

Bankruptcy in the United States is a “rehabilitative” process. Unlike many other countries, the bankruptcy process does not aim to liquidate businesses to provide value to creditors. Bankruptcy aims to reorganize businesses to improve the operations that led the business into distress. To aid in turnaround, bankruptcy provides those who file special protections. However, businesses have been able to leverage the protections of the bankruptcy code despite not being under any distress.

Purdue Pharma developed, manufactured, and began marketing OxyContin as a safer alternative to traditionally prescribed opioids in the mid-1990s. From 1991 to 2021, an estimated 645,000 Americans died from opioid use. Senior Purdue Pharma executives pled guilty to their role in causing the crisis in 2007 after OxyContin was found to be more addictive than advertised. To shield themselves from the civil liability related to the opioid cases, the Sackler family, the majority owners of Purdue Pharma, planned to file the business for bankruptcy and contribute up to \$6 billion to the bankruptcy estate in exchange for a judicial order that would prevent any victims of the opioid crisis from suing the Sackler family directly.

Although bankruptcy court initially approved this proposal, the 2nd U.S. Circuit Court of Appeal reversed the ruling. The case was then brought to the Supreme Court after an appeal by the U.S. Trustee. In essence, the conflict the justices aimed to resolve concerned the ability of bankruptcy law to protect non-debtor parties. Ultimately, the Supreme Court ruled in a 5-4 decision to prevent nonconsensual third-party releases, effectively holding the Sacklers to account. However, bankruptcy is still a valuable tool to protect corporate entities and debtors from mass tort litigation.

Several arms of the Catholic Church in California used bankruptcy to manage over 2000 lawsuits alleging sexual abuse in 2023. A victim of the Church pointed out how the Oakland diocese raised over \$200 million for a new cathedral but couldn’t “get the money together to pay the child victims whom they raped for decades.” Of the 2000 sexual abuse cases, 330 named the Oakland diocese specifically. Although supporters of the church argue bankruptcy allows the Church to treat all victims equally, the Church is also able to subordinate the claims of victims underneath financial claims and negotiate lower payments to each alleged victim. Furthermore, the bankruptcy court doesn’t give claimants the same rights as a civil or criminal court.

Johnson and Johnson began developing a plan in 2021 to limit compensation to cancer patients who suffered because of J&J’s talc power products. J&J’s strategy, named Project Plato, leveraged state corporate laws and the federal bankruptcy code to underpay victims, prevent future litigation, and allow the company to operate as usual. Project Plato utilizes the following steps to conduct a Texas Two-Step. First, J&J moved its headquarters to Texas to utilize the loose state corporate laws. Second, J&J created a new subsidiary. Next, the new subsidiary, Legacy Talc Litigation (LTL) Management, took on all of the talc powder litigation liability and a comparatively small amount of assets from J&J. This allowed LTL Management to award less in compensation as they had substantially less assets than the value of the litigants’ claims. Litigants would also be unable to sue J&J because all liability is now placed with LTL Management. Fourth, LTL Management filed for bankruptcy. A court dismissed the filing in

January 2023, prompting J&J to repeat the same process with Red River Talc, another subsidiary. Red River was given more assets by J&J to secure more support in court from claimants¹. After 83% of claimants approved the updated bankruptcy plan, all eyes are on the courts to see if they will approve Red River's bankruptcy despite concerns surrounding the legitimacy of the vote².

J&J is one of two US companies with a "AAA" credit rating, hardly a company that the bankruptcy code aims to protect. Last week, Senator Elizabeth Warren reintroduced the Nondebtor Release Prohibition Act of 2024 the seeks to close the loopholes that the Texas Two-Step exploits. The legislation is viewed as a partisan effort by Democrats, however public outrage over misuse of the bankruptcy code incited a bipartisan group to introduce the Ending Corporate Bankruptcy Abuse Act in July 2024. Until serious reform of the bankruptcy code, victims will continue seeing themselves bankruptcy court instead of civil and criminal court.

1

Although J&J needs claimants' approval to file the talc subsidiary, this is far less consideration than litigants would receive in civil/criminal court.

2

J&J used a strategy known as district shopping to find the most favorable court to file its subsidiaries for bankruptcy. Additionally, holdouts argue that J&J is using additional compensation as leverage to force groups to approve the plan, essentially "buying votes."