Paul | Weiss

MARCH 2022 | ISSUE NUMBER 2

Restructuring Department Bulletin

Alan Kornberg Featured in *Global Restructuring Review* Profile

Restructuring partner Alan Kornberg was featured in a profile, "Heads-Up: Alan Kornberg at Paul Weiss in New York," published in *Global Restructuring Review* on February 18, 2022. In the article, Alan discusses the current transitional era in international restructurings as countries around the world migrate to chapter 11-like regimes; how rescue loans are being used as a gateway to distressed investments; and the evolution of chapter 11 practice over the course of his career. Alan reviews his rise in the industry, starting from his clerkship for Judge John Galgay in the Southern District of New York. Judge Galgay was presiding over the WT Grant retail bankruptcy, one of the largest cases in the country at the time. The article notes that Alan launched the Paul, Weiss restructuring group in 1990. Since then, he has guided the group's growth into a premier restructuring practice that represents clients in all aspects of restructuring matters in and out of court, both domestically and in cross-border contexts.

Click Here to read Article.

DID YOU KNOW…

On February 18, 2022, a Delaware Bankruptcy Court approved the structured dismissal of Nine Point Energy Holdings, Inc. in *In re NPE Winddown Holdings, Inc.* Ch. 11 Case No. 21-bk-10570 (MFW) (Bankr. D. Del. Mar. 15, 2021). The Debtors sought dismissal after having sold substantially all of their assets, leaving their estates with insufficient funds to confirm a chapter 11 plan. A structured dismissal provides an alternative to chapter 11 plan confirmation or chapter 7 conversion. It effects a dismissal of the cases but includes provisions in the order that incorporate relief typically obtained in a chapter 11 plan including: releases (some more limited than others); protocols for reconciling and paying claims; "gifting" of funds to unsecured creditors; and provisions providing for the bankruptcy court's continued retention of jurisdiction over certain post-dismissal matters. The Nine Point Energy dismissal order was uncontested and entered without a hearing.

Click Here to view Initial Dismissal Order.

Bankruptcy Court Denies Talc Claimants' Motion to Dismiss J&J Subsidiary's Chapter 11 Case as Not Having Been Filed in Good Faith: In re LTL Management, LLC, 2022 WL 596617 (Bankr. D.N.J. Feb. 25, 2022)

The New Jersey Bankruptcy Court denied motions filed by the Official Committee of Talc Claimants and others ("Movants") seeking an order dismissing the bankruptcy case of LTL Management, LLC ("LTL") as not having been filed in good faith within the meaning of section 1112(b) of the Bankruptcy Code. *LTL Mgmt.*, 2022 WL 596617 at *1.

LTL is an indirect subsidiary of Johnson & Johnson ("J&J"). Shortly before filing bankruptcy, LTL was formed through a corporate restructuring (the "2021 Corporate Restructuring") that included a divisional merger under the Texas Business Corporation Act. As a result of the 2021 Corporate Restructuring, LTL assumed responsibility for all claims alleging that J&J's talc-containing Johnson's Baby Powder caused ovarian cancer and mesothelioma. Through the restructuring, LTL also received rights under a funding agreement pursuant to which

Delaware Bankruptcy Court Rejects Chapter 7 Trustee's Use of IRS as "Golden Creditor" to Assert Otherwise Time Barred Avoidance Claims: Miller v. Fallas (In re J&M Sales Inc.). 2022 WL 532721 (Bankr. D. Del. Feb. 22, 2022)

The Delaware Bankruptcy Court denied a chapter 7 trustee's motion to file an amended complaint seeking to re-allege certain time-barred constructive fraudulent conveyance claims under section 544(b) of the Bankruptcy Code using the IRS as a predicate creditor. *See J&M Sales*, 2022 WL 532721 at *1. Section 544(b) of the Bankruptcy Code permits a trustee to avoid any transfer of the debtor's property or obligation incurred that is "voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of the [Bankruptcy Code]," a so-called "triggering" or "golden" creditor. 11 U.S.C. § 544(b)(1). If a "golden" creditor exists, the trustee can step into

J&J and another affiliate were obligated to fund a trust to satisfy LTL's talc-related liabilities in bankruptcy (subject to a cap related to the value of the subsidiary that J&J alleges is responsible for such claims). *See id.* at 2-4. LTL filed chapter 11 shortly after completion of the 2021 Corporate Restructuring with the stated purpose of "globally resolv[ing] talc-related claims." *LTL Mgmt.*, 2022 WL 596617 at *3. Movants argued that LTL filed its chapter 11 case in bad faith because, among other things, LTL was created within hours of the filing as a special purpose vehicle with the stated purpose of employing the bankruptcy's automatic stay and asbestos resolution schemes for the benefit of its solvent operating parent and affiliated entities, as well as certain other third parties. *See id.* at *4. Movants further contended that LTL's formation through the pre-petition restructuring was intended to force talc claimants to "face delay" and was "an obvious legal maneuver to impose an unfavorable settlement dynamic on talc victims." *Id*.

The Bankruptcy Court disagreed, finding among other things that (a) there was a valid bankruptcy purpose underlying LTL's decision to file chapter 11 and (b) LTL did not file chapter 11 to secure an unfair litigation advantage. The Bankruptcy Court found that at the time of filing, the Debtor faced nearly 40,000 pending tort claims with thousands of additional claims expected annually for decades to come. *See LTL Mgmt.*, 2022 WL 596617 at *8. It held that the "Debtor's efforts to address the financially draining mass tort exposure through a bankruptcy is … consistent with the aims of the Bankruptcy Code," and that "the filing of a chapter 11 case with the expressed aim of addressing present and future liabilities associated with ongoing global personal injury claims to preserve corporate value is unquestionably a proper purpose under the Bankruptcy Code." *Id*. Some of the Movants appealed on March 7, 2022. They intend to seek direct review of the decision by the Third Circuit Court of Appeals.

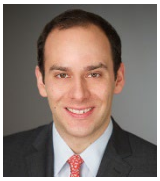
Click Here to read Opinion.

that creditor's shoes and may be able to bring and prosecute an otherwise time-barred avoidance action if the limitations period under the applicable law is longer than the one available under traditional state law fraudulent avoidance statutes. Trustees have thus sought to rely on section 544(b) of the Bankruptcy Code to benefit from the 10-year limitations period applicable to the IRS under the Internal Revenue Code to bring actions to collect unpaid tax assessments, as did the trustee here. *See id*. at 1-2. The use of a governmental unit as a "golden" creditor for such purposes remains controversial.

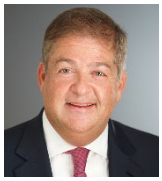
In J&M Sales, the trustee argued that he could rely on the IRS as a "golden" creditor under section 544(b) even though the IRS had not filed a proof of claim in that case. *See id.* at *2. The objecting defendants maintained that because section 544(b) of the Bankruptcy Code specifically refers to the claims allowance provision in section 502 of the Bankruptcy Code, a creditor must have filed a proof of claim or be excused from doing so to hold an "allowable" claim and qualify as a "golden" creditor. *See id.* The Bankruptcy Court agreed with the defendants. It held that "[s]ince the IRS did not file a proof of claim (or even an informal proof of claim) and the Debtors did not schedule an IRS claim, [the trustee could not] rely on the IRS as a predicate creditor for purposes of pursuing fraudulent conveyance claims beyond the four-year lookback period provided in [the otherwise applicable state fraudulent transfer statute.]" *Id.* at 4.

Click Here to read Order.

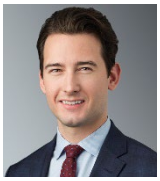
Questions? Please contact any of our Restructuring Partners to discuss these or other topics in greater depth.



Jacob A. Adlerstein
+1-212-373-3142
jadlerstein@paulweiss.com



Paul M. Basta
+1-212-373-3023
pbasta@paulweiss.com



Brian Bolin
+1-212-373-3262
bbolin@paulweiss.com

Robert A. Britton
+1-212-373-3615
rbritton@paulweiss.com

Kelley A. Cornish
+1-212-373-3493
kcornish@paulweiss.com

Alice Belisle Eaton
+1-212-373-3125
aeaton@paulweiss.com

Brian S. Hermann
+1-212-373-3545
bhermann@paulweiss.com

Christopher Hopkins
+1-212-373-3334
chopkins@paulweiss.com

Kyle J. Kimpler
+1-212-373-3253
kkimpler@paulweiss.com

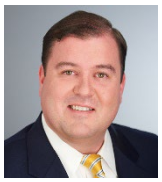
Alan W. Kornberg
+1-212-373-3209
akornberg@paulweiss.com

Elizabeth R. McColm
+1-212-373-3524
emccolm@paulweiss.com

Andrew M. Parlen
+1-212-373-3141
aparlen@paulweiss.com

Andrew N. Rosenberg
+1-212-373-3158
arosenberg@paulweiss.com

Jeffrey D. Saferstein
+1-212-373-3347
jsaferstein@paulweiss.com



John Weber
+1-212-373-3656
jweber@paulweiss.com

Kenneth S. Ziman
+1-212-373-3733
kziman@paulweiss.com