rise to the defect may occur at the point of manufacture, the point of sale, or the time of the actual injury.

Prior to its decision in *Jeld-Wen*,<sup>36</sup> the Third Circuit applied a test known as the “accrued state law theory” test, which looks to when a claim accrues under state law.<sup>37</sup> This test has been widely criticized because the test turns on facts that are outside of the debtor’s control and creates wildly different results based on which state law is applied. Since many major corporate bankruptcies were (and continue to be) filed in the Third Circuit, the application of the conduct test had broad implications. With *Jeld-Wen*, the Third Circuit Court of Appeals brought its jurisprudence in line with other circuits that apply the conduct test.

By way of background, in a controversial 1985 decision, the Third Circuit Court of Appeals found that “a claim is created for bankruptcy purposes when a claim accrues under state law.”<sup>38</sup> Under this test, the existence of a valid claim depends on: (1) whether the claimant possessed a right to payment; and (2) when that right arose, as determined by reference to the applicable non-bankruptcy law.<sup>39</sup> In *Frenville*, an accounting firm was sued by a debtor’s banks after the filing of the debtor’s bankruptcy petitions, for negligently and recklessly preparing the debtor’s financial statements pre-petition.<sup>40</sup> The accounting firm sought to implead the chapter 11 debtor as a third party defendant, invoking common law indemnification principles. The Third Circuit concluded that the accounting firm had not violated the automatic stay, even

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<sup>36</sup> *Jeld-Wen, Inc. (f/k/a Grossman’s Inc.) v. Van Brunt (In re Grossman’s)*, 607 F.3d 114 (3d Cir. 2010), overruling *Avellino & Bienes v. M. Frenville Co. (In re M. Frenville Co.)*, 744 F.2d 332 (3d Cir. 1984).

<sup>37</sup> *In re M. Frenville Co.*, 744 F.2d at 337. See National Bankruptcy Review Commission Report at 324 n.801 (Oct. 20, 1997), <http://govinfo.library.unt.edu/nbrcreporttitlepg.html>; see also Ralph R. Mabey & Annette W. Jarvis, *In re Frenville: A Critique by the National Bankruptcy Conference’s Committee on Claims and Distributions*, 42 Bus. Law. 697, 698-699 (May 1987).

<sup>38</sup> *In re M. Frenville Co.*, 744 F.2d at 337.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 333.

though the events that formed the basis for the complaint occurred pre-petition.<sup>41</sup> The reasoning was that the accounting firm did not have a right to payment against the debtor until the firm itself was sued by the banks and, therefore, it did not hold a “claim” until after the filing.<sup>42</sup> Critics noted that inconsistent results arise from various state law standards regarding when a cause of action arises, and from the significance placed on events beyond a debtor’s control, such as when a third party decides to sue another third party to whom the debtor has indemnification duties. This is particularly troubling in the mass tort context, where a “right to payment” may not exist until a victim has discovered his injuries and obtained a judgment or other affirmative “right to payment” from the wrongdoer; all of which may occur many years following the injury or exposure, and long after a corporation has exited bankruptcy.

The Third Circuit had an opportunity to review the propriety of *Frenville* in the *Jeld-Wen* case, this time in the asbestos context. In an *en banc* decision in *Jeld-Wen* on June 2, 2010, the Third Circuit reversed *Frenville* and joined with other circuits in holding that “a ‘claim’ under section 101(5) of the Bankruptcy Code arises when an individual is exposed pre-petition to a product or other conduct giving rise to an injury which underlies a ‘right to payment’ under the Bankruptcy Code.”<sup>43</sup>

In *Jeld-Wen*, the plaintiff, Mary Van Brunt, developed mesothelioma allegedly from exposure to asbestos found in a product sold by Grossman’s Inc. Mrs. Van Brunt was exposed to the asbestos in 1977, but she did not develop mesothelioma until 2006, approximately ten years after confirmation of Grossman’s bankruptcy plan. Mrs. Van Brunt sued Grossman’s successor

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<sup>41</sup> *Id.* at 337.

<sup>42</sup> *Id.*

<sup>43</sup> *Jeld-Wen, Inc. (f/k/a Grossman’s Inc.) v. Van Brunt (In re Grossman’s)*, 607 F.3d 114, 125 (3d Cir. 2010).

in interest, Jeld-Wen, Inc.<sup>44</sup> Jeld-Wen reopened the bankruptcy case and filed an adversary proceeding to determine whether Mrs. Van Brunt's liability claim was discharged by the bankruptcy case and whether she was, therefore, barred from bringing suit.<sup>45</sup>

The bankruptcy court, relying on *Frenville*, held that Mrs. Van Brunt was not barred from bringing her product liability claim against the reorganized retailer because, under state law, her asbestos personal injury cause of action did not arise until the injury manifested itself, which was many years post-petition.<sup>46</sup> The bankruptcy court rejected Jeld-Wen's argument that her claims arose when Grossman's sold her the goods in 1977. The district court affirmed the substance of the lower court's decision, noting that it was "compelled" to do so by *Frenville*'s binding precedent.<sup>47</sup>

In a complete turn around, relying on a fresh reading of section 101(5) of the Bankruptcy Code, Supreme Court precedent, and legislative history, the Third Circuit concluded that *Frenville* had too narrowly construed "claim" by effectively disregarding the "contingent" and "unmatured" language in the Bankruptcy Code.<sup>48</sup> The *Frenville* test also failed to acknowledge the gap between the span of time during which a "claim" might arise under the Bankruptcy Code and when a right to payment could exist under state law.<sup>49</sup> The Third Circuit thus applied the "conduct test," concluding that "a 'claim' arises when an individual is exposed pre-petition to a

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<sup>44</sup> *Id.* at 117-18. Jeld-Wen had purchased Grossman's stock pursuant to Grossman's confirmed plan. *Id.* at 118, n.1.

<sup>45</sup> *Id.* at 118.

<sup>46</sup> *Jeld-Wen, Inc. (f/k/a Grossman's Inc.) v. Van Brunt (In re Grossman's)*, 400 B.R. 429, 432 (D. Del. 2009) ("Under New York law, causes of action for asbestos related injuries do not arise until the injury manifests itself").

<sup>47</sup> *Id.*

<sup>48</sup> *In re Grossman's*, 607 F.3d at 121. *See also* 11 U.S.C. § 101(5) (defining "claim").

<sup>49</sup> *Id.*

product or other conduct giving rise to an injury, which underlies a ‘right to payment’ under the Bankruptcy Code.”<sup>50</sup>

The *Jeld-Wen* decision (setting aside any due process concerns raised by the Third Circuit) will enhance the benefit of the Bankruptcy Code’s protections for debtors in the Third Circuit. Application of the conduct test will widen the scope of “claims” that are subject to both the automatic stay and the discharge. It will also ease the debtor’s burden of understanding and planning for its potential claims. The “conduct” test, which examines the debtor’s historical actions, leads to far more predictability than the “accrual” test, which relies on the acts and circumstances of *third parties* over whom the debtor has no control and possibly no knowledge.

After *Jeld-Wen*, it should be expected that mass tort debtors will craft the discharge provisions of their chapter 11 plans to cover a greater number of mass tort claimants. Debtors may also be expected to seek bankruptcy court approval of broad public notice provisions that would be deemed to bind all possible creditors, including those who were exposed to a certain product during a certain period of time, regardless of whether they have yet manifested an injury. Where, however, the negative effects of exposure to a harmful substance or product are slow to manifest, such as with asbestos or other similar products, courts may, consistent with due process, be unlikely to cut off a victim’s recourse until the victim has become aware of his injuries and has had some opportunity to seek recovery. As discussed below, both the

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<sup>50</sup> *Id.* at 125. Significantly, the Third Circuit declined to decide whether Mrs. Van Brunt’s claim was discharged by the bankruptcy court’s 1997 confirmation order. The court remanded to the bankruptcy court to consider whether the plaintiff had sufficient notice of the bankruptcy case and its implications. For remand, the Third Circuit suggested certain factors which the bankruptcy court might consider to determine whether the claim would be discharged, including: “the circumstances of the initial exposure to asbestos, whether and/or when the claimants were aware of their vulnerability to asbestos, whether the notice of the claims bar date came to their attention, whether the claimants were known or unknown creditors, whether the claimants had a colorable claim at the time of the bar date, and other circumstances specific to the parties, including whether it was reasonable or possible for the debtor to establish a trust for future claimants as provided by § 524(g).” *Id.* at 127-128.



Bankruptcy Code and the case law have evolved to provide a means of recovery for these “future claims.”

### **C. Addressing Future Claims.**

As discussed above, and in most chapter 11 cases, upon confirmation of a plan of reorganization, any debts or liabilities incurred pre-petition are discharged and cannot be asserted against the reorganized debtor. A fundamental due process prerequisite to a discharge is that creditors are made aware of the process and have an opportunity to assert their claims and, in many cases, vote on the proposed chapter 11 plan. In some mass tort cases, especially asbestos cases, because of the long latency period associated with certain mass tort claims, a large number of potential future claimants may exist, but be unknown and unknowable to the debtor at the time of confirmation of the plan.<sup>51</sup> In such cases, the bankruptcy court still has an interest in enabling the debtor to emerge without liabilities that would hamper the reorganized entity going forward. So, following the *Manville* model, and through section 524(g) or 105 of the Bankruptcy Code,<sup>52</sup> a debtor can create a trust to which present and future claims are channeled and from which claims are paid. In such cases, all claims are channeled to the trust itself, rather than the reorganized debtor, giving the debtor a much stronger balance sheet upon emergence.

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<sup>51</sup> Where the risk of future claims is more predictable, a debtor may not need to provide specifically for future claims in its chapter 11 plan. For example, Chemtura Corporation faced tort claims arising from its production and distribution of diacetyl, a butter flavoring ingredient. Rather than appoint a future claims representative and establish specific reserves for diacetyl claimants, Chemtura (1) settled most of the known claims prior to confirmation, (2) retained an expert to estimate its diacetyl liabilities, and (3) negotiated a complex insurance settlement, with a portion of the company’s insurance coverage remaining available to fund diacetyl claims that may arise post-confirmation. An extensive, extremely detailed bar date noticing scheme was intended to put potential diacetyl claimants on notice of their right to assert a claim and minimize the number and amount of future claims. This outcome, which enabled Chemtura to emerge from chapter 11 with a stronger balance sheet, was possible because of the relatively low likelihood that injuries caused from exposure to diacetyl, which Chemtura’s subsidiary ceased producing in 2005, would be discovered after Chemtura’s emergence in 2010. *See In re Chemtura Corp.*, Case No. 09-11233 (REG) (Bankr. S.D.N.Y.).

<sup>52</sup> In the asbestos context, it is unlikely that a debtor may employ section 105 of the Bankruptcy Code to expand the scope of relief beyond that already provided for by section 524(g) of the Bankruptcy Code. *In re Combustion Engin’g, Inc.*, 391 F.3d 190 (3d Cir. 2004).

In addition to creating the trust as a means to address future claims, another necessary prerequisite under the Bankruptcy Code is the appointment of a future claims representative to advocate for future claimants who, by definition, are unaware that their rights may be at stake. The future claimants' representative is a fiduciary who acts as "a legal representative for the purpose of protecting the rights of persons that might subsequently assert demands" against the trust.<sup>53</sup> By ensuring that future claimants are represented, debtors can obtain greater certainty that they will not face new claimants whose injuries are discovered post-reorganization.

### **1. Evolution of the *Manville* Mass Tort Trust: Section 524(g)**

Congress codified key concepts from the *Manville* trust as part of its rewriting of the Bankruptcy Code in 1994 by adding section 524(g).<sup>54</sup> Section 524(g), which only applies to asbestos cases, authorizes the creation of a channeling injunction and trust.<sup>55</sup> Section 524(g) requires that the trust: (1) be funded in whole or in part by the securities of at least one of the debtors and by the obligation of the debtor to make future payments, including dividends; (2) own (either outright or through an offering) a majority of the voting shares of the debtor, the debtor's parent, or a debtor-subsiidiary; and (3) use its assets or income to pay both present and future claims.<sup>56</sup> Elements (1) and (2) are intended to align the interests of the reorganized company's management and the tort claimants—both benefit from the success of the reorganized company.

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<sup>53</sup> See 11 U.S.C. § 524(g)(4)(B)(i).

<sup>54</sup> Pasquale & Krieger, *supra* note 18, at § 4.

<sup>55</sup> In asbestos cases, a channeling injunction and trust must comply with section 524(g), regardless of whether other sections, like section 105, could be used in other contexts. See *In re Combustion Engin'g, Inc.*, *supra*; *In re Congolium Corp.*, 2007 WL 328700 (Bankr. D.N.J. 2007) (both holding that section 105 cannot be used in an asbestos bankruptcy in lieu of section 524(g) as a basis for a channeling injunction against third parties).

<sup>56</sup> 11 U.S.C. § 524(g)(2)(B)(i)(II)-(IV).

In order for the channeling injunction to be applied to potential future claimants, the court is required to make certain findings, including that: (1) the debtor is likely to face “substantial future demands” for payment for asbestos-related actions; (2) the amount, number, and timing of those demands are indeterminate; (3) the pursuit of those demands would likely threaten the plan’s purpose to deal equitably with claims and future demands; (4) a supermajority (at least 75%) of a class of asbestos claimants has voted to accept the plan; and (5) the trust includes mechanisms, such as periodic or structured distributions, that give the court “reasonable assurance” that the trust will “be in a financial position to pay present and future demands that involve similar claims in substantially the same manner.”<sup>57</sup> If warranted, the injunction also may extend beyond the debtor to third parties, such as affiliates, managers, executives, or insurers. This feature of the injunction provides incentives to the debtor’s key principals to ensure an expeditious reorganization, as well as to deep-pocketed investors and affiliates who may otherwise shy away from associating with a debtor with such significant tort liabilities and contributing to a trust that will resolve the debtor’s tort liabilities.

## **2. Evolution of the *Manville* Mass Tort Trust: Case Studies**

Since *Manville*, several mass tort defendants have successfully sought refuge in the bankruptcy system, establishing trusts to address mass tort claims outside of the asbestos context by appealing to bankruptcy courts’ general equitable powers under section 105 of the Bankruptcy Code and leveraging other valuable bankruptcy tools.<sup>58</sup>

One such notable mass tort bankruptcy case was filed by A.H. Robins Company, Incorporated in August of 1985 in response to an “avalanche of actions filed in various state and

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<sup>57</sup> 11 U.S.C. § 524(g)(2)(B)(ii)(I)-(IV). *See also* Pasquale & Krieger, *supra* note 18.

<sup>58</sup> *See* 11 U.S.C. § 105(a) (“[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.”).

federal courts throughout the United States . . . seeking damages for injuries allegedly sustained by the use of an intrauterine contraceptive device known as a Dalkon Shield[.]”<sup>59</sup> Robins manufactured the device until 1974 but did not recall the device until 1984, by which time the number of lawsuits against Robins on account of the device had ballooned to approximately 5,000.<sup>60</sup> Indeed, by the time of its bankruptcy filing, Robins along with its insurer had paid approximately \$530 million in settlements and judgments in connection with asserted Dalkon Shield claims.<sup>61</sup> In light of the costs of defending myriad lawsuits, and the associated burdens on senior management, Robins sought bankruptcy protection.<sup>62</sup>

*First*, filing for bankruptcy provided Robins with the immediate and substantial benefit of the automatic stay, which precluded the “uncontrollable scramble for [Robins’] . . . assets in a number of uncoordinated proceedings in different courts” and afforded Robins the reprieve necessary to formulate a plan of reorganization.<sup>63</sup>

*Second*, following multi-party negotiations with the committee of “Dalkon Shield” tort claimants, the United States Trustee, and the creditors’ committee, Robins obtained bankruptcy court approval for special procedures for the determination of claims arising from the use of the injurious device. The procedures called for the publication of a notice to all potential Dalkon Shield tort claimants, requiring prospective claimants to file by a specified bar date a statement with their name, address, and indication that they were making a Dalkon Shield-related claim. Prospective claimants also had to complete and file by a specified bar date a questionnaire

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<sup>59</sup> See *A.H. Robins Co., Inc. v. Piccinin*, 788 F.2d 994, 996 (4th Cir.1986).

<sup>60</sup> *Id.*

<sup>61</sup> *In re A.H. Robins Co., Inc.*, 88 B.R. 742, 746 (E.D. Va. 1988).

<sup>62</sup> *A.H. Robins Co., Inc. v. Piccinin*, 788 F.2d at 996.

<sup>63</sup> *Id.* at 998.

detailing the injury suffered. Approximately 200,000 prospective claimants properly satisfied the requirements to file a Dalkon Shield-related claim, with innumerable potential claimants failing to do so. Improperly submitted claims were disallowed.<sup>64</sup> Accordingly, these procedures accomplished the efficient collection of proofs of claim in connection with Dalkon Shield injuries, narrowed the pool of claimants by over one-hundred thousand, and mitigated the economic impact of Robins' mass tort.

The bankruptcy court held a six-day hearing for the estimation of Robins' aggregate tort liability and determined "that the sum of \$2.475 billion, payable over a reasonable period of time, [was] . . . sufficient to pay in full all Dalkon Shield personal injury claims[.]"<sup>65</sup> Robins' plan of reorganization, which was accepted by 94.38% of all Dalkon Shield claimants who voted,<sup>66</sup> then established the trusts to administer payments to claimants and contained related channeling provisions to limit claimants' recoveries to the assets of the trusts.<sup>67</sup> In confirming Robins' plan of reorganization, the court found, in part, that:

[s]ection 105 of the Bankruptcy Code and the general equitable powers of this Court confer upon it jurisdiction to . . . approve the channeling provisions in order to ensure: . . . (iii) the systematic evaluation and payment of Dalkon Shield claims in an orderly, fair manner, applying the same rules to all; (iv) that the bulk of the funds in both Trusts are made available for the payment of Dalkon Shield personal injury claims pursuant to the same method of claims evaluation; . . . (vii) that Dalkon Shield personal injury claimants do not bypass the Claims Resolution Facility, to the detriment of other Dalkon Shield personal injury claimants; (viii) equality of distribution to Dalkon Shield personal injury claimants;

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<sup>64</sup> For a discussion of the procedures by the bankruptcy court, see *In re A.H. Robins Co.*, 862 F.2d 1092 (4th Cir. 1989).

<sup>65</sup> *In re A.H. Robins Co., Inc.*, 88 B.R. at 746.

<sup>66</sup> *Id.* at 750.

<sup>67</sup> *Id.* at 752.

and (ix) rehabilitation and reorganization of Robins, free from direct and indirect involvement in further Dalkon Shield litigation.”<sup>68</sup>

Accordingly, the bankruptcy court not only capped Robins’ potential liability, but under section 105 of the Bankruptcy Code, by way of the litigation trusts, permitted an efficient mechanism through which Robins was able to address *in toto* and in a unified manner its mass tort liability.

The case of Dow Corning Corporation provides another example of a mass tort debtor using bankruptcy as a safe harbor outside of the asbestos context. As with *Robins*, Dow Corning took advantage of various tools under the Bankruptcy Code and the Federal Rules of Civil Procedure and Evidence, including (a) consolidated legal challenges to the scientific underpinnings of the personal-injury claims that were not available in state courts and (b) the release of tort claims against certain non-debtor affiliates under section 105 of the Bankruptcy Code in channeling litigation to a trust to resolve its debilitating mass tort liabilities.

Dow Corning first commercialized silicone gel-filled breast implants in 1964 but ceased marketing the product in 1992 as a wave of lawsuits began and the United States Food and Drug Administration imposed a moratorium (since lifted) on silicone gel-filled breast implants.<sup>69</sup> The principal driver of the tort claims was the allegation that silicone caused a variety of known autoimmune diseases as well as a host of allegedly new autoimmune diseases. From 1992 through 1994, 18,000 implant-related suits were commenced against Dow Corning, with the company incurring more than \$200 million in litigation costs in 1994 alone.<sup>70</sup> Mounting litigation costs and continuous management distraction proved overwhelming and Dow Corning

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<sup>68</sup> *Id.* at 753.

<sup>69</sup> For discussion of the history preceding Dow Corning’s filing for bankruptcy, see *In re Dow Corning Corp.*, 211 B.R. 545, 550-553 (Bankr. E.D. Mich. 1997).

<sup>70</sup> *Id.* at 551-552.

filed for bankruptcy in May, 1995. As of the petition date, “the Debtor was a defendant in over 19,000 individual silicone-gel breast implant lawsuits and at least 45 putative silicone-gel breast implant class actions.”<sup>71</sup>

*First*, to manage its tort claims more efficiently, Dow Corning removed the pending breast implant litigation against itself and its two shareholders, Dow Chemical and Corning, Inc., to the bankruptcy court.<sup>72</sup>

*Second*, the debtor attempted to further streamline the claim process and minimize its liabilities, by proposing extensive procedures for the court’s estimation and ultimate liquidation of Dow Corning’s tort liability based on the Bankruptcy Code, the Federal Rules of Civil Procedure, the Federal Rules of Evidence and the gatekeeper rules for scientific evidence set forth in the U.S. Supreme Court’s 1993 ruling in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). The Bankruptcy Court denied as premature Dow Corning’s motion seeking to estimate the debtor’s tort liability, finding that “[while we] do not irrevocably foreclose the possibility of estimating unliquidated tort claims, say as part of a confirmed consensual plan of reorganization[,] . . . in the context of a case in which no plan has obtained even the mild approval of any relevant constituency, [we deny the proposed claim estimation protocols].”<sup>73</sup> Dow Corning also sought the disallowance of all asserted personal injury claims, arguing primarily that claimants lacked admissible scientific evidence supporting such claims and that,

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<sup>71</sup> *Id.* at 553.

<sup>72</sup> *Id.* at 554.

<sup>73</sup> *Id.* at 562. *See also id.* at 566-67 (“The strategy behind the Debtor’s request for estimation of the aggregate value of tort claims is to limit the amount it will ultimately have to pay on account of tort liability. In other words, the Debtor’s strategy assumes that estimation will lead to a discharge of all liability and that individual post-confirmation liquidation can only be had against a trust fund established as part of a plan of reorganization regardless of whether such liquidation proves that the estimate was too low.”)

accordingly, Dow Corning was entitled to summary judgment on an omnibus basis.<sup>74</sup> Dow Corning’s proposed litigation protocol, while never ruled upon, provided the leverage needed to negotiate a consensual plan of reorganization.

In the end, the debtor’s confirmed plan of reorganization provided for Dow Corning’s shareholders to retain a substantial portion of their equity while channeling tort claims into one of two options. The first gave claimants the right to opt into a settlement fund capped at \$1.95 billion (net present value as of the bankruptcy case’s effective date) and to pursue an administrative claim based on disease and disability criteria set forth in the plan’s detailed settlement grid. The second option preserved claimants’ rights to a jury trial and permitted the filing of claims in federal district court—still subject to omnibus case management procedures regarding causation—against a litigation facility funded by Dow Corning, up to a \$400 million net present value cap.<sup>75</sup>

#### **D. The Role of Insurers in Managing Mass Tort Claims in Bankruptcy**

A discussion of mass tort claims would not be complete without a word about insurance, which often funds at least part of creditors’ recovery. In some mass tort bankruptcy cases, the debtor’s estate has insufficient assets to fund a litigation trust, and no debtor affiliate or plan sponsor is willing to provide the funds necessary to do so. Unless exhausted, the debtor will, however, have insurance coverage. In fact, the proceeds from insurance policies frequently

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<sup>74</sup> *Id.* at 554.

<sup>75</sup> Notably, the trusts were funded with monies from the company’s shareholders, its own cash reserves and its liability insurers (most of which had to be procured in coverage litigation pursued by Dow Corning in Michigan state court during the chapter 11 case). In exchange, the plan released Dow Corning’s insurers and shareholders from future liability on settled claims and permanently enjoined “any party holding a claim released against Dow [Corning] from bringing an action related to that claim against . . . [the] insurers or shareholders.” *Class Five Nevada Claimants v. Dow Corning Corp. (In re Dow Corning Corp.)*, 280 F.3d 648, 655 (6th Cir. 2002).



provide the bulk (if not all) of the funding for a debtor's mass tort trust.<sup>76</sup> As a corollary, many insurance companies have become repeat players in mass tort bankruptcy cases.

Careful insurance companies often scrutinize plans of reorganization and trust instruments that may appear to override the applicable terms of the insurance policies and perhaps create rights against the insurers that may not otherwise exist. Some plans may contain an "insurance neutrality" provision in the plan or trust distribution procedures, which may purport to leave the insurer's non-bankruptcy state law rights intact and, thus, strip the insurer of standing to participate in the bankruptcy case because the insurer has suffered no injury in fact.<sup>77</sup> Although the concept of "insurance neutrality" is not found in the Bankruptcy Code, it is often included in plans of reorganization by debtors as a means to protect insurers' rights to enforce the terms of their policies (most notably the right to defend against claims it deems non-meritorious) after plan confirmation and before claims are paid out, thereby mooting insurer standing to oppose a proposed plan of reorganization.<sup>78</sup> Many insurers dispute the true "neutrality" of these provisions, and often seek an agreement among the parties or a ruling from the bankruptcy court that (1) insurers will not be bound by the plan, (2) insurers will not have their contractual rights affected by the plan, and (3) any plan provisions will not be construed (or

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<sup>76</sup> Leonard P. Goldberger, *Last Man Standing: Insurers' Participation in Plan Confirmation Process*, 27-Nov AM. BANKR. INST. J. 30. 31-32 (Nov. 2008) (comparing *Hartford Accident and Indemnity Co. v. Global Industrial Technologies, Inc.*, No. 02-21626, 2008 WL 6838582 (W.D. Pa. 2008) (denying insurers standing to participate in the plan confirmation proceedings because of the insurance neutrality provisions in the plan that would prevent the insurers from paying anything) with *In re Quigly Co., Inc.*, 391 B.R. 695, 706 (Bankr. S.D.N.Y. 2008) (holding that insurer did have standing in contested plan confirmation proceeding but limiting standing to "challenging the Plan provisions and raising the confirmation objections that directly affect their contractual rights and interests," but declining to decide whether the plan was "insurance neutral").

<sup>77</sup> *Id.*

<sup>78</sup> See Mark D. Plevin, *Recent Developments Affecting Mass Torts Cases: Combustion Engineering, et al.- Insurer Neutrality and Insurer Standing*, 080405 AM. BANKR. INST. 83 (Aug. 2005).

even admissible) in any subsequent insurance coverage litigation.<sup>79</sup> Therefore, in any mass tort bankruptcy where a trust is formed and where the debtor has significant insurance coverage, the plan of reorganization's treatment of insurers is likely to be a major issue.

#### **IV. LIMITATIONS OF BANKRUPTCY AS MEANS TO RESOLVE MASS TORT LIABILITY**

Although bankruptcy has the potential to allow an organization to obtain a fresh start without the burden of massive tort liability, it is not a cure-all. Chapter 11 has multiple disclosure requirements, such as detailed listings of assets and liabilities and monthly operating reports that force some companies to divulge information that they would normally keep private. These disclosures are time-consuming and at times costly, and many would-be debtors shy away from "life in the fishbowl." Further, filing a petition for bankruptcy inevitably disrupts to some degree a debtor's vendor and customer relationships, requiring the debtor to enter crisis management mode to prevent the destabilization of its operations. And although successfully reorganized companies will likely conclude that its bankruptcy-related expenses were worth it, preparing for, prosecuting and, at times, litigating a chapter 11 case requires professional services that carry a cost. In addition, debtors must pay the fees and expenses of professionals of official committees appointed in the case. While this often includes only the official committee of unsecured creditors, it may also include an equity committee, a funded debt committee, and any other committee necessitated by the constituents in a particular case, including a committee representing a debtor's mass tort claimants. Many would-be debtors that would willingly pay their own professionals bristle at the thought of paying the professionals of their creditors.

Filing for bankruptcy also subjects a company to Bankruptcy Code restrictions governing a debtor's use and sale of property outside of the ordinary course of business. Transactions that

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<sup>79</sup> *Id.*

may have been relatively quick and efficient for the debtor to execute outside of the bankruptcy context instead face public scrutiny and require the debtor to obtain prior bankruptcy court approval. Moreover, certain transfers of the debtor's property to creditors made in advance of the bankruptcy filing are heavily scrutinized and may be reversed by the Bankruptcy Court. Additionally, a chapter 11 filing requires debtors to send their creditors multiple notices, some of which are designed to alert creditors of their right to file claims. During this noticing process and the attendant publicity of large chapter 11 cases, the debtor may find itself inundated with dubious claims, or claims that it did not know existed and that may have never been pursued if not for the bankruptcy. Each and every claim filed in a chapter 11 case must be allowed or expunged at some point during the chapter 11 cases, and many large debtors find themselves spending months or years of time and millions of dollars reconciling and adjudicating claims. While some claims for payment must be managed outside of bankruptcy as well, the claims process may be daunting enough to cause many potential debtors to examine their non-bankruptcy options that much more closely.

## **V. CONCLUSION**

No matter the forum, mass torts are likely to continue to be resolved in bankruptcy. Although bankruptcy is not a panacea and may not be right for every enterprise, the benefits of the automatic stay, the claims discharge and channeling injunctions are too valuable to overlook for any company facing large scale tort liability, especially when compared to the other means of resolution available. The *Jeld Wen* decision, which brought the Third Circuit in line with other circuits in holding that claims arise when the tortious conduct occurs, is likely to attract even more mass tort debtors into the bankruptcy fold.

The treatment of mass tort liabilities in bankruptcy will continue to evolve as the landscape for tort litigation continues to change. With asbestos cases seeming to have peaked,

and with the asbestos industry unlikely to make another surge through the bankruptcy courts, it remains to be seen what the next tort will be to leave its mark on bankruptcy jurisprudence.