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LTL II and *Imerys*: Balloting and Solicitation in Mass Tort Cases

"Where are these claimants coming from, and who are these claimants? Because we can't reconcile them with the numbers ... that were in front of us in the first case."
— Hon. ***Michael B. Kaplan***[1]

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Just hours after LTL's first bankruptcy case was dismissed on April 4, 2023, LTL filed a second petition (hereinafter, "*LTL II*"). LTL asserted that it had the support of "[more than] 60,000 claimants who have signed and delivered plan-support agreements," despite the fact that the debtor had not revealed such high-claim volumes in its dismissed bankruptcy case.[2]

The official committee of talc claimants argued that "LTL had no commitments from claimants, only commitments from attorneys representing those clients to recommend that their client support[ed] the proposed agreement."[3] To say the least, no consensus existed in the early days of *LTL II* as to the legitimacy of the debtor's assertions of broad tort claimant support for its proposed reorganization plan.

As every chapter 11 practitioner knows, support for a reorganization plan is central to the confirmation process in a chapter 11 case. The Bankruptcy Code, in combination with case law and legislative history, provides some guidance for balloting and solicitation in chapter 11 cases, although these standards are very amorphous and seem to be evolving in mass tort bankruptcy cases. In addition, unlike in standard chapter 11 cases, the nature and magnitude of mass tort claims in mass tort bankruptcy cases cause further challenges in the voting process.

These issues are only amplified in mass tort bankruptcy cases dealing with asbestos liability. Section 524(g) of the Bankruptcy Code requires a plan to be approved by at least 75 percent of voting claimants if a channeling injunction is to be issued in an asbestos mass tort bankruptcy case — a higher percentage of acceptance than would be required in a typical chapter 11 case.

Although the focus of the practitioners in *LTL II* quickly shifted from the legitimacy and significance of the alleged 60,000 claims to the motion to dismiss filed by the official committee of talc claimants, which ultimately led to the bankruptcy court dismissing *LTL II* only four months after it was filed, the early days of the case illuminated important questions about balloting and solicitation in mass tort bankruptcy cases.

If *LTL II* had moved forward, questions about who could vote on the proposed plan, the value of each claim during voting and the mechanics of the voting process would have been raised. The bankruptcy court was able to sidestep these issues in *LTL II*, but bankruptcy courts will undoubtedly be forced to tackle the questions discussed in this article in future mass tort bankruptcy cases, and the answers are far from obvious, making the outcome of contentious plan-confirmation litigation in asbestos bankruptcy cases uncertain at best.

Who Is Entitled to Vote on the Reorganization Plan?

This was the first question raised by *LTL II*. Determining who can vote in a typical chapter 11 case is a straightforward process. Section 1126 of the Bankruptcy Code provides that only "allowed" claims or interest-holders may accept or reject a plan.[4] A claim is allowed if a party files a proof of claim before the bar date without an objection from a party-in-interest.[5] However, the question of who can vote on a reorganization plan in a mass tort bankruptcy case is more challenging when the debtor, like the debtor in *LTL II*, does not request that the court set a bar date.[6]

Without a bar date or proof-of-claim process to determine whether a claim is substantiated, the door is left open for any purported claimant that fits the description listed in a proposed plan being entitled to vote. When proofs of claim are not filed, there is no process for corroborating or verifying the alleged exposure of the voting claimants or their subsequent injury. In *LTL II*, the proposed plan included "Class 4 — Talc Personal Injury Claims," which consisted of all talc personal-injury claims.[7] The plan further defined "Talc Personal-Injury Claims" as

1 Transcript of Hearing on Motion by Movant Anthony Hernandez Valadez at 102, *In re LTL Mgmt. LLC*, No. 23-12825 (Bankr. D.N.J. April 11, 2023).
2 Public Petition for *Writ of Mandamus* of Official Committee of Talc Claimants and Appendix Volume 1 of 11 (pp. A1-A66) at 12, *In re Official Comm. of Talc Claimants*, No. 23-12825 (Bankr. D.N.J. May 1, 2023).
3 *Id.*
4 11 U.S.C. § 1126.
5 11 U.S.C. §§ 501-502.
6 For example, in *In re Imerys Talc Am. Inc.*, the debtor did not request a bar date, which led to votes being eliminated because there was no process for disposing of non-meritorious claims prior to voting. Case No. 19-10289, 2021 WL 4786093, *11 n.93 (Bankr. D. Del. Oct. 13, 2021). Conversely, the debtors in recent mass tort bankruptcy cases that have reached a settlement requested that the court set a bar date. *See In re Boy Scouts of Am. and Delaware BSA LLC*, 642 B.R. 504, 533 (Bankr. D. Del. 2022), *supplemented*, No. 20-10343 (LSS), 2022 WL 20541782 (Bankr. D. Del. Sept. 8, 2022), *aff'd*, 650 B.R. 87 (D. Del. 2023), *aff'd*, 650 B.R. 87 (D. Del. 2023); *see also In re Purdue Pharma LP*, 2023 WL 5950707, *1-2 (S.D.N.Y. Sept. 13, 2023).
7 Chapter 11 Plan of Reorganization of LTL Management LLC at 26, *In re LTL Mgmt. LLC*, No. 3:23-bk-12825 (Bankr. D.N.J. May 15, 2023).

> any claim or Talc Personal-Injury Demand against the Debtor, Old JJCI, or any other Protected Party, whether known or unknown, including with respect to any manner of alleged bodily injury, death, sickness, disease, emotional distress, fear of cancer, medical monitoring, or any other alleged personal injuries (whether physical, emotional, or otherwise), directly or indirectly arising out of or in any way relating to the presence of or exposure to talc or talc-containing products.[8]

Accordingly, any person who alleged that they had a claim as defined above would have theoretically been entitled to vote on the plan, although many tort claimants would have certainly objected to such an open, unstructured voting process for fear that the voting power of their legitimate claims would be diluted. By broadening the claimant pool, a debtor can dilute the voting power of tort claimants with substantiated claims, increasing its chance of obtaining enough support to clear the § 524(g) threshold. It is unclear how Judge Kaplan would have dealt with these issues.

However, the problem of determining who can vote on a proposed plan in a mass tort bankruptcy case is not unique to *LTL II*, nor is the all-encompassing language in the *LTL II* plan unique. A similar problem caused by a comparable plan and case structure existed in *Imerys Talc America Inc*., another mass tort case in which the debtor did not seek a bar date for tort claimants.[9] What was different about *Imerys* was that the plan-confirmation process was allowed to play out longer than it did in *LTL II*. The outcome of that process demonstrates how important it is for the bankruptcy court to provide some sort of gatekeeping function with respect to plan votes in mass tort bankruptcy cases.

In *Imerys*, a law firm submitted a master ballot representing 15,719 claimants with no due diligence or regard for whether any of the claimants had the injury required to vote on the plan.[10] According to the court, the law firm did not even attempt to discern whether any claimant was exposed to talc.[11]

In *LTL II*, the official committee of talc claimants warned of a similar situation and argued that the debtor was inflating the voting rolls "by including unfiled, unsubstantiated claims that would ultimately recover no (or only nominal) compensation" to broaden the claimant pool.[12] Without a process for corroborating or verifying the alleged exposure of the voting claimants, claimants who would not have had a claim in the tort system would be allowed to influence whether a reorganization plan is approved, causing an unjust result. However, an exact process to be implemented that would both ensure a fair voting process and be efficient enough in cases with thousands of potential claims has not yet been perfected.

How Is Each Claim Valued for Voting Purposes?

As posed in this second question raised by *LTL II*, voting to confirm a plan occurs before an individual's tort claim has been liquidated. Thus, courts typically have very little information about the individual's tort claim during the voting process. The order of this process raises questions about the appropriate voting valuation for each tort claimant. Should specific voting amounts be assigned on an individualized basis, or should all claimants have their claim valued at $1 for voting purposes? Should courts prioritize the efficiency of valuing all claims at $1, or try to adequately assign values that reflect the individual claimant's injury? These questions highlight a larger tension in mass tort bankruptcies between efficiency and adequate representation.

In asbestos cases, two methods have emerged to value tort claims for voting purposes. The first claim-valuation method values every claim at $1 solely for voting purposes.[13] Opponents of this method argue that it nullifies claimants that have claims of greater magnitude by treating each tort claimant the exact same regardless of their alleged injury.

For example, in *Johns-Manville Corp*., the court used this method of valuation — estimating each asbestos claim at $1 — and one of the creditors challenged the procedure, alleging that the voting valuation violated his rights under the Bankruptcy Code.[14] The creditor argued that by valuing each claim at $1, the court "failed to adhere to the Code's voting scheme whereby a minority of class members with just over one third of the value of the total claims may reject a plan."[15] The court rejected the argument, holding that "the alleged irregularities were at most harmless error."[16] Nevertheless, the *Quigley Co*. court warned that if a different voting method would change the result, "the alternative is to weigh each vote based on [the] nature and impairment of each claimant's injury."[17]

The second claim-valuation method assigns a dollar amount based on the disease category of the claimant's alleged injury. At the time of voting, the claimant indicates what type of disease is alleged, and the disease corresponds to a specific value.

The *Quigley Co*. court explained that "[t]his method more accurately aligns the voting strength with the ultimate claim value ... and prevents the holders of relatively small claims from disenfranchising the more severely impaired who hold larger claims."[18] Nevertheless, the question remains as to whether courts should spend the time and resources adequately assigning values that reflect the individual claimant's injury, to the extent that it is possible, or prioritize the efficiency of valuing all claims at $1.

8 *Id.* at 17-18.

9 Many of the proposed plans filed in *Imerys Talc America Inc.* defined a class of talc personal-injury claimants the same way as the plan filed in *LTL II*. *In re Imerys Talc Am. Inc.*, Case No. 19-10289, 2021 WL 4786093 (Bankr. D. Del. Oct. 13, 2021).

10 *Id.* at *9.

11 *Id.*

12 Public Petition for *Writ of Mandamus* of Official Committee of Talc Claimants and Appendix Volume 1 of 11 (pp. A1-A66) at 12-13, *In re Official Comm. of Talc Claimants*, No. 23-12825 (Bankr. D.N.J. May 1, 2023).

13 *See Kane v. Johns-Manville Corp.*, 843 F.2d 636, 641, 647-48 (2d Cir. 1988); *In re Lloyd E. Mitchell Inc.*, 373 B.R. 416, 427-28 (Bankr. D. Md. 2007); *In re Quigley Co.*, 346 B.R. 647, 654 (Bankr. S.D.N.Y. 2006); *see also Imerys*, 2021 WL 4786093, at *11 (approving solicitation procedures, at debtors' request and without objection by any party-in-interest, that allowed unliquidated and disputed "Direct Talc Personal Injury Claims" at $1 for voting purposes).

14 *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 641 (2d Cir. 1988).

15 *Id.* at 646.

16 *Id.* at 648.

17 *In re Quigley Co.*, 346 B.R. 647, 654 (Bankr. S.D.N.Y. 2006).

18 *Id.* at 654.

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Should Master Ballots Be Allowed?

Regarding the third question raised by *LTL II*, due to the large volume of claimants the use of master ballots has become commonplace in mass tort bankruptcy cases, with law firms submitting a master ballot containing the votes of all the claimants it represents. The drawback of master ballots was recently illuminated in *Imerys Talc America Inc.*, when the U.S. Bankruptcy Court for the District of Delaware eliminated 15,719 votes on a proposed plan because a law firm submitted a master ballot without asking any individual claimant how they wanted to vote on the plan.[19]

Instead, the firm relied on a one-page "attorney agreement" that granted the law firm the authority to vote on behalf of all claimants.[20] In voting, the law firm did not consider each claimant individually, but instead treated all claimants together in voting to either reject or accept the plan in its entirety.[21] In response, the court withdrew the master ballot and cautioned the plaintiffs' bar:

> It is counsel's job to make the plan understandable and (if counsel is not empowered to vote for the client) to provide advice on whether to accept or reject the plan. This is the second time this year in a mass tort case that counsel has suggested that these types of cases are too complicated for individuals to comprehend. To paraphrase my previous response: "I don't buy it."[22]

Further, in *Combustion Engineering*, the Third Circuit Court of Appeals elaborated, stating that "[w]here the voting process is managed almost entirely by proxy, it is reasonable to require a valid power of attorney for each ballot to ensure claimants are properly informed about the plan and that their votes are valid."[23] Therefore, while courts may continue to permit master ballots, the question remains: What safeguards are necessary to ensure that the use of master ballots prioritizes and protects the rights of individual claimants?

Conclusion

The permissibility of nonconsensual nondebtor releases is not the only controversial issue that practitioners face in mass tort bankruptcy cases. Who can vote on a proposed plan, the value of each claim for voting purposes, and the specific mechanics of the voting process must be determined in every mass tort bankruptcy case. When the parties do not agree on the answers to these questions, uncertainty reigns. The unpredictability surrounding contentious plan-confirmation litigation should serve as a reminder to chapter 11 practitioners of the importance of prioritizing settlement and good-faith negotiations throughout the chapter 11 process. abi

19 *In re Imerys Talc Am. Inc.*, 2021 WL 4786093 at *9.
20 *Id.*
21 *Id.*
22 *Id.* at *12.
23 *In re Combustion Eng'g Inc.*, 391 F.3d 190, 245 n.66 (3d Cir. 2004).