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PERSPECTIVE

Let J&J File for Bankruptcy

BY ED NEIGER

According to a July 18 report by Reuters, Johnson & Johnson is considering offloading liabilities from its talc litigation into a newly created subsidiary that would then seek bankruptcy protection.

While certain talc claimants have denounced this strategy, I view this as a positive development for J&J's talc victims.

In my experience, bankruptcy can be used as an efficient and effective mechanism to resolve a large volume of widespread claims in one forum with consistent results. It also provides for a quicker recovery time for victims, who often desperately need the money. This is especially true here, where many victims suffer from terminal cancer allegedly linked to talc.

The strategy being explored by J&J is known as a "divisive merger" and it has been utilized where a company with massive tort liabilities splits the company into two companies and allocates the assets and liabilities however it pleases among the two successor entities. "Divisive mergers" are authorized under Texas law and are often referred to as the "Texas two-step." The newly formed unit will hold all of the liabilities and that entity will then file for Chapter 11.

This strategy has been used in recent years by several companies facing large numbers of asbestos claims. In 2017, Georgia-Pacific LLC used the Texas law to break off an affiliate that retained asbestos-related liabilities, which then sought Chapter 11 protection. In 2019, CertainTeed LLC split off an asbestos affiliate, which shortly thereafter sought Chapter 11 protection. In early 2020, Paddock Enterprises, LLC, the entity holding the liabilities of Owens-Illinois, filed for Chapter 11 protection.

As of April, there were approximately 29,000 pending lawsuits in the United States linking J&J's talc-containing powders to ovarian cancer and mesothelioma. In recent years, J&J has taken some talc-injury cases to trial and, in some of these cases, juries have sided with the company.


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If J&J were able to seek bankruptcy protection for an affiliate holding its talc liabilities, talc-injury claimants would be treated in a more full, fair, and consistent manner. They would also would receive payments much more expeditiously than if they litigated their claims in the various non-bankruptcy courts. This has been the case in several recent bankruptcies, including PG&E.

While some plaintiffs' attorneys fear that the "Texas two-step" would isolate J&J's assets from the victims' reach, that would likely be

a prima facia fraudulent transfer and, therefore, those assets would be recoverable for victims under the Bankruptcy Code.

J&J likely wants to file for bankruptcy because only in bankruptcy can it obtain "channeling injunction." A channeling injunction directs or channels tort claims, including yet to be discovered claims, to a litigation trust funded by participating parties. This device has been utilized not only in asbestos cases (for example, Johns-Manville, W.R. Grace, Owens Corning, Celotex, Eagle Pitcher) but also in other mass tort product liability cases, such as Takata. It delivers finality to the debtors and potentially others. This would allow J&J to not have to worry about future talc claims; they could move on without the burden of the talc liability ad infinitum.

This is a tremendous benefit to highly-valuable companies such as J&J, which boasts a market value exceeding $450 billion. Furthermore, by utilizing the divisive merger strategy, J&J is able to protect its brand. Importantly, the continuation of a highly-profitable brand does not necessarily conflict with the victims' goals since J&J will likely fund the victims' trust.

Certain plaintiffs' attorneys have attempted to utilize the courts to block J&J, in advance, from implementing a divisive merger transaction. In August, lawyers for cancer victims asked the Bankruptcy Court for the District of Delaware to issue a restraining order against J&J's proposed divisive merger as part of its oversight of the bankruptcy proceedings of Imerys Talc America, one of J&J's former talc suppliers. The Judge denied the request on the basis that it would be improper, as part of Imerys' bankruptcy case, to legally bar J&J from undertaking a hypothetical future restructuring.

Bankruptcy can be used as an efficient and effective mechanism to resolve a large volume of widespread claims in one forum with consistent results. It also provides for a quicker recovery time for victims, who often desperately need the money.

Earlier this month, plaintiffs' attorneys also filed a motion in the Superior Court of New Jersey, the state where J&J is headquartered, seeking a restraining order to prevent the transaction on the basis that it violates fraudulent conveyance laws. This and other similar state court actions will likely be unsuccessful for the same reasons stated by the Bankruptcy Court in the Imerys case.

I say let J&J file for bankruptcy. Once in bankruptcy, plaintiffs could use the tools that only the Bankruptcy Code gives them, such as claims estimation, voting mechanisms, Rule 2004 discovery, and federal bankruptcy fraudulent transfer laws. Plus, the United States Trustee will likely appoint an official talc claimants' committee, which can hire the nation's top lawyers and advisors, all paid for by the debtor. All this will give talc claimants leverage they didn't have before, which could be used to obtain a better result. In all likelihood, victims will recover almost as much, if not as much, as they would in a non-bankruptcy context, but the recovery will be quicker and easier.

And, after all, isn't that most beneficial to the victims?

In re: Johnson & Johnson Talcum Powder Products Marketing, Sales Practices, and Products Liability Litigation, MDL No. 16-2738 (FLW) (LHG)

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