THE MASS TORT CLAIMANTS' BARGAIN

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This Article charts a path forward for the bankruptcy system to assume the function of implementing fair and efficient collective resolution of mass tort cases in the wake of recent controversies over third-party releases and solvent debtor mass tort chapter 11 cases. Drawing on lessons gleaned from bankruptcy courts' forty years of experience in the field, I propose reforms that at once broaden access to bankruptcy's collective resolution processes for mass tort defendants while addressing the fairness concerns of their victims. Properly constrained, bankruptcy has powerful tools to collectively resolve mass torts: global litigation stays, consolidation of federal and state actions; permanent channeling of filed lawsuits, unfiled present claims and future claims; nondebtor releases to resolve derivative and related mass-tort claims made against co-liable third-party defendants; and, most importantly, classification, solicitation and class-wide voting procedures that may be readily adapted to obtain authentic class-based consent to collective settlements and impose those settlements on outvoted dissenters. Creative and judicious refinement of these mechanisms can appropriately balance negotiating power among claimants and defendants and constructively push the parties toward a fair resolution of mass tort problems.

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I. INTRODUCTION: CHAPTER 11 AS A MASS TORT RESOLUTION PROCEDURE

Modern mass tort litigation cries out for a collective solution. Resolving thousands of tort cases arising out of one course of conduct, through seriatim individual jury trials, in multiple state and federal courts, makes no sense.

Class actions evolved to deal with the opposite pole of the collective litigation spectrum: vindicating fundamentally identical small claims each

uneconomic to individually prosecute but which in the aggregate constitute a substantial legally cognizable injury worthy of being redressed. Halting attempts to adapt that mechanism to deal with mass tort problems (where typically there is far more variation among claimants, and often far greater ability to prosecute individual claims) failed in the 1990s.[1]

That left the field to multidistrict litigation (MDL) proceedings[2] and the Bankruptcy Code.[3] Neither the Multidistrict Litigation Act nor the Code,[4] however, specify a framework for the substantive resolution of mass tort litigation. Judges asserting discretion have filled the void, creating mechanisms for collective resolution of mass tort problems in the absence of legislative guidance or constraint.

Both procedures' handling of recent mass tort cases have elicited controversy and criticism.[5] In particular, the ability of the bankruptcy court to resolve the liabilities of related nondebtor defendants and solvent debtors has elicited heated debate.

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[1] Ortiz v. Fibreboard Corp., 527 U.S. 815, 853 (1999); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 604 (1997). *See also* FED. R. CIV. P. 23 Advisory Committee Note (1966) (suggesting "mass accident" cases inappropriate for class action status); Linda S. Mullenix, *Class Resolution of the Mass Tort Case: A Proposed Federal Procedures Act*, 64 TEX. L. REV. 1039, 1049 (1986) (discussing rejection of attempts to litigate mass torts under Rule 23). *See also* David Marcus, *The Short Life and Long Afterlife of the Mass Tort Class Action*, 165 U. PA. L. REV. 1565 (2017).

[2] Transfer of individual federal civil actions for consolidated pretrial proceedings pursuant to the order of the Judicial Panel on Multidistrict Litigation is authorized by 28 U.S.C. § 1407 (as amended through 2022, the "Multidistrict Litigation Act").

[3] Unless otherwise noted all statutory references in the text are to the United States Bankruptcy Code. 11 U.S.C. § 101 *et seq.* (the "Code").

[4] The only Code section explicitly directed towards mass tort resolution is § 524(g) which codifies a template for the resolution of mass-asbestos cases only based on the landmark *Johns-Manville* chapter 11 plan. Kane v. Johns-Manville Corp. (*In re* Johns-Manville Corp.), 843 F.2d 636 (2d Cir. 1988).

[5] Most critics had assumed that the Multidistrict Litigation Act of 1968 was never designed to handle mass torts. Professor Bradt, however, demonstrates that, although the original impetus behind the Act was mass antitrust litigation, in particular the electrical equipment cases in the early 1960s, the drafters shrewdly anticipated that the MDL process would be used to consolidate future mass tort litigation based on products liability, designed the statute with that goal in mind, and then downplayed its scope and applicability to such matters to allay political opposition. Andrew D. Bradt, *"A Radical Proposal": The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831 (2017). Bradt however takes no position on the criticisms that have been leveled against the MDL process including lack of transparency and judicial review of settlements, insufficient mechanisms to gauge claimant support for settlements, and the agency problems and coercive nature of all or nothing settlements. *Id.* at 908 ("Whether MDL is preferable to other available alternatives is an open question, subject to dynamic and ongoing debate.").

In *Purdue Pharma* the debate focuses on the nondebtor related-party defendant problem. The chapter 11 plan's channeling order makes the *Purdue Pharma* settlement trust solely responsible for all present and future opioid claims against Sackler family members in exchange for the Sacklers' $6 billion contribution to the settlement trust.[6] The Sacklers owned and controlled Purdue Pharma and received over $10 billion in prebankruptcy distributions from the firm. At least some members of the Sackler family have been personally implicated in the tortious conduct that led to mass addiction to Purdue Pharma's immensely profitable (and even more immensely harmful) opioid medication, OxyContin. Opioid claimants are bound by the Sackler release whether or not they voted for the plan. The Supreme Court is now considering in that case "⟦w⟧hether the Bankruptcy Code authorizes a court to approve, as part of a plan of reorganization under Chapter 11 of the Bankruptcy Code, a release that extinguishes claims held by nondebtors against nondebtor third parties, without the claimants' consent."[7] In issuing a stay pending appeal, at least five members of the Supreme Court implicitly, albeit preliminarily, determined that this challenge to the Sackler release is likely to succeed on the merits.

More or less concurrently with the nondebtor release of the Sacklers in *Purdue Pharma*, controversy has also swirled around the so-called Texas two-step cases. Johnson & Johnson (J&J), facing mass tort liabilities arising out of sale of its iconic *Johnson's Baby Powder*, allegedly contaminated with asbestos, sought to resolve those liabilities through bankruptcy. It underwent a divisive merger under Texas law and assigned its mass tort liabilities to a shell corporation it created and named LTL[8] pursuant to a "Funding Agreement" that contemplated J&J would fund LTL's § 524(g) mass-asbestos bankruptcy case with the objective of obtaining a nondebtor

[6] To be clear, the $6 billion contribution under the plan also entitles the Sacklers to a release of all liability for the *Purdue Pharma* estate's fraudulent transfer claims against them. These claims arise out of the Sacklers' receipt of some $10 billion in distributions from Purdue Pharma pre-bankruptcy. It is uncontroversial that the Bankruptcy Code authorizes the settlement of these estate causes of action against the Sacklers through a chapter 11 plan. §§ 544(b), 548, 550 & 1123(b)(3)(A); FED. R. BANKR. P. 9019. *See also* Protective Comm. for Indep. S'holders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414 (1968).

[7] Harrington v. Purdue Pharma L.P., No. 23-124, 2023 WL 5116031, at *1 (U.S. Aug. 10, 2023) (order granting stay and certiorari). The Solicitor General has subsequently requested the Court hold the cross petitions for certiorari in *Highland Capital v. NexPoint Advisors* pending its merits decision in *Purdue*. Highland Capital involves nonconsensual exculpation of nondebtors for certain conduct related to administration of the liquidation of the debtor after Highland Capital's bankruptcy filing. *Brief for the United States as Amicus Curiae* at 9, Highland Cap. Mgmt., L.P. v. Nex-Point Advisors, L.P., No. 22-631 (U.S. Oct. 19, 2023).

[8] LTL is an acronym for "Legacy Talc Liabilities."

release of all J&J's talc liabilities in exchange for a (to be negotiated) contribution to a settlement trust. The Third Circuit dismissed this case as a bad faith filing.[9] J&J refiled the case asserting it had reached a settlement and the bankruptcy court dismissed the second case as well, relying on the Third Circuit precedent.[10] Courts and commentators have rebelled in cases like J&J's at the idea that an enterprise with common equity that the public market values at over $400 billion can use bankruptcy to manage a mass tort problem rather than conventional financial distress.

This Article takes no position on the lawfulness or propriety of nonconsensual third-party releases under current law, Texas two-steps, or more broadly, the management of MDL proceedings, the chapter 11 plans being proposed or confirmed, or other issues being litigated, in the controversial current generation of mass tort cases bubbling up in courts across the country.[11] Rather my project is to reflect more broadly on bankruptcy courts' forty years of experience dealing with mass torts, and then, assuming a clean slate, imagine how we might construct a broadly accessible bankruptcy-based solution for the mass tort problems of both solvent and insolvent defendants that reasonably reflects and protects the nonbankruptcy rights of claimants while substituting an efficient administrative process for thousands of individual adjudications in the tort system.[12]

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[9] *In re* LTL Mgmt., LLC, 64 F.4th 84, 111 (3d Cir. 2023) (dismissing Johnson & Johnson's initial Texas two-step § 524(g) bankruptcy filing for lack of financial distress).

[10] *In re* LTL Mgmt., LLC, 652 B.R. 433, 443 (Bankr. D.N.J. 2023) (dismissing second LTL chapter 11 filing). Media reports indicate J&J is contemplating a third attempt at a bankruptcy filing, this time in Houston. Alex Wolf, *Johnson & Johnson Looks to Texas for Unit's Third Bankruptcy Bid*, BLOOMBERG L. (Oct. 18, 2023), https://www.bloomberglaw.com/product/blaw/bloomberglawnews/bankruptcy-law/BNA%200000018b-446d-d179-a1eb-5f7dd7900001. *See also infra* note 51 and accompanying text.

[11] Prominent pending mass tort chapter 11 cases include: *In re* Boy Scouts of Am., No. 20-10343-LSS, 2023 WL 2891519 (D. Del. Apr. 11, 2023) (affirming bankruptcy plan confirmation in sexual abuse litigation); *In re* Bestwall LLC, 71 F.4th 168 (4th Cir. 2023) (refusing to dismiss Georgia-Pacific's Texas two-step mass-asbestos case as a bad-faith filing); *In re* Aearo Techs. LLC, No. 22-02890-JJG-11, 2023 WL 3938436 (Bankr. S.D. Ind. June 9, 2023) (dismissing 3M's Texas two-step case stemming from defective earplug litigation), *appeal docketed,* No. 23-2286 (7th Cir. June 29, 2023); *In re* LTL Mgmt., LLC, 64 F.4th 84 (3d Cir. 2023) (dismissing Johnson & Johnson's initial Texas two-step mass-asbestos case for lack of financial distress); *In re* Purdue Pharma L.P., 69 F.4th 45 (2d Cir. 2023) (affirming channeling order releasing Sackler family from opioid claims), *stayed and cert. granted*, *Harrington*, 2023 WL 5116031 (Aug. 10, 2023).

[12] This Article also takes no position on whether the bankruptcy courts as Article I courts created under Congress's bankruptcy power may constitutionally issue final

Greatly complicating the picture is the reality that mass tort problems come in all shapes and sizes. Some situations involve a defective product with only one primary tortfeasor, relatively few difficulties in establishing negligence and causation, and without significant risk of ongoing future harms. *AH Robins* is a seminal example. In August 1985, AH Robins filed the first major non-asbestos mass tort chapter 11 case on account of liabilities arising out of its sale of the intrauterine contraceptive device, the Dalkon Shield.[13] Although the case was controversial at the time,[14] within the cloistered world of chapter 11 practice, it established a precedent around which a consensus developed that chapter 11 could effectively deal with this type of mass tort issue.

Punitive damage claims and jury trial rights in the *AH Robins* case were effectively abrogated and administrative resolution substituted for civil litigation.[15] A claimants' trust was created out of the proceeds of a sale of the company free and clear of Dalkon Shield claims which followed a vigorous auction process.[16] Insurance proceeds were marshalled through a global settlement and also placed in the claimants' trust.[17] Related parties' liability (the Robins family and the inventors of the Dalkon Shield) and their claims for indemnity and insurance rights were extinguished. Equity holders

orders imposing channeling injunctions in favor of nondebtor parties and channeling future claims. *See* Stern v. Marshall, 564 U.S. 462 (2011). Given doubt over this issue, Congress required federal district court review of channeling orders in mass asbestos cases when it enacted § 524(g)(3)(A). Similarly, as a matter of chapter 11 practice in non-asbestos mass tort cases, district court affirmance is generally a condition of the effectiveness of a mass tort chapter 11 plan channeling claims to a settlement trust. The Third Circuit has held, however, that bankruptcy courts have constitutional and statutory authority to issue final orders confirming reorganization plans that enjoin assertion of claims of nondebtors against nondebtor third parties, *Stern v. Marshall* notwithstanding. *In re* Millennium Lab Holdings II, LLC, 945 F.3d 126 (3d Cir. 2019), *cert. denied*, 140 S.Ct. 2805 (2020). *But see* Pacor, Inc. v. Higgins, 743 F.2d 984 (3d Cir. 1984) (no related-to bankruptcy jurisdiction to enjoin claims against nondebtors outside the plan confirmation context). The best answer to these problems has always been conferring Article III status on the bankruptcy courts. Daniel J. Bussel, *Bankruptcy Appellate Reform: Issues and Options*, 1995 ANN. SURV. BANKR. L. 257, 267-68. Short of that, the § 524(g) approach of conditioning effectiveness of a channeling injunction on district court affirmance is a workable second-best solution.

[13] A.H. Robins Co. v. Piccinin, 788 F.2d 994 (4th Cir. 1986).

[14] RICHARD B. SOBOL, BENDING THE LAW: THE STORY OF THE DALKON SHIELD BANKRUPTCY 67 (University of Chicago Press 1st ed. 1991).

[15] *Id.* at 249, 315.

[16] Menard-Sanford v. Mabey (*In re* A.H. Robins Co.), 880 F.2d 694, 702 (4th Cir. 1989). The sale was contingent upon American Home Products release and injunction from Dalkon Shield claims. Sobol, *supra* note 14, at 221-22.

[17] Sobol, *supra* note 14, at 217-19.

received value equal to approximately twenty-two percent of the sale proceeds.[18]

Although the Robins family emerged from the case with a large portion of its wealth intact and protected from continuing mass tort litigation, in the bankruptcy community, *AH Robins* is viewed in retrospect as one of the most successful mass tort resolutions in chapter 11 over the last forty years.[19]

In many ways the *AH Robins* story is the same as *Purdue Pharma*, only worse. As with the Sacklers the nondebtor claims nonconsensually released were personal liabilities of the Robins family based on their personal involvement, as controlling shareholders, officers and directors of the debtor firm, in its promotion and sale of its profitable (albeit negligently designed and marketed in disregard of the risks posed to users) Dalkon Shield.[20] The release given was broader than the discharge that would have been available to those individuals in their personal bankruptcies. The Robinses received value for their 42% equity interest in AH Robins of approximately $385 million[21] out of the chapter 11 sale and only remitted $25 million to the Dalkon Shield settlement trust; the Sacklers promised to contribute $6 billion to the Purdue settlement trust and walked away from their (valueless)

[18] The sale agreement allocated American Home Products stock then worth $700 million to A.H. Robins shareholders, $2.34 billion to the Dalkon Shield tort claimants' trust, $100 million to trade creditors, and a settlement of independent actions against A.H. Robins' insurer. Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 685 (1989). However, due to stock appreciation between the sale agreement and the date of issuance, the market value of the American Home Products' stock transferred to A.H. Robins shareholders rose to $916 million at issuance. Sobol, *supra* note 14, at 286.

[19] Georgene Vairo, *Mass Tort Bankruptcies: The Who, The Why and The How,* 78 AM. BANKR. L. J. 93, 121 (2004) (99% of claims resolved without litigation or formal arbitration enabling trust to make pro rata distributions equal to 102% of initial claims and resolve 300,000 claims within 10 years before terminating in 2000).

[20] In 1971, 1972, and 1973, Dalkon Shield outsold all other IUD brands, combined. At the end of 1973, Robins had sold more than three million devices. Facing growing pressure from the scientific community as more and more information became public regarding the risks of Dalkon Shield and septic abortions, pelvic inflammatory disease, perforation of the uterus, ectopic pregnancies, and birth defects, sales in the United States were suspended in June of 1974. Robins stopped selling Dalkon Shield internationally in 1975. At that point, an estimated 3.6 million women had a Dalkon Shield IUD worldwide. *See* Sobol, *supra* note 14, at 7-11.

[21] Sobol, *supra* note 14, at 286. In 2023 dollars, the $385 million received by the Robins family out of the *AH Robins* plan would equate to $925 million. *CPI Inflation Calculator*, U.S. BUREAU OF LAB. STAT., https://www.bls.gov/data/inflation_calculator.htm (last visited Sep. 8, 2023).

equity interest in the firm. The issues of the Sacklers' liability, causation and damages that complicate matters in *Purdue Pharma* were much clearer in *Robins* since those matters had been largely established in ten years of bitter and extensive prebankruptcy litigation that AH Robins had lost.[22]

I will not endorse every aspect of the *AH Robins* and *Purdue Pharma* global mass tort settlements or the process by which they were reached. As will be discussed below at length I have many qualms about the process and the shift in negotiating leverage toward debtors that has occurred under modern chapter 11 mass tort practice. But I do suggest that global settlement of these cases in chapter 11, and cases like them, represent a greatly superior alternative to any other option provided by the US legal system for mass torts. We need to stop fretting about whether it is legal to globally resolve mass torts in bankruptcy. If the existing Code does not authorize the global settlements reached in *AH Robins* and *Purdue Pharma*, well then, it ought to be amended to do so, albeit in a manner that is procedurally and substantively fair to claimants.

Moreover, in crafting a bankruptcy-based global mass tort settlement procedure, I see no reason to stop at cases like *AH Robins* and *Purdue Pharma*. I concede the problem, already difficult, is made much more complex when future claimants, solvent defendants, unrelated codefendants, and non-settled insurance policies are thrown into the mix. Nevertheless, I suggest that there is reason to hope that the bankruptcy process, properly designed and constrained, can produce the consent necessary to legitimize global settlements that involve these complicating factors as well. *Johns-Manville* and the § 524(g) mass-asbestos chapter 11 cases that followed in its wake demonstrated that where future claims are an important piece of the puzzle, future claims can be dealt with in chapter 11. And I see no reason to shut the courthouse door to solvent companies with genuine mass tort distress not otherwise in need of financial or operational restructuring, even immensely wealthy ones like J&J–if we are able to create a substantively and procedurally fair bankruptcy mechanism for resolving those liabilities.

It is the ambition of this Article to sketch out how this might be done.

I take as a jumping off point a recent article by Professors Casey & Macey suggesting that bankruptcy may be the best available venue for mass

[22] By the time AH Robins finally withdrew the Dalkon Shield from the market in 1984, it had spent $260 million resolving 7,700 cases and ten new lawsuits were filed a day. Sobol, *supra* note 14, at 23.

tort resolution.[23] They suggest that both MDL and mass tort bankruptcies are flawed, but chapter 11 nevertheless has decisive advantages that MDL cannot match. In bankruptcy:

> State and federal litigation is consolidated.
>
> Future claims can be resolved alongside current claims on an equitable basis.
>
> Bar dates can be set, and unfiled claims can be resolved along with pending litigation.
>
> Claimant consent binding on all dissenting individual claimants can be solicited and manifested through class-voting processes.
>
> There is greater transparency.

MDL advocates, of course, dispute the claimed superiority of chapter 11.[24] MDL courts' informal coordination with state courts also exercising control over related consolidated litigation can expand MDL's reach beyond pending federal civil actions. Although they do not consistently do so, MDL courts could require greater transparency from defendants and plaintiffs' steering committees.

MDL's inability to deal with futures and unfiled claims, and to accurately assess claimant class consent, are less tractable problems.[25] But futures, though central in mass-asbestos cases, are not an important component of all mass torts. Moreover, informal, arguably coercive,

[23] Anthony J. Casey & Joshua Macey, *In Defense of Chapter 11 for Mass Torts*, 90 U. CHI. L. REV. 973 (2023) (hereinafter Casey & Macey).

[24] For a spirited defense of MDL, *see* Memorandum of Law of Amici Curiae by Certain Complex Litigation Law Professors in Support of Motion of the Official Committee of Talc Claimants to Dismiss Debtor's Chapter 11 Case, *In re* LTL Mgmt., LLC, No. 21-30589-MBK, (Bankr. D.N.J. Oct. 14, 2021), ECF No. 1410.

[25] The Code expansively defines "claim" at § 101(5), to encompass not only pending federal civil actions (as MDL proceedings do) but also all legal and equitable rights to payment including rights that are unliquidated, contingent, unmatured, and disputed. This definition clearly encompasses state as well as federal claims, and claims for which no lawsuit is or even could be filed under applicable nonbankruptcy law because the claim has not matured. The courts of appeal have also held that the Code's definition encompasses future claims so long as liability is based on prepetition conduct of the debtor and there is a sufficient pre-confirmation relationship between the future claimants and the debtor based on contact, exposure, impact, or privity. Epstein v. Off. Comm. of Unsecured Creditors Est. of Piper Aircraft Corp., 58 F.3d 1573, 1577 (11th Cir. 1995).

contractual arrangements may effectively extend settlements reached in the MDL proceedings to capture claimants with unfiled claims or those otherwise disinclined to settle. Such techniques may include all-or-nothing settlements, contractual arrangements between defendants and claimants' counsel, and most favored nations clauses that effectively neuter dissenters and preclude separate settlements.[26] Finally MDL proponents insist that any shortcomings in the MDL process be weighed against the perception and reality that chapter 11 unduly shifts mass tort settlement leverage to defendants, with particular scorn directed at the Texas two-step as employed by J&J. The Texas two-step is an easy target because it purports to unilaterally limit the liability of the solvent primary defendant through elaborate corporate manipulations.[27]

Casey & Macey respond that criticism of the Texas two-step is misguided. Solving mass tort problems does not necessarily require a concurrent global financial restructuring of an otherwise healthy company. Joining these two complex processes (mass tort resolution and financial restructuring) magnifies the cost and complexity of both with no corresponding benefit. Casey & Macey embrace the Texas two-step on this ground. Two-step bankruptcy avoids unnecessarily tethering a global financial restructuring to a mass tort case. In this respect, the Third Circuit decision dismissing J&J's two-step case as "bad faith" because of an absence of financial distress focuses on a red herring: mass tort distress, not financial distress, should be the sine qua non for invoking the jurisdiction of the bankruptcy court to address a mass tort problem.[28] Judge Graham's thoughtful opinion dismissing 3M's attempt to invoke chapter 11 to resolve its earplug liabilities concludes the problem with using chapter 11 as a general mass tort resolution procedure is a want of express congressional authorization to do so (outside the mass-asbestos arena) rather than any inherent limitation on bankruptcy relief.[29]

[26] D. Theodore Rave, *Closure Provisions in MDL Settlements*, 85 FORDHAM L. REV. 2175 (2017). *See also* Nora Freeman Engstrom, *The Lessons of Lone Pine*, 129 YALE L. J. 2 (2019).

[27] 3M, in invoking chapter 11 to resolve its earplug litigation liabilities, did not undertake a divisive merger as a prelude to the bankruptcy filing of its Aearo affiliate, but that case shares many similarities with the two-step cases, in particular the attempt of the primary defendant to obtain a non-consensual third party release of mass tort liabilities by funding its wholly owned subsidiary's chapter 11 case without undertaking its own global financial restructuring.

[28] *In re* LTL Mgmt., LLC, 58 F.4th 738 (3d Cir. 2023).

[29] *In re* Aearo Techs., LLC, No. 22-02890-JJG-11, 2023 WL 3938436, at *21, n. 24 (Bankr. S.D. Ind. June 9, 2023) ("Were Congress to so intervene and expand § 524(g) beyond asbestos cases, bankruptcy would become a more suitable alternative for resolving

Untethering mass tort resolution from financial restructuring makes good sense.[30] Viewing the Texas two-step through this lens obviates many of the objections to the procedure. The two-step should not be constructed or viewed as a device to relieve the primary tortfeasor of any liability to claimants at all. The two-step adds a defendant (the tortfeasor's newly created affiliate); it does not, or should not, subtract one. The new defendant is merely a vehicle for commencing a mass tort bankruptcy solution to the primary tortfeasor's mass tort liability. Its creation should not alter the primary tortfeasor's liability to claimants, though perhaps it may reallocate liability internally among the parties to the divisive merger. Given the oddity and ambiguity of Texas law governing divisive mergers, introducing a "Funding Agreement" between the tortfeasor and its chapter 11 affiliate may be necessary under current law. It would be clearer to simply mandate that the chapter 11 affiliate's assumption of liability does not effect a release of any liability of other tortfeasors to third parties. Step one of the two-step, the divisive merger, permits the tortfeasor to invoke bankruptcy's collective resolution process without declaring bankruptcy itself; it does not relieve it of any liability unless and until there is successful confirmation of a plan channeling that liability to a trust under established standards, including, most importantly, the consent of an overwhelming majority of the affected claimants. Administrative resolution imposed pursuant to the genuine consent of the overwhelming majority of the affected claimants may be

mass tort cases."), *appeal docketed,* No. 23-2286 (7th Cir. June 29, 2023). 3M recently announced a $6 billion global settlement proposal to resolve the earplug litigation of its Aearo subsidiaries, contingent on reaching a 98% claimant participation threshold. Press Release, 3M, 3M Announces Combat Arms Settlement (Aug. 29, 2023), https://news.3m.com/2023-08-29-3M-Announces-Combat-Arms-Settlement,1. The settlement agreements can be found at 3M, Current Report (Form 8-K) (Aug. 29, 2023), https://www.sec.gov/ix?doc=/Archives/edgar/data/66740/000006674023000073/mmm-20230829.htm.

[30] Isolating and resolving a particular class of debt through bankruptcy without undertaking a general corporate restructuring is well-established practice in the United Kingdom. We undoubtedly can learn from that experience to create more selective restructuring techniques in this country tailored to solve particular restructuring problems; mass torts is an excellent place to start. For a thorough analysis of selective restructuring in the UK and comparison and critique of chapter 11 practice, see Sarah Paterson & Adrian Walters, *Selective Corporate Restructuring Strategy*, 86 MOD. L. REV. 436 (2023); *see also* Sarah Paterson & Adrian Walters, *Chapter 11's Inclusivity Problem*, 55 ARIZ. ST. L. J. (forthcoming 2023) (manuscript at 5), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4448945 (framing selective restructuring as an early intervention technique that can maximize value for all creditors).

"silencing litigation."[31] But if it efficiently and fairly compensates individual claims in a way that harmonizes the treatment of the affected claimants to effect a rough justice for the vast majority—a goal the tort system is incapable of attaining through uncoordinated individual adjudications—I'm all for it.

Even if the two-step is recast (or clarified) in this way, however, as Casey & Macey acknowledge, many other problems with current mass tort chapter 11 practice remain.

A foundational problem is that except insofar as Congress has codified the *Manville* plan as a template for mass-asbestos resolution,[32] there is only oral Torah rather than written Torah governing mass tort resolution in bankruptcy. If chapter 11 is going to be a primary venue for mass tort resolutions, there should be a statutory framework for regulating that process.

Proponents of non-asbestos mass tort chapter 11 purport to find authority to do what they do in broad open-textured provisions of the Code: §105(a) ("court may issue any order that is necessary or appropriate to carry out the provisions of ⟦the Code.⟧"); § 1123(a)(5) (nonexclusive listing of plan provisions that may satisfy the requirement of adequate means of implementation); and § 1123(b)(6) (plan may "include any other provision not inconsistent with ⟦the Code⟧"). The argument is that these residual Code provisions authorize bankruptcy courts to approve any plan provision the court deems "necessary." Recognizing that necessity alone cannot justify running roughshod over claimants' rights on any and all terms, bankruptcy courts have developed uncodified fairness standards often drawn by analogy

[31] Pamela Foohey & Christopher K. Odinet, *Silencing Litigation Through Bankruptcy*, 109 VA. L. REV. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4365005.

[32] Section 524(g) essentially codified the seminal and innovative Johns-Manville chapter 11 plan as a template for resolving mass-asbestos litigation. Latency periods measured in decades and the wide use of asbestos from 1935-1975 was not merely a *Manville* problem: It was a ticking public health time bomb for American society, industry, insurers, and the state and federal legal systems. Congressional and class-action efforts to resolve the exploding litigation outside of bankruptcy failed, leaving chapter 11 as the only workable option. Congress anticipated that § 524(g) might eventually serve as a model for further legislative or judicial innovation in the treatment of mass torts more generally. 140 Cong. Rec. H 10,764 (daily ed. Oct. 4, 1994), *reprinted in* COLLIER ON BANKRUPTCY App. Pt. 9(b) 76-78 (Richard Levin & Henry J. Sommer eds. 16th ed., vol. E-1, Lexis 2009) ("How the new statutory mechanism works in the asbestos area may help the Committee judge whether the concept should be extended into other areas."); Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 111(b), 108 Stat. 4106, 4117 (1994) ("⟦n⟧othing in ⟦§524(g)⟧ shall be construed to modify, impair or supercede any other authority the court has to issue injunctions in connection with an order confirming a plan of reorganization.") (uncodified rule of construction).

from § 524(g).[33] Most critically, courts have rejected the possibility that mass tort plans channeling future and third-party claims to a settlement trust can be crammed down on a dissenting claimant class. Indeed, courts generally require claimant supermajorities that exceed the 75% consent requirement in §524(g) for mass-asbestos plans.[34]

Over the last forty years, an entire herd of mass tort elephants, from AH Robins through the opioid, earplug, and sexual abuse cases, has hidden in these mouseholes.[35] I am hardly the first commentator to observe that it would be nice if Congress established some rules governing resolution of mass torts in bankruptcy, albeit rules that leave plenty of play in the joints to address the idiosyncrasies of particular mass tort problems.[36] So far, Congress has been content to let the bankruptcy courts struggle to manage mass torts without statutory guidance. But Congress's ostrich-like stance may not be sustainable much longer. Leaving mass tort resolution to the discretion of bankruptcy judges may not survive today's jurisprudential zeal for textualism and related skepticism of bankruptcy courts' uncabined equitable discretion coupled with the controversy swirling around the new

[33] *In re* Purdue Pharma L.P., 69 F.4th 45, 78-79 (2d Cir. 2023), *stayed and cert. granted,* Harrington v. Purdue Pharma L.P., No. 23-124, 2023 WL 5116031 (U.S. Aug. 10, 2023); *In re* Master Mtg. Inv. Fund, Inc., 168 B.R. 930, 937-38 (W.D. Mo. 1994); *In re* Millennium Lab Holdings II, LLC, 575 B.R. 252, 272 (Bankr. D. Del. 2017); *In re* Boy Scouts of Am., 642 B.R. 504, 597 (Bankr. D. Del. 2022); *In re* Dow Corning Corp., 280 F.3d 648, 658 (6th Cir. 2002); SE Prop. Holdings, LLC v. Seaside Eng'g & Surveying, Inc. (*In re* Seaside Eng'g & Surveying, Inc.), 780 F.3d 1070, 1079 (11th Cir. 2015).

[34] § 524(g)(2)(B)(ii)(IV)(bb). The term of art used in the non-asbestos cases is "overwhelming consent" of the claimant class. Since the Code requires two-thirds of the amount of claims voted to avoid cramdown, overwhelming consent must mean more than two-thirds of the class vote. In fact, most confirmed mass tort chapter 11 plans achieve claimant consent thresholds exceeding 90% of the votes cast. The Second Circuit has characterized the 75% consent threshold as the "bare minimum" indication of "overwhelming approval." *In re* Purdue Pharma L.P., 69 F.4th 45, 78-79 (2d Cir. 2023), *stayed and cert. granted,* Harrington v. Purdue Pharma L.P., No. 23-124, 2023 WL 5116031 (U.S. Aug. 10, 2023). *See infra* notes 108-134 and accompanying text (discussing classification and voting).

[35] Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 468 (2001).

[36] Troy A. McKenzie, *Towards A Bankruptcy Model for Nonclass Aggregate Litigation,* 87 N.Y.U. L. REV. 960 (2012); Alan Resnick, *Bankruptcy as a Vehicle for Resolving Enterprise-Threatening Mass Tort Liability,* 148 U. PA. L. REV. 2045 (2000); *Bankruptcy: The Next Twenty Years,*, NATIONAL BANKRUPTCY REVIEW COMMISSION (Oct. 20, 1997); Samir D. Parikh, *The New Mass Torts Bargain*, 91 FORDHAM L. REV. 447 (2022); Lindsey D. Simon, *Bankruptcy Grifters*, 131 YALE L. J. 1154 (2022).

generation of mass tort bankruptcies[37] and the pending challenge to the *Purdue Pharma* channeling order.

So we need a framework for dealing with non-asbestos mass torts in chapter 11. That framework can draw from the mass-asbestos statute for inspiration. But § 524(g) itself is sorely in need of an update. It essentially codifies the *Manville* plan, and like a fly caught in amber reflects 1980s bankruptcy practices and concerns no longer relevant. It is time to expand and update § 524(g) to create a framework suitable for regulating mass tort chapter 11 practice in general.

Coming from a bankruptcy perspective, the natural theoretical lens through which that framework ought be constructed and evaluated is that propounded and elaborated by Thomas Jackson and Douglas Baird some forty years ago: The Creditors' Bargain.[38] That theoretical frame (heuristic actually) pushes us to consider that in shifting from individual debt collection to collective bankruptcy proceedings we should endeavor, while substituting collective process for individual process, to mirror the substantive rights of the parties as they exist under otherwise applicable nonbankruptcy law subject, however, to the exigencies and feasibility of the collective proceeding itself.

The "Mass Tort Claimants' Bargain" I am imagining is, of course, like the Creditors' Bargain, wholly hypothetical: It is a resolution procedure that rational fully informed tort claimants and defendants "would agree to," if they could, ex ante and behind the veil of ignorance. The goal of the Mass Tort Claimants' Bargain is to preserve the basic nonbankruptcy economic rights of the claimants while substituting an efficient collective administrative process to realize those substantive rights. That entails altering procedure dramatically in ways that are inconsistent with otherwise applicable law, while preserving the basic economics and replicating, to the

[37] Law v. Siegel, 571 U.S. 415 (2014); Czyzewski v. Jevic Holding Corp., 580 U.S. 451 (2017); Nondebtor Release Prohibition Act of 2021, H.R. 4777, S. 2497, 117th Cong., 1st Sess. (2021).

[38] THOMAS H. JACKSON, THE LOGIC AND THE LIMITS OF BANKRUPTCY LAW (Harvard 1986). *See also* Douglas G. Baird & Thomas H. Jackson, *Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy*, 51 U. CHI. L. REV. 97 (1984); Douglas G. Baird & Thomas H. Jackson, *Kovacs and Toxic Wastes in Bankruptcy*, 36 STAN. L. REV. 1199 (1984); Douglas G. Baird & Thomas H. Jackson, *Fraudulent Conveyance Law and Its Proper Domain*, 38 VAND. L. REV. 829 (1985); Thomas H. Jackson, *Translating Assets and Liabilities to the Bankruptcy Forum*, 14 J. LEGAL STUD. 73 (1985); Thomas H. Jackson, *Avoiding Powers in Bankruptcy*, 36 STAN. L. REV. 725 (1984); Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 YALE L. J. 857 (1982).

extent feasible, the balance of power that exists outside of bankruptcy. The move to collective resolution, for example, should not result in a forfeiture of the insurance assets available to satisfy tort victims outside of bankruptcy.[39] Moreover, collective proceedings notoriously create opportunities for holdouts. Class consent, carefully regulated and measured, must be substituted for individual consent in order to practically implement a global resolution.[40]

Under current practice, the move from the tort system and MDL to chapter 11 shifts leverage to the mass tort defendant in numerous ways. Some of that shift is inherent in moving to an administrative collective resolution mechanism. For example, eliminating tort law's wild card features of individual jury trials and punitive damage assessments reduces claimant leverage. It is difficult, however, to imagine an administrative process that would preserve these random shocks that systematically operate to increase defendants' risk of extreme outcomes in individual cases. Processes can be created that will allow for damage assessments consistent with historical settlements and median jury verdicts in like cases.[41] But individual claimants' rights to jury trials or punitive damages will not survive the chapter 11 process, or indeed any plausible collective resolution mechanism.[42]

But there are other aspects of modern chapter 11 practice that shift leverage to defendants unnecessarily and in some cases those features of chapter 11 are only aggravated by the two-step bankruptcy solution embraced by Casey & Macey. Defendants with substantial operating businesses that file for chapter 11 relief suffer significant harm to their business both in terms of direct costs, loss of competitive advantages, and

[39] *See infra* nn. 183-220 and accompanying text (discussing insurance issues).

[40] *See infra* nn. 108-134 and accompanying text (discussing classification and voting issues).

[41] The leading example of such a mechanism is the Independent Review Option under the Trust Distribution Procedures in the Boy Scouts of America case. Third Modified Fifth Amended Chapter 11 Plan of Reorganization (With Technical Modifications) at Ex. A, pp. 28-34, *In re* Boy Scouts of Am., No. 20-10343-LSS (Bankr. D. Del. Sep. 6, 2023), ECF No. 10296 (Trust Distribution Procedures Art. XIII).

[42] I recognize that in theory jury trial rights are preserved in personal injury and wrongful death cases under the current jurisdictional statutes, bankruptcy notwithstanding. 28 U.S.C. §§ 1411, 157(b)(2)(B) and 157(b)(5). It is an open secret, however, that the settlement trusts and channeling injunctions constructed in mass tort bankruptcies usually make individual access to jury trials or punitive damages remote at best. Settlement trust consent to individual jury trials is generally limited to the liquidation of claims that will facilitate recovery of insurance proceeds from non-settling carriers or other third-party defendants outside the protection of the channeling injunction.

loss of nimbleness as their operations become subject to court supervision. They want out of chapter 11 as soon as possible and that incentivizes them to make a deal with the tort claimants. The two-step bankruptcy mitigates those deadweight costs of bankruptcy by keeping non-mass tort constituents and valuable operating assets out of bankruptcy. But it also reduces the exigency felt by the primary tortfeasor to settle on anything less than the most advantageous terms to it. That shifts the balance of power toward the defendant in the bankruptcy negotiation.

Bankruptcy venue rules[43] also favor the defendant. Plaintiffs have the power of initial forum selection in tort litigation. This advantage is mitigated to some extent by federal removal jurisdiction if the parties are of diverse citizenship or federal questions are involved. The MDL process shifts the forum to a consolidated transferee court selected by the neutral MDL panel. But bankruptcy venue is controlled by the defendant and bankruptcy's liberal venue provisions[44] giving the defendant not only a wide choice of venue but, in some situations, the practical ability to select a particular bankruptcy judge.[45] Bankruptcy judges have wide-ranging discretion in matters of case administration, and the ability to shape not only the bargaining space but also the terms of the plan itself.[46] The importance of venue is apparent in cases like the Boy Scouts and J&J. Had the Boy Scouts been required to file for bankruptcy relief in Texas where their principal place of business is located, the third-party releases that formed the core of its plan would have been impermissible under Fifth Circuit precedent. Had J&J succeeded in turning its Texas two-step into a North Carolina bankruptcy through LTL's eve-of-bankruptcy reincorporation in North

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[43] 28 U.S.C. §§ 1408, 1409.

[44] *Id.* at § 1408(1) (venue lies where debtor resides) & (2) (affiliate filing rule). For venue purposes, the settled understanding is that artificial persons' residence is the state of organization. TC Heartland LLC v. Kraft Foods Grp. Brands LLC, 581 U.S. 258, 262 (2017).

[45] Adam Levitin, *Judge Shopping in Chapter 11 Bankruptcy*, 2023 U. ILL. L. REV. 351. *See also In re* Purdue Pharma L.P., 69 F.4th 45, 90-91 (2d Cir. 2023) (Wesley, J., concurring) ("As it stands, a nondebtor's ability to be released through bankruptcy turns on where a debtor files."), *stayed and cert. granted,* Harrington v. Purdue Pharma L.P., No. 23-124, 2023 WL 5116031 (U.S. Aug. 10, 2023). Following criticism of Purdue's apparent ability to select Judge Robert Drain by filing bankruptcy in the White Plains division where only he presided, the Southern District of New York adopted a local rule requiring random assignment regardless of the division in which the bankruptcy is filed. James Nani, *N.Y. Mega Bankruptcies to Get Random Judges After Purdue Furor*, BLOOMBERG L. (Nov. 22, 2021), https://www.bloomberglaw.com/bloomberglawnews/bankruptcy-law/X9FBDA48000000.

[46] Douglas G. Baird, *Three Faces of Creditor-on-Creditor Aggression*, 97 AM. BANKR. L. J. 213, 246-252 (2023).

Carolina, its hand in the subsequent bad faith litigation (which it lost in the Third Circuit) would have been significantly strengthened.[47]

Moving past the special problems of the two-step and venue selection, as Casey & Macey note, numerous procedural and informational asymmetries favor defendants in chapter 11 and drive down the value of the global tort settlements offered in that forum. To address these asymmetries, Casey & Macey tentatively identify procedural and substantive reforms to level the chapter 11 playing field. These suggestions include:

greater disclosure from the beneficiaries of channeling orders;

limiting interim stays of litigation against nondebtors;

strengthening fraudulent transfer law;

limiting or eliminating plan exclusivity;

changes in corporate governance or the appointment of a trustee; and

increasing the priority of tort claims.

Casey & Macey recognize that these reforms may be costly in other ways and that those costs need to be weighed against the benefits before they are implemented. These suggestions and other leveling the field suggestions are discussed and evaluated below.[48]

Another source of defendant leverage in chapter 11 is the debtor's ability to manufacture and manipulate the consent of the claimant class through the classification and voting process. The defendant's ability to exploit intraclass conflicts through classification and voting rules systematically disadvantages the most severely injured claimants with the strongest claims.

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[47] Indeed, after the Third Circuit's dismissal of *LTL Management I,* the Fourth Circuit rejected a very similar bad faith challenge in the *Georgia-Pacific* case. Bestwall, LLC v. Off. Comm. of Asbestos Claimants (*In re* Bestwall, LLC), 71 F.4th 168 (4th Cir. 2023).

[48] *See infra* text at nn. 74-84.

Then there is the insurance piece that has become more and more central to mass tort chapter 11 practice over the years. Defendants' liability insurance assets are major sources of trust funding, often far and away the most significant source. Yet those assets come encumbered by myriad uncertainties. Absent settlement on terms agreeable to the insurers, the estate and its successor trust can be mired in years of complex coverage litigation with uncertain results. Mass tort chapter 11 needs an efficient mechanism for marshalling and liquidating liability insurance assets for the benefit of the tort claimants.

These are all considerable challenges. Casey & Macey are right to suggest that we embrace rather than repudiate chapter 11 as a device for managing mass torts. But if we are to embrace mass tort bankruptcies we must face up to these challenges.

Not every of one of these challenges exists in every case. In some cases, futures are not an issue. In others, there is no need to impose nonconsensual third-party releases. Insurance may not be an important factor in some instances. In others, although insurance funding is critical to the plan, all the insurance has been settled and so non-settled insurer issues disappear. In some cases, intra-claimant conflicts may be minor or easily resolved without separate classification and separate settlements. But in creating a general framework for resolving mass tort cases collectively through bankruptcy processes, all of these issues are on the table.

This Article, accordingly, imagines a framework for collective resolution of mass torts in chapter 11 independent of any global financial restructuring that may (or may not) be otherwise necessary. The procedures suggested here neither describe nor critique current practice; they are aspirational; their comprehensive adoption likely requires legislation. Moreover, I have no illusions that the balance proposed here will be universally optimal. Any framework for mass tort resolution must be adapted to address specific, varying mass tort problems. As in so many areas of bankruptcy practice, there must remain "some play in the joints."[49]

All that said, the plan here is to proceed as follows. Part II discusses gating requirements appropriately conditioning access to chapter 11 on genuine mass tort distress and the related forum selection issues. Part III introduces reforms intended to level the chapter 11 playing field between mass tort claimants and defendants. The most important of these involve

[49] *In re* Trib. Co., 972 F.3d 228, 244-45 (3d Cir. 2020).

limiting interim stays and requiring more active and timely court participation in structuring the claimant classes and voting procedures. Part IV addresses important implementation issues associated with jury trial rights and marshalling and liquidating insurance assets. A short conclusion follows.

II. CHAPTER 11 GATING ISSUES: WHEN AND WHERE

A. Conditioning Access on Genuine Mass Tort Distress.

Defendants in civil litigation might often prefer to have suits against them resolved administratively under a claims matrix excluding juries and punitive damages and capping recoveries at amounts based on a class consent to a defendant-formulated plan. Although our civil justice system has many critics and there are many proposals for tort reform, no one has dared suggest that chapter 11 furnishes a general right of any defendant facing (or fearing) substantial tort liability to unilaterally opt out of the tort system and into bankruptcy court.[50]

A traditional bankruptcy view focuses on whether the mass tort problem is "enterprise-threatening" for a defendant otherwise capable of reorganizing.[51] This view would exclude defendants that are not

[50] Parties to pre-dispute contracts frequently opt out of the tort system either through arbitration clauses or jury trial waivers. These provisions often exist in non-negotiable contracts of adhesion, but at least in theory the individual plaintiff must manifest assent to waiving his right to assert his claims in the tort system or before a jury for these agreements to be enforceable. In addition, some specific types of claims have been removed from the tort system by statute, e.g., workers' compensation claims.

[51] *In re* LTL Mgmt., LLC, 58 F.4th 738, 764 (3d Cir. 2023) (dismissing bankruptcy case on ground that the debtor was not financially distressed); *In re* Aearo Techs. LLC, No. 22-02890-JJG-11, 2023 WL 3938436 (Bankr. S.D. Ind. June 9, 2023) (same); Alan N. Resnick, *Bankruptcy as a Vehicle for Resolving Enterprise-Threatening Mass Tort Liability*, 148 U. PA. L. REV. 2045, 2055 (2000) (arguing early access to bankruptcy relief preserves value for creditors). Although the Third Circuit ordered dismissal of the initial *LTL Management* case on bad faith grounds, J&J caused LTL to promptly refile to implement an asserted mass tort settlement with certain talc claimant representatives. Voluntary Petition, *In re* LTL Mgmt., LLC, No. 23-12825-MBK (Bankr. D.N.J. Apr. 4, 2023), ECF No. 1. Following the Third Circuit decision, the bankruptcy court dismissed the second filing on the same grounds of insufficient financial distress. *In re* LTL Mgmt., LLC, 652 B.R. 433, 448 (Bankr. D.N.J. 2023). Media reports indicate J&J is contemplating a third attempt at a bankruptcy filing, this time in Houston. Alex Wolf, *Johnson & Johnson Looks to Texas for Unit's Third Bankruptcy Bid*, BLOOMBERG L. (Oct. 18, 2023), https://www.bloomberglaw.com/product/blaw/bloomberglawnews/bankruptcy-law/BNA%200000018b-446d-d179-a1eb-5f7dd7900001. It will be interesting to see if the Southern District of Texas takes a different view of the legitimacy of a chapter 11 filing

reorganizable, or for whom mass tort liability does not pose an existential threat. The view that mass tort relief in bankruptcy should be limited to reorganizing firms which, like Manville, otherwise face destruction of a valuable business franchise and eventual liquidation, lies at the root of many of the objections to the *Purdue*, *LTL* and *Aearo* bankruptcies. This traditional view, however, disregards the reality that collective resolution is essential in handling the mass tort problems of solvent defendants too, and that chapter 11 may be the best collective option available.

Professor Smith recognized thirty years ago that the use of bankruptcy as a mass tort resolution mechanism need not be tied to insolvency, limited funds, or general financial distress.[52] Solvent defendants and their present and future tort creditors might also benefit from a properly structured *Manville*-style trust.

Smith's principal concern was ensuring fair distribution among present and future claimants and substituting market valuation for judicial valuation of these liabilities in *Manville*-type cases, i.e. a reorganizable entity rendered insolvent by overwhelming mass tort liability.[53] But he went on to address in very general terms how the Bankruptcy Code might also provide a more general mass tort mechanism that did not assume debtor insolvency as a predicate.[54] Neither Smith's capital markets solution to the insolvent debtor mass tort problem nor his suggestion of how it might be generalized to address mass tort problems more broadly, however, were ever taken up in the mass tort context.[55]

based on mass tort, rather than financial, distress, assuming the debtor demonstrates sufficient talc claimant support for its proposed settlement. Courts have sometimes been sympathetic to allowing class actions to proceed for settlement purposes in cases where motions for class certification were denied pre-settlement. Ramirez v. DeCoster, 142 F. Supp. 2d 104, 111 n.9 (D. Me. 2001) (prior denial of class certification does not preclude subsequent certification of settlement class); Sullivan v. DB Invs., Inc., 667 F.3d 273, 302-303 (3d Cir. 2011) (differing state laws that could defeat commonality requirement in class certification not relevant in settlement context).

[52] Thomas A. Smith, *A Capital Markets Approach to Mass Tort Bankruptcy*, 104 YALE L.J. 367 (1994).

[53] *Id.* at 396. Smith's admirably clever solution to the problems of fair distribution and valuation with regard to present and future mass tort claims was to issue claimants' long-term interest-bearing negotiable trust certificates in the face amount of their allowed claim. The issuing trust would function as a closed end mutual fund with a fixed liquidation date at which point its assets would be distributed pro rata to all certificate holders. The capital markets would discount the certificates, presumably based on the best available information regarding the amount of the aggregate liquidated and unliquidated liabilities and the issuing trust's ability to satisfy them. Certificate holders could then sell their certificates in the market or hold them until maturity as they desired.

[54] *Id.* at 422-432.

[55] Liquidating trusts emerging out of mass financial frauds have experimented with a capital-markets solution to problems posed by the uncertainty of the value of their assets and illiquidity. *See e.g.* First Amended Joint Chapter 11 Plan of Liquidation at 40, *In re*

I acknowledge that many commentators[56] and at least some judges[57] find that divorcing mass tort resolution from general financial restructuring violates current law. If they are right, we should open our minds to changing current law to allow for efficient collective resolution of mass torts regardless of defendant solvency. If wrong, then the collective resolution mechanism that exists is a global restructuring procedure under chapter 11 never designed for, and sub-optimally resolving, pure mass tort problems.[58] Either

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Woodbridge Grp. Of Cos., No. 17-12560-KJC (Bankr. D. Del. Aug. 22, 2018), ECF No. 2397 and *Frequently Asked Questions*, WOODBRIDGE LIQUIDATION TR., https://woodbridgeliquidationtrust.com/faq/ (last visited Aug. 21, 2023).

As of December 24, 2019, Class A Liquidation Trust Interests are freely transferable to the extent permissible under applicable law. The Class A Liquidation Trust Interests have since been approved by the Depository Trust Company for Direct Registration System ("DRS") services, and are quoted on OTC Link® ATS under the trading symbol WBQNL. With the availability of DRS services, registered holders of Class A Liquidation Trust Interests are able to electronically transfer their Class A Liquidation Trust Interests from Continental Stock Transfer & Trust Company to the holder's securities broker so that market trades can be executed by the broker at the instructions of the holder.

Similar devices were employed in connection with liquidating trusts created in the Lehman Brothers and Enron Chapter 11 cases.

[56] Michael A. Francus, *Texas Two-Stepping Out of Bankruptcy*, 120 MICH. L. REV. ONLINE 38, 46, 49 (2022) (arguing the Texas Two-Step constitutes a bad-faith filing); Adam J. Levitin, *Purdue's Poison Pill: The Breakdown of Chapter11's Checks and Balances*, 100 TEX. L. REV. 1079, 1089 (discussing coercive pre-plan transactions); Adam Levitin, *The Texas Two-Step: The New Fad in Fraudulent Transfers*, CREDIT SLIPS (July 19, 2021); Hon. Judith K. Fitzgerald (Ret.), *Over-Thinking Ramifications of the Dismissal of LTL Management LLC's Bankruptcy*, HARV. BANKR. ROUNDTABLE, https://hlsbankruptcyr.wpengine.com/wp-content/uploads/2023/02/Fitzgerald-LTL-commentary_BRT-revisions-2.12.2023.pdf (last visited July 14, 2023) ("[Bankruptcy] is not a subterfuge for a solvent entity with no need for that relief trying to circumvent the requirements of Bankruptcy Code by machinations such as the Texas Two-Step."); Mark Roe & William Organek, *[Texas Two-Step and the Future of Mass Tort Bankruptcy Series] The Texas Two-Step: The Code Says it's a Transfer*, HARV. BANKR. ROUNDTABLE (July 19, 2022), https://bankruptcyroundtable.law.harvard.edu/2022/07/19/texas-two-step-and-the-future-of-mass-tort-bankruptcy-series-the-texas-two-step-the-code-says-its-a-transfer/ (arguing divisive mergers are transfers and should thus invoke fraudulent transfer scrutiny); Pamela Foohey & Christopher K. Odinet, *Silencing Litigation through Bankruptcy*, 109 VA. L. REV. 1261, 1329 (2023) (arguing two-steps should be deemed fraudulent transfers); *see also* Samir D. Parikh, *Mass Exploitation*, 170 U. PA. L. REV. ONLINE 53, 57-59 (2021-2022); Lindsey D. Simon, *Bankruptcy Grifters,* 131 YALE L.J. 1154 (2022); Ralph Brubaker, *Mandatory Aggregation of Mass Tort Litigation in Bankruptcy,* 131 YALE L. J. F.960 (2022); J. Maria Glover, *Due Process Discontents in Mass-Tort Bankruptcy*, 72 DEPAUL L. REV. 535 (2023).

[57] *In re* LTL Mgmt., LLC, 58 F.4th 738 (3d Cir. 2023); *In re* Aearo Techs. LLC, No. 22-02890-JJG-11, 2023 WL 3938436 (Bankr. S.D. Ind. June 9, 2023).

[58] Section 524(g), dealing solely with mass asbestos cases, is an example of a bespoke chapter 11 designed for one particular type of mass tort case. *See also supra* note 30 (discussing selective corporate restructuring under UK law).

way, the proper next step is to develop a framework to normalize and regulate solvent mass tort chapter 11 cases.

Accepting the premise that mass tort distress rather than general financial distress is a proper predicate for invoking chapter 11 relief forces us to distinguish genuine mass tort distress from other significant civil litigation. That is no easy task. As Judge Richard Posner observed in connection with the related problem of expanding the bankruptcy definition of "claim"[59] to encompass future liabilities:

> ⟦T⟧he issue is ⟦not⟧ one that lends itself to governance by formula. It may not be possible to say anything more precise than if it is reasonable to do so, bearing in mind the cost and efficacy of notice to potential future claimants and the feasibility of estimating the value of their claims … the bankruptcy court can bring those claimants into the bankruptcy proceeding…."[60]

The reasonableness of removing mass tort litigation from the tort system depends on the scale of the litigation and whether feasible alternatives to managing that litigation within the tort system exist (i.e. traditional tort litigation or the MDL process). The mass tort has to involve many claimants with significant individual claims and a very large aggregate potential liability in multiple jurisdictions. We do not need bespoke administrative processes for modest liabilities, or for large liabilities involving few parties, or even for large liabilities involving many parties within a unitary court system that are subject to effective collective resolution under alternative processes. Where resolving future claims is essential there may be no viable alternative to bankruptcy in the tort system.

Moreover, it is desirable that there should be a significant incubation period in the tort system in which the litigation matures before forced collective resolution is invoked. An adequate litigation and settlement history is a predicate to estimating the true size of the aggregate liability and even more importantly establishing proper baselines for administrative resolution of individual claims.[61] If that track record does not exist at the commencement of the case, the timeline for the bankruptcy will have to be extended to allow reliable estimates to be generated through post-petition nonbankruptcy litigation, trying bellwether cases, or extended estimation proceedings in the bankruptcy court.

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[59] § 101(5).

[60] Fogel v. Zell, 221 F.3d 955, 962 (7th Cir. 2000).

[61] Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 692-94 (1989).

In *Manville* and *Robins* track record was not an issue: ten years of widespread, intensive mass tort litigation preceded the bankruptcy filings. Similarly, in later mass-asbestos cases, a reliable forty-year track record of settlements, judgments, and relevant precedent claims matrices existed. The tendency in more recent non-asbestos cases, however, has been for defendants to seek to remove the mass tort litigation from the tort system much earlier in the process.[62] This is especially so as the focus moves to a third-party release that insulates the primary tortfeasor from general financial restructuring even as it collectively manages its mass tort liabilities through bankruptcy. Proactive early chapter 11 filing may allow defendants to nip the mass tort litigation in the bud, and perhaps to obtain a bankruptcy discharge of present and future liabilities before the full magnitude of the liability is understood.

Whatever the advantages might otherwise be to proactive resolution of incipient mass tort problems, channeling the liability to a settlement trust may be impractical if the amount of that liability is insufficiently defined through prior individual tort litigation to identify the relevant factors in determining claim values and allow for reasonable extrapolation. Deferring global resolution until significant nonbankruptcy litigation of representative cases will also ensure that the mass tort problem is one that is solved by—rather than created by—bankruptcy. A track record of substantial judgments and settlements ensures that the claims are viable in the tort system prior to invoking the collective resolution mechanisms that are available in bankruptcy.

In the absence of such a prebankruptcy track record, the claims will have to gestate post-petition or require complex estimation proceedings, in either case significantly extending the bankruptcy timeline. It may be wiser to defer resolution in bankruptcy until the mass tort liability has ripened further in

[62] In 3M and J&J's cases, no final judgments or settlements of individual cases existed at the time of the bankruptcy filings. Instead, a modest number of "bellwether" cases selected by the parties and the MDL court on a non-random basis had been tried with highly variable results and appeals pending. At the time of Purdue's bankruptcy, in addition to government actions and Purdue's criminal plea agreement with the Department of Justice, approximately 3,000 civil actions against Purdue and 400 actions against the Sackler family had been filed. *In re* Purdue Pharma L.P., 69 F.4th 45, 60 (2d Cir. 2023), *stayed and cert. granted,* Harrington v. Purdue Pharma L.P., No. 23-124, 2023 WL 5116031 (U.S. Aug. 10, 2023). But the Sacklers have still not yet been found liable in any case, nor paid any individual settlements, notwithstanding their desire in the *Purdue Pharma* case to globally settle those present and future opioid liabilities for $6 billion.

the tort system to allow for reliable estimation in the bankruptcy court on a more expedited basis.

B. Case Commencement

Who should decide whether any particular firm can demonstrate sufficient mass tort distress to warrant chapter 11 relief?

Debtors subjecting themselves to a global reorganization process may elect bankruptcy relief simply by filing a voluntary petition in any bankruptcy court in which venue lies. The principal safeguard against abuse of this voluntary filing system is the heavy cost a debtor pays in subjecting itself to the supervision of a bankruptcy court. Debtors do not file for bankruptcy lightly: It is an expensive and burdensome process. Indeed, historically, bankruptcy law's concern has been to create sufficient incentives for distressed debtors to refrain from unduly delaying their bankruptcies.[63]

That safeguard operates to some extent in the context of a nonglobal restructuring directed only at the mass tort distress. Mass tort bankruptcy is shockingly expensive and disruptive too.[64] When the purpose of the bankruptcy, however, is not to implement a financial restructuring, but rather to displace the tort system, some additional gating requirements are appropriate.

One model might be class certification practice. One might require bankruptcy court findings that the case meets gating criteria in terms of size, numerosity, maturity and amenability to collective chapter 11 resolution. In the world of class actions, however, certification battles can be protracted and the resulting orders, although interlocutory, may be appealed.[65] The

[63] DANIEL J. BUSSEL, DAVID A. SKEEL, JR. & MICHELLE M. HARNER, BANKRUPTCY 606 (11th ed. 2021).

[64] Over $120 million in professional fees were incurred in the initial LTL bankruptcy filing which resulted in dismissal on bad faith grounds only months later. Monthly Operating Report at 8, *In re* LTL Mgmt., LLC, No. 21-30589-MBK (Bankr. D.N.J. May 22, 2023), ECF No. 3954. The tab has since run to $178 million inclusive of the second filing. Evan Ochsner, *J&J Unit's Failed 'Two-Step' Talc Bankruptcies Cost $178 Million*, BLOOMBERG L. (Oct. 4, 2023), https://news.bloomberglaw.com/bankruptcy-law/j-j-units-failed-two-step-talc-bankruptcies-cost-178-million. Aearo's run rate was approximately $9.5 million per month from August 2022 until its dismissal in June 2023, totaling some $100 million. *Purdue* fees included over $475 million to the debtor's professionals, over $175 million to official creditor committee professionals, and $90 million to the ad hoc committee, totaling $740 million in aggregate legal costs paid by the *Purdue* bankruptcy estate. Monthly Operating Report at 23, *In re* Purdue Pharma L.P., No. 19-23649 (Bankr. S.D.N.Y. Jun. 27, 2023), ECF No. 5751. The *Boy Scouts* bankruptcy estate incurred $245 million in professional fees. Omnibus Order Granting Final Allowance of Certain Fees and Expenses for Certain Professionals at 3-6, *In re* Boy Scouts of Am., No. 20-10343 (Bankr. D. Del. Oct. 17, 2023), ECF 11541.

[65] FED. R. CIV. P. 23(f).

experience in bankruptcy has been similar.[66] To avoid expense and delay, modern bankruptcy generally shies away from adversary litigation in the bankruptcy court over debtor eligibility.[67]

Intimately related to the question of whether the case exhibits features of mass tort distress is the question of venue. Inevitably, defendants will take the initiative in invoking bankruptcy jurisdiction, but it does not follow that defendants should be able to freely select venue as well. An alternative that would provide some assurance that venue is not being unfairly manipulated is the practice followed for multidistrict litigation where consolidation and transfer motions are heard on an expedited basis on summary procedures before a panel and are not appealable.[68] A national body akin to the Panel on Multidistrict Litigation could determine, in a similar fashion, whether the case meets gating requirements for the extraordinary relief of consolidated resolution of the underlying tort claims in bankruptcy in preference to the MDL process, and, if so, in what venue that consolidation should occur. Analogous non-random/non-filer-controlled assignment processes are already employed in connection with municipal bankruptcies under the Code's chapter 9 and in PROMESA

[66] Prior to enactment of the 1978 Bankruptcy Code, under the Bankruptcy Act of 1898, 30 Stat. 544 (repealed 1979), a creditor could petition for an involuntary filing of a debtor by showing any of six Acts of Bankruptcy had occurred. The debtor in turn could then contest the filing, inclusive of the right to a jury trial, as a threshold issue. These initial adversary proceedings upon filing delayed relief and further diminished going concern value. *See* H.R. Doc. No. 93-137 Pt. 1, at 190 (1973) (citing studies showing bankruptcy filing produces needless litigation and "is less an effective means of distribution, than it is a method of disposing of remnants for the benefit of the functionaries."). These provisions had been the subject of longstanding criticism, *see, e.g.*, Israel Treiman, *Acts of Bankruptcy: A Medieval Concept in Modern Bankruptcy Law*, 52 HARV. L. REV. 189, 208-210 (1938). The 1973 Commission Report leading to the Bankruptcy Reform Act of 1978 echoed these criticisms:

> The Commission has encountered a generally prevalent opinion in the business community that a major factor explaining the smallness of distributions in business bankruptcies is the delay in the institution of proceedings for liquidation until assets are largely depleted. Debtors are reluctant to file voluntary petitions until after the situation has become hopeless, and creditors are obliged to allege and prove the commission of one of six acts of bankruptcy. For most of these acts the petitioner must be able to establish that the debtor was insolvent at the time the act was committed. Insolvency is defined in the Act as insufficiency of the debtor's property at a fair valuation to pay his debts. It is frequently difficult for a debtor's creditors to establish this fact, and the debtor is entitled to jury trial of the issue of whether he committed an act of bankruptcy.

H.R. Doc. No. 93-137 Pt. 1, at 14.

[67] The most prominent exceptions are involuntary cases under § 303 and municipal bankruptcies under chapter 9 which require showings of equitable insolvency.

[68] R. P. U.S. Jud. Panel Multidistrict Litig. (2016).

proceedings.[69] In addition to denying prospective debtors the strategic advantage of forum selection, this procedure would have the public benefit of avoiding the unseemly and controversial practice of judge and forum shopping.[70]

Requiring a motion before a national mass tort bankruptcy panel prior to commencing a mass tort case would involve costs in the form of delay, market disruption and uncertainty, but the experiences of J&J and Pacific Gas & Electric (PG&E) suggest these costs are likely to be very modest. J&J signaled far in advance its intention to implement a Texas two-step, so LTL's bankruptcy filing was no surprise to investors or J&J counterparties. Moreover, the case was initially filed in North Carolina and then transferred to New Jersey (over J&J's objection) before J&J obtained any substantive relief.[71] Similarly, PG&E was constrained by California law to give advance notice of its anticipated filing which came as no surprise to the market.[72] Its venue choice as a regulated utility was practically limited to Northern California. Whatever disruption these bankruptcy filings entailed does not appear to have been materially increased by modest delays in commencement and constraints imposed on the debtor's choice of venue.

In addition, in cases brought for the benefit of defendants like 3M, J&J and other large investment-grade defendants, liquidity is not an issue. It would make sense to condition access to chapter 11 relief in large solvent cases on a substantial down payment, perhaps $100 million or more to be set aside and held to fund the case and for the claimants' trust.[73]

These specialized gating requirements for mass tort cases should displace the "bad faith" filing doctrine as it has been understood in the caselaw. Solvent tortfeasors facing mass tort distress invoking chapter 11

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[69] *See* § 921(b) (bankruptcy judge assigned by chief judge of the court of appeals for the circuit in which the case is commenced); Puerto Rico Oversight, Management, and Economic Stability Act, 48 U.S.C. § 2168(a) (2016) (Chief Justice of the United States designates a district court judge to conduct the case).

[70] *See supra* note 45; Adam J. Levitin, *Judge Shopping in Chapter 11 Bankruptcy*, 2023 U. ILL. L. REV. 351 (2023); *see also* Theodore Eisenberg, Lynn M. LoPucki, *Shopping for Judges: An Empirical Analysis of Venue Choice in Large Chapter 11 Reorganizations*, 84 CORNELL L. REV. 967 (1999); *In re* LTL Mgmt. LLC, No. 21-30589, 2021 WL 5343945 at *6 (Bankr. W.D.N.C. Nov. 16, 2021) ("the Debtor is not just forum shopping; the Debtor is manufacturing forum and creating a venue to file bankruptcy" out of preference for Fourth Circuit bankruptcy dismissal standard).

[71] Acknowledgement of Transfer of Case to District of New Jersey, *In re* LTL Mgmt., LLC, No. 21-30589 (Bankr. W.D.N.C. Nov. 17, 2021), ECF No. 441.

[72] CAL. PUB. UTIL. CODE § 854.2(d) (requiring California utilities give fifteen days' notice of bankruptcy filing). *See generally* KATHERINE BLUNT, CALIFORNIA BURNING: THE FALL OF PG&E (2022).

[73] In appropriate cases (including two-steps) nondebtor third parties could also be required to furnish additional contributions to the claimant trust as the price of obtaining interim stays of litigation under §105(a). *See infra* text at note 91.

through nonoperating affiliates under these circumstances are not acting in "bad faith." Segregating mass tort liabilities into a nonoperating entity on the eve of bankruptcy with a view toward channeling the mass tort liabilities of all the affiliates to a settlement trust without subjecting the primary tortfeasor's operations and finances to a global restructuring becomes a matter of administrative convenience rather than indicium of bad faith. It is a useful first step for resolving mass tort liabilities without undertaking an otherwise unnecessary global financial restructuring. A debtor in genuine mass tort distress that is willing to pay to play, cede choice of venue to a neutral panel, and not limit its own liability until a consensual resolution is worked out with the tort claimants in accordance with a fair set of rules, is not abusing the system by filing a dormant affiliate rather than its solvent business. It is using chapter 11 for a problem it has been retrofitted to handle.

Still missing is the template for negotiating and implementing a mass tort resolution in bankruptcy, and the limits that should be placed on its substantive terms—a task to which I now turn.

III. CHAPTER 11 REFORMS

A. Casey & Macey Procedural Reforms: Disclosure and Governance.

Casey and Macey focus heavily on the issues of disclosure and corporate governance in their bid to fine-tune chapter 11 to more effectively handle mass tort cases.[74] Disclosure and governance reform have been a centerpiece of corporate and securities law and policy since the Great Depression and so it is natural to consider reforms along those lines. But I am deeply skeptical that tinkering with bankruptcy law's already elaborate disclosure and governance regimes will meaningfully contribute to finding the proper balance between claimants and defendant in negotiating a collective mass tort resolution. On the disclosure front, claimant representatives have extensive tools already, the most potent of which is that they can simply withhold consent to a claims-channeling plan unless and until they are satisfied that they have the necessary information to evaluate the plan. Moreover, the chapter 11 process arms them with a deep bench of estate-paid professionals to assess the information and powerful discovery

[74] Casey & Macey, *supra* note 23, at 1012-1017.

tools to obtain it.[75] That said, the Texas two-step and extensive use of third-party releases should not be techniques that skirt disclosure obligations. Claimants are entitled to thorough disclosure and analysis of protected parties' tort liability, earnings, cash flow, assets and other liabilities before being asked to consent to channel their claims in exchange for a financial contribution to the settlement trust. Full disclosure by these nondebtor parties is an appropriate part of the price they must pay for the release they seek and is the necessary predicate for the claimants to evaluate the fairness of the proposed mass-tort settlement.

With respect to Casey & Macey's governance suggestions, experience has shown that "independent directors" are at best of limited utility in controlling abuse in the bankruptcy context.[76] This is especially so in the context of a two-step bankruptcy where a wealthy publicly-owned parent is calling the shots. Similarly, appointment of a trustee in this circumstance would accomplish little unless the trustee controlled the parent which of course would destroy all advantage in the two-step and probably the business of the parent as well.

The key is to create a balance of negotiating power between claimants and defendants that will constructively push the parties toward a fair resolution of the mass tort problem. Neither want of disclosure nor flawed corporate governance is the core of the problem.

B. Casey & Macey Substantive Reforms: Priority and Fraudulent Transfer Reform.

Casey & Macey tentatively suggest the possibility of leveling the playing field by enhancing the substantive legal rights of tort claimants. They suggest increasing the bankruptcy priority for tort claims and transferee liability for fraudulent transfers.

Increasing priority for tort claims is a poor fit for many mass tort cases. Insolvent cases where liability insurance plays a predominant role might actually become more difficult to resolve. Given priority against general assets, the temptation for claimants might be to refocus on corporate assets rather than insurance proceeds as a source of payment and leave it to the

[75] Individual claimants of course lack these tools, but it is in the nature of a collective resolution of a mass tort that claimants act through representatives and professionals in negotiating the terms of the plan. To the extent important subsets of claimants are not adequately represented on the official committees, reimbursing professional fees on the basis of substantial contribution to unofficial committees and claimant groups may be particularly appropriate in mass tort cases. Daniel J. Bussel, *Fee-Shifting in Bankruptcy*, 95 AM. BANKR. L.J. 613 (2021).

[76] Jared Ellias, Ehud Kamar & Kobi Kastiel, *The Rise of Bankruptcy Directors*, 95 S. CAL. L. REV. 1083 (2022).

defendant to fight it out with insurers in post-confirmation litigation. So one result might be fewer insurance settlements and more hard-fought defendant/tort claimant/financial and trade creditor negotiations. It is unclear that substituting priority against insurance proceeds for priority against corporate assets would enhance claimant recoveries or facilitate resolution of mass tort cases against insolvent defendants.

This reform's fit for Casey & Macey's primary target, Texas two-steps, is even poorer. Priority against corporate assets means little in a case like J&J where the primary tortfeasor is unquestionably solvent and all general unsecured claims will be paid in their full allowed amounts whenever they are liquidated without regard to priority. Even in mass tort cases without a solvent defendant often there is comparatively little priority financial debt competing with the mass tort claims. The key issues are not priority fights with senior creditors but how much the defendants, related parties and insurers will pony up to resolve the tort liability, and internal conflicts among the tort claimants themselves.

The idea of enhanced recoveries for fraudulent transfers has more appeal. This benefits all creditors, not just mass tort claimants, and it is calculated to redress the relatively weak deterrent value of fraudulent transfer law. That law generally caps defendant liability at the value of the property transferred and erects numerous defenses and evidentiary hurdles that must be overcome to recover from the transferee. A simple and cold-blooded look at this incentive structure suggests that fraudulent transfers pay: take a dollar and if the transferor fails, perhaps, if the bankruptcy estate can meet its evidentiary burdens and overcome asserted defenses, you'll have to give back what you took but no more. Indeed, fraudulent transfer claims almost invariably settle, and the settlements generally fall far short of full disgorgement.

This analysis, while containing a kernel of truth, oversimplifies fraudulent transfer law. There are many quasi-punitive elements built into fraudulent transfer law already: the rule of *Moore v. Bay*,[77] the fact that transferee value given but not received by the debtor is not netted against transferee liability,[78] possible claim disallowance and equitable

[77] 284 U.S. 4 (1931) (declaring the void against one, void against all principle applicable to the bankruptcy avoiding powers).

[78] § 548(c) (requiring that good faith transferee "gave value to the debtor" to obtain credit against avoidance liability to the estate).

subordination,[79] the ability to recover the greater of appreciated assets or value transferred,[80] denial of credit for value given by bad faith transferees,[81] and the prevailing transferee's inability to recover litigation costs while the trustee's litigation expenses are expenses of administration.[82]

I do not suggest that the balance currently drawn in fraudulent transfer law is optimal or that fraudulent transfers are being adequately deterred. There is a problem here. Corporate asset-stripping and leveraged recapitalizations followed by bankruptcies seem more common than ever, notwithstanding whatever deterrent effect fraudulent transfer law poses.[83] In particular, the extensive settlement payment defenses and financial contract safe harbors embedded in the Bankruptcy Code have grown to the point where they have seriously degraded fraudulent transfer law.[84] If there is to be substantive reform of fraudulent transfer law, cutting back these defenses rather than increasing liability across the board seems to be a far better starting point. In all events, redressing imbalances in fraudulent transfer law is not a mass tort problem but a fraudulent transfer problem. Calls to increase transferee liability should be evaluated on that basis.

C. The Interim 105(a) Stay.

Both claimants and defendants have to do better through collective resolution to justify pulling the litigation out of the tort system in a solvent defendant case. A level playing field would allow claimants to credibly threaten to walk away from the table and resume litigation in the tort system. Lengthy stays in mass tort cases, like lengthy exclusivity periods in other chapter 11 cases, skew the playing field in defendants' favor by removing these claimant alternatives to acceding to the debtor's plan. Credible threats to resume tort litigation tend to level it.

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[79] § 502(d) (claim disallowance); § 510(c) (equitable subordination).

[80] § 550.

[81] § 548(c) (requiring "good faith" to obtain credit against avoidance liability to the estate for value given to the debtor).

[82] § 503(b). *See also* Daniel J. Bussel, *The Problem with Preferences*, 100 IOWA L. REV. BULL. 11, 12 (2014).

[83] *See* Douglas G. Baird, *Three Faces of Creditor-on-Creditor Aggression*, 97 AM. BANKR. L.J. 213 (2023); Diane Lourdes Dick, *Hostile Restructurings*, 96 WASH. L. REV. 1333 (2021) (describing coercive loan restructuring tactics that pit creditors against one another using J.Crew as a case study); Alicia McElhaney, *'Creditor-on-Creditor Violence' Lands Big Managers in Court*, INST. INV. (Nov. 20, 2020), https://www.institutionalinvestor.com/article/2bsx05dt5jw9x39168t8g/portfolio/creditor-on-creditor-violence-lands-big-managers-in-court (describing the rise of 'creditor on creditor violence' in loan restructurings).

[84] §§ 546(e)-(g), (j). Bussel, *supra* note 82, at 13 & n.9; Daniel J. Bussel, *Second Circuit Fumbles Tribune on Reconsideration*, HARV. BANKR. ROUNDTABLE (Jan. 14, 2020), https://bankruptcyroundtable.law.harvard.edu/2020/01/14/second-circuit-fumbles-tribune-on-reconsideration/.

Accordingly, the terms and length of the interim stay that debtors invariably seek to prevent the mass tort claimants from proceeding against certain nondebtor parties pending confirmation of a plan resolving those liabilities are critical. So long as the stay remains in place, claimants' only mechanism to liquidate and collect their claims is to negotiate a global settlement with the debtor. Experience under old chapter XI[85] and later under the pre-2005 version of chapter 11 suggest, however, that unlimited exclusivity gave debtors too much leverage—the de facto power through delay to force creditors to accede to their preferred plans.[86] An unlimited stay of litigation against the debtor and related parties operates in much the same way in a mass tort case—it places the mass tort claimants in "creditors' prison."[87] So long as the stay remains in place the only route to payment is through a plan of reorganization.[88]

If collective resolution in chapter 11 is more efficient than the tort system alternative and therefore in the mutual interest of claimants and defendants, why should an interim injunction ever be issued unilaterally at

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[85] Chapter XI in the Bankruptcy Act of 1898 provided unlimited plan exclusivity. Bankruptcy Act of 1898, Pub. L. 55-541, ch. 541, § 12, 30 Stat. 544 (1898) (repealed 1978). Under the Bankruptcy Reform Act of 1978, the exclusivity period was fixed at four months, but the bankruptcy courts had authority to extend exclusivity indefinitely for cause and in large chapter 11 cases lapses in exclusivity were rare. Former § 1121 (2004). In 2005, the Code was amended to impose an outside limit of 18 months on plan exclusivity. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub. L. No. 109-8, § 411, 119 Stat 23 (2005), *codified at* § 1121(d)(2)(A).

[86] Unlimited exclusivity in chapter XI under the Bankruptcy Act of 1898 resulted in effective debtor control of the proceeding absent conversion to chapter X. The Bankruptcy Reform Act of 1978 rejected unlimited exclusivity but provided for unlimited extensions of exclusivity for good cause shown. Creditor dissatisfaction with this state of affairs led to the 18-month maximum for debtor exclusivity imposed by BAPCPA in 2005. § 1121.

[87] *See* BUSSEL, SKEEL & HARNER, BANKRUPTCY at 649 (11th ed. 2021) ("So long as exclusivity remains intact, time is on the side of the debtor. Since unsecured and undersecured creditors receive no postpetition interest on their claims, delay is very costly to them. Creditors normally want prompt confirmation. If there are lengthy extensions of exclusivity, creditors may feel they have little choice but to accept an unfavorable plan of the debtor when, absent exclusivity, they might have been able to propose their own plan—one more favorable to their interests.").

[88] § 1121. *See* BUSSEL, SKEEL & HARNER, *supra* note 87, at 649:

> Limited exclusivity is thought to advance the reorganization goal of Chapter 11: the debtor is usually the most pro-reorganization constituent in the case, and centralizing the plan process in the debtor focuses the reorganization effort. Absent 'exclusivity,' it is argued, the case might quickly dissolve into chaos as each constituency independently seeks to promote its own plan. Moreover, 'exclusivity' provides a procedural counterweight for the debtor to the substantive legal rights of creditors. The resulting balance of forces, it is hoped, will drive the parties towards a consensual rather than a litigated solution to the reorganization case.

the defendant's behest when a channeling order requires overwhelming claimant consent? The justification typically is that staying the litigation will allow the negotiating parties to focus exclusively on settlement. In the context of a global financial restructuring where there are many competing constituencies and uncoordinated prebankruptcy dispute resolution processes an automatic and general time-out makes great sense. But for a chapter 11 case solely directed at resolving mass tort litigation, no general time-out is on the table. Only the mass tort claimants are affected by the stay. Life goes on as usual for all the other constituents.

If the purpose of the stay is to allow the mass tort claimants and defendant time and space to negotiate to a mutually satisfactory collective resolution to the mass tort problem while leaving all other parties unimpaired it is difficult to justify anything more than a short "catch your breath in the wake of filing" stay unless the representatives of tort claimants consent to the stay. Otherwise the stay of litigation simply shifts leverage during the bankruptcy negotiation from claimants to defendants. The right answer seems to be a short pause to allow the parties to assess the new bargaining environment followed by presumptive resumption of litigation absent claimant consent. The Code's provisions regarding assumption or rejection of nonresidential real property leases may be a model. They provide for a short initial window to assume or reject nonresidential real property leases that can only be extended with landlord consent.[89] Of course measuring mass tort claimant consent is much trickier than determining landlord consent. There will always be holdouts in the mass tort context that press for immediate trial of their claims notwithstanding a widespread consensus that settlement will be advanced by a limited pause in the litigation. If the representatives of key claimant constituencies stipulate with the debtor to extend the stay, that may indicate sufficiently broad claimant consent to leave the stay in place over individual claimant objections. But if claimant representatives generally believe that claimants are harmed by the stay, it should promptly terminate.

In addition, these preliminary injunctions as currently structured confer certain procedural advantages on defendants that work against claimants' interests.

For one thing, although the timely filing of a proof of claim preserves a claimant's rights against the debtor and its estate, it does not toll limitations periods against third parties co-liable with the debtor who may benefit from

[89] § 365(d)(4)(A)-(B) (debtor has 210 days to assume or reject lease of nonresidential real property subject to a single 90 day extension for cause absent nondebtor landlord's consent).

the stay of litigation. Accordingly, statutes of limitations continue to run and may eventually bar such claims even as their prosecution is enjoined by the bankruptcy court. A condition of any such injunction must be that otherwise applicable statutes of limitations are tolled as to enjoined claims against protected parties during the pendency of the injunction. Automatic tolling of applicable statutes of limitation during the pendency of the interim injunction similar to that available for claims subject to the automatic stay against the debtor and its estate is an easy, even-handed fix. Alternatively, the interim stay may be modified to permit the filing of complaints solely for the purpose of complying with applicable statutes of limitations.

For another thing, usually in obtaining preliminary injunctive relief the moving party must post an injunction bond to compensate the enjoined parties for the damages they incur. Under current chapter 11 practice, however, the posting of an injunction bond is excused by statute because the movant is, as a formal matter, the debtor rather than the protected party.[90] The protected nondebtors are spared significant litigation costs and defer litigation posing potentially billions of dollars in liability. Compensating claimants for the delay with periodic payments for their benefit in lieu of a bond, much like occurs with the automatic stay imposed on mortgagees in single-asset real estate cases, would tend to balance things out.[91] Making these stays pay-to-play is particularly compelling in Texas two-step bankruptcies (and other solvent debtor cases) since there is no concurrent global reorganization of an operating business occurring, and no argument that scarce management and financial resources must be preserved for that restructuring.

Finally, if the mass tort at issue has not sufficiently matured in the tort system to afford the parties a reliable basis for estimating the aggregate amount of the liability, a blanket stay of litigation may actually undermine the process of collective resolution. In such a case, if there is any stay at all, it should be conditioned on allowing a representative sample of cases to move forward on an expedited basis to build an adequate track record of settlements and judgments for accurate assessment of the liability necessary to implement a just collective resolution.

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[90] FED. R. BANKR. P. 7065.

[91] *Cf.* § 362(d)(3) (requiring interim adequate protection payments for mortgagees in single asset real estate cases).

D. Bar Dates and Small Claims.

Small individual claims are infeasible to assert in the tort system. Indeed, suing on tort claims of less than $100,000 is impractical in many United States jurisdictions if there is even modest complexity to the claim and any defenses.

Bankruptcy alters this dynamic because of the ease of filing a proof of claim and the statutory deemed allowance of claims absent objection.[92] In the world of personal bankruptcy this leads to the unfortunate casual assertion of clearly time-barred claims which dilute creditor recoveries on valid claims and impair the debtor's bankruptcy discharge.[93] In mass tort cases, these differences can cause claims to massively proliferate.[94] Substantial concerns about the integrity of the claims filed may also exist in some cases.[95]

Specialist law firms have developed business models for efficiently exploiting the chapter 11 settlement mechanism created in *Manville* and codified in § 524(g). The second generation of mass-asbestos cases led the way. Some law firms built portfolios of high value mesothelioma cases where causation and damages were easy to establish.[96] Others opted to build much larger portfolios of smaller and more dubious claims involving lesser injuries more difficult to trace to asbestos exposure. These large portfolios of small claims would have little value in the tort system because the cost of bringing them there would exceed their value. But administrative settlement through

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[92] § 502(a).

[93] Midland Funding LLC v. Johnson, 581 U.S. 224 (2017). I critique *Midland Funding* at length in Daniel J. Bussel, *Fee-Shifting in Bankruptcy*, 96 AM. BANKR. L.J. 613, 648-651 (2021).

[94] For example, in the *Boy Scouts* case, approximately 300 sexual abuse lawsuits were pending at the time of bankruptcy and the Boy Scouts had notice of an additional 1,400 claims. Nevertheless 82,209 non-duplicative direct sexual abuse claims were filed by the November 16, 2020 bar date, including 50,200 claims that were presumptively barred by the applicable state statute of limitations. Amended Disclosure Statement for the Modified Fifth Amended Chapter 11 Plan of Reorganization at 71, 90-95, *In re* Boy Scouts of Am., No. 20-10343-LSS (Bankr. D. Del. Sep. 30, 2021), ECF. No. 6445. Similarly, after A.H. Robins fixed its claims bar date, filings rapidly accelerated to a cumulative 300,000 claims, far exceeding initial estimates of up to 50,000 claims. Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 677 (1989).

[95] *See, e.g., In re* Garlock Sealing Techs., LLC, 504 B.R. 71, 85-86 (Bankr. W.D.N.C. 2014). An estimated one third of the 300,000 Dalkon Shield claims against A.H. Robins were disqualified as duplicates, filed in error, or due to lack of injury. McGovern, *supra* note 94, at 677.

[96] Mesothelioma claims are particularly well-suited to collective resolution because medical causation is not an issue. As a practical matter virtually all persons with mesothelioma contracted the disease through exposure to asbestos. In addition, mesothelioma is a terminal disease with no known cure and limited treatment options. The five-year survival rate is less than ten percent. *See generally* BARRY I. CASTELMAN, ASBESTOS MEDICAL AND LEGAL ASPECTS (5th ed Aspen 2005).

asbestos trusts made large portfolios of small claims economic to assert.[97] Mass advertising initially on television and print and more recently through social media has made it increasingly easy to assemble these portfolios.

In addition, control over a large portfolio of small claims created power in chapter 11 as the practice developed in *Manville* of allowing all unliquidated asbestos claims at $1 for purposes of classification and voting took root. Section 524(g) required 75% consent from the holders of asbestos claims; in determining whether that threshold was met, each claim, whether large or small, had equal value for voting purposes. Thus, affirmative votes from a large number of small claims with little or no value outside of bankruptcy could result in confirmation of a plan opposed by a small number of much larger claims with high value in the tort system.

In the 2020s, hedge-fund investors and litigation financiers entered the fray. Fueled by financing from these investors, who view mass torts as an exciting new asset class, solicitation of claims through mass advertising by law firms and nonlawyer "lead generators" on the asbestos model became more scientific, more common, and more effective. In the case of defective earplugs furnished by 3M to the United States military, solicitation of veterans through social media resulted in over 300,000 lawsuits.[98]

One cost of using bankruptcy as a mass tort resolution mechanism then is controlling the tendency of claims, especially small claims, to proliferate in bankruptcy and the resulting opportunity for the debtor to employ a divide

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[97] Opinion at 20-22, *In re* Imerys Talc Am., Inc., No. 19-10289 (Bankr. D. Del. Oct. 13, 2021), ECF No. 4239 (discussing and disqualifying master ballot voting of 15,719 mass asbestos claims by Mr. Bevan).

[98] U.S. JUD. PANEL MULTIDISTRICT LITIG., MDL STATISTICS REPORT: DISTRIBUTION OF PENDING MDL DOCKETS BY ACTIONS PENDING at 1 (May 15, 2023), https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Actions_Pending-May-15-2023.pdf (335,941 total historical and 255,500 pending 3M Combat Arms earplug products liability cases as of a May 15, 2023 MDL statistical report). 3M's record-setting earplug mass tort is expected to be overtaken shortly by litigation over contaminated water at United States Marine Corps base at Camp LeJeune, North Carolina. Roy Strom, *Camp LeJeune Ads Surge Amid 'Wild West' of Legal Finance, Tech*, BLOOMBERG L. (Jan. 30, 2023) ("Strom") (noting $112 million in 2022 spent on television advertising for victims of contaminated water at Camp LeJeune). Congress has appropriated $6 billion to compensate an anticipated 500,000 victims exposed to toxic water at Camp LeJeune during the period 1953-1987. The Sergeant First Class Heath Robinson Honoring our Promise to Address Comprehensive Toxics (PACT) Act of 2022, Pub. L. No. 117-168, 136 Stat. 1759 (2022). Mass solicitation of victims has commenced in earnest. Strom, *supra*. *See also* Samir D. Parikh, *Opaque Capital and Mass-Tort Financing*, 133 YALE L.J. F. 32 (2023) (describing tactics private equity financiers employ to amass claims and arguing these techniques may enable them to control mass tort litigation outcomes).

and conquer strategy pitting small holders against large holders. In an alliance between defendants and small holders, a plan that purports to have "overwhelming support" from a claimant class dominated by small holders can undercompensate large claims even though most large holders vote to reject the plan."[99]

One obvious check would be to mimic the tort system by imposing a modest filing fee on the holders of mass tort claims. Another obvious mechanism would be to require separate classification and treatment of small claims as an unimpaired convenience class with claimants voluntarily reducing their claims to a modest fixed payment.[100] Finally, meaningful sanctions, perhaps in the form of attorney fee-shifting, could be imposed on investors and claims aggregators who assert large numbers of meritless small claims.[101]

E. Exclusivity and Cramdown.

Under current law, no conventional bankruptcy cramdown of dissenting classes of mass tort claimants can occur if future claims or claims against nondebtor parties are channeled. Channeling of futures and third-party releases require overwhelming consent by affected claimant classes. On the other hand, no creditors' plan has been nonconsensually confirmed against a mass tort debtor either. Confirmed mass tort plans under current chapter 11 are the product of a bargain between an "overwhelming majority" of current mass tort claimants and the debtor. There are an infinite variety of nuanced terms in these bargains, but the central issue is always how much value can and will be feasibly placed in trust for the benefit of mass tort victims.

Exclusivity, creditors' plans, and cramdown—staples of chapter 11 practice—are largely irrelevant in mass tort cases. Debtors cannot impose a plan on claimants because they need overwhelming claimant consent to obtain the channeling order they want. Claimants cannot force the nondebtor parties to make the desired contributions to the trust without their consent.[102] In the two-step bankruptcies, the irrelevance of exclusivity and cramdown becomes transparent. The shell company serving as debtor

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[99] *See infra* notes 108-134 and accompanying text (discussing classification and voting issues).

[100] § 1122(b).

[101] Daniel J. Bussel, *Fee-Shifting in Bankruptcy*, 96 AM. BANKR. L.J. 613, 629-633 (2022). *See supra* notes 97-98 and accompanying text.

[102] Under MacArthur Co. v. Johns-Manville Corp., 837 F.2d 89 (2d Cir.), *cert. denied*, 488 U.S. 868 (1988), nondebtor rights as additional insureds under shared insurance policies may be an exception to the consent requirement. *See* text at nn. 194-202 (discussing marshalling of shared insurance).

for the primary tortfeasor has no assets other than the voluntary commitment of its parent and other third parties to settle their mass tort liability by purchasing a third-party release based on the overwhelming consent of the claimant class.[103] Neither the parent nor the claimant classes can be required to furnish the consents necessary to confirm a plan. The only walk-away option for either side is to exit back into the tort system. Without a nonconsensual confirmation option, exclusivity and creditors' plans are largely irrelevant.[104] The only confirmable plan is one agreed to both by the claimant class bound by the channeling injunction and the parties protected by it. The irrelevance of cramdown places critical pressure on the length and terms of any interim stay of the underlying tort litigation.[105]

Complex valuation disputes must be resolved in order to reach agreement on a plan. In a solvent case, the amount of the mass tort liabilities present and future is the central issue. In an insolvent case, the reorganization value of the defendant places a limit on claimant recovery whatever the amount of the liability. In a case where the defendant may or may not be solvent, both valuation issues may be on the table. In such a situation, an auction of the company free and clear of its mass tort liabilities, or "some other form of market valuation,"[106] may be the best answer.[107]

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[103] Coupling a divisive merger with a Funding Agreement between the primary tortfeasor and its chapter 11 affiliate muddies the waters somewhat. If the Funding Agreement is enforceable over the objection of the primary tortfeasor upon confirmation of a creditors' plan, then the ability to terminate exclusivity and the power to propose a creditors' plan might be significant leverage for claimants. The text assumes that this is not the case. *See* Declaration of John R. Castellano in Support of Chapter 11 Petitions and First Day Motions at 38 (Exhibit B - Funding Agreement), *In re* Aearo Techs. LLC, No. 22-02890-JJG-11 (Bankr. S.D. Ind. July 26, 2022), ECF No. 11 (an arguable interpretation of the Aearo Funding Agreement makes it only enforceable pursuant to a plan approved by an Aearo board of directors appointed by 3M).

[104] Creditors' plans may serve as the mechanism by which claimants at impasse over the debtor's plan seek to exit back into the tort system, particularly in cases where they are otherwise laboring under a nonconsensual interim stay of litigation. The point in the text is that claimants as a class, like debtors, are unable to achieve the efficiencies of a collective resolution of the mass tort litigation without their counterparties' consent.

[105] *See supra* text at nn. 85-91 (discussing the interim stay).

[106] Bank of Am. Nat. Trust and Sav. Ass'n v. 203 N. LaSalle St. P'ship, 526 U.S. 434, 443 (1999). *See also In re* Castleton Plaza L.P., 707 F.3d 821 (7th Cir. 2013).

[107] Both *Robins* and *Piper Aircraft* are good examples of mass tort valuation problems that ultimately could only be resolved through a sale of the company free and clear. RICHARD B. SOBOL, BENDING THE LAW: THE STORY OF THE DALKON SHIELD BANKRUPTCY 178-208 (1991); *In re* Piper Aircraft Corp., 244 F.3d 1289, 1292-93 (11th Cir. 2001).

F. Classification and Voting.

The most pressing unsolved problem in dealing with mass tort cases is how to classify and calculate class acceptance for tens of thousands, or even hundreds of thousands, of unliquidated personal injury tort claims. It is uncontroversial that final liquidation of these claims for purposes of distribution must be deferred and assigned to the post-confirmation settlement trust created under the plan. Indeed, a primary goal of a mass tort chapter 11 case is to create such a trust to manage the allowance and payment of these claims.

Legal authority (and the moral legitimacy) to channel claims to the trust rests on the foundation of the "overwhelming" class consent of the mass tort claimants affected by the channeling. As the following chart indicates, mass tort channeling orders are generally supported by over 90% of those casting ballots in the affected class or classes:[108]

Chapter 11 Mass Tort Case	Plan Acceptance Rate (Affected Creditors)
In re Johns-Manville Corp., Case No. 82 B 11656/76 (Bankr. S.D.N.Y.)	95%[109]
In re A.H. Robins Company, Inc., Case No. 85-01307-R (E.D. Va.)	94.38%[110]

[108] *In re* Master Mtg. Inv. Fund, 168 B.R. 930, 937-38 (W.D. Mo. 1994); *In re* Wool Growers Cent. Storage Co., 371 B.R. 768, 777 (Bankr. N.D. Tex. 2007) ("Most courts have held that factor four [of the *Master Mortgage* factors] is satisfied when over 90% of the impacted creditors approve the plan.").

[109] *In re* Johns-Manville Corp., 68 B.R. 618, 631 (Bankr. S.D.N.Y. 1986) ("Over 50,000 [asbestos health] claimants voted, and with 3,000 ballots yet to be counted, *approximately 95%* of this class has accepted the Plan") (emphasis in original), *aff'd*, 78 B.R. 407 (S.D.N.Y. 1987), *aff'd sub nom.* Kane v. Johns-Manville Corp., 843 F.2d 636 (2d Cir. 1988).

[110] *In re* A.H. Robins Co., 88 B.R. 742, 750 (E.D. Va. 1988), *aff'd*, 880 F.2d 694 (4th Cir. 1989).

Chapter 11 Mass Tort Case	Plan Acceptance Rate (Affected Creditors)
In re Purdue Pharma L.P., et al., Case No. 19-23649 (RDD) (Bankr. S.D.N.Y.)	95.7% (general PI claims) 98% (intrauterine exposure)[111]
In re W.R. Grace & Co., et al., Case No. 01-01139 (JKF) (Bankr. D. Del.)	99.5%[112]
In re Dow Corning Corp., Case No. 95-20512 (Bankr. E.D. Mich.)	95.5%[113]
In re Combustion Engineering, Inc., Case No. 03-10495 (Bankr. D. Del.)	97-99%[114]

[111] *In re* Purdue Pharma L.P., 633 B.R. 53, 61 (Bankr. S.D.N.Y. 2021), *vacated* 635 B.R. 26 (S.D.N.Y. 2021), *rev'd in part sub nom*, Purdue Pharma, L.P. v. City of Grande Prairie, 69 F.4 45 (2d Cir. 2023*), stay and cert. granted sub nom*, Harrington v. Purdue Pharma, L.P., No. 23-124, 2023 WL 5116031 (U.S. Aug. 10, 2023) (95.7 percent (Class 10(b)) to over 98 % (Class 10(a))).

[112] Plan Proponents' Main Brief in Support of Plan Confirmation at 106, *In re* W.R. Grace & Co., No. 01-01139 (JKF) (Bankr. D. Del. Aug. 8, 2009), ECF No. 22,733 ("[T]he Joint Plan was accepted by approximately 99.5% of the valid Ballots of claimants in Class 6…."). *See also* Plan Proponents' Main Post-Trial Brief in Support of Confirmation & etc. at 120 & n.389, *In re* W.R. Grace & Co., No. 01-01139 (JKF) (Bankr. D. Del. Jan. 3, 2009), ECF. No. 23,662 (noting that Class 6 voted to accept the plan by 99.51%).

[113] *In re* Dow Corning Corp., 287 B.R. 396, 414 (E.D. Mich. 2002) (domestic breast implant claimants).

[114] *In re* Combustion Eng'g, Inc., 391 F.3d 190, 208 (3d Cir. 2004) (noting that plan was accepted by approximately 97% of voting claimants submitting valid ballots); Plan Proponents' Memorandum in Support of (I) Approval of Disclosure Statement and Solicitation Procedures and (II) Confirmation of Plan of Reorganization & etc. at *6, *In re* Combustion Eng'g, Inc., No. 03-10495, 2003 WL 23965286 (Bankr. D. Del. Apr. 10, 2003) ("The Plan is overwhelmingly supported by CE's asbestos claimants who voted 99 percent in favor of it.").

Chapter 11 Mass Tort Case	Plan Acceptance Rate (Affected Creditors)
In re Western Asbestos Co., Case No. 02-46284T (Bankr. N.D. Cal.)	96%[115]
In re J T Thorpe Co., Case No. 02-41487-H5-11 (Bankr. S.D. Tex.)	99%[116]
In re TK Holdings Inc., Case No. 17-11375 (BLS) (Bankr. D. Del.)[117]	PSAN Claims (IIM) 74.59% PSAN Claims (TDM) 77.70% PSAN Claims (SMX) 74.38% Other PI/WD Claims (Debtors) 84.94% Other PI/WD Claims (IIM) 87.42% Other PI/WD Claims (TDM) 86.84% Other PI/WD Claims (SMX) 87.42%[118]

[115] Plan Proponents' Memorandum in Support of Request for Report and Recommendation to District Court Regarding Confirmation Issues at 56, *In re* Western Asbestos Co., No. 02-46284, 2003 WL 24240789 (N.D. Cal. Sep. 2, 2003), ECF No. 7 ("Here, the Plan classifies the Asbestos Related Claims separately into Class 4, the members of which voted in excess of 96 percent in number and amount in favor of the Plan.").

[116] *In re* J. T. Thorpe Co., 308 B.R. 782, 789 (Bankr. S.D. Tex. 2003) (all impaired classes accept by more than 99%).

[117] The *Takata* plan separately classified and tabulated the votes of tort victims based on the source of their injury and the responsible protected party. The type of injury is specified as either "PSAN" (phase-stabilized ammonium nitrate) or "Other PI/WD" (other personal injury or wrongful death), and the parenthetical acronyms identify the protected party against whom the applicable class members held claims. Crucially, in each case individual claimants were afforded affirmative recourse rights to pursue their claims against the applicable nondebtor party outside the plan. *See* Findings of Fact, Conclusions of Law, and Order Confirming the Fifth Amended Joint Chapter 11 Plan of Reorganization & etc., *In re* TK Holdings Inc., No. 17-11375, 2018 WL 1306271 (Bankr. D. Del. Jan. 5, 2018), ECF No. 1629.

[118] Revised Declaration of Christina Pullo of Prime Clerk LLC Regarding the Solicitation of Votes and Tabulation of Ballots & etc. at Ex. A, *In re* TK Holdings Inc., No. 17-11375 (Bankr. D. Del. Feb. 16, 2018), ECF No. 2100.

Chapter 11 Mass Tort Case	Plan Acceptance Rate (Affected Creditors)
In re Mallinckrodt PLC, Case No. 20-12522 (JTD) (Bankr. D. Del.)	Third Party Payor Opioid Claims 98.26% PI Opioid Claims (9(b)) 96.94% NAS Opioid Claims (9(c)) 96.96%[119]

In mass-asbestos cases, the statute sets a floor of 75% acceptance.[120] Because the vast majority of mass tort claims remain to be liquidated, courts must estimate the claims for voting purposes in order to determine whether the appropriate threshold has been met.[121] Typically the problem is "solved" by arbitrarily assigning a value of $1 to each mass tort claim for voting purposes.

But not all mass tort claims are of equal value. Treatment that is both fair and acceptable to holders of small claims may be unfair and unacceptable to large holders, and vice-versa. This intra-class conflict is in no way limited to mass tort claims. Bankruptcy law deals with the potential of intra-class conflict between large and small holders by applying a double screen to determine class acceptance.[122] The Code requires that both a majority in number of claimants and two-thirds in amount of the claims voted accept the plan to deem the class an accepting class.[123]

Arbitrarily allowing all mass tort claims at $1 for voting purposes neuters bankruptcy law's two-thirds in amount requirement designed to protect large holders from having their votes swamped by a mass of small holders.[124] Since the holders of small claims, and the tort lawyers who have

[119] Final Declaration of James Daloia of Prime Clerk LLC Regarding the Solicitation of Votes and Tabulation of Ballots Cast & etc. at Ex. A2, *In re* Mallinckrodt PLC, No. 20-12522 (Bankr. D. Del. Oct. 31, 2021), ECF No. 5087.

[120] §524(g)(2)(B)(ii)(IV)(bb). *See also In re* Purdue Pharma L.P., 69 F.4th 45, 78-79 (2d Cir. 2023) (characterizing 75% consent threshold as "bare minimum"), *stay and cert. granted*, Harrington v. Purdue Pharma L.P., No. 23-124, 2023 WL 5116031 (U.S. Aug. 10, 2023).

[121] Typically in mass tort cases there are only a relatively small number, if any, of claims that have been liquidated through final judgments or settlements that have not been paid at the time of the bankruptcy.

[122] *But see In re* Figter Ltd., 118 F.3d 635, 640 (9th Cir. 1997) (construing numerosity requirement as majority of allowed claims voted rather than majority of creditors voting in the class).

[123] § 1126(c).

[124] *Id.*

assembled large portfolios of such claims, know that the tort system is not a viable option for them to achieve compensation, they may agree to a prompt cash settlement of their claim at modest levels with minimal showings or process. Moreover, the ease at which large portfolios of small claims can be assembled through advertising on television and social media enable small claims to control a class vote in which the number of claimants rather than the value of the claims is the decisive factor. The debtor may exploit the intra-class conflict between large and small to confirm a plan that channels all claims to a trust process skewed in favor of small claims and against those who are the most severely injured by the debtor's conduct. Those protected by the channeling order may find it cheaper to buy off the votes of the small claim holders, than to deal fairly with the holders of large claims.

One control on this process is to impose some barriers to entry on the holders of small claims as suggested above.[125] Even so, barriers to entry in bankruptcy will never be as severe as the cost of bringing a tort action of low value or uncertain or dubious merit. So, the problem of intra-class conflict will persist when a great mass of unliquidated claims cannot be reliably estimated individually before the creation of the trust to which the claims will be channeled.

Only rough justice can be provided in such a context.[126] A two-track solution may be the best available answer in many cases, one that incorporates separate settlement structures for the holders of large and small claims. The "Independent Review Option" ("IRO") developed in the *Boy Scouts* plan is one example of such a two-track system.[127] In that case, holders that expect that their claims would exceed $1 million in the tort system may, upon paying a substantial filing fee, opt into an independent review process mimicking the tort system. IRO does not rely upon capped matrix values and predetermined aggravating and mitigating factors applicable to the mass tort claims generally but requires an additional investment in submitting supporting proof sufficient to establish the value of the claim in the tort system. Successful claimants in the IRO process have preferential access to an "Excess Awards Fund" funded by recoveries from the Boy Scouts excess liability insurance.[128]

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[125] *See supra* text at notes 92-100 (discussing bar dates and small claims).

[126] *In re* Trib. Co., 972 F.3d 228, 244-45 (3d Cir. 2020).

[127] *In re* Boy Scouts of Am., 642 B.R. 504 (Bankr. D. Del. 2022) and Third Modified Fifth Amended Chapter 11 Plan of Reorganization (With Technical Modifications) at Ex. A, pp. 28-34, *In re* Boy Scouts of Am., No. 20-10343-LSS (Bankr. D. Del. Sept. 6, 2023), ECF No. 10296 (Trust Distribution Procedures Art. XIII).

[128] Since the per occurrence limits of the debtor's primary liability carriers were generally $1 million or less, recoveries from excess insurers depended principally on their liability for individual claims in excess of $1 million.

This ad hoc two-track approach fortuitously developed in the *Boy Scouts* case evolved into a workable compromise in that case. But a structural approach to generating such compromises that appropriately distinguishes and treats high and low value mass tort claims is necessary if bankruptcy is to serve as the alternative mechanism for resolving mass torts. That structural solution should require the plan proponent to garner the necessary "overwhelming" consent from each subclass pursuant, as appropriate, to separate settlements.[129]

Bankruptcy Rule 3013 recognizes that proper classification may be so central in determining creditor consent to a plan that a court may fix and approve the classification in advance of solicitation of the plan.[130] But Rule 3013 is virtually never used. Plan proponents have successfully persuaded courts that classification is properly tested only at confirmation after the votes are already in. At confirmation, of course, the tactical environment greatly favors the plan proponent since it can characterize the objecting parties as the outvoted dissenting minority of a consenting class to an otherwise confirmable plan. Classification objections have sometimes prevailed at confirmation, but usually only in single-asset real estate cases,[131] and rarely, if ever, in a mass tort case.

Constructing a bankruptcy solution to a mass tort problem without undertaking a general restructuring of the debtor requires rethinking the classification and voting issues. In this context, unlike the standard chapter 11 case, classification and voting are decidedly not about waiving rights to absolute priority and preventing unfair discrimination. Confirmation cannot involve "cramdown";[132] feasibility and best interest of the creditors are not

[129] Some authorities question whether legally similar claims may be separately classified for reasons other than cashing out small claims for administrative convenience subject to the election of the claimant. Matter of Greystone III Joint Venture, 995 F.2d 1274 (5th Cir. 1991); Granada Wines v. New England Teamsters, 748 F.2d 42 (1st Cir. 1984). But at least in the case of "operating" chapter 11 cases, most courts take a more flexible view of classification of legally similar claims. *In re* U.S. Truck Co., 800 F.2d 581 (6th Cir. 1986); Hanson v. First Bank of S.D., 828 F.2d 1310 (8th Cir. 1987). The Code prohibits placement of legally dissimilar claims in the same class but does not speak directly to separate classification of legally similar claims outside the context of administrative convenience classes. § 1122.

[130] FED. R. BANKR. P. 3013.

[131] *See, e.g.*, Matter of Greystone III Joint Venture, 995 F.2d 1274 (5th Cir. 1991); *In re* Barakat, 99 F.3d 1520 (9th Cir. 1996).

[132] No cramdown of a mass tort class is permitted under §524(g) and the third party releases that are generally included in all mass tort plans require overwhelming consent of the channeled classes under existing law.

meaningful protections for outvoted dissenting mass tort claimants.[133] What is at stake is whether dissenting members of consenting classes and future claims can be bound to a global settlement negotiated by similarly situated parties. Such a case should be laser focused on assessing whether all the subclasses being channeled are actually consenting by large majorities of truly similarly situated parties. In that context, assessing the propriety of the classification of the mass tort claims in advance of solicitation by Rule 3013 motion should be required.

Perhaps the best mechanism for sorting voting creditors into the right classes is to tie access to preferred treatments to voting. In dealing with administrative convenience classes, any creditor can opt into the convenience class by reducing its claim and accepting the prescribed treatment being offered. Although translating this technique into the world of mass torts is undoubtedly complex, similar mechanisms can be employed. For example, in the *Boy Scouts* case one could imagine that a subclass might have been constructed of only those who have elected to forgo the claims matrix and enter the IRO. Similarly, to the extent that third-party claims are being channeled to the trust, a subclass of claimants holding claims against

[133] These statutory tests (§§ 1129(a)(7) (best interests) and (11) (feasibility)) that protect outvoted dissenting creditors lose their meaning when the plan at issue leaves the operations of a solvent non-distressed debtor untouched and only imposes a global resolution of mass tort litigation based on agreed contributions. Such plans are invariably feasible in the bankruptcy sense in that no further reorganization is likely if the plan is confirmed. The best interests test is also very difficult to apply when the plan liquidates the aggregate liability of the solvent nondebtor defendant through a plan settlement that results in a contribution to the settlement trust commensurate with the solvent nondebtor defendant's liability on the mass tort claims. Some cases hold that the nondebtor's assets must be considered in the best-interests liquidation analysis. *See e.g.*, *In re* Wash. Mut., Inc., 442 B.R. 314, 359-60 (Bankr. D. Del. 2011) ("In a case where claims are being released under the chapter 11 plan but would be available for recovery in a chapter 7 case, the released claims must be considered as part of the analysis in deciding whether creditors fare at least as well under the chapter 11 plan as they would in a chapter 7 liquidation."); *In re* Quigley Co., 437 B.R. 102, 144-46 (Bankr. S.D.N.Y. 2010) (plan violated best interest test because the debtor's liquidation analysis did not reflect that some creditors would retain their rights to sue the solvent nondebtor parent in a chapter 7 liquidation, rights released under the chapter 11 plan). But if the solvent nondebtor's liability is coextensive of the debtor's and is being channeled in exchange for a fully commensurate contribution then it is at best unclear why the plan is not a payment in full plan satisfying §1129(a)(7) unless the proceeds of the settlement contribution are being redistributed within the claimant class to claimants to whom the nondebtor is not liable. Of course, if a court construes §1129(a)(7) as limited to distributions in liquidation from the debtor's estate, then the test will be easily met. The liquidating debtor as a standalone will invariably return less to tort claimants than a plan that is largely funded by solvent nondebtors. Certainly, this is the case of a shell entity created in a Texas two-step or similar transaction. *Cf.* Joshua M. Silverstein, *A Revised Perspective on Non-Debtor Releases*, 43 BANKR. L. LETTER, Oct. 2023, at 10-11 (arguing courts must assume creditors affected by a nondebtor release will be paid in full from the shielded nondebtor for the purposes of determining compliance with the best-interests requirement of §1129(a)(7)).

those third parties should be solicited and that subclass's consent required before the third party channeling order is put in place.[134]

G. Third Party Releases: Of Derivative and Independent Liabilities.

The single most important unsettled issue of law under chapter 11 remains the long-standing conflict in the circuits over the availability of third-party releases under non-asbestos reorganization plans.[135] The Supreme Court is now poised to address this issue directly in *Purdue Pharma*.[136] There is significant risk that in doing so, the Supreme Court may throw the baby out with the bathwater.

Three distinct types of parties commonly seek third-party releases in mass tort cases: (i) insurers whose liability is derived from the debtor's status as their insured, (ii) parties related to the debtor whose liability is derived from ownership in, financing of, employment by, or affiliate status with the debtor,[137] and (iii) insurers, related parties and third parties who are otherwise co-liable with the debtor based on their own independent legal responsibility for a mass tort.

[134] Existing bankruptcy law at least arguably requires this analysis under §1123(a)(4) (mandating equal treatment within classes). *See infra* text at notes 155-163 (discussing *AOV* and *Quigley*).

[135] *Robins* extended *Manville's* channeling order-settlement trust concept to non-asbestos mass torts and the non-derivative liabilities of related third parties. A.H. Robins Co. v. Piccinin (*In re* A.H. Robins Co.), 788 F.2d 994 (4th Cir.) *cert. denied* 479 U.S. 876 (1986). *Robins* lacked the separation of ownership and management that existed in *Manville*. Identity between ownership and management precipitated a struggle over preserving shareholder control and value in the face of overwhelming Dalkon Shield liability, a struggle that ultimately was resolved through a third party sale of the company free and clear of the Dalkon Shield liabilities pursuant to a plan that allocated approximately thirty percent of the sale proceeds to shareholders. Shareholder consent to that resolution required third party releases to insiders and other related parties as an essential, albeit controversial, part of the *Robins* plan. *See generally* RICHARD B. SOBOL, BENDING THE LAW: THE STORY OF THE DALKON SHIELD BANKRUPTCY (1991).

[136] *In re* Purdue Pharma L.P., 69 F.4th 45 (2d Cir. 2023), *stay and cert. granted,* Harrington v. Purdue Pharma L.P., No. 23-124, 2023 WL 5116031 (U.S. Aug. 10, 2023).

[137] The caselaw is muddled with respect to the proper line drawn between "derivative" and "independent" liabilities in categories (ii) and (iii) discussed in the text. The narrowest view is that derivative liability is secondary liability based on the underlying liability of the debtor as primary tortfeasor, such as liability predicated on suretyship law or *respondeat superior*. Such liability is generally subject to full indemnity by the primary tortfeasor as a matter of law. Effectively, however, some courts, including the Second Circuit in *Purdue Pharma* characterize liabilities that are legally predicated on independent tortious conduct of the nondebtor party as "derivative" if the debtor is co-liable for the same harm and the nondebtor has equitable rights of contribution or contractual indemnity. *See infra* text accompanying notes 144-150.

Although some circuits dissent,[138] most federal courts of appeals permit releases for third parties in the first two categories given overwhelming class consent and a contribution to the settlement trust from the released party commensurate with its liability.[139] Moreover, Congress has specifically endorsed third-party releases to this extent in mass-asbestos cases.[140] From a policy standpoint it seems clear that if bankruptcy is to be a venue for collective mass tort resolution, third-party releases to this extent should be

[138] Three Circuits ban non-consensual nondebtor releases entirely (except as authorized by §524(g)) on the basis that they are prohibited by § 524(e), which provides generally that "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." *See* Bank of N.Y. Tr. Co. v. Off. Unsecured Creditors' Comm. (*In re* Pac. Lumber Co.), 584 F.3d 229 (5th Cir. 2009); *In re* Lowenschuss, 67 F.3d 1394 (9th Cir. 1995); *In re* Western Real Estate Fund, Inc., 922 F.2d 592 (10th Cir. 1990); *but see* Zacarias v. Stanford Int'l Bank Ltd., 945 F.3d 883 (5th Cir. 2019) (third parties making substantial contributions to the receiver in the R. Allen Stanford Ponzi scheme are entitled to an order barring creditors from suing on the creditors' claims), *reh'g en banc denied*, No. 17-11073 (5th Cir. Jan. 21, 2020). *See also* Ralph Brubaker, *Bankruptcy Injunctions and Complex Litigation: A Critical Reappraisal of Non-Debtor Releases in Chapter 11 Reorganizations*, 1997 U. ILL. L. REV. 959. The Ninth Circuit's stance against third party releases has softened recently. It has approved nonconsensual exculpation of third parties for actions taken in connection with the reorganization case itself. Blixseth v. Credit Suisse, 961 F.3d 1074 (9th Cir. 2020). *See In re* Astria Health, 623 B.R. 793 (Bankr. E.D. Wash. 2021) (approving exculpation and consensual third party releases on the authority of *Blixseth*). The Fifth Circuit, however, has refused to distinguish exculpation of the type approved in *Blixseth* from other forms of nonconsensual third party release that it prohibits. Nexpoint Advisors v. Highland Cap. Mgmt., L.P. (*In re* Highland Cap. Mgmt.), 48 F.4th 419 (5th Cir. 2022), *petition for cert. docketed*, (Jan. 9, 2023) (No. 22-631).

[139] Courts in the Second, Third, Fourth, Sixth, Seventh, and Eleventh Circuits permit non-consensual nondebtor releases on somewhat varying tests. *In re* Metromedia Fiber Network, 416 F.3d 136, 141 (2d Cir. 2005); *In re* Millennium Lab Holdings II, LLC, 575 B.R. 252 (Bankr. D. Del. 2017) *dismissed as moot In re* Millennium Lab Holdings II, LLC, 945 F.3d 126 (3d Cir. 2019); *In re* Combustion Eng'g, Inc., 391 F.3d 190 (3d Cir. 2004); *In re* Cont'l Airlines, 203 F.3d 203 (3d Cir. 2000); Menard-Sanford v. Mabey (*In re* A.H. Robins Co.), 880 F.2d 694, 702 (4th Cir. 1989); Class Five Nev. Claimants v. Dow Corning Corp. (*In re* Dow Corning Corp.), 260 F.3d 648, 655 (6th Cir. 2002); *In re* Specialty Equip., 3 F.3d 1043, 1047 (7th Cir. 1993); *In re* Seaside Eng'g & Surv'g, Inc.), 780 F.3d 1070 (11th Cir. 2015). All the formulations, however, turn on showings of necessity, and overwhelming consent of the affected constituency, exceeding the 75% threshold set forth in §524(g) for mass asbestos cases. In addition, courts also generally assess the so-called *Master Mortgage* factors in determining the lawfulness of non-consensual third party releases outside the mass-asbestos context. *In re* Master Mortgage Inv. Fund, 168 B.R 930 (W.D. Mo. 1994). In the Second Circuit, disagreement arose over whether the channeling of non-derivative mass tort liabilities of nondebtors may be channeled based on class consent. *In re* Purdue Pharma L.P., 635 B.R. 26, 37 (S.D.N.Y. Dec. 16, 2021) (lawfulness of nonconsensual third party release characterized as "great unsettled question" in Second Circuit); *see also* Johns-Manville Corp. v. Chubb Indem. Ins. Co. (Manville III), 600 F.3d 135, 141-142 (2d Cir. 2010) (finding no bankruptcy court jurisdiction over independent third party liabilities). The Second Circuit recently resolved this ambiguity in favor of channeling nondebtor liabilities at least where the nondebtor's liability was based in whole or in part on the debtor's conduct. *In re* Purdue Pharma L.P., 69 F.4th 45, 74-75 (2d Cir. 2023), *stay and cert. granted,* Harrington v. Purdue Pharma L.P., No. 23-124, 2023 WL 5116031 (U.S. Aug. 10, 2023). We shall shortly see if this resolution survives Supreme Court scrutiny. Oral argument is scheduled for Dec. 4, 2023.

[140] § 524(g)(4)(A)(ii).

expressly authorized,[141] subject to obtaining sufficient contributions from the releasees to win overwhelming consent from holders of claims against them. We will shortly see whether the Supreme Court will find sufficient legislative authority in the interstices of the Code and historical precedents to continue this practice. If not, new legislation will be necessary to preserve this tool for mass tort resolution outside the mass-asbestos context.

The third category—non-derivative liabilities of insurers, related parties, and unrelated third parties—raises the most difficulties.

The Second Circuit has grappled with the problem of independent liabilities of insurers and related parties. Although the cases are difficult to reconcile, the Second Circuit appears to have been more sympathetic to extending relief to the non-derivative liabilities of related parties than of insurers.

In the *Bailey* litigation growing out of the *Johns-Manville* confirmation order, the Second Circuit suggested that insurer liability based on the insurer's own tortious conduct rather that the tortious conduct of its insured could not be permanently channeled in the insured's chapter 11 case.[142] Although the Supreme Court granted certiorari in this case it ultimately ducked the question of bankruptcy court jurisdiction to issue a non-derivative third-party release to Manville's settling insurers on res judicata grounds.[143]

The channeling of liability of nondebtor related parties based on their independently tortious conduct is front and center in the Second Circuit's *Purdue Pharma* case now before the Supreme Court. The bankruptcy court

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[141] Both *Robins* and *Manville*, lacking any express Congressional guidance, relied on the general and residual equitable powers of both the bankruptcy and Article III courts to evolve these creative solutions to the problems presented. *See* § 105(a) ("The Court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title"); § 1123(a)(5) (non-exclusive list of ways in which plan may satisfy the requirement to provide adequate means of implementation); § 1123(b)(6) ("[a plan may] include any other appropriate provision not inconsistent with the applicable provisions of this title."). Congress has never expressly ratified the use of these statutes in this manner, but neither has it ever rejected these efforts. In passing, the Bankruptcy Reform Act of 1994, consistent with this neutral stance neither endorsing nor rejecting channeling orders outside the mass-asbestos context, Congress instructed that the amendments codifying the *Manville* template in §§ 524(g)-(h), shall not "be construed to modify, impair, or supersede any other authority the court has to issue injunctions in connection an order confirming a plan of reorganization." Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 111(b), 108 Stat. 4106, 4117 (uncodified rule of construction).

[142] *In re* Johns-Manville Corp., 517 F.3d 52, 66 (2d Cir. 2008) *rev'd and remanded on other grounds sub nom.* Travelers Indem. Co. v. Bailey, 557 U.S. 137 (2009).

[143] Travelers Indem. Co. v. Bailey, 557 U.S. 137 (2009).

had approved the channeling of Sackler family liability insofar as the debtor's conduct was either "a legal cause, or a legally relevant factor" in all the released causes of action.[144] Since the Sacklers' liability for harms caused by opioids stemmed from their personal misconduct in connection with Purdue's sale and marketing of OxyContin, Purdue's conduct was "a legally relevant factor." Indeed, Purdue was itself liable for all the opioid harms for which the Sacklers were also liable. The district court felt that this factual overlap did not change the fact that the Sacklers' liability was based on their own conduct, not on Purdue's, and that the bankruptcy court therefore lacked statutory authority to channel these non-derivative claims against them.[145] The Second Circuit majority, however, relying on its earlier decisions in *Manville I*,[146] *Metromedia*[147] and *Drexel*[148] agreed with the bankruptcy court that this factual overlap provided a sufficient basis to channel these related party liabilities.[149] It located the statutory authority for doing so in §1123(b)(6).[150]

The upshot is that under current law in the Second Circuit somewhat broader relief appears to be available to mass tort related parties under § 1123(b)(6) than to mass-asbestos insurers under § 524(g).

The furthest bridge of all is the attempt to channel the non-derivative liabilities of unrelated codefendants. In mass-asbestos practice unrelated codefendants receive neither an interim stay of litigation[151] nor the protection of a channeling order.[152] Some courts, however, have both stayed

[144] *In re* Purdue Pharma L.P., 69 F.4th 45, 57 (2d Cir. 2023), *stay and cert. granted,* Harrington v. Purdue Pharma L.P., No. 23-124, 2023 WL 5116031 (U.S. Aug. 10, 2023).

[145] *In re* Purdue Pharma L.P., 635 B.R. 26 (S.D.N.Y. 2021), *rev'd in part sub nom*, Purdue Pharma, L.P. v. City of Grande Prairie, 69 F.4 45 (2d Cir. 2023*), stay and cert. granted sub nom*, Harrington v. Purdue Pharma, L.P., No. 23-124, 2023 WL 5116031 (U.S. Aug. 10, 2023).

[146] MacArthur Co. v. Johns-Manville Corp. (Manville I), 837 F.2d 89, 91 (2d Cir. 1988).

[147] *In re* Metromedia Fiber Network, Inc. 416 F.3d 136 (2d Cir. 2005).

[148] *In re* Drexel Burnham Lambert Grp., Inc., 960 F.2d 285 (2d Cir. 1992).

[149] *In re* Purdue Pharma L.P., 69 F.4th 45, 79-81 (2d Cir. 2023), *stay and granted,* Harrington v. Purdue Pharma L.P., No. 23-124, 2023 WL 5116031 (U.S. Aug. 10, 2023). Neither the district court nor the Second Circuit majority in *Purdue* effectively reconciled *Manville III* with their decisions in *Purdue*. The specific limitations on the scope of channeling orders built into §524(g), however, might explain why the scope of the bankruptcy court's channeling authority might be more limited in a mass asbestos case than in cases involving other mass torts not regulated by §524(g).

[150] *Id.* at 77, 79 (relying on United States v. Energy Res. Co., Inc., 495 U.S. 545, 549 (1990)). Judge Wesley in concurrence expressed great skepticism about the majority's reliance on § 1123(b)(6) and *Energy Resources* but acknowledged that prior Second Circuit cases supported channeling the Sackler family's liabilities.

[151] Lynch v. Johns-Manville Sales Corp., 710 F.2d 1194 (6th Cir. 1983); Pacor, Inc. v. Higgins, 743 F.2d 984 (3d Cir. 1984).

[152] § 524(g)(4)(A)(ii).

and channeled unrelated co-defendant claims in non-asbestos mass torts. In most cases these have been affiliated codefendants whose liabilities are at least arguably based on the debtor's conduct.[153] But in some of the more recent cases unaffiliated codefendants have also succeeded in having claims on which they are co-liable with the debtor channeled to its settlement trust even though that liability is predicated on the nondebtor's own conduct.[154]

Recognizing that it would represent a significant extension of third-party releases beyond the § 524(g) model, I nevertheless would be willing to cross all these bridges. I believe that under appropriate conditions there is a place for well-regulated third-party releases of non-derivative liabilities to insurers, related parties and even unrelated codefendants based on the overwhelming consent of the affected parties in service of a global resolution of certain mass tort litigation.

Bankruptcy can best serve as a collective mass tort resolution procedure if those co-liable with the debtor for the same harms can concurrently resolve their own liability with that of the debtor. If the problem being solved is cast as the distress caused by the mass tort litigation rather than the financial distress of the debtor, resolving the debtor's liability alone is only a piece of the problem. Why not take the opportunity to resolve the litigation in its entirety including co-defendant liability for the same harm? If solvent debtors can avail themselves of bankruptcy relief to manage mass tort distress, then solvent codefendants suffering from the same mass tort distress can also be part of the process.

Accepting the possibility that solvent codefendants may resolve their liability concurrently with the debtor in order to effect a truly global resolution of the litigation is only the first step. If the process is to be extended to resolve co-defendant liability based on their independent acts or omissions, then we must face up to determining on what conditions the protection of the channeling order should be extended to those codefendants.

Crucially, fairness requires overwhelming consent from the affected claimants and a contribution from or on behalf of the co-defendant commensurate with the liability being channeled and based on adequate

[153] *In re* Dow Corning Corp., 287 B.R. 396 (E.D. Mich. 2002); *In re* Quigley Co., Inc., 437 B.R. 102 (Bankr. S.D.N.Y. 2010).

[154] *In re* TK Holdings, Inc., No. 17-11375 (BLS), 2021 WL 6101496 (Bankr. D. Del. Dec. 20, 2021); *In re* Boy Scouts of Am., 630 B.R. 122 (D. Del. 2021), *aff'd*, 35 F.4th 149 (3d Cir. 2022); *In re* Dow Corning Corp., 287 B.R. 396 (E.D. Mich. 2002).

disclosure by any and all beneficiaries of the channeling order.[155] In many situations, claimants' rights against codefendants may differ widely within the claimant class. Those who forgo strong third-party claims in exchange for the same pro rata consideration received by others in the class who hold no or weak claims against the third-party co-defendant are being treated unfairly.[156]

If the claimants hold fundamentally different economic rights against the various nondebtors, determining consent to third-party releases by pooling the claims and giving each claimant an equal vote is fundamentally unfair. Creditors with superior claims against more solvent nondebtors are compelled to relinquish those valuable claims but receive the same treatment as those without such claims.

AOV Industries[157] is a leading case in point. There, a plan placed all unsecured creditors in a single class sharing pro rata in a fund comprised of $800,000 contributed by the debtor, and $3,000,000 to be contributed by third-party plan sponsors.[158] The debtor's contribution would fund an approximate 4% dividend for creditors; the plan sponsors' contributions an additional 13%.[159] Critically, the plan also provided that creditors could receive the 13% enhancement only by executing a release in favor of the plan sponsors.[160] For the most part, creditors had only claims derivative of the debtors' claims against the plan sponsors, but one creditor – Hawley Fuel Coal – objected to the plan on the basis that, alone among creditors, Hawley asserted a direct guarantee claim against one of the sponsors, a claim that was substantially more valuable than the derivative claims held by the other

[155] Such disclosure by the beneficiaries of channeling orders should be part and parcel of the required solicitation package sent to the claimant class, § 1125, and should contain adequate information sufficient to inform a reasonable hypothetical claimant of the fairness of the proposed release in light of the amount of liability faced by the released party, the probability of success in litigation, the expense, delay and complexity of the litigation, the collectability of that liability, the value of the contribution being made by the released party or on its behalf, the necessity for the release, and other factors germane to the fairness of the proposed settlement. *See* Protective Comm. for Indep. S'holders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414 (1968); *In re* Martin, 91 F.3d 389 (3d Cir. 1996); *In re* A & C Props., Inc., 784 F.2d 1377 (9th Cir. 1986).

[156] *In re* AOV Indus., Inc., 792 F.2d 1140, 1152 (D.C. Cir. 1986) ("[T]o the extent that the creditor was called upon to release a unique, direct claim in order to participate in the $3 million Fund, we conclude that [it] was being subjected to unequal treatment in violation of 11 U.S.C. § 1123(a)(4)."); *see also In re* Quigley Co., 437 B.R. 102, 124 (Bankr. S.D.N.Y. 2010); Joshua M. Silverstein, *A Revised Perspective on Non-Debtor Releases*, 43 BANKR. L. LETTER, Oct. 2023, at 8-9 (arguing nondebtor releases are lawful only if the chapter 11 plan provides for payment in full of the underlying claims).

[157] *In re* AOV Indus., Inc., 792 F.2d 1140 (D.C. Cir. 1986).

[158] *Id.* at 1150.

[159] *Id.*

[160] *Id.*

unsecured creditors.[161] Noting that the "most conspicuous inequality that § 1123(a)(4) prohibits is payment of different percentage settlements to co-class members," the Court observed that the "other side of the coin of unequal payment, however, has to be unequal consideration tendered for equal payment."[162] The Court explained:

> It is disparate treatment when members of a common class are required to tender more valuable consideration – be it their claims against specific property of the debtor or some other cognizable chose in action—in exchange for the same percentage of recovery.[163]

Takata provides a nice example of this same problem in the mass tort context.[164] Takata manufactured defective airbags that were installed in various makes and models of cars. Numerous individuals were injured in accidents in which the airbags failed, and the owners of vehicles with Takata airbags that were not involved in these accidents suffered losses in the value of their vehicles. Claims for airbag injuries against solvent car manufacturers co-liable with their airbag supplier Takata were channeled and resolved in Takata's chapter 11 case. But that resolution properly proceeded on a manufacturer by manufacturer basis. A stylized illustration makes clear why this was necessary.

If 10,000 claimants are injured in Toyotas because Takata airbags installed in them are defective, Toyota and Takata are co-liable in those cases. If another 30,000 Takata claimants are injured in Hondas, Takata and Honda are co-liable in those cases. Toyota's contribution to satisfy its liabilities should be based on the estimated value of all the claims based on Toyota accidents. The consent that is required to effectuate an aggregate settlement of those claims should be obtained from the 10,000 injured in Toyotas. And so also for Honda and the 30,000 Honda victims.

It makes great sense to handle all the Takata airbag claims collectively in one proceeding that resolves Takata, Toyota and Honda liabilities to these 40,000 airbag victims. It makes no sense, however, to treat Honda victims and Toyota victims (and Toyota and Honda liabilities) as a fungible mass, commingle the Toyota and Honda contributions and spread them across

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[161] *Id.* at 1151-52.
[162] *Id.*
[163] *Id.*
[164] *In re* TK Holdings Inc., No. 17-11375, 2018 WL 1306271 (Bankr. D. Del. Jan. 5, 2018).

40,000 victims pro rata based on the combined class vote of all 40,000 Takata victims. The subclass of persons injured in Toyotas should determine whether Toyota's contribution to them is adequate to resolve Toyota's liability to them. And so for Honda and its victims.

Commingling the two sets of claimants and two codefendants risks mischief. Honda victims as a class may have much weaker claims against Honda than Toyota victims do against Toyota because of, say, Toyota's particular knowledge, acts, and omissions. If Takata, Toyota and Honda negotiate a joint settlement with all victims, the Honda claimants with weak claims against Honda are more likely to accept a joint settlement spread pro rata across the entire class. Their 30,000 votes may swamp the 10,000 Toyota claimant votes. If all claims are arbitrarily estimated at $1 each for voting, the Honda acceptances alone may provide the settling defendants more than 75% acceptance of the settlement. Effectively the defendants will have purchased a cheap global settlement by offering a sweetheart settlement to the Honda claimants partly funded by redistributing value away from the holders of strong claims against Toyota, a solvent third-party defendant.

In short, the inherent tension that exists in joint classification of large and small claims all estimated for voting purposes at $1 each also exists, indeed is exacerbated, when nonconsensual co-defendant releases are on the table. In dispensing nonconsensual third-party releases, the consent that matters is the consent of those who hold the claims against the third-party tortfeasor that are being channeled, not the consent of all claimants. Unless all third-party releasees are similarly co-liable on all the debtor's claims, such a settlement should require voting subclasses for each releasee. Constructing appropriate subclasses should be part and parcel of the court's pre-solicitation effort to fix classification pursuant to Rule 3013. If nonconsensual third-party releases of unrelated codefendants are incorporated into the plan, then special care must be exercised by the court and parties in constructing the appropriate classes used to measure claimant consent and ensuring adequate disclosure by the intended beneficiary of the release.

H. Punitive Damages.

As I have already suggested,[165] individual punitive damage claims must be disallowed as part of the collective mass tort resolution process. If the settlement trust is paying claims pro rata at a percentage of their allowed amount, allowing some individuals to assert punitive damage claims does not punish the tortfeasor, it simply dilutes the recovery of other claimants.

[165] *See supra* at note 42.

It is tempting to fashion a centralized punitive remedy against solvent defendants as a kind of substitute for the individual punitive damage claims that exist under nonbankruptcy laws and then distribute these noncompensatory remedies pro rata across all claimants. But any such attempt quickly runs into obstacles that seem insuperable. The law governing punitive remedies is highly variable from state to state. Expanding *Moore v. Bay*'s void against one, void against all principle into this realm threatens a massive extension of liability based on a small subset of punitive claims arising in the jurisdictions holding the most expansive view of punitive damages.

In a settlement context, punitive damages rarely figure into the final settlement amounts. On reflection, the only plausible solution is to extinguish all punitive damage claims as part of the global settlement effectuated through the mass tort chapter 11 plan.

I. Futures.

The asbestos cases, and later *Piper Aircraft*,[166] raised but could not definitively resolve the question of when and how to deal with "future claims," that is anticipated harms that with some degree of statistical assurance will manifest themselves in the future stemming from the same prebankruptcy conduct as the existing mass tort claims, creating additional mass tort distress for the defendants. The central problem with these future claims is that the identity of the claimants cannot be determined with reasonable certainty at the time of the collective mass tort settlement, yet it is imperative to the success of the plan that these liabilities be channeled away from the reorganized debtor and other parties whose contributions are essential to the success of the reorganization. Their claims are effectively being settled under the plan without their consent or the consent of those similarly situated, raising due process concerns.[167] Before the Bankruptcy

[166] 58 F.3d 1573 (11th Cir. 1995).

[167] Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306 (1950), held that before a court can deprive a person of property, due process requires notice and opportunity for hearing; notice by publication may meet this standard for unknown existing claimants who at least in theory could self-identify and object to the settlement barring their claim. Such notice was given in *Robins* where the problem of future claims was relatively minor. There the court dealt with the future claims issue by ruling that a woman's claim arose for purposes of bankruptcy law at the time she began use of the Dalkon Shield even though injury might not occur until after the date of confirmation of the *Robins* plan. RICHARD B. SOBOL, BENDING THE LAW: THE STORY OF THE DALKON SHIELD BANKRUPTCY 113-114 (University of Chicago Press 1st ed. 1991). This ruling was upheld in Grady v. A.H. Robins Co., 839 F.2d 198 (4th Cir. 1988).

Reform Act of 1978, bankruptcy law treated such claims as not "provable" and they were neither discharged nor entitled to a distribution from the bankruptcy estate.[168] This led to very unsatisfactory results in both liquidations and reorganizations. In neither scenario would the unliquidated tort claim receive a pro rata distribution equal to that received by other general unsecured creditors. In liquidations, nonprovable claims would receive no distribution in bankruptcy, and, following liquidation, would have no way of asserting their claim against the debtor in the future.[169] They received nothing. In reorganizations, however, nonprovable claims would simply pass through the bankruptcy and remain fully collectible against the reorganized firm thereby receiving payment in full. The inability to effectively deal with nonprovable claims in reorganization cases and their surviving preferential collection rights against the reorganized firm could, depending on the magnitude of the nonprovable liabilities, preclude successful reorganization of otherwise reorganizable firms.

To address these problems the Code eliminated the concept of provability and expanded the bankruptcy definition of "claim"[170] and the bankruptcy court's estimation powers,[171] to the maximum extent possible consistent with due process—subject to the limitation that "for purposes of distribution" the jury trial rights of wrongful death and personal injury claimants were preserved. The goal was to ensure that the bankruptcy discharge applied and that all claims would in exchange receive appropriate pro rata distributions under the plan. In the legislative history, Congress expressed its intention through the broad redefinition of "claim" to sweep in all claims no matter how contingent or remote.[172]

Following enactment of the Code, the potential conflict between this expansive definition of claim and traditional notions of due process raised by future claims came into sharp focus in the asbestos cases. Given the forty

[168] Bankruptcy Act of 1898, Pub. L. 55-541, § 63, 30 Stat. 544 (1898) (repealed 1978).

[169] Matter of Cartridge Television, Inc., 535 F.2d 1388 (2d Cir. 1976).

[170] § 101(5).

[171] § 502(c).

[172] *See In re* Baldwin-United Corp., 55 B.R. 885, 898 (Bankr. S.D. Ohio 1985):

> No longer will some creditors enjoy a windfall or effectively be denied any recovery based upon the provability or allowability of their claims and the financial status of the debtor after bankruptcy. Equally important, Congress has insured that the debtor will receive a complete discharge of his debts and a real fresh start, without the threat of lingering claims "riding through" the bankruptcy.

See also H.R. Rep. No. 595, 95th Cong., 2d Sess. 309 (1978) (new definition of "claim" designed to permit "all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case."); *In re* Blanco, 649 B.R. 571, 577-79 (Bankr. E.D. Wash. 2023) (discussing definition of "claim" and how that expansive definition encompasses payment rights triggered by post-bankruptcy events).

year potential latency period for asbestos-related diseases, successful reorganization of an asbestos debtor requires discharge or channeling of unmanifested future claims of unidentifiable individuals as well as the present claims—even though neither the identity of the claimants nor the amount of their claims can be determined, and even though the claimants' jury trial rights are expressly preserved by statute. We learned from the asbestos cases that sometimes successful resolution of a mass tort problem required the bankruptcy court to extend its reach to channel claims even though it was not possible to presently notify the claimant or estimate the claim. Notwithstanding much handwringing about due process, bankruptcy courts stepped up to deal with future claims in the asbestos cases. They did so, on the premise that due process could be satisfied by a combination of representation by a court-appointed fiduciary (the "future claims representative") and a commitment on the part of the bankruptcy court to ensure fair and equitable treatment (i.e. nondiscriminatory treatment as compared to current claimants) under the plan.[173]

Later it became apparent that it was not always possible or necessary to deal with future claims to adequately resolve some mass tort cases. In some situations, it seemed reasonable to simply allow them to ride-through the bankruptcy as had been the practice in pre-Code reorganizations.[174] And so we are left with the very difficult situation of dealing with future claims, but only when we must, and with no clear understanding of when and when not to.

Perhaps the best statement of this problem is that of Judge Richard Posner. In *Fogel v. Zell*,[175] the debtor's predecessor, Interpace, manufactured and sold defective prestressed concrete pipe to 10,000 end users including the City of Denver. Interpace was sold to the debtor. By the time of the debtor's bankruptcy in 1991, eight purchasers of Interpace pipe had filed suit against the debtor asserting damages of $300 million. Denver was not among the eight because its Interpace sewer pipes had not yet burst. By the time the pipes did burst (causing $17 million in damages) it was 1997, long after the claims bar date fixed by the bankruptcy court in the debtor's

[173] For a critique of the futures claim representative process, see *Evading Accountability: Corporate Manipulation of Chapter 11 Bankruptcy: Hearing Before the S. Comm. on the Judiciary*, 117th Cong., at 12-14 (2023) (statement of Prof. Samir D. Parikh); *see also* Sergio Campos & Samir D. Parikh, *Due Process Alignment in Mass Restructurings*, 91 FORDHAM L. REV. 325, 349-50 (2022) (arguing the FCR selection process should be reformed to address due process failures and principal-agent conflicts).

[174] *In re* Piper Aircraft Corp., 58 F.3d 1573 (11th Cir. 1995).

[175] 221 F.3d 955 (7th Cir. 2000).

case. Chief Judge Posner expressed doubt that Denver held a claim subject to discharge at the time of the bar date:

> Suppose a manufacturer goes bankrupt after a rash of products liability suits. And suppose that ten million people own automobiles manufactured by it that may have the same defect that gave rise to those suits but, so far, only a thousand have had an accident caused by the defect. Would it make any sense to hold that all ten million are tort creditors of the manufacturer . . . ? Does a pedestrian have a contingent claim against the driver of every automobile that might hit him? We are not alone in thinking that the answer to those questions is "no."
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> There has been, however, understandable pressure to expand the concept of a "claim" in bankruptcy in order to enable a nonarbitrary allocation of limited assets to be made between present and future claimants.
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> * * *
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> However, mindful of the problem flagged by our automobile hypotheticals, the courts in these cases have suggested various limiting principles. We needn't go through them, for a reason that will appear in a moment; and anyway we greatly doubt that the issue is one that lends itself to governance by formula. It may not be possible to say anything more precise than that if it is reasonable to do so, bearing in mind the cost and efficacy of notice to potential future claimants and the feasibility of estimating the value of their claims before, perhaps long before, any harm giving rise to a matured tort claim has occurred, the bankruptcy court can bring those claimants into the bankruptcy proceeding and make provision for them in the final decree. This "test," if it can be dignified by such a term, would exclude the automobile hypotheticals; given that so far only one of every thousand pipes sold by Interpace have burst, this case may be closer to those hypotheticals than to asbestos and Dalkon Shield.[176]

As must be apparent to those reading this far, much about the collective resolution of mass torts in bankruptcy depends on the wise exercise of discretion of the bankruptcy court. In appointing a futures representative the bankruptcy court must perform the balancing suggested by Judge Posner in defining the proper scope of the future liabilities, and, if feasible, to

[176] *Id.* at 960-962.

compensate and discharge them in the plan. In considering a motion to appoint the futures' representative the court should consider these factors in addressing whether futures must be dealt with at all in the case, and, if so, in defining the constituency his appointee will represent. Channeling of future as well as present mass tort liabilities should be authorized based on the consent of the futures representative and court findings of both necessity and that the plan treats futures in a nondiscriminatory fashion.

IV. JURIES & INSURANCE

A. Jury Trial Rights.

Administrative resolution of mass tort claims is incompatible with individual jury trial rights. On a practical level, modern settlement trusts effectively gut jury trial rights notwithstanding the statutory protection of those rights for the holders of personal injury and wrongful death claims in the jurisdictional statutes governing the bankruptcy courts.[177] Although these trusts nominally afford claimants a "tort-out" option for allowance of their claims, the option is illusory. Burdensome administrative exhaustion requirements and the subordination of excess jury awards to matrix-determined claim values effectively deter exercise of the tort-out option. Collective resolution in bankruptcy pulls claims out of the tort system to save the time and money associated with trying individual cases before juries and achieve more timely, predictable, and consistent compensatory awards. It liquidates most claims using preset damage calculations and standardized categories and scaling factors. Such a system cannot tolerate an unrestricted option for any claimant to exit to the tort system if he believes he can do better there.

These realities are in tension with existing statutory jurisdictional limitations on the bankruptcy courts,[178] but they are consistent with Article III and the Seventh Amendment to the Federal Constitution. Even the most stringent interpretations of the Constitution concede that administrative processing of claims against the bankruptcy estate by non-Article III

[177] 28 U.S.C. § 1411 ([the Bankruptcy Code and related jurisdictional statutes] do not affect any right to trial by jury that an individual has under applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim); 28 U.S.C. §§ 157(b)(2)(B) & (O) (excluding personal injury and wrongful death claims from the list of core proceedings); *id.* § 157(b)(5) (requiring personal injury tort and wrongful death claims to be tried in federal district court).

[178] 28 U.S.C. §§ 157(b)(2)(B) & 1411.

adjudicators is permitted,[179] notwithstanding jury trial rights that would attach to those claims if adjudicated in state or federal court.[180] Although there is less clarity concerning the bankruptcy court's ability to channel claims against nondebtors without preserving jury-trial rights, the Supreme Court has rejected constitutional challenges in analogous contexts where Congress has determined that administrative resolution is appropriate.[181] Legislation can clarify that illusory tort-out options are not a predicate to collective mass tort resolution in bankruptcy as to properly channeled claims against debtors and nondebtors alike. Overwhelming consent of the affected claimant classes to administrative resolution of their claims is an appropriate basis to override individual civil jury trial rights in the context of a general mass tort settlement.[182]

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[179] Article I adjudication of the allowance of claims against the estate, matters which Congress has expressly designated as core proceedings, 28 U.S.C. § 157(b)(2)(B), routinely occurs in every bankruptcy proceeding. Indeed, it is difficult to imagine what bankruptcy judges can do if they cannot allow, disallow and otherwise process claims against the estate. *But see* Stern v. Marshall, 564 U.S. 462, 504 (2011) (Scalia, J., concurring) ("Perhaps historical practice permits non-Article III judges to process claims against the bankruptcy estate, *see, e.g.*, Thomas Plank, *Why Bankruptcy Judges Need Not and Should Not Be Article III Judges*, 72 AM. BANKR. L.J. 567, 607-609 (1998); the subject has not been briefed, and so I state no position on the matter."). The historical practice, of course, even prior to the adoption of the Bankruptcy Act of 1898, has always been that non-tenured bankruptcy referees and judges routinely dispose of contract and tort claims against the bankruptcy estate by final order and without a jury—notwithstanding the existence of jury trial rights under current and historical state law and the Seventh Amendment. Katchen v. Landy, 382 U.S. 323 (1966); Wiswall v. Campbell, 93 U.S. 347 (1876).

[180] Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989), distinguishing Katchen v. Landy, 382 U.S. 323 (1966), found that the Seventh Amendment preserved jury trial rights in fraudulent transfer actions brought by the bankruptcy estate against a nondebtor transferee only if the fraudulent transfer claim fell outside bankruptcy's administrative claim resolution process.

> Because petitioners here, like the petitioner in *Schoenthal*, have not filed claims against the estate, respondent's fraudulent conveyance action does not arise "as part of the process of allowance and disallowance of claims." Nor is that action integral to the restructuring of debtor-creditor relations. Congress therefore cannot divest petitioners of their Seventh Amendment right to a trial by jury. *Katchen* thus supports the result we reach today; it certainly does not compel its opposite.

Id. at 58-59

[181] Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986); Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568 (1985).

[182] Many settlement trusts funded in part with non-settled insurance rights employ tort-outs and the threat of jury trial as a tool to collect the non-settled insurance. For the avoidance of doubt, this sort of tort-out is unobjectionable and entirely consistent with the fundamental objective of centralized administrative control of the claim allowance and asset collection functions in the settlement trust.

B. Insurance.

1. Preemption and Neutrality.

In chapter 11's mass tort briar patch, no issue is thornier than the proper treatment of the defendants' liability insurance. In insolvent defendant cases it sometimes seems that the case is only about the insurance. As to settling carriers, the key issue becomes the proper scope of the channeling injunction protecting them in exchange for their contributions to the settlement trust. As to non-settling carriers the key issue is ensuring that the conveyance of unliquidated insurance assets to the settlement trust and the administrative resolution of the underlying claims will not impair the value of the insurance assets.

Much of the discussion in the caselaw concerning insurance revolves around the concept of "insurance neutrality." Most of this discussion ends up going nowhere in addressing the actual problems of marshalling and collecting insurance assets for the benefit of claimants.

Insurance neutrality is a standing concept; plan proponents employ it to deprive non-settling insurers of standing to object to, and appeal from, plan confirmation. To be insurance neutral in this sense, a plan may not alter any of the insurers' prepetition rights under the insurance policies and applicable state law. It is the equivalent of leaving a creditor "unimpaired" in the technical bankruptcy sense that none of its legal or equitable rights are altered.[183] The two most prominent insurance neutrality cases adopted this model and contemplated liquidating the claims precisely in accordance with insurers' prebankruptcy legal and contractual rights—in *Combustion Engineering,* administrative procedures that the insurers had consented to prepetition and in the case of *Kaiser Gypsum,* full tort system liquidation.[184]

This is quite different from Baird and Jackson's Creditors Bargain Model—or my notion of a Mass Tort Claimants' Bargain. These theoretical frames allow alteration of procedural rights wholesale so long as economic substance is preserved, and also permit adverse substantive alterations to the extent such alterations are essential to the feasibility of the new collective procedure.

[183] § 1124.

[184] *In re* Combustion Eng'g, Inc., 391 F.3d 190 (3d Cir. 2004); *In re* Kaiser Gypsum Co., 60 F.4th 73, 79 (4th Cir. 2023), *cert. granted,* Truck Ins. Exch. v. Kaiser Gypsum Co., No. 22-1079, 2023 WL 6780372 (U.S. Oct. 13, 2023).

Under this model, the fact that mass tort claimants and insureds agree—on bankruptcy court-approved terms—that liability determinations will be handled administratively through a settlement trust should not effect a release of the liability of non-settling insurers who make no contribution to the trust and do not obtain the consent of the enjoined claimant classes to the channeling of their mass tort liabilities. The shift to administrative resolution of individual claims should not forfeit coverage so long as that administrative mechanism comports with due process. That shift is inherent in collective resolution of a mass tort. Insurers are entitled to due process, not any particular state or federal court process for liquidation of the covered claims. Insurers that have not consented to the trust distribution procedures should have either some participation rights in the trust's claim allowance process or the ability in subsequent coverage litigation to challenge the reasonableness of the amount of the trust's allowance of particular claims. Insurers, however, should not be permitted to block collective resolution by insisting that moving out of the tort system to administrative resolution with existing insurance coverage intact requires their consent.

At least one court[185] has suggested that due process is violated if a settlement trust has the power to resolve claims administratively under trust distribution procedures that the insurers have not consented to if they are also completely excluded from the claims allowance process and denied an opportunity to challenge the amount of the allowed claim. But if the insurers are not bound by the outcome of the administrative process, or if they have sufficient participation rights in that process to meet due process requirements, then the shift in bankruptcy from the tort system to administrative resolution by a settlement trust should not impair insurance rights assigned to the trust for the benefit of claimants.

In light of cases like *Thorpe*, and the reality that insurers seem to invariably contest denial of standing on the basis of insurance neutrality no matter how rigorously it is defined,[186] the better part of valor is to accede to

[185] *In re* Thorpe Insulation Co., 677 F.3d 869 (9th Cir. 2012). Many of the insurance neutrality cases—including *Thorpe*—take place in mass asbestos cases where courts have observed that § 524(g) contemplates using a trust and administrative resolution procedures to resolve claims.

[186] Even the "pure" insurance neutrality cases—*Combustion Engineering* and *Kaiser Gypsum*—were litigated all the way up to the Court of Appeals by the non-settling insurers resulting in substantial delay and uncertainty before claimants could obtain the recoveries that the plan contemplates. *In re* Combustion Eng'g, Inc., 391 F.3d 190 (3d Cir. 2004); *In re* Kaiser Gypsum Co., 60 F.4th 73, 79 (4th Cir. 2023), *cert. granted*, Truck Ins. Exch. v. Kaiser Gypsum Co., No. 22-1079, 2023 WL 6780372 (U.S. Oct 13, 2023). And finality will have to wait further still, as the Supreme Court has granted certiorari for Kaiser Gypsum's non-settling insurer to argue it has standing to dispute the plan confirmation in spite of (or because of) the insurance neutrality finding. After 20 years

insurer standing, eschew insurance neutrality in the sense of unimpairment and embrace it as part of the Mass Tort Claimants' Bargain. The move to administrative resolution alters insurers' procedural rights. They have standing to complain about it. But unless there is a substantive adverse economic consequence to the procedural alteration that is not implicit in the move to effective collective resolution and not otherwise authorized by applicable law (including applicable bankruptcy law), their objection should be overruled.

Courts have been clear that anti-assignment provisions in insurance policies or otherwise applicable law are overridden in bankruptcy as to policies that insure the debtor.[187] The law is less clear, however, with respect to policies covering channeled claims of nondebtors that have issued to those nondebtors. In general, most jurisdictions permit post-loss assignment of insurance notwithstanding contractual restrictions on assignment.[188] But some jurisdictions honor contractual restrictions on assignment even post-loss.[189]

Like Mary's little lamb, however, everywhere that claims are channeled, the insurance covering them should be sure to go. Accordingly, to properly effectuate channeling of nondebtor claims the protected parties' insurance assets must also be channeled to the settlement trust. Express federal preemption of anti-assignment provisions in nondebtor insurance policies or otherwise applicable state law would clarify that in fact all applicable insurance whether issued to debtors or nondebtors follows channeled claims into the trust.

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disputing its coverage obligation in scorched earth litigation, Truck Insurance Exchange did not yield at a finding that the bankruptcy plan did not impair its rights. Brief in Opposition at 4, Truck Ins. Exch. v. Kaiser Gypsum Co., No. 22-1079, 2023 WL 6780372 (U.S. Oct 13, 2023).

[187] *In re* Federal-Mogul Glob., Inc. 684 F.3d 355 (3d Cir. 2012).

[188] STEPHEN PLITT, ET AL., COUCH ON INSURANCE § 35:8 (3d ed. 2023) ("the great majority of courts adhere to the rule that general stipulations in policies prohibiting assignments of the policy, except with the consent of the insurer, apply only to assignments before loss, and do not prevent an assignment after loss . . ."); *see also* 44 Am. Jur. 2d Insurance § 777 (2023) ("Although the majority of courts adhere to the rule that general stipulations in insurance policies prohibiting assignments except with the consent of the insurer apply only to assignments before loss, some courts hold that the restriction applies even after a loss."). Similarly, State law may also prohibit the insurer and insured from making an agreement that impairs the post-loss insurance rights of the claimant.

[189] *See, e.g.*, Nautilus Ins. Co. v. Concierge Care Nursing Ctrs., 804 F. Supp. 2d 557 (S.D. Tex.2011) (Texas law); Keller Founds., Inc. v. Wausau Underwriters Ins. Co., 626 F.3d 871, 875-76 (5th Cir. 2010) (Texas law).

The problem of forfeiture of insurance rights is less acute in solvent debtor cases as the insurance rights need not be transferred to and liquidated by the settlement trust. Still, administrative resolution of claims consistent with due process will generally be part of any collective resolution of mass torts in solvent cases, too. The shift from individual to collective resolution can be readily facilitated by providing that the solvent insured's contribution to the settlement trust in satisfaction of its liability for the mass torts is a covered claim against the insurer to the same extent as reasonable individual settlements of underlying covered claims to individual claimants would be.

The *Fuller-Austin* case is a particularly egregious example of a court erroneously concluding that the use of the channeling order/settlement trust mechanism with the assignment of unsettled insurance rights to the trust resulted in forfeiture of insurance assets.[190] *Fuller-Austin* ruled that unsettled excess carriers would not be held to indemnify asbestos claims at their estimated claim value but only at the pennies-on-the-dollar discounted rate at which the settlement trust (absent the excess insurance) could actually pay the claims pro rata given the limited assets of the trust. The effect is to give the debtors' insurers the benefit of the debtor's bankruptcy discharge in direct contravention of § 524(e) which expressly provides that the discharge of the debtor shall not release insurers, guarantors, or others co-liable on the discharged debt.[191] *Fuller-Austin* has to be wrong.

Some courts have found that the emergence of substantially more claims upon the suggestion that an insurance-funded trust would be created[192] can negate the plan's insurance neutrality. But if claims increase because bankruptcy processes lower the cost of asserting claims that is part and parcel of the shift to administrative resolution. That shift alone cannot create a new defense to insurer liability.

Finally, I note that expanding the scope of mass tort relief available in bankruptcy to encompass solvent defendants, simplifies rather than exacerbates these issues. The default solution to thorny insurance issues if the insured is solvent should be to leave the insurance assets where they are—with the insured—and require the insured and insurer to resolve their contractual coverage issues between themselves either through settlement or coverage litigation as they may choose. If the solvent defendant is capable

[190] Fuller-Austin Insulation Co. v. Highlands Ins. Co., 135 Cal. App. 4th 958, 1000 (2006).

[191] § 524(e).

[192] *In re* Glob. Indus. Techs., Inc., 645 F.3d 201, 204-207 (3d Cir. 2011) (noting increase from 169 pre-bankruptcy silica claims to 5,125 voting silica claims at the time of plan solicitation and that many of the post-bankruptcy silica claims appeared to be meritless).

of funding the settlement trust to the satisfaction of appropriately constructed claimant classes, it should do so and work out its insurance issues with its insurer itself.

Accordingly, the most elegant resolution (from the perspective of claimants) of complex insurance issues is to shift the responsibility and risk of collection to the solvent insured. An obstacle to this resolution is the risk that the non-settling carrier may nevertheless assert in subsequent coverage litigation that the channeling of the claims for administrative resolution releases the insurer from liability under its policies. This obstacle should be removed by statute or court findings much as has been done with the problem of forfeiture of policies based on bankruptcy filing, debtor financial condition, discharge and assignment to the settlement trust. Contractual terms in insurance policies to the contrary notwithstanding, the economic rights of the insured, its successor settlement trust and tort claimants should not be diminished by these events. Neither the bankruptcy of the debtor nor its discharge effects a release or reduction of the liability of insurers.[193] Similar rules should apply to the insurers of nondebtor beneficiaries of a channeling order. The channeling of claims against an insured based on commensurate contribution and claimant consent should not let the nondebtor's non-settling insurers off the hook.

2. Marshalling Shared Insurance.

Moving past the problem of forfeiture of coverage simply by implementing a collective rather than individualized resolution procedures, other complex problems emerge in collecting liability insurance for the benefit of claimants. It turns out that many liability policies cover multiple named and additional insureds co-liable with the primary tortfeasor on the mass tort claims. Moreover, after an insured loss has been incurred, state law may confer on claimants an interest in the policies enforceable by "direct action" against the insurer. For insurance to be liquidated by settlement, it is essential that these indirect claims against the policies also be channeled to the trust. If additional insured indirect claims and direct actions against the insurer cannot be channeled, then as a practical matter, insurers are unlikely to make an aggregate settlement of the policies. Insurers will rarely, if ever, buy back policies unless all claims under the policy are extinguished.

[193] § 541(c)(1) (excusing ipso facto, financial condition and assignment defaults); §524(e) ("discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt."). *See also In re* Federal-Mogul Glob. Inc., 684 F.3d 355 (3d Cir. 2012).

In *MacArthur Co. v. Johns-Manville Corp.* the Second Circuit directly confronted this problem. It held that shared insurance can be marshalled into the settlement trust as property of the Debtors' estates without the additional insureds' consent.[194] *MacArthur* remains the only Court of Appeals decision on this marshalling point.[195] At the time of the *Manville* case there were over 7,000 pending lawsuits against Manville vendors subject to defense and indemnity under Manville's insurance.[196] The *Manville* vendors named in vendor endorsements in Manville's liability policies were permitted to assert indemnity claims against the *Manville* asbestos trust in lieu of their contractual rights against the settling insurers under the policies.[197] These indemnity claims subsequently received a pennies-on-the-dollar distribution from the *Manville* asbestos trust as a part of a further restructuring and final resolution of the claims.[198]

Under the authority of *MacArthur*, additional insureds may be entitled to assert indirect mass tort claims against the Settlement Trust for indemnity to the extent of any such insurance marshalled into the Settlement Trust. Any such claim, however, is measured by the limited rights of an additional insured to indemnity under those policies. For example, per occurrence or aggregate limits that would have to be allocated among the named and additional insureds are subject to exhaustion. Moreover, policies typically contain "Other Insurance" clauses some of which require the primary tortfeasor's insurance to be treated as excess policies to any separate insurance that the additional insured has that responds to the victim's mass tort claim. In some other cases, Other Insurance clauses may require formulaic or equitable apportionment between shared and separate

[194] MacArthur Co. v. Johns-Manville Corp., 837 F.2d 89 (2d Cir.), *cert. denied*, 488 U.S. 868 (1988).

[195] There are two contrary lower court authorities that are distinguishable. The court in *In re* SportStuff, Inc., 430 B.R. 170 (B.A.P. 8th Cir. 2010), distinguished *MacArthur* on the basis that, in the case before it, the equitable considerations that drove *MacArthur* did not apply because the additional insured's claims for indemnity were not channeled and the debtor's ability to control and resolve the shared insurance was not necessary to a reorganization. Neither distinction applied. Similarly, *In re* Forty-Eight Insulations, Inc., 133 B.R. 973 (Bankr. N.D. Ill. 1991), *aff'd*, 149 B.R. 860 (N.D. Ill. 1992), the court also distinguished *MacArthur* on the ground that, in the case before it, the affected nondebtor insured was a named insured, not an additional insured, and therefore, the nondebtor party was a primary holder of the shared insurance policy. Finally, an unpublished bankruptcy court opinion, *In re* SoyNut Butter Co., 2018 WL 3689549, at *5 (Bankr. N.D. Ill. Aug. 1, 2018), refused to follow *MacArthur* in a chapter 7 context.

[196] Petition for Writ of Certiorari at 5, MacArthur Co. v. Johns-Manville Corp., U.S. Sup. Ct. No. 87-2082, 1988 WL 1094600 (June 20, 1988).

[197] *Id.* at 18-20.

[198] *In re* Joint E. & S. Dist. Asbestos Litig., 129 B.R. 710, 900 (E.D.N.Y. 1991), vacated, 982 F.2d 721 (2d Cir. 1992), *modified on reh'g*, 993 F.2d 7 (2d Cir. 1993) (reciting terms of stipulated settlement); *In re* Joint E. & S. Districts Asbestos Litig., 878 F. Supp. 473, 611 (E.D.N.Y. 1995) (subsequent stipulation).

insurance. Given all these factors, any indirect indemnity liability the settlement trust might bear under the structure used in *MacArthur* is likely to be quite limited. Finally, indirect mass tort claims may be disallowed or subordinated to the payment in full of direct claims under §§ 502(e) and 509(c).[199]

These limitations render the rights of additional insureds in insurance policies issued to and paid for by the primary tortfeasor, at best, tenuous and fragile. The practical answer is to channel such indirect claims to the settlement trust to facilitate global settlement of the insurance. The harder question is not whether the claims of additional insureds should be channeled but whether and to what extent channeled indirect claims should be permitted to dilute the recoveries of direct claimants. The most obvious treatment under bankruptcy law should be disallowance so long as the indirect liabilities remain contingent[200] and subordinated after they become fixed.[201] To facilitate marshalling of insurance and minimize litigation the rights of injured tort victims should take precedence over the rights of those insured by liability insurance payable to those victims. Thus, subordination may be the most appropriate result. The existing ambiguity over the proper treatment of indirect claims, however, sometimes drives the parties to a negotiated compromise on this issue. This may be an area where ambiguity should be left in place in order to induce compromise.[202]

Collective resolution of mass tort cases cannot be held hostage to the consent of additional insureds any more than non-settled carriers. Settlement of the policies is certainly desirable and to be encouraged. But the strongest inducement to settlement is the availability of a robust channeling injunction that can extinguish all liability under comprehensively settled policies.

3. Excess Carriers.

Administrative resolution of claims may inadvertently confer a windfall on excess liability carriers. This windfall occurs as a consequence of reducing the uncertainty and variability of recovery in the tort system by imposing

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[199] §§ 502(e), 509(c). *See In re* Plant Insulation Co., 734 F.3d 900, 915 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 1901 (2014) (trust back-stop for insurers' indirect asbestos contribution claims not required under 524(g)).

[200] § 502(e).

[201] § 509(c).

[202] Daniel J. Bussel & Kenneth N. Klee, *Recalibrating Consent in Bankruptcy*, 83 AM. BANKR. L.J. 663, 693-94 (2009).

caps on recovery that exceed primary layers of insurance that would not be applicable in the tort system. In a world where juries can return verdicts ranging from zero to $10 million a significant number of high value claims will hit liability policies that are in excess of $1 million, $2 million and $5 million in underlying limits. In a world where a claims matrix caps recoveries at, say, $2.5 million, these same excess carriers' exposure may be greatly reduced or even eliminated, even as the aggregate liability of the settlement trust has mushroomed because of the post-bankruptcy proliferation of claims. There is no reason that the shift out of the tort system should confer this windfall on excess insurers. The claims that hit excess policies are those that are most valuable in the tort system and are held by the most severely injured tort victims. Artificially capping these claims for the benefit of the responsible excess carriers is unjustifiable as those are exactly the kinds of outlier liabilities that the excess carriers underwrote and insured against. *Boy Scouts* (where the vast majority of the excess insurance remained non-settled as of the plan effective date) is a prime example of both the problem and a potential solution (the independent review option available to holders of high value claims) to it.[203]

4. Nondebtor Liability Insurance.

The Texas two-step cases and third-party releases as used in the *Boy Scouts of America* case, in favor of Local Councils and Chartered Organizations, raise additional complications in the administration of liability insurance in mass tort cases. In such cases the primary tortfeasor may be a nondebtor and may be solvent. Resolution of that nondebtor's liability may turn on its ability to assign its separate insurance rights to the settlement trust as well as any interest it may have in shared insurance rights. Moreover, settlement of any shared insurance rights held by the debtor may turn on extending a third-party release to the primary tortfeasor with whom its insurance rights are shared.

In such cases, the policy choice to permit two-steps and facilitate resolution of the mass tort liabilities of solvent debtors is entwined with the goal of liquidating and marshaling applicable insurance assets into the settlement trust. The channeling of claims against a nondebtor or the assignment of a nondebtor's insurance rights to a settlement trust should not diminish those insurance rights or release the insurer from its liability in connection with a covered claim that is channeled.[204] Bankruptcy law

[203] *See supra* notes 127-28 and accompanying text.

[204] These issues were finessed in the *Boy Scouts* case by providing that in the event that the assignment of Local Council insurance rights to the settlement trust failed that the

provides that the debtor's bankruptcy and any discharge of the debtor's liability on insured claims do not diminish the liability of any insurer for the claim.[205] The same should be true of the liability of all protected parties under channeling orders.

5. Deductibles and Self-Insured Retentions; Fronting Policies.

In a commercial liability policy, the primary insurer generally pays a covered claim from the first dollar and seeks reimbursement from the insured up to the deductible amount.[206] Insurers seeking deductible reimbursements from a mass tort debtor for claims arising prepetition are usually entitled only to general unsecured claim status that remain subject to disallowance until fixed by payment.[207]

Like the treatment of deductible reimbursement claims, if an insurer advances litigation defense costs of an insolvent insured (to avoid default judgments or awards that would exceed the deductible threshold), the insurer's claims for reimbursement of those defense costs below the deductible threshold can constitute only unsecured prepetition claims.

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applicable Local Council would, at the expense of the Settlement Trust and upon the reasonable request of the Settlement Trustee, pursue the insurance rights for the benefit of the Settlement Trust and promptly transfer to the Settlement Trust any amounts recovered in respect of their insurance rights. Supplemental Findings of Fact and Conclusions of Law and Order Confirming the Third Modified Fifth Amended Chapter 11 Plan & etc. at 89 (Art. V.S.1a), *In re* Boy Scouts of Am., No. 20-10343-LSS (Bankr. D. Del. Sep. 8, 2022), ECF No. 10316-1.

[205] § 524(e). Both state law and customary provisions in insurance contracts provide likewise. *See, e.g.*, CAL. INS. CODE § 11580(b)(1) (West 2023) ("the insolvency or bankruptcy of the insured will not release the insurer from the payment of damages."). *See also* Patricia A. Bronte, et al., *Coverage Issues for the Insolvent Policyholder*, 14 COVERAGE (A.B.A. Sec. Lit.) No. 2 (Mar./Apr. 2004) (citing similar statutes in Arkansas, Florida, Louisiana, Maryland, Minnesota, New York, Oregon, and Virginia).

[206] Margaret M. Anderson, *Postbankruptcy Treatment of Insured Claims*, 17 J. BANKR. L. & PRAC. 6 Art. 3 (2008). Some policies may provide for the policyholder to make up-front direct payments of covered claims, and then seek reimbursement from the insurer above the deductible amount. These policies can precipitate coverage disputes in bankruptcy like those involving self-insured retentions. For a discussion of the treatment of "pay-first" policy provisions in insolvency, see Patricia A. Bronte, *"Pay First" Provisions and the Insolvent Policyholder*, 3 INS. COVERAGE L. BULL., No. 5, at 3 (June 2004).

[207] *In re* Broaddus Hosp. Ass'n, 159 B.R. 763, 768 (Bankr. N.D.W. Va. 1993) (by issuing policy, the insurer "stepped into the shoes" of tort claimants vis-à-vis the debtor and therefore deductible reimbursements should be accorded the same priority as pre-petition tort claims). *See also In re* HNRC Dissolution Co., 343 B.R. 839 (Bankr. E.D. Ky. 2006), *aff'd*, 371 B.R. 210 (E.D. Ky. 2007), *aff'd*, 536 F.3d 683 (6th Cir. 2008) (denying administrative expense priority to insurer's deductible claims against the debtor). Until payment of the insured claim by the insurer, the claim back against the insured for the deductible remains contingent and therefore subject to disallowance. § 502(e).

Self-insured retentions ("SIRs") are more controversial than standard deductible reimbursement claims. The majority view treats the SIR like a deductible, requiring the insurer to pay the claim—at least above the amount of the SIR—and then seek reimbursement from the insured alongside other creditors.[208] This treatment of SIRs facilitates marshalling of liability insurance assets into a settlement trust.

The animating force behind this majority view is the basic principle that insolvency of an insured should not relieve an insurer of its obligations to pay insured claims.[209] Nevertheless, some jurisdictions continue to find that SIR clauses can constitute a condition on the insurers' obligation to pay claims. These courts require that the SIR be satisfied in full before the insurer is liable to pay claims under its policy. In order to properly marshal insurance assets to resolve mass tort liabilities in these jurisdictions, express federal preemption may be required to ensure that a debtor's failure to fund an SIR due to insolvency does not give the excess carrier a get out of jail free card.[210]

Where tiered or overlapping insurance policies are quilted together to create comprehensive coverage, the failure to pay—whether by bankruptcy or settlement below face value—can create ambiguous gaps in coverage that raise thorny issues of law and contract interpretation. In the same way the insolvency of the insured can cloud a policy requirement to fund an SIR, the failure of any layer of insurance coverage to pay claims up to the policy limit—most especially in the case of insolvency—can implicate the coverage of a higher level of insurance, which in some circumstances may be required to "drop down" and fill the gap.

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[208] Sturgill v. Beach at Mason Ltd. P'ship., No. 1:14CV0784 (WOB), 2015 WL 6163787, at *2 (S.D. Ohio Oct. 20, 2015) ("great weight of authority" errs on the side of enforcing coverage despite the failure of the insured to cover the SIR due to insolvency). *But see* Pak-Mor Mfg. Co. v. Royal Surplus Lines Ins. Co., No. SA-05-CA-135-RF, 2005 WL 3487723, at *6 (W.D. Tex. Nov. 3, 2005) ("Under Texas law, insurers are free to issue policies that relieve them of liability in the bankruptcy context."); *In re* Apache Products Co., 311 B.R. 288, 297 (Bankr. M.D. Fla. 2004) (applying Florida law, insurer not obligated to cover claims unless insured exhausts SIR on a per claim basis consistent with policy language).

[209] *See, e.g.,* Home Ins. Co. of Illinois v. Hooper, 294 Ill. App. 3d 626, 632-33 (1998) (requiring payment of the SIR as a condition precedent to coverage liability would violate public policy and IL insurance law). Note that in *Home Ins. Co.*, public policy did not go so far as to compel the insurer's coverage liability to drop down below the level of the SIR, however. *See also* Matter of Fed. Press Co., 104 B.R. 56, 62 (Bankr. N.D. Ind. 1989) (resolving ambiguity between SIR exhaustion clause and insolvency clause in favor of indemnification of insured).

[210] *See, e.g., In re* Keck, Mahin & Cate, 241 B.R. 583, 596 (Bankr. N.D. Ill. 1999) (unfunded SIR to be treated as any other unsecured claim against the estate, insurer required to pay claims above the SIR but not drop down, such that the insurer's "exposure is not increased by a penny" but contracted-for insurance assets remain available to resolve litigation).

An important authority in this area is *Qualcomm, Inc. v. Lloyds of London*.[211] In *Qualcomm*, the insured settled with its primary insurer below the $20 million policy limit and then sought to self-insure up to the $20 million to trigger coverage under the excess liability policy.[212] Because the language of the exhaustion clause stated that the primary insurer must actually pay (or at least be legally obligated to pay) the full value of the policy limit, the court found that the excess carrier was released from liability.[213] Forfeiture of the excess insurance occurred despite the fact that the insurer suffered no financial harm due to the policyholder self-insuring the gap.[214] Other courts, however, refuse to allow the forfeiture of insurance if a below policy limit settlement does not economically harm a higher level of coverage.[215] This approach avoids a *Qualcomm* gap destroying excess liability insurance assets and relies on court supervision to prevent collusive settlements between an insured and primary carrier that may harm excess carriers.

Excess liability policies triggered by an "amount recoverable" rather than exhaustion of the underlying policy skirt this issue and may require the excess policy to drop down and fill a coverage gap.[216] Note that even in the absence of a court-ordered drop down, an excess carrier may be practically compelled to advance defense costs to avoid adverse judgments that would

[211] 161 Cal. App. 4th 184 (2008).

[212] *Id.* at 198.

[213] *Id.*

[214] *See also* Comerica Inc. v. Zurich Am. Ins. *Co.*, 498 F. Supp. 2d 1019, 1032 (E.D. Mich. 2007) (citing the risk of collusion, the policyholder's settlement with a primary insurer below the face value was held to not exhaust the policy limit, relieving the excess carrier of coverage liability).

[215] Fireman's Fund Ins. Co. v. One-Beacon Ins. Co., 49 F.4th 105, 120 (2d Cir. 2022) (rejecting a rule that "would automatically preclude a policyholder that settles with a lower-level insurer from recovering anything from a higher-level insurer"). *Fireman's Fund* relied on Augustus Hand's opinion in Zeig v. Mass. Bonding & Ins. Co., 23 F.2d 665, 666 (2d Cir. 1928), in which he held that below-limit settlements with primary insurers exhausted those policies sufficient to trigger excess liability coverage, largely because the aggregate settlement value exceeded the minimum insurance requirement of the excess liability policy. However, in *dicta*, Judge Hand also stated, "It is doubtless true that the parties could impose [actual full payment as] . . . a condition precedent to liability upon the policy, if they chose to do so."

[216] *See, e.g.*, Donald B. MacNeal, Inc. v. Interstate Fire & Cas. Co., 132 Ill. App. 3d 564, 565 (1985) (excess policy drafted with "amount recoverable under underlying insurance" language did assume risk of insolvency of primary insurer, requiring drop down).

trigger liability under the excess policy by reaching into its layer of coverage.[217]

Finally, fronting policies are insurance policies where the policy limit equals the deductible or the self-insured retention, such that, as between insurer and insured, the risk remains with the insured. Fronting policies are used to satisfy regulatory or contractual requirements to obtain third-party insurance while functionally self-insuring.[218] However, when the insured is insolvent, determining whether the policy constitutes true self-insurance or provides that the insurer must pay under the policy and then seek reimbursement from the bankruptcy estate is of critical importance to mass tort victims. Since the primary function of a fronting policy is to shift the risk of the insured's inability to honor its deductible obligations from the tort victim to the insurer while otherwise leaving the liability risk on the insured, it would seem that the risk of the insured's insolvency must lie on the insurer. Moreover, if a fronting policy forms primary coverage upon which excess policies are conditioned, courts must treat them as insurance in order to preserve excess liability assets.[219] There is, however, scant authority regarding treatment of fronting policies in bankruptcy.[220]

Adhesive insurance contracts are likely to contain language excess carriers will use to argue a policyholder's failure to fund an SIR, pay claims up to a deductible, or effectively self-insure under a fronting policy relieves them of coverage obligations. In the mass tort context, the real party in interest in that battle is not the insured but the tort victims reliant on

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[217] *See generally*, Margaret M. Anderson, *The Creditor That Is Always There—The Insurance Company* 17 J. BANK. L. & PRAC. 4 Art. 1 (2008).

[218] *See generally* Deborah M. Minkoff, *Distinguishing between Large or Matching Deductibles and Self-Insured Retentions*, 22 INS. COVERAGE LITIG. 32 (2012).

[219] Outside bankruptcy, courts have interpreted fronting policies both as self-insurance and as true insurance. In *Carns v. Smith*, General Motors used a fronting policy arrangement with an insurer where the insurer's risk of collecting the deductible was mitigated by a collateralized trust fund for the insurer's exclusive benefit. Noting that "'insurance' requires a party to shift its risk to the insurer," the court found the policies to legally constitute self-insurance. Carns v. Smith, No. 01-972H, 2003 WL 22881538, at *2 (Ohio Com. Pl. Nov. 7, 2003). Other courts have found fronting policies to qualify as insurance, noting premiums paid, insurance contracts, and the potential risk to the insurer of being unable to collect deductible reimbursement from the insured. Fireman's Fund Ins. Co. v. TIG Ins. Co., 14 S.W.3d 230, 233-234 (Mo. Ct. App. 2000). *See also* Air Liquide Am. Corp. v. Cont'l Cas. Co., 217 F.3d 1272, 1279 (10th Cir. 2000) (fronting policy that was effectively self-insurance qualified as "other insurance" sufficient to implicate excess liability policy). The Goldilocks approach may be to understand a fronting policy as a policy that insures only against the risk of insolvency of the policyholder, such that they may self-insure under excess policies or to meet jurisdictional requirements. St. Paul Fire & Marine Ins. Co. v. Temple Univ. Hosp., 57 F. App'x 128, 133 (3d Cir. 2003) (interpreting fronting policy as a surety agreement against the risk of policyholder's insolvency).

[220] Margaret M. Anderson, *Postbankruptcy Treatment of Insured Claims* 17 J. BANK. L. & PRAC. 6 Art. 3 at 861 (2008) ("it is speculative as to what conclusion a bankruptcy court would reach on this issue.").

insurance proceeds for compensation for their injuries. In such cases, law mandating that insolvency of the insured does not relieve the insurer from coverage liability is essential to properly marshal insurance assets for the benefit of tort victims.

V. CONCLUSION

To summarize, I propose:

Explicitly embracing chapter 11 as a collective resolution mechanism for mass tort distress without financial distress or mass-asbestos limitations.

Separating mass tort resolution from chapter 11's general function as a global financial restructuring tool by authorizing the third-party release of mass tort defendants to segregate mass tort liabilities into a wholly owned subsidiary.

Authorizing a national judicial panel to screen prospective debtors for eligibility and assign appropriate venue.

Authorizing channeling of claims against unrelated codefendants conditioned on overwhelming consent of those holding claims against that co-defendant and a commensurate contribution to the trust for the benefit of affected claimants.

Limiting the imposition and terms of interim stays of litigation.

Permitting express waiver of jury trial rights by overwhelming class consent of those affected.

Extinguishing individual punitive damage claims.

Expressly authorizing and regulating the channeling of claims against insurers, affiliates and unrelated third parties under specified conditions.

Conferring discretion on the bankruptcy court to channel future claims subject to appointment of a futures representative with a properly defined constituency, that representative's consent, a commensurate contribution to the settlement trust, and nondiscriminatory treatment of present and future claims.

Imposing modest filing fees on small claims and sanctions on those making false claims.

Requiring court participation in pre-solicitation fixing of tort claimant voting classes pursuant to Rule 3013.

Facilitating the marshalling of insolvent defendants' liability insurance assets into the settlement trust by releasing insurers' liability to gratuitous additional insureds and preserving all insurance assets applicable to channeled claims notwithstanding the shift to administrative resolution of claims.

Placing the responsibility and risk of insurance recovery on solvent defendants.

It's a long list. But the project of adapting chapter 11 to the problem of collectively resolving mass tort cases efficiently and fairly is an ambitious one.

Moving from individual injuries to mass injuries, our pre-industrial individualized civil justice system eventually broke. Before the 20th century mass personal injuries mostly went uncompensated. They were attributed to Acts of God or War or Government rather than the negligence of any private party actor capable of being sued for damages. Compensation, if available at all, would be through first party insurance, charity, or government relief. In that world, legal collective relief was available for mass *financial* injuries, but those injuries were generally tied to debtor insolvency. Bankruptcy law and equity receiverships substituted collective processes and rough justice for lawsuits and individualized justice to resolve multiple inconsistent financial claims against a common debtor.

The world has changed. Mass tort cases are no longer unusual, and they are not going away. Tools developed in *Manville* and later refined and expanded in subsequent cases can provide a bankruptcy-based solution superior to competing methods of consolidation within the framework of the tort system. As chapter 11 moves into the business of resolving mass torts in addition to the problems of financial insolvency, however, it needs to be adapted to the changed circumstances that it faces. In short, we need a chapter 11 designed specifically to resolve mass tort problems as a stand-alone issue.

The great confounding factors are that (i) from a defendant's perspective those economic gains can come either from administrative efficiency or by reducing aggregate claimant recoveries and (ii) from a plaintiff's perspective those economic gains can come either from administrative cost savings or by redistributing recoveries from some plaintiffs to others. Chapter 11 is currently being manipulated in both ways. Aggregate recoveries are being unfairly limited as defendants exploit leverage points in chapter 11 to negotiate favorable settlements with a portion of the claimant body whose

representatives can deliver the requisite consents through plans that redistribute recoveries within the claimant class away from those whose claims have the greatest value in the tort system and who have suffered the most severe injuries.

This Article identifies the key elements of a properly tailored chapter 11 process focused exclusively on creating a balanced and efficient administrative resolution process for mass torts. The goals are (i) limit collective resolution to mass tort problems requiring this sort of intervention, (ii) require meaningful class consents from the claimants obtained through negotiations conducted on a level playing field, (iii) resolve through proper classification and voting protocols claimant conflicts among holders of large and small claims and those with related claims against third parties as well as the debtor, (iv) efficiently marshal and liquidate available insurance assets and (v) administratively resolve individual claims efficiently and fairly. All without unnecessarily subjecting a solvent primary tortfeasor to a global restructuring process.

Some may object that regulating and specifying the chapter 11 process in this way will so burden the process that it will no longer be an attractive venue for collective resolution of mass tort litigation. I do not believe that constructing a reasonable bankruptcy framework that ensures overwhelming consent of the affected claimants is obtained before releasing the responsible tortfeasors will render chapter 11 unworkable for mass tort resolution. I do not believe that it is necessary to stack the deck against the claimants or in favor of settlement to achieve that resolution. But if I am wrong and few mass tort cases end up in chapter 11 as a result of these reforms then perhaps the proponents of MDL resolution rather than chapter 11 resolution will have been proven correct.

Collective resolutions inevitably administer rough justice. Some degree of redistribution is inevitable in moving from individual to collective justice. Congress and the courts must put appropriate parameters and guidelines around that redistribution to assure that rough justice is the best justice available. So far Congress has completely abdicated its role in setting those parameters outside the context of mass-asbestos cases and the courts have only haltingly and imperfectly filled the gap. It is time to step up.

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