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Litigators of the Week: 3rd Circuit Zaps J&J's Talc Bankruptcy Move Finding a Lack of 'Financial Distress'

Jeffrey Lamken of MoloLamken, Jonathan Massey of Massey & Gail and Michael Winograd of Brown Rudnick co-led the appellate team for the official committee of talc claimants. Lamken argued at the Third Circuit alongside David Frederick of Kellogg Hansen, representing plaintiffs firm Arnold & Itkin, and DOJ attorney Sean Janda, representing the U.S. Trustee.

By Ross Todd
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Last September, arguing before the Third Circuit, **Jeffrey Lamken** of **MoloLamken** pointed out something peculiar about the bankruptcy filing by Johnson & Johnson affiliate LTL management, which put the brakes on nearly 40,000 lawsuits involving talc products.

"This is probably the first planned major bankruptcy—at least the first I've ever heard of—where if you're looking for indicia of financial distress, you don't find any business executive, you don't find any documents at J&J … before the bankruptcy saying 'Wow, we're financially distressed. We're heading for insolvency,'" Lamken said. "The first time you see that is in the bankruptcy. And where's it coming from? The lawyers."

Zing.

This week the Third Circuit cited the lack of financial distress at LTL in its decision dismissing the bankruptcy and opening the trial courts back up to plaintiffs bringing talc-related claims against J&J. The team heading up the appeal for the official committee of talc claimants included Lamken, **Jonathan Massey** of **Massey & Gail** and **Michael Winograd** of **Brown Rudnick**.

Courtesy photos

(L-R) Jeffrey Lamken of MoloLamken, Jonathan Massey of Massey & Gail and Michael Winograd of Brown Rudnick.

David Frederick of **Kellogg Hansen Todd Figel & Frederick**, who represented plaintiffs firm **Arnold & Itkin**, and DOJ attorney **Sean Janda**, who represented the U.S. Trustee, also argued at the Third Circuit for the bankruptcy to be dismissed.

Litigation Daily: Who were your clients and what was at stake?

Jonathan Massey: We were fortunate to work with the Official Committee of Talc Claimants—10

very dedicated individuals with ovarian cancer and mesothelioma talc claims against J&J. Blue Cross Blue Shield of Massachusetts was also a committee member. Ultimately, we represented all talc creditors—tens of thousands of cancer victims with claims against J&J. At stake was the claimants' fundamental right to their day in court, to have their claims heard before juries of their peers in the civil justice system, and to seek fair compensation for themselves and their families.

Who was on your team and how did you divide the work on the appeal?

Michael Winograd: This appeal was a huge team effort across several law firms and lawyers. There were numerous work streams, from early motions seeking direct appeal to the Third Circuit and expedition, to the appellate briefs themselves, to ensuring that Jeff Lamken was as prepared as possible for oral argument. Lawyers from several firms—Brown Rudnick (primarily **David Molton**, who coordinates and leads committee counsel, **Marek Krzyzowski**, **Michael Reining** and myself), Molo Lamken (Jeffrey Lamken and **Rayiner Hashem**), Massey & Gail (Jonathan Massey and **Matt Collette**), **Otterbourg** (**Melanie Cyganowski** and **Adam Silverstein**), **Bailey & Glasser** (**Brian Glasser**), **Parkins & Rubio** (**Lenard Parkins** and **Charles Rubio**), and **Genova Burns** (**Dan Stolz**)—played key roles in producing the final work product. That was true concerning everything from drafting papers to participating in argument preparation sessions. In addition, we coordinated with appellate counsel for other appellants and the U.S. Trustee as well to ensure we were maximizing both efficiency and effectiveness.

What other parties backed your position on appeal? And how did they help contribute to the Third Circuit outcome?

Jeffrey Lamken: In a case of this magnitude, everything is a team effort—labeling the support we received as "support" understates its significance. The U.S. Trustee, represented by Sean Janda of the Justice Department, filed a powerful brief and delivered a moving argument. An ad hoc committee of mesothelioma victims, represented by **Deepak Gupta** of **Gupta Wessler**, and several law firms representing victims, represented by **Robert Pfister** of **KTBS Law** and David Frederick, filed phenomenal briefs as well, taking a deep dive into critical issues. And we were supported by academics (including **Erwin Chemerinsky**), public interest groups, and experts on MDL litigation. That kind of support can have an important impact. They can help set the case in the larger context; bring to life the human experience, the impact on real, injured people who are waiting for justice; explore particular legal issues more deeply; and provide the court with useful factual insights and differing perspectives. The briefs in this case did all that. And, while I am sure we are going to get to this later, the advocates representing those groups contributed to an ongoing dialogue and conversation that helped us focus, refine, and better defend our arguments throughout the briefing cycle and oral argument. It is rarely possible to say that one brief or another turned the tide in a particular case. But this case in particular required tireless efforts from trial lawyers representing injured claimants, experienced and insightful bankruptcy lawyers, and appellate counsel willing to listen and incorporate those insights and perspectives into a strategy for appeal.

How did the work at the bankruptcy court—including the rapid-fire discovery in the case—contribute to the Third Circuit's findings about LTL's lack of financial distress when it entered bankruptcy?

Winograd: The significant expedited discovery and week-long trial in the bankruptcy court—conducted by our Committee's trial team, which was headed by

Brown Rudnick and Bailey Glasser—were crucial to the Third Circuit's ruling. Perhaps most notably, they provided the evidentiary basis for the Third Circuit's critical finding that LTL was not in financial distress when it filed for bankruptcy in October 2021. That issue was a significant target of discovery in the bankruptcy case and something we focused on both during witness examinations at trial and in the appellate papers. Ultimately, the Third Circuit found it to be dispositive in determining that the bankruptcy filing was in bad faith and must therefore be dismissed.

Mr. Lamken, how did you prepare for the oral argument at the Third Circuit? Was there anything in particular that stood out to you about the panel's questions?

Lamken: Oral argument preparation was an intensive, tireless, and collaborative effort. As a general rule, I like to conduct at least two moot courts during which lawyers, often ones not previously involved in the case, press the limits on our positions. I sometimes call it human piñata, because the moot-court judges just keep beating on you until you—and seemingly your positions—fall apart. But the most important part of that process comes at the end, when the arguing lawyer sits down and listens to everyone else. Whenever I feel like something did not go quite right at the actual oral argument, I can almost always find a moment in argument preparation where someone said something that should have flagged an issue for me but, for whatever reason, I did not fully grasp the warning. Done right, however, the exhaustive process of argument preparation—studying the briefs, cases, and record, identifying hard questions and good answers, pressure testing and revamping all that in the crucible of moot courts—should leave you well prepared.

At the actual argument, however, you face judges who have seen so many more cases and have so much more experience than the advocates before them. No matter how carefully you prepare or attempt to choreograph your approach, the actual argument almost always proves to be an organic and candid conversation with the court. The judges here came to the case extremely well prepared—and with experiences and insights that made their questions especially probing. All three judges have been on the bench for quite some time, and Judge Ambro has deep expertise and experience in bankruptcy law and practice. Often, questions that could be interpreted as hostile to one side or another turned out to telegraph helpful insights.

J&J has argued that the trial courts aren't equipped to handle the nearly 40,000 talc cases already on the dockets, let alone those yet to be filed. Why is going back to the trial courts to litigate and try these claims a better option for your clients than reaching some sort of global settlement via bankruptcy proceedings?

Massey: Ovarian cancer claims were already centralized, even before the bankruptcy, in a multidistrict litigation proceeding in federal court in New Jersey. The majority of mesothelioma claims were pending in a single state court in New Jersey. So bankruptcy was not necessary to provide a centralized forum for talc claims. It's worth noting that Congress established the MDL process for the precise purpose of managing mass tort litigation, and over the past several decades MDL proceedings have handled some 1 million lawsuits. Time and again MDLs have successfully resolved mass torts with latent injuries and future claims. It's not up to a bankruptcy court—much less J&J—to decide that bankruptcy is a better forum, especially when the fundamental requirements of bankruptcy (like financial distress) have not been satisfied.

What happens now? LTL has said it plans to seek en banc review. How soon might we see talc trials back up and running?

Lamken: This bankruptcy had the effect of shutting down thousands of actions by sickened and dying talc claimants. For more than a year, we have had no trials, no settlements, nothing. And during that time, hundreds and hundreds of those victims have died, still waiting for their day in court. So everyone is eager to get the bankruptcy case dismissed, so the injured can once again pursue their claims and justice in the Article III and state courts that have handled tort claims for centuries.

I have no doubt that J&J and its lawyers would rather face that day later rather than earlier—or perhaps not at all. I would expect them to seek rehearing and rehearing en banc in the Third Circuit. That has the effect of delaying issuance of the Third Circuit's mandate, and thus effectuation of the Third Circuit's judgment, until shortly after the petition is denied. LTL might seek other relief in the Third Circuit or the Supreme Court as well. I do not expect those efforts to succeed. So, all things being equal, I would guess we will see the Third Circuit's judgment effectuated, and talc claimants getting their day in court once again, in the next 60 days or so. For someone who is dying, or who cannot even settle with J&J for enough to pay their medical bills, 60 days can seem like an eternity. So we are also evaluating how to keep delays to a minimum. I have faith the judicial system will act promptly, but that faith encompasses respect for its processes.

What do you hope any other mass tort defendant contemplating a "Texas two-step" bankruptcy takes from this decision?

Winograd: The floodgates are closed. If your corporate client is not actually in financial distress, then using the Texas Two Step cannot artificially manufacture financial distress for you. Bankruptcy is not a voluntary menu choice for a multinational corporation worth nearly half a trillion dollars with a credit rating better than the United States of America, for example, to remove mass tort cases out of the state and federal tort systems and deprive victims of their day in court and due recompense.

What will you remember most about this matter?

Lamken: The victims. Despite suffering from cancer, weakened by the therapies required to keep them alive, the client representatives dutifully attended meeting after meeting. They asked probing questions. They shared their experiences. And despite the delays, despite having their cases frozen during bankruptcy, they never lost faith in the judicial process and always felt that, whatever the outcome, their voices were being heard. We appellate lawyers sometimes lose sight of the people who are so profoundly affected by the cases we handle. It was humbling and uplifting to work with them here.

Massey: We were part of a very talented team, and I will always treasure the chance to work with such gifted and passionate lawyers to secure justice for so many deserving clients.

Winograd: The gravity of this case on so many levels—from the legal issues involved to the impact the Third Circuit's ruling will have on the tens of thousands of victims suffering (many dying) from cancer caused by what J&J has called its "ubiquitous" baby powder and other talc-related products.

After the Third Circuit's ruling, we immediately began to hear how so many of our committee members, victims of J&J's conduct, were crying for joy. From the boardrooms of corporate tortfeasors to the living rooms of victims, this case will have an immediate and significant impact.