

FRIDAY, FEBRUARY 17, 2023

PERSPECTIVE

Johnson & Johnson's Texas two-step fail

By Catherine E. Bauer

On its website factsabout-talc.com, Johnson & Johnson claims that "... addressing each and every one of the talc cases against Johnson & Johnson on an individual basis could take thousands of years for each currently filed case to make its way to trial." Say what? Maybe "years" was supposed to be "days?" Maybe they meant the amount of time it would take for all the cases cumulatively to go to trial? I wish someone would explain this to me because it doesn't make sense.

But, maybe it doesn't matter anymore what they say on their website. The Third Circuit's recent decision striking down the bankruptcy filing of LTL Management LLC (the phantom entity J&J created through the so-called "Texas Two-Step" process to file bankruptcy in relation to its talc litigation) sends a clear message that legal creativity does not necessarily a legitimate bankruptcy case make.

On direct appeal from the bankruptcy court, the Third Circuit dismissed the LTL bankruptcy case saying: "We start, and stay, with good faith. Good intentions — such as to protect the J&J brand or comprehensively resolve litigation — do not suffice alone. What counts to access the Bankruptcy Code's safe harbor is to meet its intended purposes. Only a putative debtor in financial distress can do so. LTL was not. Thus we dismiss its petition."

Some commentators have made much of the fact that LTL was well-funded by J&J (to the tune of



Shutterstock

approximately \$61.5 million), and that J&J's very substantial assets remained as a stopgap if necessary. So, was J&J just too nice and generous? Without this funding would the LTL case have been legit? I think not.

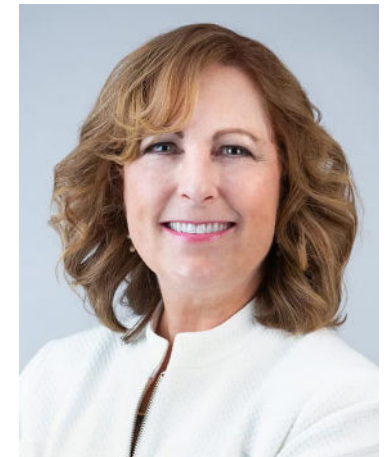
While the Circuit didn't hinge its decision to dismiss on J&J's use of a Texas Two-Step bankruptcy (instead it focused on whether LTL was "financially distressed"), the term "good faith" was still lurking in the background and mentioned over and over. Probably not good faith to put a solvent debtor into bankruptcy, but probably also not good faith to create a phantom entity for the specific purpose of filing bankruptcy and protecting a solvent entity from liability. So, Texas Two-Step bankruptcy cases

may not be dancing much longer in light of this decision.

Importantly, the Third Circuit noted that at the time of LTL's bankruptcy filing J&J had well over \$400 billion in equity value, it had a AAA credit rating and it had \$31 billion in cash and marketable securities. It also observed that J&J distributed over \$13 billion to shareholders in both 2020 and 2021. Obviously, J&J was and is in excellent financial shape.

In defense of its bankruptcy strategy, J&J's website claims "The United States tort system is not equipped to resolve thousands of cases quickly or efficiently" (and, apparently, it takes thousands of years to get to trial). But does any objective person really believe that J&J's purpose in attempting to

Hon. Catherine Bauer (Ret.) is a mediator and arbitrator with Signature Resolution. She can be reached at judgebauer@signatureresolution.com.



use the bankruptcy system is, as it states on its website “activating a process designed to resolve all cosmetic talc legal claims in a way that would be reasonable for all parties...”

If bankruptcy is so wonderful for J&J plaintiffs, why did J&J and their attorneys swear everyone involved in its Texas Two-Step planning to secrecy? Why did it tell those involved not to even tell their spouses about the project? Shouldn't the planning of “Project Plato” have been out in the open

and shouted from the rafters as a wonderful solution that would get money into dying plaintiffs' hands faster?

The reason for the secrecy was as obvious then and it is now. This was always about J&J wanting litigation advantage. This was about protecting J&J's brand. This was about stopping all those pesky lawsuits (defense lawyers are expensive and juries can be sympathetic to the dead and dying). I don't care what J&J says about the benefits of bankruptcy court, this was all

about them. They wanted the benefits of bankruptcy (the automatic stay for one), without the responsibilities and pain that go with filing in your own name.

In my estimation the Texas Two-Step is just another example of how money can, if we let it, game our legal system. If you hire expensive lawyers you can find creative solutions to your legal woes that lesser mortals don't know about and can't access.

It certainly would be nice if we mere mortals could transfer our

liabilities to phantom people who would then file bankruptcy for us. Alas, we can't do this. If we want to file bankruptcy, we have to do so in our own names. So to be fair, J&J and other solvent corporations shouldn't be allowed to create phantom entities to file bankruptcies either. Justice really should be blind. I hope the Third Circuit's decision portends the last dance for the Texas Two-Step. But stay tuned for the appeal. I'd bet money on it. If I lose that bet, I'll file bankruptcy in my own name.