The Texas Two-Step: a Problematic Reframing of the Bankruptcy Code Toolkit or an Equitable Solution for Productive Conglomerates and their Mass Tort Claimants?

By Jeffrey R. Gleit and Matthew R. Bentley[*]

TABLE OF CONTENTS

Introduction

Large companies often have numerous divisions, each focusing on a unique aspect of the corporate mission for the benefit of the entire enterprise. There are situations, however, in which the parent company decides it is beneficial to "spin-off" one of these divisions from the rest of the company. The term "spin-off" generally refers to transactions in which a parent company creates an independent company and transfers to it a particular line of the parent's business. The parent then distributes shares of the new company to the parent's shareholders. The new, spun-off entity now has its own distinct management and mission.

[*]Jeffrey Gleit is a partner Bankruptcy & Financial Restructuring group at Arent Fox Schiff LLP and is based in the New York office. Matthew Bentley is an associate in Bankruptcy & Restructuring group and is also based in the New York office.

The reasons to implement a spin-off are varied. For instance, the parent company may recognize that certain investors are interested only in a particular line of business and not the parent's enterprise as a whole; spinning off that line of business will unlock potential value by attracting new investors to the spun-off entity. Additionally, a spin-off will result in the appointment of new management for the spun-off entity, which can then focus solely on the new entity's direction and operations. This frees up the parent's management to focus on their own remaining business lines.

Executing a spin-off can be a complex undertaking. In every spin-off transaction, the issues can vary greatly depending on a variety of factors, including (i) the goals to be achieved by the transaction, (ii) how deeply the businesses were integrated prior to the spin-off, and (iii) the extent to which the parent will own the new entity after completing the spin-off. It should come as no surprise then that a substantial amount of legwork goes into executing a spin-off; the transaction must be effectuated through multiple steps involving the conveyance of assets, assumption of liabilities, and distributions to shareholders. For instance, one work stream requires a thorough review of existing agreements to determine whether they may be assigned from the parent to the new entity, or whether consents to assignment will be required.

To streamline this process and increase the number of incorporations in Texas, the Texas legislature in 1989 amended the Texas Business Corporation Act to redefine the word "merger" to mean that one entity may "merge" into two or more new entities.[1] This is popularly called a divisive merger, and is meant to relieve companies of their burden in dealing with separate asset conveyances, contract assignments, shareholder distributions, and other particulars associated with traditional spin-offs, thus simplifying the spin-off process and bolstering Texas as an attractive, business-friendly jurisdiction.[2] There are other applications for the divisive merger not related to spin-offs, such as tax and regulatory compliance, but those are outside the scope of this article. The Texas Business Corporation Act was later replaced by the Texas Business Organizations Code (the "TBOC"), which retains the divisive merger provision.

The TBOC provides two options for exercising a divisive merger. Under the first option, an existing Texas entity will "merge" into two or more new entities.[3] The original entity does not survive the merger, but its assets and liabilities are allocated among the new entities as proposed in the "plan of merger." (It is worth noting that all bankruptcies featuring the Texas Two-Step used this first option.) Under the second option, the existing Texas entity will survive the merger, but its assets and liabilities will be allocated between it and one or more new entities, again, as proposed in the plan of merger.[4]

The plan of merger is a document filed with the Texas Secretary of State, and identifies any new entity to be created as part of the divisive merger.[5] The plan of merger details the allocation of the original entity's assets and liabilities among the new entities emerging from the divisive merger.[6] If the plan of merger does not address the allocation of a particular asset or liability, then that asset or liability will be shared by the post-merger entities.[7] Importantly, section 10.008(a)(2)(C) of the TBOC provides that in a divisive merger, the allocation of assets and liabilities will take effect "without any transfer or assignment having occurred."[8]

An example of the effect of section 10.008(a)(2)(C) of the TBOC is found in a recent patent case emanating out of the United States District Court for the Eastern District of Texas, *Plastronics*.[9] In this case, two parties entered into a patent ownership agreement containing an anti-assignment provision, a provision by which the parties agreed not to transfer their interests in the patent without written consent from the other party. Subsequently, the first party executed a divisive merger and allocated its rights in the patent agreement to its post-merger successor. The counterparty to the patent agreement argued that this act constituted a transfer of the first party's interest and was a violation of the anti-assignment provision.

In its decision upholding the transaction, the court first noted that issues of patent ownership are typically governed by state law, which in this instance was Texas law. The court then recognized that under the TBOC, an allocation of interests through a divisive merger does not constitute a transfer. The court concluded that no prohibited transfer occurred, and that the post-merger entity could exercise its rights in the patent without infringement.[10]

In recent years, companies facing substantial mass tort litigation have looked to the TBOC and honed in on the notion that a divisive merger takes effect "without any transfer or assignment having occurred." From this phrase, they have crafted a strategy to shed their mass tort liabilities while shielding valuable assets from creditors (specifically, the mass tort litigants). This strategy, popularly called the "Texas Two-Step" has been implemented in five bankruptcy cases involving the following debtors: (i) Bestwall, LLC, an affiliate of Georgia-Pacific, (ii) DBMP, LLC, an affiliate of Saint-Gobain Corporation, (iii) and (iv) the twin cases of Aldrich Pump, LLC and Murray Boiler LLC, both affiliates of Ingersoll Rand, and (v) LTL Management LLC, an affiliate of Johnson & Johnson.[11]

In addition to explaining the mechanics of the Texas Two-Step, this article will address: (i) whether the Texas-Two Step violates fraudulent transfer laws, (ii) who has standing to bring fraudulent transfer claims against the debtors, (iii) whether the automatic stay extends to litigation pending against non-debtors involved in divisive mergers, (iv) whether a bankruptcy case involving a Texas Two-Step debtor can be dismissed as a bad faith filing, (v) the divisive merger statutes of other states, as well as pending federal legislation designed to stop Texas Two-Steps, and finally, (vi) whether the Texas Two-Step is a sensible strategy that encourages mass tort claimants to negotiate a settlement on behalf of all present and future claimants while preserving the economic engine of large conglomerates, or is it too great a deviation from the framework of the Bankruptcy Code (the "Code") to be permissible.

The Texas Two-Step - What is it?

The five Texas Two-Step bankruptcies follow a similar blueprint. A company is impacted by onerous tort liabilities throughout the country (the underlying liabilities plaguing all Texas Two-Step debtors are current and future lawsuits related to asbestos exposure). Typically, the pre-merger company with the liabilities will also possess valuable assets.[12] The Texas Two-Step begins when this pre-merger company converts to a Texas entity, and then initiates a divisive merger in which the pre-merger company is dissolved, and two new, post-merger entities are created. The plan of merger allocates nearly all of the pre-merger company's assets in one entity ("GoodCo"), and all of the mass tort liabilities in the other ("BadCo").

As an example, in one of the Ingersoll-Rand divisive mergers, 98% of the assets belonging to the pre-merger entity, Old Trane, went to New Trane, while all of Old Trane's asbestos liabilities went to the eventual debtor, Murray Boiler.[13] Similarly in J&J, most of the assets belonging to the pre-merger entity, Old JJCI, went to New JJCI, while all asbestos liabilities went to debtor LTL Management. In sum, LTL Management received assets comprising $6 million in cash and 100% equity in an subsidiary valued at approximately $375 million. The total cost of LTL Management's asbestos liabilities is unknown, but the court presiding in *LTL Management* noted that total liability stemming from mesothelioma claims filed only in the post-petition period could exceed $15 billion.[14] (At first glance these transactions may appear ripe for fraudulent transfer challenges, but as explained later in this article, the issue is not so cut-and-dry.)

Following the divisional merger, GoodCo converts from a Texas company to a Delaware company, while BadCo converts from Texas to North Carolina. The Texas Two-Step is a fast dance; in less than forty-eight hours: the pre-merger entity converts to Texas, initiates the divisive merger, and GoodCo and BadCo convert away from Texas. Shortly after arriving in North Carolina, BadCo will file its bankruptcy petition in the United States Bankruptcy Court for the Western District of North Carolina (the "WDNC"). Notably, in *LTL Management* the debtor filed its bankruptcy petition in the WDNC only two days after converting from Texas to North Carolina. However, the case was subsequently transferred to the District of New Jersey.[15]

Attraction to the WDNC may be driven in part by a 2014 decision in which the local bankruptcy court capped a debtor's asbestos liability at $125 million when the claimants were seeking $1.4 billion.[16] Another possible attraction is the Fourth Circuit's bad faith dismissal standard, which is relatively debtor-friendly when compared to the standards found throughout the country.

Once in bankruptcy, the debtor will file a complaint seeking a stay on all asbestos lawsuits against the non-debtors that make up the parent enterprise. In the Texas Two-Step bankruptcies filed to date, this injunction is always granted and temporarily pauses all asbestos litigation pending against non-debtors within the parent enterprise. With this breathing room, the debtor will push for a plan that resolves all asbestos claims and provides a permanent injunction on present and future asbestos litigation against the parent enterprise.

In bankruptcy cases involving asbestos liabilities, section 524(g) of the Code authorizes the creation of a trust into which all present and future asbestos claims may be channeled.[17] The trust is funded by the debtors and any other party so designated under the plan. Asbestos claimants may then pursue their claims only against the trust and may receive compensation from the trust in satisfaction of their claims. In return for funding the trust, the court will issue an injunction that bars asbestos claimants from bringing lawsuits against the debtor and other parties funding the trusts. (Controversially, bankruptcy courts have approved similar trusts outside the asbestos context pursuant to section 105(a).)

In contemplation of funding these trusts in exchange for injunctions, the parent enterprises and debtors in all Texas Two-Step bankruptcies have executed funding agreements ("Funding Agreements") which specify that the parent enterprises will contribute funds to the trusts to the extent the debtors are unable to do so.[18] Given the debtors' limited assets, trust contributions by the parent enterprises will likely be the biggest source of recovery to asbestos claimants. The Funding Agreements also provide that trusts will only be funded if the plan is confirmed and the plan provides the parent enterprise with an injunction.[19] Effectively, the parent enterprise will fund the trust only if they are guaranteed an injunction.

It is worth noting that the Texas Two-Step does not leave claimants completely defenseless. In asbestos cases, the Code requires that asbestos claimants accept a plan by a 75% majority of current claimants and by the court-appointed representative for future claimants.[20] Arguably, the interests of the asbestos claimants are protected because their approval of a plan is required prior to plan confirmation, giving them leverage when negotiating the terms of the plan and trust, and the estimation of claimants' present and future injuries. Additionally, claimants may receive (and in one instance, have received)[21] derivative standing to challenge a divisive merger as a fraudulent transfer. These mechanisms demonstrate that claimants are protected from harms Texas Two-Steps are alleged to have wrought.

The Texas Two-Step also provides a benefit to claimants as a whole because they will have the opportunity to resolve their claims in a single forum (i.e., the bankruptcy court) and on a uniform basis. This benefits the interests of current and future asbestos claimants because the current claimants are no longer competing with one another in a race for judgments in courthouses throughout the country, and future claimants will benefit by receiving compensation from the trust.[22] This last point is critical because outside of bankruptcy, future asbestos claimants are not entitled to compensation because their injuries may not manifest until long after current asbestos claimants have scavenged the debtor.

The parent enterprise (including its shareholders, employees, and suppliers) also benefits because it can resolve its asbestos liabilities without needing to go through its own bankruptcy process that can be time consuming and value-destructive. Arguably, asbestos claimants receive the same recovery in a Texas Two-Step bankruptcy as they would in a traditional bankruptcy involving the parent enterprise because the parent enterprise is obligated to fund the trust pursuant to the Funding Agreements. In either bankruptcy scenario, the asbestos claimants are ultimately paid by the parent enterprise.

On the other side of the coin, critics argue that the Texas Two-Step does more harm to the claimants' leverage in negotiations than if the Texas Two-Step had never happened in the first place. Additionally, in all of the Texas Two-Step bankruptcies, claimants have alleged that the Funding Agreements are flawed because they do not strictly require the parent enterprise to fund the trusts, and therefore claimants' recoveries might be more at risk than if the parent enterprise itself had filed for bankruptcy.[23]

Regardless of whether one thinks the Texas Two-Step is an appropriate strategy, the claimants in all Texas Two-Step bankruptcies battle for leverage by seeking derivative standing to pursue fraudulent transfer claims on behalf of the estate, moving to dismiss the bankruptcy cases for being filed in bad faith, and, at least in one instance, seeking to bring the parent enterprise into bankruptcy using substantive consolidation.[24]

I. Fraudulent Transfer

At its root, the Texas Two-Step is designed to separate assets and liabilities. This separation, however, may constitute a fraudulent transfer. The courts presiding over the Texas Two-Step bankruptcies have yet to decide this issue, but the implications are enormous for all parties involved.

Both the Uniform Fraudulent Transfer Act ("UFTA"), which most states have enacted, and section 548 of the Code provide that a fraudulent transfer occurs if the debtor makes a transfer or otherwise incurs an obligation with (A) actual intent to hinder, delay, or defraud any creditor of the debtor, or (B) the debtor did not receive reasonably equivalent value in exchange for the transfer of assets, and the debtor is unable to pay debts at either the time of the transfer or as a result of the transfer itself.[25]

It is well-settled in caselaw that using a traditional spin-off to separate assets and liabilities without reasonably equivalent value will likely result in a successful fraudulent transfer challenge. A failed example of an attempt to spin-off liabilities is found in *In re Tronox*.[26] In *Tronox*, Kerr-McGee Corporation (Old KM) was a chemical and energy company plagued with onerous liabilities. To rid itself of these liabilities, Old KM created a new parent entity, NKM, and transferred to it all of Old KM's equity in its profitable subsidiaries. Old KM was renamed Tronox, and it retained Old KM's liabilities. Burdened by poor cash flow and enormous liabilities, Tronox filed its chapter 11 petition in January 2009. NKM, meanwhile, was purchased by Anadarko Petroleum Corporation (Anadarko) for nearly $18 billion.

After filing its petition, Tronox commenced an adversary proceeding against NKM and Anadarko alleging that the transfer of Old KM's profitable lines of business was actually and constructively fraudulent under the Oklahoma UFTA and sections 548 and 550 of the Code. Tronox sought $15 billion in damages. After a thirty-four day trial, Judge Gropper ruled that the defendants were liable for actual and constructive fraudulent transfers because Old KM knew that by implementing such a spin-off, the company's creditors would be delayed or hindered, and that Tronox did not receive reasonably equivalent value and was rendered insolvent as a result of the spin-off. Judge Gropper ordered damages in an amount between $5 billion and $14 billion (the parties subsequently settled for $5 billion).[27]

The novelty of, and the attraction to, the Texas Two-Step is that the TBOC provides that a divisive merger takes effect "without any transfer or assignment having occurred."[28] If the merger's allocation of assets and liabilities does not constitute a transfer, then how can there be a claim for fraudulent transfer? It is therefore theoretically possible that a divisive merger, in which one entity receives the assets and another receives the liabilities, will survive a fraudulent transfer challenge because the underlying predicate, the occurrence of a transfer, is not met.

A. Does the TBOC preclude a finding of Fraudulent Transfer?

Before determining whether a divisive merger constitutes a fraudulent transfer, the court must first decide the threshold issue of whether the "no-transfer" language in the TBOC precludes a finding of fraudulent transfer. Interpreting the TBOC in this way creates friction with the policies behind fraudulent transfer laws. If the courts ever have an opportunity to preside over this argument, they will likely determine that the TBOC does not preclude a finding of fraudulent transfer for two reasons: (i) the TBOC itself does not permit a divisive merger to allocate assets and liabilities in a way that harms creditors while simultaneously averting fraudulent transfer liability, and (ii) fraudulent transfer laws are deliberately drafted to apply to all methods of disposing, or parting with property. Arguably, this includes divisive mergers.

i. The TBOC does not permit harm to Creditors

For the first point, although section 10.008(a)(2)(C) of the TBOC provides that a divisive merger takes effect "without any transfer or assignment having occurred," language elsewhere in the TBOC, specifically section 10.901, explicitly states that divisive merger provisions do not "abridge any right or rights of any creditor under existing laws."[29] This language appears to make fraudulent transfer laws applicable in divisive mergers. There is no caselaw interpreting the contours of what "under existing laws" means, but the *Plastronics* case may shed some light on the issue.

As earlier explained, the counterparty in *Plastronics* objected to the divisive merger's allocation of a patent ownership contract because it violated that contract's anti-assignment clause. The court held that Texas law controlled, and that "[u]nder Texas law, the division of Plastronics constitute[d] a divisive merger and the transfer of rights [in the patent contract] therefore occurred by operation of law, so no prohibited transfer occurred."[30] Notably, in *Plastronics* there were no "existing laws" protecting the counterparty and preventing the allocation of the patent ownership contract. This stands in stark contrast to the fraudulent transfer issue because section

548 of the Code and the UFTA are existing laws that protect the rights of creditors. Therefore, § 10.901 of the TBOC would likely curtail the no-transfer language in § 10.008.

Additionally, the legislative history provides that "creditors' rights would not be adversely affected by the proposed amendment, and creditors would continue to have the protections provided by the [UFTA] and other existing statutes that protect the rights of creditors."[31] Comments from experts, including a co-author of the Texas Business Corporation Act (the TBOC's predecessor) support the position that the divisive merger statute was drafted merely to give companies more flexibility with their transaction structuring, and not to subvert "the existing rights of creditors of parties to the divisive merger."[32] The co-author, Curtis W. Huff, further elucidated the point:

> Although a merger will not involve a "transfer" of assets in the traditional sense, and in fact Article 5.06A(2) of the TBCA provides that the allocation of assets in a merger occurs "without transfer or assignment having occurred," the allocation of assets in a merger should constitute both a "transfer" and "conveyance" of assets under both the letter and spirit of the UFTA, the UFCA and the Bankruptcy Code.[33]

With this weight of authority, it becomes clear that the TBOC should not be interpreted to permit the use of divisive mergers to subvert the rights of creditors while averting fraudulent transfer liability.

ii. Fraudulent Transfer Laws Override the TBOC

For the second point, both federal and state fraudulent transfer laws are drafted in a way that broadly capture a wide array of transactions.[34] Section 548 of the Code provides that a debtor-in-possession may avoid any transfer that is actually or constructively fraudulent.[35] Section 101(54) of the Code defines transfer to mean, in part, "each mode, direct or indirect . . . of disposing of or parting with property or an interest in property."[36]

Courts have not yet addressed whether section 10.008(a)(2)(C) of the TBOC precludes a finding of fraudulent transfer in a divisive merger, but caselaw suggest that bankruptcy courts will not be bound by that section's treatment of transfers. In *Barnhill v. Johnson*, the Supreme Court noted that although property and property rights are typically creatures of state law, the definition of "transfer" for purposes of section 548 of the Code is a matter of federal law and governed by the Code in section 101(54).[37]

In turn, it is well-settled that the Code's definition of transfer should be interpreted as broadly as possible to capture all modes of disposing of or parting with property.[38] If a challenge to a divisive merger is brought under section 548 of the Code, courts will likely determine that the divisive merger's allocation of assets and liabilities constitutes a "transfer," and may therefore be unwound if the transfer is deemed fraudulent, regardless of the TBOC's treatment of transfers.

Challenges to the divisive merger may also proceed under state fraudulent transfer laws or section 544 of the Code (which makes state fraudulent transfer laws applicable in a bankruptcy case).[39] State fraudulent transfer laws define a transfer similarly to section 101(54) of the Code, and are designed to be just as broad. Although there is conflict between fraudulent transfer laws and section 10.008(a)(2)(C) of the TBOC, courts will likely resolve this conflict in favor of fraudulent transfer laws for reasons similar to that in the prior paragraph.

The Code provides that debtors-in-possession enjoy exclusive standing to bring fraudulent transfer claims, but derivative standing may be awarded to claimants' committees that successfully persuade the court that the debtor will not pursue fraudulent transfers or will not settle such matters on an arms-length basis.[40] Until recently, no complaint alleging fraudulent transfer had been filed in any of the Texas Two-Step bankruptcies.

In *DBMP*, the Official Committee of Asbestos Personal Injury Claimants and the Future Claimants' Representative received derivative standing to pursue a fraudulent transfer action against the parent enterprise on behalf of the estate. The complaint was filed on January 21, 2022 (just within the Code's two-year statute of limitations), and alleges that the divisive merger is actually and constructively fraudulent under section 548 of the Code and under state fraudulent transfer laws of Texas, Delaware, Pennsylvania, and North Carolina.[41] If this action is pursued to its conclusion, the *DBMP* court will likely determine that the TBOC does not preclude a finding of fraudulent transfer. The next question then is whether this particular divisive merger is fraudulent.

B. Whether a Divisive Merger is Actually or Constructively Fraudulent?

From the perspective of asbestos claimants, the divisive merger is actually fraudulent because the divisive merger was implemented to hinder, delay or defraud claimants by keeping valuable assets out of their hands and is constructively fraudulent because the assets and liabilities were separated without the exchange of reasonably equivalent value (e.g., an insufficient Funding Agreement) and the debtor does not have the resources to satisfy its liabilities.

i. Actual Fraud

The Code and UFTA each provides that a transfer is voidable if it was made with actual intent to hinder, delay, or defraud creditors. Pleading actual fraud is a high bar, and pursuant to Federal Rule of Civil Procedure 9(b), the plaintiff must plead intent under the stringent "particularity" standard.[42] Proving intent can be difficult, and courts often look to certain "badges of fraud" from which they infer the existence of fraud. Although the UFTA provides a list of badges of fraud,[43] the Code does not enumerate badges of fraud, but courts have developed badges of fraud similar to those in the UFTA and the badges of fraud do not greatly vary between different jurisdictions.[44]

In *Tronox*, which was a non-Texas Two-Step spinoff, the court found that it was clear from the evidence that "there can be no dispute that [Old KM] acted to free substantially all of its assets - certainly its most valuable assets-from 85 years of environmental and tort liabilities."[45] The court also noted that "[t]he obvious consequence of this act was that the legacy creditors would not be able to claim against 'substantially all of [Old KM's] assets,' and with a minimal asset base against which to recover in the future, would accordingly be 'hindered or delayed' as the direct consequence of the scheme. This was the clear and intended consequence of the act, substantially certain to result from it."[46]

The defendants mounted good faith defenses, including that (i) the defendants intended and believed that the debtor would be a successful, solvent company capable of paying its creditors, (ii) there was a legitimate purpose for the spin-off, that is, to unlock value but not to evade liabilities, and (iii) the defendants were merely trying to limit or contain the overall environmental liability of the parent enterprise.[47]

The court rejected these arguments, finding that the record did not support the defendants' assertion that they believed that Tronox would be solvent and capable of paying its creditors. The court noted that the defendants spun off Tronox with a capital structure of $550 million in debt, $40 million in cash, and mass tort liabilities that had cost Old KM more than $1 billion in the years prior to the spin-off.[48] The court pointed to a lack of evidence of a "contemporaneous analysis" that would support the defendant's good faith belief that Tronox would be able to handle its liabilities.[49] Defendants presented an analysis that was prepared by advisors to Old KM, in which the advisors expressed certainty that Tronox would continue as a going concern for one year following the spin-off. The court noted that "[o]bviously, a year's survival does not ensure that Tronox would be a viable standalone and that creditors would not be adversely impacted by its separation."[50] Additionally, the court found that the record did not indicate a legitimate business reason for imposing all liabilities on Tronox, and that separating assets and liabilities for the purpose of containing overall liability to the parent enterprise cannot be a good faith defense to an actual fraudulent transfer challenge.[51]

As part of its divisive merger, the debtor in *LTL Management* received all equity in a subsidiary worth $375 million, $6 million in cash, a contract right in the Funding Agreement, and mass tort liabilities that caused Old JJCI to incur "nearly $1 billion in defending a tidal wave of personal-injury lawsuits relating to alleged talc exposure, nearly all of which was spent in only the last five years. In the months prior to the Petition Date, Old JJCI was paying anywhere from $10 million to $20 million monthly in defense costs."[52] The cost of jury verdicts against the parent enterprise was also staggering. In June 21, 2021, the Supreme Court of Missouri upheld a jury verdict finding Old JJCI liable for $500 million in actual damages; (ii) J&J liable for $125 million in actual damages, and (iii) $1.6 billion in aggregate punitive damages, with a greater amount imposed on J&J due to its "reprehensible conduct."[53] Excluding the Funding Agreement, there appears to be a great disparity between the assets allocated to New JJCI and the debt allocated to the debtor under the divisive merger.

Interestingly, the issue of fraudulent intent may turn on the value of the Funding Agreements and whether their value cuts against a finding of intent to delay, hinder, or defraud creditors. As explained above, Funding Agreements obligate the parent or remaining enterprise to fund trusts as part of the debtors' chapter 11 plans. If claimants are to be paid pursuant to a fully funded trust, are they really delayed, hindered, or defrauded by the Texas Two-Step? This question may eventually be answered in one of the Texas Two-Step bankruptcies.

ii. Constructive Fraud

The Code and the UFTA provide that a transfer is voidable if it caused the debtor to incur a liability without the exchange of reasonably equivalent value and the debtor was, or was rendered by the transfer, insolvent, inadequately capitalized, or unable to pay its debts as they become due. Notably, the "heightened federal pleading standard for allegations of fraud does not apply to a complaint to avoid transfers as constructively fraudulent."[54] Rather, constructive fraudulent transfers are subject to the more lenient "fair notice" standard under the Federal Rule of Civil Procedure 8(a).[55]

In *Tronox*, the court concluded that Tronox received less than reasonably equivalent value when, at the conclusion of the spin-off, $17 billion of assets had been transferred from Tronox to the spun-off entity, NKM, but Tronox had received only $2.6 billion.[56] To the court, this $14.5 billion reduction in value illustrated a lack of reasonably equivalent value. The court concluded that the liabilities of Tronox outweighed its assets, leaving it insolvent, and that the onerous liabilities prevented Tronox from accessing capital markets or engaging in a capital transaction when its lack of capital caught up with it, leaving Tronox inadequately capitalized.[57] (Crucially, there was no contract resembling a Funding Agreement in *Tronox*.)

As explained above, all Texas Two-Step bankruptcies involve the disproportionate allocation of assets and liabilities between GoodCo and BadCo. For instance, in a pending Texas Two-Step bankruptcy, *DMPB*, the debtor has received assets (not including the Funding Agreement) aggregating approximately $175 million,[58] which is far short of the billions of dollars that the claimants' committee asserts is the total cost of the asbestos liabilities.[59] The disparity between the value of assets and liabilities arguably indicate that the debtor received less than reasonably equivalent value and was insolvent. However, a sufficiently capitalized Funding Agreement may be a proper defense.

C. Is a Funding Agreement a Defense to Fraudulent Transfer Challenges?

The principal issue in fraudulent transfer challenges to divisive mergers will be whether the Funding Agreements increase the value received by the debtors such that they (and the claimants) are not any worse off than they were prior to the divisive merger. The Funding Agreements provide that, to the extent the debtors are unable, the parent enterprises will pay the cost of liabilities. Importantly, the parent enterprises insist that there are technically no caps to these Funding Agreements in any of the Texas Two-Step bankruptcies, and that they are not loans and impose no repayment obligation on the debtors.[60] The existence of these Funding Agreements seems to indicate that, as part of their divisive mergers, the debtors were allocated sufficient resources to pay tort liabilities.

Claimants' committees allege that these Funding Agreements are illusory because only the debtors are permitted to enforce the terms of the Funding Agreements and that there are no dispute resolution mechanisms if a debtor's request for funding is denied.[61] Claimants' committees further allege that any assertion that the Funding Agreements are uncapped is false, because the Funding Agreements require the parent enterprises to fund a trust only up to the value of the pre-merger entity as of the date of the divisive merger, and that this mechanism "replace[s] operating businesses (which have historically increased in value) with an amorphous, artificially capped contract right, the value of which would take years to adjudicate."[62]

Although no court has yet decided whether a Funding Agreement constitutes a valid fraudulent transfer defense, three courts have indicated their views on Funding Agreements, which interestingly differ. In its decision enjoining litigation against non-debtors, the court in *Aldrich Pump/Murray Boiler* noted that the Funding Agreements in that case were unsecured and conditional, and that "the willingness of New TTC or New Trane to pay asbestos claimants cannot be assumed . . . [t]hus, an action to contest the mergers and the exclusive allocation of all asbestos claims to Aldrich and Murray appears to be a viable cause."[63]

In contrast, in its decision denying a motion to dismiss the bankruptcy case, the court in *Bestwall* held that,

> Bestwall has the full ability to meet all of its obligations . . . through the Funding Agreement . . . [which] exists and is enforceable, it cannot be disregarded . . . The Committee contends that the Funding Agreement's protections are illusory and insufficient. However, the terms of the Funding Agreement and the evidence of record demonstrate the opposite. The Funding Agreement is a binding and enforceable contractual obligation.[64]

Similarly, in *LTL Management*, the court noted that "the Funding Agreement between Debtor, on the one hand, and J&J and New JJCI (on a joint and several basis) on the other, is not intended to—and is unlikely to—impair the ability of talc claimants to recover on their claims."[65] On fraudulent transfer actions in general, the court telegraphed its sentiment towards such actions by noting that "[a]s this Court has emphasized throughout this Opinion, far from a means to 'hinder and delay talc claimants,' a global resolution of these claims through the bankruptcy may indeed accelerate payment to cancer victims and their families."[66]

It remains to be seen whether courts will recognize a Funding Agreement as a valid defense to any fraudulent transfer claims, and such a decision is likely to be made on a case-by-case basis turning on the terms of each Funding Agreement. However, if courts affirm the validity and value of Funding Agreements, they should serve as a valid defense to fraudulent transfer claims. Moreover, the arrangements contemplated under these Funding Agreements may be negotiated with claimants resulting in settlements that benefit all parties.

Fraudulent transfer challenges, however, are not the only means by which claimants may threaten to unwind a divisive merger. The pursuit of derivative standing, and then the commencement a fraudulent transfer challenge, may eventually result in the unwinding of divisive mergers, but claimants may opt for a more immediate form of relief - that the court dismiss the Texas Two-Step bankruptcies for being filed in "bad faith."

II. Bad Faith

Claimants, like all parties in interest, possess standing to move for the dismissal of a debtor's bankruptcy case.[67] In two of the Texas Two-Step cases, *Bestwall* and *LTL Management*, claimants' committees filed motions to dismiss the bankruptcy cases for being filed in bad faith.[68] The courts in both cases denied the motions pursuant to the bad faith dismissal standards of their respective Circuits.

Section 1112(b)(1) of the Code provides that the court, upon finding "cause", shall dismiss a chapter 11 case or convert it to a chapter 7 case, whichever is in the best interest of the estate and its creditors.[69] Section 1112(b)(4) enumerates several examples of cause, such as the debtor's failure to comply with court orders or failure to attend the 341(a) meeting of creditors.[70] Section 1112(b)(4) is not exhaustive, and caselaw has developed to include several more examples of cause, including the commencing of a bankruptcy case in "bad faith."

It may be by design that all Texas Two-Step bankruptcies were filed in the Fourth Circuit (although one, *LTL*, was later transferred to a bankruptcy court in the Third Circuit) which uses a "stringent" two-pronged dismissal standard.[71] Specifically, the Fourth Circuit's standard demands that movants show (i) objective futility and (ii) subjective bad faith.[72] Additionally, movants in the Fourth Circuit bear the initial burden of proving these elements by a preponderance of the evidence.[73]

To prove objective futility, the movant must show that the bankruptcy case is objectively futile because there is not even a remote chance that the debtor will reorganize. The "objective futility inquiry" concentrates on (i) whether there is no going concern to preserve and (ii) no hope of rehabilitation.[74] In *Carolin*, the Fourth Circuit reasoned that it is worthwhile to include the objective futility element in its bad faith dismissal standard because "it is better to risk proceeding with a wrongly motivated invocation of Chapter 11 protections whose futility is not immediately manifest than to risk cutting off even a remote chance that a reorganization effort so motivated might nevertheless yield a successful rehabilitation."[75] Thus, even if the bankruptcy case was commenced to halt numerous litigations throughout the country, the case will not be dismissed if the possibility remains for a successful reorganization.

In the *Bestwall* decision, the court denied the motion to dismiss on the basis that the movants did not prove objective futility. The court noted that, as part of the divisive merger, the debtor was allocated all equity interests in a non-debtor subsidiary projected to generate $18 million EBITDA in 2019 and worth approximately $145 million.[76] In the mind of the court, the subsidiary's operations demonstrated that the debtor had an ongoing business to preserve. Additionally, like all Texas Two-Step debtors, the debtor in *Bestwall* was party to a Funding Agreement that called upon non-debtors to fund the 524(g) asbestos trust to the extent the debtor was unable. The court concluded that the Funding Agreement and the value of the debtor's business, as well as the existence of cash on hand, demonstrated resources with which the debtor could reorganize, therefore there was a hope for rehabilitation.[77]

For these reasons, the *Bestwall* court concluded that the movants did not demonstrate that the bankruptcy was objectively futile and denied the motion to dismiss.[78] The court did not reach the issue of whether the case was filed in subjective bad faith because it already concluded that the case was not objectively futile. It is unclear whether the court would have dismissed the case if subjective bad faith alone was the standard by which bad faith dismissal decisions were decided.

Not all jurisdictions follow the Fourth Circuit's bad faith dismissal standard. The only Texas Two-Step bankruptcy outside of the Fourth Circuit is *LTL Management*, which is currently pending in the Third Circuit. Importantly, the Third Circuit follows a more lenient bad faith dismissal standard than that of the Fourth Circuit.

The Third Circuit does not require movants to prove that a bankruptcy case is objectively futile, but instead looks to the totality of facts and circumstances to determine whether the case was filed in bad faith.[79] To aid in such a determination, questions asked in the Third Circuit include (i) whether the bankruptcy was commenced to obtain a tactical litigation advantage, or (ii) whether the debtor's bankruptcy serves a valid bankruptcy purpose.[80] Further, unlike the Fourth Circuit which requires movants to demonstrate a debtor's bad faith by a preponderance of the evidence, the Third Circuit only requires movants to make a prima facie showing that the debtor's bankruptcy was filed in bad faith. After filing a motion to dismiss, the burden is on the debtor to demonstrate, by a preponderance of the evidence, that its bankruptcy was not filed in bad faith.[81]

Although the Third Circuit's dismissal standard is more favorable to movants than the standard in the Fourth Circuit, the court in *LTL Management* denied the motion to dismiss shortly after venue was transferred to it. In a comprehensive opinion, the court noted that "the filing of a chapter 11 case with the expressed aim of addressing the present and future liabilities associated with ongoing global personal injury claims to preserve corporate value is unquestionably a proper purpose under the Bankruptcy Code."[82] The court additionally held that "Debtor seeks to employ the tools provided by Congress under the Bankruptcy Code (the automatic stay and § 105 or § 524(g) trust) to attain a bankruptcy resolution of its mass tort liabilities.

Without more, merely availing itself of chapter 11 tools does not constitute an improper litigation tactic."[83]

In the Texas Two-Step bankruptcies, the debtors were unquestionably formed immediately prior to their respective petition dates, but disagreements arise around certain issues, including whether the bankruptcy was commenced to give the parent enterprise an advantage in litigation it would not enjoy outside of bankruptcy.[84] For instance, the debtors and parent enterprises enjoy court-ordered injunctions on all litigation and advantageous platforms from which to negotiate settlements. There is also a question of whether the reorganization serves a valid purpose, which centers on the question of whether a Texas Two-Step debtor has sufficient assets to give that debtor a valid reorganizational purpose, or if the reorganization's true purpose is to serve the interests of the parent enterprise.[85]

If claimants are ever successful in convincing the court that a Texas Two-Step debtor commenced its bankruptcy in bad faith, the case could be dismissed, and the litigation pending in the tort system would resume. In the case of J&J, one of the officers for LTL Management testified that if all 38,000 claims were litigated through trial in the tort system, it would cost J&J as much as $190 billion.[86] In light of the timeline and costs, the bankruptcy court does seem like an appropriate forum to handle thousands of claims that will result in fair treatment for all claimants as opposed to a rush to judgment that may benefit certain claimants but may be detrimental to numerous others. Allowing these claims to proceed in the tort system, the court in *LTL Management* noted, would waste time and value, "which value could be better used to achieve some semblance of justice for existing and future talc victims . . . [w]hy is it necessary to place at risk the livelihoods of employees, suppliers, distributors, vendors, landlords, retailers . . . when there is no palpable benefits to those suffering and their families?"[87]

III. Other Divisive Merger Statutes and Federal Legislation

Although a small number of states possess divisive merger statutes, the TBOC is presently the only statute by which Texas-Two Step debtors have implemented their divisive mergers. This may be due in part to the explicit carveouts for fraudulent transfers that are written into the divisive merger statutes of those other states: Delaware, Arizona, and Pennsylvania.

In Delaware, the Delaware Limited Liability Company Act (the "DLLCA") went into effect in 2018, and provides that one entity may divisively merge into several. Similar to the TBOC, the assets and liabilities of the pre-merger entity may be allocated among the new entities. The assets and liabilities are allocated as provided in the "plan of division," which is a document similar in substance to the TBOC's plan of merger.[88]

Another similarity between divisive mergers under the DLLCA and the TBOC is that the allocation of assets and liabilities "shall not be deemed, as a result of the division, to have been assigned or transferred to such division company for any purpose of the laws of the State of Delaware."[89] Although containing the similar no-transfer language as the TBOC, the DLLCA also provides that assets and liabilities cannot be allocated if doing so would constitute a fraudulent transfer, and in the event a court determines that such an allocation does constitute a fraudulent transfer, each entity party to the merger becomes jointly and severally liable.[90] A glaring difference between the TBOC and the DLLCA is that under Delaware law only limited liability companies may avail themselves of a divisive merger.[91]

In Pennsylvania[92] and Arizona,[93] the pre-merger entity must file a plan of division allocating assets and liabilities to other entities involved in the merger. In both states, the allocation of assets and liabilities is not considered a transfer. The Pennsylvania statute provides that the allocation of assets and liabilities will be ineffective or voidable if the allocation constitutes a fraudulent transfer.[94] Although the Arizona statute does not explicitly mention fraudulent transfers, it is the most restrictive of all the divisive merger statutes in that entities emerging from a divisive merger under Arizona law will be considered jointly and severally liable for the liabilities of the pre-merger entity; the liability may only be successfully allocated to a specific post-merger entity if the relevant creditor provides consent, or if the recourse created by the liability is limited to an asset belonging to that specific post-merger entity.[95] In this way, assets and liabilities cannot be allocated in a manner similar to the Texas Two-Step bankruptcies, unless creditors provide consent.

Although Delaware, Pennsylvania, and Arizona all have divisive merger statutes, it remains to be seen whether any bankruptcy case will involve a "Delaware Waltz" or a "Pennsylvania Pop-and-Lock." The Texas Two-Step remains the only strategy by which conglomerates shift assets and liabilities in anticipation of a bankruptcy filing.

Despite Texas' dominance in this area, there is currently before Congress proposed federal legislation designed to curtail future application of the Texas Two-Step. If enacted, the Nondebtor Release Prohibition Act (the "NRPA"), will amend section 1112 of the Code by directing the court, upon a motion by a party in interest and after notice and a hearing, to dismiss a case if -

> [t]he debtor or a predecessor of the debtor was the subject of, or was formed or organized in connection with a divisional merger or equivalent transaction or restructuring that had the intent or foreseeable effect of separating material assets from material liabilities of an entity eligible to be a debtor under this title and assigning or allocating all or a substantial portion of those liabilities to the debtor, or the debtor assuming or retaining all or a substantial portion of those liabilities and occurred during the 10-year period preceding the date of the filing of the petition.[96]

The NRPA may ease the movant's burden of obtaining dismissal of a Texas Two-Step bankruptcy and make such dismissals more uniform across jurisdictions, but implicit in the NRPA is the dubious assumption that all divisive mergers are prejudicial to creditors. Critics argue that the NRPA casts a wide net that threatens to deny divisively merged companies access to the bankruptcy court even in situations where the company's divisive merger was undertaken for legitimate purposes and did not prejudice creditors.

Instead, these critics argue that the NRPA's effective ban on divisive mergers is not warranted, and that bankruptcy judges should continue to decide if such a case was commenced in bad faith and dismiss where appropriate.[97] Rather than banning divisive mergers, the National Bankruptcy Conference has proposed "amending Bankruptcy Code § 1104(a) to provide for (a) a presumption that the appointment of an operating trustee is in the best interest of creditors if the debtor is the result of a division or divisive merger that occurred during the two year period preceding the petition date and (b) the burden of rebutting the presumption to be on the debtor."[98]

The NRPA would also limit injunctions that stay lawsuits against non-debtors to a period of no more than 90 days following the petition date. As explained above, the courts overseeing Texas Two-Step bankruptcies have always used their power under section 105(a) to extend the automatic stay to lawsuits against non-debtors. This is important because the injunction gives the parent enterprise and claimants the focus necessary to negotiate a global settlement of the tort claims. Time will tell whether the NRPA will be enacted in its current form, but if enacted, it will greatly diminish the reorganization prospects for future Texas Two-Step debtors.

Conclusion

Courts have not yet had occasion to decide any fraudulent transfer challenges to divisive mergers, and may not render a decision any time soon. The potential for negotiation among the debtors and claimant committees may resolve these disputes ahead of any decision. Additionally, the potential for bad faith dismissals may obviate the need for claimants to challenge divisive mergers as fraudulent transfers, especially if the motion to dismiss is filed at the outset of the bankruptcy case. These outcomes, however, should be deliberated carefully on a case-by-case basis.

To broadly label Texas Two-Steps as problematic schemes outside the contours of the Code misses the equitable resolutions that these arrangements might bring to all parties involved. Texas Two-Steps can benefit claimants as a whole because they will have the opportunity to resolve their claims in a single forum and on a uniform basis. The interests of not only current claimants, but future claimants as well, are equally preserved and the race for judgments in courthouses throughout the country is halted. The parent enterprise, and the economic well-being of many other institutions, also stand to benefit from the preservation of value, jobs, and orientation towards innovation that Texas Two-Steps can bring. Where applicable, we should count on the wisdom and perceptiveness of bankruptcy courts to gatekeep the restructuring process from any egregious cases that violate fraudulent transfer laws and the principles of a good faith filing.

NOTES:

[1]H. Comm. On Bus. & Com., Bill Analysis, H.B. 472, 1989 Leg., 71st Reg. Sess., at 23

(Tex. 1989) (the divisive merger is intended "to provide domestic corporations with greater flexibility in structuring business combinations and to make Texas a uniquely desirable jurisdiction in which to incorporate . . . this would provide Texas corporations with unprecedented ability to effect 'spin-offs' and similar restructuring transactions through a simplified statutory process that is not available in other jurisdictions.").

[2]See Curtis W. Huff, "The New Texas Business Corporation Act Merger Provisions," 21 St. Mary's L.J. 109, 114–15 (1989).

[3]Tex. Bus. Orgs. Code Ann. § 1.002(55)(A).

[4]Tex. Bus. Orgs. Code Ann. § 1.002(55)(A).

[5]Tex. Bus. Orgs. Code Ann. § 10.002.

[6]Tex. Bus. Orgs. Code Ann. § 10.003.

[7]Tex. Bus. Orgs. Code Ann. § 10.008(a)(9)(B).

[8]Tex. Bus. Orgs. Code Ann. § 10.008(a)(2)(C).

[9]See Plastronics Socket Partners, Ltd. v. Dong Weon Hwang, 2019 WL 1009404 (E.D. Tex. 2019), report and recommendation adopted, 2019 WL 1000908 (E.D. Tex. 2019).

[10]Plastronics Socket Partners, Ltd. v. Dong Weon Hwang, 2019 WL 1009404 at *2 (E.D. Tex. 2019), report and recommendation adopted, 2019 WL 1000908 (E.D. Tex. 2019).

[11]In re Bestwall LLC, Case No. 17-31795 (Bankr. W.D.N.C. November 2, 2017); In re DBMP, LLC, Case No. 20-30080 (Bankr. W.D.N.C. January 23, 2020); In re Aldrich Pump LLC, Case No. 20-30608 (Bankr. W.D.N.C. June 18, 2020); In re Murray Boiler LLC, Case No. 20-30609 (Bankr. W.D.N.C. June 18, 2020); In re LTL Management LLC, Case No. 21-30589 (Bankr. D.N.J. October 14, 2021).

[12]See e.g., Steven Church, "J&J Baby Powder Claims Spur Bankruptcy Despite $25 Billion in Cash," BLOOMBERG (Oct. 15, 2021), https://www.bloomberg.com/news/articles/2021-10-15/j-j-embraces-baby-powder-bankruptcy-despite-25-billion-in-cash (last visited Feb. 5, 2022).

[13]Aldrich Pump LLC, 20-ap-03041, Dkt. No. 308, p. 19.

[14]Compare LTL Management LLC, 21-ap-03032, Dkt. 1, p. 6 ("J&J and New JJCI have agreed to advance $2 billion under the Funding Agreement into a qualified settlement trust"), with Mike Spector and Dan Levine, "Special Report: Inside J&J's Secret Plan to Cap Litigation Payouts to Cancer Victims," REUTERS (February 4, 2022) https://www.reuters.com/business/healthcare-pharmaceuticals/inside-jjs-secret-plan-cap-litigation-payouts-cancer-victims-2022-02-04/ (reporting that at the first board meeting of LTL Management LLC, board members noted that "J&J faced a total of about $5 billion in costs from judgments, settlements and legal fees."). (last visited Feb. 5, 2022).

[15]LTL Management LLC, 21-bk-30589, Dkt. 1572, p. 17.

[16]See In re Garlock Sealing Technologies, LLC, 504 B.R. 71, 97 (Bankr. W.D. N.C. 2014).

[17]See 11 U.S.C.A. § 524(g).

[18]See e.g., Aldrich Pump LLC, 20-bk-30608, Dkt. No. 27, Annex 2 (copy of a Funding Agreement).

[19]See e.g., Aldrich Pump LLC, 20-ap-03041, Dkt. No. 308, p. 27.

[20]11 U.S.C.A. §§ 524(g) to (h).

[21]See DBMP LLC, 20-bk-30080, Dkt. No. 1005 (Court entered order granting derivative standing).

[22]11 U.S.C.A. § 524(g)(2)(B)(i)(II).

[23]See e.g., LTL Management LLC, Case No. 21-bk-30589 Dkt. 632, ¶ 23 ("The Debtor falsely claims that the Funding Agreement 'ensure[s] that [LTL] has at least the same, if not

greater, ability to fund talc-related claims and other liabilities as Old JJCI had before the restructuring.' Rather, the Funding Agreement obligates J&J and New JJCI to fund LTL up to the value of Old JJCI as of the date of the divisive merger. J&J and JJCI thus replace operating businesses (which have historically increased in value) with an amorphous, artificially capped contract right, the value of which would take years to adjudicate. And that litigation only ripens when J&J and New JJCI refuse to make payments under the Funding Agreement . . . [I]n other words, a tort claimant in possession of a judgment against LTL cannot enforce that judgment on assets held by LTL: instead, it must request that LTL (controlled by J&J) demand payment from J&J or New JJCI. If they refuse, the claimant must wait on LTL to litigate for that funding. Moreover, at present, J&J's and New JJCI's obligations to provide financing under the Funding Agreement are likely "financial accommodations," as such term is used in section 365(c) of the Bankruptcy Code, and are therefore unenforceable by the Debtor against J&J or New JJCI absent further order of the Court or a different agreement from J&J and New JJCI. Talc claimants have thus been intentionally rendered worse off than they were prior to the divisional merger, an outcome prohibited by the statute.") (internal citations omitted).

[24] See DBMP LLC, 20-bk-30080, Dkt. No. 1005.

[25] 11 U.S.C.A. § 548(a).

[26] See In re Tronox Incorporated, 503 B.R. 239 (Bankr. S.D. N.Y. 2013).

[27] Patrick Fitzgerald, Daniel Gilbert and Andrew Grossman, "Anardarko Settles Tronox Lawsuit for $5.15 Billion," Wall St. J. (April 3, 2014) https://www.wsj.com/articles/SB10001424052702304441304579479671680682560 (last visited Feb. 5, 2022).

[28] Tex. Bus. Orgs. Code Ann. § 10.008(a)(2)(C).

[29] Tex. Bus. Orgs. Code Ann. § 10.901.

[30] Plastronics Socket Partners, Ltd. v. Dong Weon Hwang, 2019 WL 1009404 at *2 (E.D. Tex. 2019), report and recommendation adopted, 2019 WL 1000908 (E.D. Tex. 2019).

[31] H. Comm. On Bus. & Com., Bill Analysis, H.B. 472, 1989 Leg., 71st Reg. Sess., at 23 (Tex. 1989).

[32] See Curtis W. Huff, "The New Texas Business Corporation Act Merger Provisions," 21 St. Mary's L.J. 109, 122, 129 (1989) ("While the provisions permitting multiple surviving entities in a merger were intended to provide corporations with greater flexibility in structuring acquisition and restructuring transactions, they were not intended to have any material effect on the existing rights of creditors of the parties to a merger."); see also Cliff Ernst, "Divisive Mergers: How to Divide an Entity into Two or More Entities Under A Merger Authorized by the Texas Business Organizations Code," 36 Corp. Couns. Rev. 233, 243 (2017) ("one could certainly imagine an egregious situation where all assets were allocated to one party to the merger and all liabilities were allocated to another party without assets, and creditors might attempt to void the transaction as a fraudulent conveyance.").

[33] Curtis W. Huff, "The New Texas Business Corporation Act Merger Provisions," 21 St. Mary's L.J. 109, 122, 129 (1989).

[34] See e.g., In re Whitley, 848 F.3d 205, 63 Bankr. Ct. Dec. (CRR) 178, 77 Collier Bankr. Cas. 2d (MB) 413, Bankr. L. Rep. (CCH) P 83068 (4th Cir. 2017) (" 'Transfer' as used in the Bankruptcy Code, was meant to be defined as broadly as possible, to encompass and array of transactions.")

[35] 11 U.S.C.A. § 548(a).

[36] 11 U.S.C.A. § 101(54).

[37] Barnhill v. Johnson, 503 U.S. 393, 398, 112 S. Ct. 1386, 118 L. Ed. 2d 39, 22 Bankr. Ct. Dec. (CRR) 1218, 26 Collier Bankr. Cas. 2d (MB) 323, Bankr. L. Rep. (CCH) P 74501, 17 U.C.C. Rep. Serv. 2d 1 (1992); In re Thompson, 186 B.R. 301, 307 (Bankr. N.D. Ga. 1995) ("Whereas an interest in property is determined by applicable state law, federal bankruptcy

law is applied to decide whether a transfer has occurred, and, if so, whether such transfer was actually or constructively fraudulent . . .").

[38]See e.g., Matter of Smiley, 864 F.2d 562, 565, 18 Bankr. Ct. Dec. (CRR) 1229, Bankr. L. Rep. (CCH) P 72637 (7th Cir. 1989); see also In re Underwood, 2009 WL 5821030, at *9 (Bankr. M.D. Fla. 2009); see also In re Feiler, 218 B.R. 957, 960, 32 Bankr. Ct. Dec. (CRR) 321, 83 A.F.T.R.2d 99-2302 (Bankr. N.D. Cal. 1998), aff'd, 230 B.R. 164, 33 Bankr. Ct. Dec. (CRR) 1211, 41 Collier Bankr. Cas. 2d (MB) 884, 83 A.F.T.R.2d 99-2295 (B.A.P. 9th Cir. 1999), aff'd, 218 F.3d 948, 36 Bankr. Ct. Dec. (CRR) 90, 44 Collier Bankr. Cas. 2d (MB) 702, Bankr. L. Rep. (CCH) P 78203, 2000-2 U.S. Tax Cas. (CCH) P 50579, 86 A.F.T.R.2d 2000-5001 (9th Cir. 2000).

[39]See 11 U.S.C.A. § 544(a).

[40]See generally Collier on Bankruptcy P. 1103.05 (16th ed. 2020).

[41]DBMP LLC, 22-ap-03000, Dkt. No. 1.

[42]See Fed. R. Civ. P. 9(b).

[43]Tex. Bus. & Com. Code § 24.005(b)(1) to (11).

[44]See In re Jenkins, 68 Collier Bankr. Cas. 2d (MB) 1381, 2012 WL 6186347 at *20 (Bankr. W.D. N.C. 2012), adopted, 2013 WL 4805731 (W.D. N.C. 2013); see also In re Hechinger Inv. Co. of Del., 327 B.R. 537, 550 (D. Del. 2005), aff'd, 278 Fed. Appx. 125 (3d Cir. 2008).

[45]Tronox, 503 B.R. at 280.

[46]Tronox, 503 B.R. at 280.

[47]Tronox, 503 B.R. at 285.

[48]Tronox, 503 B.R. at 285.

[49]Tronox, 503 B.R. at 286–88.

[50]Tronox, 503 B.R. at 286.

[51]Tronox, 503 B.R. at 288–290.

[52]LTL Management LLC, 21-ap-03032, Dkt. No. 1, ¶ 36.

[53]Ingham v. Johnson & Johnson, 608 S.W.3d 663, 724, Prod. Liab. Rep. (CCH) P 20934 (Mo. Ct. App. E.D. 2020), reh'g and/or transfer denied, (July 28, 2020) and transfer denied, (Nov. 3, 2020) and cert. denied, 141 S. Ct. 2716, 210 L. Ed. 2d 879 (2021).

[54]In re Bernard L. Madoff Inv. Securities LLC, 445 B.R. 206, 225, 65 Collier Bankr. Cas. 2d (MB) 358 (Bankr. S.D. N.Y. 2011).

[55]Fed. R. Civ. P. 8(a).

[56]Tronox, 503 B.R. at 293.

[57]Tronox, 503 B.R. at 329.

[58]DBMP LLC, 20-bk-30080, Dkt. No. 24, p. 8.

[59]DMPB LLC, 22-ap-03000, Dkt. 1, ¶ 135.

[60]See e.g., Aldrich Pump LLC, 20-ap-03041, Dkt. No. 308, at p. 25.

[61]See e.g., DMPB LLC, 22-ap-03000, Dkt. 1, ¶¶ 62–72.

[62]LTL Management LLC, 21-bk-30589, Dkt. No. 632, ¶ 23.

[63]Aldrich Pump LLC, 20-ap-03041, Dkt. No. 308, at p. 56.

[64]Bestwall, 605 B.R. at 49.

[65]LTL Management LLC, 21-bk-30589, Dkt. No. 1572, at p. 44.

[66]LTL Management LLC, 21-bk-30589, Dkt. No. 1572, at p. 51.

[67]11 U.S.C.A. § 1112(b)(1).

[68]See Bestwall LLC, 17-bk-31795, Dkt. No. 938; see also LTL Management LLC, 21-bk-30589, Dkt. No. 632.

[69]11 U.S.C.A. § 1112(b)(1).

[70]11 U.S.C.A. § 1112(b)(4).

[71]See Collier on Bankruptcy P 1112.07 (16th ed. 2021) ("The Fourth Circuit's additional requirement to show objective futility as a prerequisite to dismissal for subjective bad faith may be too stringent.").

[72]Carolin Corp. v. Miller, 886 F.2d 693, 700–01, 19 Bankr. Ct. Dec. (CRR) 1425, Bankr. L. Rep. (CCH) P 73071 (4th Cir. 1989).

[73]In re Bestwall LLC, 605 B.R. 43, 48 (Bankr. W.D. N.C. 2019).

[74]Carolin, 886 F.2d at 701–02.

[75]Carolin, 886 F.2d at 701.

[76]Bestwall, 605 B.R. at 50.

[77]Bestwall, 605 B.R. at 50.

[78]Bestwall, 605 B.R. at 50.

[79]In re SGL Carbon Corp., 200 F.3d 154, 165, 35 Bankr. Ct. Dec. (CRR) 116, 43 Collier Bankr. Cas. 2d (MB) 668, Bankr. L. Rep. (CCH) P 78084, 1999-2 Trade Cas. (CCH) ¶ 72739 (3d Cir. 1999).

[80]SGL, 200 F.3d at 165–69.

[81]In re Rent-A-Wreck of America, Inc., 580 B.R. 364, 374, 65 Bankr. Ct. Dec. (CRR) 74 (Bankr. D. Del. 2018).

[82]LTL Management LLC, 21-bk-30589, Dkt. No. 1572, at p. 16.

[83]LTL Management LLC, 21-bk-30589, Dkt. No. 1572, at p. 50.

[84]See e.g., LTL Management LLC, Case No. 21-bk-30589 Dkt. 1465.

[85]See e.g., Vince Sullivan, "Talc Claimants Say J&J Unit's Ch. 11 Benefits Parent Co. Only," LAW360 (February 17, 2022) https://www.law360.com/newjersey/articles/1466288/talc-claimants-say-j-j-unit-s-ch-11-benefits-parent-co-only?nl_pk=95a44549-bc9a-4517-b109-e92b77db57e5&utm_source=newsletter&utm_medium=email&utm_campaign=newjersey (last visited Feb. 18, 2022).

[86]Vince Sullivan, "Ch. 11 For J&J Talc Unit Only Wise Choice, Top Lawyer Says," LAW360 (February 15, 2022) https://www.law360.com/newjersey/articles/1465375/ch-11-for-j-j-talc-unit-only-wise-choice-top-lawyer-says (last visited Feb. 5, 2022).

[87]LTL Management LLC, 21-bk-30589, Dkt. No. 1572, at p. 47.

[88]6 DE Code § 18-217(g).

[89]6 DE Code § 18-217(l)(8).

[90]6 DE Code § 18-217(l)(4) to (5).

[91]6 DE Code § 18-217(a)(1).

[92]15 Pa. Cons. Stat. Subchapter F.

[93]29 Ariz. Rev. Stat. § 2601.

[94]15 Pa. Cons. Stat. § 368(d).

[95]29 Ariz. Rev. Stat. § 2607.

[96]Nondebtor Release Prohibition Act of 2021, H.R. 4777, 117th Cong. (2021).

[97]See e.g., Vince Sullivan, “Senators Hear Possible Solutions to ‘Texas Two-Step’,” LAW360 (Feb. 9, 2022) https://www.law360.com/bankruptcy/articles/1462698/senators-hear-possible-solutions-to-texas-two-step-issues?nl_pk=f31a3338-c8d5-4030-8952-eb6af2154c63&utm_source=newsletter&utm_medium=email&utm_campaign=bankruptcy&read_more=1 (last visited Feb. 9, 2022).

[98]The National Bankruptcy Conference, “Fraudulent Transfer Proposals”, http://nbconf.org/wp-content/uploads/2021/11/12-AP-Avoidance-Committee.pdf (last visited Feb. 9, 2022).