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## Silencing Litigation Through Bankruptcy

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## SILENCING LITIGATION THROUGH BANKRUPTCY

*Pamela Foohey\* & Christopher K. Odinet\*\**

*Bankruptcy is being used as a tool for silencing survivors and their families. When faced with claims from multiple plaintiffs related to the same wrongful conduct that can financially or operationally crush the defendant over the long term—a phenomenon we identify as onslaught litigation—defendants harness bankruptcy’s reorganization process to draw together those who allege harm and pressure them into a swift, universal settlement. In doing so, they use the bankruptcy system to deprive survivors of their voice and the public of the truth. This Article identifies this phenomenon and argues that it is time to rein in this destructive use of bankruptcy. Whereas the current literature largely discusses mass tort bankruptcy from a doctrinal, constitutional, or economic perspective, this Article examines how bankruptcy proceedings like these cause direct harms to survivors, to public trust in the justice system, and to the corporate economy. It traces the evolution of defendants’ use of bankruptcy to resolve mass torts from asbestos, IUD, and breast implant product liability litigation to its present-day use in controversies involving the Catholic Church, Purdue Pharma, the Weinstein Companies, USA Gymnastics, the Boy Scouts of America, Alex Jones’s Infowars, and Johnson & Johnson. The Article shows how the prior use of reorganization for mass torts created the necessary conditions to allow defendants to use bankruptcy to silence people and facilitate cover-ups in a wider variety of onslaught litigation. It concludes with a normative proposal for the narrow circumstances in which courts should allow bankruptcy to be used to deal with onslaught litigation, while still preserving the voices of those harmed.*

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## INTRODUCTION

*“I do not forgive you.”*<sup>1</sup>

That is what over two dozen individuals told three members of the Sackler family, the owners of the now-notorious Purdue Pharma drug company, as part of a larger recounting of how the immensely addictive

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critiques, and suggestions on earlier versions of this Article. The Authors also thank Madison Hall (Iowa Law Class of 2024) for her excellent research and editorial support. Any errors belong to the Authors alone.

<sup>1</sup> Jeremy Hill, ‘I Do Not Forgive You:’ Opioid Victims Address Sacklers Directly, Bloomberg (Mar. 10, 2022), <https://www.bloomberg.com/news/articles/2022-03-10/sacklers-to-hear-from-opioid-victims-live-in-bankruptcy-court> [<https://perma.cc/2EHY-S4VW>].

painkiller OxyContin destroyed lives and killed loved ones.<sup>2</sup> The Sacklers had to confront, in person, stories of dead children, lost spouses, and babies born with opioid dependencies.<sup>3</sup>

This opportunity for survivors and families of victims to be heard took place during Purdue Pharma's chapter 11 bankruptcy case through which it sought to reorganize.<sup>4</sup> Survivors and their families fought hard for the chance to face the Sacklers directly, which may ring as atypical for a legal proceeding that would resolve the claims that they held against Purdue Pharma and the Sacklers.<sup>5</sup> That they asked and were allowed to confront the Sacklers as part of Purdue Pharma's reorganization proceeding indeed was atypical for a bankruptcy case and also was unusual of most civil lawsuits. But the essence of what survivors and families of victims sought—for their allegations to be heard and to have some closure regarding their experiences—is precisely part of what the Sacklers were trying to avoid via Purdue Pharma's chapter 11 case.

The Sacklers were not misguided in their expectations of what bankruptcy might provide them. That survivors and their families—in bankruptcy terms, *claimants* or *creditors*—had a voice in Purdue Pharma's reorganization, including vis-à-vis related third parties like the Sacklers, was extraordinary. Some claimants in Purdue Pharma received confrontational justice. More typical of civil lawsuits, including multidistrict litigation of complex cases, is that plaintiffs have a robust ability, through their counsel, to engage in discovery about the alleged harms, to participate in the litigation, and to possibly gain some closure.

This process for the vindication of rights provides procedural justice, which supports the participation and dignity values that are vital for people to perceive legal processes as legitimate, and which is part of the fundamental constitutional principle of due process.<sup>6</sup> Without procedural justice, those who allege harm suffer further from an inability to “have

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<sup>2</sup> *Id.*; see also Brian Mann, For the First Time, Victims of the Opioid Crisis Formally Confront the Sackler Family, NPR (Mar. 10, 2022, 4:51 PM), <https://www.npr.org/2022/03/10/1085174528/sackler-opioid-victims> [<https://perma.cc/6X8K-MRVB>] (detailing the testimonies).

<sup>3</sup> Hill, *supra* note 1.

<sup>4</sup> *Id.*

<sup>5</sup> See Mann, *supra* note 2 (noting the Sacklers' lack of an apology for years during the opioid crisis).

<sup>6</sup> See Pamela Foohey, A New Deal for Debtors: Providing Procedural Justice in Consumer Bankruptcy, 60 B.C. L. Rev. 2297, 2313–16 (2019) (discussing procedural justice); David Resnick, Due Process and Procedural Justice, in 18 *Nomos* 206 (J. Roland Pennock & John W. Chapman eds., 1977) (linking due process and procedural justice); *infra* Section IV.A.

their wills ‘counted’[] in societal decisions they care about,” and people more generally lose faith in the legal system.<sup>7</sup> The disappearance of opportunities for would-be plaintiffs to litigate their claims against defendants like the Sacklers when businesses seek to reorganize is exactly why for-profit and nonprofit corporations,<sup>8</sup> and the people associated with those businesses, are increasingly using chapter 11 to deal with what we term in this Article *onslaught litigation*.<sup>9</sup>

Onslaught litigation, as we define the term, refers to alleged wrongful conduct that produces claims from multiple plaintiffs against the same defendant or group of defendants. When collected, the magnitude of claims and lawsuits presents the possible financial or operational crippling of the defendants over the long-term, or else will require the defendant to devote tremendous operational resources and time to the litigation because of its public saliency. Mass tort litigation is an example of onslaught litigation, such as the opioid liability faced by Purdue Pharma and the Sacklers, or the asbestos multidistrict and class action litigation that started in the 1980s.<sup>10</sup>

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<sup>7</sup> Victor D. Quintanilla & Michael A. Yontz, Human-Centered Civil Justice Design: Procedural Justice and Process Value Pluralism, 54 *Tulsa L. Rev.* 113, 115, 140–41 (2018) (quoting Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One’s Rights—Part I*, 1973 *Duke L.J.* 1153, 1172).

<sup>8</sup> In this Article, we generally use the term “corporation” to refer to the for-profit and nonprofit business entities that file chapter 11. Although not all businesses that have filed chapter 11 are organized as corporations, such as some of the Catholic dioceses, the majority are. For simplicity, we refer to businesses as “corporations.”

<sup>9</sup> This term is inspired by the U.S. Court of Appeals for the Second Circuit’s discussion of the trust established in Johns-Manville’s chapter 11 case, which it filed to deal with mass tort litigation. *Kane v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 843 F.2d 636, 640 (2d Cir. 1988) (“[T]he Plan seeks to ensure that health claims can be asserted only against the Trust and that Manville’s operating entities will be protected from an *onslaught of crippling lawsuits* that could jeopardize the entire reorganization effort.” (emphasis added)). Jonathan Lipson recently similarly defined what he terms “social debt” bankruptcies: “Social debt is financial liability for serious (e.g., criminal) misconduct, often involving violations of health and safety laws, made unsustainable due to persistent governance failures of transparency and accountability.” Jonathan C. Lipson, *The Rule of the Deal: Bankruptcy Bargains and Other Misnomers*, 97 *Am. Bankr. L.J.* 41, 43 (2023) [hereinafter Lipson, *The Rule of the Deal*]. Our definition of “onslaught litigation” is broader. It focuses less on the normative qualities of the underlying harms and more on the operational and time resources, including public relations resources, that a corporation may project it will have to devote to the litigation. Onslaught litigation includes violations of health and safety laws, sexual harassment, and criminal misconduct, but also may include, for example, allegations of underpaying workers, of price fixing, or of deceptive trade practices.

<sup>10</sup> *Infra* Sections II.C, III.B.

Although onslaught litigation typically presents as mass tort claims, it encompasses many more kinds of lawsuits.<sup>11</sup> It includes claims stemming from alleged harms that affect a smaller group of people and may yield only a handful of lawsuits, but which reflect very poorly on a corporation and its directors, officers, and owners. Examples of this type of onslaught litigation include allegations of rampant sexual abuse and harassment, such as Harvey Weinstein’s abuse and harassment of almost one hundred women.<sup>12</sup> Onslaught litigation also encompasses the prominent defamation cases against Alex Jones and Infowars for Jones’s repeatedly calling the 2012 shooting at the Sandy Hook Elementary School in Connecticut a “giant hoax.”<sup>13</sup>

The critical connection among these examples is the significance of the accusations and lawsuits to a corporation’s continued smooth functioning now or continued function in the future. Magnitude refers both to the number of potential lawsuits, such as with mass torts, and to the public outrage and shock over even a few allegations and lawsuits. The prominence and public saliency of the allegations make the resulting lawsuits onslaught litigation. When faced with onslaught litigation, corporations’ directors, officers, and owners naturally want to truncate the lawsuits and minimize additional public discussion of the allegations.

Reorganizing via chapter 11 promises to collect and resolve most or all of the lawsuits and claims arising from the alleged wrongdoing. It also has the potential to decrease information available to the public about the allegations.<sup>14</sup> When corporations file chapter 11 in the wake of onslaught

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<sup>11</sup> Mass tort litigation refers to the situation where many individuals have tort-based claims against a single or a handful of persons (or entities). See Douglas G. Smith, *Resolution of Mass Tort Claims in the Bankruptcy System*, 41 U.C. Davis L. Rev. 1613, 1616–26 (2008) (overviewing mass tort litigation); *infra* Section I.B.

<sup>12</sup> See Amelia Schonbek, *The Complete List of Allegations Against Harvey Weinstein*, N.Y.: The Cut (Jan. 6, 2020), <https://www.thecut.com/2020/01/harvey-weinstein-complete-list-allegations.html> [<https://perma.cc/KE2C-Z5KK>] (listing allegations).

<sup>13</sup> Alex Jones, Infowars, and the Sandy Hook Defamation Suits, *First Amend. Watch* (Dec. 2, 2022), <https://firstamendmentwatch.org/deep-dive/alex-jones-infowars-and-the-sandy-hook-defamation-suits> [<https://perma.cc/YX2J-BTJN>].

<sup>14</sup> A chapter 11 filing, initially, will require a corporation to disclose more information than it would be required to disclose in civil litigation, especially given the use of protective orders. This Article is concerned with the totality of information that may be exposed via news stories about litigation and through litigation filed over decades, which a chapter 11 filing will cut off. Stated differently, corporations are trading the possibility of alleged wrongdoings circulating in the public for decades (or longer) for chapter 11’s immediate, short-term, and predictable information disclosure.

litigation, what they seek is two-fold: to bypass procedural justice and to shut down discussion of their purported wrongdoings.

Based on past chapter 11 proceedings, corporations' directors and officers expect that negotiations will be allowed to take place between only a subset of parties, that discovery requests can be pushed back against forcefully, and that requests for examiners can be successfully fought. They also expect that related claims against business entities and people arising from the alleged wrongdoings that do not file bankruptcy will be swept into the reorganization case. They further expect that calls for shortening the reorganization process will be heeded and that bankruptcy law provisions designed to ensure claimants can vote on the proposed plan will only be nominally followed—usually under the guise of ensuring that victims receive as much money as possible.

Silencing people and sweeping the alleged harms under the proverbial rug become a byproduct of reassurances about making sure that victims are treated well. But it is the corporation and its leaders that benefit, not the people who they hurt. The chapter 11 case will end with a forever resolution of onslaught litigation claims against the corporation and third parties and with little public understanding of what the corporation sought to escape through bankruptcy. The corporation (and its owners) will continue to operate, effectively freed from its wrongdoing.<sup>15</sup>

This Article argues that it is time for this destructive, targeted use of bankruptcy to be reined in and proposes how to limit and control those chapter 11 cases filed with a primary purpose of resolving onslaught litigation. In the past decade, chapter 11 cases filed to deal with onslaught litigation have made headline news. Some of these filings are discussed in the media and literature as mass tort bankruptcy cases such as: Catholic dioceses,<sup>16</sup> the Boy Scouts of America,<sup>17</sup> and Purdue Pharma.<sup>18</sup> Others involve onslaught litigation that may not be characterized as mass tort

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<sup>15</sup> See *infra* Part II for an overview of chapter 11 as applied to onslaught litigation.

<sup>16</sup> Rebecca Klapper, 4 New York Dioceses File for Bankruptcy Due to Flood of Sexual Abuse Lawsuits, *Newsweek* (Aug. 13, 2021, 9:42 AM), <https://www.newsweek.com/4-new-york-dioceses-file-bankruptcy-due-flood-sexual-abuse-lawsuits-1619136> [https://perma.cc/4G67-MLMT].

<sup>17</sup> Cara Kelly, Nathan Bomey & Lindsay Schnell, Boy Scouts Files Chapter 11 Bankruptcy in the Face of Thousands of Child Abuse Allegations, *USA Today* (May 18, 2020, 4:51 PM), <https://www.usatoday.com/in-depth/news/investigations/2020/02/18/boy-scouts-bsa-chapter-11-bankruptcy-sexual-abuse-cases/1301187001> [https://perma.cc/M9Q7-WMH5].

<sup>18</sup> Jan Hoffman & Mary Williams Walsh, Purdue Pharma, Maker of OxyContin, Files for Bankruptcy, *N.Y. Times* (Nov. 24, 2020), <https://www.nytimes.com/2019/09/15/health/purdue-pharma-bankruptcy-opioids-settlement.html> [https://perma.cc/7BMJ-S366].

litigation: Bikram Yoga,<sup>19</sup> the Weinstein Companies,<sup>20</sup> USA Gymnastics,<sup>21</sup> and Remington and Infowars after the Sandy Hook shooting.<sup>22</sup> More recently, Johnson & Johnson (“J&J”) and 3M strategically placed certain of their corporate entities into bankruptcy to deal with onslaught litigation about particular products—claims that talcum powder caused cancer in hundreds of thousands of women in J&J’s case and claims that military earplugs harmed United States servicemembers in 3M’s case.<sup>23</sup>

Scholars have recently written about the problems inherent in using the chapter 11 process to deal with mass tort liabilities, including issues related to third-party releases, judge shopping, bypassing procedures, and

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<sup>19</sup> Tracy Rucinski, *Bikram Yoga Guru Seeks Bankruptcy in Wake of Harassment Claims*, Reuters (Nov. 10, 2017, 3:55 PM), <https://www.reuters.com/article/us-bikram-choudhury-yoga-bankruptcy/bikram-yoga-guru-seeks-bankruptcy-in-wake-of-harassment-claims-idUSKBN1DA2SA> [<https://perma.cc/9U6P-5FP2>].

<sup>20</sup> Brooks Barnes, *Weinstein Company Files for Bankruptcy and Revokes Nondisclosure Agreements*, N.Y. Times (Mar. 19, 2018), <https://www.nytimes.com/2018/03/19/business/weinstein-company-bankruptcy.html> [<https://perma.cc/TE8R-MMBV>].

<sup>21</sup> Rachel Axon, Nancy Armour & Tim Evans, *USA Gymnastics Files for Bankruptcy, a Move Related to Larry Nassar’s Sexual Abuse Lawsuits*, USA Today (Dec. 5, 2018, 5:40 PM), <https://www.usatoday.com/story/sports/olympics/2018/12/05/usa-gymnastics-files-bankruptcy-nassar-lawsuits/2218546002> [<https://perma.cc/3GEG-HBS3>].

<sup>22</sup> Sarah Jorgensen, Jason Hanna & Erica Hill, *Sandy Hook Families Reach \$73 Million Settlement with Gun Manufacturer Remington*, CNN (Feb. 16, 2022, 5:04 AM), <https://www.cnn.com/2022/02/15/us/sandy-hook-shooting-settlement-with-remington/index.html> [<https://perma.cc/BPT4-NFVJ>]; Derrick Bryson Taylor, *Alex Jones’s Infowars Files for Bankruptcy*, N.Y. Times (Apr. 18, 2022, 5:15 PM), <https://www.nytimes.com/2022/04/18/us/alex-jones-infowars-bankruptcy.html> [<https://perma.cc/2KJR-TWD3>].

<sup>23</sup> Johnny Magdaleno, *Major Bankruptcy Case Hits Indianapolis as Veterans Claim Combat Earplugs Were Faulty*, IndyStar (Aug. 17, 2022, 7:21 AM), <https://www.indystar.com/story/news/2022/08/16/major-bankruptcy-case-hits-indianapolis-veterans-sue-3m-subsiary/65404066007> [<https://perma.cc/8KP3-5TCH>]; Brian Mann, *Rich Companies Are Using a Quiet Tactic to Block Lawsuits: Bankruptcy*, NPR (Apr. 2, 2022, 7:00 AM), <https://www.npr.org/2022/04/02/1082871843/rich-companies-are-using-a-quiet-tactic-to-block-lawsuits-bankruptcy> [<https://perma.cc/R5QT-JCG6>]. The Third Circuit subsequently dismissed J&J’s corporate entity’s case as a bad-faith filing. See *infra* note 120 and accompanying text. On April 4, 2023, J&J filed the same corporate entity in chapter 11 for a second time and, in doing so, proposed a \$8.9 billion settlement. Evan Ochsner, *Cancer Victims’ Lawyers Vow to Fight J&J Proposed Settlement*, Bloomberg L. (Apr. 6, 2023, 1:40 PM), <https://news.bloomberglaw.com/bankruptcy-law/cancer-victims-lawyers-vow-to-fight-j-j-proposed-settlement> [<https://perma.cc/5PV-D-XTL6>]. Ralph Brubaker characterized the filing as a “rather audacious ploy.” Steven Church & Jef Feeley, *J&J Begins ‘Audacious’ Return to Failed Cancer Settlement Tactic*, Bloomberg L. (Apr. 5, 2023, 12:28 PM), <https://news.bloomberglaw.com/bankruptcy-law/j-j-begins-audacious-return-to-failed-cancer-settlement-tactic> [<https://perma.cc/THA9-L7VP>].



the much-decried Texas Two-Step.<sup>24</sup> But the role of the bankruptcy system in people losing their ability to take part in litigation and the damage to procedural justice has been given short shrift—particularly in the wider context of onslaught litigation which may or may not be categorized as arising from a mass tort. Likewise absent from discussion in the literature is the way in which denying survivors a voice in onslaught litigation reorganization cases prevents light from being shed on problems such that the company (and its owners) can cabin how much public scrutiny they face.

This Article brings those concerns to the forefront. It thereby advances the literature from a discussion of mass tort bankruptcies largely tied to bankruptcy law provisions, constitutional concerns, and a traditional view of reorganization as a monetary-value-preserving venture,<sup>25</sup> to an

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<sup>24</sup> See generally Melissa B. Jacoby, *Sorting Bugs and Features of Mass Tort Bankruptcy*, 101 Tex. L. Rev. (forthcoming 2023) (manuscript at 3) [hereinafter Jacoby, *Sorting Bugs and Features*], <https://ssrn.com/abstract=4323151> [<https://perma.cc/EG3B-7378>] (detailing the extraordinary relief that corporations seek in bankruptcy, with a focus on mass tort bankruptcies); Jonathan C. Lipson, *First in Time; First is Right: Comments on Levitin's Poison Pill*, 101 Tex. L. Rev. Online 33, 34 (2022) [hereinafter Lipson, *First in Time*] (discussing Adam Levitin's article, *Purdue's Poison Pill*, and third-party releases, appellate review, and venue); Ralph Brubaker, *Mandatory Aggregation of Mass Tort Litigation in Bankruptcy*, 131 Yale L.J.F. 960, 964–66 (2022) [hereinafter Brubaker, *Mandatory Aggregation of Mass Tort Litigation in Bankruptcy*] (advocating prohibiting nonconsensual third-party releases); Michael A. Francus, *Texas Two-Stepping Out of Bankruptcy*, 120 Mich. L. Rev. 38, 38–39 (2022) (discussing the Texas Two-Step, fraudulent transfer law, and good-faith challenges to chapter 11 filings); Adam J. Levitin, *Purdue's Poison Pill: The Breakdown of Chapter 11's Checks and Balances*, 100 Tex. L. Rev. 1079, 1083–84 (2022) [hereinafter Levitin, *Purdue's Poison Pill*] (discussing coercive restructuring techniques, lack of appellate review, and forum shopping); Samir D. Parikh, *The New Mass Torts Bargain*, 91 Fordham L. Rev. 447, 455 (2022) [hereinafter Parikh, *The New Mass Torts Bargain*] (overviewing the intersection of mass torts and bankruptcy); Samir D. Parikh, *Scarlet-Lettered Bankruptcy: A Public Benefit Proposal for Mass Tort Villains*, 117 Nw. U. L. Rev. 425, 429–31 (2022) [hereinafter Parikh, *Scarlet-Lettered Bankruptcy*] (proposing that companies facing mass torts that file bankruptcy emerge as public benefit corporations); Lindsey D. Simon, *Bankruptcy Grieters*, 131 Yale L.J. 1154, 1159–61 (2022) [hereinafter Simon, *Bankruptcy Grieters*] (detailing how and when third-party releases should be granted); Melissa B. Jacoby, *Shocking Business Bankruptcy Law*, 131 Yale L.J.F. 409, 411–12 (2021) [hereinafter Jacoby, *Shocking Business Bankruptcy Law*] (pinpointing the harms of “off-label bankruptcy” and “bankruptcy à la carte,” including third-party releases); Adam J. Levitin, *The Texas Two-Step: The New Fad in Fraudulent Transfers, Credit Slips* (July 19, 2021, 10:50 AM) [hereinafter Levitin, *The Texas Two-Step*], <https://www.creditslips.org/creditslips/2021/07/the-texas-two-step.html> [<https://perma.cc/MUQ2-AJDQ>] (detailing the mechanics of the Texas Two-Step).

<sup>25</sup> A few scholars have called out and deviated from this more traditional focus. See Jacoby, *Sorting Bugs and Features*, *supra* note 24 (manuscript at 11) (emphasizing the non-economic constitutional rights of future claimants); Jonathan C. Lipson, “Special”: Remedial Schemes

examination of the direct harms to people and public trust in corporations. It also expands the discussion of chapter 11 cases filed in the wake of litigation from mass torts to the broader context of our concept of onslaugth litigation. It thus links headliner chapter 11 filings from the past couple of decades with a full history of mass tort bankruptcies in a manner not yet explored, but which underscores and explicates an integral motivator of recent chapter 11 filings that have provoked outrage and calls for a reexamination of the business bankruptcy system.

To make these points—and to explain our solutions—the Article proceeds as follows. Part I overviews how a corporation would resolve onslaugth litigation, with a focus on mass tort cases, outside of the bankruptcy system. Part II compares this to how corporations can manage onslaugth litigation in the bankruptcy system, including tracing the evolution of chapter 11’s use to deal with mass torts from asbestos litigation through intrauterine device (“IUD”) and breast implant product liability litigation. Part III relies on three case studies—Catholic dioceses, Purdue Pharma, and Infowars and Alex Jones—to build on how the prior use of bankruptcy to deal with mass torts has created the necessary conditions to allow defendants to leverage chapter 11 to silence victims and facilitate cover-ups in a wider variety of onslaugth litigation. Part IV turns to a detailed explanation of the problems—the denial of victims’ voices, the destruction of procedural justice, and the suppression of information. Part V offers solutions. Although solving bankruptcy’s silencing problem may, almost necessarily, require more costly and longer reorganization cases, we argue that such a cost is worth it for people to have a voice and for upholding the integrity of both the justice system and the corporate economy.

### I. ONSLAUGHT LITIGATION OUTSIDE BANKRUPTCY

Corporate defendants increasingly try to use bankruptcy to resolve certain kinds of legal actions that we term *onslaught litigation*. As noted, we define onslaugth litigation as alleged wrongful conduct that leads a

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in Mass Tort Bankruptcies, 101 Tex. L. Rev. 1773, 1778 (2023) [hereinafter Lipson, Remedial Schemes], (assessing “what actually happened in *Purdue Pharma* along familiar dimensions of ‘exit,’ ‘voice,’ and ‘loyalty’” (citing John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 Colum. L. Rev. 370, 376 (2000))); Lipson, *Rule of the Deal*, supra note 9, at 44 (interrogating questions of transparency and accountability in “social debt” bankruptcies); infra notes 299–302 and accompanying text.

person or organization to face legal claims from multiple parties, all of which stem from the same or similar conduct and where the net effect of the totality of litigation is of such a magnitude that it has the likelihood of causing the defendant's financial collapse or of requiring the defendant to devote significant operational resources and time to the litigation in part because of its public saliency.<sup>26</sup> Onslaught litigation typically has a public relations component that accompanies allegations of wrongdoing.<sup>27</sup> In addition, multiple defendants involved in the same common conduct may be named in the resulting civil and criminal actions, such as the corporation, related corporate entities, and their owners. Corporate directors, officers, and owners may worry that they will be tried in state and federal courts, as well as the court of public opinion.

In contrast to onslaught litigation, for instance, multiple claims from suppliers against a corporation stemming from similar contract issues, although potentially expensive to resolve, are unlikely to rise to the level of what corporate officers will experience as onslaught litigation. The claims instead are a predictable, though unfortunate, cost of doing business and should not be expected to provoke outrage, particularly public rebuke, in the way that allegations of knowingly selling a dangerous product, sexual harassment, abuse, libel, slander, and other tortious conduct often do.

To understand how corporate defendants benefit from filing bankruptcy to handle onslaught litigation, it is useful first to consider how defendants would handle the litigation outside bankruptcy. The remainder of this Part overviews litigation of the range of onslaught litigation. Because a sizable portion of onslaught litigation is mass tort litigation, it emphasizes the resolution of mass tort claims outside bankruptcy.

#### *A. Resolving Lawsuits Generally*

Onslaught litigation proceeds the same as any civil lawsuit—pleadings, discovery, trial, verdict (and award of damages), and possibly an appeal

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<sup>26</sup> See *supra* notes 9–13 and accompanying text.

<sup>27</sup> Even if litigation does not threaten financial or operational collapse or if the underlying lawsuits have questionable merit, the litigation's saliency among clients, customers, and the general public can be sufficient to deem it onslaught litigation. Public saliency and scrutiny are key to determining which litigation a defendant (or a group of related defendants) would experience as onslaught litigation.

or multiple appeals.<sup>28</sup> As a baseline, each individual lawsuit is resolved separately. At any point, the plaintiffs and defendants may come to settlements.<sup>29</sup> Every settlement is unique to the individual lawsuit.<sup>30</sup> Absent a settlement, a civil lawsuit can take anywhere from a few months to a few years.<sup>31</sup>

For corporations facing onslaught litigation, as each lawsuit continues, with every step, the public exposure risk remains.<sup>32</sup> The allegations make headline news upon the filing of each case.<sup>33</sup> Discovery requests bring news stories. The trial's start is noteworthy. The verdict, judgments, and appeals draw out how long the corporation's misdeeds circulate.

Each lawsuit also takes time away from running a corporation.<sup>34</sup> And as each lawsuit concludes, money judgments stack up.<sup>35</sup> Although defendants may be able to handle, operationally and financially, the initial lawsuit or handful of lawsuits, as the timeline and dollar figure for the resolution of claims extends, corporations' directors, officers, and owners grow anxious and may look for a way out of the uncertainty.<sup>36</sup>

In the context of allegations involving multiple plaintiffs and multiple lawsuits, instead of settling each lawsuit or waiting for it to resolve via a

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<sup>28</sup> 1 Legal Pros., Inc., *Legal Professional's Handbook* ¶1221 (2022) (describing the progression of civil litigation).

<sup>29</sup> Jerry M. Custis, *Litigation Management Handbook* § 8:24 (2022).

<sup>30</sup> See also John R. Allison, Mark A. Lemley & David L. Schwartz, *Understanding the Realities of Modern Patent Litigation*, 92 *Tex. L. Rev.* 1769, 1777 (2014) (discussing the particularities of patent litigation settlements).

<sup>31</sup> Jarrett Lewis, *Third-Party Litigation Funding: A Boon or Bane to the Progress of Civil Justice?*, 33 *Geo. J. Legal Ethics* 687, 687 (2020) ("Because of discovery requests and lengthy trials, litigation can last for years . . .").

<sup>32</sup> See Joe Couto, *Bungling of Abuse Scandal Weakens the Church's Voice*, *ChristianWeek* (May 4, 2010), <https://www.christianweek.org/bungling-of-abuse-scandal-weakens-the-churchs-voice> [<https://perma.cc/3D3K-22GD>] (noting how the Catholic Church faces media scrutiny with revelations of sex abuse and how that erodes its "brand").

<sup>33</sup> See Abbott Koloff & Deena Yellin, *Over a Year, More Than 230 Sex Abuse Suits Have Been Filed in NJ Against the Catholic Church*, *NorthJersey.com* (Dec. 1, 2020, 12:09 PM), <https://www.northjersey.com/story/news/2020/12/01/more-than-230-sex-abuse-suits-filed-against-catholic-church-nj/3768960001> [<https://perma.cc/D6AY-AYDK>] (noting how one paper examined more than 230 sex abuse lawsuits filed against five Catholic dioceses).

<sup>34</sup> See James Malm, Kenneth W. Soyeh & Srinidhi Kanuri, *Litigation Risk and Corporate Performance*, 37 *J. Behav. & Experimental Fin.*, July 2023, at 1 ("Managers of defendant firms spend much time holding meetings dedicated to lawsuits, which can distract them from making critical investment decisions.").

<sup>35</sup> See Jonathan T. Molot, *A Market in Litigation Risk*, 76 *U. Chi. L. Rev.* 367, 368–75 (2009) (discussing how businesses attempt to manage litigation risk).

<sup>36</sup> See Malm et al., *supra* note 34, at 1 ("[L]itigation may affect managerial decision-making and ultimately interrupt the sustainability of future earnings . . .").

trial, the lawsuits may be coordinated under state civil procedure laws.<sup>37</sup> A paradigmatic onslaught litigation example in which coordination has been used relates to lawsuits filed against individual Catholic Church dioceses on account of sexual abuse allegations over a period of decades.<sup>38</sup> The abuse claims arose and were reported over many years.<sup>39</sup> Dozens, and sometimes hundreds, of lawsuits against a particular diocese were filed and remained pending over an extended period.<sup>40</sup> Although some dioceses settled, dioceses looked for ways to coordinate and consolidate the pending lawsuits.<sup>41</sup> For example, to deal with the 850 civil cases filed against Catholic dioceses in California, the state courts used a state law process known as civil case coordination.<sup>42</sup> Coordination in California is allowed for two or more claims “that share common questions of fact or law and that are pending in different counties to be joined in one court.”<sup>43</sup> The cases were coordinated in a geographic

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<sup>37</sup> 2 Jane R. Roth, *Business and Commercial Litigation in Federal Courts* §§ 21:4, 21:10 (Robert L. Haig ed., 5th ed. 2022).

<sup>38</sup> Marie Keenan, *Child Sexual Abuse and the Catholic Church: Gender, Power, and Organizational Culture* 3–23 (2012) (overviewing what is known about sexual abuse within the Catholic Church); John Jay Coll. of Crim. Just., *The City Univ. of N.Y., The Nature and Scope of Sexual Abuse of Minors by Catholic Priests and Deacons in the United States 1950–2002* (June 2004), <https://www.usccb.org/sites/default/files/issues-and-action/child-and-youth-protection/upload/The-Nature-and-Scope-of-Sexual-Abuse-of-Minors-by-Catholic-Priests-and-Deacons-in-the-United-States-1950-2002.pdf> [<https://perma.cc/CL35-PRKP>] (relying on a survey of Catholic dioceses and religious institutes to document sexual abuse within the Catholic Church).

<sup>39</sup> The Archdiocese of Baltimore provides an example, where “[m]ore than 150 Roman Catholic priests in the Archdiocese of Baltimore have been accused of sexually and physically abusing more than 600 victims over the past 80 years.” Kiara Alfonseca, *State Investigation Identifies 158 Priests Accused of Abuse, Over 600 Victims in Last 80 Years*, ABC News (Nov. 18, 2022, 6:04 PM), <https://abcnews.go.com/US/probe-identifies-158-priests-accused-abuse-600-victims/story?id=93565644> [<https://perma.cc/RA3A-CDSM>].

<sup>40</sup> *Id.*

<sup>41</sup> For instance, the Catholic Diocese of Albany recently offered a settlement that bypasses litigation and a potential bankruptcy filing. Brendan J. Lyons, *Albany Diocese Offered \$20M for ‘Global Settlement’ with Victims of Abuse*, Times Union (Jan. 15, 2023), <https://www.timesunion.com/state/article/Albany-diocese-offered-20M-for-global-17715979.php> [<https://perma.cc/2X3C-LGUC>].

<sup>42</sup> Cal. Civ. Proc. Code § 404; *An Explanation of the Clergy Abuse Litigation in California*, Associated Press (Oct. 9, 2004), [https://www.snapnetwork.org/legal\\_courts/stories/ca\\_explanation\\_calif\\_cases.htm](https://www.snapnetwork.org/legal_courts/stories/ca_explanation_calif_cases.htm) [<https://perma.cc/JBR8-RCRT>].

<sup>43</sup> *Civil Case Coordination*, Cal. Cts., <https://www.courts.ca.gov/27922.htm#howcomplex> [<https://perma.cc/6GUD-YE6R>] (last visited Dec. 1, 2022) (providing the individual filings and coordination orders); see also Helen E. Zukin & Melanie Meneses Palmer, *Demystifying Complex-Case Coordination*, Advocate (Feb. 2017), <https://www.advocatemagazine.com/>

manner, separating the cases into groups called Clergy I, Clergy II, and Clergy III, with each being assigned to a different county district court—the first two in Southern California and the third group in Northern California.<sup>44</sup>

Case coordination for onslaught litigation is not without its flaws. When state courts are used, the ability to consolidate claims and lawsuits from multiple states is not possible due to jurisdictional constraints. As explained below, class actions and multidistrict litigation, in comparison, provide a more efficient and inclusive method to litigate alleged misconduct affecting multiple people across multiple jurisdictions.

### *B. Resolving Lawsuits Through Class Actions and Multidistrict Litigation*

Class actions and multidistrict litigation have been used most often with mass tort claims. This Section overviews these techniques in that context. Mass tort litigation, as a form of onslaught litigation, arises when there are numerous plaintiffs with a common defendant and whereby the tort-based claims of the plaintiffs stem from the same conduct by the defendant, such as a corporation.<sup>45</sup>

However, this simple description belies the immense complexity of mass tort litigation. The injuries in mass tort actions are many—physical, emotional, and psychological—and quite significant. Mass tort cases have historically involved injuries caused by dangerous or defective consumer products, large-scale catastrophes, defective prescription drugs and medical devices, or exposure to toxic substances.<sup>46</sup> Plaintiffs often are spread over a large geographic area and their injuries may become apparent over a protracted timeline. Mass tort litigation usually also involves multiple actors, ranging from defendants, attorneys, claims administrators, and litigation financing companies.<sup>47</sup>

Mass tort cases have long presented unique challenges. Plaintiffs come forward at different points in time. Two people exposed to a product at the same time may manifest injuries at different times. In cases involving asbestos exposure, the latency period for asbestos-produced diseases can

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article/2017-february/demystifying-complex-case-coordination [https://perma.cc/7LNR-HV82] (discussing coordination in California).

<sup>44</sup> See An Explanation of the Clergy Abuse Litigation in California, *supra* note 42.

<sup>45</sup> See *supra* note 11.

<sup>46</sup> See Parikh, *The New Mass Torts Bargain*, *supra* note 24, at 462–63.

<sup>47</sup> Lindsey D. Simon, *The Settlement Trap*, 96 *Ind. L.J.* 661, 678–80 (2021).

be as long as forty years.<sup>48</sup> In other circumstances, such as sexual abuse and harassment, that the conduct and injury have occurred is known, but it may take harmed individuals time to process the harm and come forward.<sup>49</sup> Such long latency periods make it difficult for corporations to estimate the extent of their future liability.<sup>50</sup>

The timelines for injury manifestation and psychological readiness to come forward also present a quandary for remedying harms. Only those people who have been injured, know they have been injured, and actually come forward can have a hand in the distribution of a corporate defendant's assets. Those current plaintiffs who successfully bring actions will deplete the finite corporate resources, leaving little to nothing for those future plaintiffs. As Samir Parikh has noted, the potential for unknown claims and liabilities to arise in the future causes corporate tortfeasors to push for global settlements whereby any and all current and future claims are settled at a certain set value.<sup>51</sup> But a global settlement sets up an anti-commons problem.<sup>52</sup> The corporation's finite resources go to those survivors who are identified and become part of the settlement at the time.<sup>53</sup> For those survivors whose injury is latent or have yet to come forward, the resources available to make them whole will be exhausted by the time they raise their injury.<sup>54</sup>

Historically, the challenges posed by onslaught litigation in the mass torts context have been addressed by the consolidation of claims in two main ways. The more typical is that the actions will go through class certification under Rule 23 of the Federal Rules of Civil Procedure.<sup>55</sup> Alternatively, the Judicial Panel on Multidistrict Litigation may, at its

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<sup>48</sup> Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 *Widener L.J.* 97, 103 (2013).

<sup>49</sup> Statutes of limitations require people to come forward within a certain timeframe. However, states can change their statute of limitations. Many states have done this for child sexual abuse in the wake of the exposure of widespread abuse of children in the Catholic Church. See Marina Pitofsky, *Catholic Church Spent \$10M on Lobbying to Delay Statute of Limitations Reforms: Report*, *The Hill* (June 5, 2019), <https://thehill.com/blogs/blog-briefing-room/news/447060-the-catholic-church-spent-10-million-in-lobbying-efforts-to> [<https://perma.cc/B4MG-BBFJ>] (discussing a report that found the Catholic Church "paid for lobbying efforts in Pennsylvania, New York, Connecticut, New Jersey, New Hampshire, Massachusetts, Maine and Rhode Island between 2011 and 2018" to delay these reforms).

<sup>50</sup> See Robreno, *supra* note 48, at 106–07.

<sup>51</sup> Parikh, *The New Mass Torts Bargain*, *supra* note 24, at 451–52.

<sup>52</sup> *Id.* at 452.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> See *id.*

discretion, transfer the cases to a single district court for consolidated proceedings.<sup>56</sup>

### *1. Class Actions*

The Supreme Court has called class actions a “special kind of litigation.”<sup>57</sup> Class actions operate under Rule 23, and a large accompanying body of case law, that provide a way for a court to determine whether “the named plaintiff’s claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.”<sup>58</sup> Class actions are particularly useful when numerous individuals experience the same harm and, although large in the aggregate, the likely monetary compensation for the harm itself is relatively small individually.<sup>59</sup> Although people have been harmed, because the likely monetary award on account of the harm is not sufficient to justify an individual plaintiff fronting the necessary attorney’s fees, or for the harmed individual to find counsel to work on a contingency fee basis, lawsuits may not be brought.<sup>60</sup>

Class actions permit multiple plaintiffs with the same claim arising from the same facts to bring their lawsuit together.<sup>61</sup> If the class is certified, a single plaintiff will be designated as the class representative and, with their counsel, will be empowered to bind the rest of the class members in the resolution of the litigation.<sup>62</sup> This allows for a larger damages award in the aggregate, which entices an attorney to take the cases on a contingency fee basis.<sup>63</sup>

Through the mid-1990s, class certification dominated as the primary means of resolving mass tort litigation.<sup>64</sup> When first created, class actions primarily functioned as a tool to enable more efficient litigation of claims.<sup>65</sup> But parties to mass tort litigation recognized the value of class

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<sup>56</sup> *Id.* (listing these alternatives).

<sup>57</sup> *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 470 (1978).

<sup>58</sup> *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982).

<sup>59</sup> Adam J. Levitin, *Consumer Finance: Markets and Regulation* 47–48 (2018).

<sup>60</sup> *Id.* at 44.

<sup>61</sup> *Id.* at 47–48.

<sup>62</sup> 1 Joseph M. McLaughlin, *McLaughlin on Class Actions* § 1:2 (19th ed. 2022) (detailing how a class is certified).

<sup>63</sup> Levitin, *supra* note 59, at 47–48.

<sup>64</sup> Troy A. McKenzie, *Toward a Bankruptcy Model for Nonclass Aggregate Litigation*, 87 N.Y.U. L. Rev. 960, 965 (2012).

<sup>65</sup> *Id.* at 970.



certification for settlement purposes.<sup>66</sup> Defendants stood to benefit tremendously from settlements, which precluded later claims and future liability.<sup>67</sup> For instance, in 1984, a class settlement of \$180 million was approved for the claims of military personnel who had been exposed to a powerful herbicide, Agent Orange, during the Vietnam War.<sup>68</sup> Many mass tort cases in the 1990s were resolved via class certification and settlement.<sup>69</sup>

In the late 1990s, however, the Supreme Court found that the use of Rule 23 class certification was inappropriate in two asbestos-related cases because the interests of the class representatives did not adequately align with the interests of future victims, who would be bound by the settlement terms and precluded from bringing individual claims despite their distinct interests.<sup>70</sup> With these two decisions, the Supreme Court effectively eliminated the option to resolve the majority of mass tort cases through class certification and settlement.<sup>71</sup> Onslaught litigation involving mass torts needed a new device.

## 2. Multidistrict Litigation

Over the last twenty years, multidistrict litigation (“MDL”) has replaced class actions for mass tort cases.<sup>72</sup> MDL, created in 1968,<sup>73</sup> brings together large and complicated civil cases scattered across the country that have common questions of both law and fact into a single court for purposes of pre-trial procedures.<sup>74</sup> When petitioned, a panel of seven federal judges appointed by the Chief Justice of the U.S. Supreme Court can transfer all of these cases to a single court if the panel

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<sup>66</sup> Richard A. Nagareda, *Mass Torts in a World of Settlement* 72 (2007).

<sup>67</sup> *Id.* at 73.

<sup>68</sup> *Id.* at 74.

<sup>69</sup> Parikh, *The New Mass Torts Bargain*, *supra* note 24, at 472.

<sup>70</sup> *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625–27 (1997); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 854–56 (1999).

<sup>71</sup> Parikh, *The New Mass Torts Bargain*, *supra* note 24, at 472–73.

<sup>72</sup> *Id.* at 475. “Non-class” aggregate litigation also has become a substitute for class actions. See Jonathan C. Lipson, *The Secret Life of Priority: Corporate Reorganization after Jevic*, 93 *Wash. L. Rev.* 631, 659 (2018) (noting potential problems with this litigation).

<sup>73</sup> The first MDL was *In re Eisler Patents*, 297 F. Supp. 1034 (J.P.M.L. 1968). Daniel S. Wittenberg, *Multidistrict Litigation: Dominating the Federal Docket*, A.B.A. (Feb. 19, 2020), <https://www.americanbar.org/groups/litigation/publications/litigation-news/business-litigation/multidistrict-litigation-dominating-federal-docket> [https://perma.cc/9JRV-BR58].

<sup>74</sup> 28 U.S.C. § 1407; Wittenberg, *supra* note 73; Dana Shilling & Christine Vincent, *Lawyer’s Desk Book* § 20.10 (2d ed. Supp. I 2023).

determines that doing so promotes justice and the convenience of the parties and witnesses.<sup>75</sup>

Once consolidated, the transferee judge handles all pre-trial motions. These include those related to discovery, to certifying a class, to lack of jurisdiction, to changing venue, and, importantly, to summary judgment.<sup>76</sup> At the end of pre-trial proceedings, the cases are all sent back to their individual district courts, and the cases then proceed to trial or settlement.<sup>77</sup>

MDL cases range widely, and MDL has become a popular device in dealing with civil disputes in federal courts. MDL has been used in cases regarding product liability, consumer protection law violations, employment discrimination, patent infringement, and securities law violations.<sup>78</sup> A study of federal litigation between 1968 and 2021 found that at the end of the period, seventy percent of all pending federal civil cases were MDLs.<sup>79</sup>

But MDL is not without its flaws. Although the statute authorizing MDL stipulates that once pre-trial proceedings have concluded, cases are remanded to the district court in which they were filed,<sup>80</sup> this is seldom the actual result. Instead, nearly all transferred cases are caught in “a captive settlement negotiation,” resolved either by a dispositive motion or settlement.<sup>81</sup> Because the settlement takes place during this pre-trial period, claims are not adjudicated, which means that meritless claims may

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<sup>75</sup> 28 U.S.C. § 1651. The transfer can occur through the panel’s own motion. Shilling & Vincent, *supra* note 74, § 20.10.

<sup>76</sup> Trudy Y. Hartzog & Wade H. Logan III, *The Nuts and Bolts of Multidistrict Litigation*, S.C. Law., Jul.–Aug. 1996, at 20, 23.

<sup>77</sup> *Id.*

<sup>78</sup> See Wittenberg, *supra* note 73 (“[T]he top three MDL case types are products liability, antitrust, and sales practices.”); Memorandum of Points and Authorities in Support of Vercy, L.L.C.’s Motion to Transfer and Consolidate for Pretrial Proceedings at 3, *In re Vercy, L.L.C. Tel. Consumer Prot. Act Litig.*, No. 3049 (J.P.M.L. Aug. 8, 2022) (consumer protection); *The Mechanics of Multidistrict Litigation: Streamlining Complex Cases*, Jones Day (Mar. 2023), <https://www.jonesday.com/en/insights/2023/03/the-mechanics-of-multidistrict-litigation-streamlining-complex-cases> [<https://perma.cc/54S2-WQMK>] (describing employment discrimination, antitrust, and intellectual property MDL cases).

<sup>79</sup> MDL Cases as Percentage of Federal Civil Caseload, *Laws. for Civ. Just.*, [https://www.rules4mdls.com/\\_files/ugd/6c49d6\\_3014148f902a47bdac63d404cb3ab40c.pdf](https://www.rules4mdls.com/_files/ugd/6c49d6_3014148f902a47bdac63d404cb3ab40c.pdf) [<https://perma.cc/3F7M-QGSY>]; U.S. Jud. Panel on Multidistrict Litig., *Statistical Analysis of Multidistrict Litigation Under 28 U.S.C. § 1407* (2018), [https://www.jpml.uscourts.gov/sites/jpml/files/JPML\\_Statistical\\_Analysis\\_of\\_Multidistrict\\_Litigation-FY-2018.pdf](https://www.jpml.uscourts.gov/sites/jpml/files/JPML_Statistical_Analysis_of_Multidistrict_Litigation-FY-2018.pdf) [<https://perma.cc/QG7G-2WZL>].

<sup>80</sup> Parikh, *The New Mass Torts Bargain*, *supra* note 24, at 474.

<sup>81</sup> *Id.* at 476–77.

consume resources that otherwise would be allocated to actual survivors.<sup>82</sup> In the aggregate, this drives up the defendant's liability without establishing their actual culpability.<sup>83</sup> Even worse, "claims of future victims . . . cannot be aggregated as part of the settlement," leaving defendants exposed to potentially high-value claims that may be brought in the future.<sup>84</sup> The process also weighs heavily on plaintiffs, who may be trapped in the proceedings for years without ever getting to trial.

Against this backdrop, scholars have argued that MDL violates the principles under which people and organizations are to be held accountable with its many unorthodox procedures that allow repeat players, like lawyers, to enrich themselves to the detriment of the parties they represent.<sup>85</sup> Scholars also note that the ad hoc and unstructured nature of the proceedings have the practical effect of forcing defendants into inequitable settlements, sometimes based on relatively meritless claims.<sup>86</sup>

In light of the collective flaws and critiques of coordination and consolidation mechanisms, corporations have turned to chapter 11 bankruptcy.<sup>87</sup> The next Part explains how.

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<sup>82</sup> See *id.* at 477.

<sup>83</sup> See *id.*

<sup>84</sup> *Id.*

<sup>85</sup> See David L. Noll, MDL as Public Administration, 118 *Mich. L. Rev.* 403, 408 (2019) (critiquing MDLs as lacking "the guarantees of transparency, public participation, and ex post review"); Elizabeth Chamblee Burch, Monopolies in Multidistrict Litigation, 70 *Vand. L. Rev.* 67, 72–74 (2017) (arguing that "the lack of checks and balances to thwart self-dealing temptations [in MDLs] becomes all the more startling and suggests that regulation is warranted" because MDL proceedings are rarely returned to the original districts).

<sup>86</sup> See Noll, *supra* note 85, at 406 ("As MDL has grown in importance, critics have charged that its procedural flexibility violates the rule of law.").

<sup>87</sup> Scholars have criticized MDLs for silencing people and for falling short of providing procedural justice. See Abbe R. Gluck & Elizabeth Chamblee Burch, MDL Revolution, 96 *N.Y.U. L. Rev.* 1, 7–8 (2021) (discussing the benefits and drawbacks of MDLs); *supra* note 85. This Article does not seek to compare bankruptcy with MDLs, class actions, and individual tort lawsuits. Their flaws should not be addressed by funneling plaintiffs to bankruptcy courts and into a procedure not designed to primarily deal with tort claims or adjudicate lawsuits, bolstered by an argument (accurate or not) that bankruptcy provides less worse silencing, procedural justice, or due process. See *infra* Part II.

## II. ONSLAUGHT LITIGATION INSIDE BANKRUPTCY

Chapter 11 was not designed for businesses dealing with onslaught litigation, particularly mass tort litigation.<sup>88</sup> Its creators devised a system to facilitate the restructuring of a company and its debts, thus hopefully preserving enterprises.<sup>89</sup> Along with the preservation of businesses, the business bankruptcy system aims to maximize the economic value of the enterprise, and, as discussed when the Bankruptcy Code (“Code”) was enacted in 1978, possibly to save jobs and communities.<sup>90</sup> Accordingly, as detailed by Melissa Jacoby, the business bankruptcy system should be understood as a public-private partnership.<sup>91</sup>

As evident in this description, the drafters of the Code contemplated that most parties involved in a bankruptcy case would have knowingly entered a relationship with the debtor, usually contractually, whether those parties be lenders, suppliers, or employees.<sup>92</sup> Only occasionally would parties who did not seek to have a legal relationship with the debtor—such as tort victims—be dragged into the bankruptcy proceeding, and in these instances, the bankruptcy case would only

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<sup>88</sup> See Alan N. Resnick, *Bankruptcy as a Vehicle for Resolving Enterprise-Threatening Mass Tort Liability*, 148 U. Pa. L. Rev. 2045, 2046 (2000) (“When the Bankruptcy Code was enacted in 1978, Congress did not contemplate the unique problems caused by mass tort liability involving future, as well as present, claimants, or that companies facing such massive liability would seek relief under the bankruptcy laws.”).

<sup>89</sup> See, e.g., Jacoby, *Shocking Business Bankruptcy Law*, *supra* note 24, at 412 (noting that chapter 11 is “[m]eant to facilitate the reorganization and preservation of for-profit and nonprofit enterprises”); Simon, *Bankruptcy Grifters*, *supra* note 24, at 1162 (“Chapter 11 is a forum focused on reorganizing struggling businesses that are often encumbered by unmanageable debt.”); Fla. Dep’t of Revenue v. *Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 37 n.2 (2008) (“[T]he central purpose of Chapter 11 is to facilitate reorganizations . . .”).

<sup>90</sup> Melissa B. Jacoby, *Unbundling Business Bankruptcy Law*, 101 N.C. L. Rev. 1703, 1710–11 (2023) [hereinafter Jacoby, *Unbundling Business Bankruptcy Law*]; see also Elizabeth Warren, *Bankruptcy Policy*, 54 U. Chi. L. Rev. 775, 788 (1987) (“Congressional comments on the Bankruptcy Code are liberally sprinkled with discussions of policies to ‘protect the investing public, protect jobs, and help save troubled businesses,’ of concern about the community impact of bankruptcy, and of ‘the public interest’ beyond the interests of the disputing parties.”).

<sup>91</sup> Melissa B. Jacoby, *Corporate Bankruptcy Hybridity*, 166 U. Pa. L. Rev. 1715, 1719–21 (2018) [hereinafter Jacoby, *Corporate Bankruptcy Hybridity*]; Jacoby, *Shocking Business Bankruptcy Law*, *supra* note 24, at 412.

<sup>92</sup> This reality is the basis for the creditor’s bargain theory that has pervaded debates about business bankruptcy law. See Anthony J. Casey, *Chapter 11’s Renegotiation Framework and the Purpose of Corporate Bankruptcy*, 120 Colum. L. Rev. 1709, 1712 (2020) (discussing the creditor’s bargain theory); Anthony J. Casey, *The Creditors’ Bargain and Option-Preservation Priority in Chapter 11*, 78 U. Chi. L. Rev. 759, 807 (2011) (disputing the “optimal distribution rule” that is the basis of the creditor’s bargain theory).

tangentially be about them and their claims. The attraction for corporations dealing with onslaught litigation stems from the exact opposite of how the bankruptcy system presumes they will use reorganization. These corporations file bankruptcy primarily (or solely) to address debts that arise from nonconsensual transactions, such as claims for environmental harm, product liability, and sexual assault and harassment.<sup>93</sup>

*A. Chapter 11 Reorganization Basics, Onslaught Litigation Edition*

Chapter 11 provides a legal framework for the debtor business and its creditors, with the input of other system actors—creditors’ committees, appointed trustees and examiners, and the Office of the United States Trustee—to craft a restructuring deal that will address all claims against the debtor, those arising from consensual and nonconsensual transactions.<sup>94</sup> The rest of the Code includes provisions that impose order on creditors and facilitate the debtor’s path to an approved deal. The Code also has an equity provision that allows the bankruptcy court to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of” the Code.<sup>95</sup> Foremost among Code provisions that are important to corporations dealing with onslaught litigation are the automatic stay, the requirement that creditors file claims, the ability of a majority of creditors to bind all creditors to a restructuring deal, and the permanent injunction against collecting debts from the debtor at the conclusion of its bankruptcy case.

The moment a business files a chapter 11 petition, the automatic stay activates, freezing nearly all lawsuits and actions against the debtor.<sup>96</sup> The automatic stay provides the debtor business with the “breathing room” necessary to craft and implement a reorganization plan.<sup>97</sup> In the context of onslaught litigation, this means that all pending lawsuits not involving

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<sup>93</sup> Jacoby, *supra* note 91, at 1723–24.

<sup>94</sup> See, e.g., Jacoby, *Shocking Business Bankruptcy Law*, *supra* note 24, at 421 (discussing the Purdue Pharma bankruptcy proceedings). See *infra* notes 112–16 and accompanying text for details about these system actors.

<sup>95</sup> 11 U.S.C. § 105(a).

<sup>96</sup> *Id.* § 362.

<sup>97</sup> *In re HSM Kennewick, L.P.*, 347 B.R. 569, 571 (Bankr. N.D. Tex. 2006).

the state come to a grinding halt and that all contemplated lawsuits cannot be initiated.<sup>98</sup>

The automatic stay, in part, is designed to allow the collection of all the claims against the debtor. The filing of a chapter 11 petition also starts the clock running for creditors to file claims against the debtor arising from the business's pre-bankruptcy actions.<sup>99</sup> The court sets the "bar date"—the date by which all creditors must file their proofs of claim.<sup>100</sup> If a creditor does not file a claim by the bar date, and the debtor does not list its claim in its schedules as disputed, contingent, or unliquidated,<sup>101</sup> the creditor effectively asserts to the court that it does not have a claim against the debtor, waiving its claim forevermore. The bar date enables the compilation of the universe of claims that the bankruptcy will resolve, thus providing finality regarding claims that can be brought related to alleged pre-bankruptcy harms.<sup>102</sup>

The Code defines "claim" very broadly as encompassing any "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured."<sup>103</sup> All people who may have been injured by the business must make a claim. This includes those people who already have filed lawsuits against the business, those people who know they were injured but have not yet initiated a lawsuit, and those people who may not know they were injured because of the debtor's pre-bankruptcy actions. People who have latent claims from injuries that have yet to manifest are termed "future claimants" and hold "future claims."<sup>104</sup> If someone who was allegedly harmed by the business

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<sup>98</sup> An exception to the automatic stay allows actions involving state and federal governments to continue. 11 U.S.C. § 362(b)(4).

<sup>99</sup> *Id.* § 501. Because there is a gap in time between when a business files chapter 11 and when the business emerges from chapter 11, claimants also may file post-petition, but pre-confirmation claims, which are treated as administrative expense claims. *Id.* § 507; *Wright v. Owens Corning*, 679 F.3d 101, 107 (3d Cir. 2012) (discussing post-petition claims).

<sup>100</sup> Fed. R. Bankr. P. 3003 (allowing for a court to set a deadline for filing); Fed. R. Bankr. P. 3007 (utilizing the term "bar date" in the comments).

<sup>101</sup> In chapter 11, the debtor is required to file a schedule of assets and liabilities. Fed. R. Bankr. P. 1007. If a creditor's claim is listed among the liabilities and is not designated as disputed, unliquidated, or contingent, the court will consider the creditor to have a claim in the amount and of the type listed by the debtor. 11 U.S.C. § 1111(a).

<sup>102</sup> See Smith, *supra* note 11, at 1640–41 (discussing the claims process).

<sup>103</sup> 11 U.S.C. § 101(5)(A).

<sup>104</sup> See Simon, *Bankruptcy Grifters*, *supra* note 24, at 1165 (discussing latent claims).

is not listed as a claimant, in the future they are prohibited from filing a lawsuit based on those harms.

Once a proof of claim is filed, based on evidence submitted by the claimant and the debtor, the court determines the claim's validity.<sup>105</sup> The court also has the power to estimate the aggregate liability for claims, including future claims. Claims estimation does not take away a claimant's and the debtor's right to litigate a single claim's actual value. Instead, it serves to establish a baseline value of all claims, taken collectively, which the debtor and creditors can refer to in negotiations, when crafting a reorganization plan, and when establishing trusts to pay claimants.<sup>106</sup>

The core of a chapter 11 proceeding is how the business restructures its operations and debts. Debtors typically negotiate a reorganization plan that allows the business to continue operating or sell the business as a going concern.<sup>107</sup> This plan must garner sufficient support from creditors: two-thirds in dollar amount of claims and more than one-half in number of the creditors whose rights are impaired must vote for the plan.<sup>108</sup> Dissenting creditors can be bound to the plan, which can incorporate settlements among the debtor and creditors, such as insurance companies and groups of victims, as approved by the bankruptcy court.<sup>109</sup>

Settlements and a confirmed plan mark the end of a chapter 11 proceeding. The Code ensures the finality of the resolution of claims, as contemplated by those settlements and the plan. The court enters a discharge along with an injunction that prohibits parties from attempting to collect from the business on any claim asserted or which could have

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<sup>105</sup> 11 U.S.C. § 502; see also Smith, *supra* note 11, at 1640–41 (describing the process of creditor claims filing within the bankruptcy).

<sup>106</sup> See Smith, *supra* note 11, at 1647–48 (discussing claims estimation).

<sup>107</sup> See Jacoby, *Shocking Business Bankruptcy Law*, *supra* note 24, at 415 (detailing these two outcomes). Debtors also may sell the business as a going concern through a sale of substantially all assets. 11 U.S.C. § 363.

The term “going concern” refers to “an existing solvent business, which is being conducted in the usual and ordinary way for which it was organized.” “Going concern value” means “[t]he value of a firm, assuming that the firm’s organization and assets remain intact and are used to generate future income and cash flows.”

*M Life Ins. v. Sapers & Wallack Ins. Agency*, 40 P.3d 6, 12 (Colo. App. 2001), *overruled on other grounds by* *Pueblo Bancorporation v. Lindoe, Inc.*, 63 P.3d 353 (Colo. 2003) (quoting Black’s Law Dictionary 691 (6th ed. 1990)). For a discussion of the use of sales of assets to fund settlement trusts, see Parikh, *Scarlet-Lettered Bankruptcy*, *supra* note 24, at 430–34.

<sup>108</sup> 11 U.S.C. §§ 1126, 1129.

<sup>109</sup> *Id.* § 1129.

been asserted against the debtor during the chapter 11 case.<sup>110</sup> All creditors, regardless of whether they filed a claim or participated in the case, are bound to the terms of the plan and have no ability to assert their discharged claims.<sup>111</sup>

Three fundamental features of the business bankruptcy system lie in the background of these provisions designed to facilitate a restructuring. First, the system contains layers of oversight. The United States Trustee, an arm of the Department of Justice, evaluates the debtor's compliance with bankruptcy laws.<sup>112</sup> The Code provides for the appointment of an official committee of unsecured creditors, which in mass tort cases often is comprised primarily of tort claimants, and allows for the appointment of other creditors' committees, such as a committee solely made up of tort claimants.<sup>113</sup> If the debtor business, which continues to control its operations post-filing as the "debtor in possession,"<sup>114</sup> is not fulfilling its duties to manage its affairs, the court may appoint a chapter 11 trustee, a person who assumes management of the business.<sup>115</sup> Relatedly, the court may appoint an examiner to investigate an aspect or multiple aspects of the business's pre-bankruptcy affairs.<sup>116</sup>

Second, the Code includes disclosure provisions that require a debtor to turn over significant information, particularly financial information.<sup>117</sup> Third, access to bankruptcy requires that the business have a good-faith

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<sup>110</sup> *Id.* §§ 524, 1141(a).

<sup>111</sup> See Brubaker, *Mandatory Aggregation of Mass Tort Litigation in Bankruptcy*, *supra* note 24, at 997 (noting outcome); Edward J. Janger, *Aggregation and Abuse: Mass Torts in Bankruptcy*, 91 *Fordham L. Rev.* 361, 368–73 (2022) (describing the reorganization process in the context of mass torts).

<sup>112</sup> See Lindsey D. Simon, *The Guardian Trustee in Bankruptcy Courts and Beyond*, 98 *N.C. L. Rev.* 1297, 1304–14 (2020) (discussing the United States Trustee).

<sup>113</sup> 11 U.S.C. § 1102(a); see also Simon, *Bankruptcy Grifters*, *supra* note 24, at 1164 (noting creditors' committees).

<sup>114</sup> 11 U.S.C. § 1101(1).

<sup>115</sup> *Id.* § 1104(a) (providing that the court shall order the appointment of a trustee for cause upon a finding of "fraud, dishonesty, incompetence, or gross mismanagement," or if "such appointment is in the interests of creditors").

<sup>116</sup> *Id.* § 1104(c); see also Jonathan C. Lipson, *Understanding Failure: Examiners and the Bankruptcy Reorganization of Large Public Companies*, 84 *Am. Bankr. L.J.* 1, 2–3, 12–14 (2010) (discussing the examiner's role); Letter from Jonathan C. Lipson, Professor of Law, Temple Univ., to William K. Harrington, U.S. Trustee (Region 2), at 1–10 (Nov. 5, 2019) [hereinafter *Lipson Letter*], <https://ssrn.com/abstract=3532642> [https://perma.cc/P29S-FXWC] (urging the appointment of an examiner in *In re Purdue Pharma, LP*, No. 19-23649 (Bankr. S.D.N.Y. Sept. 16, 2019)).

<sup>117</sup> See, e.g., 11 U.S.C. § 521(a) (providing for disclosures); *id.* § 1125 (requiring information before voting on a plan); Fed. R. Bankr. P. 2004 (allowing examinations).



reason to file.<sup>118</sup> For instance, in 2021, the National Rifle Association (“NRA”) spent four months in chapter 11 attempting and failing to prove that despite being solvent and admitting to filing in order to escape the New York State Attorney General’s action to dissolve it for alleged corruption, the NRA still belonged in bankruptcy.<sup>119</sup> The U.S. Court of Appeals for the Third Circuit recently dismissed J&J’s corporate entity’s chapter 11 case for lacking good faith because it was not in apparent or immediate financial distress.<sup>120</sup>

### *B. The Perks of Using Chapter 11 for Onslaught Litigation*

Although Congress did not contemplate reorganizations in the wake of onslaught litigation, such as mass tort bankruptcies, the Code makes filing chapter 11 attractive to companies dealing with a plethora of litigation, leading to what Melissa Jacoby has termed “off-label bankruptcies” in which “parties use the system to solve problems other than unpayable debt loads (such as litigation management).”<sup>121</sup> Crucial to off-label bankruptcies is the willingness of bankruptcy judges to cede to debtors’ demands for benefits (“perks”) that the Code does not directly authorize.<sup>122</sup> As Peter Boyle notes, “in the face of mass-tort litigation” some judges believe that “equity supersedes the strict requirements of the Code.”<sup>123</sup> The equity provision makes modern day mass tort and onslaught litigation bankruptcy possible.

The appeal of bankruptcy originates from the halting and collecting of claims, which, in the context of litigation, brings an end to an otherwise long tail of fresh lawsuits.<sup>124</sup> A perk of bankruptcy is that the judge may extend the automatic stay which effectuates the halting of actions against

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<sup>118</sup> 11 U.S.C. § 1112(b).

<sup>119</sup> Jonathan Stempel, *NRA Says Bankruptcy Shows Why NY Attorney General Cannot Shut It Down*, Reuters (July 21, 2021, 3:04 PM), <https://www.reuters.com/legal/transactional/nra-says-bankruptcy-shows-why-ny-attorney-general-cannot-shut-it-down-2021-07-21> [<https://perma.cc/39D9-JE84>]; Tim Mak, *Judge Dismisses NRA Bankruptcy Case, Heightening Risk for Dissolution of Group*, NPR (May 11, 2021 4:43 PM), <https://www.npr.org/2021/05/11/995934682/judge-dismisses-nra-bankruptcy-case-heightening-risk-for-dissolution-of-group> [<https://perma.cc/36JK-VJL9>].

<sup>120</sup> *In re LTL Mgmt., LLC*, 58 F.4th 738, 763 (3d Cir. 2023).

<sup>121</sup> Jacoby, *Shocking Business Bankruptcy Law*, *supra* note 24, at 411.

<sup>122</sup> *Id.*

<sup>123</sup> Peter M. Boyle, *Non-Debtor Liability in Chapter 11: Validity of Third-Party Discharge in Bankruptcy*, 61 *Fordham L. Rev.* 421, 431 (1992).

<sup>124</sup> Resnick, *supra* note 88, at 2045 (discussing “long-tail” torts).

the debtor to non-debtor parties.<sup>125</sup> With all litigation stemming from the alleged wrongful conduct halted, the natural complementary request is that the claims against third parties, such as the debtor's owners, be brought into and resolved in the chapter 11 proceeding. This perk is effectuated via two main mechanisms—channeling injunctions and third-party releases—both of which require a bankruptcy court to call upon its equity power.

Specifically, the debtor business and third parties want the chapter 11 case to resolve all claims arising from the alleged wrongful conduct, including future claims. People who hold future claims, necessarily, do not know that they need to file claims in the chapter 11 case. To solve this problem, the bankruptcy court may appoint a future claims representative to protect the interests of future claimants.<sup>126</sup> With all creditors (ostensibly) represented, creditors, creditors' committees, and the future claims representative settle their claims by agreeing that claims will be dealt with by a trust.<sup>127</sup> This trust is funded by the debtor business, drawing on assets, future income, and settlements with insurers.<sup>128</sup> If the trust resolves claims against third parties, these third parties will contribute money to the trust.<sup>129</sup>

Upon plan confirmation, the bankruptcy court issues a channeling injunction that requires injured parties, including future claimants, to look

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<sup>125</sup> Simon, *Bankruptcy Grifters*, supra note 24, at 1163; Ralph Brubaker, *Bankruptcy Injunctions and Complex Litigation: A Critical Reappraisal of Non-Debtor Releases in Chapter 11 Reorganizations*, 1997 U. Ill. L. Rev. 959, 969 [hereinafter Brubaker, *Bankruptcy Injunctions and Complex Litigation*] (“Congress specifically contemplated that bankruptcy courts would issue section 105 injunctions ‘to stay actions not covered by the automatic stay,’ with the courts determining ‘on a case-by-case basis whether a particular action which may be harming the estate should be stayed.’” (quoting S. Rep. No. 95-989, at 51 (1978))).

<sup>126</sup> See Smith, supra note 11, at 1640 (discussing representation of future claims); Yair Listokin & Kenneth Ayotte, *Protecting Future Claimants in Mass Tort Bankruptcies*, 98 Nw. U. L. Rev. 1435, 1443–46 (2004) (overviewing the problems presented in adequately providing for future claimants).

<sup>127</sup> See Simon, *Bankruptcy Grifters*, supra note 24, at 1167 (“Typically, channeling injunctions require all claimants, both current and future, to settle post-confirmation claims against a specified trust.”); Brubaker, *Mandatory Aggregation of Mass Tort Litigation in Bankruptcy*, supra note 24, at 999–1003 (discussing consolidation of claims under 28 U.S.C. § 157(b)); Smith, supra note 11, at 1649–63 (detailing how 28 U.S.C. § 157(b) and 28 U.S.C. § 1334(b) provide the bankruptcy court’s jurisdiction over a global resolution of mass tort claims).

<sup>128</sup> See Simon, *Bankruptcy Grifters*, supra note 24, at 1167–68 (discussing this trust).

<sup>129</sup> See Brubaker, *Bankruptcy Injunctions and Complex Litigation*, supra note 125, at 971 (noting how creditors are persuaded to include third parties in the trust and plan).

to the trust and only the trust to resolve and pay their claims.<sup>130</sup> Channeling injunctions that include claims against non-debtor parties necessarily require that, along with the debtor business, non-debtor parties be released from liability—that is, third-party releases.<sup>131</sup>

Bankruptcy courts situate the ability to approve channeling injunctions in their equity power, combined with subsections 363(f) and 363(h), which “explicitly provide for the channeling of claims in this manner.”<sup>132</sup> Courts (and some scholars) defend the use of the bankruptcy court’s equity power by calling upon the guiding principles of traditional reorganization cases, stating that the use of channeling injunctions and third-party releases “will help to maximize the amounts which will be available for ultimate payment.”<sup>133</sup>

Likewise, bankruptcy courts find the authority to issue third-party releases in their equity power. Section 524(e), which provides for the discharge, restricts the discharge to the debtor’s personal liability, preserving the ability of claimants to pursue non-debtors.<sup>134</sup> But that section does not prevent judges from using equity to extend the discharge to third parties.<sup>135</sup>

Combined, a business and its third parties can pause all litigation, use the Code’s provisions designed to induce creditors to negotiate to push for settlements of all liability, and use the Code’s provisions regarding plan confirmation to “cramdown” the plan over nonconsenting tort victims.<sup>136</sup> Although the legality of channeling injunctions and third-party releases historically drew intense suspicion,<sup>137</sup> both have become more

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<sup>130</sup> See Simon, *Bankruptcy Grifters*, supra note 24, at 1167–68 (discussing channeling injunctions).

<sup>131</sup> *Id.* at 1169.

<sup>132</sup> *In re Johns-Manville Corp.*, 68 B.R. 618, 625 (Bankr. S.D.N.Y. 1986).

<sup>133</sup> *In re Johns-Manville Corp.*, 97 B.R. 174, 178 (Bankr. S.D.N.Y. 1989); see also Simon, *Bankruptcy Grifters*, supra note 24, at 1168–69 (presenting a hypothetical to detail this reasoning); William Organek, “A Bitter Result”: Purdue Pharma, a Sackler Bankruptcy Filing, and Improving Monetary and Nonmonetary Recoveries in Mass Tort Bankruptcies, 96 *Am. Bankr. L.J.* 361, 364 (2022) (arguing that despite their flaws, third-party releases may increase monetary and nonmonetary outcomes for creditors).

<sup>134</sup> See Brubaker, *Bankruptcy Injunctions and Complex Litigation*, supra note 125, at 970 (discussing § 524(e)).

<sup>135</sup> See Simon, *Bankruptcy Grifters*, supra note 24, at 1169–70 (discussing the statutory basis and use of third-party releases); Brubaker, *Bankruptcy Injunctions and Complex Litigation*, supra note 125, at 972.

<sup>136</sup> See 11 U.S.C. §§ 1126, 1129.

<sup>137</sup> See, e.g., Boyle, supra note 123, at 450 (“Discharges of non-debtors under section 105(a) must cease. They are not only violative of the express command of section 524 but are also

accepted tools to address mass torts.<sup>138</sup> Thereby a system designed to rehabilitate struggling businesses has turned into a system to litigate mass torts and similar lawsuits by saddling survivors with settlements to which they may not agree and from which they have little ability to escape. Even more troubling than this non-contemplated use of bankruptcy is that debtor businesses have become adept at convincing bankruptcy judges to bypass the protections that sit as backdrops in all chapter 11 cases.<sup>139</sup>

### *C. From Asbestos to IUDs and Breast Implants*

The creep of acceptance of channeling injunctions and third-party releases began with onslaught litigation involving asbestos. This litigation culminated in an amendment to the Code to deal specifically with these mass tort cases. Simultaneously, bankruptcy courts expanded the relief provided in asbestos cases to other mass torts. This, in turn, led to the creation of an on-ramp for bankruptcy to be used for onslaught litigation writ large.

#### *1. The Emergence of Bankruptcy as an Onslaught Litigation Tool*

Hundreds of thousands of lawsuits involving the collection of minerals known as asbestos—a substance that “confers remarkable properties of flexibility, tensile strength, and resistance to acid or fire”<sup>140</sup>—served as the impetus for bankruptcy to become a tool for resolving onslaught

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contrary to public policy.”); G. Marcus Cole, A Calculus Without Consent: Mass Tort Bankruptcies, Future Claimants, and the Problem of Third-Party Non-Debtor “Discharge,” 84 Iowa L. Rev. 753, 800 (1999) (“Where bankruptcy courts prohibit consensual releases between third parties and creditors, or permit a third party non-debtor ‘discharge’ of future claims, they are engaged in judicial overreaching unwarranted by the circumstances, unauthorized by the Code, and destructive of the rule of law.”); Joshua M. Silverstein, Overlooking Tort Claimants’ Best Interests: Non-Debtor Releases in Asbestos Bankruptcies, 78 UMKC L. Rev. 1, 100 (2009) (“The extraordinary circumstances in asbestos insolvencies do not, however, justify disregarding fundamental protections set forth in the Bankruptcy Code.”).

<sup>138</sup> See Simon, *Bankruptcy Grifters*, supra note 24, at 1170–71 (overviewing the debates).

<sup>139</sup> See Melissa B. Jacoby, *Fake and Real People in Bankruptcy*, 39 Emory Bankr. Devs. J. (forthcoming 2023) (manuscript at 5) [hereinafter Jacoby, *Fake and Real People in Bankruptcy*], <https://ssrn.com/abstract=4228047> [<https://perma.cc/LQA8-BY7E>] (“In real life, these integrity promoting elements tend to get muted in large business bankruptcy cases.”); Janger, supra note 111, at 373 (“[C]reative attorneys have found ways to work around this process.”).

<sup>140</sup> Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 Harv. J.L. & Pub. Pol’y 541, 544 n.5 (1992).

litigation.<sup>141</sup> Asbestos's many benefits led to its widespread use in the construction of buildings, boilers, steam engines, pipes, cement, and similar projects.<sup>142</sup> At the time, it was not known that asbestos exposure can lead to severe negative health consequences, including cancer and other fatal or seriously impairing illnesses.<sup>143</sup> The discovery of asbestos's toxicity launched thousands of lawsuits.<sup>144</sup> During the 1990s, lawsuits grew "at the rate of approximately 40,000 per year."<sup>145</sup>

Because of the swell of claims, in the 1980s, major manufacturers of asbestos materials filed bankruptcy, including the corporate giants Johns-Manville and Raybestos. Johns-Manville's chapter 11 case, filed in 1982,<sup>146</sup> is particularly instructive for how bankruptcy became the place to address this particular instance of onslaught litigation. When it filed chapter 11, Johns-Manville projected that an unknown, but likely immense number of lawsuits would be filed against it in the future.<sup>147</sup> Crucially, these future lawsuits would be predicated on Johns-Manville's past actions. Bankruptcy cases are supposed to address all of a company's past actions, allowing the company to emerge without having to worry about claims based on its pre-bankruptcy life.

The most important aspect of Johns-Manville's chapter 11 case was establishing if and how *future* tort claims could be addressed in the case. When Johns-Manville filed, it was solvent, meaning its assets were worth more than its liabilities.<sup>148</sup> Although the Code does not have an insolvency prerequisite to filing, solvency is an indication of a bad-faith filing.<sup>149</sup> The relevant question boiled down to whether there is a meaningful distinction for purposes of access to bankruptcy between current claims and those

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<sup>141</sup> Smith, *supra* note 11, at 1615–18.

<sup>142</sup> Schuck, *supra* note 140, at 544 n.5.

<sup>143</sup> See *id.* at 544–49 (discussing the health conditions associated with asbestos).

<sup>144</sup> *Id.* at 541 n.1; see also Smith, *supra* note 11, at 1618 (noting that 37,000 cases were filed by 1985).

<sup>145</sup> Smith, *supra* note 11, at 1618.

<sup>146</sup> *In re Johns-Manville Corp.*, No. 82-bk-11656 (Bankr. S.D.N.Y. filed Aug. 26, 1982).

<sup>147</sup> *In re Johns-Manville Corp.*, 36 B.R. 727, 729 (Bankr. S.D.N.Y. 1984) ("According to Manville, this current problem of approximately 16,000 lawsuits pending as of the filing date is compounded by the crushing economic burden to be suffered by Manville over the next 20–30 years by the filing of an even more staggering number of suits by those who had been exposed but who will not manifest the asbestos-related diseases until some time during this future period ('the future asbestos claimants').").

<sup>148</sup> See Janger, *supra* note 111, at 376 (citing A.R. Gini, *MANVILLE: The Ethics of Economic Efficiency?*, 3 J. Bus. Ethics 63, 68 (1984)) (discussing the relevance of Johns-Manville's seeming solvency).

<sup>149</sup> See *supra* notes 118–20 and accompanying text.

that would inevitably arise in the future.<sup>150</sup> The judge found the difference to be minimal, that Johns-Manville likely would be unable to handle all forthcoming asbestos-related claims while staying in business, and, thus, that the filing was not in bad faith—a decision that would have far-reaching effects.<sup>151</sup>

Having found that a company could file bankruptcy to address not only current claims, but also future, yet-to-be-known claims, the *Johns-Manville Corp.* judge needed to provide for these future claimants. This led to the birth of the future claims representative and the idea of creating a trust to pay out future claims as claimants emerged.

In *Johns-Manville*, the trust was funded by payouts under various insurance policies and by the company from its current cash, future income, and shares of its common stock.<sup>152</sup> The total assets in the trust were presumed to be sufficient to pay current claims and all future claims; it did not matter when an individual claimant's injury became apparent, as the trust funds would be available whenever harmed parties came forward.<sup>153</sup> In turn, the trust as a payout method facilitated the discharge of the debts of future claimants at the time that Johns-Manville emerged from chapter 11.<sup>154</sup> The reorganization plan channeled claims of present or future asbestos victims against Johns-Manville and related third parties to the trust, exclusively, with no other source of recourse.<sup>155</sup>

In reality, the number of claims was much greater than the fund could accommodate.<sup>156</sup> Current claims were paid in full, causing the funds to dwindle quickly.<sup>157</sup> Ultimately, future parties seeking redress against Johns-Manville only received ten percent of their claims.<sup>158</sup>

Johns-Manville's chapter 11 case established five key elements of modern-day mass tort bankruptcies: The ability to deal with future claims, the appointment of a future claims representative, the creation of a trust, the channeling of claims to that trust, and the extension of the discharge

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<sup>150</sup> *In re Johns-Manville Corp.*, 68 B.R. 618, 628 (Bankr. S.D.N.Y. 1986).

<sup>151</sup> *Id.* at 628, 632, 637.

<sup>152</sup> Listokin & Ayotte, *supra* note 126, at 1444–45; see also *In re Johns-Manville Corp.*, 68 B.R. at 621.

<sup>153</sup> Listokin & Ayotte, *supra* note 126, at 1444–45.

<sup>154</sup> *Id.* at 1144, 1145 n.47.

<sup>155</sup> *Id.* at 1144–45.

<sup>156</sup> *Id.* at 1445.

<sup>157</sup> *Id.* (citing History, Manville Pers. Injury Settlement Tr., <https://mantrust.claimsres.com/history/> [<https://perma.cc/H53R-QDWV>] (last visited Apr. 26, 2023)).

<sup>158</sup> *Id.*

to third parties whose actions were linked with claims channeled to the trust. Of these, the channeling injunction and third-party release have become the most important and the most stretched from their original purpose. In *Johns-Manville*, its affiliated corporate entities, directors, officers, employees, and insurers were granted releases. Insurers contributed money to the trust, as they would have paid money to Johns-Manville to be paid to claimants. Affiliated entities and a host of employees were all part of the Johns-Manville company. The third-party releases were effectively confined to the business and its insurance companies.

After confirmation of Johns-Manville's plan, other asbestos companies filed chapter 11 with the intent to follow the *Johns-Manville* blueprint.<sup>159</sup> But questions remained about the legality of how Johns-Manville had dealt with future claims and claimants. To provide certainty, in 1994, Congress put the *Johns-Manville* solution into the Code, adding section 524(g), which codifies the procedures for obtaining a channeling injunction in asbestos cases.<sup>160</sup> Although section 524(g) only applies to asbestos cases, and only specifically allows for non-debtor releases for insurance companies, in the legislative history, Congress stated that the section draws on the equitable powers bankruptcy courts already possessed.<sup>161</sup> As such, the ability to use the Code's equity provision to create similar trusts with channeling injunctions and third-party releases in other mass tort bankruptcy cases, and in onslaught litigation cases more broadly, remained open.

## 2. *Honing the Bankruptcy Tool*

The opportunity to once again deploy the *Johns-Manville*-style equitable maneuver in bankruptcy presented itself soon enough. Throughout the mid-1960s, gynecologist Hugh Davis developed and tested various IUDs, eventually creating the Dalkon Shield in 1968.<sup>162</sup> Davis's design was intended to address design flaws present in other IUDs

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<sup>159</sup> See *infra* Subsection II.C.2.

<sup>160</sup> 11 U.S.C. § 524(g); see also Sander L. Esserman & David J. Parsons, The Case for Broad Access to 11 U.S.C. § 524(g) in Light of the Third Circuit's Ongoing Business Requirement Dicta in *Combustion Engineering*, 62 N.Y.U. Ann. Surv. Am. L. 187, 189–92 (2006) (detailing the origin of § 524(g)).

<sup>161</sup> See Susan Power Johnston & Katherine Porter, Extension of Section 524(g) of the Bankruptcy Code to Nondebtor Parents, Affiliates, and Transaction Parties, 59 Bus. Law. 503, 514–15 (2004) (detailing legislative history).

<sup>162</sup> Richard B. Sobol, *Bending the Law* 1 (1991).

that frequently resulted in the IUD being expelled from the body.<sup>163</sup> But Davis's design choices would prove to be even more problematic. The Dalkon Shield was painful to insert and remove, increased the risk of complications of pregnancy while it was inserted, and invited bacteria and subsequent infection into the uterine cavity as long as it remained in the body.<sup>164</sup>

Davis sold the rights to the Dalkon Shield to the A.H. Robins Company, which began aggressively marketing the product.<sup>165</sup> By the end of 1973, more than three million Dalkon Shields had been sold.<sup>166</sup> Along the way, Robins turned a blind eye to evidence of high pregnancy rates and information indicating the dangers of the device.<sup>167</sup> Months after these reports, Robins further promoted the product and encouraged pregnant individuals to keep the shield in place.<sup>168</sup> This went on for several years, until Robins could no longer overcome the negative publicity.<sup>169</sup> Robins withdrew the Dalkon Shield from the domestic market in mid-1974, although the company continued to defend it as "a safe and effective IUD."<sup>170</sup>

By 1984, over ten thousand claims had been filed against Robins.<sup>171</sup> Plaintiffs were awarded millions of dollars in damages, causing Robins to become concerned about the increasing punitive damage awards, which were not covered under its liability insurance policies.<sup>172</sup> Class certification under Federal Rule of Civil Procedure 23(b)(1) on the issue of punitive damages failed, and claims continued to amass.<sup>173</sup>

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<sup>163</sup> Id.

<sup>164</sup> Id. at 2, 9.

<sup>165</sup> Id. at 4–6; Georgene Vairo, *Mass Tort Bankruptcies: The Who, the Why and the How*, 78 *Am. Bankr. L.J.* 93, 111–12 (2004) (overviewing the pre-bankruptcy procedural history of Robins).

<sup>166</sup> Sobol, *supra* note 162, at 7; Vairo, *supra* note 165, at 111.

<sup>167</sup> Sobol, *supra* note 162, at 8–9 (detailing reports that Robins received about the dangers).

<sup>168</sup> The promotion claimed that "[w]hen pregnancy does occur, the bag of water pushes the IUD to one side and the developing baby is not really touching the device at all." Id. at 9 (internal quotation marks omitted).

<sup>169</sup> See id.

<sup>170</sup> Id. at 9–11. Although Robins withdrew the Dalkon Shield from domestic market in 1974, he continued to sell it abroad for another ten months. Id. at 10.

<sup>171</sup> Id. at 23.

<sup>172</sup> Id. at 37.

<sup>173</sup> Id. at 45–47; Vairo, *supra* note 165, at 111.



In 1985, A.H. Robins filed chapter 11,<sup>174</sup> presumably with the intent to use the Code's provisions similarly to how Johns-Manville had reorganized. The most notable development in the case was that several plaintiffs' attorneys attempted to separate the claims that listed the company's officers and directors and Robins's liability insurer as Robins's co-defendants and then proceed with litigation outside of the bankruptcy against every party but Robins.<sup>175</sup> Although directors, officers, and insurance companies were implicated in Johns-Manville's chapter 11 case, their role in resolving claims took a back seat to questions about future claims and claimants. In contrast, Robins's litigation of the legality of the court's granting an injunction to stop claims against the co-defendants from moving forward took center stage.<sup>176</sup> Robins argued that claims against these third parties were actually claims against Robins's assets (such as the remaining liability insurance). Accepting this reasoning, the court granted an injunction permanently barring related claims against Robins's co-defendants, "represent[ing] a significant innovation in bankruptcy law that usually confines the automatic stay to the debtor alone."<sup>177</sup>

The remainder of the *A.H. Robins Co. v. Piccinin* case proceeded akin to the *Johns-Manville* case, but with an eye toward crafting a trust payout procedure that would not drain that trust before all claims had been paid.<sup>178</sup> With claimants' liability estimated to be nearly \$2.5 billion, the reorganization plan established the Dalkon Shield Claimants Trust.<sup>179</sup> Claimants were given three payment options, two of which aimed at the quick resolution of low value claims and claims facing alternative causation issues.<sup>180</sup> Those people who had suffered the most serious Dalkon Shield related injuries were offered settlements "designed to be

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<sup>174</sup> Sobol, *supra* note 162, at 47; Vairo, *supra* note 165, at 112; see *In re AH Robins Co.*, 219 B.R. 145 (Bankr. E.D. Va. 1998) (discussing the initial filing and the subsequent submission of the plan for reorganization).

<sup>175</sup> Sobol, *supra* note 162, at 63.

<sup>176</sup> See Vairo, *supra* note 165, at 115–16.

<sup>177</sup> *Id.* at 113; see *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 997 (4th Cir. 1986) (discussing the injunctions by the district court).

<sup>178</sup> Vairo, *supra* note 165, at 94, 104, 114. A couple notable developments in the Robins case were (1) that, immediately upon its filing, the district court withdrew the reference to the bankruptcy court and most proceedings were conducted jointly by the district and bankruptcy courts, and (2) that an examiner was appointed, who monitored Robins's business affairs. *In re AH Robins Co.*, 88 B.R. 742, 743, 746 (E.D. Va. 1988).

<sup>179</sup> Vairo, *supra* note 165, at 115.

<sup>180</sup> *Id.* at 118–20.

as high as possible considering the medical evidence submitted, historical settlement values and the existence of the limited fund, rather than an initial low ball offer.”<sup>181</sup> If claimants did not accept this “best and final offer,” they could proceed to trial or arbitration with their claims.<sup>182</sup>

The Dalkon Shield Claimants Trust resolved over 300,000 claims, nearly all of which ended without litigation or arbitration.<sup>183</sup> In 2000, ten years after the trust’s creation, all claims had been paid and the trust was closed.<sup>184</sup> The *Robins* chapter 11 case’s success lay in pushing claimants to settle via flexible and multiple options for payment.<sup>185</sup> Whereas *Johns-Manville* established how to wrap future claims and claimants into a chapter 11 case, *Robins* established how to offer a seemingly beneficial settlement to mass tort victims.

In addition, although questions about third-party releases arose in the *Robins* case, as with the *Johns-Manville* case, the parties that asked to attach themselves to *Robins*’s chapter 11 proceeding were so closely related to the company that payout on claims against them were intertwined with *Robins*’s payout on claims. Directors and officers insurance policies would cover the directors and officers, and insurance policies would cover the insurance carriers.<sup>186</sup>

Following in the footsteps of *Robins*, while the Dalkon Shield Claimants Trust was still distributing funds, in 1995, Dow Corning Corporation filed chapter 11 to consolidate and address an onslaught of lawsuits claiming injury from its defective silicone breast implants.<sup>187</sup> According to the lawsuits and various testimony, the silicone implant caused autoimmune disorders, such as lupus, scleroderma, and rheumatoid arthritis.<sup>188</sup> The FDA ordered Dow Corning to take the product off the market in 1992.<sup>189</sup> By this time, it was estimated that up

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<sup>181</sup> *Id.* at 119.

<sup>182</sup> *Id.* at 119–20.

<sup>183</sup> *Id.* at 121.

<sup>184</sup> *Id.*

<sup>185</sup> Smith, *supra* note 11, at 1637. But see Listokin & Ayotte, *supra* note 126, at 1447 (noting that the *Robins* trust proved not to be underfunded, but that the outcome still “penalized future claimants in some respects”).

<sup>186</sup> *Robins* and *Johns-Manville* focused on the ability to use third-party releases and to establish trusts, and on providing survivors with full (or near-full) payment. Even with full payment, concerns about silencing and procedural justice remain. These concerns were not raised squarely during these cases, likely because they were early mass tort chapter 11 cases.

<sup>187</sup> *In re Dow Corning Corp.*, 211 B.R. 545, 553 (Bankr. E.D. Mich. 1997).

<sup>188</sup> *Id.* at 551.

<sup>189</sup> *Id.*

to two million individuals in the United States had the implants.<sup>190</sup> Nearly 20,000 lawsuits were filed against the company, causing it to incur \$200 million in litigation costs.<sup>191</sup>

Initially the lawsuits were consolidated via MDL in the Northern District of Alabama,<sup>192</sup> which resulted in a global settlement of \$2 billion.<sup>193</sup> But the terms of the settlement allowed claimants to opt-out if the global settlement amount proved insufficient.<sup>194</sup> Within a year of its approval, the global settlement fell far short.<sup>195</sup> In the face of hundreds of pending actions, Dow Corning could not handle the defense of what it anticipated to soon be thousands of additional lawsuits—an onslaught.<sup>196</sup>

In Dow Corning's case, third-party releases and claims settlement were central to the litigation. The approved reorganization plan released Dow Corning, its insurers, and shareholders from liability on tort claims. All victims had to look to a claims-settlement process whereby they could recover solely from a \$3.2 billion trust.<sup>197</sup> Taken together, *Robins* and *In re Dow Corning* established that resolving future claims and using channeling injunctions and third-party releases were appropriate exercises of bankruptcy courts' equitable powers in non-asbestos situations.<sup>198</sup>

### 3. Charging Forward Despite Calls for Caution

When Congress enacted section 524(g) to clarify bankruptcy's use in asbestos cases, it also created the National Bankruptcy Review Commission ("NBRC"), which was tasked with evaluating the bankruptcy system.<sup>199</sup> In proposing that the bankruptcy system could be an effective forum to handle aggregate litigation, the NBRC's report, published in 1997, called for legislation to address such litigation, and identified concerns about due process and representation, particularly for

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<sup>190</sup> Id. at 552 n.5.

<sup>191</sup> Id. at 551–52.

<sup>192</sup> *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 793 F. Supp. 1098, 1099–100 (J.P.M.L. 1992).

<sup>193</sup> *In re Dow Corning*, 211 B.R. at 552.

<sup>194</sup> Id.

<sup>195</sup> Id.

<sup>196</sup> Id. at 552–53.

<sup>197</sup> See Vairo, *supra* note 165, at 125.

<sup>198</sup> See id. at 110–11 (predicting increased usage of chapter 11 for non-asbestos litigation).

<sup>199</sup> Jacoby, *Sorting Bugs and Features*, *supra* note 24 (manuscript at 1 & n.1).

future claimants, about claim estimation, and about venue.<sup>200</sup> Around the same time, judges and academics advocated proceeding with caution in using bankruptcy to resolve mass tort cases, focusing on due process and fairness in treatment of tort claimants.<sup>201</sup>

Despite these warnings, Congress took no action to address potential issues with defendants using chapter 11 to resolve mass tort and other aggregate litigation. Instead, in the years following the *Dow Corning* case, several companies facing mass tort claims relied on chapter 11 to deal with isolated problems, and, in doing so, pushed bankruptcy law's boundaries.<sup>202</sup> In 2004, Delaco filed chapter 11 after allegations that its "Dexatrim" brand diet pills, which contained phenylpropanolamine, caused strokes, heart conditions, and death.<sup>203</sup> Its plan resolved claims arising from Dexatrim against the debtor company and non-debtor drug vendors, distributors, and insurers.<sup>204</sup> The inclusion of drug vendors and distributors among the third parties released from liability marked a deviation from the prior three cases.

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<sup>200</sup> Id. (manuscript at 5–8) (discussing the Commission's recommendations); Nat'l Bankr. Rev. Comm'n, *Bankruptcy: The Next Twenty Years 9–11* (1997), <https://govinfo.library.unt.edu/nbrcreport/titlepg.html> [<https://perma.cc/BF82-USRW>].

<sup>201</sup> See Jacoby, *Sorting Bugs and Features*, supra note 24 (manuscript at 3, 8–11) (discussing this scholarship); S. Elizabeth Gibson, *A Response to Professor Resnick: Will this Vehicle Pass Inspection?*, 148 U. Pa. L. Rev. 2095, 2107–16 (2000) [hereinafter Gibson, *A Response to Professor Resnick*] (drawing out constitutionality concerns with mass tort bankruptcy, particularly with creation of classes); Edith H. Jones, *Rough Justice in Mass Future Claims: Should Bankruptcy Courts Direct Tort Reform?*, 76 Tex. L. Rev. 1695, 1696 (1998) (urging "caution before bankruptcy courts enter deeper into the mass tort litigation fray" and noting "essential questions regarding class membership and adequacy of representation"); S. Elizabeth Gibson, *Judicial Management of Mass Tort Bankruptcy Cases 2* (2005), [https://www.uscourts.gov/sites/default/files/gibsjudi\\_1.pdf](https://www.uscourts.gov/sites/default/files/gibsjudi_1.pdf) [<https://perma.cc/VF5A-A93D>] (explaining the work as "a combination judicial manual–treatise–case study"); S. Elizabeth Gibson, *Case Studies of Mass Tort Limited Fund Class Action Settlements & Bankruptcy Reorganizations 1* (2000) [hereinafter Gibson, *Case Studies*], [https://www.uscourts.gov/sites/default/files/masstort\\_1.pdf](https://www.uscourts.gov/sites/default/files/masstort_1.pdf) [<https://perma.cc/ZU7Y-8MF4>] (examining the fairness and effectiveness of three class action mass tort settlements and four reorganizations to deal with mass tort litigation).

<sup>202</sup> See Jacoby, *Sorting Bugs and Features*, supra note 24 (manuscript at 12) (noting the development of today's aggregate litigation bankruptcy practices).

<sup>203</sup> Voluntary Petition, *In re Delaco Co.*, No. 04-bk-10899 (Bankr. S.D.N.Y. filed Feb. 12, 2004); Bloomberg News, *Company News; Delaco Has Filed for Bankruptcy Protection*, N.Y. Times (Feb. 14, 2004), <https://www.nytimes.com/2004/02/14/business/company-news-delaco-has-filed-for-bankruptcy-protection.html> [<https://perma.cc/U9AV-B6MA>]; Simon, *Bankruptcy Grifters*, supra note 24, at 1175.

<sup>204</sup> See Simon, *Bankruptcy Grifters*, supra note 24, at 1175 (discussing the Delaco bankruptcy).

In 2017, the airbag manufacturer Takata used the same strategy when faced with “near-endless tort liability” arising from its defective product that was known “to overinflate and explode with such force that shrapnel could spew into drivers and passengers.”<sup>205</sup> It filed chapter 11 with the plan to sell all of its assets (without the attendant liabilities) to another company, which the bankruptcy court allowed.<sup>206</sup> To deal with product liability claims, it established a trust, channeled claims to that trust, and provided a release from liability for itself and certain non-debtor parties.<sup>207</sup> The Takata case allowed an otherwise solvent company to resolve its onslaught liabilities through bankruptcy and severely limit how injured parties could seek redress.

The next Part delves into a few modern-day chapter 11 cases as examples of how for-profit and nonprofit organizations—and their owners—have built off of these mass tort bankruptcies described in Part II to leverage bankruptcy law and the reorganization process to silence people who claim to have been harmed, bypass procedural justice, and cabin what the public learns about alleged wrongdoing in the context of the range of onslaught litigation.

### III. CASE STUDIES IN SILENCING OF ONSLAUGHT LITIGATION

In crucial ways, the Catholic Church pioneered the recent wave of chapter 11 filings to deal with onslaught litigation. Its series of filings moved the use of chapter 11 from product liability that threatened a company’s financial viability to its current use to escape from sexual abuse and harassment claims, then to evade litigation about widespread wrongdoing, and, most recently, to get ahead of litigation regarding not only product liability, but a host of tortious conduct. The following three case studies build the recent evolution of mass tort bankruptcy, with each case study highlighting how for-profit and nonprofit organizations leverage dealing with future claims, using channeling injunctions, and asking for third-party releases to cabin people’s voices and cut short public scrutiny of alleged wrongdoing.

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<sup>205</sup> See *id.* at 1177 (discussing the Takata bankruptcy).

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 1177–78.

*A. Sexual Abuse and Harassment: Catholic Dioceses*

The Archdiocese of Portland, Oregon's chapter 11 filing in July 2004 marked the first Catholic diocese bankruptcy filing.<sup>208</sup> But it was not the first time that the Catholic Church had considered using bankruptcy to consolidate, coordinate, and minimize litigation stemming from its decades-long covering up of rampant sexual abuse of children by priests across the United States. The *Boston Globe's* groundbreaking reporting in 2002 of the Archdiocese of Boston's failure to protect children blew open the doors on the Catholic Church's wrongdoings.<sup>209</sup> The Boston Archdiocese contemplated filing chapter 11 in the wake of the exposé and as molestation-related claims mounted,<sup>210</sup> but it forwent bankruptcy in favor of dealing with and settling lawsuits individually. As of 2021, it still was entering into settlements in lawsuits that continued to trickle in almost twenty years after the *Globe* story broke.<sup>211</sup>

That abuse claims from conduct that occurred decades ago continue to haunt the Boston Archdiocese demonstrates the attraction of filing chapter 11 for other dioceses facing dozens or hundreds of abuse claims: they can force all survivors to come forward immediately and minimize

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<sup>208</sup> Voluntary Petition, In re Roman Cath. Archbishop of Portland in Or., No. 04-37154 (Bankr. D. Or. July 6, 2004); Marie T. Reilly, *Catholic Dioceses in Bankruptcy*, 49 *Seton Hall L. Rev.* 871, 873 (2019); Jonathan C. Lipson, *When Churches Fail: The Diocesan Debtor Dilemmas*, 79 *S. Cal. L. Rev.* 363, 363–64 (2006) (discussing the first three diocese chapter 11 filings).

<sup>209</sup> Michael Rezendes, *Church Allowed Abuse by Priests for Years*, *Bos. Globe* (Jan. 6, 2002), <https://www.bostonglobe.com/news/special-reports/2002/01/06/church-allowed-abuse-priest-for-years/cSHfGkTirAT25qKGvBuDNM/story.html> [https://perma.cc/K2UA-ETDZ]; Reilly, *supra* note 208, at 872–73 (discussing the Archdiocese of Boston).

<sup>210</sup> Pam Belluck & Adam Liptak, *For Boston Archdiocese, Bankruptcy Would Have Drawbacks*, *N.Y. Times* (Dec. 3, 2002), <https://www.nytimes.com/2002/12/03/us/for-boston-archdiocese-bankruptcy-would-have-drawbacks.html> [https://perma.cc/WE3P-HZJZ]; Walter V. Robinson & Stephen Kurkjian, *Archdiocese Weighs Bankruptcy Filing*, *Bos. Globe* (Dec. 1, 2002), [https://archive.boston.com/globe/spotlight/abuse/archive/print3/120102\\_bankruptcy.htm](https://archive.boston.com/globe/spotlight/abuse/archive/print3/120102_bankruptcy.htm) [https://perma.cc/8RTU-VXFD].

<sup>211</sup> See Wheeler Cowperthwaite, *Boston Archdiocese Settles Two New Lawsuits Alleging Sexual Abuse by Priests*, *Patriot Ledger* (Nov. 15, 2021, 12:18 PM), <https://www.patriotledger.com/story/news/2021/11/15/boston-archdiocese-settles-two-lawsuits-filed-over-abusive-priests-john-connell-brian-gallagher/6352051001/> [https://perma.cc/VA54-2M4U] (reporting on the settlement of two lawsuits filed in November 2021); Jeremy C. Fox, *Archdiocese of Boston Settles Six Clergy Abuse Lawsuits Dating Back Decades*, *Bos. Globe* (July 28, 2021, 11:43 PM), <https://www.bostonglobe.com/2021/07/28/metro/archdiocese-boston-settles-lawsuits-over-six-priests-accused-sexual-abuse> [https://perma.cc/5D23-S78J] (reporting on the settlement of abuse claims from alleged conduct dating back to 1966 through 1990).

the length of time that stories appear in the media about the history of abuse overlooked by that diocese. Between 2004 and 2022, that attraction has led twenty-eight dioceses and three nonprofit organizations affiliated with Catholic religious orders, such as the Christian Brothers of Ireland, to file chapter 11.<sup>212</sup> Through these thirty-one cases, the Catholic Church has honed its use of Code provisions and bankruptcy judges' willingness to call on their powers to force all survivors to come forward, to ensure that every abuse claim is settled, to cabin which assets are available to fund settlements, and to extend injunctions and releases to parishes and other third parties.<sup>213</sup>

When the Boston Archdiocese was contemplating filing chapter 11, Yair Listokin and Kenneth Ayotte wrote that it seemed like "a candidate for a bankruptcy trust, given the number of molestation-related claims against it and the possibility of many claimants failing to come forward immediately."<sup>214</sup> The trust envisioned by Listokin and Ayotte likely was similar to the trust in *Johns-Manville* or *Robins*. Abuse survivors could choose to litigate their claims outside bankruptcy and then ask the trust for payment or to settle and receive payment from the trust quickly. Listokin's and Ayotte's noting of people failing to come forward immediately likely was a reference to the ability of chapter 11 to deal with future claims. Indeed, the article in which they wrote this sentence focuses on protecting future claimants.<sup>215</sup>

Neither of these assumptions actually occur in diocese cases. Instead, survivors are pushed into settlements. And they generally must come forward or lose their ability to litigate.

The chapter 11 case of *In re Archdiocese of Saint Paul & Minneapolis*, filed in 2015, is particularly instructive.<sup>216</sup> Almost all the Catholic cases have been filed on the eve of trials or after a few settlements had been

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<sup>212</sup> See Catholic Dioceses in Bankruptcy, Pa. St. L. eLibr., <https://elibrary.law.psu.edu/bankruptcy> [<https://perma.cc/JW6J-HB25>] (last visited Mar. 13, 2023) (collecting diocese filings); Voluntary Petition, *In re Christian Bros. of Ir., Inc.*, No. 11-bk-22820 (Bankr. S.D.N.Y. filed Apr. 28, 2011).

<sup>213</sup> See Kristina Cooke, Mike Spector, Benjamin Lesser, Dan Levine & Disha Raychaudhuri, Special Report: Boy Scouts, Catholic Dioceses Find Haven from Sex Abuse Suits in Bankruptcy, Reuters (Dec. 30, 2022, 6:07 AM), <https://www.reuters.com/world/us/boy-scouts-catholic-dioceses-find-haven-sex-abuse-suits-bankruptcy-2022-12-30> [<https://perma.cc/J3GE-SFJM>] (discussing the Catholic Church's use of chapter 11).

<sup>214</sup> Listokin & Ayotte, *supra* note 126, at 1437.

<sup>215</sup> *Id.* at 1435.

<sup>216</sup> Voluntary Petition, *In re Archdiocese of Saint Paul & Minneapolis*, No. 15-bk-30125 (Bankr. D. Minn. filed Jan. 16, 2015).

reached.<sup>217</sup> The Saint Paul and Minneapolis Archdiocese filed days prior to the scheduled start of three civil trials.<sup>218</sup>

At the time of filing, all of the potential abuse of children by employees (priests, bishops, teachers, and similar) had occurred, bringing any lawsuits arising from alleged abuse into the case. Because the abused children—now typically adults—knew they had been abused, the issue of how to handle future claims faded. Survivors had to submit a claim by the bar date. Although the equivalent of future claims representatives could have been appointed, the bankruptcy judge in the *Archdiocese of Saint Paul & Minneapolis* case denied the request to appoint a legal representative for the interests of unknown abuse claimants.<sup>219</sup> There also was no need to craft trust procedures to account for the manifestation of latent injuries, as with asbestos. Instead, the official committee of unsecured creditors, in coordination with attorneys retained by individual survivors, negotiated on behalf of all survivors who submitted claims.<sup>220</sup>

The *Archdiocese of Saint Paul & Minneapolis* case established both the timing for and how a debtor must notify people that they must submit a claim or lose their ability to allege abuse. When the judge set the bar date for about six months after the diocese filed, which is typical for chapter 11 cases, an attorney representing many of the known survivors, objected, arguing that “[b]ecause of the psychological issues victims of

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<sup>217</sup> See Reilly, *supra* note 208, at 873 n.4 (noting that the Archdiocese of Portland filed chapter 11 right before jury selection in a civil sexual abuse trial); Michael R. Sisak & David R. Martin, Suburban NY Diocese Files for Bankruptcy Amid Abuse Lawsuits, AP News (Oct. 1, 2020), <https://apnews.com/article/virus-outbreak-new-york-sexual-abuse-by-clergy-lawsuits-sexual-abuse-3287a82c35430451bd3ad70641ba68b8> [<https://perma.cc/2CWX-WS9D>] (noting that the Diocese of Rockville Centre filed chapter 11 after the state appeals court refused to halt lawsuits brought against it).

<sup>218</sup> Jean Hopfensperger, St. Paul Archdiocese Declares Bankruptcy, Calling It ‘Fairer’ Recourse, Star Trib. (Feb. 2, 2015, 1:30 PM), <https://www.startribune.com/jan-16-archdiocese-s-bankruptcy-freezes-lawsuits/288823511> [<https://perma.cc/2RB8-M5A8>].

<sup>219</sup> Order Denying the Motion of the Debtor for an Order Creating a Legal Representative for the Interests of Future Abuse Claimants, Including Minors, and Appointing the Initial Representative, In re Archdiocese of Saint Paul & Minneapolis, No. 15-bk-30125 (Bankr. D. Minn. Oct. 30, 2015), ECF No. 458.

<sup>220</sup> Second Amended Chapter 11 Plan of Reorganization of the Official Committee of Unsecured Creditors of the Archdiocese of Saint Paul and Minnesota at 1, 11, 15, In re Archdiocese of Saint Paul & Minneapolis, No. 15-bk-30125 (Bankr. D. Minn. Dec. 19, 2016), ECF No. 890.



sexual abuse face, . . . they needed as much time as possible to file claims.”<sup>221</sup> The judge did not alter the bar date.<sup>222</sup>

Subsequently, the official unsecured creditors’ committee, which was comprised of five clergy abuse survivors, requested that the court order all 187 parishes within the Saint Paul and Minneapolis diocese to play a seven-minute video in which three abuse claimants explain the necessity of filing a claim by the bar date and discuss, from their perspectives, why coming forward was important for survivors and for the Catholic Church.<sup>223</sup> The committee stressed that survivors needed special assurances and support to come forward.<sup>224</sup>

In response, the diocese and parishes urged the court to find that procedures approved by the court that required placement of notices of the diocese’s bankruptcy filing and the bar date in a variety of newspapers and mediums likely to be read by parishioners was sufficient to notify potential claimants that they had to come forward or lose their rights.<sup>225</sup> The judge agreed with the diocese and parishes, thereby setting the standard for bringing survivors into onslaught litigation chapter 11

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<sup>221</sup> Deadline Set for Filing Claims Against Archdiocese, Archdiocese of Saint Paul & Minneapolis (Apr. 17, 2015), <https://www.archspm.org/deadline-set-for-filing-claims-again-st-archdiocese> [<https://perma.cc/6UU9-JGGM>].

<sup>222</sup> Associated Press, Judge Won’t Extend Deadline for Minnesota Archdiocese Claims, *TwinCities Pioneer Press* (Oct. 28, 2015, 9:32 PM), <https://www.twincities.com/2015/07/29/judge-wont-extend-deadline-for-minnesota-archdiocese-claims/> [<https://perma.cc/6E5Q-MTDC>].

<sup>223</sup> Notice of Hearing and Verified Motion of the Official Committee of Unsecured Creditors for an Order (1) Granting Expedited Relief and (2) Approving Additional Notice Procedures at 3–5, *In re Archdiocese of Saint Paul & Minneapolis*, No. 15-bk-30125 (Bankr. D. Minn. June 29, 2015), ECF No. 270; Pamela Foohey, Notifying Potential Claimants in Diocese Chapter 11 Cases, *Credit Slips* (June 30, 2015, 5:28 PM), <https://www.creditslips.org/creditslips/2015/06/notifying-potential-abuse-claimants-in-diocese-chapter-11-cases.html> [<https://perma.cc/K666-CP5C>] (discussing the video and motion).

<sup>224</sup> Transcript of Proceedings on July 9, 2015 at 21, *In re Archdiocese of Saint Paul & Minneapolis*, No. 15-bk-30125 (Bankr. D. Minn. July 17, 2015), ECF No. 298 (“I have worked with survivors for 32 years. I have learned how they can be reached and how hard it is for them to be. I have lived it. I know it. I urge the court to allow this to be played so that some of them can be reached.” (quoting the committees’ attorney)).

<sup>225</sup> Response of the Official Parish Committee of Unsecured Creditors to the Motion of the Official Committee of Unsecured Creditors for Approval of Additional Notice Procedures at 1–3, *In re Archdiocese of Saint Paul & Minneapolis*, No. 15-bk-30125 (Bankr. D. Minn. July 7, 2015), ECF No. 278; Response of the Archdiocese of Saint Paul and Minneapolis to Motion of the Official Committee of Unsecured Creditors for an Order (1) Granting Expedited Relief and (2) Approving Additional Notice Procedures at 3, *In re Archdiocese of Saint Paul & Minneapolis*, No. 15-bk-30125 (Bankr. D. Minn. July 7, 2015), ECF No. 279.

cases.<sup>226</sup> Survivors were notified largely through newspapers and had approximately six months after the diocese filed chapter 11 to submit their claims.<sup>227</sup>

With all abuse claims collected, the diocese turned to negotiating a settlement with survivors and insurers. Unlike in *Johns-Manville*, or even *Robins*, the goal was to resolve every claim. In addition to binding every survivor who filed a claim and insurers, the settlement also established how much money in terms of assets and property the diocese could contribute, plus those funds contributed by parishes and other entities potentially liable for the abuse—in return for channeling injunctions and third-party releases.<sup>228</sup>

Another key aspect of the case was establishing that parishes and other entities affiliated with the diocese were considered independent for the purposes of which assets were available to pay survivors.<sup>229</sup> Parishes may voluntarily contribute funds to the trust, but they usually do so only if they receive releases and if claims against them are channeled to the trust. The Saint Paul and Minneapolis Archdiocese's final settlement provided for \$210 million to be distributed to 450 survivors. Insurance carriers contributed \$170 million. The diocese and parishes contributed \$40 million. The funds were placed in a trust to be managed by a trustee, who would determine individual awards.<sup>230</sup> The parishes received third-party

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<sup>226</sup> Order Denying Motion for Additional Notice Procedures, In re Archdiocese of Saint Paul & Minneapolis, No. 15-bk-30125 (Bankr. D. Minn. July 9, 2015), ECF No. 285.

<sup>227</sup> Elizabeth Mohr, Claims Against St. Paul Archdiocese Flood in as Deadline Approaches, TwinCities Pioneer Press (Oct. 25, 2015, 12:30 AM), <https://www.twincities.com/2015/07/15/claims-against-st-paul-archdiocese-flood-in-as-deadline-approaches/> [<https://perma.cc/Z8P6-XH2W>].

<sup>228</sup> Disclosure Statement for Chapter 11 Plan of Reorganization of the Archdiocese of Saint Paul and Minnesota at 2–4, In re Archdiocese of Saint Paul & Minneapolis, No. 15-bk-30125 (Bankr. D. Minn. May 26, 2016), ECF 656.

<sup>229</sup> See Reilly, *supra* note 208, at 884–90 (overviewing how courts have decided that parish property is not property of the bankruptcy estate); Vanessa Romo, Minnesota Archdiocese Reaches \$210 Million Settlement With 450 Clergy Abuse Victims, NPR (June 1, 2018, 11:48 PM), <https://www.npr.org/sections/thetwo-way/2018/06/01/616187545/minnesota-archdiocese-reaches-210-million-settlement-with-450-clergy-abuse-victims> [<https://perma.cc/6YKM-QUAW>] (“One of the most recent delays in the proceedings was a dispute over whether parishes and other nonprofit entities are considered independent or part of the archdiocese, in which case their assets could theoretically be sold off to cover the cost of damages.”). Another question is whether property held by parishes, trusts, and other entities affiliated with a diocese can be brought into the estate via avoidance actions or substantive consolidation; these arguments have failed. See Reilly, *supra* note 208, at 890–97 (discussing these arguments).

<sup>230</sup> See Romo, *supra* note 229 (detailing the settlement); Third Amended Joint Chapter 11 Plan of Reorganization of the Archdiocese of Saint Paul and Minneapolis, In re Archdiocese

releases. Also among the “Protected Parties,” as defined by the reorganization plan were three schools, a youth camp, a youth center, and seminaries.<sup>231</sup>

The list of entities that received third-party releases in the *Archdiocese of Saint Paul & Minneapolis* case matches that of other Catholic cases. For example, as detailed by Lindsey Simon, the Diocese of New Ulm’s settlement and reorganization plan provided for the release of five insurance carriers, the eighty-two parishes within the diocese, the area Catholic schools, “the employees of the church including all the priests and nuns, and all other related entities, including the Catholic Church.”<sup>232</sup>

Also as discussed by Simon, New Ulm succeeded in stretching the limits of how a debtor can ensure that every abuse claim is settled once and for all. The settlement approved in that case provided for compensation of survivors from a trust, with individual awards determined by a “Survivor Claims Reviewer.”<sup>233</sup> A survivor’s only avenue to appeal the determination of the reviewer was to the reviewer itself. Survivors were required to appeal within ten days of the reviewer’s determination and to include a \$500 check with the appeal.<sup>234</sup>

In coming years, more dioceses almost certainly will file chapter 11, allowing the Catholic Church to continue to hone its use of bankruptcy. In the most recent diocese bankruptcies, survivors have balked at global settlements, demanding more money and the preservation of their claims against insurers. The Diocese of Camden, which filed chapter 11 in October 2020,<sup>235</sup> initially proposed a plan that would pay survivors \$90 million. This amount included \$30 million contributed by insurers, in return for channeling injunctions and third-party releases.<sup>236</sup> Survivors strongly opposed the settlement and plan. The diocese subsequently made

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of Saint Paul & Minneapolis, No. 15-bk-30125 (Bankr. D. Minn. Sept. 19, 2018), ECF No. 1262.

<sup>231</sup> Third Amended Joint Chapter 11 Plan of Reorganization of the Archdiocese of Saint Paul and Minneapolis at 7, 11, In re Archdiocese of Saint Paul & Minneapolis, No. 15-bk-30125 (Bankr. D. Minn. Sept. 19, 2018), ECF No. 1262.

<sup>232</sup> Simon, Bankruptcy Grifters, *supra* note 24, at 1202.

<sup>233</sup> *Id.* at 1201.

<sup>234</sup> *Id.*

<sup>235</sup> Voluntary Petition for Non-Individuals Filing for Bankruptcy, In re Diocese of Camden, N.J., No. 20-bk-21257 (Bankr. D.N.J. Oct. 1, 2020).

<sup>236</sup> See James Nani & Alex Wolf, Bankrupt Catholic Dioceses’ Victim Payout Deals Spurn Insurers, Bloomberg L. (Nov. 17, 2022, 5:00 AM), <https://news.bloomberglaw.com/bankruptcy-law/bankrupt-catholic-dioceses-victim-payout-deals-spurn-insurers> [<https://perma.cc/BKK5-H4QA>] (overviewing case history).

a new deal with the official committee of tort victims whereby it and parishes would pay \$87.5 million to survivors, while preserving survivors' rights to sue insurers.<sup>237</sup> This result maintained survivors' voice going forward, plus allowed for more survivors to come forward and sue the insurers directly.

The blueprint the Catholic Church laid out for collecting and settling claims has been followed by for-profit and nonprofit corporations in several high-profile reorganizations. Following allegations of sexual misconduct against its founder, Bikram Choudhury, which resulted in millions of dollars of judgments, in November 2017, Bikram Yoga filed chapter 11, with the hope of reviving the yoga chain.<sup>238</sup> The Weinstein Company ("TWC") filed chapter 11 in March 2018, soon after Jodi Kantor's and Megan Twohey's reporting in *The New York Times* of Harvey Weinstein's career-long sexual harassment and assault, which resulted in almost 100 women alleging abuse.<sup>239</sup> The filing also was a month on the heels of the New York Attorney General's "investigation into violations of human rights law, anti-discrimination law, denial of equal protection under state civil rights law, and illegal business conduct" stemming from TWC's repeated enabling of Weinstein's abuse.<sup>240</sup>

As 2018 drew to a close, two years after *The Indianapolis Star* reported the sexual abuse committed by USA Gymnastics' physician Larry

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<sup>237</sup> See *id.* (detailing this deal).

<sup>238</sup> Voluntary Petition for Non-Individuals Filing for Bankruptcy, In re Bikram Choudhury Yoga Inc., No. 17-bk-12046 (Bankr. C.D. Cal. Nov. 9, 2017); Richard Godwin, 'He Said He Could Do What He Wanted': The Scandal that Rocked Bikram Yoga, *Guardian* (Feb. 18, 2017), <https://www.theguardian.com/lifeandstyle/2017/feb/18/bikram-hot-yoga-scandal-cho-udhury-what-he-wanted> [<https://perma.cc/9H2K-VNNL>]; Tracy Rucinski, Bikram Yoga Guru Seeks Bankruptcy in Wake of Harassment Claims, *Reuters* (Nov. 10, 2017, 3:55 PM), <https://www.reuters.com/article/us-bikram-choudhury-yoga-bankruptcy/bikram-yoga-guru-seeks-bankruptcy-in-wake-of-harassment-claims-idUSKBN1DA2SA> [<https://perma.cc/5D6H-H2K8>].

<sup>239</sup> Voluntary Petition for Non-Individuals Filing for Bankruptcy, In re Weinstein Co. Holdings, No. 18-bk-10601 (Bankr. D. Del. Mar. 19, 2018); Jodi Kantor & Megan Twohey, Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades, *N.Y. Times* (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html> [<https://perma.cc/XG85-JRY3>]; Schonbek, *supra* note 12.

<sup>240</sup> Jacoby, Fake and Real People in Bankruptcy, *supra* note 139 (manuscript at 15); see also Jacoby, Unbundling Business Bankruptcy Law, *supra* note 90, at 5–6, 16–24 (using TWC as a case study of "bankruptcy à la carte").

Nassar,<sup>241</sup> USA Gymnastics filed chapter 11.<sup>242</sup> About a year later, in February 2020, the Boy Scouts of America (“BSA”) filed chapter 11 to deal with nearly 2,000 claims of sexual abuse across decades.<sup>243</sup> These four cases focused on forcing survivors to come forward and settle their claims, bypassing requests for discovery, and looping in third parties with channeling injunctions and non-debtor releases.<sup>244</sup>

### *B. Widespread Wrongdoings: Purdue Pharma*

Of all of the chapter 11 filings connected with onslaught litigation in recent years, Purdue Pharma’s filing in September 2019<sup>245</sup> has garnered the most attention.<sup>246</sup> Its proceeding incorporated every key aspect of prior mass tort chapter 11 cases.<sup>247</sup>

<sup>241</sup> Tim Evans, Mark Alesia & Marisa Kwiatkowski, Former USA Gymnastics Doctor Accused of Abuse, *Indianapolis Star*, <https://www.indystar.com/story/news/2016/09/12/former-usa-gymnastics-doctor-accused-abuse/89995734> [<https://perma.cc/6JDF-TH7U>] (Jan. 24, 2018, 4:35 PM) (originally published on Sept. 12, 2016, at 3:46 PM).

<sup>242</sup> Voluntary Petition for Non-Individuals Filing for Bankruptcy, In re USA Gymnastics, No. 18-bk-09108 (Bankr. S.D. Ind. Dec. 5, 2018).

<sup>243</sup> Voluntary Petition for Non-Individuals Filing for Bankruptcy, In re Boy Scouts of Am., No. 20-bk-10343 (Bankr. D. Del. Feb. 18, 2020); Simon, Bankruptcy Grifters, *supra* note 24, at 1197.

<sup>244</sup> See Simon, Bankruptcy Grifters, *supra* note 24, at 1195–200 (overviewing the USA Gymnastics and BSA cases); Becky Yerak, Bikram Choudhury’s Yoga Business Files for Chapter 11 Bankruptcy, *Wall St. J.* (Nov. 10, 2017, 4:50 PM), <https://www.wsj.com/articles/bikram-choudhurys-yoga-business-files-for-chapter-11-bankruptcy-1510333163> [<https://perma.cc/7J2X-BNE8>] (discussing the Bikram Yoga filing). See generally Jacoby, Unbundling Business Bankruptcy Law, *supra* note 90 (describing the Weinstein proceedings).

<sup>245</sup> Voluntary Petition for Non-Individuals Filing for Bankruptcy, In re Purdue Pharma Inc., No. 19-bk-23648 (Bankr. S.D.N.Y. Sept. 15, 2019).

<sup>246</sup> See, e.g., Levitin, *Purdue’s Poison Pill*, *supra* note 24, at 1083 (using the Purdue Pharma case to illustrate how the chapter 11 system’s checks and balances have broken down); Lipson, *The Rule of the Deal*, *supra* note 9, at 62–63 (using the Purdue Pharma bankruptcy to discuss how bankruptcy law supports confidential deals); Orgonek, *supra* note 133, at 364–67 (arguing that the Purdue Pharma chapter 11 settlement was not abusive and that the Sacklers should not be required to file bankruptcy). Purdue Pharma has been the subject of several books. See generally Ryan Hampton with Claire Rudy Foster & Hillel Aron, *Unsettled: How the Purdue Pharma Bankruptcy Failed the Victims of the American Overdose Crisis* (2021); Patrick Radden Keefe, *Empire of Pain: The Secret History of the Sackler Dynasty* (2021); Beth Macy, *Dopesick: Dealers, Doctors, and the Drug Company that Addicted America* (2018).

<sup>247</sup> Purdue Pharma also aggressively attempted to halt police and regulatory activity via chapter 11, against which some states unsuccessfully fought. Peg Brickley, Bankruptcy Judge Pushes Purdue Into Talks With States Over Sackler Family Legal Shield, *Wall St. J.* (Oct. 11, 2019, 7:15 PM), <https://www.wsj.com/articles/bankruptcy-judge-pushes-purdue-into-talks-with-states-over-sackler-family-shield-11570829855> [<https://perma.cc/6ZGH-469X>]; Mike Spector, Nate Raymond & Tom Hals, U.S. States Fight Back Against Purdue’s Bid to Halt

When it filed, Purdue Pharma was the defendant in over 2,600 civil actions stemming from its production of OxyContin. None of the actions had produced judgments, but Purdue Pharma faced significant litigation costs and the Sacklers faced the potential to have to pay the more than \$10 billion to opioid addiction survivors and their families.<sup>248</sup> Purdue Pharma had little debt when it filed; the tort claimants were its only creditors.<sup>249</sup> It wanted to use chapter 11 to confirm a pre-negotiated settlement with certain plaintiffs, including twenty-four attorneys general and the executive committee in a pending MDL, that would release the Sacklers from all claims.<sup>250</sup> Stated succinctly, Purdue Pharma and the Sacklers planned to put the opioid litigation to rest quickly, with as little public scrutiny as possible, using bankruptcy.<sup>251</sup>

The case began with a request for an expansive automatic stay that covered the Sackler family and government agencies.<sup>252</sup> It continued with the quashing of requests for discovery, calls to permit a “bellwether” litigation, and the appointment of an examiner, even though the Code technically required an examiner’s appointment.<sup>253</sup> Instead, Purdue Pharma proposed that the Sacklers would disclose information necessary for creditors to assess the settlement, provided that those parties privy to the information could not disclose what they learned publicly.<sup>254</sup> Purdue Pharma then sought approval of its proposed settlement and plan.

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Opioid Lawsuits, Reuters (Oct. 4, 2019, 7:14 AM), <https://www.reuters.com/article/uk-purduepharma-bankruptcy/u-s-states-fight-back-against-purdues-bid-to-halt-opioid-lawsuits-idUKKBN1WJ19Y> [<https://perma.cc/7ML4-4ZEN>].

<sup>248</sup> Levitin, *Purdue’s Poison Pill*, supra note 24, at 1103–04; Organek, supra note 133, at 363.

<sup>249</sup> See Levitin, *Purdue’s Poison Pill*, supra note 24, at 1103–04 (detailing the path to Purdue Pharma’s filing).

<sup>250</sup> Id. at 1104–05; Lipson, *The Rule of the Deal*, supra note 9, at 63 (overviewing the settlement).

<sup>251</sup> See Lipson, *First in Time*, supra note 24, at 37 (noting that “many opioid survivors and activists feared that the Sacklers were using the bankruptcy of their company, Purdue Pharma, to ‘get away with it’”); Lipson, *The Rule of the Deal*, supra note 9, at 62 (“The Sacklers wanted to shield as much information as possible.”).

<sup>252</sup> See Lipson, *First in Time*, supra note 24, at 47 (noting the “sprawling injunction”); Organek, supra note 133, at 368–69 (discussing the automatic stay); Simon, *Bankruptcy Grifters*, supra note 24, at 1188 (same); supra note 247.

<sup>253</sup> 11 U.S.C. § 1104(c); Lipson, *First in Time*, supra note 24, at 49 (discussing the treatment of requests); Lipson, *The Rule of the Deal*, supra note 9, at 74–76 (discussing the judge’s rejection of calls for bellwether litigation and requests for an examiner); Lipson Letter, supra note 116 (calling on the Office of the United States Trustee to seek an order to appoint an examiner pursuant to 11 U.S.C. § 1104(c)).

<sup>254</sup> See Lipson, *First in Time*, supra note 24, at 48 (detailing this stipulation).

At this point, now famously, the case went off the rails, at least from Purdue Pharma executives' and the Sacklers' perspectives. Mediation required three phases that spanned eighteen months.<sup>255</sup> The mediations resulted in a proposed reorganization plan under which the Sacklers contributed about \$4.5 billion and transferred all insurance claims to governmental creditors, the Sacklers were prohibited from doing business in the opioid industry, Purdue Pharma became a public benefit company, and two philanthropic trusts were established with funding exclusively for opioid crisis abatement.<sup>256</sup> In exchange, all creditors released all civil claims against the Sacklers.<sup>257</sup>

The expansive releases were the most controversial aspect of the plan. Individual tort claimants would receive between \$3,500 and \$48,000 based on the specifics of their claim, as disclosed on a separate form they were required to submit (in addition to their already-submitted proof of claim).<sup>258</sup> The releases sparked outrage among the claimants.<sup>259</sup> Purdue Pharma argued that the broad releases were the linchpin of the plan. Without them, the settlement would fall apart.<sup>260</sup>

Judge Robert Drain, the bankruptcy judge overseeing the case, confirmed the plan with some minor changes.<sup>261</sup> In confirming the plan, Judge Drain expressed disappointment that mediation had not resulted in the Sacklers contributing more money to survivors and their families—a focus on value recovery traditionally associated with business bankruptcy

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<sup>255</sup> See Organek, *supra* note 133, at 369 (noting the mediations).

<sup>256</sup> *Id.* at 369–70.

<sup>257</sup> See *id.* (overviewing the terms of this proposed plan); Simon, *Bankruptcy Grifters*, *supra* note 24, at 1190–91 (“The trust procedures allow a claimant to pursue their personal-injury claim in the tort system, but only if they affirmatively opt out on the claim form.”).

<sup>258</sup> See Simon, *Bankruptcy Grifters*, *supra* note 24, at 1190–91 (detailing tort claimants’ rights).

<sup>259</sup> John Seewer & Geoff Mulvihill, *Deal with OxyContin Maker Leaves Families Angry, Conflicted*, PBS News Hour (Sept. 2, 2021, 2:17 PM), <https://www.pbs.org/newshour/nation/deal-with-oxycontin-maker-leaves-families-angry-conflicted> [<https://perma.cc/US5T-L39T>].

<sup>260</sup> See Organek, *supra* note 133, at 370–71 (“The releases were seen by plan proponents (the Sackler family most prominent, but far from alone, among them) as essential to the plan . . .”). Although 95% of creditors that cast votes supported the plan, that Purdue Pharma engineered the plan process such that only it could put forth a plan undercuts this vote. Creditors had to support the plan or forfeit all value. Levitin, *Purdue’s Poison Pill*, *supra* note 24, at 1117–18.

<sup>261</sup> *In re Purdue Pharma L.P.*, 633 B.R. 53, 115 (Bankr. S.D.N.Y. 2021) (confirming Purdue’s plan with amendments in sections 5.8, 10.07(b), and 11.1(e)); Simon, *Bankruptcy Grifters*, *supra* note 24, at 1189–91 (detailing Purdue’s plan). For how and why Purdue Pharma and the Sacklers chose Judge Drain, see Levitin, *Purdue’s Poison Pill*, *supra* note 24, at 1131–48; Lipson, *The Rule of the Deal*, *supra* note 9, at 64–69.

cases.<sup>262</sup> Notably, he said little about the denial of survivors' ability to have a voice or overall lack of transparency. The confirmation decision mentioned the document depository aspect of the settlement, and the plan promised a public document repository.<sup>263</sup>

The United States Trustee and several government entities appealed the confirmation. The district court held that the Code does not permit non-consensual third-party releases and vacated the plan.<sup>264</sup> The Sacklers appealed this decision to the Second Circuit, which ruled in favor of Purdue Pharma's reorganization plan, thereby affirming Purdue Pharma's use of nonconsensual third-party releases.<sup>265</sup> Simultaneous with this appeal, a fourth round of mediation began.<sup>266</sup> This mediation resulted in the Sacklers agreeing to increase their contribution by more than a billion, bringing their total contribution to about \$5.5 billion.<sup>267</sup>

Although Purdue Pharma's chapter 11 case sparked more intense scrutiny of the Sacklers and third-party releases than the Sacklers and Purdue Pharma ever intended, the core of what the bankruptcy court allowed and approved reflects the progression of mass tort bankruptcies from asbestos through the Catholic dioceses. All survivors and their families were forced to come forward. Their ability to hold the Sacklers accountable occurred via class representatives and behind closed doors. They were bound to a plan that exceedingly limited their ability to launch their own lawsuits against the Sacklers and related entities. And though the plan ultimately provided for some public disclosure of documents,<sup>268</sup> the case's conclusion largely would end scrutiny of the Sacklers and Purdue Pharma.<sup>269</sup>

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<sup>262</sup> Organek, *supra* note 133, at 371.

<sup>263</sup> *In re Purdue Pharma L.P.*, 633 B.R. at 114; Lipson, *The Rule of the Deal*, *supra* note 9, at 73 & n.175.

<sup>264</sup> *In re Purdue Pharma L.P.*, 635 B.R. 26, 37–38 (S.D.N.Y. 2021).

<sup>265</sup> *In re Purdue Pharma L.P.*, 69 F.4th 45, 57 (2d Cir. 2023).

<sup>266</sup> See Lipson, *The Rule of the Deal*, *supra* note 9, at 73 (noting that the settlement “would be negotiated through four court-ordered mediations”).

<sup>267</sup> See *id.* (“[T]he Sacklers raised their offer from \$3 billion to about \$5.5 billion, which sounds significant, but they also doubled the payout period.”). The Sacklers negotiated changes to their non-monetary obligations. See Organek, *supra* note 133, at 371–72 (detailing these changes). This fourth mediation produced the hearing during which over two dozen individuals spoke directly to three members of the Sackler family. Mediator's Fourth Interim Report at 8, *In re Purdue Pharma L.P.*, No. 19-23649 (Bankr. S.D.N.Y. Mar. 3, 2022), ECF No. 4409; *supra* notes 1–4 and accompanying text.

<sup>268</sup> See *supra* note 263 and accompanying text.

<sup>269</sup> Some arguments before the Second Circuit focused on Purdue Pharma's bad faith in filing and proposing the reorganization plan. See Brief of Amici Curiae Law Professors in



*C. Beyond Product Liability: Infowars and Alex Jones*

The latest wave of mass tort bankruptcies stretches the innovations of prior cases in an attempt to further cabin available assets and disclosure obligations. J&J's chapter 11 filing of a specially created subsidiary, named LTL Management, where it dumped (for lack of a better term) all potential liability stemming from its talcum powder marked a much criticized move from placing an entire corporation in bankruptcy to only dealing with specific tort issues.<sup>270</sup> This filing received significant attention, particularly for its “brazen” use of bankruptcy to ensure that “deeper-pocketed and more culpable parties” would not be the actual debtor.<sup>271</sup> The Third Circuit's dismissal of LTL's filing for lack of good faith brings into question using specially created subsidiaries to effectuate reorganization.<sup>272</sup>

Along with the strategic placement of subsidiaries into bankruptcy, a prominent set of chapter 11 filings in 2022 moved beyond the product liability and sexual abuse of earlier bankruptcies and seemingly targeted limiting information disclosure. In April 2022, after losing defamation suits relating to Alex Jones's lies about the Sandy Hook Elementary School shooting being a hoax, but before damage awards were set, Jones placed three business entities affiliated with his Infowars website into chapter 11.<sup>273</sup> The stated reason for the filings was to resolve the liability on the suits for about \$10 million while releasing Jones and his companies.<sup>274</sup> The Department of Justice immediately called the filings abusive.<sup>275</sup> Rather than wait for the bankruptcy judge to assess

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Support of Appellees Regarding the “Abuse” Standard at 7–8, In re Purdue Pharma, L.P., No. 22-110 (2d Cir. Mar. 22, 2022), ECF No. 639 (detailing bad faith).

<sup>270</sup> See Jacoby, Fake and Real People in Bankruptcy, *supra* note 139 (manuscript at 13) (discussing this filing).

<sup>271</sup> *Id.* at 12.

<sup>272</sup> Tom Hals, Mike Spector & Dan Levine, U.S. Court Rejects J&J Bankruptcy Strategy for Thousands of Talc Lawsuits, Reuters (Jan. 31, 2023, 8:43 AM), <https://www.reuters.com/legal/jjs-ltl-units-bankruptcy-dismissed-by-us-appeals-court-filing-2023-01-30> [<https://perma.cc/5P4S-LBHW>]; see *supra* note 120 and accompanying text.

<sup>273</sup> Debtors' Emergency Motion for Joint Administration of Chapter 11 Cases, In re InfoW, LLC, No. 22-bk-60020 (Bankr. S.D. Tex. Apr. 18, 2022), ECF No. 5 (filing chapter 11 for InfoW, LLC, IWHealth, LLC, and Prison Planet TV, LLC).

<sup>274</sup> Mike Spector & Dietrich Knauth, Conspiracy Website Infowars Parent Files for Bankruptcy, Reuters (July 29, 2022, 8:54 PM), <https://www.reuters.com/business/media-telecom/infowars-parent-files-bankruptcy-2022-07-29> [<https://perma.cc/5GCB-FB8X>].

<sup>275</sup> Steven Church, Infowars Bankruptcy May Be ‘Abuse’ of Court Rules, DOJ Warns, Bloomberg L. (Apr. 22, 2022, 10:14 AM), <https://www.bloomberglaw.com/product/blaw/>

abusiveness, the plaintiffs in the defamation suits dropped the entities as defendants from the litigation. With no purpose for the chapter 11 cases, the three entities asked for a voluntary dismissal of the proceedings.<sup>276</sup>

That did not end Jones's or Infowars's attempts to use the business bankruptcy system to deal with the defamation suits and ostensibly to avoid oversight. In July 2022, Infowars's parent company, Free Speech Systems LLC, filed chapter 11.<sup>277</sup> The filing came in the midst of a trial in Texas to determine the damage award for parents of victims of the Sandy Hook shooting.<sup>278</sup> Free Speech Systems used the Code's new subchapter V, which requires debtors to have under \$7.5 million in debts,<sup>279</sup> and which comes with fewer reporting requirements and less oversight than a typical chapter 11 proceeding.<sup>280</sup> Free Speech Systems's eligibility for subchapter V hinged on the defamation suits' damage awards not yet being set.<sup>281</sup> Once the current trial concluded, the damages awarded undoubtedly would increase Free Speech Systems' debts far above the eligibility threshold.<sup>282</sup> (The Texas jury subsequently awarded two parents about \$50 million.<sup>283</sup>)

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bloomberglawnews/bloomberg-law-news/XBQADC74000000 [https://perma.cc/7M72-KK UW].

<sup>276</sup> Spector & Knauth, *supra* note 274.

<sup>277</sup> Voluntary Petition for Non-Individuals Filing for Bankruptcy, In re Free Speech Sys. LLC, No. 22-bk-60043 (Bankr. S.D. Tex. July 29, 2022).

<sup>278</sup> Kate Marino, Alex Jones Uses Bankruptcy to Limit Sandy Hook Reckoning, Again, *Axios* (Aug. 3, 2022), <https://www.axios.com/2022/08/03/alex-jones-sandy-hook-trial-bankruptcy> [https://perma.cc/QMZ3-LP96].

<sup>279</sup> Lance P. Martin, Subchapter V Debt Ceiling Restored to \$7.5 Million, *Ward & Smith, P.A.* (June 23, 2022), <https://www.wardandsmith.com/articles/subchapter-v-debt-ceiling-restored-to-75-million> [https://perma.cc/539G-LMWE].

<sup>280</sup> See Jonathan Friedland, Christopher M. Cahill, Mark Melickian, Jack O'Connor & Hajar Jouglaf, Subchapter V of Chapter 11: A User's Guide, *DailyDAC* (Oct. 18, 2021), <https://www.dailydac.com/subchapter-v-of-chapter-11-the-complete-users-guide/> [https://perma.cc/2XLY-HF5N] (comparing a traditional chapter 11 case to a subchapter V case).

<sup>281</sup> Marino, *supra* note 278.

<sup>282</sup> *Id.*; William Melhado, Alex Jones' Company Files for Bankruptcy Midway Through Sandy Hook Damages Trial, *Tex. Trib.* (July 30, 2022, 4:00 PM), <https://www.texastribune.org/2022/07/30/alex-jones-company-bankruptcy/> [https://perma.cc/7XC9-C23S].

<sup>283</sup> James Nani, Infowars' Bankruptcy Judge Removes Top Advisors, Orders Probe, *Bloomberg L.* (Sept. 21, 2022, 12:25 PM), <https://www.bloomberglaw.com/bloomberglawnews/bankruptcy-law/X3U9K6BG000000> [https://perma.cc/3E79-SPQX]. Jones tried and failed to have the award reduced. Jack Queen, Alex Jones Loses Bid to Slash \$50 Million Sandy Hook Defamation Verdict, *Reuters* (Nov. 22, 2022, 8:12 PM), <https://www.reuters.com/legal/alex-jones-loses-bid-slash-50-million-sandy-hook-defamation-verdict-2022-11-22> [https://perma.cc/4TVR-KUA5].

Deviating from other chapter 11 cases, instead of allowing the automatic stay to pause the defamation suit, Free Speech Systems asked that the suit continue. The company specifically wanted to know the damages figure, which it could resolve through the bankruptcy case.<sup>284</sup> The filing also came two days before jury selection in a Connecticut trial.<sup>285</sup> The Sandy Hook families' lawyer called the filing "a stunt by Alex Jones to try to avoid facing justice."<sup>286</sup> In subsequent months, Free Speech Systems faced setbacks in setting who exactly would advise the debtor business, but succeeded in keeping the Infowars website running and in continuing to shield financial records.<sup>287</sup> As of this Article's writing, the case remains pending.

Alex Jones's lies perpetrated via his Infowars collections of companies may seem like an odd choice for a case study, especially because Jones consented to the continuation of defamation suits in Free Speech Systems's chapter 11 case. Nonetheless, what Jones (clumsily) did with his companies follows the blueprint of the mass tort bankruptcies of the past couple decades. It thus demonstrates how mass tort bankruptcies are a subset of chapter 11 cases filed to address the broader idea of onslaught litigation. That the tort issue that Jones and his companies wanted to deal with via chapter 11 encompassed only a couple lawsuits makes the bankruptcy cases easier to dissect. It also reflects a move away from using chapter 11 to deal with latent tort claims, as with asbestos, to filing bankruptcy in the wake of allegations of wrongdoing in which all claimants should know of their harm.

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<sup>284</sup> Jim Vertuno, *Alex Jones' Media Company Files for Bankruptcy Amid Trial*, AP News (July 29, 2022), <https://apnews.com/article/shootings-austin-texas-63f4ecbf7adbb60c2f5dfe0726b6cb5e> [<https://perma.cc/G9XA-5HZE>].

<sup>285</sup> Id. That suit ended in a \$965 million damage award. Dave Collins, *Alex Jones Seeks New Trial After \$965 Million Verdict in Sandy Hook Lawsuit*, AP News (Oct. 22, 2022, 3:00 PM), <https://www.pbs.org/newshour/nation/alex-jones-seeks-new-trial-after-965-million-verdict-in-sandy-hook-lawsuit> [<https://perma.cc/CZ9D-32R5>]; Jemima McEvoy, *Alex Jones Likely Doesn't Have \$1 Billion. He Does Own Five Homes in Texas, Though.*, Forbes (Oct. 13, 2022, 4:58 PM), <https://www.forbes.com/sites/jemimamcevoy/2022/10/13/alex-jones-likely-doesnt-have-1-billion-he-does-own-five-homes-in-texas-though> [<https://perma.cc/YRU2-DY4B>].

<sup>286</sup> Melhado, *supra* note 282.

<sup>287</sup> Elizabeth Williamson, *Alex Jones Accused of Hiding Assets from Sandy Hook Families*, N.Y. Times (Oct. 12, 2022), <https://www.nytimes.com/2022/08/25/us/politics/alex-jones-law-suits-bankruptcy.html> [<https://perma.cc/4245-8M4L>]; Jonathan Randles, *Bankruptcy Judge Orders Independent Review of Alex Jones's Infowars Over Conflicts*, Wall St. J. (Sept. 20, 2022, 11:07 PM), <https://www.wsj.com/articles/bankruptcy-judge-orders-independent-review-of-alex-jones-infowars-over-conflicts-11663729619> [<https://perma.cc/6X5L-2C8U>].

Through the initial filings of the three Infowars-related entities, Jones sought third-party releases for himself and the rest of his organization, which would have ended the lawsuits and likely intense public scrutiny of his lies. When that failed, through Free Speech Systems's filing, he sought to fast-track the defamation lawsuits' conclusions and to wrap up his and his companies' monetary liability. This aspect of bankruptcy continues to be valuable because Jones allegedly moved millions of dollars among himself and his companies.<sup>288</sup> The longer those allegations persist and the longer that a variety of parties have the ability to look into Jones's finances, the more his misdeeds will remain in the news.

As if on cue, in December 2022, Alex Jones himself filed chapter 11.<sup>289</sup> The top seventeen of Jones's twenty largest unsecured creditors were plaintiffs in the defamation lawsuits.<sup>290</sup> Jones will not be able to discharge the vast majority of the over one billion dollars that he owes if the court finds that the conduct that produced the defamation judgments constituted "willful and malicious injury by the debtor to another entity or to the property of another."<sup>291</sup> Because of the procedural history of the defamation judgments, Jones may be able to litigate the character of his conduct during the chapter 11 case. This will push off the plaintiffs for some time, although it seems unlikely that Jones will be granted a discharge of the judgments.<sup>292</sup>

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<sup>288</sup> Jonathan O'Connell, *Sandy Hook Families Sued Alex Jones. Then He Started Moving Money Around*, Wash. Post (Nov. 21, 2022, 7:00 AM), <https://www.washingtonpost.com/investigations/2022/11/21/alex-jones-sandy-hook-lawsuit> [<https://perma.cc/YJ2X-V29S>].

<sup>289</sup> Voluntary Petition for Individuals Filing Bankruptcy, In re Alexander E. Jones, No. 22-bk-33553 (Bankr. S.D. Tex. Dec. 2, 2022); Becky Sullivan, *Alex Jones Files for Bankruptcy Following \$1 Billion Sandy Hook Verdicts*, NPR (Dec. 2, 2022, 11:13 AM), [npr.org/2022/12/02/1140349600/alex-jones-bankruptcy](https://www.npr.org/2022/12/02/1140349600/alex-jones-bankruptcy) [<https://perma.cc/SXW3-UXSU>]. He filed chapter 11 because his debts were too large to file under chapter 13 and filing chapter 11 allowed him to remain in control of assets. See Adam Levitin, *Alex Jones's Bankruptcy, Credit Slips* (Dec. 2, 2022, 9:39 AM), <https://www.creditslips.org/creditslips/2022/12/alex-jones-bankruptcy.html> [<https://perma.cc/R865-ARC�>] (discussing the potential for the appointment of a trustee).

<sup>290</sup> The eighteenth largest creditor was \$150,000 owed to American Express. Voluntary Petition for Individuals Filing Bankruptcy, In re Alexander E. Jones, No. 22-bk-33553 (Bankr. S.D. Tex. Dec. 2, 2022), ECF No. 1.

<sup>291</sup> 11 U.S.C. § 523(a)(6); see also Levitin, *supra* note 289 (discussing what assets may be available in Jones's bankruptcy estate).

<sup>292</sup> See Levitin, *supra* note 289 (discussing application of willful and malicious). In March 2023, the plaintiffs in the defamation cases filed adversary proceedings in Jones's chapter 11 case, seeking to establish that the judgments cannot be discharged because they were incurred willfully and maliciously. Leslie A. Pappas, *Sandy Hook Families File Ch. 11 Suits Over Debt*

However, Jones may be even more interested in the potential for leveraging bankruptcy to cabin disclosures. His filing brought skepticism about his willingness to be forthright and calls for investigations of over \$10 million of donations to Jones from fans.<sup>293</sup> As with dischargeability, it seems unlikely that Jones will prevail in limiting financial disclosures and escaping from intense scrutiny of exactly how much money and other property is available to pay the Sandy Hook families.<sup>294</sup> As compared to the outcome if he had received third-party releases via the chapter 11 cases of the three Infowars business entities, Jones probably will pay more to families to resolve his chapter 11 case.

Infowars and Alex Jones illustrate the shift in the use of chapter 11 to limit disclosures and bypass other protections for creditors designed to be part of the bankruptcy framework. Compare the likely outcome of Jones's case—that he will have to pay all his assets to defamation claimants and that the debts will not be discharged, allowing the families to continue to pursue him for years despite his filing bankruptcy—with the full release and forever resolution that he may have gotten through his companies' chapter 11 cases. This juxtaposition highlights the attractiveness of bankruptcy to corporations (and their owners) facing onslaught litigation. They can twist the bankruptcy system into a silencing device. Infowars and Alex Jones also highlight that those corporations with access to elite lawyers versed in how to leverage the chapter 11 process and venue rules will be more successful at twisting the bankruptcy system. Infowars's initial chapter 11 cases failed quickly, in part, because Jones did not have access to the same elite lawyers as Purdue Pharma and the Sacklers.

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Discharge, Law360 (Mar. 13, 2023, 6:59 PM), <https://www.law360.com/articles/1585324/sandy-hook-families-file-ch-11-suits-over-debt-discharge> [<https://perma.cc/CZZ5-RR53>].

<sup>293</sup> Rick Archer, Sandy Hook Families 'Skeptical' of Jones' Ch. 11 Disclosures, Law360 (Dec. 7, 2022, 9:15 PM), <https://www.law360.com/articles/1555975/sandy-hook-families-skeptical-of-jones-ch-11-disclosures> [<https://perma.cc/66XD-5X9G>]; James Nani, Sandy Hook Families to Probe Alex Jones' \$10 Million From Fans, Bloomberg L. (Dec. 7, 2022, 5:21 PM), <https://www.bloomberglaw.com/bloomberglawnews/bankruptcy-law/XA1UVF9000000> [<https://perma.cc/9PEL-R4UG>].

<sup>294</sup> Bankruptcy courts' willingness to be more lenient on entities that reorganize than real people who file bankruptcy seems relevant to how Jones's personal chapter 11 case is likely to proceed. See generally Jacoby, Fake and Real People in Bankruptcy, *supra* note 139 (manuscript at 2–3) (calling out this dichotomy).

## IV. BANKRUPT SILENCING

Because of the history of the use of bankruptcy to deal with mass torts, much of the initial scholarship devoted to onslaught litigation focused on the specific context of mass tort bankruptcy and on future claimants and the business that filed, not on channeling injunctions and third-party releases that now benefit a myriad of non-debtors.<sup>295</sup> This allowed modern-day mass tort bankruptcies to proliferate with little attention to the full import of a business's use of chapter 11. This Part begins by examining recent scholarship addressing corporations' innovations in reorganization, and detailing core elements of procedural justice research to fill a key gap in current business bankruptcy scholarship. Based on that merging of literature, it interrogates the harms of utilizing reorganization to truncate onslaught litigation.

*A. Procedural Justice and Bankruptcy*

In the last few years, as more mass tort chapter 11 filings made headline news, scholarship predominately has focused on channeling injunctions and third-party releases, centering on value recovery to tort claimants,<sup>296</sup> and constitutional, jurisdictional, and procedural concerns.<sup>297</sup> Similarly,

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<sup>295</sup> See, e.g., Listokin & Ayotte, *supra* note 126, at 1435–42 (discussing future claimants without reference to third parties); Resnick, *supra* note 88, at 2089–90 (mentioning third parties or non-debtors only in connection with sales of assets); Mark J. Roe, *Bankruptcy and Mass Tort*, 84 *Colum. L. Rev.* 846, 848–49 (1984) (arguing that companies dealing with mass torts should file chapter 11 earlier in their resolution of litigation claims, and not mentioning channeling injunctions or third-party releases). But see Brubaker, *Bankruptcy Injunctions and Complex Litigation*, *supra* note 125, at 964–65 (making “the long-overdue challenge to non-debtor releases”).

<sup>296</sup> See, e.g., Organek, *supra* note 133, at 364 (arguing for the efficiency of channeling injunctions and third-party releases); Parikh, *Scarlet-Lettered Bankruptcy*, *supra* note 24, at 425 (proposing the companies facing mass torts emerge from bankruptcy as public benefit corporations because, as argued, that would provide greater monetary recovery to tort claimants); Parikh, *The New Mass Torts Bargain*, *supra* note 24, at 455 (proposing amendments to the Code to “improve predictability, efficiency, and victim recoveries” in mass tort bankruptcies).

<sup>297</sup> See, e.g., Jeanne L. Schroeder & David Gray Carlson, *Third Party Releases Under the Bankruptcy Code After Purdue Pharma*, 31 *Am. Bankr. Inst. L. Rev.* 1, 4 (2023) (analyzing when the Code authorizes third party releases); Brubaker, *Mandatory Aggregation of Mass Tort Litigation in Bankruptcy*, *supra* note 24, at 965 (“[T]he fundamental illegitimacy of nondebtor releases is of a constitutional magnitude . . . .”); Sergio Campos & Samir D. Parikh, *Due Process Alignment in Mass Restructurings*, 91 *Fordham L. Rev.* 325, 330–31 (2022) (focusing on procedures for the selection of a future claims representative and the claims estimation process); Adam J. Levitin, *The Constitutional Problem of Nondebtor Releases in*

the most recent scholarship addresses even newer innovations in mass tort bankruptcies, calling out how companies pick bankruptcy courts and judges and bypass Code provisions, though still mainly from the perspectives of survivors' monetary recovery and the perversion of the business bankruptcy system as codified.<sup>298</sup>

A few scholars—notably Jonathan Lipson and Melissa Jacoby—have shifted the discussion from a focus on Code provisions and victim recoveries to add an explanation of the dynamics (on the ground, as litigated) that allow companies to use the business bankruptcy system to advance their agendas. Lipson focuses on what he terms “social debt” bankruptcies, and details how bankruptcy’s traditional “rule of the deal” which supports resolving disputes about remedies through negotiations and confidential deals clashes with investigating allegations of serious wrongdoings.<sup>299</sup> Jacoby describes how attorneys are adept at portraying business problems, such as an onslaught of litigation, as emergencies, such that bankruptcy judges accept quick resolutions that bypass

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Bankruptcy, 91 Fordham L. Rev. 429, 430–33 (2022) (arguing that nonconsensual third-party releases are unconstitutional); Simon, Bankruptcy Grifters, *supra* note 24, at 1215–16 (concluding that “Congress and the courts should increase disclosure obligations and strengthen procedural checks before granting nondebtor channeling injunctions and releases and should mandate baseline procedural protections for channeled claims”).

<sup>298</sup> See Anthony J. Casey & Joshua C. Macey, In Defense of Chapter 11 for Mass Torts, 90 U. Chi. L. Rev. 973, 976 (2023) (arguing “that legal innovations such as the two-step bankruptcy and the third-party release can reduce bankruptcy costs and preserve value for all claimants”); Janger, *supra* note 111, at 383 (concluding that bankruptcy “can benefit both the enterprise and the tort claimants by improving their recovery. It is crucial, however, that these tools be tethered to their justification in insolvency and subjected to appropriate process protections”); Adam J. Levitin, *Purdue’s Poison Pill*, *supra* note 24, at 1083–84 (calling out coercive restructuring techniques, lack of appellate review, and judge shopping); Samir D. Parikh, Mass Exploitation, 170 U. Pa. L. Rev. Online 53, 57 (2022) (discussing divisive mergers “through the lens of victim recoveries”). Other recent scholarship highlights how businesses bypass a myriad of Code provisions. See Lynn M. LoPucki, Chapter 11’s Descent into Lawlessness, 96 Am. Bankr. L.J. 247, 251–53 (2022) (examining how debtors get around notice requirements and requests to appoint examiners, while controlling plan confirmation, critical vendor orders, collective bargaining agreements, and retention bonuses); Jared A. Ellias & Robert J. Stark, Bankruptcy Hardball, 108 Calif. L. Rev. 745, 751 (2020) (detailing how “clever debtors and their lawyers . . . disable the formal machinery of creditor protection”).

<sup>299</sup> Lipson, *The Rule of the Deal*, *supra* note 9, at 43–44 (distinguishing between “rule of law” and “rule of the deal” and arguing that “social debt” bankruptcies involve more “rule of law” questions, making bankruptcy, which focuses on the “rule of the deal,” an inappropriate forum to resolve primarily questions of liability); see also Lipson, Remedial Schemes, *supra* note 25, at 1794 (asserting that the bankruptcy judge in *Purdue Pharma* attempted to shut down challenges to the proposed settlement).

procedural protections, constitutional authority, and unravel was what meant to be “[c]hapter 11’s package deal.”<sup>300</sup> Bankruptcy judges’ overall inclination to “resist treating [businesses that file bankruptcy] as culpable actors capable of independent wrongdoing,” as Jacoby identifies, “makes bankruptcy an unreliable partner in the broader societal project of deterring, punishing, and remedying serious corporate misconduct.”<sup>301</sup> Jacoby further calls out a lack of focus on the nonmonetary interests of claimants.<sup>302</sup>

Missing from these discussions is a primary and sustained focus on how corporations’ use of bankruptcy to deal with onslaught litigation is designed to cut short survivors’ process for coping with alleged harms,<sup>303</sup> cabin discovery about the alleged wrongdoing, and bury the possibility of future public exposure to the problems.<sup>304</sup> This use of reorganization goes beyond securing releases for grifters.<sup>305</sup> Corporations effectively seek exoneration. Their leaders hope that chapter 11 will provide that exoneration not only by allowing for deals that release them of liability and reduce people’s monetary recovery, but also by suppressing discussions of the alleged wrongdoings. The silencing potential of their chapter 11 cases may be most important, even though they couch their decisions to file in language about providing claimants with equitable recoveries from limited funds. Through silencing, corporations and third parties seek to escape the full legal and societal ramifications of alleged misconduct.

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<sup>300</sup> Jacoby, *Shocking Business Bankruptcy Law*, supra note 24, at 411; see also Jacoby, *Unbundling Business Bankruptcy*, supra note 90, at 1706–07 (focusing on sales and loans in “unbundled bankruptcies”).

<sup>301</sup> Jacoby, *Fake and Real People in Bankruptcy*, supra note 139 (manuscript at 4).

<sup>302</sup> Jacoby, *Sorting Bugs and Features*, supra note 24 (manuscript at 26) (“I have heard survivors lament that bankruptcy turned [out] to be not about justice, but just dollars and cents.”).

<sup>303</sup> A recent student note focuses on how mass tort bankruptcies bypass survivors’ dignitary interests and deny them a voice in proceedings. Ella Epstein, Note, *The Need for Dignitary Justice for Tort Creditors in Chapter 11 Bankruptcy*, 2022 Colum. Bus. L. Rev. 943, 946.

<sup>304</sup> In the context of Purdue Pharma, Jonathan Lipson has focused on how the Sacklers hoped to use bankruptcy to conceal information and squelch calls for transparency. Lipson, *The Rule of the Deal*, supra note 9, at 62; Lipson, *Remedial Schemes*, supra note 25, at 1778–79, 1793–94. Melissa Jacoby has discussed the lack of attention to procedural justice and that lack of attention’s effect on the bankruptcy system’s legitimacy. Jacoby, *Corporate Bankruptcy Hybridity*, supra note 91, at 1739–42.

<sup>305</sup> See generally Simon, *Bankruptcy Grifters*, supra note 24 (describing the benefits obtained by these entities and individuals through the reorganization process).



The silencing aspect of onslaught litigation bankruptcies also may be more harmful and more important to many of the plaintiffs who become claimants in the bankruptcy cases. Likewise largely missing from recent literature about mass tort bankruptcies is sustained engagement with research about procedural justice and its connection to due process. This research focuses on both the formal procedural rules and, perhaps more significantly, how parties' treatment in litigation and dispute resolution influences their feeling about and acceptance of decisions, which, in turn, affects public perception of the legal system.<sup>306</sup>

Litigants desire to have a voice and to be heard by a neutral, trustworthy decision-maker who is deemed to behave fairly and in an even-handed manner.<sup>307</sup> In assessing whether they were treated respectfully, litigants consider consistency and impartiality of decision-making, as well as the ability to appeal the decision.<sup>308</sup> Litigants also appreciate and draw value from feeling that they had at least some opportunity to control the procedure of the dispute resolution.<sup>309</sup>

Providing procedural justice is key to respecting human dignity and to meeting the requirements of due process.<sup>310</sup> It legitimates legal procedures and dispute resolution.<sup>311</sup> Litigants who feel that procedures of a decision were fair are more likely to accept the decision, even if they

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<sup>306</sup> See Doron Dorfman, *Re-Claiming Disability: Identity, Procedural Justice, and the Disability Determination Process*, 42 *Law & Soc. Inquiry* 195, 204–05 (2017) (“[P]rocedural justice focuses on how subjects experience the procedure through which decisions regarding substantive rights are made, rather than its outcomes.”); Victor D. Quintanilla, *Taboo Procedural Tradeoffs: Examining How the Public Experiences Tradeoffs Between Procedural Justice and Cost*, 15 *Nev. L.J.* 882, 889–92 (2015) (overviewing the importance of procedural justice); Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 *Hastings L.J.* 127, 130 (2011) (surveying “the psychology of procedural justice as it plays out on the ground of federal court litigation”).

<sup>307</sup> See Dorfman, *supra* note 306, at 205 (overviewing procedural justice’s characteristics); Foohey, *supra* note 6, at 2313–16 (discussing procedural justice).

<sup>308</sup> See Dorfman, *supra* note 306, at 205 (discussing dignified and respectful treatment); Steven L. Blader & Tom R. Tyler, *A Four-Component Model of Procedural Justice: Defining the Meaning of a “Fair” Process*, 29 *Personality & Soc. Psych. Bull.* 747, 753 (2003) (discussing procedures for decision-making and quality of treatment).

<sup>309</sup> See Dorfman, *supra* note 306, at 205 (discussing research about “control over the procedure and decisions”); E. Allan Lind & Tom R. Tyler, *The Social Psychology of Procedural Justice* 97–99 (1988) (noting that litigants value process control even if they experience negative substantive outcomes).

<sup>310</sup> See Quintanilla, *supra* note 306, at 885 (“[T]he Due Process Clause, properly understood, is inherently about procedural justice, fairness, and furnishing individuals human dignity.”).

<sup>311</sup> See *id.* at 889 (noting the intersection between procedural justice and legitimacy).

are displeased with the outcome.<sup>312</sup> Overall, research shows that laypeople “pay a great deal of attention to the way things are done [i.e., the way an authority or decision maker comes to a decision] and the nuances of their treatment by others,”<sup>313</sup> and that when people experience procedural injustice, public confidence in the legal system deteriorates.<sup>314</sup>

Procedures that litigants deem just may result in apologies, a version of the confrontational justice that opioid claimants chose in the Purdue Pharma chapter 11 case.<sup>315</sup> Additionally, in pursuing dignity and vindication for survivors, providing procedural justice increases the likelihood of exposing the truth about alleged wrongdoings—a process which corporations and their owners, like the Sacklers, seemingly hope to bypass via bankruptcy.<sup>316</sup>

The initial chapter 11 filings in the wake of mass torts serve as models for chapter 11 filings of for-profit and nonprofit corporations that deal with a slew of litigation. But these initial cases had several features that have fallen to the wayside in recent onslaught litigation bankruptcies, which has eroded due process and procedural justice in these cases.

### *B. Harms of Bankrupt Silencing*

Although all of the initial mass tort chapter 11 cases were controversial when filed, the cases seemed to try to follow the Bankruptcy Code’s vision of “a party-driven, court-supervised process of bargaining over restructuring that serves multiple purposes.”<sup>317</sup> Corporations dealing with asbestos faced an unknown number of lawsuits related to a single product, and the manifestations of the product’s harms had a long tail. If the corporations addressed each lawsuit or batch of lawsuits as they arose, there was a troublesome possibility that those people who filed lawsuits later in time would receive nothing because the corporations had buckled

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<sup>312</sup> See Dorfman, *supra* note 306, at 205 (noting the connection between the provision of procedural justice and deference to legal and governmental institutions).

<sup>313</sup> Lind & Tyler, *supra* note 309, at 242.

<sup>314</sup> See Quintanilla & Yontz, *supra* note 7, at 115–16 (detailing research).

<sup>315</sup> Jennifer K. Robbennolt, Apologies and Reasonableness: Some Implications of Psychology for Torts, 59 DePaul L. Rev. 489, 490–94 (2010) (discussing apologies).

<sup>316</sup> See Rachel Bayefsky, Remedies and Respect: Rethinking the Role of Federal Judicial Relief, 109 Geo. L.J. 1263, 1265 (2021) (noting that civil litigation, in addition to “securing material benefit[s],” can “also be a way to pursue an interest in something more intangible: dignity, respect, or vindication”); Matthew A. Shapiro, The Indignities of Civil Litigation, 100 B.U. L. Rev. 501, 514 (2020) (arguing that dignity is provided in civil litigation).

<sup>317</sup> Janger, *supra* note 111, at 373–74.

under the lawsuits' weight. Even with the Dalkon Shield and breast implants, both of which were no longer sold when Robins and Dow Corning filed bankruptcy, worries about future claimants influenced the cases.<sup>318</sup>

By the time that these corporations filed chapter 11, information about the hazards of their products was widely known, and during the cases, more time was provided for discovery and disclosure. For example, in the *Robins* case, it took more than a year for the court to collect, review, and compile evidence for valuing the personal liability claims, in aggregate, to set the funding of the compensation trust.<sup>319</sup> In addition, the court appointed an examiner.<sup>320</sup> More importantly, the entire corporation filed chapter 11, meaning that the Code's disclosure requirements applied widely.<sup>321</sup>

In addition, the contours of the finalized trusts provided tort claimants with a process to help prepare their claims and preserved parties' ability to litigate individual claims.<sup>322</sup> The non-debtor parties that received channeling injunctions and releases were enmeshed with the debtor business. Insurance carriers would pay a portion of the debtor's liability inside or outside of bankruptcy. Because of the nature of the alleged harms, directors and officers likely would be indemnified by the debtor corporation inside or outside of bankruptcy. Insurance carriers and directors and officers benefitted from the chapter 11 case because they too held claims against the debtor and had an interest in seeing the debtor's liability fully resolved.<sup>323</sup>

The chapter 11 cases boiled down to preserving a business so that people collectively could receive more money than if they individually or in batches sued the corporation—a conclusion evident from the cases themselves, not merely because the corporations stated that they filed bankruptcy to help survivors receive as much money as possible. Although not everyone agreed with all of the results, including the amount

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<sup>318</sup> See Kenneth R. Feinberg, *The Dalkon Shield Claimants Trust*, 53 *Law & Contemp. Probs.* 79, 101 (1990) (discussing the procedure in *Robins* for collecting present and future claims).

<sup>319</sup> See *id.* at 102–03 (detailing the claims estimation process).

<sup>320</sup> See *supra* note 178.

<sup>321</sup> See *supra* Subsection II.C.2.

<sup>322</sup> See Georgene M. Vairo, *The Dalkon Shield Claimants Trust: Paradigm Lost (or Found)?*, 61 *Fordham L. Rev.* 617, 638–39 (1992) (overviewing the trust); *supra* notes 179–82 and accompanying text.

<sup>323</sup> See *supra* Subsection II.C.1.

of funds set aside for tort claimants and the process to access the funds, the initial mass tort chapter 11 proceedings were about achieving a productive allocation of resources. Discussions of the filings at the time even mentioned that choosing bankruptcy might bring more scrutiny and questions to companies such that the cost-benefit analysis might tip towards not filing, as one bankruptcy practitioner wrote after the *Robins* case concluded: “From the [debtor’s] perspective, there is the risk that the cloud of uncertainty induced by the bankruptcy process will be more financially harmful than the cloud of tort liabilities that would exist outside of the bankruptcy forum.”<sup>324</sup>

Headliner chapter 11 filings to contend with onslaught litigation are no longer *primarily* about preserving a business or limited to mass tort product liability situations. The for-profit and nonprofit organizations that use chapter 11 now are no longer so worried about uncertainty in the reorganization process or about reputation management *because of* the bankruptcy filing. Filing chapter 11 itself has transformed into a reputation management tool. Corporations do not seek to use bankruptcy primarily as a remedial scheme focused on monetary recovery. Instead, through filing, corporations seek a way out of accountability and litigation. The litigation that organizations seek to deal with in bankruptcy has shifted from product liability with latent claims to harassment, abuse, criminal cover-ups, and lies. Even those filings that center on product liability aim to cabin lawsuits about alleged wrongdoings.

As evidenced by the three case studies, organizations facing onslaught litigation file bankruptcy with the goal of bypassing litigation procedures in a few primary, destructive ways. At the onset, the chapter 11 cases force people to come forward under the auspices of collecting all the potential claims so that assets and other resources may be allocated fairly. But with onslaught litigation, this requirement may cut short the time that people need to be mentally and emotionally prepared to confront abuse, as in the *Archdiocese of Saint Paul & Minneapolis* case.<sup>325</sup> Unlike in product liability mass tort cases, everyone harmed must come forward essentially immediately because the harms are known to them. If the bankruptcy court approves the appointment of the equivalent of a future claims representative, that representative’s power is more limited than in product liability cases because of the difficulty in predicting the number

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<sup>324</sup> Feinberg, *supra* note 318, at 88.

<sup>325</sup> See *supra* notes 223–24 and accompanying text.

of survivors who will come forward in the future. And while a diocese, for instance, may face a few hundred plaintiffs, unlike with mass tort product liability, the number of people potentially harmed rarely reaches the scope of tens of thousands.<sup>326</sup> The urgency of finding a way to fairly adjudicate so many lawsuits falls away in the context of some onslaught litigation.<sup>327</sup>

Additionally, even more so than with product liability, this procedure allows the corporation to more readily assure that discussion of the wrongdoings will not continue to invade operations. Claims from harassment, abuse, and other harmful conduct will not mount year after year, because the chapter 11 case will take care of them all, including releasing third parties who may have helped cover up the problematic behavior. TWC's chapter 11 case was designed, in part, to get releases for directors and executives, including Robert Weinstein, Harvey Weinstein's brother and a company co-founder, who knew about the abuse.<sup>328</sup> Releasing executives who may have concealed abuse is much different than releasing executives whose actions likely come under the purview of director and officer insurance policies.

Simultaneously, the debtor and other parties, such as insurance carriers, may cast doubt on the validity of claims filed, which further facilitates reputation management. Most prominently, in the BSA case, insurance carriers spent months trying to deflect allegations of abuse and blame attorneys for filing false claims.<sup>329</sup> When BSA filed chapter 11, about 275

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<sup>326</sup> The BSA chapter 11 case is an exception to this observation. See *infra* notes 330–32.

<sup>327</sup> See Alexandra Lahav, *The Case for "Trial by Formula,"* 90 *Tex. L. Rev.* 571, 575–76 (2012) (describing the tension between individual liberty and social welfare with mass torts).

<sup>328</sup> Melena Ryzik & Cara Buckley, *Harvey Weinstein Accusers Agree to \$17 Million Settlement*, *N.Y. Times* (July 20, 2021), <https://www.nytimes.com/2021/01/27/movies/harvey-weinstein-settlement.html> [<https://perma.cc/YUP5-W7E7>]. See generally Jodi Kantor & Megan Twohey, *She Said: Breaking the Sexual Harassment Story That Helped Ignite a Movement* (2019) (describing the history of abuse and sexual misconduct by Harvey Weinstein against women).

<sup>329</sup> As of the writing of this Article, the insurance carriers' efforts continue. Chad Hemenway, *Insurers Say 'Bazooka' of Bogus Boy Scouts Claims Is Abuse of Bankruptcy System*, *Ins. J.* (Nov. 10, 2022), <https://www.insurancejournal.com/news/national/2022/11/10/694731.htm> [<https://perma.cc/WWR5-JS94>]; Dietrich Knauth, *Boy Scouts Insurers Say \$2.46 Bln Settlement Inflated by Bogus Claims*, *Reuters* (Nov. 8, 2022 1:47 PM), <https://www.reuters.com/legal/litigation/boy-scouts-insurers-say-246-bln-settlement-inflated-by-bogus-claims-2022-11-08> [<https://perma.cc/88SB-PU7V>]. On March 28, 2023, the district court upheld the bankruptcy court's approval of BSA's reorganization plan. Vince Sullivan, *Boy Scouts Ch. 11 Plan Upheld On Appeal*, *Law360* (Mar. 28, 2023, 10:49 AM), <https://www.law360.com/bankruptcy/articles/1590819> [<https://perma.cc/B97C-VMPD>]. On

lawsuits alleging sexual misconduct were pending and the Boy Scouts reported knowing of 1,400 other abuse claims.<sup>330</sup> More than 82,000 abuse claims initially were filed.<sup>331</sup> Although as with large bankruptcy cases, a portion of the claims were discarded, over 80,000 claims ultimately were wrapped into the final settlement and reorganization plan.<sup>332</sup>

Corporations facing onslaught litigation also now use the chapter 11 process to minimize information discovery and flow. In Bikram and TWC's cases, executives ostensibly hoped to reduce how long scandals remained in the press and social media, while preserving going-concern value by putting investigations on the proverbial back burner. As noted by Melissa Jacoby, "TWC's bankruptcy did not prioritize investigations of assault and employment discrimination on which it blamed its bankruptcy. . . . Instead, under the leadership of Robert Weinstein, TWC went bankrupt to sell itself quickly to a private equity firm."<sup>333</sup>

As detailed above, Purdue Pharma's bankruptcy case drew even more intense scrutiny for sidelining attempts at appointing examiners, squashing "bellwether" litigation, and rushing investigations into the Sacklers' ability to contribute to settlements.<sup>334</sup> Indeed, in the broader context of onslaught litigation, especially when there is some consensus about the veracity of alleged harms, information management may shift to containing disclosures about money made and the full extent of funds available, including those that can be contributed by third parties that seek

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March 31, 2023, the non-settling insurers indicated they would appeal that ruling to the Third Circuit Court of Appeals. Randall Chase, Boy Scouts Bankruptcy Plan Headed to Federal Appeals Court, AP News (Mar. 31, 2023), <https://apnews.com/article/boy-scouts-bankruptcy-appeals-court-9474baf5ba9628cef13ac4f1ffad0a44> [<https://perma.cc/C7RU-X869>].

<sup>330</sup> Becky Yerak & Soma Biswas, Boy Scouts Draw Plan to Settle with Sex-Abuse Victims, Exit Bankruptcy. Here's What We Know., Wall St. J. (Sept. 15, 2021, 4:32 PM), <https://www.wsj.com/articles/the-boy-scouts-bankruptcy-case-what-to-know-11630062000> [<https://perma.cc/K7MR-TAAJ>].

<sup>331</sup> Mike Baker, Sex-Abuse Claims Against Boy Scouts Now Surpass 82,000, N.Y. Times (May 11, 2021), <https://www.nytimes.com/2020/11/15/us/boy-scouts-abuse-claims-bankruptcy.html> [<https://perma.cc/2LZL-ZDVV>].

<sup>332</sup> Lauren del Valle, Judge Grants Final Approval of Boy Scouts of America Reorganization Plan to Pay More than \$2.4 Billion in Sex Abuse Claims, CNN (Sept. 9, 2022, 10:03 PM), <https://www.cnn.com/2022/09/09/us/boy-scouts-of-america-bankruptcy-judge-final-approval/index.html> [<https://perma.cc/A8XZ-8L9N>].

<sup>333</sup> Jacoby, Unbundling Business Bankruptcy Law, *supra* note 90, at 1718–19, 1728 (noting that TWC entered chapter 11 with a deal to sell itself to Lantern Capital); see also Jacoby, *Sorting Bugs and Features*, *supra* note 24 (manuscript at 15) (discussing transparency rules and norms).

<sup>334</sup> See *supra* Section III.B; Lipson, Remedial Schemes, *supra* note 25, at 1795–96 (detailing "structural conflicts" among estate fiduciaries in the *Purdue Pharma* case).

channeling injunctions and releases. This leveraging of the reorganization process focuses less on forcing everyone to come forward immediately, and more on litigation management, such that the lawsuits are resolved swiftly and relatively quietly.

This aspect of silencing is apparent in J&J's and 3M's chapter 11 filings of subsidiaries.<sup>335</sup> By segregating the problematic lawsuits into a portion of the entire corporate family, J&J and 3M seek to expedite the process—the smaller the debtor, the fewer the disclosures and the more contained the settlement and reorganization plan.<sup>336</sup> These cases show that some judges are catching on to this tactic. In the case involving Aeero Technologies, the subsidiary that 3M placed in chapter 11, Bankruptcy Judge Jeffrey J. Graham declined to extend the automatic stay to pending litigation regarding allegedly defective earplugs against 3M.<sup>337</sup> Judge Graham subsequently dismissed the chapter 11 case for lack of a “valid reorganization purpose.”<sup>338</sup> Relatedly, in 3M's pending multidistrict litigation, the federal district court judge stated that 3M has full potential liability and called out the corporation's “brazen abuse of the litigation process.”<sup>339</sup> And the Third Circuit booted J&J's subsidiary, LTL, out of chapter 11.<sup>340</sup>

Along with this expedited process, in the most recent onslaught litigation bankruptcies, the debtor demands that all (or nearly all) would-be plaintiffs agree to the settlement, further supporting the resolution of all discussions of the wrongdoings. *Purdue Pharma* again illustrates debtors' calls for the complete resolution of litigation.<sup>341</sup> It also shows

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<sup>335</sup> See *supra* note 23.

<sup>336</sup> See Casey & Macey, *supra* note 298, at 977 (describing this as allowing “a firm to quarantine mass tort liabilities from operations facilitating resolution in a single, streamlined bankruptcy proceeding”).

<sup>337</sup> *In re Aeero Techs. LLC*, 642 B.R. 891, 896 (Bankr. S.D. Ind. 2022); 3M Combat Earplug Lawsuits to Proceed, Judge Rules, Despite Bankruptcy Case, Reuters (Aug. 26, 2022, 9:24 PM), <https://www.reuters.com/markets/us/3m-subsiariys-bankruptcy-fails-stop-combat-earplug-lawsuits-2022-08-26> [<https://perma.cc/GME4-7UK8>].

<sup>338</sup> *In re Aeero Techs. LLC*, No. 22-bk-02890, 2023 WL 3938436, at \*38 (Bankr. S.D. Ind. June 9, 2023), ECF No. 1744.

<sup>339</sup> Martina Barash, 3M Combat Earplug Judge Blocks Bid to Shift Blame to Aeero Unit, Bloomberg L. (Dec. 22, 2022, 4:58 PM), <https://news.bloomberglaw.com/litigation/3m-combat-earplug-judge-blocks-bid-to-shift-blame-to-aeero-unit> [<https://perma.cc/W8GG-TJTP>].

<sup>340</sup> See *supra* note 272 and accompanying text. This did not prevent LTL from filing chapter 11 again; this second chapter 11 case is pending at the time of this Article's drafting. See *supra* note 23.

<sup>341</sup> See *supra* Section III.B.

how the Code's provisions regarding voting on reorganization plans can be followed such that plans are approved, but relatively few tort claimants actually vote. In *Purdue Pharma*, the nearly 60,000 personal injury claimants who cast votes overwhelmingly approved of the plan, but almost 69,000 claimants did not cast votes.<sup>342</sup> Alex Jones and Infowars's case likewise follows the pattern of seeking a swift resolution of litigation, even if that litigation is in its final stages.

When collected, these tactics squash people's voices, deny them a sense of control over the resolution process for the harms they allege have been perpetrated against them, and largely ensure that they will feel disrespected. They violate the basics of procedural justice. People are less likely to accept the reorganizations' outcomes and are more likely to question the integrity of the business bankruptcy and civil justice systems. The tactics further serve to harm the public's view of the likelihood that corporations will have to answer for their actions. Each successive corporation that files chapter 11 to deal with onslaught litigation contributes to a growing collective disillusion with the economy and businesses. Yet specific corporations (and their owners) still may achieve what they desire—to limit future discussions of their wrongdoings so they can get back to their business freed from negative press and from accountability.

In recent onslaught litigation bankruptcy filings, all of the corporate debtors and their executives justify the filings with language about ensuring that all people who allege harms are treated fairly and evenhandedly and with calls for expediting the process to save resources such that people can recover as much as possible on account of the wrongdoings. But mass tort bankruptcies of the past have provided tort plaintiffs with more voice during the chapter 11 proceedings via discovery and negotiations, at least partially preserved plaintiffs' ability to choose among remedies, and given far fewer third-party releases.

That the most recent onslaught litigation chapter 11 filings amount to a severe stretching of the relief previously afforded has not gone unnoticed by the public, litigants, and some bankruptcy and appellate courts. There has been push back against third-party releases

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<sup>342</sup> See Jacoby, *Sorting Bugs and Features*, supra note 24 (manuscript at 12–14) (discussing how assigning the same voting power to all tort claimants' claims dilutes the power of those people with higher value claims); Lipson, *Remedial Schemes*, supra note 25, at 1791–92 (overviewing how voting was constrained in *Purdue Pharma*).



(successfully in a diocese's case)<sup>343</sup> and expedited timelines, requests for more examination, and calls for tort claimants to have more say during negotiations and the ability to detach individual claims from global settlements.<sup>344</sup> But it should not be largely the work of tort claimants (that is, survivors) to fight against corporations' attempts to force people to come forward and to control the flow of information by leveraging bankruptcy. And tort claimants should not have to wait months or years for objections to corporations' "brazen abuse" of chapter 11 to work their way through appeals before claimants are freed from bankruptcy's hold.<sup>345</sup> There are ways to protect survivors' voices and the justice system's integrity by limiting chapter 11 filings and by imposing stricter requirements for corporations to remain in bankruptcy—many of which can draw from the lessons of recent onslaught litigation bankruptcies. The next Part details those solutions.

#### V. ENSURING VOICE IN BANKRUPTCY

Chapter 11 reorganization was not built with onslaught litigation in mind. The calls for proceeding with caution in the wake of the asbestos cases have gone unheeded and largely forgotten.<sup>346</sup> To rein in this use of chapter 11, we propose that when faced with a bankruptcy filing related to onslaught litigation, it should be presumed that the filing was not made in good faith and should be dismissed. Instead of other parties, such as survivors, having to assert bad faith, the debtor business should have to

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<sup>343</sup> See *supra* notes 236–37 and accompanying text.

<sup>344</sup> In Hertz's chapter 11 case, Judge Mary Walrath ruled that people who accused Hertz of false arrest could sue outside of bankruptcy court. In re Rental Car Intermediate Holdings, LLC, No. 20-bk-11247, slip op. at 15 (Bankr. D. Del. July 14, 2022); Steven Church, Hertz False-Arrest Claimants Allowed to Sue in State Court, Bloomberg (Oct. 11, 2022, 3:47 PM), <https://www.bloomberg.com/news/articles/2022-10-10/hertz-false-arrest-claimants-can-sue-in-state-court-judge-rules> [<https://perma.cc/C425-ZVXX>]. But see James Nani, Bankrupt Long Island Diocese Urged to Mediate to Avoid 'Abyss,' Bloomberg L. (Feb. 21, 2023, 4:22 PM), <https://news.bloomberglaw.com/bankruptcy-law/bankrupt-long-island-diocese-urged-to-mediate-to-avoid-abyss> [<https://perma.cc/Q59X-W7MG>] (reporting on how the bankruptcy judge in Catholic Diocese of Rockville Centre's case pushed survivors and the diocese to negotiate when their requested settlement amounts were \$140 million apart).

<sup>345</sup> Barash, *supra* note 339. It took over fifteen months, from October 14, 2021, to January 30, 2023, for LTL's filing to be dismissed. In re LTL Mgmt., LLC, 64 F.4th 84, 97 (3d Cir. 2023).

<sup>346</sup> See *supra* notes 200–01 and accompanying text.

prove good faith, based on the criteria courts have used to determine that businesses are abusing bankruptcy.<sup>347</sup>

For those organizations that put forth legitimate reasons for using chapter 11, the bankruptcy court must put in place protective measures to guard against the diminishment of people's voices and to ensure public accountability. Although these measures will require longer and potentially more costly cases, the time and expense are necessary to preserve procedural justice, due process, and the integrity of the bankruptcy system. If a debtor business refuses to follow these measures, the case should be dismissed as not being brought in good faith. The most important of these measures are overviewed in the remainder of this Part.

*Admission of Responsibility.* The defendant must admit liability for the acts that it allegedly committed.<sup>348</sup> With onslaught litigation, alleged wrongful actions implicate tortious or abusive conduct and have the ability to affect financial or operational stability. If an organization seeks to use bankruptcy to process and truncate the resolution of these claims, it must not wholly dispute its culpability. Relatedly, the corporate defendant must issue a public statement of responsibility attesting to the role it played in the harm, and the statement must be released such that it is reasonably likely to be noticed by the public.

*No Preliminary Injunctions for Third Parties.* If a corporate defendant seeks to use chapter 11 for onslaught litigation, bankruptcy courts should not use their equitable power to extend preliminary injunctions to third parties who are not the debtor.<sup>349</sup> If third parties—such as individuals,

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<sup>347</sup> 11 U.S.C. § 1112(b); see *In re Nat'l Rifle Ass'n of Am.*, 628 B.R. 262, 281 (Bankr. N.D. Tex. 2021) (“[T]he Court believes the NRA’s purpose in filing bankruptcy is less like a traditional bankruptcy case in which a debtor is faced with financial difficulties or a judgment that it cannot satisfy and more like cases in which courts have found bankruptcy was filed to gain an unfair advantage in litigation or to avoid a regulatory scheme.”). This is a version of the NBRC’s premise that mass tort litigation be mature *and* enterprise threatening. *Nat'l Bankr. Rev. Comm'n*, supra note 200, at 327–28.

<sup>348</sup> See Jacoby, *Sorting Bugs and Features*, supra note 24 (manuscript at 7) (noting that the NBRC “doubted a mass future claims bankruptcy should proceed if the debtor enterprise disclaimed all responsibility”). If a defendant wishes to adjudicate liability, it should not be allowed to use bankruptcy to do that. This will disaggregate the liquidation of claims from ability to pay. See Lipson, *The Rule of the Deal*, supra note 9, at 44 (arguing that “rule of law” questions, such as determining liability in the first instance, do not belong in bankruptcy court). Even if the debtor does admit liability, bankruptcy judges should consider lifting the automatic stay to allow suits in other courts to go forward, thereby allowing other courts to adjudicate the contours of liability—as Judge Walrath did in Hertz’s chapter 11 case. See supra note 344.

<sup>349</sup> See supra notes 124–25 and accompanying text.

related corporate entities, insurers, or suppliers—want to pause litigation against them during the corporate defendant’s chapter 11 case, they will have to file bankruptcy themselves. They thus will have to meet the Code’s requirements, including disclosure requirements. This will increase information flow. If the costs of bankruptcy outweigh its benefits, these third parties will not file. While the corporate defendant’s chapter 11 case is pending, the benefits of chapter 11 will be limited to the defendant debtor.<sup>350</sup>

*No Third-Party Releases and Channeling Injunctions.* Relatedly, with the exception of cases filed to deal with asbestos, bankruptcy courts should not use their equitable power to grant third parties releases and channel claims against third parties to trusts in chapter 11 cases filed to address onslaught litigation.<sup>351</sup> If third parties want to use bankruptcy to resolve related litigation, they will have to file chapter 11 themselves. The discharge of the onslaught litigation indebtedness will be limited to only defendant debtors.<sup>352</sup>

*Presumptive Examiner Appointment.* The Code provides that in certain circumstances, if an examiner is requested in a chapter 11 case, the court *must* appoint such an individual.<sup>353</sup> However, in prior mass tort chapter 11 proceedings, such as Purdue Pharma’s case, bankruptcy judges have declined to appoint an examiner when requested.<sup>354</sup> In onslaught litigation

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<sup>350</sup> Alternatively, there must be a threshold determination that a third party’s participation in the chapter 11 case is necessary such that the third party’s decision not to file chapter 11 itself would be significantly value destroying—for example, to prevent dissipation of assets. We view this as an inferior alternative for promoting voice and accountability, and that it should not be coupled with allowing third-party releases and channeling injunctions. Nonetheless, if so, these third parties must be subject to reporting requirements akin to the level of financial reporting they would be subject to if they had filed bankruptcy themselves.

<sup>351</sup> 11 U.S.C. § 524(g); see also *supra* notes 119–35 and accompanying text.

<sup>352</sup> Alternatively, only *consensual* third-party releases and channeling injunctions should be allowed. This recommendation pairs with allowing claimants to opt-out of the chapter 11 scheme for the adjudication of their individual claims. We view this as an inferior alternative for promoting voice and accountability. If third-party releases and channeling injunctions are allowed at all, there must be the ability, clearly communicated to claimants, that they can opt-out of the chapter 11 case entirely *and* the third parties must be subject to reporting requirements akin to the level of financial reporting they would be subject to if they had filed bankruptcy themselves. The reporting requirements envisioned go beyond those proposed by other scholars. Casey & Macey, *supra* note 298, at 978 (recommending that courts be “aggressive in demanding disclosures” about finances and fraudulent transfers); Simon, *Bankruptcy Grifters*, *supra* note 24, at 1205–10 (proposing more disclosures).

<sup>353</sup> 11 U.S.C. § 1104(c).

<sup>354</sup> See Lipson, *The Rule of the Deal*, *supra* note 9, at 75–76 (“An examiner was proposed early in *Purdue Pharma*. Many personal injury victims apparently wanted one. But Judge

chapter 11 cases, examiner appointment should be presumptive.<sup>355</sup> The burden of proof should be on the defendant debtor to show why an examiner is not needed.

*Multiple Claims Representatives.* Onslaught litigation typically involves hundreds, thousands, or tens of thousands of tort survivors who become claimants when a corporate defendant files chapter 11. Some claimants have already come forward, some will come forward, some may not be ready to come forward, and some may not know they need to come forward because their injuries remain latent. These claimants, even those who have come forward, often hold claims legally distinct from each other. But debtors lump all claimants together, including in weighing votes, resulting in the appointment of one committee to represent current claimants and one future claims representative. Litigation claimants in these chapter 11 cases are not that monolithic and the lack of representation dilutes their voices. Indeed, in writing about mass tort bankruptcies, in her 2000 book published with the Federal Judicial Center, Elizabeth Gibson identified concerns about placing current claimants in a single class in reorganization plans and the use of a single future claims representative.<sup>356</sup>

Going forward, judges overseeing chapter 11 cases dealing with onslaught litigation must consider appointing multiple future claim representatives and how current claimants' interests are represented by committees and in voting procedures.<sup>357</sup> To facilitate this consideration, the debtor defendant should submit detailed information about the range of claims, types of defenses, and timelines for latency. With this information, bankruptcy judges, with the help of the United States Trustee can assess how to ensure that the claimants covered by a representative or by a committee have similar interests, removing the tension among

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Drain forcefully rejected these suggestions.”). Judge Drain eventually appointed an examiner. Maria Chutchian, *Purdue Pharma Bankruptcy Judge OKs Examiner But Condemns Sackler-related Attacks*, Reuters (June 16, 2021, 6:52 PM), <https://www.reuters.com/legal/transactional/purdue-pharma-bankruptcy-judge-oks-examiner-condemns-sackler-related-attacks-2021-06-16/> [<https://perma.cc/82RV-X2PX>].

<sup>355</sup> For this recommendation to comply with the text of 11 U.S.C. § 1104(c), the Office of United States Trustee should be prepared to immediately request an examiner in onslaught litigation chapter 11 cases.

<sup>356</sup> Gibson, *Case Studies*, *supra* note 201, at 14–15, 18–22; see also Gibson, *A Response to Professor Resnick*, *supra* note 201, at 2106–16 (discussing claimants).

<sup>357</sup> See Jacoby, *Sorting Bugs and Features*, *supra* note 24 (manuscript at 14–15) (discussing how the best interests of creditors test is affected by claims estimation).

constituents that committees and future claims representatives currently face.<sup>358</sup>

*Ability to Opt-Out.* Claimants, including future claimants, must have the ability to opt-out of the chapter 11 scheme for purposes of raising their injury outside bankruptcy. Stated differently, plaintiffs will maintain the ability to litigate their claims in district court even if the bankruptcy process is administering the claims of some other would-be plaintiffs. Similarly, if a plaintiff decides to have their claim adjudicated via the chapter 11 process, they must maintain the ability to opt-out of any settlements within the bankruptcy, such as those rolled into reorganization plans. Although this requirement may seem to destroy bankruptcy's collective nature, if claimants receive more information and protections during the process, such as through disclosures, examiners, and representatives, their willingness to agree to submit to the settlement process and reorganization plan vote should increase such that few (if any, depending on the number of litigation claimants) opt out.

For those claimants who agree to the settlement in bankruptcy, they too must have options for adjudicating their individual claims through the resulting trust. As a baseline, a claimant can choose to accept the amount of recovery as formulated by the settlement terms. But they must be afforded an avenue to dispute the recovery amount—essentially to litigate with the trust administrator the value of their claim. And claimants must have the option to make public the result of that determination. So-called secret side-settlements should be prohibited. Preventing information about the dispute and the settlement from being sealed allows information to make its way to other claimants and to the broader public. In addition, if a claimant disputes their claim value as set by the trust administrator, they must have an avenue to appeal to an Article III judge.<sup>359</sup>

*Cutting Off Ancillary Maneuvers.* Finally, the chapter 11 filings of J&J and 3M subsidiaries highlight how corporate defendants currently can engage in venue and judge shopping and use loopholes in fraudulent transfer law to effectuate the so-called Texas Two-Step in particular

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<sup>358</sup> See Gibson, A Response to Professor Resnick, *supra* note 201, at 2106–16 (discussing current and future claimants); Casey & Macey, *supra* note 298, at 1018 (posing “appointing independent board members whose job is to represent tort claimants” as a more radical proposal).

<sup>359</sup> This ability to opt-out will be bolstered by ensuring that the trust reconciliation process is designed with affording claimants with procedural justice in mind. This should increase claimants' willingness to agree to submit to the settlement process and reorganization plan vote.

bankruptcy courts.<sup>360</sup> The ability to forum shop in these ways must be eliminated, which will require legislative action. Enactment of the Bankruptcy Venue Reform Act of 2021 will end venue and judge shopping by amending bankruptcy's venue provisions to provide that large companies and wealthy individuals must file in either their home states (where their principal place of business is located) or where their significant assets are located.<sup>361</sup> If enacted, corporate defendants seeking the benefits of bankruptcy will be unable to “run across the country” and “cherry-pick[] courts that they think will rule in their favor.”<sup>362</sup>

The Texas Two-Step is a controversial process under which certain state corporate laws, including that of Texas, allow a corporation created under that state law to divide itself into two separate corporate entities. One entity receives select liabilities, leaving the other free of those legal obligations. The liability-laden entity files chapter 11. The other entity proceeds with business as usual, without the need to file bankruptcy.<sup>363</sup> To prevent these transactional abuses, bankruptcy courts should deem the corporate divisions and segregation of assets to only one of the surviving companies as fraudulent transfers, which should force all corporate entities to enter chapter 11 to deal with onslaught litigation.

Collectively, for those organizations that seek to reorganize to deal with onslaught litigation, and which survive the initial inquiry into the reasons for their invocation of the chapter 11 process, these measures will realign the balance of power between tort claimants, debtor businesses, and other parties, and safeguard against the concealment of information. If an organization that files chapter 11 in the wake of onslaught litigation

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<sup>360</sup> See Levitin, *Purdue's Poison Pill*, supra note 24, at 1128–31 (discussing venue shopping); Levitin, *The Texas Two-Step*, supra note 24 (discussing how J&J used this process).

<sup>361</sup> Bankruptcy Venue Reform Act, S. 2827, 117th Cong. (2021) (codified as amended at 28 U.S.C. § 1408); Warren, Cornyn Introduce Bill to Prevent Large Corporations From ‘Forum-Shopping’ in Bankruptcy Cases, Elizabeth Warren (Sept. 23, 2021), <https://www.warren.senate.gov/newsroom/press-releases/warren-cornyn-introduce-bill-to-prevent-large-corporations-from-forum-shopping-in-bankruptcy-cases> [https://perma.cc/JCL9-DZN8].

<sup>362</sup> Maria Chutchian, Warren, Cornyn Introduce Bill to Block Judge-Shopping in Bankruptcy, Reuters (Sept. 23, 2021, 4:56 PM), <https://www.reuters.com/legal/transactional/warren-cornyn-introduce-bill-block-judge-shopping-bankruptcy-2021-09-23> [https://perma.cc/7Y6E-2V8C].

<sup>363</sup> See Levitin, *The Texas Two-Step*, supra note 24 (discussing this process); Samantha Goldstein, *The Texas Two-Step: A Controversial Bankruptcy Dance*, U. Miami L. Rev. News (May 3, 2022), <https://lawreview.law.miami.edu/the-texas-two-step-a-controversial-bankruptcy-dance> [https://perma.cc/KP7T-AQ82] (same).

refuses to agree to these protections, it should not be allowed to resolve the litigation through bankruptcy.

#### CONCLUSION

Scott Hershovitz has warned that tort theory tends to neglect the procedural dimensions of tort law, thereby overlooking how justice is administered (or not) between survivors and wrongdoers.<sup>364</sup> For-profit and nonprofit organizations have learned how to move onslaught litigation to the bankruptcy system, in part to similarly shift away from the procedural justice and due process that the civil litigation system affords plaintiffs. As Alexandra Lahav has written, the idea “that every person should be entitled to [their] day in court” lies “at the heart of the [American] legal system.”<sup>365</sup> By funneling onslaught litigation into bankruptcy, corporate defendants use chapter 11 to deny people the ability to participate in the justice process and to hurriedly shut down the truth telling and concomitant public airing that can come from that process. This Article shows how the reorganization process has been twisted to resolve onslaught litigation such that now its use is largely inappropriate. With the understanding that some businesses will have legitimate reasons to file chapter 11 when facing onslaught litigation, it offers a narrow path for resolving these disputes in chapter 11 through the implementation of necessary guardrails and assurances that those harmed will maintain their voice.

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<sup>364</sup> Scott Hershovitz, *Harry Potter and the Trouble with Tort Theory*, 63 *Stan. L. Rev.* 67, 68–69 (2010).

<sup>365</sup> Alexandra Lahav, *In Praise of Litigation*, 112, 114 (2017). See generally Maya Steinitz, *The Case for an International Court of Civil Justice* (2019) (detailing the access to justice and day in court virtues of the civil justice system, including in mass tort cases).