



Over Dissent Again, Fourth Circuit Allows Mass Tort Reorgs Without Financial Distress

Quick Take

Fourth Circuit needs to sit en banc before deciding whether *Carolin* and *Robbins* apply when the debtor is not in financial distress.

Analysis

For the fourth time, Circuit Judge Robert Bruce King has filed a vigorous dissent imploring his colleagues on the Fourth Circuit to sit *en banc* and reconsider whether the circuit's *Carolin* and *Robbins* decisions permit chapter 11 reorganization by solvent debtors able to pay tort claims in full.

As he had done twice last year in *Bestwall* dissents, Judge King said that "our Circuit has become the 'safe haven' for ultra-wealthy corporations seeking to evade asbestos-related civil tort liability under the guise of the Bankruptcy Code."

Bound by *Carolin* and *Robbins*, the majority affirmed denial of a motion to modify the automatic stay in a mass tort case involving CertainTeed Corp. Declining to reach the issues raised by the dissenter, the February 11 majority opinion by Circuit Judge Paul V. Neimeyer explained the narrow scope of the majority's opinion:

[W]e do not have before us any motion to dismiss the Chapter 11 petition so as to challenge whether Chapter 11's § 524(g) reorganization procedure has been appropriately invoked in this case. Nor do we have the question before us [of] whether the pre-bankruptcy Texas Two-Step process is appropriate or legal. Indeed, we also do not have before us the more fundamental question of whether Congress had constitutional authority to enact § 524(g) without requiring a showing of "insolvency."

Thus, in this *presumptively* viable Chapter 11 proceeding, we address only the standard for lifting a § 362(a) stay and whether the district court correctly applied that standard.

The Divisional Merger

Owned by a French corporate parent, CertainTeed manufactured products containing asbestos. As Judge Neimeyer said in his majority opinion, the company spent some \$3.5 billion until 2019 litigating and settling lawsuits, exhausting insurance in the process.

In 2019, the company underwent a so-called divisional merger under Texas corporate law, creating two companies. One was to become the debtor.

The debtor assumed all liability for asbestos and was given a business with an estimated \$150 million market value. The second company, which we shall refer to as New CertainTeed, had the profitable businesses and no asbestos liability.

New CertainTeed gave the debtor an uncapped funding agreement promising to pay all expenses under chapter 11 together with an undertaking to pay all asbestos-related claims through a trust to be created at plan confirmation under Section 524(g).

In early 2020, the debtor filed a chapter 11 petition in North Carolina.

After a lengthy trial in 2021, the bankruptcy court denied a motion to modify the automatic stay that would have allowed tort claims to proceed. In the same order, the bankruptcy court extended a preliminary injunction barring suits against nondebtor third parties. There was no appeal, nor did anyone file a motion to dismiss the chapter 11 case, Judge Neimeyer said.

In early 2024, two asbestos claimants filed a motion to lift the automatic stay. The motion argued that the chapter 11 filing was in subjective bad faith because the debtor had the capacity to pay all claims in full. The bankruptcy court denied the motion, ruling that the claimants had not shown evidence of bad faith. The district court affirmed, prompting an appeal to the Fourth Circuit.

Robbins and Carolin

On the merits, Judge Neimeyer said that the “narrow question” was whether the bankruptcy court properly denied the lift-stay motion. For “decades,” he said, *In re*

Robbins, 964 F.2d 342 (4th Cir. 1992), and its three-factor test has been the “controlling authority” in the Fourth Circuit.

Judge Neimeyer said that the bankruptcy court had “correctly” applied the *Robbins* factors and went on to provide “extensive explanation as to why those factors suggest that granting the motion to lift the stay would undermine the entire bankruptcy proceeding.”

Judge Neimeyer characterized the claimants as contending that “*Robbins* is not dispositive because it did not address its argument that [the debtor] acted in bad faith in filing the Chapter 11 petition to obtain a stay” when it was profitable and not financially distressed. He agreed “that *Robbins* did not address whether a showing of bad faith would justify lifting the stay,” because that question was not presented to the appeals court. Citing *Carolin Corp. v. Miller*, 886 F.2d 693 (4th Cir. 1989), he also agreed that “good faith is an *implied* requirement for obtaining an automatic stay.” [Emphasis in original.]

Turning to *Carolin*, Judge Neimeyer said that bad faith as grounds for dismissal or stay modification “is not without boundaries.” The movant must show both “subjective bad faith and objective futility,” as *Carolin* requires.

In the case on appeal, Judge Neimeyer said that the bankruptcy court found a lack of evidence about bad faith and failure to meet the objective futility requirement.

On bad faith, Judge Neimeyer said that the debtor “was legitimately seeking to invoke the § 524(g) process authorized by Congress to address the circumstances in which it faced 60,000 pending asbestos-related claims and expected to receive a continuous flow of such lawsuits for decades to come.”

Regarding the debtor’s ability to pay claims in full without chapter 11, Judge Neimeyer said that the “statutory authority for a company to pursue a § 524(g) plan in a Chapter 11 reorganization does not require a showing of ‘insolvency.’”

Addressing the inadequacy of the country’s tort system, Judge Neimeyer said that the “§ 524(g) process is quicker, more efficient, and fairer than can be provided by continuing with widely dispersed litigation in various federal and state courts.”

Finding no fact that was clearly erroneous, the majority affirmed, holding that the bankruptcy court had not abused its discretion.

The Dissent

The majority opinion was 20 pages. Judge King “wholeheartedly” dissented in a 38-page opinion. He saw

ample evidence in this record that the Debtor . . . and its non-debtor parent . . . have engaged in pervasive, well-documented, and systematic bad faith by subverting the Bankruptcy Code to evade asbestos-related civil tort liability and deprive tens of thousands of dead and dying Americans of their constitutionally protected day in court before a jury of their peers.

“In my view,” Judge King said, “the majority’s decision is not only inexplicable as a matter of law and fact, it is unacceptable.” He referred to the debtor’s “sham Chapter 11 bankruptcy” and the “corporate sleight-of-hand called the ‘Texas Two-Step.’” He said that *Robbins* was “inapposite” and that *Carolin* was “wholly inapplicable.”

Judge King had three reasons for differing with the majority. First, lack of good faith is grounds for modifying the stay, citing the Supreme Court and three circuits. Second, *Robbins* “merely articulates the test for ascertaining what constitutes the statutory ‘cause’ in the context of a good faith bankruptcy.” Third, “It makes no sense to conclude that the Debtor has been acting within the contours of a legitimate Chapter 11 bankruptcy . . . without first addressing the ‘bad faith’ that already infects its Chapter 11 bankruptcy petition.”

Harkening to the Third Circuit’s ground for twice dismissing chapter 11 filings by a Johnson & Johnson subsidiary, he said that CertainTeed “was not, and never will be, in any financial distress, [and] is not seeking to reorganize for a legitimate purpose.” He went on to say “that § 524(g) is a remedy within Chapter 11 and made available to an entity ‘in financial distress.’”

Judge King accused the majority of being “engage[d] in a rather alarming type of extra-legislative judicial ‘tort reform,’” based on a belief that “§ 524(g) is ‘quicker, more efficient, and fairer than can be provided by continuing with widely dispersed litigation in various federal and state courts.’”

Judge King “wholeheartedly” dissented.

Commentary # 1

Prof. Ralph Brubaker provided ABI with the following commentary:

“After declining to take up the issue on multiple previous occasions, the Fourth Circuit has now squarely held that a Texas Two-Step filing, by a debtor with the admitted ability to fully and timely pay all of its mass-tort obligations, is not a bad-faith filing.

“Given the Third Circuit’s contrary ruling in the Johnson & Johnson/*LTL Management* case, there is now a clear circuit split that will hopefully convince the Supreme Court to step in.

“These Texas Two-Step cases raise profound issues regarding whether it is appropriate to use the Chapter 11 process *solely* as a means of displacing the nonbankruptcy tort system. The good-faith inquiry in such a case also implicates fundamental constitutional issues regarding the scope of the Bankruptcy Power, the Due Process and Seventh Amendment rights of individual tort claimants, and states’ sovereignty over the development and administration of state-law tort claims, embedded in Article III’s limitations on federal courts’ jurisdiction over state-law claims.”

Professor Brubaker is the James H.M. Sprayregen Professor of Law at the University of Illinois College of Law. He is a consultant to counsel for one of the participants in a pending Texas Two-Step mass-tort bankruptcy case. The views expressed here are solely his own.

To read one of Prof. Brubaker’s writings on the constitutional issues, [click here](#).

Commentary # 2

Prof. Robert M. Lawless provided ABI with the following commentary:

“The issue is not going away anytime soon, and it has the feel that we are setting up for a Supreme Court decision in the coming years.

“The dissent implies the problem is with the divisive merger. Would the dissent have ruled differently if the case had involved putting the original company into

bankruptcy? With the backstop, isn't the entire corporate group equally solvent (or insolvent) before and after the divisive merger?

"If so, what is it about a divisive merger specifically that causes concern? The dissent nods at an answer. The backstop from the 'GoodCo' replaces the assets of 'OldCo' with a promise to pay the value of the assets. If there is anything bankruptcy lawyers understand, it is that a promise to pay is not the same as the payment itself."

Prof. Lawless is the Max L. Rowe Professor of Law and co-director of the Program on Law, Behavior & Social Science at the University of Illinois College of Law.

Note

To read ABI's reports on the Fourth Circuit's three recent *Bestwall* opinions and Judge King's dissents, [click here](#), [here](#) and [here](#).

Case Name

Herlihy v. DBMP LLC

Case Citation

Herlihy v. DBMP LLC, 24-2109 (4th Cir. Feb. 11, 2026).

4th Circuit

Automatic Stay

Corporate Governance

Creditors' Committee

Plan Confirmation

Practice and Procedure

Venue/Jurisdiction

Business Reorganization

Mass Torts

Case Type

Business

Alexa Summary

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Links:

[1] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5380517 [2]

<https://www.abi.org/newsroom/daily-wire/fourth-circuit-may-prompt-cert-to-decide-whether-bankruptcy-requires-insolvency/>

[3]

<https://www.abi.org/newsroom/daily-wire/bestwall-dissenting-opinion-reads-like-dismissal-of-ltl-mgmt-for-a-bad-faith>

[4]

<https://www.abi.org/newsroom/daily-wire/a-fourth-circuit-dissenter-opposes-mass-tort-injunctions-protecting-non-debtors>

[5] <https://www.abi.org/terms/courts/4th-circuit> [6]

<https://www.abi.org/terms/journal-article-tags/automatic-stay> [7]

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