
Bankruptcy by Another Name

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ABSTRACT. In a recent essay, Abbe R. Gluck, Elizabeth Chamblee Burch, and Adam S. Zimmerman object to the increasing use of bankruptcy to resolve mass-tort claims. They and others are concerned that bankruptcy reduces plaintiff voice, impedes the development of state law remedies, and limits discovery that can drive state and federal regulatory interventions. This Response addresses these critiques. Contrary to popular descriptions of the bankruptcy system, bankruptcy courts do not simply aim to maximize economic efficiency and financial recoveries. Bankruptcy includes numerous procedures, including robust disclosure, bellwether trials, future-claims representatives, and voting, to ensure a fair process and promote noneconomic goals. These provisions advance the exact values that critics argue are missing from the bankruptcy process. And, to the extent that bankruptcy is insufficiently attentive to noneconomic values, it is reasonably easy to tweak the system we have to accommodate these goals more effectively.

INTRODUCTION

In the past few years, bankruptcy has emerged as a popular tool for resolving mass-tort litigation. Academics have largely greeted this development with skepticism and alarm, arguing that large corporations turn to bankruptcy to reduce expected payouts at the expense of plaintiffs who have been harmed by corporate misconduct.¹ Courts, too, have begun to push back against the use of bankruptcy

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1. See Lindsey D. Simon, *Bankruptcy Grifters*, 131 YALE L.J. 1154, 1159-61 (2022); Jonathan C. Lipson, “Special”: Remedial Schemes in Mass Tort Bankruptcies, 101 TEX. L. REV. 1773, 1778 (2023); Jonathan C. Lipson, *First in Time; First Is Right: Comments on Levitin’s Poison Pill*, 101 TEX. L. REV. ONLINE 33, 34 (2022); Ralph Brubaker, Mass Torts, the Bankruptcy Power, and Constitutional Limits on Mandatory No-Opt-Outs Settlements, Keynote Address at the Perspectives in Bankruptcy Law Symposium (Jan. 26, 2024); Ralph Brubaker, *Assessing the Legitimacy of the “Texas Two-Step” Mass-Tort Bankruptcy*, BANKR. L. LETTERS, Aug. 2023, at 1; Ralph Brubaker, *Assessing the Legitimacy of the “Texas Two-Step” Mass-Tort Bankruptcy (Part II)*, BANKR. L. LETTERS, Apr. 2023, at 1; Ralph Brubaker, *Mandatory Aggregation of Mass Tort Litigation in*

to resolve mass-tort cases.² In an earlier article, we defended mass-tort bankruptcies as providing a process that can offer significant economic benefits to both plaintiffs and corporate defendants.³ Bankruptcy, we pointed out, is designed to prevent a race to the courthouse that can destroy enterprise value.⁴ By

Bankruptcy, 131 YALE L.J.F. 960, 964-66 (2022); Michael A. Francus, *Designing Designer Bankruptcy*, 102 TEX. L. REV. (forthcoming 2024) (manuscript on file with author); Michael A. Francus, *Texas Two-Stepping Out of Bankruptcy*, 120 MICH. L. REV. ONLINE 38, 38-39 (2022); Adam J. Levitin, *Purdue's Poison Pill: The Breakdown of Chapter 11's Checks and Balances*, 100 TEX. L. REV. 1079, 1083-84 (2022); Samir D. Parikh, *The New Mass Torts Bargain*, 91 FORDHAM L. REV. 447, 455 (2022); Samir D. Parikh, *Scarlet-Lettered Bankruptcy: A Public Benefit Proposal for Mass Tort Villains*, 117 NW. U. L. REV. 425, 429-31 (2022); Vince Buccola & Joshua Macey, *Claim Durability and Bankruptcy's Tort Problem*, 38 YALE J. REGUL. 766, 773-78 (2021). For a discussion of the interaction between bankruptcy and environmental law, see Joshua C. Macey & Jackson Salovaara, *Bankruptcy as Bailout: Coal Company Insolvency and the Erosion of Federal Law*, 71 STAN. L. REV. 879, 883 (2019).

2. *In re Purdue Pharma L.P.*, 633 B.R. 53 (Bankr. S.D.N.Y. 2021), *vacated*, 635 B.R. 26 (S.D.N.Y. 2021), *certificate of appealability granted*, No. 21-cv-7532, 2022 WL 121393 (S.D.N.Y. Jan. 7, 2022), *rev'd in part and aff'd in part*, 69 F.4th 45 (2d Cir. 2023), *cert. granted sub nom. Harrington v. Purdue Pharma L.P.*, 144 S. Ct. 44 (2023). For bankruptcy court decisions where there has been an issue raised about whether bankruptcy should be used to resolve mass-tort cases and the court has allowed the bankruptcy proceeding to go forth, see *In re LTL Mgmt., LLC*, 64 F.4th 84, 101 (3d Cir. 2023) (“[A]bsent financial distress, there is no reason for Chapter 11 and no valid bankruptcy purpose.”); *In re Boy Scouts of Am.*, 642 B.R. 504 (Bankr. D. Del. 2022); *In re Mallinckrodt PLC*, 639 B.R. 837 (Bankr. D. Del. 2022); *In re Endo Int'l PLC*, No. 22-22549, 2022 WL 16640880 (Bankr. S.D.N.Y. Aug. 16, 2022); *In re Aearo Techs. LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022); *In re Roman Cath. Church of Archdiocese of New Orleans*, 632 B.R. 593 (Bankr. E.D. La. 2021); *In re USA Gymnastics*, No. 18-09108-RLM-11, 2020 WL 1932340 (Bankr. S.D. Ind. Apr. 20, 2020); and *In re Bestwall LLC*, 606 B.R. 243 (Bankr. W.D.N.C. 2019).
3. See Anthony J. Casey & Joshua C. Macey, *In Defense of Chapter 11 for Mass Torts*, 90 U. CHI. L. REV. 973, 976-77 (2023) (“Bankruptcy law resolves the collective action problem that arises when creditors pursue their claims in a variety of separate proceedings. . . . The Bankruptcy Code’s core provisions – the automatic stay, priority rules, prohibitions on fraudulent transfers, preference rules, and treatment of unpaid claims – are all designed to address [this problem].”).
4. THOMAS H. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* 7-11 (1986); Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors’ Bargain*, 91 YALE L.J. 857, 859-71 (1982); Douglas G. Baird, *A World Without Bankruptcy*, 50 LAW & CONTEMP. PROBS. 173, 184 (1987) (“[T]he self-interest of creditors leads to a collective action problem, and a legal mechanism is needed to ensure that the self-interest of individuals does not run counter to the interests of the group.”); Alan Schwartz, *A Contract Theory Approach to Business Bankruptcy*, 107 YALE L.J. 1807, 1809 (1998) (arguing that bankruptcy addresses coordination problems); Douglas G. Baird, *Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren*, 54 U. CHI. L. REV. 815, 827 (1987); Anthony J. Casey & Aziz Z. Huq, *The Article III Problem in Bankruptcy*, 82 U. CHI. L. REV. 1155, 1198 (2015) (“Some matters must be litigated before a centralized tribunal because a critical benefit of bankruptcy derives from the procedural aggregation of claims into a single forum as a way to mitigate perverse and destructive collective action problems.”).

consolidating proceedings in a single forum and binding holdouts and future claimants, bankruptcy provides a vehicle for quickly and efficiently resolving complex mass-tort litigation. This can leave all parties better off, increasing plaintiff recoveries and helping a corporation resolve lawsuits that would otherwise drain resources.

Our defense of bankruptcy was based on a view that it could—in the right cases and under the right circumstances—provide an efficient and cost-effective means of resolving proceedings with multiple claimants.⁵ Since we first published our article, several scholars have responded with noneconomic objections. For example, Pamela Foohey and Christopher K. Odinet argue that bankruptcy “allow[s] defendants to leverage chapter 11 to silence victims and facilitate cover-ups.”⁶ Most directly, in this journal, Abbe R. Gluck, Elizabeth Chamblee Burch, and Adam S. Zimmerman (GBZ) cite our article as an example of how “[t]hose who defend bankruptcy’s use in this context rarely engage with the lost public-regarding values of litigation.”⁷

Our prior defense of bankruptcy started from a different fundamental theory of civil litigation. In our view, litigation is about redressing wrongs involving two or more parties. The optimal system is the one that most efficiently gives plaintiffs whatever compensation they are legally owed. Bankruptcy, we argued, offers more money to plaintiffs and allows corporate defendants to focus on valuable economic output. It provides a structured mechanism for aggregate voting and settlement that is not available elsewhere in the legal system, and thus a system for mass-tort plaintiffs to negotiate for and vote whether to accept (or reject) settlements.

GBZ and those who worry that bankruptcy undermines public-regarding values, by contrast, are part of a long tradition of scholars who regard litigation as a complement to—rather than a means of implementing—state and federal regulation. For them, bankruptcy is objectionable because bankruptcy courts “don’t typically develop state tort doctrines,” “don’t typically engage in broad discovery,” and “rarely take the time to utilize juries . . . or take testimony from tort victims anxious to have their day in court.”⁸ Their concern is that bankruptcy does not accommodate process-based virtues that benefit plaintiffs, third parties, and the public at large. On this account, discovery, redundancy, and plaintiff

5. Casey & Macey, *supra* note 3, at 977-79.

6. Pamela Foohey & Christopher K. Odinet, *Silencing Litigation Through Bankruptcy*, 109 VA. L. REV. 1261, 1269 (2023).

7. Abbe R. Gluck, Elizabeth Chamblee Burch & Adam S. Zimmerman, *Against Bankruptcy: Public Litigation Values Versus the Endless Quest for Global Peace in Mass Litigation*, YALE L.J.F. 525, 532 (2024) (citing Casey & Macey, *supra* note 3).

8. *Id.* at 527.

voice provide “public-regarding” benefits that cannot easily be measured in economic terms.

In this Response, we respond to GBZ and others on their own terms. Even accepting GBZ’s premise that victims’ monetary recoveries and their right to vote in favor of settlements should sometimes be sacrificed for noneconomic public-regarding values,⁹ and that policymakers can somehow figure out how to balance the tradeoff between economic and noneconomic and private and public values, bankruptcy is still superior in many mass-tort cases because it can accommodate noneconomic and public values as effectively as – and often more than – existing alternatives.

In responding to our initial defense of bankruptcy, GBZ invoke Owen Fiss to suggest that the “public good” should be considered “rather than the mere private ends of individual dispute resolution and money changing hands.”¹⁰ This is an argument for a litigation system that produces potentially lower payouts to victims to promote broad, nonmonetary, but important social values. Such a system involves difficult and potentially intractable tradeoffs. Individual litigation can lead to lower and more inequitable payouts as plaintiffs receive different recoveries based on when their claims manifest, what state they happen to live in, and the jury they receive.¹¹ Aggregated litigation in bankruptcy can reduce individual voice and might limit the development of private law remedies.¹² How does one balance these incommensurable competing values? And who makes the call?

Those are difficult questions. But what if the trade-off has been exaggerated? What if bankruptcy can accommodate noneconomic and public-regarding values and still facilitate efficient settlement and reorganization goals? Our primary argument here is that bankruptcy can do these things. It can (and does)

9. Abbe R. Gluck, Elizabeth Chamblee Burch, and Adam S. Zimmerman (GBZ) invoke Owen Fiss’s argument that private settlements should be subordinated to, or at least pitted against, public interests in their title and throughout their essay, writing

He argued that civil lawsuits should be understood in light of the public good they serve, rather than the mere private ends of individual dispute resolution and money changing hands. As we detail in Part III, we likewise believe that public goods from litigation are at risk when mass-tort actions move into more unorthodox terrain.

Gluck, Burch & Zimmerman, *supra* note 7, at 533 (citing Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984)) (footnote omitted).

The “private ends of individual dispute resolution and money changing hands” in this context are the quick monetary recoveries that the overwhelming majority of victim votes favored for in the mass-tort bankruptcies of Purdue, Boy Scouts, Mallinckrodt, the various dioceses cases, and the like.

10. *Id.* at 533, 561-62 (citing Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984)).

11. See *infra* Part II.

12. See Gluck, Burch & Zimmerman, *supra* note 7, at 553-54.

accommodate noneconomic and public-regarding values – at least relative to all available alternatives – while also facilitating efficient settlement. Indeed, contrary to GBZ’s arguments, there is nothing about bankruptcy that is inherently incompatible with noneconomic goals, and the evidence from actual practice does not support broad claims that bankruptcy does worse on these dimensions than the available alternatives.

The disconnect arises because GBZ – like many bankruptcy critics – work from an inaccurate view of the bankruptcy process. They assume an ethereal “bankruptcy culture”¹³ that ruthlessly pursues efficiency while preventing bankruptcy courts from developing law, reviewing cases on the merits,¹⁴ and providing victims with an opportunity to be heard.¹⁵ They argue that bankruptcy prevents plaintiffs from testing novel tort theories,¹⁶ that it fails to protect future claimants,¹⁷ and that it limits discovery that supports future regulation.¹⁸ These descriptions, however, do not match reality.¹⁹

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13. See *id.* at 526 (suggesting that the pretrial process would require “a sea change” for “bankruptcy’s culture”); *id.* at 527 (noting that “bankruptcy’s culture centers on efficiency” as the reason bankruptcy courts cannot be expected to develop cases or take testimony from victims); *id.* at 533 (asserting that “bankruptcy’s culture is to streamline,” invoking the “cultural norms of bankruptcy,” and noting that scholars who defend bankruptcy “understate the incompatibility of the goals and the strength of the bankruptcy culture”); *id.* at 562 (invoking “bankruptcy’s efficient culture” as running counter to bellwether trials).
 14. *Id.* at 561.
 15. GBZ repeatedly lament that bankruptcy courts rarely “hear testimony from tort victims anxious to have their day in court.” *Id.* at 525; see *id.* at 527, 536, 551, 553. But when confronted with the fact that more victims were heard in the Purdue Pharma bankruptcy than most mass-tort cases – including the J&J opioid trial that GBZ invoke – they subordinate victim voice to public discovery: “The victim impact statements that Joshua C. Macey & Anthony J. Casey laud as coming forth in the bankruptcy process are not the same as discovery from the companies about questionable industry practice.” *Id.* at 557 & n.156.
 16. *Id.* at 531.
 17. *Id.* at 544 (arguing that power is shifted from future claimants); *id.* at 555–56 (noting concerns about future claimants).
 18. See *id.* at 532.
 19. If they did, we should be horrified. Bankruptcy courts deal with more cases than other federal courts, and most of those cases are dealing with individual consumers. GBZ offer numbers about the “federal docket,” *id.* at 529 n.10, 534 n.31, but they do not include the bankruptcy docket. For example, they mention a “civil federal caseload” of 470,581 for 2020. *Id.* at 534 n.31. In that same year, 612,561 bankruptcy petitions were filed – down from 776,674 the previous year. *Judicial Business 2020*, U.S. CTS. (2020), <https://www.uscourts.gov/statistics-reports/judicial-business-2020> [<https://perma.cc/P3QG-4FKJ>]; *Judicial Business 2019*, U.S. CTS. (2019), <https://www.uscourts.gov/statistics-reports/judicial-business-2019> [<https://perma.cc/VR2Z-3UVB>]. The overwhelming majority of those cases are filed by individual consumers. No matter how one counts, individual bankruptcy cases dominate the total federal caseload. Bankruptcy judges – far from living in the sterile efficiency culture described – see more cases implicating social and public-facing problems than other federal judges.

In practice, bankruptcy can and often does support public-regarding, noneconomic values, often more effectively than nonbankruptcy alternatives. The Bankruptcy Code already requires judges to provide many of the procedures that bankruptcy skeptics complain it lacks—including review of substantive law, referral of cases for trial,²⁰ extensive discovery,²¹ and the broadest protection of victim’s rights to be found in any existing aggregated judicial procedure²²—and it affords bankruptcy judges the power and discretion to go even further to enhance plaintiffs’ voice and certify trials to state and district courts.²³ Because bankruptcy both is efficient and supports the realization of noneconomic goals, Troy A. McKenzie, one of the first scholars to recognize the overlap in these fields, was correct in his “tentative assessment . . . that the essentials of the bankruptcy process make it a superior framework, at least for the most vexing mass-tort cases.”²⁴

This debate is far from academic alone. As we write, legal challenges to bankruptcy courts’ authority to resolve collective proceedings mean that approximately \$10 billion in money set aside in an opioid settlement cannot be disbursed.²⁵ Similarly, over \$2 billion in funds for victims of sexual abuse in the Boys Scouts are at risk,²⁶ as are settlement negotiations in several other mass-tort cases including claims related to asbestos, opioids, and sexual-abuse claims

20. See *infra* notes 80-87 and accompanying text.

21. See *infra* Section II.D.

22. See *infra* Section II.C.

23. See *infra* notes 80-87 and accompanying text.

24. Troy A. McKenzie, *Toward a Bankruptcy Model for Nonclass Aggregate Litigation*, 87 N.Y.U. L. REV. 960, 963-64.

25. See John Kruzel & Andrew Chung, *US Supreme Court Halts Purdue Pharma Bankruptcy Settlement Pending Review*, REUTERS (Aug. 11, 2023, 8:55 PM EDT), <https://www.reuters.com/legal/us-supreme-court-scrutinize-purdue-pharma-bankruptcy-settlement-2023-08-10> [<https://perma.cc/55GL-75CE>].

26. See Order, *Lujan Claimants v. Boy Scouts of Am.*, No. 23A741 (U.S. Feb. 16, 2024) (Alito, J., in chambers), <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/23a741.html> [<https://perma.cc/G9XD-QG9C>] (“Upon consideration of the application of counsel for the applicants, and the responses filed thereto, it is ordered that the March 28, 2023 order of the United States District Court for the District of Delaware, case No. 1:22-cv-1237, and the consolidated cases, is hereby administratively stayed pending further order of Justice Alito or of the Court.”); Randall Chase, *Boy Scouts’ \$2.4 Billion Bankruptcy Plan Upheld by Judge*, ASSOCIATED PRESS (Mar. 28, 2023, 8:14 PM EST), <https://apnews.com/article/boy-scouts-bankruptcy-child-sexual-abuse-f6359f826b98d471c290598573ebc5da> [<https://perma.cc/7TDK-BV3H>] (reporting the district judge’s order upholding the bankruptcy plan); Brief of Ad Hoc Group of Local Councils of the Boy Scouts of America as *Amicus Curiae* Supporting Debtor Respondents, *Harrington v. Purdue Pharma L.P.*, 144 S. Ct. 44 (2023) (No. 23-124) (defending the district court’s order).

against Catholic churches.²⁷ Blocking these payments and settlements in exchange for nonmonetary values is a complicated choice. Doing so for an illusory tradeoff is an obvious mistake.

A final word about some assumptions underlying this debate: In our view, scholars should think about the optimal mechanism for resolving mass torts and develop an account of what reforms can be made to existing resolution schemes to achieve that system. If one accepts, as we and GBZ do,²⁸ that some level of aggregation is necessary, then the task at hand is to structure an aggregate proceeding to realize the various goals of litigation. This includes finding a balance between efficiency and plaintiff voice, and between financial expediency and public-regarding procedural virtues. In our view, bankruptcy—with its robust discovery, voting mechanism, and flexibility—is the best hope to achieve that balance. Bankruptcy already provides an efficient mechanism to resolve mass torts. With small reforms, it could further accommodate procedural and public-regarding values. Scholars and policymakers should consider reforming the bankruptcy system to realize these values rather than rejecting it outright in favor of inferior alternatives. Of course, one might also achieve the same outcome by designing a new process from scratch and calling it something else. We are confident, however, that such a system would include the core features of bankruptcy. Here, too, Troy McKenzie was right in observing that “[b]ankruptcy is simply another form of aggregation.”²⁹

27. See *In re LTL Mgmt., LLC*, 64 F.4th 84, 101 (3d Cir. 2023); *In re Bestwall LLC*, 606 B.R. 243 (Bankr. W.D.N.C. 2019); *In re Purdue Pharma L.P.*, 633 B.R. 53 (Bankr. S.D.N.Y. 2021), *vacated*, 635 B.R. 26 (S.D.N.Y. 2021), *certificate of appealability granted*, No. 21-cv-7532, 2022 WL 121393 (S.D.N.Y. Jan. 7, 2022), *rev'd in part and aff'd in part*, 69 F.4th 45 (2d Cir. 2023), *cert. granted sub nom.* Harrington v. Purdue Pharma L.P., 144 S. Ct. 44 (2023); *In re Mallinckrodt PLC*, 639 B.R. 837 (Bankr. D. Del. 2022); *In re Endo Int'l PLC*, No. 22-22549, 2022 WL 16640880 (Bankr. S.D.N.Y. Aug. 16, 2022); *In re Roman Cath. Church of Archdiocese of New Orleans*, 632 B.R. 593 (Bankr. E.D. La. 2021).

28. Gluck, Burch & Zimmerman, *supra* note 7, at 552.

29. McKenzie, *supra* note 24, at 999. We agree with McKenzie. It is for that reason that we have previously argued that one of the leading virtues of United States bankruptcy law is that it provides an aggregate proceeding to solve collective-action problems and imposes no insolvency requirement on a debtor's access to that proceeding. See Casey & Macey, *supra* note 3, at 990 n.61. To the extent courts require a debtor also show that it is in financial distress, that requirement—which is not found in any language of the Bankruptcy Code—should be construed in favor of more, not fewer, filings, as it has been by all courts prior to 2023. Prior to *In re LTL Mgmt., LLC*, 64 F.4th 84, 110-11 (3d Cir. 2023), courts that did require financial distress focused almost entirely on whether the debtor had a legitimate “bankruptcy purpose.” In *LTL*, the Third Circuit added a requirement that the financial distress be “imminent.” *In re LTL Mgmt., LLC*, 64 F.4th at 108. If this requirement is taken seriously, it will create perverse incentives that harm plaintiffs and increase litigation costs, as we have previously discussed. See Casey & Macey, *supra* note 3, at 990-91. The primary question should simply be whether the

This Response proceeds in three parts. Part I describes the public-goods theory of litigation. Part II provides a brief sketch of the bankruptcy process and describes how bankruptcy can promote public-regarding and noneconomic values. Part III acknowledges that bankruptcy, like other tools for obtaining global peace, may not perfectly accommodate all these values and proposes reforms that would allow bankruptcy to promote noneconomic values more effectively.

I. NONECONOMIC VALUES

At its core, GBZ's argument against bankruptcy is an argument against a process that gives plaintiffs who participate in the bankruptcy proceeding a chance to vote for a negotiated settlement. As we discuss below, there is no bankruptcy resolution unless plaintiffs vote to approve the reorganization plan. A

case presents a value-destroying collective-action problem that bankruptcy is designed to solve.

In any event, the financial-distress question is not relevant to most mass-tort bankruptcies. Financial distress is plain for almost all of them. It is only in the recent Texas Two-Step asbestos cases—of which there have been a total of five—that financial distress and solvency were even debatable. See *infra* Section II.C.1 for our discussion of the merits of the Texas Two-Step. For the five Two-Steps, see *In re Aldrich Pump LLC*, No. 20-30608, 2023 WL 9016506 (Bankr. W.D.N.C. Aug. 23, 2021); *In re DBMP LLC*, No. 21-03023, 2021 WL 3552350 (Bankr. W.D.N.C. Aug. 11, 2021); *In re Bestwall LLC*, 605 B.R. 43 (Bankr. W.D.N.C. 2019); *In re LTL Mgmt., LLC*, 637 B.R. 396 (Bankr. D.N.J. 2022), *rev'd and remanded*, 58 F.4th 738 (3d Cir. 2023), and *rev'd and remanded*, 64 F.4th 84 (3d Cir. 2023); *In re Tehum Care Services, Inc.*, 23-90086 (Bankr. S.D. Tex. filed Feb. 12, 2023).

Notably, Purdue Pharma, which GBZ focus most on, was unquestionably insolvent. Purdue had around \$1.8 billion in assets, and there were around \$40 trillion in credible claims against it. *In re Purdue Pharma L.P.*, 69 F.4th 45, 60 (2d Cir. 2023), *cert. granted sub nom.* *Harrington v. Purdue Pharma L.P.*, 144 S. Ct. 44 (2023). It therefore was likely one of the—if not the—most insolvent companies to have ever existed. This is an important distinction that is often missed. None of the critics of mass-tort bankruptcy have proposed any reform or rule that would have kept Purdue out of bankruptcy or even delayed its filing. The issue in that case is of a different nature: whether the Sacklers should get releases or face litigation on their own. But litigation against the Sacklers is not the same as litigation against Purdue. It would be much more fragmented with more limited discovery. It would also pose jurisdictional challenges because the Sacklers—and their money—are spread across the world. See *Casey & Macey, supra* note 3, at 1002-03.

If GBZ and other critics want more nonbankruptcy litigation *against Purdue*, the necessary reform to get there is a mystery. For example, without releases, if we abolished all of bankruptcy law, Purdue Pharma would have been forced to liquidate and ceased to exist in 2019, making it an impossible target for public-regarding litigation. If they are concerned about the Sacklers getting releases, the issue is not one of insolvency but of the long arm of tort law. Indeed, if the Sacklers can be held liable for the claims against Purdue, they are insolvent, and everyone will end up back in bankruptcy. If the Sacklers cannot be held liable, it is because their funds are beyond the reach of the U.S. courts. Either way, it is hard to see a path toward the disaggregated jury trials that GBZ advocate.

majority of plaintiffs can always demand fuller protections as a condition of settlement. The legitimacy of this settlement is therefore the crucial point of dispute.³⁰ The antisettlement position is consistent with GBZ's criticisms of aggregation—majority voting is, after all, coercive. As they describe it, their position against settlement aims to place certain public goods on par with or ahead of private choice.³¹ Of course, because every limitation on private choice is coercive, their critique can be brought against most forms of aggregation. The question, then, is which form of coercion best serves the public-regarding, noneconomic values that GBZ and other critics pursue.

Broadly speaking, there are two reasons critics argue that bankruptcy fails at achieving noneconomic values. First, they worry that bankruptcy does not support the regulatory process as effectively as piecemeal litigation.³² This account of civil litigation understands tort law to serve broad regulatory goals such as deterring corporate risk-taking and increasing transparency about corporate affairs and corporate conduct.

Civil litigation complements government regulation in a few ways. The information that comes out in discovery can itself support litigation that deters corporate misconduct. It can also support the formal regulatory process by providing information about the harms caused by products. This synergistic relationship between litigation and regulation was, according to GBZ, perhaps most apparent in tobacco and opioid litigation, where lawmakers imposed more stringent regulations partly in response to information that became available in discovery.³³ Litigation can also support the development of novel private-law theories. As GBZ observe, “To state the obvious, tort law would not develop if courts did not render decisions.”³⁴ A related argument for imposing guardrails on aggregated proceedings is that redundancy serves important federalism values. When different plaintiffs bring suit in different jurisdictions, multiple judges will weigh in on the same issues. That, in turn, can “reduc[e] error and judicial bias and . . . encourage[e] salutary development of the common law through multiple layers of independent judicial review.”³⁵

30. In fact, when one of us has critiqued the bankruptcy system, one of our central points was that prebankruptcy conduct limited the ability of environmental claimants to participate in bankruptcy negotiations. See Macey & Salovaara, *supra* note 1, at 934-35.

31. See Gluck, Burch & Zimmerman, *supra* note 7, at 533.

32. See *id.* at 551-53.

33. *Id.* at 532, 556-57.

34. *Id.* at 559.

35. *Id.* at 560; see also Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 649-80 (1981) (reviewing arguments for the utility of jurisdictional redundancy); Zachary D. Clopton, *Redundant Public-Private Enforcement*, 69

Second, critics argue that bankruptcy cuts off noneconomic remediation for the harms that individuals suffer as a result of corporate or individual misconduct.³⁶ This argument takes seriously the remedial benefits that plaintiffs receive from getting their day in court, confronting their wrongdoer, and enjoying the dignitary values associated with due process. These benefits protect rights that cannot be vindicated by monetary compensation. If litigation is about remediating dignitary harms, participating in the civil-litigation system may be just as important as financial compensation. Another virtue of civil litigation is that the due-process values associated with plaintiff participation serve an important legitimating role. In some contexts, litigation empowers plaintiffs to select the forum in which to adjudicate their claim, the lawyer who will represent them, and the interests counsel will pursue in litigation.³⁷

Critics have argued that bankruptcy curtails these rights. These critiques assume a “bankruptcy culture” that prioritizes efficiency over all other values:

Unlike ordinary state and federal trial courts, bankruptcy courts don’t generally assign responsibility for widespread harm; they preserve and efficiently distribute resources. Petitioners in bankruptcy aren’t called “victims” or “plaintiffs”; they are called “creditors” with limited voting rights over the distribution of an estate. Bankruptcy courts don’t typically develop state tort doctrines. They don’t typically engage in broad discovery designed to reveal accountability and spur policy reform. Instead, bankruptcy courts streamline. Any discovery tends to focus on the debtor’s financial health. And, because bankruptcy’s culture centers on efficiency and preventing further depletion of assets, bankruptcy courts rarely take the time to utilize juries themselves, or remand most cases for further development in trial courts, or take testimony from tort victims anxious to have their day in court.³⁸

VAND. L. REV. 285, 290 (2016) (“[R]edundant litigation may cure existing under-enforcement and deter future under-enforcement by allowing a second agent to fill the remedial gap . . .”).

36. See Gluck, Burch & Zimmerman, *supra* note 7, at 552.
37. See Elizabeth Chamblee Burch & Abbe R. Gluck, *Plaintiffs’ Process: Civil Procedure, MDL, and a Day in Court*, 42 REV. LITIG. 225, 240-42 (2023) (identifying these typical procedural privileges afforded plaintiffs and noting their curtailment in multidistrict litigation).
38. Gluck, Burch & Zimmerman, *supra* note 7, at 525 (footnote omitted). Some of these statements are simply false. For example, the word victim is regularly used in bankruptcy proceedings, as a search of the docket of the major cases reveals. In *Purdue* there are several references to victims including several filings by the Ad Hoc Committee of Individual Victims of Purdue Pharma L.P. See *Purdue Pharma L.P., Case No. 19-23649*, KROLL (Feb. 26, 2024), <https://restructuring.ra.kroll.com/purduepharma/Home-DocketInfo> [<https://perma.cc/87XD-7QYP>]. The same is true in *Mallinckrodt* where there was an Ad Hoc Group of Personal Injury Victims. See *Mallinckrodt plc, Case No. 20-12522*, KROLL (Feb. 22, 2024), <https://restructuring.ra.kroll.com/mallinckrodtplc/Home-DocketInfo>.

These statements do not accurately describe bankruptcy. Nor do they reflect the procedural rights and protections afforded to plaintiffs in bankruptcy. For one, it is simply not true that bankruptcy keeps information about corporate misconduct out of the public's eye.³⁹ Bankruptcy judges cannot cut off discovery to facilitate an efficient reorganization. To the extent that plaintiffs are not satisfied with a debtor's disclosure statement, they can veto a reorganization plan until the debtor produces additional information. It therefore provides an enormous amount of information that can support legislation to reduce the risk of future corporate misconduct. Nor is bankruptcy incompatible with federalism values.⁴⁰ To the contrary, it can facilitate the development of substantive state law in a variety of ways, including bellwether trials, transferring cases to other courts for trial, and certification to state and federal courts. Bankruptcy provides a forum in which plaintiffs lead negotiations with the debtor and a robust procedure for court-supervised supermajority voting among claimants, one which does not exist anywhere else in our legal system.⁴¹ In short, the bankruptcy process empowers victims and makes their participation as plaintiffs a condition of any reorganization plan.

Bankruptcy also includes additional protection in the form of the U.S. Trustee and the bankruptcy examiner.⁴² The U.S. Trustee is a representative of the Department of Justice that monitors the bankruptcy process in every case. The Trustee can take legal action to prevent fraud and abuse, refer matters to be investigated for criminal prosecution, review disclosure statements, and make sure that professionals such as attorneys charge reasonable fees. Bankruptcy

ra.kroll.com/mallinckrodt/Home-DocketInfo [https://perma.cc/5D6K-JGVV]. The same is true in the *Boy Scouts* bankruptcy, where the parties regularly refer to the "Abuse Victims." *Court Docket*, Omni (Apr. 12, 2024), <https://cases.omniagentsolutions.com/documents?clientid=3552&tagid=1153> [https://perma.cc/S658-6E8A]. Moreover, in *Purdue*, the Supreme Court Brief filed by the debtor uses the word victim thirteen times and argues, "That is why the victims with the greatest reason to seek retribution against the Sacklers – including over a hundred thousand individuals and state and local government entities across the country – overwhelmingly support the plan." Brief for Debtor Respondents, *Harrington v. Purdue Pharma L.P.*, 144 S. Ct. 44 (2023) (No. 23-124). The brief filed by individual victims supporting the plan uses the word seventy times Brief for Respondent Ad Hoc Group of Individual Victims of Purdue Pharma, L.P. et al., *Harrington v. Purdue Pharma L.P.*, 144 S. Ct. 44 (2023) (No. 23-124). Similarly, parties to any adversary proceeding are certainly referred to as "plaintiffs" in bankruptcy proceedings.

39. See *infra* Section II.D.

40. See *infra* Section II.B.

41. See *infra* Section II.C.1.

42. See *infra* Section II.E.

examiners can be appointed to investigate the debtor's prepetition conduct and provide additional transparency to parties that are affected by the bankruptcy filing.⁴³

Of course, bankruptcy, like all litigation, usually results in settlement, and when it does, the parties may prioritize private benefits and efficiency over public goods such as the development of state law. Sometimes bankruptcy's aggregation and voting mechanisms prioritize plaintiffs' collective economic recoveries over the voice of dissenters. But, as Part II demonstrates, if it gets the balance wrong, it is not because the bankruptcy system is incapable of supporting non-economic values, but rather because the supermajority of victims has prioritized economic recoveries.

II. THE BANKRUPTCY PROCESS

While recent critiques of bankruptcy have stressed bankruptcy courts' authority to act coercively, the reality is that bankruptcy facilitates negotiation among different parties. As part of this negotiation, Chapter 11 empowers plaintiffs to drive negotiations with debtors and other creditors, to assert their rights in state and federal courts, and to participate in every part of the bankruptcy settlement. It requires disclosure of a large amount of information about the debtor's affairs – information that is subject to negotiation among claimants, and which has previously supported regulatory interventions aimed at responding to the policy gaps that contributed to corporate wrongdoing.

A. *The Origins and Contours of Mass-Tort Bankruptcies*

Recent scholarship that critiques the use of bankruptcy in mass tort cases reprises arguments that have been levied against the bankruptcy process for as long as courts and Congress have sanctioned the use of bankruptcy as a forum for resolving collective proceedings.⁴⁴ Since the Code's passage in 1978, bankruptcy has offered a ready-made solution to the collective-action problems posed by mass torts and has been used as an efficient means of resolving complex

43. Dennis J. Connolly & David A. Wender, *Investigating the Investigations: Process and Policy Issues Relating to Bankruptcy Investigations by Examiners and Creditors' Committees, and Government Investigations that May Overlap Bankruptcy Investigations*, UNIV. OF PA. CAREY L. SCH., <https://www.law.upenn.edu/live/files/1237-investigating-investigations--chapter-11-panelpdf> [<https://perma.cc/6P28-SMMZ>].

44. See NAT'L BANKR. REV. COMM'N, *BANKRUPTCY: THE NEXT TWENTY YEARS* 315-17 (1997), <https://govinfo.library.unt.edu/nbrc/reportcont.html> [<https://perma.cc/C43B-YZUU>] (describing due-process challenges and advocating for additional protections for future claimants).

collective-tort proceedings. In those early years, one reason civil litigation was unappealing for plaintiffs was that high administrative costs reduced plaintiff recoveries and became difficult for corporations to manage. According to one estimate, plaintiffs in asbestos cases recovered only thirty-nine cents out of every dollar spent in asbestos litigation – the other sixty-one cents went to transaction costs such as attorney’s fees.⁴⁵ As a result, all parties – *including plaintiffs* – needed a different option to achieve settlement and turned to bankruptcy.⁴⁶

It is important to emphasize this point: *It is not just the debtors who prefer bankruptcy.* Victims and their lawyers are often the strongest advocates of the bankruptcy system. In most mass-tort bankruptcies, including Boys Scouts and Johnson & Johnson, large groups of victims support the bankruptcy filing and settlement.⁴⁷ In Purdue’s bankruptcy, groups representing victims who filed briefs at the Supreme Court came out overwhelmingly on the side of the bankruptcy and its settlement. The respondents filing briefs in favor of the bankruptcy settlement in that case included:

- The Ad Hoc Group of Individual Victims of Purdue Pharma (which is comprised of over 60,000 victims and “was the party most involved in advocating for the specific interests of personal injury victims throughout the confirmation hearing, including on the topic of third-party releases and their impact on individual victims”)⁴⁸
- The Official Committee of Unsecured Creditors (which is constituted mostly by opioid victims and states representing their interests)⁴⁹

45. *Cimino v. Raymark Indus.*, 751 F. Supp. 649, 651 (E.D. Tex. 1990).

46. As GBZ note, “when [multidistrict litigation (MDL)] failed to produce the global resolution desired, enterprising parties, driven by various interrelated shortcomings of and abuses in the tort system, turned to bankruptcy.” Gluck, Burch & Zimmerman, *supra* note 7, at 537 (internal quotations omitted).

47. See, e.g., Amici Curiae Brief of Claimants Represented by Merson Law, PLLC in Opposition to the Application for a Stay of the Bankruptcy Plan Being Implemented in the United States Bankruptcy Court for the District of Delaware, as Amici Curiae Supporting Petitioners, Lujan Claimants v. Boy Scouts of Am., No. 23A741 (U.S. Feb. 15, 2024) (urging, on behalf of 320 abuse victims, the court to allow the Boy Scouts settlement to go forward); Initial Statement of Ad Hoc Committee of Supporting Talc Claimants, *In re LTL Mgmt.*, 638 B.R. 291 (Bankr. D.N.J. 2022) (No. 23-12825), ECF No. 253 (indicating that fourteen law firms representing 55,000 talc claimants support the bankruptcy filing); Omnibus Objection of the Ad Hoc Committee of Supporting Counsel to Motions to Dismiss, *In re LTL Mgmt., LLC*, 637 B.R. 394 (Bankr. D.N.J. 2022) ECF No. 613.

48. See Brief for Respondent Ad Hoc Group of Individual Victims of Purdue Pharma, L.P., et al. at 1-2, *Harrington v. Purdue Pharma L.P.*, 144 S. Ct. 44 (2023) (No. 23-124).

49. See Brief for Respondents the Official Committee of Unsecured Creditors of Purdue Pharma L.P., et al. at 1, *Harrington v. Purdue Pharma L.P.*, 144 S. Ct. 44 (“The Official Committee’s membership comprises eight dedicated members, including individuals who are themselves

- The Ad Hoc Committee of Governmental and Other Contingent Litigation Claimants⁵⁰
- The Multi-State Government Entities Group⁵¹

On the other side, only two claimants – one lone victim⁵² and a class of Canadian municipalities⁵³ – filed briefs joining the U.S. Trustee in opposing the settlement.

Returning to the origins of mass-tort bankruptcies, it is perhaps because of the efficiencies of its streamlined process and the support from debtors and victims alike that, despite controversy surrounding the use of bankruptcy in asbestos cases, Congress ultimately sanctioned procedural innovations that had developed to facilitate settlements of asbestos litigation. Bankruptcy courts had gone to extraordinary lengths to find a way to resolve complex proceedings involving existing and future plaintiffs with different claims. In 1982, the Manville corporation filed for bankruptcy to resolve all its asbestos claims. Manville's reorganization plan, like Johnson & Johnson and other debtors who have filed in the past few years, was controversial because Manville appeared to be solvent at the time of its filing.⁵⁴ Some plaintiffs challenged Manville's bankruptcy filing on the ground that the bankruptcy system should only be about resolving consensual debts, not mass torts.⁵⁵ Nonetheless, in 1988, the bankruptcy court

(or whose loved ones are or sadly were) victims of the opioid epidemic; caregivers to children born with neonatal abstinence syndrome; representatives of a trade association for 35 independent health insurance companies collectively insuring 110 million members; a member of one of the largest hospital systems in the United States; the Pension Benefit Guaranty Corporation (the federal entity responsible for insuring defined benefit pension plans) [which abstained from joining]; a codefendant in opioid litigation that has asserted indemnification claims against Purdue Pharma L.P. and its affiliated debtors; and a trade creditor engaged in the development and manufacture of innovative drug delivery systems such as transdermal patches and oral thin films for the pharmaceutical industry; as well as three *ex officio* members that represent, respectively, political subdivisions, tribes, and public school districts.”).

50. See Brief of Respondent Ad Hoc Committee of Governmental and Other Contingent Litigation Claimants, *Harrington v. Purdue Pharma L.P.*, 144 S. Ct. 44.
51. See Brief for Respondent the Multi-State Governmental Entities Group, *Harrington v. Purdue Pharma L.P.*, 144 S. Ct. 44.
52. See Brief of Respondent Ellen Isaacs as Respondent Supporting Petitioner, *Harrington v. Purdue Pharma L.P.*, 144 S. Ct. 44.
53. See Brief of Respondents Supporting Petitioner, *Harrington v. Purdue Pharma L.P.*, 144 S. Ct. 44.
54. See Robert Jones, *The Manville Bankruptcy: Treating Mass Tort Claims in Chapter 11 Proceeding*, 96 HARV. L. REV. 1121, 1121-22 (1983) (“Although Manville and UNR Industries 6 are the first such apparently healthy corporations to file chapter 11 petitions in the face of massive tort claims, manufacturers in a variety of industries that face similar liability could follow suit.”).
55. See *In re Johns-Manville Corp.*, 36 B.R. 727, 737-40 (Bankr. S.D.N.Y. 1984) (finding that a bankruptcy filing to resolve asbestos litigation did not constitute bad faith).

approved an ambitious and procedurally innovative reorganization plan.⁵⁶ The plan included a settlement trust to compensate everyone with an asbestos claim against Manville and a channeling injunction that required that future claims be brought against the trust.⁵⁷ After considerable controversy, Congress in 1994 enacted Section 524(g) of the Bankruptcy Code, which authorized the trust and channeling injunction that was invented in the Manville bankruptcy.⁵⁸ With Congress's blessing, most asbestos claims were channeled to bankruptcy courts.

In creating Section 524(g), Congress took care to give plaintiffs special procedural protections. For example, Section 524(g), which blessed Manville's channeling injunction, requires that a supermajority of tort claimants vote to approve the plan.⁵⁹ It further requires the appointment by the court of a future claims representative to protect the interests of plaintiffs whose injuries have yet to manifest.⁶⁰ These provisions of the Code ensure that no plan is confirmed unless a vast majority of plaintiffs who vote on the plan approve it.⁶¹ They also respond to concerns the Supreme Court has expressed in the context of class actions about interplaintiff conflict: If the defendant can only provide a certain amount of money to settle claims, why would existing plaintiffs and their attorneys have an incentive to advocate on behalf of plaintiffs whose injuries have yet to manifest?

Congress also stipulated that bankruptcy courts should only authorize channeling injunctions when the "pursuit of such demands outside the procedures prescribed by such plan is likely to threaten the plan's purpose to deal equitably with claims and future demands."⁶² This requirement builds on other procedural protections, such as the U.S. Trustee and the court-appointed future claims representative, which aim to ensure representation for future claimants and other parties who may not be in a position to advocate to protect their own interests.

Bankruptcy became a popular forum for resolving asbestos claims in part because it allowed courts to consolidate diverse claims that otherwise could not be

56. *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 93 (2d Cir. 1988).

57. *History, MANVILLE TRUST*, <https://mantrust.claimsres.com/history> [<https://perma.cc/AAH2-ZL5W>].

58. 11 U.S.C. § 524(g) (2018).

59. *Id.* § 524(g)(1).

60. *Id.* § 524(g)(4)(B)(i).

61. GBZ also critique bankruptcy on the ground that not all plaintiffs exercise their right to vote. See Gluck, Burch & Zimmerman, *supra* note 7, at 555-56. But in the Purdue case, an enormous number of plaintiffs—138,000—filed claims. See Abbie VanSickle & Jan Hoffman, *What to Know About the Purdue Pharma Case Before the Supreme Court*, N.Y. TIMES (Dec. 4, 2023), <https://www.nytimes.com/article/purdue-pharma-supreme-court.html> [<https://perma.cc/JU5G-HPG7>]. Those plaintiffs who did not participate chose not to exercise their rights.

62. 11 U.S.C. § 524(g)(2)(B)(ii)(III).

resolved in a single proceeding. Because asbestos plaintiffs had suffered different harms in many different states, courts felt that the claims should not be consolidated in a class proceeding.⁶³ Courts also expressed skepticism of judicial attempts to secure global peace through the class action by binding future claimants.⁶⁴ When the Supreme Court considered this issue, it was particularly concerned that existing claimants and their representatives may not adequately or zealously represent the interests of future claimants.⁶⁵ Interestingly, at the time, the Supreme Court suggested that bankruptcy might be the proper way to resolve mass torts with unknown future claimants, pointing out that a negotiated class settlement would “significantly undermine the protections for creditors built into the Bankruptcy Code.”⁶⁶ It also pointed out, with seeming approval, that Congress had provided for bankruptcy resolution of future asbestos claims in Section 524(g) of the Bankruptcy Code.⁶⁷

B. Bankruptcy’s Aggregating Features

Bankruptcy consolidates claims in a single forum to facilitate a global settlement of related claims. As soon as a debtor files a bankruptcy petition, the automatic stay enjoins all actions—including tort claims—against the debtor.⁶⁸ At that point, the bankruptcy court has jurisdiction over the debtor and nearly all its assets—including assets that are currently in the possession of nondebtor third parties.⁶⁹ Once the debtor has filed, a creditor who wants to participate in the bankruptcy must file a proof of claim.⁷⁰ The debtor then files a plan of reorganization,⁷¹ at which point the creditors vote on whether to accept the plan of reorganization.⁷² If the plan is confirmed, it acts as a final disposition of claims against the debtor.⁷³

To approve a plan of reorganization, the debtor must convince interested parties to vote to approve the plan. This is the part of a comprehensive negotiation process overseen by the bankruptcy court. The first step to approve a plan

63. *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 624-26 (3d Cir. 1996).

64. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 827 (1999).

65. *Id.* at 856-57.

66. *Id.* at 860 n.34.

67. *Id.*

68. 11 U.S.C. § 362(a) (2018).

69. *Id.* § 541(a).

70. *Id.* § 501.

71. *Id.* § 1121.

72. *Id.* §§ 1126, 1129.

73. *Id.* § 1141.

involves disclosure.⁷⁴ The debtor must provide a statement with an accounting of its affairs to parties that hold claims against the debtor's assets.⁷⁵ In the disclosure statement, the debtor classifies claims that can be brought against it, lists its assets, and explains how it plans to emerge from bankruptcy.⁷⁶ The bankruptcy judge must approve the disclosure and find that it includes sufficient information for claimants to make an informed decision.⁷⁷

These aggregating features do not, however, mean that bankruptcy courts have the authority to wipe out property or tort claims. One of the foundational principles of bankruptcy law is that it is procedural and intended to respect non-bankruptcy substantive law as much as possible.⁷⁸ Contrary to what critics imply, bankruptcy courts do not make up tort law or ignore state tort law. They can estimate claims for procedural purposes, but they do not have the power to determine liability or liquidate damages other than according to state law.⁷⁹

In fact, when there is uncertainty about state law remedies, bankruptcy judges have the same power as other federal courts to certify a question to a state court. When appropriate they can (and sometimes indeed must) also send cases to a district court for trial—the term in practice is “withdraw the reference”—or lift the automatic stay to allow cases to be litigated in the forum (state or federal) that would have heard the case in the absence of a bankruptcy filing.⁸⁰

74. *Id.* § 1125.

75. *Id.* § 1125(a)-(c).

76. *See id.* (requiring “adequate information” to enable a class member to make “an informed judgment”).

77. *Id.* § 1125(b).

78. *See, e.g.,* *Butner v. United States*, 440 U.S. 48, 55-57 (1979).

79. *See id.* (holding that bankruptcy courts must follow state property laws); 28 U.S.C. § 157(b)(2), (5) (2018) (outlining core bankruptcy court procedures, including “other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims”); 11 U.S.C. § 1129 (2018) (describing the process for confirming a plan). By excluding personal injury and wrongful death tort claims from the list of core claims, and requiring that they be tried in the district court, Section 157 makes plain that bankruptcy courts do not have the power to determine liability and damages for purposes of payouts. Moreover, Section 1129(a)(11) provides that claimants must receive at least what they would have received in a liquidation, which effectively puts a floor on recovery at the amount that they would be entitled to receive under state law. Perhaps most important is what is not in the Bankruptcy Code: No provision of the Bankruptcy Code provides any power for the court to ignore state law in determining liability for payouts. This brings things full circle to *Butner*, which tells courts to look to state law in the absence of contrary direction in the Bankruptcy Code. *Butner v. United States*, 440 U.S. 48, 55-57 (1979).

80. 28 U.S.C. § 157(d) (2018). The phrase “withdraw the reference” comes from Section 157(d), which provides that the district court “may *withdraw*, in whole or in part, any case or proceeding *referred* under this section.” *Id.* (emphasis added).

When the reference is withdrawn, litigation proceeds in a federal district court. Cases can be withdrawn by a district court on its own motion or by a motion filed by a party in interest. Withdrawal can be mandatory if the bankruptcy proceeding involves a significant and unresolved federal question.⁸¹ Alternatively, district courts may exercise their discretion to withdraw a case.⁸²

When the automatic stay is lifted, the parties can proceed with litigation in other forums, including state or federal court, as they would have done if the bankruptcy proceeding had not been initiated.⁸³

GBZ suggest the bankruptcy courts rarely send cases to other courts for jury trial.⁸⁴ But, as they point out, the same is true in the multidistrict litigation (MDL) system.⁸⁵ The driving force in both contexts are the parties and their desire for settlement. While precise numbers are unavailable, we are skeptical that bankruptcy judges possess some unique disdain for referring cases to trial.⁸⁶ Anecdotal evidence suggests that bankruptcy judges do send tort cases to state or federal district courts for trial when asked. Examples of such cases are easy to find.⁸⁷

81. See, e.g., *In re Vicars Ins. Agency, Inc.*, 96 F.3d 949, 952-94 (7th Cir. 1996); *In re Chateaugay Corp.*, 193 B.R. 669, 673 (S.D.N.Y. 1996); *In re E & S Facilities, Inc.*, 181 B.R. 369, 372 (S.D. Ind. 1995); *In re Contemp. Lithographers, Inc.*, 127 B.R. 122, 126-27 (M.D.N.C. 1991).

82. 28 U.S.C. § 157(d).

83. A final alternative exists. Because mass-tort bankruptcy can only be resolved by a settlement with the supermajority of the voting class of victims, a case that does not achieve settlement will result in dismissal under 11 U.S.C. § 349 (2018). In the case of dismissal, parties are free to proceed with all nonbankruptcy litigation.

84. See Gluck, Burch & Zimmerman, *supra* note 7, at 527, 532.

85. *Id.* at 542, 552 (“Approximately ninety-nine percent of MDL cases are resolved in the MDL, not in their home-court jurisdiction.”).

86. GBZ suggest that bankruptcy judges are unlikely to refer cases “regardless of the possibilities in the Code.” *Id.* at 551.

87. See, e.g., *In re Arnott*, 512 B.R. 744, 757 (Bankr. S.D.N.Y. 2014) (“For the foregoing reasons, the Court grants the motion to lift stay to allow Plaintiff’s [personal injury tort] claims to proceed outside of this Court.”); *Desimone Hosp. Servs., LLC v. W. Va.-Am. Water Co.*, No. AP 2:14-2008, 2014 WL 1577051, at *3 (S.D.W. Va. Apr. 16, 2014) (“Inasmuch as many of these related-to cases involve traditional personal injury tort claims of a non-core variety, the better course is to withdraw reference immediately to assure efficient case administration.”); *In re Gordon*, 646 B.R. 903, 910 (Bankr. D. Idaho 2022) (“Creditor’s claims constitute personal injury torts. As such, the liquidation and estimation of these claims is a non-core matter, and this Court cannot enter final judgment. . . . [T]he Court will grant Creditor relief from the automatic stay to permit the parties to return to the Central District of California.”); *In re Gary Brew Enters. Ltd.*, 198 B.R. 616, 620 (Bankr. S.D. Cal. 1996) (remanding personal injury tort claims to the district court for a jury trial); *In re Pilgrim’s Pride Corp.*, No. 08-45664 DML, 2011 WL 3799835, at *3 (Bankr. N.D. Tex. Aug. 26, 2011) (“The court will not exceed its jurisdiction and so concludes that Wheatley’s claim for sexual harassment must be tried, if at all, before the District Court.”); *Moore v. Idealease of Wilmington*, 358 B.R. 248, 252

In addition, bankruptcy judges' approval of a mass-tort settlement is subject to de novo review by a federal district court.⁸⁸ And if no settlement is reached, personal injury tort claimants can demand that their case be sent to a district or state court for jury trial. This is required because Section 157 prevents bankruptcy courts from finally valuing or estimating personal injury or wrongful death claims for "purposes of distribution."⁸⁹ For state cases, the procedural mechanism for such a demand would take the form of a motion to lift the automatic stay so that a trial could proceed in the state court.⁹⁰ For federal cases, it could be a motion to lift the stay or to refer the case to the district court under 28 U.S.C. § 157, which requires that personal injury and wrongful death suits be "tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose."⁹¹

Section 157 changes bankruptcy's bargaining dynamics. If the debtor wants to avoid a series of jury trials, it must propose a settlement that gets

(E.D.N.C. 2006) ("Because plaintiff alleges personal injury tort claims against defendants, this court retains jurisdiction over those claims pursuant to 28 U.S.C. § 157(b)(5)."); *In re Stewart*, 649 B.R. 755, 759 (Bankr. N.D. Ill. 2023) (lifting the automatic stay and noting that "[b]ecause the claim is one for a 'personal injury tort,' it must be liquidated in the district court or the state court. 11 U.S.C. § 157(b)(5)."); *In re Ice Cream Liquidation, Inc.*, 281 B.R. 154 (Bankr. D. Conn. 2002) (granting a motion to lift the automatic stay to allow pretrial and trial of personal injury tort claims in district court); *In re Roman Cath. Church for Archdiocese of New Orleans*, No. CV 21-1238, 2021 WL 3772062 (E.D. La. Aug. 25, 2021) (granting a motion to withdraw the reference in favor of a jury trial for personal injury tort claims); *In re Mason*, 514 B.R. 852, 860 (Bankr. E.D. Ky. 2014) (granting a motion to lift the stay because the bankruptcy court did not have authority to liquidate personal injury tort claims); *In re Basic Energy Servs., Inc.*, No. 21-90002, 2023 WL 8000290, at *2 (Bankr. S.D. Tex. Aug. 7, 2023) (recommending that the district court withdraw the reference because the bankruptcy "[c]ourt does not have the authority, absent consent, to liquidate personal injury tort claims for purposes of distribution in a chapter 11 case"); *see also Roman Cath. Diocese of Rockville Ctr. v. Certain Underwriters at Lloyds, London & Certain London Mkt. Cos.*, 634 B.R. 226, 240 (S.D.N.Y. 2021) (granting a motion to withdraw the reference in favor of a jury trial for mass-tort-related claims against an insurer); *In re Cachet Fin. Servs.*, 652 B.R. 341, 350 (C.D. Cal. 2023) (granting a motion to withdraw the reference in favor of a jury trial for tortious interference claims); *Desmond v. Ng*, 552 B.R. 781, 790 (D. Mass. 2015) (granting a motion to withdraw the reference in favor of a jury trial for contract and tort claims); *In re Bateman*, 601 B.R. 700, 707 (D. Mass. 2019) (granting a motion to withdraw the reference in favor of a jury trial reference for a fraudulent transfer claim); *In re EPD Inv. Co., LLC*, 594 B.R. 423, 426 (C.D. Cal. 2018) (same).

88. *See In re Purdue Pharma L.P.*, 69 F.4th 45, 68 (2d Cir. 2023), cert. granted sub nom. *Harrington v. Purdue Pharma L.P.*, 144 S. Ct. 44 (2023).

89. 28 U.S.C. § 157(b)(2)(B) (2018). Section 157 provides this requirement by excluding such claims from the list of "[c]ore proceedings." *Id.* It then provides that bankruptcy courts' power to enter final judgment only extends to core claims. *Id.* § 157(c).

90. 11 U.S.C. § 362 (2018).

91. 28 U.S.C. § 157(b)(5) (2018).

supermajority support from the claimants. Of course, tort claimants do not always invoke Section 157. As is the case in all forms of civil litigation, if the defendant is not contesting liability or damages, or if the parties reach a settlement, no trial is necessary. On this score, the only difference between bankruptcy and MDL is that dissenting plaintiffs are brought into the settlement. But, as later explained and as widely recognized in the relevant literature, the existence of “choice” to dissent in MDL is questionable.

Beyond that, after a mass-tort bankruptcy settlement, individual victims still have the right to opt for litigation in state tort systems. That statement may surprise most readers because critics of bankruptcy routinely get this wrong. For example, GBZ say that “bankruptcy courts order payment of *all* claims, often without testing their merit as the tort process could”;⁹² and: “Unlike even mandatory multidistrict litigation, no one can opt out of bankruptcy by dismissing their lawsuit and suing in state court instead.”⁹³

That is not how it works. Bankruptcy courts do not declare the value or merits of the victims’ claims. Rather, they issue injunctions requiring that victims pursue their claims against settlement trusts. Those trusts have administrators who make determinations about the claims brought to them. If the individual claimants disagree with the liability and damages determination made by the fund administrators, they retain the right to litigate the matter *in the tort system* against the settlement trust long after the bankruptcy is over. For example, under the *Boy Scouts* bankruptcy settlement, any claimant has the right to opt out of the administrator’s procedures and have the value of their claim determined by “a court of competent jurisdiction.”⁹⁴ The same is true in the *Purdue* settlement⁹⁵ and the *Mallinckrodt* settlement.⁹⁶

Thus, after the bankruptcy process has concluded, the victims have the unequivocal right to opt out of the administrative process and litigate the merits of liability and damages in a state court. It is worth emphasizing this point one

92. See Gluck, Burch & Zimmerman, *supra* note 7, at 531.

93. *Id.* at 552.

94. *In re Boy Scouts of Am., LLC*, 642 B.R. 504, 544 (Bankr. D. Del. 2022), *supplemented*, No. 20-10343 (LSS), 2022 WL 20541782 (Bankr. D. Del. Sept. 8, 2022), *aff’d*, 650 B.R. 87 (D. Del. 2023), *aff’d*, 650 B.R. 87 (D. Del. 2023) (“Alternatively, he may notify the Settlement Trustee that he intends to seek a de novo determination of his claim by a court of competent jurisdiction (the ‘TDP Tort Election.’).”).

95. See Exhibit B of Debtors at 22, *In re Purdue Pharma L.P.*, 633 B.R. 53 (Bankr. S.D.N.Y. 2021).

96. See *Mallinckrodt Opioid Personal Injury Trust Distribution Procedures for Non-NAS PI Claims*, *In re Mallinckrodt*, 639 B.R. 837 (Bankr. D. Del. 2022) (“A PI Claimant who (i) submits a Claim Form to the PI Trust and (ii) elects expressly in the Claim Form to liquidate his/her PI Claim in the tort system rather than pursuant to the streamlined procedures set forth in these PI TDP (each, an “Opt-Out Claimant”), may assert and liquidate such PI Claim in the tort system at his/her own expense.”).

more time because so many critics get it wrong: Victims who want to litigate the amount of their claim before a jury in the tort system retain the right to do so after a bankruptcy settlement. There is simply no need to opt out of bankruptcy in order to get a jury trial in state court. Similarly, the settlement procedures for claims administration and opt-out trials refute the GBZ claim that bankruptcy plans “distribute resources without testing claims’ merits or finding liability.”⁹⁷

GBZ do not explain how the settlement funds that result from MDL proceedings test the merits of claims and findings of liability. Importantly, those agreements utilize similar administrative procedures as bankruptcy, but without the option to go to trial.⁹⁸ While GBZ are concerned that in bankruptcy “low-value claims may get overcompensated, while higher-value claims may be underpaid,”⁹⁹ they do not explain how MDL settlement funds avoid this problem any better than bankruptcy settlement funds.

C. *Bankruptcy Protects Voice*

Other bankruptcy provisions empower plaintiffs to represent their own interests in a variety of ways. These participatory protections can be understood to embrace a vision of democratic participation that, in our view, partially vindicates plaintiffs’ dignitary interests. Troy McKenzie has observed that these procedural requirements offer a unique means of vindicating plaintiffs’ dignitary and democratic interests in actively pursuing their tort claims, albeit one based on a different mode of participatory governance than the civil-litigation system:

The class action starts with an assumption that individual claimants will be brought to a collective resolution only on the strictly limited terms of formal procedural rules but, once within the collective, have little voice in it. Bankruptcy, by contrast, starts with an assumption that collective resolution is necessary, but then tempers the emphasis on the collective with group and individual consent and with institutional structures that prevent the excessive accretion of power by lawyers or particular subgroups of claimants.¹⁰⁰

97. Gluck, Burch & Zimmerman, *supra* note 7, at 553.

98. See, e.g., Settlement Agreement, *In re Vioxx Prods. Liab. Litig.*, MDL 1657 (E.D. La. Nov. 9, 2007), <https://web.archive.org/web/20081010051035/http://www.browngreer.com/vioxx-settlement/images/pdfs/mastersa.pdf> [<https://perma.cc/UH8U-A7T6>] (providing a complex claims-assessment process that allocates points to each claim).

99. Gluck, Burch & Zimmerman, *supra* note 7, 531.

100. See McKenzie, *supra* note 24, at 962.

We address the various protections in the categories of voting, the opportunity to be heard, and the right to dissent and appeal.

1. *Voting*

By empowering plaintiffs to participate democratically in ongoing negotiations, bankruptcy allows plaintiffs, subject to voting rules, to advocate on their own behalves and balance competing financial and dignitary values.

As a threshold matter, nonplaintiff classes cannot force plaintiffs to accept a plan of reorganization unless a supermajority of voting plaintiffs approve the plan. The settlement plans in mass-tort cases are voluntary settlements approved by a vote of the class of tort victims. While GBZ assert that voting rules allow for “the ability of non-tort creditors to approve the reorganization without trial or pretrial process,” they do not explain what they have in mind. This outcome is strictly prohibited for asbestos settlements under Section 524(g).¹⁰¹ It is also strictly impossible in the most controversial mass-tort cases, those involving the Texas Two-Step (Two-Steps).

Like most critics, GBZ malign Two-Steps as a maneuver to “shed mass-tort liability” and produce a “shift in leverage.”¹⁰² What they fail to observe is that Two-Steps add value by simplifying the bankruptcy process and excluding non-tort creditors from doing exactly the thing that GBZ are worried about: interfering with the rights of tort victims. As we explained in our prior article,

[The Two-Step] blocks nontort creditors from extracting value by inserting themselves in the bankruptcy proceedings. The divisional merger is thus in the interest of tort claimants because it increases their relative leverage and protects them from the risk that other creditors will extract concessions.¹⁰³

In other cases, an outcome in which a group of non-tort creditors forces a settlement on tort creditors would require one of two exceedingly rare things to happen: 1) the debtor creates a class of creditors that mixes tort and non-tort claims together and then the non-tort claims control the vote in that class; or 2) the

^{101.} 11 U.S.C. § 524(g)(2)(b)(ii)(iv)(bb) (2018) (requiring approval “by at least 75 percent of those voting”).

^{102.} See Gluck, Burch & Zimmerman, *supra* note 7, at 548.

^{103.} Casey & Macey, *supra* note 3, at 1009. Admittedly our concern was the opposite of GBZ’s. While they worry about the impossible scenario of non-tort creditors approving a harmful plan, we worry about non-tort creditors *vetoing* a beneficial plan in an attempt to extract a hold-up payment.

court approves a plan of reorganization over the objection of an entire class of tort claimants.

The first scenario is a straw man. The Bankruptcy Code requires that claims must be “substantially similar” to be in the same class.¹⁰⁴ It also provides voting rules requiring at least a majority in number of claims and two-thirds in value for acceptance,¹⁰⁵ and most courts require a supermajority consistent with Section 524(g). In the cases we have been discussing, the mass-tort claimants count in the tens or hundreds of thousands. What other groups of creditors would overwhelm the vote of the opioid victims in *Purdue*, the abuse victims in *Boy Scouts*, or the ovarian cancer victims in *LTL*? Even if a court allowed the debtor to put mass-tort claimants in a class with non-tort creditors, the effect would be to silence *non-tort* creditors.

The second scenario would require the invocation of 11 U.S.C. § 1129(b), also known as the cramdown provision. Cramdown allows a debtor to approve a plan over the objection of one class of creditors. Again, this is strictly prohibited for asbestos settlements under Section 524(g) and strictly impossible in a Texas Two-Step. It is also prohibited—by 28 U.S.C. § 157(b)—for personal injury or wrongful death torts where the debtor is disputing liability or disagrees with the class of victims on the question of damages. As a result, a solvent debtor could never cramdown a class of personal injury or wrongful death torts for any amount less than what the class was willing to accept.

So, what is the scenario that worries GBZ? It is presumably one in which an *insolvent* debtor is providing a plan that retains no value for equity, and where there is no dispute over liability or total damages. In such cases, the debtor might propose a plan that distributes value among various classes of creditors. If the class of victims objected to the distribution—likely because they thought some asset of the debtor was being valued incorrectly—that class of victims might have their objection overruled and be crammed down under § 1129(b). To get to that outcome, § 1129(b) would still require a finding that the plan was “fair and equitable,”¹⁰⁶ did not discriminate against the dissenting victims,¹⁰⁷ and provided each victim more than they would receive in a liquidation.¹⁰⁸ That is the one situation in which non-tort creditors might force a settlement on tort creditors. And note that to do so, the bankruptcy judge must independently find that tort creditors are not worse off than they would be if the firm liquidated.

^{104.} 11 U.S.C. § 1122(a) (2018).

^{105.} *Id.* § 1126(d).

^{106.} *Id.* § 1129(b)(1).

^{107.} *Id.*

^{108.} *Id.* § 1129(a)(7)(A)(ii).

This scenario does not describe any of the recent mass-tort bankruptcies that have garnered so much attention.¹⁰⁹ This is true in large part because bankruptcy courts have been especially solicitous about the procedural protections tort plaintiffs should be afforded. They have thus required class approval for settlements that channel future claims to a settlement trust and have typically required that plans not be approved unless supermajorities consisting of at least seventy-five percent of tort claimants vote to approve the plan. On top of that, the debtor must show that the dissenting creditors are likely to receive a payment that is at least equal in value to what they would get in the absence of a settlement.¹¹⁰

2. *Opportunity to Be Heard*

There are additional procedural protections available to mass-tort claimants in bankruptcy. While a supermajority of plaintiffs can bind a minority, that does not take away from the fact that plaintiffs are able to influence the direction of any settlement that emerges from the bankruptcy process by demanding more disclosure, objecting to the terms of the settlement, or even pushing for unorthodox remedies. In fact, bankruptcy affords the broadest opportunity for claimants to be heard of any federal proceeding. Indeed, Section 1109 of the Code provides that any “party in interest” can “be heard on any issue in a case under this chapter.”¹¹¹

This provision allows the victims to be an integral part of negotiations and bring issues to the court when necessary. As Frederick Tung has observed:

The formal rules alone do not capture the dynamics of plan negotiation. The rules merely provide leverage points for the various parties in interest. To a great extent, the negotiating skill of each party and its ability to use its leverage in Chapter 11 determine the consideration it ultimately receives under the plan. The terms of reorganization are set by the aggregate outcomes of the multiple negotiations.¹¹²

Finally, while the bankruptcy system was not specifically designed to allow plaintiffs to confront defendants, bankruptcy courts have worked to vindicate

109. In 1999, in *In re Dow Corning*, something adjacent to this scenario occurred. There, a plan was crammed down on one class of tort victims with the approval of several other classes of tort victims. *In re Dow Corning Corp.*, 244 B.R. 696, 699 (Bankr. E.D. Mich. 1999).

110. 11 U.S.C. § 1129(a)(7) (2018).

111. *Id.* § 1109(b) (2018).

112. Frederick Tung, *Confirmation and Claims Trading*, 90 NW. U. L. REV. 1684, 1693 (1996).

victims' noneconomic interests. In Purdue's bankruptcy, for example, Judge Drain required that plaintiffs be allowed to confront the Sackler family.¹¹³

3. *Right to Dissent and Appeal*

Another important feature of bankruptcy law is that dissenting tort claimants can object to and appeal the group settlement in bankruptcy without giving up their right to participate in the settlement.¹¹⁴ This is a key feature of aggregation that does not exist in MDL or in any private litigation settlement. In these nonbankruptcy fora, victims are faced with a coercive choice: accept the settlement quietly or risk being left out of the group settlement.

Consider a case where the deal on the table is second best. It is worse for plaintiffs than an alternative that they could negotiate for but better than no deal. In bankruptcy, the dissenting victims can object. If they win, they get the good deal. If they lose, they get the second-best deal. In MDL, dissenters get no deal. For example, any victim who voted against, objected to, and appealed the Purdue settlement is still entitled to share in the settlement fund. Currently in Purdue, the only remaining objectors are one individual and several Canadian municipalities.¹¹⁵ If the Supreme Court affirms the settlement, they will participate fully. Now imagine a dissenting plaintiff in the 3M earplug case. That case settled in MDL. Any plaintiff who rejects the deal, has rejected the deal. Full stop. They might try to appeal some aspect of the settlement process, but they are not entitled to wiggle back into the settlement they rejected. This creates a classic collective-action problem that is known to lead parties to accept suboptimal coercive deals.

But it gets worse. In the MDL context, lawyers—seeking global peace and aggregation—have taken to including settlement provisions that require plaintiffs' lawyers to abandon any client who rejects the settlement offer.¹¹⁶ How these provisions are legal and consistent with any notion of legal ethics¹¹⁷ is beyond

113. Brian Mann, *For the First Time, Victims of the Opioid Crisis Formally Confront the Sackler Family*, NAT'L PUB. RADIO (Mar. 10, 2022, 4:51 PM EST), <https://www.npr.org/2022/03/10/1085174528/sackler-opioid-victims> [<https://perma.cc/YF4L-V487>].

114. 11 U.S.C. § 1126(c), (f) (2018); *id.* § 1129(a)(10).

115. See *supra* notes 52–53 and accompanying text.

116. Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. 1445, 1460–63 (2017).

117. They always include a provision saying they are only enforceable if consistent with ethical rules. But you would need a dissenting victim to risk their payoff to challenge the provision to see if ethical rules had been violated.

us.¹¹⁸ Bankruptcy, on the other hand, allows the victims to vote on the settlement offer while preserving their right to object and appeal without risking abandonment by their lawyers and other co-plaintiffs. Of course, our goal is not to adjudicate the relative merits of bankruptcy and MDL. We simply mean to point out that bankruptcy affords procedural protections that further noneconomic goals, and that it is especially unwise to dismiss bankruptcy if it is the least imperfect option available under current law.

D. Discovery

Nor is it clear that bankruptcy is a vehicle for covering up wrongdoing and avoiding potentially harmful discovery. While the initial disclosure statement must simply list assets, liabilities, and business affairs, that is not the end of the story. The disclosure statement also must include “adequate information” regarding the debtor’s affairs to enable claimants to make an informed decision about whether to vote to approve a plan of reorganization.¹¹⁹ In mass-tort bankruptcies, initial disclosures have typically included significant information about the activities that led to the tort suits. More importantly, plaintiffs in mass-tort bankruptcies have insisted on substantial additional disclosure before voting to approve plans.¹²⁰

118. Despite their obvious ethical problems, these provisions are nonetheless allowed by courts, regularly used, and difficult to challenge. See ELIZABETH CHAMBLEE BURCH, *MASS TORT DEALS: BACKROOM BARGAINING IN MULTIDISTRICT LITIGATION* 44-50 (2019). Lindsey D. Simon has aptly described the MDL settlement process:

In the case of multidistrict litigation, many proposed settlements are rife with “ethically questionable means for achieving litigation closure,” such as walk-away provisions for defendants or bonus payments for 100% settlement participation, all of which manipulate attorney behavior in ways that may not align with their client’s interests.

Lindsey D. Simon, *The Guardian Trustee in Bankruptcy Courts and Beyond*, 98 N.C. L. REV. 1297, 1332 (2020) (footnote omitted) (quoting Elizabeth Chamblee Burch, *Financiers as Monitors in Aggregate Litigation*, 87 N.Y.U. L. REV. 1273, 1283 (2012)).

119. 11 U.S.C. § 1125 (2018).

120. As an aside on information, it is worth pausing to note that the information produced in litigation is not always beneficial. Indeed, several mass-tort litigations seem to be producing misinformation. And this information can be dangerous. A New York judge recently dismissed a case claiming that Tylenol taken by pregnant women causes ADHD. The judge dismissed the case based on the lack of scientific support. It is easy to imagine how one large verdict not based on science could create real public health costs, leading, for instance, to pregnant patients foregoing fever medication because of misinformation in the verdict. As the judge noted in dismissing the case, “The issues explored by this litigation have great public health significance. It matters to get this right. It matters to parents, their children, and their health care providers.” *In re Acetaminophen – ASD-ADHD Prods. Liab. Litig.*, No. 22MC3043, 2023 WL 8711617, at *16 (S.D.N.Y. Dec. 18, 2023); see also *In re Zantac (Ranitidine) Prods. Liab. Litig.*,

Compare, for example, the information that came out during the Purdue bankruptcy with the information produced by the Oklahoma bench trial¹²¹ that GBZ cite as an example of the value available from piecemeal litigation.¹²² In *Purdue*, without a single case going to trial, the company was forced to disclose extensive information about its production, and more than two-dozen opioid victims were given the opportunity to make impact statements.¹²³ In Oklahoma, after a thirty-three day trial characterizing Johnson & Johnson as “the kingpin” of the opioid epidemic in America,¹²⁴ the appellate court reversed the trial court’s \$465 million verdict, noting that, “Evidence at trial demonstrated that J&J sold only 3% of all prescription opioids statewide; other pharmaceutical companies were responsible for marketing and selling 97% of the prescription opioids.”¹²⁵ More importantly, during those thirty-three days, it appears that only five impact victims testified, one of whom had taken a Johnson & Johnson manufactured drug.¹²⁶

644 F. Supp. 3d 1075, 1201 (S.D. Fla. 2022) (“Second, the Plaintiffs’ experts take a position of enormous consequence to the public health – that every H2-blocker and every PPI, all of them, cause cancer.”), *appeal dismissed*, No. 23-10090-J, 2023 WL 2849068 (11th Cir. Mar. 22, 2023), *appeal dismissed*, No. 23-11047, 2023 WL 7426136 (11th Cir. Nov. 9, 2023). Regarding litigation surrounding the blood thinner Xarelto, consultants for the manufacturers have argued that the litigation advertising alone has caused patients to discontinue the treatment without consulting their physician resulting in serious negative medical events. See Paul Burton & W. Frank Peacock, *A Medwatch Review of Reported Events in Patients Who Discontinued Rivaroxaban (XARELTO) Therapy in Response to Legal Advertising*, 2 HEARTRHYTHM CASE REPS. 248, 248 (May 2016). Similar misinformation risks existed with litigation related to vaccines and autism. This is a difficult problem, with no obvious solution. We raise it only to demonstrate why calculating the tradeoffs can be so difficult.

121. While GBZ refer to this case as a “jury trial,” Gluck, Burch & Zimmerman, *supra* note 7, at 558, it was in fact a bench trial. See *State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719, 722 (Okla. 2021) (“The district court conducted a 33-day bench trial . . .”); David Lee, *Witness Accuses Physicians of Over-Prescribing Opioids*, COURTHOUSE NEWS SERV. (June 11, 2019), <https://www.courthousenews.com/witness-in-oklahoma-trial-claims-he-was-attacked-for-criticizing-opioids> [<https://perma.cc/E4DR-KKX2>] (referring to “the bellwether bench trial”); see also The Oklahoman, *Opioid Trial: Day 33 - Closing Statements Full Testimony*, YOUTUBE (July 15, 2019), https://www.youtube.com/watch?v=_w3Uoahj8bo [<https://perma.cc/KHF5-PKD9>] (recording the closing arguments before the judge).
122. Gluck, Burch & Zimmerman, *supra* note 7, at 559. This case is also a poor example of the value of piecemeal litigation over aggregation as it was brought by a state attorney general and not by individual plaintiffs. *Johnson & Johnson*, 499 P.3d at 721.
123. *What Opioid Victims Told Sacklers When They Got the Chance*, ASSOCIATED PRESS (Mar. 10, 2022, 7:22 PM EDT), <https://apnews.com/article/opioid-victims-statements-to-sacklers-9d7e7e603179c1522c8734aa567b6e8> [<https://perma.cc/P54Z-7EBV>].
124. The Oklahoman, *supra* note 121.
125. *Johnson & Johnson*, 499 P.3d at 729.
126. This statement is based on watching most of the recordings of the trial. Despite the claim that this litigation is a wellspring of information, we were unable to locate significant other details

GBZ argue that the extensive discovery in *Purdue* is attributable not to bankruptcy but to the fact that Purdue “participated in the MDL for over a year and a half before filing for bankruptcy.”¹²⁷ But this characterization is not correct. The relevant discovery in *Purdue* was due to MDL, not to bankruptcy. Nor is it correct, that bankruptcy cuts off discovery that would otherwise be available in

about the trial proceedings. We inquired into obtaining a written trial transcript but were told that this would cost over \$16,000. Compare that to mass-tort bankruptcies where the entire docket of each case is available to the public for free. The *Purdue* docket can be found here: *Purdue Pharma L.P., Case No. 19-23649*, KROLL (Feb. 26, 2024), <https://restructuring.ra.kroll.com/purduepharma/Home-DocketInfo> [<https://perma.cc/87XD-7QYP>]. The Mallinckrodt docket can be found here: *Mallinckrodt plc, Case No. 20-12522*, KROLL (Feb. 22, 2024), <https://restructuring.ra.kroll.com/mallinckrodt/Home-DocketInfo> [<https://perma.cc/5D6K-JGVV>]. The first LTL docket can be found here: *LTL Management LLC, Case# 21-30589*, EPIQ (Apr. 4, 2023), <https://dm.epiq11.com/case/llc/info> [<https://perma.cc/3KAJ-5G2Y>]. The second LTL docket can be found here: *LTL Management LLC (2021), Case# 23-12825*, EPIQ, <https://dm.epiq11.com/case/ltl/dockets> [<https://perma.cc/AA2N-5PFW>].

Court dockets for Chapter 11 cases are, in fact, among the most publicly accessible of any court system in the world. To any reader in doubt, we suggest they run searches to try to find court documents for Chapter 11 cases and then do the same for any other case. Elizabeth Chamblee Burch notes that MDL dockets can be frustratingly hard to find. “Google ‘pelvic mesh litigation,’” she writes, “and the MDL court’s seven websites, one devoted to each proceeding, appear nowhere in the first twelve pages of results.” Elizabeth Chamblee Burch & Margaret S. Williams, *Perceptions of Justice in Multidistrict Litigation: Voices from the Crowd*, 107 CORNELL L. REV. 1835, 1922-23 (2022).

To compare, we tried the following searches, and for each, the bankruptcy docket was the first result:

- “purdue bankruptcy docket”
- “j&j bankruptcy docket” (even though the actual debtor was technically LTL) (this was the 2023 docket, which provides a link to the 2021 docket)
- “boy scouts bankruptcy docket”
- “mallinckrodt bankruptcy docket” (the 2020 docket was the first result, the 2023 docket was the second)
- “3M bankruptcy docket” (technically Aearo)
- “bestwall bankruptcy docket”
- “st gobain bankruptcy docket” (technically DBMP LLC)
- “revlon bankruptcy docket” (technically RMC LLC)

We did not come up with any searches where the free and public bankruptcy docket was not the first result. We tried several non-tort bankruptcies – FTX, Blockfi, Hertz, Bed Bath & Beyond, WeWork – with the same results.

127. Gluck, Burch & Zimmerman, *supra* note 7, at 557. This is a strange argument against bankruptcy. As GBZ point out, Purdue filed for bankruptcy early – before any private cases went to trial – and they argue that discovery was robust because of what happened before the filing. *Id.* If that is true, it is hard to see how bankruptcy is cutting off discovery, since it appears that discovery had already run its course. In the other high-profile mass-tort cases, the filing occurred after a series of trials. This was true for 3M, Boy Scouts, and Johnson & Johnson’s talc litigation. One wonders what harm bankruptcy is doing if the discovery was already fully flushed out before these were filed.

litigation. The Bankruptcy Code authorizes broad and wide-ranging discovery. The Federal Rules of Bankruptcy Procedure allow any party in interest to request a “2004 Examination.”¹²⁸ Such examinations go beyond conventional discovery and have been recognized as being “broad and unfettered and in the nature of fishing expeditions.”¹²⁹ Several orders approving 2004 Examinations, as well as stipulations agreeing to discovery requests can be found on the *Purdue* docket.¹³⁰ Just one discovery stipulation included massive document productions from the following individuals:

- Mortimer D.A. Sackler
- Ilene Sackler
- Kathe Sackler
- Theresa Sackler
- Samantha Hunt
- Marissa Sackler
- Sophie Dalrymple
- Michael Sackler
- Karen Lefcourt Taylor
- Jeffrey Lefcourt
- Susan Shack Sackler
- Jaqueline Sackler¹³¹

According to the judge in the case, the total bankruptcy discovery included the production of “approximately ten million documents . . . comprising almost 100 million pages.”¹³²

^{128.} Fed. R. Bankr. P. 2004.

^{129.} *In re Enron Corp.*, 281 B.R. 836, 840 (Bankr. S.D.N.Y. 2002).

^{130.} See, e.g., Amended Order Pursuant to Federal Rules of Bankruptcy Procedure 2004 and 9016 Authorizing Examination of Third Parties, *In re Purdue Pharma*, 633 B.R. 53 (Bankr. S.D.N.Y. 2021) (No. 19-23649); Order Pursuant to Federal Rules of Bankruptcy Procedure 2004 and 9016 Authorizing Examinations of and Document Production by Third Parties, *In re Purdue*, 633 B.R. 53; Notice of Filing of Stipulations and Agreed Orders Among the Official Committee and (i) the Mortimer Side Covered Parties, (ii) Certain Raymond Side Covered Parties and (iii) the IACS Regarding Discovery in the Chapter 11 Cases, *In re Purdue*, 633 B.R. 53.

^{131.} Notice of Filing of Stipulations and Agreed Orders Among the Official Committee and (i) the Mortimer Side Covered Parties, (ii) Certain Raymond Side Covered Parties and (iii) the IACS Regarding Discovery in the Chapter 11 Cases, *In re Purdue*, 633 B.R. 53.

^{132.} *In re Purdue*, 633 B.R. at 86.

E. Bankruptcy's Public-Regarding Protections

In addition to protecting individual rights and encouraging individuals to advocate on their own behalves through voting and negotiated settlement, bankruptcy law protects public-regarding values in ways not found in the tort system. The U.S. Trustee – the bankruptcy “watchdog” charged with representing the broad public interest – participates in every case and may also be heard on “any issue in any case.”¹³³ The Trustee is a component of the Department of Justice “whose mission is to promote the integrity and efficiency of the bankruptcy system for the benefit of all stakeholders – debtors, creditors, and the public.”¹³⁴ As Lyndsey D. Simon has pointed out, this model of “guardian trustees” protects the general public interest.¹³⁵

Purdue Pharma’s bankruptcy provides an example of this public-regarding guardian role of the Trustee. Issues at the core of the mass-tort bankruptcy debate are now before the Supreme Court despite the fact that not a single tort claimant or creditor sought review. One might disagree with the Trustee’s position in *Purdue*.¹³⁶ But it is undeniable that the question is only being heard because of bankruptcy’s unique procedural protections. Were this a nonbankruptcy settlement – like the one in the 3M earplug litigation – there would be no U.S. Trustee and no public-facing appeal.¹³⁷ The U.S. Trustee’s role in *Purdue* is consistent with its role in all bankruptcies. As Simon has explained:

The U.S. Trustee is involved in every part of this process, and may interact with and impact the action of every party involved in the proceeding. Among other things, the U.S. Trustee reviews the debtor’s petition and required disclosures, solicits and selects members of the creditors’ committee, and ensures that all pleadings and actions in the case comply with

^{133.} 11 U.S.C. § 307 (2018).

^{134.} *U.S. Trustee Program*, U.S. DEP’T JUST., <https://www.justice.gov/ust> [<https://perma.cc/G5B8-9NMM>].

^{135.} Simon, *supra* note 118, 1300.

^{136.} See Anthony Casey & Edward Morrison, *The Supreme Court Should Bless the Purdue Pharma Settlement*, WASH. POST (Aug. 21, 2023, 3:31 P.M. EDT), <https://www.washingtonpost.com/opinions/2023/08/21/purdue-pharma-settlement-sacklers-supreme-court> [<https://perma.cc/5MFE-SLA8>].

^{137.} In fact, Professor Simon has advocated for importing the guardian-trustee model into all aggregate litigation. Until such reforms are adopted, bankruptcy has the advantage in protecting public-regarding interests. Simon, *supra* note 118, at 1327 (“The most fruitful extension of the guardian trustee concept may well involve its application in the context of aggregate litigation.”).

the Bankruptcy Code. Simply put, the U.S. Trustee is a fixture of the bankruptcy process.¹³⁸

Similarly, the Bankruptcy Code provides for the appointment of an Examiner “on request of a party in interest or the United States trustee.”¹³⁹ Examiners are neutral parties with broad authority to investigate “any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor or by current or former management of the debtor.”¹⁴⁰ Examiners can serve a major role in uncovering prior misconduct and serving the public-regarding values for which GBZ advocate. Moreover, at least in the Third Circuit, the appointment of an examiner is mandatory upon the request of any party in interest for debtors with debts that exceed \$5,000,000.¹⁴¹

F. *Bankruptcy’s Equitable Protections*

In some respects, aggregation invariably limits plaintiffs’ voice and control. Plaintiffs have less ability to choose their venue in bankruptcy than they do in nonbankruptcy litigation. Opting out is more complicated, and it is not possible for every plaintiff to confront the defendant. In other respects, though, bankruptcy affords a more equitable distribution of due-process values among different plaintiffs. As mentioned, plaintiffs in *Purdue* were able to directly confront the Sackler family. Imagine an alternative proceeding in which plaintiffs sued Purdue in a piecemeal process. If that were to happen, plaintiffs with sophisticated attorneys or sympathetic juries or whose injuries manifested quickly might receive extremely large payouts. Not only would other plaintiffs receive nothing, but the promise of procedural intervention rings hollow since plaintiffs cannot confront a firm that has liquidated. For future claimants, although they can only participate in a bankruptcy vicariously through a representative, that is of greater value to them than cutting off those protections, which might eliminate their voice and their economic recoveries.

Bankruptcy also stops the race to the courthouse. While we previously defended this feature on efficiency grounds,¹⁴² it also promotes due-process values. If a few plaintiffs win large judgments, a debtor’s insolvency will prevent any future plaintiff from recovering money and confronting the defendant. One

138. *Id.* at 1306.

139. 11 U.S.C. § 1104(c) (2018).

140. *Id.*

141. *In re FTX Trading Ltd.*, 91 F.4th 148, 151-52 (3d Cir. 2024) (citing 11 U.S.C. § 1104(c) (2018)).

142. See *Casey & Macey*, *supra* note 3, at 977.

might question whether certain firms are in fact in financial distress, but the reality is many recent bankruptcies were filed by firms that were in a precarious financial position because the onslaught of state and federal litigation in separate proceedings was costing the firm millions of dollars in legal fees a day, not to mention the multi-billion-dollar jury verdicts.¹⁴³ Allowing a race to the courthouse against financially distressed firms puts at risk all of the noneconomic values that litigation might provide for future claimants. If there is no company and no settlement fund, there is no litigation, no money, and no public-regarding value to be preserved.

These examples suggest that aggregation is itself helpful in promoting certain noneconomic values. By aggregating claims, bankruptcy ensures that every plaintiff participates in the resolution on equal terms. While the plaintiffs in Purdue had only a limited ability to confront the Sacklers, and while the apology the Sackler family issued is no substitute for an adversarial proceeding in a nonbankruptcy court, the compulsory features of the bankruptcy process ensured that every plaintiff was able to participate. The same cannot be said of disaggregated tort litigation, nor even of the MDL system.

III. POTENTIAL REFORMS

The protections just discussed are not perfect. In the end, any collective proceeding will, to some extent, reduce the ability of plaintiffs to express themselves, curtail the development of state law, and reduce redundancy. For example, because the bankruptcy process binds future tort claimants, it obviously prevents them from having their literal day in court. But the alternative risk, as Troy McKenzie has pointed out, is the risk that “[p]resent tort claimants, who have already manifested injuries, may exhaust the resources available for compensation well before future claimants later manifest injuries.”¹⁴⁴

Bankruptcy, like all aggregate proceedings, also limits redundancy. While we have explained that bankruptcy judges can and sometimes must refer cases to nonbankruptcy courts, redundancy – taken to the extreme – is inconsistent with aggregation. If every claim has to be litigated before a jury, or if every holdout has a veto, then settlement becomes impossible. One could take a deontological view and say that every single plaintiff is entitled to their day in court.¹⁴⁵ Such

143. Jessica Shumaker, *Tort Victims' Fund Gets \$480M from Talc Judgment*, MO. LAWYERS (June 29, 2021), <https://molawyersmedia.com/2021/06/29/tort-victims-fund-gets-480m-from-talc-judgment> [<https://perma.cc/PPG4-UGZV>].

144. McKenzie, *supra* note 24, at 1001.

145. The premise of every mass-tort litigant getting one day in court is ridiculously impractical. Opioid, asbestos, and earplug claims alone add up to over a million. Giving a million claimants just one day would require over 2,739 years of judicial time, if judges work every day of

an argument is extreme, and it is preferable to give all claimants some recovery and some right to participate at the expense of giving a small number of claimants the right to veto all settlements and demand a separate process.

A. Bankruptcy Reforms

Still, despite our support of bankruptcy as a means of resolving mass-tort cases, we do not claim that it is perfect. We have previously written about the possibility of substantive law reforms to improve tort claimants' position in and out of bankruptcy.¹⁴⁶ We also explored more radical possibilities that include "eliminating the debtor in possession's exclusive right to propose a plan of reorganization, appointing independent board members whose job is to represent tort claimants, and [most radically] replacing the existing board and management with a trustee or other custodian."¹⁴⁷ These reforms could improve plaintiffs' leverage in negotiating settlements, though they also come with significant costs.¹⁴⁸ Here, we discuss a few additional reforms that could make bankruptcy more effective in promoting the noneconomic benefits of litigation.

Before we do, however, it is worth discussing one feature of bankruptcy where we are skeptical that radical reforms would be beneficial. One difference between bankruptcy and MDL is that in bankruptcy, debtors can typically determine where to file. For years, scholars have argued that this encourages debtor opportunism,¹⁴⁹ though Jared A. Elias has shown that debtors primarily seek predictability and judicial expertise.¹⁵⁰ In our view, there are reasons to think that venue shopping in bankruptcy serves desirable ends, and there are reasons to think it can be abused.¹⁵¹ As a result, we favor reforms that would preserve

the year. Thus, if every one of the 677 federal judges in the country worked on nothing else and every day, they might be able to clear those million case in a little over four years. See *Judicial Vacancies*, U.S. CTS. (Mar. 27, 2024), <https://www.uscourts.gov/judges-judgeships/judicial-vacancies> [<https://perma.cc/7PTF-CUVQ>] (noting 677 district court judgeships). They could then turn to the Tylenol, Zantac, Roundup, Boy Scout, Baby Powder, Hair Relaxer, PFAS, and Church Diocese claims for the following decades.

¹⁴⁶ Casey & Macey, *supra* note 3, at 1010-20.

¹⁴⁷ *Id.* at 1018.

¹⁴⁸ *Id.*

¹⁴⁹ See, e.g., LYNN M. LOPUCKI, *COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS* 9-24 (2005); Adam J. Levitin, *Judge Shopping in Chapter 11 Bankruptcy*, 2023 U. ILL. L. REV. 351, 354-55 (arguing that forum shopping undermines the integrity of the bankruptcy process).

¹⁵⁰ See Jared A. Elias, *What Drives Bankruptcy Forum Shopping? Evidence from Market Data*, 47 J. LEGAL STUD. 119, 145-47 (2018).

¹⁵¹ Anthony J. Casey & Joshua C. Macey, *Bankruptcy Shopping: Domestic Venue Races and Global Forum Wars*, 37 BANKR. DEV. L.J. 463, 466-67 (2021); Robert K. Rasmussen & Randal S.

socially valuable venue shopping. To the extent debtors look for judges who are unsympathetic to tort claimants, we think that venue is not the appropriate means of addressing this problem. Instead, policymakers should enact substantive reforms to bankruptcy and nonbankruptcy law while ensuring meaningful opportunity to appeal adverse judgments through a robust appeals process.¹⁵²

Setting aside these procedural issues, substantive reforms could allow bankruptcy to better vindicate noneconomic values. One problem with current voting rules is that bankruptcy judges often allow claimants with weak claims to have an outsized influence while weakening the input of plaintiffs with strong claims. Bankruptcy judges often, though not always, estimate that every tort claim is worth one dollar for voting purposes.¹⁵³ Because tort claimants are in their own class, this does not harm them compared to financial creditors. The plan will only be approved if a supermajority of tort claimants votes for the plan.¹⁵⁴ The value given to tort claims does, however, mean that plaintiffs with weak claims have more influence than they should.¹⁵⁵ A plan can only be approved if two-thirds in dollar amount vote for the plan. Because weak claims are often estimated at the same dollar value for voting purposes, their votes are weighed more heavily than they should be. As a result, one should expect settlements to be skewed. To the extent claims are separable—for example when a product causes different types of injuries—the claimants can be placed in different voting classes.¹⁵⁶ The difficulty is when the injury type is the same, but the severity is not yet known.

The decision to estimate all plaintiffs' claims the same—regardless of the merits of their case—is problematic. While it is common, it is likely insufficient

Thomas, *Timing Matters: Promoting Forum Shopping by Insolvent Corporations*, 94 NW. U. L. REV. 1357, 1357-63 (2000).

152. See Casey & Macey, *supra* note 151, at 496-506.

153. See, e.g., *In re A.H. Robins Inc.*, 880 F.2d 694, 698 (4th Cir. 1989) (describing the practice of valuing tort claims at one dollar as “at most harmless error”); see also S. Elizabeth Gibson, *Judicial Management of Mass Tort Bankruptcy Cases*, FED. JUD. CTR. 132 (2005), https://www.uscourts.gov/sites/default/files/gibsjudi_1.pdf [<https://perma.cc/26AB-5ZHB>] (“Courts have devised two ways of dealing with the problem of tort claim value for voting purposes. A number of courts have temporarily allowed all tort claims within a single class at the same amount, typically one dollar. . . . In some other mass tort cases, all involving asbestos, courts have approved a special voting procedure for the personal injury claimants that assigns a claim amount for voting purposes based on the disease category the claimant’s alleged injury falls within.”); Melissa L. Jacoby, *Sorting Bugs and Features of Mass Tort Bankruptcy*, 101 TEX. L. REV. 1745, 1755 (2023) (similar).

154. See *supra* Section II.B.

155. See D. Theodore Rave, *Bankruptcy v. Multidistrict Litigation for Mass Torts* 38 (Mar. 3, 2024) (unpublished manuscript) (on file with author).

156. 11 U.S.C. § 1123(a)(1) (2018).

to meet the Code's requirement that courts estimate claims. Ideally, judges would develop a uniform and robust claims-estimation process. Alternatively, Congress should amend the Code to provide more guidance on claims estimation. Congress or courts could even innovate with alternative mechanisms for creating classes. Perhaps victims could be placed into various voting classes, and a super-majority vote of each class could be required to approve a settlement plan. With appropriate rules allowing victims to object to classification based on the strength of their claims, such a system might alleviate the voting-estimation problem.

Another potential problem with the existing process is that the future claims representative may not have an adequate incentive to advocate on behalf of clients. Future claims representatives are appointed by the court. They are supposed to act as a fiduciary for claimants who are unable to represent themselves. According to some commentators, however, future claims representatives' real interest lies in appeasing the judge, since doing so increases the likelihood that they will be appointed in future cases.¹⁵⁷ If that is correct, then future claims representatives may be more inclined to support whatever outcomes the judge prefers. For example, they may think the judge prefers a smooth resolution to reduce demands on her time. If bankruptcy judges are not neutral for any reason, it may be preferable to have a neutral third party such as the district judge or U.S. Trustee appoint the claims representative without input from the bankruptcy judge.

CONCLUSION

There is considerable irony in modern critiques of the bankruptcy system. In the mid-1990s and early 2000s, academics were critical of Supreme Court decisions that made it difficult to aggregate mass-tort claims in class actions.¹⁵⁸

157. This appears to be a difficulty with any aggregation procedure. See Theodore Rave, *Closure Provisions in MDL Settlements*, 85 *FORDHAM L. REV.* 2176, 2177 (2017) (“[A] central feature of MDL is the complex principal-agent problem it presents. Although, as a formal matter, each claimant has hired a lawyer and filed an individual lawsuit, claimants who are sucked into an MDL have little actual control over the litigation; lawyers on the PSC make the important decisions. And in settlement negotiations, the PSC’s interests may align more with the defendant’s in getting a deal done than with the claimants’ interests in maximizing individual recoveries.” (footnote omitted)); see, e.g., Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 *VAND. L. REV.* 67 (2016); Burch & Williams, *supra* note 116, at 1448, 1451 (documenting “the practices and norms that influential actors used to foster settlement and influence attorneys’ fees outside of certified class actions”).

158. Francis McGovern, *Settlement of Mass Torts in a Federal System*, 36 *WAKE FOREST L. REV.* 871, 878 (2001) (arguing that “Amchem and Ortiz . . . [made] class action settlements more expensive and, in certain circumstances, improbable”); see *id.* at 882 (“There will be efforts to

Scholars were particularly concerned that, without a central proceeding to consolidate claims and bind holdouts, plaintiff recoveries would decline, and future claimants would be unable to exercise their due-process rights.¹⁵⁹ In other words, scholars recognized that aggregation was necessary to ensure a fair process and secure global peace.¹⁶⁰

Now that bankruptcy offers the precise tools for which scholars advocated in the civil-litigation context more than twenty years ago, the new concern is that it allows for too much aggregation. Interestingly, the more persuasive critiques of modern bankruptcy practices—for example, that valuation is difficult and uncertain, that future claims representatives may not adequately represent their clients, and that aggregation reduces plaintiff voice—are problems that must be managed in every type of aggregation. Bankruptcy, however, has a forty-year head start—as compared to some hypothetical aggregation process by another name—in working through these problems. It is the only procedure currently available for binding future claimants. It also provides the most robust and protective mechanism for reaching consensus and binding minority holdouts after a vote, while still ensuring them an opportunity to be heard. In contrast, MDL is widely known and criticized for using coercive terms to force dissenting claimants to join settlements.¹⁶¹ Most egregiously, lawyers promise to cease representing any of their existing clients who turn down the settlement.¹⁶² It seems clear to us that bankruptcy's coercion—a voting regime with judicial oversight, and a guarantee of payment that is no worse than the nonbankruptcy alternative—is far superior to a collusive agreement among lawyers to abandon their clients. It may not get the balance exactly right, but academics and policymakers should start by tweaking the system we have, not by blowing it up entirely.

The reforms we discuss are just some of the options that could improve the procedural and public-regarding values in bankruptcy. We do not present an

facilitate class action settlements by relaxing the 23(a) prerequisites and, at the same time, strengthening 23(e) scrutiny.”); Roger C. Cramton, *Individualized Justice, Mass Torts, and “Settlement Class Actions”: An Introduction*, 80 CORNELL L. REV. 811, 817 (1995) (describing the high costs and other challenges of nonaggregated mass-tort litigation); Eric D. Green, *What Will We Do When Adjudication Ends? We'll Settle in Bunches: Bringing Rule 23 into the Twenty-First Century*, 44 UCLA L. REV. 1773, 1798-1800 (1997) (arguing in support of amendments to class certification in order to facilitate mass settlement).

159. Cramton, *supra* note 158, at 827-28 (explaining the need to protect future claimants in class actions).

160. GBZ seem to agree. Gluck, Burch & Zimmerman, *supra* note 7, at 552 (“And we share the view of scholars like Samuel Issacharoff and Judith Resnik that aggregation is critical for individuals to access court. We are not suggesting an impractical return to individual litigation.” (footnote omitted)).

161. Burch & Williams, *supra* note 116, at 1460-63.

162. *Id.*

exhaustive list. Rather, our main point is to show that small reforms are on the table and could go a long way. In fact, one lesson from the MDL agreements is that lawyers will find ways to aggregate claims to reach global settlement. They always have.¹⁶³ But bankruptcy provides aggregation with the least cost and the most robust protections for procedural and public-regarding values. We can improve on it to further those goals. Alternatively, we could start anew and design a system with robust discovery, procedural protections, mechanisms to force information disclosure, strict voting rights, and the option to refer bellwether cases to trial when necessary. We could then appoint a neutral administrative officer to supervise it and have their final approval subject to further judicial oversight. That would be a great system. And you might call it all kinds of things. But we call it bankruptcy.

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¹⁶³. Gluck, Burch & Zimmerman, *supra* note 7, at 552 (“It is true that most complex (and even much individual) litigation settles, and that settlements often intentionally avoid any acceptance of responsibility.”).