

Pratt's Journal of Bankruptcy Law

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EDITOR'S NOTE: DEFAULTS HAPPEN

Victoria Prussen Spears

PROTECTING CONDOMINIUM CONSTRUCTION LENDERS WHEN DEVELOPERS DEFAULT

Stuart M. Saft

LEGISLATION OPENING UP THE STATUTE OF LIMITATIONS ON SEXUAL ABUSE CLAIMS WILL LIKELY LEAD TO MORE BANKRUPTCIES

Mark D. Plevin and Brendan V. Mullan

A LOOK BACK AT MASS TORT BANKRUPTCY CASES IN 2019—ASBESTOS AND BEYOND

Mark D. Plevin and Tacie H. Yoon

NINTH CIRCUIT AFFIRMS SALE OF TRUSTEE'S LITIGATION CLAIMS TO SELF-INTERESTED PARTY

Michael L. Cook

ULTRA III: MAKE-WHOLE NEVER DIES

David Griffiths and Michael Godbe

THIRD CIRCUIT HOLDS BANKRUPTCY COURTS MAY CONSTITUTIONALLY CONFIRM A CHAPTER 11 PLAN CONTAINING NONCONSENSUAL THIRD-PARTY RELEASES

Brian Trust, Adam C. Paul, Thomas S. Kiriakos, Sean T. Scott, and Alexander F. Berk

THIRD CIRCUIT CLARIFIES THE INNER WORKINGS OF FORECLOSURE ON REPO COLLATERAL

Shmuel Vasser and Yehuda Goor

SECOND CIRCUIT PAVES A WAY TO PROTECT LBO PAYMENTS FROM AVOIDANCE ACTIONS

Shmuel Vasser and Alaina Heine

COURT OVERTURNS *SUN CAPITAL* DECISION – PE FUNDS NOT LIABLE FOR BANKRUPT PORTFOLIO COMPANY'S PENSION OBLIGATIONS

John F. Hartmann, P.C., Alexandra Mihalas, John C. O'Quinn, P.C., Jeffrey S. Quinn, and Sara B. Zabloutney, P.C.



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Editor's Note: Defaults Happen Victoria Prussen Spears	101
Protecting Condominium Construction Lenders When Developers Default Stuart M. Saft	104
Legislation Opening Up the Statute of Limitations on Sexual Abuse Claims Will Likely Lead to More Bankruptcies Mark D. Plevin and Brendan V. Mullan	116
A Look Back at Mass Tort Bankruptcy Cases in 2019—Asbestos and Beyond Mark D. Plevin and Tacie H. Yoon	120
Ninth Circuit Affirms Sale of Trustee's Litigation Claims to Self-Interested Party Michael L. Cook	125
<i>Ultra III</i>: Make-Whole Never Dies David Griffiths and Michael Godbe	130
Third Circuit Holds Bankruptcy Courts May Constitutionally Confirm a Chapter 11 Plan Containing Nonconsensual Third-Party Releases Brian Trust, Adam C. Paul, Thomas S. Kiriakos, Sean T. Scott, and Alexander F. Berk	133
Third Circuit Clarifies the Inner Workings of Foreclosure on Repo Collateral Shmuel Vasser and Yehuda Goor	138
Second Circuit Paves a Way to Protect LBO Payments from Avoidance Actions Shmuel Vasser and Alaina Heine	142
Court Overturns <i>Sun Capital</i> Decision—PE Funds Not Liable for Bankrupt Portfolio Company's Pension Obligations John F. Hartmann, P.C., Alexandra Mihalas, John C. O'Quinn, P.C., Jeffrey S. Quinn, and Sara B. Zabloutney, P.C.	145

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A Look Back at Mass Tort Bankruptcy Cases in 2019—Asbestos and Beyond

*By Mark D. Plevin and Tacie H. Yoon**

The authors of this article discuss recent mass tort asbestos and non-asbestos related bankruptcy filings, seeking to address potentially crushing liability caused by other types of mass torts such as wildfires in California, a bridge collapse in Florida, ovarian cancer allegedly caused by exposure to talc in baby powder, the opioid crisis, and sexual abuse in religious organizations.

Only two asbestos bankruptcy cases were filed in 2019—the lowest number in any one year since Congress enacted the special asbestos bankruptcy trust/channeling injunction statute, Section 524(g) of the Bankruptcy Code.

However, 2019 also marked an uptick in bankruptcy filings by non-asbestos debtors seeking to address potentially crushing liability caused by other types of mass torts, such as wildfires in California, a bridge collapse in Florida, ovarian cancer allegedly caused by exposure to talc in baby powder, the opioid crisis, and sexual abuse in religious organizations.

Debtors in these non-asbestos mass tort cases seek to emerge from bankruptcy cleansed of their current liabilities and protected from future claims by an injunction that “channels” such future tort claims to a trust established to resolve and pay claims, using procedures that are based on those in Section 524(g).

MASS TORT BANKRUPTCIES

Mass tort bankruptcies that were filed in 2019 are shown in Chart 1.

CHART 1

DEBTOR	CASE NO.	COURT	DATE FILED	SOURCE OF LIABILITY
Archdiocese of Agana	19-00010	Bankr. D. Guam	1/16/2019	Sexual abuse
Maremont Corp.	19-10118	Bankr. D. Del.	1/22/2019	Asbestos

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MASS TORT BANKRUPTCY CASES IN 2019

PG&E Corp.	19-30088	Bankr. N.D. Cal.	1/29/2019	Wildfires
Imerys Talc America, Inc.	19-10289	Bankr. D. Del.	2/13/2019	Talc/Asbestos
Magnum Construction Management, LLC	19-12821	Bankr. S.D. Fla.	3/1/2019	Pedestrian bridge collapse
Insys Therapeutics, Inc.	19-11219	Bankr. D. Del.	6/10/2019	Opioids
Diocese of Rochester	19-20905	Bankr. W.D.N.Y.	9/12/2019	Sexual Abuse
Purdue Pharma L.P.	19-23649	Bankr. S.D.N.Y.	9/15/2019	Opioids

MASS TORT BANKRUPTCIES WITH CONFIRMED PLANS

Mass tort bankruptcies where the court confirmed a plan during 2019 that established a trust to resolve and pay mass tort claims and included a channeling injunction are shown in Chart 2.

CHART 2

DEBTOR	CASE NO.	COURT	DATE PLAN CONFIRMED	SOURCE OF LIABILITY
Oakfabco	15-27062	Bankr. N.D. Ill.	4/11/2019	Asbestos
Maremont Corp.	19-10118	Bankr. D. Del.	5/17/2019 (Bankr. D. Del.), <i>aff'd</i> 6/27/2019 (D. Del.)	Asbestos
Duro Dyne National Corp.	18-27963	Bankr. D.N.J.	7/16/2019 (Bankr. D. Del.), appeal pending	Asbestos
Diocese of Duluth	15-50792	Bankr. D. Minn.	10/21/2019	Sexual abuse
Magnum Construction Management, LLC	19-12821	Bankr. S.D. Fla.	12/12/2019	Pedestrian bridge collapse

SECTION 524(g) OF THE BANKRUPTCY CODE

Section 524(g) was added to the Bankruptcy Code by Congress to provide debtors facing crushing liability due to asbestos with a means to discharge both

their past and future liabilities to asbestos claimants.

The statute essentially enacted the structure used in the seminal *Johns-Manville* asbestos bankruptcy case. The confirmed plan of reorganization in that case fashioned an innovative “channeling injunction” that permanently barred all asbestos claimants—future as well as current—from asserting claims against the reorganized debtor.

Such claims were instead “channeled” to a trust that was created for the express purpose of paying such claims. Manville’s insurers, which contributed \$770 million to the trust, were also protected by the channeling injunction, which by its terms barred asbestos claimants from asserting claims against Manville’s insurers.¹

Section 524(g), which Congress explicitly modeled on the *Manville* channeling injunction, expressly permits future asbestos claims to be enjoined and channeled to a trust if the statute’s many requirements are met.²

Moreover, Section 524(g) states that, other than on a direct appeal, the injunction “may not be revoked or modified by any court.”

Therefore, a Section 524(g) injunction is, by statute, unalterable and invulnerable to collateral attack.

NON-ASBESTOS-RELATED CLAIMS

Section 524(g), however, applies only to asbestos-related claims in Chapter 11 cases. Thus, for other kinds of mass tort claims, courts need to rely on another provision of the Bankruptcy Code, Section 105(a), to enter channeling injunctions. 11 U.S.C. § 105(a) authorizes a bankruptcy court to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” Section 105 channeling injunctions are, for the most part, equivalent to injunctions entered under Section 524(g), except that—unlike the case with injunctions under Section 524(g)—Section 105(a) contains no language providing that such an injunction is protected from later collateral attack.

The entry of channeling injunctions under Section 105(a) in mass tort cases

¹ See *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 141-42 (2009) (describing the history of the *Manville* channeling injunction).

² For discussions of the statutory requirements, see *In re Combustion Engineering, Inc.*, 391 F.3d 190, 234-35 (3d Cir. 2004), and Plevin, *et al.*, *The Future Claims Representative in Prepackaged Asbestos Bankruptcies: Conflicts of Interest, Strange Alliances, and Unfamiliar Duties for Burdened Bankruptcy Courts*, 62 N.Y.U. Ann. Surv. Am. L. 271, 280-81 (2006).

has become increasingly more common.

For example, last year the court in *Magnum Construction* confirmed a plan that established a trust to pay claims arising from the collapse of a pedestrian bridge. All claims against the debtor and its insurers were channeled to a trust that was established pursuant to the plan.

Similarly, the court in *Diocese of Duluth* last year confirmed a plan that channeled sexual abuse claims to a trust, and also entered a channeling injunction under Section 105(a) barring the assertion of future claims against the debtor and its insurers.

Because the liabilities at issue in many of the cases listed above are not asbestos-related, the debtors in those cases cannot rely on Section 524(g) to obtain protection against future claims. Instead, they will have to rely on Section 105(a). Time will tell whether those debtors succeed in obtaining confirmation of plans that include channeling injunctions. Future developments will also disclose whether Section 105(a) channeling injunctions are increasingly sought by a larger number of debtors with a wider variety of types of liabilities, whether any judicial resistance develops to the use of such injunctions, whether courts asked to issue Section 105(a) channeling injunctions begin to condition them on compliance with most, if not all, of the requirements under Section 524(g), and whether there will be a move to standardize this type of mass tort relief through legislation.

It also remains to be seen whether there will be an uptick in asbestos bankruptcy filings.

EARLY 2020 ASBESTOS BANKRUPTCIES

Although only two asbestos bankruptcies were filed during all of 2019, three were filed during just the first month of 2020: *ON Marine Services Company LLC* (f/k/a Oglebay Norton Company) in the U.S. Bankruptcy Court for the Western District of Pennsylvania;³ *Paddock Enterprises LLC* (successor to Owens Illinois) in the U.S. Bankruptcy Court for the District of Delaware;⁴ and *DPMB LLC* (f/k/a CertainTeed) in the U.S. Bankruptcy Court for the Western District of North Carolina.⁵

³ *In re ON Marine Services Company LLC*, No. 20-20007-CMB (Bankr. W.D. Pa.).

⁴ *In re Paddock Enterprises, LLC*, No. 20-10028 (Bankr. D. Del.).

⁵ *In re DPMB LLC*, No. 20-30080 (JCW) (Bankr. W.D.N.C.).

