

BANKRUPTCY UPDATE

Expert Analysis

When Mass Tort Meets Bankruptcy

This issue of the Bankruptcy Update focuses on recent bankruptcy filings by Pacific Gas and Electric Company, Imerys Talc America and Insys Therapeutics and their efforts to navigate the intersection of mass tort liabilities and bankruptcy.

Pacific Gas and Electric Co.

On Jan. 29, 2019, PG&E Corporation and its primary subsidiary, Pacific Gas and Electric Company filed petitions for relief under Chapter 11 of the Bankruptcy Code in the U.S. Bankruptcy Court for the Northern District of California. *Pacific Gas and Electric Co.* (Bankr. N. D. Cal. Case No. 19-30088)

The debtors, power suppliers to 16 million households in Northern and Central California, sought bankruptcy protection in the face of mounting damage claims arising from California's devastating wildfires that killed 130 people and burned down multiple structures in 2017 and 2018. The debtors viewed restructuring as the only viable path that may enable them to continue business operations, invest in infrastructure to meet safety measure requirements, and satisfy dam-

By
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age claims and \$24 billion in funded debt.

To fund operations under Chapter 11, the debtors sought approval of a \$5.5 billion DIP financing facility from a group of about 50 financial institutions including JP Morgan Chase Bank NA, Bank of America NA, Barclays Bank PLC and Citigroup Global Markets Inc. After several contested hearings, the financing package was approved on March 27, 2019 with modifications extending certain grace periods in effect before the lenders may exercise default remedies or take possession of utility assets.

Subsequently, the debtors sought and obtained an extension of their exclusive period to file and solicit a Chapter 11 plan, from May 29, 2019 to Nov. 29, 2019, and from July 29, 2019 to Jan. 28, 2020, respectively. The debtors argued an extension was appropriate in light of the size and complexities of their cases and need for additional time to resolve massive potential wildfire liabilities that could exceed \$30 billion.

Nevertheless, the debtors soon faced motions to terminate exclusivity by an ad hoc group of subrogation claim holders and an ad hoc group of unsecured bondholders. Each group proposed an independent Chapter 11 plan in conjunction with seeking to terminate exclusivity.

In the interim, in July the Governor of California signed legislation that establishes a multi-billion dollar fund for dealing with future wildfires. While the legislation is complex, one critical component gives the debtors until June 30, 2020, to emerge from Chapter 11 and address

On June 10, 2019, Insys Therapeutics Inc. and six affiliates filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code in the U.S. Bankruptcy Court for the District of Delaware.

their massive wildfire claims. By mid-August 2019, the debtors obtained commitments for \$13 billion in plan funding and expect this amount to rise. Ultimately, the bankruptcy court denied the motions to terminate exclusivity despite noting that movants proposed confirmable alternative plans concluding that the presumption in favor of

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debtor exclusivity weighed against termination.

Imerys Talc America

On Feb. 13, 2019, Imerys Talc America, Inc. and two affiliates filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code in the U.S. Bankruptcy Court for the District of Delaware. *Imerys Talc America* (Bankr. D. Del. Case No. 19-10289).

Imerys, the sole cosmetic talc supplier of Johnson & Johnson, sought bankruptcy protection following a massive wave of tort claims from about 14,650 individual claimants arguing that Imerys' talc contained cancer-causing asbestos. Prior to the bankruptcy filing, the company did not have any secured financing arrangements or any third party credit facilities and primarily relied on positive cash flow from the operations to run the business but found themselves forced to use cash flow to cover litigation liabilities.

Following commencement of their Chapter 11 cases, the debtors initiated an adversary proceeding against two former owners—Cyprus Mines Corp. and Cyprus Amax Minerals Co.—who had filed an emergency motion seeking permission to access insurance funds to cover various lawsuits. The debtors sought to bar Cyprus from accessing insurance funds until the ownership of the policies was determined. In support of their ownership claim, the debtors asserted that they took assignment of the policies as part of the acquisition of Cyprus' talc assets and liabilities in 1992. In addition, the official committee of tort claimants objected to Cyprus' access to insurance proceeds arguing that the Cyprus companies were solvent unaffiliated defendants and were not entitled to the insurance proceeds. The bankruptcy court ruled in favor of the debtors and refused to grant Cyprus' emergency motion but did not determine the ownership issue.

Following this loss, Cyprus sought an extension of the automatic stay to stop talc related suits against them pending a determination on the ownership issue. To resolve the stay extension litigation, the debtors agreed to grant Cyprus temporary access to liability insurance until the ownership dispute was resolved.

Subsequently, a group of insurance companies filed a motion seeking to lift the automatic stay to allow a California state action filed in August of 2017 to proceed to determine insurance coverage limits. In support, the insurers argued that the California action should proceed because it does not include any direct claims against the debtors. The debtors countered that the California state suit was recently transferred to a new judge and had been dormant for almost two years before the bankruptcy filing and, therefore, the insurers would not be prejudiced by waiting until the insurance ownership dispute was resolved. The bankruptcy court denied the insurers' motion after concluding that there was no procedural or substantive basis to grant the relief sought.

Insys Therapeutics

On June 10, 2019, Insys Therapeutics Inc. and six affiliates filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code in the U.S. Bankruptcy Court for the District of Delaware. *Insys Therapeutics* (Bankr. D. Del. Case No. 19-11292)

Just prior to the bankruptcy filing, Insys agreed to plead guilty to five counts of mail fraud and pay \$225 million to settle federal criminal and civil investigations that alleged that Insys bribed doctors to prescribe a fentanyl-based painkiller called Subsys. The debtors then commenced their Chapter 11 cases to effectuate a sale of their assets and attempt to preserve liquidity.

Contemporaneously with their bankruptcy filing, the debtors commenced an adversary proceeding seeking to enjoin multiple lawsuits by state attorney generals, other governmental entities, counties and municipalities. Subsequently, the debtors reached a deal with attorney general offices in New York, New Jersey, Arizona, North Carolina, and Minnesota and with the official committee of unsecured creditors to temporarily stay opioid litigation while the debtors pursue the sale of their assets.

On Aug. 22, 2019, the bankruptcy court approved the sale of Insys' naloxone nasal spray and cannabis based products to Hikma Pharmaceuticals USA Inc. and Chillion Group Holdings US Inc. for total consideration of approximately \$29 million. An auction of the debtors' remaining assets, including Subsys, will be scheduled for a later date.

In the interim, the debtors, the official committee of unsecured creditors and several other major constituents are engaging in mediation to facilitate resolution of various disputes and claims outside of a formal claim estimation process.