Mass Torts Evolve: The Intersection of Aggregate Litigation and Bankruptcy

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Panelist Biographies

Kenneth Ayotte

Professor Ayotte joined Berkeley Law in 2014. From 2007-2014, he was a Professor of Law at Northwestern University. From 2002-2007, he was an Assistant Professor in the Finance and Economics group at Columbia Business School, where he won the Dean’s Award For Teaching Excellence.

Ayotte’s research interests are in the areas of bankruptcy, corporate finance, and law and economics. His research has been published in peer-reviewed journals, such as *Review of Financial Studies* and the *Journal of Law, Economics and Organization*, as well as law reviews, including *University of Chicago Law Review* and *Michigan Law Review*. His paper “Bankruptcy or Bailouts?” with David Skeel, analyzing the role of bankruptcy law in financial crises, was chosen as a Top 10 article in corporate and securities law by the *Corporate Practice Commentator*. Ayotte is currently a director of the American Law and Economics Association and an Associate Editor at the *International Review of Law and Economics*.

Sheila Birnbaum

Sheila L. Birnbaum is co-chair of Dechert’s product liability and mass torts practice and focuses on complex product liability, mass torts and insurance litigation. She is one of the country’s preeminent product liability defense lawyers, having served as national counsel or lead defense counsel for numerous Fortune 500 companies in some of the largest and most complex tort cases in the United States. She has also argued many influential appeals in appellate courts across the United States, including the U.S. Supreme Court.

In addition to her legal achievements, Ms. Birnbaum has led an active career as an academic, becoming the first tenured woman professor of law at Fordham University Law School, and was a professor of law and associate dean at New York University School of Law.

Andrew Bradt

Andrew Bradt’s primary scholarly interests are in the areas of civil procedure, conflict of laws, and remedies. His current research focuses on the adaptation of procedural and choice-of-law
systems to large-scale multijurisdictional litigation, with a particular interest in federal multidistrict litigation. In 2019, he received Berkeley Law’s Rutter Award for Teaching Distinction.

Bradt’s scholarship has been published in numerous law journals and has been cited by both courts and prominent legal treatises. He is a co-author, with Geoffrey C. Hazard, William A. Fletcher, and Stephen McG. Bundy, of Pleading and Procedure—Cases and Materials (12th ed., Foundation Press, 2020), and a co-author, with Edward Sherman, Richard Marcus, and Howard Erichson, of Complex Litigation—Cases and Materials on Advanced Civil Procedure (7th ed., West Academic, 2021). In 2018, Bradt was appointed by the Counselor to the Chief Justice of the United States to the Supreme Court Fellows Program’s Academic Advisory Board. In 2019, he was elected to the membership of the American Law Institute, and he serves on the Members Consultative Groups for the Restatement (Third), Conflict of Laws, and the Restatement (Third), Torts: Remedies.

Elizabeth Chamblee Burch

Elizabeth Chamblee Burch joined the University of Georgia School of Law faculty in 2011. She was promoted to the rank of full professor in 2015 and served a visiting professor at Harvard Law School in 2017. After holding the Charles H. Kirbo Chair of Law for two years, she assumed the Fuller E. Callaway Chair of Law in 2019. She is the author of *Mass Tort Deals: Backroom Bargaining in Multidistrict Litigation* (Cambridge University Press 2019) and her teaching and research interests include civil procedure, class actions and mass torts.

Burch is an award-winning scholar whose groundbreaking work on multidistrict litigation and class actions won the American Law Institute's Early Career Scholars Medal in 2015, the Fred C. Zacharias Memorial Prize for Professional Responsibility Scholarship in 2016 and the Mangano Dispute Resolution Advancement Award in 2019.


Elizabeth Cabraser
Elizabeth Cabraser is a persistent wanderer in the fields of aggregate (class action and mass tort) litigation, representing plaintiffs. She lectures on aggregate and multidistrict litigation at Berkeley and Yale law schools, and currently serves on the federal Standing Committee on Rules of Practice and Procedure.

**Sergio Campos**

Sergio Campos joined the University of Miami School of Law faculty in 2009. Prior to joining the faculty, he was Charles Hamilton Houston Fellow at Harvard Law School and was in private practice. He also clerked for the Honorable Juan R. Torruella of the United States Court of Appeals for the First Circuit and the Honorable Patti B. Saris of the United States District Court for the District of Massachusetts. His research interests include civil procedure, federal courts, and remedies.

**Zachary Clopton**

Zachary D. Clopton joined Northwestern Pritzker School of Law as a Professor of Law in 2019. His research and teaching interests include civil procedure, complex litigation, international litigation, and national security law.

Clopton clerked for the Honorable Diane P. Wood of the United States Court of Appeals for the Seventh Circuit. He served as an Assistant United States Attorney in Chicago and he worked in the national security group at Wilmer Hale in Washington, D.C. Prior to joining Northwestern, Clopton was as an Associate Professor of Law at Cornell Law School. He also was a Public Law Fellow at the University of Chicago Law School.


**Andrew Dawson**

Professor Dawson joined the Miami Law faculty in 2011. He received his B.A. from Williams College and his J.D. from Harvard Law School, where he was a senior editor of the Harvard Negotiation Law Review and recipient of the American Bankruptcy Institute Medal of Excellence and the Irving Oberman Memorial Award. Before joining the faculty, he was a Kauffman Legal

His research has focused on the intersection of federal bankruptcy and labor laws, both in the corporate and municipal bankruptcy context. Labor issues have played a major role in the restructuring of corporate debtors -- for example, in the airline, coal, and manufacturing industries -- and, more recently, have been a central element in municipal insolvency. In addition to his scholarship in this field, he has served as the Reporter for the Labor and Benefits Subcommittee of the American Bankruptcy Institute's Commission to Study the Reform of Chapter 11. The ABI Commission worked for three years to study ways in which the Bankruptcy Code should be modernized to take into account the significant changes in corporate finance and corporate governance since the Code's enactment in 1978.

**Hon. John Dorsey**

On June 11, 2019, John T. Dorsey was sworn in as a United States Bankruptcy Judge for the District of Delaware. The oath was administered in a private ceremony before Hon. Leonard P. Stark, Chief Judge of the United States District Court for the District of Delaware. Judge Dorsey fills one of two much-needed, newly created seats, which were established by Congress after tireless efforts by the Administrative Office of U.S. Courts and the strong support of the Delaware Congressional delegation, particularly Senator Chris Coons and his staff. This brings the Court’s current complement of judges to seven.

Judge Dorsey practiced complex commercial litigation in Wilmington, Delaware for the past 28 years. For the past 16 years, Judge Dorsey was a partner at Young Conaway Stargatt & Taylor, LLC, representing debtors and creditors in chapter 11 litigation matters. Judge Dorsey also served as general counsel to Young Conaway for the past five years. Prior to joining Young Conaway, Judge Dorsey practiced with Richards Layton & Finger, PC, and served as the State Director for then U.S. Senator Joseph R. Biden, Jr. Prior to practicing law, he served in both the U.S. Army as a Military Police Investigator and the U.S. Air Force as an ICBM launch officer.

**Samuel Issacharoff**

Samuel Issacharoff is the Reiss Professor of Constitutional Law. His wide-ranging research deals with issues in civil procedure (especially complex litigation and class actions), law and economics, constitutional law, particularly with regard to voting rights and electoral systems, and employment law. He is one of the pioneers in the law of the political process, where his Law of
Democracy casebook (co-authored with Stanford’s Pam Karlan and NYU’s Rick Pildes) and dozens of articles have helped to create a vibrant new area of constitutional law. He is also a leading figure in the field of procedure, both in the academy and outside. He served as the reporter for the Principles of the Law of Aggregate Litigation of the American Law Institute.

Issacharoff is a 1983 graduate of the Yale Law School. After clerking, he spent the early part of his career as a voting rights lawyer. He then began his teaching career at the University of Texas in 1989, where he held the Joseph D. Jamail Centennial Chair in Law. In 1999, he moved to Columbia Law School, where he was the Harold R. Medina Professor of Procedural Jurisprudence. His published articles appear in every leading law review, as well as in leading journals in other fields. Issacharoff is a fellow of the American Academy of Arts and Sciences.

Robert Klonoff

Jordan D. Schnitzer Professor (and former Dean) Robert Klonoff is the author of three textbooks and numerous articles on class actions and multidistrict litigation. He served as an Associate Reporter for the ALI’s class action project, “Principles of the Law of Aggregate Litigation.” From 2011-2017, he served as the academic member of the U.S. Judicial Conference Advisory Committee on Civil Rules. Professor Klonoff has argued eight cases before the U.S. Supreme Court and has served as an expert witness or as counsel in numerous class actions and MDLs, including TransUnion v. Ramirez, BP Deepwater Horizon oil spill, NFL Concussion, VW Clean Diesel, National Opiates, and many others.

Alexandra Lahav

Alexandra D. Lahav is a nationally recognized expert on the civil justice system and tort law. She takes an institutional approach to the study of these subjects, using methods and perspectives drawn from legal analysis, history, political theory, and economics. She teaches civil procedure, torts, complex litigation, professional responsibility, and related subjects.

In her work on torts, Lahav has explored the use of statistical sampling to resolve mass tort cases, the role of the jury, and how insights from epidemiology can inform the resolution of mass and toxic torts. Her articles in this area include Mass Tort Class Actions – Past, Present, and Future, 92 NYU L. Rev. 998 (2017) and The Case for “Trial by Formula,” 90 Texas L. Rev. 571 (2012). She is currently working on a project on how epidemiology can inform the future direction of tort doctrine.
Jessica Lauria

Jessica Lauria is a partner in White & Case's Financial Restructuring and Insolvency Practice based in the New York office. Jessica represents clients in a wide variety of in court and out of court restructuring matters. Her work includes providing advice on complex questions relating to governance in the corporate restructuring context as well as, among other things, analysis, strategic advice and negotiation of all aspects of corporate restructurings including debtor-in-possession financing arrangements, cash collateral usage and exit financing facilities; formulation of legal and financial strategies for negotiating and implementing plans of reorganization; negotiating debt and equity documents for reorganized companies; strategic advice and negotiation of sale documents and pleadings in connection with section 363 and other complex asset sales; strategic planning for debt restructuring alternatives and chapter 11 filings; preparing debtors for chapter 11 filings and structuring exit strategies for chapter 11 proceedings. Jessica also has extensive experience representing clients in connection with mass tort chapter 11 proceedings.

Edward Neiger

Edward Neiger is the co-managing partner of ASK LLP. His practice lies at the intersection of bankruptcy and mass tort law, and he had leading roles representing victims in the bankruptcies of The Weinstein Company, PG&E, The Boy Scouts, Mallinckrodt and Purdue Pharma. Edward is the author of the New York Law Journal’s “Mass Torts Roundup” and “Bankruptcy Update” columns and is a passionate advocate for those affected by the opioid crisis. He lives in Scarsdale, New York with his wife and two daughters.

Samir Parikh

Samir Parikh is a professor of law at Lewis & Clark Law School and the Editor-in-Chief of the Bloomberg Law Bankruptcy Treatise. Samir is a nationally recognized expert on mass tort bankruptcies. His new article, Scarlet-Lettered Bankruptcy: A Public Benefit Proposal for Mass Tort Villains, is the first to propose a public benefit alternative to traditional resolution mechanisms for mass tort debtors. The article is forthcoming in the Northwestern University Law Review. His new essay, Mass Exploitation, is forthcoming in the University of Pennsylvania Law Review and identifies the new shadowed practices in mass restructuring cases like Purdue Pharma and Johnson & Johnson. The essay builds on his recent articles, The New Mass Torts Bargain and Due Process Alignment in Mass Restructurings (with Sergio Campos), which are forthcoming in the Fordham Law Review. Samir is a Fulbright Schuman Scholar and was a Visiting Professor of Law at Oxford University in 2019. He is a graduate of the University of Michigan Law School.
The Honorable R. David Proctor

United States District Court for the Northern District of Alabama, Birmingham

Judge R. David Proctor was nominated by President George W. Bush to the United States District Court for the Northern District of Alabama, and received his commission on September 22, 2003.

Judge Proctor received his undergraduate degree from Carson-Newman College in 1983. After graduating from the University of Tennessee College of Law in 1986, Judge Proctor served as a law clerk to United States Circuit Judge H. Emory Widener, Jr. of the U.S. Court of Appeals for the Fourth Circuit.

In addition to his regular docket, Judge Proctor has served as a transferee judge in three separate MDLs, was previously a member of the Judicial Panel on Multidistrict Litigation from 2014-2020, and is currently a member of the Civil Rules Advisory Committee. He has taught courses in Complex Civil Litigation and Multidistrict Litigation at Cumberland School of Law, the University of Alabama School of Law, the University of Georgia School of Law, the University of Tennessee School of Law, and the University of Miami School of Law.

Theodore Rave

Teddy Rave writes and teaches in the areas of civil procedure, complex litigation, constitutional law, and election law. His recent scholarship focuses on class actions, multidistrict litigation, and public fiduciary law. Professor Rave’s articles have appeared in leading journals, including the Harvard Law Review, the California Law Review, the Duke Law Journal, the Georgetown Law Journal, the Northwestern University Law Review, and the Vanderbilt Law Review. His article, When Peace Is Not the Goal of a Class Action Settlement, was selected for the 2015 Yale/Stanford/Harvard Junior Faculty Forum. He was elected to the American Law Institute in 2018.

Raymond Silverman

Raymond C. Silverman is a partner at Parker Waichman, LLP in Port Washington, New York. For the past ten years, he has practiced exclusively in the area of Mass Tort litigation, representing individuals injured by pharmaceuticals, medical devices, and consumer products. Raymond has held court-appointed leadership positions, including co-lead counsel, in numerous multi-district litigations and other coordinated proceedings across the country. Raymond
currently represents claimants in bankruptcy proceedings involving talcum powder, Boy Scouts of America, and Purdue Pharma. He is also a graduate of Fordham Law School, Class of 1999.

Hon. Patti Saris

United States District Judge Patti B. Saris became Chief Judge of the United States District Court for the District of Massachusetts on January 1, 2013. She was Chair of the United States Sentencing Commission in Washington, DC from January, 2011 to January, 2017. She is a graduate of Radcliffe College ‘73 (Magna Cum Laude, Phi Beta Kappa) and Harvard Law School ‘76 (Cum Laude). After graduating from law school, she clerked for the Supreme Judicial Court, and then went into private practice. When Senator Edward M. Kennedy became chairman of the Senate Judiciary Committee, she moved to Washington D.C. and worked as staff counsel. She later became an Assistant United States Attorney, and eventually chief of the Civil Division. In 1986, Judge Saris became a United States Magistrate Judge, and in 1989, she was appointed as an Associate Justice of the Massachusetts Superior Court. In 1994, she was appointed to the United States District Court.

Tancred Schiavoni

Tancred Schiavoni, Chair of O’Melveny & Myers' Insurance Practice, represents insurance and reinsurance companies in a variety of disputes, including bad faith claims and environmental coverage litigation. Tan has represented carriers in cases in a number of states, including New Jersey, New York, and New Hampshire. He has also conducted and assisted in mediations and provided coverage advice to clients to assist them in avoiding disputes without the need for litigation. Tan participated at trial in the defense of a major environmental coverage action involving multiple parties and claims for coverage exceeding US$500 million. Tan also was involved in the trial of another major multiparty coverage dispute involving coverage claims in a dozen states and Canada.

Chambers USA notes that Tan is “known as a go-to lawyer on high-stakes mass tort and insurance bad faith litigation.”

Lindsey Simon

Lindsey Simon is an assistant professor at the University of Georgia School of Law.
Her research focuses on the bankruptcy system, drawing concepts from bankruptcy structure and procedure to address broader institutional design challenges. Simon’s articles have been published in the *Administrative Law Review*, the *Cardozo Law Review*, the *Indiana Law Journal* and the *North Carolina Law Review*. Simon’s most recent scholarship addresses the intersection between mass torts and bankruptcy, including an article on non-debtor relief in Chapter 11 forthcoming in the *Yale Law Journal*. She has assisted academics, judges, members of Congress and many other stakeholders on the subject of mass tort bankruptcies, and her commentary in connection with the Purdue Pharma, Boy Scouts of America and USA Gymnastics bankruptcies has appeared in various media outlets, including *The Wall Street Journal*, *The New York Times*, *Forbes*, *The Economist*, *NPR* and *Reuters*.

**Ted Janger**

Edward Janger is the David M. Barse Professor of Law at Brooklyn Law School. He teaches and writes in the areas of bankruptcy law, commercial law, consumer credit and data privacy. His articles have appeared in the *Illinois Law Review*, the *Michigan Law Review*, the *Texas Law Review* and the *Yale Law Journal*. Recent scholarship explores issues of value allocation and governance in Chapter 11 cases, cross-border bankruptcy, resolution of systemically important financial institutions, and the treatment of financial contracts in bankruptcy. He is co-director of the Center for the Study of Business Law & Regulation at Brooklyn Law School.

Professor Janger is the past chair of the Association of American Law Schools’ Section on Commercial and Consumer Law, and a member of the American College of Bankruptcy, the International Insolvency Institute and the American Law Institute. He has served as consultant to the Business Bankruptcy Subcommittee of the Federal Bankruptcy Rules Advisory Committee. He has held both the Maurice R. Greenberg and the Anne Urowsky Visiting Professorships at Yale Law School, and the Bruce W. Nichols Visiting Professorship at Harvard Law School, as well as serving as the Robert Zinman Scholar-in-Residence at the American Bankruptcy Institute in Washington, D.C.

**Adam Levitin**

Professor Levitin specializes in bankruptcy, commercial law, and financial regulation. His scholarship has won numerous awards, including the American Law Institute’s Young Scholar’s Medal, in recognition of his work’s potential to influence improvements in law.

Before joining Georgetown faculty, Professor Levitin practiced in the Business Finance & Restructuring Department of Weil, Gotshal, & Manges, LLP and served as law clerk to the
Honorable Jane R. Roth on the United States Court of Appeals for the Third Circuit. Professor Levitin has also previously served as the Bruce W. Nichols Visiting Professor of Law at Harvard Law School, as the Robert Zinman Scholar in Residence at the American Bankruptcy Institute, as Special Counsel to the Congressional Oversight Panel for the Troubled Asset Relief Program, and on the Consumer Financial Protection Bureau’s Consumer Advisory Board.

**Anupama Yeramalli**

Anupama Yerramalli represents debtors, official and ad hoc committees, bondholders, lenders, and other creditors and investors in some of the market’s most complex and multifaceted bankruptcies and restructurings, both in and out of court.

Ms. Yerramalli advises constituents across the capital structure, on matters throughout every stage of a restructuring. Her practice encompasses a range of bankruptcy cases, out-of-court restructurings, and other distressed situations, with a particular focus on company-side representations.

She regularly counsels leading domestic and multinational corporations across major industries, including healthcare, shipping, telecommunications, energy, manufacturing, and retail. She draws on her broad corporate governance and liability management experience to help companies navigate a variety of sensitive issues that arise in connection with high-stakes insolvency matters.
Mass torts create a unique scale of harm and liabilities. Corporate tortfeasors are desperate to settle claims but condition settlement upon resolution of substantially all claims at a known price – commonly referred to as a global settlement. Without this, corporate tortfeasors are willing to continue with protracted and fragmented litigation across jurisdictions. Global settlements can be elusive in these cases. Mass torts are oftentimes characterized by heterogeneous victim groups that include both current victims and future victims – individuals whose harm has not yet manifested and may not do so for years. Despite this incongruence, future victim claims must be aggregated as part of any global settlement. This is the tragedy of the mass tort anticommons: without unanimity, victim groups are unable to access settlement resources in a timely or meaningful way, but actual coordination across the group can be impossible.

Current resolution structures have proven ill-equipped to efficiently and equitably address the novel challenges posed by mass torts. Many cases cannot satisfy Rule 23’s requirements for class action certification. Multidistrict litigation is the most frequently invoked resolution structure, but the MDL process has infirmities. MDL lacks many of Rule 23’s fundamental safeguards that protect process integrity and victim autonomy. MDL has become a captive settlement process. In response, a new strategy for resolving modern mass torts has emerged. Corporate tortfeasors – including Johnson & Johnson, Purdue Pharma, Boy Scouts of America, and USA Gymnastics – have started filing for bankruptcy. These mass restructurings automatically halt the affected MDL cases and transfer proceedings to a bankruptcy court – a process I describe as bankruptcy preemption. Unfortunately, bankruptcy preemption replaces one deficient structure with another. Mass restructuring debtors are exploiting statutory gaps in the Bankruptcy Code in order to bind victims through an unpredictable, ad hoc structure. The new bargain creates myriad risks, including insolvent settlement trusts and disparate treatment across victim classes.

This Article is the first to attempt a reconceptualization of how modern mass torts should be resolved and delivers an unprecedented normative construct focused on addressing anticommons dynamics through statutory amendments to the Bankruptcy Code. These changes, coupled with an evolved perspective on fundamental structural anomalies, are designed to improve predictability, efficiency, and victim recoveries.
INTRODUCTION

Dr. Cicely Saunders’s patients were hopelessly addicted to morphine. She prescribed the drug without hesitation and escalated doses on a predetermined schedule often times independent of patient input. But rather than being vilified, Saunders was revered. As the mother of the modern hospice movement in 1960s London, her attention to pain management for dying cancer patients was revolutionary.\(^1\) Her primary objective was to prevent suffering in a patient’s final days. The threat of addiction was irrelevant. In fact, by 1970, Saunders was seeking an even more potent morphine drug.\(^2\)

Saunders approached Napp Pharmaceutical – a subsidiary of US corporation Purdue Pharma – with the idea of an intensified, slow-release morphine pill.\(^3\) Such a pill would alleviate pain in dire, end-of-life scenarios and ensure a constant release of morphine to allow cancer patients to enjoy uninterrupted sleep at night. In 1981, Napp brought MS Contin to market, and it quickly became the gold standard for managing cancer patients’ pain.\(^4\) Saunders rejoiced. Unfortunately, the unintended consequences of her simple request were cataclysmic.

In the 1980s, cancer care represented a miniscule part of the prescription drug market,\(^5\) and profits from MS Contin were negligible.\(^6\) Purdue Pharma wanted more. But there was little possibility of expanding the patient demographic for MS Contin. Morphine was seen as a wildly addictive and potent drug reserved for terminal patients.\(^7\) Purdue needed to change the narrative.

Purdue identified medical professionals proselytizing aggressive pain management for all patients, not just those with cancer.\(^8\) Saunders’s system of escalating morphine doses appeared to be transformative. Could the system help individuals manage general chronic pain? Seizing on this question, Purdue undertook an inventive and depraved strategy. Instead of promoting a morphine pill like MS Contin, the company pivoted and decided to formulate pain medication containing oxycodone, a drug that is approximately 50\% more potent than morphine but with generally misunderstood effects.\(^9\) Purdue’s field research indicated that physicians failed to appreciate oxycodone’s potency or addiction

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\(^2\) See Christopher Glazek, The Secretive Family Making Billions From the Opioid Crisis, Esquire (October 16, 2017).
\(^3\) See id.
\(^4\) See id.; see also McGreal, supra note 1, at 27.
\(^6\) Prior to its foray into prescription narcotics, Purdue was a relatively small pharmaceutical company specializing in low-margin products, including ear-wax remover, laxatives, and antiseptics. See Glazek, supra note 2.
\(^7\) See id.
\(^8\) Dr. Lynn Webster was part of a cohort that challenged the medical profession’s aversion to potent and potentially addictive drugs for pain management. He now regrets his involvement, stating recently: “We thought we could restore the life of these people who are suffering….Clearly, if I had an inkling of what I know now then, I wouldn’t have spoken in the way that I spoke.” See McGreal, supra note 1, at 26.
\(^9\) See Glazek, supra note 2, at 20.
The New Mass Torts Bargain

gravity. The drug had not been stigmatized at that time. Further, many physicians referred to the drug as “oxycodeine” – an unfortunate malapropism that conjured images of codeine, a ubiquitous drug with limited addictive properties used for moderate pain.

By 1990, the medical profession was adjusting its view of pain management, and Purdue stepped into this shifting landscape to offer the best pain medication ever created. In 1996, Purdue brought OxyContin to market, and prescriptions for the drug during that first year exceeded 300,000. A staggering 6 million OxyContin prescriptions were written in 2001. Sales topped $1 billion for that year alone. By 2004, OxyContin was the most prevalent prescription opioid abused in the US. And just four years later, Americans – who represent less than 5 percent of the world’s population – were consuming more than 80 percent of the world’s opioids.

Purdue did not create the pain management movement. The company just monetized it better than anyone else, but the oversized profits the company enjoyed were not merely first-mover premiums. Purdue created a sales strategy that suppressed the drug’s addition risks. Instead of targeting physicians who exclusively treated cancer patients, the company moved the drug into the mainstream by soliciting general practitioners, dentists, gynecologists, and physical therapists. To ensure profits, the company provided kickbacks to each cog in the distribution chain: wholesalers received rebates in exchange for keeping OxyContin off prior-authorization lists; pharmacists received kickbacks on their initial orders; patients received coupons for 30-day starter kits; medical academics received grants for research on the benefits of pain management; and politicians received donations from the company and its founding family. Numerous other companies would replicate these tactics to promote their own pharmaceuticals, but Purdue was the alpha.

Purdue is not unique. Myriad businesses and institutions have obfuscated the harmful effects of consumer products and actively suppressed evidence of gross transgressions. The conduct and resultant harm have been described as mass torts.

10 See id.
11 See id.; see also McGreal, supra note 2, at 27 (“Oxycodone was a strange beast. While the public has heard of morphine and tended to have views about it, oxycodone was far less well known.”).
12 See id.
13 See Bethany McLean, “We Didn’t Cause the Crisis”: David Sackler Pleads His Case on the Opioid Epidemic, 3 VANITY FAIR (June 19, 2019).
14 See Glazek, supra note 2.
15 See id.
16 See id., at 4 & 24.
17 See McLean, supra note 13, at 10.
18 See id. at 5. On August 18, 2020, the state of New York asserted that Purdue has caused almost $2.16 trillion in damages to various institutions and individuals throughout the United States. See Emily Field, Purdue and Sacklers Caused $2.16T in Damage, NY Says, LAW360 (Aug. 18, 2020, 4:08 PM), https://www.law360.com/articles/1302015/purdue-and-sacklers-caused-2-16t-in-damage-ny-says.
19 See Glazek, supra note 2, at 20 & 24.
20 See id.
21 See id.; McLean, supra note 13, at 8-9.
The sheer volume of claims and potential liabilities represent an existential threat to corporate tortfeasors. Defendants are anxious to resolve these cases, but there is an obstacle. Defendants demand global settlements – a term describing resolution of substantially all outstanding current and future claims at a known price.\textsuperscript{22} Without a global settlement, corporate tortfeasors are willing to continue with protracted and fragmented litigation; in effect denying the victims collective access to the settlement funds, or, at the very least, delaying access for an unacceptable period of time.

The global settlement imperative amplifies resolution complexity. Many mass torts involve latent harm\textsuperscript{23} and are characterized by heterogeneous victim groups.\textsuperscript{24} One stratum includes current victims – those who have been affected by the defendant’s tortious conduct and already exhibit harm. In many cases there is a second stratum that includes future victims – those who have been affected by the defendant’s tortious conduct but may not exhibit harm for years or decades. Individuals exposed to asbestos present a good example of this phenomenon, but the dynamic exists in many other cases.\textsuperscript{25} Further complicating resolution is that some future victims are entirely unknown and unknowing – meaning that they cannot be identified by the defendant and they themselves do not know they have been exposed to significant tortious conduct.

These cases present unique anticommons dynamics. In an anticommons model, a large group of individuals enjoy restricted access to a scarce resource.\textsuperscript{26} The use is restricted because each individual in the group is endowed with the unfettered right to exclude others from using the resource.\textsuperscript{27} When multiple individuals hold exclusion rights, transaction costs preclude coordination, and the resource at issue cannot be accessed.\textsuperscript{28} The resource invariably devolves over time. Modern mass torts present this dynamic. In these cases, there is a significant number of victims holding claims against a corporate defendant. The defendant has insurance


\textsuperscript{23} Latent harm arises in situations where exposure to tortious conduct creates harm that will be realized at various points along an extended continuum. For example, exposure to asbestos fibers leads to a significantly higher risk of cancer. But asbestos has a latency period of up to 40 years. Consequently, individuals exposed to asbestos fiber who develop cancer can see that development occur at any point 40 years after exposure. Some individuals may not even realize that they were exposed to asbestos fibers until many years later.

\textsuperscript{24} See Francis E. McGovern & William B. Rubenstein, The Negotiation Class: A Cooperative Approach to Class Actions Involving Large Stakeholders, 99 TEX. L. REV. 73, 76 fn. 3 (2020) (“Classes may be characterized by heterogeneity along axes other than claim value....”).

\textsuperscript{25} See, e.g., In re Boy Scouts of Am, Case No. 20-10343 (Bankr. D. Del. 2020) (future victims exist in this case because survivors of sexual abuse often repress memories of abuse).


\textsuperscript{27} See id.

\textsuperscript{28} See id.
proceeds and other capital for settlement of these claims. Current victims would like to consume these resources immediately. But claims of future victims must somehow be included to satisfy the global settlement imperative. Therefore, future victims unintentionally exercise exclusion rights. Anticommons dynamics are especially deleterious in mass tort cases, which hinge on claim aggregation. The question that emerges is how can Due Process be satisfied for individuals who may be unidentifiable and may not even know they are victims.

The judiciary has developed structures that attempt to resolve anticommons dynamics. Once federal courts have jurisdiction over one mass tort case, aggregation of factually similar cases can occur through three primary means: 1) class certification under Rule 23 of the Federal Rules of Civil Procedure, 2) consolidation by the Judicial Panel on Multidistrict Litigation and transfer to a single district court, and 3) corporate bankruptcy filing under Title 11.

In the late 20th century, these options worked together to formulate meaningful resolution avenues for the “elephantine mass of asbestos cases” that threatened to overwhelm the judiciary. An asbestos defendant that could satisfy Rule 23’s strictures was allowed to bind all victims and provide judicial supervision. Cases unable to satisfy Rule 23’s strictures could still be resolved through multidistrict litigation (“MDL”), which offers captive negotiation that facilitates out-of-court settlements. Finally, defendants seeking a platform with more restructuring options could file for bankruptcy and access section 524(g) of the Bankruptcy Code. The section aggregates all victims’ claims – including those held by future victims – and channels those claims to a settlement trust. In exchange for funding the trust, various parties receive immunity through a channeling injunction. In order to balance this extraordinary benefit, section 524(g) installs procedural and substantive protections for victims and other stakeholders.

Over the last 40 years, an immense canon of scholarship has emerged exploring the resolution dynamics of mass torts. This canon’s light has been filtered through the prism of asbestos exposure cases, the archetype that has dominated the landscape. But modern mass torts rarely involve asbestos exposure claims, and new asbestos cases are dwindling. Modern cases are more likely to

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31 Over an eight-and-a-half-year period, the number of new federal cases decreased by 99%. 46,936 asbestos cases were filed and transferred to the asbestos MDL in 2010, but only 21 cases were transferred in 2018. As of July 30, 2019, only 9 cases had been transferred. See MDL-875 Asbestos Product Liability Litigation Caseload Statistics, U.S. District Ct. E.D. of Pa. https://www.paed.uscourts.gov/documents2 mdl/mdl875#Statistics. Only two asbestos bankruptcy cases were filed in 2019 – the lowest number in any one year since 1996. See Crowell and Moring, https://www.crowell.com/files/list-of-asbestos-bankruptcy-cases-chronological-order.pdf. The peak for asbestos bankruptcy cases was in 2002, when 13 cases were filed. See id.; see also Stephen J. Carroll, Deborah Hensler, et al., Asbestos Litigation, 110 (Rand Institute for Civil Justice 2005).
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involve opioid abuse, sexual abuse involving religious institutions, sexual abuse involving non-religious institutions, life threatening diseases caused by common, everyday products, and environmental disasters.

The emergence of a new strategy within the mass tort kingdom coincides with this shift. Mass tort defendants ensnared in MDL’s captive negotiation process have sought to alter the bargain. These tortfeasors have reclaimed control by turning to the lone exit available. Only federal bankruptcy has the power to free claims from MDL capture. In the last few years, the most notorious defendants subject to—or facing the prospect of being subject to—an MDL, including Johnson & Johnson, Purdue Pharma, Boy Scouts of America, and USA Gymnastics, have escaped the MDL process by filing for bankruptcy protection. The filing transferred the adjudication of all claims against the entity at issue to the bankruptcy court and halted entirely any pending MDL process. I refer to this election as bankruptcy preemption. Unfortunately, bankruptcy preemption has just replaced one deficient structure with another.

Section 524(g) of the Bankruptcy Code applies only to mass tort cases that involve asbestos exposure claims. Therefore, it does not apply to the new wave of mass restructurings. Corporate tortfeasors have identified a statutory loophole that allows them to craft an entirely unprecedented bargain. By filing for bankruptcy, these cases escape from the MDL process. Once in bankruptcy, mass tort debtors are fashioning their own ex post, ad hoc resolution structure by cherry-picking attractive provisions and concepts out of section 524(g), incorporating them into a plan of reorganization, and convincing bankruptcy courts to enforce these provisions pursuant to their equitable powers under section 105. These exempt plans seize section 524(g)’s benefits without being subject to its procedural and substantive restrictions. As explored in detail herein, exempt plans create serious

33 See, e.g., In re Archdiocese of St. Paul and Minneapolis, Case No. 15-30125 (Bankr. D. Minn. 2015).
34 See, e.g., In re Boy Scouts of Am., Case No. 20-10343 (Bankr. D. Del. 2020); In re USA Gymnastics, Case No. 18-09108 (Bankr. S.D. Ind. 2018).
35 See, e.g., In re LTL Management LLC, Case No. 21-30589 (Bankr. D.N.J. 2021); In re Imerys Talc Am., Case No. 19-10291 (Bankr. D. Del. 2019); In re Roundup Prods. Liability Litig., No. 16-md-02741 (N.D. Cal. filed Oct. 10, 2016);
36 See, e.g., In re PG&E Corp., Case No. 19-30088, (Bankr. N.D. Cal. 2019).
37 In re Roundup Products Liability Litigation is a similar case. An estimated 125,000 individuals have alleged that Roundup Weed-Killer, sold by a subsidiary of the global behemoth Bayer, causes non-Hodgkin lymphoma. The scientific community is split on the question. Bayer has proposed a $10 billion settlement in the MDL proceedings, which includes a $1.1 billion fund for future claims. See In re Roundup Prods. Liability Litig., Pretrial Order, Case No. 16-md-02741, Doc. #11182 (N.D. Cal. July 6, 2020).
38 See Reade Pickert, Yue Qiu & Alexander McIntyre, U.S. Recession Model at 100% Confirms Downturn is Already Here (April 8, 2020); https://www.bloomberg.com/graphics/us-economic-recession-tracker/.
39 Section 105 of the Code allows the bankruptcy court to “issue any order, process, or judgment that is necessary or appropriate to carry out the provision of this title.” See 11 U.S.C. §105.
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consequences for mass tort victims by implementing disparate treatment across settlement classes and increasing the risk of insolvent settlement trusts.

The Bankruptcy Code’s current deficiencies allow for a distorted bargain, but the process also presents the possibility of an optimal resolution platform. Bankruptcy can encapsulate a superposition;[40] it can layer multiple forms of delineated relief and revenue-generating mechanisms that are particularly impactful in mass tort cases. The potential exists to resolve mass tort claims efficiently, generate capital for the debtor, address anticommons problems, satisfy Due Process strictures, compel settlement of both federal and state actions, and instill comprehensive injunctions. All of these benefits are available if certain facets of the current platform can be corrected.

This Article makes three contributions to the legal literature on mass torts, civil procedure, and financial restructuring. Primarily, this Article is the first to identify the new mass torts bargain and delineate the distinguishing characteristics and unique resolution complexities it presents.

Second, this Article conceptualizes how these new cases should be adjudicated and delivers an unprecedented, normative construct focused on solving the anticommons problem through statutory amendments to the Bankruptcy Code. The changes are encapsulated in two spheres. The first one addresses the representative appointed in bankruptcy to negotiate on behalf of future victims and attempts to minimize capture risk and better align this representative’s interests with those of her invisible clients. The second sphere seeks to amend section 524(g) to apply to these new modern mass torts but also undergo a comprehensive structural redesign to improve predictability, efficiency, and victim recoveries.

Third, mass tort legal literature has overlooked the intersection of tort litigation and bankruptcy. This Article attempts to engage scholars from various disciplines to explore the divergent complexities – including anticommons dynamics and Due Process concerns – presented by this species of non-class aggregate litigation.

This Article proceeds in four parts. Part I defines the pernicious mass torts that are the subject of the Article and how current resolution structures developed in response to asbestos exposure cases. The part also explains that modern mass torts rarely involve asbestos claims.

Part II explores how legislative failures and Rule 23 strictures have forced most mass torts into multidistrict litigation, a distorted process that has achieved practical results through structurally deficient means. This part identifies how many modern mass tort cases are exiting the MDL process by filing for bankruptcy. Part III reveals how bankruptcy preemption is allowing mass tort defendants to exploit statutory loopholes and fashion an ex post, ad hoc resolution structure that seizes all of section 524(g)’s benefits but bears none of the burdens. There are many consequences, including insolvent settlement trusts that leave future victims without recovery for serious injuries.

Part IV explores the possibility of a bankruptcy superposition – the idea that targeted statutory modifications can yield a significantly enhanced resolution structure. The part presents my normative construct and illuminates how key substantive objectives can be furthered by focusing on two core pillars:

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[40] “Superposition” describes the combination of multiple distinct phenomena of the same type so that they coexist as part of the same event; the combination oftentimes represents a material enhancement.
1) addressing disparate treatment of similarly situated victims by minimizing the systemic failures in the process for selecting a representative for future victims; and 2) amending 524(g) to offer resolution options and impose restrictions to all mass tort cases.

Mass tort canon explores a bygone era of aggregate litigation. Emergence of a unique resolution strategy for mass torts has been underappreciated. This Article is the first to identify this shift and the threats the new bargain poses, but also present a comprehensive statutory revision to secure alignment between the need to efficiently resolve mass tort disputes and the ideal of protecting victims’ rights. More broadly, I attempt to animate scholarly debate around this vital litigation area that is in the midst of an evolution.

I. UNDERSTANDING THE MASS TORTS UNIVERSE

The term “mass tort” includes a panoply of idiosyncratic events distinguished by the type of conduct involved and scale of harm inflicted. Transgressions can be organized into one of five categories, with each category presenting unique dimensions based on case facts, causation, harm inflicted, and latency risk. The first four categories are (i) mass disasters, (ii) simple property damage mass torts, (iii) economic loss mass torts, and (iv) limited personal injury mass torts without latent harm; none of the cases that fall into these categories are within this Article’s purview. Complex personal injury mass torts represent the final

42 Some mass torts result from a single defective product or a series of similar defective products. The product may harm the end user but, in many cases, the claimant seeks replacement or repair of the defective product. See Nagareda, supra note 41; Anne E. Cohen, Mass Tort Litigation after Amchem, SC57 ALI-ABA 269 (1998).
43 Economic loss torts arise in unique situations where individuals have suffered economic loss due to misconduct, but there is no accompanying physical injury or property damage. The typical example offered for this type of mass tort involves latent product defect cases. See, e.g., In re TK Holdings, Disclosure Statement, pg. 58-59 Case No. 17-11375-BLS, Doc.#1164 (Bankr. D. Del. November 15, 2017) (economic loss claims based on the theory that the Takata airbag recall reduced the market value of affected vehicles) [hereinafter “Takata Disclosure Statement”]. Another example involves the quixotic Elon Musk. On August 7, 2019, Elon Musk tweeted that he was considering purchasing all the outstanding shares of Tesla, Inc. at $420/share. The stock price spiked after the announcement but then plummeted after Musk acknowledged that he had not undertaken the necessary diligence to assess if the proposal was even possible. Investor actions followed and were consolidated in the Northern District of California. See In re Tesla, Inc. Securities Litig., Case No. 18-cv-04865-EMC (April 15, 2020).
44 Limited personal injury mass torts capture negligent transgressions that involve repeated actions or widely disseminated products, both of which create either minor personal injury on a large scale or significant personal injury on a relatively small scale.
category and are the most pernicious mass tort quandaries, making them this Article’s focus.

A. General Characteristics of Complex Personal Injury Mass Torts

Complex personal injury mass torts disorient private, legislative, and judicial resolution structures because of their scale, temporal dispersion, latent harm, and causation dilemmas. Victims of mass torts suffer significant physical, psychological, and emotional injuries. The number of victims affected is considerable. This dynamic creates geographic dispersion. Further, unlike mass disasters, victims’ exposure to the tortious conduct at issue is temporally scattered across a broad timeline. For example, in the Takata airbag case, the installation of defective airbags in popular automobiles represented the primary tortious conduct. The nature of the tort precluded prompt identification; early injuries and deaths were attributed to the vehicular collision at issue, not the defective airbag. The first victim was identified in 2004, but a meaningful recall did not occur until 2014. And a defective Takata airbag killed an individual just a few years ago.

Temporal dispersion is amplified by another factor. In many mass tort cases, multiple victims are exposed to tortious conduct, but the manifestation of harm occurs randomly over an extended period. For example, asbestos presents particularly vexing latency issues. A group of individuals who are exposed to asbestos have a significantly higher risk of contracting cancer than a comparable group that has not been exposed to the toxin. But, as Professor Nagareda explains, the exposed individuals “stand as players in a macabre lottery.” For most victims, the disease will emerge at different stages of their lives over the course of 40 years. Others may experience absolutely no harm from their exposure. This is the latency problem that plagues this type of mass tort. There can be a considerable time gap between exposure to tortious conduct and manifestation of harm.

For many of these mass torts, the long tail of harm creates a new type of victim and stratification in the victim class. These mass torts have traditional victims who suffer immediate harm due to the corporate tortfeasor’s conduct. However, in addition to this group, there are individuals – referred to as future victims – who have been affected by the defendant’s tortious conduct but for whom harm will not

45 I do not attempt to formulate a list of features that apply to all mass tort cases. This part focuses on key features of many mass tort cases, with particular emphasis on the profile of modern mass tort cases that have sought bankruptcy protection.
46 See Sean McLain & Mike Spector, With 54 Million To Go, This Airbag Recall Is Never Going to End, WALL ST. J. (June 26, 2017).
48 See Tom Krisher, Arizona Man Killed By Exploding Takata Airbag In Honda Civic Brings Death Toll To 24, reprinted in USA Today (March 29, 2019) (describing the death that occurred on June 11, 2018).
49 See MICHAEL D. GREEN, REFERENCE GUIDE ON EPIDEMIOLOGY 348-49 (2000).
50 See id.
51 See id.
52 See id.
manifest until some undetermined future point. Some of these future victims do not even know they have been exposed to tortious conduct. They are unknown to themselves and the tortfeasor and cannot be marshaled by plaintiffs’ attorneys. These unknown, future victims cause further resolution complexity.

The interests and preferences of future victims do not align with current victims, which is one reason why class aggregation under Rule 23 of the Federal Rules of Civil Procedure is oftentimes unavailable. Traditional means of notice are infeasible, because these individuals do not identify as tort victims and cannot be identified by the corporate tortfeasor. As detailed in Part II, this stratification within the victim class complicates claim aggregation, a necessary prerequisite for resolution of mass torts.

Causation can also be extremely difficult to establish for mass tort victims. Long latency periods allow for other variables to intervene in the causal chain. This is further exacerbated when an individual suffers an injury that is fairly common in the general population. Imagine an individual who was exposed to asbestos fibers in her early 20s. After a lifetime of smoking cigarettes, this individual develops lung cancer in her 60s. Is this illness the result of asbestos exposure or years of cigarette smoking? Further, the effect of certain tortious conduct is difficult to understand. Scientific studies may reach diametrically opposed conclusions and mass tort cases frequently involve conflicting and speculative expert witness testimony. For example, various studies indicate that a woman’s use of talcum powder on her body does not increase the risk of ovarian cancer, but there is a lack of unanimity in the scientific community. This schism has led to a number of jury verdicts against Johnson & Johnson and drove the

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53 The mere possibility of a particular product or action causing the victim’s harm is legally insufficient; generally, a direct, or proximate, causal relationship between the corporate tortfeasor’s product or conduct and the victim’s harm is necessary. See, e.g., Kenneth R. Feinberg, The Dalkon Shield Claimants Trust, 53 LAW AND CONTEMPORARY PROBLEMS 79, 82 (1990).


55 See supra footnote 41.


58 See Patti Neighmond, Study Finds Talcum Powder Not Likely A Risk For Ovarian Cancer, npr.com https://www.npr.org/sections/health-shots/2020/01/07/794386909/study-finds-talcum-powder-not-likely-a-risk-for-ovarian-cancer (January 7, 2020) (explaining that a study of more than 250,000 women found no significant link between the use of powder in the genital area and risk of ovarian cancer among women).

59 See Nicole M. Fletcher, et al., Molecular Basis Supporting the Association of Talcum Powder Use With Increased Risk of Ovarian Cancer, Reproductive Sciences (2019) (study confirming the cellular effect of talc and providing support to previous reports linking genital use to increased ovarian cancer risk).

60 See Robert Patrick, Talc Cancer Verdict of $4.6 Billion from St. Louis Jury Sends “Very Powerful Message”, St. Louis Post-Dispatch (July 13, 2018); Charles Toutant, After $750
company’s talc subsidiary and Imerys Talc – Johnson & Johnson’s primary talc supplier – into bankruptcy. Historically, the legal bases and scientific validity of the claims at issue in most mass tort cases were not resolved until many years after the cases settled. The reason for this is that the sheer volume of claims demands prompt resolution, merit notwithstanding.

Resolving mass tort claims can present staggering transaction costs. The volume of claims causes significant resolution delay and precludes meaningful private negotiation and contracting. Naturally, claim resolution is more viable if transaction costs can be reduced, but these costs cannot be managed without aggregating fragmented and dispersed victim claims in one forum – a result that hinges on access to some effective and efficient judicial process. Until there is aggregation in one forum, limited resources are expended for pyrrhic victories that fail to move the war closer to resolution. Some structure is necessary to address the “inability of the private market to overcome the transactional barrier to the prosecution” of mass tort claims.

B. Mass Tort Anticommons and the Global Settlement Imperative

The final distinguishing feature of mass torts is the unique anticommons problem that they present. The tragedy of the commons is a well-known theoretical model. The tragedy arises when a group of individuals have ostensibly unfettered privileges to use a scarce resource. No one individual in the group is allowed to exclude another from using the resource; nor can the group coordinate efforts to

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61 Over 30,000 plaintiffs have talcum-powder lawsuits pending against Johnson & Johnson, which has a market capitalization of over $400 billion. See Mike Spector and Jessica Dinapoli, J&J Exploring Putting Talc Liabilities Into Bankruptcy, Reuters.com (July 19, 2021). Johnson & Johnson has won some of these lawsuits but faces staggering damage awards in the cases it has lost. See Peter Loftus, Missouri Court Cuts Talc-Powder Verdict Against J&J to $2.1 Billion, WALL ST. J. (June 23, 2020). On May 19, 2020, the company announced it was discontinuing sale of all talc-based baby powder in the United States. In October 2021, Johnson & Johnson executed a “divisive merger” – an extremely obscure maneuver that allowed for the isolation of all liability related to its talcum powder business in LTL Management. See Samir D. Parikh, Mass Exploitation, 170 U. PA. L. REV. ONLINE (forthcoming 2022). On October 14, 2021, LTL Management filed for bankruptcy. The other parts of the J&J empire stayed out of the process. See Johnson & Johnson Puts Talc-Spinoff Into Ch. 11, LAW360 (Oct. 14, 2021); Jonathan Randles, How Bankruptcy Could Help Johnson & Johnson Corral Vast Talc Litigation, WALL ST. J. (July 20, 2021).

62 See Weinstein, supra note 41, at 43.

63 See id.; see also Jeff Feeley, Pharmacies Face Peril Without Opioid Settlements, Judge Says, BLOOMBERGLAW.COM (Apr. 7. 2021) (explaining that even if claims against pharmacies lack a legal basis for liability, the idea that these defendants would try hundreds of cases all over the country is unrealistic).


65 See id.

restrict access to the resource. Each individual benefits directly from consumption and this benefit is greater than the delayed harm stemming from depletion risk, which is distributed evenly among the group. Consequently, the individuals in the group do not internalize all the costs of their conduct. The tragedy is that “the total of resource units withdrawn from the resource will be greater than the optimal economic level of withdrawal." In other words, each individual acting rationally in her own self-interest will create collective action that results in the overconsumption – and, in many cases, the entire depletion – of the scarce resource.

Anticommons theory is the lesser known sister model that presents the converse situation. In this model, a large group of individuals enjoy restricted access to a scarce resource. The use is restricted because each individual in the group is endowed with the unfettered right to exclude others from using the resource. When multiple individuals hold exclusion rights, transaction costs preclude coordination, and the resource at issue cannot be accessed. Invariably, the resource devolves naturally over time.

Mass torts offer a particularly unique example of an anticommons dynamic. There are a significant number of claims seeking compensation from a limited pool of settlement funds. Current victims – many of whom are suffering life-threatening illnesses – would like to consume these resources immediately. Plaintiffs’ attorneys have devoted significant resources to identifying and marshalling these victims. Consequently, current victims are able to coordinate and negotiate a mechanism that allows them to access promptly the trust fund resources. But there is a problem. Corporate tortfeasors are interested in resolving mass tort claims that represent an existential threat to their businesses, even if the merits of the claims are suspect. However, corporate tortfeasors demand global settlements – a term describing resolution of substantially all outstanding current and future claims at a known price. Without a global settlement, corporate tortfeasors are willing to continue with fragmented and protracted litigation; in effect denying the victims...

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67 See id. Coordination obstacles oftentimes arise from excess transaction costs related to coordination as opposed to some sort of theoretical restriction.
68 See id.
69 See id.
70 Garrett Hardin developed the archetypical example of the tragedy. Imagine a pasture open to all animals of area herders. Each herder receives a direct benefit from her animals grazing in the pasture and the risk of animals overgrazing on the pasture and destroying it is a delayed cost that is spread across all area herders. “Each [herder] is locked into a system that compels him to increase his herd without limit [but the resource at issue is limited.]” Ostrom, supra note 66, at 2.
71 See Heller, supra note 26, at 670-76.
72 See id.; see also Samir D. Parikh & Zhaochen He, Failing Cities and the Red Queen Phenomenon, 58 B.C. L. Rev. 599, 628-29 (2017) (describing how the small pool of sovereign bonds in the 1970s required bondholder unanimity as a prerequisite to debt impairment).
73 See id.
74 See Schuck, supra note 22, at 962.
collective access to the settlement funds, or, at the very least, delaying access for an unacceptable period of time.\textsuperscript{75}

The global settlement imperative exists because corporate tortfeasors are exposed to a destabilizing degree of uncertainty without a settlement that binds all current and future claimants. More specifically, a settlement that allows certain defendants to “opt-out” or carves out future victims creates the risk of material unaddressed claims.\textsuperscript{76} Such a settlement has significantly diminished value.\textsuperscript{77} Indeed, high-value victims will invariably opt-out of the settlement in order to avoid their damage claim being diluted in the general pool.\textsuperscript{78} Further, future victims can emerge at any time and in unknown numbers, decimating otherwise profitable industries as they did for countless asbestos companies.\textsuperscript{79} Lingering uncertainty creates a black cloud. The cloud suppresses market capitalization, because investors are forced to discount valuation of the corporate entity to account for the possibility that unaddressed claims will emerge and destroy. Credit markets are affected similarly, but the results are increased borrowing costs or – in the doomsday scenario – restricted access to credit. Corporate tortfeasors refuse to accept the possibility of either outcome.

Returning to the anticommons model, we can see that corporate tortfeasors – as well as insurers, affiliated corporate entities, and other parties funding the settlement trust – invariably require substantially all victims to agree to specific disbursement terms before any one victim can timely access settlement funds. This edict gives individual victims unfettered exclusion power. The latency quandary adds further complexity. Many mass torts have future victims whose claims must be resolved as part of a global settlement but for whom harm has not yet manifested. Current victims may be able to coordinate and negotiate a mechanism that allows them to access the trust fund resources, but future victims must be brought along. Modern mass torts present a unique obstacle that transcends traditional transaction costs issues. Further, some of the victims necessary to secure unanimity are truly unknown, even to themselves. Coordination among

\textsuperscript{75} For example, in the Vioxx Product Liability Litigation, Vioxx proposed a generous settlement of $4.85 billion to eligible claimants, but plaintiffs’ counsel was required to secure consent of 100% of their clients; further the settlement was void if less than 85% of all federal and state plaintiffs joined the settlement.

\textsuperscript{76} See McGovern & Rubenstein, supra note 24, at 78.

\textsuperscript{77} See id.; see also Theodore Eisenberg, The Role of Opt-Outs, 57 VAND. L. REV. 1529, 1555 (2004). The settlement in the fen-phen dietary supplement case failed due to multiple plaintiffs utilizing opt-out rights. See Nagareda, supra note 41, at 146-47. Further, the risk of victims exercising opt-out rights in mass tort cases is much higher than in traditional class action cases. In traditional class action cases the value of an individual victim’s claim is less than the transaction costs necessary to adjudicate the claim. These victims benefit by class aggregation, which creates the scale necessary to pursue meaningful recovery. In mass tort cases, many victims hold extremely high-value claims and do not necessarily benefit from aggregation.

\textsuperscript{78} See id.

members of this class is impossible, which can preclude – or at least greatly delay – access to settlement funds.

II. THE EVOLUTION OF MASS TORTS

The factual scenarios in mass tort cases form a rich tapestry. Cases involve war-time herbicides, defective medical devices, countless pharmaceutical cases involving staggering side effects, severe personal injury, and product liability disputes. But cases involving asbestos exposure have cast a long shadow across the landscape.

For centuries, asbestos was regarded as a type of miracle mineral because it could “withstand punishing forces of fire, corrosion, and acid, while also being

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80 For example, Agent Orange was a powerful herbicide used by U.S. military forces during the Vietnam War, affecting millions of veterans. See Peter H. Schuck, Agent Orange on Trial: Mass Toxic Disasters in the Courts (1986).
81 For example, the Dalkon Shield case involved a defective intrauterine birth-control device that caused pelvic infections, sterility, involuntary abortion, and death in thousands of women. See Karen Kenney, Dalkon Shield Gives Birth to a Generation of Lawsuits, Los Angeles Daily News (April 30, 1985).
82 For example, DES – or diethylstilbestrol – is a synthetic estrogen that was approved by the FDA for the prevention of early miscarriage. During a 20-year period starting in 1948 between 3 and 4 million women ingested DES in the US. Unfortunately, female children of mothers who had ingested the drug “developed preneoplastic vaginal and cervical changes in adolescence or adulthood.” Han W. Choi & Jae Hong Lee, Pharmaceutical Product Liability (Chapter 55, page 694), Principles and Practice of Pharmaceutical Medicine (3d ed. 2011).
83 For example, in In re NFL Players’ Concussion Injury Litig., 301 F.R.D. 191 (E.D. Pa. 2014), former players in the National Football League brought suits alleging that the league and executive members “concealed [the risks of head injuries] from the players.” See id. at 195.
84 In 1962, Dow Corning began marketing silicone breast implants that consisted of a small silicone bag containing silicone gel. See Marcia Angell, Science on Trial: The Clash of Medical Evidence and the Law in the Breast Implant Case, 39 (W.W. Norton & Co. 1996). A small percentage of the implants would rupture and gel could migrate through an individual’s body, but Dow Corning did not believe that the gel posed any risk of harm. See id. at 39-43. In the 1990s, a wave of litigation brought substantial jury verdicts, even though studies failed to show any link between the implants and increased risk of cancer. See David E. Bernstein, The Breast Implant Fiasco, 87 Cal. L. Rev. 457, 477-84 (1999). By the late 1990s, implant manufacturers were winning 80% of the cases that reached a verdict. Nevertheless, in May 1995, Dow Corning filed for bankruptcy protection and structured a $3.2 billion trust to settle tens of thousands of claims. The bulk of silicone implant litigation was bereft of scientific evidence. See id. In 2006, the Food & Drug Administration lifted the ban on silicone gel implants.
85 I acknowledge that asbestos cases are not the only type of personal injury mass tort, but these cases have eclipsed all others. Indeed, asbestos exposure cases have dominated this area and collectively represent the “longest-running mass tort litigation in the United States.” Carroll, supra note 31, at 21. The tragedy has spurred an enormous canon of academic literature, countless studies, and exhaustive legislative and procedural changes. See Hensler, supra note 30. (“Over the past half-dozen years, there has probably been more procedural innovation associated with asbestos litigation in federal and state courts than in any other single area of litigation.”).
versatile enough to weave into textiles and line automobile brakes, retard shipboard fires, and bind rockets together.” In the 1960s, Dr. Irving Selikoff substantiated the harmful effects of asbestos inhalation. The widespread use of asbestos ceased shortly thereafter, but the contagion had already been realized: countless individuals had been directly exposed to asbestos fibers. A series of isolated cases emerged in the early 1980s, but the filings accelerated quickly. By 1991, there were 715,000 asbestos claims pending in federal and state courts. The “elephantine mass of asbestos cases” threatened to overwhelm the judiciary.

The Judicial Conference of the United States established an Ad Hoc Committee on Asbestos Litigation to analyze the situation and propose solutions. The committee’s 1991 report concluded that the “situation had reached critical dimensions and...the courts were ill-equipped to handle this disaster.” The committee recommended a “national solution” premised on Congressional action to create a single forum for all federal and state court asbestos cases. But the prospect of Congressional intervention was dim.

In 1991, eight district judges petitioned the Judicial Panel on Multidistrict Litigation (the “JPML”) to consolidate all asbestos cases in a single judicial district. On July 29, 1991, pursuant to 28 U.S.C. §1407, the panel created MDL-875 and transferred all 26,000 pending federal cases to Judge Charles R. Weiner for pretrial management. MDL-875 has been in existence for almost 30 years and represents the largest MDL in US history. Total spending on asbestos litigation from the 1960s to 2002 has been estimated to be over $70 billion.

Asbestos cases present particularly complex latency issues and intriguing financial, procedural, and constitutional dynamics that have impacted various generations across the country. This litigation beast has fascinated and terrified policy makers and jurists. The expectation is that asbestos litigation will ultimately total over one million claims costing defendants and insurers over $265 billion. The canon of mass tort scholarship is dominated by academic literature chronicling the asbestos epidemic, diagnosing resolution defects, and proposing structural, statutory, and jurisprudential modifications to tame the beast.

Asbestos exposure cases consumed the judiciary and produced a bespoke resolution structure. But the asbestos imprint has faded over time. Modern mass

87 See id.
88 See Hensler, supra note 30.
91 See id. at 3.
93 See id.
94 See id. at 100, n.4. (MDL-875 is the largest MDL in US history in terms of number of claims and cases transferred).
95 See id. at 88 (figure 5.1).
96 See id. at 105.
torts rarely involve asbestos claims.97 In fact, by 2007, “nearly all of the major [asbestos] manufacturers ha[d] declared bankruptcy.”98

A new species of mass tort litigation has evolved over the last 10 years. Numerous modern cases capture this shift, including those involving the opioid crisis,99 sexual abuse involving non-religious entities,100 and product liability with significant latent injury risks.101 These new cases do not present identical

97 See supra note 31.
98 Dixon et al., supra note 79, at 3 (citation omitted).
99 Purdue Pharma and Insys Therapeutics are just two examples. These manufacturers built a business model on the premise that if they could get their drugs into the hands of the general public, patients would become hopelessly addicted. See Joe Eaton, How a Drugmaker Bribed Doctors and Helped Fuel the Opioid Epidemic, AARP (January 24, 2020) (“The longer the patient stayed on the drug, the higher the dose that they were going to use, and the more revenue it was going to be worth to us.” (quoting former Insys CEO Michael Babich)). Executives understood the devastation that would result. What they failed to appreciate was that the collective of depraved individuals willing to implement this type of strategy was extremely large, and a national crisis was the inevitable result.

Societal, legal, and business pressures all aligned and both cases quickly reached a mature litigation stage ready for settlement. This aligned with the objective of MDL Judge Dan Polster, who voiced a strong desire for a prompt out-of-court settlement of these actions. Transcript of Proceedings, at 4, In re Nat’1 Prescription Opiate Litig., No. 1:17-MD-02804 (N.D. Ohio Jan. 9, 2018). Judge Polster explained, “[M]y objective is to do something meaningful to abate this crisis and to do it [immediately]….W[e] don’t need a lot of briefs and we don’t need trials.” But neither Purdue Pharma nor Insys Therapeutics settled with the victims of their transgressions as part of the MDL. Instead, they both filed for bankruptcy protection under chapter 11 and exited those proceedings.

100 Boy Scouts of America demonstrates a radical new perspective on personal accountability in sexual abuse cases. In that case, staggering numbers of children and young adults were sexually abused by individuals working within the organizations. Further, key executives at the national and local chapters were aware and refused to report the abuses, choosing to protect abusers from law enforcement and other organizations. BSA held records detailing abuse from as early as 1919. See Nina Feldman & Nicholas Pugliese, New Lawsuit Reveals More Sexual Abuse Allegations Against Boy Scouts of America, NPR (Aug. 7, 2019). BSA’s plan of reorganization calls for the creation of a settlement trust funded by BSA cash and insurance proceeds to which all victims’ claims will be channeled. See In re Boy Scouts of America and Delaware BSA, LLC, Disclosure Statement for the Chapter 11 Plan of Reorganization, Case No. 20-10343, Doc.# 21, pg. 23–24 (Bankr. D. Del. February 18, 2020) [hereinafter BSA Disclosure Statement].

101 Consumer products with significant latent injury risks continue to plague the marketplace. Many of these products are seen as safety mechanisms designed to actually protect end-users or innocuous products without the possibility of any negative effects. The Takata mass tort is an example of the former. The Japanese conglomerate specialized in airbag systems and seat belts. See Takata Disclosure Statement, pg. 58-59. Unfortunately, the company installed defective airbags beginning in the early 2000s but failed to take corrective measures until 2014. The problem is particularly pernicious because Takata airbag systems were installed in over 40 million vehicles in the US alone – roughly 16% of the 260 million vehicles on US roads. Only a fraction of the affected vehicles has been recalled and repaired. See Sean McLain & Mike Spector, With 54 Million To Go, This Airbag Recall Is Never Going to End, WALL ST. J. (June 26, 2017). On February 5, 2015, the JPML centralized numerous proposed class actions against Takata and various automakers in federal district court in Florida (the “Airbag MDL”). See In re Takata Airbag Litig. Case #15-02599-MD (S.D. Fla. 2015). Shortly thereafter, Takata determined
resolution obstacles, but they do highlight new strategies and expose the void that currently exists in resolution structures – a void that will be explored further in Part III.

Mass torts have evolved, but – as detailed in the following section – the only structures available to resolve them have not.

III. RESOLUTION STRUCTURES

Professor Heller explains that close-knit groups may over time develop informal norms that help them access a resource efficiently, while ensuring uniform resource allocation across groups with misaligned interests. But mass torts do not involve close-knit groups. A more realistic solution to the claim aggregation problem involves an aggressive legislative response to create a structure to bind all victims even without coordination. Unfortunately, the dream of a legislative deus ex machina is long dead. What remains for those seeking resolution of modern mass torts is an overreliance on the judiciary and the multidistrict litigation process, a structure designed in a distant era to address fundamentally different problems.

This Part explores how legislative failures and Rule 23 strictures forced many mass torts into multidistrict litigation and federal bankruptcy court for a substantive resolution.

A. Regulatory Inaction and Legislative Failures

Regulatory agencies offer ex ante means to prevent mass torts. These measures are extremely attractive to policymakers. Enhanced regulatory oversight could theoretically keep defective products and perverse pharmaceuticals out of public hands, as well as prevent financial and other institutional crimes. For example, a more diligent Food & Drug Administration has the capacity to limit the introduction of highly-addictive drugs into the market and restrict “off-label” prescriptions. Further, aggressive monitoring can be impactful in many cases even without meaningful enforcement.

Unfortunately, regulatory agencies have failed to control excessive corporate

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that an asset sale represented its most viable option. After extensive negotiations, Takata and various affiliates filed for bankruptcy on June 25, 2017 and exited the Airbag MDL. See Takata Disclosure Statement, supra note 45.

102 Heller, supra note 26, 677-78.


104 See Parikh & He, supra note 73, at 601 (explaining that, as the proverb states, the best way to dismantle an atomic bomb is to not build it in the first place).

105 See Nagareda, supra note 41, at 10.

106 See Samir D. Parikh, A New Fulcrum Point for City Survival, 57 WM. MARY L. REV. 221, 278 (2015) (“Studies demonstrate that people modify their behavior if they believe they are being monitored, even if the monitor cannot take any action against them.”)
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risk taking. One reason for this deficiency is that these bodies do not have sufficient resources. Over the last 40 years, administrations led by individuals from both primary political parties have undertaken a concerted effort to minimize the purview of regulatory agencies. Funding for these agencies has similarly diminished over time. Most damning is the fact that modern mass torts oftentimes involve intentional misconduct; actions that present a high-risk of significant civil penalties and even criminal prosecution. Nevertheless, corporate tortfeasors in these instances behave irrationally, making decisions infected by various heuristics and biases. Unethical corporate actors with this orientation and an intention to commit illegal acts can be policed only by aggressive internal and external controls. And governmental agencies are not positioned to meet this challenge.

Ex post legislative options are similarly limited. Under Article I, Congress enjoys the power to unilaterally alter preexisting rights through legislation. Professor Nagareda has urged Congress to pass legislation establishing a bespoke administrative framework to resolve mass tort claims. Under Professor Nagareda’s proposal, government officials would identify mass tort cases of a certain scale. Claims in those cases would be pulled out of the tort system and managed in an administrative process where officials distribute private funds to victims pursuant to a predetermined compensation matrix. In exchange for funding the distribution, corporate tortfeasors would be absolved of further liability.

The idea is attractive in theory, but past Congressional attempts to fashion an administrative resolution framework have failed. For example, in the late 1990s, the judiciary had been unable to resolve asbestos litigation, and the focus shifted to

107 Examples abound and stretch across various fields from pharmaceuticals (e.g. the Food & Drug Administration’s failure to police opioid manufacturers over a 30-year period) to the financial sector (e.g. the Securities & Exchange Commission’s failure to discover Bernie Madoff’s 50-year Ponzi scheme even after repeated whistleblower notices detailing the intricacies of the scheme).
108 See Nagareda, supra note 41, at 10.
109 For example, the SEC was underfunded throughout the 2000s (https://www.investmentnews.com/sec-seeks-more-examiners-but-sro-idea-still-loomng-42349) and chose to focus on certain financial crimes (e.g. insider trading) while generally ignoring others (e.g. Ponzi schemes). Bernie Madoff repeatedly mocked the SEC’s attempts to detect his billion-dollar Ponzi scheme. The FDA, EPA, and other agencies are in similar situations.
112 See Prentice, supra note 110.
113 Hui Chen and Eugene Soltes, Why Compliance Programs Fail – and How to Fix Them, HARV. BUS. REV. (March-April 2018)
114 See Nagareda, supra note 41, at 58-63.
115 See id. at 62.
116 See id.
117 See id.
118 See id.
Congress. From 1998 to 2005, over 15 bills were introduced in Congress proposing changes to how asbestos claims are resolved. Almost every bill created a publicly administered resolution structure that was privately funded. Asbestos manufacturers and insurance companies, among other stakeholders, agreed to fund the trust in exchange for being absolved of future liability. Despite the overwhelming need for legislative intervention, all 15 bills failed. Ultimately, “[t]he significant problem with a legislative solution has [to do with] politics…and the array of interests” that align to derail sweeping legislative proposals. An additional legislative option is the idea of using public dollars to supplement victim compensation. Congress has established administrative compensation programs in the past to address toxic torts. Unfortunately, the results undermine the efficacy of this proposal. For example, in 1969, Congress passed the Federal Coal Mine Health and Safety Act (the “Coal Mine Act”) to help coal miners suffering from black lung. The act allowed affected miners to receive workers’ compensation benefits and distributions.

The Coal Mine Act and its extensive amendments are considered a disaster. In its 1980 report, the General Accounting Office highlighted various problems. Primarily, the legislation was poorly drafted and created a fundamentally deficient payment infrastructure. Further, the program was not well administered. The Coal Mine Act’s legacy is that it significantly reduced the possibility that the federal government would consider administering a mass tort compensation program of any kind.

Legislators could do a lot to prevent mass torts or, at the very least, effectively compensate victims. But Congress has retreated from this challenge and ceded the space to the judiciary.

See Robreno, supra note 92, at 114.
See id. (citations omitted).
This approach may be particularly appealing because the US does not have a comprehensive medical-disability system as do many developed countries.
See Schuck, supra note 22, at 970.
Barth, supra note 124, at 262.
Id. at 284. For example, a majority of miners received large compensation awards even though there was little medical evidence they had black lung. See id. at 269. The legislation was “the epitome of political manipulation of the pork barrel process under the guise of operating a workers’ compensation scheme.” Id. at 128.
See id. at 284 (“[Any program similar to the black lung program] would be an expensive blunder.”); see also Schuck, supra note 22, at 969 n.124 (“Congress has taken one lesson away from its experience with the black lung program: ‘Don’t do it again.’”). I acknowledge the relative success of the fund established to address claims for death or personal injury related to the 9/11 terrorist attacks. However, this fund came about as a result of a terrorist attack that was equated to an act of war with the victims described as casualties of war entitled to special consideration. See George Rutherglen, Distributed Justice, 12 Va J. Soc. Pol’y & L. 673, 678-79 (2005).
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B. The Judiciary’s Current Approach

Over 35 years ago, Professor Rosenberg argued that mass tort litigation should be seen as a public law dispute.\(^{129}\) Because of the type and scale of harm suffered and the difficulty in resolving claims at an individual-claimant level, these cases demand a collective process focused on accelerated resolution, decreased transaction costs, some semblance of equity across claimant classes, and more generalized causation inquiries.\(^{130}\) Mass tort cases are akin to public litigations involving court-ordered restructuring of institutions to efficiently compensate victims while protecting their constitutional rights.\(^{131}\) Public interest cases – such as school desegregation – impact communities far beyond those represented by the actual litigants.\(^{132}\)

Mass torts are indeed a hybrid. They are customary private disputes but present a scale that transforms resolution options. The underlying claims at issue are not public, but mass torts force courts to view what appears to be a private law matter a societal lens.\(^{133}\)

These dynamics render private and legislative ordering of these cases difficult and misshapen. Consequently, the judiciary has assumed an oversized role. As explored below, once federal courts have jurisdiction over one mass tort case, aggregation of factually similar cases occurs through three primary means: 1) certification of a class under Rule 23; 2) consolidation by the JPML and transfer to a single district court; or 3) a corporate bankruptcy filing under Title 11.

1. Class Aggregation and Rule 23

Rule 23 of the Federal Rules of Civil Procedure offers the infrastructure to provide various options for qualifying class actions. This process attempts to address the private market’s inability to overcome the transactional barrier to the resolution of voluminous private claims.\(^{134}\) It offers judicial supervision and noncontractual aggregation. Class actions are designed for cases involving unified causation elements where victims hold negative value claims – a label that applies where the value of an individual victim’s claim is less than the transaction costs necessary to adjudicate the claim and secure that dollar value.\(^{135}\) Class actions overcome the incentive deficiencies that accompany negative value claims “by aggregating the relatively paltry potential recoveries into something worth someone’s (usually an attorney’s) labor” and securing bargaining leverage that is otherwise unavailable.\(^{136}\)

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\(^{129}\) See Rosenberg, supra note 54.


\(^{131}\) See Weinstein, supra note 41, at 40.

\(^{132}\) Id.

\(^{133}\) Id. at 204.

\(^{134}\) See Issacharoff, supra note 64, at 212.

\(^{135}\) See McGovern & Rubenstein, supra note 24, at 81; Elizabeth Chamblee Burch, Procedural Justice in Nonclass Aggregation, 44 WAKE FOREST L. REV. 1, 11-24 (2009).

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The process has had a transformative effect on our jurisprudence. Rule 23 allows members of a class to sue as representative parties on behalf of other victims who are similarly situated.\(^{137}\) The adjudication of the representatives’ claims invariably determines the resolution of those held by absent class members. Absent class members enjoy the right to opt out of settlements, but few do because they invariably hold negative value claims.\(^{138}\)

Rule 23 mandates that the court play an enhanced gatekeeper role. At the entry point, the trial court will certify a class only if the suit satisfies the criteria set forth in Rule 23(a) involving numerosity,\(^{139}\) commonality,\(^{140}\) typicality,\(^{141}\) and adequacy of representation.\(^{142}\) If these criteria are satisfied, the court must then determine the appropriate class type – among the three delineated in Rule 23(b) – for the claims at issue. The vast majority of class actions for money damages are brought under subsection (b)(3), which requires that questions of law or fact common to class members predominate over any questions affecting individual members. This subsection also requires that class certification must be superior to other available methods of adjudication.\(^{143}\)

Rule 23(e) allows for class certification for the sole purpose of settlement, and has become the preferred resolution option.\(^{144}\) In these circumstances, the trial court approximates a fiduciary for absent class members and is tasked with protecting Due Process rights for all members.\(^{145}\) Adequate notice to the class is mandated and allows members to participate in proceedings or opt out of any settlement and pursue litigation individually.\(^{146}\) Returning to its enhanced gatekeeper role, the court will not allow exit before it assesses the fairness, reasonableness, and adequacy of the settlement terms and the settlement process.\(^{147}\)

\(^{138}\) See id.
\(^{139}\) The class must be so numerous that joinder of all members is impracticable. The requisite number of cases varies based on the dispute at hand. See In re Modafinil Antitrust Litig., 837 F.3d 238, 252-53 (3d Cir. 2016).
\(^{140}\) Common questions of law or fact characterize the claims of class victims and these common questions must find resolution in common answers. See Wal-Mart Stores v. Dukes, 564 U.S. 338, 350 (2011).
\(^{141}\) The claims or defenses of the representative parties are typical of the claims or defenses of the class. See, e.g., Wiener v. Dannon Co., 255 F.R.D. 658, 666-67 (C.D. Cal. 2009).
\(^{142}\) The representative parties will fairly and adequately protect the interests of the class. The class representatives should not have material conflicts of interest with absent class members. See, e.g., Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999); see also Eubank v. Pella Corp., 753 F.3d 718 (7th Cir. 2014) (overturning class settlement because lead class counsel was the lead class representative’s son-in-law).
\(^{143}\) See Smith supra note 137, at 309. This option is also the most popular form of class action in the US, and it is the class type relevant to this Article. See id.
\(^{145}\) As explained by the Advisory Committee, “[t]he central concern in reviewing a proposed class-action settlement is that it be fair, reasonable, and adequate.” ADVISORY COMMITTEE ON CIVIL RULES, 119-27 (April 2017), https://www.uscourts.gov/sites/default/files/2017-04-civil-agenda_book.pdf.
\(^{146}\) See Smith, supra note 137, at 310.
\(^{147}\) See id.
In order to fulfill this obligation, courts invariably appoint experts or other adjuncts to evaluate the settlement process and offer an additional layer of class protection. Ultimately, Rule 23 creates a structural design that facilitates adjudication when necessary and settlement when possible, while also attempting to ensure procedural and constitutional integrity. After decades of legislative inaction and failure, class aggregation was seen as perhaps the only viable option to address mass tort litigation.

However, the adequacy-of-representation requirement rendered many mass tort cases a poor fit within Rule 23’s strictures. Plaintiffs’ attorneys sought a way around this obstacle. A new theory emerged in the 1980s: instead of relying on class actions for case adjudication, the process could facilitate resolution of mass torts by merely serving as an enforcement device for out-of-court global settlements. Animated by this premise, plaintiffs’ attorneys sought class certification as a means to resolve mass torts.

Many mass tort cases in the 1990s were certified and ultimately resolved. It appeared that mass tort litigation had found a home. However, at the end of the decade, the Supreme Court addressed the propriety of Rule 23 certification in Amchem Products v. Windsor and Ortiz v. Fibreboard Corp. and altered the landscape.

a. The Mass Tort Carve Out

There is considerable overlap between Amchem and Ortiz. Many of the same parties – most notably, plaintiffs’ attorneys – involved in Amchem were involved in Ortiz, and the settlements in both cases were drafted alongside one another,

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149 I do not dispute that the process is far from optimal. Rule 23’s structure and implementation has received criticism. See Samuel Issacharoff & Robert H. Klonoff, The Public Value of Settlement, 78 FORDHAM L. REV. 1177, 1189-90 (2009) (acknowledging that “class action settlement procedures are far from perfect and are often inadequate” before listing various deficiencies). Further, the process arguably represents a type of litigation extortion where excessive stakes coerce corporate defendants to settle claims that lack merit in order to avoid risking the corporate entity’s survival. See Daniel Klerman, Posner and Class Actions, 86 U. CHI. L. REV. 1097, 1103-04 (2019).
150 FED. R. CIV. P. 23(b)(3) advisory committee’s note (1966) (explaining that mass tort cases were “ordinarily not appropriate” for class treatment because of the difficulty in identifying class representatives that could fairly and adequately protect class interests).
151 See Nagareda, supra note 41, at 72-73.
152 Jurists admitted that the asbestos crisis necessitated judicial flexibility. See Jenkins v. Raymark Indus., 782 F.2d 468, 473 (5th Cir. 1986). And courts took comfort in the fact that mass tort cases were certified to exclusively pursue settlement. See McKenzie, supra note 144, at 969.
despite the two-year gap in the cases’ timeline. Consequently, it should come as no surprise that class certification in both cases met the same dire fate.

Amchem and Ortiz involved extensive asbestos liability and distinct anticommons dynamics. Indeed, settlement funds were available for victims, but defendants demanded global settlement that would bind both current and future claimants. Current victims were selected as class representatives to represent the interests of the entire victims’ class, including future claimants. These representatives agreed to a settlement that bound all victims to a compensation scheme that failed to contain a meaningful opt-out option. In other words, future claimants were precluded from bringing individual claims against the defendants based on the agreement made by a group of claimants who held entirely distinct interests and incentives. In both cases, the settlement classes failed to assure the necessary level of cohesiveness of interests among named representative plaintiffs and future claimants. The class design failed to provide essential structural protections against obvious conflicts of interest.

Our jurisprudence provides that individuals are generally not bound by a prior judgment unless they are a party to the proceeding and served with process. Precedent allows courts to deviate from this premise if structural safeguards ensure that a person who failed to receive notice of the prior proceedings was adequately represented in those proceedings. The Court rejected the settlement class actions in Amchem and Ortiz because each settlement disregarded adequate representation. This deficiency precluded any attempt to bind absent class members or extinguish their prospective right to sue individually.

b. The Landscape After Amchem and Ortiz

Amchem, Ortiz, and modern case law capture the Court’s concern with structural and procedural integrity in class aggregation. However, with these decisions, the Court limited the class action resolution option for the vast majority of mass tort cases. In the years since Amchem and Ortiz, federal courts have reached a consensus: most personal injury mass torts present too many individual issues surrounding causation and damages to satisfy Rule 23(b)(3)’s predominance and superiority requirements. Class actions have dropped out of the “available set of tools for attempting to settle [most] mass torts, absent some extraordinary

156 See Chamblee, supra note 41, at 212.
157 See Amchem, 521 U.S. at 600-01; Ortiz, 527 U.S. at 824-25.
158 See Amchem, 521 U.S. at 602-03; Ortiz, 527 U.S. at 825-27.
159 See Amchem, 521 U.S. at 604-05; Ortiz, 527 U.S. at 827.
160 See Amchem, 521 U.S. at 627-28; Ortiz, 527 U.S. at 856-67.
161 See McKenzie, supra note 144, at 977.
164 See id.
willingness of settling defendant to allow some form of future claims to return to
the tort system.”

This shift has produced an odd result. By limiting the class aggregation option, the Court – perhaps unintentionally – pushed these cases into a resolution framework that oftentimes fails to rigorously assess settlements and the integrity of the settlement process.

2. MDL and Structurally Deficient Means

*Amchem* and *Ortiz* ostensibly eliminated Rule 23’s class aggregation option for most mass tort cases. The rise of multidistrict litigation was an effort to address this gaping void, creating practical results with structurally deficient means.

a. MDL Design

In the 1960s, electrical equipment antitrust cases threatened to overwhelm the judiciary. In response, Chief Justice Warren created a coordinating committee to fashion “uniform pretrial and discovery orders, national depositions, and central document depositories.” This procedural streamlining miraculously resolved these cases by 1967. The promising results warranted codification. The Multidistrict Litigation Act of 1968 added Section 1407 to the U.S. Judicial Code and created the Judicial Panel on Multidistrict Litigation. On a motion of an interested party or on its own motion, the JPML may aggregate and transfer cases pending in federal court to one federal district court for pretrial proceedings. The Panel does not consider cases in which trial is underway. The statute instructs the Panel to determine whether: (1) “one or more common questions of fact are pending in different districts[, (2) transfer] will be for the convenience of parties and witnesses[, and (3) transfer] will promote the just and efficient conduct of such actions.” The statute’s flexibility is evident. The inquiry of common questions of fact is easier to satisfy than Rule 23(b)(3)’s predominance requirement.

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165 Issacharoff, supra note 64, at 208. However, some courts have recently been more receptive to certifying mass torts. See, e.g., Martin v. Behr Dayton Thermal Prods., 896 F.3d 405 (6th Cir. 2018).
166 In *Ortiz*, the Court suggested that Fibreboard’s best option may be a bankruptcy filing. See 527 U.S. at 823.
167 See Klonoff, supra note 162, at 745-55.
168 See Nagareda, supra note 41, at 174.
170 See id.
171 Id. at 714. (“The Panel is empowered to transfer to any federal district court ‘civil actions involving one or more common questions of fact…for coordinated or consolidated pretrial proceedings.’” (quoting 28 U.S.C. §1407(a).
172 28 USC 1407(a).
173 For example, this was the case for the opioid abuse litigation. See *In re Nat’l Prescription Opiate Litigation*, 290 F. Supp. 3d 1375, 1378-79 (J.P.M.L. 2017) (finding that “[a]ll of the actions can be expected to implicate common fact questions as to the allegedly improper marketing and widespread diversion of prescription opiates . . . and discovery will likely be voluminous.”).
Section 1407’s overriding goal is to allow one federal judge to streamline pretrial — general procedural — matters. At the conclusion of pretrial proceedings, however, the statute mandates that cases be remanded to the districts where they were originally filed. The MDL court was not intended to be a destination; it is merely a stop along the path to resolution.

In the last 20 years, MDLs have supplemented class actions for personal injury mass tort cases. MDL’s growth has been meteoric; 52% of all pending civil cases in federal court are in MDLs. Mass tort dockets comprise only 23% of all MDLs, but those dockets represent the consolidation of over 125,000 civil actions, “constituting over 96% of all pending actions included in all of the MDL dockets.” Lost in these numbers and resolution primacy is the fact that the multidistrict litigation process has evolved in ways that undermine the resolution model for many mass tort victims, and this forced transformation belies the statute’s failure to include safeguards essential for the role.

b. MDL Distortion

Multidistrict litigation has been instrumental in resolving complex cases and preserving the viability of the judiciary in the face of potentially overwhelming case volume. But the promise of procedural streamlining is a mirage that has led parties into quicksand. “[T]he worst kept secret in civil procedure” is that transferred cases do not return to their transferor courts. According to the 2018 statistics, approximately 156,511 actions were pending in front of 48 transferee district courts as of September 30, 2018. From 1968 through September 30, 2018, transferee courts had received and resolved approximately 516,593 cases. Of these civil actions, only 16,728 were remanded for trial. In other words, only 3% of transferred cases escaped MDL capture; 97% of transferred cases are resolved in the MDL court by dispositive motion or settlement.

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174 H.R. REP. NO. 1130, at 2-3 (1968); see also S. REP. NO. 454 (1968). I acknowledge that §1407 seeks efficiency and, by extension, legislators must have contemplated settlement disposition for cases. But there is no indication in the legislative history that policymakers contemplated settlement entirely displacing adjudication, which is what has materialized.


177 See Klonoff, supra note 162; Thomas Willging & Emery Lee, From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After Ortiz, 58 KAN. L. REV. 775, 806 (2010).


183 See id.

184 See id.; Bradt supra note 176, at 871.
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MDL should not be a captive settlement negotiation. The process should accommodate the possibility of cases being remanded at the conclusion of relatively accelerated pretrial proceedings.\(^\text{185}\) Instead, cases languish—sometimes for years—as the transferee judge accommodates, cajoles, urges, and in many cases compels, settlement. Adjudication is no longer an option, and the process predicated on efficiency has lost its way.\(^\text{186}\)

For example, in *In re Patenaude*,\(^\text{187}\) transferred cases languished before the MDL judge for seven years. Plaintiffs sought to have the cases remanded, asserting that pre-trial proceeding had been resolved years before. Their objections fell on deaf ears. The plaintiffs petitioned the Third Circuit for a writ of mandamus to remand their cases for trial. The Third Circuit denied the writ because, in its estimation, pretrial proceedings were “ongoing” even after 7 years.\(^\text{188}\)

In *In re Nat’l Prescription Opiate Litigation*,\(^\text{189}\) the MDL court made settlement a fait accompli. At the initial hearing, Judge Polster stated that his sole goal was to see an immediate global settlement of the cases.\(^\text{190}\) In fact, he stated unequivocally that trials were entirely unnecessary, and he would consider it a “failure” if he allowed the matter to proceed to litigation and adjudication.\(^\text{191}\) The shocking import of this statement was best captured by Professor Erichson, who noted that “[i]t is one thing for a judge to say that abatement of a crisis is an important goal….It is quite another thing to forswear litigation and adjudication altogether.”\(^\text{192}\)

These tactics are not entirely unforeseeable. The statute forbids MDL judges from adjudicating cases; compelling a settlement is the only means to effectuate immediate impact. And the MDL process is infected with the idea that settlement is a successful result under any circumstances.\(^\text{193}\)

As noted above, 97% of MDLs are either settled or resolved through a dispositive motion. And, in fact, the supermajority of mass tort litigation is resolved through contractual settlements.\(^\text{194}\) However, this number says nothing


\(^{186}\) MDL–875 for asbestos litigation was commonly known as the “black hole” because transferred cases never returned to their transferor courts but were similarly never resolved. See Robreno, *supra* note 92, at 126; see also Eldon E. Fallon, *Bellwether Trials in Multidistrict Litigation*, 82 *TUL. L. REV.* 2323, 2330 (2008) (explaining that Judge Fallon, who presided over the Vioxx MDL, admitted that the process can “resemble a black hole into which cases are transferred never to be heard from again.”).

\(^{187}\) 210 F.3d 135 (3rd Cir. 1999).

\(^{188}\) Id. at 146.

\(^{189}\) 290 F. Supp. 3d 1375 (J.P.M.L. 2017).

\(^{190}\) In *re Nat’l Prescription Opiate Litig.*, *supra* note 99, at 4 (Judge Polster explained that “[p]eople aren’t interested in depositions, and discovery, and trials. So my objective is to do something meaningful to abate this crisis and to do it [immediately]…. [W]e don’t need a lot of briefs and we don’t need trials.”) (emphasis added).

\(^{191}\) See id. at 5-6, 9.


\(^{194}\) See Chamblee, *supra* note 41, at 159.
about the efficiency and equity of the resolution process. Keep in mind that “even though section 1407 aims to effectuate the goal of ‘just conduct’ nothing in the statute permits the Panel to ensure fairness, reasonableness, or adequacy in settlements or to endow the transferee court with the authority to oversee settlements.” In other words, there are no statutory requirements that the MDL court review or assess the integrity of a settlement process or any settlement reached by the parties. And, in the pursuit of expediency, many courts do not undertake such inquiries. Unfortunately, a structure consumed with efficiency through procedural devices undermines just outcomes if it lacks the ability to assure claim merit, defendant culpability, or settlement integrity.

All of these factors highlight victims’ lack of control. Agency principles breakdown in the MDL process because the agents – plaintiffs’ attorneys – are invariably immune from the instructions and wishes of the principals, the victims. Cases are guided by steering committees, and plaintiffs’ attorneys and the MDL judge exercise absolute resolution control. A truly surprising facet of the process is that victims are unable to exit. MDL judges are extremely invested in these cases and have exhibited a propensity to compel settlements that are coercive to individual plaintiffs.

More fundamentally, the process contravenes policy objectives. The process fails to deter undesirable behavior. Compelled settlements rarely consider culpability, heightening the possibility of extortion litigation. Deterrence is unrealized because there are significant lottery effects; in other words, corporate actors that conform their behavior to legal strictures are no better off than those that do not. Culpability is not necessary to establish liability, which creates perverse incentives. Further, MDL settlements can live in the shadows. Settlements do not need court approval, and confidentiality agreements invariably prevent

195 See Ericson, supra note 192.
196 Chamblee, supra note 41, at 196.
197 See id. at 196.
198 See id.
199 See generally George Priest, Procedural Versus Substantive Controls of Mass Tort Class Actions, 26 J. LEGAL STUD. 521, 559-69 (1997).
201 See Martin H. Redish & Julie M. Karaba, One Size Doesn't Fit All, 95 B.U. L. REV. 109, 110 (2015) (“[T]he current practice of MDL actually makes the modern class action appear to be the pinnacle of procedural due process by comparison.”).
202 Bradt, supra note 176, at 836 (“[T]here is no right to opt out of an MDL proceeding – once you’re in, you’re in, often for years until pretrial proceedings have concluded.”).
203 MDL judges have various means to compel settlement. Primarily, judges will aggressively encourage parties to engage in settlement, including appointing a special master to be actively involved in ensuring meaningful discussions. See, e.g., In re Volkswagen, No. 3:15-md-02672-CRB (Doc. 973) (N.D. Cal. Jan. 19 2016). Judges can also just hold on to cases indefinitely and pressure settlement. Judges can focus initial discovery on information that is necessary to assess settlement positions and frontload important dispositive motions. See, e.g., In re Nat’l Football League Players’ Concussion Injury Litig., 307 F.R.D. 351, 390 (E.D. Pa. 2015).
204 See supra note 149 delineating extortion risks that some commentators believe plague class actions; see also Chamblee, supra note 41, at 196.
publication or an assessment of the details. Corporate abuses do not come to light in a process where there are no trials and no attempts are made to investigate malfeasance. The MDL process was designed to efficiently resolve procedural matters and provide compensation for meritorious claims. But the process does not effectively further that goal. Resources that could go to actual victims are fragmented by fraudulent claims.

Mass tort personal injury cases make up 90% of MDL civil actions. Consequently, the MDL distortion is having a profound effect on these types of cases. Because of extreme lottery effects, erosion of individual victims’ rights, and a lack of predictability, some scholars have concluded that the MDL structure must be redesigned.

c. Market Response

Compelled settlement with no prospect of adjudication may appear attractive in some cases, but the overall risks are daunting. Distorted use rarely creates an optimal structure, and it is no different with the MDL process. However, my objective is not to debate the MDL process’s efficacy. The process has produced many successful outcomes, but no one can dispute that there exist structural deficiencies. This Article asserts that corporate defendants involved in modern mass torts have identified these deficiencies and turned to the lone exit available. Only federal bankruptcy has the power to free claims from MDL capture. In the last few years, many corporate defendants subject to – or facing the prospect of being subject to – an MDL, including Johnson & Johnson, Purdue Pharma, Boy Scouts of America, and USA Gymnastics, have decided to file for bankruptcy. These mass restructurings transferred the adjudication of all claims against the entity at issue to the bankruptcy court and halted any pending MDL process. I refer to this election as bankruptcy preemption.

Ultimately, corporate defendants are drawn to bankruptcy as a means to regain control over the resolution process. But bankruptcy preemption has just replaced one deficient structure with another.

3. The Promise of Bankruptcy Preemption

Corporate defendants have started invoking bankruptcy preemption, fleeing one deficient resolution structure for another. Market response supports the argument that – in many modern mass tort cases – Chapter 11 offers substantive advantages over multidistrict litigation. In reality, many of the advantages accrue only to the benefit of the corporate defendant. Section 524(g) offers bespoke resolution provisions for asbestos exposure cases, but this section does not extend to modern mass torts, which rarely involve asbestos claims. Judicial flexibility is allowing corporate defendants to exploit statutory gaps and create an ad hoc structure of their own design.

206 See Bradt, supra note 176.
207 See, e.g., Schuck, supra note 22, at 969 (describing MDL as a “costly, tragic, social policy failure”).
a. Chapter 11 Exceptionalism

Bankruptcy scholars do not always agree on federal bankruptcy’s purpose. This stems in part from how versatile the process has become. Much like the mass tort universe, corporate bankruptcies include a vast array of cases with idiosyncratic dimensions that do not fit neatly into defined categories, regardless of the level of abstraction to which a scholar may be willing to proceed. Nevertheless, most scholars and practitioners would agree that corporate restructuring seeks to efficiently address contracting failure while maximizing value and minimizing holdout risks; the restructuring takes place within a flexible statutory process that effectively aggregates claims, binds creditors, and offers myriad forms of relief available only in bankruptcy.

Bankruptcy’s structural, procedural, and substantive benefits provide optionality that serves in sharp contrast to MDL’s settlement fixation. For example, the Federal Rules of Civil Procedure and Supreme Court precedent limit federal district courts to mere procedural aggregation of mass tort litigation. Bankruptcy courts transcend these boundaries. Bankruptcy courts enjoy jurisdiction over all “civil proceedings arising under title 11, or arising in or related


210 Holdout risk arises in situations where a certain threshold of consent from a group is necessary before specified action can be undertaken; the risk is that one or a few members of the group will withhold consent – and seek a premium payment – even though the refusal to comply harms the group’s collective interest. Because of class voting and other means of statutory and judicial compulsion, the bankruptcy process is able to minimize holdout risk in a way that is unavailable outside of bankruptcy.

211 Holdup risk arises in situation where creditors of a distressed company may be able to work most efficiently by coordinating but eschew cooperation because of concerns that they may give another creditor in their group oversized bargaining power and other advantages. See generally Casey, supra note 208.

212 See Jones, supra note 153, at 1704.

213 Sections 157 and 1334 of Title 28 collectively grant jurisdiction over bankruptcy cases to federal district courts, and then standing orders of reference in each district automatically refer these cases to bankruptcy courts.
The seemingly boundless reach of bankruptcy court jurisdiction allows the court to marshal all matters affecting a debtor in one single venue for prompt and efficient adjudication for the benefit of all stakeholders.

Coupled with this powerful *in rem* jurisdiction is the bankruptcy court’s *in personam* jurisdiction over the parties in litigation related to the bankruptcy case. In contrast with Rule 4 of the Federal Rules of Civil Procedure, Bankruptcy Rule 7004 permits nationwide service of process. These dimensions pair to afford the bankruptcy court a unique jurisdictional arsenal useful in mass tort litigation where cases populate federal and state courts across the country.

Further, the bankruptcy court is authorized to identify claims subject to pending litigation against the debtor and estimate the value of the claims that cannot be resolved in a timely manner. After estimation, claimants are allowed to participate in the proceedings but are subject to having their claims ultimately discharged through a plan of reorganization. This result may seem unduly harsh. Indeed, rather than fully adjudicating a dispute in the customary nonbankruptcy forum over the course of multiple years, these parties are forced into bankruptcy court where a judge will assess the value of their claims after an extremely truncated proceeding. But without this power, bankruptcy proceedings would languish while parties waited for full resolution of nonbankruptcy litigation in order to determine treatment of these parties.

The ultimate goal of most reorganization proceedings is to formulate a binding settlement delineated in the debtor’s plan of reorganization. In order for a plan to be approved for implementation, creditors must vote and ultimately approve the terms. Creditors are placed in classes based on the substance of their interests and claims. Claimants who do not receive the full satisfaction of their claim are deemed “impaired” and allowed to vote. Each impaired class must vote in favor of the plan in order for it to be approved. However, unanimity is unnecessary. The Code minimizes holdout risk by deeming a class to have voted to approve a plan where a majority of claimants vote to approve. Further, in order to avoid potential tyranny of the majority, 2/3rds of the value of claims within each class must also vote to approve the plan.

Even with this holdout accommodation, securing consent from each creditor class can be difficult. Therefore, the Code contains the colorfully described “cramdown” option, which allows a court to confirm a plan even if not all creditor classes have consented as long as the class has been treated fairly and equitably and the plan does not discriminate unfairly.

In many respects, decreased individual autonomy and protection is the tax for settlement facilitated by bankruptcy aggregation. Once the plan is approved, it serves to bind all prepetition claimants – even for those who voted against the plan or failed to participate in proceedings. Plan confirmation includes powerful

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215 Double Eagle Energy Services, L.L.C. v. MarkWest Utica EMG, L.L.C., 936 F.3d 260, 264 (5th Cir. 2019) (“With nationwide service, the forum is the United States. So minimum contacts with the United States (Fifth Amendment due process) suffice….”).
injunctions preventing various creditor actions against the parties involved in the bankruptcy, as well as the reorganized debtor.

b. Brief History of Section 524(g)

In addition to the comprehensive resolution platform described above, federal bankruptcy offers a bespoke statutory provision to address mass torts with asbestos exposure claims. Section 524(g) was built on the foundation of *In re Johns-Manville*, the original asbestos bankruptcy case. Even after almost a quarter of a century without amendment, the section represents innovative problem solving.

i. Johns-Manville

Johns-Manville Corporation was the largest producer of asbestos-containing products and, by the 1980s, faced a litany of lawsuits.219 The company filed for bankruptcy in 1982, but the Code did not have a specific statutory provision that provided guidance on how to address the billions of dollars in claims against the company. Consequently, the case languished for six years until stakeholders determined to shift the asbestos liabilities to a settlement trust. Pursuant to the debtors’ plan of reorganization, all asbestos claims – including those held by future claimants – were channeled to a $2.5 billion trust funded by the debtors and related parties.220 In return, asbestos claims could not be brought against the reorganized debtor or various other corporate entities involved in the bankruptcy case.

The bankruptcy court formulated two ways to address Due Process concerns for future victims. Primarily, the court appointed a legal representative to negotiate on behalf of future claimants.221 Further, a voting proxy was used. The court asserted that future victims’ interests were materially aligned with the interests of current victims.222 Based on this false premise, the court reasoned that all victims’ interests would be protected if an overwhelming number of current victims approved the plan. The court required that at least 75% – as opposed to a mere majority as mandated by the Code – of the members of the current victims’ class had to approve the plan in order for the class to be deemed to have accepted the plan, and the terms to bind current and future victims.223

The Manville Trust was expected to pay claimants close to 100 percent of the settlement value of their claims. The court anticipated the trust resolving approximately 100,000 claims, with a per claim value around $25,000.224 The projections were wrong. By 1992, “more than 190,000 claims were seeking

219 See Dixon, supra note 79, at 5.
222 Scholars and jurists have rejected this notion. See McKenzie, supra note 130, at 75-76.
compensation from the trust[,]"225 and the trust was deemed insolvent just a few years after inception.226 The parties were forced to return to court to resolve the financial deficiency. The reorganized debtor contributed additional funds, and a new settlement was implemented whereby the trust would follow an alternative compensation plan that prioritized those with the most serious illnesses – invariably malignant cancers. This new directive evolved into the compensation matrix that is ubiquitous today.

After the initial correction, the trust has remained viable. As of the first quarter of 2020, the trust had received 946,482 claims and had already paid almost $5 billion.227

ii. Section 524(g) Overlay

After watching the Johns-Manville case languish in bankruptcy for six years, the bankruptcy court forged the path forward with the simple idea that a successful end would justify the means. Congress could have taken the court’s creative – but significantly flawed – resolution design and improved it. Rather, Congress undertook a wholesale codification. In 1994, Congress added section 524(g) to the Code. Generally, the subsection allows debtors facing asbestos liabilities – and only those debtors – to fund a settlement trust to resolve all claims in exchange for a channeling injunction that provides immunity to the debtor, the reorganized debtor, and other entities, including parent corporations, acquirer of assets, and insurance companies.228 The injunction’s scope is extremely broad, capturing “any right or demand for payment that arises from the debtor’s underlying asbestos liabilities, regardless of when that right or demand arises, whether it was raised during the bankruptcy proceeding or is contingent on a future event.”229

Section 524(g) requires the bankruptcy court to find that the debtor faces substantial contingent, unfiled claims that threaten to preclude repayment. In response, the court may approve a plan of reorganization with a settlement trust and channeling injunction. The primary features are: 1) the trust is funded by securities or debt from the debtor for the benefit of present and future asbestos claims; 2) the channeling injunction prevents attempts to pursue any claims based on asbestos exposure against parties protected by the plan;230 3) the trust owns a majority of the voting stock of the reorganized debtor, the parent company of the

228 The benefits of section 524(g)’s channeling injunction are available only to debtors facing claims based on asbestos exposure. The section layers additional requirements on top of those already in place for debtors seeking confirmation of a Chapter 11 plan of reorganization.
230 See 140 Cong., Rec. S14461, S14464 (daily ed., Sept. 12, 1993) (“[The statutory injunction] assur[es] investors, lenders, and employees that the reorganized debtor has indeed emerged from Chapter 11 free and clear of all asbestos-related liabilities other than those defined in the confirmed plan….This added certainty will ensure that the full value of such a trust’s assets – the securities upon which it relies in order to generate resources to pay asbestos claims – can be realized.”) (quoting Senator Heflin).
debtor, or of a subsidiary of the debtor;\textsuperscript{231} 4) the trust pays present and future claims against the debtor and other protected parties; 5) the plan is approved by a 75-percent vote of current claimants in number and by two-thirds of the voting claims in terms of claim value;\textsuperscript{232} and 6) a future claim representative is appointed to negotiate on behalf of future victims but does not vote on the plan. The court must have “reasonable assurance” that the trust will operate in a manner where similar claims will be treated in substantially the same manner.\textsuperscript{233}

Modern mass torts rarely involve asbestos claims. Section 524(a) does not apply to these cases. Instead, mass tort debtors are fashioning their own ex post, ad hoc resolution structure by cherry-picking attractive provisions and concepts out of section 524(g), incorporating them into a plan of reorganization, and convincing bankruptcy courts to enforce these provisions pursuant to their equitable powers under section 105.\textsuperscript{234} These exempt plans seize section 524(g)’s benefits without being subject to its procedural and substantive restrictions.

As detailed in the following section, a new bargain is being imposed on mass tort victims.

IV. \textsc{The New Bargain}

Part II explored the limited resolution options available in mass tort cases. Legislative failure has hoisted the problem onto the judiciary. In the 1990s, the Supreme Court ruled that Rule 23’s strictures exclude all but a few mass tort cases. In response, policymakers embraced multidistrict litigation to serve a role for which it was not designed. Recognizing this incongruence, modern mass tort defendants have begun invoking bankruptcy preemption and exiting the MDL process.

This part explains how the bankruptcy process offers extensive options and a bespoke resolution provision for debtors facing asbestos exposure claims. But modern mass torts rarely involve asbestos claims. Section 524(g) is unavailable in these cases. Mass tort debtors are exploiting statutory gaps in the Code to bind victims through an unpredictable, ad hoc structure. The impairment risks faced by future victims are daunting. Three problems significantly complicate the process.

A. Exempt Plans: The Debtor-Designed, Ad Hoc Structure

\textsuperscript{231} See, \textit{e.g.}, \textit{In re} Plant Insulation Co., 734 F.3d 900, (9th Cir. 2013).
\textsuperscript{232} The voting thresholds count only current claimants who are generally advised by plaintiffs’ attorneys. Neither future claimants – beneficiaries of the trust – nor their appointed representative are included in the voting class.
\textsuperscript{233} See, \textit{e.g.}, \textit{In re} Combustion Engineering, Inc., 391 F.3d 190, 237 (3d Cir. 2004).
\textsuperscript{234} Section 105 of the Code allows the bankruptcy court to “issue any order, process, or judgment that is necessary or appropriate to carry out the provision of this title.” 11 U.S.C. §105. This provision has been construed to afford bankruptcy courts sweeping powers, and bankruptcy courts have not been shy about exploring the broadest reaches of the section’s power conferment. \textit{See, e.g., In re} Kaiser Aluminum Corp., 456 F.3d 328, 340 (3d Cir. 2006).
Professor Rosenberg’s resolution paradigm for mass torts advocates for an ex ante victims’ perspective, “which places individuals behind a ‘veil of ignorance’ without information about their particular situation in the ‘ex post’ world-to-come of accident risk and scarce resources.” 235 In formulating key provisions of mass tort resolution structures, the paradigm advises policymakers to consider the results individuals would seek if they knew they were to be mass tort victims seeking compensation from a limited asset pool but did not know the extent or temporal dispersion of their injuries.

The crux of Professor Rosenberg’s construct is well known to bankruptcy scholars. Creditors’ Bargain Theory has shaped bankruptcy policy the last 40 years. 236 The model “view[s] bankruptcy as a system designed to mirror the agreement one would expect…creditors to form among themselves were they able to negotiate such an agreement from an ex ante position.” 237 The theory offers a way to conceptualize solutions to pernicious problems. 238 A corollary to this theory is that a nondelineated, ad hoc resolution process will produce distorted results as litigants are driven by ex post, wealth-maximization strategies. 239 In the mass tort context, this behavior is exemplified by the fear that current victims and plaintiffs’ attorneys will coordinate with the corporate debtor to allow for disparate treatment of future victims.

Section 524(g) attempts to limit these ex post, wealth-maximization techniques, but the subsection applies only to mass tort debtors facing asbestos exposure claims. One may conclude that mass tort debtors excluded from section 524(g) are at a disadvantage. Quite the opposite is true. Excluded debtors are fashioning their own ex post resolution structure by cherry-picking attractive provisions and concepts out of section 524(g), incorporating them into a plan of reorganization, and then convincing bankruptcy courts to enforce these provisions pursuant to their section 105 equitable powers. 240 The technique creates what I refer to as an “exempt plan.” An exempt plan seizes section 524(g)’s benefits—most notably the channeling injunction—without being subject to its restrictions.

237 Jackson, supra note 236, at 860.
238 The theory has recently received some criticism, see, e.g., Casey, supra note 208, and Professor Baird himself has cautioned against overreliance on the model. See Baird & Rasmussen, supra note 209, at 652-53. But I believe the theory does more than just advocate efficiency. In the mass torts context, the theory provides a useful perspective from which to formulate policy design independent of mere efficiency concerns.
239 See Rosenberg, supra note 235, at 833.
240 See, e.g., In re Insys, Plan of Liquidation, Case 19-11292-KG, Doc.#1096 (Bankr. D. Del. January 14, 2020) [hereinafter “Insys Plan of Reorganization”]; see also Boy Scouts of Am. and Delaware BSA, LLC, Plan of Reorganization, Case No. 20-10343, Doc.#20 (Bankr. D. Del. February 18, 2020) [hereinafter “BSA Plan of Reorganization”]. In fact, corporate debtors who were entitled to use §524(g) have tried to ignore the subsection and convince bankruptcy courts to use §105 to allow for an alternative structure. See In re Energy Future Holdings, Co., 949 F.3d 806 (2020).
For example, section 524(g) has an onerous 75%-voting threshold that must be cleared before victims’ classes can be deemed to have “accepted” the proposed plan. This threshold compromises the debtor’s bargaining position by placing an inordinate amount of power in the hands of plaintiffs’ attorneys, who are essential for convincing their clients – current victims – to vote in favor of the plan.\textsuperscript{241} But exempt plans do not have to meet this voting threshold. A simple majority vote is sufficient pursuant to the structures seen in modern mass tort cases.\textsuperscript{242} Further, section 524(g) prevents plans of reorganization from being approved without the consent of victim classes, precluding the debtor from “cramming down” these classes.\textsuperscript{243} But exempt plans do not face this restriction.\textsuperscript{244}

Section 524(g) places peculiar requirements on the funding for victims’ trusts, including that (i) the reorganized debtor is obligated to make future payments to the trust; and (ii) the trust must be funded – at least in part – by securities of the reorganized debtor or an affiliated entity.\textsuperscript{245} Further, the section requires that at least half of the equity value of the reorganized debtor must be vested in the victims’ trust – a troubling requirement that could chill equity investment in the business.\textsuperscript{246} Exempt plans do not have to abide by these funding restrictions.

As noted, section 524(g)’s channeling injunction and third-party releases are arguably the most valuable aspects of the bankruptcy process. However, with limited exceptions, these benefits were designed to protect the debtor.\textsuperscript{247} Nond Debtor parties – including corporate parent and affiliate entities, as well as insurance companies and other financiers – would love to free ride and receive immunity. But these parties may only be protected if various onerous criteria under section 524(g)(4)(A)(ii) are satisfied.\textsuperscript{248} In many cases, nondebtor parties have been unable to satisfy these criteria and have sought the injunction’s protections under alternative bankruptcy provisions.\textsuperscript{249} These attempts have been unsuccessful.\textsuperscript{250} Modern mass tort cases are not subject to this restriction. Exempt

\textsuperscript{241} See Nagareda supra note 41, at 175 (“The real bargaining leverage…lies with plaintiffs’ lawyers who control large inventories of present claims…[and] have the power effectively to veto any…[plan].”)
\textsuperscript{242} See supra note 240.
\textsuperscript{243} See 11 U.S.C. §524(g).
\textsuperscript{244} See, e.g., Takata Disclosure Statement, supra note 43 (delineating the debtors’ right to cramdown victim classes, if necessary).
\textsuperscript{245} See 11 U.S.C. §524(g)(2)(B)(II).
\textsuperscript{247} See 11 U.S.C. § 524(e).
\textsuperscript{248} See, e.g., In re Quigley Co, Inc., 676 F.3d 45 (2d Cir. 2012) (injunction could not be extended to protect debtor’s parent entity); In re Pittsburgh Corning Corp., 453 B.R. 570 (Bankr. W.D. Pa. 2011) (injunction could not be extended to protect nondebtor affiliated entity).
\textsuperscript{249} For example, in In re Combustion Engineering, Inc., 391 F.3d 190, 236-37 (3d Cir. 2004), the debtor sought to extend the injunction’s protection to two affiliated entities but could not satisfy section 524(g)(4)(A)’s criteria. The debtor was able to convince the bankruptcy court to extend the injunction’s protections pursuant to the court’s §105 equitable powers. The Third Circuit rejected this action “[b]ecause…the general powers of §105(a) cannot be used to achieve a result not contemplated by the more specific provisions of §524(g).”
\textsuperscript{250} See id.
plans authorize channeling injunctions and third-party releases that protect a wide swath of nondebtor parties, including parent and affiliate corporate entities, insurers, professional advisors, board members, and various administrative agents.\(^{251}\) The most prominent example of this are the releases the Sackler family received in Purdue.\(^{252}\) The necessary showing is merely that the protected party was necessary in formulating and implementing the victims’ trust at issue.\(^{253}\)

Ultimately, mass restructurings follow an ad hoc structure that deviates from the ex ante victims’ perspective and increases the risk of distorted results.\(^{254}\)

**B. Due Process and the Future Claimants’ Representative**

Due Process can protect future victims from exempt plans that diverge too aggressively from customary norms. Under certain circumstances, contemporary case law establishes that interest representation can satisfy Due Process but offers little guidance on what constitutes permissible design.\(^{255}\) Section 524(g) attempts

\(^{251}\) See, e.g., Insys Plan of Reorganization, supra note 240, at 73; BSA Plan of Reorganization supra note 240.


\(^{253}\) See, e.g., Takata Disclosure Statement, supra note 43.

\(^{254}\) The flexibility offered by exempt plans presents a unique dimension when coupled with the unbridled forum shopping available to corporate bankruptcy filers. Due to extremely permissive venue provisions, corporate debtors have the ability to file in ostensibly any district they choose. See Samir D. Parikh, *Modern Forum Shopping in Bankruptcy*, 46 CONN. L. REV. 159 (2013). Over time, bankruptcy attorneys assess prominent jurists’ predilections and then forum shop to find a jurist whose perspectives further case objectives; a pliable process is coupled with an agreeable jurist. See Adam J. Levitin, *Purdue’s Poison Pill: The Breakdown of Chapter 11’s Checks and Balances*, 100 TEX. L. REV. ___ (forthcoming 2022).

\(^{255}\) The Supreme Court’s constitutional property doctrine establishes that a cause of action is a “property interest” of which a claimant cannot be deprived without due process of law. A party alleging contravention of the Due Process Clause must demonstrate a deprivation of a protected interest – life, liberty, or property – and that the process afforded by the State was constitutionally inadequate. *See In re Energy Future Holdings Corp.*, 949 F.3d 806, 822 (3d. Cir. 2020). From that perspective, settlements can be conceptualized as a plaintiff selling her property – the cause of action – to the defendant and relinquishing the rights of ownership. Property owners should be involved in this sales process and enjoy the right not to sell. In rare cases where forced sales are necessary, they should be preceded by notice and an opportunity for hearing. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). Rigid fidelity to procedural due process can be unreasonable in many instances, including mass tort cases. *See Hansberry v. Lee*, 311 U.S. 32, 41 (1940). Future victims – who must be included in the claim aggregation process – cannot be provided actual notice or their “day in court.” *See, e.g.*, Weinstein, supra note 41, at 126-27; Ryan C. Williams, *Due Process, Class Action Opt Outs, and the Right Not to Sue*, 115 COLUM. L. REV. 599, 620-21 (2015). But that does not necessarily preclude aggregation. Due Process requires “only reasonable notice and that reasonableness is to be evaluated by balancing the state’s interest in an existing notice scheme against the individual’s interest in receiving
to satisfy Due Process concerns in mass tort cases by requiring the appointment of a future claimants’ representative (“FCR”) to advocate for future victims affected by a channeling injunction. The idea has considerable value in theory. The execution has been alarming.256

Section 524(g) requires the appointment of an FCR as part of its binding aggregation process. In a customary agency relationship, the parties to be represented select their agent. In mass torts agency, future victims are the principal and, of course, they are absent from the process. This dynamic allows for exploitation.257 Primarily, the Code fails to prescribe selection procedures for the FCR. This silence is surprising. The FCR is the sole representative for future victims who customarily hold claims valued at hundreds of millions of dollars. These clients enjoy no ex ante input in the selection process. Nevertheless, the FCR negotiates with the debtor and other stakeholders and is able to unilaterally bind all unknown class members. The FCR has extraordinary, exclusive power but operates without any client oversight. This lack of oversight is arguably unavoidable in mass torts, but the agency breakdown is even more pronounced


256 My intent is not to assess whether the means of addressing claims held by future victims can withstand Constitutional scrutiny. The asbestos exposure canon holds that Due Process strictures are satisfied when an FCR is appointed to represent the interest of future victims. My objective is to analyze how to improve the FCR appointment process and execution of that office to fairly ensure that future victims receive a recovery comparable to current victims. However, I acknowledge that the Supreme Court has not reviewed these bankruptcy provisions, and – based on Court precedent – an argument could be made that the fundamentals of the current process are in fact Constitutionally deficient. See Sergio Campos & Samir D. Parikh, Due Process Alignment in Mass Restructurings, 91 FORDHAM L. REV. ___ (forthcoming 2022) (exploring the constitutionality of mass tort outcomes in bankruptcy). This may sound naïve considering this mechanism is a part of numerous cases that have survived circuit court review. However, keep in mind that the Court has repeatedly taken up entrenched bankruptcy practices only to rule that the structures were unconstitutional and needed to be dismantled. See, e.g., Stern v. Marshall, 564 U.S. 462 (2011) (bankruptcy courts lack authority under Article III to enter final judgment on a variety of claims); Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (holding that the bankruptcy code’s jurisdictional grant to non-Article III judges was unconstitutional); Ashton v. Cameron County Water Improvement District, 298 U.S. 513 (1936) (holding nation’s first municipal bankruptcy law to be unconstitutional).

257 Jones, supra note 153, at 1713.
than it seems. There is also no ex post check. Future victims who later emerge and come to learn that the FCR agreed to extremely disadvantageous terms cannot opt out of the agreement and have no recourse against the FCR, who enjoys broad immunity for all actions aside from fraud, gross negligence, and willful misconduct.258

The Code assigns the task of selecting the FCR to the bankruptcy court, without any further guidance. Bankruptcy courts have delegated this responsibility to the corporate debtor – the very party against whom the FCR will be negotiating.259 Invariably, the debtor is the only stakeholder who proposes FCR candidates and, in almost all cases, nominates only one.260 Courts are not required to give any deference to this nomination, but they invariably approve the debtor’s nominee without considering anyone else or even soliciting nominees from other stakeholders.261 Further, the only standard of review adopted by courts is that the nominee be “disinterested” – which represents an extremely low bar focused on whether the individual has any overt conflicts of interest.262 Once a selection is made, courts do not review the adequacy of the FCR representation.263

The idea that the FCR would fail to be a zealous advocate may seem confusing at first but emerges with shocking clarity when one considers the capture risk involved in mass tort cases. A small pool of professionals manages the universe of mass tort bankruptcy cases, and the process is characterized by repeat players.264 FCRs receive significant fees and, once appointed, immediately hire as legal counsel the law firm at which they are a partner, thereby amplifying the benefit.265 Therefore, the promise of multiple engagements is a truly distortive incentive for these individuals. This promise can incentivize an FCR to discount her invisible

258 See, e.g., Takata Disclosure Statement, supra note 43; see also S. Todd Brown, Section 524(g) Without Compromise, 2008 COLUM. BUS. L. REV. 102, 159 (2008).
259 See Mark D. Plevin, et al., The Future Claims Representative in Prepackaged Asbestos Bankruptcies: Conflicts of Interest, Strange Alliances, and Unfamiliar Duties for Burdened Bankruptcy Courts, 62 N.Y.U. ANN. SURV. AM. L. 271, 301-14 (“In almost every asbestos bankruptcy case to date, the bankruptcy court has granted the debtor a presumptive right to select the FCR.”). This delegation is akin to allowing the debtor to select class representatives and counsel for the official creditors’ committee.
261 See id.
262 See 11 U.S.C. §101(14); but see In re Fairbanks, 601 B.R. at 839-40 (ruling that the “disinterestedness” standard was insufficient and reviewed the FCR nominee in that case under the more demanding standards applicable to appointments of guardians ad litem).
263 See Brown, supra note 258, at 159.
264 See, e.g., In re Fairbanks, 601 B.R. at 835 & 841 ([T]he danger is that the FCR is part of a closed group and has an incentive to advocate so that the FCR remains in the group at the expense of future claimants. A [FCR] who rocks the boat….may not be in the next boat."); see also Nagareda, supra note 41, at 176-78.
265 For example, when selected as an FCR, James L. Patton always hires Young, Conaway, Stargatt & Taylor, the firm at which he is an equity partner. See, e.g., In re Imerys, Disclosure Statement, Case No. 19-10289, Doc.# 1715 (Bankr. D. Del. May 15, 2020), at 21 [hereinafter “Imerys Disclosure Statement”].
clients’ interests. FCRs seeking subsequent engagements face extreme pressures to avoid taking positions in one case that may alienate key parties who will be involved in future cases. The reality is that today’s adversary could be tomorrow’s client.

The distortive pressures go further. Keep in mind that courts are not immune to self-interested behavior. A confirmed reorganization plan is to a bankruptcy judge what a global settlement is to an MDL judge: an unadulterated success. An amenable FCR greatly improves the likelihood of that result. An overly zealous FCR risks creating an impasse could push the case into liquidation – considered a failure to jurists and bankruptcy professionals alike.

The FCR structure is extremely beneficial to the debtor and current victims, because it allows them to overcome the anticommons problem and then leverage the other components of the bankruptcy process to secure settlement. Unfortunately, the nature of these disputes breaks down basic agency principles. Neither the Code nor the judiciary offer means to reassemble the pieces. Ultimately, accommodating FCRs receive rewards without consequences. A dereliction of duty is in the best interests of all parties at the bargaining table.

C. Estimating the Value of Future Victims’ Claims

Bankruptcy courts must estimate the aggregate value of future claims in order to overcome the anticommons problem. Section 502(c) authorizes claim estimation for plan confirmation. The estimate is vital because the present value of the total of all victims’ claims constitutes the debtor’s trust liability. With that number, the key parties can begin the final design of the plan of reorganization.

266 In re Fairbanks, 601 B.R. at 835 (“The idea is that the [FCR]…will ‘go along to get along’ to the detriment of future claimants in order to be selected for the next case.”).

267 See McKenzie, supra note 130, at 75-76.

268 In approving FCRs, courts regularly tout how a particular individual is qualified because the nominee has been selected in various other cases, see Duro Dyne, 2019 WL 4745879 at *1, but fail to consider that this familiar face should raise impartiality concerns. James L. Patton, Jr. has served as an FCR in eight different cases in just the last ten years. See In re Boy Scouts of Am., Case 20-10343-LSS Doc.# 223 (March 18, 2020); see also Nagareda, supra note 41, at 176-77 (noting the small pool of FCRs).


270 There has been some debate whether the term “claim” as defined in the Code can capture unfiled claims of future victims. Bankruptcy courts would be precluded from adjudicating future claims if these claims are excluded from the definition of “claim.” However, courts have construed the term “claim” broadly, and I do not view this as a live controversy. See In re Grossman’s Inc., 607 F.3d 114, 125 (3d Cir. 2010); see also Takata Disclosure Statement, supra note 43.

271 Section 502(c) allows bankruptcy courts to estimate contingent and unliquidated claims, but the statute appears to limit this estimation for purposes of allowance and voting. See Fed. R. BANKR. P. 3018(a). Estimation for purposes of distribution – the reason estimation is sought in mass tort bankruptcies – is not explicitly authorized. Nevertheless, courts have consistently undertaken estimation for plan confirmation – and presumably distribution – in mass tort cases. See, e.g., In re Garlock Sealing Techs., LLC, 504 B.R. 71, 74 (Bankr. W.D.N.C. 2014); In re Armstrong World Indus., Inc., 348 B.R. 111, 124 (D. Del. 2006).
The significance of the final number cannot be overstated; it will be transformative for the case and all affected victims.

The Code fails to provide instruction on estimation mechanics or methodology. Courts are instructed to choose “the appropriate method of estimation in light of the particular circumstances of the bankruptcy case before it.” Consequently, this essential process devolves to a battle of experts. Indeed, experts representing the debtor, the official committees, and other stakeholders present highly speculative assessments that happen to perfectly align with their client’s interests. The bankruptcy court is tasked with sorting this quagmire and selecting the estimation that it finds most plausible.

Bankruptcy courts rarely undertake this herculean task and, in fact, are inexperienced in adjudicating personal injury cases. But the estimation process ignores this inexperience and allows these jurists to liquidate thousands of claims never having had conducted a single jury trial, taken any victim testimony, or thoroughly assessed historical data.

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272 S. ELIZABETH GIBSON, FED. JUDICIAL CTR., JUDICIAL MANAGEMENT OF MASS TORT BANKRUPTCY CASES 90 (2005) (“[N]either section 502(c) nor any provision of the Bankruptcy Rules provides any guidance about the method the judge should use.”).


274 See, e.g., In re Armstrong World Indus., Inc., 348 B.R. 111, 115 & 125 (D. Del. 2006) (“Although there is no dearth of well-compensated experts willing to assume the task of predicting the future asbestos personal injury liability of companies emerging from bankruptcy...the number of possible variables makes any pretense to certainty illusory.”).

275 Estimation hearings are multi-day affairs filled with conflicting expert witness testimony, see In re Owens Corning, 322 B.R. at 725 (the low expert assessment of total liability was $2.08 billion, while the high was $11.1 billion); In re A.H. Robins, 880 F.2d 694, 699 (4th Cir. 1989) (the range was $600 million to $7 billion); Garlock Sealing, 504 B.R. at 74 (the range was $125 million to $1.3 billion), and misleading evidence, see id. at 86-87 (determining that plaintiffs’ attorneys had withheld material exposure evidence that had unfairly inflated the debtor’s liabilities and the practice was widespread, affecting many asbestos cases).

276 See, e.g., In re Armstrong World Indus., Inc., 348 B.R. 111, 134 (D. Del. 2006) (“Presented with three estimates of...pending and future asbestos personal injury liability...the Court...finds that $3.1 billion is a reasonable prediction....”).

277 See Jones, supra note 153, at 1714.

278 See id. Bankruptcy judges’ inexperience stems from the fact that they lack authority to adjudicate personal injury tort or wrongful death claims. See 28 U.S.C. §157(b)(2)(B). Bankruptcy courts may not estimate personal injury tort or wrongful death claims for purposes of making a distribution from estate assets. Section 502(c), however, does not prevent courts from estimating these claims in order to allow the debtor to formulate a plan of reorganization.

279 See In re Armstrong World Indus., Inc., 348 B.R. 111, 115 (D. Del. 2006) (acknowledging that estimation under section 502(c) involves making “predictions which are themselves based on predictions and assumptions”); see also Sergio Campos & Samir D. Parikh, Due Process Alignment in Mass Restructurings, 91 FORDHAM L. REV. ___ (forthcoming 2022) (arguing for coordination between district and bankruptcy courts to allow for bellwether trials in these cases to inform the estimation process).
The New Mass Torts Bargain

Some jurists have rejected the premise that bankruptcy judges can “accurately estimate the results of a series of extremely speculative problems” and refused to undertake the task;\(^\text{280}\) all acknowledge the process’s systemic flaws.\(^\text{281}\) Nevertheless, many courts have no choice but to estimate claims. Plan confirmation is unavailable without this number.

D. Consequences of the New Bargain

Mass restructurings reveal bankruptcy’s structural and substantive deficiencies, which culminate in various practical consequences, including a lack of predictability, loss of victim autonomy, and suppressed recoveries. However, the most concerning of these consequences is disparate treatment between current and future victims. Current victims and plaintiffs’ attorneys appear willing to coordinate with corporate debtors and other stakeholders to create an underfunded victims’ trust that allows for immediate compensation but faces premature insolvency. The consequence of this coordination will not be apparent for years after the plan of reorganization is confirmed; indeed, there is a long latency period with this financial harm just as there is a long latency period for many of the torts that underlie these cases. Insolvent trusts create the unacceptable risk that mere temporal dispersion will allow one victim to receive a full recovery while another similarly situated victim seeking compensation just a few years later receives nothing.

One would imagine that a process built around a compensation trust with a meaningful risk of insolvency would require some contingency plan. But exempt plans have absolutely no contingency plan to address prematurely insolvent trusts.\(^\text{282}\) Future victims have no recourse against the corporate tortfeasor, because that entity was dissolved through the bankruptcy process. Future victims have no recourse against the reorganized debtor or acquirer of assets, because those entities assume no liability for the corporate debtor’s prepetition conduct. Future victims cannot opt out of the settlement agreement and have no recourse against the FCR that accepted an underfunded plan or any other party, because all are either protected by a channeling injunction or enjoy immunity through the plan.\(^\text{283}\)

Is all hope lost? Not necessarily. Current structural anomalies are allowing debtors to fashion a distortive new bargain. But bankruptcy offers a comprehensive resolution platform and the allure of superposition. As detailed below, revisions to just a few bankruptcy provisions can create an efficient and equitable option for modern mass tort cases.

V. The Possibility of Bankruptcy Superposition

\(^{280}\) See In re Dow Corning Corp., 211 B.R. 545, 562 n.16 (Bankr. E.D. Mich. 1997) (refusing to adopt an estimation process and urging the parties to reach a consensual resolution).

\(^{281}\) See, e.g., In re Armstrong, 348 B.R. at 124 (“The best the court can do is to consider the expert reports, [and remain] vigilant to the potential bias that a party’s expert may have….”).

\(^{282}\) See, e.g., Imerys Disclosure Statement, supra note 265; Takata Disclosure Statement, supra note 43.

\(^{283}\) See, e.g., BSA Plan of Reorganization supra note 100, at 53.
Part IV explained how mass tort defendants have begun invoking bankruptcy preemption and exiting the MDL process. Unfortunately, bankruptcy preemption has just replaced one deficient structure with another. But unlike the MDL process, bankruptcy has the potential to layer multiple forms of delineated relief and revenue-generating mechanisms that are particularly impactful for resolution of mass tort cases. Transformative benefits are available if certain facets of the current platform can be corrected.

A. Structural and Substantive Objectives

Administrative peacemaking presents challenges. Professor Nagareda has explained that “the challenge lies in lending a structure to peacemaking that affords latitude for creativity to generate value but, at the same time, inhibits plaintiffs’ lawyers and defendants from largely appropriating that value for themselves.”\(^{284}\) While accurate, Professor Nagareda tells only part of the story. In fact, the objective must go further. The structure must preserve value and ensure that plaintiffs’ lawyers, defendants, and current victims will not appropriate value to the detriment of future claimants.

What are the goals of this process? The process must aggregate claims and then bind claimants; there must be a meaningful level of predictability in the delineation and execution of the process; defendants should enjoy relative finality and meaningful options to preserve enterprise value; plaintiffs’ recoveries should approximate litigation outcomes and settlements should be scrutinized for their fairness and integrity – more specifically, in this context, we want to avoid disparate treatment of similarly situated victims; and all parties deserve resolution on an accelerated timeline.

The compilation of these objectives highlights the deficiencies of current options and historical proposals for structural modification. The mass tort canon is filled with radical proposals to more effectively resolve mass torts, including unique compensation schemes,\(^{285}\) wholesale transfer of bankruptcy court powers to

\(^{284}\) Nagareda, supra note 43, at xi (intro).

\(^{285}\) Professor Nagareda proposed modifying plaintiffs’ attorneys’ compensation to incentivize aggressive advocacy of both current and future claimants, but he did not provide any meaningful specifics about how such an elaborate deviation from accepted norms would be structured or if this one change would be sufficient to address other resolution obstacles. See Nagareda, supra note 41, at 232-238.
nonbankruptcy courts, reliance on exotic financial instruments, and creating statutory super-priority for tort victims.

Ultimately, historical proposals fail to address the novel challenges posed by modern mass restructurings. In this section, I eschew radical reforms and return to the idea of a legislative solution implemented by the judiciary; a normative construct that minimizes misallocation risk and places the burden of alignment not on elaborate compensation schemes or financial markets, but on the bankruptcy court – the entity best positioned to bear this burden.

**B. Two Pillars of the Normative Construct**

This Part develops a conceptual framework for an efficient and equitable mass tort resolution structure. The key substantive objectives of this structure can be furthered by focusing on two core pillars: 1) addressing disparate treatment of similarly situated victims by minimizing the systemic failures in the FCR process; and 2) codifying the key aspects of the resolution overlay for mass tort cases.

Changes in these two spheres bring focus on the negotiation structure for these restructuring cases and solvency of resulting trusts; by bolstering judicial oversight and FCR advocacy and accountability, the process will maximize available trust funds and improve equality of distribution across victim classes. This improved negotiation structure allows for the elimination of various section 524(g)

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286 Professor McKenzie advocated for the incorporation of meaningful provisions from the Bankruptcy Code into a nonbankruptcy aggregation proceeding. See McKenzie, supra note 144. He acknowledged that this action is unlikely, and I agree with that assessment. I also question the use of bankruptcy as a model for resolving mass tort litigation when modifying the process itself is a far easier and more likely legislative outcome. Also, the prevalence of bankruptcy preemption in modern mass torts impedes the viability of Professor McKenzie’s proposal. See also Francis E. McGovern, *Asbestos Legislation II: Section 524(g) Without Bankruptcy*, 31 Pepp. L. Rev. 233, 252-53 (2003) (proposing legislation that would ostensibly make section 524(g) available to mass tort defendants outside of bankruptcy and describing a settlement model that arguably mirrors the existing MDL process).

287 Professor Smith proposed the creation of a liquidating trust in which victims receive shares that they can sell in the capital markets when they need cash. See Thomas Smith, *A Capital Markets Approach to Mass Tort Bankruptcy*, 104 Yale L.J. 367 (1994). While certainly inventive, this proposal assumed a robust market for this type of security, which Professor Smith acknowledged was unlikely. Without a robust market, information gaps regarding the value of such shares would lead to extreme price discounting as investors bear assessment cost. This proposal places the burden of market failures on future victims.

restrictions that fail to further key objectives, thereby streamlining the court’s inquiry.\textsuperscript{289}

1. **Reassembling Agency Principles in the Selection Process for the Future Claimants’ Representative**

The FCR is the linchpin in addressing the anticommons problem in modern mass torts, but this key figure lacks statutory definition. The FCR is tolerated by the other stakeholders who seek global settlement. As detailed above, there is a material capture risk with FCRs that undermines the integrity of the resolution process. FCRs lack incentives to advocate zealously but, in many cases, they also lack the means. The FCR can be a terrible agent for future victims. The statutory revisions below seek to bring the FCR out of the shadows more empowered.

a. **Minimizing Capture Risk**

The Bankruptcy Code does not prescribe a process for appointing the FCR or the standard to be used for this selection. Courts have delegated to the corporate debtor selection of the FCR. Of course, the debtor is the very party against whom the FCR will be negotiating. The most effective way to reduce obvious capture risk is to mandate that the United States Trustee – the party that already manages the committee appointment process under section 1102 – oversee FCR selection. A new statutory subsection to section 524(g) should provide that the UST will compile a list of independent candidates and be tasked with selecting an FCR from this list subject to approval by the bankruptcy court.\textsuperscript{290} Parties in interest may nominate candidates, but the UST’s master list should include candidates the UST identifies independently. Further, the bankruptcy court should be authorized to remove an FCR after appointment if the court determines that the change is necessary to ensure adequate representation of future claimants.\textsuperscript{291}

Corporate debtors currently control the nomination process, and bankruptcy courts invariably approve lone nominees under the “disinterestedness” standard, which represents an extremely low bar focused on whether the individual has any overt conflicts of interest. This standard is used for evaluating agents in bankruptcy who are actively managed by their principals but is inappropriate in light of the lack of customary agency controls for future victims.

\textsuperscript{289} Policymakers and jurists have spent too much time conceptualizing resolution design and interpreting section 524(g) guided by what the *Johns-Manville* court envisioned. This evaluative perspective should be abandoned. See, e.g., *In re Plant Insulation*, 734 F.3d 900, 906 (9th Cir. 2013) (“[T]he original Johns-Manville case is a distant memory[, and current cases] could hardly be more different….”). *In re Johns-Manville* was an idiosyncratic case, which forced the court to take extremely aggressive and desperate actions that were uniquely tailored to the problems at hand.

\textsuperscript{290} This change aligns with appointment powers afforded to the United States Trustee in other contexts. See 11 U.S.C. §332 (directing United States Trustee to appoint consumer privacy ombudsman) and 11 U.S.C. § 333 (directing United States Trustee to appoint patient care ombudsman).

\textsuperscript{291} This language comports with the standard delineated in section 1102 for removal of committee members. See 11 U.S.C §1102(a).
Conceptualizing the FCR as a guardian ad litem offers an improved framework. The Federal Rules of Bankruptcy Procedure permit the court to appoint a guardian ad litem to represent an incompetent person who cannot appear in proceedings or otherwise represent themselves. The Code does not define guardian ad litem, but the “overarching purpose of the role is to protect the rights of persons in litigation who cannot represent themselves.” Future victims are not incompetent in a traditional sense, but they are unable to appear in a proceeding or otherwise retain a representative. Courts have been willing to appoint guardians under similar circumstances in other contexts.

A modified assessment of FCR candidates is the result of this new framework. Under the guardian model, the bankruptcy court must – in addition to finding that a candidate is disinterested, qualified, and competent – determine that a candidate will act as an objective, impartial, and effective advocate for future victims. Courts must undertake a qualitative assessment, including (i) how often a candidate has served as an FCR, (ii) to which law firm or organization the candidate is affiliated, and (iii) which party in interest – if any – nominated that candidate. Experience is important. But the utility of experience can, after a certain point, be overwhelmed by capture risk.

b. Condorcet Jury Theorem and FCR Voting

Condorcet Jury Theorem was formulated to assess the optimal size of a deliberative body and support the binding effect of majority and supermajority voting. The theorem has been applied by scholars assessing juries. But the theorem has broader applications and posits an interesting proposition. Imagine that a person is choosing between two options: one is deemed correct and the other incorrect. Further assume that the probability that the person will choose the correct option is only slightly greater than 50%. The Condorcet Jury Theorem holds that having multiple individuals vote – instead of just one – significantly increases the probability that the correct option will be chosen.

The theorem provides a useful perspective from which to view the FCR construct. In mass restructurings, there are arguably “correct” choices that increase the likelihood of viable settlement trusts. The bankruptcy process can be redesigned to move FCRs towards these choices. The current formulation places too much power in the hands of one FCR. I argue that a true committee representing future victims is the optimal structure. Three FCRs should be

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292 FRCP 17 affords courts this authority, and Rules 7017 and 9014 of the Federal Rules of Bankruptcy Procedure make the rule applicable in bankruptcy proceedings.

293 In re Fairbanks, 601 B.R. at 840.

294 See, e.g., Burress v. Blake, 2016 WL 11475018 (E.D. Tex. December 1, 2016) (appointing guardian to review settlement on behalf of plaintiff who had disappeared prior to trial).


appointed to negotiate on behalf of future victims. This small-scale committee reduces capture risk because distorted self-interest is more easily managed as additional individuals are added to a process that originally involved one decision-maker. Further, Condorcet Jury Theorem supports the idea that a true committee approach will improve decision making.

The members of this new committee deserve some of the rights afforded to members of other committees. In particular, the new committee deserves the right to vote on any proposed plan of reorganization. Unsecured creditor voting in bankruptcy is premised on parties being organized into classes and majority voting binding class members. Current victims in mass tort cases are organized in this fashion, but, under the existing framework, their representative does not vote.

The Code should be modified so that a plan can be confirmed only if both current and future victims’ classes accept the plan. Two out of the three FCRs must vote in favor of a proposed plan in order for the future victims’ class to be deemed to have accepted the plan. Finally, the statute should provide that an FCR may only vote in favor of a proposed plan if the FCR possesses a reasonable belief that the terms of the trust ensure that claims of similarly situated victims will receive substantially similar treatment.

2. Codifying the Basic Structure

Revising the FCR process is a necessary improvement but insufficient standing alone. Codifying an improved resolution structure is necessary. Indeed, modern mass tort cases are not subject to section 524(g)’s various restrictions, but exempt

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298 I anticipate an argument that adding two additional FCRs would be cost prohibitive. But this argument overlooks the fact that modern mass tort cases are adjudicating thousands of claims through a multi-billion-dollar settlement trust. In this context, total FCR fees are immaterial. For example, in the Takata bankruptcy case, the FCR’s fees totaled approximately $1.42 million. The fees of the FCR’s professionals totaled approximately $6.51 million. See, e.g., In re TK Holdings, Summary of Final Fee Application of Frankel Wyron LLP, Case No 17-11375, Doc.# 2866 (Bankr. D. Del. May 22, 2018). These costs represent less than 8% of the overall fees charged by legal and financial professionals in the case, see In re TK Holdings, Fee Examiner’s Final Report, Case No 17-11375, Doc.# 3011 (Bankr. D. Del. June 21, 2018), and a fraction of the $1.5 billion asset sale that was only possible because the corporate debtor was allowed to channel to the settlement trust the claims of future claimants. Further, approximately 80% of the costs associated with the Takata FCR are the professional fees of her legal and financial advisors. These fees should not fluctuate materially with the addition of two FCRs. Ultimately, cost is not a deterrent to adding two additional FCRs.

299 See Edelman, supra note 294.

300 See id.

301 For an impaired class to have deemed to have accepted a proposed plan of reorganization, a majority in number and 2/3rds of the aggregate value of claims must vote to approve the plan. See 11 U.S.C. §1126.

302 In other words, revised section 524(g) will prevent plans from being crammed down on dissenting victims’ classes, though cramdown will be available to cramdown other types of creditor classes. See 11 U.S.C. §1129(b)(1).
plans in these cases seize all the benefits in fashioning an unpredictable, ad hoc resolution. Simply modifying the Code so that all mass torts are subject to section 524(g) would be a half measure. As noted above, the section was drafted to address the unique problems posed by asbestos exposure cases. Merely subjecting all modern mass tort cases to the section would improve predictability but fail to address the section’s glaring substantive deficiencies. A more sweeping revision is warranted.

Primarily, section 524(g) must be made applicable to modern mass tort cases. I propose amending section 524(g)(2)(B)(i)(I) to capture corporate debtors that have been named as a defendant in personal injury, wrongful death, or property-damage actions (a) seeking recovery for damages allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products; (b) aggregated and transferred by the JPML to a single federal district court for pretrial proceedings; or (c) that the bankruptcy court determines contain substantial future demands for payment that cannot be addressed equitably without the subsection’s protections. Affected corporate debtors wishing to include a channeling injunction in a plan of reorganization will be required to comply with the section. For most mass torts, bankruptcy courts would no longer be able to approve exempt plans pursuant to section 105, closing a significant statutory loophole.

Section 524(g)(2)(B)(ii) provides that victims’ claims that are to be addressed by the settlement trust must be organized in a separate class, and 75% of the members of that class must vote to approve the plan of reorganization for it to be confirmed. This requirement comes from the Johns-Manville court, which mistakenly believed that overwhelming support by current victims would indicate a good deal for future victims and address Due Process concerns. But this premise is entirely misguided. As detailed in Part III.B, the interests of current and future victims are misaligned. The 75% threshold gives courts a false sense that they have addressed disparate treatment. The requirement also puts too much power in the hands of a few plaintiffs’ attorneys who represent the bulk of current victims. The debtor must appease this small group of attorneys in order to clear the daunting threshold, which positions these individuals to distort the distribution scheme to favor current victims. With the changes noted in Part V.B.1, a new committee populated with three FCRs will be tasked with voting on the plan and determining what is in the best interests of future victims. Therefore, the basis for the 75% threshold disappears entirely, and the requirement should be eliminated.

Plans of reorganization that include a section 524(g) settlement trust should have a provision detailing how the risk of trust insolvency has been addressed. As described above, there is material risk that latent financial harm is embedded in these cases, and trusts will become insolvent prematurely. A new subsection should be added to section 524(g)(2)(B)(ii) that requires the bankruptcy court to have reasonable assurance that the settlement trust will not become insolvent prior to resolving – pursuant to the compensation matrix delineated in the plan of reorganization – all claims expected to be brought against the trust. Currently, the court is required to have only a reasonable assurance that the trust will pay present and future claims in substantially the same manner. But a prematurely insolvent

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303 See, e.g., Nagareda, supra note 41.
304 See id.
trust may provide similarly meager distributions to both current and future victims. The current requirement is useful but does little to focus the court on the problem of the trust becoming insolvent prematurely.

The final major piece of my proposal involves eliminating entirely the requirements delineated in sections 524(g)(2)(B)(i)(II) and (III). These restrictions unnecessarily inhibit the debtor’s funding options in a failed attempt to tie the trust’s fortunes to the reorganized debtor’s postpetition success. These subsections fashion a poor proxy to eliminate the risk of insolvent trusts. Subpart (II) requires that the settlement trust be funded by the debtor’s securities and an obligation to make future payments. But the provision has no impact in practice. Debtors subject to asbestos exposure claims invariably fund settlement plans with insurance proceeds and capital contributions from parent entities or affiliates. In order to satisfy Subpart (II), parties place near worthless securities in the settlement trust—or actually require the trust to purchase these securities—and then provide some nominal future payment obligation. These components fail to help the trust avoid insolvency.

Subpart (III) requires that the trust own a majority of the voting shares of the reorganized debtor or its affiliates. However, the crux of this requirement is easily circumvented. The reorganized debtor that emerges from the bankruptcy does not have to continue the business that initially made the corporate debtor profitable or retain any meaningful operations. Indeed, many mass restructurings are characterized by asset sales as the primary means of value maximization, and the debtor’s valuable assets and operations are sold to another party. In order to satisfy Subpart III in these cases, asbestos plans have merely set up a dummy reorganized debtor that holds various causes of action of questionable value but has no meaningful operations that could generate value to support a faltering trust. A majority ownership stake in these dummy entities has marginal value. Consequently, Subpart III’s requirement similarly fails to support the solvency of the settlement trust.

Ultimately, provisions that seek to create significant contingent liabilities that withstand the bankruptcy process undermine finality and are detrimental to value preservation. Investors and creditors will price the contingencies into the assessed value of any equity issued, asset sold, or debt borrowed by the debtor—which invariably destroys value. The primary benefit of the channeling injunction is to eliminate the risk of discounting and maximize asset values through the bankruptcy process. As we saw in Johns-Manville, Section 524(g)’s current

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306 See, e.g., In re Plant Insulation, 734 F.3d at 915.
307 See id.
308 See e.g., Takata Disclosure Statement, supra note 43; Insys Plan of Reorganization, supra note 240.
309 See, e.g., Imerys Disclosure Statement, supra note 265, at 59–60 (setting up a dummy reorganized debtor to merely hold various causes of action of questionable value).
310 140 Cong. Rec. S4521, S4523 (daily ed. Apr. 11, 1994) (“The provision recognizes the threat that lingering liabilities pose to a debtor’s successful asset sale or future success as a reorganized entity. Without a clear statement in the code of a court’s authority to issue such injunctions, the financial markets tend to discount the securities of the reorganized debtor. This in turn diminishes the trusts’ assets and its resources to pay victims.”).
311 The first Johns-Manville trust was deemed insolvent just a few years after inception. See Dixon, et al., supra note 79, at 6.
financing restrictions do not minimize the risk of an insolvent trust, but they do suppress the value of the debtor and the debtor’s assets. The objective of these financing provisions should be to maximize the value of funds contributed to the settlement trust. Within these new statutory parameters, the debtor should be afforded flexibility and finality.\textsuperscript{312}

CONCLUSION

A new strategy has emerged in the mass tort kingdom. Corporate defendants trapped in multidistrict litigation are filing for bankruptcy and exiting one claim aggregation process for another. But bankruptcy is not designed for these new cases. Mass tort defendants can impose a new bargain by exploiting statutory loopholes to fashion an ex post, ad hoc resolution structure. This approach comes with myriad risks, most notably insolvent settlement trusts and disparate treatment across victim classes. This Article proposes an unprecedented, normative construct that addresses anticommons dynamics and remedies statutory failings in order to improve predictability, efficiency, and victim recoveries. Further, this Article seeks to stimulate scholarly debate of an overlooked trend that will reshape mass tort litigation in the upcoming decade.

\textsuperscript{312} As noted above, under my new proposals, a corporate debtor seeking a channeling injunction must be able offer the court “reasonable assurance” that the resulting settlement trust will not become insolvent prematurely. Debtors can certainly rely on the historical financing constructs captured in sections 524(g)(2)(B)(i)(II) and (III) to make the necessary showing, but these features should not be a requirement.
Modern mass tort defendants—including Johnson & Johnson, Purdue Pharma, USA Gymnastics, and Boy Scouts of America—have developed unprecedented techniques for resolving mass tort cases. Three weapons in this new arsenal are particularly noteworthy. Before filing for bankruptcy, corporate defendants undergo divisive mergers to access bankruptcy on their terms. Once in bankruptcy, these mass restructuring debtors curate advantageous provisions in the Bankruptcy Code to craft their own ad hoc resolution mechanism implemented through plans of reorganization. This maneuver facilitates questionable outcomes, including the third-party releases the Sackler family recently secured. Finally, a mass restructuring debtor can agree to convert its tainted business into a public benefit...
corporation after bankruptcy and devote future profits—no matter how speculative they may be—to victims in exchange for a reduced financial contribution to the victims’ settlement trust.

The net effect of these legal innovations is difficult to assess because the intricacies are not fully understood. Debtors argue that these resolution devices provide accelerated and amplified distributions. And forum shopping has landed cases before accommodating jurists willing to tolerate unorthodoxy. The fear, however, is that mass tort victims are being exploited. The aggregation of these maneuvers may allow culpable parties to sequester funds outside of the bankruptcy court’s purview and then rely on statutory loopholes to suppress victim recoveries. Mass restructuring debtors are also pursuing victim balkanization—an attempt to pit current victims against future victims in order to facilitate settlements that may actually create disparate treatment across victim classes.

This Essay is the first to identify and assess the new shadowed practices in mass restructuring cases, providing perspective on interdisciplinary dynamics that have eluded academics and policymakers. This is one of the most controversial legal issues in the country today, but legal academia has largely overlooked it. This Essay seeks to create a dialogue to explore whether a legislative or judicial response is necessary and what shape such a response could take.

INTRODUCTION

In 1956, Battelle Memorial Institute (BMI) received an odd request. Johnson & Johnson (J&J) asked the relatively obscure research laboratory
to analyze large deposits of talc mined in Italy. Small amounts of “grit” permeated batches of talcum powder, rendering some product abrasive. J&J wanted BMI to identify the source, explore methods to filter the offending particles from future batches, and comprehensively resolve the problem.

BMI produced a pair of reports (BMI Reports), which identified myriad particles and contaminants that contributed to abrasiveness. In particular, BMI found in each talc sample a relatively small amount of tremolite. In exhausting detail, the BMI Reports explored how tremolite’s “cleavage fragments” were likely causing abrasiveness in J&J’s baby powder. The BMI Reports, however, failed to appreciate the study’s true significance: asbestos is the more common name for the fibrous form of tremolite. Tale particles contaminated with asbestos could cause cancer if inhaled or placed in areas where the particles could enter the body—a placement J&J’s advertising had encouraged for decades.

The BMI Reports’ seismic consequences were not lost on J&J executives. In subsequent years, the company purchased numerous talc mines searching for a clean talc source. But an April 9, 1969 memo written by the J&J executive tasked with the company’s talc supply acknowledged

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2 See id.
3 See generally id.
5 Eduardo C. Robreno, The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?, 23 Widener L.J. 97, 102-03 (2013) (“Evidence produced during litigation has shown that at least some asbestos manufacturers were aware of the risks that asbestos exposure posed to miners and factory workers as early as the 1930s. In the 1960s, a prominent epidemiological study, directed by Dr. Irving Selikoff and others at Mount Sinai Hospital, described asbestos inhalation’s harmful effects on insulation workers’ health.”).
7 In the 1960s, Dr. Irving Selikoff substantiated the harmful effects of asbestos inhalation. See Robreno, supra note 5; Deborah R. Hensler, Inst. for Civ. Just., Asbestos Litigation in the United States: A Brief Overview (1991).
8 See Girion, supra note 4.
that tremolite was a common particle found in talc deposits and virtually impossible to eliminate.9

J&J never disclosed its fears to the Food & Drug Administration or its customers.10 Further, its marketing campaign continued to encourage customers to sprinkle baby powder on their bodies; more specifically, women were encouraged to apply the powder to their perineal area.11 Recent lawsuits alleging a link between the repeated application of talcum powder and ovarian cancer have forced the release of internal J&J documents.12 New information has led to a modified view of talcum powder and a better understanding of its effects.13 Adverse jury verdicts against J&J culminated in a $4.7 billion verdict against the company in 2018.14 As of July 29, 2021, there were 38,200 talc-related cases pending against the company.15 These lawsuits have been consolidated in multidistrict litigation (MDL) in the U.S. District Court in New Jersey.

MDL consolidation is frequently the precursor to comprehensive settlement, but J&J has no intention of going gentle into that good night. The company recently executed a “divisive merger”—an extremely obscure maneuver that allowed for the isolation of all liability related to its talcum powder in one subsidiary. And on October 14, 2021, that subsidiary—LTL Management LLC—filed for bankruptcy while the other parts of the J&J empire stayed out of the process.16

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9 See Memorandum from W. H. Ashton, Johnson & Johnson on Alternate Domestic Talc Sources File No. 101 to Dr. G Hildick-Smith (Apr. 9, 1969).


12 See id.

13 See id.


15 See Johnson & Johnson, Quarterly Report, 29 (Form 10-Q) (July 29, 2021).

Why would one of the most profitable companies in the world even consider bankruptcy? This question is just one of many that arise in the brave new world of mass restructurings. My recent article unpacked the answer to this question and explained how federal bankruptcy offers mass tort defendants the ability to aggregate and resolve state and federal claims on an accelerated timeline in a forum that is particularly responsive to their preferences. Bankruptcy resolution is the optimal process to resolve many moder mass tort cases, providing the greatest recovery for the victims’ collective on the shortest timeline. But the process can still undermine victims’ rights in ways that are obscured.

This Essay explores the new legal innovations and statutory exploitations that have become part of this process. The story starts before the bankruptcy filing. Divisive mergers, the state court process designed for small businesses, are being used by corporate behemoths to file for bankruptcy on their terms. Once inside the gates, mass restructuring debtors are exploiting statutory loopholes to fashion an ex post, ad hoc resolution structure that seizes all of the Bankruptcy Code’s benefits with few of the costs. There are many consequences, including nondebtor releases that immunize malfeasance and insolvent settlement trusts that leave future victims without recovery for serious injuries. Finally, a revolutionary idea—which I refer to as the Public Benefit Proposal—theoretically allows a mass tort defendant to reduce its contribution to a victim settlement trust in exchange for agreeing to convert its business into a public benefit corporation and devote all profits to victims. This proposal purports to address the suppressed distributions seen in modern mass tort cases but could aggravate the risk of insolvent trusts.


I seek to make three primary contributions to the legal literature on mass torts, civil procedure, and financial restructuring. The result is primarily descriptive but serves a vital role in determining if corrective measures are necessary. This Essay is the first to identify the new shadowed practices, delineating the distinguishing characteristics and unique complexities they present.

Second, this Essay assesses these new maneuvers through the lens of victim recoveries. Mass defendants may be acting in ways that advantage some victims to the detriment of others. This Essay explores how the victim collective is not a monolith, and balkanization may be corporate defendants’ true objective; pitting current victims against future victims by arguing that any attempt to fully compensate both groups will lead to significant recovery delays for victims currently suffering.

Finally, legal literature has overlooked the intersection of aggregate litigation and bankruptcy. This oversight has allowed shadowed practices to proliferate undetected. I hope to engage scholars from various disciplines to explore whether a legislative or judicial response is necessary and the optimal resulting framework.

I. GAINING ACCESS THROUGH DIVISIVE MERGERS

The Texas Business Organizations Code (TBOC) has an intentional quirk. “Merger” is defined to include a division of a business into two new entities. This process is referred to as a “divisive merger” and has been an obscure part of the TBOC since 1989. The original design was to protect small businesses—including cattle and farming operations—involving in potentially dangerous operations. A divisive merger allows these businesses to isolate valuable assets in an entity protected from creditor claims related to the primary operations.

In the last few years, this quirk of Texas law has garnered a lot of attention. Mass tort defendants began relying on the divisive merger because it offers corporate defendants the ability to access bankruptcy on

21 I refer to this process as “corporate mitosis,” which more accurately describes the result.
22 See Ernst, supra note 19, at 234 n.5. Arizona, Pennsylvania, and Delaware have adopted similar provisions but lack the case history supporting the practice. See Donald F. Parsons, Jr., R. Jason Russell & Koah M. Douds, The Business Lawyer—Seventy-Five Years Covering the Rise of Alternative Entities, 75 BUS. LAW. 2467, 2485 n.144 (2020). The limited enactment of this provision does not affect its utility. An entity wishing to pursue a divisive merger can simply incorporate in the necessary state and effect the maneuver.
23 See Ernst, supra note 19, at 235-38.
their terms. This interest culminated with J&J’s announcement in October 2021 that it was planning a divisive merger in order to isolate mass tort liability related to its iconic talcum powder in a new subsidiary. And on October 14, 2021, that subsidiary, LTL Management LLC, filed for bankruptcy while the other parts of the J&J empire stayed out of the process. Divisive mergers are now center stage in the growing mass tort wars.

But how does the process work? In most cases, there is a corporate structure that includes at least one entity that holds valuable business operations but includes assets tainted by mass tort liability (“InfectedCo”). The conglomerate faces significant liability and may have already suffered adverse judgments or be involved in multi-district litigation. A global settlement of all mass-tort liability is necessary but would require InfectedCo and perhaps other subsidiaries to file for bankruptcy “subjecting the entire . . . enterprise[] and . . . many employees, suppliers, vendors, and creditors to a chapter 11 proceeding.”

Bankruptcy represents the best resolution model, but the corporate parent would prefer to avoid subjecting valuable assets to creditor recovery and convoluted business decisions to bankruptcy court scrutiny.

In order to effectuate a divisive merger, InfectedCo—invariably a Delaware entity—incorporates as a limited liability company under Texas state law. Relying on the TBOC, InfectedCo undergoes corporate mitosis producing two new corporate entities. Let’s call them GoodCo and BadCo. Under state law, InfectedCo is authorized to allocate assets and liabilities among the two new entities. BadCo receives assets of nominal value and becomes solely responsible for all mass tort claims against InfectedCo. In

24 This maneuver has been used in other cases. See, e.g., In re Bestwall LLC, 605 B.R. 43, 47 (Bankr. W.D.N.C. 2019); In re Aldrich Pump LLC, No. 20-30608, Adv. No. 20-03041, 2021 WL 3729335, at *1 (Bankr. W.D.N.C. Aug. 20, 2021).
25 See, e.g., Randles, supra note 16.
26 See sources cited supra note 16.
27 See Parikh, supra note 18, at 4 (explaining the global settlement imperative facing corporate defendants).
29 See Parikh, supra note 18, at 6, 27, 48 (explaining that (i) class aggregation is rarely an option when the victim class is populated with both current and future victims because a class representative cannot be appointed when victims have fundamentally divergent interests; and (ii) MDLs have turned into captive settlement processes that deprive many defendants of autonomy and options).
30 TEX. BUS. ORGS. CODE ANN. § 10.003 (West 2021). The allocation must be made under a plan of division, which is not filed with the state.
other words, BadCo becomes the dumpster for all of InfectedCo’s mass tort liability. GoodCo receives all other InfectedCo assets and liabilities. InfectedCo is dissolved.

This process effectively isolates mass tort liability in BadCo, unless the allocation constitutes a fraudulent transfer.\(^{31}\) To address this daunting risk, GoodCo and BadCo sign various agreements designed to prop up what is ostensibly a shell company. The “Support Agreement” establishes reciprocal indemnification obligations corresponding to the allocation of liabilities in the divisive merger.\(^{32}\) In other words, this agreement obligates both GoodCo and BadCo to indemnify each other for all losses incurred in connection with their respective assets and liabilities.\(^{33}\) The “Funding Agreement” serves a loftier goal. This agreement requires GoodCo to provide funding for all costs and expenses incurred by BadCo to the extent BadCo lacks sufficient funds to satisfy such obligations.\(^{34}\) Mass tort defendants argue that this agreement—which is the linchpin to defending against a fraudulent transfer claim—ensures that BadCo has the same ability to pay off its mass tort claims as InfectedCo did before the divisive merger.

After these machinations, GoodCo can remain a Texas company but will most likely reincorporate in Delaware. BadCo domiciles itself in a jurisdiction that will facilitate forum shopping to a friendly bankruptcy venue. BadCo filing for bankruptcy is the final step.

A divisive merger allows the parent to isolate mass tort liabilities in one subsidiary and then have that subsidiary—and that subsidiary alone—file for bankruptcy. Mass tort defendants can access bankruptcy on their terms and potentially keep valuable assets out of victims’ reach. Once inside the gates, the Bankruptcy Code’s statutory loopholes raise exploitation risks.

II. AD HOC RESOLUTION IN BANKRUPTCY

Section 524(g) of the Bankruptcy Code is designed to provide structured relief to debtors facing claims based on asbestos exposure; only debtors

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\(^{31}\) See 11 U.S.C. § 548 (establishing the criteria for avoidance of a fraudulent transfer).

\(^{32}\) See Pittard Declaration, supra note 28, at 9 (detailing the responsibilities contemplated in the funding agreements, including indemnification); see also Adversary Complaint at 8-9, Off. Comm. of Asbestos Claimants v. Bestwall LLC (In re Bestwall), No. 17-31795, Adv. No. 20-03149 (Bankr. W.D.N.C. July 29, 2020) (same).

\(^{33}\) Pittard Declaration, supra note 28, at 8-10; Adversary Complaint, supra note 32, at 8-9.

\(^{34}\) Pittard Declaration, supra note 28, at 8-10; Adversary Complaint, supra note 32, at 8-9.
facing those types of claims fall within the section’s purview. The section also imposes various restrictions to protect asbestos victims. But modern mass torts rarely involve asbestos claims. The new mass restructuring debtors are not subject to §524(g) or any of the various victim protections found therein. This freedom has allowed mass restructuring debtors to impose a new bargain on victims.

A. Section 524(g)

Section 524(g) of the Bankruptcy Code is a bespoke statutory provision enacted to address mass restructurings involving asbestos exposure claims. Generally, an asbestos debtor has the option to fund a settlement trust to resolve all victim claims. In exchange, the debtor receives immunity through a channeling injunction that redirects all claims to the settlement trust. The injunction can also be extended to nondebtor parties, including a parent corporation, affiliated entities, acquirers of assets, and insurance companies.

This structure is implemented through the debtor’s plan of reorganization. The primary features include: (1) the creation of a victims’ trust funded by the debtor, affiliated entities, and insurers for payment to pay all present and future asbestos claims; (2) a channeling injunction that prevents attempts to pursue any claims based on asbestos exposure against parties protected by the plan; and (3) a future claim representative appointed to negotiate on behalf of unknown, future victims and presumably satisfy Due Process strictures.

B. Exploiting Loopholes in the Bankruptcy Code

Section 524(g) does not apply to most modern mass restructuring cases. One may conclude that these debtors lament their exclusion, but it’s actually an opportunity. Excluded debtors are fashioning their own ad hoc

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35 11 U.S.C. § 524(g)(2)(B) (explaining that the provision is limited to cases involving injury caused by exposure to asbestos or asbestos-containing products).
36 See Parikh, supra note 18, at 5.
37 See id. at 32-34 (explaining the history of § 524(g)).
38 See 11 U.S.C. § 524(g)(3)(A). The injunction’s scope is extremely broad, capturing “any right to or demand for payment that arises from the debtor’s underlying asbestos liabilities, regardless of when that right or demand arises, whether it was raised during the bankruptcy proceeding or is contingent on a future event.” In re W.R. Grace & Co., 729 F.3d 311, 321 (3d Cir. 2013).
40 See Parikh, supra note 18, at 34 (detailing these and three other primary features found in reorganization plans).
resolution structures by extracting beneficial provisions and concepts out
of § 524(g), dropping them into a plan of reorganization,\textsuperscript{41} and then
convincing a bankruptcy judge to bless the Frankenstein creation pursuant
to her § 105\textsuperscript{42} equitable powers. These exempt plans enjoy § 524(g)’s
benefits without the costs. For example, § 524(g) has a 75%-voting
threshold that must be cleared before victims’ classes can be deemed to
have “accepted” the proposed plan—a requirement under the Code.\textsuperscript{44} But
exempt plans do not have to meet this voting threshold. A simple majority
vote is sufficient.\textsuperscript{45}

Section 524(g)’s channeling injunction and nondebtor releases are the
most desirable features of the bankruptcy process. However, the
channeling injunction envisioned by § 524(g) is intended to protect the
debtor exclusively.\textsuperscript{46} Nondebtor parties—including affiliated entities and
insurance companies—would love to secure the injunction’s protection.
These parties may only be included in the injunction’s broad protection if
various onerous criteria under § 524(g)(4)(A)(ii) are satisfied.\textsuperscript{47} Modern
mass tort cases are not subject to this restriction. Exempt plans authorize
channeling injunctions and third-party releases that protect a wide swath
of nondebtor parties, including parent and affiliate corporate entities,
insurers, professional advisors, board members, and various

\begin{footnotesize}
\begin{enumerate}
\item I refer to these as “exempt plans” because they are not subject to § 524(g)’s restrictions.
\item Section 105 of the Code allows the bankruptcy court to “issue any order, process, or
judgment that is necessary or appropriate to carry out the provision of this title.” 11 U.S.C.
§ 105(a). This provision has been construed to afford bankruptcy courts sweeping powers, and
bankruptcy courts have not been shy about exploring the broadest reaches of the section’s power
conferment. See, e.g., In re Kaiser Aluminum Corp., 456 F.3d 328, 340 (3d Cir. 2006) (citing
§ 105(a) as vesting bankruptcy courts with broad equitable power, subject to the parameters of
the bankruptcy code).
\item See, e.g., Second Amended Joint Chapter 11 Plan of Liquidation at 70, In re Insys
Reorganization] (relying on § 105 powers for injunctions and stays in a bankruptcy case); see
also Fifth Amended Chapter 11 Plan of Reorganization at 102, In re Boy Scouts of Am., No. 20-
10343 (Bankr. D. Del. Feb. 18, 2020) [hereinafter BSA Plan of Reorganization] (relying on § 105
equitable injunction power). In fact, corporate debtors who were entitled to use § 524(g) have
tried to ignore the subsection and convince bankruptcy courts to use § 105 to allow for an
alternative structure. See In re Energy Future Holdings, Corp., 949 F.3d 806, 825 (3d Cir. 2020)
(chastising a party for “attempting to circumvent § 524(g)”).
\item See Parikh, supra note 18, at 36.
\item See 11 U.S.C. § 524(e) (“[D]ischarge of a debt of the debtor does not affect the liability
of any other entity on, or the property of any other entity for, such debt.”).
\item See, e.g., Pfizer Inc. v. Law Offices of Peter G. Angelos (In re Quigley Co, Inc.), 676
F.3d 45, 59-60, 62 (2d Cir. 2012) (holding that an injunction could not be extended to protect a
debtor’s parent entity); see also Parikh, supra note 18, at 36-37.
\end{enumerate}
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Some releases are actually designed to protect nondebtor third parties from liability for conduct unrelated to the debtor or its business.⁴⁹ The debtor is merely required to show that the protected party was necessary for formulating and implementing the victims’ trust at issue—an extremely low bar to clear.⁵⁰

Further, § 524(g) attempts to satisfy due process concerns in many mass tort cases by requiring the appointment of a future claimants’ representative, or FCR, to advocate for unknown, future victims.⁵¹ The FCR’s approval is necessary before future victims’ claims can be subject to a channeling injunction or other disposition.⁵² This procedure has already been adopted in modern mass tort cases not subject to § 524(g).⁵³ Unfortunately, the procedure is inherently flawed.

The Code fails to prescribe selection procedures for the FCR, who has the exclusive power to bind unknown, future victims, but operates without any client oversight. This dynamic is arguably unavoidable when dealing with future victims, but the agency breakdown is more severe than it seems. Courts have delegated this responsibility to the mass restructuring debtor—the very party against whom the FCR will be negotiating.⁵⁴ Invariably, the debtor is the only stakeholder that proposes FCR candidates and, in almost all cases, nominates only one.⁵⁵ The only standard of review is that the nominee be disinterested—which represents an extremely low

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⁴⁹ See, e.g., Fifth Amended Joint Chapter 11 Plan of Reorganization at 113-14, In re Purdue Pharma L.P., No. 19-23649 (Bankr. S.D.N.Y. June 2, 2021) [hereinafter Purdue’s Fifth Amended Plan] (releasing liability for tort, contract, fraud, negligence, and other forms of liability).


⁵¹ See 11 U.S.C. § 524(g)(4)(B). Naturally, many mass tort cases do not involve unknown, future claimants and avoid the complexities created by the FCR.


⁵³ See, e.g., TK Holdings Third Amended Plan, supra note 50, at 6 (noting the appointment of a future claimants’ representative in a case not involving asbestos liability).


⁵⁵ See In re Duro Dyne Nat’l Corp., 2019 WL 4745879, at *1 (nominating one); In re Fairbanks Co., 601 B.R. at 833 (same); In re Imerys Talc Am., Inc., 2019 Bankr. LEXIS 1452, at *2 (same).
bar focused on whether the individual has any blatant conflicts of interest. Once a selection is made, courts do not review the FCR’s performance. Future victims lack opt out rights. Victims whose harm manifests on a longer timeline and who face extremely inequitable settlement terms have no recourse against the FCR, who enjoys broad immunity through the plan of reorganization for all actions aside from fraud, gross negligence, and willful misconduct.

The idea that the FCR would fail to be a zealous advocate may seem confusing at first but emerges with shocking clarity when one considers the capture risk involved in mass tort cases. A small pool of professionals manages the universe of mass tort bankruptcy cases, and the process is characterized by repeat players. FCRs receive significant fees and, once appointed, immediately hire as legal counsel the law firm at which they are a partner, thereby amplifying the benefit. The promise of multiple engagements can incentivize an FCR to discount her invisible clients’ interests.

Exempt plans produce distorted results. The Purdue Pharma bankruptcy case is just one example of this. After extensive rounds of negotiation with various governmental agencies and creditor committees, the Sackler family agreed to contribute approximately $4.3 billion to the victims’ settlement trust. In exchange, the debtor’s plan provided comprehensive releases for (i) Raymond and Mortimer Sackler, (ii) all of their living and unborn descendants, (iii) all current and future spouses, and (iv) various associated parties that could include thousands of unknown individuals. The initial releases insulated these protected parties from conduct unrelated to Purdue Pharma or its business and

56 See 11 U.S.C. § 101(14) (defining a “disinterested person” as someone who is “not a creditor, an equity security holder, or an insider,” is not or was not in the two years prior to filing an officer, director, or employee of the debtor, and “does not have an interest materially adverse” to any creditor of the debtor); In re Duro Dyne Nat’l Corp., 2019 WL 4745879, at *7-10 (holding that the “disinterested” standard under § 101(14) applies to the future claimants’ representative, rather than the “appearance of impropriety” standard).

57 See, e.g., S. Todd Brown, Section 524(g) Without Compromise: Voting Rights and the Asbestos Bankruptcy Paradox, 2008 COLUM. BUS. L. REV. 841, 869 (“[B]ankruptcy plans routinely shield legal representatives from liability to future claimants for all but the most egregious misconduct.”).


59 Memorandum of Law in Support of U.S. Trustee’s Expedited Motion for a Stay of Confirmation Order at 6, In re Purdue Pharma, No. 19-23649 (Bankr. S.D.N.Y. Sept. 15, 2021) [hereinafter UST’s Stay Motion].
protected any type of civil misconduct—including fraud, gross negligence, willful misconduct, and deliberate ignorance. It would have been extremely difficult to justify these releases if the company had been subject to § 524(g). But without § 524(g)’s restrictions, the bankruptcy court approved Purdue’s plan of reorganization with the controversial Sackler family releases intact.

Gaining access to bankruptcy facilitates expedited resolution. This prospect is transformative to current victims facing staggering health care costs, providing meaningful recoveries instead of endless courtroom delays. But there is a potential cataclysm imbedded in this process. In the rush to resolve these crises, jurists may accept settlements that place the risk of non-recovery on future victims. This is what I describe as victim

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60 Purdue’s Fifth Amended Plan, supra note 49, at 113-14 (releasing liability for all “claims, counterclaims, disputes, obligations . . . .”).

61 See Parikh, supra note 18, at 36-37 (discussing § 524(g)’s requirement that 75% of voting victim class members approve the plan and that the victim trust must be funded in part by the debtor’s securities and also by the reorganized debtor). A nondebtor party can enjoy the protections of § 524(g)’s channeling injunction only if various onerous criteria are satisfied under § 524(g)(4)(A)(ii)—a task that has proven to be quite difficult. See generally In re Combustion Engineering, Inc., 391 F.3d 190, 236-37 (3d Cir. 2004) (barring the use of the general powers of § 105 to achieve a result not contemplated by § 524).


balkanization. This is the process by which debtors pit current victims against future victims with a simple threat: any attempt to secure comparable recoveries across the victim class will lead to significant delays in case resolution and ultimately deprive current victims of any recovery in the short term. This subtle threat permeates settlement discussions and raises the specter that the court will approve a resolution model that allows current victims to be first to the trough while leaving little for future victims whose claims are no less meritorious. The Public Benefit Proposal, explored below, adds further complexity to the quagmire by allowing mass tort defendants to offer a potentially illusory promise to victims in exchange for a reduced financial contribution.

III. THE REVOLUTIONARY PUBLIC BENEFIT PROPOSAL

Bankruptcy architecture provides two primary resolution models for corporate debtors with viable businesses. A debtor can restructure its business by using the Bankruptcy Code’s various forms of relief and emerge as a new entity. A debtor may also sell some or substantially all of its assets through a § 363 asset sale and use proceeds to satisfy creditor claims. But Purdue Pharma proposed something unprecedented in its bankruptcy case. Instead of selling its profitable business operations, the company sought to emerge from bankruptcy as a public benefit corporation.

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64 I acknowledge that victim balkanization was not present in the Purdue case but wish to note that this dynamic has emerged in other mass tort cases and may be an effective strategy in Johnson & Johnson’s attempt to resolve its talcum powder liability.

65 Section 363 of the Bankruptcy Code allows a debtor to sell all of its assets through court-supervised auction process. 11 U.S.C. § 363(b). In many circumstances, these sales represent the optimal means of securing funds to compensate creditors. See generally Douglas G. Baird, The New Face of Chapter 11, 12 AM. BANKR. INST. L. REV. 69 (2004).

66 The genesis of the idea is unclear. In October 2020, the DOJ announced an agreement with Purdue Pharma as part of an attempt to resolve various federal claims against the company (the “PBP Agreement”). The PBP Agreement requires Purdue to emerge from bankruptcy as a public benefit corporation functioning entirely in the public interest. See Press Release, Dep’t of Just., Justice Department Announces Global Resolution of Criminal and Civil Investigations with Opioid Manufacturer Purdue Pharma and Civil Settlement with Members of the Sackler Family (Oct. 21, 2021), https://www.justice.gov/opa/pr/justice-department-announces-global-resolution-criminal-and-civil-investigations-opioid [https://perma.cc/3HVR-889Y]. A number of Senators have argued that Sackler family members were the “driving force” behind the provision. See Letter from Tammy Baldwin, U.S. Sen. et al. to the Hon. William Barr, Att’y Gen. of the U.S. (Nov. 10, 2020) [hereinafter Baldwin Letter] https://www.baldwin.senate.gov/imo/media/doc/2020.11.10%20Senators%20to%20Barr%20Purdue%20PBP%20Letter.pdf [https://perma.cc/L685-QAMF] (“Purdue and the Sackler family are the driving force behind the inclusion of the PBC in the agreement . . . .”). But this claim lacks substantiation. See also infra Part IV.C (explaining the public benefit corporation proposal).
Purdue owns a business that could generate billions in future profits. Unfortunately, the business is tainted by the criminality and gross malfeasance committed by its executives. This taint could presumably destroy enterprise value and suppress bidder interest in any auction. In other words, Purdue could try to sell its scandalous—but otherwise profitable—business through an asset sale in bankruptcy, but the proceeds will most likely be materially less than what it would have otherwise received without its scarlet letter.67 As an alternative, Purdue’s plan of reorganization offered to continue the company’s business operations after the bankruptcy case and devote profits to compensate victims of the opioid crisis.68 This approach would also allow victims to enjoy a quasi-equity position. To the extent that the public benefit corporation is wildly successful, victims will be able to participate in that windfall. Finally, any excess, residual profits from the reorganized debtor could be deployed to benefit the public at large. I refer to this concept as the Public Benefit Proposal.69

Purdue’s design for a reorganized public benefit corporation has relatively simple mechanics. The primary covenants provide for the creation of a new limited liability company called Knoa Pharma.70 Purdue’s plan provides that Knoa must (i) fundamentally operate for the public benefit, (ii) consider long-term public-health interests relating to the opioid crisis in its decisionmaking processes, and (iii) employ transparent and sustainable management practices.71 More specifically, Knoa must develop and distribute medicines to treat opioid addiction and reverse opioid overdoses.72 The company will be run by a board of

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67 See Disclosure Statement for Third Amended Joint Chapter 11 Plan of Reorganization at app. B, 3-6, Exhibit 1, In re Purdue Pharma L.P., No. 19-23649 (Bankr. S.D.N.Y. May 24, 2021) (estimating discounted sale prices for Purdue’s assets).


71 Purdue’s Twelfth Amended Plan, supra note 62, at 22-23 (including this in the definition of “NewCo Governance Covenants”).

72 See In re Purdue Pharma, L.P., No. 21-07752, 2021 WL 9779108, at *28 (S.D.N.Y. Dec. 16, 2021) (“[Knoa] will manufacture products, including Betadine, Denokot, Colace, magnesium products, opioids and opioid-abatement medications, and oncology therapies.”); see also Levine, supra note 70.
managers selected by officials from the various states that brought suit against Purdue (the “Governmental Consent Parties”) in consultation with the creditors’ committee and the debtor. The managers must be disinterested, independent, and experienced in one or more areas related to health care, law enforcement, or business administration. A monitor is also part of the process and tasked with reviewing Knoa’s compliance with its corporate covenants and bankruptcy court orders. Similar to the company’s board, the monitor is selected by the Governmental Consent Parties in consultation with the creditors’ committee and the debtor.

Knoa will operate until 2024, at which time all assets will be sold and proceeds distributed pursuant to the plan waterfall. Knoa must first satisfy all operating expenses; excess funds then flow to victim trusts and various state and local governments to support opioid abatement programs. Nevertheless, Purdue estimates that approximately $5.5 billion will be distributed to victims.

The Public Benefit Proposal is intriguing because it offers a model for companies contemplating bankruptcy that hold extremely valuable assets tainted by corporate criminality. An attempt to sell these assets during a time of public fervor would be questionable. There is a high risk that value would be materially suppressed. A full chapter 11 reorganization may be similarly futile. A mere rebranding will not remove the residual stain or address harsh public scrutiny. The Public Benefit Proposal is a type of deferred asset sale with a publicly conscious entity offering a philanthropy shield behind which assets can be cleansed. This proposal could be instrumental in preserving

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73 There will be either five or seven managers. The ultimate design will be delineated in the order confirming the plan of reorganization. See In re Purdue Pharma L.P., 2021 WL 5979108, at *28.
74 See Purdue’s Twelfth Amended Plan, supra note 62, at 71 (Section 5.4(d)) (describing the appointment of the NewCo managers).
75 Id. The Department of Justice is afforded the right to oversee the selection process but does not appear to have the ability to veto selections. Id.
76 Id. at 71-72 (Section 5.4(i)).
77 Disclosure Statement for Third Amended Joint Chapter 11 Plan of Reorganization, supra note 67, at app. F (describing the Knoa “Disposition Event” wherein the company will be dissolved by December 31, 2024); Purdue’s Twelfth Amended Plan, supra note 62, at 63-64 (Section 5.2(f)) (describing the MDT, NewCo, and TopCo Priority Waterfalls).
80 See Parikh, supra note 69 (explaining the intricacies of the Public Benefit Proposal).
value for companies that have engaged in evil—value that should ultimately be directed to victims.

Despite these platitudes, the Public Benefit Proposal could be used for a far less honorable purpose. The proposal could be implemented in a way that helps a mass restructuring debtor and perhaps its parent company reduce the mandatory up-front contribution to a victims’ settlement trust, diminishing the financial burden while still securing nondebtor releases. More specifically, a mass restructuring debtor could propose a plan that includes a large financial contribution to a victims’ settlement trust but with a significant portion of this contribution derived from the future revenue of a reorganized public benefit corporation. Victims would bear the risk of overstated future revenue projections and subsequent insolvency.

IV. ASSESSING THE NEW MANEUVERS

One could argue that the mere fact that mass tort defendants are pursuing these maneuvers establishes that victims will be disadvantaged. But such conclusions represent mere speculation. In my recent article, I explained the global settlement imperative and how bankruptcy is oftentimes the optimal means of satisfying the imperative because it aggregates claims and offers accelerated resolution and finality. Ultimately, there are myriad reasons why mass tort defendants are pulling the bankruptcy lever. But landmines persist. The material risk is that the new maneuvers could undermine victim recoveries. Indeed, corporate mitosis offers defendants the ability to sequester valuable corporate assets outside of bankruptcy. The Bankruptcy Code allows mass restructuring debtors to create an underfunded settlement trust that minimizes a debtor’s financial burden. And the Public Benefit Proposal could represent an illusory promise that further heightens the risk of an insolvent settlement trust.

81 To be clear, this was apparently not the case in Purdue. The Sackler family was afforded various concessions, including third-party releases, but these concessions were not the result of promises regarding Knoa’s future performance. Rather, these concessions—which were ultimately approved by virtually all significant stakeholders in the case—were made to secure a prompt settlement and avoid decades of litigation with the Sackler family. See Hill, supra note 68.

82 See Baldwin Letter, supra note 66, at 2 (“The plan allows Purdue to inflate the value of the settlement by relying on its own rosy analysis of the company’s value and promising to pay the terms of a settlement out of the future profits of the company.”).

83 See Parikh, supra note 18, at 4, 13 (describing the global settlement imperative).
This Section explores these fears and offers some insight for the path forward.

A. Divisive Mergers and Funding Agreement Infirmitities

Divisive mergers remove some barriers to a bankruptcy filing.\(^8^4\) I believe that victims on the whole benefit by mass tort defendants accessing bankruptcy; without this option, victims would have to seek recovery on a case-by-case basis through the court system—a process that could take years—and hope for enough victories to force the mass tort defendant to the settlement table. But mass tort defendants are not restricted in accessing bankruptcy. That option is always available and cannot be infringed by creditors or contracts.\(^8^5\) Divisive mergers allow mass tort defendants to access bankruptcy on their terms and potentially eliminate a source of creditor recovery.

Companies employing this maneuver have pointed out that the process is authorized under Texas state law and may be attacked only if assets are fraudulently transferred.\(^8^6\) To address this risk, mass tort defendants seek cover behind the ubiquitous funding agreement, which presumably affords BadCo—the company that files for bankruptcy—the same repayment capabilities enjoyed by InfectedCo—the pre-bankruptcy iteration. But this statement is misleading. InfectedCo’s valuable assets are excluded from the bankruptcy process. To the extent the bankruptcy process suppresses victim distributions, the corporate parent will benefit.

And funding agreements present their own infirmities. In mass tort bankruptcies from previous generations, responsible parties made large contributions to victims’ settlement trusts in exchange for various

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\(^8^4\) See supra Part I (explaining how separating mass tort liability from valuable corporate assets creates a more palatable path into bankruptcy for mass tort defendants).  
\(^8^5\) See, e.g., The Bank of China v. Huang (In re Huang), 275 F.3d 1173, 1177 (9th Cir. 2002) (explaining that any contract term seeking to prohibit a bankruptcy filing is void as contrary to federal public policy).  
protections. These parties provided funds in lump sums. This arrangement avoided the fear of a responsible party’s subsequent insolvency derailing the trust. But funding agreements today are designed to push risk onto victims. Funding agreements seen so far make GoodCo—the healthy sister company of BadCo—responsible for BadCo’s obligations. But the financial burden does not appear as a lump-sum obligation; instead, the agreement envisions what I refer to as drip financing. BadCo agrees to a monthly funding schedule based on invoices presented by the victims’ trust. These invoices are routed to GoodCo, which is obligated to fund expenses that are warranted under the governing documents and court orders.

Keep in mind that settlement trusts must invariably endure for decades. What if GoodCo failed just a few years after confirmation? The funding agreement is unsecured and unguaranteed. And there is no provision in the funding agreement that delineates a contingency plan if GoodCo cannot make the necessary payments. Further, there is no covenant restricting GoodCo from transferring assets. The import of this design emerges with amazing clarity: victims bear all insolvency risk. This outcome is at odds with the mass tort architecture that has dictated outcomes for the last 50 years.

Restricting divisive mergers through injunctive relief does not appear to be realistic. However, divisive mergers that involve funding agreements that push insolvency risk onto victims should be viewed as fraudulent transfers because the financial backstop—GoodCo’s assets—could very well prove to be a mirage. Bankruptcy courts should reject drip financing arrangements that lack insurance backstops, multiple corporate guarantees, or other financial safety nets. Ideally, settlement trusts would be funded by upfront contributions that help insulate the trust from subsequent cascading insolvencies. Ultimately, judicial intervention can

87 See In re Johns-Manville Corp., 68 B.R. 618, 621-22, 27 (Bankr. S.D.N.Y. 1986) (describing funding agreements in which a victims’ trust was initially funded with a substantial amount of cash, to be supplemented yearly, and a reorganized company was protected from certain claims, including those for punitive damages, to ensure it remained viable to continue funding the trust).

88 See Pittard Declaration, supra note 28, at 9 (discussing the Funding Agreements and related financial obligations); see also Adversary Complaint, supra note 32, at 16-17 (describing funding agreements in In re Bestwall, In re Aldrich Pump, and In re Murray Boiler).

89 See Pittard Declaration, supra note 28, at 24-26; see also Adversary Complaint, supra note 32, at 11-12.

90 See sources cited supra note 86 (noting courts have refused to dismiss bankruptcy cases that follow divisive mergers).
easily address this potential inequity once jurists are made aware of these subtle tactics.91

B. Simple Changes to Close Statutory Loopholes

I acknowledge that mass restructuring debtors have exploited loopholes in the Bankruptcy Code to accelerate the plan confirmation process. Simple statutory amendments, however, could enhance process integrity and avoid disparate treatment across victim classes. Primarily, § 524(g) must be amended to capture all mass tort cases, including those that do not involve asbestos claims; this one change will limit the ability of nondebtor parties to secure releases or otherwise be protected by the channeling injunction. To minimize FCR capture risk, new § 524(g) should (i) require the appointment of three FCRs, (ii) allow only the United States Trustee—as opposed to the mass restructuring debtor—to propose viable candidates, and (iii) require that all candidates be disinterested, qualified, and competent to effectively represent future victims’ interests.92 Conceptually, these changes are relatively simple. As explored in my recent article, the final design will require a more comprehensive assessment of § 524(g)—a provision drafted almost three decades ago—to ensure alignment with modern policy objectives.93

91 In response to a prior draft, Professor Lynn LoPucki gently chided me for my apparent naivete. I argue that bankruptcy judges can easily limit exploitive debtor behavior. This much is true. However, many scholars will counter that rampant forum shopping in bankruptcy undermines the viability of this proposal. Corporate debtors can easily locate cases in any jurisdiction they choose. See, e.g., LYNN M. LOPUCKI, COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS 19-24 (2005) (describing how “an era of rampant, routine forum shopping” leads to a decrease in bankruptcy cases for some jurisdictions); see also Samir D. Parikh, Modern Forum Shopping in Bankruptcy, 46 CONN. L. REV. 159, 163, 173-81 (2013) (“[T]he forum shopping phenomenon continues to plague the bankruptcy system . . . .”). And at least some judges are interested in securing these reputation-making cases. Therefore, there will always be a receptive court for these debtors, regardless of how easily corrective measures can be implemented. I acknowledge that forum shopping is bankruptcy’s poisonous tree, bearing many fruits. However, statutory amendments cannot resolve many granular bankruptcy problems, and amendments to the Code happen infrequently. Judicial action invariably represents the most viable means for policing exploitive behaviors. Ultimately, forum shopping’s specter must be acknowledged, but Congress is the only body capable of and willing to resolve that issue.

92 See Parikh, supra note 18, at 46 (advocating for a more demanding standard of review but recognizing that the ultimate formulation must be left up to the bankruptcy court).

93 See id.
C. The Public Benefit Proposal and Illusory Promises

The Public Benefit Proposal has allure. In the right context, the proposal can solve fundamental threats to asset value. There is a certain level of equitable balance in a company that has done evil being reorganized to fight that evil. The victims’ collective, as the new owner of the reorganized entity, has the possibility of sharing in a shareholder windfall if the company experiences unexpected success after emerging from bankruptcy.

In the Purdue case, one fear with the public benefit model was that a lack of strong governance and oversight would prevent Knoa from fulfilling its lofty societal goals. And that may well be the case. But Knoa’s mission is clear and supported by strong covenants enforced by the bankruptcy court. As noted above, the board of managers will be selected by state officials presumably representing victims’ interests. Further, Knoa has a court-supervised monitor—also appointed by these state officials—tasked with reviewing Knoa’s operations and reporting back to the bankruptcy court. And to the extent Knoa is incorporated in Delaware, there are various statutory provisions that limit actions contrary to a public benefit corporation’s stated public mission. These factors improve the likelihood that Knoa’s lofty societal goals will be fulfilled.

The problem with the Public Benefit Proposal is that Knoa may fulfill its societal goals but fail to fulfill its financial ones. Purdue Pharma had $2.3 billion in net sales from OxyContin alone in 2010. By 2018, net OxyContin sales were down to $810 million, before falling to $517 million in 2020. Purdue estimates that Knoa will provide $5.5 billion to victims, but much of that value comes indirectly from supposed price discounts on anti-overdose drugs and opioid dependence treatments. Further, Knoa will be sold or liquidated by 2024. Purdue’s key patents for OxyContin are set to expire in 2025 and 2027, at which point generics will be an existential threat. With that looming, it is unclear if Knoa will have any value by

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94 See Del. Code tit. 8, § 366(b) (2021) (requiring a public benefit corporation to issue biennial public benefit reports); id. § 367 (authorizing shareholder suits to enforce a stated specific public benefit); Leo E Strine, Jr., Making It Easier For Directors to “Do the Right Thing”? 4 Harv. Bus. L. Rev. 235, 243-45 (2014) (outlining provisions in the Delaware statute that create a duty for a public benefit corporation to focus on the public good).
95 Hill, supra note 68.
96 Id.
97 See Purdue Memorandum of Law, supra note 78 at 150 (“The majority of that $5.5 billion will be provided to creditor trusts . . . that will be used to fund opioid crisis abatement programs across the United States.”).
98 See Hill, supra note 68.
2024. Once sold, a buyer of Knoa would not be bound by the Public Benefit Proposal and could abandon those principles entirely.

Stepping outside of the Purdue case, one can see the Public Benefit Proposal’s primary flaw. A mass restructuring debtor could overestimate the reorganized public benefit corporation’s value and—based on that error—seek a substantial credit in its mandatory contribution to the victims’ settlement trust. In such a case, the credit to the debtor would well exceed the ultimate benefit to victims. Courts should be open to a public benefit model for value preservation, but corporate beneficiaries of the proposal should receive credits on a staggered timeline informed by the public benefit corporation’s future performance. To the extent that the Public Benefit Proposal finds its way into future mass restructuring cases, bankruptcy courts must be able to address this risk.

Ultimately, the public benefit model could serve an essential value preservation role in upcoming cases. In our era of renewed personal accountability, I suspect more mass restructuring debtors will emerge with viable businesses but woefully tainted assets. In fact, J&J may consider a public benefit component for LTL Management; indeed, the company’s talcum powder business is still extremely profitable and does not face the same legal challenges overseas that it does domestically.

CONCLUSION

This Essay attempts to delineate the new shadowed practices in mass restructuring cases and offer a few normative proposals to minimize victim exploitation risk. The ultimate result is primarily descriptive but serves a vital role in properly conceptualizing a complex problem in order to begin discussion. And, a lot of discussion is necessary to address the deficiencies in the machinery. This is one of the most controversial legal issues in the country today, but there is very little scholarship addressing it. I suspect many scholars and policymakers have been daunted because mass restructurings straddle various complex disciplines. I hope this Essay will initiate the interdisciplinary dialogue necessary to minimize further exploitation in this new iteration of aggregate litigation.

99 See LOPUCKI, supra note 91; Parikh, supra note 91 (discussing the problem of forum shopping in the bankruptcy system).
A handful of large, profitable corporations are using a new strategy to access U.S. bankruptcy courts, unlocking powerful legal tools for settling thousands of asbestos lawsuits for a fraction of what juries might force these companies to pay.

The new legal tactic is shifting the balance of power toward corporate defendants Johnson & Johnson, Georgia-Pacific LLC as well as U.S. units of Ireland’s Trane Technologies PLC and France’s Compagnie de Saint-Gobain SA, which have corporate affiliates accused of previously selling products that contain asbestos, a cancer-causing mineral.

J&J, Georgia-Pacific, Trane and Saint-Gobain haven’t filed for bankruptcy. But they have used a Texas law to shift at least 250,000 personal-injury cases to bankruptcy court through newly created subsidiaries with limited business operations, a strategy developed by law firm Jones Day, court records show.

The Texas law let the companies fill their new subsidiaries with legal liability for pending and future injury litigation before those units filed for chapter 11. The bankruptcies have paused pending lawsuits either against the parent companies or
their U.S. affiliates, locking injury claimants out of the tort system and preventing them, at least for now, from putting their claims to juries.

Mr. Gregory at his home.

These four companies are receiving legal and financial benefits from chapter 11 without risking the likely loss of equity value that would come from placing whole business divisions in bankruptcy. The legal strategy will be put on trial in a New Jersey bankruptcy court later this month as personal-injury lawyers seek to dismiss the bankruptcy case filed in October by a J&J subsidiary, LTL Management LLC, to drive a settlement of roughly 38,000 cancer lawsuits over its talc-based products.

Some personal-injury lawyers and academics have said that J&J is abusing the bankruptcy system by shifting legal liabilities to a shell company with limited business operations. They have said LTL was created solely to benefit its owner and stockholders
and to sap tort claimants’ negotiating leverage

“This is an attack on the American tort system,” said Bruce Markell, a Northwestern Pritzker School of Law professor and retired bankruptcy judge who is among several academics urging a bankruptcy judge to dismiss LTL’s chapter 11 case.

J&J has denied that the restructuring was done in bad faith or will shortchange victims. The subsidiary in chapter 11 has a funding agreement with its parent company to cover any amounts it is deemed to owe.

A J&J spokeswoman said that LTL’s bankruptcy filing “follows established process, and courts have uniformly acknowledged that equitably resolving these types of claims through chapter 11 is a legitimate use of the restructuring process.”

J&J said in 2020 it would stop selling its talcum-powder-based products in the U.S. and Canada, citing a decline in demand fueled by changing consumer habits and “misinformation around the safety of the product and a constant barrage of litigation advertising.” In court papers, J&J has said it could face new talc lawsuits for decades to come.

Law firm Jones Day didn’t respond to requests for comment about the legal strategy.

Willie Gregory, who said his wife, Sonna Gregory, died in May from ovarian cancer at the age of 59, said he was shocked when he learned of the bankruptcy filing by LTL. Mr. Gregory, 55, said his wife used Johnson’s Baby Powder for nearly 30 years up until about 1990 and was diagnosed with cancer in 2016. A lawsuit they filed against J&J in 2020, now on pause, blames the use of its talc-based products for the cancer developed by his wife, who was a longtime commissioner for Georgia’s Clayton County.

“It’s almost like they’re trying to brush it off and sweep it under the rug,” said Mr. Gregory, a helicopter pilot with the Clayton County Police Department.

J&J has denied liability in Mr. Gregory’s lawsuit, one of his lawyers said. The J&J spokeswoman said that Johnson’s Baby Powder is safe and doesn’t contain asbestos or cause cancer.

Chapter 11 allows companies facing asbestos claims to forge a settlement covering both pending claims and new injuries that arise years after exposure, a challenging task outside of bankruptcy. Bankruptcy courts can also value large numbers of tort claims collectively, giving defendants a court-imposed cap on aggregate payouts.

J&J began exploring a bankruptcy strategy and moved its talc liabilities to a new
subsidiary after the U.S. Supreme Court declined in June to review a $2.1 billion judgment in Missouri in favor of 20 women who blamed the company’s baby powder for their ovarian cancer.

Johnson & Johnson in 2020 said it would stop selling talcum-based baby powder in the U.S. and Canada.

PHOTO: JUSTIN SULLIVAN/GETTY IMAGES

Michelle Ryan, J&J’s former treasurer, said in a July email to a Moody’s Investors Inc. analyst that a chapter 11 strategy was a potential option for “capping our talc liability, especially with the recent disappointing Supreme Court inaction,” according to a copy of the email shown in bankruptcy court.

Ms. Ryan retired from J&J in January, according to her LinkedIn page. While being questioned about the email during a January deposition, Ms. Ryan said uncertainty over the talc cases hurt J&J’s credit rating and that she used the term “capping” to describe the company’s desire to have “a defined liability.”

Moody’s declined to comment Monday.

LTL said when it filed for bankruptcy that J&J offered $2 billion to settle all talc-related injury claims against J&J. LTL said J&J also gave it an equity interest in a royalty business worth $350 million. Robert Wuesthoff, a J&J vice president who runs the LTL unit, said in a December deposition that filing for bankruptcy was “a pretty common sense call” and that the settlement offer is significant because J&J stands behind the safety of its products and believes the talc lawsuits lack merit.

Mr. Wuesthoff said he thought the $2 billion offer “was a great start, and hopefully, not even two billion is needed,” according to court documents.
If LTL’s bankruptcy case is dismissed, injury lawyers could resume litigating against J&J around the country. Otherwise, they could be negotiating a settlement with J&J or fighting in bankruptcy and appellate courts, potentially for years.

“If the bankruptcy courts allow this to happen, they better create a whole new division and hire a bunch of new bankruptcy judges because every company will be doing it,” said Roy Barnes, the former Georgia governor who represents Mr. Gregory and dozens of ovarian cancer victims suing J&J.

LTL said its corporate predecessor incurred roughly $3.5 billion in indemnity payments before the chapter 11 filing. In court papers, LTL has described jury trials as a “lottery like” system, where a handful of personal-injury claimants win astronomical sums while others lose at trial and get nothing. J&J has said a resolution of the litigation through chapter 11 is a fairer and quicker way to dispense compensation.

A lawsuit filed against J&J in 2020 by Mr. Gregory and his wife is now on pause. J&J has denied liability, one of his lawyers said.

Some cancer patients are hoping their legal claims will provide payouts for their families after they die. California resident Vincent Hill died Sunday at age 56 after battling malignant mesothelioma, his lawyer said. Last month, Mr. Hill testified in bankruptcy court that he had put Johnson’s Baby Powder on patients’ bed linens after they finished bathing while working at Sutter General Hospital in Sacramento, Calif.

Mr. Hill had been scheduled to go to trial last December over his personal-injury lawsuit against J&J, but a California judge postponed his case after J&J moved his lawsuit and the others to chapter 11.

“It’s very important that I get a chance to tell my story,” Mr. Hill said last month. He said he had been in hospice care and sought to provide financial security for his wife
and 2-year-old daughter.

J&J denied liability in Mr. Hill’s lawsuit. A lawyer for J&J during the bankruptcy hearing cited Mr. Hill’s medical records, saying he smoked, could have been exposed to asbestos while working construction and that none of his physicians said his cancer was caused by J&J’s baby powder.

Although family members or estate representatives can continue lawsuits after someone dies, in some states, death itself wipes out some of a person’s legal claims, such as for pain and suffering, according to plaintiffs’ attorneys.

Judge Michael Kaplan of the U.S. Bankruptcy Court in New Jersey said that while it was “unfortunate and horrific” that Mr. Hill was aware he likely wouldn’t live to see a resolution to his lawsuit, it couldn’t move forward because it would likely undermine the possibility of a broad settlement in the chapter 11 case filed by LTL.

Although asbestos lawsuits against J&J are paused, chapter 11 has procedures to protect the interests of asbestos victims. A committee is representing claimants’ in court and, if LTL’s case proceeds, plaintiffs would have an opportunity to vote on any settlement. These procedures will likely motivate J&J to negotiate with claimants and build support for any settlement proposal, said Samir Parikh, a law professor at the Lewis & Clark Law School in Portland, Ore.

“There are a number of parties at the table pushing back making sure their clients’ interests are represented,” Mr. Parikh said.

A pair of U.S. affiliates of Ireland’s Trane Technologies holding legacy asbestos liabilities were put into chapter 11 in 2020 after they also underwent a Texas corporate restructuring. Separately, Saint-Gobain’s CertainTeed LLC, a construction parts maker, carved off its asbestos liabilities in 2019, sending a new subsidiary holding those liabilities to chapter 11.

CertainTeed was “seeking a less expensive way of dealing with these tort liabilities” and turned to a strategy that its corporate representative said was “driven not by businesspeople, but by lawyers,” a bankruptcy judge ruled in August. The judge said that CertainTeed’s corporate reshuffling had “apparent negative effects...on the legal rights of asbestos claimants” but didn’t conclude it broke the law. He made similar findings about Trane’s use of chapter 11 later that month.
The Georgia-Pacific building in Atlanta.

A Saint-Gobain spokesman said that its attempts to resolve asbestos litigation through a trust that would pay valid injury claims is consistent with bankruptcy law and will result in current and future plaintiffs receiving faster payments “without the delay, stress and uncertainty of litigation in the tort system.”

Georgia-Pacific, owned by Koch Industries Inc., also used Texas law to shift about 64,000 pending asbestos cases as well as future liability arising from past sales of gypsum plaster products into a subsidiary before placing it in chapter 11 in 2017. The unit, Bestwall LLC, has sought to put a price tag on its asbestos liabilities through estimation, the process available in bankruptcy court to collectively value mass torts. In estimation, legal and medical experts debate how much a company should pay to be done with a litigation for good.

Georgia-Pacific declined to comment. Trane didn't respond to requests for comment. These companies have said they put corporate affiliates into chapter 11 to fairly and equitably compensate asbestos victims and resolve costly litigation arising from asbestos-containing products they stopped producing decades ago.

Georgia-Pacific spent about $3 billion defending and resolving asbestos claims in the decades leading up to Bestwall’s chapter 11 filing, court papers show. After the bankruptcy filing, a 10-member committee was formed to represent claimants who allege they were sickened by asbestos.

Five people on the original committee have died since the chapter 11 case began and have been replaced by their representatives. Bestwall and the committee have had negotiations but haven’t agreed yet to a deal for how, and how much victims would be paid.
Write to Jonathan Randles at jonathan.randles@wsj.com
Thank you for the opportunity to testify on the hearing topic, “Corporate Efforts to Side-Step Accountability Through Bankruptcy.” It is a great honor to provide this written statement. I should note that my statement reflects my own views, not the views of Lewis & Clark Law School, where I work.

My statement begins with an executive summary and then unpacks some key issues in mass tort bankruptcies. I hope this statement will offer insight and perspective on matters that have been overlooked and misunderstood.

**EXECUTIVE SUMMARY**

The primary objectives in resolving mass tort cases should be to provide deserving plaintiffs the largest recovery possible under the circumstances and secure that recovery on the shortest timeline. Claims arising out of similar facts should not receive wildly divergent recoveries – a result customarily seen when mass tort cases are resolved through jury trials across the country. Pursuit of these objectives illuminates federal bankruptcy court as the optimal resolution venue. This conclusion is the result of bankruptcy’s unique optionality and the limitations and deficiencies that characterize other claim aggregation processes.

Class aggregation under Rule 23 of the Federal Rules of Civil Procedure is arguably the most well-known claim aggregation process in the US. But in the 1990s, the Supreme Court ruled that Rule 23’s strictures exclude the vast majority of personal injury, mass tort cases. Multi-district litigation was subsequently embraced to fill the resolution void, but the process has evolved in ways that undermine the resolution model for many mass tort cases. MDL lacks many of Rule 23’s fundamental safeguards that ensure process integrity, and victims rarely receive their “day in court” through this process. Most troubling, MDL – which has repeatedly been described as a “black hole” – can be extremely protracted and is plagued by backroom deals, the details of which remain hidden from the public.

In recent years, federal bankruptcy has emerged as the optimal venue to resolve personal injury, mass tort cases. Bankruptcy allows aggregation of state and federal claims held by both current and future victims. Bankruptcy’s automatic stay halts the litigation tsunami that squanders resources that should ultimately go to victims. Parties are able to focus on a global settlement. The promise of a comprehensive resolution draws parties to the bargaining table and encourages meaningful settlement talks; ending pointless posturing and attempts to curry public favor through the media. The bankruptcy court can rapidly estimate all claims against the mass tort defendant for the purposes of formulating a plan of reorganization. Victims are able to vote on their proposed treatment, and inequitable plans can be voted down. Because there are few debtholders or other creditors typical of most chapter 11 cases, mass tort victims hold a tremendous amount...
leverage in designing the final resolution. Naturally, the process is not perfect, but the primary infirmities can be addressed by the bankruptcy judge overseeing the case. We don’t need new legislation or complicated statutory amendments to make the bankruptcy process work for mass tort stakeholders.

Divisive mergers are the final issue discussed below. The maneuver known as the “Texas Two-Step” – but which I refer to as “corporate mitosis” – is certainly unorthodox. However, there is nothing illegal, inequitable, or fundamentally improper about it. Divisive mergers have been undertaken for decades, and are legal in Texas, Arizona, Pennsylvania, and Delaware. Divisive mergers that seek to defraud creditors can be attacked as a fraudulent transfer, a claim that bankruptcy courts are experienced in assessing. I do not believe that a corporation that has undertaken a divisive merger prior to filing for bankruptcy should be assumed to have engaged in a bad faith filing. In my opinion, any blanket rule that denies divisive-merger entities access to federal bankruptcy court would be misguided.

Ultimately, bankruptcy offers the highest likelihood of providing deserving plaintiffs with a meaningful recovery on an shortened timeline. Without bankruptcy, these cases may have to be adjudicated on a case-by-case basis over the course of years or decades. Some victims may secure enormous recoveries through jury trials; others may receive nothing even though all these claims emerge from a similar nucleus of facts. This litigation option is slow, highly speculative, and resource intensive. MDL is the alternative but comes with many of these problems and adds a few more. I don’t believe either option serves victims’ best interests.

Divergent recoveries are an inveterate aspect of our jury system. However, federal bankruptcy offers mass tort victims an alternative to this inequity. Baseless speculation should be insufficient to preclude access to this superior resolution option. I applaud this subcommittee for devoting hearings to these important issues and hope to offer some insight.\(^2\)

I. **Elusive Class Aggregation**

Rule 23 of the Federal Rules of Civil Procedure delineates the infrastructure for qualifying class actions. Class actions are optimal for cases involving unified causation elements where victims hold negative value claims – a label that applies where the value of an individual victim’s claim is less than the transaction costs necessary to adjudicate the claim and secure that dollar value. Rule 23 allows members of a class to sue as representative parties on behalf of other victims who are similarly situated. The adjudication of the representatives’ claims invariably determines the resolution of those held by absent class members. Absent class members enjoy the right to subsequently opt out of settlements, but few do.\(^3\)

Rule 23(e) allows for class certification for the sole purpose of settlement and has become the preferred resolution option. In these circumstances, a fiduciary represents absent class members and is tasked with protecting Due Process rights for all members. The court will not allow exit before it assesses the fairness, reasonableness, and adequacy of the settlement terms and the

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settled process. Ultimately, Rule 23 creates a structural design that facilitates adjudication when necessary and settlement when possible, while also attempting to ensure procedural and constitutional integrity.

But class aggregation is not available for many mass tort cases. The Supreme Court addressed the propriety of Rule 23 certification in *Amchem Products v. Windsor* and *Ortiz v. Fibreboard Corp.*, and limited the class action resolution option for the vast majority of mass tort cases. In the years since *Amchem* and *Ortiz*, federal courts have reached a consensus: most personal injury, mass tort cases present too many individual issues surrounding causation and damages to satisfy Rule 23’s requirements. Class actions have dropped out of the “available set of tools for attempting to settle [most] mass torts, absent some extraordinary willingness of settling defendant to allow some form of future claims to return to the tort system.”

II. MDL DISTORTION

*Amchem* and *Ortiz* ostensibly eliminated Rule 23’s class aggregation option for most mass tort cases. MDL’s rise was a rushed effort to address the gaping resolution void that emerged. Section 1407 of the US Judicial Code creates the MDL infrastructure and allows one federal judge to streamline pretrial – general procedural – matters. At the conclusion of pretrial proceedings, however, the statute mandates that cases be remanded to the districts where they were originally filed. The MDL court is not intended to be a destination; it is merely a stop along the path to resolution.

I acknowledge that MDL has been instrumental in resolving complex cases and preserving the viability of the judiciary in the face of potentially overwhelming case volume. Nevertheless, MDL has evolved in ways that undermine the resolution model for many mass tort cases. The promise of procedural streamlining is a mirage that has led parties into quicksand. The worst kept secret in mass tort litigation is that transferred cases do not return to their transferor courts. Only 3% of transferred cases escape MDL capture; 97% of transferred cases are resolved in the MDL court by dispositive motion or settlement. Victims do not receive their “day in court.” And this number says nothing about the efficiency and equity of the resolution process. Keep in mind that there are no statutory requirements that an MDL court review or assess the integrity of a settlement or the settlement process itself. And most courts do not undertake such inquiries. Unfortunately, a structure consumed with efficiency through procedural devices undermines just outcomes if it lacks the ability to assure claim merit, defendant culpability, or settlement integrity.

All of these factors highlight victims’ lack of control in an MDL. A truly surprising facet of the process is that victims are unable to exit. MDL judges are invested in these cases and have exhibited a propensity to compel settlements that may be coercive to individual plaintiffs.

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10 For example, in *In re Nat’l Prescription Opiate Litigation*, 290 F. Supp. 3d 1375 (J.P.M.L. 2017), Judge Polster stated that his sole goal was to see an immediate global settlement of the cases. He stated that “[p]eople aren't
fundamental, the process contravenes policy objectives by failing to deter undesirable behavior. Compelled settlements rarely consider culpability, heightening the possibility of extortion litigation. Deterrence is unrealized because there are significant lottery effects; in other words, corporate actors that conform their behavior to legal strictures are no better off than those that do not.

Further, unlike bankruptcy’s public forum, MDL settlements can live in the shadows. Settlements do not need court approval, and confidentiality agreements invariably prevent publication or an assessment of the details. Corporate abuses do not come to light in a process where there are ostensibly no trials and no attempts are made to investigate malfeasance.

Ultimately, my objective is not to debate the MDL process’s efficacy. The process has produced some successful outcomes, but no one can dispute that there exist significant structural deficiencies that render the process suboptimal for many mass tort victims.

III. FEDERAL BANKRUPTCY AS THE OPTIMAL VENUE

Bankruptcy’s structural, procedural, and substantive benefits provide optionality that serves in sharp contrast to MDL’s settlement fixation. For example, bankruptcy courts enjoy jurisdiction over all “civil proceedings arising under title 11, or arising in or related to cases under title 11.” 11 The seemingly boundless reach of bankruptcy court jurisdiction allows the court to marshal all state and federal matters affecting a debtor in one single venue for prompt and efficient adjudication for the benefit of all stakeholders. MDL does not enjoy this reach. Further, bankruptcy’s powerful automatic stay halts all creditor actions, including pending litigation against the debtor and can be extended to nondebtors in order to allow all key parties to focus on negotiating a global settlement. This reduces the risk of precious resources being squandered on one-off litigation matters that ultimately fail to move the parties any closer to a settlement. I argue that these resources should be devoted to victims.

Most cases in bankruptcy – including those involving mass tort claims – enjoy a speed premium; to the extent that the case can be resolved quickly, additional funds can be devoted to creditors. The Bankruptcy Code authorizes courts to identify claims subject to pending litigation against the debtor and estimate the value of the claims that cannot be resolved in a timely manner. 12 Claims that could take decades to be tried and resolved outside of bankruptcy can be assessed within a matter months. Victims are allowed to participate in this process and argue for the valuation they believe is just. Keep in mind, the bankruptcy judge is not unilaterally deciding what each victim will receive. Rather, the judge is determining the total value of all claims against the debtor and allowing the debtor to propose a settlement to victims based on that figure. This settlement will be delineated in the debtor’s plan of reorganization. Victims are not bound by this offer. Bankruptcy allows these creditors to vote on whether they believe that the debtor’s proposal is the best offer they can secure. 13 In fact, victims – as a collective – could choose to reject the

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13 In the Purdue Pharma bankruptcy case, more than 95% of the approximately 120,000 submitted votes were in favor of approving the debtor’s proposed plan of reorganization. See Samir D. Parikh, Scarlet-Lettered Bankruptcy: A Public Benefit Proposal for Mass Tort Villains, 117 NW. U. L. REV. ___ (forthcoming 2022), available at
debtor’s offer. This would put pressure on the debtor. After a certain number of rejections, there is a distinct possibility that the court will dismiss the bankruptcy case, which could be disastrous for the debtor and other key-decision makers in the case.

I acknowledge that individual victim autonomy is sacrificed in bankruptcy, but that is the case in all aggregation processes involving thousands and thousands of claims.14 Not every plaintiff can have her day in court when these many claims are outstanding. The defendant’s legal expenses would consume everything, leaving little for the vast majority of victims. I also acknowledge that the claim estimation process in bankruptcy has deficiencies. But bankruptcy court judges can easily address them. For example, if there are concerns about a bankruptcy court judge estimating personal injury claims, the judge could lift the automatic stay as to a particularly subset of cases and allow the MDL district court to adjudicate them.15 The resultant rulings could help provide some concrete data that would help the bankruptcy judge in her claim assessment process. This hybrid joins the advantages of MDL, which offers a jurist experienced in adjudicating personal injury claims, and bankruptcy, which offers victims an accelerated recovery and the chance to vote on the treatment they will ultimately receive.

IV. UNDERSTANDING DIVISIVE MERGERS

The Texas Business Organizations Code (TBOC) defines “merger” to include a division of a business into two new entities. This process is referred to as a “divisive merger” and has been an obscure part of the TBOC since 1989.16 A divisive merger allows a business to isolate valuable assets in an entity protected from creditor claims related to its primary operations.

How does the process work? In most cases, there is a corporate structure that includes at least one entity that holds valuable business operations but includes assets tainted by mass tort liability (“InfectedCo”).17 The conglomerate faces significant liability and may have already suffered adverse judgments or be involved in multi-district litigation. In order to effectuate a divisive merger, InfectedCo – invariably a Delaware entity – incorporates as a limited liability company under Texas state law. Relying on the TBOC, InfectedCo undergoes a corporate mitosis producing two new corporate entities. Let’s call them AssetCo and LiabilityCo. Under state law, InfectedCo is authorized to allocate assets and liabilities among the two new entities. LiabilityCo receives assets of nominal value and becomes solely responsible for all mass tort claims against InfectedCo. AssetCo receives all other InfectedCo assets and liabilities. InfectedCo is dissolved.

This process effectively isolates mass tort liability in LiabilityCo, unless the allocation constitutes a fraudulent transfer. To address this daunting risk, AssetCo and LiabilityCo sign various agreements designed to support what is ostensibly a shell company.18 These agreements establish reciprocal indemnification obligations corresponding to the allocation of liabilities in the divisive merger. In other words, AssetCo and LiabilityCo (as well as other potential entities) agree to indemnify each other for all losses incurred in connection with their respective assets and liabilities. The agreements also require AssetCo and potentially other corporate entities to provide

16 Arizona, Pennsylvania, and Delaware have adopted similar provisions but lack the case history supporting the practice.
18 See id.
funding for all costs and expenses incurred by LiabilityCo to the extent LiabilityCo lacks sufficient funds to satisfy such obligations. These agreements arguably ensure that LiabilityCo has the same ability to pay off its mass tort claims as InfectedCo did before the divisive merger. For example, my understanding is that there is no cap on Johnson & Johnson’s liability exposure to victims in the LTL Management case.

The fact that a legal technique could possibly be abused should not preclude parties from pursuing a legitimate execution. This axiom applies to divisive mergers. There is nothing illegal, inequitable, or fundamentally improper about this option. As noted above, divisive mergers have been undertaken for decades, and are legal in Texas, Arizona, Pennsylvania, and Delaware. Divisive mergers that defraud creditors can be attacked under fraudulent transfer law, a claim that bankruptcy courts are experienced in assessing. I do not believe that a corporation that has undertaken a divisive merger prior to filing for bankruptcy should be assumed to have engaged in a bad faith filing. In my opinion, any blanket rule that denies divisive-merger entities access to federal bankruptcy court would be misguided. In fact, US Bankruptcy Court Judge Laurie Selber Silverstein has already rejected a request for a restraining order that would have blocked LTL Management’s ability to file a bankruptcy petition.¹⁹

**CONCLUSION**

There is a fair amount of hyperbole surrounding mass tort bankruptcies. The reality is far less salacious. Bankruptcy is the optimal venue for many personal injury, mass tort cases. Divisive mergers can facilitate entry to the bankruptcy process. To the extent that a divisive merger is an attempt to defraud creditors, bankruptcy courts have extensive experience to rectify this type of abuse.

I would like to close by reiterating that the objectives of mass tort cases are quite simple: provide victims the largest recovery possible under the circumstances and secure that recovery on the shortest timeline. Other matters should not obscure these goals.

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Written Testimony of David A. Skeel, Jr.

Before the Subcommittee on Federal Courts, Oversight, Agency Action and Federal Rights
Senate Committee on the Judiciary
United States Senate

February 8, 2022

Thank you for the opportunity to testify about “Abusing Chapter 11: Corporate Efforts to Side-Step Accountability Through Bankruptcy.” It is a great honor to appear before you, and to provide this written testimony.¹

I should start by noting that this testimony reflects my own views, not the views of the University of Pennsylvania Carey Law School, where I work, or of the Financial Oversight & Management Board for Puerto Rico, which I currently chair.

The issue we’re focusing on today—the potential abuse of so-called Texas Two-Step transactions and other divisive mergers—is one of the principal reasons for a growing backlash against perceived abuses in the Chapter 11 reorganization process. I have written about some of the other controversial practices in detail elsewhere and will refer to those practices in a footnote below.²

The term “divisive” or “divisional” merger is an oxymoron. A merger ordinarily combines two firms, with one or the other emerging as the “surviving” firm. In a divisive merger, by contrast, a firm tears itself asunder, separating its assets and/or liabilities into two entities. In the controversial recent Johnson & Johnson divisive merger, for instance, Johnson & Johnson put its talc liabilities into a new entity called LTL. Shortly after this transaction, LTL filed for bankruptcy, seeking to resolve the talc liability in bankruptcy. This strategy—effecting a divisional merger under the Texas statute and then putting the new entity in bankruptcy, has become known as the “Texas Two-Step.”

Texas Two-Step transactions are part of a larger pattern of transferring assets or liabilities from one corporate entity to another in a way that potentially disadvantages creditors of the original entity. In Johnson & Johnson’s case, talc claimants were shunted off to a separate entity

¹ I am grateful to Caroline Nowlin and David Wreesman, both University of Pennsylvania Carey Law School class of 2020, for providing excellent research for this testimony on very short notice.
² Other controversial practices include third party releases, forum shopping by corporate debtors, payment of bonuses to managers before or after filing for bankruptcy, and “equitable mootness.” For discussion, see David Skeel, The populist backlash in Chapter 11, ECONOMIC STUDIES AT BROOKINGS, Jan. 10, 2022.
with essentially no assets of its own. The new entity, LTL, is the passive recipient of funds from Johnson & Johnson and the entity that retained the assets (now called Johnson & Johnson Consumer Inc., or New JJCI) as expenses are incurred or victims obtain judgments.

Texas’s divisive merger statute was not created with bankruptcy in mind. Texas lawmakers introduced it in 1989, hoping to add flexibility to corporate transactions. Its potential use to shift liabilities to a separate entity and then address those liabilities in bankruptcy seems to have been discovered roughly five years ago by companies with mass tort liability. The opportunity for abuse—and for undercutting the rights of victims and other creditors—is obvious.

Bankruptcy law offers at least two major mechanisms for policing potential abuses. The first is to ask the court to dismiss the case as having been filed in bad faith or because the case is not suitable for Chapter 11. The J&J case has been challenged on these grounds—victims argue that LTL has essentially no assets of its own other than the funding agreement, that it was created simply for the purpose of capping Johnson & Johnson’s talc liability, and thus it not the kind of enterprise Chapter 11 is designed to restructure.

The second response is fraudulent conveyance law, which comes into play if the case is not dismissed at the outset. When a transaction is intended to defraud creditors (known as “actual “fraud”) or assets are transferred or liabilities incurred for less than “reasonably equivalent value” (constructive fraud), the transaction can be challenged as a fraudulent conveyance and its harm undone by reversing (“avoiding”) the transaction.

Legislation recently introduced in the United States House would take a much more sweeping approach. The legislation would amend bankruptcy law to require dismissal of any divisive merger that “had the intent of foreseeable effect of … separating material assets from material liabilities … and … assigning all or a substantial portion of those liabilities to the debtor.” This language would essentially bar the doors to bankruptcy for divisive mergers.

If divisive mergers pose a serious risk of abuse—and I believe they do—the question is whether the best solution is to rely on bankruptcy’s existing remedies, or to amend the Bankruptcy Code to intervene more directly.

The current remedies are not perfect. Courts are generally reluctant to dismiss cases as filed in bad faith in the absence of egregious behavior. Fraudulent conveyance actions face legal and practical obstacles in some contexts. Texas’s divisive merger statute adds to these obstacles by explicitly stating that the divisive merger does not constitute a “transfer,” which is the

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4 The first appears to have been Bestwall, which filed for bankruptcy in the Western District of North Carolina in 2017.

5 H.R. 4777, 117th Cong., 1st Sess. (July 28, 2021). The primary purpose of the proposed legislation is to ban so-called third party releases, but it includes a provision (§ 4) barring divisional mergers.

6 Id. § 4.
principal basis for a fraudulent conveyance action. Some commentators also worry that venue shopping—debtors’ ability to choose where to file their bankruptcy case—discourages oversight. This concern has been fueled in part by the filing of a series of Texas Two-Step bankruptcy cases in the same, somewhat unlikely location: the Western District of North Carolina.

Despite these concerns, I think the existing remedies are likely to be adequate to the task. Courts can dismiss divisive merger bankruptcies that are clearly abusive, and the obstacles to fraudulent conveyance actions to not appear to preclude intervention. Moreover, the notoriety the cases already has seems to have prompted transfer of the Johnson & Johnson case to New Jersey from its favored venue in North Carolina.

My optimism could be mistaken. Courts may fail to adequately police divisional mergers. If they do, legislative intervention would be warranted. But I do not believe it is currently warranted and I worry that any legislation may have unfortunate unintended consequences.

The remainder of this testimony will discuss these points in slightly more detail. After providing the context and describing the Texas merger statute, I will assess the principal current tools for curbing abuses, as well as the proposed legislation.

The Context

The strategy of shuffling assets and liabilities prior to bankruptcy in ways that can harm the company’s current creditors—whether they be tort victims as in the Johnson & Johnson case or financial creditors—is not new, but it seems to have become more prevalent and at times more brazen in recent years. In several of these recent cases, a private equity fund acquired a company—largely using borrowed money-- then moved assets around to the detriment of its creditors before filing for bankruptcy.7

Perhaps the most notorious example—if only because it is the subject of a recent book—was Caesars.8 After acquiring the casino enterprise, two private equity funds transferred some of its most valuable casino properties to a new entity that its current creditors did not have an interest in. Although the current creditors might nevertheless have been protected by the parent corporation’s guaranty of their obligations, the private equity sponsors took actions that terminated the guaranties. The transactions were challenged as fraudulent conveyances in the Caesars bankruptcy. These challenges were central to the Chapter 11 reorganization that ensued.

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7 Private equity funds, which previously were called leveraged buyout (LBO) or takeover firms, often buy publicly held companies using borrowed funds, run them for a few years, then take them public again.
In other recent cases, companies have taken advantage of loopholes in loan documents to transfer assets to other entities or to borrow additional funds. Widely discussed examples include Serta and Nine-West.9

Texas’s divisive merger statute is more than simply a loophole in loan documents. It is a statutory provision that seems to invite abusive behavior.

**Texas’s Divisive Merger Statute**

Dating back to 1989, Texas’s divisive merger statute consists of three related provisions in the Texas Business Organizations Code. The central provision is Tex. Bus. Orgs. Code § 1.002(55)(A), which defines the term "merger" to include "the division of a domestic entity into two or more new domestic entities." This provision supplies the basis for a merger whose oxymoronic purpose is “divisive”—intended to divide.

The second provision is Tex. Bus. Orgs. Code § 10.003, which requires that for mergers that result in more than one organization, the "plan of merger" must allocate the property (§ 10.003(1)) and liabilities (§ 10.003(3)) of the original organization(s) to the surviving organizations.

Finally, Tex. Bus. Orgs. Code § 10.008(a)(4) states that newly created entities are not responsible for the liabilities assigned to other newly created entities.

Together, these provisions enable a business to hive off liabilities—with or without assets—to a separate entity. The divisive merger statute gives the company complete flexibility to decide which assets or liabilities to put in which entity. The company theoretically could put all of the liabilities in a new entity without any source of funds for paying them, though most divisive mergers include a funding agreement with the entity that retains the assets.

The Texas House Committee that produced the divisive merger protection signaled that its goal in redefining the concept of a merger in this fashion was to make Texas an attractive jurisdiction for incorporation. The Committee sought to enhance flexibility, with a particular concern for potentially risky farming operations. I am not aware of any evidence that the drafters contemplated that companies would effect divisive mergers as an immediate prelude to bankruptcy. The Texas Two-Step seems to have emerged in the past five years, as companies with mass tort liabilities have created a separate entity for this liability and subsequently put the new entity in bankruptcy.

In a Texas Two-Step transaction, a company shifts its liabilities into a new entity, and the original entity enters into a funding agreement that provides payments to and/or indemnification of the new entity. If the funding agreement were backed by all of the assets of the original entity, the new entity would be able to operate as usual, and the old entity could go bankrupt. This is a powerful maneuver for avoiding existing debts.

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the transaction might not leave the victims or other creditors any worse than they were before. If it isn’t, the risk that the transaction is abusive from the victims’ perspective is far higher.

Johnson & Johnson is a troubling use of the divisive merger statute. Johnson & Johnson effected a divisional merger on October 12, 2021, transferring its talc liabilities to LTL. LTL’s only real asset is its funding agreement with Johnson & Johnson and the original entity (now called New JJCI). Under this agreement, LTL can obtain payments from the original entity or Johnson & Johnson. One commentator describes agreements that take this form as “drip financing.” Just two days after the transaction, Johnson & Johnson put J&L into bankruptcy. The point of the divisive merger seems to have been to separate the talc liabilities from the original entity and from Johnson & Johnson itself, so that they can be resolved in bankruptcy—or, as the victims have put it, quoting internal Johnson & Johnson documents, to “capture the liability in one subsidiary … and then basically bankrupt that subsidiary.” The new entity was domiciled in North Carolina so that the bankruptcy could be filed in the Western District of North Carolina, as several other cases had been.

**Existing Remedies: Bad Faith**

Under existing law, victims and other creditors have at least two significant remedies against abusive transactions: alleging bad faith and bringing a fraudulent conveyance challenge.

If a company has engaged in an abusive divisive merger, victims can ask that the bankruptcy case be dismissed. Although bad faith actions rarely succeed under ordinary circumstances when a troubled company files for bankruptcy, courts have dismissed cases where the debtor signaled that bankruptcy was not really necessary. In the best known case in the Third Circuit, the federal court of appeals that provides the governing law for the Johnson & Johnson case, the debtor said it had no need for bankruptcy and had only filed for Chapter 11 due to deal with a lawsuit it faced. The court held that this constituted bad faith. In another case, the court dismissed that case because the entity had no real business that needed to be restructured in bankruptcy.

With Johnson & Johnson, victims and the victims’ committees have asked for the case to be dismissed on bad faith grounds. They argue, among other things, that the purpose of bankruptcy is to maximize the value of a company’s assets for the benefit of its creditors and other constituencies. Because J&L has no real assets, they argue, and because the only purpose

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for creating LTL was to cap and contain Johnson & Johnson’s talc liabilities, the case does not belong in bankruptcy.

One limitation of dismissal is that it would not undo the effects of the divisive merger. The assets would still be separate from the original entity.16 Dismissal would prevent bankruptcy from being used to reduce the liabilities, however, and the victims could invoke any rights they had against the original entity or other related entities, including fraudulent conveyance actions under state law.

**Existing Remedies: Fraudulent Conveyance**

Assuming a divisive merger bankruptcy is not dismissed, the victims can challenge the transaction as a fraudulent conveyance. Fraudulent conveyance law can be used to reverse prebankruptcy transactions that are intended to defraud creditors (“actual fraudulent conveyances”)17 or for which an insolvent debtor did not receive “reasonably equivalent value” (“constructive fraudulent conveyances”).18 The Bankruptcy Code includes a federal fraudulent conveyance provision (§ 548) and nearly every state has very similar state law fraudulent conveyance provisions.19

With an abusive divisive merger, victims can argue the transaction was deliberately intended to harm creditors’ interests, or that the entity to which the liabilities were assigned did not receive reasonably equivalent consideration for assuming the liabilities.

The divisive merger statute creates an important complication for both actual and constructive fraudulent conveyance challenges. Because the statute explicitly states that no “transfer” takes place, it is possible that fraudulent conveyance law simply does not apply. Fraudulent conveyance law applies when there has been a transfer (or the incurring of a debt, as discussed below). Courts have already begun wrestling with the question whether this feature of the divisive merger statute precludes fraudulent conveyance challenges. Several have suggested that it does not.20 The statute explicitly states that it does not alter any existing creditors’ rights. Since fraudulent conveyance law is an important creditor protection, this may open the door to a fraudulent conveyance challenge. In addition, courts may apply a federal bankruptcy definition

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16 The victims could challenge the divisive merger under state fraudulent conveyance law, which would raise the same issues as discussed below.
17 The Bankruptcy Code’s prohibition of actual fraud is 11 U.S.C. § 548(a)(1)(A). The debtor or trustee can also use any state law fraudulent provision that would apply outside of bankruptcy, because section 544(b) gives it access to nonbankruptcy avoidance provisions.
19 The debtor or trustee can invoke state fraudulent conveyance law in bankruptcy, as an alternative to the federal provision. See 11 U.S.C. § 544(b). The principal benefit of the state law provisions is that they often have a longer statute of limitations.
20 In the Bestwall case, Judge Laura Beyer stated that “if a debtor used the Texas statute to commit a fraudulent transfer – creating the harm that the Committee complains of – such law would be available to address such acts.” Bestwall, 606 B.R. at 252. In the DBMP case, Judge Craig Whitley noted that, while the Bankruptcy Code does not preempt Texas law on divisional mergers, the Texas Two Step “appears” prejudicial to the rights of the claimants and “is subject to legal challenge.” DBMP v. Those Parties Listed on Appendix A to Complaint and John and Jane Does 1–1000, Adv. No. 20-03004 (Bankr. W.D.N.C. Jan. 23, 2020).
of transfer, rather than the language in the Texas statute, at least with respect to fraudulent conveyance challenges under the federal Bankruptcy Code. Finally, fraudulent conveyance law applies not only to “transfers” but also to the incurring of a debt. It is possible that courts would construe the assignment of liabilities to a new entity, as with LTL, as the incurring of debts.

Constructive fraudulent conveyance challenges face an additional obstacle. The debtor must be insolvent or nearly so at the time of the transaction. Because the funding agreement in the Johnson & Johnson transaction provides for payment of expenses and of talc judgments by the original entity and by Johnson & Johnson, the debtor (LTL) arguably is fully solvent.

Because LTL may be solvent, representatives of the talc victims have alleged actual fraud rather than constructive fraud. They argue that the divisive merger was designed to undermine their ability to pursue their claims. In cases where the funding agreement is more limited, the debtor may be insolvent, enabling victims to argue both for actual and for constructive fraud.

A final practical issue for victims and other creditors the questions of who is entitled to pursue the fraudulent conveyance action. Under the bankruptcy laws, the debtor or trustee is the one with explicit authority to challenge problematic transactions.\(^1\) With a challenge to a divisive merger, the debtor itself obviously has little incentive to pursue a fraudulent conveyance action, especially if it is controlled by the original entity or the entity’s parent corporation. A creditors committee can ask to be permitted to bring the action under these circumstances.\(^2\)

Overall, fraudulent conveyance law appears to offer a robust basis for challenging abusive transactions, but it does face potential obstacles.

Will Venue Shopping Impede Use of the Remedies?

It is well-known that companies that file for bankruptcy can file their case nearly anywhere they wish to, and that a disproportionate percentage of the largest cases go to New York, Delaware, Richmond and Houston. I and others have written extensively about this phenomenon elsewhere.

Some worry that desire to attract large cases will cause courts to look the other way when abusive cases are filed in their district. Professor Lynn LoPucki, the most prominent critic of forum shopping, argues that bankruptcy courts are unable “to push back against anything the case placers [the debtor, its lawyers or others who decide where to file the case] demand. Pushback has no effect because the cases can so easily go elsewhere.”\(^3\)

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\(^1\) For example, § 548 authorizes the “trustee” (which is defined in § 1107 to include the debtor in possession) to challenge a fraudulent conveyance.

\(^2\) In the DBMP case, for instance, Judge Whitley noted that creditors seeking to challenge the divisive merger as fraudulent need to obtain derivative standing to bring such claims.

\(^3\) Lynn M. LoPucki, *Chapter 11’s Descent into Lawlessness*, AM. BANKR. L.J. (forthcoming, 2022), manuscript at 58.
This conclusion strikes me as overly pessimistic, including with divisive mergers. Over the past few years, the Western District of North Carolina became an attractive filing location for divisive mergers, apparently because the standard for determining whether a bankruptcy case was filed in bad faith is more difficult for victims or other creditors to meet in the Fourth Circuit—the federal court of appeals that governs North Carolina—than in other circuits. The pattern of filing Texas Two-Step bankruptcies in the Western District of North Carolina dates back to Bestwall, which filed for bankruptcy there in 2017.

With the controversy surrounding Johnson & Johnson, this seems to have quickly changed. The bankruptcy court transferred the case to New Jersey, since any connection to North Carolina was quite limited. This ruling seems likely to have diminished the attractiveness of filing Texas Two-Step bankruptcies in the Western District of North Carolina.

Proposed Legislation

H.R. 4777, which was recently proposed by Congressman Nadler, Congresswoman Maloney, and Congressman Cicilline to prohibit third-party releases includes a provision aimed at divisive mergers. This provision would amend bankruptcy law to require dismissal of any divisive merger that “had the intent of foreseeable effect of … separating material assets from material liabilities … and … assigning all or a substantial portion of those liabilities to the debtor.” This language would essentially bar access to bankruptcy for a divisive merger such as the Johnson & Johnson transaction.

In my view, such a sweeping crackdown is not currently needed. Divisive mergers do not strike me as invariably pernicious—it is noteworthy in this regard that the Texas statute was not enacted with bankruptcy in mind. And the existing bankruptcy remedies seem likely to be sufficient to police problematic transactions. In my view, a wait-and-watch approach is preferable to a sweeping ban.

That said, if bankruptcy courts fail to adequately police abusive transactions, legislative reform might be warranted. A more tailored approach would preferable to the approach of H.R. 4777—an approach that would focus more narrowly on clearly abusive transactions rather than barring every divisive merger from bankruptcy.

24 Under the Fourth Circuit standard, a party seeking to have the case dismissed needs to show that the reorganization would be objectively futile and the case was filed subjective bad faith. Carolin Corp. v. Miller, 886 F.2d 693, 700-01 (4th Cir. 1989)
25 Delaware and other popular Chapter 11 venues do not appear to have handled divisive merger bankruptcies. The only divisive merger case I am aware of in Delaware is In re Imerys Tale America, Inc., 2021 WL 4317388 (Bankr. D. Del. 2021), which found that the debtors, who claimed indemnification from Johnson & Johnson, did not have standing to seek to enjoin a divisive merger by Johnson & Johnson.
Conclusion

Divisive or divisional mergers are one of a growing number of practices that are contributing to a growing perception that Chapter 11, our corporate reorganization framework, has become seriously dysfunctional. Many worry that it is controlled by insiders, and that outsiders fare poorly under current practices. This perception has prompted a populist backlash, as reflected in hearings like this one.26

I believe the concerns are indeed serious. In several recent cases, courts have pushed back against perceived abuses. Third party releases have been a particular focus, with federal district courts rejecting proposed releases in the Purdue Pharma and Ascena cases. As noted earlier, the Johnson & Johnson case was transferred to New Jersey, and the court appears to be giving serious consideration to a motion to dismiss the case.

If this pushback continues, it will obviate the need for legislative intervention, which often has unintended consequences. But if Texas Two-Step transactions escape meaningful oversight, the opposite conclusion may be warranted.

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26 See, e.g., Skeel, supra note 1.
PRO BANKRUPTCY DISTRESS

How Bankruptcy Could Help Johnson & Johnson Corral Vast Talc Litigation

The company has told personal-injury attorneys it is considering filing a subsidiary for bankruptcy, which legal experts say could prompt injury claimants to settle.

Consumers have alleged in thousands of lawsuits against J&J that talcum powder in Johnson’s Baby Powder and Johnson’s Shower to Shower can cause inflammation that leads to cancer.

PHOTO: MIKE SEGAR/REUTERS

By Jonathan Randles
July 20, 2021 5:30 am ET

Johnson & Johnson has told personal injury attorneys it is considering putting a subsidiary into bankruptcy to corral thousands of lawsuits alleging its talcum-based baby powder caused ovarian cancer and mesothelioma, according to people familiar with the matter. A company spokesperson said it hasn’t decided on any course of action with respect to the talc lawsuits, except to defend the safety of talc and to litigate pending claims.

Here is how a chapter 11 filing could affect the legal fight between the healthcare giant and the thousands of people who blame one of its flagship products for their cancer.

Why would J&J use bankruptcy?
Bankruptcy gives companies several tools to resolve all of the liability claims they face now or in the future over products that cause injuries or are defective in some way. After a bankruptcy filing, lawsuits in every state and federal court are automatically paused and brought before a single bankruptcy judge.

Consumers have alleged in thousands of lawsuits against J&J that talcum powder in Johnson’s Baby Powder and Johnson’s Shower to Shower can cause inflammation that leads to cancer. Other complaints allege the talc products were contaminated with asbestos. J&J has denied the allegations and has for years been defending itself against talc-related litigation.

A bankruptcy filing by a J&J subsidiary would halt pending lawsuits, at least for a while. The publicly traded parent company could receive the benefit of the automatic stay even if only an affiliate filed for bankruptcy.

A chapter 11 filing would provide a centralized forum for personal injury claims to be evaluated and capped, possibly through an estimation that would ballpark the compensation they are due. That is attractive for J&J because litigation exposure can be hard for companies to price, said Alexandra Lahav, a professor at the University of Connecticut School of Law.

J&J has taken some talc-injury cases to trial, and while some juries have sided with the company, others have returned huge damage awards, including a $2.1 billion judgment in Missouri. There were 28,900 talc-related lawsuits pending against J&J as of April, according to the company’s most recent quarterly report.

“If I have a really wide variance, it makes it really hard to predict the next case,” Ms. Lahav said. “So this is an attempt to put a cap on it through bankruptcy.”

In a bankruptcy, J&J would get to choose its preferred venue, rather than defending claims in the courts where they are filed. Filing for chapter 11 also would pressure claimants to accept lower settlements, since they could otherwise be stuck in bankruptcy court for years, with no chance of advancing their claims elsewhere, Ms. Lahav said.

The company announced last year that it would stop selling Johnson’s Baby Powder made with talc in the U.S. and Canada, citing a decline in customer demand amid the safety concerns.
In bankruptcy, J&J has the opportunity to effectively resolve all the litigation in one chapter 11 proceeding and put the talc lawsuits behind it for good, legal experts said.

“When it’s done, it is done,” said Lindsey Simon, an assistant professor of law at the University of Georgia School of Law.

**How would a chapter 11 filing work for J&J?**

In discussions with lawyers for personal-injury claimants, J&J has said it could split the talc-related liabilities of its Johnson & Johnson Consumer Inc. unit away from income-producing assets, people familiar with the matter said.

Dividing a corporate unit’s assets and liabilities into different affiliates is possible under a Texas statute that has been used by other companies facing large numbers of tort claims, legal experts said.

Koch Industries Inc.’s Georgia-Pacific LLC in 2017 used a Texas divisive merger to break off an affiliate that housed asbestos-related liabilities, which then filed for bankruptcy. In 2019, Saint-Gobain Group’s CertainTeed LLC similarly split off an asbestos affiliate shortly before placing it in bankruptcy.

In both instances, the bankrupt units were supported by commitments from their parent companies to cover asbestos claims that were determined to be valid in the course of the chapter 11 process. A similar arrangement would give injury claimants access to J&J’s assets.

“So long as the entity that’s producing value remains on the hook to pay the tort claims, dividing the company isn’t necessarily a bad way to manage a mass tort problem,” said Ted Janger, a professor at Brooklyn Law School. “But here, they appear to be using it as a threat to coerce settlements.”

**Are there risks for J&J?**

Chapter 11 is an expensive process that, in some cases, ends up costing large corporations hundreds of millions of dollars in professional fees. J&J also risks potential harm to its brand name and reputation if it initiates a bankruptcy, experts said.

If injury claimants are dissatisfied with settlement talks, they can challenge J&J by seeking to lift the stay on lawsuits against the company. If granted, that would allow...
proceedings in state courts to resume, once again exposing J&J to jury verdicts and defense costs.

The use of bankruptcy to resolve large-scale legal liability also can be controversial. OxyContin maker Purdue Pharma LP is currently in chapter 11 and has proposed a bankruptcy exit plan that would provide legal release to members of the Sackler family who own the company, a proposal that has attracted attention from Congress. J&J would be seeking a similar release from future liability, despite not filing for bankruptcy itself.

**What would a bankruptcy mean for injury claimants?**

Personal injury claimants may face more pressure to settle in chapter 11 and would lose the individual leverage they may have against J&J, proceeding instead in a collective fashion at the negotiating table, experts said.

However, claimants could be compensated faster through a chapter 11 process, though the amount they would ultimately get would depend upon what assets are placed in trust for them, and how the trust is administered.

A court-appointed representative generally looks out for the interests of people who will develop claims in the future, but haven’t yet shown any illness or injury. A supermajority of injury claimants could bind a minority to accepting a settlement offer from J&J.

All claimants would face the risk, however, that any trusts could run out of money to pay injuries that show up in the future, said Samir Parikh, a professor at Lewis & Clark Law School. Chapter 11 doesn’t provide personal injury claimants with a backstop in the event a bankruptcy trust runs out of money, Mr. Parikh said.

Though the speed of chapter 11 could present claimants with challenges, it also often provides a relatively fast resolution for personal injury claims, which can be especially important for those who are seeking compensation quickly so they can move on with their lives, Mr. Parikh said.

“Victims don’t want to sit and wait for 10 years while this slowly meanders its way through the court system,” Mr. Parikh said.

—Andrew Scurria contributed to this article.

Write to Jonathan Randles at Jonathan.Randles@wsj.com
Written Statement of Anthony J. Casey

for the Hearing on Abusing Chapter 11: Corporate Efforts to Side-Step Accountability Through Bankruptcy

before the

Subcommittee on Federal Courts, Oversight, Agency Action, and Federal Rights
of the Committee of the Judiciary

United States Senate

February 8, 2022

Thank you for the opportunity to provide this statement. I am a Professor of Law and the Deputy Dean at the University of Chicago Law School, where I teach classes on bankruptcy, corporate law, and civil procedure. I am also the Faculty Director of the University of Chicago Law School’s Center on Law and Finance.

This statement reflects my individual views as a scholar of bankruptcy law and does not reflect the views of The University of Chicago Law School.

My focus in writing this statement is to address some of the confusion and recent criticisms related to the interplay of divisional mergers and Chapter 11 of the United States Bankruptcy Code.

A divisional merger is a state-law transaction where a business entity divides itself into two new entities. It is similar in substance to other state-law transactions that result in the emergence of new legal entities. In some sense, the creation of legal business entities is a mundane feature of corporate structuring. Virtually all large businesses are organized into multiple legal entities.

The controversy arises when—following the divisional merger—one of the new entities initiates Chapter 11 bankruptcy proceedings. This transaction—sometimes called the “Texas Two-Step” because the mergers are often consummated under Texas law—can be a socially valuable tool that furthers the purpose of our bankruptcy system.

Its critics, however, have highlighted only the potential for abuse. Their concern is that divisional mergers can be used to shield assets
from liability. While any transaction can be abused, these concerns have been exaggerated and overlook the value that such transactions can create.

In the remainder of this statement, I review the purpose that Chapter 11 serves, explain how a divisional merger can further that purpose in the mass tort context, and then discuss how existing law already protects against the potential for abuse. As such, any bankruptcy reform that prohibits or penalizes divisional mergers would be ill-advised.

Chapter 11’s Purpose

Chapter 11 of the United States Bankruptcy Code creates a procedure to preserve value when viable business enterprises experience financial distress. Doing so preserves jobs, protects the ongoing operations of the business, and provides the highest value to those who have claims against the enterprise. Rather than allow value to be destroyed by competing collection efforts and non-bankruptcy litigation, Chapter 11 pauses and coordinates the efforts of all claimants in one proceeding.

Chapter 11 is, in my opinion, the most successful corporate restructuring regime in the world, with several other jurisdictions borrowing and imitating its provisions. One particularly important innovation of the American system is that it has liberal initiation rules and a broad definition of financial distress. While some other jurisdictions require a debtor to show actual insolvency or meet other strict requirements at the time of filing, Chapter 11 allows and encourages businesses to invoke its protection to resolve financial distress long before things have fallen apart.

Thus, to initiate a Chapter 11 proceeding, a debtor only needs to show that its primary purpose for filing is consistent with bankruptcy’s collective value-preserving purpose. That means that the debtor must identify some looming distress that threatens to destroy value or operations of the business and that can be resolved through Chapter 11’s collective process.

Any other rule requiring insolvency or a greater showing of distress would prevent early and efficient reorganization efforts. The innovation of our system is that a debtor need not wait for the house to burn down before it calls for help.
Chapter 11’s Purpose and the Resolution of Mass Tort Claims

One of the most important contexts in which Chapter 11 proceedings can facilitate the preservation of value is the resolution of financial distress related to mass tort claims. Over the last forty years, Chapter 11 has been invoked to facilitate settlement in dozens of large mass tort cases. Without Chapter 11, these value preserving settlements would have never been possible.

This is true for several reasons. First, mass tort cases always involve complex claims of multiple—often tens of thousands of—claimants looking to recover value from a business enterprise. The core provisions of Chapter 11, which are designed to coordinate behavior among claimants, address exactly these types of multilateral-claims situations. These provisions allow the quick, efficient, and fair resolution of claims and preserve value for the claimants and the other stakeholders of the business.

Second, there are no good alternatives. Many view the non-bankruptcy litigation system for resolving mass tort claims as broken. The coordinated resolution of mass tort claims outside of bankruptcy is almost impossible. With claimants dispersed over time and across the country, traditional civil proceedings provide no centralized procedure for resolution. Moreover, the procedures that do exist often last decades and consume large amounts of value that would otherwise be available for the recovery of the tort victims and other stakeholders of the enterprise. They also produce inconsistent results with a large variance in victim recoveries.

Providing an alternative for the resolution of these mass tort cases is a quintessential function of bankruptcy law. Few debates about bankruptcy policy—in practice or in the academy—can be had without reference to the rules for mass tort claims, and the casebooks from which law students learn bankruptcy law are full of mass tort cases. This is true because a business facing major mass tort liability presents exactly the type of financial distress that Chapter 11 was created to address.

Without bankruptcy resolution, the uncertainty of future liability in mass tort cases can prevent a debtor from productively carrying on its business and undertaking projects or asset sales that could create value
and facilitate a cooperative resolution. Scholars often refer to Chapter 11 as a way to remove this cloud of debt that hangs over a business.¹

**Divisional Mergers and the Resolution of Mass Tort Claims**

The first thing to recognize about a divisional merger is that it is not unique. It is a state law transaction that creates new legal entities and then allocates assets and liabilities among those entities. There are many ways under state law—such as a conventional spin-off—to create new legal entities within a business enterprise. And there are many ways to allocate assets and liabilities among those entities.

The divisional merger is attractive in some cases because it is simple and requires fewer steps than other methods. But the substantive outcome is no different. Any laws penalizing and prohibiting divisional mergers would therefore have little substantive effect. Rather they would simply channel transactions from one form to another.

The important question, therefore, is whether a divisional merger—or any other form of entity creation—is being used to facilitate a socially valuable outcome consistent with the purpose of Chapter 11. When used appropriately a divisional merger preceding a bankruptcy filing can facilitate a socially valuable resolution of mass tort claims, isolating (but not limiting) the mass tort liability for resolution independent of the other operations of the business.

To see why this is true, consider a large otherwise solvent and productive business enterprise facing tens of thousands of potential tort lawsuits. The number and timing of the lawsuits are uncertain. Litigating those lawsuits will take years and consume value that could otherwise be paid to the victims. In the end, those lawsuits will likely result in varied (arguably unfair) results with some plaintiffs recovering large amounts and others recovering nothing. The only certainty is that the process will take years and consume massive private value and public resources.

¹ It is worth noting that the resolution of claims in a bankruptcy case is a robust process overseen by a judge and subject to appellate review. Proceedings in bankruptcy are different than other proceedings. But different does not mean deficient. In the context of mass torts, the difference is often that the bankruptcy proceeding reduces delay and adds consistency.
Given the dispersion and number of claims, trying to resolve the situation through a coordinated settlement outside of bankruptcy is sure to be impossible.

One option would be for the entire enterprise to enter bankruptcy. As noted above, this option is available if the filing serves bankruptcy’s purpose of preserving the operations and value of a distressed business for the benefit of its stakeholders. Resolving complex and massive claims against a business in an efficient proceeding that consumes fewer resources is such a purpose.

But there are major costs to an enterprise-wide bankruptcy. The tools of Chapter 11 are blunt. The automatic stay applies across all creditors even those unrelated to the mass torts. Similarly, the filing triggers all sorts of enterprise-wide provisions. All creditors have to file their claims and can demand to be involved in the proceedings and in plan confirmation. This would be true for creditors that have no connection to the mass tort litigation. In essence, the enterprise-wide filing brings extra parties and extra claims into the process. And the more diverse parties that are involved, the more opportunities there are for them to take strategic litigation positions that can delay things. This can complicate the resolution of mass tort claims.\(^2\)

The divisional merger structure provides a mechanism to further simplify the process. In the right case, this structure can make things more efficient and focus the Chapter 11 process on the specific mass tort resolution that is necessary for the preservation of value.

The divisional merger structure does this by creating a separate entity that in a sense contains the quantum of distress that the debtor is seeking to resolve. By doing this, a divisional merger followed by a Chapter 11 filing creates a simplified one-issue bankruptcy where the relevant parties can focus their efforts and negotiations on that issue without worrying about attempts by other stakeholders to create new issues and extract value.

Key to this structure is that the transaction must provide adequate funding to resolve the liabilities that are to be resolved. It would be at odds with Chapter 11’s purpose if the divisional merger transaction left

\(^2\) To be clear, the value of simplification does not mean that the bankruptcy system is broken. But like every legal system it has costs, and those costs increase with the addition of parties and issues.
the claimants worse off. The purpose is not reducing liability but rather reducing complexity and cost.

Thus, a divisional merger is consistent with the bankruptcy code only when it is structured to preserve value and to put claimants in an equal or better position than they were in prior to the transaction. This can be achieved in many ways—most obvious are capital infusions and funding agreements.

Consistent with this principle, recent cases utilizing the divisional merger structure prior to a Chapter 11 petition have provided funding agreements assuring that claimants have access to the same or more value in pursuing their claims against the business.

In fact, a key feature—one that critics have overlooked—is that these divisional merger transactions have created additional sources of funding that were not available to the tort victims before the merger. In this way, the divisional mergers put the tort claimants in a better position and are consistent with the purpose of Chapter 11.

Potential for Abuse

Divisional mergers, like most transactions, can be abused. A transaction that creates new entities to house liabilities without any provision for funding the payment of those liabilities serves no bankruptcy purpose. It would allow a debtor to abusively shed liabilities simply because it does not want to pay.

Fortunately, existing fraudulent conveyance law protects against this type of abuse. A divisional merger that leaves claimants worse off and strips assets away from their reach is a fraudulent conveyance. An actionable fraudulent conveyance claim can be established if a divisional merger was intended to reduce the assets available to tort claimants or if the funding agreements associated with the merger left the creditors worse off than they were before the merger.3

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3 This point is not in serious question. Every state has a form of fraudulent conveyance law. Most commonly states have enacted the Uniform Voidable Transactions Act or the Uniform Fraudulent Transfer Act. See, for example, Tex. Bus. & Com. Code §§ 24.001, et seq. As one court put it, “If a debtor used the Texas statute to commit a fraudulent transfer — creating the harm that the Committee complains of — such
Any reform that prohibited or penalized divisional mergers would be ill-advised. Such reform could eliminate valuable restructuring transactions that facilitate the resolution of mass tort cases with little benefit in the light of existing protections against abuse.