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Rediscovering § 157(b)(5) Transfers in Mass Tort Bankruptcies: Part II

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This two-part series highlights one of the underutilized tools for the resolution of mass torts in the bankruptcy system: 28 U.S.C. § 157(b)(5). Part I, published in the previous issue,[1] discussed what § 157(b)(5) is and does. To recall, § 157(b)(5) is an aggregation tool that allows a district court where a chapter 11 case is pending to order the transfer of all personal-injury cases related to the chapter 11 case to the district court for full adjudication.

A § 157(b)(5) transfer is presumed to be appropriate when requested, and it gives the district court the power to pull cases directly from state court without removal. Section 157(b)(5) has a long history of helping to resolve mass torts, including in some of the earliest mass tort bankruptcies, such as *A.H. Robbins* and *Dow Corning*. Given the U.S. Supreme Court's recent rejection of nonconsensual third-party releases in *Purdue*,[2] it is likely that § 157(b)(5) will be rediscovered.

Part II discusses *how* practitioners can use § 157(b)(5) to assist in the resolution of mass torts through bankruptcy in a world without nonconsensual third-party releases. Courts and practitioners can use § 157(b)(5) to create a sort of "super-MDL" that combines the benefits of multi-district litigation (MDL) and chapter 11 cases to aid in achieving a full resolution of mass tort situations.

Using § 157(B)(5) to Create a "Super-MDL" Within a Bankruptcy Case

As noted in Part I, practitioners have long been searching for a way to resolve mass torts effectively and completely. Of the many strategies employed, two have been most prominent in recent years: the MDL and the chapter 11 case.

Where MDLs are available, they have proven to be very effective. Around 97 percent of MDLs end in a successful settlement, and MDL filings now account for 21 percent of the federal civil docket. Despite their successes, MDLs suffer from at least two limitations that restrict their ability to fully resolve mass torts.

First, because MDLs are exclusively federal, they cannot include nonremovable state cases or state attorneys general actions. This means that MDLs can almost never result in *global* peace, and they foster dueling litigation tracks and a race to the courthouse. Second, because an MDL consolidates cases for strictly pre-trial purposes, MDL judges cannot take cases all the way to trial — even when that would be conducive to achieving a consensual resolution of the mass tort liabilities.

In light of these limitations, chapter 11 cases in recent years have taken center stage. Bankruptcy courts have effectively used procedural mechanisms like preliminary injunctions to halt mass tort litigation pending outside of bankruptcy court. Debtors have then sought to confirm chapter 11 plans containing nonconsensual third-party releases. However, as has been well documented in this publication, the Supreme Court's rejection of nonconsensual third-party releases in *Purdue* has raised questions about how effective bankruptcy courts will continue to be in resolving mass torts. The limitations of MDLs and the question marks surrounding chapter 11 have raised questions about whether either of these mechanisms alone can effectively address mass torts, which is where § 157(b)(5) comes in.

Section 157(b)(5) allows the district court to transfer *all* cases related to a bankruptcy — whether pending in state or federal court — to district court for adjudication in one central forum. This forum will be able to work in coordination with the bankruptcy court, which can use the procedural mechanisms of the Bankruptcy Code and those developed in MDLs to adjudicate overlapping disputes.

Thus, a § 157(b)(5) transfer can be used to create what might be called a "super-MDL" within the bankruptcy case, through which a district court can exercise full jurisdiction to final judgment over all personal-injury cases, working in tandem with the bankruptcy court to achieve a global resolution. By combining some of the procedural innovations of MDLs with the broad bankruptcy jurisdiction created by Congress, § 157(b)(5) creates

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1 Corinne Ball & Christopher DiPompeo, "Resolving the Mass Tort Problem: Part I: Aggregating Cases in a Single Forum Under § 157(b)(5)," XLIV *ABI Journal* 3, 30-31, 55-56, March 2025, abi.org/abi-journal/resolving-the-mass-tort-problem-part-i-aggregating-cases-in-a-single-forum-under-%C2%A7-157b5.

2 ABI held a webinar shortly after the Supreme Court issued its decision in *Purdue*. To listen to the abiLIVE recording, please visit abi.org/newsroom/videos. ABI also published a digital book, *The Purdue Papers*, a compilation of 3,500+ pages of *amicus* briefs, petitions and other related background material. To order your downloadable copy, visit store.abi.org.

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a powerful mechanism for accomplishing a global settlement within bankruptcy cases, even without nonconsensual third-party releases.

Section 157(b)(5) Transfers Address the Major Limitations of MDLs

Using § 157(b)(5) to create a super-MDL by aggregating claims has several advantages over a traditional MDL. First, the reach of a § 157(b)(5) transfer is much broader than a traditional MDL's reach. A § 157(b)(5) transfer reaches any cases "related to" a bankruptcy, including cases pending in state court.

Thus, while the jurisdiction of an MDL court is limited only to cases pending in federal court, § 157(b)(5) allows the district court to draw *all* pending federal and state cases to a single forum. This effectively eliminates the risk that parallel litigation in state court will continue while the MDL is pending, thereby stopping the "race to the courthouse" and focusing efforts on a single forum to resolve the mass tort.

Second, unlike MDL courts, district courts after a § 157(b)(5) transfer can hold trials, which (1) eliminates the incentive for MDL courts to retain cases, even when trial might be appropriate or helpful to the parties in settling; (2) allows the district court to exercise discretion about whether, when and which issues should be resolved through final judgment to decide questions helpful to a comprehensive resolution; and (3) allows the district court to make those determinations after discussion with the parties and consultation with the bankruptcy court about what is necessary to effect a comprehensive solution for all stakeholders.

Third, aggregating tort cases in the district court where the bankruptcy is pending allows the mass tort defendant to use bankruptcy tools to help resolve the mass tort within the super-MDL. For example, bankruptcy courts are particularly adept at using focused, expedited litigation to narrow disputes for ultimate resolution. The more flexible appellate rules in bankruptcy can also allow for more efficient appellate review of issues pertinent to the resolution of the mass tort, which allows for quicker resolution of discrete issues necessary for a global resolution.

Fourth, creating a super-MDL allows for much more efficient coordination between the bankruptcy and district courts than can be achieved when cases are pending all over the nation. For example, standing orders referring bankruptcy cases to bankruptcy courts and procedural rules allowing a district court to withdraw that reference make moving disputes from the bankruptcy court to the district court simple. Since claims against the estate pending in the bankruptcy court also will often overlap with civil litigation claims pending against the debtor, coordination can avoid piecemeal litigation and ensure that similar issues are resolved once.

Section 157(b)(5) Transfers Address Some of the Limitations of Courts

Using a § 157(b)(5) transfer to create a super-MDL at the district court also helps to solve problems faced by mass tort chapter 11 debtors. Specifically, the fact that bankruptcy courts lack jurisdiction to enter final judgment on personal-injury claims[3] incentivizes two key parties — insurers and individual claimants — to resist participating in the bankruptcy process in favor of litigation in other courts. However, consolidating these cases in the district court, which *does* have jurisdiction to enter final judgment on the claims, focuses everyone on the single consolidated proceeding.

Insurance is a major issue in nearly all mass tort situations. There often are pending coverage actions between the debtor and its insurers, and these actions sometimes are filed by the debtor to obtain a determination that the insurer is liable for some or all of the loss. Other times, the insurers themselves file actions seeking a declaratory judgment that they have no responsibility for the claims.

When a bankruptcy is filed, these coverage actions are often withdrawn to the district court on the grounds that a bankruptcy court does not have jurisdiction to try a tort case or determine the amount of tort claims for purposes of distribution. This creates an odd dynamic within the chapter 11 case, and creates an opportunity for insurers to refuse to engage in the bankruptcy process on the grounds that the district court's (often longer time frame) decision regarding their coverage must take precedence.

A § 157(b)(5) super-MDL helps with this dynamic. After transfer, all existing tort cases will be pending in the district court, *along with* the insurers' coverage actions, so the parties have no choice but to engage in this forum. Insurers who do not meaningfully engage risk the district court making determinations that fix their liability without their participation, which even extends to settlement negotiations. For example, it is possible for the debtor and plaintiffs to enter into a global settlement that establishes an agreed amount of the plaintiffs' claims. While a bankruptcy court cannot approve such a settlement, a district court can. The district court's approval would likely result in a judicial finding of the amount of liability under the insurers' policies, which the insurer would be liable to pay absent a defense.

As recognized in such cases as *Drennen v. Certain Underwriters at Lloyd's of London*,[4] it is the fixing of the *face amount* of the allowed claim by the district court that determines the insurer's liability, regardless of what is ultimately paid from the debtor's estate under a chapter 11 plan. An insurer who does not meaningfully participate in settlement discussions does so at its own peril that the debtor and

3 *See* 28 U.S.C. § 157(b)(2)(B).

4 *See Drennen v. Certain Underwriters at Lloyd's of London (In re Residential Cap. LLC)*, No. 12-12020 (MG), 2022 WL 17836560, at *79-80 (Bankr. S.D.N.Y. Dec. 21, 2022), *reconsideration denied*, No. 12-12020 (MG), 2023 WL 2978894 (Bankr. S.D.N.Y. April 17, 2023).

some (or all) plaintiffs will reach a settlement on their own that will fix the insurer's liability at a point well above what it would otherwise prefer.

A second and related problem involves individual plaintiffs. At the commencement of a mass tort bankruptcy, there are typically hundreds or thousands of individual lawsuits pending throughout the state and federal system, yet those tort plaintiffs are typically represented by a few dozen major plaintiffs' law firms. Here again, the fact that bankruptcy courts cannot finally determine the amount of tort plaintiffs' claims creates incentives for individual plaintiffs and plaintiffs' counsel to attempt to stay out of the bankruptcy case and push for the resolution of their claims in the tort system.

The fact that the Bankruptcy Code typically requires the appointment of a single committee to represent all unsecured creditors also creates a structure that can interfere with participation by relevant stakeholders. Committee members must be individual creditors, even though the key decision-makers are often the lawyers advising the significant groups of plaintiffs. These lawyers end up being two steps removed from the debtor, which primarily interacts with the committee. Professional ethics rules further restrict the ability of plaintiffs' lawyers to participate directly in settlement negotiations with counsel for the debtor by prohibiting counsel with multiple clients from participating in negotiations or recommending a settlement without informed consent from each client.[5]

Here again, creating a super-MDL in the district court through § 157(b)(5) can help with this dynamic by facilitating more productive negotiations. Aggregating all mass tort cases in the district court to create a super-MDL could simplify the leadership structure to more easily resolve related disputes, given that all parties (including both state and federal plaintiffs) would be consolidated into one forum. Judges, lawyers and parties in MDLs have had to sort through similar issues regarding plaintiff representation and decision-making in the MDL, and have developed various approaches (*e.g.*, plaintiffs' steering committees (PSCs) and common benefit funds) to address them.

The same types of approaches could be used in super-MDL chapter 11 cases. For example, upon consolidating all state and federal cases in the district court, the district court can issue an order appointing a PSC consisting of the largest plaintiffs' counsel. The PSC's purpose would be to effectively and efficiently represent the common interests of all plaintiffs by reviewing documents, taking depositions, drafting briefs, developing legal arguments and prosecuting the aspects of the litigation that are common to all plaintiffs. PSC members would also take a lead role in negotiating settlements and would be fully authorized by the district court to do so.

This would allow the chapter 11 debtor — in its capacity as a tort defendant in the consolidated super-MDL — to interact directly with plaintiffs' counsel authorized to do so by a court order, thus eliminating any professional responsibility concerns and narrowing the artificial distance between the debtor and the individual claimants. In addition, a common benefit award established through a global settlement can also be implemented via a chapter 11 plan, just as provisions related to payment of professional fees for official committees and *ad hoc* committees are routinely implemented in chapter 11 plans. Thus, as with insurers, a consolidated super-MDL within the chapter 11 case can most efficiently ensure that decision-makers are all aligned on the effort to resolve, once and for all, the mass tort in the chapter 11 process.

> **Section 157(b)(5) ... is Congress's chosen method for dealing with mass torts related to a bankruptcy, and it presents an opportunity to capture many of the benefits of an MDL without some of its limitations.**

A Suggested Strategy for Using § 157(b)(5) in Mass Tort Bankruptcies

This leads to the final point: How can § 157(b)(5) be employed in a mass tort chapter 11? The following framework strategy should be considered.

First, upon filing the chapter 11 case, the debtor should also file a motion with the district court under § 157(b)(5) seeking the transfer and consolidation of all related mass tort litigation. There is longstanding precedent for this strategy, including in *A.H. Robbins* and *Dow Corning*, and legal authority suggesting that the presumption should be in favor of transfer. Once the cases have been consolidated, the debtor should ask the district court to create a PSC consisting of key plaintiffs' counsel. The debtor can work with the PSC to determine how to handle the litigation pending in state court — whether to pause the litigation or to allow some focused issues to go forward that would aid in final resolution.

The debtor should also develop a practice and procedures for enabling close coordination between the bankruptcy and district courts, particularly with respect to the claims-allowance process in the bankruptcy court and any coverage litigation with insurers. The parties should also then work toward final resolution through negotiations, using the tools available through the bankruptcy and district courts to narrow disputes and drive toward a consensual resolution.

Conclusion

Section 157(b)(5)'s aggregation device should be one of the key tools in the mass tort lawyer's toolkit moving forward. It is Congress's chosen method for dealing with mass torts related to a bankruptcy, and it presents an opportunity to capture many of the benefits of an MDL without some of its limitations. abi

5 *See* Model Rules of Prof'l Conduct r. 1.8(g) ("A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients ... unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.").