

Litigation

WWW.NYLJ.COM

VOLUME 260—NO. 10

MONDAY, JULY 16, 2018

A Field Guide To Channeling Injunctions And Litigation Trusts

GARY SVIRSKY,
TANCRED SCHIAVONI,
ANDREW SORKIN, AND
GERARD SAVARESE

Mass-tort product liability cases are particularly difficult to resolve because there are few adequate procedural devices to ensure finality through settlement. Parties interested in resolving mass-tort litigation often overlook that channeling injunction protections are not just available to debtors. In many contexts, non-debtors too can benefit from the same channeling injunction protections as settling non-debtors.

A court-approved channeling injunction can direct—or channel—tort claims to a litigation trust funded by participating parties. Claimants must then look exclusively to the trust assets to satisfy their claims, which can provide them with an



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efficient claims-evaluation process that typically does not require the level of proof they would need to satisfy in court. At the same time, the channeling injunction and trust insulate debtors, certain non-debtor defendants, and other participants from known current and future

claims. Bankruptcy Code Section 105 (and Section 524(g) for asbestos bankruptcies) grants a court broad powers to establish such trusts and issue injunctions that channel claims against debtor and non-debtors with a sufficient unity of interest.

GARY SVIRSKY and TANCRED SCHIAVONI are litigation partners at O'Melveny & Myers. ANDREW SORKIN is counsel in the firm's restructuring practice and GERARD SAVARESE is an associate in the litigation department.

As the chart below shows, this device has been used in various mass-tort product liability cases, ranging from diet pills to portable gas canisters, delivering finality not just to debtors but to others in the product’s distribution chain. Recently, this device was employed in the *Takata* bankruptcy to channel injuries alleged from defectively manufactured car airbag inflators:

Case	Product	Protected Non-Debtor
<i>Takata</i>	Air Bag Inflators	Automakers
<i>Blitz</i>	Gas Cans	Private Equity Investors, Retailers, Insurers
<i>Delaco</i>	Diet Pills	Drug Vendors, Distributors, Insurers
<i>Dow Corning</i>	Breast Implants	Doctors, Distributors

In many of these cases, the protected non-debtor’s alleged liability derived from the debtor’s, and its contribution to a settlement fund was important to the bankruptcy. These criteria are not as limiting as may at first appear. *Blitz*, for instance, presents a model for retailers sued based on a manufacturer’s defective product, while *Delaco* offers an example for defendants caught up in failed drug litigation. See *In re Biltz U.S.A.*, 11-13603, (Bankr. D. Del., Jan. 30, 2014); *In re The Delaco Co.*, 04-10899, (Bankr. S.D.N.Y. Feb. 17, 2006).

Pros and Cons of Plaintiffs and Defendants Participating in a Trust

Channeling injunctions come with strong potential upside for product liability defendants and plaintiffs alike. For defendants, the injunctions buy certainty, fixing claim values and eliminating the risk of runaway jury awards or punitive damages. They also protect against future risk. Because the injunction can funnel future claims to the trust, participants can avoid being blindsided by unforeseen claims. Even if a tort defendant is confident

in its defenses, channeling injunctions cut off the costs of defending weak or bogus claims (which nevertheless engender litigation costs). Similarly, channeling injunctions can help remove objectors, smoothing the way for a more efficient bankruptcy. Payments can be structured in different ways. Many mass-tort and asbestos bankruptcies have used economists to estimate funding levels

for future claims. That invariably leads to intra-expert battles. The *Takata* bankruptcy avoided this through a pay-as-you-go trust. While defendants did not get the comfort of an aggregate liability cap, they received other benefits (such as efficient claims resolution and specified claims values) and eliminated the need for a complex and expensive bankruptcy trial featuring dueling economists and other assorted experts.

Plaintiffs too benefit from channeling injunctions. Critically, a channeling injunction allows plaintiffs to recover quickly, without protracted litigation, proof requirements, or personal testimony. Channeling injunctions also make it easier for claimants to pursue low-value claims that are difficult to prove in court. This can be especially useful in allowing tort committees to deliver value to their constituents—and plaintiffs’ lawyers—without estate-depleting litigation.

What Kinds of Claims Can be Channeled?

Claims that have been alleged against both debtor and qualifying

non-debtors as of the injunction date can be channeled. Future claims can also be channeled, which refers to claims based on injuries that may occur in the future: A defective product may not cause injury for years, but if defects were to emerge down the road, then any claims would be channeled.

There are, however, jurisdictional limitations on the bankruptcy court’s ability to channel claims against non-debtors. The claims against non-debtor must be “related to” the Chapter 11 case, requiring “unity of interest” between debtor and non-debtor third parties. See 28 U.S.C. §1334(b); *In re Combustion Eng’g, Inc.*, 391 F.3d 190, 230 (3d Cir. 2004), *as amended* (Feb. 23, 2005). Courts have found unity of interest when a judgment against the non-debtor would without further process result in debtor liability, such as when there is a contractual indemnification obligation to the non-debtor. See *W.R. Grace & Co. v. Chakarian*, 386 B.R. 17, 34–35 (Bankr. D. Del. 2008); *see also Pacor v. Higgins*, 743 F.2d 984, 995 (3d Cir. 1984).

Not all claims must be channeled, and not all defendants must participate. Claims that are not included in the trust (or, in debtor’s case, not discharged) could pass through bankruptcy unimpaired and back into the tort system. For example, the *Takata* plan channeled only personal injury and wrongful death claims against automakers while letting economic loss claims continue in the tort system. See *In re TK Holdings*, 17-11375-BLS, Dkt. No. 2120, (Bankr. D. Del. Feb. 21, 2017). Nor must all tort defendants participate. Non-debtors can opt out of the trust and take their chances in

court. But for the trust to be worth pursuing there should be a critical mass of participating defendants, with involvement from defendants with the highest exposure often a must for building consensus with plaintiffs.

Getting the Trust Up and Running

While it is possible to confirm a non-consensual channeling injunction, to channel claims against a non-debtor it is best to proceed consensually. So a first step is to get all stakeholders to the table. This includes debtors, participating non-debtors, tort claimants or their committees, insurance carriers with implicated

identity of trustee(s) or and claims processor. Typical procedures require plaintiffs to assert a claim to establish several specified criteria, which the administrator would then evaluate. There is no adversarial claim testing or supporting evidence. The administrator applies the pre-approved TDPs to assess the claim value and then pays out accordingly. Therefore, some claims that would typically not get paid in the tort system could recover from the trust.

With a trust structure in place, the parties look to the court to bind future claimants. Even a consensual trust and channeling injunction must pass muster with the bankruptcy court. Usually, channeling injunctions and trusts are embodied in a reorganization plan and considered as part of the confirmation process. In deciding whether to approve third-party releases and channeling injunctions, courts generally consider some variant of the five factors articulated in *In re Master Mortgage Investment Fund*, including whether (i) there is identity of interest between the debtor and third party, (ii) the third party made a substantial contribution to the trust, (iii) the injunction is essential to the bankruptcy, (iv) the impacted creditors support the injunction, and (v) the plan provides for paying substantially all claims. 168 B.R. 930, 935 (Bankr. W.D. Mo. 1994); *see also In re Zenith Electronics*, 241 B.R. 92 (Bankr. D. Del. 1999).

While channeling injunctions offer an opportunity to fix or limit a non-debtor's exposure to mass-tort liability, they are not a windfall—one should assume that the “substantial contribution” could be pegged to the estimated value of a solvent non-

debtor's claim exposure. Further, a court cannot approve an injunction that unlawfully impairs rights of parties that may not vote on the channeling injunction, *e.g.* insurers' contribution, indemnification, reimbursement, or subrogation rights may not be impaired. *See In re Pittsburgh Corning Corp.*, 453 B.R. 570, 611 (Bankr. W.D. Pa. June 16, 2011).

Final Thoughts

Channeling injunctions are not a panacea. Some product liability defendants may decide that the required contribution is too high and they may be willing to take whatever risks come in the tort system. Participating in a trust may also signal that there is a problem with defendants' product (even if that is not the case), which could send a bad message to customers, shareholders, lenders, suppliers, or regulators. In some cases, simply discussing a trust can sound like a dinner bell to plaintiffs attracted by what they may regard as easy money.

At the same time, injunctions are another option for resolving mass-tort claims and can provide the sort of certainty that a business needs. It can create the closure similar to that resulting from an approved settlement with a certified class. But at a cost. Product liability and tort defendants should carefully consider whether a channeling injunction is the best solution, and work closely with experienced counsel to generate alternatives, such as opt-ins and pay-as-you-go mechanisms.

A court-approved channeling injunction can direct—or channel—tort claims to a litigation trust funded by participating parties. **This device has been used in various mass-tort product liability cases, ranging from diet pills to portable gas canisters,** delivering finality not just to debtors but to others in the product's distribution chain.

policies, and the court-appointed future claimants' representative (or FCR).

There are many issues to negotiate, but the following are foundational: (i) trust distribution procedures (or TDPs) that set out the payment criteria, values, and process for evaluating claims; (ii) terms of the trust and funding sources; (iii) the channeling injunction's scope, which specifies the claims that will be channeled; (iv) the breadth of third-party releases; and (v)