

Pratt's Journal of Bankruptcy Law

LEXISNEXIS® A.S. PRATT®

JANUARY 2022

EDITOR'S NOTE: BANKRUPTCY DEVELOPMENTS

Steven A. Meyerowitz

UNDERSTANDING PAYMENT DISPUTES IN BANKRUPTCY BETWEEN PROJECT PARTICIPANTS DURING AND AFTER COMPLETION OF CONSTRUCTION PROJECTS

James P. Chivilo, Richard A. Bixter and Gregory R. Meeder

COURTS BEGIN INTERPRETING NEW DUE DILIGENCE REQUIREMENTS FOR TRUSTEES BEFORE FILING PREFERENCE ACTIONS

Gregory G. Hesse and Michael R. Horne

SUBSTANTIVE CONSOLIDATION AND NON-CONSOLIDATION OPINIONS

Kathryn M. Borgeson and Peter M. Dodson

SECOND CIRCUIT COURT OF APPEALS RULES NON-QUALIFIED PRIVATE STUDENT LOANS ARE DISCHARGEABLE

Benjamin Mintz and Brendan M. Gibbons

“TEXAS TWO STEP” CREATES UNIQUE RESTRUCTURING OPPORTUNITY—BUT NOT WITHOUT CHALLENGES

Jordan Chavez, Alex Kirincic and Cameron Scales

ARIZONA SIGNIFICANTLY ALTERS HOMESTEAD EXEMPTION AND JUDGMENT LIEN RULES

Gabriel M. Hartsell, W. Scott Jenkins, Jr., and Madison Stark

SOVEREIGN DEBT RESTRUCTURINGS IN LATIN AMERICA: A NEW CHAPTER

Ian Clark, Thomas MacWright, Brian D. Pfeiffer, Dimitrios Lyratzakis and Amanda Parra Criste

THE NEW CROSS-BORDER ARRANGEMENT BETWEEN HONG KONG AND MAINLAND CHINA ON INSOLVENCY AND RESTRUCTURING MATTERS—A COMPARISON WITH CHAPTER 15 OF THE U.S. BANKRUPTCY CODE

Naomi Moore, Abid Qureshi, Liz Osborne, Daniel Cohen, Jeremy Haywood and Jingli Jiang



LexisNexis

Pratt's Journal of Bankruptcy Law

VOLUME 18

NUMBER 1

January 2022

| | |
|--|----|
| Editor's Note: Bankruptcy Developments Steven A. Meyerowitz | 1 |
| Understanding Payment Disputes in Bankruptcy Between Project Participants During and After Completion of Construction Projects James P. Chivilo, Richard A. Bixter and Gregory R. Meeder | 4 |
| Courts Begin Interpreting New Due Diligence Requirements for Trustees Before Filing Preference Actions Gregory G. Hesse and Michael R. Horne | 10 |
| Substantive Consolidation and Non-Consolidation Opinions Kathryn M. Borgeson and Peter M. Dodson | 15 |
| Second Circuit Court of Appeals Rules Non-Qualified Private Student Loans Are Dischargeable Benjamin Mintz and Brendan M. Gibbons | 18 |
| "Texas Two Step" Creates Unique Restructuring Opportunity—But Not Without Challenges Jordan Chavez, Alex Kirincic and Cameron Scales | 21 |
| Arizona Significantly Alters Homestead Exemption and Judgment Lien Rules Gabriel M. Hartsell, W. Scott Jenkins, Jr., and Madison Stark | 24 |
| Sovereign Debt Restructurings in Latin America: A New Chapter Ian Clark, Thomas MacWright, Brian D. Pfeiffer, Dimitrios Lyratzakis and Amanda Parra Criste | 27 |
| The New Cross-Border Arrangement Between Hong Kong and Mainland China on Insolvency and Restructuring Matters—A Comparison with Chapter 15 of the U.S. Bankruptcy Code Naomi Moore, Abid Qureshi, Liz Osborne, Daniel Cohen, Jeremy Haywood and Jingli Jiang | 39 |

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please call:

Ryan D. Kearns, J.D., at 513.257.9021
Email: ryan.kearns@lexisnexis.com
Outside the United States and Canada, please call (973) 820-2000

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at (800) 833-9844
Outside the United States and Canada, please call (518) 487-3385
Fax Number (800) 828-8341
Customer Service Website <http://www.lexisnexis.com/custserv/>

For information on other Matthew Bender publications, please call

Your account manager or (800) 223-1940
Outside the United States and Canada, please call (937) 247-0293

Library of Congress Card Number: 80-68780

ISBN: 978-0-7698-7846-1 (print)

ISBN: 978-0-7698-7988-8 (eBook)

ISSN: 1931-6992

Cite this publication as:

[author name], [*article title*], [vol. no.] PRATT'S JOURNAL OF BANKRUPTCY LAW [page number] ([year])

Example: Patrick E. Mears, *The Winds of Change Intensify over Europe: Recent European Union Actions Firmly Embrace the "Rescue and Recovery" Culture for Business Recovery*, 10 PRATT'S JOURNAL OF BANKRUPTCY LAW 349 (2014)

This publication is designed to provide authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of RELX Inc. Matthew Bender, the Matthew Bender Flame Design, and A.S. Pratt are registered trademarks of Matthew Bender Properties Inc. Copyright © 2022 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved.

No copyright is claimed by LexisNexis or Matthew Bender & Company, Inc., in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
www.lexisnexis.com

MATTHEW  BENDER

Editor-in-Chief, Editor & Board of Editors

EDITOR-IN-CHIEF

STEVEN A. MEYEROWITZ

President, Meyerowitz Communications Inc.

EDITOR

VICTORIA PRUSSEN SPEARS

Senior Vice President, Meyerowitz Communications Inc.

BOARD OF EDITORS

SCOTT L. BAENA

Bilzin Sumberg Baena Price & Axelrod LLP

ANDREW P. BROZMAN

Clifford Chance US LLP

MICHAEL L. COOK

Schulte Roth & Zabel LLP

MARK G. DOUGLAS

Jones Day

MARK J. FRIEDMAN

DLA Piper

STUART I. GORDON

Rivkin Radler LLP

PATRICK E. MEARS

Barnes & Thornburg LLP

Pratt's Journal of Bankruptcy Law is published eight times a year by Matthew Bender & Company, Inc. Copyright © 2022 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner. For customer support, please contact LexisNexis Matthew Bender, 9443 Springboro Pike, Miamisburg, OH 45342 or call Customer Support at 1-800-833-9844. Direct any editorial inquiries and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway Suite 18R, Floral Park, New York 11005, smeyerowitz@meyerowitzcommunications.com, 631.291.5541. Material for publication is welcomed—articles, decisions, or other items of interest to lawyers and law firms, in-house counsel, government lawyers, senior business executives, and anyone interested in privacy and cybersecurity related issues and legal developments. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

POSTMASTER: Send address changes to *Pratt's Journal of Bankruptcy Law*, LexisNexis Matthew Bender, 230 Park Ave. 7th Floor, New York NY 10169.

“Texas Two Step” Creates Unique Restructuring Opportunity—But Not Without Challenges

*By Jordan Chavez, Alex Kirincic and Cameron Scales**

The authors discuss a strategy being used by more and more companies seeking to resolve mass liabilities in bankruptcy.

In the restructuring space, entities are utilizing a strategy dubbed the “Texas Two Step” to resolve mass liabilities through the bankruptcy process. The process involves converting a business entity into a Texas organization and subsequently splitting it into one or more separate entities, with the bulk of the tort or other liabilities allocated to one entity. Subsequently, the entity holding such liabilities enters Chapter 11 in an effort to achieve a global resolution of the claims.

WHAT IS A MERGER?

The Texas Two Step is made possible by the Texas Business Organizations Code, which defines a “merger” to include “the division of a domestic entity into two or more new domestic entities or other organizations.”¹ At its core, a divisive merger is similar to a traditional merger. The agreement and plan of merger must clearly identify the assets and liabilities allocated to each entity involved.²

The Texas Two Step has been utilized by several companies facing mass tort liabilities resulting from asbestos exposure.³ Companies such as Bestwall and Aldrich Pump LLC filed Chapter 11 after each was created using the divisive merger statute.

* Jordan Chavez, Alex Kirincic and Cameron L. Scales are associates in the Dallas office of Haynes and Boone, LLP. They may be contacted at jordan.chavez@haynesboone.com, alex.kirincic@haynesboone.com and cameron.scales@haynesboone.com, respectively.

¹ Tex. Bus. Orgs. Code Ann. § 1.002(55)(A) (2019).

² Tex. Bus. Orgs. Code Ann. § 10.003 (2006).

³ *Bestwall LLC v. Those Parties Listed on Appendix A to Complain and John and Jane Does 1-1000 (In re Bestwall LLC)*, 606 B.R. 243, 246–51 (Bankr. W.D.N.C. 2019); *DBMP v. Those Parties Listed on Appendix A to Complaint and John and Jane Does 1-1000*, Adv. No. 20-03004 (Bankr. W.D.N.C. Jan. 23, 2020); *Aldrich Pump LLC & Murray Boiler LLC v. Those Parties to Actions Listed on Appendix A to Complaint and John and Jane Does 1-1000 (In re Aldrich Pump LLC, et al.)*, Adv. No. 20-030401 (Bankr. W.D.N.C. June 18, 2020).

Similarly, DBMP LLC, another company facing asbestos liability, entered Chapter 11 after it was created by its predecessor entity upon confirmation of the predecessor's Chapter 11 plan, which included a divisional merger support agreement.⁴

The aforementioned cases are pending in the U.S. Bankruptcy Court for the Western District of North Carolina, and the debtors have faced certain challenges from the tort claimants' committees, including allegations that the divisive merger was a fraudulent transfer.

Notably, Texas law specifies that the property allocated to each entity vests without "any transfer or assignment having occurred."⁵ Nevertheless, the statute does not "abridge any rights or rights of any creditor under existing laws," including "the Uniform Fraudulent Transfer Act," which Texas has adopted.⁶

BESTWALL AND DBMP

In *Bestwall*, Judge Laura Beyer held "if a debtor used the Texas statute to commit a fraudulent transfer—creating the harm that the Committee complains of—such law would be available to address such acts."⁷

Relying on the *Bestwall* opinion, in *DBMP*, Judge Craig Whitley noted that, while the Bankruptcy Code does not preempt Texas law on divisional mergers, the Texas Two Step "appears" prejudicial to the rights of the claimants and "is subject to legal challenge." Further, Judge Whitley concluded that creditors seeking to challenge the divisive merger as fraudulent need to obtain derivative standing to bring such claims.

The most recent case with prospects of a divisive merger is the Imerys Talc bankruptcy. Currently, a motion for a preliminary injunction is pending in the case to prevent Johnson & Johnson from utilizing the Texas Two Step to restructure its talc liability.⁸

⁴ *In re DBMP LLC*, No. 20-30080 (Bankr. W.D.N.C. Jan. 23, 2020).

⁵ Tex. Bus. Orgs. Code Ann. § 10.008(a)(2)(C) (2015).

⁶ Tex. Bus. Orgs. Code Ann. §§ 24.001-24.013; *DBMP*, Adv. No. 20-03004, *Findings of Fact and Conclusions of Law* [Docket No. 972].

⁷ *Bestwall*, 606 B.R. at 252.

⁸ *Imerys Talc Am. v. Johnson & Johnson, (In re Imerys Talc Am., Inc., et al.)*, Case No. 19-10289, Adv. No. 21-51006 (Bankr. D. Del. 2021). Certain talc claimants also filed an action in Missouri state court seeking to prevent Johnson & Johnson from pursuing a Texas Two Step. Johnson & Johnson removed the action to federal district court in Missouri and filed a motion to dismiss for lack of personal jurisdiction. On September 1, 2021, the talc claimants filed a

In addition to arguing the requirements for a preliminary injunction are met, including that the public interest would be served by preventing a fraudulent transfer, the tort claimants’ committee also argued that a Texas Two Step would violate the automatic stay. The committee cited to the language in *Bestwall* and *DBMP* suggesting fraudulent transfer liability is possible if the elements of a fraudulent transfer are established. The case is pending before Judge Silverstein in bankruptcy court in Delaware, and she has taken the preliminary injunction matter under advisement.

CONCLUSION

In sum, the Texas Two Step presents an evolving strategy for companies to divide into multiple entities and potentially shield some assets from the bankruptcy process.

Nevertheless, the caselaw involving divisional mergers demonstrates that creditors still raise various challenges to this approach, and the courts facing these issues have not ruled out the potential for fraudulent transfer liability.

notice voluntarily dismissing the Missouri action. *Victoria Lynne Giese, et al. v. Johnson & Johnson, et al.*, Case No. 21-cv-01064 (E.D. Mo. 2021).