Selective corporate bankruptcy, mass torts, and Italy's PNRR
di **SALVATORE SALTARELLI**

SUMMARY: **1.** THE JOHNSON & JOHNSON CASE. – **2.** TEXAS'S DIVISIVE MERGER. – **3.** DEBTOR'S FINANCIAL DISTRESS AND GOOD FAITH. DIRECTORS' DUTY OF GOOD FAITH AND ITS IMPLICATIONS. – **4.** THE INTERESTS AT STAKE AND THE NEED FOR LEGISLATIVE INTERVENTION – **5.** SCISSIONE AND CLASS ACTIONS UNDER ITALIAN LAW: RECENT DEVELOPMENTS AND FUTURE PROSPECTS.

Abstract

Nell'ambito della responsabilità civile c.d. di massa, grandi *corporation* statunitensi hanno utilizzato in maniera creativa strumenti del diritto societario e delle procedure concorsuali per accedere a strumenti di composizione della crisi con patrimoni separati creati *ad hoc.*
Particolare attenzione ha destato la strategia di *Johnson & Johnson,* la quale, investita da molte azioni per danni derivanti da un prodotto al talco, ha eseguito un *divisive merger* ai sensi della legge statale del Texas (operazione accostabile alla scissione di diritto italiano, ma priva del regime di responsabilità solidale di cui all'art. 2506-quater, 3° comma, c.c.). All'esito dell'operazione, le passività connesse ai prodotti oggetto di contenzioso sono state assegnate ad una specifica beneficiaria, insieme a determinate attività. La stessa beneficiaria ha quindi presentato domanda di ammissione a procedura di *reorganization* ai sensi del *Chapter 11*, proponendo un accordo ai creditori da votare a maggioranza e sulla base del quale gli stessi sarebbero stati soddisfatti con somme e procedure prestabiliti attraverso un *trust* creato a tale scopo, perdendo il diritto di agire individualmente in giudizio.
Si tratta di un utilizzo anomalo della *reorganization* da parte di una società che non versa in stato attuale di crisi, ma crea una controllata facendola nascere allo scopo di accedere alla procedura. Operazioni simili sono state compiute anche da altre grandi *corporations.* Le corti hanno espresso opinioni divergenti sul ricorrere, in tali casi, dei requisiti di buona fede e *financial distress* richiesti dalla normativa.
Occorre considerare che le attività di produzione di farmaci, particolarmente esposte a questo tipo di rischi, sono anche altamente profittevoli. Nei Paesi, come negli Stati Uniti, dove il prezzo di molti farmaci è determinato dal mercato, è ragionevole pensare che le società produttrici incorporino i rischi dei contenziosi nei prezzi così determinati, "spalmandoli" già sull'utenza. Pertanto, è opinabile che le stesse debbano avere un trattamento preferenziale quando si tratta di accertare i requisiti di accesso a procedure concorsuali.
In ogni caso, il rilievo crescente della produzione su larga scala di prodotti potenzialmente rischiosi richiede un intervento legislativo per meglio regolare le procedure volte ad accertare la responsabilità dei produttori

1. The *Johnson & Johnson* case. To manage widespread litigation about one of its products, can a company:

1) divide itself, assigning the related liabilities to a newco (together with predetermined assets); and
2) have this newco file for reorganization under bankruptcy law, thus:

a) Solving the alleged mass tort with a settlement that would become binding on all claimants (present and future) after being approved by a majority of present claimants; and
b) Continuing operating its business through another company resulting from the division, shielding productive assets from the claims at stake?

Johnson & Johnson Consumer Inc., a US *corporation* of the Johnson & Johnson group, has marketed for decades products known to the general public, including Band-Aid, Tylenol, Aveeno, Listerine and Johson's Baby Powder[1]. This last product, a talc powder for girls and boys, has been at the center of disputes for years. Since 2010, lawsuits have been brought by users who claimed to have contracted serious diseases as a result of using the powder, which allegedly contains traces of asbestos that could lead to ovarian cancer and mesothelioma[2]. In 2016, in Missouri, a claimant with ovarian cancer obtained a verdict from a jury condemning the pharmaceutical company to $72 million, including punitive damages[3]. The trial court's judgment was later reversed on appeal based on a jurisdiction issue[4], but in the meantime, lawsuits against J & J had started to increase exponentially. In 2016, the *Financial Times* reported that around 500 similar disputes were pending: four years later, the number was 25,000[5].

In 2018, another jury verdict (the *Ingham* verdict) in the state of Missouri sentenced J & J to pay 4.7 billion dollars to a group of 20 women with ovarian

[1] *In re LTL Mgmt., LLC,* No. 22-2003, 2023 WL 1098189 (3d Cir. 2023).
[2] C. HU, *Court Rejects Johnson & Johnson's Use of the "Texas Two-Step" to Tackle Baby Powder Liability,* in *U. Chi. Bus. L. Rev.*, 2023, *online edition*, https://businesslawreview.uchicago.edu/online-archive/court-rejects-johnson-johnsons-use-texas-two-step-tackle-baby-powder-liability, p. 1 et seq.. See also the cases cited in *In re LTL Mgmt., LLC,* 637 B.R. 396 (Bankr. D.N.J. 2022), par. I.
[3] A copy of the Missouri Jury's verdict can be found at https://www.beasleyallen.com/wp-content/uploads/talcum-powder-lawsuit-fox-v-johnson-and-johnson-verdict-form.pdf.
[4] *Estate of Fox v. Johnson & Johnson*, 539 S.W.3d 48 (Mo. Ct. App. 2017). Related news caught the attention of the press: see for example https://www.reuters.com/article/us-johnson-johnson-cancer-lawsuit-idUSKBN1CM2IF.
[5] M. TINDERA, J. SMYTH, *Best of: Inside Johnson & Johnson's bankruptcy two-step*, *Financial Times*, May 31, 2023, available at: https://www.ft.com/content/aae0a7f0-ad08-437d-adba-3fa883b5be66.

cancer[6]. The amount was halved on appeal: in any case, claimants ended up being awarded more than 2 billion dollars[7].

Such controversies are long and complex, and their outcomes are highly uncertain. It is not easy, in fact, to establish causation between the use of powder and the onset of the disease: the very presence of asbestos in the product and its quantities is still the subject of controversy and a federal investigation[8]. At present, the company claims that it has won more disputes than it has lost[9]; however, the number of cases has kept increasing together with related legal expenses[10]. While continuing to deny any wrongdoing allegation, Johnson & Johnson has announced the end of commercialization of talc-based Baby Powder in the United States and Canada, starting from 2020; and all over the world, starting from 2023[11].

After the Supreme Court declared the appeal against the *Ingham* judgment inadmissible[12], the pharmaceutical company adopted a new strategy based on the unconventional use of bankruptcy procedures.

2. Texas's divisive merger. The company that had marketed the talc-based products and held the related assets and liabilities, Johnson & Johnson Consumer Inc., completed a divisive merger under Texas law[13]. The *divisive merger* is comparable to the Italian "*scissione*": at least in the simplest case, the

---

[6] *Ingham v. Johnson & Jonhson*, No. 1522-CC10417-01 (Mo. CIR. CT. 2018).

[7] *Ingham v. Johnson & Johnson*, 608 S.W.3d 663 (Mo. CT. App. 2020).

[8] L. GIRION, *Johnson & Johnson knew for decades that asbestos lurked in its baby powder,* https://www.reuters.com/investigates/special-report/johnsonandjohnson-cancer/. More generally on the links between Johnson & Johnson and asbestos-related cases, see information at: https://www.asbestos.com/companies/johnson-johnson/.

[9] A statement that is also referred to in Court opinions: see *in In re LTL Mgmt., LLC,* No. 22-2003, cit.

[10] *ID.*., p. 21, acknowledging costs related to such disputes in the order of several billion dollars.

[11] See https://www.cnbc.com/2022/08/11/jj-to-stop-selling-talc-based-baby-powder-globally-in-2023.html.

[12] *Ingham v. Johnson & Johnson*, 608 S.W.3d 663 (Mo. CT. App. 2020), cert. denied, No. 20-1223, 141 S. Ct. 2716 (2021).

[13] Corporate governance matters are normally a matter of state law: see S. BAINBRIDGE, *Corporate Law, St.* Paul MN, Foundation Press, 2015, p.8: «Corporate governance matters are controlled by the law of the state of incorporation». On the other hand, insolvency is regulated at the federal level, given the powers attributed to Congress by the Constitution (art. I, sect. 8). See the U.S. Code: Title 11.

original company assigns its assets and liabilities to new entities and ceases to exist, while its original shareholders are assigned shares in the new entities[14].

By its divisive merger, Johnson & Johnson Consumer Inc. ceased to exist established two new companies[15]:

- A limited liability company called LTL Management LLC
- A new corporation called Johnson & Johnson Consumer Inc.

The first company was assigned all liabilities and obligations arising from talc-related damage claims by third parties[16]. The same company received several assets, as well as the right to receive from the new Johnson & Johnson Consumer Inc. and its parent company Johnson & Johnson financing "to... fund a trust, created in a reorganization plan, to address the responsibilities related to talc for the benefit of existing and future actors"[17]. The purpose of the trust was precisely to resolve disputes by offering claimants pre-determined sums payable on the exhibition of the documents listed in the plan, thereby avoiding costly judicial procedures[18]. All claimants that would be able to submit the documents required by the plan would be entitled to compensation according to pre-determined schemes[19].

The second company, Johnson & Johnson Consumer Inc., on the other hand, was assigned all the remaining assets of the previously existing company, including the various productive branches[20].

[14] *Texas Business Organizations Code* 1.002(55)(A). Full text of the legislation available at the following address: *https://statutes.capitol.texas.gov/Docs/BO/htm/BO.1.htm*.
[15] See, for more details on the specific reorganization procedure, the Court's opinion in *In re LTL Mgmt., LLC,* No. 22-2003, cited above, p. 24.
[16] *ID.., p. 25*.
[17] *ID.*, p. 26.
[18] See the reorganization plan, available on the online database https://dm.epiq11.com/case/ltl/info, Docket n. 525, p. 27 ss.
[19] ID.
[20] *In Re LTL Mgmt., LLC,* No. 22-2003, cit., p. 26.

The peculiarity of Texas's divisive merger is that each new entity is solely responsible for all the liabilities that it receives[21]. Unlike in the Italian *scissione*[22], no liability exists for such debts on the side of the other new companies involved. Creditors harmed by the divisive *merger* have the sole opportunity to challenge the transaction in court as a fraudulent transfer[23].

On October 14, 2021, two days after the transaction became effective[24], LTL, the company holding talc liabilities, initiated a reorganization procedure according to Title 11, Chapter 11, U.S.C. (comparable to the Italian *concordato preventivo*): such a procedure allows debtors in distress to file far-reaching reorganization plans and have their creditors vote on them[25]. The opening of the reorganization had the effect of halting individual lawsuits brought by talc claimants against the J&J group[26].

By virtue of the divisive merger, talc-related liabilities were therefore segregated into a new subsidiary, which immediately initiated the *Chapter 11* procedure and benefited from the related automatic stay. At the same time, the overwhelming majority of the assets held by the original company remained

[21] See *Texas Business Organizations Code* 10.008(A)(4): «*When a merger takes effect... each surviving or new domestic organization to which a liability or obligation is allocated under the plan of merger is the primary obligor for the liability or obligation, and, except as otherwise provided by the plan of merger or by law or contract, no other party to the merger, other than a* surviving *domestic entity or non-code organization liable or otherwise obligated at the time of the merger, and no new domestic entity or non-code organization created under the plan of merger is liable for the debt or other obligation*».

[22] Art. 2506-*quater* c.c.: *«Ciascuna società è solidalmente responsabile, nei limiti del valore effettivo del patrimonio netto ad essa assegnato o rimasto, dei debiti della società scissa non soddisfatti dalla società cui fanno carico.»* For further analysis and case references, see for example A. BUSANI, F. URBANI, *Operazioni straordinarie: la scissione,* in *Società*, 2017, p. 1408 ss.

[23] M.A. FRANCUS*, Texas Two-Stepping Out of Bankruptcy*, 120 *Mich. L. Rev.* 38 (2022), p. 43 et seq., *https://michiganlawreview.org/texas-two-stepping-out-of-bankruptcy/*. See also *In Re LTL Mgmt., LLC,* No. 22-2003, cited above, p. 53, footnote 18. State laws protecting creditors' rights (such as the *Texas Uniform Fraudulent Transfer Act*, the text of which can be found at: *https://statutes.capitol.texas.gov/Docs/BC/htm/BC.24.htm*) may apply. In the context of bankruptcy, federal laws provide for a special discipline: see 11 U.S. Code § 548.

[24] As noted in *In re LTL Mgmt., LLC,* No. 22-2003, cited above, p. 27.

[25] See K. CLARKSON, R. MILLER, F. CROSS, *Business Law: Text and cases,* 13th ed., Cengage, Boston, 2015, p. 608 et seq.; D. BAIRD, *The Elements of Bankruptcy*,7th ed., Foundation Press, St. Paul, 2022, p. 218 et seq; https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics

[26] 11 U.S.C. § 362(a) See D. BAIRD, *The elements of bankruptcy*, cit., p.203 et seq.; J.R. GRAHAM, *Institutional capture: why we're overdue for a new Bankruptcy Act,* NYU Journal of Law & Business, Vol.19/2, 419 et seq.

isolated in the other entity resulting from the merger[27]. As mentioned above, the reorganization plan provided for the creation, by LTL, of a trust financed also with the contribution of the parent companies. All assets held in such trust would be devoted to the resolution of talc disputes[28]. That same trust would distribute fixed sums to claimants, in accordance with verification procedures described in detail in the plan[29]. Upon approval by a majority of claimants, all those who wished to assert claims for damages related to talc should have done so exclusively against the trust and not against any other subject in the J&J group[30].

Some claimants filed a motion to dismiss J&J's plan as it was not initiated in good faith. According to *Chapter 11*, the competent court has the right to dismiss a case "for cause"[31]. But the bankruptcy court rejected the motion, holding:

— that the reorganization plan was worthy of protection as it was able to address damage claims in a better way than a plurality of lawsuits with random outcomes and in many different courts.

— that the risk of so many separate ongoing and future civil lawsuits was sufficient to hold the debtor company in financial distress[32].

3. Debtor's financial distress and good faith. Directors' duty of good faith and its implications. On appeal, however, the motion to dismiss was

[27] M.A. FRANCUS, *Texas Two-Stepping Out of Bankruptcy*, cit.
[28] See the disclosure statement issued by the company at https://dm.epiq11.com/case/ltl/info, Docket no. 1009, p. 21 ss. The document refers to the latest version of the plan (2023), but these aspects are common to the 2021 plan.
[29] *ID.*, p. 7.
[30] *ID.*, p. 64. The possibility of binding unknown, contingent claimants is expressly provided for in laws regarding asbestos-related injuries. See Bankruptcy Code § 524(g). In other cases, it remains a highly debated topic. See L. BAREFOOT, T. KESSLEY, A. MACEY, *Discharge of Mass Tort Liability, Due Process & Illusory Finality in Chapter 11,* Bloomberg Law, Aug. 2022, https://www.bloomberglaw.com/external/document/X2IVVMOO000000/bankruptcy-professional-perspective-discharge-of-mass-tort-liabi.
[31] *11 U.S. Code* § 1112 (b)(1), «*the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the state, for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.* ». Regarding diverging interpretations of the good faith requirement, see J.R. GRAHAM, *Institutional capture: why we're overdue for a new Bankruptcy Act,* NYU Journal of Law & Business, Vol.19/2, 443 et seq.
[32] *In Re LTL Mgmt., LLC,* 637 B.R. 396, cit.

upheld[33]. The Court held that LTL was not in such financial distress[34] as it is required to file a plan in good faith within the meaning of *Chapter 11*[35]. The court embraced an interpretation of the financial distress concept that requires a greater degree of immediacy than what LTL demonstrated. [36]. LTL'S plan described its distress as resulting merely from the *possibility* of a series of costly controversies and unfavorable verdicts[37].

According to the court, if the possibility of accessing *Chapter 11* is accorded prematurely, creditors would be disproportionately harmed and unfairly deprived of their rights[38]. Bankruptcy may be appropriate for dealing with mass civil liability, but only in cases of immediate financial distress[39]. Instead, the company, considering the intra-group financing agreements[40], the previous record of cases won[41] or settled[42], and the possibility of further favorable outcomes in the future, was not in such a distress[43] to justify its filing for *Chapter 11* relief[44].

Following the decision, LTL submitted a new *reorganization plan.* It stated that it had in the meantime reached a preliminary agreement with some 60.000 alleged victims, and that intragroup financing agreements had been amended so that some transfers of resources to LTL were made conditional on its admission

[33] *In Re LTL Mgmt., LLC,* No. 22-2003, cit., p. 24.
[34] *ID.*., p. 53.
[35] *ID.*., pp. 35, 41.
[36] *ID.*., p. 38: Financial distress must not only be apparent, but it must be immediate enough to justify a filing".
[37] *ID.*., p. 38 s.
[38] *ID.*., pp. 39; 56: «resort to Chapter 11 is appropriate only for entities facing financial distress. This safeguard ensures that claimants' pre-bankruptcy remedies – here, the chance to prove to a jury of their peers injuries claimed to be caused by a consumer product - are disrupted only when necessary.
[39] *ID.*, p. 41.
[40] Such clauses allowed LTL extensive access to funds from other highly solvent companies in the Johnson & Johnson group. *ID.*., pp. 46, 55.
[41] As Johnson & Johnson acknowledges: see *https://www.jnj.com/johnson-johnson-subsidiary-to-appeal-bankruptcy-court-ruling-that-deprived-talc-claimants-of-an-equitable-and-efficient-resolution*.
[42] *In Re LTL Mgmt., LLC,* No. 22-2003, cit., p.
[43] *ID.*., p. 49.
[44] *ID.*., p. 53 s.

to the *Chapter 11* procedure[45]. However, the motion to dismiss for lack of good faith was reiterated and this time immediately upheld by the Bankruptcy Court[46]. Conforming to the previous appeal decision[47], and although expressing reserves as to the restrictive interpretation of *distress*[48], the Bankruptcy Court declared that there was no sufficient financial distress to justify access to *Chapter 11*[49]. The company stated that it would appeal[50]. Meanwhile, individual lawsuits, regardless

[45] See the *disclosure statement* issued by the company and available at https://dm.epiq11.com/case/ltl/info, Docket No. 1009, p. 21 et seq.: «The J&J Support Agreement, which the Debtor intends to seek approval of from the Bankruptcy Court, is operative only in the Chapter 11 Case. It obligates J&J to provide the trust funding Holdco is required to provide under the 2023 Funding Agreement under a supported plan, but only if Holdco fails to provide the funding…». See W. Organek, *The Dismissal of LTL and What Lies Ahead for Mass Tort Bankruptcy,* https://hlsbankruptcyr.wpengine.com/category/texas-two-step-and-the-future-of-mass-tort-bankruptcy-series/

[46] *In re LTL Mgmt., LLC,* No. 23-12825 (MBK), 2023 WL 4851759 (Bankr. D.N.J. 2023).

[47] The Third Circuit Court opinion cited above (*In re LTL Mgmt., LLC,* No. 22-2003, cited above) has binding precedent authority over the lower Bankruptcy Court.

[48] *In re LTL Mgmt., LLC,* No. 23-12825 (MBK), 2023 WL 4851759 (Bankr. D.N.J. 2023): «The Third Circuit mandated that the Debtor's financial distress must be "immediate", "imminent" and "apparent"; the Circuit further advanced that "an attenuated possibility standing alone" regarding a bankruptcy filing does not establish good faith. … One can view the Third Circuit's ruling as being somewhat at odds with a pro-active approach to trouble. When one smells smoke, the wise course of action is to get out of the house and call for help. However, as it stands now, in gauging financial distress, observing smoke may not be enough—one must see flames».

[49] *In Re LTL Mgmt., LLC,* No. 23-12825 (MBK), 2023 WL 4851759, cit., paragraph B.

[50] *https://www.jnj.com/johnson-johnson-subsidiary-to-appeal-bankruptcy-court-ruling-that-deprived-talc-claimants-of-an-equitable-and-efficient-resolution*. After the latest decision of the Bankruptcy Court that halted the proceeding (*In re LTL Mgmt., LLC,* No. 23-12825 (MBK), 2023 WL 4851759 (Bankr. D.N.J. 2023), the company issued a statement that reads as follows: «Johnson & Johnson (NYSE: JNJ) (the Company) today announced its subsidiary LTL Management LLC (LTL) will appeal the ruling by the United States Bankruptcy Court for the District of New Jersey dismissing the bankruptcy case LTL filed. LTL commenced its bankruptcy case in good faith and in strict compliance with the Bankruptcy Code. The reorganization plan that LTL proposed with its filing committed an unprecedented $8.9 billion settlement to resolve all talc claims and is supported by counsel representing approximately 60,000 claimants. In contrast, and as the Bankruptcy Court recognized, litigating these cases in the tort system would take decades and waste billions of dollars—mainly spent on lawyers' fees. For those few cases that actually reach trial, the Company has prevailed in the overwhelming majority, and most claimants receive nothing. By affording timely compensation for all claimants, the proposed reorganization plan offered the most equitable resolution for all claimants. LTL will appeal the Bankruptcy Court's ruling to preserve claimants' ability to avail themselves of that offer. "We respectfully disagree with the Bankruptcy Court's conclusion that the 'substantial liability' that LTL faces from the massive volume of talc claims asserted against it does not establish 'immediate' financial distress under the standard imposed by the Third Circuit, which itself is found nowhere in the Bankruptcy Code and is contrary to the persuasive authority from other Circuit Courts and directives of the Supreme Court of the United States," said Erik Haas, Worldwide Vice President of Litigation. "The Bankruptcy Code does not require a business to be engulfed in 'flames' to seek a reorganization supported by the vast majority of claimants. As the Bankruptcy Court urged in its decision, we will continue to work with counsel representing about 60,0000 claimants to pursue a resolution of the talc claims. In the event we return to the tort system—where we have prevailed in the

of their merits, had been suspended in limbo because of the reorganization procedures initiated by the defendant[51].

The constant reference to "good faith" contained in relevant court opinions is particularly interesting. In fact, a company's good faith must be verified through its directors' conduct, and the duty to act in good faith is a key duty which Delaware case-law bestows on directors, and which can be asserted also in shareholder derivative lawsuits[52]. Directors are liable to the company and its shareholders for damages caused by decisions taken in violation of the duty of good faith[53]. In this context, acting in 'good faith' means acting with a reasonable belief that the conduct is in the interests of the company[54]. Such a duty is frequently mentioned in precedents[55] and often included in the broader *duty of*

overwhelming majority of cases tried—we will vigorously litigate these meritless claims and bring our own actions to address the plaintiffs' bar abuses that engendered this spurious litigation».

[51] Several stories have caught the attention of the press: see Mr. Val Johnson's case reported by M. TINDERA, J. SMYTH, *Best Of: Inside Johnson & Johnson's bankruptcy two*-step, *Financial Times*, May 31, 2023, available at: *https://www.ft.com/content/aae0a7f0-ad08-437d-adba-3fa883b5be66*.

[52] See, among the fundamental cases in the matter, *Guth v. Loft Inc*., 5 A.2d 503, 23 Del. Ch. 255 (Del. 1939). Delaware case law is highly influential on many other states. Indeed, "Delaware is the state where more than half of the corporations listed for the trading on the NYSE are incorporated". S. BAINBRIDGE, *Corporate Law,* cit., p. 10. Companies incorporated in Delaware are subject to Delaware state law regarding corporate governance. According to S. BAINBRIDGE, *Corporate Law,* cit., p. 10, «Delaware's dominance can be ascribed to a number of factors: there is a considerable body of case law interpreting the Delaware General Corporation Law (DGCL), which allows legal questions to be answered with confidence. Delaware has a separate court, the Court of Chancery, devoted largely to corporate law cases. The Chancellors have great expertise in corporate law matters, making their court a highly sophisticated forum for resolving disputes. They also tend to render decisions quite quickly, facilitating transactions that are often time sensitive». Delaware's highly regarded *Court of Chancery* was established in 1792 and is a court of *equity,* which allows it to exercise its powers with flexibility. M. SPERANZIN*, Un nuovo ordine delle fonti del diritto commerciale,* in *Riv. dir. soc.*, 2019, p. 1183. A. MORINI, *"Good faith", buona fede; verso "nuovi doveri" degli amministratori di s.p.a.* in *Riv. dir. soc.*, 2011, p. 1048 ss.; H. FLEISCHER, S. BONG, S. COOLS, *Spezialisierte Spruchkörper im Gesellschaftsrecht,* Rabels Zeitschrift Für Ausländisches Und Internationales Privatrecht, 2017, p. 653 ss.

[53] A. MORINI, *"Good faith", good faith*, cit., p.

[54] See the definition given by the *Court of Chancery* in *Stone v. Ritter*, 911 A.2d 362 (Del. 2006), *https://casetext.com/case/stone-v-ritter*. For a general comment on the duty to act in good faith, see S. BAINBRIDGE, *Corporate Law, cit*., pp. 178-181.

[55] S. BAINBRIDGE, *Corporate Law,* cit., p. 178: «The notion that directors ought to act in good faith pervades Delaware's corporate governance jurisprudence». The frequent reference to the concept of good faith is also explained by the fact that the *Court of Chancery* is a court of equity that tends to thoroughly scrutinize the circumstances of each specific case. V. M. TINDERA, S. INDAP, *Why Elon Musk is breaking up with Delaware*, *Financial Times*, February 14, 2024, *https://www.ft.com/content/818a35fb-3965-4501-934a-dc22cb717a4f*.

loyalty[56], the violation of which makes the protective[57] umbrella of the *business judgement rule* [58] inapplicable to directors' decisions.

True, the "good faith" referred to in the LTL cases concerns the conditions for filing for Chapter 11. A plan filed by a debtor that is not distressed is considered not to be proposed in good faith[59]. Yet, potential conflicts of interest make good faith relevant also in its other aspect related to directors' liability to shareholders. Besides providing that claimants must be satisfied by the newly created entity alone, the reorganization plan expressly bars actions towards the original company and towards its directors or controlling shareholders[60]. The admissibility of such *third-party releases* [61]*,* which extinguish claims held by nondebtors against nondebtor third parties as a consequence of a majority voting in the debtor's reorganization procedure, is controversial[62]. It will shortly be the subject of a ruling by the Supreme Court[63]. But the mere fact that the plan includes them means that the decision to initiate the *reorganization* is a decision

[56] See for an outline of the debate A. MORINI*, 'Good faith', good faith*, cited above, p.1048 et seq.
[57]ID.., p. 1050.
[58] I.E., the ordinary deference regime that courts accord to directors' business decisions, abstaining from substantive review of the same. V. S. BAINBRIDGE, *Corporate Law,* cit., p. 122.
[59] *In Re LTL Mgmt., LLC,* No. 22-2003, cit., pp. 35-41.
[60] J&J's reorganization plan*,* available at https://dm.epiq11.com/case/ltl/info, Docket n. 525, p. 12, provides for a list of "protected parties" including representatives of the debtor and other companies in the group. "From and after the Effective Date, the Debtor, the Reorganized Debtor, and the other Protected Parties shall have no liability, obligation, or responsibility, financial or otherwise, for any Talc Personal Injury Claim".
[61] Third party releases are currently being scrutinized in another important case regarding a pharmaceutical company, *Purdue Pharma,* and to the assets of some of its directors and controlling shareholders: J. JIA, X. WU, *How Do 'Bankruptcy Grifters' Destroy Value in Mass Tort Settlements? In Re Purdue Pharma as a Bargaining Failure*, in *Am. Bankr. INST. L.*Rev., 2024, under publication, available on SSRN; J.C. COFFEE, *Mass Torts and Corporate Strategies: What will the Courts Allow?*, in *The CLS Blue Sky Blog,* 2023, *https://clsbluesky.law.columbia.edu/2023/11/01/john-c-coffee-jr-mass-torts-and-corporate-strategies-what-will-the-courts-allow/*. See also M.J. BIENENSTOCK, D.S. DESATNIK, *Are Third-Party Releases Proper?,* Sept.19, 2023, https://bankruptcyroundtable.law.harvard.edu; J.R. GRAHAM, *Institutional capture: why we're overdue for a new Bankruptcy Act,* NYU Journal of Law & Business, Vol.19/2, 425 et seq.
[62] See G.E. ZOBITZ, P. H. ZUMBRO, L.A. MOSKOWITZ, *Second Circuit Affirms Permissibility of nonconsensual Third-Party Releases in Purdue Pharma Bankruptcy Case*, 2023, https://www.cravath.com/a/web/sB8FRkQujq6nm9S5QUTUb4/7JE8nX/second-circuit-affirms-permissibility-of-nonconsensual-third-party-releases-in-purdue-pharma-bankruptcy-case.pdf.
[63] A hearing was held in December 2023. See *Purdue Pharma Bankruptcy Series Oral Argument Summary + Thoughts,* Harvard Law School Bankruptcy Roundtable, *https://bankruptcyroundtable.law.harvard.edu/2023/12/13/purdue-pharma-bankruptcy-series-oral-argument-summary-thoughts/*.

in which directors have a personal interest, separate from the company's interest and which could compromise their good faith. Therefore, in case of a shareholder derivative lawsuit, the decision can be reviewed by courts without the protection of the *business judgement rule.* The court would apply the much more invasive standard of *entire fairness,* which mandates for a review of the economic validity of the choice[64].

The LTL case, in which the application was filed several times and then rejected, resulted in enormous expenditures of company resources in legal costs[65]. It is not absurd to imagine a new dispute adding to the tort claims, advanced by minority shareholders asking to ascertain whether the interests of the directors have led to decisions that proved harmful to the company itself. The issue is even more relevant given that directors cannot be exempted from liability for breaching their duty of loyalty, not even by virtue of voluntary waivers in the company's articles of incorporation[66].

And regarding good faith, it should not be neglected that the company could well have offered a transaction to the public of claimants *outside* of bankruptcy. By offering reasonable payments, the company could have relied on a good number of adhesions that would have significantly reduced litigation. The company could have hired experts to quantify payments that were reasonable considering their certainty (in contrast with the lengthy and unpredictable trials that claimants should otherwise stand), to be delivered upon the exhibition of appropriate medical documentation[67]. Faced with a reasonable offer, a significant portion of claimants would likely have chosen to accept it instead of embarking in lengthy, unpredictable trials.

---

[64] See *Guth v. Loft Inc*, 5 A.2d 503, 23 Del. Ch. 255 (Del. 1939).
[65] E. OCHSNER, *J&J Unit's Failed 'Two-Step' Talc Bankruptcies Cost $178 Million*, Bloomberg Law, Oct. 4, 2023, https://news.bloomberglaw.com/bankruptcy-law/j-j-units-failed-two-step-talc-bankruptcies-cost-178-million
[66] H. SPAMANN, J. FRANKENREITER, *Corporations,* Open Casebook, Resource 4.2. DGCL 102(b)(7), *https://opencasebook.org/casebooks/261-corporations/resources/4.2-dgcl-102b7/*.
[67] As listed in the reorganization plan. See the disclosure statement issued by the company at *https://dm.epiq11.com/case/ltl/info*, Docket no. 1009, p. 21 ss.

Instead, the company chose to create an *ad hoc* vehicle to access *Chapter 11,* thus benefiting from the automatic stay on individual lawsuits and aiming at making the settlement proposal binding for dissenting claimants[68].

4. The interests at stake and the need for legislative intervention. The cases described above show a far-reaching clash of interests. On the one hand, there are people who must be able to count on the judiciary to assess the merits of their claims. On the other hand, companies must deal with tens of thousands of disputes, with verdicts that can be financially unsustainable and the mere possibility of which harms the company's ability to access credit and raise capital. Other stakeholders, such as law firms, should not be neglected, too. There is no general rule in the United States forcing the unsuccessful party to pay for the winner's legal costs. Normally, everyone pays their own attorneys' fees[69]. And law firms representing claimants can obtain millions – if not billions[70] - thanks to widely adopted *contingency fee* schemes[71].

The problem is certainly not peculiar to the *Johnson & Johnson* case alone[72]. Indeed, at least in sectors requiring particularly large investments such

[68] See *In Re LTL Mgmt., LLC,* 637 B.R. 396, cit., p. 407: «J & J and Debtor have been candid and transparent about employing Debtor's chapter11 filing as a vehicle to address the company's growing talc-related liability exposure and costs in defending the tens of thousands of pending ovarian cancer claims and hundreds of mesothelioma cases, well as future claims. As Movants' own experts have acknowledged, the use of the Texas divisional merger statute and subsequent filing by the newly formed LTL created a single integrated transaction designed to allow New JJCI to continue to operate Johnson & Johnson's Consumer Health business in the United States without interruption and provide LTL with the opportunity to pursue process to resolve current and future [cl]aims in an equitable and efficient manner. »

[69] There are some exceptions: 42 U.S.C. § 1988; see G.P. FLETCHER, *American Law in a Global Context: The Basics,* Oxford and New York, Oxford University Press, 2005, 518.

[70] Consider the verdict in the *Ingham* case, cit.

[71] See the "Contingency Fee" entry in the *Wex Legal Dictionary* edited by *Cornell Law School*, *https://www.law.cornell.edu/wex/contingency_fee*: «A contingency fee is a form of payment to a lawyer for their legal services. In contrast to a fixed hourly fee, in a contingent fee arrangement lawyers receive a percentage of the monetary amount that their client receives when they win or settle the case... Contingency fees are particularly common in personal injury cases, where. the successful lawyer is awarded between 20 % to 50 % of the recovery amount.»

[72] Other cases similar to Johnson & Johnson's, both in terms of size and legal matters involved, are pending: *In Re Bestwall*, 605 B.R. 43.46 (Bankr. W.D. N.C. 2019), relating to tens of thousands of asbestos-related lawsuits. See references in C. HU, *Court rejects Johnson & Johnson's use of the "Texas Two-step"*, cit., p.3. Recently, a large company that has long been involved in health services for prisoners completed its own Texas divisive merger, too: N.

as pharmaceuticals[73] or aircraft, the supply side is dominated by a small number of large companies, offering their products and services around the world to large numbers of users. Procedural issues linked to the potential multiplication of judicial procedures are self-evident[74].

Other staples of the traditional tort system, such as class actions and multidistrict litigation, have already proved inadequate to deal with mass torts of such scale.

In cases such as J&J's, *class actions* were not available due to the diverse nature of individual plaintiffs' positions: a condition for starting a class action according to US law is the homogeneity of the claimants' positions, which has not been found[75]. Multi-district litigation, which makes it possible to concentrate multiple trials before a single court[76], is not a viable tool, too, because it:

a) relates only to the stages to be completed before a jury trial starts.
b) cannot address claims by unknown, contingent claimants.
c) is applicable to cases pending before federal courts, while the cases at hand are normally pending before state courts.

Moreover, cases such as the present one affect a single sector of very large businesses that simultaneously operate multiple projects. In these circumstances, the company's interest in being able to 'selectively reorganize'[77] a portion of its business without involving the other branches is paramount for its future viability.

The conflicting interpretations that American courts have embraced in terms of access to bankruptcy stem from different visions about which interests

---

EINBINDER, D. CAMPBELL, *Hidden investors took over Corizon Health, a leading prison healthcare company. Then they deployed the Texas Two*-Step, https://www.businessinsider.com.

[73] See for example D.R. HENDERSON, C.L. HOOPER, *Be Thankful for High Drug Prices,* in *Wall Street Journal*, February 4, 2024.

[74] Such an issue has far-reaching implications for the entire system of tort law. See P.G. MONATERI, *La responsabilità civile "individualista" e la responsabilità civile di massa: il costo del sistema*, in *Danno e responsabilità*, 2023, pp. 5-7.

[75] See *Amchem Prods., Inc. v. Windsor, 521 U.S. 591,* 117 s.Ct.2231, 138 L.Ed.2d 689 (1997).

[76] See the "Multidistrict litigation" entry in the *Wex Legal Dictionary* edited by *Cornell Law School* *https://www.law.cornell.edu/wex/mulID.istrict_litigation*.

[77] S. PATERSON, A. WALTERS, *Chapter 11's Inclusivity Problem, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4448945*.

should be prioritized. In the *LTL* case, the Bankruptcy Court and the Circuit Court diverged on the interpretation of the financial distress requirement. The Circuit Court expressly acknowledged the existence of different views in the different *Circuits*[78]. The lower court originally chose to give the concept *of financial distress* a broader meaning, giving relevance to the risks inherent in a potentially infinite flow of undefined or not yet proposed causes[79]. The higher court embraced a more restrictive interpretation, according to which the debtor's *distress* must be apparent and immediate[80].

As precedents do not establish clear boundaries, Courts are being entrusted with enormous discretionary power[81]. Conflicting interpretations are inevitable, as they reflect different takes on the opposed interests at play. Some courts are closer to claimants who want to be heard by a jury of their peers; others take the sides of businesses overwhelmed by tens of thousands of dubious disputes.

The importance of this debate calls for a composition in the venue where conflicts should be channeled in mature democracies: Parliaments.

The absence of clear legislation is harming all the parties involved. Claimants must bear the length of the trials and the random outcomes of the verdicts, while businesses risk that the costs of litigation overwhelm the 'healthy' branches of their activity[82]. In the United States, the need to take legislative action to amend the text of *Chapter 11* has already been remarked by scholars[83]. The

[78] *In Re LTL Mgmt., LLC,* No. 22-2003, cit., p. 28, footnote 8.
[79] *In Re LTL Mgmt., LLC,* 637 B.R. 396, cit.
[80] *In Re LTL Mgmt., LLC,* No. 22-2003, cit., p. 24.
[81] U.S. C. Title 11 § 1112 (b) (1) establishes that the Bankruptcy Court may dismiss the case "for cause".
[82] S. PATERSON, A. WALTERS, *Chapter 11's Inclusivity Problem*, cit.
[83] *ID.*, p. 56; J.R. GRAHAM, *Institutional capture: why we're overdue for a new Bankruptcy Act,* NYU Journal of Law & Business, Vol.19/2, 439 et seq.
On September 19, 2023, the *U.S. Senate Judiciary Committee* held a hearing on the issue of how *Chapter 11* is being used by large companies, with a focus on the *Johnson & Johnson case.* Erik Haas, Worldwide Vice President of Litigation for *Johnson & Johnson,* a representative of the families of mesothelioma victims, and several jurists all spoke in front of the committee. See L. PANSGRAU, J. LYN, *Senate Judiciary Committee Subcommittee Hearing on "Evading Accountability: Corporate Manipulation of Chapter 11 Bankruptcy: In Recap,* https://bankruptcyroundtable.law.harvard.edu/2023/09/26/.

opaque areas of current laws pave the way for creative, but sometimes distorted, uses of bankruptcy, resulting in increased time and cost of litigation[84].

At least, legislation should adequately sanction abuse of the bankruptcy code by profitable corporations.

Developing drugs benefits society but is also a very profitable business which large corporations legitimately operate for their shareholders' profit. But it is a tenet of corporate finance that higher profits come with higher risks[85], and controversies started by allegedly injured users are part of this risk. As we allow companies to profit from selling drugs in a market, why should they be treated differently from other debtors when facing the challenges that come with such rewards?

Moreover, J&J *could* have created *ex ante* an *ad hoc* company to produce and market its talc-based power. Its *chose* not to do so because evidently the benefits of limited liability were not worth waiving the benefits of integrating the business into its preexisting corporate structure. Why should J&J be allowed to reap *ex post* the benefits of limited liability that it knowingly waived before?

5. *Scissione* and class actions under Italian law: recent developments and future prospects. Mass torts are bound to increase in developed economies where both businesses and markets are constantly expanding, and legislative bodies should take action. The Italian *Piano Nazionale di Ripresa e Resilienza* emphasizes the importance of improving the efficiency of the judicial system. Such an objective was already part of the EU *Country Specific Recommendations* for 2019 and 2020[86].

Could selective reorganization procedures similar to the one described in this article be implemented in Italy? The Italian *scissione* is characterized by the

[84] S. PATERSON, A. WALTERS, *Chapter 11's Inclusivity Problem*, cit.
[85] Any corporate finance textbook may be cited on the matter. See for example D. HILLIER, S. ROSS, R. WESTERFIELD, J. JAFFE, B. JORDAN, Corporate Finance, European Edition, Berkshire, 2010, 235 ss.
[86] PNRR, 30-31 (Tavola 1.2: Raccomandazioni Per Il 2019 E Per Il 2020), 55 (Riforme E Investimenti. La Riforma Della Giustizia. *Ivi*, p. 55-63; 99-100 (M1C1.3 Innovazione Organizzativa Del Sistema Giudiziario).

fact that, according to Article 2506-quater of the Italian Civil Code, 'each company is jointly and severally liable, within the limits of the actual value of the net assets assigned or left to it, for the obligations of the company being divided that are not fulfilled by the company to which they are assigned'[87]. This rule marks a fundamental divergence from Texas's *divisive merger*, which does not provide for such joint liability[88]. After an Italian *scissione*, however, could the newly created company, with its assigned assets and liabilities, file for a reorganization procedure (a *concordato preventivo*), and submit a reorganization plan to the vote of its creditors? What if the plan stated that creditors (including involuntary ones) would lose the right to act towards the original divided company by virtue of the approval of the plan by a majority of the same creditors[89]? Can the waiver of such joint and several liability of the original company be included in the proposal?[90].

True, the newly created company should be endowed with resources that make the plan reasonable[91] for creditors; otherwise, no majority could be reached. But the newly formed company should also claim to be in a state of distress, which is the precondition to be admitted to a *concordato preventivo.* So, it should be assigned assets that are adequate, but not superior, to the specific mission of managing an extended group of related disputes. But the management of such disputes, even if carried out systematically, cannot be the *oggetto sociale* (the company's business) that Italian law requires to be put forward in a new company's articles of incorporation. Companies in Italy need to be created to

[87] *«Ciascuna società è solidalmente responsabile, nei limiti del valore effettivo del patrimonio netto ad essa assegnato o rimasto, dei debiti della società scissa non soddisfatti dalla società cui fanno carico. »*

[88] *Texas Business Organizations Code* 10.008(A)(4), cit.

[89] Reorganization plans must be approved by a majority of the company's creditors (Artt. 109-110 D.Lgs. 13/2019, *Codice della crisi d'impresa e dell'insolvenza*).

[90] Nonconsensual third-party releases, which extinguish claims held by nondebtors against nondebtor third parties as a consequence of a majority voting in the debtor's reorganization procedure, are controversial in the U.S. See *supra.* Third-party releases are important in the context of *divisive mergers,* as they can extinguish *any claim* against the third party (for example, the divided company). With a third-party release, the company being divided can for example protect itself from creditors who consider the *merger* a fraudulent transfer.

[91] The actual value of the assets allocated to each company (even in the presence of a negative book value) must be positive. V. Cass. Civ., n. 26043 del 20 novembre 2013; Consiglio Notarile di Milano, *massima* n. 72/2005, available at https://www.consiglionotarilemilano.it/massime-commissione-societa/72.

carry out economic activities that are aimed at generating *profits* to be divided between their shareholders (art.2247 c.c.). The mere payment of creditors, accompanied by funding that is barely sufficient for this task (otherwise, the company could not file for a reorganization procedure) cannot be considered a profit-generating economic activity. Therefore, such a company cannot be created under Italian law. To allow the incorporation of such entities, special rules should be introduced providing for an exemption from the requirement set forth in art.2247 of the civil code.

The discipline of Italian class actions originally governed by the Italian *Codice del consumo* has recently been reformed[92] and is now to be found in Articles 840-bis *et* seq. of the Code of Civil Procedure. The articles in question lay down detailed rules governing the procedure, dealing extensively with the use of electronic communication means, the publicity of the action[93], and the possibility of settlement agreements[94].

Moreover, Italy has recently introduced a new "azione rappresentativa"[95]*.* A new action on behalf of consumers as a group the discipline of which has been inserted into the *Codice del consumo*. The new rules, in force since June 25, 2023, provide for actions that can be started only by associations of consumers and users, registered on a public list or in any case identified by relevant laws[96]. The actions concern the protection of consumers' interests from infringements of specific provisions contained in EU regulations and national acts that implement EU directives. They are available for the specific fields identified in the Decree[97], including lawsuits stemming from defective products. The action makes it possible to ask for both injunctive[98] and compensatory relief[99].

Such remedies are important for the effective enforcement of the liability of large companies for their own conduct.

[92] Legge n.31 del 12 Aprile 2019.
[93] See Artt. 840-ter - 840- quater cod.civ.
[94] Art. 840 cod.proc.civ.
[95] D.Lgs. 28/2023.
[96] Art. 140-quater and 140-quinquies D.Lgs. 206/2005.
[97] See Annex II -septies to the D.Lgs. 206/2005.
[98] Articles 140-ter (1)(h) and (i); 140-octies and 140-novies cod.proc.civ.
[99] Art. 140- quinquies D.Lgs. 206/2005.

However, the homogeneity of claims remains a staple of the actions and is required both for the action regulated within the Code of Civil Procedure[100] and for the new European action[101]. The verification of such homogeneity is difficult when health-related damages are at stake, as these issues manifest in very different forms. In the United States, the lack of homogeneity of applicants' rights prevented the use of *class actions* for asbestos-related damages[102].

However, once class actions have been considered appropriate by the law for the protection of users damaged by defective or insecure products, the homogeneity requirement must be interpreted in such a way as not to frustrate the effectiveness of the law. Therefore, courts should undertake a greater interpretative effort. Personal injuries and diseases can vary in their manifestations, and the clinical situations of a plurality of users can never be as overlapping with each other as merely economic losses can. But it will be necessary to define criteria to recognize homogeneity also regarding such matters. Otherwise, an entire category of rights, one for which the action would be particularly effective given the different economic strength of the parties, would be denied the remedy.

To allow the new rules to be effective, legal practitioners must elaborate carefully on the homogeneity requirement. Interpretation will remain fundamental as the complexity and variety of cases makes it impossible to draft legislative definitions setting quantitative boundaries for the concept.

A suitable approach may consist in the drafting, by virtuous court offices and with the contribution of attorneys, of best practices that guide on the procedures to be followed and the elements to be acquired in the assessment of the requirement. Such guidelines would make initiating a class action less of a gamble, which would be a considerable improvement given the necessary

[100] Articles 840 - bis and 840 - sexies, paragraph 1(b), cod.proc.civ.
[101] Art. 140-septies, paragraph 8, letter c), D.Lgs. 206/2005.
[102] See *Amchem Prods., Inc. v. Windsor*, *521 U.S. 591,* 117 s.Ct.2231, 138 L.Ed.2d 689 (1997). V. J.C. COFFEE, *Mass Torts and Corporate Strategies*, cited above: «since *Amchem Products v. Windsor,* a class action covering most claimants in a mass tort case has become difficult (and potentially impossible) to certify. This has left the corporation facing a seemingly endless line of individual cases, aggregated in an MDL proceeding and settling at steadily increasing prices. »

amount of preliminary work. At the same time, they would bring about a certain degree of uniformity between the various courts without resorting to the less flexible legislative instrument. It is no coincidence that the elaboration of *best practices* in court procedures is also expressly mentioned in the PNRR[103].

Class actions are better than bankruptcy to deal with mass torts in cases such as Johnson & Johnson's. They allow for stricter judicial scrutiny and greater parity between the parties. Bankruptcy should be reserved for debtors in distress. While it is fair that a corporation be allowed to deal with the disputes at stake in a single venue, this should not come at the expense of creditors' rights. Legislators should keep working to improve the mechanics of class actions to make them adequate to the challenges of the contemporary economic framework.

[103] PNRR, 57 (Riforme e investimenti. La riforma della giustizia. La strategia per il futuro: organizzazione, interventi processuali, valorizzazione delle *best practice*).