Standards and Strategies for Voting and Solicitation in MASS TORT BANKRUPTCIES

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In recent years, Bankruptcy Courts have seen an influx of bankruptcies that primarily result from a debtor's outstanding mass tort liability. While many commentators focus on plan confirmation issues, such as non-debtor releases, mass tort bankruptcies pose unique challenges in the solicitation and balloting process that are often overlooked as preliminary or administrative matters.

Because of the vast number of tort claimants that are drawn into such bankruptcy cases and the importance of claimant support for court approval of certain remedies, debtors must carefully consider various strategic options with respect to solicitation and balloting for applicable tort claims. Properly navigating these early case decisions may ultimately determine a debtor's ability to reorganize and comprehensively resolve its tort liabilities.

Bar Date Considerations

At the outset of most Chapter 11 cases, debtors seek court approval of designated deadlines by which general, administrative, and governmental unit proofs of claim must be submitted, known as claim bar dates, pursuant to Rule 3003(c)(3) of the Federal Rules of Bankruptcy Procedure. Although Bankruptcy Rule 2002(a)(7) generally provides that all parties in interest must receive a minimum of 21 days' notice of the proofs of claim deadline, neither the Bankruptcy Code nor the Bankruptcy Rules specify a time by which proofs of claim must be filed by non-governmental entities in Chapter 11 cases. Therefore, a debtor has some discretion to propose a bar date, or multiple bar dates, subject to court approval.

With mass tort bankruptcies, a debtor's decision to set a bar date is more complex and is often a critical strategic element that can impact other aspects of the case. One option in such cases is for debtors to establish a separate bar date for holders of applicable tort claims, rather than requiring all claims to be filed by a single general bar date. For example, in *Weinstein*, the debtors received court approval to establish a bar date solely with respect to holders of sexual harassment claims against the debtors. See *In re The Weinstein Company Holdings, LLC,* Case No. 18-10601 (MFW) (Bankr. D. Del. Sept. 9, 2020) [Docket No. 2966].

Similarly, a debtor can establish a separate proofs of claim submission process for holders of tort claims while keeping the bar date for such claims the same as the bar date for other general prepetition claims. For instance, in *Boy Scouts,* the debtors received court approval to establish a separate proofs of claim submission process with respect to holders of sexual abuse claims against the debtors, though the bar date for those claims was the same as the general bar date. See *In re Boy Scouts of America and Delaware BSA, LLC,* Case No. 20-10343 (LSS) (Bankr. D. Del. May 26, 2020) [Docket No. 695]; see also *In re PG&E Corp.,* Case No. 19-30088 (DM) (Bankr. N.D. Cal. July 1, 2019) [Docket No. 2806] (providing separate customized proof of claim forms for fire claimants).

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Finally, debtors do not have to require submission of proofs of claim for tort claimants but can establish a separate claim submission process entirely. This method was used in *Mallinckrodt*, where the debtors declined to set a bar date for holders of opioid claims and did not require proofs of claim to be filed against the debtors for such claims, opting instead to channel all opioid claims to one or more opioid claim trusts that would handle claims reconciliation through a separate process. See *In re Mallinckrodt PLC,* Case No. 20-12522 (JTD) (Bankr. D. Del. Oct. 20, 2020) [Docket No. 667]; see also *In re Imerys Talc America, Inc.,* Case No. 19-10289 (LSS) (Bankr. D. Del. July 25, 2019) [Docket No. 881] (setting bar date that excluded talc claims).

Although all of these options have previously received court approval, certain pathways may present differing strategic advantages for debtors. While it may appear seamless at first blush to channel applicable claims into a tort claims trust without first requiring proofs of claim, setting a bar date for tort claimants can help facilitate claim valuation and estimation at the outset of the bankruptcy case and provide the debtor with a better sense of the universe of such claims.

This additional knowledge may foster more focused settlement discussions between debtors and creditors at the outset of the bankruptcy cases, because the debtor will have a better grasp on the size and magnitude of the outstanding claims once the bar date has passed and submitted claims are analyzed. Without such an understanding at the outset, claim estimation, as well as solicitation, may prove increasingly more challenging given that the number of claims and their respective amounts would remain largely unknown.

Solicitation Challenges

Given the highly publicized nature and recently heightened criticism of mass tort bankruptcies, the notice, disclosure, and opportunity for tort claimants to be heard often take center stage in the solicitation process. As with unique proofs of claim forms, debtors may be motivated to customize solicitation and voting materials specifically for tort claimants who may be unfamiliar with the bankruptcy process to help provide additional context with respect to the treatment of their claims and overall understanding of the plan voting process.

For example, at the outset of the *Weinstein* disclosure statement, the debtors included a section specifically for holders of sexual misconduct claims, directly addressing their claim treatment and the inclusion of releases in the plan. See *In re The Weinstein Company Holdings, LLC,* Case No. 18-10601 (MFW) (Bankr. D. Del. Nov. 17, 2020) [Docket No. 3098]; see also *In re PG&E Corp., Case* No. 19-30088 (DM) (Bankr. N.D. Cal. Mar. 17, 2020) [Docket No. 6338] (debtors filed specific claims resolution procedures for fire victims that included frequently asked questions for the benefit of such victims). These inserts were used to help simplify the process, with the goal that streamlined disclosures would lead to more active participation in a complex bankruptcy process. Such additional, simplified disclosures can help ensure that recipients of solicitation materials understand the various aspects of the plan, which in turn may motivate them to participate in the plan voting process.

To further guide tort claimants involved in mass tort bankruptcies, debtors frequently seek court approval to include letters voicing support for (or opposition to) the plan as part of the solicitation materials. These letters are usually written by the unsecured creditors' committee or tort claimants' committee to provide guidance to claim holders in determining whether to vote to accept or reject the plan. Such letters can carry significant weight with solicited creditors, and their inclusion must be authorized through the solicitation procedures order or risk causing unnecessary confusion among eligible voters, as emphasized by the recent solicitation saga in *Boy Scouts*.

There, the tort claimants' committee permitted a letter voicing severe opposition to the plan to be sent from an official email account to tens of thousands of tort claimants five weeks after the court approved the disclosure statement and after the solicitation process had concluded.[1] The court in *Boy Scouts* expressed significant concerns about the potential impact that this letter would have on the voting process. Though both the debtors and tort claimants' committee proposed efforts to remediate the impact, the court did not approve any additional communications for creditors. Ultimately, both classes of abuse claims voted to accept the plan.[2]

The importance of claimant support is magnified in mass tort cases because of the extraordinary remedies that debtors seek to resolve litigation exposure. In mass tort bankruptcies, a debtor's ability to pay claimants any meaningful recovery often relies upon contributions of cash or insurance proceeds from third parties. Because many contributing parties are also mass tort defendants, the plan commonly seeks to incorporate a release of claims against non-debtors as well.

For a class of creditors to accept the plan, including tort claimants, such class must vote to accept by "at least two-thirds in amount and more than one-half in number" of the amount of solicited claims that submitted votes on the plan. See 11 U.S.C. Section 1126(c). However, if a debtor seeks nonconsensual third-party releases, courts typically require "overwhelming" support of the plan from affected creditors to illustrate the fairness necessary to justify granting such relief. See, *e.g., In re Cont'l Airlines,* 203 F.3d 203 (3d Cir. 2000). As scrutiny of non-debtor releases grows more intense, the accuracy of solicitation and evidentiary value of plan support will play an even more prominent role.

Balloting Issues

Because voting on plan confirmation typically occurs before liquidation or even estimation of various tort claims, it can be difficult for debtors to establish the appropriate voting amount allocated to each tort claim in each ballot—particularly if a debtor elects not to require proofs of claim prior to solicitation or the proofs of claim that were filed contain insufficient detail to evaluate the claim.

The traditional approach adopted by most debtors and solicitation agents is to assign $1 to unliquidated, contingent, and disputed claims, categories that tend to include the vast majority of tort claims. Where tort claims have been scheduled or previously liquidated for a specific amount, those creditors' votes will carry more weight and may be critical in satisfying the requisite Section 1126(c) standard. As such, debtors and claims/solicitation agents should review such claims carefully ahead of solicitation to ensure accuracy.

Mass tort bankruptcies commonly involve plaintiffs' law firms that

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represent a contingency of tort claimants. In such cases, debtors can request court authority to utilize master ballots for a single law firm to submit on behalf of all its clients. See *e.g., In re Boy Scouts of America and Delaware BSA, LLC*, Case No. 20-10343 (LSS) (Bankr. D. Del. Sept. 30, 2021) [Docket No. 6438-1] (approving use of master ballots by certain law firms to vote their clients claims).

In these instances, the court may scrutinize the law firms' efforts to confirm whether a claimant actually has a vote and wanted to cast it a certain way. If the master ballot falls short of this standard, the votes can be thrown out and the debtor may not have the requisite plan support to move forward. See *e.g., In re Imerys Talc America Inc. et al,* Case No. 19-10289 (LSS) (Bankr. D. Del. Oct. 13, 2021) (deeming nearly 16,000 votes cast with a master ballot "withdrawn" because counsel failed to do due diligence on whether his clients had valid claims against the debtors).

As technology continues to develop, there also may be ways for debtors and solicitation agents alike to improve how solicitation materials are provided to creditors and how votes are cast.

In recent years, solicitation agents have used flash drives, hyperlinks, and even QR codes to provide lengthy solicitation materials, which have proven cost-effective and more easily accessible for many claimants.

Additionally, most solicitation agents now provide/allow electronic methods on case-specific websites through which claimants may cast ballots electronically, rather than sending the executed ballot via mail. By and large, Bankruptcy Courts have looked favorably upon this bypassing of traditional balloting means (*i.e.*, hard copy ballots submitted through the mail).

Conclusion

As exemplified by recent cases like *Purdue Pharma, Boy Scouts, Mallinckrodt, Weinstein,* and others, the unique intersection of mass torts and bankruptcy law has led to evolving approaches to solicitation and voting. Because of the significant number of claimants and unique jurisdictional, economic, and practical considerations, mass tort Chapter 11 cases require substantial planning and flexibility to address these critical issues.

And while debtors usually develop these strategies near or prior to filing, decisions on solicitation and voting may have an outsized impact on whether a successful reorganization is possible for debtors. Thus, it is incumbent on key stakeholders to fully analyze and assess these issues before attempting to restructure mass tort liabilities in Chapter 11.

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[1] See "Tensions Continue to Run High Over TCC's 'Very Disturbing' Email to Voters; Interim Voting Report Shows 'Overwhelming' Support for Plan," Reorg (Nov. 17, 2021), available at app.reorg.com/file/527773/Boy_Scouts_of_America_-_2021-11-17_14_10_16_-_Tensions_Continue_to_Run_High_Over_TCC___s____Very_Disturbing____Email_to_Voters__Interim_Voting_Report_-43073-0.pdf

[2] See "Boy Scouts Files Final Voting Declaration, All Classes Accept; 73.57% of Direct Abuse Claimants, 69.57% of Indirect Abuse Claimants Vote in Favor of Plan," Reorg (Jan. 18, 2022), available at app.reorg.com/file/529079/Boy_Scouts_of_America_-_2022-01-18_10_26_34_-_Boy_Scouts_Files_Final_Voting_Declaration__All_Classes_Accept__73_57__of_Direct_Abuse_Claimants__69_57__-43073-0.pdf