

SYMPOSIUM

DISSONANCE AND DISTRESS IN BANKRUPTCY AND MASS TORTS

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This Essay reviews the highly successful Fordham Law Review symposium entitled Mass Torts Evolve: The Intersection of Aggregate Litigation and Bankruptcy, held in 2022. The symposium brought together judges, scholars, and practitioners who work on multidistrict litigation (MDL), bankruptcy, or both. The symposium was successful because it brought these groups into conversation at a time when high-profile mass tort defendants are increasingly turning to bankruptcy to escape MDL, while others involved in the MDL process seek to keep them in. The symposium was also successful—and distressing, in our view—because it highlighted disturbing trends in complex litigation.

This Essay makes two principal observations. First, we document the different ways that MDL and bankruptcy players view their institutions. Even if they share similar goals of achieving lasting resolutions to mass tort disputes, they come from different starting points and stress different values. Civil litigators, including those who work in MDLs, hue to traditional notions of victims, liability, and adversarial adjudication. Bankruptcy lawyers, meanwhile, focus more on creditors, preserving value, and moving on. Second, we demonstrate that criticisms of MDL's treatment of individual plaintiffs—both in the symposium and outside it—are being leveraged by defense-side interests seeking to promote bankruptcy as a means of resolving mass torts. Taken together, these two observations reveal a dissonance between the seemingly pro-plaintiff criticisms of MDL and the seemingly pro-defendant use of those criticisms to denigrate MDL in favor of bankruptcy.

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INTRODUCTION

The *Fordham Law Review*'s editors could hardly have felt more justified in choosing *Mass Torts Evolve: The Intersection of Aggregate Litigation and Bankruptcy* as their symposium topic than when a major development happened *during the symposium*. While the proceedings unfolded, the U.S. Bankruptcy Court for the District of New Jersey released its blockbuster decision approving Johnson & Johnson's attempt to shift its multibillion-dollar liability in talc-related tort litigation to a new subsidiary that it had immediately placed into bankruptcy.¹ This maneuver, which has increasingly penetrated the public discourse in part because of its catchy name, the "Texas Two-Step,"² demonstrates the importance and persistence of the question: can and should mass torts be handled through bankruptcy, as opposed to other aggregate-litigation processes such as multidistrict litigation (MDL)?³

Bankruptcy is nothing new in the world of mass torts.⁴ After all, the more massive the tort, the bigger the liability. And, the bigger the liability, the more likely bankruptcy becomes for a defendant.⁵ The Texas Two-Step, however, allows a defendant to unilaterally opt out of litigation, without the headache of putting the company through bankruptcy, by spinning off a bespoke entity that it then takes into bankruptcy while the rest of the company operates normally.⁶ Should Johnson & Johnson's gambit succeed, that success would usher in a new frontier in mass torts, and one that demands the immediate attention of the legal academy, bench, and bar. This symposium will advance that investigation, thanks in large part to the generative and candid interaction between different players in the system that the event fostered.

1. *In re LTL Mgmt.*, 638 B.R. 291, 323–24 (Bankr. D.N.J. 2022).

2. The name is derived from the unusual Texas law that allows the move, though some have suggested that other names would be more accurate. See Samir D. Parikh, *Mass Exploitation*, 170 U. PA. L. REV. ONLINE 53, 57 & n.21 (2022) (mentioning "divisive merger" and the author's preference for "corporate mitosis").

3. See, e.g., Noman N. Kinel, *The "Texas Two-Step" Firestorm: This Is No Dance!*, NAT'L L. REV. (Feb. 22, 2022), <https://www.natlawreview.com/article/texas-two-step-firestorm-no-dance> [<https://perma.cc/6GZ2-P9SB>].

4. See, e.g., Hosp. & Univ. Prop. Damage Claimants v. Johns-Manville Corp. (*In re Johns-Manville Corp.*), 7 F.3d 32, 33 (2d Cir. 1993); Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 SUP. CT. REV. 183, 209; Edith Jones, *Rough Justice in Mass Future Claims: Should Bankruptcy Courts Direct Tort Reform?*, 76 TEX. L. REV. 1695, 1695 (1998); S. ELIZABETH GIBSON, FED. JUD. CTR., JUDICIAL MANAGEMENT OF MASS TORT BANKRUPTCY CASES (2005), https://www.uscourts.gov/sites/default/files/gibsjudi_1.pdf [<https://perma.cc/57AG-NVWT>]; Troy A. McKenzie, *The Mass Tort Bankruptcy: A Pre-History*, 5 J. TORT L. 59, 59 (2012) (discussing the *Ringling Brothers* case); Troy A. McKenzie, *Toward a Bankruptcy Model for Non-Class Aggregate Litigation*, 87 N.Y.U. L. REV. 960, 960 (2012) [hereinafter McKenzie, *Toward a Bankruptcy Model*]; Alan N. Resnick, *Bankruptcy as a Vehicle for Resolving Enterprise Threatening Mass Tort Liability*, 148 U. PA. L. REV. 2045, 2045 (2000); Mark J. Roe, *Bankruptcy and Mass Tort*, 84 COLUM. L. REV. 846, 848 (1984).

5. See *supra* note 4.

6. See, e.g., Parikh, *supra* note 2; Michael A. Francus, *Texas Two Stepping Out of Bankruptcy*, 120 MICH. L. REV. ONLINE 38, 45 (2022).

Much of what made the symposium so successful—aside from its immediate relevance—was the collection of participants that it brought together: scholars of complex litigation and bankruptcy, an array of lawyers who often find themselves embroiled in either or both, and judges from both district and bankruptcy courts.

But, on reflection, what struck us most from the day's discussion was the remarkable level of dissonance among the players. All of us assembled at this symposium are increasingly part of the same conflict-resolution orchestra—whether we like it or not. But we are not playing the same tune. Disagreements emerged, not only on whether civil litigation or bankruptcy proceedings offer a superior forum for resolving mass torts. There was also a fundamental disagreement on what is actually occurring within each system.

First, the scholars and practitioners of bankruptcy and civil litigation appear to hail from different worlds. The mass tort lawyers, district judges, and civil procedure scholars in the room brought experience with large-scale tort cases and MDLs, but admittedly brought little knowledge of the complexities of bankruptcy. Their counterparts in the bankruptcy world understand the intricacies of the labyrinthine U.S. Bankruptcy Code and complex corporate restructuring, but may perhaps be less familiar with the decades of debates about the management and resolution of mass torts. And there appeared to be suspicion between these camps. Many of us on the traditional litigation side are leery of bankruptcy's visions of tort liability as just another set of debts to be settled to give the debtor a fresh start, while those on the bankruptcy side view litigation as a waste of time and money.⁷ Perhaps unsurprisingly, each side seemed to think that everyone—including putative tort victims—is worse off on the other side.

Second, and perhaps even more interesting, was the way in which the day culminated. The final panel addressed the experiences of individual tort victims in aggregate litigation and bankruptcy.⁸ But the bulk of the discussion focused on how individual plaintiffs are treated in MDLs.⁹ For those of us who labor in the civil procedure side of the world, the panel could serve as a time capsule for the debate over mass tort litigation, circa 2022. As our readers well know, MDL remains the dominant mode of mass tort resolution in the federal system,¹⁰ a result which represents the aspirations of

7. See, e.g., Panel Two: Settlement Dynamics in Mass Torts at the Fordham Law Review Symposium: Mass Torts Evolve: The Intersection of Aggregate Litigation and Bankruptcy (Feb. 25, 2022), <https://vimeo.com/694126999> [<https://perma.cc/VP5J-VML6>].

8. Panel Four: Reassessing Litigation Objectives Through the Prism of Victims' Rights at the Fordham Law Review Symposium: Mass Torts Evolve: The Intersection of Aggregate Litigation and Bankruptcy (Feb. 25, 2022), <https://vimeo.com/694126999> [<https://perma.cc/VP5J-VML6>].

9. See *id.*

10. David L. Noll, *MDL as Public Administration*, 118 MICH. L. REV. 403, 405 (2019) (“From the Deepwater Horizon disaster to the opioid crisis, MDL has become the preeminent forum for working out solutions to the most intractable problems in the federal courts.”). Many state courts also have MDL procedures, but in most mass tort litigation, like products liability litigation, the bulk of the cases are typically filed in, or removed to, federal court, and

the MDL statute's drafters.¹¹ Indeed, MDL is the primary forum for the kinds of mass products-liability litigations, like litigation involving talc and opioids, that were front and center during this symposium. MDL, as even its most prominent partisans recognize, is imperfect and continues to evolve as it enters its sixth decade of existence.¹² But even MDL's critics would admit that MDL has succeeded where other procedural mechanisms have failed in providing a forum for coordinated mass tort resolution.¹³

On this final panel, the loudest criticism of MDL seemed to come from those who believe that it does not give plaintiffs a fair enough shake.¹⁴ Professor Elizabeth Chamblee Burch, in presenting the results of a study conducted with Dr. Margaret Williams, contended that the MDL process does too little to respect the interests of individual plaintiffs.¹⁵ In their view, the specialized network of repeat-player MDL lawyers on both sides of cases, supported by insider MDL judges, tend to serve their own mutual best interests rather than those of the tort victims.¹⁶ As a result, plaintiffs are lost in the shuffle, not only left with little control over their own cases, but also often without information as to how those cases are progressing. To support this position, Professor Burch and Dr. Williams presented survey responses from individuals whose cases were swept into MDLs, demonstrating dissatisfaction with the process and its ultimate results.¹⁷

Regardless of whether one considers these data persuasive, the last panel of the day revealed that allegations about MDL's shortcomings are potent ammunition not only for those who seek to give plaintiffs more of a say in

the judges and lawyers in satellite state MDLs often coordinate closely with the federal MDL. See Zachary D. Clopton & D. Theodore Rave, *MDL in the States*, 115 NW. U. L. REV. 1649, 1714–18 (2021).

11. Andrew D. Bradt, *Something Less and Something More: MDL's Roots as a Class Action Alternative*, 165 U. PA. L. REV. 1711, 1728 (2017).

12. Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. REV. 767, 790 (2017) (describing MDL “as a platform for encouraging and enabling judicial procedural innovations in the form of ad hoc procedure in future complex litigations”). Despite a torrent of criticism seemingly from all sides, attempts to further regulate MDL or restrict its availability have thus far failed. Andrew D. Bradt, *The Stickiness of the MDL Statute*, 37 REV. LITIG. 203, 204 (2018). And, indeed, one reason for this has been MDL's success in avoiding defendants turning to bankruptcy. *Panel's Long-Time Chair Steps Down*, THIRD BRANCH, Dec. 2000, at 10, 10 (interview with Judge John F. Nangle).

13. Martin H. Redish & Julie M. Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109, 110 (2015) (“While class actions have generally been somewhat on the decline in recent years, MDL practice has become so pervasive as to be almost routine.” (footnote omitted)).

14. Elizabeth Chamblee Burch & Margaret Williams, *Perceptions of Justice in Multidistrict Litigation: Voices from the Crowd*, CORNELL L. REV. (forthcoming 2022).

15. *Id.* See generally ELIZABETH CHAMBLEE BURCH, MASS TORT DEALS (2018) (reporting Burch's wider study of MDL).

16. See generally Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. 1445, 1458–63 (2017); Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 74 (2017).

17. See generally Burch & Williams, *supra* note 14.

mass litigation.¹⁸ These criticisms also provide rhetorical support for those who labor primarily on the defense side to argue that the MDL system is irredeemably dysfunctional. Counsel for defendants at the event were attracted to the Burch and Williams presentation like flies to honey—criticizing MDL practice and, by comparison, legitimizing the turn to bankruptcy.¹⁹ This connection was echoed outside the symposium as well, when Lawyers for Civil Justice, a prominent defense-side group, cited the same study to support their proposed rules of MDL procedure.²⁰ Without descending too far into cynicism, one might reasonably wonder whether those typically on the defense side of the “v.” truly have plaintiffs’ best interests at heart, or whether their sudden pleas of sympathy are crocodile tears. Either way, if these critiques lead to the abandonment of MDL in favor of bankruptcy—which places far less value on litigant autonomy—the irony will be thick. The MDL critics will have succeeded only in taking us all the way through the looking glass.

In this Essay, our goal is simply to preserve the tenor of the day rather than persuade our readers that any particular position is correct. More research is necessary to accomplish the latter goal—something that all the professors present agreed on. Our aspirations are therefore more modest in that we want to clarify, and perhaps classify, the sources of the dissonance that we observed during the symposium. In Part I, we describe the dissonance that characterized the discussions between those who hail from the bankruptcy world and those who hail from the litigation world, and try to explain why they see the world so differently. In Part II, we turn our attention to the remarkable fourth panel, at which the criticisms of MDL were so agilely taken up by those who would prefer bankruptcy as an alternative—and how their success would prove a remarkable irony.

I. BANKRUPTCY AND LITIGATION

The symposium offered an important opportunity for lawyers and scholars involved in mass tort litigation and bankruptcy to learn from one another. Although mass torts and bankruptcy have long been intertwined, there remains much more learning to do, especially in a dynamic world. And, participants disagreed about whether bankruptcy or civil litigation offered the superior option.

What struck us most about the early panels, though, was something distinct from the intricate differences between modern case management in the district courts and the creative implementation of the Bankruptcy Code in mass tort bankruptcies. Rather, we were struck by the differences in values—

18. *See* Panel Four: Reassessing Litigation Objectives Through the Prism of Victims’ Rights, *supra* note 8.

19. *Id.*; *see infra* notes 61–64.

20. LAWYERS FOR CIVIL JUSTICE, COMMENT TO THE ADVISORY COMMITTEE ON CIVIL RULES AND ITS MDL SUBCOMMITTEE (2022), https://www.lfcj.com/uploads/1/1/2/0/112061707/lcj_comment_on_mdj_sketch_rule_draft_3-8-22.pdf [https://perma.cc/2X9E-NJNM].

and the rhetoric that illustrated those values—that various participants invoked. To be clear, these are observations from three professors who live in the procedure world; to the extent our understanding of bankruptcy is superficial at best, we hope our colleagues will be forgiving, as we sometimes find ourselves when reading bankruptcy scholars’ musings on the particulars of complex litigation.

At the outset, it is important to note that while tort and bankruptcy lawyers and scholars might seem to hail from different planets, the distance between them should not be exaggerated. Aggregate litigation in either form pursues the same goal: a fair, efficient, and equitable outcome for all involved, often through a final “global resolution” of the underlying disputes.²¹ And while we proceduralists emphasize due process and sometimes overly romanticize concepts like the “day in court” and the “search for truth,” it has long been the case that (the Owen Fisses of the world aside²²) settlement is a central policy goal, especially in complex litigation.²³ But all settlements are not the same, nor are the processes that lead to them.²⁴ So while both systems may seek the same ultimate goal, the differences in procedures may lead to different substantive outcomes.

As the participants made clear, speed and ability for the debtor to emerge with a “fresh start” are primary goals of bankruptcy proceedings.²⁵ Even without novel strategies like the Texas Two-Step, many aspects of bankruptcy, such as those authorizing the automatic stay, channeling injunctions, and immunity from litigation after approval of a reorganization plan, illustrate the values prized by bankruptcy.²⁶ Bankruptcy starts from the presumption that a reorganization is a value-generating transaction. The goal is to move forward on the assumption that doing so leaves everyone—creditors and the debtor alike—better off than forcing the debtor corporation

21. See, e.g., McKenzie, *Toward a Bankruptcy Model*, *supra* note 4, at 960–63; D. Theodore Rave, *Governing the Anticommons in Aggregate Litigation*, 66 VAND. L. REV. 1183, 1238–39 (2013).

22. See, e.g., Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 FORDHAM L. REV. 1177 (2009) (critiquing Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984)).

23. See, e.g., *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008) (“[T]here is a strong judicial policy that favors settlements, particularly where complex class action litigation is concerned.”); *Colella v. Univ. of Pittsburgh*, 569 F. Supp. 2d 525, 530 (W.D. Pa. 2008) (“The strong public policy and high judicial favor for negotiated settlements of litigation is particularly keen ‘in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation.’”).

24. See, e.g., RICHARD L. MARCUS, EDWARD F. SHERMAN, HOWARD M. ERICSON & ANDREW D. BRADT, *COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE* 609–12 (7th ed. 2021) (describing how “different legal regimes” pursue mass settlement, but noting that “each . . . carries distinct requirements, draws on a different history, and implicates different policies”).

25. See, e.g., *Marama v. Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007) (“The principal purpose of the Bankruptcy Code is to grant a ‘fresh start’ to the ‘honest but unfortunate debtor.’” (quoting *Grogan v. Garner*, 498 U.S. 279, 286 (1991))).

26. See, e.g., Lindsey D. Simon, *Bankruptcy Gifters*, 131 YALE L.J. 1154, 1161–71 (2022); Adam J. Levitin, *Purdue’s Poison Pill: The Breakdown of Chapter 11 Checks and Balances*, 100 TEX. L. REV. 1079 (2022).

out of business and liquidating its assets.²⁷ The question then becomes how to equitably allocate the proceeds among the various players. When the bankruptcy is not of the “two-step” variety, the tort claimants are just another class of creditors—after all, much of the goal of the bankruptcy lawyer is to consider *all* the debtor’s obligations to *all* of its creditors, and to determine whether bankruptcy makes sense as a tool for a debtor staring down the barrel of insolvency.

The Texas Two-Step brings these values to tort litigation.²⁸ It lowers the perceived cost to the debtor of invoking the bankruptcy process because the debtor need not put its entire operation through bankruptcy nor settle accounts with all creditors simultaneously.²⁹ While we hope that bankruptcy judges will not tolerate attempts to play liability shell games or to artificially cap total tort liability through divisive mergers,³⁰ the Texas Two-Step allows debtors to create a bespoke entity to compartmentalize tort liability and to use bankruptcy as a mechanism for satisfying the claims of tort plaintiffs (present and future) as though they were creditors. The Texas Two-Step is a solo dance: engage in a divisive merger, allocate the liabilities to the unfortunate subsidiary, and file for bankruptcy in the preferred venue, all before a judge who subscribes to the foundational norms of the bankruptcy system.³¹

In the end, what one thinks about the Texas Two-Step will turn on one’s confidence in bankruptcy procedure and bankruptcy judges’ ability to ensure a defensible outcome. Strong faith in bankruptcy may lead one to view tort litigation as a big, slowly accruing transaction cost that siphons off resources that could have either gone to the creditors (tort victims and others) or perhaps might have been preserved for the debtor. And regardless of the Texas Two-Step’s viability, one might prefer bankruptcy to MDL because of bankruptcy’s ability to essentially cut off litigation by new claimants going forward—so-called “future” claimants.³²

The proceduralists at the event espoused a different view. Although settlement is always a likely outcome, the means of getting there is an adversarial process. In theory, that process is aimed at ensuring participation and accurate results, even if it is sometimes slower and more deliberate. This

27. See, e.g., Thomas H. Jackson, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* 10–13 (1986); see also McKenzie, *Toward a Bankruptcy Model*, *supra* note 4, at 963 (“Bankruptcy . . . starts with the assumption that collective resolution is necessary.”).

28. See Parikh, *supra* note 2, at 58–59; Francus, *supra* note 6, at 40.

29. See Parikh, *supra* note 2, at 58.

30. In his *LTL Management* opinion, Chief Judge Michael B. Kaplan suggested that he would not look kindly on any such attempts and stood ready to use fraudulent-transfer doctrine to block them. *In re LTL Management, LLC*, 637 B.R. 396, 423–24 (Bankr. D.N.J. 2022) (“[W]ith the bankruptcy filing, the bankruptcy estate succeeds to all rights held by the Debtor, with the oversight and jurisdiction of the Court as needed for enforcement. Significantly, the resources under the Funding Agreement will be available upon confirmation of the plan—whether or not the plan is acceptable to J&J or New JJCI, and whether or not the plan offers payors protection under 524(g).”).

31. See Parikh, *supra* note 2, at 59.

32. This is not to say that litigation cannot—or has not—dealt with future claims, only that bankruptcy partisans believe that their process is particularly adept at doing so.

tradeoff is reflected prominently in Rule 1 of the Federal Rules of Civil Procedure, which sets out the goal of promoting the “just, speedy, and inexpensive determination of every proceeding.”³³ As any first-year law student understands, however, it is difficult to have all three of those adjectives simultaneously describe any given case. We might have to fudge on justice to get to a result quickly and cheaply, or we might simply accept that getting to the right answer through a process where all parties have the opportunity to be heard is going to cost money and take time. Aggregate litigation ramps up the inherent challenge posed by these competing values because the more complex litigation is, and the more parties are involved, the harder it will be to figure out the best ways to make the tradeoff. Insisting too much on participation could make litigation interminable, while insisting too much on efficiency runs the risk of unjust outcomes, which may result in illegitimacy and dissatisfaction.

Class actions and MDL represent attempts to cut this Gordian knot, and there have been decades of debates over how well they do it, both in general and relative to one another.³⁴ One underlying assumption of this symposium is that class action treatment is largely unavailable in the kinds of mass torts that the group was focused on. That has left MDL as the most likely aggregation mechanism in federal court, and MDL attempts to solve the problem of the tradeoff between efficiency and participation by essentially maintaining a “split personality.”³⁵ That is, MDL is simultaneously a temporary aggregation of separate cases for pretrial proceedings before remand for trial *and* a tightly knit aggregate managed by the transferee judge and the lawyers appointed to leadership positions. While MDL represents an effective mechanism for achieving mass settlements of enormous litigations, it is not entirely at the expense of the other side of its personality, which adheres to traditional adversarial norms of individual litigation. In MDL, mass tort settlement designers often strive to approximate the closure that bankruptcy takes for granted,³⁶ but for any global resolution to stick, the fundamental structure of MDL requires buy-in from the plaintiffs themselves.

This emphasis on the adversarial process and individual participation was missing from the way in which the symposium’s bankruptcy players spoke. That is not to say that the claimants’ lawyers in a bankruptcy are not adversarial, but their goal is not to prove liability for harm. Their goal is to

33. FED. R. CIV. P. 1.

34. See generally Andrew D. Bradt, *Something Less and Something More: MDL’s Roots as a Class Action Alternative*, 165 U. PA. L. REV. 1711, 1736 (2017); Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After Ortiz*, 58 U. KAN. L. REV. 775 (2010); Judith Resnik, *From “Cases” to “Litigation,”* 54 LAW & CONTEMP. PROBS. 5 (1991).

35. See, e.g., Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendants’ Terms: Bristol-Myers Squibb and the Federalization of Mass-Tort Litigation*, 59 B.C. L. REV. 1251, 1256–58 (2018); Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 CALIF. L. REV. 1259, 1269–72 (2017).

36. D. Theodore Rave, *Closure Provisions in MDL Settlements*, 85 FORDHAM L. REV. 2175, 2176–77 (2017).

compete with others similarly situated for their client's piece of the pie.³⁷ In a sense, then, tort claimants in the bankruptcy process are no more victims of a legal wrong than any other creditor. All creditors are owed a debt, and all will share in the equitable distribution of the debtor's assets according to their priority in the bankruptcy. While the closure that bankruptcy offers may sometimes increase the size of the pie, converting tort victims from plaintiffs to creditors can significantly reduce their leverage to demand their share. True, they can lengthen negotiations, and, if they have the numbers, threaten to vote down the reorganization plan, but they lose the ability to use litigation tactics. No longer can the plaintiffs threaten a jury trial and all that comes with it, including the potential risk for damaging press, exceptionally large damage awards, or punitive damages. Moreover, the victims lose their chance—even through a proxy—to tell their story in open court to people who must listen.

These competing visions are not just the musings of academics studying these processes from afar. One virtue of this symposium was that it brought together academics with practitioners and judges who live in these worlds every day. The competing visions we just described could not have been more clearly expressed than by the judges on the symposium's lunchtime keynote panel. In one corner was U.S. District Judge Patti B. Saris. Judge Saris's reaction to the discussion of the way in which bankruptcy handles mass tort cases was remarkable. As she noted, bankruptcy lawyers focus on "peace."³⁸ But, in the civil litigation world where she resides, she stated, "I don't think about peace, I think about the merits of the lawsuit."³⁹ She described civil litigation in this way:

[Y]ou do go in, right from the beginning with discussions that are not anything like what you heard this morning. I worry about the plaintiffs: can they meet the burden? Do they have good claims? Are the defendants liable? We go straight to the merits of the thing [W]e go through everything that you all probably learned in law school. Motions to dismiss, plausible claims, summary judgment, *Daubert* hearings to see if the science is good—we go right to the merits. One of the things I never think about is, taking notes this morning, when I get a case, I don't think about creating value, preserving value.⁴⁰

In the other corner was U.S. Bankruptcy Judge John T. Dorsey. Speaking about bankruptcy, Judge Dorsey described his world in starkly different terms:

37. *But see* Lynn A. Baker, *Mass Tort Remedies and the Puzzle of the Disappearing Defendant*, 98 TEX. L. REV. 1165, 1165 (2020) (noting that defendants in mass tort litigation may defer to others in the way in which settlement proceeds are divided among plaintiffs).

38. Hon. Patti B. Saris, Judge, U.S. District Court for the District of Massachusetts, Keynote Address at the Fordham Law Review Symposium: Mass Torts Evolve: The Intersection of Aggregate Litigation and Bankruptcy (Feb. 25, 2022), <https://vimeo.com/694126999> [<https://perma.cc/VP5J-VML6>].

39. *Id.*

40. *Id.*

[A debtor is] coming to the bankruptcy court so they can get a full resolution of all of those claims. So if you have a debtor who is coming in, and you know the value, you start with the value of the company, how much is the company worth? And you look at, what are the claims against the company, how are we going to maximize the value for the claimants who are going to be recovering? Because you want to maximize the value of the company, so that you can maximize the value for the creditors of the company—creditors of the company in case of mass torts or the individual claimants who have claims against the company. And so, how do you resolve those? And it's certainly not a perfect system. As a bankruptcy judge, I cannot liquidate a personal injury claim, it's not permitted by the code, so all I can do is estimate those claims in connection with trying to come up with what value is there available to pay those claims. And so it's not perfect, it's done in an expedited fashion for a reason. Usually when a debtor files for bankruptcy, the cost is astronomical for a large company in bankruptcy, it can run into the millions, tens of millions of dollars a month to be in bankruptcy. So they're losing even more money as they're going along, when you're trying to preserve as much as you can. So you're trying to move the case along. I think that's the purpose of the bankruptcy code.⁴¹

The dissonance between these two views of the judicial role is striking because they represent the underlying primary considerations of the two systems.⁴² Even the vocabulary differed in meaningful ways. Judge Saris talked about claims, merits, and liability. Judge Dorsey wants to maximize, estimate, and expedite. Judge Saris said she does not focus on preserving value. Judge Dorsey used the word “value” six times in just the small portion of his remarks reprinted here.

One open question is whether these competing visions matter in the end. After all, MDL settlement designers often strike deals aimed at creating or preserving value, and bankruptcy lawyers must grapple with the merits to figure out how to value creditors' claims. This symposium can pose, but not answer, that question. There is more work to be done. But the language is suggestive—highly suggestive, in our view—of the fact that these processes, seeking similar ends, do so through very different mechanisms, and in service of very different values.

II. PLAINTIFFS AND DEFENDANTS

Although the central theme of the symposium was bankruptcy and litigation, a related conversation developed about what occurs within mass litigation itself. This conversation is important in its own right, but will also (we suspect) have direct consequences for the bankruptcy-versus-litigation debate.

41. Hon. John T. Dorsey, Judge, U.S. Bankruptcy Court for the District of Delaware, Keynote Address at the Fordham Law Review Symposium: Mass Torts Evolve: The Intersection of Aggregate Litigation and Bankruptcy (Feb. 25, 2022), <https://vimeo.com/694126999> [<https://perma.cc/VP5J-VML6>].

42. See *supra* notes 29–41 and accompanying text.

This second conversation hit its peak during the final panel of the day, entitled *Reassessing Litigation Objectives Through the Prism of Victim's Rights*. The academics on the panel were Professor Elizabeth Chamblee Burch of the University of Georgia School of Law, Professor Edward Janger of Brooklyn Law School, and Professor Alexandra D. Lahav of the University of Connecticut School of Law. Joining them were prominent attorneys Sheila L. Birnbaum of Dechert LLP, one of the country's preeminent mass tort defense lawyers, Elizabeth J. Cabraser of Lief Cabraser Heimann & Bernstein, among the most prominent plaintiffs' lawyers in leadership in aggregate litigations, and Edward Neiger of ASK LLP, a leading lawyer representing individual plaintiffs in opioids litigation, among other matters.

Much could be said about this remarkable conversation, but one element in particular caught our attention. Although we spent most of the day observing the almost dehumanizing way in which the bankruptcy process approaches tort victims, this panel's discussion focused on Professor Burch's presentation of her forthcoming study, conducted with Dr. Margaret Williams (who was not present), which is highly critical of individual litigants' experiences in MDL.⁴³ Professor Burch presented survey data that they collected on perceptions of justice in MDLs related to drugs and medical devices marketed to women. They put out a nationwide call to all plaintiffs who had participated in women's health MDLs, promoting it in major newspapers, through social media, and through direct outreach to some of the lawyers involved.⁴⁴ Out of those hundreds of thousands of plaintiffs, they received around 200 unique responses.⁴⁵

Many of the respondents who chose to complete their survey were profoundly dissatisfied with their representation in the MDLs.⁴⁶ Survey respondents felt that their lawyers were not sufficiently communicative about details like where and before which judge their suits were pending.⁴⁷ Respondents reported that their lawyers did a poor job of explaining what was occurring in their cases and the risks and benefits of key decisions.⁴⁸ Indeed, many could not even recall their attorneys' names.⁴⁹ Many survey respondents were disappointed in the outcome of the litigation.⁵⁰ They felt that their recoveries in settlement were less than they had anticipated at the outset, that the litigation took longer than they had expected, and that they never had a chance to tell their stories.⁵¹ For many respondents, the litigation did not meet their goals because the products that had injured them remained

43. See Burch & Williams, *supra* note 14.

44. *Id.* at 14–15.

45. *Id.* at 18 n.123.

46. *Id.* at 24.

47. *Id.*

48. *Id.*

49. *Id.* at 23.

50. *Id.* at 43.

51. *Id.* at 37–38, 41, 47.

on the market, the compensation they received was too low, and their quality of life remained poor.⁵²

This is not the place to delve deeply into questions of methodology, sample size, and the like. Professor Burch and Dr. Williams are clear in their paper that their participants were not randomly selected and that they cannot claim that their results are representative. Their survey methodology was not designed to generate a representative sample and their sample size is quite small.⁵³ For this reason, the authors view their study as a pilot project and call for more research.⁵⁴ Indeed, Professor Burch used her remarks on this panel to make a pitch for more studies like this one.⁵⁵

Generally, in the pursuit of knowledge, some data is better than no data. Even limited, unrepresentative data can help to uncover potential problems and identify fruitful research questions. Pilot projects can chart a course for future research and experimentation. Academic readers know that they need to be careful with such data. They know to watch out for confounding variables or selection biases, particularly when a survey sample is not randomly generated.⁵⁶ And they know that a baseline question always looms in the background: “Compared to what?”⁵⁷ This is perhaps especially true in complex litigation, where debates over the relative costs and benefits of aggregation proceed with the background understanding that the gold standard of participation—an individual trial or even a “day in court”—is inevitably infeasible.⁵⁸

52. *Id.* at 42, 49.

53. As they write, “[W]e know nothing about the underlying population from which [respondents] are drawn.” *Id.* at 17.

54. *Id.* at 5 (“[W]e hope others will continue the work we begin here.”); *id.* at 18 (“Our study is the first to examine litigant satisfaction in MDLs, but it should be the first of many.”).

55. Elizabeth Chamblee Burch, Fuller E. Callaway Chair of Law, University of Georgia School of Law, Remarks at the Fordham Law Review Symposium: Mass Torts Evolve: The Intersection of Aggregate Litigation and Bankruptcy (Feb. 25, 2022), <https://vimeo.com/694126999> [<https://perma.cc/VP5J-VML6>] (“We’d love very much to have access to a whole bunch of plaintiffs, so that we can replicate the study on a much broader plaintiff population I think the first step is trying to get a larger data set of MDLs We’d love for judges to start a pilot project across a couple of different MDLs where we could look at more participants to make sure that what we’re saying is representative of the broader plaintiff population.”).

56. *See, e.g.*, Roger M. Michalski, *In a Different Voice*, JOTWELL (Nov. 18, 2021), <https://courtslaw.jotwell.com/in-a-different-voice/> [<https://perma.cc/R9CU-V9BB>] (“In short, the [Burch and Williams] survey is not random and it is difficult to identify a population from which it samples. Also, as the authors acknowledge, ‘it is possible that those who felt more strongly about their experiences might have been more likely to participate and, of course, recollections may be tainted by any number of biases.’ As such, all claims that rely on the representativeness of the survey must be read with lavish caution.”).

57. Professor Lahav offered one particularly poignant version of this idea, observing that some of these results might be “endemic to legal practice,” both individual and aggregate. Alexandra D. Lahav, Professor of Law, Cornell Law School, Remarks at the Fordham Law Review Symposium: Mass Torts Evolve: The Intersection of Aggregate Litigation and Bankruptcy (Feb. 25, 2022), <https://vimeo.com/694126999> [<https://perma.cc/VP5J-VML6>].

58. *See, e.g.*, Judith Resnik, *Compared to What?: ALI Aggregation and the Shifting Contours of Due Process and Lawyers’ Powers*, 79 GEO. WASH. L. REV. 628, 633–34 (2011).

The day's events made this question even more palpable as participants spent most of their time discussing the choice between MDL and bankruptcy, a prominent comparator. One purpose of procedural scholarship is to clarify the tradeoffs and better understand the consequences of our choices. Ultimately, then, Professor Burch is right: more research should be in the offing, and that research should place a premium on finding the right comparators, to the extent possible, when examining the inherently messy world of real-life litigation.

The quest for knowledge in the academy must continue, but that quest is not purely academic. In law, perhaps more than in other academic disciplines, the relationship between the academy and the real world is a close one. And within law, that holds especially true in civil procedure, a field in which academics, judges, and lawyers alike participate in litigation and lawmaking.⁵⁹ Moreover, these processes are inherently political—as Professor Stephen B. Burbank persistently reminds us, the “dirty little secret” that “procedure is power” has been out for decades.⁶⁰ So while we agree that we academics should not be deterred in our pursuit of knowledge, we also should remember that a little knowledge can be a dangerous thing. The unavoidable fact is that what academics produce is grist for the political mill, and participants in the political process are acutely aware of the “compared to what?” question, as they joust over which forums and which procedures should apply in real cases.

The final panel was an object lesson. Professor Burch presented her results carefully and repeated her call for more research. As if those caveats did not happen, the lawyers who represent mass tort debtors and defendants sprang into action, as if to say, “See—MDL litigation is a disaster. What do you have to lose by trying something new?” For instance, Sheila Birnbaum noted, “None of this surprises me at all, because in the large MDLs, what you see are most of the plaintiffs’ cases—unless you are one of the bellwether cases—they are parked.”⁶¹ She added, “So it doesn’t surprise me at all that these people are unhappy with the process, and whatever else, because I think as Elizabeth also said, some of us have too many cases, and they’re not paying any attention to the cases that are parked, which are most of them in the MDL.”⁶² An audience member, Tancred Schiavoni, a partner at O’Melveny & Myers LLP who had been an earlier panelist and represents debtors, chimed in, adding, “This is an area that needs reform. I got to tell you, we have these shadowy claims aggregators and the people who really

59. This was amply illustrated by Professor Lahav’s “deposition” of Edward Neiger after he accused the academics on the panel of living in an ivory tower. Alexandra Lahav, Remarks, *supra* note 57.

60. Stephen B. Burbank, *Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy*, 106 COLUM. L. REV. 1924, 1927–28 (2008) (“[L]egislators too had learned procedure’s dirty little secret[,] and . . . interest groups were pushing Congress either to restrain the judiciary or itself to exercise the power of procedure.”).

61. Sheila L. Birnbaum, Partner, Dechert LLP, Remarks at the Fordham Law Review Symposium: Mass Torts Evolve: The Intersection of Aggregate Litigation and Bankruptcy (Feb. 25, 2022), <https://vimeo.com/694126999> [<https://perma.cc/VP5J-VML6>].

62. *Id.*

own the claims behind them.”⁶³ Birnbaum then noted, “In the free-for-all that’s the mass tort, and even to our settlers, nobody knows what’s going on. Cases are being settled, and if you have aggregation of a hundred thousand cases, settle them all cheap, because the largest fees can be really large.”⁶⁴ Note, too, that as defense- and debtor-side lawyers jumped on these data to disparage MDL and pump up bankruptcy, not once did they suggest that bankruptcy would perform better when it comes to the deficiencies of MDL that Professor Burch’s respondents reported.

We now lay our own cards on the table: watching those who represent defense-side interests seize on the Burch and Williams data to argue that MDL is simply too broken, and that bankruptcy will ultimately leave individual claimants better off, causes us some angst as proceduralists. Is bankruptcy normatively better or worse than MDL? Is the Texas Two-Step, for lack of a better word, a scam? Well, the jury (which might be deployed in a tort case as opposed to bankruptcy proceedings) is out. It is going to take hard work and a lot of research and litigation to be able to answer these questions. But there may not be time for that if those who would prefer bankruptcy to satisfy their clients’ interests are able to shortcut the debate through political means. As the final panel illustrated, defendants are quite adept at deploying arguments that plaintiffs are not getting a fair shake to advance defendants’ goals.⁶⁵ There is, of course, nothing wrong with defense-side lawyers and interest groups lobbying for procedural changes that would benefit their clients. That is how the system is supposed to work. But they should do so by convincing decision-makers that the system they prefer is a *better* system, not by using feigned concern for their adversaries to try to undermine the legitimacy of the current system and attack the very source of their adversaries’ power and leverage.⁶⁶

So the “compared to what?” question is of more than academic importance. Whether we like it or not, the academic work on MDL is going to be leveraged by those who seek alternatives that promote their interests, whether or not they improve the measures that motivated the initial research. And there, in a nutshell, is the rub: the irony of defense and bankruptcy lawyers using arguments that MDL dehumanizes plaintiffs, in favor of a

63. Tancred Schiavoni, Partner, O’Melveny & Myers LLP, Remarks at the Fordham Law Review Symposium: Mass Torts Evolve: The Intersection of Aggregate Litigation and Bankruptcy (Feb. 25, 2022), <https://vimeo.com/694126999> [<https://perma.cc/VP5J-VML6>].

64. Sheila L. Birnbaum, Remarks, *supra* note 61.

65. See *supra* notes 61–64 and accompanying text. Importantly, this diagnosis extends far beyond the occasional participation in an academic symposium. Defense-side interest groups have pointed to arguments that MDL shortchanges individual plaintiffs in multiple policy forums. Lawyers for Civil Justice, for example, has relied on Professor Burch and Dr. Williams’s work—including this study—to lobby both Congress and the Advisory Committee on Civil Rules to adopt a series of defendant-friendly rules for MDLs on the premise that it is necessary to weaken mass tort plaintiff-side lawyers for the protection of their own clients. See, e.g., LAWYERS FOR CIVIL JUSTICE, *supra* note 20.

66. See Andrew D. Bradt & D. Theodore Rave, *It’s Good to Have the “Haves” on Your Side: A Defense of Repeat Players in Multidistrict Litigation*, 108 GEO. L.J. 73, 119–23 (2019).

system that calls them “debtors” and prioritizes “moving on,”⁶⁷ would be somewhat hilarious if not potentially tragic. And we should expect this panel to provide a preview for congressional testimony, floor speeches, and amicus briefs in the near future.

We end, therefore, with a call for more: More research about MDLs *and* bankruptcy. More thinking about what metrics actually matter, and how these regimes perform on those metrics. And more time to work through these difficult questions, including at more fantastic events like this one.

67. *See supra* note 41.