Nos. 22-2006, 22-2007 & 22-2008

In the United States Court of Appeals For the Third Circuit

IN RE: LTL MANAGEMENT, LLC

JAN DEBORAH MICHELSON-BOYLE, KATHERINE TOLLEFSON, EVAN PLOTKIN, AND GIOVANNI SOSA,
Petitioners-Appellants,

V.

LTL MANAGEMENT, INC.
Respondent-Appellee.

On Direct Appeal from the
United States Bankruptcy Court for the District of New Jersey

REPLY BRIEF FOR APPELLANTS (AD HOC COMMITTEE OF MESOTHELIOMA CLAIMANTS)

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MESOTHELIOMA CLAIMANTS' REPLY BRIEF

The Mesothelioma Claimants, unlike the other appellants, focus on the second issue on appeal: the propriety of the bankruptcy court's unprecedented injunction.

LTL defends the injunction's full sweep. It endorses the bankruptcy judge's decision to enjoin thousands of tort claims against solvent non-debtors based on a belief that he alone can resolve them—not juries or Article III judges under the rules set up by our Constitution and Congress. But the linchpin of LTL's argument is more technical: its purported contractual indemnification of J&J and other non-debtors.

LTL's reliance on alleged indemnity provisions is riddled with problems. An indemnity provision can't convert claims against non-debtors into claims "against the debtor" for the automatic stay. It can't confer bankruptcy jurisdiction over those claims. And it can't create irreparable harm for LTL. At most, it "shift[s] the burden of pursuing [LTL] from the [talc] plaintiffs to whichever defendants are ultimately judged responsible." *Gold v. Johns-Manville Sales Corp.*, 723 F.2d 1068, 1076 (3d Cir. 1983). Only one provision, moreover, was even discussed below—and it's inapplicable.

A separate problem for LTL is that it concedes that the bankruptcy will be successful only if the claims against non-debtors can be permanently enjoined. That is doubly fatal. It's fatal to the injunction because this Court's precedents forbid that relief. And it's fatal to LTL's good-faith argument because a desire to spare solvent non-debtors from the judgment of juries is not a legitimate purpose of bankruptcy.

ARGUMENT

I. A fully solvent corporation's desire to evade the tort system is not a legitimate bankruptcy purpose.

LTL concedes (at 70, 93) that the end goal of its bankruptcy is to protect J&J *itself* by "permanently enjoining talc suits" against it. The point of this bankruptcy, in other words, is to escape the decisions of juries and courts that have found J&J independently liable for its own "reprehensible conduct" in concealing the presence of asbestos in its products. *Ingham v. Johnson & Johnson*, 608 S.W.3d 663, 723 (Mo. Ct. App. 2020); *see* JA4707. If non-debtor J&J cannot "overcome the tort system," as its counsel put it, Dkt. 2565 at 41, "the bankruptcy could not achieve its purpose." Br. 7.

But none of J&J's gripes about the tort system—"unfair" verdicts, overly "hospitable judges and juries," "unacceptable delays," Br. 3, 55—has anything to do with bankruptcy law. Chapter 11 exists to allow "financially troubled businesses" to reorganize, not to allow solvent non-debtors "to achieve … resolution of the claims against [them]," *In re SGL Carbon Corp.*, 200 F.3d 154, 157, 169 (3d Cir. 1999), and "cleanse themselves of [their own] asbestos liability without enduring the rigors of bankruptcy," *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 237 (3d Cir. 2004). As in *Shapiro v. Wilgus*, LTL's bankruptcy is part of a "single scheme to hinder and delay creditors in their lawful suits"—a purpose long "condemned in Anglo-American law." 287 U.S. 348, 353, 354-55 (1932). The Supreme Court has also more recently warned of the "serious constitutional concerns that come with any attempt to aggregate

individual tort claims" in a way that "compromises [plaintiffs'] Seventh Amendment rights" and the "deep-rooted historic tradition that everyone should have his own day in court." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845-46, 868 (1999).

Congress responded to *Ortiz* by repeatedly considering legislative solutions to asbestos litigation—and repeatedly declining to adopt them. S. Rep. 109-97 (2005). Some judges might disagree with that policy choice, but they are "not free to devise" their own "ideal system for adjudicating these claims." *Ortiz*, 527 U.S. at 865 (Rehnquist, J., concurring). Congress provided a different process for resolving mass claims: multi-district litigation. 28 U.S.C. § 1407. In keeping with this design choice, talc claims against J&J have been largely consolidated in an MDL, which was set to start bellwether trials later this year before the bankruptcy judge intervened. J&J itself sought creation of the talc MDL and initially praised the "efficient adjudication by the MDL court." *In re Imerys Talc Am., Inc.*, No. 19-103, Dkt. 2 (D. Del. 2019).

Only after losing most of its evidentiary challenges to the plaintiffs' experts did J&J begin complaining about the MDL's supposed inefficiencies. *See In re Johnson & Johnson Talcum Powder Prods. Mkt., Sales Pracs. & Prods. Litig.*, 509 F. Supp. 3d 116, 198 (D.N.J. 2020). But as one court noted in rejecting a copycat LTL bankruptcy scheme last month, "the fact that the bellwether trials conducted in the MDL have not yet yielded a global settlement does not mean that the MDL itself is broken." *In re Aearo Techs. LLC*, 2022 WL 3756537, at *7 (Bankr. S.D. Ind. 2022). "Multidistrict litigation,

through the bellwether process, is itself designed to enhance and accelerate both the litigation process itself and the global resolutions that often emerge from [it]." *Id.* A solvent defendant cannot "evade the jurisdiction of an Article III court" based on "its policy disagreement with a system created by Congress and its dissatisfaction with the lawfully entered rulings of an Article III court." *In re 3M Combat Arms Earplug Prod. Liab. Litig.*, 2022 WL 3370146, at *2 (N.D. Fla. 2022). Because that is exactly what LTL is trying to do for J&J here, its petition must be dismissed.

II. LTL cannot defend the bankruptcy court's sweeping injunction.

Even if the petition weren't dismissed, the injunction would have to be vacated as to the claims against J&J and other non-debtors. As explained in our opening brief (at 13-25), no statute authorizes such an unprecedented exercise of power.

In response, LTL relies on the same three provisions as the court below: It argues that the claims are automatically stayed under sections 362(a)(1) and 362(a)(3), and it argues that section 105 authorizes the stay. All three arguments are wrong.

A. Claims against non-debtors for their own liability are not claims "against the debtor" under section 362(a)(1).

First up is section 362(a)(1). LTL does not deny that this provision "grants 'no authority' to bankruptcy judges" and is limited to its text: covering actions and claims "against the debtor." *See* Opening Br. 14-15. LTL's argument, rather, is that the claims against non-debtors for their own liability *are* "claim[s] against the debtor." Br. 79.

They are not. "[T]he wording of the statute is clear and unambiguous and is not subject to judicial interference." *Williford v. Armstrong World Indus., Inc.*, 715 F.2d 124, 127 (4th Cir. 1983). Unlike Chapter 13, which stays claims "against non-debtors who are jointly liable with a debtor," section 362(a) stays claims only "against the debtor." *Maritime Elec. Co. v. United Jersey Bank*, 959 F.2d 1194, 1205 n.9 (3d Cir. 1991). Thus, this Court has held that section 362(a)'s "automatic stay is not available to non-bankrupt co-defendants of a debtor even if they are in a similar legal or factual nexus with the debtor." *Id.* at 1205. Further, "formal distinctions between debtor-affiliated entities are maintained when applying the stay." *Id.*

LTL's only response is that "a judgment against [non-debtors] will in effect be a judgment or finding against [LTL]" because the claims are similar, and because of indemnification provisions. Br. 31, 80-85. But the similarity of the claims is irrelevant: It is "universally acknowledged" that section 362(a)(1) does not apply to non-debtors "with a similar legal or factual nexus to the debtor." *McCartney v. Integra Nat'l Bank N.*, 106 F.3d 506, 509-10 (3d Cir. 1997); *see also Parker v. Bain*, 68 F.3d 1131, 1139 n.13 (9th Cir. 1995). And unlike the claims in *In re Colonial Realty Co.*, on which LTL relies (at 79), the claims against J&J assert "independent" liability. 980 F.2d 125, 132 (2d Cir. 1992).

As for the purported indemnification provisions, the Supreme Court has made clear that an "indemnification provision does not somehow convert [a] suit against [one defendant] into a suit against [the indemnitor]." *Lewis v. Clarke*, 137 S. Ct. 1285,

1293 (2017). LTL will not be "legally bound by [any] adverse judgment," *id.* at 1292-93, and its "rights are in no sense affected," *Janney Montgomery Scott, Inc. v. Shepard Niles, Inc.*, 11 F.3d 399, 410 (3d Cir. 1993); *contra* Br. 82-83. Non-debtors could "pursue any claim for … indemnification they might have against [LTL] in a separate action," but *that* claim would be stayed by section 362(a)(1). *Gen. Refractories Co. v. First State Ins. Co.*, 500 F.3d 306, 320 (3d Cir. 2007); *see also Credit All. Corp. v. Williams*, 851 F.2d 119, 121 (4th Cir. 1988) (holding that independently liable co-defendants are "limited to claims for reimbursement or contribution to the extent allowed under 11 U.S.C. § 502(e) or subrogation to the rights of the creditor under 11 U.S.C. § 509"); *United States v. Dos Cabezas Corp.*, 995 F.2d 1486, 1492 (9th Cir. 1993) (same). "Moreover, indemnification is not a certainty here," *Lewis*, 137 S. Ct. at 1293; *see* Opening Br. 18-19 & n.5, and under the funding agreement, it is J&J—not LTL—"who will ultimately pick up the tab" for any indemnification obligations in any event, *Lewis*, 137 S. Ct. at 1293.

LTL leans heavily on this Court's decision in *McCartney*, but it doesn't call for a different result. As explained in our opening brief (at 13-14), *McCartney* involved a state law requiring the debtor's "necessary participation" as a defendant. That isn't the case here. Nor can "unusual circumstances" justify judicial revision of section 362(a). Br. 79-80. Arguments of that kind, as the Eighth Circuit has held, are properly addressed under section 105, not section 362(a). *See* Opening Br. 15-16; *In re Panther Mountain Land Dev., LLC*, 686 F.3d 916, 926-27 (8th Cir. 2012). LTL has no response.

B. Section 362(a)(3) requires a finding that shared insurance policies would be "automatically" depleted by third-party litigation—and the bankruptcy court found the opposite.

Next up is section 362(a)(3), which protects "property of the estate." LTL says that this provision applies because of shared insurance policies. In doing so, it concedes the prerequisite for this argument (at 87): the need for a "factual finding" that claims against non-debtors will "automatically deplete" available insurance. The trouble for LTL is that the bankruptcy court not only failed to make such a finding, but in fact found the opposite. It "[a]dmitted[]" that "coverage is disputed," which is why the "policies have not yet been exhausted." JA182-83. So there is no way that third-party claims could "automatically deplete" any "available" coverage.

LTL just barely argues otherwise. It asserts that the court's "observ[ation]" about the policies' mere existence, coupled with its statement about how proceeds are "potentially still available" given the coverage dispute, constitutes a "sufficient factual finding" of automatic depletion. Br. 87-88. But that isn't nearly enough under this Court's cases. *See Combustion Eng'g*, 391 F.3d at 232-33 & n.43; Opening Br. 14. And here, the insurers will either prevail in their coverage dispute or they will not. If they prevail, there will be no coverage to deplete. But that's also true if they don't prevail: In that scenario, they will be required to pay the previously denied insurance claims, which indisputably exceed the total coverage, leaving nothing to draw down. So there is zero at stake for LTL: Either the coverage is nonexistent or it is exhausted.

C. This Court's precedents in *Combustion Engineering* and *W.R. Grace* foreclose LTL's arguments under section 105.

Last up is section 105. To sustain the injunction on this ground, LTL must do two things: (1) "affirmatively" demonstrate jurisdiction over talc claims against non-debtors and (2) make a "clear showing" that it's entitled to the "extraordinary remedy" of a preliminary injunction. Opening Br. 16-25. LTL does neither. Under *Combustion Engineering* and *In re W.R. Grace & Co.*, 591 F.3d 164 (3d Cir. 2009), the injunction must be vacated as to the claims against non-debtors.

1. Jurisdiction. None of LTL's three jurisdictional arguments survive an encounter with this Court's precedents.

First, LTL pushes for "arising under" jurisdiction (at 89) on the theory that the injunction is "necessary to protect the integrity of the automatic stay," which is a "substantive right" under the Code. But Congress chose *not* to extend section 362(a)(1) to claims against non-debtors for their own independent liability. It did so even though it "knew how to extend the automatic stay to non-bankrupt parties when it intended to do so." *Credit All.*, 851 F.2d at 121. There is thus no "substantive right" to enjoin non-derivative claims against non-debtors. That settles the matter—not only for arising-under jurisdiction, but also for whether section 105 may be used to expand the automatic stay even assuming jurisdiction. As this Court held in *Combustion Engineering*, section 105 "does not give the court the power to create substantive rights that would otherwise be unavailable under the Code," and it "cannot be used to

achieve a result not contemplated by [the Court's] more specific provisions." 391 F.3d. at 236-37.

Second, LTL provides a brief, limited defense of the bankruptcy court's holding that there's "arising in" jurisdiction. LTL does not defend the court's reasoning that the adversary proceeding itself confers jurisdiction—reasoning rejected by this Court in *W.R. Grace.* Opening Br. 17. Yet LTL's position amounts to the same thing. LTL posits that an injunction "lasting only" until the end of the case is a remedy "unique to bankruptcy." Br. 90. What LTL is describing, however, is the generally available remedy of a preliminary injunction. While preliminary relief in a "bankruptcy case" is, by definition, "unique to bankruptcy," that line of reasoning cannot be the basis for jurisdiction. *Id.* If it could, bankruptcy courts could "enjoin any action, no matter how unrelated to the underlying bankruptcy it may be, so long as the injunction motion was filed in the adversary proceeding." *W.R. Grace*, 591 F.3d at 174.

Finally, LTL looks to related-to jurisdiction. It gives one reason why talc claims against non-debtors are sufficiently related to LTL's bankruptcy: the indemnification agreements. LTL concedes that "the Bankruptcy Court did not find" that LTL has "automatic indemnification obligations" to non-debtors, and instead contends that "'automatic' liability is not necessar[y]." Br. 92, 96. But this Court's cases hold that the debtor must "be bound automatically" by a judgment against a non-debtor for related-to jurisdiction to attach. *Combustion Eng'g*, 391 F.3d at 226. Or put differently:

"direct[]" liability is required. *Id.* at 231-32. This Court's "precedent dictates that a bankruptcy court lacks subject matter jurisdiction over a third-party action if the only way in which that third-party action could have an impact on the debtor's estate is through the intervention of yet another lawsuit"—exactly what we have here. *W.R. Grace*, 591 F.3d at 173; *see Combustion Eng'g*, 391 F.3d at 231-33; Opening Br. 18-20.

LTL tries to distinguish these precedents in a paragraph. It says that the claims there involved "different products," and the debtor would not have been "bound by any judgment against the third party." Br. 81-82. But this Court has held that even "the unity of exposure created by asbestos contained in a common product [is] insufficient to give rise to 'related to' jurisdiction when the third-party claim would not directly result in liability for the debtor." *Combustion Eng'g*, 391 F.3d at 232.

That is the case here. Again, a judgment against a non-debtor for its own independent liability "will not bind [LTL] in any way," and the existence of an "indemnification provision does not somehow" alter this fact. *Lewis*, 137 S. Ct. at 1292-93. And again, "indemnification is not a certainty here." *Id.* at 1293. Quite far from it: As we explained (at 18), the text of J&J's indemnification provision "covers only liabilities 'on the books or records of Johnson & Johnson' in 1979—not future liabilities," which "is the only interpretation that gives this language meaning." LTL provides no plausible contrary interpretation of this text. Nor does it deny that the bankruptcy court itself (1) believed that the text was "ambiguous," (2) acknowledged

that ambiguity is construed *against* indemnification under New Jersey law, and (3) did not examine any other provisions as to any other non-debtors. Opening Br. 19 n.5. Instead, LTL says (at 86 n.6) that the "parties' course of performance" resolves the ambiguity. The parties' internal allocations, however, cannot bear the weight that LTL places on them. They are simply "accounting" decisions for "administrative convenience" that do not prove legal liability to talc claimants. JA1031-32; JA3963.

Regardless, the fact remains: "any indemnification claims against" LTL "would require the intervention of another lawsuit to affect the bankruptcy estate, and thus cannot provide a basis for 'related to' jurisdiction." *Combustion Eng'g*, 391 F.3d at 232. If J&J (or some other non-debtor) were found liable for its own tortious conduct, it could press a contractual indemnification claim against LTL at that point. That claim would then be stayed and, were the bankruptcy successful, submitted as a claim either "for reimbursement … under 11 U.S.C. § 502(e)" or for "subrogation to the rights of the [talc plaintiff] under 11 U.S.C. § 509." *Credit All.*, 851 F.2d at 121. "[E]ither way, the estate's liability would be the same." Opening Br. 20 n.6. Thus, allowing claims against non-debtors "simply shift[s] the burden of pursuing [LTL] from the [talc] plaintiffs to whichever defendants are ultimately judged responsible for inflicting at least part of the harm alleged." *Johns-Manville*, 723 F.2d at 1076. That is where it belongs.

LTL cannot concede its way around this precedent. It suggests that no lawsuit would be required because it would voluntarily pay indemnification to non-debtor J&J—its benefactor—and would do so (1) during the bankruptcy and (2) even though it has a potentially winning defense. But as we pointed out in our opening brief (at 18-19 n.5), that is just "further evidence of bad faith." LTL offers no rebuttal.

2. Injunction factors. Even if there were jurisdiction to enjoin the claims against non-debtors, LTL has not shown entitlement to that relief. Like the court below, LTL concedes that its bankruptcy will be "successful" only if it "permanently enjoin[s] talc suits" against J&J and other solvent non-debtors. Br. 70, 93. But what LTL doesn't acknowledge is that this Court has already held that this relief is unavailable where, as here, "the liability alleged is not derivative of the debtor." *Combustion Eng'g*, 391 F.3d at 236-37. "Certain claims against [non-debtors] allege independent liability, wholly separate from any liability involving [the debtor]. As the plain language of the statute makes clear, § 524(g)(4)(A) does not permit the extension of a channeling injunction to include these non-derivative third-party actions." *Id.* at 235. LTL cites no "evidence of derivative liability." *Id.* at 231. Instead, it strings together selective quotations of parts of section 524(g) (at 70-71)—with no explanation of why they matter or how they change the analysis.

As for the balance of equities, they could hardly be more lopsided. Although LTL asserts that irreparable harm "is a certainty," it makes no serious effort to show

that it would be harmed *at all* by declining to expand the automatic stay's protections beyond what Congress provided. Br. 96. In contrast, many talc claimants, and especially mesothelioma claimants, "are dying, often from the very diseases that have led to these actions." *Johns-Manville*, 723 F.2d at 1076. It would be inequitable to "force these plaintiffs to forbear" in their actions against solvent non-debtors "until [LTL] emerge[s] from the reorganization proceedings." *Id.* For that reason, as this Court has held, "the balance of hardship weighs in favor of the injured plaintiffs." *Id.*

CONCLUSION

The bankruptcy court's orders should be reversed in their entirety.

September 6, 2022

Respectfully submitted,

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COMBINED CERTIFICATIONS

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2. Word Count, Typeface, and Type Style: This brief contains 3,243 words and therefore complies with the June 21, 2022 order of a motions panel of this Court, which restricted the Petitioner-Appellants—alone among the parties to these consolidated proceedings—to a reply brief containing no more than 3,250 words. *But see* Fed. R. App. P. 32(a)(7)(B)(i) (allowing 6,500 words for the reply briefs of separately represented parties). This brief further complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Baskerville font.

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September 6, 2022

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