Johnson&Johnson

Statement of

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before the

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Chairman Durbin, Ranking Member Graham, and Members of the Committee, I am Erik Haas, and since November 2020 I have served as the World Wide Vice President of Litigation for Johnson & Johnson (J&J). In that capacity, I have oversight responsibility for J&J's litigations, including the bankruptcy cases filed by J&J's subsidiary LTL Management, LLC (LTL). It is an honor to appear before the Committee, and I thank you for the opportunity to respond to your inquiries today.

Mr. Chairman, you asked that we speak to LTL's recent bankruptcy filings, which were brought to effectuate an equitable and efficient resolution of mass tort litigation that had forced J&J's stand-alone consumer product subsidiary into a loss position in 2020. LTL's proposed bankruptcy resolution contemplated the payment of an unprecedented $8.9 billion to resolve all claims alleging that the subsidiary's talc powder products caused cancer. That unprecedented offer understandably was supported by the court-appointed mediators and counsel representing the vast majority of the talc claimants.[1] The offer also was supported by J&J, which agreed to provide a financial backstop for LTL's proposed bankruptcy resolution that—as the Third Circuit Court of Appeals recognized—*the company had no obligation to provide*.[2] Far from "evading accountability," as suggested by the title of this hearing, the proposed resolution would have afforded the talc claimants timely recourse and afforded them a stronger position than that available to them in the unpredictable and lengthy tort system.

Most significantly, the proposed bankruptcy resolution provided a potential recovery for *all* claimants, which was and is a result that cannot be achieved in the tort system. To start, J&J and its subsidiary have won the majority of cases tried in court, and most claimants received absolutely nothing from litigating in the tort system. The company has prevailed because the talc claims—contrived and fomented by the mass tort litigation plaintiffs' bar—are meritless. Those claims are refuted by decades of independent research and clinical evidence by medical experts around the world that support the safety of cosmetic talc, as well as the findings by FDA and other health agencies that cosmetic talc does not cause cancer. Further, trying the tens of thousands of talc cases filed as of the bankruptcy—let alone the thousands of additional cases threatened to be filed—would take more than 3,000 years. This impossibility means most claimants will never even

[1] *In re LTL Mgmt., LLC*, 652 B.R. 433, 439–40 (Bankr. D.N.J. 2023).
[2] *In re LTL Mgmt., LLC*, 64 F.4th 84, 111 (3d Cir. 2023).

have their claims heard in the tort system. Lastly, only bankruptcy provides tools that allow similarly situated but unknown future claimants the ability to participate in the resolution process and ensure their ultimate compensation. In other words, the proposed resolution through bankruptcy was and is the only way to provide all claimants with a timely and predictable recovery.

With the support of counsel representing the vast majority of claimants, there was a strong likelihood of securing the requisite vote in favor of LTL's plan. In most federal circuits, including in the Fourth Circuit where the case was commenced, the bankruptcy would have been allowed to proceed to a vote. Unfortunately, the claimants never had the opportunity to be heard. Instead, the case was transferred to the Third Circuit, where the appellate court adopted a novel standard not in the Bankruptcy Code that required the dismissal of the bankruptcy. It did so at the urging of mass tort lawyers representing a small minority of claimants who repeatedly espoused that they would never settle under any terms, as their business model is predicated on the possibility of winning a one-off jackpot verdict for which they will then claim 40% for their fees. This mass tort litigation business model is not in the best interests of the claimants, should not be dictating bankruptcy policy, and is a scourge facing U.S. companies today.

Constrained by the Third Circuit's newly announced standard, the Bankruptcy Court presiding over the LTL matter felt compelled to dismiss the case. In so doing, however, the Bankruptcy Court also felt equally compelled to state that LTL had made "remarkable progress" toward a "fair, efficient, and expeditious settlement," and "strongly encouraged" it to continue to pursue a global resolution—*through bankruptcy*.[3]

We respectfully submit that the Committee should support legislation to clarify that bankruptcy is an appropriate mechanism to effectuate the complete, equitable and efficient resolution of large mass tort litigation, such as the talc litigation.

The Mass Tort Litigation Business Model

J&J is the world's largest, most diversified healthcare products company. We are committed to using the full breadth of our history, our partnerships, our clinical and scientific expertise and our tireless commitment to patients to improve health outcomes around the world. Unfortunately, the primary threat we face in fulfilling that promise—and the greatest threat to the continued viability and prominence of many U.S. businesses—is the advent of excessive and meritless litigation, most notably mass tort litigation. There are two significant changes in law and rules governing litigation in the United States that have enabled the escalation of such litigation.

First, over the course of the last decade, courts have rolled-back restrictions on the ability of third parties to finance litigation. This has resulted in an extraordinary increase in the levels of litigation funding from private equity firms, hedge funds, traditional investment firms, and banks. Reports suggest that upwards of $2.3 billion to $5 billion per year is being invested by third party financiers in U.S. litigation.[4] Moreover, according to advisors to these funders, roughly 70% of

[3] *In re LTL Mgmt., LLC*, 652 B.R. at 455.
[4] Mark Popolizio, *Third-party Litigation Funding in 2022 -- Three Issues for Your Radar*, VERISK (Jan. 31, 2022), https://www.verisk.com/insurance/visualize/third-party-litigation-funding-in-2022-----three-issues-for-your-radar/.

this extraordinary funding is pouring into mass tort litigation.[5] This nearly boundless financing has fueled a mass tort litigation business model that starts with the lawyer contriving a theory of liability that is then used to solicit individuals to act as plaintiffs and to mislead the public who comprises the jury pools, the judiciary who adjudicates the claims and the legislatures that oversee the judicial process.[6] The sheer volume of financing reflects the extraordinary returns that the financed litigation has exacted from defendants, mainly U.S. businesses.[7]

Second, relaxation of ethical rules limiting attorney advertising is also driving the escalation in meritless filings. One need only drive down our nation's highways or turn on the television to see the explosion in attorney advertising, much of which makes false or misleading claims to solicit potential plaintiffs for mass tort actions. This advertising is funded by the litigation financiers, with the expectation of large payouts from the subsequent actions or settlements. These relentless media campaigns have generated extraordinary volumes of claims, which have swamped the nation's courts.[8] Right now, there are more than 400,000 claims pending in multi-district litigations (MDLs) alone.[9] More than 95% of these 400,000 claims are held in roughly 18 MDLs, all of which are mass tort litigations.[10] And this number does not account for the thousands of one-off lawsuits not coordinated in MDLs and pending in courts across the country, which according to reporting just last week have grown in number by nearly 90% in the last decade.[11]

The continual bombardment of TV, internet and other ads that demean the value of important FDA-approved medications and medical devices, among other consumer products, mislead people into making bad healthcare decisions, sometimes causing serious harm. Individuals relying on litigation-financed ad campaigns touting lawyer-contrived theories may forego the valid scientific testing required to ascertain the true cause of their malady (e.g., genetic history) or adopt less effective or more dangerous alternatives in lieu of appropriate treatments. In response to these concerns, the AMA and AARP have cautioned that fearmongering in lawsuit ads are "dangerous" (AMA) and have "frightened" patients into stopping critical care (AARP).[12]

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[5] WESTFLEET ADVISORS, THE WESTFLEET INSIDER: 2022 LITIGATION FINANCE MARKET REPORT 5–6 (2022) (referencing "portfolio" litigation, another term for mass tort litigation).

[6] *Asbestos Litigation,* THE TASC GROUP, https://www.thetascgroup.com/case-study/asbestos/ (reciting the mesothelioma plaintiff bar's communication strategy to "try these cases in the court of public opinion, bring public pressure to bear on the courts and shed light on the issue for political leaders and members of Congress to act to change the laws").

[7] U.S. GOV'T ACCOUNTABILITY OFF., GAO-23-105210, THIRD-PARTY LITIGATION FINANCING: MARKET CHARACTERISTICS, DATA AND TRENDS 22 (2022) ("For example, in 2021, one commercial funder reported a 93 percent return on invested capital on concluded assets since inception in one of its portfolios. Another commercial funder reported a 91 percent return on invested capital on completed investments in two of its funds since 2017.").

[8] Philip Goldberg, *How Mass Tort Litigation is Gaming the Judicial System,* BLOOMBERG LAW (Mar. 2, 2023), https://news.bloomberglaw.com/us-law-week/how-mass-tort-litigation-is-gaming-the-judicial-system; *see generally* LEX MACHINA, PRODUCT LIABILITY LITIGATION REPORT (2023).

[9] United States Judicial Panel on Multidistrict Litigation, *MDL Statistics Report – Distribution of Pending MDL Dockets by Action Pending* (Apr. 17, 2023), https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Actions_Pending-April-17-2023.pdf

[10] *Id.* As one commentator noted, "MDLs have grown considerably. There were 73 active MDLs in 2013—now there are 300, and 90% involve mass tort cases. Where earlier MDLs had a few dozen or hundreds of claimants, MDLs now regularly have thousands." Goldberg, *supra* note 8.

[11] LEX MACHINA, *supra* note 8, at 3.

[12] Press Release, Am. Med. Ass'n, AMA Adopts New Policies on Final Day of Annual Meeting (June 15, 2016), https://www.ama-assn.org/press-center/press-releases/ama-adopts-new-policies-final-day-annual-meeting; *Don't Let*

Yet the mass tort litigation plaintiffs' bar cites the mere existence and sheer volume of filings fomented by these advertising campaigns to suggest that the allegations asserted in the lawsuits have some legitimacy. The claims are allowed to proceed, resulting in coerced settlements to avoid litigation costs and aberrant verdicts, which the mass tort plaintiffs' bar argues justifies bringing even more actions that are not supported by scientific evidence. In the end, the cost of defending this vicious cycle of litigation is unsustainable, resulting in coerced settlements and the payouts upon which the third-party funders were betting. The cycle then continues, and if left unchecked, could place more and more U.S. businesses into a loss position.

The Mass Tort Litigation Business Model Created The Talc Litigation

The draconian consequences of the mass tort litigation business model are well illustrated by the proliferation of talc claims against the J&J subsidiary that operated its North American consumer products business—Johnson & Johnson Consumer Inc. (JJCI). In 2017, the mass tort litigation plaintiffs' bar brought a flood of lawsuits alleging that its 100+ year old talc products contain asbestos and cause cancer. The claims, which continue to grow in volume each year, were and are based on "junk science" presented by purported "experts" bought and paid by the plaintiffs' bar, which tout a false narrative about the alleged dangers of talc in advertisements they continue to run night and day.

These allegations are directly contrary to decades of scientific consensus from independent experts and regulatory agencies, as well as the robust talc testing protocols using the most sensitive methods that the company employed for years. To be clear: JJCI's talc products were and are safe, do not contain asbestos, and do not cause cancer. While we empathize with the individuals and their families who suffer from cancer, and understand the desire for answers, the company's talc products were not the cause of the cancer. The talc litigation is a disservice to the very cancer patients for which it is brought, who are deceived by their lawyers as to—and therefore do not seek to address—the true cause of their harm.

The rapid proliferation of the talc claims is a testament to the power of the mass tort litigation machine. In the span of just a few months, between 2016 and 2017, the company went from a few hundred claims to nearly 5,000. The pace only accelerated from there. For the period 2017 through 2019, the company was served, on average, with one or more talc-related complaints *every other hour of the day, every single day of the week*. By the time of the first LTL bankruptcy filing, JJCI faced nearly 40,000 lawsuits, filed in almost every state in the country, in both state and federal courts, with no end in sight.

The talc litigation also serves as a stark example of the limitations of the tort system to resolve the unique problems created by the mass tort litigation machine. The talc cases have been allowed to linger on the docket notwithstanding the meritless nature of the claims, as confirmed by the track record at trial. Of the small number of cases tried, the company has prevailed in the majority, leaving most claimants to recover nothing after years of waiting. Even where plaintiffs prevailed at the trial court level, the range of outcomes for similarly situated claimants was wildly

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Lawsuit Ads Put You at Risk, AARP (Mar. 18, 2018), https://community.aarp.org/t5/Scams-Fraud/Don-t-let-Lawsuit-Ads-Put-You-at-Risk/m-p/1984308.

divergent, with some being awarded low seven figures, and others ranging as high as hundreds of millions of dollars. And many of these verdicts did not withstand appellate review, sending some of these same claimants back to the queue for re-trial.

Moreover, the sheer magnitude of filings and the practical limitations on the pace at which the cases may be tried renders MDLs and the other tools offered by the tort system incapable of affording a timely resolution of the claims. From 2017 through the first LTL filing in October 2021, fewer than 50 cases reached trial. At that pace, the approximately 40,000 cases filed as of the first bankruptcy would take more than 3,000 years to resolve, and if the additional claims disclosed in the bankruptcy are pursued, it would take well over *20,000 years* to resolve the talc litigation. And, of course, this does not even account for the unknown and unidentified future claimants that may surface in the coming decades for cancers that mass tort lawyers claim were caused by talc but did not manifest until years later, due to the long latency of such diseases.[13]

Johnson & Johnson Consumer Inc.'s Financial Distress

This tsunami of talc litigation had a real and significant impact on JJCI's financial stability, a fact that is both indisputable and has been confirmed by every court who has examined LTL's bankruptcy. In 2019 alone, JJCI recorded a $1.1 billion loss directly attributable to the extraordinary expense of adjudicating the talc litigation and the aberrant but large one-off verdicts rendered against JJCI.[14] The litigation costs and threat of additional verdicts, let alone the cost of defense, was unrelenting.

As the Bankruptcy Court noted: "Even without a calculator or abacus, one can multiply multi-million dollar or multi-billion dollar verdicts by tens of thousands of existing claims, let alone future claims, and see that the continued viability of all J&J companies is imperiled. . . . At the time of filing, the prospects of continued monthly $10-20 million defense expenditures, with rapidly increasing numbers of new claims being filed, warranted seeking action in this Court." [15] In reaching that conclusion, the Bankruptcy Court explained that J&J's financial position was irrelevant to assessing the financial distress of JJCI, as a parent corporation has no general obligation to fund the liabilities of an independent subsidiary.[16]

Significantly, the Third Circuit did not challenge the Bankruptcy Court's findings that the talc litigation had left JJCI in financial distress. Instead, without adopting a specific standard for

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[13] *In re LTL Mgmt., LLC*, 652 B.R. 433 at 449 ("This glacial pace coupled with the undeniable surge in the number of new actions means that the vast majority of claimants will not get the opportunity to seek recovery for years to come, if ever. The sluggish speed of the tort system—which plaintiffs' attorneys repeatedly acknowledged during trial—continues to trouble this Court.").

[14] *In re LTL Mgmt, LLC*, 637 B.R. 396, 417 (Bankr. D.N.J. 2022), *rev'd and remanded*, 58 F.4th 738 (3d Cir. 2023), and *rev'd and remanded*, 64 F.4th 84 (3d Cir. 2023) ("talc-related litigation was the 'primary driver' that caused J&J's entire Consumer Health segment 'to drop from a $2.1 billion profit (14.8 percent of sales) in 2019 to a $1.1 billion loss (-7.6 percent of sales) in 2020.'").

[15] *Id.*

[16] *Id.* ("Claimants repeatedly have called to the Court's attention the market capitalization ($450 billion) and stellar credit-rating of Debtor's indirect parent, J&J. Nonetheless, apart from voluntarily undertaking such an obligation or a judicial finding as to alter ego status, J&J (like all parent corporations) have no legal duty to satisfy the claims against its wholly-owned or affiliated subsidiaries.").

the requisite showing of distress, it found that, at least in this case, the parent company's agreement to provide a backstop for the proposed resolution meant that the debtor itself was not facing immediate financial distress.[17] Significantly, the Third Circuit acknowledged the "irony" of its decision to bar LTL from bankruptcy on the grounds that J&J had agreed to provide a financial backstop which "it was never required to provide to claimants."[18]

In short, to invoke the words of the Committee, every court that has reviewed the LTL bankruptcy has recognized that J&J was not "evading accountability" through "corporate manipulation of Chapter 11 bankruptcy." Rather, J&J was voluntarily backstopping a financially distressed entity in a good faith effort to facilitate a resolution for all claimants.

The Unique Tools Offered In Bankruptcy

When one appreciates both the momentous impact of the mass tort litigation machine on U.S. business and the inherent limitations of the tort system, the propriety of LTL's decision to commence bankruptcy to pursue resolution of the talc litigation is clear. It is equally evident that there is a compelling need for uniform access to the unique tools afforded by bankruptcy.

Bankruptcy brings at least three unique resolution tools to bear that are not available in the tort system, even where the cases are coordinated in an MDL. *First*, and most importantly, bankruptcy is the only forum that facilitates the resolution of *all* claims, including future claims. The significance of this feature cannot be overstated for certain mass torts litigations, like the talc litigation, that are likely to involve a significant number of unknown and unidentifiable future claimants with latent injuries that may manifest years in the future. Through the appointment of a future claims representative, use of estimation, and the imposition of a channeling injunction, bankruptcy provides a means by which to value all claims, including future claims, while also accounting for, protecting, and binding future claimants. In other words, bankruptcy offers both a voice and a path to finality for all stakeholders.

Second and relatedly, bankruptcy addresses opt-outs through a bar date and other procedural mechanisms. Again, such tools create finality and a path to total or complete resolution that is simply lacking in mass tort litigation.

Finally, bankruptcy provides a single forum for all parties to address both state and federal claims, resulting in a uniform and unified set of outcomes for claimants who are similarly situated. Even setting aside the complexity of the future claims issue, MDLs cannot provide a path to complete resolution because they cannot bind state court litigation. Given the proliferation of lawsuits, some claims will inevitably remain in the state court system, as is the case in the talc litigation.

The outcome of LTL's efforts was frustrating not only for LTL and J&J, but also the 60,000 (and growing) talc claimants who publicly and vociferously voiced their support, through counsel, for a resolution that they fundamentally understood could only be achieved through bankruptcy. It

[17] *In re LTL Mgmt., LLC*, 64 F.4th at 110 (While LTL faces "substantial future talc liability," its access to a funding agreement "mitigates any financial distress.").
[18] *Id.* at 110–11.

also shines a light on the critical inconsistency in the availability of bankruptcy's unique tools. Had LTL's case proceeded in the Fourth Circuit, where it was initially filed, it is likely that LTL would be well on its way to implementing its roundly supported, equitable, and efficient reorganization plan.

LTL's Path Forward

The Bankruptcy Court repeatedly found that LTL filed its cases with the legitimate intent to obtain an equitable and efficient resolution for all claimants.[19] LTL's proposed resolution for an unprecedented $8.9 billion fund was and is supported by counsel for a majority of the claimants, who described the proposal as a "significant victory" that would "provide expeditious, substantial and fair compensation" for their clients.[20] The Bankruptcy Court echoed that sentiment in its final decision in the case, wherein it "strongly encouraged" the parties to pursue the resolution, including through another bankruptcy case.[21]

We intend to follow the Bankruptcy Court's directive, to achieve a resolution in the best interests of and supported by the claimants. We respectfully request the Committee's assistance in that regard. Had LTL's case proceeded in the Fourth Circuit, where it was originally filed, or had it been transferred to the Second Circuit, it surely would have survived. This split in circuits is one that the Supreme Court will need to address going forward. But this Committee can also bring clarity to the Code that will ultimately result in uniformity in its application.

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Thank you for the opportunity to provide these comments and appear before the Committee. I am hopeful that the work of this Committee will ensure that the bankruptcy system is used for its intended purpose and can uniformly serve as a tool by which to achieve fair outcomes for all interested parties.

I would be happy to answer any questions that you may have.

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[19] *In re LTL Mgmt., LLC,* 637 B.R. at 427 (The "Debtor filed this case to resolve the potentially crippling costs and financial drain associated" with the litigation and "far from a means to 'hinder and delay talc claimants,' a global resolution of these claims though the bankruptcy may indeed accelerate payment to cancer victims and their families."); *In re LTL Mgmt., LLC*, 652 B.R. at 455 ("The foundation for a fair, efficient, and expeditious settlement has been laid by the dogged efforts of the AHC, Debtor and other parties.")

[20] Tiffany Hsu, *Johnson & Johnson Reaches Deal for $8.9 Billion Talc Settlement,* NY TIMES (Apr. 4, 2023), https://www.nytimes.com/2023/04/04/business/media/johnson-johnson-talc-settlement.html.

[21] *In re LTL Mgmt., LLC*, 652 B.R. at 455 ("This Court sees no reason why this type of settlement cannot be pursued in a context other than this current bankruptcy case, such as part of the pending Imerys chapter 11 bankruptcy proceeding in Delaware.").