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THE LAW OF CLASS ACTIONS AND OTHER AGGREGATE LITIGATION

THIRD EDITION

by

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The headings in this Table of Contents are keyed to the original Table of Contents in The Law of Class Actions and Other Aggregate Litigation (Third Edition). This Table of Contents references only the sections with changed content.

A. The Significance of the Class Certification Decision

2. Significance for Defendants

On page 76, please substitute the following for the last paragraph of Note 9:

The Supreme Court applied *Spokeo*'s concrete harm requirement in *TransUnion LLC v. Ramirez*, 2021 WL 2599472 (U.S. S. Ct. June 25, 2021). The *TransUnion* class consisted of 8,185 individuals, all of whom were incorrectly flagged as potential "terrorists, drug traffickers, or other serious criminals" in their TransUnion credit reports. *Id*. at *4-*5. The class plaintiffs alleged violations of the Fair Credit Reporting Act. The case went to trial and the class recovered a jury verdict for statutory and punitive damages. The Ninth Circuit affirmed the judgment after reducing the punitive damages component, holding in particular that all class members had standing to recover damages on all the claims. *Id*. at *5. The Supreme Court reversed.

The Court first insisted that "*every* class member must have Article III standing in order to recover individual damages." See *id*. at *10 (emphasis added). It relied on an earlier concurrence by Chief Justice Roberts as authority for this proposition. See *Tyson Foods, Inc. v. Bouaphakeo*, 577 U. S. 442, 466 (2016) (Roberts, C.J., concurring) ("Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not."); cf. Theane Evangelis & Bradley J. Hamburger, *Article III Standing and Absent Class Members*, 64 Emory L.J. 383, 387 (2014) (noting that "the courts of appeals are divided on whether absent class members must also satisfy Article III" but arguing that absent class members must satisfy standing requirements).

The Court then concluded that while 1,853 class members had standing to recover damages (on one of the claims), 6,332 class members failed to show the type of "concrete harm" required by Article III. See *TransUnion*. at *10-*11. These 6,332 class members could not show reputational harm because TransUnion never disseminated their credit reports to third parties during the class period. Nor did they (or any other class members, except possibly the named plaintiff) show any harm from TransUnion sending deficient credit reports to them. *Id*. at *11-*15.

The Court made clear, however, that it was not opining on the standing requirements for class certification: "We do not here address the distinct question whether every class member must demonstrate standing *before* a court certifies a class." *Id*. at *10 n. 4 (emphasis in original); see *id*. at *16 (remanding with the suggestion that "the Ninth Circuit may consider in the first instance whether class certification is appropriate in light of our conclusion about standing.").

B. GENERAL REQUIREMENTS FOR CLASS CERTIFICATION

2. CLASS DEFINITION

On page 80, please add the following at the end of the section.:

The Eleventh Circuit has joined those courts disavowing the Third Circuit's heightened ascertainability requirement. *Cherry v. Dometic Corp*., 986 F.3d 1296, 1301-02, 1303-05 (11th Cir. 2021) (holding that class members are not required to prove an administratively feasible method of identifying individual class members in order to obtain class certification, but that "administrative feasibility" is relevant to manageability and should be balanced against other factors in determining 23(b)(3) superiority—although "administrative feasibility alone will rarely, if ever, be dispositive" of certification).

C. WHAT TYPE OF CLASS?

1. OPT-OUT CLASSES UNDER RULE 23

d. Putting the Rule 23(b)(3) Inquiry Together

On page 222, please add the following to the end of Note 1:

Settlement administration in NFL Concussion continues to date. As of July 18, 2022, the official website reported that the claims process had produced a total of $992,461,257 in payable monetary awards for 1425 former players. https://www.nflconcussionsettlement.com/Reports_Statistics.aspx.

One issue that generated intense controversy in administering the settlement has to do with the use of "race norming" in making baseline assessments of cognitive functioning. "Race-norming" is "an increasingly disputed practice in neuropsychology"; it comes into play when doctors test to determine if a person has a brain disease or cognitive impairment and "race is used as a rough proxy for other factors that can affect results in learning and memory tests, such as socioeconomic background and education." Will Hobson, *NFL Says It Will End Controversial Race-Norming in Concussion Settlement with Players,* WASH. POST, https://www.washingtonpost.com/sports/2021/06/03/nfl-concussion-settlement-race-norming/. In the NFL Concussion litigation, race-norming made it likely that an African-American player would receive a lower award than a white player for the same cognitive impairment.

While the NFL and class counsel claimed that "the use of race-norms was optional and ultimately the doctor's discretion," some doctors apparently "felt race-norms were mandated by the settlement's test battery." Hobson, *supra*. A group of players filed a lawsuit challenging the practice as discriminatory. Judge Brody dismissed the suit on the ground that it was "an improper collateral attack on the Settlement

Agreement." Order, *Henry v. National Football League*, C.A. No. 20-4165, (March 8, 2021). But she also ordered that "the NFL and Class Counsel Seeger Weiss—the original parties that drafted the Settlement Agreement—are referred to [a magistrate judge] to seek to address the concerns relating to the race-norming issue." *Id.*

In June 2021, the NFL agreed to eliminate the use of race-norming. Hobson, *supra*. Class counsel is also committed to its elimination. *Id.*

D. The Parameters of Judicial Inquiry in Class Certification

On page 334, please add the following to the end of Note 2:

The Supreme Court addressed price impact again in *Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System*, 2021 WL 2519035 (U.S. S. Ct. June 21, 2021) (holding that the defendant has the burden of persuasion to prove no price impact when rebutting a fraud-on-the-market presumption, and that the court must consider "all record evidence relevant to price impact," including the generic nature of alleged misrepresentations).

Chapter 4: The Coordination of Aggregate Litigation

B. Personal Jurisdiction over Defendants in Aggregate Litigation

1. Recent Developments in General and Specific Jurisdiction

On Page 556, please add the following at the end of the first paragraph as footnote *

When *Bristol-Myers* was decided, many lower courts read the Due Process Clause as generally barring specific jurisdiction unless the defendant's purposeful contacts with the forum state had created a causal relationship between the claim and forum state. See, e.g., *O'Connor v. Sandy Lane*, 496 F.3d 312, 318–323 (3d Cir. 2007). But the Court's decision in *Ford Motor Co. v. Montana Eighth Judicial District Court*, 141 S. Ct. 1017 (2021), raises doubts about that understanding in at least some circumstances.

Ford contended that a state court may exercise specific jurisdiction "only if the defendant's forum conduct *gave rise* to the plaintiff's claims." *Ford*, 121 S. Ct. at 1026 (emphasis in original). Thus, the company argued, only the states in which Ford had sold the vehicles that had injured the plaintiffs and the states in which Ford had designed and manufactured the vehicles could exercise specific jurisdiction over the product-liability suits at issue. The Court rejected that argument, insisting that "none of our precedents has suggested that only a strict causal relationship between the defendant's in-state activity and the litigation will do." 141 S. Ct. at 1026. The

Court went on to hold that "when a company like Ford serves a market for a product in the forum State and the product malfunctions there," the company is subject to specific jurisdiction in that state *even if* the defendant had nothing to do with delivery of the product to the forum State. *Id.* at 1027.

In evaluating the reach of the Court's holding, keep in mind that the Court emphasized the extensiveness of Ford's contacts with the forum states, including advertising, selling, and servicing the same car model in those states. The Court did not explain whether its holding would have been the same if the defendant had had less extensive contacts.

2. The Effect of Recent Developments on Mass Actions and Class Actions

On Page 558, please substitute the following for footnote †:

In *Mallory v. Norfolk Southern Railway. Co.*, 600 U.S. ___, 2023 WL 4187749 (June 27, 2023), the Court held that the Due Process Clause permits a state to exercise general jurisdiction over a corporation that has appointed an agent for service of process in the state pursuant to a registration statute, provided process is served on the corporate agent. Every state requires an out-of-state corporation doing business in the state to register with the state and appoint an agent for service of process in the state. See Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 Cardozo L. Rev. 1343, 1363-66 (2015). And some of these statutes have been construed as providing a basis for jurisdiction rather than simply a method of service. *Id.* at 1369-70.

In *Pennsylvania Fire Insurance Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917), the Court had held that service on an agent appointed pursuant to a registration statute provides a constitutionally sufficient basis for the exercise of what is now known as general jurisdiction. But whether this remained good law after *International Shoe* was a matter of debate. Once the Court decided *Daimler*, the cases began to trend decisively against the view that general jurisdiction on the basis of a registration statute is constitutional. Compare, e.g., *Genuine Parts Co. v. Cepec*, 137 A.3d 123 (Del. 2016) (construing registration statute as not authorizing jurisdiction to keep the statute within constitutional bounds), with *Sternberg v. O'Neill*, 550 A.2d 1105 (Del. 1988) (reaffirming the constitutionality of exercising general jurisdiction based on service of process on an agent appointed pursuant to the registration statute. The Pennsylvania Supreme Court followed that trend in *Mallory*, 266 A. 3d 542 (Pa. 2021). But the U.S. Supreme Court reversed, holding that "*Pennsylvania Fire* controls this case," *Id.* at *7.

Mallory appears to render irrelevant the *due process* limits *Bristol-Myers* and *Daimler* imposed on personal jurisdiction in states that treat the actual appointment of an agent for service of process pursuant to a registration statute as a basis for general jurisdiction. Indeed, the dissent complained that "[i]f States take up the Court's invitation to manipulate registration, *Daimler* and *Goodyear* will be obsolete, and, at least for corporations, specific jurisdiction will be 'superfluous.' " *Id*. at *28.

The Court, however, did not consider whether the exercise of jurisdiction in this case was consistent with the Commerce Clause. *Id.* at *3 n.3. Justice Alito, who provided the fifth vote for the Court's holding, expressed skepticism: "In my view, there is a good prospect that Pennsylvania's assertion of jurisdiction here—over an out-of-state company in a suit brought by an out-of-state plaintiff on claims wholly unrelated to Pennsylvania—violates the Commerce Clause." *Id.* at *18 (Alito, J., concurring). He explained:

> Under our modern framework, a state law may offend the Commerce Clause's negative restrictions in two circumstances: when the law discriminates against interstate commerce or when it imposes "undue burdens" on interstate commerce. . .
>
> There is reason to believe that Pennsylvania's registration-based jurisdiction law discriminates against out-of-state companies. But at the very least, the law imposes a "significant burden" on interstate commerce by "[r]equiring a foreign corporation ... to defend itself with reference to all transactions," including those with no forum connection.

Id. at *18-*19. *See also* John F. Preis, *The Dormant Commerce Clause as a Limit on Personal Jurisdiction*, 102 Iowa L. Rev. 121, 125 (2016) (arguing that the Commerce Clause "prohibits a state from subjecting a defendant to jurisdiction based on registration . . . where the lawsuit lacks any connection" with the state "because it impermissibly discriminates against interstate commerce and imposes an impermissible burden on interstate commerce.").

The Commerce Clause, in other words, arguably does not permit courts to exercise general jurisdiction based on service of process pursuant to a registration statute. Are you persuaded? Is it discriminatory for a state to impose the same jurisdictional burdens on an out-of-state corporation doing substantial *intrastate* business in the state as the state imposes on a domestic corporation doing the same quantum of business in the state? Does the failure to distinguish between domestic and out-of-state corporations in this regard impose an "undue burden" on interstate commerce? For discussion of the distinction between intrastate and interstate commerce in the Court's Commerce Clause jurisprudence, see Charles W. Rhodes & Cassandra Burke Robertson, *A New State Registration Act: Legislating a Longer Arm for Personal Jurisdiction*, 57 Harv. J. on Legis. 377, 405-08 (2020) (noting the significance of the distinction but nonetheless recommending that registration statutes not be drafted to authorize general jurisdiction).

For discussion of a second case decided after *Bristol-Myers* that may bear on the accuracy of the predictions in Justice Sotomayor's dissent in *Bristol Myers*, see the discussion of *Ford Motor Co. v. Montana Eighth Judicial District Court*, 141 S. Ct. 1017 (2021), in this supplement above.

Chapter 5: Multidistrict Litigation

C. AGGREGATE SETTLEMENTS

2. AGGREGATE SETTLEMENT VIA CONTRACTS WITH PLAINTIFFS' LAW FIRMS

b. The Prohibition Against Ex Ante Agreements for Non-Unanimous Consent

On page 701-06, please substitute the following for Note 1:

1. The American Law Institute's Proposal. As the *Tax Authority* court notes, considerable controversy has emerged in the scholarly literature over whether the aggregate settlement rule should be revised to permit ex ante agreements to abide by non-unanimous consent. What dangers would such waivers pose, if permitted? Section 3.17(b) of the Principles of the Law of Aggregate Litigation makes a proposal along these lines. See PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.17(b) (AM. LAW INST. 2010) (permitting ex ante agreement to abide by "a substantial-majority vote of all claimants concerning an aggregate-settlement proposal (or, if the settlement significantly distinguishes among different categories of claimants, a separate substantial-majority vote of each category of claimants)").

The Comments accompanying § 3.17(b) explain:

> Subsection (b) provides an alternative to the aggregate-settlement rule as a vehicle for finalizing aggregate non-class settlements. Subsection (b) departs from the current aggregate-settlement rule by providing that a waiver of individual approval may be valid and binding provided that it is knowingly and voluntarily made, is in writing, is signed by the claimants after full disclosure, and vests decisionmaking power in the claimants either collectively or through some preestablished voting structure.
>
> Waivers of important rights are valid in a variety of areas, including the most cherished of constitutional rights. Subsection (b) rejects the view that individual decisionmaking over the settlement of a claim is so critical that it cannot be subject to a contractual waiver in favor of decisionmaking governed by substantial-majority vote. To that end, subsection (b) proposes a contractual-waiver mechanism for settling aggregate cases, while subsection

(a) reaffirms that the aggregate-settlement rule remains the default mechanism for aggregate settlement.

Although an aggregate settlement may be binding on a claimant, the claimant remains free to terminate the attorney-client relationship. Subsection (b) does not change existing law governing a claimant's right to pursue malpractice or breach-of-fiduciary-duty claims against his attorney. Further, subsection (f) emphasizes that the risk of improper inducement into an aggregate settlement falls with claimants' counsel.

Current law prohibits waiving individual-claimant settlement decisionmaking, thereby empowering individual holdout claimants to exercise control over a proposed settlement and to demand premiums in exchange for approval. Moreover, in many instances, multiple claimants derive substantial benefits from joint representation by one lawyer or law firm, particularly one with expertise and stature in the particular area of law in which the claimant's claims arise. To the extent that reasonable aggregate settlements—achieved after good-faith, arm's-length negotiations and independent review—cannot go forward because one claimant (or a small number of claimants) objects, the other claimants lose the benefit of the collective representation. Indeed, there are numerous reported cases invalidating collective settlements for noncompliance with the aggregate-settlement rule. Even the threat of such a holdout may cause the defendant to withhold the premium associated with complete peace, thereby inuring to the detriment of all the represented claimants. Subsection (b) sets out an alternative mechanism for settling an aggregate lawsuit in certain circumstances, provided that specific safeguards, as described in subsections (b) through (e), are in place.

In form, agreements subjecting group settlements to a substantial-majority rule may be agreements solely between or among clients or agreements between or among clients that also include their attorneys. The form of agreement may affect the governing law, the revocability of the agreement, or other matters. Subsection (b) assumes that the Restatement Third of the Law Governing Lawyers—which sets limits on lawyer-client agreements—applies to agreements subjecting group settlements to a substantial-majority rule, even when the agreements are nominally client-client agreements rather than client-lawyer agreements. The assumption is especially warranted when the lawyer acting for a group of clients is involved in the creation of the agreement. Subsection (b) further assumes that the existence of an agreement does not obviate the lawyer's duty of faithful representation, nor does it act as a prohibition on subsequent challenges to the attorney's discharge of his or her duties.

Four requirements must be satisfied for an agreement under subsection (b) to be valid:

(1). Power to settle must remain with claimants. Subsection (b)(1) recognizes that, under prevailing ethics rules, a lawyer may not obtain a nonrevocable assignment of the client's individual authority to decide whether to settle a case and for what amount. Consequently, the authority to settle without complying with the aggregate-settlement rule is *not* given to counsel but, instead, remains with the collective claimants, who may act to accept a settlement pursuant to a waiver only upon agreement of a substantial majority of the claimants who are covered by the proposed settlement (or a substantial majority of the claimants in each significant settlement category).

(2). Informed-consent requirement for a waiver of individual-claimant decisionmaking. As stated in subsection (b)(2), a waiver under subsection (b) is valid only when the claimant gives informed consent. Because the decision to settle is fundamental, when agreements encumbering control of settlement are made, clients must be fully informed. The amount of information required for informed consent depends on the facts of the case. In some cases, the lawyer may wish to discuss with the claimant the substantial benefit the claimant may potentially receive from the lawyer's ability to represent the claimant more effectively as a result of the waiver. The lawyer must discuss with the claimant the potential material disadvantages that could result from agreeing to such a waiver. Informed consent also requires advising the client (or prospective client) of the desirability of seeking the advice of other counsel before executing a waiver, and the client must be given a reasonable opportunity to do so. The affording of such an opportunity to seek independent legal counsel tends to indicate that the lawyer did not apply improper pressure to the client and that the client was given time to consider the implications of the agreement.

(3). Procedures for settlement approval. An agreement under subsection (b) must specify the procedures for approval of any settlement offer by participating claimants. Claimants may, but are not required to, exercise their collective decisionmaking power to select an independent agent to represent the best interests of the claimants, provided that the agent is not affiliated with claimants' counsel. Although claimants must be fully informed when subjecting their control of the settlement decision to majority rule, they need not know, and typically will not know, the terms of a proposed settlement when doing so. To reduce uncertainty regarding the allocation of settlement proceeds, claimants may, but are not required to, agree on an allocation plan when providing for substantial-majority rule. For example, they may agree that a settlement fund will be divided pro rata on the basis of each claimant's monetary loss. They may also specify that each claimant will receive at least a specified sum or a specified percentage of the recovery. When the allocation mechanism is unresolved at the time of proposed settlement, counsel for the participating claimants should normally provide

> for a disinterested neutral to oversee the allocation of settlement proceeds to the settling claimants.
>
> *(4). Disclosure of alternatives.* Subsection (b)(4) requires that the lawyer inform claimants that they have the option of insisting upon compliance with the aggregate-settlement rule under subsection (a) as an alternative to the approach under subsection (b), and that a lawyer may not terminate an existing representation because the claimant elects an approach under subsection (a) rather than under subsection (b). This requirement ensures that claimants' choices about how to structure settlements are freely made, and is designed to eliminate any possibility that a claimant may feel improperly pressured to follow the approach in subsection (b) in order to secure his or her preferred choice of counsel. Those who elect to proceed under subsection (a) rather than subsection (b) remain free to negotiate their own individual settlements. Subsection (b)(4) also ensures that the decision about whether, when, and how to settle remains with the claimants rather than the lawyer. In addition, subsection (b)(4) requires lawyers who are simultaneously representing separate groups of claimants under subsection (a) and subsection (b) to inform claimants represented under subsection (a) of their power to refuse the settlement after its terms are disclosed.
>
> Subsection (b) does not prevent counsel from refusing to represent claimants who choose representation under subsection (a); however, if a legislature finds, after adopting the approach of subsection (b), that claimants choosing representation under subsection (a) are consistently unable to secure representation, it may choose to prohibit counsel from refusing to represent claimants solely because such claimants opt for representation under subsection (a).

Id. § 3.17 cmt. b, at 265–68.

Does the ALI put forward a convincing case for change? Or would such an approach only further advantage large, well-capitalized plaintiffs' law firms in mass litigation?

The State of West Virginia has adopted a version of the ALI's recommendation. It permits individual clients to enter into an allocation agreement through their shared lawyer where they agree to be bound by a super-majority (75%) vote. Before they vote, they must give informed consent in writing and the attorney must disclose that the clients (not the lawyer) have the authority to accept or reject the settlement. Finally, to ensure fairness, the shared attorney must get the court to approve the settlement and her fees and expenses. W. VA. RULES OF PROF'L CONDUCT, R. 1.8 cmt. 17. How might the judge obtain the information to decide whether the agreement is fair? Should the stage of litigation matter? What if the attorney negotiates the agreement before the judge has ever ruled on a motion that goes to the merits of the litigation?

In the massive *In re Opiate* MDL, lead lawyers put forth a proposal that mirrors § 3.17, but applies it in the class-action context. Joe Rice, whom you might recall from the *Amchem* and *Ortiz* settlements, chairs the negotiating committee and is co-lead counsel in the litigation, which is comprised principally of cities and counties as plaintiffs. The proposal differs markedly from typical class-settlement negotiations where class counsel negotiates a deal with the defendants and then seeks preliminary court approval. In contrast, the proposal sets up a structure for negotiations on behalf of the class and binds class members in advance to the result of the negotiation subject to an aggregate voting protocol. In particular, it binds all class members to a supermajority vote approving an aggregate settlement and does so before the settlement is negotiated. A class member can opt out if she doesn't want to be bound in this way, but only before knowing the result. The approach is based on a paper by Professors Francis McGovern and William Rubenstein. (Professor McGovern was a special master in the *Opiate* MDL at the time.) Francis E. McGovern & William B. Rubenstein, *The Negotiation Class: A Cooperative Approach to Class Actions Involving Large Stakeholders*, 99 Tex. L. Rev. 73 (2020).

What would this novel approach accomplish that aggregating through an MDL and appointing a leadership committee would not? Who is included in the class—only cities and counties that have sued or all cities and counties in the United States that do not opt out? The lead lawyers contend that the procedure aligns with *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) and that, even if it could not be certified as a plenary class, it would meet the requirements for issue-class certification:

> Here, the issue is not one of a common question of conduct or liability, nor the actual adjudication, on the merits, of any claim or issue . . . . Rather, it is a common issue of process: how to establish a procedural mechanism that provides integrity and inclusiveness to the process of settlement consideration and approval.

Plaintiffs' Memorandum in Support of Certification of Rule 23(b)(3) Cities/Counties Negotiation Class, at 69, *In re Nat'l Prescription Opiate Litig.*, No. 17–md–2804 (N.D. Ohio June 14, 2019). Do you agree that the proposal complies with *Amchem*? For an argument that it does not, see Jay Tidmarsh, *The Negotiation Class Action*, Jotwell, Nov. 13, 2019, https://courtslaw.jotwell.com/the-negotiation-class-action/.

After the district court certified the negotiation class in September of 2019, *In re Nat'l Prescription Opiate Litig.*, 332 F.R.D. 532 (N.D. Ohio 2019), a number of the defendants and state attorneys general raised concerns about state sovereignty, allocation of funds, and potentially excessive attorneys' fees. Those opposed to the negotiation class appealed to the Sixth Circuit, objecting that the class was out of step with Supreme Court precedent on class actions, unauthorized by Rule 23, and failed to ensure adequate representation for all class members.

Focusing on the text of Rule 23 rather than the broader concerns raised by opponents, the Sixth Circuit reversed Judge Polster's order in September 2020. *In re Nat'l Prescription Opiate Litig.*, 976 F.3d 664 (6th Cir. 2020). It explained:

> However innovative and effective the addition of negotiation classes would be to the resolution of mass tort claims—particularly those of grave social consequence—we are to be 'mindful that the Rule as now composed sets the requirements [courts] are bound to enforce,' and we 'are not free to amend a rule outside the process Congress ordered.'

Id. at 676 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997)). The Sixth Circuit also denied the petition for en banc rehearing. Order, *In re Nat'l Prescription Opiate Litig.*, No. 19-4097/19-4099 (6th Cir. Dec. 29, 2020).

Chapter 6: Other Modes of Aggregation

B. REORGANIZATIONS IN BANKRUPTCY

2. THE INTERSECTION OF § 524 REORGANIZATIONS AND CLASS SETTLEMENTS

On Page 790, please add the following Note after the last paragraph:

7. The Texas Two-Step. As corporate defendants have grown frustrated with the inability to achieve global peace through multidistrict litigation, creative lawyers have begun to push at the seams of bankruptcy to do what a federal MDL cannot: resolve all related state and federal claims, as well as future claims.

Enter then the "divisional merger," a technique that typically has been invoked under Texas law by corporate defendants seeking to shed mass-tort liabilities—thus the term "Texas Two-Step." (This technique is also permitted in Arizona, Delaware, Kansas, and Pennsylvania.) In simple terms, a company first uses authority granted by statute to divide itself into two new companies: "GoodCo," which receives all the company's assets and operating business, and "BadCo," which inherits all the mass-tort liability plus a funding agreement saying that GoodCo will foot the bill for BadCo's tort obligations. Second, BadCo files for Chapter 11. Ralph Brubaker, *Assessing the Legitimacy of the "Texas Two-Step" Mass-Tort Bankruptcy*, 42 Bankr. L. Ltr. 1 (Aug. 2022).

Circuit courts are divided on when BadCo can legitimately use bankruptcy.

In January 2023, for example, the Third Circuit reversed Johnson & Johnson's move to spin off its liability to talc claimants (who alleged that talc, possibly containing asbestos, caused ovarian cancer) into BadCo, LTL Management LLC. GoodCo, Johnson & Johnson Consumer Inc., held all of the valuable consumer products like Band-Aid, Tylenol, and Listerine. When the Official Talc Claimants moved to dismiss BadCo's bankruptcy petition as not filed in good faith, the Third Circuit held that financial distress is ordinarily a prerequisite to a finding of good faith:

[T]he good-faith gateway asks whether the debtor faces the kinds of problems that justify Chapter 11 relief. Though insolvency is not strictly required, and "no list is exhaustive of all the factors which could be relevant when analyzing a particular debtor's good faith," *SGL Carbon*, 200 F.3d at 166 n.16, we cannot ignore that a debtor's balance-sheet insolvency or insufficient cash flows to pay liabilities (or the future likelihood of these issues occurring) are likely always relevant. . . .

The takeaway here is that when financial distress is present, bankruptcy may be an appropriate forum for a debtor to address mass tort liability. Our *SGL Carbon* decision specifically addressed this in distinguishing the financial distress faced by Johns-Manville in its Chapter 11 case. It was prompted by a tide of asbestos litigation that, but for its filing, would have forced the debtor to book a $1.9 billion liability reserve "trigger[ing] the acceleration of approximately $450 million of outstanding debt, [and] possibly resulting in a forced liquidation of key business segments." *In re Johns-Manville Corp.*, 36 B.R. 727, 730 (Bankr. S.D.N.Y. 1984). That created a "compelling need [for the debtor] to reorganize in order to meet" its obligations to creditors. *Id.* This urgency stood in stark contrast to the circumstances in *SGL Carbon*, where the debtor faced no suits, or even liquidated judgments, that threatened its ongoing operations.

[In the DES cases,] A.H. Robins Company, before its bankruptcy, faced financial woes like Johns-Manville's, in both cases caused by mass product liabilities litigation. Before filing, Robins had only $5 million in unrestricted funds and a "financial picture . . . so bleak that financial institutions were unwilling to lend it money." *In re A.H. Robins Co., Inc.*, 89 B.R. 555, 558 (Bankr. E.D.V.A. 1988). The Court concluded Robins "had no choice but to file for relief under Chapter 11." *Id.*

And in Dow Corning's Chapter 11 case, the Court described the company's resolve to address mass tort liability as "a legitimate effort to rehabilitate a solvent but *financially-distressed* corporation." *In re Dow Corning Corp.*, 244 B.R. 673, 676-77 (Bankr. E.D. Mich. 1999) (emphasis added). It specifically recognized that "the legal costs and logistics of defending the worldwide product liability lawsuits against the [d]ebtor threatened its vitality by depleting its financial resources and preventing its management from focusing on core business matters." *Id.* at 677.

These cases show that mass tort liability can push a debtor to the brink. But to measure the debtor's distance to it, courts must always weigh not just the scope of liabilities the debtor faces, but also the capacity it has to meet them. . . .

> [W]e cannot agree LTL was in financial distress when it filed its Chapter 11 petition. The value and quality of its assets, which include a roughly $61.5 billion payment right against J&J and New Consumer, make this holding untenable. . . .
>
> It is hard to imagine a scenario where J&J and New Consumer would be unable to satisfy their joint obligations under the Funding Agreement. And, of course, J&J's primary, contractual obligation to fund talc costs was one never owed to Old Consumer (save for the short moment during the restructuring that it was technically a party to the Funding Agreement).
>
> Yet the Bankruptcy Court hardly considered the value of LTL's payment right to its financial condition. . . . Finally, we cannot help noting that the casualness of the calculations supporting the Court's projections engenders doubt as to whether they were factual findings at all, but instead back-of-the-envelope forecasts of hypothetical worst-case scenarios. Still, to the extent they were findings of fact, we cannot say these were inferences permissibly drawn and entitled to deference. *See Universal Mins.*, 669 F.2d at 102. Hence, they were clearly erroneous.

In re LTL Management, LLC, 64 F 4th 84, 102-07 (3d Cir. 2023).

Approximately two hours after the Third Circuit's decision, LTL filed for bankruptcy a second time. The filing (1) proposed $8.9 billion settlement of the talc claims (which LTL claimed had more support from talc claimants) and (2) relied on a new funding agreement between J&J and LTL that was less favorable to LTL than the funding agreement at issue in the bankruptcy filing rejected by the Third Circuit. Opponents of the plan say, among other things, that Johnson & Johnson simply created the illusion of widespread support. Dietrich Knauth, *Cancer Plaintiffs Drill Down on J&J's Support for $8.9 billion Talc Settlemen*t, Reuters (June 29, 2023, 4:54 AM).

The tort claimants' committee immediately asked the judge to dismiss the second filing, which he refused to do, and the Third Circuit denied a mandamus petition seeking to compel the bankruptcy judge to summarily dismiss. *See* LTL Management LLC, 2023 WL 3136666 (D.N.J. Bankr. Apr. 27, 2023). Whether to confirm the new bankruptcy plan came before the bankruptcy court in late June 2023. The bankruptcy court has not issued an opinion as of July 10, 2023.

The Fourth Circuit, where LTL's bankruptcy was initially filed before it was transferred to New Jersey, relied on a dramatically different analysis in *In re Bestwall, LLC*, 2023 WL 4066848 (4th Cir. June 20, 2023), than did the Third Circuit in *LTL*. In *Bestwall*, Georgia-Pacific (GoodCo), which makes tissue and packaging materials, spun off its asbestos liability into Bestwall, LLC (BadCo), which filed for Chapter 11 in the Western District of North Carolina a month later. BadCo then requested a preliminary injunction to prevent third parties from pursuing asbestos-related personal injury lawsuits that would be protected by a channeling injunction in its Chapter 11 plan.

The committee of asbestos claimants appealed the bankruptcy court's decision to grant the preliminary injunction, arguing that the bankruptcy court lacked jurisdiction to enjoin non-bankruptcy proceedings against GoodCo, which teed up an issue similar to that raised in *LTL*.

The Fourth Circuit has adopted the most stringent standard for a bad-faith filing, which provides that "even if subjective bad faith in filing [can] properly be found, dismissal is not warranted if [objective] futility cannot also be found." *Carolin Corp. v. Miller*, 886 F.2d 693, 701 (4th Cir. 1989). In other words, objecting parties must show both subjective bad faith and objective futility of any possible reorganization.

In *Bestwall*, the Fourth Circuit held that complaining parties showed neither bad faith nor objective futility. Instead, they "appear to be using their jurisdictional arguments as a back-door way to challenge the propriety of the reorganization and merits of a yet-to-be-filed chapter 11 plan."

Notably, Judge Robert King dissented in part:

> The majority rightly explains that the Third Circuit's 2023 decision in *LTL Management* concerning the propriety of LTL's bankruptcy petition is distinguishable here—the *LTL* case did not consider or discuss the bankruptcy court's jurisdiction to halt tort claims against a non-debtor. Ultimately, the court of appeals directed that LTL's petition be dismissed, as the company was never truly in financial distress. . . . [W]hile the two bankruptcy cases have charted different paths, the Johnson & Johnson proceedings underscore the very point at issue here—a healthy corporation's placement of a liability-laden subsidiary into bankruptcy in order to avoid Chapter 11 reorganization for the balance of the healthy company is not guaranteed to result in smooth sailing. . . .
>
> In sum, I would squarely reject Georgia-Pacific's use of its 2017 restructuring—little more than a corporate shell game—to artificially invoke the jurisdiction of the bankruptcy court and obtain shelter from its substantial asbestos liabilities without ever having to file for bankruptcy. The bankruptcy court's injunction was entered without any legitimate jurisdictional basis, and its effects run directly counter to the purposes of the Bankruptcy Code. In a pending Seventh Circuit case involving the efforts of a corporate subsidiary in Chapter 11 bankruptcy to spare its parent company from continued product liability litigation, a well-reasoned amicus submission explains that "the Bankruptcy Code has increasingly been manipulated by solvent, blue-chip companies faced with mass tort liability" that, "[t]hrough dubious readings of the Bankruptcy Code that Congress

> never intended ... have invented elaborate loopholes enabling them to pick and choose among the debt-discharging benefits of bankruptcy without having to subject themselves to its creditor-protecting burdens." *See In re Aearo Techs., LLC*, No. 22-2606, at 3-4 (7th Cir. Feb. 1, 2023), ECF No. 89. Such is the essence of these proceedings—and the core of the reason why the district court's judgment should be reversed, the bankruptcy court's injunction vacated, and this matter remanded for further proceedings.

In re Bestwall, LLC, at *18. On July 5, 2023, the asbestos claimants committee asked the full Fourth Circuit to reconsider the decision.

Finally, the Seventh Circuit is currently considering a bankruptcy stemming from the MDL over 3M's military earplugs. Although not formally a divisional merger, 3M's subsidiary, Aearo Technologies LLC, filed for bankruptcy in the Southern District of Indiana in an attempt to circumvent the nation's largest MDL. Drawing on the Third Circuit's logic in Johnson & Johnson's LTL case, the bankruptcy judge presiding over the Aearo bankruptcy dismissed the filing. Aearo had unlimited backing from its parent company, 3M, thus there was no valid financial distress, and the company was unable to demonstrate a valid reorganization purpose. Order Dismissing Bankruptcy Cases, *In re Aearo Technologies LLC*, No. 22-02890-JJG-11 (S.D. Ind. Bankr. June 9, 2023). As of July 10, 2023, the Seventh Circuit has not issued a ruling.

What do these cases suggest about the vitality of corporate defendants using the Texas Two-Step and bankruptcy as a shield to mass-tort liability?

Chapter 7: Aggregation Meets Arbitration

C. CLASS-WIDE ARBITRATION

On page 835, please add the following at the end of note 3:

After the election of President Joseph Biden, however, the executive branch's attitude toward "forced arbitration" shifted yet again. In 2022, the Biden Administration issued a "Statement of Administration Policy" declaring support for the "Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act" which was then working its way through Congress, and also expressing the hope of "working with the Congress on broader legislation that addresses these issues as well as other forced arbitration matters, including arbitration of claims regarding discrimination on the basis of race, wage theft, and unfair labor practices." The House and Senate passed the Act in February 2022, and President Biden signed it into law on March 3, 2022. See *Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021*, Pub. L. No. 117-90 (117th Cong., 2d Sess.). The statute allows sexual assault and sexual harassment claimants to bring their assault and harassment claims in court and to do so through a "joint, class, or collective action"—even when those claimants would otherwise be subject to pre-dispute arbitration agreements and/or joint-action waivers. In particular, Section 402 of the Act states:

> Notwithstanding any other provision of this title, at the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute, or the named representative of a class or in a collective action alleging such conduct, no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute."

The statute applies prospectively to "any dispute or claim that arises or accrues after" March 3, 2022.

On page 839, please add the following at the end of note 6:

But see *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 (2022).