

Nos. 22-2003, 22-2004, 22-2005, 22-2006, 22-2007,
22-2008, 22-2009, 22-2010, 22-2011 (Consolidated)

**In the United States Court of Appeals
for the Third Circuit**

IN RE LTL MANAGEMENT, LLC,

Debtor,

OFFICIAL COMMITTEE OF TALC CLAIMANTS,

Appellant,

Direct Appeal from the United States Bankruptcy Court for the
District of New Jersey in Ch. 11 No. 21-30589
and Adv. Pro No. 21-03032

**BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED
STATES OF AMERICA AND AMERICAN TORT REFORM
ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF APPELLEE**

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INTEREST OF AMICI CURIAE¹

The Chamber of Commerce of the United States of America (the “Chamber”) is the world’s largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in each industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation’s business community.

The American Tort Reform Association (“ATRA”) is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than three decades, ATRA has filed *amicus curiae* briefs in cases involving important liability issues.

Many of Amici’s members participate in bankruptcy proceedings in different capacities, including during plan confirmations under chapter 11. Therefore, Amici

¹ No party or party’s counsel authored any part of this brief. No one, apart from Amici, their members, or their counsel, contributed money intended to fund the brief’s preparation or submission. All parties have consented to the filing of this brief.

have a strong interest in the appropriate interpretation of bankruptcy court powers and the ability of businesses to address mass tort liabilities under U.S. bankruptcy law.

SUMMARY OF ARGUMENT

Complex mass tort bankruptcies often involve third parties, including debtor companies' predecessors and successors in interest, suppliers, customers, and corporate affiliates. Compensation systems established through bankruptcy allow claimants to receive timely payments rather than having to pursue lengthy litigation against multiple defendants. The bankruptcy system has a long history of effectively managing the extraordinary costs and inefficiencies of mass tort litigation that may bankrupt a company. It maximizes the funds available to claimants and serves the U.S. economy in positive ways.

The use of bankruptcy to address mass tort claims is a historically valid bankruptcy purpose, and the examples of resolution of major litigations in a prompt and efficient manner in bankruptcy are legion. The Official Committee of Talc Claimants ("Claimants"), therefore, is incorrect that contingent tort liability cannot be considered in determining whether a bankruptcy was filed in good faith, and the Court should reject Claimants' contention that the bankruptcy system is inherently unfair to tort claimants; to the contrary, the bankruptcy system contains numerous safeguards that maximize the value for claimants and ensure fairness and efficiency.

This Court's precedents demonstrate that whether a filing is in good faith or whether the ultimate plan is fair will depend on close examination of the particular facts and the value provided to creditor groups, not on the per se rules advanced by the Claimants. A debtor is not required to be insolvent to file for bankruptcy; rather, a debtor is encouraged by Congress to consider future claimant liabilities when analyzing its financial situation. And no bad faith should be inferred where a company uses applicable state corporate law to reorganize its affairs before using federal bankruptcy law to solve foreseeable financial distress. Doing so may be the best way for businesses to address such distress while continuing to contribute to society (*i.e.*, through employment, payment of taxes, providing public equity for pension and retirement funds to own, and providing lifesaving and beneficial medical and consumer products that enhance societal well-being).

ARGUMENT

I. COURTS HAVE RECOGNIZED THAT IT IS APPROPRIATE TO USE BANKRUPTCY TO ADDRESS MASS TORT LITIGATION CLAIMS

A. The Debtor's Chapter 11 Filing Has a Recognized Bankruptcy Purpose

One proper use of chapter 11 proceedings is to address present and future liabilities associated with mass tort claims. Congress and courts have consistently and uniformly acknowledged as much. *See, e.g.*, 11 U.S.C. § 524(g)(2)(B)(ii) (setting out requirements for future, unknown liabilities in an asbestos trust under a

plan). This Court, for example, recognized that a bankruptcy case was filed in good faith where large judgments already had been entered and the “prospect loomed of tens of thousands of asbestos health-related suits over the course of 20-30 years.” *See In re SGL Carbon Corp.*, 200 F.3d 154, 164 & n.15 (3d Cir. 1999) (citations omitted) (listing mass tort cases that were filed in good faith).

Many solvent companies proactively have filed bankruptcy cases to address asbestos liabilities, and there is nothing improper or inappropriate about a business choosing to do so. This Court recognized “the drafters of the Bankruptcy Code understood the need for early access to bankruptcy relief to allow a debtor to rehabilitate its business before it is faced with a hopeless situation.” *SGL Carbon*, 200 F.3d at 163 (citing Alan N. Resnick, *Bankruptcy as a Vehicle for Resolving Enterprise-Threatening Mass Tort Liability*, 148 U. PA. L. REV. 2045, 2055 (2000)); *In re Amatex Corp.*, 755 F.2d 1034, 1036 (3d Cir. 1985) (recognizing it was “[t]he potential liability . . . from the [asbestos] lawsuits and the associated defense costs [that] formed the basis of the company’s ‘insolvency’ for purposes of its chapter 11 petition”); *In re Bestwall LLC*, 605 B.R. 43, 49 (Bankr. W.D.N.C. 2019) (“Attempting to resolve asbestos claims through 11 U.S.C. § 524(g) is a valid reorganizational purpose, and filing for Chapter 11, especially in the context of an asbestos or mass tort case, need not be due to insolvency”); *In re Johns–Manville Corp.*, 36 B.R. 727, 736–37 (Bankr. S.D.N.Y.1984) (observing a business “must not

be required to wait until its economic picture has deteriorated beyond salvation to file for reorganization”).

The Debtor properly filed this case to address nearly 40,000 ovarian cancer and mesothelioma claims that the Debtor and its parent companies face in the tort system. A445 at ¶ 42. As the bankruptcy court below found, “[t]his chapter 11 followed denial of review by the U.S. Supreme Court of a multi-billion-dollar award in the *Ingham* litigation, as well as other more recent verdicts for hundreds of millions of dollars.” *In re LTL Mgmt., LLC*, 637 B.R. 396, 417 (Bankr. D.N.J. 2022). It also followed the breakdown of a potential multi-billion-dollar global settlement in the *Imerys* bankruptcy. *Id.* at 417. Where a debtor’s contingent liabilities equate to billions of dollars, with no foreseeable end date, it is entirely consistent with the Bankruptcy Code and procedure to file for bankruptcy filing to address those liabilities. As such, this chapter 11 is a permissible, good faith filing under this Court’s decisions in *SGL Carbon*, 200 F.3d 154, *In re Integrated Telecom Express, Inc.*, 384 F.3d 108, 118 (3d Cir. 2004), and *In re 15375 Mem’l Corp. v. Bepco, L.P.*, 589 F.3d 605 (3d Cir. 2009).

B. Bankruptcy Court Resolution of Mass-Tort Liabilities Has Been a Key Tool for U.S. Businesses Since the Bankruptcy Code Was Enacted in 1978

The present Bankruptcy Code was enacted in 1978 and, since its adoption, has provided a useful statutory mechanism to address mass tort claims. The bankruptcy

process is able to address the needs of both tort claimants and the needs of a company subject to such claims, along with its employees, its shareholders, and the people who use its goods or services.

The history of mass tort cases in bankruptcy began with the Johns-Manville Corporation, a company that manufactured numerous building products containing asbestos. As lawsuits mounted against Johns-Manville, the company filed for bankruptcy in 1982. During the bankruptcy, claimants filed numerous motions to dismiss under the “cause” requirement in section 1112(b), making various arguments similar to those made by the Claimants here regarding the good faith of the company that files bankruptcy to address prospective tort liability before it became insolvent. The bankruptcy court denied all of these motions on the theory that insolvency was no longer a requirement for a chapter 11 filing under the Bankruptcy Code and that a debtor need not wait to file a chapter 11 petition until the situation is dire. *In re Johns-Manville Corp.*, 36 B.R. 727, 730-40 (Bankr. S.D.N.Y. 1984), *leave to appeal denied* 39 B.R. 234 (S.D.N.Y. 1984), *mandamus denied*, 749 F.2d 3 (2d Cir. 1984).² Having survived these motions to dismiss, Johns-Manville went on to propose a plan that channeled all asbestos claims to a trust that

² The Second Circuit held that the bankruptcy court’s order denying a motion to dismiss under 11 U.S.C. § 1112(b) was an interlocutory order because good faith was also an element that a mass-tort debtor would have to satisfy in a chapter 11 plan.

was funded by dividends from the reorganized debtors and provided payments to those harmed by their products.

As part of the Bankruptcy Reform Act of 1994, Congress enacted legislation, codified in 11 U.S.C. § 524(g), to deal with asbestos mass tort claims in chapter 11 reorganizations. The bankruptcy system offers a structured system to manage multiple liabilities and has provided a forum for companies with massive liabilities to do so. Within a few years of the Act's passage, “[a]t least 15 asbestos manufacturers, including UNR, Amatex, Johns-Manville, National Gypsum, Eagle-Picher, Celotex, and Raytech . . . organized or liquidated in attempts to address massive numbers of known and unknown asbestos claimants using Chapter 11 of the Bankruptcy Code.” Sheldon S. Toll, *Bankruptcy and Mass Torts: The Commission's Proposal*, 5 Am. Bankr. Inst. L. Rev. 363, 379 (1997) (citing NAT'L BANKR. REV. COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS, FINAL REPORT at 315 (1997)).

Congress has also recognized the need for a mechanism to deal with non-asbestos mass tort claims. *Id.* The 1994 asbestos amendments, therefore, do not preclude the use of bankruptcy to deal with other types of mass tort claims, and many other companies have, under 11 U.S.C. § 105(a), addressed mass tort liabilities in non-asbestos cases, for present and future claimants:

- Addressing liability associated with medical devices such as the Dalkon Shield and silicone breast implants. *See In re A.H. Robins Co., Inc.*, 88

- B.R. 742 (E.D. Va. 1988), *aff'd*, 880 F.2d 694, 19 (4th Cir. 1989); *In re Dow Corning Corp.*, 280 F.3d 648 (6th Cir. 2002).
- Settling successor liability for defects in aircraft by allowing an OldCo aircraft debtor to sell its assets to a NewCo aircraft company by using a channeling injunction and the funding of a trust. *See In re Piper Aircraft Corp.*, 603 B.R. 525, 525-26 (Bankr. S.D. Fla. 2019).
 - Addressing sexual abuse cases. *See In re USA Gymnastics*, 624 B.R. 443, 446 (Bankr. S.D. Ind. 2021), *reconsideration denied*, No. 18-09108-RLM-11, 2021 WL 8825479 (Bankr. S.D. Ind. Feb. 18, 2021) (hundreds of former and current athletes sued for sexual abuse by Larry Nassar, a USAG volunteer); *In re Boy Scouts of Am. & Delaware BSA, LLC*, No. 20-10343 (LSS), 2022 WL 3030138 (Bankr. D. Del. July 29, 2022) (addressing over 84,000 sexual abuse cases); *In Re Cath. Diocese of Wilmington, Inc.*, 432 B.R. 135 (Bankr. D. Del. 2010) (Debtor was named as a defendant in approximately 131 sexual abuse cases filed in the Delaware state courts, and, within the bankruptcy case, entered into a settlement with the abuse survivors).
 - Addressing the opioid crisis. *In re Purdue Pharma L.P.*, 633 B.R. 53 (Bankr. S.D.N.Y.), *vacated* 635 B.R. 26 (S.D.N.Y. 2021), *certificate of*

- appealability granted*, No. 21 CV 7532 (CM), 2022 WL 121393 (S.D.N.Y. Jan. 7, 2022); *In re Mallinckrodt PLC*, 639 B.R. 837 (Bankr. D. Del. 2022).
- Addressing wildfires in California. *In re PG & E Corp.*, 617 B.R. 671 (Bankr. N.D. Cal. 2020), *appeal dismissed sub nom, McDonald v. PG&E Corp.*, No. 20-CV-04568-HSG, 2020 WL 6684592 (N.D. Cal. Nov. 12, 2020), *aff'd*, No. 20-17366, 2022 WL 1657452 (9th Cir. May 25, 2022), and *appeal dismissed sub nom, Int'l Church of the Foursquare Gospel v. PG&E Corp.*, No. 20-CV-04569-HSG, 2020 WL 6684578 (N.D. Cal. Nov. 12, 2020).
 - Addressing a train crash in Maine. *In re Montreal Maine & Atl. Ry., Ltd.*, No. BR 13-10670, 2015 WL 7431192 (Bankr. D. Me. Oct. 9, 2015), *adopted*, No. 1:15-MC-329-JDL, 2015 WL 7302223 (D. Me. Nov. 18, 2015).

In short, for the last 40 years many companies have filed chapter 11 petitions to address mass tort liabilities in similar circumstances facing the Debtor here, and the courts consistently have permitted this practice. As a result of these bankruptcy filings, millions of people have received compensation for their claims, often in a prompt and efficient manner. In light of this history, it is implausible to suggest that filing a chapter 11 petition to address mass tort liability is indicative of bad faith.

C. Many of the Harms Surmised by the Claimants Can Be Addressed by the Bankruptcy Code

The Bankruptcy Code provides mechanisms and standards for addressing the concerns raised by the Claimants regarding whether this bankruptcy will maximize value of the bankruptcy estate, ensure fairness among creditors, and avoid delays in recovery. The bankruptcy court evaluated the evidence adduced at the evidentiary hearing and credited Debtor’s intent to invoke §§ 105(a) and 524(g) to “ensure fair and equitable treatment of present and future mass tort claimants and provide a mutually acceptable global resolution of crippling mass tort litigation.” *See Debtor’s Obj. to Mots. to Dismiss Chapter 11 Case*, 25, ECF No. 956, at 25, *In re LTL Mgmt. LLC*, No. 21-30589 (Bankr. D.N.J. Dec. 22, 2021). The court considered all the relevant factors, including the procedural history, the structure and amount of funding agreements, and the means by which the bankruptcy process maximizes recovery to benefit claimants. The court’s determination that the Claimants’ concerns could be adequately addressed through the bankruptcy process is substantiated by §§ 524(g) and 105(a).

1. Section 524(g)

Congress enacted 11 U.S.C § 24(g) specifically to resolve asbestos-related mass-tort claims. *See In re G-I Holdings Inc.*, 420 B.R. 216, 270 (D.N.J. 2009) (“[T]he purpose of § 524(g) is to channel asbestos-related claims to a trust, which relieves the debtor of the uncertainty of future asbestos liabilities and helps achieve

the purposes of chapter 11 by facilitating the reorganization and rehabilitation of the debtor as an economically viable entity while providing for an equitable resolution of asbestos-related claims.”). More than 60 entities have filed bankruptcy and established such trusts. *See* U.S. Gov’t Accountability Office, *Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts*, at 3 (Sept. 2011). Here, the Debtor intends to use § 524(g) to accelerate payments to talc claimants and their families and provide a global resolution of these talc-related claims.

This Court and others have consistently recognized the benefits of resolving mass tort claims through the establishment of trusts under § 524(g). This Court noted “the trusts’ effectiveness in remedying some of the intractable pathologies of asbestos litigation, especially given the continued lack of a viable alternative providing a just and comprehensive resolution.” *In re Fed.-Mogul Glob. Inc.*, 684 F.3d 355, 362 (3d Cir. 2012); *see also In re Bestwall LLC*, 606 B.R. 243, 257 (Bankr. W.D.N.C. 2019), *aff’d*, No. 3:20-CV-105-RJC, 2022 WL 68763 (W.D.N.C. Jan. 6, 2022) (“[A] § 524(g) trust will provide all claimants—including future claimants who have yet to institute litigation—with an efficient means through which to equitably resolve their claims.”). This Court has further acknowledged that the § 524(g) trust was specifically tailored to protect the due process rights of future claimants and is perhaps the best vehicle for addressing these concerns. *In re Grossman’s Inc.*, 607 F.3d 114, 127 (3d Cir. 2010).

In their brief, Claimants argue that recovery would be slowed due to the bankruptcy court's claims estimation process, which it asserts would not be held until 2023, causing claimants to wait years to recover. *See* Claimants Brief ("Claimants Br.") at 29. But the Debtor faces nearly 40,000 pending tort claims, with thousands more expected annually for decades to come. At the time of the bankruptcy filing, fewer than 50 trials had proceeded to verdict. *LTL Mgmt.*, 637 BR at 410. Given the pace of litigation and new lawsuit filings, there is no reason to disturb the bankruptcy court's determination that resolution of the mass tort presented by this case will be more efficiently addressed in chapter 11. Further, formal estimation is not a requirement in a mass tort case as Trust Distribution Procedures often establish the process for claimants to establish the value of a claim and to receive payment once the negotiated parameters (which are frequently part of a mediated resolution)³ are met. *See, e.g., In re Boy Scouts of Am. & Delaware BSA, LLC*, 2022 WL 3030138 (setting out the factual background of extensive mediation, including the development of trust distribution procedures).

³ In the case below, the Claimants wanted certain trials to proceed, and the Debtor proposed an estimation procedure. Rejecting both, the bankruptcy court appointed a noted mass tort damage expert to provide a report estimating the value of the claims. *See* Dietrich Knauth, *Judge Appoints Kenneth Feinberg to Evaluate J&J Cancer Claims in Bankruptcy*, Reuters (July 28, 2022), <https://www.reuters.com/legal/litigation/judge-appoints-kenneth-feinberg-evaluate-jj-cancer-claims-bankruptcy-2022-07-28/>.

A successful reorganization and implementation of a settlement trust pursuant to § 524(g) could dramatically reduce litigation costs, ensure balanced recoveries for both present and future talc claimants, and provide both a meaningful opportunity for justice as well as a timely recovery for claimants. Further, establishment of a trust would allow resolution of potentially crippling costs and financial drain associated with defending—over the next several decades—tens of thousands (if not hundreds of thousands) of talc-related claims with what could ultimately be a multi-billion-dollar exposure. *LTL Mgmt.*, 637 BR at 427.

Claimants further contend that these alleged “years of delay” will increase settlement pressure on talc claimants. Claimants Br. at 28. However, § 524(g) provides safeguards for this exact concern. Under § 524(g), the tort claimants must approve any plan employing a § 524(g) trust by a 75% super majority. *See* 11 U.S.C. § 524(g). The approval process obviates many of Claimants’ policy concerns about the fairness and value of an eventual plan. Meanwhile, Claimants’ concerns that § 524(g)’s super-majority requirement will result in undue delay is speculative and contrary to the judgment of Congress, which established this procedure to protect claimants’ rights. *See In re Combustion Eng’g, Inc.*, 391 F.3d 190, 237 (3d Cir. 2004), *as amended* (Feb. 23, 2005) (observing that the “prerequisites set forth in [section] 524(g) are designed to protect the interest of future claimants” including

that “the plan must be approved by a super-majority of current claimants, and must provide substantially similar treatment to present and future claimants”).

Claimants also argue that the value of the Debtor’s estate will not be maximized through bankruptcy. Claimants Br. at 32. The bankruptcy court found that the New JJCI-LTL division enhanced the Debtor’s estate by forgoing the costs associated with a more complex Old JJCI bankruptcy. *LTL Mgmt.*, 637 B.R. at 396. Further, § 524(g) was enacted precisely for this reason—*i.e.*, to “help...victims receive maximum value” from bankrupt entities. 140 Cong. Rec. S14,461 (Sept. 12, 1994) (statement of Sen. Heflin). Absent a chapter 11 bankruptcy, some claimants may win the race to the courthouse (or conference room for settlement) and receive payment in full or significant payments resulting in the bankruptcy of a debtor, leaving future claimants, many of whom will not be known for years to come, with little to nothing. Section 524(g), however, maximizes a debtor’s assets for a fair and equitable distribution to all present and future claimants.

The bankruptcy court found that the Debtor here has various assets, for example, the Funding Agreement and Insurance Rights, that will be available to help fund the trust to pay the claimants under a plan. And an Article III court will have to affirm any confirmation order with respect to such plan before an injunction is enforceable. *See* 11 U.S.C. § 524(g)(3)(A). Through this process, the Debtor has

stated an intent to compensate claimants in a fair and equitable way, which is an appropriate use of the Bankruptcy Code consistent with Congressional intent.

2. Section 105(a)

In addition to § 524(g) of the Bankruptcy Code, § 105(a) of the Bankruptcy Code empowers bankruptcy courts to “[i]ssue any order, process or judgment that is necessary or appropriate to carry out the provisions of” the Bankruptcy Code. As this case proceeds, the bankruptcy court will employ its limited equitable authority under § 105(a) to facilitate a fair and just result for all, consistent with the policies and objectives of the Bankruptcy Code. *LTL Mgmt.*, 637 BR at 429.

II. THE BANKRUPTCY COURT CORRECTLY DETERMINED LTL’S CHAPTER 11 FILING WAS NOT IN BAD FAITH

In this Circuit, “a Chapter 11 petition is subject to dismissal for ‘cause’ under 11 U.S.C. § 1112(b) unless it is filed in good faith.” *SGL Carbon*, 200 F.3d at 162. Good faith is not defined in § 1112(b) or any other section of the Bankruptcy Code; rather, the bankruptcy court determines whether a petition was filed in good faith based on the totality of the circumstances. *See SGL Carbon*, 200 F.3d at 162 (noting that the relevant inquiry is “fact intensive” and focuses on the “totality of the circumstances”); *see also Integrated Telecom*, 384 F.3d at 118. In those cases where the court has found bad faith, the specific facts were markedly different than those presented here. For example, in *SGL Carbon*, 200 F.3d 154, the debtor proposed to pay all creditors in full except certain antitrust litigants, 200 F.3d at 163-64; in

Integrated Telcom, 384 F.3d 108, the debtor filed its case to limit one creditor's claim and to gain "litigation advantage over" litigants in a single securities class action that would not have rendered the company insolvent, 384 F.3d at 124-25; and in *BEPCO*, the debtor filed for bankruptcy to prohibit a single civil litigation from going to trial, 589 F.3d at 619-22. None of these cases involved mass tort liabilities that, in aggregate, could cause the company financial distress or insolvency. Amici are aware of no published decision ever dismissing for bad faith a bankruptcy case filed to address mass tort liability, much less mass tort liability of the scale at issue here.⁴ Claimants cite none. Filing a chapter 11 case to deal with thousands of cases alleging billions of dollars in liability is not an impermissible litigation tactic, but rather, a proper use of the collective recovery mechanism contemplated by the Bankruptcy Code.

Consistent with the standards in the Third Circuit cases, the bankruptcy court examined the record and found, in its discretion, that the Debtor demonstrated good faith in filing its chapter 11 petition. This is a straightforward conclusion based on

⁴ See, e.g., *Integrated Telecom*, 384 F.3d at 125 (distinguishing the use of chapter 11 filing to avoid a single securities class action from filings to address mass tort cases "such as *Johns-Manville*" and "*The Bible Speaks*" where the debtor faced tens of thousands of lawsuits and a "staggering" claim that may well exceed the value of the Debtor's assets").

the fact that the Debtor is facing significant mass tort liabilities and proposed to reorganize in a fashion that provides maximal value to its creditors.

A. Insolvency is Imminent in the Context of a Mass Tort Case and Traditional Proof of Insolvency is Not Required.

The Claimants allege that the bankruptcy court erred as a matter of law in finding that financial distress justified the filing, stating that there was no “immediate financial difficulty.” *See* Claimants Br. At 22. But, “[i]t is well established that a debtor need not be insolvent before filing for bankruptcy protection.” *SGL Carbon Corp*, 200 F.3d at 163 (citations omitted), *see also*, *e.g.*, *Bestwall LLC*, 605 B.R. at 49 (“filing for Chapter 11, especially in the context of an asbestos or mass tort case, need not be due to insolvency”); *In re Marshall*, 721 F.3d 1032, 1052 (9th Cir. 2013) (“As a statutory matter, it is clear that the bankruptcy law does not require that a bankruptcy debtor be insolvent, either in the balance sheet sense (more liabilities than assets) or in the liquidity sense (unable to pay the debtor’s debts as they come due), to file a chapter 11 case or proceed to the confirmation of a plan of reorganization”). In fact, this Court has acknowledged that businesses may need to take exactly this type of anticipatory action in order to rehabilitate before their situations are beyond repair. *SGL Carbon*, 200 F.3d at 163; *Integrated Telecom*, 384 F.3d at 118 (while the Third Circuit requires “some” degree of financial distress, the Bankruptcy Code does not “require any particular degree of financial distress as a condition precedent to a petition”).

The Debtor is facing financial difficulty in the context of mass tort cases that present billions of anticipated dollars in liability and defense costs. A7117. Even if the Debtor is currently balance sheet solvent, it is appropriate to consider future liabilities when determining the financial position of the debtor. Moreover, the specific provisions of 11 U.S.C. § 524(g), which consider these precise types of liabilities, are evidence of Congress' intent to account for them when determining solvency. Thus, generally accepted accounting principles (GAAP), while relevant, are neither controlling nor presumptively valid in determining debtor's solvency in light of potential future, contingent liabilities. *See, e.g., In re Babcock & Wilcox Co.*, 274 B.R. 230 (Bankr. E.D. La. 2002) (holding that GAAP analysis does not control because debtor-manufacturer's liabilities to future asbestos claimants had to be included in determining its solvency at time of corporate restructuring); *accord In re W.R. Grace & Co.*, 281 B.R. 852, 866 (Bankr. D. Del. 2002).

The Bankruptcy Code is also designed to address the problem of successive litigation, particularly in the quintessential scenario that often triggers a bankruptcy filing: a race to the courthouse to collect on limited assets. *In re Johns-Manville Corp.*, 36 B.R. at 740 (finding that, but for bankruptcy, the debtor "would become a target for economic dismemberment, liquidation, and chaos, which would benefit no one except the few winners of the race to the courthouse"). Bankruptcy brings order to this free-for-all. The Supreme Court has thus recognized, in the context of third-

party litigation rights, that bankruptcy represents a “special remedial scheme.” *Martin v. Wilks*, 490 U.S. 755, 762 n.2, 109 (1989). To that end, unlike, for instance, Rule 23 class actions, a bankruptcy proceeding can serve as an “exception” to the general principle and “deep-rooted historic tradition that everyone should have his own day in court,” by barring “successive litigation.” *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999). Once the debtor is in bankruptcy, all litigation against the debtor is stayed, and the court has the power to equitably resolve all claims against the debtor in one forum.

A further consideration is the impact of so-called claims aggregators, which in the wake of large jury verdicts, begin advertising to increase the number of claims asserted against the debtor and—as occurred here—can result in mounting claims in unanticipated amounts that threaten to swamp even apparently solvent debtors. *See, e.g., In re Boy Scouts of Am. & Delaware BSA, LLC*, No. 20-10343 (LSS), 2022 WL 3030138, at *15 (Bankr. D. Del. July 29, 2022) (“The plaintiffs’ bar also played an active (some have argued aggressive) role in targeting potential claimants by instituting a massive advertising campaign of its own.”).

Claimants are also incorrect that Congress intended multi-district litigation (“MDL”) procedures to be the exclusive mechanism for dealing with mass tort litigation. *See* Claimants Br. at 54 (asserting that “[t]he MDL process better accounts for the individual, constitutional, and systemic interests involved” and claiming that

“individual bankruptcy courts have no authority to override Congress’s decision about how to manage complex mass litigation”). Certainly, formation of an MDL is a valid and legitimate way to address complex litigation; however, it is not the only means of addressing mass tort claims and it often falls short of the collective solution possible under chapter 11. The MDL process is designed to handle only pre-trial coordination of mass-tort *proceedings* — it does not address the management of mass-tort *liabilities*. 28 U.S.C. § 1407. To the contrary, a transferee court administering an MDL is empowered only to manage cases up until trial, after which it must remand to the transferor jurisdiction. 28 U.S.C. § 1404(a). Of course, in the process, parties may enter into settlements or may, by agreement, allow bellwether trials to occur in the MDL Court — but those are voluntary litigation options, not procedures mandated by Congress. *See Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 36 & n.1 (1998) (holding transferee court cannot assign a transferred case to itself for trial absent waiver of the right to remand). Nothing in the MDL statute or rules suggests its pre-trial coordination procedures preclude the normal operation of the Bankruptcy Code.

The use of channeling injunctions and establishment of a properly funded trust can benefit claimants by allowing efficient recoveries, without the burdensome costs of litigation, and make it easier for claimants to pursue claims that are difficult to prove in court or have lower value. *See, e.g., Amchem Prod., Inc. v. Windsor*, 521

U.S. 591, 595 (1997) (“[A] nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure.”). At the same time, the mechanisms benefit the company by allowing for global resolution of mass tort claims and thereby providing some certainty that the company’s ongoing business may be protected and permitted to proceed. Further, a channeling injunction provides for a balance of payment and similar treatment for all claims—both present and future—whereas claims that are brought and tried first through the civil courts would be more likely to be compensated than later brought claims.

B. The Valid Use of State Divisional Merger Laws (the “Texas Two-Step”) is Not Evidence of Bad Faith

Claimants also challenge the Debtor’s use of the divisional merger statute (also known as the “Texas Two-Step”). The divisional merger statute is intended to have a neutral impact on creditors and has been used for over 30 years. *See* Curtis W. Huff, *The New Texas Business Corporation Act Merger Provisions*, 21 St. Mary’s L.J. 109, 110 (1989). Old JJCI is not the first mass tort defendant to enter into a corporate restructuring prior to a bankruptcy filing. *See, e.g., In re DBMP LLC*, No. 20-30080, 2021 WL 3552350, at *1 (Bankr. W.D.N.C. Aug. 11, 2021); *In re Aldrich Pump LLC*, No. 20-30608 (JCW), 2021 WL 3729335, at *1 (Bankr. W.D.N.C. Aug. 23, 2021); *Bestwall LLC*, 605 B.R. 43.

Claimants' arguments to the contrary disregard Texas state corporate law, which permits a divisional merger under these circumstances. Other states have similar statutes allowing for divisional mergers. *See, e.g.*, 15 Pa. C.S. § 361 (West); Ariz. Rev. Stat. Ann. § 29-2601; Del. Code Ann. tit. 6, § 18-217(b)-(c) (West). This Court should reject Claimants' effort to impugn the use of state corporate reorganizational laws as "evincing bad faith" merely because a corporation contemplates that a bankruptcy filing may follow restructuring. Claimants Br. 3.

Bankruptcy law, moreover, has provisions that prevent the abuses contemplated by Claimants. These bankruptcy protections include fraudulent transfer laws, special voting provisions for mass tort asbestos claimants requiring a 75% super-majority, affirmation of any injunction by an Article III judge, a path for creditors to seek stay modification to assert a unique or special need to liquidate a claim outside of bankruptcy, and provisions for authorizing an examiner to investigate the pre-petition conduct for any wrongdoing or appointing a chapter 11 trustee to displace the board of directors. *See* 11 U.S.C. § 524(g).

In addition, courts properly consider the totality of the circumstances and thus, this Court should reject Claimants' view that, to avail itself of the bankruptcy system, a large and complex company must be liquidated or restructured. Such a rule would not only increase the costs and inefficiencies of the bankruptcy proceeding, it would also unnecessarily jeopardize a company that employs

thousands of employees, that provides products that improve the quality of life for consumers, and in which numerous pension funds and other retirement vehicles own stock. The idea that such a business must litigate until it is nearly destroyed before filing bankruptcy stretches the provisions in § 1112(b) too far.

Here Old JJCI's subsidiary faced a rising tide of mass tort liability with billions of dollars at stake, and the circumstances suggested that the process for addressing those claims would be chaotic, inefficient, and expensive. It is a good faith use of the bankruptcy procedure for a company in that circumstance to avail itself of State corporate law that permits a divisional merger, fund the Debtor emerging from a divisional merger in a manner that maximizes value for its creditors, and otherwise reorganize the company to meet its obligations and pursue the goals and objectives of the Bankruptcy Code. That process, meanwhile, is governed by the federal statutes that balance the interests of all stakeholders and is subject to the initial oversight of an Article I bankruptcy judge and ultimately, the oversight of Article III judges in the federal district and appellate courts.

CONCLUSION

Amici respectfully request that the Court affirm the bankruptcy court's orders.

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Certification of Compliance

I hereby certify as follows.

Pursuant to this Court's Local Rule 28.3(d), I am a member of the bar of this Court.

Pursuant to this Court's Local Rule 31.1(c), the text in the electronic copy of this brief is identical to the text in the paper copies of the brief filed with the Court.

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Dated: August 22, 2022

/s/ Ilana H. Eisenstein
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CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2022, I electronically filed this brief with the Clerk of the Court for the United States Court of Appeals for the Third Circuit using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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