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## Against Bankruptcy: Public Litigation Values Versus the Endless Quest for Global Peace in Mass Litigation

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**ABSTRACT.** Can bankruptcy court solve a public-health crisis? Should the goal of “global peace” in complex lawsuits trump traditional litigation values in a system grounded in public participation and jurisdictional redundancy? How much leeway do courts have to innovate civil procedure? These questions have finally reached the Supreme Court in *Harrington v. Purdue Pharma L.P.*, the \$10 billion bankruptcy that purports to achieve global resolution of all current and future opioid suits against the company and its former family owners, the Sacklers.

The case provides a critical opportunity to reflect on what is lost when parties in mass torts find the “behemoth” litigation system unable to bring mass disputes to a close, when they charge multidistrict litigation as a “failure,” and when defendants contend that sprawling lawsuits across national courts have thrown them into unresolvable crises that only bankruptcy can solve. The case is just one of many recent examples of extraordinarily unorthodox civil-procedure maneuvers in both the bankruptcy and district courts that push cases further away from the federal rules and the trial paradigm in the name of settlement. Diverse defendants—many of whom, notably, are not even in financial distress—from the Catholic Diocese and Boy Scout abuse cases to Johnson & Johnson talc, 3M’s earplugs, Revlon hair straighteners, and many more, have now looked to the bankruptcy court to use its inherent authority to invent new forms of procedure to find a path to global peace.

The turn to bankruptcy raises particular concerns, especially in cases like that of the Sacklers, when parties turn to bankruptcy court to avoid traditional litigation altogether—rather than down the line after some pretrial process has occurred and claims have been fleshed out. Bankruptcy courts usually don’t declare accountability; they efficiently distribute resources. They don’t typically engage in broad discovery to reveal industry practice and spur policy reform but instead use discovery to determine the debtor’s financial health. They shift the balance of power from plaintiff to defendant, allowing the defendant to choose the forum, centralize claims, shut off tort process, and even sometimes overcome state statutes of limitations. They rarely utilize juries or hear testimony from tort victims anxious to have their day in court because the strong cultural norm in bankruptcy is to save money and streamline.

Bankruptcy courts are attractive because they are the only American courts that can overcome federalism’s jurisdictional boundaries; they can commandeer both state and federal litigants into a single forum and halt all other civil litigation no matter what court it is in. They also have stretched their own equitable powers to allow innovative corporate maneuvers, as in *Purdue*, that cabin liability and preclude future litigation even for entities not in financial trouble. But bankruptcy court

is not supposed to be a superpower of a court that trumps all others in public litigation. And those who argue that bankruptcy courts can easily be nudged to provide more pretrial process underestimate what a sea change that would be for bankruptcy's culture.

Our aim here is not at bankruptcy per se; it is at its use to shut off public-harms litigation prematurely, forego the public benefits of jurisdictional redundancy, and deprive plaintiffs of control over their suit and day in court. Unorthodox bankruptcies are just the latest chapter in a decades-long saga of unorthodox civil-procedure development in the name of global peace—one that has largely escaped appellate review until now.

## INTRODUCTION

What the Court regards as folly is the contention that the tort system offers the only fair and just pathway of redress and that other alternatives should simply fall by the wayside. . . . There is nothing to fear in the migration of tort litigation out of the tort system and into the bankruptcy system. . . . The bankruptcy courts offer a unique opportunity to compel the participation of all parties in interest . . . in a single forum with an aim of reaching a viable and fair settlement.<sup>1</sup>

Can bankruptcy court solve a public-health crisis? Should the goal of “global peace” in complex lawsuits trump traditional litigation values in a system grounded in public participation and jurisdictional redundancy? How much leeway do courts have to innovate civil procedure?

These questions have finally reached the U.S. Supreme Court, albeit indirectly, in the Purdue Pharma bankruptcy settlement under review this Term—a roughly \$10 billion bankruptcy deal coming out of the national opioid crisis that purports to resolve the thousands of current and future tort claims against the company and, controversially, also against its former family owners, the Sacklers.<sup>2</sup> The case offers just one of many recent examples of unorthodox and creative civil-procedure maneuvers in both the bankruptcy and district courts that push cases further away from the federal rules and the trial paradigm in the name of settlement. How the Court decides the case will send a strong signal about whether the doors are open or closed to these kinds of off-the-books moves via bankruptcy, multidistrict litigation, or whatever comes next in the dynamic and elusive quest for global peace—the end of all lawsuits—in complex civil litigation.

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1. *In re LTL Mgmt., LLC*, 637 B.R. 396, 414 (Bankr. D.N.J. 2022).

2. *In re Purdue Pharma L.P.*, 633 B.R. 53 (Bankr. S.D.N.Y. 2021), *vacated*, 635 B.R. 36 (S.D.N.Y. 2021), *certificate of appealability granted*, No. 21-cv-7532, 2022 WL 121393 (S.D.N.Y. Jan. 7, 2022), *rev'd*, 69 F.4th 45 (2d Cir. 2023), *cert. granted sub nom. Harrington v. Purdue Pharma L.P.*, 144 S. Ct. 44 (2023).

Consider the risks. Unlike ordinary state and federal trial courts, bankruptcy courts don't generally assign responsibility for widespread harm; they preserve and efficiently distribute resources. Petitioners in bankruptcy aren't called "victims" or "plaintiffs"; they are called "creditors" with limited voting rights over the distribution of an estate. Bankruptcy courts don't typically develop state tort doctrines. They don't typically engage in broad discovery designed to reveal accountability and spur policy reform. Instead, bankruptcy courts streamline. Any discovery tends to focus on the debtor's financial health.<sup>3</sup> And, because bankruptcy's culture centers on efficiency and preventing further depletion of assets, bankruptcy courts rarely take the time to utilize juries themselves, or remand most cases for further development in trial courts, or take testimony from tort victims anxious to have their day in court.<sup>4</sup>

These risks are intensely exacerbated when cases come to bankruptcy prematurely – often with the very purpose of escaping litigation entirely – and before matters like liability, applicable law, causation, and claim valuation are fully fleshed out. The Sacklers' deal is especially provocative in this regard, as it provides this kind of unorthodox and complete off-ramp from the tort system and so prevents the thousands of opioid plaintiffs from ever litigating their cases against the family. The narrow question the Court will decide is whether solvent third parties – like the Sackler family – can rely on the bankruptcy of a different entity to avoid lawsuits without declaring bankruptcy themselves. But we are focused on a broader aspect of these developments that may also interest the Court: the swelling tide of bankruptcy cases as the purported salve for inefficient or unresolvable mass litigation in our intentionally redundant federalist litigation system.

Sprawling mass torts have created pressure for centralized settlement. An unprecedented number of diverse defendants, including but beyond Purdue, have recently filed for bankruptcy – from the Catholic Diocese and Boy Scout abuse cases, to Johnson & Johnson talc, 3M earplugs, Revlon hair straighteners, and several other defendants in the massive national opioid litigation.<sup>5</sup> These

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3. *E.g.*, 11 U.S.C. § 521(a) (2018) (requiring disclosure of assets and liabilities).
  4. Personal injury and wrongful death claims can be tried in the Article III district court where a bankruptcy is pending or, if the district court where a bankruptcy is pending so orders, where the claim arose. 28 U.S.C. § 157(b)(5) (2018); *id.* § 1411(a) (permitting a district court to order "issues arising under section 303 of title 11 to be tried without a jury"). But the pressure to resolve claims means that few bankruptcy cases actually go to trial. *See* S. ELIZABETH GIBSON, JUDICIAL MANAGEMENT OF MASS TORT BANKRUPTCY CASES 82-90 (2005).
  5. *See, e.g.*, *In re LTL Mgmt., LLC*, 652 B.R. 433 (Bankr. D.N.J. 2023); *In re Revlon, Inc.*, No. 22-10760, 2023 WL 2229352 (Bankr. S.D.N.Y. Feb. 24, 2023); *In re Boy Scouts of Am.*, 642 B.R. 504 (Bankr. D. Del. 2022); *In re Mallinckrodt PLC*, 639 B.R. 837 (Bankr. D. Del. 2022); Voluntary Petition for Non-Individuals Filing for Bankruptcy, *In re Endo Int'l PLC*, No. 22-22549 (Bankr. S.D.N.Y. Aug. 16, 2022), ECF No. 1; *In re Acaro Techs. LLC*, 642 B.R. 891 (Bankr.

defendants turn to bankruptcy to compensate for what their court filings call the “failure” of traditional litigation to expeditiously extinguish all lawsuits.<sup>6</sup> And they call on the bankruptcy court, just like they called on the multidistrict-litigation court before it and the class-action court before that, to use its inherent authority and creative applications of federal procedural rules to invent new forms of civil procedure to find a path to global peace. Many of these efforts have largely escaped appellate review – until now.

To grasp the unusual here, note that many of these new bankruptcy defendants are not even financially distressed. That’s not why they have turned to bankruptcy court. Rather, the parties instead insist that bankruptcy court—which is *neither* a state court nor a federal district court—is the only court with sufficient power to address the burden of nationwide litigation.<sup>7</sup> Bankruptcy court’s novel procedures offer the tantalizing prospect of something parties have yet to obtain in over eighty years of complex litigation practice: a final and centralized end to litigation in the past, present, and future.

But our system wasn’t designed for global peace. The American litigation system reflects our national federalism: two sets of robust litigating court systems, state and federal. The very existence of these two systems—despite the many salutary virtues of jurisdictional overlap—often impedes efficient global resolution of giant cases that raise common questions of liability.

Bankruptcy courts are attractive in part because they are the only American courts that can overcome federalism’s jurisdictional boundaries; they are the only courts that, through Bankruptcy Code Section 362, have the power to commandeer both state and federal litigants into a single forum and halt all other civil litigation, no matter what court it is in. But bankruptcy court is not supposed to be a superpower that trumps all others in public litigation. And the more bankruptcy’s unique features draw these cases in, the more distance we create from the traditional trial system’s public values: transparency, accountability,

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S.D. Ind. 2022); *In re Roman Cath. Church of Archdiocese of New Orleans*, 63 B.R. 593 (Bankr. E.D. La. 2021); *In re USA Gymnastics*, No. 18-09108, 2020 WL 1932340 (Bankr. S.D. Ind. Apr. 20, 2020); *In re PG&E Corp.*, No. 19-30088, 2020 WL 1539254 (Bankr. N.D. Cal. Mar. 30, 2020); *In re Bestwall LLC*, 606 B.R. 243 (Bankr. W.D.N.C. 2019).

6. See, e.g., Complaint for Injunctive Relief at 26, *In re Purdue Pharma L.P.*, No. 19-23649 (Bankr. S.D.N.Y. Sept. 18, 2019), ECF No. 74 (“As long as pursuit of the Pending Actions fosters a race to the courthouse . . . claims against the estates will proceed by the luck of the draw instead of fairly and equitably under the principles of the Bankruptcy Code.”); Informational Brief of Aeero Technologies LLC at 1, *In re Aeero Techs.*, No. 22-02890 (Bankr. S.D. Ind. July 26, 2022), ECF No. 12 (“Aeero turns to Chapter 11 in the wake of the failure of the largest [multidistrict litigation (MDL)] in U.S. history to successfully advance the resolution of tort claims related to the Combat Arms earplug.”).

7. These concerns do not turn on differences between Article I and Article III power. They would also apply if Congress made bankruptcy judges Article III judges, as some recommend. See NAT’L BANKR. REV. COMM’N, BANKRUPTCY: THE NEXT TWENTY YEARS § 3.1, at 718 (1997).

participation, law development, due process, educating the public, jurisdictional redundancy, and more.

There is a long history of creative procedures in service of global resolution. In Part I, we review litigants' attempts at global settlements, which, over time, have relied on private claim-resolution facilities,<sup>8</sup> the modern class action, state attorney general multistate actions, and most recently and dramatically, multidistrict litigation (MDL).<sup>9</sup> Repurposed by creative lawyers and judges into the golden-child workhorse of modern massive mass-torts cases, MDLs now occupy a whopping fifty-four percent of the federal docket,<sup>10</sup> and have been widely hailed as a way to bring cross-country litigation like opioids to a close.

But MDL, as we have detailed elsewhere, has proved controversial—raising constitutional questions about the extent of the court's jurisdiction and whether MDL offers sufficient due process safeguards for plaintiffs.<sup>11</sup> And in the opioid litigation, despite the fact that the MDL's gravitational pull and the sheer ambition of the district judge at first seemed enough to resolve thousands of state and federal cases in a single (federal) forum, it has not achieved the “global peace” that was promised. And so, the door opened for yet another procedural innovation.

Enter bankruptcy. As we detail in Part II, Purdue Pharma filed for bankruptcy on September 15, 2019. Two manufacturer defendants, Mallinckrodt and

8. Dana A. Remus & Adam S. Zimmerman, *The Corporate Settlement Mill*, 10 VA. L. REV. 129, 130 (2015); Rory Van Loo, *The Corporation as Courthouse*, 33 YALE J. REGUL. 547, 549 (2016); Nathaniel Donohue & John F. Witt, *Tort as Private Administration*, 105 CORNELL L. REV. 1093, 1093 (2020) (“[I]nsurers, and others are developing and managing claims resolution facilities that have turned the resolution of one-off tort claims in the United States into something akin to aggregate litigation or a public compensation program.”).
9. 28 U.S.C. § 1407 (2018); Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. REV. 1, 9-10 (2021).
10. See *Statistical Analysis of Multidistrict Litigation Under 28 U.S.C. § 1407, Fiscal Year 2022*, U.S. JUD. PANEL ON MULTIDISTRICT LITIG. 7 (2022), [https://www.jpml.uscourts.gov/sites/jpml/files/JPML%20Fiscal%20Year%202022%20Report-12-9-22\\_o.pdf](https://www.jpml.uscourts.gov/sites/jpml/files/JPML%20Fiscal%20Year%202022%20Report-12-9-22_o.pdf) [<https://perma.cc/ZFY3-CF8G>] (reporting 392,374 actions in MDL); *Table 2.1—U.S. Courts of Appeals—Cases Filed, Terminated, and Pending*, U.S. CTS. (2022), [https://www.uscourts.gov/sites/default/files/data\\_tables/jff\\_2.1\\_0930.2022.pdf](https://www.uscourts.gov/sites/default/files/data_tables/jff_2.1_0930.2022.pdf) [<https://perma.cc/VB8C-LDR2>] (reporting 32,512 cases pending in the circuit courts, not including the Federal Circuit); *Table 3.1—U.S. Court of Appeals for the Federal Circuit—Appeals Filed, Terminated, and Pending*, U.S. CTS. (2022), [https://www.uscourts.gov/sites/default/files/data\\_tables/jff\\_3.1\\_0930.2022.pdf](https://www.uscourts.gov/sites/default/files/data_tables/jff_3.1_0930.2022.pdf) [<https://perma.cc/E7TQ-3SRY>] (reporting 1,404 cases pending in the Federal Circuit); *Table 6.1—U.S. District Courts—Total Civil and Criminal Cases Filed, Terminated, and Pending*, U.S. CTS. (2022), [https://www.uscourts.gov/sites/default/files/data\\_tables/jff\\_6.1\\_0930.2022.pdf](https://www.uscourts.gov/sites/default/files/data_tables/jff_6.1_0930.2022.pdf) [<https://perma.cc/D9BB-Q4NU>] (reporting 688,528 cases pending in the district courts).
11. See Gluck & Burch, *supra* note 9; Elizabeth Chamblee Burch & Abbe R. Gluck, *Plaintiffs' Process: Civil Procedure, MDL, and a Day in Court*, 42 REV. LITIG. 225 (2023).

Endo, followed in October 2020 and August 2022,<sup>12</sup> actions mirrored by defendants across a number of industries to resolve mass-tort claims. Many courts, in reviewing the propriety of these bankruptcy filings, have explicitly refused the invitation to opine on what the cases say about the “relative merits or demerits of the MDL.”<sup>13</sup> And yet by raising the question and refusing to answer, the question hangs in the balance.

What’s to be gained and what’s to be lost by the turn to bankruptcy? Trials are elusive in all court systems. But no other court—not even the U.S. Supreme Court—can exercise jurisdiction over both state and federal court cases in the same way.<sup>14</sup> Bankruptcy also solves the white-whale problem of preclusion like no other court can across systems; the Code, in Section 105,<sup>15</sup> gives the bankruptcy court broad equitable authority to bind all current and future claimants in a single proceeding without satisfying the complexities of Rule 23’s class action, the Anti-Injunction Act, or traditional preclusion doctrines.

But the “federalism problem” in complex civil litigation isn’t always a problem.<sup>16</sup> There are benefits to at least some redundancy in mass-tort litigation. Litigation can serve a variety of salutary goals in public-harm cases, including testing the value of claims and holding wrongdoers accountable; unearthing valuable and often secreted industry information; and developing substantive law. In opioids, the structural redundancy from the dueling systems produced important discovery, assigned responsibility, and allowed for new doctrinal development around nuisance law that would not have happened had the MDL succeeded in keeping everything in one district court.

The key question is what purpose the court system is supposed to serve in cases involving widespread public harm. If the sole goal of litigation in public-health suits is money, then perhaps bankruptcy is an answer. Experts have argued that payouts are maximized through bankruptcy because the Code can bind all mass-torts claims, settle them at a premium, and use less protracted and less

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12. Voluntary Petition for Non-Individuals Filing for Bankruptcy, *In re Mallinckrodt PLC*, No. 20-12522 (Bankr. D. Del. Oct. 12, 2020), ECF No. 1; Voluntary Petition for Non-Individuals Filing for Bankruptcy, *In re Endo Int’l PLC*, No. 22-22549 (Bankr. S.D.N.Y. Aug. 16, 2022), ECF No. 1. These bankruptcies did not resolve all the litigation coming out of the opioid crisis. See, e.g., Jan Hoffman, *Drug Distributors and J.&J. Reach \$26 Billion Deal to End Opioid Lawsuits*, N.Y. TIMES (July 21, 2021), <https://www.nytimes.com/2021/07/21/health/opioids-distributors-settlement.html> [<https://perma.cc/3QZ7-3U7Q>].

13. *In re Acaro Techs. LLC*, 642 B.R. 891, 902 (Bankr. S.D. Ind. 2022).

14. Adam Liptak, *Arizona Files Novel Lawsuit in Supreme Court over Opioid Crisis*, N.Y. TIMES (July 31, 2019), <https://www.nytimes.com/2019/07/31/us/politics/arizona-supreme-court-opioid-sackler.html> [<https://perma.cc/E6AL-TAPW>]; *Arizona v. Sackler*, 140 S. Ct. 812 (2019) (mem.).

15. 11 U.S.C. § 105 (2018).

16. Burch & Gluck, *supra* note 11.

costly procedures than those demanded by Article III and state courts.<sup>17</sup> But these assumptions are empirically contestable. The bankruptcy statute doesn't clearly bind public plaintiffs. And the Supreme Court has never actually settled that bankruptcy courts have the power to bind the claims of future potential claimants. The idea that the risk of a few individuals racing to the courthouse necessitates bankruptcy overlooks the numerous other aggregation mechanisms as well as the notion that filing bankruptcy itself is a kind of race to the courthouse – one that shuts off all other litigation.

Bankruptcy itself is also very expensive. Johnson & Johnson's failed attempts cost \$178 million in attorneys' fees alone.<sup>18</sup> And the contention that bankruptcy maximizes payouts to mass-tort plaintiffs or is the best mechanism to value claims requires more proof. Plaintiffs killed by addictive opioids in *Purdue* stand to gain only between \$3,500 to \$48,000 a claim.<sup>19</sup>

Indeed, claim valuation is a big problem in bankruptcy. That's because bankruptcy courts order payment of *all* claims, often without testing their merit as the tort process could. This means that low-value claims may get overcompensated, while higher-value claims may be underpaid. And entirely novel tort theories of liability, causation, and damages may remain unresolved as a matter of law because they just get paid off.

With respect to high-value claims, practitioners worry that defendants enjoy more leverage over tort plaintiffs in bankruptcy and that bankruptcy judges tend to be less generous than state courts – not least because of the wide latitude businesses enjoy over where and when they file for bankruptcy.<sup>20</sup> While these are also empirical claims in need of testing, the procedural point is that even if bankruptcy provides more uniform recovery across plaintiffs, those awards may not reflect the real value of plaintiffs' claims without meaningful opportunities to

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17. See, e.g., Anthony J. Casey & Joshua C. Macey, *In Defense of Chapter 11 for Mass Torts*, 90 U. CHI. L. REV. 973 (2023); Sergio Campos & Samir D. Parikh, *Due Process Alignment in Mass Tort Restructurings*, 91 FORDHAM L. REV. 325 (2022) (but also raising due-process issues with bankruptcy resolution of mass-tort claims).
  18. Evan Oschner, *J&J Unit's Failed 'Two-Step' Talc Bankruptcies Cost \$178 Million*, BLOOMBERG L. (Oct. 4, 2023, 5:00 AM EDT), <https://news.bloomberglaw.com/bankruptcy-law/j-j-units-failed-two-step-talc-bankruptcies-cost-178-million> [<https://perma.cc/4BY9-79PY>].
  19. Cici Yongshi Yu, *Opioid Victims Struggle with Purdue Pharma Settlement's High Bar*, BLOOMBERG L. (Aug. 8, 2023, 5:00 AM EDT), <https://news.bloomberglaw.com/health-law-and-business/opioid-victims-struggle-with-purdue-pharma-settlements-high-bar> [<https://perma.cc/LY7G-XMHU>].
  20. See, e.g., Adam J. Levitin, *Judge Shopping in Chapter 11 Bankruptcy*, 2023 U. ILL. L. REV. 351 (identifying judge-shopping problems in bankruptcy); Robert K. Rasmussen, *COVID-19 Debt and Bankruptcy Infrastructure*, 131 YALE L.J.F. 337, 356-61 (2021) (addressing judge-driven venue issues).

test them in state and federal court.<sup>21</sup> Funds promised in bankruptcy to victims may also completely evaporate when creditors force a second bankruptcy without the victims' consent, as occurred in the Mallinckrodt restructuring,<sup>22</sup> or when other sophisticated creditors simply secure more favorable deals than tort claimants.

More importantly, money is often one of only several goals. Those who defend bankruptcy's use in this context rarely engage with the lost public-regarding values of litigation.<sup>23</sup> The history of the tobacco lawsuits, as well as opioids, offer a prime example of these values. From traditional discovery in both contexts, evidence about manufacturers' strategy to encourage addictive use of their products emerged that not only made companies accountable, but also helped spur legislative policy change.<sup>24</sup> Such evidence might never have come to light in a streamlined bankruptcy proceeding.

Those who argue the Bankruptcy Code could rather easily be used or "tweaked" to generate litigation values look to 28 U.S.C. § 157, which delineates proceedings bankruptcy judges may preside over and specifies how district courts can hear related personal-injury tort claims. They argue that bankruptcy courts already have tools to provide at least some of the process that we deem crucial.

In practice, however, bankruptcy courts rarely use these tools, and uses that do exist have been inconsistent. Bankruptcy judges aren't routinely sending their cases out to district or state court to develop tort law or test claims; of course they can, and of course there are instances when they do. But the courts' primary goal, once bankruptcy is filed, is resolving the debtors' financial distress and more litigation often conflicts with that goal. Our main concern is primarily those cases in which bankruptcy is used intentionally, especially by those not in financial distress, as a strategy to avoid all pretrial process. There's a reason why

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21. See GIBSON, *supra* note 4, at 82. Unlike asbestos bankruptcies in the 1980s, where litigation matured to the point at which defendants stopped contesting liability and general causation, *id.* at 82-83, the Sackler family did not face any trials before the Purdue bankruptcy.

22. Dietrich Knauth, *Court OKs Mallinckrodt Restructuring, \$1 Billion Cut to Opioid Settlement*, REUTERS (Oct. 10, 2023), <https://www.reuters.com/business/healthcare-pharmaceuticals/mallinckrodt-gets-approval-restructuring-1-billion-cut-opioid-settlement-2023-10-10> [<https://perma.cc/6A62-RQQ3>].

23. Casey & Macey, *supra* note 17.

24. See, e.g., Noelia Duchovny & Ryan Mutter, *The Opioid Crisis and Recent Federal Policy Responses*, CONG. BUDGET OFF. (Sept. 2022), <https://www.cbo.gov/system/files/2022-09/58221-opioid-crisis.pdf> [<https://perma.cc/L3W2-MZ7J>] (describing federal responses to the opioid crisis); Brian Mann, *4 U.S. Companies Will Pay \$26 Billion to Settle Claims They Fueled the Opioid Crisis*, NAT'L PUB. RADIO (Feb. 25, 2022, 7:39 AM ET), <https://www.npr.org/2022/02/25/1082901958/opioid-settlement-johnson-26-billion> [<https://perma.cc/B8RF-S24Z>] (describing public drug-treatment programs funded by opioid-litigation settlements).



victims of the opioid crisis cried that Purdue was avoiding responsibility when it filed for bankruptcy, and why victims of the Catholic Diocese claimed that the Diocese's Chapter 11 filing deprived them of their chance to tell their story and hold wrongdoers to account.<sup>25</sup> Defendants don't turn to bankruptcy to litigate the merits of tort law or for an extended airing of claims; bankruptcy's culture is to streamline.<sup>26</sup>

This may also explain why similar proposed reforms to mass-tort bankruptcies have consistently failed: cultural norms of bankruptcy are too strong and focusing on the debtor's distress is often inherently at odds with the expense and delays entailed in generating more adversarial trial process. Bankruptcy judges in mass-tort cases are faced with potentially incompatible goals: a proper result in the tort litigation and resolving the defendant-debtor's financial distress. Scholars who argue the Code could easily be amended to require more process understate the incompatibility of the goals and the strength of the bankruptcy culture.

Forty years ago, Owen Fiss famously argued in this *Journal* that we should favor "justice" over "peace," and hence in-court resolution over settlement.<sup>27</sup> He argued that civil lawsuits should be understood in light of the public good they serve, rather than the mere private ends of individual dispute resolution and money changing hands.<sup>28</sup> As we detail in Part III, we likewise believe that public goods from litigation are at risk when mass-tort actions move into more unorthodox terrain.

We are not naïve. We know that more traditional litigation is not necessarily generating all of Fiss's public values either. Few MDLs go to trial.<sup>29</sup> And in many

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25. See Michael Gold, *Facing 200 Abuse Claims, Diocese Becomes U.S.'s Largest to Seek Bankruptcy*, N.Y. TIMES (Oct. 5, 2020), <https://www.nytimes.com/2020/10/01/nyregion/rockville-centre-diocese-bankruptcy.html> [<https://perma.cc/ES4N-RGA4>]; Scott Maucione, *The Archdiocese of Baltimore Declares Bankruptcy Just as New Child Sex Abuse Law Passes*, NAT'L PUB. RADIO (Oct. 8, 2023), <https://www.npr.org/2023/10/08/1204545824/the-archdiocese-of-baltimore-declares-bankruptcy-just-as-new-child-sex-abuse-law> [<https://perma.cc/3D5M-397S>]; cf. Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 49-54 (1976) (outlining individual dignity and equality as values by which to evaluate the fairness of adjudicatory procedures).

26. See *infra* Section II.A.

27. Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984).

28. *Id.*

29. Eleanor Tyler & Robert Combs, *2023 Litigation Statistics Series: Multidistrict Litigation*, BLOOMBERG L. 1 (2023), <https://pro.bloomberglaw.com/reports/2023-multidistrict-litigation-report> [<https://perma.cc/5A99-PX28>]; cf. Brief for the Chamber of Commerce of the United States of America and National Federation of Independent Business as Amici Curiae in Support of Petitioner at 30, *Trans Union LLC v. Ramirez*, 141 S. Ct. 2190 (2021) (No. 20-297) ("In 2019,

cases, truly financially distressed defendants look to bankruptcy court only after litigating in state and federal courts. Indeed, once tort cases have matured and fleshed out the merits, litigation values have been gained, and more process may be less valuable relative to bankruptcy's efficient procedure. But that's not what happened in the Sacklers' case. And it is these unorthodox maneuvers that short circuit all or most litigation goods that are our primary concern.

Our aim here is not to definitively resolve the question of whether nondebtor releases are *per se* unlawful or whether there may be some instances where they should be permitted. Defendants like the Sacklers, however, are calling on the bankruptcy court to provide a workaround to the basic federalist, law-generative, and publicly accountable features of our civil justice system in the name of efficient financial settlement. The case thus provides a critical opportunity for the Court and court-watchers alike to reflect on what is gained and what is lost when parties in mass torts find the "behemoth" litigation system unable to bring mass disputes to a close and contend that sprawling lawsuits across national courts have thrown them into unresolvable crisis.<sup>30</sup> Much is at stake: depending on how one counts, nearly one out of every two pending cases on the federal docket is part of a major mass tort.<sup>31</sup>

#### I. UNORTHODOX CIVIL PROCEDURE AND THE LONG QUEST FOR PEACE

How did we get to the point where bankruptcy became the resolution mechanism of choice for many corporate defendants? Unorthodox procedures in our federal system are common. Often, they come in the form of old tools repurposed for new situations or entirely new devices that expand on traditional authorities. Generally, unorthodox procedures are the symptom, not the cause, of traditional legal procedures no longer meeting evolving needs. We have

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companies reported settling 60.3 percent of class actions, and they settled an even higher 73 percent of class actions the year before.").

30. Informational Brief of Aeero Technologies LLC at 2, *In re Aeero Techs. LLC*, No. 22-02890 (Bankr. S.D. Ind. July 26, 2022), ECF No. 12.
31. Product liability cases equaled 322,443 cases out of a total of 330,816 cases pending on the MDL docket in December 2020. *MDL Statistics Report - Distribution of Pending MDL Dockets by Actions Pending*, U.S. JUD. PANEL ON MULTIDISTRICT LITIG. (Dec. 15, 2020), [https://www.jpml.uscourts.gov/sites/jpml/files/Pending\\_MDL\\_Dockets\\_By\\_Actions\\_Pending-December-15-2020.pdf](https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Actions_Pending-December-15-2020.pdf) [<https://perma.cc/5WBJ-5EC2>]. This is more than half of the civil federal caseload of 470,581 for fiscal year 2020. *Judicial Business 2020*, U.S. CTS. (2020), <https://www.uscourts.gov/statistics-reports/judicial-business-2020> [<https://perma.cc/P3QG-4FKJ>]. This number, however, depends on whether one considers class actions, which dominate other nonproduct liability MDLs, to be multiple cases or a single case (which is how they are currently counted).

chronicled such developments before: in Congress, with processes like fast-track procedures and omnibus bills; in the administrative state through expedited rulemaking and “agency class actions”; and in the court system, where the most salient development until now has been the transformation of MDL into an aggressive, coordinating mechanism to compensate for class action’s weaknesses.<sup>32</sup>

In our civil-litigation system, unorthodox procedures often emerge from the substantial discretion afforded to judges and parties under an array of statutes and court procedures.<sup>33</sup> These include equitable and gap-filling rules that allow courts to manage cases, as in Federal Rule of Civil Procedure 16, or to “issue any order, process, or judgment that is necessary or appropriate” to fulfill a court’s fundamental objectives, as in Section 105 of the Bankruptcy Code.<sup>34</sup>

Unorthodox doesn’t always mean “bad.” We have previously written about some benefits of MDL, including how it has increased access to court.<sup>35</sup> And sometimes procedures that come on the scene as unorthodox gradually become the new orthodoxy. But the appearance of procedural innovations usually suggests the persistence of an obstacle to be overcome, whether that’s an obstacle to legislation, an obstacle to aggregation, or an obstacle to dispute resolution. Unorthodox civil procedure may be an inevitable development of a procedure system—and the doctrines that implement it—not evolving with the needs of a modern national economy. But as new procedures emerge, it is important to articulate the protections and values that may be lost if they are not rigorously preserved, even if within a new model.

#### A. *A Brief Tour Through Obstacles to Aggregation and Finality*

To understand the emergence of bankruptcy as an off-ramp to the tort system, reviewing previous procedural innovations is helpful—bankruptcy isn’t the first and won’t be the last. The desire for global peace means extinguishing nearly all<sup>36</sup> parallel as well as future claims (when there is a lag between exposure

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32. Abbe R. Gluck, Anne Joseph O’Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1791-99 (2015); Michael D. Sant’Ambrogio & Adam S. Zimmerman, *Inside the Agency Class Action*, 126 YALE L.J. 1634, 1637-45 (2017).

33. Alexandra D. Lahav, *Procedural Design*, 71 VAND. L. REV. 821, 861 (2018); Pamela Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. REV. 767, 784-92 (2017); Gluck et al., *supra* note 32, at 1672; Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 426-27 (1982).

34. 11 U.S.C. § 105(a) (2018); FED. R. CIV. P. 16; Pamela Foohey & Christopher K. Odinet, *Silencing Litigation Through Bankruptcy*, 109 VA. L. REV. 1261, 1284 (2023).

35. Gluck & Burch, *supra* note 9, at 8; Adam S. Zimmerman, *The Bellwether Settlement*, 85 FORDHAM L. REV. 2275, 2288-89 (2017).

36. Bankruptcy enthusiasts tend to overstate bankruptcy’s benefits with respect to compelling 100% participation. MDLs and class actions frequently produce “global” peace with some

and injury); but this is not an intuitive goal in a system that is premised on fifty-one state court systems and a parallel federal court system with jurisdictional barriers between them. Nor is global peace a necessarily obvious goal for a legal system that is predisposed to disfavor precluding new plaintiffs and favor giving them their day in court.

In mass torts, three linked obstacles are salient reasons for the move toward the unorthodox. The first is grounded in the limitations of private contract and ordering. Corporations that hope to systematically settle far-flung claims involving the same common questions cannot do so without some formal legal mechanism to deal with people who do not want to settle.

Second, the Supreme Court has made class actions, the formal litigation tool for organizing large numbers of common claims with due process guardrails, increasingly difficult to certify. This is especially true for mass torts when individuals experience diverse harms and when claims involve different underlying state-law torts from various jurisdictions; there, the Supreme Court's high bar for commonality poses a challenge. This near death-by-doctrine of the mass-tort class action fed the quest for other aggregation mechanisms – like MDL.<sup>37</sup>

Third, later-coming unorthodox aggregation mechanisms, like MDL, have had a hard time figuring out if they can constitutionally preclude (prevent from future litigation) nonconsenting plaintiffs via settlement. In the opioids MDL, there were many attempts at procedural innovation in the name of global resolution, including an (ultimately unsuccessful) attempt to invent a new type of class action.<sup>38</sup>

Like water in a raft that always finds the tiny hole to escape through, innovative attorneys on both sides of the “v” have been relentless in their efforts to repurpose, tweak, and curate new aggregate forms when previous efforts fail.<sup>39</sup> After one of the Supreme Court cases that substantially undermined expansive class actions, *Amchem Products, Inc. v. Windsor*,<sup>40</sup> two noted plaintiffs' lawyers wrote, “The aggregation of mass harm cases in federal courts did not end with

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holdouts or opt outs. Even in the context of the opioid litigation, a small number of nonparticipants was not seen as a threat to the \$26 billion global settlement with opioid distributors. Nate Raymond, *Drug Distributors, J&J Agree to Finalize \$26 Bln Opioid Settlement*, REUTERS (Feb. 25, 2022), <https://www.reuters.com/legal/litigation/drug-distributors-agree-finalize-opioid-settlement-2022-02-25> [<https://perma.cc/R5HT-96BY>] (noting that “[m]ost states are settling”).

37. Eldon E. Fallon, Jeremy T. Grabill & Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2340 (2008).

38. Francis E. McGovern & William B. Rubenstein, *The Negotiation Class: A Cooperative Approach to Class Actions Involving Large Stakeholders*, 99 TEX. L. REV. 73, 80 (2020).

39. Alexandra D. Lahav, *The Continuum of Aggregation*, 53 GA. L. REV. 1393, 1394 (2019) (“Mass litigation is like water, the cases will move to the form of litigation that is most available . . .”).

40. 521 U.S. 591, 601 (1997).

*Amchem* . . . it just took more experimental and less transparent forms.”<sup>41</sup> MDL was born from this determination and creativity. And then, when MDL failed to produce the global resolution desired, enterprising parties, “driven by various interrelated shortcomings of and abuses in the tort system,” turned to bankruptcy.<sup>42</sup>

As we take a brief tour through the evolution of aggregation vehicles below, we note that they are not mutually exclusive. Today, creative lawyers sometimes combine different features of various unorthodox vehicles in a single litigation or borrow features from one model to innovate procedure in another. Here we do not focus on that dynamic feedback loop, but rather on the features of each mechanism that make them attractive to lawyers and/or raise constitutional concerns.

*B. Vehicles that Have Emerged to Overcome the Obstacles: Private Dispute Resolution, Class Action, Attorney General Multistate Actions, and MDL*

Mass civil harms affect people today, as well as populations whose injuries may not manifest for years.<sup>43</sup> Some may involve a single mass disaster,<sup>44</sup> but they also may implicate evolving standards and conduct for whole industries and distribution chains. They are a national problem in a federalist system,<sup>45</sup> and so the complexity of the quest for single resolution is not surprising.

Global settlement offers something for both would-be plaintiffs and defendants. For plaintiffs, comprehensive bargains eliminate the race to the courthouse and promise actual compensation for their injuries in their own lifetimes, an

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41. Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. REV. 846, 875 (2017).

42. Informational Brief of Bestwall LLC at 5, *In re Bestwall LLC*, 606 B.R. 243 (Bankr. W.D.N.C. 2019) (No. 17-31795), ECF No. 12.

43. Geoffrey C. Hazard, Jr., *The Futures Problem*, 148 U. PA. L. REV. 1901, 1902 (2000) (describing the difficulty in evaluating toxic tort cases where injuries do not manifest for weeks, months, or years).

44. Campbell Robertson, *In Town Where Train Derailed, Lawyers Are Signing Up Clients in Drove*, N.Y. TIMES (Feb. 24, 2023), <https://www.nytimes.com/2023/02/24/us/east-palestine-ohio-residents-lawsuits.html> [<https://perma.cc/G8HZ-PLPV>]; Campbell Robertson, *Ohio Attorney General Sues Norfolk Southern Over Derailment*, N.Y. TIMES (Mar. 14, 2023), <https://www.nytimes.com/2023/03/14/us/ohio-train-derailment-norfolk-southern-law-suit.html> [<https://perma.cc/6LKN-222Y>]; ALM Staff, *Pa. School Files Toxic Tort Suit Against Norfolk Southern over East Palestine Derailment*, LAW.COM (Mar. 24, 2023, 12:08 PM), <https://www.law.com/thelegalintelligencer/2023/03/24/pa-school-files-toxic-tort-suit-against-norfolk-southern-over-east-palestine-derailment> [<https://perma.cc/48G4-ZTE5>].

45. See Abbe R. Gluck, *MDL Nationalism, Federalism, and the Opioid Epidemic*, 70 DEPAUL L. REV. 321, 330-31 (2021) (discussing how civil-procedure doctrine has faced growing pressure from the nationalization of the economy).

understandable goal in cases where the sheer volume of individualized trials could otherwise take decades or consume limited funds. And, for defendants, global resolutions promise an efficient and predictable end to litigation risk, especially attractive when a common course of conduct gives rise to hundreds or thousands of claims, both present and future.<sup>46</sup>

It is worth emphasizing at the outset that mass-tort litigation does not equal solving a public-health crisis. As we detail in Part III, litigation produces outputs – such as accountability, information, law development, and money – that help spur legislative and industry reform. Our claim is those outputs are valuable even as litigation alone (including litigation that ends in global settlement) almost never fully solves the underlying policy problem.

### 1. *Corporate Dispute Resolution*

The earliest efforts to adopt informal procedures to resolve large numbers of complex cases emerged in response to the rise of industrial accidents at the end of the nineteenth century.<sup>47</sup> Industries often relied on intermediaries to broker and categorically settle on behalf of whole groups of immigrant workers injured on the shop-room floor. These private, corporate forms of dispute resolution dominated throughout the twentieth century.<sup>48</sup>

Take the Owens Corning National Settlement Program, one of the few such programs for which there is public information. As Congress considered legislation to respond to the growing number of asbestos claims in the litigation system, Owens Corning held up its own innovative, mass contract-based settlement program as an inexpensive alternative to the litigation system.<sup>49</sup> By convincing over 100 of the leading plaintiff-side asbestos law firms to participate, it created a wholly owned subsidiary to administer its own private National Settlement

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46. See, e.g., Troy A. McKenzie, *Toward a Bankruptcy Model for Nonclass Aggregate Litigation*, 87 N.Y.U. L. REV. 960, 961 n.2 (2012) (“I accept in this Article that, as a descriptive matter, peacemaking becomes the overriding goal as a mass tort reaches maturity . . .”); Samuel Issacharoff & D. Theodore Rave, *The BP Oil Spill Settlement and the Paradox of Public Litigation*, 74 LA. L. REV. 397, 414 (2014); William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371, 372 (2001).

47. Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregated Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1575 (2004).

48. H. LAURENCE ROSS, *SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT* (1970).

49. See *Fairness in Asbestos Compensation Act of 1999: Hearing Before the H. Comm. on the Judiciary*, 106th Cong. 137-42 (1999) (statement of Maura J. Abeln, General Counsel, Owens Corning).

Program (NSP) and offered quick payouts according to standardized medical criteria.<sup>50</sup>

Others followed with similar settlements, which proved short-lived. New entrepreneurial plaintiff-side firms entered the market and declined to participate in programs like the NSP; they opted instead to return to the courts, extracting larger verdicts and settlements.

## 2. *Class Actions*

The modern class-action rules were borne out of a response to another corporate defendant's innovation – when a railroad company in 1953 “ingeniously” sought to certify a declaratory class action after 7,000 plaintiffs sued dozens of corporate and governmental entities in state and federal courts across the country after an explosion.<sup>51</sup> Despite describing the idea as “so tempting that the plan deserves the closest scrutiny,”<sup>52</sup> the district court held that it simply could not act without more formal legislation from Congress.<sup>53</sup>

Reformers charged with amending the Rule 23 class action in 1966 cited the case for the proposition that courts should be wary of mass-tort class actions.<sup>54</sup> But despite caution from the Rule's drafters, a wave of mass-tort classes emerged in the 1980s and 1990s, after the famously creative Judge Jack Weinstein certified a settlement class for the more than two million sickened veterans in *In re “Agent Orange” Product Liability Litigation*.<sup>55</sup> Nevertheless, the class action's guardrails for notice and representation were thought to protect plaintiffs and ensure due

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50. See Press Release, Owens Corning, Owens Corning Launches Integrex, New Service Business Offering Scientific Testing and Litigation Management (June 25, 1998), <http://www.prnewswire.com/news-releases/owens-corning-launches-integrex-new-service-business-offering-scientific-testing-and-litigation-management-78070432.html> [https://perma.cc/D273-MGYX]; RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT 109-10 (2007).

51. See *Pa. R.R. v. United States*, 111 F. Supp. 80, 85 (D.N.J. 1953).

52. *Id.*

53. *Id.* at 91.

54. See Lawyers For Civil Justice et al., *To Restore a Relationship Between Classes and Their Actions: A Call for Meaningful Reform of Rule 23*, Comment to the Civil Rules Advisory Committee and Its Rule 23 Subcommittee (Aug. 9, 2013), [https://www.uscourts.gov/sites/default/files/fr\\_import/13-CV-G-suggestion.pdf](https://www.uscourts.gov/sites/default/files/fr_import/13-CV-G-suggestion.pdf) [https://perma.cc/XNJ9-RGYM] (observing that, “in these circumstances,” such as the one implicated in *Pennsylvania v. United States*, “an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried”).

55. 580 F. Supp. 690 (E.D.N.Y. 1984); Jack C. Coffee, Jr., *Jack Weinstein: Last of the Mohicans?* CLS BLUE SKY BLOG (Dec. 21, 2021), <https://clsbluesky.law.columbia.edu/2021/12/02/jack-weinstein-last-of-the-mohicans> [https://perma.cc/3KBT-X42J].

process—which in turn enabled preclusion, a key benefit that later-coming alternatives have struggled to emulate.

But in 1997, the Supreme Court substantially changed course in *Amchem Products, Inc. v. Windsor*.<sup>56</sup> Asbestos manufacturers sought to certify a sweeping class action to settle hundreds of thousands of claims involving anyone exposed to asbestos after 1993, even if they had not yet suffered an injury. In rejecting the class, the Court observed that it had never faced such a “sprawling” national class and that it did not raise common questions given the range of exposures, products, laws, and people implicated.<sup>57</sup> Justice Ginsburg, who wrote for the majority, had said at oral argument that the proposed settlement “changed” the class action into something far beyond what Congress intended.<sup>58</sup>

In the years that followed, Justice Ginsburg’s interpretation of Rule 23 did not result in the careful subclassing and smaller actions that she had hoped for as an answer to *Amchem*’s commonality and representation issues. As one commentator noted, the class-action framework after *Amchem* felt “less necessary and far less convenient.”<sup>59</sup> Leading plaintiffs’ attorney Elizabeth J. Cabraser argues that *Amchem* “transformed Federal Rule of Civil Procedure 23(b)(3)’s ‘superiority’ requirement into a mandate of perfection.”<sup>60</sup>

It is important to note that *Amchem* and cases like it did not end the use of class actions to resolve mass torts. Class-action innovations continue to this day, often within MDLs.<sup>61</sup> But there is little question that *Amchem* introduced new structural limits that pushed creative lawyers to find other ways to achieve the aggregate resolutions they needed.

### 3. Attorney General “Multistate” Actions and Other Government Actors

State Attorneys General (AGs) in the 1980s figured out a new way to structurally aggregate and settle collectively without actually aggregating or undermining federalism. The “AG Multistate” was an innovation first developed by a small group of Attorneys General in the 1980s in antitrust litigation. It evolved

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56. 521 U.S. 591 (1997).

57. *Id.* at 622-24.

58. Abbe R. Gluck & Anne Joseph O’Connell, *The Orthodox, and Unorthodox, RBG: Administrative Law and Civil Procedure*, 90 GEO. WASH. L. REV. 1532, 1554 (2022).

59. Morris A. Ratner, *Class Conflicts*, 92 WASH. L. REV. 785, 843 (2017).

60. Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475, 1475-76 (2005).

61. See generally Adam S. Zimmerman, *The Class Appeal*, 89 U. CHI. L. REV. 1419 (2022) (tracing evolution); Francis E. McGovern & William B. Rubenstein, *The Negotiation Class: A Cooperative Approach to Class Actions Involving Large Stakeholders*, 99 TEX. L. REV. 73 (2020) (detailing class-action innovation).



to allow AGs to file cases in their own various state courts, while sharing resources, discovery, and leverage.<sup>62</sup> In the years that followed, State AGs used the multistate action to produce elaborate settlements for major public issues (sometimes crowding out private litigation), including the Master Settlement Agreement for tobacco, the National Mortgage Foreclosure Settlement,<sup>63</sup> and in the opioid litigation itself.<sup>64</sup>

But the heyday may be over. Dissatisfaction from localities and public-health experts with how the states distributed money in their landmark \$250 billion tobacco settlement spurred a key innovation in the opioid MDL that, in turn, also made the MDL harder to resolve.<sup>65</sup> Frustrated cities and counties—represented by private law firms on a contingency basis—sued on their own, even before the AGs became central players. The localities’ actions generated tensions with the AGs, who had planned “old fashioned” multistate suits in their own state courts. Ultimately, the leverage exerted by the thousands of localities in MDL was enough to pressure the AGs to come to the federal table for settlement, at least sometimes, even though their own state cases were outside the federal MDL court’s jurisdiction.<sup>66</sup>

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62. Jason Lynch, *Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation*, 101 COLUM. L. REV. 1998, 2003-04 (2001).

63. See, e.g., Press Release, State Attorneys General, *Feds Reach \$25 Billion Settlement with Five Largest Mortgage Servicers on Foreclosure Wrongs* (Feb. 9, 2012), <http://naag.org/state-attorneys-general-feds-reach-25-billion-settlement-with-five-largest-mortgage-servicers-on-foreclosure-wrongs.php> [<https://perma.cc/L73Z-CHJN>]; *The Tobacco Settlement*, STATEAG, <https://www.stateag.org/initiatives/the-tobacco-settlement> [<https://perma.cc/7DYF-7GPN>].

64. See, e.g., Brian Mann, *State Attorneys General Reach a \$26 Billion National Opioid Settlement*, NAT’L PUB. RADIO (July 21, 2021, 3:55 PM ET), <https://www.npr.org/2021/07/21/1018881195/state-attorneys-general-26-billion-opioid-settlement> [<https://perma.cc/56L2-U4DR>]; Press Release, State Attorneys General, *Feds Reach \$25 Billion Settlement with Five Largest Mortgage Servicers on Foreclosure Wrongs* (Feb. 9, 2012), <http://naag.org/state-attorneys-general-feds-reach-25-billion-settlement-with-five-largest-mortgage-servicers-on-foreclosure-wrongs.php> [<https://perma.cc/L73Z-CHJN>]; *The Tobacco Settlement*, STATEAG, <https://www.stateag.org/initiatives/the-tobacco-settlement> [<https://perma.cc/7DYF-7GPN>].

65. Experts complained that the money swelled state-legislative coffers instead of addressing smoking cessation and prevention. See Michael Janofsky, *Tiny Part of Settlement Money Is Spent on Tobacco Control*, N.Y. TIMES (Aug. 11, 2001), <https://www.nytimes.com/2001/08/11/us/tiny-part-of-settlement-money-is-spent-on-tobacco-control.html> [<https://perma.cc/YUG8-2WKT>]; Greg Winter, *State Officials Are Faulted on Anti-Tobacco Programs*, N.Y. TIMES (Jan. 11, 2001), <https://www.nytimes.com/2001/01/11/us/state-officials-are-faulted-on-anti-tobacco-programs.html> [<https://perma.cc/WW3V-XAZV>].

66. E.g., Lauren Berg, *Walmart’s Opioid Deal Advances with States’ Participation*, LAW360 (Aug. 22, 2023, 10:19 PM EDT), <https://www.law360.com/articles/1714083/walmart-s-opioid-deal-advances-with-states-participation> [<https://perma.cc/F3R7-C7TN>]; Emily Field, *Kroger to*

Parroting opioids, school boards and even water districts are now joining cities to bring more MDLs in federal court to litigate issues of national concern – including social-media addiction in children, vaping in schools, and forever chemicals in rivers and streams – independent of state-AG action.<sup>67</sup>

#### 4. *Multidistrict Litigation*

Finally, MDL has evolved into the principal forum for globally resolving mass disputes filed across the federal system. MDL was born by statute in 1968 to deal with massive antitrust litigation involving the electrical-equipment industry.<sup>68</sup> The animating idea was that cases would be coordinated for pretrial procedures to avoid duplicative efforts in multiple federal courts, and all suits would ultimately return to their original federal courts for disposition. But MDL has morphed into a centripetal force for global resolution of nationwide litigation. Although there are sometimes bellwether trials in the MDL, trials are rare. Approximately ninety-nine percent of MDL cases are resolved in the MDL, not in their home-court jurisdiction.<sup>69</sup> Unlike class actions, MDLs offer no opt-out and no formal rules about representation; plaintiffs not infrequently find their filed cases dragged across the country without consent and their representation taken over by appointed counsel different from the one they hired, all thanks to how MDL works as a venue transfer on steroids.

MDLs also allow for almost no appellate review. Because all the significant action is generally pretrial, and because federal courts require a “final” order prior to appeal, there are very few opportunities to appeal even the most determinative MDL decisions. And with an eye toward settlement rather than motion practice, MDL judges rarely develop new tort law and sometimes delve

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*Pay Up to \$1.4B to End Opioid Claims*, LAW360 (Sept. 8, 2023, 9:32 AM EDT), <https://www.law360.com/articles/1719444/kroger-to-pay-up-to-1-4b-to-end-opioid-claims> [<https://perma.cc/U2PF-WMQ6>].

67. See, e.g., Memorandum of Law in Support of Plaintiffs’ Motion for Preliminary Approval of Class Action Settlement, for Certification of Settlement Class and for Permission to Disseminate Class Notice at 5-8, *In re Aqueous Film-Forming Foams Prods. Liab. Litig.*, No. 18-mn-02873 (D.S.C. July 3, 2023), ECF No. 3370-1; Golriz Chrostowski, *Analysis: Schools Repurpose Juul Claims Against Meta, TikTok*, BLOOMBERG L. (Jan. 30, 2023), <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-schools-repurpose-juul-claims-against-meta-tiktok> [<https://perma.cc/GXS5-JA5G>] (summarizing school litigation involving vaping and social media addiction).
68. 28 U.S.C. § 1407 (2018); see Andrew D. Bradt, “A Radical Proposal”: *The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831, 854-63 (2017).
69. Elizabeth Chamblee Burch & Margaret S. Williams, *Perceptions of Justice in Multidistrict Litigation: Voices from the Crowd*, 107 CORNELL L. REV. 1835, 1851 (2022).

unfortunately little into the differences among states' laws – instead they tend to “mush” state tort laws together assuming they are essentially all alike.<sup>70</sup>

Expansive notions of federal MDL court power – not formal jurisdiction really – vacuum cases out of state court and to the MDL bargaining table.<sup>71</sup> Parallel state actions are often asked to share discovery and settle at the federal-court table. State-case lawyers are even often asked to contribute to the federal MDL's attorneys' fees.<sup>72</sup> And, in large MDLs, judges have insisted that each proceeding is too unique to be confined by the transsubstantive Federal Rules. That leads to customized procedural creations, like fact sheets in lieu of traditional complaints and *Lone Pine* orders that test expert evidence and cull claims without a motion for summary judgment.<sup>73</sup> A final mass settlement in an MDL can include “closure” provisions that attempt to bind as many litigants as possible. Variations include “walkaway provisions” that require close to 100% participation in the settlement, terms that make participating attorneys recommend the settlement to all of their eligible clients, and, more controversially, terms that require attorneys to withdraw from representing any client who refuses to settle.<sup>74</sup> But MDL lawyers and judges have yet to figure out how to preclude litigants who have not yet filed – one of the class action's special powers.

*In re National Prescription Opiate Litigation*, the sprawling opioid MDL that gave rise to the Purdue bankruptcy, may have been the apotheosis of the creative and ambitious “MDL revolution.”<sup>75</sup> Thousands of cases were quickly consolidated under the MDL statute and transferred to a single federal judge who announced at his first hearing that he did not think “depositions, and discovery, and trials” were the answer.<sup>76</sup> His goal was “to do something meaningful to abate the crisis” within a year.<sup>77</sup>

As the parties searched for a mechanism to resolve all claims, including claims by cities and counties that had not yet sued, plaintiffs' attorneys, spurred on by the judge and a creative special master, even invented a novel procedural mechanism – the so-called “negotiation class” – to collectively bind absent

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70. Gluck & Burch, *supra* note 9, at 18.

71. Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 90-107 (2017).

72. Gluck & Burch, *supra* note 9, at 14.

73. See, e.g., Nora Freeman Engstrom, *The Lessons of Lone Pine*, 129 YALE L.J. 2, 20-21, 43-44, 46-47 (2019).

74. ELIZABETH CHAMBLEE BURCH, MASS TORT DEALS: BACKROOM BARGAINING IN MULTIDISTRICT LITIGATION 40-54 (2019).

75. Gluck & Burch, *supra* note 9, at 1-9, 21-31.

76. Transcript of Proceedings at 4, *In re Nat'l Prescription Opiate Litig.*, No. 17-md-2804 (N.D. Ohio Jan. 9, 2018).

77. *Id.*

parties to an anticipated, lump-sum settlement.<sup>78</sup> The Sixth Circuit rejected this maneuver, warning: “What Plaintiffs fail to appreciate is that a new form of class action, wholly untethered from Rule 23, may not be employed by a court.”<sup>79</sup> Frustrated by the opioid MDL and others, creative lawyers adapted again – this time, turning to bankruptcy.

## II. BANKRUPTCY TO THE RESCUE?

Seen in this context, bankruptcy has emerged as the latest forum promising global peace. Bankruptcy is tantalizing in mass actions because it brings two extraordinary powers: the power to stay parallel litigation (along with all other claims against the debtor) regardless of where the litigation was filed, and the power to finally resolve all pending claims and bar future claims against the debtor company, including future tort lawsuits.

Bankruptcy rules exist precisely so that claims against businesses in financial distress can proceed in an orderly way, notwithstanding our traditional dual system of state and federal courts. But traditionally, legal claims are filed, tested, and even valued first by the tort system before bankruptcy occurs. Bankruptcy was never designed as the primary vehicle for resolving mass-tort lawsuits.<sup>80</sup>

Below, we discuss two recent unorthodox moves at the intersection of bankruptcy and complex public-harms litigation. First, repeat-player lawyers have aggressively innovated to deliver bankruptcy’s finality for third-party tailcoat riders, like the billionaire Sackler family in Purdue.<sup>81</sup> Second, behemoth companies like Johnson & Johnson have tried to cleave off a piece of themselves and saddle that new piece with the company’s mass-tort liabilities – and then dispose of them in bankruptcy, the so called “Texas Two Step.”

When combined with bankruptcy’s role in centralizing decentralized federalist claims and finally resolving past, present, and future claims, these two innovations go beyond other forms of “unorthodox” procedure and rulemaking that we have identified, especially where entities aren’t financially distressed and claims haven’t first been developed in the tort system. They not only shift power and leverage to defendants, but they also threaten to shut off the traditional tort process – and with it, the public benefits of litigating mass-harm cases – entirely.

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78. McGovern & Rubenstein, *supra* note 38, at 93-94.

79. *In re Nat’l Prescription Opiate Litig.*, 976 F.3d 664, 672 (6th Cir. 2020).

80. Alan N. Resnick, *Bankruptcy as a Vehicle for Resolving Enterprise-Threatening Mass Tort Liability*, 148 U. PA. L. REV. 2045, 2046 (2000).

81. See Melissa B. Jacoby, *Fake and Real People in Bankruptcy*, 39 EMORY BANKR. DEVS. J. 497, 508-09 (2023); George W. Kuney, *Misinterpreting Bankruptcy Code Section 363(f) and Undermining the Chapter 11 Process*, 76 AM. BANKR. L.J. 235, 247-48, 261-62 (2002).

A. *The High Stakes of Purdue’s Bankruptcy Maneuver: Channeling Injunctions and Releases for Solvent Nondebtors to Achieve Global Settlement*

In fall 2019, Purdue Pharma filed for Chapter 11 as part of a tentative deal struck with thousands of local governments, states, U.S. territories, hospitals, and other parties involved in the MDL. The bankruptcy filing immediately utilized Bankruptcy Code Section 362 – a provision that allows the court to temporarily halt all federal and state litigation – to bring everyone to the negotiating table.<sup>82</sup> This stay persisted for years, included all State AG actions, class actions, and multidistrict litigation, and also created the leverage that made the more controversial aspect of the deal possible.<sup>83</sup>

To complete the deal and assuage concerns that Purdue had lost value due to its family owners “siphoning” company assets in advance of Chapter 11, Purdue’s lawyers relied on an innovative pair of remedies in exchange for the Sacklers’ personal \$5.5 to \$6 billion contribution: third-party releases from all future civil liability for the Sacklers and a channeling injunction that funneled already filed lawsuits against the Sacklers into the Purdue debtor trust instead.<sup>84</sup> This is the unorthodox bankruptcy procedure the Court granted certiorari to decide.

The stakes are high. Although public litigation against other companies involved in the opioid crisis did continue outside of the bankruptcy, the locus of power over the public face of the nation’s most intractable public-health litigations – Purdue Pharma and the Sackler family – shifted away from the state and federal trial courts into one, solitary bankruptcy proceeding.

Channeling injunctions, which permanently enjoin all lawsuits against certain parties and funnel them into a trust, are a core part of the maneuver. Initially, such injunctions were designed to shield only the reorganized corporation (e.g., Purdue Pharma itself) – not nondebtors like the Sackler family. But in the 1980s, the bankruptcy court overseeing the Johns-Manville Corporation Chapter 11 filing relied on its broad equitable authority under Bankruptcy Code Section 105 to do two things: (1) force present and future asbestos plaintiffs to seek

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82. 11 U.S.C. § 362 (2018); Voluntary Petition for Non-Individuals Filing for Bankruptcy, *In re Purdue Pharma L.P.*, No. 19-23649 (Bankr. S.D.N.Y. Sept. 15, 2019).

83. There is some question if the automatic stay, when used in this durable manner, goes beyond the limits of protections under Rule 65 of the Federal Rules of Civil Procedure. See Melissa B. Jacoby, *Sorting Bugs and Features of Mass Tort Bankruptcy*, 101 TEX. L. REV. 1745, 1762 (2023).

84. Lindsey D. Simon, *Bankruptcy Grifters*, 131 YALE L.J. 1154, 1188-91 (2022); Associated Press, *Sackler Family Is Willing to Pay More in Purdue Opioids Settlement, Mediator Says*, NAT’L PUB. RADIO (Feb. 18, 2022, 7:37 PM), <https://www.npr.org/2022/02/18/1081923591/sackler-family-is-willing-to-pay-more-in-purdue-opioids-settlement-mediator-says> [<https://perma.cc/8CAM-HZFW>].

compensation from the trust, and (2) release asbestos plaintiffs' claims against *nondebtor* third parties with very specific financial relationships to the debtor.<sup>85</sup> Congress blessed these maneuvers in the asbestos context by enacting § 524(g) to assure asbestos defendants that they could use the same strategy.<sup>86</sup>

This new § 524(g) also recognized a limited "claim" for people who had been exposed to asbestos, but who had not yet become sick.<sup>87</sup> And instead of allowing plaintiffs to sue certain nondebtor defendants in court, the channeling injunction would force present and future asbestos plaintiffs to sue the new bankruptcy trust, which would be funded by the debtor and its nondebtor affiliates.<sup>88</sup> These channeling injunctions thus protected both the debtor manufacturer and a narrow group of nondebtor third parties.<sup>89</sup> In exchange, released nondebtors had to contribute substantial funds to the trust, which facilitated settlement.

For asbestos claimants, § 524(g) required a supermajority to approve the reorganization plan.<sup>90</sup> But the voting structure did not differentiate based on the severity of plaintiffs' injuries. Everyone had the same vote to approve or reject the plan—regardless of whether they had mesothelioma or a far less severe disease. This led to worries that those who were sickest could have their vote diluted.

In response, Congress created a commission in 1994 to study the use of bankruptcy.<sup>91</sup> That body ultimately recommended a precondition before using bankruptcy to respond to a mass tort: the company had to be in real financial distress. Some future claims, like a failure to warn about new dangers associated with a product, could not be released by the bankruptcy.<sup>92</sup> Parties had limited rights to try cases in federal court to establish liability. And no nonconsensual releases

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85. *In re Johns-Manville Corp.*, 68 B.R. 618, 624-25, 638 (Bankr. S.D.N.Y. 1986).

86. *See Special Problems in Bankruptcy: Hearing Before the Subcomm. on Cts. & Admin. Prac. of the S. Comm. on the Judiciary*, 102d Cong. 61-63 (1991) (statement of W.T. Stephens, Chairman of the Board, President, and Chief Executive Officer, Manville Corp.) ("Specifically, Mr. Chairman, I am here to urge this subcommittee to codify the permanent nature of court-ordered and -issued injunctions in the context of a chapter 11 reorganization proceeding").

87. *Bookman & Noll*, *supra* note 33, at 771-72.

88. *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 751-52, 771 (E. & S.D.N.Y. 1991), *vacated*, 982 F.2d 721 (2d Cir. 1992), *modified on reh'g*, 993 F.2d 7 (2d Cir. 1993).

89. 11 U.S.C. § 524(g)(4)(A)(ii)-(iii) (2018).

90. *Id.* § 524(g) (requiring seventy-five percent consent of a class of asbestos claims to approve a channeling injunction). This requirement can be evaded by manipulating the pool of claimants who vote. *See, e.g., Jacoby*, *supra* note 83, at 1745 n.55, 1756-58.

91. NAT'L BANKR. REV. COMM'N, *supra* note 7.

92. *Id.* at 348.

would be granted to third parties.<sup>93</sup> But none of these recommendations ever became law.

Meanwhile, nondebtor releases and channeling injunctions quickly spread beyond the authority Congress had granted for asbestos and without the minimal protections in § 524(g). With § 524(g) technically silent on the use of third-party releases outside of asbestos,<sup>94</sup> and the Code's equity provision allowing bankruptcy courts to "issue any order, process, or judgment that is necessary or appropriate" to fulfill the Code's provisions,<sup>95</sup> enterprising attorneys convinced some bankruptcy judges to issue channeling injunctions and nondebtor releases outside of asbestos.<sup>96</sup>

Before long, Dow Corning used the bankruptcy court's general equitable powers under § 105(a) to channel all the women who claimed their silicone breast implants were defective into a trust with a reorganization plan that released not only Dow Corning, but also its insurers, shareholders, doctors, and distributors from liability.<sup>97</sup> A.H. Robins Company used its bankruptcy to pull in all the women suing over its faulty Dalkon Shield contraceptive device and shield the Robins family as well as the company's officers, directors, and employees.<sup>98</sup> Delaco channeled claims by its Dexatrim diet pill users (who experienced heart problems and strokes) and protected not only its insurers, but also its supply chain — drug vendors and distributors.<sup>99</sup> These bankruptcy reorganizations

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93. Jacoby, *supra* note 83, at 1749–52; Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 602, 108 Stat. 4106, 4147; NAT'L BANKR. REV. COMM'N, *supra* note 7, at 24 (recommending that creditors declining to release nondebtor parties would "not be bound to release their claims").
94. See, e.g., 140 Cong. Rec. H10766 (daily ed. Oct. 4, 1994) (statement of Rep. Brooks) ("[T]he special rule being devised for the asbestos claim trust/injunction mechanism is not intended to alter any authority bankruptcy courts may already have to issue injunctions").
95. 11 U.S.C. § 105(a) (2018); Foohey & Odinet, *supra* note 34, at 1284.
96. Peter M. Boyle, *Non-Debtor Liability in Chapter 11: Validity of Third-Party Discharge in Bankruptcy*, 61 *FORD. L. REV.* 421, 431-32 (1992).
97. *In re Dow Corning Corp.*, 280 F.3d 648, 657-58 (6th Cir. 2002); see Jason J. Jardine, *The Power of the Bankruptcy Court to Enjoin Creditor Claims Against Nondebtor Parties in Light of 11 U.S.C. § 524(e)*: *In re Dow Corning Corp.*, 2004 *B.Y.U. L. REV.* 283, 298-300. Courts also rely on 11 U.S.C. § 363(f) and (h), which "explicitly provide for the channeling of claims in this manner" and conclude that "[t]he court's authority to channel claims is . . . 'granted by implication,' even absent statutory provisions." *In re Johns-Manville Corp.*, 68 B.R. 618, 625 (Bankr. S.D.N.Y. 1986).
98. Ralph Brubaker, *Mandatory Aggregation of Mass Tort Litigation in Bankruptcy*, 131 *YALE L.J.F.* 960, 961 (2022) (noting that like the Sacklers, the Robins family was accused of defrauding the public).
99. *In re The Delaco Co.*, No. 04-10899 (Bankr. S.D.N.Y. Feb. 17, 2006); Gary Svirsky, Tancred Schiavoni, Andrew Sorkin & Gerard Savarrese, *A Field Guide to Channeling Injunctions and Litigation Trusts*, *N.Y. L.J.* (July 13, 2018), <https://www.law.com/newyorklawjournal/2018/>

provided a vital means to cram settlements down on nonconsenting mass-tort claimants.

Insurance companies and others who must arguably indemnify debtors for personal-injury claims are one matter, but as the foregoing examples show, protection for nondebtors has extended well beyond that.<sup>100</sup> So it came as little surprise when defective airbag manufacturer Takata used its bankruptcy to protect car manufacturers, and USA Gymnastics used it to protect other individuals connected to sex abuser Dr. Larry Nassar’s training facility.<sup>101</sup> This practice of nondebtor releases and channeling injunctions had been mostly noticed only by the bankruptcy gurus—until *Purdue*.

*B. Unorthodox Bankruptcy’s Next Maneuvers: The Texas Two-Step*

If the Supreme Court in *Purdue* paves the way for creative uses of § 105, more than just third-party releases are at stake. Consider the so-called “Texas Two-Step,” a more recent innovation in which corporate defendants use divisional mergers to shed mass-tort liabilities and avoid litigation.

Under this maneuver, in simple terms, a company first uses authority granted under state corporate law to divide itself into two new companies: “RichCo,” which receives the company’s assets and operating business, and “PoorCo,” which inherits the mass-tort liability plus a funding agreement saying that RichCo will pay PoorCo’s tort obligations.<sup>102</sup> Second, rather than litigating all the tort claims it is given, PoorCo is poor enough to file for bankruptcy and take advantage not only of bankruptcy court’s centralizing authority but also of the shift in leverage that bankruptcy gives to the debtor. So, PoorCo files for Chapter 11. Formally known as a “divisional merger,” this technique has typically been invoked under Texas law, thus its more colloquial name, “Texas Two-Step.” But because this technique is also permitted in Delaware, the corporate home of many of the country’s Fortune 500, this tool carries national consequences.<sup>103</sup>

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07/13/channelling-injunctions-and-litigation-trusts-a-field-guide [https://perma.cc/T8DP-JZLA].

100. A circuit split exists over nonconsensual nondebtor releases, with the Fifth, Ninth, and Tenth Circuits prohibiting them and the Fourth, Sixth, Seventh, and Eleventh Circuits permitting them. Brubaker, *supra* note 98, at 964 n.15 (2022).

101. Simon, *supra* note 84, at 1178-79.

102. Ralph Brubaker, *Assessing the Legitimacy of the “Texas Two-Step” Mass-Tort Bankruptcy*, 43 BANKR. L. LETTER 1, 2 (2023); Samir D. Parikh, *Mass Exploitation*, PENN. L. REV. ONLINE 53, 57-59 (2022).

103. TEX. BUS. ORGS. CODE ANN §§ 1.002(55)(a), 10.001-.010 (West 2023); ARIZ. REV. STAT. ANN. §§ 29-2101 to -2703 (2023); DEL. CODE ANN. tit. 6, § 18-217(b)-(c) (2023); KAN. STAT. ANN. § 17-7685a (2023); 15 PA. CONS. STAT. § 361-368 (2023).



Circuit courts have split over how to handle divisional mergers. The debate centers on the extent to which companies must file bankruptcy petitions in good faith<sup>104</sup> – something that wasn’t at issue in earlier unorthodox bankruptcy maneuvers like in *John-Manville Corporation*<sup>105</sup> or *Dow Corning*.<sup>106</sup>

In January 2023, the Third Circuit reversed Johnson & Johnson’s move to spin off its liability to talc claimants (who alleged that talc, possibly containing asbestos, caused ovarian cancer) into LTL Management LLC (the PoorCo), which would file for bankruptcy.<sup>107</sup> The case ultimately came down to whether LTL was really in “financial distress.”<sup>108</sup> In holding it was not, the Third Circuit explained that testing a debtor’s financial troubles was “necessary because bankruptcy significantly disrupts creditors’ existing claims against the debtor.”<sup>109</sup> Chapter 11, it recognized, gives courts the power “to give those businesses teetering on the verge of a fatal financial plummet an opportunity to reorganize on solid ground and try again, not to give profitable enterprises an opportunity to evade contractual or other liability.”<sup>110</sup>

The Fourth Circuit came out the opposite way in *In re Bestwall, LLC*.<sup>111</sup> There, Georgia-Pacific (RichCo), which makes tissue and packaging materials, spun off its asbestos liability into Bestwall, LLC (PoorCo), which filed for Chapter 11 in the Western District of North Carolina a month later and detailed the “shortcomings . . . and abuses in the tort system.”<sup>112</sup> PoorCo then requested a preliminary injunction to prevent third parties from pursuing asbestos-related personal-injury lawsuits that would be protected by a channeling injunction in its Chapter 11 plan.<sup>113</sup> When the bankruptcy court granted the preliminary injunction, a committee of asbestos claimants argued that the bankruptcy court had overstepped its jurisdiction.<sup>114</sup> It could not, they posited, enjoin mass-tort litigation against a solvent RichCo like Georgia Pacific. But using a standard that

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104. 11 U.S.C. § 1112(b) (2018).

105. *In re Johns-Manville Corp.*, 36 B.R. 727, 730 (Bankr. S.D.N.Y. 1984).

106. *In re Dow Corning Corp.*, 244 B.R. 673, 676-77 (Bankr. E.D. Mich. 1999).

107. *In re LTL Mgmt., LLC*, 64 F.4th 84, 110-11 (3d Cir. 2023).

108. *Id.* at 102-07.

109. *Id.* at 103.

110. *Id.* (quoting *In re Cedar Shore Resort, Inc.*, 235 F.3d 375, 381 (8th Cir. 2000)).

111. 71 F.4th 168 (4th Cir. 2023).

112. Informational Brief of Bestwall LLC at 5, *In re Bestwall LLC*, 606 B.R. 243 (Bankr. W.D.N.C. 2019) (No. 17-31795).

113. 71 F.4th at 175-76.

114. *Id.* at 173.

did not turn purely on financial distress, the Fourth Circuit sided with Best-wall.<sup>115</sup>

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The foregoing ad hoc bankruptcy procedures for nondebtors—procedures invoked under the court’s general equitable powers under § 105(a) and never expressly blessed by Congress outside of asbestos—have achieved success where others have failed: enabling mandatory settlement of mass-tort victims’ claims against solvent *nondebtors* across all federal and state courts.<sup>116</sup> The problem isn’t bankruptcy per se, it’s the use of bankruptcy in cases by nondistressed companies to escape any kind of tort process, and the beneficial discovery, accountability, public participation, and claim testing that goes with it. Indeed, in the 3M bankruptcy litigation, the court recognized that allowing 3M to use bankruptcy to escape the tort system risked turning bankruptcy courts into courts of “general jurisdiction”<sup>117</sup>—as opposed to courts with special powers to help companies in special circumstances.<sup>118</sup>

### III. BANKRUPTCY AND LOST LITIGATION VALUES

No system does all things. Bankruptcy is one response to the public problems mass torts present. But its chief advantage—an all-encompassing solution to a litigation onslaught whose primary focus is on efficient distribution of assets—is precisely what imperils many other litigation values. Those tradeoffs are clearer in the face of true insolvency, but in that context, there is often some tort litigation first—bankruptcy is not sought as a way to avoid litigation altogether.

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<sup>115</sup>. *Carolin Corp. v. Miller*, 886 F.2d 693, 701-02 (4th Cir. 1989).

<sup>116</sup>. Brubaker, *supra* note 98, at 966.

<sup>117</sup>. *In re Aearo Techs. LLC*, No. 22-02890, 2023 WL 3938436, at \*21 (Bankr. S.D. Ind. June 9, 2023) (“[R]equiring a valid bankruptcy purpose and a debtor in need of bankruptcy relief protects this Court’s jurisdictional integrity. Otherwise, a bankruptcy court risks becoming another court of general jurisdiction, which it most decidedly is not.”).

<sup>118</sup>. Arguments that *litigation* itself is a special event that requires the bankruptcy court depends on a variety of false assumptions, including the notion that the existence of high-number single jury verdicts means that litigation is *per se* unaffordable—when of course such verdicts don’t resemble payouts in mass settlements in court. For instance, in the pelvic mesh litigation, there was a \$41 million verdict against Johnson & Johnson, but the average settlement was closer to \$40,000. Matthew Goldstein, *As Pelvic Mesh Settlements Near \$8 Billion, Women Question Lawyers’ Fees*, N.Y. TIMES. (Feb. 1, 2019), <https://www.nytimes.com/2019/02/01/business/pelvic-mesh-settlements-lawyers.html> [https://perma.cc/L9NL-X6JB].

If the goal of mass-tort litigation were simply to reallocate assets, bankruptcy might produce superior value, though that is a conclusion that requires empirical testing and many have suggested that tort creditors do worse than other bankruptcy claimants when they must share the pie. Our aim is to insist that mass-tort litigation has many goals other than merely efficiently providing closure for defendants – and to insist as well that scholars extolling bankruptcy engage with those goals more than they have.<sup>119</sup>

Tort law, and public litigation more broadly, has many aims: deterring wrongdoers, empowering and compensating victims, testing and valuing claims, generating public goods by making information available to regulators, fostering democracy and voice by allowing litigants and the public to participate in trials, developing legal doctrine, and ensuring a forum in which all citizens are viewed equally before the law.<sup>120</sup>

For the last twenty-five years, scholars have proposed numerous ways to retrofit bankruptcy to better effectuate traditional litigation values, but their ideas seem not to have impacted practice.<sup>121</sup> Those who argue the Bankruptcy Code could be amended to generate litigation values assume that bankruptcy judges will eagerly conduct trials or refer cases to district and state court for doctrinal development, liability-related discovery, or bellwethers. As we have noted, such proposals have never progressed. Moreover, the inefficiency and cost of such a scenario contravenes bankruptcy's efficient and cost-saving ideology – a main reason that companies turn to it in the first place. Parties seek out bankruptcy for its streamlined proceedings and to prevent ballooning litigation costs and the burdens of discovery. A world in which bankruptcy judges are routinely adjudicating tort claims – or sending cases back and forth to district or state courts to do so – seems unlikely regardless of the possibilities in the Code.

This is not to say that such guardrails would not be welcome, or even required, especially for tort defendants who come to bankruptcy without first engaging in any pretrial tort process. But that may require a massive cultural shift in bankruptcy courts. At the same time, we recognize that the tort litigation system itself has moved further and further away from the paradigm of discovery, law development, jury trial, and the individual day in court. We recognize that if proceedings in Article III federal and state courts are not delivering enough on traditional litigation values themselves; that undercuts claims that bankruptcy is a poorer alternative, especially given bankruptcy's efficiency and finality benefits.

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119. Cf. Casey & Macey, *supra* note 17, at 973-74 (arguing that “bankruptcy proceedings are well-suited to resolving mass tort claims” and serve many other important goals but reforms remain necessary); Foohey & Odinet, *supra* note 34, at 1261 (same).

120. See generally ALEXANDRA LAHAV, IN PRAISE OF LITIGATION (2017) (presenting arguments in favor of widespread litigation).

121. E.g., NAT'L BANKR. REV. COMM'N, *supra* note 7; Foohey & Odinet, *supra* note 34, at 1267-68.

In previous work, we have argued how litigation values could be better elevated in MDL. In this Part, we offer a similar analysis for bankruptcy, identifying the core values that litigation provides and the risks unorthodox bankruptcy may pose to them.

A. *Accountability, Plaintiffs' Rights, and a Day in Court*

Accountability—placing fault—is a central reason why people sue. So too is the opportunity to tell one's side of the story. At the heart of *Martin v. Wilks* and *Mathews v. Eldridge*<sup>122</sup> lies the fundamental concept that every person is entitled to their “day in court.”<sup>123</sup> Jerry Mashaw long ago suggested that the opportunity to be heard is core to one's “dignity” as a litigant and is essential to equality.<sup>124</sup> And as Tom Tyler observes, procedural legitimacy is about more than just outcomes: “When dealing with judicial authorities . . . people want to have an opportunity to . . . tell their side of the story . . . before decisions are made . . . .”<sup>125</sup>

It is true that most complex (and even much individual) litigation settles, and that settlements often intentionally avoid any acceptance of responsibility. It is true too that jury trials are increasingly rare, especially in aggregate litigation. And we share the view of scholars like Samuel Issacharoff and Judith Resnik that aggregation is critical for individuals to access court.<sup>126</sup> We are not suggesting an impractical return to individual litigation.

But plaintiffs' rights are significantly burdened in bankruptcy. Unlike even mandatory multidistrict litigation, no one can opt out of bankruptcy by dismissing their lawsuit and suing in state court instead. In addition to norms against trials and in favor of streamlining already discussed, the voting rules in bankruptcy have an additional impact: the ability of non-tort creditors to approve the reorganization without trial or pretrial process.

Not all plaintiffs' claims are equal, nor would they receive the same weight in court. But when a defendant files for Chapter 11, pending tort claims—even if still unproved and merely just filed—are all treated simply as debts to pay. Plaintiffs “win” in that sense, without any adjudication: bankruptcy plans typically

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122. *Martin v. Wilks*, 490 U.S. 755 (1989); *Mathews v. Eldridge*, 424 U.S. 319 (1976).

123. 490 U.S. 755, 762 (1989) (quoting 18A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4449, at 417 (3d ed. 2023)).

124. Mashaw, *supra* note 25, at 49–54.

125. Tom R. Tyler, *The Psychology of Aggregation: Promise and Potential Pitfalls*, 64 DEPAUL L. REV. 711, 713 (2015).

126. See Samuel Issacharoff, *Assembling Class Actions*, 90 WASH. U. L. REV. 699, 710 (2013); Judith Resnik, *Reorienting the Process Due: Using Jurisdiction to Forge Post-Settlement Relationships Among Litigants, Courts, and the Public in Class and Other Aggregate Litigation*, 92 N.Y.U. L. REV. 1017, 1028 (2017).

distribute resources without testing claims' merits or finding liability. This means that low-value claims may get overcompensated so long as the plan garners enough votes.

Melissa Jacoby observes that bankruptcy judges are inclined not to treat corporate debtors “as culpable actors capable of independent wrongdoing,” which “makes bankruptcy an unreliable partner in the broader societal project of deterring, punishing, and remedying serious corporate misconduct.”<sup>127</sup> And in some cases, prepackaged deals arrive in court with private terms and arrangements presented to the judge as a *fait accompli* that a bankruptcy court cannot meaningfully refuse.<sup>128</sup>

Nondebtors arguably pose even bigger problems for both accountability and plaintiffs' day in court. In a products-liability case, for example, all the parties in a chain of distribution – from manufacturers and distributors to commercial retailers – are potential defendants. Take *Temple v. Synthes Corp.*, where the facts concerned both a defective plate made for long-bone leg-type fractures and a doctor experimenting on the plaintiff's back without consent.<sup>129</sup> When the Supreme Court allowed Billy Temple to sue the manufacturer and the doctor in separate lawsuits, it upheld plaintiffs' right to choose when, where, and whom to sue.<sup>130</sup>

But unorthodox bankruptcy moves that also release nondebtors deprive plaintiffs of this option and undermine their substantive and procedural entitlements to sue those parties where and how they wish.<sup>131</sup> Indeed, the debtor-defendant chooses the forum and the plaintiffs' tort cases against nondebtors are shut down. All this without even the finding of accountability that – in addition to money – often motivates a lawsuit.<sup>132</sup> The bankruptcy court in *Purdue* expressly said of the Sacklers that the deal was not “an adjudication of the claim . . . [i]t is part of the settlement,” not a finding of liability.<sup>133</sup>

Bankruptcy may also serve as an especially effective means to silence claimants' voices.<sup>134</sup> Not only does filing create a deadline for mass-tort claimants to reveal themselves – one that, importantly, trumps state statutes of limitation –

127. Jacoby, *supra* note 81, at 501.

128. See, e.g., Adam J. Levitin, *Purdue's Poison Pill: The Breakdown of Chapter 11's Checks and Balances*, 100 Tex. L. Rev. 1079, 1092 (2022); Melissa B. Jacoby & Edward J. Janger, *Ice Cube Bonds: Allocating the Price of Process in Chapter 11 Bankruptcy*, 123 Yale L.J. 862, 866 (2014).

129. 498 U.S. 5, 5-6 (1990).

130. *Id.* at 7-8.

131. See Brubaker, *supra* note 98, at 966-71.

132. Burch & Williams, *supra* note 69, at 1865.

133. *In re Purdue Pharma L.P.*, 633 B.R. 53, 98 (Bankr. S.D.N.Y. 2021).

134. Foohey & Odinet, *supra* note 34, at 1266.

but it also stays all other litigation. In that sense, it has become a powerful tool for short-circuiting civil trials and the bad press that can come from pretrial filings, discovery, and trial, the principal opportunities plaintiffs have to tell their stories.

When the Archdiocese of Saint Paul & Minneapolis filed for Chapter 11 bankruptcy on the eve of three civil trials,<sup>135</sup> the court imposed a filing deadline on sex-abuse survivors. To salvage their tort claims, they had to come forward within six months, despite the psychological turmoil they faced and the much longer state-law statutes of limitations.<sup>136</sup> Revlon filed for bankruptcy before the release of a National Institute of Health (NIH) report linking the company's hair straightening products to cancer. When the NIH report came out, the judge gave potential claimants just one month to file their claims – causing an uproar due to the much shorter window than most mass-torts claimants have.

### B. *Due Process and Adequate Representation*

Due process entails the right to be heard before a public body with legitimate authority over the parties. In aggregate litigation, individuals' right to be heard is often satisfied, as Fiss has noted, through their "right of representation"<sup>137</sup> by others who share and advance their interests. With respect to courts' power, we have previously detailed our concerns about how MDL courts often purport to exercise jurisdiction over parties where jurisdiction is lacking or questionable.<sup>138</sup>

We also have raised general concerns about what we call "plaintiffs' process."<sup>139</sup> Civil procedure is fixated on due process for defendants. But unorthodox civil procedure often raises serious questions about plaintiffs' due-process rights, especially when plaintiffs' cases are moved across the country (as in MDL or bankruptcy), to different courts with new counsel, with little to no opportunity to opt out or ensure counsel represents their interests.

In bankruptcy, the defendants are the ones who are filing, choosing their fora in a way they do not generally get to do in ordinary procedure. And plaintiffs – regardless of where they live, who represents them, or whether and where they initiated their case – are forced to join them. While these moves are formally

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<sup>135.</sup> Foohey & Odinet, *supra* note 34, at 1299 (citing Jean Hopfensperger, *St. Paul Archdiocese Declares Bankruptcy, Calling It 'Fairest' Recourse*, STAR TRIB. (Feb. 2, 2015), <https://www.startribune.com/jan-16-archdiocese-s-bankruptcy-freezes-lawsuits/288823511> [<https://perma.cc/GR2S-4S9Q>]).

<sup>136.</sup> *Id.* at 1300.

<sup>137.</sup> Owen M. Fiss, *The Allure of Individualism*, 78 IOWA L. REV. 965, 970-71 (1993).

<sup>138.</sup> Burch & Gluck, *supra* note 11.

<sup>139.</sup> *Id.*

authorized in the bankruptcy context, thanks to the § 362(a) stay, we wonder whether they are constitutionally justified if the debtor is not financially distressed or if nondebtor defendants also stand to benefit. Indeed, in the 3M litigation, the bankruptcy court relied on this notion of improper authority to reject the filing, raising concerns about its own jurisdictional authority.<sup>140</sup>

With respect to representation, it is possible that bankruptcy courts' voting measures accord more protections than MDL. It is this right to adequate representation that we have argued is lacking in many MDLs, because there are no due-process guardrails over counsel selection or subclassing according to interests as there are in class actions. In bankruptcy, before a reorganization plan is approved, it must be put to a vote by creditors and interest holders.<sup>141</sup> In theory, each mass-tort plaintiff with a claim in the bankruptcy has a chance to approve or disapprove of the plan, though a "positive" vote binds dissenters too.<sup>142</sup>

On the ground, however, this mode of voting may fail to provide adequate representation. First, placing all mass-tort claimants into a single voting class gerrymanders power in the hands of plaintiffs' lawyers whose financial interest in ensuring that the plan goes through may be at odds with claimants' desires, particularly if they have severe injuries.<sup>143</sup> A single class runs the risk that plaintiffs with low-merit, less vetted claims will receive awards at the expense of true victims; again, this is because in bankruptcy cases that lack some pretrial process, the court looks to settle all filed claims without necessarily testing the merits.<sup>144</sup> Second, the vote occurs only among those who actually vote, and commentators have raised concerns about sufficient outreach and notice to current claimants — much less those who might have future tort claims.<sup>145</sup> In Boy Scouts of America's bankruptcy, fewer than 57,000 of over 82,000 abuse victims voted, and 8,000 of those who voted cast votes against the plan.<sup>146</sup> In Purdue Pharma's bankruptcy,

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140. *In re Aeero Techs. LLC*, 642 B.R. 891, 902 (Bankr. S.D. Ind. 2022); cf. *Stern v. Marshall*, 564 U.S. 462, 482 (2011) (at the same time recognizing that "most mass tort claims in a bankruptcy are resolved not through jury trials before a district court, but by consensual resolution through a plan of reorganization," and that it is "also accurate to say that it is unlikely that all of the 290,000 [p]laintiffs will have a jury trial in the MDL").

141. 11 U.S.C. § 1125(a) (2018).

142. *Id.* § 1129; Edward J. Janger, *Aggregation and Abuse: Mass Torts in Bankruptcy*, 91 FORDHAM L. REV. 361, 368-73 (2022).

143. NAGAREDA, *supra* note 50, at 169; *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 245-46 (3d Cir. 2004).

144. See Jacoby, *supra* note 83, at 1757-58.

145. See Jacoby, *supra* note 83, at 1766.

146. *In re Boy Scouts of Am.*, 642 B.R. 504, 518 (Bankr. D. Del. 2022); Jacoby, *supra* note 83, at 1756.

58,000 opioid survivors voted yes, 2,600 voted no, but 69,000—well over half of all survivors—didn't vote at all.<sup>147</sup>

Additionally, bankruptcy still fares worse than class actions with respect to due-process protections like adequate representation.<sup>148</sup> To determine which claims can be grouped together, Chapter 11 requires only that they be “substantially similar,” not that the grouping be free of disabling conflicts of interest as in class actions.<sup>149</sup> And the debtor gets the first crack at drawing those lines. The norm is to put mass-tort claimants into a single bucket—regardless of differences in insurance coverage, injury severity, or whether the injury has even manifested.<sup>150</sup>

If blending claimants together creates a risk that their attorneys will favor one type of claimant over another, then each subgroup deserves its own representative.<sup>151</sup> As Richard A. Nagareda explained of *Amchem*, “[a] good deal, in itself, cannot make for a permissible class . . . because the permissibility of the class is what legitimizes the dealmaking power of class counsel in the first place.”<sup>152</sup>

### C. Information Production

Information production, especially from big corporations, is another distinct benefit of litigation, especially aggregate litigation.<sup>153</sup> And producing information is often critical to another goal of public-health-related tort litigation: teeing up issues for legislative intervention. From tobacco, to guns, to opioids, litigants turned to the courts as a second-best solution after legislative action had failed. It was discovery in litigation that then proved critical in illuminating dangerous industry tactics.

For example, in one of the few tort cases to proceed to verdict against gun manufacturers, Connecticut litigants coming out of the Newtown school

147. See Jacoby, *supra* note 83, at 1756; RYAN HAMPTON, UNSETTLED: HOW THE PURDUE PHARMA BANKRUPTCY FAILED THE VICTIMS OF THE AMERICAN OVERDOSE CRISIS 215-20 (2021).

148. This is true despite appointing a separate representative for future tort claimants because of persistent problems with repeat players. NAGAREDA, *supra* note 50, at 174-78.

149. 11 U.S.C. § 1122(a) (2018); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 627-28 (1997).

150. See, e.g., *In re AOV Indus., Inc.*, 792 F.2d 1140, 1150 (D.C. Cir. 1986).

151. *Amchem*, 521 U.S. at 627; PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.07(a)(1)(B) (AM. LAW INST. 2010); Samuel Issacharoff & Richard A. Nagareda, *Class Settlements Under Attack*, 156 U. PA. L. REV. 1649, 1677-1700 (2008).

152. Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 184 (2003).

153. Elizabeth Chamblee Burch & Alexandra D. Lahav, *Information for the Common Good in Mass Torts*, 70 DEPAUL L. REV. 345, 379 (2021).



massacre produced discovery evidence that gun manufacturers' advertising campaigns intentionally used video-game-type military imagery to target young men prone to violence.<sup>154</sup> And the tobacco litigation elucidated damning information about industry practices. Political actors often require such evidence to break legislative impasse and act against powerful companies. Litigation cannot usually solve a public-health crisis, but it can produce settlements, information, and attention that spur the needed policy change.<sup>155</sup>

In bankruptcy, by contrast, the kind of financial information that most courts focus on – which can sometimes include robust disclosures about a debtor's "assets and liabilities" – is not the same kind of discovery into liability for health-harming industry behavior one saw flowing from tobacco, guns, or opioid litigation. In opioids, productive discovery came through litigation in the MDL. Even more came through the persistence of decentralized litigation, as various cases in state courts contributed to what was revealed. To the extent that aspects of the Purdue bankruptcy process resembled the MDL, it is not because bankruptcy was the natural place for that information to be elicited; it is precisely because Purdue participated in the MDL for over a year and a half before filing for bankruptcy. That process teed up the issues and settlement parameters for the bankruptcy court. Indeed, the bankruptcy judge specifically referenced the value of "[t]he extensive discovery in the Opioid MDL, and the discovery coordination it facilitated."<sup>156</sup> As we have emphasized, the more tort claims are fleshed out before bankruptcy – as opposed to seeking bankruptcy to avoid tort process altogether – the fewer concerns we have.

Though it is true that bankruptcy courts have the power to force disclosures,<sup>157</sup> the Code likewise authorizes sealing public records, which, like confidentiality agreements governing discovery in mass-tort litigation, seems to get overused.<sup>158</sup> The Purdue bankruptcy court sealed Purdue Pharma's records,

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154. See First Amended Complaint at 7, *Soto v. Bushmaster Firearms Int'l, LLC*, No. FBTCV156048103S, 2016 WL 2602550 (Conn. Super. Ct. Apr. 14, 2016) (alleging that Bushmaster "attract[s] buyers by extolling the militaristic and assaultive qualities of their AR-15 rifles").

155. Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 *YALE L.J.* 350, 367-78 (2011).

156. In re Purdue Pharma L.P., 635 B.R. 26, 50 (S.D.N.Y. 2021). The victim impact statements that Joshua C. Macey & Anthony J. Casey laud as coming forth in the bankruptcy process are not the same as discovery from the companies about questionable industry practice. See Anthony J. Casey & Joshua C. Macey, *Bankruptcy by Another Name*, 133 *YALE L.J.F.* (forthcoming 2024).

157. See, e.g., 11 U.S.C. § 521(a) (2018); Simon, *supra* note 84, at 1207.

158. Jacoby, *supra* note 81, at 512; Burch & Lahav, *supra* note 153, at 364-79.

forcing news organizations to demand transparency.<sup>159</sup> And when the largest U.S. Roman Catholic Diocese filed for bankruptcy, commentators complained that the defendants were using the process to conceal information from the public.<sup>160</sup> The organization Survivors Network of Those Abused by Priests argued, “Those secrets should come out and the men who allowed abuse to continue should be held responsible. Without full knowledge of what went wrong in these cases, we cannot hope to prevent them again in the future.”<sup>161</sup>

Consider, in contrast, the jury trial against Johnson & Johnson in Oklahoma state court that resulted in a nearly \$500 million verdict in 2019. Although the verdict was eventually overturned on tort-law grounds, the trial nevertheless produced discovery and testimony about the industry’s marketing practices that remain relevant to policy and corporate reforms.<sup>162</sup> And the appeal clarified public nuisance law in the state — something that would not have happened in bankruptcy.

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159. Reporters Committee, *News Organizations Urge Federal Court to Unseal Judicial Records in Purdue Pharma Bankruptcy Case*, REPS. COMM. FOR FREEDOM PRESS (Nov. 23, 2020), <https://www.rcfp.org/unseal-purdue-pharma-bankruptcy> [<https://perma.cc/27MR-VLR8>]. Unsealed documents from settled lawsuits against Purdue Pharma in Florida, West Virginia, and Washington led to a National Bureau of Economic Research working paper, which found that “the introduction and marketing of OxyContin explains a substantial share of overdose deaths over the last two decades.” Abby E. Alpert, William N. Evans, Ethan M.J. Lieber & David Powell, *Origins of the Opioid Crisis and Its Enduring Impacts* 4 (Nat’l Bureau of Econ. Rsch., Working Paper No. 26500, 2019), <https://www.nber.org/papers/w26500.pdf> [<https://perma.cc/FKA9-K4AZ>].
160. Michael Gold, *Facing 200 Abuse Claims, Diocese Becomes U.S.’s Largest to Seek Bankruptcy*, N.Y. TIMES (Oct. 1, 2020), <https://www.nytimes.com/2020/10/01/nyregion/rockville-centre-diocese-bankruptcy.html> [<https://perma.cc/L7F8-C5YP>].
161. Official SNAP Media Statements, *Civil Lawsuits and a Decline in Attendance Are to Blame According to Church Officials in Buffalo*, SNAP NETWORK (May 12, 2022), [https://www.snapnetwork.org/civil\\_lawsuits\\_and\\_a\\_decline\\_in\\_attendance\\_are\\_to\\_blame\\_according\\_to\\_church\\_officials\\_in\\_buffalo](https://www.snapnetwork.org/civil_lawsuits_and_a_decline_in_attendance_are_to_blame_according_to_church_officials_in_buffalo) [<https://perma.cc/U5HL-QXBJ>].
162. E.g., David Lee, *Witness Accuses Physicians of Overprescribing Opioids*, COURTHOUSE NEWS SERV. (June 11, 2019), <https://www.courthousenews.com/witness-in-oklahoma-trial-claims-he-was-attacked-for-criticizing-opioids> [<https://perma.cc/E4DR-KKX2>]. Some have argued that bankruptcy routinely produces information that leads to government reforms. See Casey & Macey, *supra* note 156. But legislation that was recently introduced relating to mass-harms cases in bankruptcy was about the bankruptcy process itself; not about industry reforms in the underlying area of tort liability, which is our interest. See Nondebtor Release Prohibition Act of 2021, H.R. 4777, 117th Cong. (2021).

#### D. Substantive Law

Development of state law – or the lack thereof – is another major problem we have written about in the MDL context.<sup>163</sup> To state the obvious, tort law would not develop if courts did not render decisions. Today, creative tort lawyers continue to press fresh theories.

In the opioid context, for example, plaintiffs' lawyers tried to apply public-nuisance theory to the epidemic, with mixed results. As AGs brought their own actions, they hammered out the contours of various states' laws.<sup>164</sup> And even in the Opioid MDL, some cases were remanded to transferor courts that applied local law in bellwether trials.<sup>165</sup> In the Johnson & Johnson case, review on appeal clarified the law of public nuisance in the state.<sup>166</sup> Now, other mass-tort claimants are seeking to use the same theory. It was a surprise to some that public-nuisance theory had not been more developed prior to opioids, especially after years of mass products-liability litigation. But aggregate national settlements, including and especially MDL, often generalize about state tort laws rather than develop them. This occurs even though the *Erie* doctrine still requires federal courts to apply the substantive law of the several states and to recognize differences across them.<sup>167</sup>

This is a problem that, as two of us argued,<sup>168</sup> MDL can and should remedy – even if the goal is settlement. MDL judges have ample opportunities to review the applicability of state law or hear motions to dismiss, and some MDL judges are starting to focus on this kind of course correction.<sup>169</sup> The path to address this problem in bankruptcy is less clear. Absent a requirement that the merits of tort cases get properly aired before filing, the lack of law development and fidelity to state substantive entitlements is particularly concerning where the debtor is not in distress.

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163. See Burch & Gluck, *supra* note 11, at 246-48.

164. See, e.g., *In re Opioid Litig.*, No. 400000/2017 (N.Y. Sup. Ct. Dec. 30, 2021) (clarifying how public-nuisance law applies in New York); *State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719 (Okla. 2021) (clarifying how public-nuisance law applies in Oklahoma).

165. *Cnty. of Lake v. Purdue Pharma, L.P.*, 622 F. Supp. 3d 584 (N.D. Ohio 2022); *City & Cnty. of San Francisco v. Purdue Pharma L.P.*, 620 F. Supp. 3d 936 (N.D. Cal. 2022).

166. *State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719 (Okla. 2021).

167. See Gluck & Burch, *supra* note 9, at 64; *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

168. Gluck & Burch, *supra* note 9, at 16-19.

169. Opinion and Order Regarding Application of the Court's Prior Rulings on Manifestation, Incidental Damages (Lost Time), and Unjust Enrichment to All Remaining Jurisdictions in Dispute (MDL Order No. 131 Issues), *In re Gen. Motors LLC Ignition Switch Litig.*, No. 14-md-02543 (S.D.N.Y. Sept. 12, 2018), ECF No. 6028.

Commentators have already documented how the steady increase of cases aggregated in federal courts has left us with a “hallowed out common law.”<sup>170</sup> But for bankruptcy judges, the fit between state law and the industry behavior is rarely even on the table. New tort theories brought by plaintiffs in their suits may lie undeveloped, or never be raised at all.

*E. Decentralized Decision-making: Federalism and Reviewability*

In the world of procedure, observations about the value of having multiple impartial decision makers are far from new. Robert Cover argued that jurisdictional redundancy has utility in reducing error and judicial bias and in encouraging salutary development of the common law through multiple layers of independent judicial review.<sup>171</sup> Cover and Alexander Aleinikoff made a parallel argument for the benefits of a federalist court system, with concurrent jurisdiction in areas like torts.<sup>172</sup> Two of us have written elsewhere how multidistrict litigation circumvents federal appellate review and jurisdictional redundancy for mass torts.<sup>173</sup>

Through its automatic stay, bankruptcy even more dramatically short-circuits the hope of having decentralized decision makers. When we add in the nondebtor releases, the impact goes further still. Nondebtors like the Sacklers have convinced bankruptcy courts to enjoin civil lawsuits against them under standards and circumstances that would never suffice under the Anti-Injunction Act.<sup>174</sup> The injunction issued in favor of the Sacklers even enjoined government actions, something the Bankruptcy Code arguably carves out of the protections afforded to even debtors themselves.<sup>175</sup>

Bankruptcy (like MDL) can stymie any hope a mass-tort claimant has for an appeal, another form of judicial redundancy. In the Archdiocese of Saint Paul & Minneapolis case, for instance, abuse survivors had to seek compensation from

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170. Samuel Issacharoff & Florencia Marotta-Wurgler, *The Hollowed Out Common Law*, 67 UCLA L. REV. 600 (2020).

171. Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 646-75 (1981).

172. Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1050-52 (1977). There are also benefits to redundancy across systems of civil, administrative, and criminal law. Adam S. Zimmerman, *Mass Settlement Rivalries*, 82 U. CIN. L. REV. 381, 383-87, 395-400 (2013).

173. Burch & Gluck, *supra* note 11.

174. 28 U.S.C. § 2283 (2018); *In re Purdue Pharma L.P.*, 633 B.R. 53, 86 (Bankr. S.D.N.Y. 2021). Melissa B. Jacoby has dubbed this practice “tailgating.” Jacoby, *supra* note 83, at 1761-63.

175. 11 U.S.C. § 362(b)(4) (2018); *In re Purdue Pharma L.P.*, 633 B.R. 53, 86 (Bankr. S.D.N.Y. 2021).

a trust, which used a Survivor Claims Reviewer to determine individual awards. The only appellate option was to pay \$500 within ten days to appeal to the same reviewer.<sup>176</sup> As Lindsey D. Simon describes, the “Survivor Claims Reviewer may then, solely on his own discretion, decide to review his own decision, and the amount awarded to the claimant could either go up or down.”<sup>177</sup> Of course, an overly formal approach to jurisdictional divides in mass litigation may push parties to informally coordinate behind closed doors in less publicly accountable ways, and there are benefits to some coordination when national questions are implicated. Moreover, as different courts hear cases in different jurisdictions, there may be less need for redundancy as the litigation matures<sup>178</sup>—the same point we have made in suggesting that tort claims be developed before they come to bankruptcy court.

When it comes to federalism, however, bankruptcy disrupts the constitutional court structures even more than other approaches. Corporate defendants, not plaintiffs, get to choose where to file, which often dictates which precedential norms will govern whether nondebtors can tag along. The result is that most mass-tort claimants will find themselves in a far-flung court without even a formal opportunity to opt out. For state-court claimants (including AGs) who filed at home and expected local adjudication in local courts, these transfers may be particularly dramatic. This non-opt-out, often cross-country-to-a-strange-court-and-strange-lawyer venue transfer in MDL raises serious enough due-process concerns. But at least there, plaintiffs’ claims are in a court that is designed to hear some cases on the merits and are part of a system of apex courts—whether federal courts or state courts—where law development and judicial review on the merits are expected at least some of the time.

Our concern is not with a world in which we have multiple systems and in which bankruptcy is a useful part of that system and the workouts that emerge from it. Our concern is a world in which bankruptcy is the only system—one that litigants seek out to shut off all other options and processes.

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Dispute resolution, payment, and closure alone do not generate public-litigation values. Fiss’s arguments “against settlement” apply even more forcefully to bankruptcy.

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176. Simon, *supra* note 84, at 1201.

177. *Id.*

178. See Frances E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659 (1989).

The dispute-resolution story makes settlement appear as a perfect substitute for judgment . . . by reducing the social function of the lawsuit to one of resolving private disputes: In that story, settlement appears to achieve exactly the same purpose as judgment—peace between the parties—but at considerably less expense to society. . . . In my view, however, the purpose of adjudication should be understood in broader terms. . . . [Judges’] job is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them. . . .

To be against settlement is not to urge that parties be “forced” to litigate. . . . To be against settlement is only to suggest that when the parties settle, society gets less than what appears, and for a price it does not know it is paying. Parties might settle while leaving justice undone.<sup>179</sup>

## CONCLUSION

The significance of the Purdue Pharma bankruptcy settlement goes far beyond the narrow question of whether nondebtor releases are generally permissible in bankruptcy, or whether the Sacklers’ own release was legitimate. It goes to the question of how much procedural innovation we are willing to tolerate in the name of global settlement, even if at the expense of core public-litigation values or short-circuiting trial processes entirely. Approving the Sackler releases, or doing so without clear guardrails to prevent abuses and preserve some traditional tort process before parties turn to bankruptcy, would galvanize even further the unorthodox use of bankruptcy to resolve mass torts. It would result in less information production, less law development, less judicial review, less federalist percolation, less due process, and fewer opportunities for plaintiffs to make their stories heard.

It’s not enough to say that bankruptcy judges may already have some authority to bring traditional pretrial and trial processes to their proceedings (and experts diverge on whether bankruptcy judges faced with personal-injury cases can in fact conduct bellwether and other trials<sup>180</sup>). Such proceedings run counter to bankruptcy’s efficient culture and the reasons parties seek bankruptcy in the first

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179. Fiss, *supra* note 27, at 1085.

180. See 28 U.S.C. § 157(b)(5) (2018) (providing that district courts “shall order that personal injury tort . . . claims shall be tried in the district court in which the bankruptcy case is pending”).

place. It's also the case that even if some judges are inclined to make such changes, and offer more process, the availability of procedure should not hinge on the discretion of individual bankruptcy judges. Bankruptcy is not just complex aggregation of another flavor; especially without some consistency in having trial-like proceedings first, bankruptcy can be more totalizing than the other forms of aggregate litigation and so places even more pressure on the fairness of settlement in our system.

This won't be the last procedural innovation in the quest for global peace. From private settlement to class action, to MDL, and now to bankruptcy, the story of mass torts is as much a story about attorney and judicial inventiveness as it is one about law. The tension between public-litigation values and participation on the one hand and closure on the other has always permeated mass torts – particularly when the costs of coordinating large groups of claims overwhelm the ability of any one person to obtain meaningful relief in their lifetime. Such closure may be justified in some cases, including bankruptcy. But, in those cases, courts carry a heavy burden to ensure that other foundational goals of our public adjudication system have been met.

In the MDL context, we have been arguing for years now that some guardrails are needed to ensure that MDL's risks to constitutional protections do not outweigh its benefits. The same goes for bankruptcy. Otherwise, bankruptcy will continue to evolve as an unorthodox procedural vehicle without barriers until it fails to satisfy the needs of certain kinds of claimants, or state actors rebel at how it undermines federalism. Those actors will then do what all enterprising parties have done for the past forty years: they will innovate anew. The conversation will begin afresh without ever reaching the core questions about what litigation in public-harms cases is for and how to protect it.

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