



American Tort Reform Association

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September 18, 2023

The Honorable Dick Durbin
Chairman
Committee on the Judiciary
U.S. Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Lindsey Graham
Ranking Member
Committee on the Judiciary
U.S. Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Hearing on Use of the Chapter 11 Bankruptcy Process
to Address Overwhelming Mass Tort Litigation

Dear Chairman Durbin, Ranking Member Graham, and Members of the Committee:

Thank you for holding this hearing and for the opportunity to share the American Tort Reform Association's (ATRA) concerns with criticism of corporate use of the bankruptcy process as a means of responding to the unprecedented, overwhelming number of mass tort lawsuits, many of which are of meritless. We respectfully do not agree with the Committee's presenting this hearing as "Evading Accountability: Corporate Manipulation of Chapter 11 Bankruptcy." Rather, our bankruptcy laws were established precisely for situations, as are now occurring, in which a business suddenly faces tens of thousands or hundreds of thousands of dubious claims with the prospect of never-ending litigation that will cost millions of dollars to legal defense alone, even if it expects to prevail in the vast majority of cases. In such instances, bankruptcy laws provide a fair system for compensating claimants while allowing American businesses to continue contributing to the economy without being saddled and distracted by litigation.

ATRA is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms. Our mission is to establish and advance a predictable, fair, and efficient civil justice system through the enactment of legislation, filing *amicus curiae* (friend of the court) briefs in litigation, and public education. In recent litigation that will likely be discussed in this hearing, ATRA has voiced its concerns with restricting the ability of businesses that face overwhelming mass tort litigation to use the bankruptcy system.¹ We have also urged the House Oversight Committee to address the hidden use of funding from outside investors that has contributed to the rise of mass tort litigation.²

¹ ATRA filed *amicus* briefs in *In re: Bestwall, LLC* in the Fourth Circuit on July 24, 2023, *In re: LTL Mgm't, LLC* in the Third Circuit on February 21, 2023 and August 22, 2022, and *In re: Aeero Technologies, LLC* in the Seventh Circuit on December 19, 2022.

² Letter from Sherman Joyce, President, American Tort Reform Association to the Hon. James Comer, Chairman, and the Hon. Jamie Raskin, Ranking Member, House Comm. on Oversight and

Courts and Congress have historically recognized that the bankruptcy system is a valid means of addressing mass tort claims. In such cases, bankruptcy may be the best way for businesses to address overwhelming tort liability while continuing to contribute to society. Members of this Committee may be aware that the unique complexities of mass asbestos litigation led Congress to enact the Bankruptcy Reform Act of 1994, codified at 11 U.S.C. 524(g). That law ensures that the interests of claimants are protected while “simultaneously enabling corporations saddled with asbestos liability to obtain the ‘fresh start’ promised by bankruptcy.”³ Section 524(g) “affirm[s] what Chapter 11 organization is supposed to be about: allowing an otherwise viable business to quantify, consolidate, and manage its debt so that it can satisfy its creditors to the maximum extent feasible, but without threatening its continued existence and the thousands of jobs that it provides.”⁴ In passing this legislation, members reaffirmed that the bankruptcy process “is designed to help asbestos victims receive maximum value.”⁵

For decades, businesses facing mass tort claims have filed Chapter 11 petitions to address mass tort liabilities and the courts have consistently permitted them to do so. As a result, millions of people have received compensation for their claims, often in a prompt and efficient manner, while at the same time preserving beneficial aspects of those businesses. For example, there are more than 60 asbestos trusts in operation, holding billions of dollars to “compensate claimants expeditiously at minimal cost.”⁶ Companies have also invoked Chapter 11 to address mass tort liabilities ranging from medical device product liability claims, such as those involving Dalkon Shield and silicone breast implants,⁷ to train crashes and wildfire damage claims.⁸

The most common targets today include pharmaceutical, medical device, and consumer product manufacturers. In recent years, mass tort litigation has exploded as an entire industry has developed to generate it. Law firms and businesses known as “lead generators” spend extraordinary sums on lawsuit advertising, sometimes financed by an influx of outside investment in speculative litigation by outside sources (known as third party litigation funding).⁹ Between 2017 and 2021, they invested \$6.8 billion on more than 77 million television ads.¹⁰ Ads have also

Accountability, Hearing on “Unsuitable Litigation: Oversight of Third-Party Litigation Funding,” Sept. 11, 2023.

³ *In re Federal-Mogul Global Inc.*, 684 F.3d 355, 359 (3d Cir. 2012).

⁴ 140 Cong. Rec. 28,358 (Oct. 6, 1994) (statement of Senator Brown).

⁵ *Id.* (statement of Sen. Heflin).

⁶ Mark A. Behrens, Asbestos Trust Transparency, 87 Fordham L. Rev. 107, 111-12 (2018).

⁷ See *In re Dow Corning Corp.*, 280 F.3d 648 (6th Cir. 2002); *In re A.H. Robins Co.*, 88 B.R. 742 (E.D. Va. 1988), *aff’d*, 880 F.2d 694 (4th Cir. 1989).

⁸ See *In re PG & E Corp.*, 617 B.R. 671 (Bankr. N.D. Cal. 2020), *appeal dismissed sub nom, McDonald v. PG&E Corp.*, 2020 WL 6684592 (N.D. Cal. Nov. 12, 2020), *aff’d*, 2022 WL 1657452 (9th Cir. May 25, 2022); *In re Montreal Maine & Atl. Ry., Ltd.*, 2015 WL 7431192 (Bankr. D. Me. Oct. 9, 2015), *adopted*, 2015 WL 7302223 (D. Me. Nov. 18, 2015).

⁹ See U.S. Gov’t Accountability Office, GAO-23-105210, [Third-Party Litigation Financing: Market Characteristics, Data, and Trends](#) 11-12 (Dec. 2022) (“GAO Report”).

¹⁰ See Am. Tort Reform Ass’n, [Legal Services Advertising in the United States 2017-2021](#), at 4 (2022).

inundated social media. Sometimes presented as “medical alerts,” ads urge viewers who have taken a medication, been treated with a medical device, or used a consumer product to “call right now” because “you may be entitled to substantial compensation.” For example, spending on ads seeking plaintiffs for lawsuits blaming talcum powder or Roundup for a person’s cancer or alleging the blood thinner Xarelto led to side effects *each* has exceeded \$100 million.¹¹ Call centers, sometimes in other countries, gather medical and other information from those who respond, then package and sell potential claims to interested law firms. In some instances, strangers have solicited individuals for lawsuits by phone, apparently through misuse of their medical records.¹²

With minimal screening, claims are filed *en masse*. One law firm recently filed over 5,000 complaints in a mass tort docket in a single week.¹³ Potentially viable claims may be buried among unsupportable ones. The strategy of the plaintiffs’ bar is to pressure companies to settle the litigation at incredible sums to avoid endless litigation and prolonged damage to their reputations, regardless of the merits of the individual cases. In litigation involving latent injuries, however, it is impossible for a company to settle unknown potential future claims through the tort system. Likewise, the mass tort system may breakdown when lawsuit advertising, the ease of filing claims, and a lack of verification of their validity leads to more claims than defendants and the courts can fairly handle. In those instances, use of the bankruptcy process offers a legitimate, needed means of fully resolving the litigation.¹⁴

But don’t take it from us, listen to what federal judges managing mass tort litigation have said about what is occurring. When overseeing an MDL of lawsuits targeting a medical device, the Chief Judge of the U.S. District Court for the Middle District of Georgia observed that lawyers file “cases that otherwise would not be filed if they had to stand on their own merit as a stand-alone action” in an MDL because they believe clear deficiencies in their claims will not be scrutinized when the claim is swept into a global settlement.¹⁵ Another federal judge, who has overseen product liability mass tort litigation, explained that it is difficult to apply the ordinary procedural safeguards used to verify claims when “the volume of individual cases in a single MDL can number in the hundreds, thousands, and even hundreds of

¹¹ See Roy Strom, *Camp Lejeune Ads Surge Amid ‘Wild West’ of Legal Finance, Tech*, Bloomberg Law, Jan. 30, 2023. Congress may be interested to learn if outside funders bankrolled the \$145 million spent, as of the end of 2022, on television and social media ads to solicit Camp Lejeune claims against the federal government, and, if so, what cut they may be taking from the \$6 billion authorized for veteran payments. *See id.*

¹² See Matthew Goldstein & Jessica Silver-Greenberg, *How Profiteers Lure Women Into Often-Unneeded Surgery*, N.Y. Times, Apr. 14, 2018.

¹³ See David Nayer, *Analytics Show One Firm Filed Over 5,000 Lawsuits in a Week*, Law Street, Feb. 8, 2023.

¹⁴ See *In re Plant Insulation Co.*, 734 F.3d 900, 905-06 (9th Cir. 2013) (“[G]iven the lengthy latency period of asbestos-related diseases, companies facing asbestos risks have no way finally to resolve or even effectively estimate their exposure.”).

¹⁵ *In re Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig.*, 2016 WL 4705827, at *2 (M.D. Ga. Sept. 7, 2016).

thousands.”¹⁶ He cautioned that the “high volumes of unsupportable claims clog the docket, interfere with a court’s ability to establish a fair and informative bellwether process, frustrate efforts to assess the strengths and weaknesses of the MDL as a whole, and hamper settlement discussions.”¹⁷ A Federal Advisory Committee on Civil Rules report provides a troubling estimate of the percentage of claims in MDLs that are unsupportable: 20% to 30% and, in some litigation, as many as 40% to 50%.¹⁸

In a mass tort litigation machine in which federal MDL dockets go from zero to tens of thousands of questionable claims in only a few months, many of which are meritless, companies must consider bankruptcy as a legitimate means of resolving cases while protecting the future viability of the business and the interests of its employees and other stakeholders.

ATRA is concerned that, recently, the U.S. Court of Appeals for the Third Circuit ruled that a company cannot invoke the federal bankruptcy process until it is in immediate “financial distress.”¹⁹ This new precondition is contrary to Congress’s intent in enacting the bankruptcy law. Not only does it place bankruptcy out-of-reach for businesses facing never-ending litigation, it is against the interests of claimants, who will not have access to the business’s resources until they are depleted.²⁰ Requiring a business’s financial situation to be so dire that there is an imminent risk that it will collapse before allowing it to file for bankruptcy is also inconsistent with how the judiciary has historically applied the law. Over the past four decades, courts have consistently permitted businesses to file Chapter 11 petitions irrespective of the solvency of the debtor or the state, nature, and timing of the company’s financial distress.

Similarly, a bankruptcy court in Indiana recently denied a Chapter 11 stay petition seeking relief from hundreds of thousands of product liability lawsuits.²¹ While six bellwether trials resulted in defense verdicts, ten trials concluded with verdicts ranging from \$1.7 million to \$77.5 million (with appeals pending).²² Meanwhile, discovery in cases in the federal MDL proceeded in “waves” of 500 cases at a time.²³ In such situations, the Bankruptcy Code’s procedures, allowing for establishment of a settlement trust with sufficient resources to pay legitimate claims, provide a legitimate alternative to an overwhelmed MDL. Yet, even as the bankruptcy court recognized the unprecedented lawsuit “tsunami,” it denied the companies’ requested stay, finding the bankruptcy did not serve a “valid

¹⁶ Judge M. Casey Rodgers, *Vetting the Wether: One Shepherds View*, 89 UMKC L. Rev. 873, 873 (2021).

¹⁷ *Id.*

¹⁸ Advisory Committee on Civil Rules, *Agenda Book*, Nov. 1, 2018, at 142.

¹⁹ *In re: LTL Mgm’t, LLC*, 58 F.4th 738, 755 (3d Cir. 2023), *rehearing denied* (Mar. 22, 2023).

²⁰ *In re Plant Insulation Co.*, 734 F.3d at 906 (“[I]f such companies collapse and liquidate, untold numbers of future claimants will be left without recovery. Present claimants, however, want to get paid quickly and efficiently.”).

²¹ *See In re Aearo Techs. LLC*, Nos. 22-02890-JJG-11, 2023 WL 3938436 (Bankr. S.D. Ind. June 9, 2023).


²² *Id.* at *3.

²³ *Id.* at *4.

reorganizational purpose” because it viewed the defendants, which had not yet begun paying judgments, as “financially healthy.”²⁴

If a business facing tens of thousands of lawsuits,²⁵ with thousands more expected in the future, that has already been hit with a single verdict for \$4.69 billion²⁶ and will need to spend immense sums on defense costs is not in sufficient “financial distress” to invoke our nation’s bankruptcy laws, who is? We also wonder, if a companies facing the largest MDL in history—over 343,000 claims with 260,000 currently pending and no end in sight, representing a staggering 30% of all cases currently pending in federal district courts²⁷—cannot obtain a bankruptcy stay, who can?

Sincerely,



Sherman Joyce

President

American Tort Reform Association

cc: Members of the Senate Judiciary Committee

²⁴ See *id.* at *17.

²⁵ Over five years, lawyers have filed nearly 39,000 claims against Johnson & Johnson claiming that its talcum powder products led to development of a client’s ovarian cancer or mesothelioma. See U.S. Jud. Panel on Multidistrict Litig., [MDL Statistics Report - Distribution of Pending MDL Dockets by Actions Pending](#), Aug. 15, 2023 (providing statistics for MDL -2738, *In re: Johnson & Johnson Talcum Powder Products Marketing, Sales Practices and Products Liability Litigation*). The bankruptcy court found that the value of all present and future claims may exceed tens of billions of dollars.

²⁶ *Ingham v. Johnson & Johnson*, 608 S.W.3d 663 (Mo. Ct. App. 2020), *cert. denied*, 141 S. Ct. 2716 (2021) (reducing \$4.69 billion verdict to twenty plaintiffs to \$2.24 billion).

²⁷ See U.S. Jud. Panel on Multidistrict Litig., [MDL Statistics Report - Distribution of Pending MDL Dockets by Actions Pending](#), Aug. 15, 2023 (providing statistics for MDL -2885, *In re: 3M Combat Arms Earplug Products Liability Litigation*).