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# Geeking out on live J&J/LTL bankruptcy hearings

By Catherine E. Bauer

While there isn't an insolvency requirement for filing bankruptcy, one must ponder why a solvent individual or entity would voluntarily file for bankruptcy. Usually there's at least one glaring reason – the desire to stop litigation in other courts.

The continuing saga of the Johnson & Johnson mega bankruptcies of its subsidiary LTL Management LLC is great fun to listen to if you're a bankruptcy nerd like me. And the best part about listening to the proceedings is it's free! Free is a bankruptcy person's favorite word. We're famously cheap.

A short recap: This is about J&J's talc liabilities. LTL was created by J&J to file a chapter 11 bankruptcy to deal with these liabilities. This is the first J&J entity ever to file bankruptcy. J&J's secretive "Project Plato" utilized the controversial "Texas Two-Step" to set the stage for LTL to file bankruptcy with the goal of discharging JNJ's talc liabilities. LTL's first bankruptcy was dismissed after the Third Circuit issued an order instructing the bankruptcy court to dismiss it for lack of good faith since LTL was not in financial distress. Within two hours of the bankruptcy court entering an order dismissing the initial case, LTL filed again. Some talc claimants and the Office of the United States Trustee are not at all happy about the second filing.

I've spent the last week listening to the live broadcasts of the hearings on the Motion to Dismiss in the latest bankruptcy case and reading J&J's factsabouttalc.com website. Not surprisingly, the website is an homage to the company and its heartfelt attempts to deal with the thousands and thousands of claimants who claim that J&J's talc products caused their cancers. While vehemently denying that their (now discontinued) talc products caused anyone's cancer, J&J says on its website and in court that it wants to fairly compensate the talc claimants through a bankruptc plan.

Unfortunately, a lot of the people who should be listening to these hearings don't know that they should. Those would be the future claimants who will come to believe that their cancers (that they don't know about yet) were caused by J&J's talc products. If this bankruptcy case proceeds and a plan of reorganization is confirmed, those future claimants will be bound by the plan. This is one of the miracles of bankruptcy – the uncertainties of future claims can be conveniently quantified. Forget due process as to future cancer victims that don't yet know they may have a claim against J&J. It really isn't surprising that, despite being spectacularly kicked out of bankruptcy already, J&J/LTL is giving it another try.

But J&J/LTL says this time is different. This time the filing is in good faith because they've reconfigured to follow the "road map" the Third Circuit so nicely provided them. LTL is solvent, but in "financial distress." It's in "financial distress" because the $61.5 billion funding agreement it entered into with J&J before its first bankruptcy (called an ATM by the Third Circuit) is no more. If this case continues, fraudulent transfer proceedings will challenge the curious voiding of this obviously advantageous agreement (which was supposed to be good both in and out of bankruptcy). And there's approximately $7 billion more in the bankruptcy pot this time. Plus, they have plan-support agreements from attorneys for 60,000 claimants, which is the majority of them. Unfortunately, the debtor isn't at liberty to disclose the identities of all those attorneys. Oh, and the claimants themselves haven't agreed to support the plan, just some of their attorneys. But clients do what their attorneys advise them to do, so don't worry. It's all good and consensual and everyone who is right thinking is good with the plan.

As a former bankruptcy judge, I cringe when I see the bankruptcy system used in a contrived manner by solvent entities. The poor but honest debtor is the system's stock-in-trade. So, when solvent individuals and entities file bankruptcy and heap praise on the bankruptcy courts for being so very efficient (while at the same time demeaning other courts), my ears perk up. Especially when, as here, the folks in charge of LTL can't or won't state that LTL owes fiduciary duties to creditors of the bankruptcy estate. These LTL people are smart, so I assume they know they have these duties. Problem is the evidence shows their actions are being directed by J&J to whom they are beholden.

While there isn't an insolvency requirement for filing bankruptcy, one must ponder why a solvent individual or entity would voluntarily file for bankruptcy. Usually there's at least one glaring reason – the desire to stop litigation in other courts. But "we want to be here" is not the same as actually being in the proper forum.

Are there other places where J&J can and could deal with its talc problems? Of course. For example, there's multidistrict litigation in federal court. And, as they well know, they could settle claims in or out of court if they really want to get money to sick people quickly. But J&J would much rather be in bankruptcy court. As mentioned, they can bind future claimants to a plan. Claimants who vote "no" on the plan can still be bound by it. There are no opt-outs. They can stop litigating in multiple forums. They can avoid jury trials where sympathetic plaintiffs might obtain huge judgments. And, if they play their cards right, they can even

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get the equivalent of bankruptcy discharges for people and entities that didn't actually file bankruptcies (most importantly, J&J itself).

I leave it to others to decide whether bankruptcies of this variety and with these goals are legitimate uses of the bankruptcy system. But there is one thing that is very clear (especially after listening all week to the Motion to Dismiss hearings in LTL's bankruptcy) – These cases take up a huge amount of bankruptcy system resources. The bankruptcy courts (judges, staff, court personnel) are crazy swamped when these cases are filed. The filing of any mega case requires all sorts of special policies and procedures. There's actually a manual for bankruptcy judges on how to deal with these cases. Also, often overlooked, is the stress placed by these cases on the Office of the United States Trustee (part of the DOJ that is perpetually underfunded and understaffed). Without a doubt, mega cases of solvent entities substantially burden the bankruptcy system, perhaps unnecessarily.

One bankruptcy judge told me "I had to scrape my law clerk off the ceiling" when that judge was assigned a mega case. The filing of a mega case means no weekends off and long nights of working late for many civil servants who aren't paid overtime. It's the non-judge personnel that deserves consideration. Sure, these may be exciting and newsworthy cases, but is it really right for solvent companies to strain the bankruptcy system because they find it to be more advantageous for them than the alternatives? Shouldn't the limited resources of bankruptcy be prioritized to benefit the people and entities the bankruptcy system was designed to help – those in financial straits and the stakeholders in those cases? Listen to a week's worth of hearings in the LTL bankruptcy before making up your mind.

We'll see if J&J gets what it wants through this manufactured bankruptcy case. If it does, be prepared for more of these cases to be filed. And be aware that, sometime in the future, your legal rights could very possibly be impacted by the terms of a confirmed bankruptcy plan that you knew nothing about.