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Bankruptcy Grifters

ABSTRACT. Grifters take advantage of situations, latching on to others for benefits they do not deserve. Bankruptcy has many desirable benefits, especially for mass-tort defendants. Bankruptcy provides a centralized proceeding for resolving claims and a forum of last resort for many companies to aggregate and resolve mass-tort liability. For the debtor-defendant, this makes sense. A bankruptcy court's tremendous power represents a well-considered balance between debtors who have a limited amount of money and many claimants seeking payment.

But courts have also allowed the Bankruptcy Code's mechanisms to be used by solvent, nondebtor companies and individuals facing mass-litigation exposure. These "bankruptcy grifters" act as parasites, receiving many of the substantive and procedural benefits of a host bankruptcy, but incurring only a fraction of the associated burdens. In exchange for the protections of bankruptcy, a debtor incurs the reputational cost and substantial scrutiny mandated by the bankruptcy process. Bankruptcy grifters do not. This dynamic has become evident in a number of recent, high-profile bankruptcies filed in the wake of pending mass-tort litigation, such as the Purdue Pharma and USA Gymnastics suits.

This Article is the first to call attention to the growing prevalence of bankruptcy grifters in mass-tort cases. By charting the progression of nondebtor relief from asbestos and product-liability bankruptcies to cases arising out of the opioid epidemic and sex-abuse scandals, this Article explains how courts allowed piecemeal expansion to fundamentally change the scope of bankruptcy protections. This Article proposes specific procedural and substantive safeguards that would deter bankruptcy-grifter opportunism and increase transparency, thereby protecting victims as well as the bankruptcy process.

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INTRODUCTION

In 2017, Olympic gold medalist McKayla Maroney[1] sued the United States Olympic and Paralympic Committee (USOPC) in connection with the horrific Larry Nassar sex-abuse scandal.[2] Today, she is trapped in the matrix of bankruptcy because USOPC is a bankruptcy grifter—a parasite that embedded itself within the Chapter 11 case of USA Gymnastics (USAG).[3] Although USOPC is a solvent entity with hundreds of millions of dollars of assets,[4] Ms. Maroney and other abuse claimants now have no choice but to pursue their claims in bankruptcy court.[5] How is this possible? USOPC did not file for bankruptcy, but by latching itself onto the USAG bankruptcy, it now seeks to receive the benefits of a Chapter 11 reorganization without incurring any of the associated costs.[6] USOPC is the prototypical bankruptcy grifter.[7]

Bankruptcy grifters like USOPC are not created by the Bankruptcy Code. Instead, it is judges, reviewing difficult restructurings under dire circumstances, who grant them access to the bankruptcy system. Case by case, exception by exception, bankruptcy grifters have infiltrated the Chapter 11 process. Over the past few years, mass litigation arising out of the opioid crisis—including the bankruptcy cases of opioid manufacturers Purdue Pharma and Mallinckrodt—has

1. McKayla Maroney was a vaulting specialist on the famed 2012 American women's gymnastics team.

2. Will Hobson, *McKayla Maroney Sues USA Gymnastics, Saying It Tried to Buy Her Silence on Abuse*, WASH. POST (Dec. 20, 2017), https://www.washingtonpost.com/sports/mckayla-maroney-sues-usa-gymnastics-saying-it-tried-to-buy-her-silence-on-abuse/2017/12/20/1e54b482-e5c8-11e7-a65d-1ac0fd7f097e_story.html [https://perma.cc/T538-AC88].

3. Maroney's suit also named USA Gymnastics (USAG), but she dismissed those claims in 2018. *See* Notice of Dismissal Pursuant to Federal Rules of Civil Procedure 41(a) or (c), Maroney v. Mich. State Univ., No. 2:18-cv-03461-JLS-KESx (C.D. Cal. July 17, 2018) (dismissing USAG from the complaint).

4. Grant Thornton LLP, *Consolidated Financial Statements and Report of Independent Certified Public Accountants*, U.S. OLYMPIC & PARALYMPIC COMM. 5 (June 22, 2020), https://2019impactreport.teamusa.org/USOPC-2019-Consolidated-Financial-Statement.pdf [https://perma.cc/4ELL-FN79].

5. Maroney is not one of USAG's creditors, which under bankruptcy law means she does not get to vote against the plan that would impact her legal rights. *See* 11 U.S.C. § 1126(a) (2018) ("The holder of a claim or interest . . . may accept or reject a plan.").

6. Under the approved USAG bankruptcy resolution, the United States Olympic and Paralympic Committee (USOPC) is forever released from liability, and all abuse claims against it will be permanently funneled into a trust. *See infra* Section III.B.1.

7. USOPC is not the only bankruptcy grifter in the USAG bankruptcy. The case is also being used to finalize settlements against an individual gymnastics facility and its owners, among others. *See infra* note 205 and accompanying text (discussing the Twistars parties).

shifted from state and federal systems to bankruptcy courts. The same has occurred in sex-abuse cases, including those involving the Boy Scouts of America (BSA), USAG, and multiple Catholic dioceses. In each of these examples, bankruptcy grifters seek to join the debtor in resolving mass-tort litigation through Chapter 11's procedures without filing for bankruptcy themselves.

This is an appealing approach for many stakeholders because it allows much-needed resources to reach victims through a large settlement scheme. The outcome of a bankruptcy case can bind absent parties, a significant feature that sets it apart from nearly all forms of civil litigation. Mass-tort defendants, eager for the binding finality of a confirmed Chapter 11 plan, are often willing to settle in bankruptcy for terms that would not be possible in other fora. The only problem is that most mass-tort defendants do not want—or do not qualify—to file for bankruptcy. Savvy defendants like the Sacklers,[8] Honda,[9] Wal-Mart,[10] and USOPC[11] have found a way to get this relief without filing Chapter 11, offering money to claimants and threatening to implode settlements unless they receive injunctions and releases in bankruptcy court. Judges, believing in the precarious nature of negotiations and the value of global resolution, allow nondebtors to absorb benefits that Congress designed for debtors only. Bankruptcy grifters are like a Trojan horse in the bankruptcy system, undermining the integrity of the bankruptcy process at the expense of claimants who will lose procedural protections and rights.

Bankruptcy operates in an alternate universe from most civil litigation. Each case complies with the basic parameters of the Bankruptcy Code, but it is bankruptcy courts' common-law development of creative mechanisms that drives most outcomes. This laboratory approach stems from stark realities. In bankruptcy, companies are at risk, valuable assets are deteriorating, and jobs hang in the balance. Within our legal system, few resolution structures exist to imagine and carry out competing stakeholders' intent when faced with a grim and unanticipated financial reality.[12] Bankruptcy imposes certainty and order among categories of creditors, provides repose from litigation and business chaos during

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8. *See infra* Section III.A.1.

9. *See infra* Part II.

10. *See infra* Section I.C.

11. *See infra* Section III.B.1.

12. Bankruptcy scholars discuss the fundamental core of corporate restructuring as arising from the "creditors' bargain" theory and expanding to related concepts. *See, e.g.*, 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 underlies the creditors' bargain model); Anthony J. Casey, *Chapter 11's Renegotiation Framework and the Purpose of Corporate* the Chapter 11 case, and restricts the debtor from improperly managing its threatened affairs. The Chapter 11 process is open and available for distress of all forms, but its rigor and adaptability are derived from a laser focus on maximizing value and preserving the estate.

Channeling injunctions and releases are the primary benefit that bankruptcy grifters seek in Chapter 11. When a bankruptcy court approves a channeling injunction as part of a plan of reorganization, it creates a dedicated quasilitigation path to resolve claims against the debtor (and potentially also against nondebtors) and releases the debtor from further liability. The channeling injunction usually funnels claimants into a dispute-resolution trust system created by the debtor, complete with debtor-created evidentiary standards, appeals processes, claims-payment regimes, and arbiter selections. These resolution systems, on average, do not have the procedural protections that accompany Article III review in a class action or multidistrict litigation (MDL) proceeding. From a claimant's perspective, channeling injunctions may extinguish their litigation against a bankruptcy grifter, force them to recover from a limited pot of money, and be approved on a timeline that does not allow the claimant to conduct sufficient discovery or receive a voice in the process. Procedural concerns abound in aggregate litigation. If left unchecked, bankruptcy can serve as an accelerant for the gravest due-process threats facing mass-tort victims.

In Part I, this Article identifies the litigation benefit that bankruptcy grifters may receive in bankruptcy through use of the channeling injunction. It begins by tracing and discussing the origin of channeling injunctions in asbestos cases. Faced with asbestos debtors' staggering liability to current and future victims, judges evaluating asbestos bankruptcies approved a channeling device to preserve funding for victims experiencing latent harm, collect and equitably distribute insurance-policy proceeds and other contributions in a trust structure, and allow companies to successfully reorganize and move on from asbestos liability. Congress codified channeling injunctions for asbestos cases in § 524(g) of the Bankruptcy Code, which sets out specific criteria for nondebtors seeking the benefits of the device.[13]

Bankruptcy, 120 COLUM. L. REV. 1709, 1709 (2020) ("The sole purpose of corporate bankruptcy law is to solve the incomplete contracting problem that accompanies financial distress."); Kenneth Ayotte & David A. Skeel Jr., *Bankruptcy Law as a Liquidity Provider*, 80 U. CHI. L. REV. 1557, 1557 (2013) (presenting an argument that "expands the prevailing normative theory of corporate bankruptcy—the Creditors' Bargain theory—to include a role for bankruptcy as a provider of liquidity").

13. 11 U.S.C. § 524(g) (2018).

Next, this Article analyzes cases where nondebtor defendants have appropriated channeling injunctions to resolve other mass-tort liability via the bankruptcy court's equitable power under § 105.[14] Though Congress never contemplated channeling injunctions outside of the asbestos context, courts have approved the device for different categories of nondebtors in many varieties of mass-tort cases. What started primarily as a tool for the debtor's insurers to compensate asbestos victims has expanded in recent cases to include settlement-hungry codefendants who have only tangential legal connections to the debtor's estate. Willingness to cut a large check to claimants cannot alone be the price of admission to Chapter 11's benefits. Part II explores the *Takata* case to show how channeling injunctions and nondebtor releases can be used to resolve a mass-tort bankruptcy. By collecting and evaluating mass-tort bankruptcies arising out of the opioid crisis and sex-abuse scandals, Part III of this Article traces the increase of bankruptcy grifters seeking relief in Chapter 11. It also identifies core shortcomings that appear in mass-tort bankruptcies and observes the negative impact that nondebtor channeling injunctions may have on mass-tort claimants.

In doing so, this Article departs from long-held views in existing scholarship about nondebtor relief by demanding additional disclosure and scrutiny of bankruptcy grifters. Debates over whether bankruptcy courts can release nondebtors under the Code, the Constitution, or other sources of power remain important, but the current state of play presupposes and expands that authority.[15] Despite an ongoing circuit split, bankruptcy courts in some jurisdictions continue to provide such relief, and have done so for three decades without interference from Congress or the Supreme Court.[16]

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14. *See infra* Section I.C.

15. For a discussion of scholarship debating the possibility of nondebtor relief, see *infra* Section I.B.

16. A minority of jurisdictions, including the Fifth, Ninth, and Tenth Circuit Courts of Appeal, have rejected the possibility of third-party releases. *See* Bank of N.Y. Tr. Co. v. Off. Unsecured Creditors' Comm. (*In re* Pac. Lumber Co.), 584 F.3d 229, 252 (5th Cir. 2009); Resorts Int'l, Inc. v. Lowenschuss (*In re* Lowenschuss), 67 F.3d 1394, 1401-02 (9th Cir. 1995); Landsing Diversified Props.-II v. First Nat'l Bank & Tr. Co. of Tulsa (*In re* W. Real Est. Fund, Inc.), 922 F.2d 592, 600 (10th Cir. 1990). The majority of circuits have held that nondebtor releases are always allowable when given with consent, and may be approved without creditor consent in rare circumstances. *See* SE Prop. Holdings, LLC v. Seaside Eng'g & Surveying, Inc. (*In re* Seaside Eng'g & Surveying, Inc.), 780 F.3d 1070, 1076 (11th Cir. 2015); Class Five Nev. Claimants v. Dow Corning Corp. (*In re* Dow Corning Corp.), 280 F.3d 648, 656 (6th Cir. 2002); Gillman v. Cont'l Airlines (*In re* Cont'l Airlines), 203 F.3d 203, 211 (3d Cir. 2000); *In re* Specialty Equip. Cos., 3 F.3d 1043, 1047 (7th Cir. 1993); Menard-Sanford v. Mabey (*In re* A.H. Robins Co.), 880 F.2d 694, 702 (4th Cir. 1989); MacArthur Co. v. Johns-Manville Corp. (*In re* Johns-Manville Corp.), 837 F.2d 89, 93 (2d Cir. 1988); *see also* Gary Svirsky, Tancred Schiavoni, Andrew Sorkin & Gerard Savaresse, *A Field Guide to Channeling Injunctions and*

This Article's most important contribution is articulating when and how courts should grant relief to bankruptcy grifters, not whether they have authority to do so. In Part IV, this Article provides a framework to bankruptcy courts that protects due process and preserves procedural justice when nondebtor involvement is necessary for an effective reorganization by proposing a number of potential statutory and judicial solutions to increase oversight over bankruptcy grifters' use of channeling injunctions and releases. These measures, including increased disclosure and discovery obligations and minimal substantive protections for channeled claims, serve two purposes. First, they give all stakeholders better information about whether the nondebtor's involvement and contribution are sufficient. If an entity wants to adopt the debtor's ability to channel and release claims, it should comply with certain of the core disclosure obligations required of the debtor. Second, the proposed requirements increase the cost of obtaining Chapter 11 relief in a way that may deter the most opportunistic bankruptcy grifters from looking to bankruptcy as a procedural panacea.

I. THE CHAPTER 11 ENDGAME FOR MASS-TORT LITIGATION

The headlines are full of mass-tort defendants and their victims' stories. From litigation over faulty products[17] to dangerous marketing[18] to abhorrent abuse,[19] mass-tort cases serve to impose consequences on bad actors and compensate victims of some of the most catastrophic situations imaginable. Mass-tort plaintiffs have the initial choice of where to bring their claims, but the reality is that many tort cases shift from state or federal court to the bankruptcy system by the defendant's choice to file for Chapter 11. This Part introduces bankruptcy as a common endgame for mass-tort cases by identifying key features of the bankruptcy process that are appealing to mass-tort defendants (Section I.A). After describing the fundamental elements of a Chapter 11 case and common characteristics of mass-tort cases, this Part outlines two key features available to

Litigation Trusts, 260 N.Y. L.J., July 16, 2018 (reviewing the use of nondebtor channeling injunctions and releases outside of the asbestos context).

17. *See, e.g.*, Mike Hughlett, *Latest Trial over Allegedly Defective Earplugs Goes Against 3M*, STAR TRIB. (Oct. 1, 2021, 4:37 PM), https://www.startribune.com/latest-trial-over-allegedly-defective-earplugs-goes-against-3m/600102810 [https://perma.cc/9ANK-LYW6].

18. *See, e.g.*, Joe Hernandez, *Johnson & Johnson Targeted Black Women with Products Linked to Cancer, Lawsuit Says*, NPR (July 29, 2021, 3:28 PM ET) https://www.npr.org/2021/07/29/1022355144/johnson-johnson-targeted-black-women-powder-products-cancer-lawsuit [https://perma.cc/P2HU-CM9Y].

19. *See, e.g.*, Madeline Holcombe & Lauren del Valle, *Lawsuit Alleges Past Culture of Sexual Abuse at University of North Carolina School of the Arts*, CNN (Oct. 5, 2021, 12:03 AM ET) https://www.cnn.com/2021/10/05/us/sexual-abuse-lawsuit-north-carolina-school-of-the-arts/index.html [https://perma.cc/92XC-N4QD].

mass-tort defendants in bankruptcy: channeling injunctions and releases (Section I.B). It then traces the origin of these debtor and nondebtor remedies from asbestos bankruptcies to other mass-tort cases (Section I.C).

A. Benefits of Bankruptcy for Mass-Tort Litigation Defendants

The common trajectory of mass-tort litigation ending in bankruptcy is both predictable and logical. Litigation is expensive and exposure to liability on a broad level can quickly exhaust insurance and cash reserves. Two main factors drive mass-tort bankruptcies: first, the reality that a company does not have enough money to pay claimants; and second, the value of filing as a strategic maneuver to effectuate or coerce a global settlement. The former reason is intuitive, but the latter may be a bit perplexing. Why does a Chapter 11 filing yield such power over negotiations? Answering this question requires a basic understanding of the bankruptcy system and the ways that bankruptcy rules impact mass-tort defendants.

1. The Allure and Expense of Bankruptcy

Chapter 11 is a forum focused on reorganizing struggling businesses that are often encumbered by unmanageable debt.[20] Though companies traditionally viewed bankruptcy as a last resort, businesses are increasingly using Chapter 11 filings as an efficient way to deal with outsized liabilities and debt.[21] That is, companies are using bankruptcy not merely because they are insolvent, but in an effort to escape unwanted obligations.[22] This approach is possible because core features built into the Bankruptcy Code allow businesses to discharge burdensome debts and liabilities.[23] The Code does this by encouraging reorganizations both through its explicit provisions and by enabling out-of-court restructuring.[24]

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20. Douglas G. Smith, *Resolution of Mass Tort Claims in the Bankruptcy System*, 41 U.C. DAVIS L. REV. 1613, 1634 (2008).

21. This Article focuses on corporate reorganization under Chapter 11 of the Bankruptcy Code, where bankruptcy grifters have taken hold.

22. Andrew M. DiPietro, Jr. & Barbara Hadley Katz, *Chapter 11 of the Bankruptcy Code—Use or Abuse?*, 57 CONN. BAR J. 418, 418 (1983) (quoting Susan Dentzer, Peter McAlevey, Daniel Shapiro & Diane Weathers, *Is Bankruptcy Misused?*, NEWSWEEK, Oct. 10, 1983, at 68).

23. Ralph Brubaker, *Bankruptcy Injunctions and Complex Litigation: A Critical Reappraisal of Non-Debtor Releases in Chapter 11 Reorganizations*, 1997 U. ILL. L. REV. 959, 961.

24. Kenneth N. Klee, *Bankruptcy and Commercial Law: Creation of the Chapter 11 Reorganization Option*, 25 L.A. LAW. 24, 24-25 (2002).

Bankruptcy offers procedural benefits to mass-tort defendants. In particular, filing for bankruptcy entails an automatic stay that, as of the moment the debtor files its petition, pauses nearly all pending litigation.[25] One challenge facing mass-tort defendants is the claimants' race to courthouses to collect awards before the money runs out.[26] Filing for bankruptcy stops the progression of cases at different timelines on multiple fronts and centralizes the core issues in one forum, at one time. This incredibly valuable benefit flows automatically to debtors, but may be extended by court order to nondebtor parties as well.[27]

Substantively, the bankruptcy process benefits mass-tort defendants by binding absent parties and discharging liabilities. Many businesses discharge tort liability in bankruptcy, but mass-tort cases have perhaps the most to gain from this remedy.[28] Bankruptcy can be used not only to settle defendants' existing noncontingent liabilities, but also to discharge claims of unknown future claimants whose injuries have not yet manifested.[29] This is possible because the Code defines a "claim" to include any "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, ma-

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25. Notable exceptions include the police- and regulatory-power exception to the automatic stay. *See* Lindsey Simon, *Chapter 11 Shapeshifters*, 68 ADMIN. L. REV. 233, 238-40 (2016) (describing the exception as applied to administrative agencies). This exception plays a prominent role in cases where states are among the claimants, as occurred in *Takata* and the opioid cases of Purdue Pharma and Insys Therapeutics. *See* Verified Complaint for Injunctive Relief at 1, *In re* TK Holdings Inc., No. 17-11375-BLS (Bankr. D. Del. July 13, 2017); Amanda Bronstad, *5 State AGs Oppose Bankruptcy Stay in Their Opioid Cases Against Insys*, DEL. L. WKLY. (July 1, 2019, 7:35 PM), https://www.law.com/delawarelawweekly/2019/07/01/5-state-ags-oppose-bankruptcy-stay-in-their-opioid-cases-against-insys [https://perma.cc/T5U2-S3FH].

26. *See, e.g.*, Bruce L. Hay, *The Theory of Fee Regulation in Class Action Settlements*, 46 AM. U. L. REV. 1429, 1470 (1997) ("Thus, for example, in a mass tort setting, a settlement might be relatively generous to claimants who have already brought suit, while leaving little money available for future claimants.").

27. The Purdue Pharma case offers one example of imposing a bankruptcy pause on claims against nondebtors. *See, e.g.*, Purdue Pharma L.P. v. Massachusetts (*In re* Purdue Pharma L.P.), No. 19-23649 (Bankr. S.D.N.Y. Oct. 11, 2019) (order pursuant to 11 U.S.C. § 105(a) granting, in part, motion for a preliminary injunction).

28. S. Elizabeth Gibson, Commentary, *A Response to Professor Resnick: Will this Vehicle Pass Inspection?*, 148 U. PA. L. REV. 2095, 2099-2105 (2000); *see also* Smith, *supra* note 20, at 1615 ("As a result, there has been a substantial increase in the number of companies seeking refuge from such claims under the bankruptcy laws.").

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

tured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured."[30] The broad definition of "claim" along with the bankruptcy court's equitable powers of injunction and release—discussed in Section I.B—have encouraged the use of bankruptcy to address mass torts.

The bankruptcy process also imposes costs on mass-tort defendant debtors. Chapter 11 provides for representative oversight through the presence of the United States Trustee, a government watchdog assigned to evaluate the debtor's compliance with the Bankruptcy Code,[31] as well as official and unofficial committees (in mass-tort cases, there is commonly a committee comprised of tort claimants) who advocate and negotiate on behalf of absent parties.[32] Debtors must comply with the Bankruptcy Code's robust disclosure provisions that require turning over significant information that might not otherwise be available outside bankruptcy or in the course of discovery.[33] Furthermore, debtors are constrained in how they operate during a Chapter 11 case, and must seek court approval before making decisions outside of the ordinary course of business.[34] The bankruptcy judge can unwind any actions that conflict with what the Bankruptcy Code permits.

2. *Elements of Mass-Tort Cases*

Many debtors will list tort litigants among their creditors, but this Article is concerned with litigation arising out of widespread harm. Mass torts usually involve a company's (or its employees') harmful actions.[35] Mass-tort liability arises in a variety of business contexts, such as dangerous pharmaceutical drugs, asbestos, diethylstilbestrol (DES),[36] or a pattern of abusive behavior over decades. In these cases, companies face many claims, often across a wide geographic

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30. 11 U.S.C. § 101(5)(A) (2018).

31. For a discussion of the unique role of the U.S. Trustee, see Lindsey D. Simon, *The Guardian Trustee in Bankruptcy Courts and Beyond*, 98 N.C. L. REV. 1297, 1304-14 (2020).

32. *See, e.g.*, 11 U.S.C. § 705 (2018).

33. *See, e.g.*, *id.* § 521(a); FED. R. BANKR. P. 2015.

34. *See* 11 U.S.C. § 1108 (2018).

35. Resnick, *supra* note 29, at 2045; *see also* Smith, *supra* note 20, at 1617 (describing mass-tort liability on products from breast implants to silica); 2 THOMAS J. SALERNO, CRAIG D. HANSEN & G. CHRISTOPHER MEYER, ADVANCED CHAPTER 11 BANKRUPTCY PRACTICE § 14.55, at 373-74 (2d ed. 1996) ("Mass torts typically arise in the products liability area, when some widely used substance or product somehow is linked to the injury of people and/or their property on a massive scale.").

36. *See* Mark J. Roe, *Bankruptcy and Mass Tort*, 84 COLUM. L. REV. 846, 846 (1984); Smith, *supra* note 20, at 1617.

range.[37] Another unique feature of mass torts—and a reason why bankruptcy is an attractive forum—is the possibility of latent claims where an injury may not manifest immediately, but instead only years later.[38] Latent harm is most obvious in asbestos and product-liability cases, but it could also apply in other contexts where the harm builds up over time[39] or where claims are not yet legally recognized.[40]

A mass-tort case may have hundreds of thousands of victims.[41] As liability accrues, it eventually poses a threat to the company's survival.[42] Facing such massive exposure, companies turn to bankruptcy to avoid the destruction of their business.[43] For this reason, dozens of asbestos companies used bankruptcy to settle their personal-injury claims.[44] The shift to bankruptcy has been further accelerated by perceived shortcomings in the civil-court systems.[45] First, the

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37. Smith, *supra* note 20, at 1617.

38. 2 SALERNO ET AL., *supra* note 35, § 14.55, at 3743535.

39. For example, the National Football League (NFL) Chronic Traumatic Encephalopathy mass-tort litigation involves brain injuries that do not manifest for years. *See generally* Lindsey D. Simon, *The Settlement Trap*, 96 IND. L.J. 661 (2021) (outlining key characteristics of the NFL traumatic brain injury multidistrict litigation (MDL) case).

40. For example, state laws on sexual-abuse statutes of limitations are shifting; while the victims no doubt are aware of their injuries, they may be ineligible to bring claims until the legal landscape shifts further. *See* Debtors' Informational Brief at 32-34, *In re* Boy Scouts of Am., No. 20-10343 (Bankr. D. Del. Feb. 18, 2020) (describing the changes to sexual-abuse statutes and how such changes significantly increased the debtor's litigation exposure).

41. *See* Resnick, *supra* note 29, at 2045; Smith, *supra* note 20, at 1618. Many also recognize that the structure of mass-tort liability itself is in a state of crisis, and that courts have either been unwilling or unable to fix the problems such litigation poses. *See* Smith, *supra*, at 1617 (quoting sources characterizing the situation as a "serious problem," a "dilemma," and a "disaster" (citations omitted)).

42. Resnick, *supra* note 29, at 2046.

43. *See id.* at 2045-46; *see also* Gibson, *supra* note 28, at 2095-96 (identifying bankruptcy as a vehicle for resolving mass-tort exposure); Smith, *supra* note 20, at 1622 ("Beginning in the 1980s, companies that manufactured asbestos-containing materials such as Johns-Manville and Raybestos were forced into Chapter 11 bankruptcy after being deluged with waves of asbestos-related claims.").

44. *See* Resnick, *supra* note 29, at 2046 (citing *In re* Johns-Manville Corp., 36 B.R. 743, 744 (Bankr. S.D.N.Y. 1984); Owens-Ill., Inc. v. Rapid Am. Corp. (*In re* Celotex Corp.), 124 F.3d 619, 622 (4th Cir. 1997); *In re* Eagle-Picher Indus., 197 B.R. 260, 263-64 (Bankr. S.D. Ohio 1996); *In re* Keene Corp., 208 B.R. 112, 113 (Bankr. S.D.N.Y. 1997)); *see also* Joshua M. Silverstein, *Overlooking Tort Claimants' Best Interests: Non-Debtor Releases in Asbestos Bankruptcies*, 78 UMKC L. REV. 1, 2 (2009) ("More than seventy firms have declared bankruptcy as a result of asbestos liability.").

45. *See* Smith, *supra* note 20, at 1627.

sheer number of claims at issue preclude mass-tort litigation from being adjudicated on a case-by-case basis both because of the administrative burdens and the costs that would be imposed.[46] Additionally, some litigants and commentators view class actions, negotiated settlements, and legislative and administrative solutions as impractical or inefficient ways to resolve mass torts.[47] All of this, plus the uniquely beneficial substantive and procedural tools offered by Chapter 11, have increased bankruptcy's stock as a forum of choice to resolve mass-tort liability.[48]

The following Section describes nondebtor releases and channeling injunctions, two related concepts that spur businesses facing mass-tort liability to view bankruptcy as a favorable forum.[49]

B. Channeling Injunctions and Nondebtor Releases

Bankruptcy offers significant advantages for businesses seeking to address mass-tort liability.[50] Businesses using bankruptcy to obtain relief from mass-tort

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46. *Id.* at 1617; *see id.* at 1627-29.

47. *See id.* at 1631-34. Notwithstanding these criticisms, many scholars think civil courts provide a useful, if imperfect, forum for claim aggregation and resolution, and dedicate entire research agendas to evaluating and improving various elements of these processes. *See, e.g.*, Lynn A. Baker & Charles Silver, *In Defense of Private Claims Resolution Facilities*, 84 L. & CONTEMP. PROBS. 45, 45-47 (2021); Francis E. McGovern & William B. Rubenstein, *The Negotiation Class: A Cooperative Approach to Class Actions Involving Large Stakeholders*, 99 TEX. L. REV. 73 (2020); Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 CALIF. L. REV. 1259 (2017); David M. Jaros & Adam S. Zimmerman, *Judging Aggregate Settlement*, 94 WASH. U. L. REV. 545 (2017). Creative attorneys continue to test the availability of aggregate-litigation devices to address this challenge. One example is the negotiation class device that parties and the court attempted to create, albeit unsuccessfully, in the opioid MDL. *See, e.g.*, Emily Field, *6th Circ. Questions Opioid Negotiation Class 'Inventiveness*,' LAW360 (July 28, 2020, 11:06 PM EDT), https://www.law360.com/articles/1295895 [https://perma.cc/664U-RF2Z] (explaining the creative approach to resolving the opioid litigation but highlighting the challenge of binding absent parties in ways the Supreme Court has rejected for most class actions).

48. *See* Yair Listokin & Kenneth Ayotte, *Protecting Future Claimants in Mass Tort Bankruptcies*, 98 NW. U. L. REV. 1435, 1436 (2004).

49. MICHAEL DORE, 2 LAW OF TOXIC TORTS § 20:13.20 (2021) (describing the difficulties for tort creditors in bankruptcy by virtue of the development of third-party releases and channeling injunctions).

50. Bankruptcy is a powerful process that offers numerous benefits, many of which are unavailable in other litigation forums. Some examples include the ability to bring all relevant parties to one forum and halt related litigation pending elsewhere, mandate disclosures and representative protections, and consolidate, quantify, and finally address all current and future claims. Smith, *supra* note 20, at 1634-35.

liability have also brought with them relief for nondebtor third parties. At one point, the bankruptcy court's authority to finally resolve mass-tort cases for nondebtors was unclear,[51] and cases relying on the Code to settle liability generated significant controversy.[52] The practice, however, has persisted for almost forty years as mass-tort litigation has grown, and court after court has refused to invalidate plans bearing nondebtor remedies designed to address mass-tort liability.[53] Courts make use of two devices to assist nondebtors in mass-tort bankruptcies: channeling injunctions and nondebtor releases.[54] These tools work together to provide relief to entities that are neither insolvent nor filing for bankruptcy.

A channeling injunction is a bankruptcy-created device that permanently enjoins all claims against certain parties, and instead funnels those claims into a trust. Channeling injunctions were developed to deal with the practically limited discharge bankruptcy offers and the endless liability mass torts can pose.[55] Channeling injunctions are considered necessary because it is unclear whether future claimants hold "claims" that are dischargeable in bankruptcy.[56] Typically, channeling injunctions require all claimants, both current and future, to settle post-confirmation claims against a specified trust.[57] A plan usually creates a trust funded by the estate that assumes the debtor's (that is, the corporation's) current and future liabilities to tort victims.[58] Then, upon plan confirmation, the court issues a channeling injunction that releases the debtor and specified third parties from liability, permitting injured parties to assert claims exclusively against the

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51. *See* Resnick, *supra* note 29, at 2046 ("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.").

52. *See infra* notes 76-80 and accompanying text (discussing scholarly debate of nondebtor relief).

53. *See* 2 SALERNO ET AL., *supra* note 35, § 14.55, at 37535 ("[T]he trend appears to be in favor of allowing the issuance of channeling injunctions to facilitate the resolution of mass tort problems through Chapter 11 reorganization."); *see also* Smith, *supra* note 20, at 1651-52 (explaining that courts have affirmed bankruptcy jurisdiction over nondebtors' claims).

54. *See* Svirsky et al., *supra* note 16, at 3.

55. *See* 2 SALERNO ET AL., *supra* note 35, § 14.55, at 375.

56. *See* Silverstein, *supra* note 44, at 14.

57. *See* S. Todd Brown, *How Long is Forever This Time? The Broken Promise of Bankruptcy Trusts*, 61 BUFF. L. REV. 537, 544-45 (2013); *see also* Francis E. McGovern, *The Evolution of Asbestos Bankruptcy Trust Distribution Plans*, 62 N.Y.U. ANN. SURV. AM. L. 163, 164 (2006) (describing the process to approve a bankruptcy trust).

58. *See* DORE, *supra* note 49, at § 20:13.20.

trust.[59] Channeling injunctions explicitly bind future claimants—that is, claimants who are yet to have a legally cognizable injury and whose rights are supposedly protected by an appointed legal representative.[60] Finally, channeling injunctions and nondebtor releases may be used together to permanently enjoin claimants from suing other potentially liable parties besides the debtor and instead permit claimants to recover only against a trust.[61]

Courts find the authority to approve channeling injunctions based on the equitable power granted by § 105(a) of the Bankruptcy Code to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."[62] Courts further rely on § 363(f) and (h) which "explicitly provide for the channeling of claims in this manner" and conclude that "[t]he court's authority to channel claims is . . . 'granted by implication,' even absent statutory provisions."[63] Channeling injunctions are designed to further the purposes of Chapter 11 by "[p]reserv[ing] the rights of all . . . claimants,"[64] while preventing "the inequitable, piece-meal dismemberment of the debtor's estate."[65] Ultimately, the use of such injunctions for corporations facing mass-tort liability "will help to maximize the amounts which will be available for ultimate payment to . . . claimants by preventing the 'onslaught of crippling law suits [which] could jeopardize the entire reorganization effort.'"[66]

Consider the hypothetical case of a pharmaceutical company that manufactures a drug later found to be harmful to humans. After facing many suits by injured customers, the manufacturer filed for bankruptcy and was able to propose a plan of reorganization that involved a channeling injunction. According to the plan, the manufacturer would contribute a set amount of money to fund the trust into which all claims would be channeled. After the bankruptcy court confirmed the plan, customers with claims against the manufacturer could only

59. *See id.*

60. *See id.*

61. 2 SALERNO ET AL., *supra* note 35, § 14.55, at 375.

62. *In re* Johns-Manville Corp., 801 F.2d 60, 63 (2d Cir. 1986) (quoting *In re* Davis, 730 F.2d 176, 183-84 (5th Cir. 1984)).

63. *In re* Johns-Manville Corp., 68 B.R. 618, 625 (Bankr. S.D.N.Y. 1986) (quoting Van Huffel v. Harkelrode, 284 U.S. 225, 227 (1931)).

64. *In re* Johns-Manville Corp., 97 B.R. 174, 178 (Bankr. S.D.N.Y. 1989) (quoting *In re Johns-Manville Corp.*, 68 B.R. at 625).

65. *Id.* (quoting *In re Johns-Manville Corp.*, 68 B.R. at 625).

66. *Id.* (quoting *In re* Johns-Manville Corp., 843 F.2d 636, 640 (2d Cir. 1988) (alteration in original)).

recover whatever money remained in the trust, and the manufacturer could continue its operations outside of bankruptcy without worrying about future liability for its harmful drug.

Meanwhile, nondebtor releases are legally binding protection against future liability that a confirmed bankruptcy plan of reorganization gives to parties that are not debtors (meaning that they did not file for bankruptcy).[67] These releases eliminate all claims against a nondebtor regarding particular mass torts.[68] The releases may even "extinguish[] . . . a creditor's claims against a non-debtor over the creditor's objection."[69] While nondebtor releases are not explicitly covered by the Bankruptcy Code (with the exception of asbestos-related liability), bankruptcy courts discharge nondebtor liability by utilizing their equitable powers under § 105(a).[70] Further, bankruptcy courts issuing releases rely on § 1123(b)(6), which allows a plan to include any "appropriate provision not inconsistent with the applicable provisions of this title."[71]

Nondebtor releases are used in a variety of situations. Commonly, they are used to enjoin actions among nondebtors involving guaranties.[72] In these situations, courts enjoin proceedings against guarantors who are also major stakeholders in the business—such as the principal shareholder or key executive.[73] Another frequent approach is to release insurance carriers from liability, which is a particularly common issue that arises in the mass-tort context.[74] As mentioned above, these nondebtor releases are often included in connection with a channeling injunction, which redirects injured parties' suits against a trust.[75] In the previous example of the pharmaceutical-company bankruptcy, the plan may also provide nondebtor releases to the companies that distributed the drugs for the debtor or to the insurance companies that provided coverage to the debtor.

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67. *See* Peter M. Boyle, *Non-Debtor Liability in Chapter 11: Validity of Third-Party Discharge in Bankruptcy*, 61 FORDHAM L. REV. 421, 422 (1992).

68. *See* Silverstein, *supra* note 44, at 19.

69. *See id.* at 20.

70. *See* 11 U.S.C. § 105(a) (2018); Manuel D. Leal, *The Power of the Bankruptcy Court: Section 105*, 29 S. TEX. L. REV. 487, 515 (1988); Silverstein, *supra* note 44, at 3.

71. 11 U.S.C. § 1123(b)(6) (2018).

72. *See* Howard C. Buschman III & Sean P. Madden, *The Power and Propriety of Bankruptcy Court Intervention in Actions Between Nondebtors*, 47 BUS. LAW. 913, 929 (1992).

73. *Id.* at 929-30, 930 n.117.

74. JOAN N. FEENEY, MICHAEL G. WILLIAMSON & MICHAEL J. STEPAN, 1 BANKRUPTCY LAW MANUAL § 7:41 (5th ed. 2021).

75. *See supra* text accompanying notes 54-61.

In those instances, individuals who might want to sue the distributors or insurers would also be subject to the channeling injunction and must look to the trust assets for any recovery.

Many scholars have addressed the role of nondebtor releases in Chapter 11 bankruptcy.[76] Initial debates focused on whether bankruptcy judges have the power to provide relief to third-party nondebtors.[77] Though consensual releases were eventually accepted, controversy continued in cases involving nonconsensual nondebtor releases.[78] Scholars who accepted the possibility of nonconsensual nondebtor releases further explored whether and when such releases were appropriate under the Bankruptcy Code—and often concluded that any such power to release nondebtors was minimal.[79] The scholarly debate then shifted to

76. *See* Kyung S. Lee, Maria M. Patterson, Jason M. Rudd & Brian A. Abramson, *Revisiting the Propriety of Third-Party Releases of Nondebtors*, 18 NORTON J. BANKR. L. & PRAC. 465, 465 (2009) (noting that the controversy over third-party releases is "well[-]documented").

77. *Compare* Brubaker, *supra* note 23, at 961-67 (arguing that nondebtor releases are an inappropriate use of bankruptcy courts' injunctive powers), Boyle, *supra* note 67, at 436-47, 450 (concluding that bankruptcy courts' equitable powers do not include release of third-party nondebtors who are not themselves in bankruptcy), Judith R. Starr, *Bankruptcy Court Jurisdiction to Release Insiders from Creditor Claims in Corporate Reorganizations*, 9 BANKR. DEVS. J. 485, 487 (1993) (same), *and* Elizabeth H. Winchester, Note, *Expanding the Bankruptcy Code: The Use of Section 362 and Section 105 to Protect Solvent Executives of Debtor Corporations*, 58 BROOK. L. REV. 929, 934, 959-72 (1992) (arguing that the automatic stay does not extend to solvent, third-party nondebtors), *with* Buschman & Madden, *supra* note 72, at 940 (arguing that permanent injunctive relief for nondebtors is permissible as "extraordinary" relief), *and* Leal, *supra* note 70, at 489-92 (stating that § 105 grants broad equitable powers to bankruptcy courts to issue stays and injunctions to nondebtor entities).

78. *See* Fouad Kurdi, *A Question of Power: Non-Consensual Third-Party Releases in Chapter 11 Plans*, 25 NORTON J. BANKR. L. & PRAC. 331, 331 (2016) (arguing that the Bankruptcy Code does not authorize nonconsensual third-party releases); Joshua M. Silverstein, *Hiding in Plain View: A Neglected Supreme Court Decision Resolves the Debate over Non-Debtor Releases in Chapter 11 Reorganizations*, 23 EMORY BANKR. DEVS. J. 13, 19-20 (2006) (asserting that *United States v. Energy Resources Co.*, 495 U.S. 545 (1990), supports a prorelease view allowing for both consensual and nonconsensual releases).

79. *See* Lauren E. Fischer, *Extracting Consideration from Settling Officers and Directors After* Ortiz v. Fibreboard, 2002 ANN. SURV. BANKR. L. 167, 169-70 (proposing that the common law and Bankruptcy Code only permit nonconsensual releases when: "(1) there is a limited fund . . . ; and (2) all defendants . . . have contributed more than a *de minimis* amount to the fund"); Helen H. Han, *Testing the Limits of Judicial Discretion in Chapter 11: The Doctrine of Necessity and Third Party Releases*, 1994 ANN. SURV. AM. L. 551, 573-76 (asserting that bankruptcy courts may grant nondebtor releases in three limited circumstances: when claims are voluntarily released by creditors, when equity requires discharge of mass-tort claims, and when the nondebtor provides consideration for the release); Kate Inman, Note, *All Debts Are Off?—Can the Bankruptcy Process Be Used to Release the Debts of Nondebtor Parties*, 49 FLA. L. REV. 631, 648-49 (1997) (concluding that releases are not only acceptable but favorable, though in limited circumstances); Peter E. Meltzer, *Getting Out of Jail Free: Can the Bankruptcy Plan Process Be Used*

focus on whether other concepts, like due process or subject-matter jurisdiction, prohibited the use of nonconsensual nondebtor releases, and what safeguards could mitigate such concerns.[80] This Article builds on prior engagements with nondebtor releases by highlighting an emerging pattern of bankruptcy grifters who exploit nondebtor releases to obtain the benefits afforded to Chapter 11 debtors while avoiding the many accompanying obligations.[81] To understand these grifters and this Article's proposals to limit their impact, it is first important to understand the progression of cases that created the model for today's bankruptcy grifters. The next Section describes the emergence of nondebtor relief.

C. The Origin and Expansion of Nondebtor Relief

The common use of nondebtor releases and channeling injunctions did not appear overnight. Debtors turned to the devices to address the challenges posed

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to Release Nondebtor Parties?, 71 AM. BANKR. L.J. 1, 41 (1997) (concluding that, except in asbestos cases, bankruptcy courts can only grant nonconsensual nondebtor releases when the plan provides for payment in full on the extinguished claims immediately upon confirmation of the plan); John E. Swallow, Note, *The Power of the Shield—Permanently Enjoining Litigation Against Entities Other than the Debtor—A Look at* In Re A. H. Robins Co., 1990 BYU L. REV. 707, 708-9 (explaining that §§ 105(a), 524(e) & 1123(b)(5) of the Bankruptcy Code justified the court's injunction in favor of nondebtor parties in *In re A. H. Robins Co.* under the facts of the case).

80. *See, e.g.*, Daniel B. Bogart, *Resisting the Expansion of Bankruptcy Court Power Under Section 105 of the Bankruptcy Code: The All Writs Act and an Admonition from Chief Justice Marshall*, 35 ARIZ. ST. L.J. 793, 794-99 (2003) (comparing § 105 of the Bankruptcy Code to the Federal All Writs Acts and the Constitution's Necessary and Proper Clause and concluding that bankruptcy courts need to be more cautious in their application of equitable powers in their use of devices like third-party releases); Dorothy Coco, Note, *Third-Party Bankruptcy Releases: An Analysis of Consent Through the Lenses of Due Process and Contract Law*, 88 FORDHAM L. REV. 231, 234 (2019) (proposing an affirmative-consent framework for nondebtor releases to mitigate constitutional due-process concerns); Steve H. Nickles & David G. Epstein, *Another Way of Thinking About Section 105(a) and Other Sources of Supplemental Law Under the Bankruptcy Code*, 3 CHAP. L. REV. 7, 18-20 (2000) (arguing that constitutional separation of powers limits bankruptcy courts' ability to provide equitable relief such as third-party releases).

81. The recent wave of mass-tort bankruptcies has reinvigorated the scholarly discussion surrounding nondebtor releases and other related topics. *See generally* Melissa B. Jacoby, *Shocking Business Bankruptcy Law*, 131 YALE L.J.F. 409 (2021) (identifying ways that Chapter 11 is being abused beyond its intended scope); Adam J. Levitin, *Purdue's Poison Pill: The Breakdown of Chapter 11's Checks and Balances*, 100 TEX. L. REV (forthcoming 2022) (analyzing problematic elements of recent mass-tort Chapter 11 cases); Ralph Brubaker, *Mandatory Aggregation of Mass Tort Litigation in Bankruptcy*, 131 YALE L.J.F. 960 (2022) (emphasizing that nondebtor releases are beyond the bankruptcy court's authority and calling for the Supreme Court to intervene).

by asbestos liability. As the scope of asbestos litigation expanded, the number of court-approved plans incorporating nondebtor relief increased over time.

Asbestos litigation began to take off during the 1960s and subsequently exploded during the 1970s.[82] Eventually, the interminable lawsuits and resulting liability forced many firms in the asbestos business to declare bankruptcy.[83] Asbestos litigation provides examples of businesses using nondebtor releases and channeling injunctions. In fact, the first channeling injunction and nondebtor release were used in the reorganization of the Johns-Manville Corporation, one of the leading producers of asbestos products.[84]

While Johns-Manville had enough resources to meet its current credit commitments and contingent liabilities, it was concerned about future liabilities because many injuries would not manifest until later.[85] This liability eventually led the corporation to file for Chapter 11 relief.[86] The *Johns-Manville* reorganization plan used the Code to deal with its asbestos liability in new and innovative ways.

First, the plan created litigation trusts to fund both property-damage claims and health-related claims.[87] These trusts would pay all asbestos-related claims.[88] Additionally, to effectuate the trusts as the place of liquidation and payment for all asbestos claims, the plan provided for the court to issue an injunction.[89] Specifically, the plan provided that the court issue a channeling injunction requiring all claims to be settled against the corporation through the trust and "prohibit[ed] all parties with asbestos-related personal injury or property damage claims from suing certain protected entities"—namely, the corporation and its insurance carriers.[90] The channeling injunction allowed all injured parties to recover from the various trusts, but prevented them from going after the company, its subsidiaries, or its insurance carriers.[91] Thus, not only did the injunction limit

82. *See* Smith, *supra* note 20, at 1616-27 (discussing the history of asbestos litigation).

83. *Id.* at 1622 & n.32.

84. *In re* Johns-Manville Corp., 97 B.R. 174, 176-77 (Bankr. S.D.N.Y. 1989). For an in-depth analysis of the Johns-Manville reorganization plan, *see* Silverstein, *supra* note 44, at 10-18.

85. *In re Johns-Manville Corp.*, 97 B.R. at 176.

86. *Id.* at 176-77.

87. *Id.*; *see also In re* Johns-Manville Corp., 68 B.R. 618, 621 (Bankr. S.D.N.Y. 1986) ("One of the most innovative and unique features of the Manville Plan of Reorganization . . . is the establishment of two Trusts out of which all asbestos-related claims will be paid.").

88. *In re Johns-Manville Corp.*, 68 B.R. at 621.

89. *Id.* at 622, 624-28.

90. *Id.*

91. *Id.* at 624.

collection from the debtor, but it also released nondebtors (the insurance companies) from liability.[92] The court issued its channeling injunction pursuant to the equitable power provided by § 105(a) of the Bankruptcy Code.[93]

The bankruptcy court's approval of the plan's trusts and injunctions survived a number of appeals. First, the United States District Court for the Southern District of New York affirmed the bankruptcy court's approval of the plan.[94] The Second Circuit then issued a two-part decision on appeal. It first held that the plaintiff lacked standing to assert the rights of future claimants (that is, third parties) who may be harmed by the plan.[95] The court then affirmed the plan, including the channeling injunction.[96]

Following final approval, a steady stream of asbestos cases followed the *Johns-Manville* blueprint.[97] Debtors facing asbestos liability used bankruptcy to establish trusts and channel claims against debtors and nondebtors alike.[98] Finally, in 1994, Congress amended the Code by adding § 524(g).[99] This provision explicitly approves the use of nondebtor releases for insurance companies and channeling injunctions in asbestos litigation so long as the plan meets certain requirements.[100]

Courts subsequently expanded third-party releases and channeling injunctions beyond the asbestos context to cover other mass-tort liability, notwithstanding the fact that Congress limited § 524(g) to asbestos litigation.[101] This

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92. *Id.*; *see also* MacArthur Co. v. Johns-Manville Corp. (*In re* Johns-Manville Corp.), 837 F.2d 89, 90 (2d Cir. 1988) (summarizing the effect of the injunction on insurance carriers).

93. *In re Johns-Manville Corp.*, 68 B.R. at 625; 11 U.S.C. § 105(a) (2018).

94. *In re* Johns-Manville Corp., 78 B.R. 407, 409 (Bankr. S.D.N.Y. 1987).

95. Kane v. Johns-Manville Corp., 843 F.2d 636, 643 (2d Cir. 1988).

96. *Id.* at 650.

97. *See* Lloyd Dixon, Geoffrey McGovern & Amy Coombe, *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts*, RAND INST. FOR CIV. JUST. 3, 21 (2010), https://www.rand.org/content/dam/rand/pubs/technical_reports/2010/RAND_TR872.pdf [https://perma.cc/49V8-5F3Q] (outlining asbestos trusts and highlighting the insufficiency of trust payments to satisfy the pool of claims).

98. Silverstein, *supra* note 44, at 3.

99. Travelers Indem. Co. v. Bailey, 557 U.S. 137, 155 (2009); 11 U.S.C. § 524(g) (2018).

100. *Travelers*, 557 U.S. at 155 ("[I]n 1994 Congress explicitly authorized bankruptcy courts, in some circumstances, to enjoin actions against a nondebtor 'alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor to the extent such alleged liability . . . arises by reason of . . . the third party's provision of insurance to the debtor or a related party,' and to channel those claims to a trust for payments to asbestos claimants." (quoting 11 U.S.C. § 524(g)(4)(A)(ii))).

101. The legislative history indicates that Congress did not intend its narrow focus on the then-pressing demands of asbestos bankruptcies to impact whether the same relief in 524(g) was trend goes hand-in-hand with litigants' increasing reliance on bankruptcy as a tool to resolve mass-tort liability.[102] Just as courts granted injunctions and releases in early asbestos bankruptcy cases prior to the creation of § 524(g), courts now rely on the equitable powers granted by § 105(a) to issue these tools in other mass-tort cases.[103]

One of the earliest examples of nondebtor relief moving beyond asbestos liability came in the bankruptcy of Dow Corning Corporation. On May 16, 1995, Dow Corning filed for bankruptcy to address billions of dollars of litigation exposure.[104] The company faced an overwhelming number of lawsuits arising out of its allegedly defective silicone breast implants, which caused autoimmune disorders.[105] The plan of reorganization permanently released Dow Corning—along with its insurers and shareholders—from liability on personal-injury claims, thereby funneling all victims into a claims-settlement process, recovering solely from a trust.[106] This approach was controversial, in particular for channeling claims against a nondebtor. On appeal, the Sixth Circuit held that the Code did not prohibit nondebtor releases.[107] The Sixth Circuit found that, similar to

available in other mass-tort cases. *See* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 111(b), 108 Stat. 4106, 4117 ("Nothing in [524(g)] . . . shall be construed to modify, impair, or supersede any other authority the court has to issue injunctions in connection with an order confirming a plan of reorganization."). *See also* 140 CONG. REC. 27,692 (1994) (statement of Rep. Jack B. Brooks) (explaining that § 111(b) "make[s] clear that the special rule being devised for the asbestos claim trust/injunction mechanism is not intended to alter any authority bankruptcy courts may already have to issue injunctions in connection with a plan [of] reorganization.").

102. Gibson, *supra* note 28, at 2095.

103. *See, e.g.*, *In re* A.H. Robins Co., 880 F.2d 694, 701-02 (4th Cir. 1989) (relying on § 105 to affirm injunctions against personal-injury claimants in Dalkon Shield litigation).

104. Barnaby J. Feder, *Dow Corning in Bankruptcy over Lawsuits*, N.Y. TIMES (May 16, 1995), https://www.nytimes.com/1995/05/16/business/dow-corning-in-bankruptcy-over-lawsuits.html [https://perma.cc/5565-5KD8]; Jason J. Jardine, *The Power of the Bankruptcy Court to Enjoin Creditor Claims Against Nondebtor Parties in Light of 11 U.S.C. § 524(e):* In re Dow Corning Corp., 2004 BYU L. REV. 283, 283 (2004) (citing *In re* Dow Corning Corp., 280 F.3d 648, 653 (6th Cir. 2002)).

105. Feder, *supra* note 104.

106. Jardine, *supra* note 104, at 298-300. The trust was funded with more than $2 billion from Dow Corning and its insurers to settle claims relating to ruptured breast implants or diseases caused by the implants. *Id.*

107. *See* Jason W. Harbour & Tara L. Elgie, *The 20-Year Split: Nonconsensual Nondebtor Releases*, 21 NORTON J. BANKR. L. & PRAC. 4 art. 4 (2012) ("[I]n *In re Dow Corning Corporation*, the Sixth Circuit followed *A.H. Robins* and declined to adopt a rule that section 524(e) prohibited nondebtor releases, reasoning that section 1123(b)(6) permits a reorganization plan to 'include any . . . appropriate provision not inconsistent with the applicable provisions of this title.'" (quoting *In re Dow Corning Corp.*, 280 F.3d at 656)).

early asbestos litigation, these nondebtor releases were an appropriate exercise of the bankruptcy court's equitable powers under § 105(a).[108]

Emboldened by the success of Dow Corning, other debtors facing mass-tort exposure for product-liability claims looked to Chapter 11 for relief that included channeling nondebtor claims. In 2004, mass-tort defendant Delaco filed for bankruptcy after an ingredient in its "Dexatrim" brand diet pills were alleged to cause terrible medical effects, including strokes, heart conditions, and death.[109] The Delaco plan channeled claims against the debtor manufacturer, in addition to nondebtor drug vendors, distributors, and insurers.[110] Or consider the 2014 Blitz Chapter 11 liquidation.[111] The gasoline-can manufacturer established the Blitz Personal Injury Trust to resolve personal-injury claims against Blitz as well as insurers and nondebtor Wal-Mart (which also faced litigation exposure due to the exploding Blitz gas cans it sold to customers).[112] The channeling injunction required all channeled claims to be resolved against the trust, which was funded in part by contributions from the nondebtors.[113] The bankruptcy court justified these features of the plan under its authority derived from § 105(a).[114]

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108. *See* Jardine, *supra* note 104, at 301 (citing *In re Dow Corning Corp.*, 280 F.3d at 657-58).

109. *See* Voluntary Petition, *In re* The Delaco Co., No. 04-10899 (Bankr. S.D.N.Y. Feb. 12, 2004), DocumentNo. 1; *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/7AU8-YFG5] (describing Dexatrim incidents that led to bankruptcy filing).

110. *See* Svirsky et al., *supra* note 16, at 2.

111. *See id.*; *In re* Blitz U.S.A., Inc., No. 11-13603, 2014 WL 2582976, at *4-6 (Bankr. D. Del. Jan. 30, 2014). Chapter 7 is the primary chapter designed to liquidate companies; however, debtors can file a Chapter 11 liquidation. *See* H. Jason Gold & Dylan G. Tranche, *Liquidation of Troubled Businesses: Chapter 11 Liquidations Increasing*, CORP. COUNS. BUS. J. (Mar. 31, 2009), https://ccbjournal.com/articles/liquidation-troubled-businesses-chapter-11-liquidations-increasing [https://perma.cc/VW2L-7G73]. Strategically, this permits the debtor to remain in control of the estate as a debtor-in-possession, rather than turning it over to a Chapter 7 trustee. *Id.*

112. Disclosure Statement for Debtors' and Official Committee of Unsecured Creditors' First Amended Joint Plan of Liquidation at 18-21, *In re* Blitz U.S.A., Inc., No. 11-13603, 2013 WL 6825605 (Bankr. D. Del. Dec. 12, 2013).

113. *Id.* at 19.

114. *Id.* at 23.

In asbestos cases and beyond, debtors facing mass-tort exposure are using Chapter 11 to release companies that are not part of the bankruptcy proceeding.[115] Controversy has surrounded bankruptcy courts' ability to grant these releases.[116] However, given courts' continued exercise of this power and reviewing courts' hesitancy to intervene, the debate on whether such action is permitted appears incomplete absent congressional intervention.[117] Given the prevalence of such releases in the wild, the relevant question is not whether to permit such relief, but rather how to best balance the relief and rights of current and future tort claimants.

II. CHANNEL AND RELEASE IN CHAPTER 11: THE TAKATA BANKRUPTCY

This Part breaks down what it means to channel mass-tort claims against nondebtors through bankruptcy. The unfortunate reality is that neither Congress nor bankruptcy stakeholders have identified best practices for channeling claims and releasing nondebtors. Some cases offer litigation experiences that closely mirror procedural rights in state or federal court, while others put claimants through a gauntlet that severely limits process and potential recoveries. By looking at the Takata bankruptcy as a case study of channeling injunctions and nondebtor releases in complex mass-litigation challenges, this Part highlights how these valuable tools can help resolve complicated mass-tort cases. Although different circumstances will require different approaches, in each case the parties and court should consider certain core elements when evaluating whether to support approval. By studying desirable elements of the Takata bankruptcy, this Part identifies core features of bankruptcy plans incorporating channeling injunctions and nondebtor releases that impact the degree to which claimants' procedural rights are preserved and sets out metrics by which future proposals can be scored.

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115. *See* Silverstein, *supra* note 44, at 3.

116. *See* Lee et al., *supra* note 76, at 465 (noting the "well[-]documented" controversy over third-party releases of nondebtors).

117. Some scholars still advocate for narrower authority outside of § 524(g). *See, e.g.*, Adam Levitin, *Mallinckrodt Pharmaceuticals Bankruptcy and Channeling Injunction Puzzle*, CREDIT SLIPS (Feb. 26, 2020, 4:10 PM), https://www.creditslips.org/creditslips/2020/02/mallinckrodt-pharmaceuticals-bankruptcy-and-channeling-injunction-puzzle.html [https://perma.cc/SXN2-ZGLS]; Gerald Posner & Ralph Brubaker, *The Sacklers Could Get Away with It*, N.Y. TIMES (July 22, 2020), https://www.nytimes.com/2020/07/22/opinion/sacklers-opioid-epidemic.html [https://perma.cc/4KM4-8YBR] (noting that Congress has never explicitly approved a "liability discharge process" like that in the OxyContin litigation).

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Takata, an airbag manufacturer, faced near-endless tort liability after installing defective airbags in millions of vehicles.[118] The airbag systems contained a defective inflator causing the airbags to overinflate and explode with such force that shrapnel could spew into drivers and passengers.[119] Takata began recalling vehicles with defective airbags in 2013.[120] In the end, Takata's defective airbags were responsible for the largest automobile recall in history, impacting more than 42 million vehicles from almost every major car manufacturer.[121] The personal-injury and wrongful-death tort liability from the defective airbags led Takata to file for Chapter 11 bankruptcy on June 25, 2017.[122] By April 2018, less than a year later, the bankruptcy concluded with a sale of Takata's assets to its largest competitor, Key Safety Systems.[123] While Key Safety Systems bought Takata's assets for about $1.6 billion, it did not assume any of Takata's liabilities relating to its failed airbag system.[124] Instead, Takata established trusts to deal with its existing and future personal-injury and wrongful-death (PI/WD) liability.[125]

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118. *See* Sean McLain & Mike Spector, *With 54 Million to Go, This Airbag Recall Is Never Going to End*, WALL ST. J. (June 26, 2017, 5:43 PM ET), https://www.wsj.com/articles/bankrupt-air-bag-maker-takata-means-to-keep-limping-along-1498477869 [https://perma.cc/NVW5-LJFA].

119. *Id.*

120. Yoko Kubota & Ben Klayman, *Faulty Takata Air Bags Prompt Expanded Toyota Recall*, REUTERS (June 11, 2014, 1:26 AM), https://www.reuters.com/article/us-toyota-recall/faulty-takata-air-bags-prompt-expanded-toyota-recall-idUSKBN0EM0F620140611 [https://perma.cc/YNQ7-9U8M].

121. *Id.* Car manufacturers affected by this recall include Acura, Audi, BMW, Cadillac, Chevrolet, Daimler Trucks North America, Daimler Vans USA LLC, Dodge/Ram, Ferrari, Fiat Chrysler, Fisker, Ford, GM, Honda, Infiniti, Jaguar, Jeep, Land Rover, Lexus, Lincoln, Mazda, McLaren, Mercedes-Benz, Mercury, Mitsubishi, Nissan, Pontiac, Saab, Saturn, Scion, Subaru, Tesla, Toyota, and Volkswagen. Third Amendment to the Coordinated Remedy Order with Annex A; Coordinated Remedy Program Proceeding, 81 Fed. Reg. 95,267, 95,274-93 (Dec. 27, 2016).

122. McLain & Spector, *supra* note 118.

123. Naomi Tajitsu, *Key Safety Systems Completes Deal to Acquire Air-Bag Maker Takata*, REUTERS (Apr. 11, 2018, 3:38 PM), https://www.reuters.com/article/us-takata-sale-key-safety-systems/key-safety-systems-completes-deal-to-acquire-air-bag-maker-takata-idUSKBN1HI3CG [https://perma.cc/6GHF-4JHM].

124. *Id.*

125. When Takata filed for bankruptcy, its personal-injury liability from the airbags had already been consolidated into an MDL, which at the time was a separate proceeding from the bankruptcy. *See* Disclosure Statement for Joint Chapter 11 Plan of Reorganization of TK Holdings Inc. and Its Affiliated Debtors at 58, *In re* TK Holdings Inc., No. 17-11375 (Bankr. D. Del. Nov. 15, 2017), Document No. 1164. The plan, however, consolidated the bankruptcy and the MDL by way of the channeling injunction. *Id.* at 27. The plan provided that, based on the type of

To rid Takata and other parties of liability, the bankruptcy plan (the Plan) provided two now-familiar features: a release from liability for both the debtor and nondebtor parties and a channeling injunction. Along with Takata, car manufacturers ("Original Equipment Manufacturers, (OEMs)) joined the bankruptcy agreement.[126] These OEMs fell into three buckets—"Consenting OEMs," "Non-Consenting OEMs," and "Participating OEMs" (P-OEMs).[127]

Consenting OEMs were companies that had used the defective airbag inflators in their cars and who had agreed to a proposed allocation of resources from Takata to the OEMs.[128] These companies agreed to vote in favor of the Plan.[129] Non-Consenting OEMs, in contrast, did not agree to the allocation and were not entitled to many of the benefits of the Plan.

A P-OEM is a Consenting OEM that agrees to contribute to the PI/WD recovery trust (the Trust).[130] Essentially, the Plan provided an opt-in mechanism where car manufacturers could, at any time, receive a release from liability—without themselves entering the bankruptcy process—in exchange for an initial contribution and a commitment of ongoing financial contribution to the Trust.[131] The P-OEMs agreed to waive any potential defenses to victims' claims, such as statutes of repose, statutes of limitations, or contributory negligence, effectively mitigating risks to current and future victims in pursuing a claim.[132] P-OEM claimants are permitted to file against the Trust only, though they are allowed to seek relief in the court system after first exhausting the procedures provided for in the Trust terms.[133]

claim, injured parties could recover from one of two trusts with nearly identical operations. *Id.* at 10-11. These parallel trusts thus effectively replaced the ongoing MDL against Takata as claimants' avenue for recovery.

126. *See* Fifth Amended Joint Chapter 11 Plan of Reorganization of TK Holdings Inc. and Its Affiliated Debtors at 8, 19, 21, *In re* TK Holdings, Inc., No. 17-11375 (Bankr. D. Del. Feb. 20, 2018), Document No. 2116 [hereinafter Plan of Reorganization].

127. *Id.* at 8-9, 21 (defining Original Equipment Manufacturer (OEM) categories). Currently, the only Participating OEMs (P-OEMs) are Honda/Acura and Nissan/Infiniti. *See Frequently Asked Questions*, TAKATA AIRBAG TORT COMP. TRUST FUND, http://www.takataairbaginjurytrust.com/faq [https://perma.cc/DG7S-738E].

128. *Id.* at 122.

129. *Id.*

130. *Id.* at 21.

131. *Id.* at 110-12.

132. PSAN PI/WD Trust Distribution Procedures at 37, *In re* TK Holdings, No. 17-11375 (Bankr. D. Del. Mar. 26, 2018), Document No. 2505-2 [hereinafter Trust Distribution Procedures]. A P-OEM Claim is a personal injury/ wrongful death (PI/WD) claim for an alleged PI/WD caused by a Takata Airbag Inflator in a P-OEM vehicle. *Id.* at 8.

133. *Id.* at 27-36.

The distinction between categories of OEMs had a material difference on how a Takata airbag victim could bring a claim. If a driver wanted to bring a wrongful-death claim against Volkswagen, a Consenting OEM, he could do so in the state tort system, subject to applicable nonbankruptcy rules of process and procedure. In contrast, if the driver wanted to sue Honda, a P-OEM, his claim would be channeled into the Trust structure and subject to all of its rules and procedures for claim recovery.

The Takata bankruptcy was controversial for many reasons, including the opportunity it gave solvent automobile manufacturers to resolve airbag liability through a Chapter 11 case. Although the Plan's outcome seems straightforward, many issues were hotly contested during the negotiation process. What lessons can be taken from Takata's case as an exemplar mass-tort bankruptcy? Why did it work and what needs to be modeled? The answers fall into two distinct categories: procedural protections and substantive outcomes.

A. *Procedural Protections*

The *Takata* Plan's channeling injunction and trust warrant praise for the procedural protections built into the claims process. Note that the alternate path for claimants is to pursue claims against nondebtors outside of bankruptcy, likely in state or federal court. Any time a claimant is forced out of her forum of choice into a new, quasi-litigation process, there is the potential for a curtailment of procedural justice. The *Takata* Plan makes an effort to replicate or replace many of the protections that would be available to claimants bringing their cases in court, therefore minimizing the negative impact on the "day in court" ideal.

One example of this protection is the claimant's right to multiple levels of appeal, with a variety of different independent and experienced decision makers at each level.[134] There are few decisions in mass-tort litigation more important than whether a claimant is eligible to recover against a defendant and how much

134. Review of determinations against a P-OEM is conducted by a reviewer from an appeals panel of up to twelve people. A second appeal to a different review panel is possible if the reviewer modified the trustee's award outside the acceptable range. Finally, if the claimant is still unsatisfied with the results of the appeals process, the Trust Distribution Procedures allow the claimant to pursue relief against the OEMs, including P-OEMs, through litigation. Before proceeding to the tort system, however, the claimant, the P-OEM, and the FCR must hold a conference. After the conference, the claimant must then submit written confirmation to the trustee rejecting the award and stating his intent to proceed in the tort system. *Id.* at 24-36.

that recovery will be. Civil procedure at the state and federal level provides multiple opportunities to challenge a determination that seems unjust.[135] Channeled claims should benefit from the same opportunities, free of charge.[136]

Another procedural protection is the opportunity for claimants to opt out of the trust structure completely. The *Takata* P-OEM claimants could avoid recovering from the trust and return to state or federal court at will.[137] Although the trust procedures do require a claimant to satisfy trust requirements prior to opting out, the option is better than what is available in most other cases and could result in a mutual agreement that is better for the claimant.[138]

Finally, the *Takata* claimants had multiple opportunities to provide information to decision makers and request additional or special review. These features—like an individualized review process allowing claimants to share independent medical information rather than accepting the amount dictated under a valuation schedule[139]—provide more litigant autonomy and acknowledge the individualized nature of claims. Scholars have documented the importance of a litigant's opportunity to have their day in court.[140] The implementation of these

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135. It is worth noting here that mass-tort settlements outside of bankruptcy often end in settlement schemes that pay out of a similar trust structure. These schemes can lead victims through a procedural minefield designed to minimize payment. *See* Simon, *supra* note 39, at 678-86 (explaining procedural hurdles in mass-tort settlement schemes, with a focus on consumer bankruptcy as a bar to recovery).

136. Access to independent review on channeled claims should not be premised on a claimant's ability to pay. Some trusts impose appeal fees that make challenging a determination prohibitive for claimants with fewer resources, which has the net impact of reducing recovery. *See infra* note 232 (discussing the Catholic Diocese bankruptcy and appeal fee of $500). Claimants may also be required to pay upfront in initial proceedings if they want independent review of their channeled claims. *See* Eleventh Mediator's Report at 23-26, *In re* Boy Scouts of Am., No. 20-10343 (Bankr. D. Del. Feb. 10, 2022), Document No. 8772-1 (outlining a proposed $20,000 fee for claimants who want a neutral third party to determine a settlement award that approximates a jury verdict). The imposition of these fees is particularly offensive given the vast sums of administrative and attorney fees that are already coming out of estate assets under provisions of the Bankruptcy Code. See 11 U.S.C. § 327 (2018) (providing for debtors' fees to come out of the estate).

137. Plan of Reorganization, *supra* note 126, at 27-36.

138. *Id.*

139. Trust Distribution Procedures, *supra* note 132, at 31-39.

140. *See* Elizabeth Chamblee Burch, *Procedural Justice in Nonclass Aggregation*, 44 WAKE FOREST L. REV. 1, 28 (2009); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 262-64 (2004).

features in the mass-tort process offers small ways for these needs to be satisfied in an otherwise impersonal and mass-produced mechanism for justice.[141]

B. Substantive Outcomes

Beyond important procedural protections, the *Takata* trust also includes some fundamental substantive guarantees that benefit claimants. First, the P-OEMs guarantee that claimants would be paid the full amount of the claim awarded, because they are required to make ongoing contributions to the trust. This contrasts with many trust structures where the nondebtor contributes a fixed sum of money, and that money is all that can be distributed pro rata among claimants.[142] Pro rata distribution makes sense for the debtor, given the finality of Chapter 11 reorganization and the understanding that the debtor's resources are limited below the total value of claim obligations. But solvent nondebtors do not have this limitation, so there is no reason to limit recovery amounts ex ante.[143] To be sure, there are instances where a limited-fund recovery is appropriate. To decide, however, whether and when that circumstance arises, stakeholders must be given enough information about the nondebtor to determine what amount is sufficient.[144]

Next, in the *Takata* Plan, the dollar value of different claims was based on carefully calculated metrics, considering critical inputs such as the average out-of-court award for different injuries and the likely defenses and arguments that might arise in nonbankruptcy litigation.[145] Though no estimation is without problems, it appears that the *Takata* Plan made a genuine effort to identify what

141. Again, bankruptcy is not exceptional in this regard, as the mass-tort system is generally perceived to be ill-positioned to give victims a day in court. Still, there is no reason to settle for average, especially in instances where the financial recovery to claimants is low. If stakeholders are already designing an ideal bankruptcy process for mass-tort cases, the "day in court" ideal should be among their considerations.

142. In contrast, asbestos trusts often are formed with a finite contribution that must be allocated among current and future claimants. *See* Dixon et al., *supra* note 97, at 21, 26-29.

143. The added benefit of removing total-contribution caps is that there is less pressure on stakeholders to correctly anticipate the total claim pool in advance. The asbestos litigation notoriously suffered from underfunded trusts, something that claimants should keep in mind when reviewing proposed structures. Future claims are not easy to quantify in many mass-tort cases.

144. *See infra* Part IV (discussing proposed disclosure obligations for bankruptcy grifters).

145. Broadly, the valuation process for trust-distribution claims classifies claims into injury categories and assigns points. The points assigned are then converted into a monetary award based on the dollar value of each point. The Trust Distribution Procedures provide that the Trustee use a three-step process to determine compensation. *See* Trust Distribution Procedures, *supra* note 132, at 18.

claims would pay outside of bankruptcy and mapped trust payments onto that framework.[146] Trust in this approach is possible because claimants and decision makers have been granted access to information about the debtor and nondebtor beneficiaries, including their litigation values and legal positions.

C. *Other Considerations*

Perhaps the unique circumstances in the *Takata* case played an outsized role in the process. The case presented a difficult problem that had to be solved: the public-health hazard (faulty airbags affecting a significant portion of American automobiles) required ongoing oversight and mediation, while injured claimants sought compensation for their harm. In a world of limited dollars and precarious relationships, getting a process in place that brought most stakeholders to the table was a tall order. The debtors had to thread the needle in difficult negotiations by keeping insurers, distributors and OEMs, and injured parties all working in the same direction. Many Chapter 11 cases pose puzzling negotiation challenges, but the stakes are not always so high. Credit is also due to Judge Shannon, a Delaware bankruptcy judge with substantial experience handling large, complex Chapter 11 cases, for keeping the case on the rails by nudging parties to consider the weaknesses in various arguments and the potential cost of losing the entire deal.[147] Because parties come before the court on so many issues, judges play a significant role in the bankruptcy-negotiation process. A less experienced hand might have a catastrophic impact on a mass-tort case.[148]

In the end, it remains exceptional as a matter of bankruptcy law that the *Takata* channeling injunction extended to solvent, nondebtor OEMs. But until courts or Congress intervene and limit the availability of nondebtor relief overall,

146. While some may be concerned by the imprecision of such valuations, the reality is that much of bankruptcy law is based on battles of valuation among experts. Courts are accustomed to evaluating these estimates as part of the plan-confirmation process. *See infra* Part IV (discussing liquidation analysis and proposing a similar type of showing for approving nondebtor injunctive relief).

147. *See, e.g.*, Motley Rice, *Takata Can Extend Airbag Lawsuit Freeze for Individuals*, BEST LAWYERS (Feb. 7, 2018, 5:51 PM), https://www.bestlawyers.com/article/airbag-lawsuit/1826 [https://perma.cc/84EF-WCZ2].

148. Bankruptcy practitioners are aware of this impact, and actively consider the potential judge when filing in a particular venue. Consider the Purdue Pharma bankruptcy, discussed in more detail in Part III, which filed its Chapter 11 case in White Plains, New York. Anyone in the corporate-restructuring industry at the time knew that Judge Drain was the only bankruptcy judge who received cases filed in that location. Judge Drain has a reputation for effectively managing large cases and a no-nonsense approach to contested issues. I have no doubt that the Purdue Pharma restructuring team, anticipating the litigation circus that would follow them into bankruptcy court, chose this location with Judge Drain in mind.

the actual process and treatment of channeled claimants in the *Takata* case was as fair and transparent as one could expect. Instead of abusing the channeling injunction to minimize liability and silence litigation risk, Takata and the OEMs used it to create a manageable process for organizing and paying claims. If nondebtors continue to receive access to the bankruptcy system, it should be in circumstances like those seen in the *Takata* case, where the centralization of proceedings gives mass-tort defendants no real substantive or procedural advantage. As the next Part outlines, the new wave of mass-tort bankruptcies fails to take that approach.

III. THE BREWING STORM OF OPIOID AND SEX-ABUSE BANKRUPTCIES

Mass-tort cases often end in bankruptcy, and judge-made expansion of bankruptcy releases has allowed nondebtors to access bankruptcy's benefits. This much has been true for decades. What has changed—and what motivates this Article's intervention—is the type of nondebtors who expect relief and the degree to which their involvement disadvantages claimants who are creditors of the estate and claimants who are not. Simply put, bankruptcy grifters have gone too far. Emboldened by prior cases to push the boundaries even further, bankruptcy grifters today are contorting the bankruptcy system beyond recognition. Just as the *Takata* debtors looked to precedent, a new class of bankruptcy grifters now relies on the Takata bankruptcy to justify nondebtor channeling injunctions and releases for other mass torts. The problem is that these new cases push beyond what happened in the past, with broader and broader categories of grifters tagging along—all the while leaving behind many of the protections and procedures that garnered legitimacy in *Takata*. This Part introduces the new bankruptcy grifters arising out of opioid (Section III.A) and sexual-assault (Section III.B) mass-tort cases.

These cases test the boundaries of who can participate in a Chapter 11 process and what connection they need to the debtor. Nonasbestos cases have no code-based limitations on participants,[149] so courts have permitted more distant entities with smaller contributions to play ball. The recent examples outlined in this Part highlight the concerning shift.

149. By its text, § 524(g) applies only to asbestos cases. 11 U.S.C. § 524(g)(2)(B)(i)(I) (2018) (permitting a channeling injunction only for a "debtor which . . . has been named as a defendant in personal injury, wrongful death, or property-damage actions seeking recovery for damages allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products . . . .").

Why have judges allowed this? In part, judges see a problem and want to solve it. Being a bankruptcy judge comes with significant power to impact outcomes for many parties, and judges often view parties' ability to come together with a solution as a success.[150] Bankruptcy judges also appreciate the consequences of permitting a deal to implode. In the Purdue Pharma bankruptcy, for example, there was more than $4.5 billion on the table that could have evaporated if the Sacklers did not receive the protections they wanted from Chapter 11.[151] Regardless of what one considers a "fair" amount for the Sacklers to pay, $4.5 billion is a significant sum that could meaningfully help many people and communities affected by the opioid crisis. Finally, it is no secret that many bankruptcy judges like having a role in high-stakes, complex business reorganizations to balance out their consumer-bankruptcy dockets. Various courts throughout the country have taken steps to make their forums more appealing to corporate debtors—or their lenders, who often drive the forum-selection analysis.[152] Ex-

150. A similar phenomenon occurs with MDL transferee judges, who receive MDL cases from the Judicial Panel on Multidistrict Litigation to resolve pretrial matters on an aggregated basis. Like bankruptcy judges, MDL transferee courts have an astronomically high settlement rate, rarely returning cases to their districts for merits decisions. *See* Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. 1445, 1447 (2017); Martin H. Redish & Julie M. Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109, 128 (2015) ("Settlement is the fate of almost all cases that are part of an MDL. . . . Parties to MDL cases and the transferee judges who preside over them face tremendous pressure to settle."); Theodore Eisenberg & Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111 (2009).

151. Jan Hoffman, *Sacklers Threaten to Pull Out of Opioid Settlement Without Broad Legal Immunity*, N.Y. TIMES (Aug. 17, 2021), https://www.nytimes.com/2021/08/17/health/sacklers-purdue-opioids-settlement.html [https://perma.cc/944V-V2YF]. This theory may soon be tested if the Purdue appellate process eliminates the Sacklers' releases. *See infra* Part III.A.1.

152. For example, after Judge Drain established his White Plains courthouse, many companies such as Purdue have filed there to seek his experienced hand. *See, e.g.*, Renae Merle & Lenny Bernstein, *Purdue's Choice of NY Bankruptcy Court Part of Common Forum Shopping Strategy, Experts Say*, WASH. POST (Oct. 10, 2019), https://www.washingtonpost.com/business/2019/10/10/purdues-choice-ny-bankruptcy-court-part-common-forum-shopping-strategy-experts-say [https://perma.cc/P3EW-RK2H]. This particular pathway has ended, both because Judge Drain will soon retire and because bankruptcies with over $100 million in assets filed in the Southern District of New York will now be randomly assigned. *See* Jonathan Randles, *Judge Overseeing Purdue Pharma, Sears Bankruptcies to Retire*, WALL ST. J. (Sept. 28, 2021, 3:02 PM ET) https://www.wsj.com/articles/judge-overseeing-purdue-pharma-sears-bankruptcies-to-retire-next-year-11632855735 [https://perma.cc/UC5Y-LRRQ]; James Nani, *N.Y. Mega Bankruptcies to Get Random Judges After Purdue Furor*, BLOOMBERG L. (Nov. 22, 2021, 1:39 PM), https://news.bloomberglaw.com/bankruptcy-law/new-york-chapter-11-mega-cases-to-be-assigned-random-judge [https://perma.cc/59N3-CUST]. Additionally, bankruptcy

perienced restructuring professionals bristle at the uncertainty and disorganization that can come from shepherding a massive bankruptcy through an inexperienced court.[153] While bankruptcy judges no doubt take their responsibilities on the bench seriously, the availability of nondebtor releases is one element that corporate debtors might consider favorably in selecting a forum.[154]

Given the factors that continue to drive judicial expansion of nondebtor remedies, this Part assesses current mass-tort cases in two major categories and then identifies notable departures from prior cases involving nondebtor relief and the shift in bankruptcy grifting (Section III.C).

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courts in the Southern District of Texas established a separate docket with just a few judges assigned to complex Chapter 11 cases to entice debtors to entrust their cases to the bankruptcy forum. *See* Samuel M. Andre, *The Southern District of Texas: The Next Big Venue in Commercial Bankruptcy?*, FREDRIKSON: RESTRUCTURING REP. (Oct. 10, 2018), https://www.fredlaw.com/the_restructuring_report/2018/10/10/1998/the_southern_district_of_texas_the_next_big_venue_in_commercial_bankruptcy [https://perma.cc/3AX9-GKQD].

153. Scholars have advanced various theories and identified empirical support for concern about inexperienced judges. *See* Kenneth Ayotte & David A. Skeel, *Jr., An Efficiency-Based Explanation for Current Corporate Reorganization Practice*, 73 U. CHI. L. REV. 425, 458-62 (2006) (identifying judicial experience as an important influence on venue selection); Benjamin Iverson, Joshua Madsen, Wei Wang & Qiping Xu, *Financial Costs of Judicial Inexperience: Evidence from Corporate Bankruptcies* 1 (Aug. 1, 2020) (unpublished manuscript), https://ssrn.com/abstract=3084318 [https://perma.cc/4JHE-RLSG] (finding that new judges' "public Chapter 11 cases spend 19% more time in bankruptcy and realize 12 percentage point lower creditor recovery rates").

154. Another recent example involves Johnson & Johnson's decision to create an entity containing its talc asbestos liability through a so-called "Texas Two-Step" divisive merger, and then put that LLC into Chapter 11 in the Bankruptcy Court for the Western District of North Carolina. *See* Steven Church, *Judge to Consider Blocking J&J from Giving Talc Claims to Unit*, BLOOMBERG NEWS (July 28, 2021, 5:28 PM EDT), https://www.bloomberg.com/news/articles/2021-07-28/judge-to-consider-blocking-j-j-from-giving-talc-claims-to-unit [https://perma.cc/X9QM-PH2F]; Samir D. Parikh, *Mass Exploitation*, 170 U. PA. L. REV. ONLINE (forthcoming 2022) (manuscript at 4-6) (describing the divisive merger under Texas state law and how corporations like Johnson & Johnson use it to resolve tort liability in Chapter 11). This was the very same court in which Georgia Pacific got a favorable ruling on its similar strategy in the Bestwall bankruptcy. *See In re* Bestwall LLC, 605 B.R. 43, 54 (Bankr. W.D.N.C. 2019) (denying the asbestos claimants' motion to dismiss or transfer the filing). Johnson & Johnson's venue selection strategy ultimately failed, and the bankruptcy is now pending in the District of New Jersey (where the company is headquartered). *See In re* LTL Mgmt., No. 21-30589 (Bankr. W.D.N.C. Nov. 16, 2021) (order transferring case to the District of New Jersey). The advantage debtors gain by hand-picking judges that offer more certain relief is one reason advocates for bankruptcy venue reform urge changes to where companies may file. *See, e.g.*, Levitin, *supra* note 81 (manuscript at 52-71) (identifying the problems with judge shopping in recent mass-tort Chapter 11 cases); Robert K. Rasmussen, *COVID-19 Debt and Bankruptcy Infrastructure*, 131 YALE L.J.F. 337, 356-61 (2021) (promoting a business bankruptcy appellate panel to resolve judge-driven venue issues).

A. Bankruptcies of the Opioid Crisis

The United States is in the midst of a legal reckoning with the opioid industry. The opioid crisis continues to ravage communities across the country with little end in sight.[155] These terrible harms, including overdose deaths, addiction, and the deterioration of entire communities in some parts of the country, arise out of the overprescription and mismarketing of opioid pain treatments.[156] For decades, pharmaceutical companies have made billions of dollars selling and promoting opioids, all while minimizing the addictive properties and ignoring (and sometimes encouraging) improper prescription trends.[157] The blame game extends throughout the opioid pipeline, from manufacturers and distributors to doctors and pharmacies. As individuals and state and local governments turned to the legal system for relief,[158] a patchwork of suits spread across the nation.

The opioid cases are quintessential mass-tort litigation. Claimants are vastly different, both known and unknown, and the defendants face broad and relentless exposure.[159] The overwhelming majority of opioid claims were joined in an MDL pending before Judge Polster in Ohio.[160] A cavalry of mass-tort attorneys jostled for positions (and lucrative appointments) in settlement negotiations, but the process has dragged on for years without final resolution.[161]

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155. *See* Nat'l Inst. on Drug Abuse, *Opioid Overdose Crisis*, NAT'L INSTS. HEALTH (Mar. 11, 2021), https://www.drugabuse.gov/drug-topics/opioids/opioid-overdose-crisis [https://perma.cc/K4WX-322D] (summarizing research findings on the ongoing opioid crisis).

156. *See id.*

157. Evan Hughes, *The Pain Hustlers*, N.Y. TIMES (May 2, 2018), https://www.nytimes.com/interactive/2018/05/02/magazine/money-issue-insys-opioids-kickbacks.html [https://perma.cc/4BRJ-FNRV] (noting that "Purdue continued booking more than $1 billion in annual sales" of OxyContin even after a 2007 settlement for $600 million in which the company pled guilty to having misrepresented the dangers the drug posed).

158. This is separate and apart from potential criminal exposure, which may result from state and federal government investigations of companies in the opioid industry.

159. *See* Colin Dwyer, *Your Guide to the Massive (and Massively Complex) Opioid Litigation*, NPR (Oct. 15, 2019, 9:05 AM ET), https://www.npr.org/sections/health-shots/2019/10/15/761537367/your-guide-to-the-massive-and-massively-complex-opioid-litigation [https://perma.cc/U82C-8T9D].

160. *In re* Nat'l Prescription Opiate Litig., 477 F. Supp. 3d 613 (N.D. Ohio 2020). The MDL procedure binds claimants for pretrial matters, though most cases settle before trial. *See* ELIZABETH CHAMBLEE BURCH, MASS TORT DEALS: BACKROOM BARGAINING IN MULTIDISTRICT LITIGATION 35-63 (2019) (outlining the inside world of MDL negotiation and the various underlying incentives that drive attorney behavior and outcomes).

161. Some settlements have been discussed for various claims against certain defendants, none of which would end the MDL. *See, e.g.*, Ben Brewer, *States, Cities Eye $26 Billion Deal: Opioid Litigation Explained*, BLOOMBERG L. (July 26, 2021, 5:31 AM), https://news.bloomberglaw

There is certainly a path for resolving such mega cases outside of bankruptcy. The tobacco-company litigation in the 1990s, for example, resulted in a global settlement without involving Chapter 11.[162] Unfortunately, the tobacco settlement resulted in very little money actually reaching harmed individuals or preventing future addiction, a reality that government claimants should keep in mind as they approach the opioid litigation. Whether a global resolution is ultimately possible for opioid litigation depends on many factors; the more challenging and expensive civil litigation becomes, the more likely it seems that companies will look to creative uses of Chapter 11 to resolve exposure.

Opioid litigation extends far beyond those companies currently involved in Chapter 11 proceedings. It seems likely that additional defendants (including manufacturers, distributors, and others facing litigation for their role in the opioid crisis) will turn to bankruptcy. While many opioid litigants (such as Johnson & Johnson) likely have sufficient litigation reserves and strong strategic reasons to avoid formal restructuring, others may find the pressure untenable.[163] The initial wave of opioid filings offers an insight into how the remaining plaintiffs may look for relief.

.com/health-law-and-business/states-cities-eye-26-billion-deal-opioid-litigation-explained [https://perma.cc/68WL-HSK6].

162. *See* Dwyer, *supra* note 159 (explaining that "[b]itter memories linger" from the big tobacco settlements, prompting local governments to be wary of state governors who may again seek to take over the process).

163. This does not mean that other manufacturers will remain completely outside of the bankruptcy system. At least a few reports circulated in 2019 suggested Johnson & Johnson considered seeking protection in the Purdue Pharma bankruptcy, which ultimately did not unfold. *See, e.g.*, Sarah Randazzo & Patrick Fitzgerald, *Novel Plan Aims to Settle Opioid Suits*, WALL ST. J. (Sept. 30, 2019, 5:33 PM ET), https://www.wsj.com/articles/drugmakers-look-to-use-purdue-pharmas-bankruptcy-to-settle-opioid-suits-11569877871 [https://perma.cc/Q66X-UBGJ]. Additionally, attorney bills submitted in the Purdue Pharma case indicate at least preliminary conversations and research into the possibility of other defendants joining the Purdue trust in a global resolution. *See* Second Monthly Fee Application of Dechert LLP for Allowance of Compensation for Services Rendered and Reimbursement of Expenses as Counsel to the Debtors and Debtors in Possession for the Period from October 1, 2019 Through October 31, 2019 at 29, 44, 46, 60, *In re* Purdue Pharma L.P., No. 19-23649 (Bankr. S.D.N.Y. Dec. 14, 2019), Document No. 651 (discussing legal services performed relating to global settlements involving manufacturers and other defendants). Instead, Johnson & Johnson invoked the "Texas Two-Step" to spin off its talc asbestos liability into a new corporation that was funneled into Chapter 11. *See supra* note 154.

1. *Purdue Pharma*

Among opioid defendants, Purdue Pharma draws a significant amount of attention for its product OxyContin.[164] The company is consistently in the headlines for its role in the opioid epidemic, and public perception of the company and its owners, the Sackler family, has turned overwhelmingly negative.[165] The company filed for Chapter 11 bankruptcy in September 2019, removing the company from looming MDL trial pressure and imposing an automatic stay on claimants seeking recovery against Purdue and the Sacklers.[166] Purdue announced a "settlement agreement in principle" with a powerful subgroup of the MDL plaintiffs.[167] The settlement required Purdue to pursue bankruptcy for the purpose of transforming the company into a "Public Benefit Corporation" that

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164. *See* Jennifer D. Oliva, *Opioid Multidistrict Litigation Secrecy*, 80 OHIO ST. L.J. 663, 664 (describing the Sacklers as "the opioid crisis's most notorious villains" who receive enthusiastic media coverage).

165. *See* Jared S. Hopkins & Sara Randazzo, *Sackler Family Actively Trying to Resolve Purdue Pharma Lawsuits*, WALL ST. J. (Mar. 22, 2019, 3:57 PM ET), https://www.wsj.com/articles/sackler-family-actively-trying-to-resolve-purdue-pharma-lawsuits-11553283308 [https://perma.cc/KB27-7WYT]; Christopher Rowland, *Sackler Legacy Is at Stake in Family's Bid to Reinvent Purdue Pharma as a Public Trust*, WASH. POST (Nov. 6, 2019), https://www.washingtonpost.com/business/economy/sackler-legacy-is-at-stake-in-familys-bid-to-reinvent-purdue-pharma-as-a-public-trust/2019/11/05/479ea040-ee91-11e9-b648-76bcf86eb67e_story.html [https://perma.cc/53A5-LX9S]; Hannah Kuchler, Shaunagh Connaire, Nick Verbitsky, Annie Wong, Rebecca Blandon & Tom Jennings, *Opioids, Bribery and Wall Street: The Inside Story of a Disgraced Drugmaker*, PBS FRONTLINE (June 18, 2020), https://pbs.org/wgbh/frontline/article/opioid-drugmaker-insys-bribing-doctors-fentanyl-painkiller [https://perma.cc/VQ5Z-ZE3W].

166. The scope of, and potential exceptions to, the automatic stay consumed much of the early case briefing and hearings. This issue was controversial because Purdue sought injunctive relief for the Sacklers, who are not debtors and thus are not eligible for stay relief, and because many of the creditors are governments, which arguably fall within an exception to the automatic stay. *See, e.g.*, The States' Coordinated Opposition to Debtors' Motion for Preliminary Injunction of State Enforcement Actions Against Purdue at 5, *In re* Purdue Pharma L.P., No. 19-23649 (Bankr. S.D.N.Y. Oct. 4, 2019), Document No. 42 (describing the injunction issue and arguing that the court "should not strip the States of their core function to enforce their own regulatory laws"). The parties ultimately reached a settlement on the scope and duration of a global pause, and the court approved broad injunctive relief given the status of settlement negotiations. Renae Merle, *Judge in Purdue Pharma Bankruptcy Case Extends Lawsuit Protection to Sacklers*, WASH. POST (Nov. 6, 2019), https://www.washingtonpost.com/business/2019/11/06/judge-purdue-pharma-bankruptcy-extends-lawsuit-protection-sacklers/ [https://perma.cc/8MH5-C99W].

167. *See* Dwyer, *supra* note 159.

operates for the purpose of funding a trust, fueled with at least $3 billion from the Sackler family.[168]

In early phases of the bankruptcy, stakeholders who felt sidelined by the prepetition settlement negotiations flocked to Judge Drain's courtroom, arguing about threshold case issues in an effort to jostle for negotiation leverage. The case docket reflects a dizzying number of official and ad hoc committees advocating for different stakeholders.[169] Each group of claimants seemed invested in preserving a settlement, but they exhibited different appetites for threatening the offer on the table. They also sought slightly different outcomes, with some hoping for public-health funding and others requesting direct payments for personal harms. In a limited-dollar scenario like Purdue, infighting among groups is inevitable.

After bumping along for nearly two years as the debtors looked for common ground, Purdue received confirmation of its twelfth amended plan of reorganization in September of 2021.[170] The Sacklers' contribution ultimately inched up to $4.325 billion paid over ten years, in exchange for broad releases of opioid liability.[171] The Sackler contribution is significant but controversial given (1) the family's direct involvement in, and profit from, opioid marketing that caused significant harm; and (2) evidence that the family has hidden assets overseas and beyond the grasp of claimants.[172] Notwithstanding these concerns, if the family

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168. *See* Susan Bokermann, *Analysis: Opioid Bankruptcy Has a Surprise Public Benefit Debate*, BLOOMBERG L. (Nov. 12, 2020, 2:34 PM), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-opioid-bankruptcy-has-a-surprise-public-benefit-debate [https://perma.cc/H5E8-7VE7]; Brian Mann, *Purdue Pharma: Sackler Family's 'Personal Wealth' Offered in Opioid Deal*, NPR (Sept. 9, 2019, 5:07 AM ET), https://www.npr.org/transcripts/758927743 [https://perma.cc/DX4Z-MSAG]; Jan Hoffman, *Purdue Pharma Is Dissolved and Sacklers Pay $4.5 Billion to Settle Opioid Claims*, N.Y. TIMES (Sept. 17, 2021), https://www.nytimes.com/2021/09/01/health/purdue-sacklers-opioids-settlement.html [https://perma.cc/YJ5T-EV8Y]. *See also* Rowland, *supra* note 165. Funding for the trust must come, at least in part, from the ongoing sale of opioids. *Id.*

169. *See* Prime Clerk, *Purdue Pharma L.P.: Case No. 19-23649*, https://restructuring.primeclerk.com/purduepharma/Home-DocketInfo [https://perma.cc/GB5Q-UEUH] (featuring, as of November 22, 2021, over four thousand docket entries in Purdue's Southern District of New York bankruptcy proceeding alone).

170. *In re* Purdue Pharma L.P., No. 19-23649 (Bankr. S.D.N.Y. Sept. 17, 2021), Document No. 3787 (setting forth findings of fact, conclusions of law, and order confirming the Twelfth Amended Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. and its Affiliated Debtors).

171. *Id.* at 30, 70-79.

172. Associated Press, *Sacklers Withdrew Nearly $11 Billion out of Purdue Pharma as Opioid Crisis Worsened*, L.A. TIMES (Dec. 16, 2019, 8:22 PM PT), https://www.latimes.com/business/story/2019-12-16/sackler-family-oxycontin-purdue-pharma-opioid-crisis-payments [https://perma.cc/TMY5-B4ME]. Anticipating headwinds on the Sackler's involvement, the debtors withdrew the settlement payment, the company would lose those billions of dollars that could have helped to meaningfully compensate claimants. Unsatisfied with the outcome, objectors appealed the confirmation order and the plan's releases took center stage in the United States District Court for the Southern District of New York.[173] In January 2021, Judge McMahon issued a blockbuster ruling that vacated the plan, finding that the bankruptcy court lacked statutory authority to grant the nondebtor, nonconsensual releases contained therein.[174] The Second Circuit will decide the issue on appeal, for now leaving Purdue and its creditors in limbo.[175]

Although the plan is not binding while the case is mired in uncertainty, it can still offer useful insight into the negotiated terms that impact claimants' treatment. Under the vacated plan, claims against Purdue and the nondebtor-released parties are channeled into a labyrinthian structure of trusts. The complexity of this settlement-distribution infrastructure reflects another core challenge of mass-tort bankruptcies: infighting among claimant groups for allocation. Purdue's case involved a mix of individual, governmental, tribal, and other claimants, all of whom had to agree to how money should best be distributed.[176] Under the plan, personal-injury claimants—the group of individuals with interests most similar to other mass-tort cases—will be allocated between $3,500 and $48,000 based on their category of claim and level of harm. Claimants must submit a claim form (separate from, and in addition to, the proof of claim that was already required by the bankruptcy process) within 90 days of receiving it in

engaged a consulting firm to analyze money going in and out of the company to various Sackler family members. *Id.* The report was not shared with the public, but it did play a role in the parties' court-ordered mediation which led to the final settlement terms. Although the information uncovered during bankruptcy was troubling, the case is a strong example of how critical disclosure is to permitting the representative parties to accept and understand the value of third-party releases.

173. *See* Jeremy Hill, *A $10 Billion Question: Did Sacklers 'Abuse' Purdue Bankruptcy?*, BLOOMBERG L. (Dec. 6, 2021, 7:06 PM EST), https://www.bloomberg.com/news/articles/2021-12-07/a-10-billion-question-did-sacklers-abuse-purdue-bankruptcy [https://perma.cc/E9K2-WSCD].

174. *In re* Purdue Pharma L.P., No. 21-cv-08566-CM (S.D.N.Y. Dec. 16, 2021), Document No. 101 (decision and order on appeal).

175. *See* Jodi Xu Klein, *Purdue Pharma Authorized to Appeal Judge's Rejection of Sackler Settlement Plan*, WALL STREET J. (Jan. 7, 2022, 6:54 PM ET), https://www.wsj.com/articles/purdue-pharma-authorized-to-appeal-judges-rejection-of-sackler-settlement-plan-11641589371 [https://perma.cc/XZ74-SANQ].

176. The end result also will involve a significant percentage of available assets being used for administrative oversight of the various trusts.

order to receive any compensation from the trust.[177] 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.[178]

2. *Insys Therapeutics*

Unlike Purdue, which seeks to reorganize a company facing massive opioid litigation into a public-benefit trust company, Insys Therapeutics used bankruptcy to sell valuable assets and wind down after putting the proceeds into trusts for claimants. Insys was a smaller pharmaceutical manufacturer, with just a few core products (most notably Subsys, a quick-delivery opioid spray for cancer pain).[179] Prior to filing for bankruptcy, Insys reached a $225 million settlement with the Department of Justice related to kickback payments that also required the Subsys sale.[180]

After selling its assets, Insys confirmed a liquidating plan to transfer assets to the Insys Liquidation Trust (ILT) and the Victims Restitution Trust (VRT).[181] The plan channeled personal-injury claims into the VRT, funded by insurance proceeds, and all remaining claims into the ILT, funded by the debtor's other assets.[182] Notably, the ILT did not channel claims against nondebtor entities, but it offers a useful example of the procedural limitations victims face in recovery trusts. Personal-injury claimants have no right to appeal claims-administrator

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177. Notice of Filing of Sixteenth Plan Supplement Pursuant to the Ninth Amended Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. and Its Affiliated Debtors at 5-6, *In re* Purdue Pharma L.P., No. 19-23649 (Bankr. S.D.N.Y. Aug. 25, 2021), Document No. 3655.

178. *Id.* at 3.

179. Russ Wiles, *After Opioid Scandal, Insys Tries to Chart New Course with Cannabis and Other Products*, ARIZ. REPUBLIC (May 8, 2019, 6:15 AM MT), https://www.azcentral.com/story/money/business/2019/05/08/arizona-insys-therapeutics-looks-cannabis-move-opioid-epidemic/1122267001 [https://perma.cc/C69B-L62Y] (noting that Subsys accounted for "around 95% of Insys' revenue").

180. Kyle Blankenship, *Insys Agrees to Sell Notorious Fentanyl Spray to Drugmaker Promising Good Behavior*, FIERCE PHARMA (Sept. 20, 2019, 10:30 AM), https://www.fiercepharma.com/pharma/bankrupt-insys-cleared-to-sell-addictive-fentanyl-spray-subsys-deal-could-net-20m [https://perma.cc/C7PN-KBLD]. The investigation also led to federal charges for Insys executives, sales managers, and doctors. *Id.*

181. *In re* Insys Therapeutics, Inc., No. 19-11292 (Bankr. D. Del. Jan. 16, 2020), Document No. 1115 (setting forth findings of fact, conclusions of law, and order confirming the Second Amended Joint Chapter 11 Plan of Liquidation of Insys Therapeutics, Inc. and Its Affiliated Debtors).

182. Second Amended Joint Chapter 11 Plan of Liquidation of Insys Therapeutics, Inc. and Its Affiliated Debtors at 49-50, *In re* Insys Therapeutics, Inc., No. 19-11292 (Bankr. D. Del. Jan. 16, 2020), Document No. 1115-1.

determinations under the VRT, a significant threat to procedural justice.[183] Furthermore, any recovery on approved claims will depend on recovery from insurance proceeds. Nearly two years after the trust was formed in February 2020, it appears that the claims administrator has finalized just one insurance settlement.[184] Perhaps the experience for Insys claimants is a function of the extremely limited assets in the case,[185] yet victims who will likely recover little or no payment on claims may stand to gain the most from an opportunity to voice concerns about proper claim treatment.[186]

3. *Mallinckrodt*

Mallinckrodt PLC, one of the largest opioid manufacturers in the United States, made headlines multiple times in recent years in connection with a potential bankruptcy filing.[187] Mallinckrodt's problems extend beyond opioid liability: they include $5.2 billion in debt obligations and regulatory issues relating to its multiple sclerosis drug Acthar.[188] In February 2020, Mallinckrodt disclosed plans to put only the generics arm of its business into bankruptcy to effectuate a settlement reached with a majority of opioid defendants.[189] But in August of that

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183. *Id.*

184. *See* Exhibit A of Seventh Quarterly Report of the VRT Trustee at 3, *In re* Insys Therapeutics, Inc., No. 19-11292 (Bankr. D. Del. Nov. 2, 2021), Document No. 1769 (outlining receipt of a $4.25 million insurance settlement but also disclosing more than $1 million in legal fees).

185. *See* Kyle Blankenship, *Bankrupt Insys Offers to Turn out Its Almost Empty Pockets for Plaintiffs*, FIERCE PHARMA (Nov. 22, 2019, 8:45 AM), https://www.fiercepharma.com/pharma/insys-offers-to-settle-opioid-claims-last-days-bankruptcy-liquidation [https://perma.cc/3224-8SYQ] (describing efforts to "pick some meat off the drugmaker's bones").

186. The counterargument to this point, of course, is that administrative costs may increase from fielding appeals. I leave for another day the assessment of whether administrative costs of bankruptcy-trust processes are appropriate but point out that meaningfully improving victims' procedural protections is likely among the highest-value expenditures.

187. *See, e.g.*, Sheila Kaplan & Jan Hoffman, *Mallinckrodt Reaches $1.6 Billion Deal to Settle Opioid Lawsuits*, N.Y. TIMES (Feb. 25, 2020), https://www.nytimes.com/2020/02/25/health/mallinckrodt-opioid-settlement.html [https://perma.cc/9SUV-PAXL]; Katherine Doherty, *Drugmaker Mallinckrodt Weighs Bankruptcy to Ease Litigation*, BLOOMBERG L. (Aug. 4, 2020, 12:28 PM), https://news.bloomberglaw.com/bankruptcy-law/drugmaker-mallinckrodt-weighs-bankruptcy-to-manage-litigation [https://perma.cc/W6RF-6X46].

188. Alexander Gladstone & Dave Sebastian, *Mallinckrodt May File for Bankruptcy, Undercutting Opioid Settlement*, WALL ST. J. (Aug. 4, 2020, 9:45 AM ET), https://www.wsj.com/articles/mallinckrodt-may-file-for-bankruptcy-undercutting-opioid-settlement-11596548714 [https://perma.cc/68E4-JT2E].

189. Alexander Gladstone, Jared S. Hopkins & Juliet Chung, *Mallinckrodt Pitches at Least $1.6 Billion Opioid Settlement, Generics Unit Bankruptcy*, WALL ST. J. (Feb. 24, 2020, 10:00 PM ET),

same year, after a federal court held that Mallinckrodt owed $640 million in rebates from the Acthar dispute, the company disclosed that the majority of its business might be forced into bankruptcy.[190] This development threatened the February settlement with opioid claimants, because a portion of the settlement contribution was in the form of company warrants—which would likely not survive Chapter 11.[191]

The company finally filed its long-awaited bankruptcy in October 2020. Much like in the other opioid bankruptcies, nondebtor entities have much to gain from engaging in Mallinckrodt's Chapter 11 proceeding. The company's press release announcing the settlement in principle noted the channeling injunction and releases were intended to reach all Mallinckrodt subsidiaries, even those carved out of the bankruptcy.[192] Mallinckrodt's confirmed plan of reorganization is the product of further negotiations with opioid claimants and stakeholders. It establishes a number of trusts for different categories of opioid claimants that will be funded by a $1.725 billion cash contribution.[193] The plan channels claims into the trusts and releases a long list of affiliates, directors, officers, and other case participants.[194] While the debtor will enter into mutual

https://www.wsj.com/articles/mallinckrodt-enters-creditor-talks-ahead-of-potential-generics-bankruptcy-11582572100 [https://perma.cc/7Q8G-GTYZ].

190. Gladstone & Sebastian, *supra* note 188.

191. Press Release, Mallinckrodt, Mallinckrodt Announces Agreement in Principle for Global Opioid Settlement and Associated Debt Refinancing Activities (Feb. 25, 2020), https://www.sec.gov/Archives/edgar/data/1567892/000119312520047142/d894295dex992.htm [https://perma.cc/NXD3-ELG3]. Warrants are a form of equity interest that are effectively extinguished in a Chapter 11 reorganization. *See* 11 U.S.C. § 1129(b) (2018) (permitting equity to retain interests only after higher priority creditors are paid in full); *see also* Lynn M. LoPucki & William C. Whitford, *Bargaining over Equity's Share in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 139 U. PA. L. REV. 125, 130 (1990) (describing the impact of the absolute priority rule on equity interests).

192. Press Release, Mallinckrodt, Mallinckrodt Announces Agreement in Principle for Global Opioid Settlement and Associated Debt Refinancing Activities (Feb. 25, 2020), https://www.sec.gov/Archives/edgar/data/1567892/000119312520047142/d894295dex992.htm [https://perma.cc/NXD3-ELG3].

193. *See* Debtors' (A) Memorandum of Law In Support of Confirmation of the First Amended Joint Plan of Reorganization of Mallinckrodt PLC and Its Debtor Affiliates Under Chapter 11 of the Bankruptcy Code and (B) Omnibus Reply to Objections to Confirmation at 33, *In re* Mallinckrodt PLC, No. 20-12522 (Bankr. D. Del. Oct. 27, 2021), Document No. 5016.

194. *See* Second Amended Joint Plan of Reorganization of Mallinckrodt PLC and Its Debtor Affiliates Under Chapter 11 of the Bankruptcy Code at 42, 139-145, *In re* Mallinckrodt PLC, No. 20-12522 (Bankr. D. Del. Dec. 2, 2021), Document No. 5636.

releases with a list of opioid manufacturers and distributors that were co-defendants in pre-bankruptcy litigation, these entities will not receive releases from opioid claimants.[195]

For opioid personal-injury claimants, the plan outlines the process by which individuals can recover from the trust.[196] First, any claimant may opt out of the trust and bring a claim in the tort system; however, any recovery cannot exceed what would have been available within the trust-liquidation procedure.[197] Each claimant will need to provide proof that they have a qualifying claim, after which they will receive an award-point allocation that may be discounted based upon available trust assets.[198] Claimants can appeal the decision to an appeals special master, after which the decision is final.[199]

B. Bankruptcies Driven by Sex-Abuse Liability

Another recent wave of mass-tort defendants has used bankruptcy to resolve liability relating to sex-abuse scandals. These bankruptcies share many characteristics with other mass-tort cases, including the defendants' desire to settle all outstanding claims, even those of victims who have not yet come forward or who may not yet have the ability to sue under existing law. These entities are unable to continue their mission while operating under the shadow and expense of litigation on many fronts. Their victims want a day in court and to extract compensation that matches the severity of the defendants' bad acts.

Bankruptcy grifters swarm around sex-abuse Chapter 11 cases, looking for any opportunity to resolve victims' relentless pursuit in one fell swoop. Their alternative—to litigate cases in piecemeal fashion—is time-consuming, costly, and anathema to much-needed rebranding and forward-looking operations. The mass-tort defendants involved in recent sex-abuse bankruptcies do not want to file for bankruptcy, which would require them to forfeit valuable assets and expose internal documentation of their bad behavior. As shown in the various proposed restructuring plans, these bankruptcy grifters would rather pay a sum of money and tell victims to "take it or leave it." The problem is that victims often

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195. *Id.* at 144.

196. *See* Exhibit A of Notice of Filing of Trust Distribution Procedures, *In re* Mallinckrodt PLC, No. 20-12522-JTD (Bankr. D. Del. July 20, 2021), Document No. 3282.

197. *Id.* at Exhibit C at 46, 57.

198. *Id.* at 51-56. Certain categories of damages, including punitive or exemplary damages, are not recoverable from the trust. *Id.* at 45.

199. *Id.* at 54-55. Claimants who appeal an award determination will have to pay a $1,000 fee, which will be refunded only if the appeal is successful. *Id.* at 54.

have little understanding of whether the payment is more than what they would recover outside of bankruptcy. This, combined with most victims' strong desire to bring wrongdoers to task through a day in court, makes global peace a tall order.

1. *USA Gymnastics*

In 2016, *The Indianapolis Star* broke a story outlining sexual abuse committed by longtime USAG physician Larry Nassar.[200] In the months and years that followed, the scope of abuse and degree of inaction by various organizations in power came to light and shocked the nation. On December 5, 2018, roiled with scandal and facing significant exposure from Nassar's victims, USAG filed for bankruptcy in Indianapolis, where the company is headquartered.[201]

After early fights over the scope of discovery into the debtor's and nondebtors' assets and defenses, protracted negotiations led to a settlement among insurers, claimants, and the debtor.[202]

Despite broad support for the $380 million deal by key stakeholders, the plan incorporating settlement terms faced pushback leading up to confirmation.[203] The plan funnels all claims against USAG and additional nondebtor parties into

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200. Tim Evans, Mark Alesia & Marisa Kwiatkowski, *Former USA Gymnastics Doctor Accused of Abuse*, INDIANAPOLIS STAR (Sept. 12, 2016, 3:46 PM ET), https://www.indystar.com/story/news/2016/09/12/former-usa-gymnastics-doctor-accused-abuse/89995734 [https://perma.cc/C8J6-99Q3].

201. *See In re* USA Gymnastics, No. 18-09108-RLM-11, 2020 WL 1932340, at *1 (Bankr. S.D. Ind. Apr. 20, 2020).

202. *See* Zoe Christen Jones, *Larry Nassar Abuse Victims Reach $380 Million Settlement with USA Gymnastics and U.S. Olympic and Paralympic Committee*, CBS NEWS (Dec. 14, 2021, 7:58 AM), https://www.cbsnews.com/news/larry-nassar-victims-settlement-380-million-usa-gymnastics [https://perma.cc/UPD4-FQTV].

203. *See* U.S. Trustee's Limited Objection to Third Amended Joint Chapter 11 Plan of Reorganization Proposed By USA Gymnastics and the Additional Tort Claimants Committee of Sexual Abuse Survivors, *In re* USA Gymnastics, No. 18-09108-RLM-11 (Dec. 3, 2021), Document No. 1734; Limited Objection of Liberty Insurance Underwriters Inc. to Confirmation of Third Amended Joint Chapter 11 Plan of Reorganization Proposed By USA Gymnastics and the Additional Tort Claimants Committee of Sexual Abuse Survivors, *In re* USA Gymnastics, No. 18-09108-RLM-11 (Dec. 3, 2021), Document No. 1735; Objection of TIG Insurance Company to Third Amended Joint Chapter 11 Plan of Reorganization Proposed By USA Gymnastics and the Additional Tort Claimants Committee of Sexual Abuse Survivors, *In re* USA Gymnastics, No. 18-09108-RLM-11 (Dec. 3, 2021), Document No. 1736; State of Indiana's Limited Objection to the Third Amended Joint Chapter 11 Plan of Reorganization Proposed By USA Gymnastics and the Additional Tort Claimants Committee of Sexual Abuse Survivors, *In re* USA Gymnastics, No. 18-09108-RLM-11 (Dec. 3, 2021), Document No. 1739.

a trust that is funded by insurance policies and other settlement contributions.[204] In exchange, the plan releases USAG along with a list of nondebtors, including USOPC, the Karolyi coaching family, Twistars, and other related individuals and entities that are connected with a training facility where Dr. Nassar committed some of his abuse.[205] There is certainly a binding thread among all defendants: a connection to Larry Nassar.[206] But each individual defendant has different pools of claimants, different levels of culpability and available defenses, and at least some different insurance coverage and resources to compensate victims. Objectors questioned whether this justified a channeling injunction and releases for nondebtors and challenged whether such relief was even permissible under Chapter 11.[207] The court confirmed the plan, finding authority in § 105 and concluding that releases were appropriate because the complex reorganization hinged on the participation and contributions of third parties.[208]

Under the plan's terms, abuse claimants will face significant substantive and procedural limitations. First, the trust only permits certain types of claims and recoveries while preventing others, such as punitive or exemplary damages.[209] USAG claimants will be assigned a fixed-point amount for their claim based on their level of performance as a gymnast and other factors. They may submit a 5-page personal statement and other individualized evidence for consideration,

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204. *See* Modified Third Amended Joint Chapter 11 Plan of Reorganization Proposed by USA Gymnastics and the Additional Tort Claimants Committee of Sexual Abuse Survivors, at 33, *In re* USA Gymnastics, No. 18-09108-RLM-11 (Dec. 13, 2021), Document No. 1761 [hereinafter Modified Third Amended Plan] (describing plan contributions).

205. *See id.* at 55-65, 185 (outlining the various releases and channeled claims, and listing the "Participating Parties" that will be released).

206. It is worth noting that claimants may receive some intangible benefit outside of bankruptcy, such as the parallel criminal proceedings against individual wrongdoers like Larry Nassar. *See* Eric Levinson, *Larry Nassar Sentenced to up to 175 years in Prison for Decades of Sexual Abuse*, CNN (Jan. 24, 2018), https://www.cnn.com/2018/01/24/us/larry-nassar-sentencing/index.html [https://perma.cc/5ZFW-VXSJ].

207. *See, e.g.*, U.S. Trustee's Limited Objection to Third Amended Joint Chapter 11 Plan of Reorganization Proposed By USA Gymnastics and the Additional Tort Claimants Committee of Sexual Abuse Survivors, *supra* note 203, at 11, 16 (challenging the court's authority to grant nondebtor releases and arguing that the plan's releases do not satisfy applicable circuit standards).

208. *In re* USA Gymnastics, No. 18-09108-RLM-11 (Dec. 16, 2021), Document No. 1776 (setting forth findings of fact, conclusions of law, and order confirming the Modified Third Amended Joint Chapter 11 Plan of Reorganization).

209. Modified Third Amended Plan, *supra* note 204, at 169 ("[P]unitive damages and damages that do not compensate the tort claimant shall not be considered or allowed, even if these damages could have been allowed in a case or at trial."). These damages could be recovered outside of bankruptcy under USOPC policies.

and have the opportunity for an interview with the single appointed claims reviewer; however, any award will be reduced by the costs and expenses of the interview.[210] Future claimants have just five years to seek recovery against a 1% future claims reserve.[211] Once they receive a point allocation, claimants have a narrow window for a single appeal for reconsideration.[212] Appeals will be heard by the exact same arbiter who made the initial determination, and expenses and costs for an appeal will come out of the claimant's award.[213] In sum, these trust procedures appear designed to silence claims as quickly as possible, limit categories of relief that would be otherwise available, and set a short window for future claimants to have guaranteed recovery. It is the debtor's responsibility to make sure that creditors have the ability to vote on a plan with sufficient knowledge about their options.[214] Meeting this standard should require delivering information about nondebtors, including their assets and position if litigation were to go forward.[215] Additional scrutiny should apply when a plan alters victims' path to recovery against both debtors and nondebtors.

2. *Boy Scouts of America*

In February 2020, BSA filed for bankruptcy to resolve its mass-tort liability arising out of decades of sexual abuse in scouting.[216] Like many mass-tort defendants, BSA faced extensive legal costs defending claims nationwide that proved unsustainable for its mission.[217] BSA estimates there are "approximately 1,700 pending or asserted claims of abuse against itself or a Local Council organization."[218] Litigation exposure, combined with declining registration and separation from the Church of Jesus Christ of Latter-Day Saints, left Chapter 11 as the only alternative.[219]

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210. *See id.* at 164-68 (describing the procedures for Abuse Claimants to support their claims).

211. *Id.* at 24, 33.

212. *Id.* at 168.

213. *Id.*

214. 11 U.S.C. § 1125 (2018).

215. *Id.*

216. Chapter 11 Plan of Reorganization for Boy Scouts of America and Delaware BSA, LLC, *In re* Boy Scouts of Am., No. 20-10343 (Bankr. D. Del. Feb. 18, 2020).

217. Debtors' Informational Brief, *supra* note 40, at 38 (noting that Boy Scouts of America (BSA) paid more than $150 million in settlements and legal and other professional fees from 2017 through 2019).

218. *Id.* at 32.

219. *Id.* at 6 n.10.

The BSA case is challenging for a few reasons. First, BSA is a nonprofit organization with significant assets that it claims are protected from distribution in the bankruptcy estate under donor restrictions.[220] Second, the corporate structure of the Boy Scouts organization separates BSA (the national entity) and its affiliates from local councils.[221] BSA nonetheless provides significant services for, and is closely intertwined with, local councils; for example, they share insurance policies that are a core asset of the bankruptcy.[222] Third, like in many mass-tort cases, the sheer number of stakeholders with different perspectives and interests complicates the path to a global resolution. Beyond the standard parties—the debtor and the creditors' committees—the BSA case involves negotiations among the Future Claimants' Representative, the Official Committee of Tort Claimants, the Coalition of Abused Scouts for Justice (which consists of 10,000 abused scouts who formed a coalition within the bankruptcy case),[223] an Ad Hoc Committee of Local Councils of the Boy Scouts of America, and insurers.

In its early pleadings, BSA filed a plan and disclosure statement, opened a data room for stakeholders, requested formal mediation, and sought to extend stay relief to local councils.[224] The bankruptcy negotiations centered on forming

220. *Id.* at 7; *see also* Mike Baker, *At Stake in Boy Scouts' Bankruptcy: $1 Billion in Assets, or Much More*, N.Y. TIMES (Feb. 19, 2020), https://www.nytimes.com/2020/02/19/us/boy-scouts-bankruptcy-assets.html [https://perma.cc/2W2Q-LN29] (identifying more than $1 billion in assets, including: "financial investments like stocks and bonds ($680 million), cash in the bank ($55 million), and property ($102 million)"). Additionally, the debtor owns an extensive art collection—including a number of Norman Rockwell oil paintings—that is estimated to be worth approximately $130 million. *See* Joseph H. Saunders, *Boy Scouts' Norman Rockwell Paintings Worth Millions at Risk in Bankruptcy from Sex Abuse Lawsuits*, ST. PETERSBURG INJURY L. NEWS (Mar. 11, 2020), https://pinellas.legalexaminer.com/legal/boy-scouts-norman-rockwell-paintings-worth-millions-at-risk-in-bankruptcy-from-sex-abuse-lawsuits [https://perma.cc/LJQ2-37HD].

221. Debtors' Informational Brief, *supra* note 40, at 2-3 (discussing the structure of BSA).

222. Randall Chase, *New Boy Scouts Bankruptcy Plan Could Exclude Local Councils*, NEWS10 (Apr. 14, 2021, 5:13 PM EDT), https://www.news10.com/news/national/new-boy-scouts-bankruptcy-plan-could-exclude-local-councils [https://perma.cc/Y9Z7-56VQ].

223. *See* Verified Statement of Coalition of Abused Scouts for Justice at 1, Century Indem. Co. v. Boy Scouts of Am. (*In re* Boy Scouts of Am.), 630 B.R. 122, No.20-10343 (Bankr. D. Del. 2021), *appeal docketed*, No. 21-2035 (3d Cir. June 3, 2021).

224. *See Boy Scouts of America Restructuring Website: Court Docket*, OMNI AGENT SOLS., https://cases.omniagentsolutions.com/documents?clientid=CsgAAncz%2b6Yclmvv9%2fq5CGybTGevZSjdVimQq9zQutqmTPHesk4PZDyfOOLxIiIwZjXomPlMZC0%3d&tagid=1153 [https://perma.cc/ZF45-HS22].

a victims' trust and the relief available to nondebtor entities.[225] BSA's relationship with its 261 local councils and many chartered organizations posed a key complication. Although BSA has significant assets, the majority of valuable property and assets are controlled at the local-council level.[226] BSA argued that local councils are legally distinct and their assets are not within estate reach.[227] But it also wanted to include local councils in the trust structure, subject to channeling injunctions and releases. Key stakeholders, such as the Official Tort Claimants' Committee and the Official Committee of Unsecured Creditors, initially challenged whether the local councils should receive the benefits of BSA's case and what their contribution should be for such protections.[228]

The BSA bankruptcy turned a recent corner with the debtors seeking approval of a confirmation plan that memorializes a settlement between the parties, full of various payments and releases.[229] Interestingly, the objections shifted from victims seeking relief to insurers arguing about the extent of their exposure under the settlement.[230] Confirmation of the plan is slated for early 2022. As the plan-confirmation process unfolds, it remains to be seen whether BSA can follow the path of Takata and successfully resolve mass-tort liability through nondebtor

225. *See* Debtor's Motion for Entry of an Order (I) Appointing a Judicial Mediator, (II) Referring Certain Matters to Mandatory Mediation, and (III) Granting Related Relief at 10, *In re* Boy Scouts of Am., No. 20-10343 (Bankr. D. Del. Feb. 18, 2021), Document No. 17 (noting that "the treatment of abuse claims related to Scouting that are asserted against entities that are not debtors in these cases" will be a core issue for mediation).

226. *See* Peg Brickley, *Boy Scouts Bankruptcy Roiled by Suspicions About Asset Transfers*, WALL ST. J. (July 9, 2020, 4:17 PM ET), https://www.wsj.com/articles/boy-scouts-bankruptcy-roiled-by-suspicions-about-asset-transfers-11594325864 [https://perma.cc/4E6E-EPW8].

227. *Id.*

228. *See* Randall Chase, *Boy Scout Victims Committee Says Claims Worth $103 Billion*, CLAIMS J. (Apr. 7, 2021), https://www.claimsjournal.com/news/national/2021/04/07/302982.htm [https://perma.cc/CD97-LFUE] (outlining open issues between the debtors and the committees); Rick Archer, *Boy Scouts, Tort Claimants Square Off Over Ch. 11 Plan*, LAW360 (May 19, 2021, 11:09 PM EDT), https://www.law360.com/articles/1386227/boy-scouts-tort-claimants-square-off-over-ch-11-plan [https://perma.cc/22JG-AATP] (same).

229. *See* Modified Fifth Amended Chapter 11 Plan of Reorganization for Boy Scouts of America and Delaware BSA, LLC, *In re* Boy Scouts of Am., No. 20-10343 (Bankr. D. Del. Sept. 30, 2021).

230. *See Boy Scouts of America Restructuring Website: Docket*, OMNI AGENT SOLS., https://cases.omniagentsolutions.com/documents?clientid=CsgAAncz%206Yclmvv9/q5CGybTGevZSjdVimQq9zQutqmTPHesk4PZDyfOOLxIiIwZjXomPlMZCo=%3E)&tagid=1153 [https://perma.cc/U3BA-8WJE] (providing court filings that set forth the objections).

relief while maintaining substantive and procedural protections. In fact, this outcome is likely better for claimants than proceeding to fight individually outside of bankruptcy.[231]

3. *Diocese Cases*

Since 2004, Catholic dioceses around the country have been filing for bankruptcy with increasing regularity.[232] Dioceses in Portland, Saint Paul, Minneapolis, Tucson, San Diego, Wilmington, Davenport, and, most recently, New Orleans have all turned to federal bankruptcy to deal with pending liability related to sexual abuse.[233] In all, more than twenty parishes have sought relief in bankruptcy—in some cases, hours before trial was set to start.[234] While some filings occurred after a settlement had been reached,[235] many of these bankruptcies deprived victims of their day in court and forced them into the settlement process through bankruptcy instead. The diocese cases use the now-familiar tools of channeling injunctions and nondebtor releases to resolve sexual-abuse liabilities.[236] What sets the diocese cases apart, however, is the way they incorporate some of the most destructive practices that set up hurdles and deprive claimants of meaningful protections.

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231. Pamela Foohey, *By Filing for Bankruptcy, the Boy Scouts May Compensate More Survivors of Sexual Abuse*, CONVERSATION (Feb. 24, 2020, 8:28 AM EST), https://theconversation.com/by-filing-for-bankruptcy-the-boy-scouts-may-compensate-more-survivors-of-sexual-abuse-132163 [https://perma.cc/GDU6-J7KN].

232. *See generally* Joseph A. Rohner IV, *Catholic Diocese Sexual Abuse Suits, Bankruptcy, and Property of the Bankruptcy Estate: Is the "Pot of Gold" Really Empty?*, 84 OR. L. REV. 1181 (2005) (discussing the first diocese to file for Chapter 11 bankruptcy in 2004 and the rash of filings that followed).

233. Marie T. Reilly, *Catholic Dioceses in Bankruptcy*, 49 SETON HALL L. REV. 871, 884-86 (2019) (collecting and describing bankruptcies by various Catholic churches); Travis Lux, *Archdiocese of New Orleans Files for Bankruptcy*, WWNO (May 1, 2020, 11:17 AM CDT), https://www.wwno.org/latest-news/2020-05-01/archdiocese-of-new-orleans-files-for-bankruptcy [https://perma.cc/2ZN9-UES3].

234. *See, e.g.*, Alan Cooperman, *Archdiocese of Portland, Ore., Declares Bankruptcy*, WASH. POST (July 7, 2004), https://www.washingtonpost.com/wp-dyn/articles/A31266-2004Jul6.html [https://perma.cc/DP5W-XBF9] (reporting that the Roman Catholic Archdiocese of Portland, Oregon, filed for bankruptcy hours before two civil trials were set to begin and while sixty others were pending).

235. Reilly, *supra* note 233, at 884-85 (discussing settlement of the Tucson, Arizona case, among others); Dan Glaister, *US Catholic Diocese Threatens Bankruptcy After Abuse Payouts*, GUARDIAN (June 23, 2004, 9:49 PM EDT), https://www.theguardian.com/world/2004/jun/24/usa.danglaister [https://perma.cc/D67V-LQCS].

236. Reilly, *supra* note 233, at 910-12.

One pertinent example of the ways in which the dioceses have gone too far is the use of channeling injunctions and nondebtor, third-party releases in the New Ulm bankruptcy. The New Ulm diocese filed for Chapter 11 bankruptcy on March 3, 2017, following "scores of clergy sex abuse lawsuits."[237] Three years later, in March 2020, the diocese reached a final settlement with survivors for $34 million which the bankruptcy judge approved.[238] The settlement provided a channeling injunction and created a trust. The trust compensates victims based on an assessment by the "Survivor Claims Reviewer," which requires claimants to prove a claim by a preponderance of the evidence.[239] The Survivor Claims Reviewer values the claim based on the nature and circumstances of abuse on a scale of zero to fifty-five (considering factors like the frequency of the abuse and grooming behaviors), the impact of the abuse (considering factors such as resulting physical or mental health conditions) on a scale of zero to forty, and claim involvement (evaluating the claimant's contribution to effectuating settlements) on a scale of zero to five.[240]

The claimant's only right of appeal to the Survivor Claims Reviewer determination is under the control of the trust, and any appeal needs to be filed within ten days accompanied by a $500 check.[241] The Survivor Claims Reviewer may then, solely on his own discretion, decide to review his own decision, and the amount awarded to the claimant could either go up or down.[242] No other right of appeal is available to the claimant.[243] Finally, the plan provided for mandatory reductions in a victim's settlement if (1) the abuser belonged to a religious order, (2) the survivor received another distribution for the same abuse, or (3) a survivor did not file a claim or lawsuit by May 25, 2016.[244]

237. Amy Fordli, *New Ulm Diocese in Southern Minnesota Files for Bankruptcy*, AP NEWS (Mar. 3, 2017, 12:31 PM), https://apnews.com/article/8a34c220758a4693987c19cbcbf3a690 [https://perma.cc/T4HN-25BH].

238. Hannah Yang, *Judge Approves $34M Clergy Abuse Settlement with New Ulm Diocese*, MPR NEWS (Mar. 10, 2020, 9:31 PM), https://www.mprnews.org/story/2020/03/10/judge-approves-34m-clergy-abuse-settlement-with-new-ulm-diocese [https://perma.cc/9NB6-JSYB].

239. First Amended Joint Chapter 11 Plan of Reorganization at 102, *In re* The Diocese of New Ulm, No. 17-30601 (Bankr. D. Minn. Dec. 18, 2019).

240. *Id.* at 104-06.

241. *Id.* at 103.

242. *Id.*

243. *See id.*

244. *Id.* at 105-06.

Additionally, the plan released the other churches that make up the New Ulm Diocese — eighty-two in all — and the New Ulm-area Catholic schools.[245] Along with the other parishes, the plan released five settling insurance companies, the employees of the church including all the priests and nuns, and all other related entities, including the Catholic Church.[246] None of the aforementioned entities other than the New Ulm diocese filed for bankruptcy. Because most valuable church property is owned at the parish level, less is available in the debtors' estate.[247]

The New Ulm case demonstrates how plans have gone too far in extending releases and approving settlements that do not properly protect victims' rights. The case is not unique in its channeling injunction or nondebtor releases. It does, however, go one step further with draconian limits on review of compensation decisions, creating an arbitrary process for appearances, and releasing a large number of nondebtors without contribution (or ongoing contribution) by the released parties.

C. *Trends of the New-Era Bankruptcy Grifter*

Recent mass-tort bankruptcies follow a few trends. First, bankruptcy grifters seeking relief have a wider range of connections to the debtor. What started as an opportunity primarily for insurers has expanded to affiliates, distributors, and even codefendants with tenuous legal links to the debtor. The Sackler family members, some of whom face claims that are independent of Purdue, sought the benefit of a channeling injunction and releases, even though their exposure outside of bankruptcy could be far greater than their settlement contribution of $4.325 billion. The parties argued that nondebtor relief is appropriate in their case due to the fact that the Sackler money on the table is all that allows Purdue to meaningfully pay claimants. And USOPC, which seeks to enjoin claimants for liability that is separate from debtor USAG, lists only an unsecured claim against USAG to justify involvement in the bankruptcy. An unsecured claim can be discharged in the course of bankruptcy, which weakens USOPC's argument. These grifters could stand alone and face mass-tort exposure but are instead paying to use the debtors' bankruptcies. In other cases, like the BSA case and the diocese bankruptcies, the relationship between the debtor and the nondebtor seeking

245. *See* Second Amended Joint Chapter 11 Plan of Reorganization at 55-57, *In re* The Diocese of New Ulm, No. 17-30601 (Bankr. D. Minn. Mar. 6, 2020).

246. *Id.* at 9 (defining "Protected Parties").

247. Catharine Pierce Wells, *Who Owns the Local Church? A Pressing Issue for Dioceses in Bankruptcy*, 29 SETON HALL LEGIS. J. 375, 382 (2005).

relief is so close that the nondebtor is effectively intertwined with the debtor. BSA is using this argument to justify nondebtor relief for its local councils and chartered organizations, while at the same time relying on corporate separateness to shield the councils' assets from recovery. The same is true of specific dioceses and the broader Catholic Church organizations. If nondebtor relief is permitted in such instances, then the cost to the nondebtors should more closely mirror that of a debtor.[248]

These cases also reflect a shift to broader injunctive relief with fewer protections and increased procedural roadblocks. Whereas exemplar trusts seek to maximize litigant access, the new era of bankruptcy grifters creates processes that reduce recovery and deter challenges. Removing or increasing costs for appeals, limiting the opportunity to present evidence, and omitting an opt-out possibility all harm claimants and ultimately threaten trust in the channeling injunction device. Fortunately, there is still time for courts or Congress to push back on bankruptcy grifters by imposing restrictions and requirements that protect claimant rights and reduce the allure of Chapter 11. Before turning to solutions, Figure 1 summarizes some of the core elements that indicate grifting behavior and features that can better protect claimants throughout the litigation process.[249]

248. See infra Part IV (suggesting a mandatory-contribution threshold for intertwined nondebtor entities.

249. This summary table offers the best assessment of the features in a given case from the perspective of individual mass-tort claimants as of the time of printing. When reviewing the table, please consider the following clarifying points. First, note that some plans have not yet been confirmed, and their elements may still evolve through ongoing negotiation—a feature, not a bug, of the bankruptcy process. Second, recall that this summary is tailored to individual claimants and not to other categories of creditors, like governments. Bankruptcy plans often treat different categories of creditors in different ways, and mass-tort bankruptcy plans may have multiple trusts, all of which may be subject to different procedures. Finally, in some cases a feature may be present but with caveats or limitations. For example, in the Takata bankruptcy, claimants were paid in full on all awarded claim amounts, but claims could not include punitive damages that might otherwise be available. In the interest of creating a useful graphic, I have not identified each of these nuances.

FIGURE 1. SUMMARY TABLE

	TAKATA	PURDUE PHARMA	INSYS THERA-PEUTICS	MALLIN-CKRODT	USA GYM-NASTICS	BOY SCOUTS OF AMERICA	NEW ULM DIO-CESE
FEATURES OF GRIFTING RISK							
Channeling injunction into trust structure	✓	✓	✓	✓	✓	✓	✓
Broad nondebtor releases	✓	✓	✓	✓	✓	✓	✓
PROCEDURAL PROTECTIONS FOR CLAIMANTS							
Right to multiple levels of appeal without additional expense	✓	x	x	x	x	x	x
Right to opt out of the trust	✓	✓	x	✓	x	✓	x
Opportunity to provide individualized information and request special review	✓	✓	✓	✓	✓	✓	✓
SUBSTANTIVE PROTECTIONS FOR CLAIMANTS							
Guarantee of payment-in-full of all awarded claim amounts	✓	x	x	x	x	x	x
Dollar value awarded reflects values awarded outside of bankruptcy	✓	✓	x	x	x	✓	x

Key:

✓: Factor present

X: Factor not present

Each of the case studies outlined above offers insight into the modern bankruptcy grifter and shows ways that grifting behavior continues to shift and evolve.

IV. ENDING THE GRIFT

As the previous Part outlines, debtors continue to expand opportunities for bankruptcy grifters and push the boundaries of Chapter 11. An obvious solution to this problem would be for Congress (or the courts) to severely narrow or eliminate the possibility of nondebtor relief in the bankruptcy process.[250] I think this nuclear approach to the problem is impractical, given its long-established practice in Chapter 11 and general acceptance (with varying levels of scrutiny) by the bench and the bar. I also do not think that universally eliminating nondebtor participation is in the best interest of claimants. Without the possibility of channeling or releasing claims, many nondebtor companies and individuals would withhold significant contributions that benefit claimants. As outlined above, in some instances, bankruptcy grifters do not contribute enough to justify a release from future litigation. But in others, like in the Takata bankruptcy, the nondebtor's involvement is substantively and procedurally superior for claimants. This Part begins the work of setting a bar for bankruptcy grifters and improving concrete standards for evaluating bankruptcy plans with nonconsensual relief for nondebtors.

The following proposals are a roadmap to limit bankruptcy grifters' misuse of Chapter 11. But recommendations in a vacuum are toothless unless someone has the power and incentive to implement them. Before identifying the path forward, we must consider the potential entities that are best situated to make these reforms. Two obvious options—each with its own challenges and limitations—come to mind: Congress and the courts.

Congressional action would be the cleanest way to address the overall problem of bankruptcy grifters. By approving changes to the Bankruptcy Code, legislators could decide precisely what sort of nondebtor releases are permitted, under what circumstances, and at what cost. Additionally, Congress could make changes by looking at the overall system with the benefit of experts who can

250. *See, e.g.*, Posner & Brubaker, *supra* note 117 (arguing that nondebtor releases like those going to the Sackler family are an "end-run around the reckoning that justice requires"). In recent months, legislators have circulated multiple bills addressing the availability of third-party releases and injunctions. *See, e.g.*, Nondebtor Release Prohibition Act, S. 2497, 117th Cong. (2021). Whether there is sufficient appetite in Congress for a legislative elimination of nondebtor releases remains to be seen.

advise on potential implications and unintended effects.[251] In contrast to shifts in court precedent occurring jurisdiction by jurisdiction, these changes would apply universally to all Chapter 11 cases and might have the added benefit of reducing debtors' venue gamesmanship by equalizing treatment of nondebtors throughout the country. If Congress does not have sufficient political appetite to pass proposed legislation that flatly prohibits most nondebtor releases, perhaps a more measured approach that mandates increased disclosure and raises approval thresholds could succeed. Despite the appeal of congressional action, passing legislation on a particular topic is a finicky and lengthy process that may not succeed for years, if ever. For this reason, relying on Congress alone to implement bankruptcy-grifter reform would be a mistake.

The judiciary might provide the answer, whether as a stopgap measure while congressional action unfolds or as a permanent end to grifting behavior. Bankruptcy judges are the first line of defense, given their expertise in the operation of the Bankruptcy Code and their role in influencing negotiations in Chapter 11 cases. By requiring debtors to meet certain thresholds when approving (or rejecting) plans with channeling injunctions and nondebtor releases, bankruptcy judges could temper today's emboldened bankruptcy grifters on a case-by-case basis. Unfortunately, as explained above, bankruptcy judges looking to maintain their district's status as a debtor-friendly venue may hesitate to impose costly limitations on nondebtor relief.[252] And courts at the appellate level may feel pressure to leave already-approved bankruptcy plans undisturbed, assuming the parties even go through the appellate process.[253]

Whoever the ultimate actor may be, the following Sections suggest changes to the bankruptcy process for nondebtors, including increased mandatory disclosure and discovery obligations. The Article then outlines procedural features

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251. In the court system, time pressure, case constraints, and client-driven advocates might result in outcomes that do not properly address the grifting problem.

252. *See supra* notes 150,152-154(discussing the motivations that may impact bankruptcy judges).

253. Bankruptcy appeals can be impacted by the equitable-mootness doctrine, which concludes that some appeals should not be decided because the remedy they seek—namely, unwinding elements of a bankruptcy plan that have already been completed—would be effectively impossible to grant. *See* Bruce A. Markell, *The Needs of the Many: Equitable Mootness' Pernicious Effects*, 93 AM. BANKR. L.J. 377, 400 (2019). In a number of recent cases, district courts have rejected nonconsensual third-party releases and sent parties back to the negotiation table. *See, e.g.*, *In re* Purdue Pharma L.P., No. 21-cv-07585-CM (S.D.N.Y. Dec. 16, 2021), Document No. 148 (decision and order on appeal vacating the Purdue Pharma plan due to third-party releases); Patterson v. Mahwah Bergen Retail Grp., Inc., No. 3:21cv167 (Bankr. E.D. Va. Jan. 13, 2022) (mem.), Document No. 79 (vacating the confirmed plan due, in large part, to the inclusion of third-party releases). If this trend expands more broadly, it may severely limit the benefits to bankruptcy grifters. However, if it remains isolated to a few jurisdictions, it will only amplify the relevance of venue selection.

that should be incorporated into plans that include nondebtor releases and channeling claims. Finally, it suggests a heightened standard for court approval of nondebtor releases and channeling injunctions that imposes a nondebtor "best interests" test, along with mandatory-contribution requirements.

A. Procedural Checks in the Bankruptcy Process

The bankruptcy process is based on a foundation of disclosure. Debtors receive the benefits of altering their prepetition rights and obligations. But in exchange they must share information about their financial and operational affairs, face examination by creditors, seek bankruptcy-court approval of certain corporate actions, and provide mandatory notice of case events. Bankruptcy grifters are not subject to the same stringent requirements, most of which apply only to debtors.

This should change. If bankruptcy grifters take the benefits of bankruptcy through channeling injunctions and releases, then they should be obligated to take on the accompanying duties aimed at transparency. This gives claimants better information about the nondebtor, allowing them to properly evaluate whether the requested relief is sufficient. It also may diminish the allure of latching onto a bankruptcy case.

1. Mandatory Disclosures

Debtors face intense scrutiny throughout the Chapter 11 process from the courts, the U.S. Trustee, and other stakeholders, including creditors and statutory committees. Mandatory disclosures are one feature of the bankruptcy process that facilitate this evaluation. First, the debtor must file detailed schedules of assets and liabilities, as well as statements of financial affairs in connection with its petition.[254] These disclosures contain significant amounts of information about the debtor's estate, including assets, liabilities, related parties, insurance coverage, insiders, litigation, and potential claimants. They are filed publicly, and anybody can access the information from the docket or claims agent.[255] The purpose of these schedules is to make sure stakeholders have the ability to confirm that estate assets are being protected and that any plan or liquidation effectively maximizes those assets for distribution to creditors. If a

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254. 11 U.S.C. § 521(a) (2018).

255. Although dockets are accessible for a fee through the PACER system, any mass-tort bankruptcy will have a claims agent that is paid to keep a free, easily accessible docket on its website for each case.

debtor's plan proposes to channel claims against bankruptcy grifters, the nondebtor should be required to complete and publicly file identical schedules.

A major challenge with evaluating nondebtor contributions is knowing whether the payment is enough to equitably compensate claimants. Having schedules could very quickly narrow the outstanding questions about how much a nondebtor could pay.[256] The *Purdue* case is a prime example of how consensus can be reached within the process through disclosures. The Sackler family disclosed millions of pages of documents about its assets and the various strengths of the claims held by the estate. While certain information remained subject to privilege and many of the related findings remain hidden from public view in mediation, these disclosures to core representative entities, such as the creditors' committee and other stakeholders, facilitated a consensual resolution.[257] Public disclosure is a price of entry to Chapter 11 for debtors; the same should apply to bankruptcy grifters.

A second category of mandatory disclosures the debtor is required to provide is the monthly operating reports (MORs). Each month, the debtor provides its report outlining changes, expenditures, and assets.[258] This gives parties a recurring view of the administrative costs of bankruptcies and notice about whether the debtor's assets remain safely within the estate. Imposing a similar MOR requirement on bankruptcy grifters is even more important. The Code prevents debtors from hiding assets, and it imposes strict penalties and clawback rights to preserve estate funds. The same is not true of nondebtors, who are free to use bankruptcy-imposed injunctions and stays to move assets, protecting themselves against recovery should the bankruptcy fall apart. Both the Sackler family

256. These schedules will also be necessary to assist with conducting the "best interests" analysis suggested below. *See infra* Section IV.B.1.

257. I recognize that there is a material difference between disclosure for internal participants to facilitate mediation versus unredacted, open access on the case docket, and that each bucket of disclosures may serve different (often valuable) purposes. Critics complained that the *Purdue* case did not require the Sacklers to share enough information about their actions with the public. *See* Modified Bench Ruling on Request for Confirmation of Eleventh Amended Joint Chapter 11 Plan at 78-81, *In re* Purdue Pharma L.P., No. 19-23649 (Bankr. S.D.N.Y. Sept. 17, 2021), Document No. 3786 (addressing states' disclosure-related objections). Given the increase in settlement value that can come from preserving confidentiality, I do not advocate for mandatory disclosure of every relevant fact, so long as sufficient access is given to those who advocate on behalf of claimants.

258. FED. R. BANKR. P. 2015 (imposing reporting requirements on Chapter 11 debtors); 11 U.S.C. § 704(a)(8) (2018); 28 C.F.R. § 58.8 (2021) (outlining procedures for completing "Uniform Periodic Reports in Non-Small Business Cases Filed Under Chapter 11 of Title 11").

and the BSA local councils have been accused of these actions, threatening creditor recovery and public trust in the process.[259] Creditors should have the ability to watch the assets of bankruptcy grifters to confirm that they are available to contribute, and nondebtors seeking channeled relief should be subject to similar limitations on asset transfers.

2. *Discovery Mechanisms*

Bankruptcy has a number of discovery-like features that give creditors information about the debtor's affairs. These tools should be duplicated for bankruptcy grifters seeking nondebtor relief.[260]

First, in each Chapter 11 case, the debtor sits for a 341 meeting. Led by the U.S. Trustee,[261] the 341 meeting is a form of bankruptcy deposition, on the record, during which parties-in-interest may appear and ask the debtor questions on a wide range of topics.[262] It is a guaranteed opportunity for individual creditors to ask the debtor questions on the record. To replicate this opportunity, courts should require bankruptcy grifters to sit for a similar examination when they seek the benefit of channeling injunctions or releases under a plan of reorganization. A mandatory examination—not unlike a 30(b)(6) corporate representative deposition in civil cases—will efficiently uncover basic information relevant to the nondebtor. It might also reduce other discovery requests by efficiently bringing together interested stakeholders and the U.S. Trustee in one place at one time.[263]

Beyond the 341 meeting, debtors are subject to formal discovery. Rule 2004 permits parties-in-interest to request documents and responses from the debtor

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259. *See supra* notes 165-178, 217-231 (discussing asset transfers in the Purdue and BSA bankruptcies).

260. The timing of mandatory disclosures may need to shift when applied to bankruptcy grifters. Schedules and the 341 meeting usually occur early in a Chapter 11 case, at which time nondebtor entities may not yet be identified. There are a number of ways to structure the timing, but one possibility is to treat the filing of a plan that contemplates nondebtor relief as the triggering event for disclosures. Strategically, it is usually in the debtor's interest to streamline plan confirmation, so it follows that debtors will encourage nondebtors to provide the necessary information sooner rather than later, and in any event a reasonable amount of time before any hearing on the disclosure statement.

261. Simon, *supra* note 31, at 1304-14.

262. *See* 11 U.S.C. § 341 (2018).

263. The cost for this examination should come from the nondebtor, not estate assets.

or others related to the debtor's estate.[264] This rule should apply to nondebtors seeking the benefit of channeling injunctions and releases. Currently, grifters can limit the amount of information they disclose to strategically withhold damaging facts, as they are not subject to any mandatory requirements prior to the plan process. Nondebtor disclosures can occur, but usually only in response to challenges from committees or noisy objectors in connection with plan confirmation, and likely upon heavily negotiated terms and limitations. This is the case in *Purdue*, where the Sackler family agreed to broad financial disclosures in connection with a court-ordered confidential mediation among the parties leading up to the final settlement, which increased their payment by more than a billion dollars.[265] If parties-in-interest have an absolute right to collect information earlier in the case relating to the nondebtor's connection to the estate and proposed plan, stakeholders can collect better information about whether the terms are appropriate or worth challenging.

Finally, discovery should benefit more than just a narrow representative group of claimants. Not everybody can (or should) have a seat at the table in aggregate cases, but to maximize disclosure and increase claimant access to information, key documents and disclosures should be shared publicly. At times, negotiations only work under protection, and in some instances, information is too sensitive to disclose to the broader public. Nevertheless, courts should be particularly careful when granting protective orders to information about bankruptcy grifters.[266]

3. *Procedural Protections for Channeled Claims*

In bankruptcy, just like in civil litigation, many of the case-specific outcomes are determined by the parties' negotiation. Flexibility is particularly important in bankruptcy, where the stakes are high and circumstances change quickly. But flexibility over the course of a restructuring is different from flexibility with the procedural elements of a claimant trust. Before confirming a plan of reorganiza-

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264. FED. R. BANKR. P. 2004. By its text, Bankruptcy Rule 2004 permits an examination of "any party in interest" which includes nondebtors, but only when related to "the acts, conduct, or property . . . of the debtor." *Id.*

265. *See* Christopher Rowland, *Members of Sackler Family Move Closer to OxyContin Settlement as Key States Drop Opposition*, WASH. POST (July 8, 2021, 12:36 PM), https://www.washingtonpost.com/business/2021/07/08/purdue-sackler-bankruptcy-settlement [https://perma.cc/4XTM-PVR8] (describing the outcome of Purdue Pharma's mediation).

266. Protected or private information is eroding trust in the Purdue and USAG cases, for example. *See supra* Sections III.A.1, III.B.1.

tion that channels nondebtor claims, courts should require some basic procedural features in proposed trusts that mirror civil litigation. Best practices include (1) an opt-out process for claimants to return to the civil system;[267] (2) the opportunity to provide supporting evidence to receive an individualized, pro-rata award rather than a flat amount;[268] (3) an automatic—and free—right to appeal;[269] (4) an independent arbiter, both initially and on review;[270] and (5) meaningful payment of awarded claims, for both current and future claimants.[271] Each of these elements might not be mandatory in every case, but courts should develop standards for acceptable trust procedures and any deviation should require court approval and case-specific jurisdiction. By increasing consistency in channeled claims and improving the baseline procedural protections in trusts, these measures would reduce the distance between civil litigation and collecting against a bankruptcy trust. This, in turn, would lessen the harm caused when bankruptcy grifters force their claimants into the Chapter 11 process.

B. Gatekeeping for Grifters

In addition to changes that increase disclosures during the bankruptcy process, I propose adding gatekeeping thresholds for approval of nondebtor channeling injunctions and releases that reduce the more problematic forms of grifting. These requirements come from prior mass-tort bankruptcies, where they played a role in balancing the scales. The goal of these measures is twofold: first, to make sure that claimants have some basic guarantee that their bankruptcy treatment from grifters is at least as strong as it would be outside of Chapter 11; and second, to limit the benefit of becoming a bankruptcy grifter instead of a debtor.

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267. *See supra* Section II.B (discussing the Takata bankruptcy).

268. *See supra* note 210 (outlining the USAG claim-assessment process).

269. *See supra* notes 245-247 (describing the appellate fee in the New Ulm case).

270. *See supra* Section II.A. (identifying the role of independent decision makers in *Takata*).

271. Any trust should "value, and be in a financial position to pay, present claims and future demands that involve similar claims in substantially the same manner." 11 U.S.C. § 524(g)(2)(B)(i)(II) (2018) (setting baseline expectations for asbestos-channeling injunctions).

1. *The "Best Interests" Test for Bankruptcy Grifters*

Bankruptcy cases involve inherent scarcity. The debtor only rarely has enough money to pay all claimants. In reorganization cases—in contrast to liquidations, where the sole purpose is to wind down operations—the goal is to balance paying claimants with preserving the company's future. The baseline expectation is that the estate is formed with all of the debtor's assets from the petition date. Over the course of the bankruptcy, the parties and court jointly assess how to reorganize those assets to address liabilities. Bankruptcy grifters, on the other hand, get different treatment. They participate in the shadows of the bankruptcy process, engaging in negotiations and offering money and information (if required), but they get to keep anything they do not willingly put on the bargaining table. Settlement is a fluid process, and judges are hesitant to intervene in the private parties' decisions about deal value. Where the stakes are high—like when claimants' rights against nondebtors are being extinguished in bankruptcy—the Code should impose basic protections.

The Bankruptcy Code already takes measures to protect creditors from unfair treatment. When a debtor seeks to confirm a plan, the Code requires the debtor to show that its plan is in the "best interest of creditors."[272] To make this showing, the debtor conducts a liquidation analysis to show that the creditor's treatment under the plan will not be worse than the treatment under a hypothetical Chapter 7 liquidation.[273] If the creditor is better off when the debtor liquidates under Chapter 7, the court cannot confirm the plan and the debtor is sent back to rework its approach.

Congress or the courts should implement a similar requirement for nondebtors seeking a channeling injunction and releases over claimants' objections. Of course, there is no liquidation at issue, so the "best interests" calculation in § 1129 is not a direct match. But at a higher level, the "best interests" test looks to two alternative realities: where the claimant stands if the requested relief is granted, and what the claimant receives if the relief is denied. For bankruptcy grifters, imagine if the debtor were required to show that channeling claims against the nondebtor will lead to equal or higher recoveries than the alternative—claimants

272. 11 U.S.C. § 1129(a)(7) note (Legislative Statements) ("Section 1129(a)(7) adopts the position taken in the House bill in order to insure that the dissenting members of an accepting class will receive at least what they would otherwise receive under the best interest of creditors test; it also requires that even the members of a class that has rejected the plan be protected by the best interest of creditors test for those rare cramdown cases where a class of creditors would receive more on liquidation than under reorganization of the debtor.").

273. *Id.* § 1129(a)(7)(A)(ii). If a debtor's Chapter 11 case fails, its case is converted to Chapter 7 and liquidated under control of a trustee.

who receive a claim against the debtor, but can still pursue the nondebtor in another forum.[274]

I suspect that in many cases the net impact of channeling claims will lead to a higher recovery, because the grifter contributes significant assets and waives potential obligations that would negatively impact the estate. But in other cases, there is no real benefit to bringing a claim in bankruptcy, and the nondebtor is simply grifting on the case to avoid full exposure outside the bankruptcy system. Consider an example. In the USAG bankruptcy, USOPC's claim against the debtor arises out of unsecured debt, which is dischargeable in bankruptcy. If the court were to evaluate whether gymnasts' claims against USOPC would be treated better under USAG's plan than outside in the tort system, it seems likely that the nonbankruptcy alternative would produce better recoveries.[275] Under USAG's plan, claims against USOPC would be determined as a flat amount and paid only out of USOPC's insurance.[276]

In a world where USOPC cannot grift on USAG's bankruptcy, the claimants have more options. First, claimants with claims against both USAG and USOPC could pursue both defendants. Claimants might receive smaller amounts from the USAG trust, because USOPC insurance proceeds would not be a part of the trust fund and USOPC would have a large unsecured claim for obligations owed by USAG, diluting the funds available to distribute.[277] Next, those claimants

274. This exact discussion played a role in the *Purdue* confirmation process. In evaluating the releases, the court assessed what alternative recovery would be available against the nondebtor grifters. *See* Modified Bench Ruling on Request for Confirmation of Eleventh Amended Joint Chapter 11 Plan at 144-49, *In re* Purdue Pharma L.P., No. 19-23649 (Bankr. S.D.N.Y. Sept. 17, 2021), Document No. 3786. Given the reality that much of the Sackler family's vast wealth was protected in overseas trusts and the overwhelming frenzy that would follow litigation against them outside of bankruptcy court, the likelihood of improved recovery over the plan's settlement terms seemed improbable.

275. Claimants in the USAG case asked for this very information to evaluate the plan. *See* Non-Committee Claimants' Objections to USA Gymnastics' Disclosure Statement, *In re* USA Gymnastics, No. 18-09108-RLM-11 (Sept. 29, 2021) (asserting that the debtor's liquidation analysis is insufficient because it does not consider the potential value of litigation against USOPC outside of bankruptcy).

276. USOPC is not contributing any cash. *See* Disclosure Statement in Support of Joint Third Amended Plan of Reorganization, at 21, *In re* USA Gymnastics, No. 18-09108-RLM-11 (Oct. 25, 2021) (explaining USOPC's contribution as "substantial proceeds from the USOPC Settling Insurance Policies and the waiver of its claims against the estate").

277. General Unsecured Creditors (GUCs) receive a pro rata share of available funds, so increasing the dollar value of claims in the GUC pool decreases the percent recovery for each creditor. *See* 11 U.S.C. § 726 (outlining distribution of estate assets).

could also sue USOPC on an individual or aggregate basis[278] and potentially recover against USOPC's insurance—the same policies that are going into the trust—in addition to USOPC's assets. Claimants would have access to more funds in a world where USOPC is not a bankruptcy grifter. Claimants would also have more, and more valuable, claims to bring. The USAG plan limits the types of damages and claims that are eligible for recovery, but such limitations do not apply in separate civil litigation against USOPC. These calculations would need to be discounted by the likelihood of success and the potential exhaustion of available funds due to the number of claimants, as well as the estimated settlement value of claims outside of bankruptcy. It is possible that kicking USOPC out of the USAG case would result in USOPC itself filing for bankruptcy, but many claimants would prefer that outcome and increased oversight, notwithstanding the administrative cost and operative interruption of Chapter 11.

Liquidation analysis is costly, imprecise, and often turns into a battle of experts who reach shockingly different values.[279] However, it still forces debtors to explain the impact of their plan and pushes the court to assess whether the substantive payments are enough. The same is true of a "best interests" test for bankruptcy grifters. If the calculation is close or if it appears that the nondebtor is gaming the system at the expense of claimants, then the court can reject the plan, or the nondebtor can alter the analysis by contributing more money to the bankruptcy trust. Giving nondebtors channeling injunctions and releases is only troubling if the relief comes at the expense of claimants. Assuming that claimants receive approximately equal process and substantive remedies, permitting access to Chapter 11 likely reduces overall litigation spending and increases the money that goes directly to claimants. The "best interests" test for bankruptcy grifters is the most effective way to meet this standard.

2. *The Section 524(g) Mandatory-Contribution Analysis*

Courts should impose an additional layer of protection to the "best interests" test by requiring that channeling injunctions comply with the mandatory-contribution requirement found in § 524(g). Under this approach, a channeling injunction could only be approved if funded by the securities and a majority of

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278. Consider the opioid litigation, where plaintiffs pursued different manufacturers for their role in the same harm in different fora (including bankruptcy, with Purdue Pharma).

279. *See* Diane Lourdes Dick, *The Bearish Bankruptcy*, 52 GA. L. REV. 437, 454-61 (2018) (describing challenges of the valuation process including competing experts and methodologies).

voting shares of one or more debtors.[280] In the BSA bankruptcy, a court imposing this proposed obligation would require the debtor to turn over all of its assets to fund the plan's trusts, rather than preserving certain high-dollar property beyond the reach of creditors.[281]

This obligation may seem extremely demanding, but it is the closest approximation available for what Congress thinks is an appropriate price for the relief of channeling claims.[282] Although Congress imposed this threshold only in asbestos bankruptcies, there is no evidence that its intent was to limit the channeling-injunction requirements to asbestos mass-tort cases.[283] Bankruptcy courts approve channeling injunctions in mass-tort cases not involving asbestos under their equitable powers in § 105(a).[284] In exercising that power, however, courts have discretion to require compliance with § 524(g)'s standards. This can occur organically as different jurisdictions reject plans that do not comply, or at an appellate level as debtors challenge failed confirmation fights. Alternatively, Congress could step in and extend application of § 524(g) beyond asbestos cases. The net impact of either approach is likely to be a larger contribution to trust assets.

CONCLUSION

Over the last decade, bankruptcy grifters have invaded the bankruptcy system. Often facing significant mass-tort liability, these entities have commandeered a process designed to equitably address failures, and instead use it to impose a binding universal settlement on claimants. Congress infused significant powers and remedies into the Bankruptcy Code, but those forces are intended to

280. 11 U.S.C. § 524(g)(2)(B)(i)(II)-(III) (2018).

281. Cara Kelly, *Boy Scouts of America Plan to Exit Bankruptcy Would Pay Abuse Survivors and Average of $6,000 Each*, USA TODAY (Mar. 7, 2021), https://www.usatoday.com/story/news/investigations/2021/03/01/boy-scouts-bankruptcy-reorganization-plan-woefully-inadequate/6872981002 [https://perma.cc/5VC2-HB8N] (identifying high adventure camps and other valuable real estate as remaining beyond the reach of creditors).

282. The mandatory-contribution requirement is itself subject to gamesmanship. In fall 2021, Johnson & Johnson created a talc-only entity under Texas corporate law that it then put into Chapter 11 in a mass-tort-friendly jurisdiction. *See* Mike Spector & Dan Levine, *J&J Puts Talc Liabilities into Bankruptcy*, REUTERS (Oct. 15, 2021), https://www.reuters.com/business/healthcare-pharmaceuticals/jj-unit-manage-talc-claims-files-bankruptcy-protection-2021-10-14 [https://perma.cc/JA82-X7KY]. Although the debtor, LTL Management LLC, is putting nearly all of its assets into the trust, those assets were carefully managed in advance by Johnson & Johnson and its restructuring professionals.

283. *See* Levitin, *supra* note 117 (identifying the higher threshold Congress created for channeling injunctions and concluding it should extend beyond asbestos cases).

284. 11 U.S.C. § 105 (2018).

help insolvent debtors get a fresh start. Bankruptcy grifters push courts to expand the types of relationships that merit nondebtor protections and dilute the substantive and procedural obligations designed to protect claimants.

Bankruptcy grifters are waiting in the wings of pending cases, ready to guide the next wave of precedent that expands use of Chapter 11. 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. These measures permit mass-tort settlements to continue in bankruptcy, while also reclaiming control over the restructuring process and improving claimants' access to information and substantive rights.