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Bankruptcy Process Offers Only Realistic Path to Resolve Outstanding Talc Liability

by Mikal C. Watts

Several months ago, Johnson & Johnson (J&J) publicly agreed to a negotiated settlement of $8.9 billion to resolve all outstanding talc liability facing the company. My firm, Watts Guerra LLC, represents more than 17,000 persons pursuing a claim against J&J and its subsidiary LTL and is a leader in the Talc Powder Ad Hoc Committee of Supporting Counsel that collectively represents 40,000 more. There's much I don't love about the notion of resolving a mass tort in bankruptcy, but in this specific case, with this specific set of facts, I believe it's the only realistic path toward final resolution.

From my point of view, the purpose of our civil legal system is to resolve conflicts between adversarial parties. In most mass litigations, one essential tool for doing so is Multi-District Litigation (MDL). Through the MDL process, claims are consolidated and coordinated, exemplar cases are tried, and parties are brought to the table to negotiate resolution. In the process, bellwether trials are litigated that help inform both sides' negotiating positions. We've seen this approach work in well-known matters like Vioxx, Celebrex/Bextra, Levaquin and Actos. But this tool is simply that: a tool, and just because you have a hammer doesn't mean that everything is a nail. MDLs are not a panacea for all mass claims, and they will not always provide the best outcome for plaintiffs in every mass tort.

MDLs are most effective in instances where there is a clear and finite pool of claimants affected by a single event, recalled medical devices or prescription drugs, or the close and temporally defined use of a given product or substance. However, MDLs can fall irreparably short where there is a long latency period: a lengthy, ill-defined, and uncertain length of time between the exposure to the product or substance and the alleged harm. In some cases, this latency period can see many years or even decades between individuals being exposed to a product and the potential diagnosis of a resulting disease.

Latency issues can make the MDL process wholly incompatible with achieving a global resolution because defendants seek an end to costly litigation in exchange for a settlement but cannot achieve any certainty around possible future claims. Available funds may be used disproportionately by present plaintiffs leaving little if anything for future plaintiffs whose claims were not known at the time of the settlement and had no seat at the negotiating table.

If MDLs are not an optimal tool to address complex and indeterminate disputes like the talc litigation, what other current avenues are there? The only obvious answer presently available is the bankruptcy system, which is specifically designed and uniquely empowered to resolve sprawling and undefined pools of claimants including future liabilities like this one.

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The asbestos litigations – spanning decades to ultimately become the longest MDL in history – offer a useful and closely analogous example to the current talc litigation. As with the talc litigation, the claims against asbestos manufacturers were traced back years, such that it was impossible to ring-fence the claimants into a single, unified group with which the companies could comprehensively settle. Ultimately, that litigation, burdened by uncertainty about the number of potential future claimants and plagued by a trail of bankrupt companies, was resolved not through MDL but through bankruptcy where the unique attributes and authorities allowed under the bankruptcy code empowered all parties to reach an acceptable outcome. Indeed, Congress promulgated section 524(g) of the code to authorize such a resolution in bankruptcy, specifically to deal with the problems encountered in attempting to resolve asbestos litigation. Bankruptcy courts can, by federal statute, centralize claims from both state and federal courts and can compel multiple parties, including, critically, representatives of future claimants, to sit at a single table and achieve a global settlement. This is why the Bankruptcy Code envisions a Future Claims Representative (FCR) to ensure that the rights of future claimants are resolved in an equitable manner; however, Congress has yet to employ an FCR for MDL proceedings.

To be clear, MDL proceedings remain the preferred avenue for most torts involving large claims that can be settled without massive and unknown future liabilities due to decades-long latency issues. For this reason, I have opposed 3M's use of the bankruptcy process for its subsidiary, Aearo Technologies, to globally resolve its liabilities for the CAEv2 Combat Arms earplug litigation. Merely because a large corporate entity might prefer to resolve a mass tort in bankruptcy does not make it appropriate. The absence of large future liability due to the absence of decades-long latency issues made bankruptcy inappropriate in that instance.

By contrast, J&J and its subsidiary LTL face three or four decades of future claimants, due to the 30-40 years latency between one's use of talc and one contracting cancer. Interestingly, in the AFFF/PFAS "forever chemicals" MDL, the parties achieved large settlements for presently known or ascertainable economic damages claims brought by our nation's water districts but have been unable to settle individuals' PFAS cancer claims because lengthy latency issues make the size of those eventual liabilities virtually unascertainable. The ascertainable group will appropriately get paid in the MDL process, while individuals with cancer – unascertainable in size – will inappropriately continue to wait for their compensation.

Today we face a similar choice between years more litigation and delays for talc plaintiffs and their families or the certainty of an equitable resolution now. Because it is not possible to define the future universe of claimants nor the scope of liability, no major public corporation like Johnson & Johnson realistically would ever squander shareholders' money on partial resolutions that would only serve to incentivize future identical litigation for decades to come. Instead, the only rational course for the company would be to continue litigating these cases piecemeal, fighting – and frequently winning – at trial or on appeal - while plaintiffs wait in an unending queue.

For nearly 35 years, I have represented plaintiffs in some of the nation's largest mass tort matters. I'm proud of that work. I have seen – and won – many tough fights for my clients, and I have the scars to prove it. But I also know when to recognize a win achieved at the settlement table. Two years ago, J&J committed only $2 billion to resolve these claims. Today, they're offering $8.9 billion, which puts money in the pockets of sick plaintiffs soon and into the future and that I think is a good deal.