

DUE PROCESS ALIGNMENT IN MASS RESTRUCTURINGS

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Mass tort defendants have recently begun exiting multidistrict litigation by filing for bankruptcy. This new strategy ushers defendants into a far more hospitable forum that offers accelerated resolution of all state and federal claims held by both current and future victims. Bankruptcy's structural, procedural, and substantive benefits also provide defendants with unique optionality.

Bankruptcy's resolution promise is alluring, but the process relies on a very large assumption: that future victims can be compelled to relinquish property rights in their cause of action against the corporate defendant and others without consent or notice. Bankruptcy builds an entire resolution structure on the premise that the U.S. Bankruptcy Code's untested interest-representation scheme satisfies due process strictures. This Essay questions that assumption and identifies two compromised pillars that could render bankruptcy's mass tort framework unconstitutional. First, the process for selecting the fiduciary that represents future victims' interests and irrevocably binds them to the agreed settlement is fundamentally broken. Second, the process by which bankruptcy courts estimate the value of thousands of mass tort claims places too much pressure on a jurist unfamiliar with personal injury claims. These compromised pillars raise the risk that the victims' settlement trust will be underfunded and will fail prematurely. In this outcome, future victims would have no recourse but to argue that the restructuring process did not satisfy due process and the entire settlement should be unwound.

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This Essay proposes that the risk of a prematurely insolvent victim’s trust can be reduced considerably by bolstering these two pillars. Our proposal seeks to (1) rebuild the future claimants’ representative role in order to ensure that future victims’ interests are effectively represented and (2) recalibrate the claim estimation process by facilitating coordination between the bankruptcy court and nonbankruptcy federal and state courts.

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INTRODUCTION

“Due process applies even in a company’s moment of crisis.”

—Judge Denny Chin¹

Johnson & Johnson (J&J) is one of the most profitable companies in the world, with a market capitalization of over \$400 billion² and a credit rating better than the U.S. government’s.³ But the product for which the company

1. *Elliot v. Gen. Motors LLC (In re Motors Liquidation Co.)*, 829 F.3d 135, 161 (2d Cir. 2016).

2. *Top 10 Companies in the World by Market Cap*, BUS. INSIDER INDIA (Sep. 2, 2022, 6:30 PM), <https://www.businessinsider.in/stock-market/top-market-cap-companies-in-the-world/slidelist/93952579.cms> [<https://perma.cc/7MD6-KRND>].

3. See Thomas Kenny, *Does It Matter If the US Regains Its AAA Bond Rating?*, THE BALANCE, <https://www.thebalance.com/u-s-companies-rated-aaa-higher-than-u-s-government-bonds-417105> [<https://perma.cc/YA2E-AJM8>] (Dec. 29, 2021).

is most famous has come under attack. Recent suits have alleged a link between the repeated application of talcum powder and ovarian cancer. The release of internal J&J documents has led to a modified view of talcum powder and a better understanding of its effects.⁴ Adverse jury verdicts against J&J culminated in a \$4.7 billion verdict against the company in 2018.⁵ Despite discontinuing talc-based product sales in the United States two years ago, the company still faces over 38,000 suits.⁶ These suits have been consolidated in multidistrict litigation (MDL)⁷ in the U.S. District Court for the District of New Jersey.

MDL consolidation is frequently the precursor to comprehensive settlement, but J&J remained defiant. Instead of settling, the company effectuated an obscure corporate maneuver under Texas state law called a divisive merger. The maneuver ostensibly allowed J&J to split the subsidiary that held its talcum powder business into two separate entities and to freely allocate assets and liabilities between them.⁸ The result was a new entity—LTL Management, LLC—that holds all of J&J’s liabilities related to the talcum powder business but none of its valuable assets. On October 14, 2021, LTL filed for bankruptcy in the Western District of North Carolina.⁹

Why would one of the most profitable companies in the world even consider bankruptcy?¹⁰ As explored in this symposium, mass tort defendants

4. Lisa Girion, *Johnson & Johnson Knew for Decades That Asbestos Lurked in Its Baby Powder*, REUTERS (Dec. 14, 2018, 2:00 PM), <https://www.reuters.com/investigates/special-report/johnsonandjohnson-cancer/> [https://perma.cc/9U7P-SXDY].

5. The award was later reduced to \$2.12 billion. See Jef Feeley, *Johnson & Johnson Talc Verdict Cut in Half to \$2.1 Billion by State Court*, DETROIT NEWS (June 23, 2020), <https://www.detroitnews.com/story/business/2020/06/23/johnson-johnson-talc-verdict-cut-half-billion-state-court/112001422/> [https://perma.cc/YQ3X-JZ2B].

6. See Steven Church, *Director of 9/11 Fund Picked to Estimate Cost of J&J Talc Claims*, BLOOMBERG (July 28, 2022, 10:13 AM), <https://www.bloomberg.com/news/articles/2022-07-28/director-of-9-11-fund-picked-to-estimate-cost-of-j-j-talc-claims> [https://perma.cc/QTF2-BX6D].

7. See 28 U.S.C. § 1407 (defining and enabling MDLs).

8. See Samir D. Parikh, *Mass Exploitation*, 170 U. PA. L. REV. ONLINE 53, 56 (2022) [hereinafter Parikh, *Mass Exploitation*]. Given its extraordinary financial position, J&J’s use of a divisive merger represents a questionable—though legal—strategy to access bankruptcy. See Samir D. Parikh, *Bankruptcy Is Optimal Venue for Mass Tort Cases*, LAW360 (Feb. 28, 2022), <https://www.law360.com/articles/1468363> [https://perma.cc/4XD5-WW3E] [hereinafter Parikh, *Bankruptcy Is Optimal Venue for Mass Tort Cases*].

9. *In re LTL Mgmt., LLC*, 637 B.R. 396, 400 (Bankr. D.N.J. 2022); see also Jonathan Randles, Becky Yerak & Andrew Scurria, *How Bankruptcy Could Help Johnson & Johnson Corral Vast Talc Litigation*, WALL ST. J. (Nov. 12, 2021), <https://www.wsj.com/articles/how-bankruptcy-could-help-johnson-johnson-corrall-vast-talc-litigation-11626773400> [https://perma.cc/K4SK-24AD]. The case was subsequently transferred to and is pending before the U.S. Bankruptcy Court for the District of New Jersey. See Vince Sullivan, *J&J Talc Liability Unit’s Ch. 11 Transferred to NJ*, LAW360 (Nov. 10, 2021, 3:09 PM), <https://www.law360.com/bankruptcy/articles/1439777/j-j-talc-liability-unit-s-ch-11-transferred-to-nj> [https://perma.cc/UMA2-VY2P].

10. One of us has examined this phenomenon in great depth, including in one essay that is part of this symposium. See Samir D. Parikh, *The New Mass Torts Bargain*, 91 FORDHAM L. REV. 447 (2022) [hereinafter Parikh, *New Mass Torts Bargain*]; see also Samir D. Parikh, *Scarlet-Lettered Bankruptcy: A Public Benefit Proposal for Mass Tort Villains*, 117 NW. U.

are increasingly filing for bankruptcy to resolve mass tort liability and impose a new bargain on claimants.¹¹ Bankruptcy's structural, procedural, and substantive benefits offer optionality that provides distinct advantages over other mass aggregation procedures like MDLs and class actions. Unlike the MDL statute, the U.S. Bankruptcy Code can bind *all* mass tort claimants, including those filing claims in state and federal court and those filing claims held by both current and future victims.¹² Moreover, unlike Federal Rule of Civil Procedure 23 ("Rule 23"), which governs class actions in federal court, the Bankruptcy Code does not require mass tort defendants to provide claimants notice or an opportunity to opt out of the proceedings.¹³ Further, bankruptcy allows mass tort defendants to achieve a global resolution of their mass tort liability, typically using less protracted and less costly procedures than those used in Article III and state courts. Mass tort claimants benefit from this streamlined process because they receive compensation more quickly with much lower costs.

These potential advantages, however, are premised on a significant assumption: bankruptcy's resolution framework can only bind future victims because it satisfies due process requirements.¹⁴ This Essay examines this assumption, focusing on the overlooked infirmities in the bankruptcy framework and the unique challenges posed by mass tort cases.

Mass torts, such as those caused by asbestos exposure,¹⁵ mass marketing of opioids,¹⁶ or large-scale sexual abuse,¹⁷ are defined in part by victim heterogeneity. Mass tort victims generally present idiosyncratic injuries.¹⁸

L. REV. 425 (2022) [hereinafter Parikh, *Scarlet-Lettered Bankruptcy*]. See generally Parikh, *Mass Exploitation*, *supra* note 8.

11. We use the term "claimants" rather than "plaintiffs" because, as explained below, the Bankruptcy Code allows for the resolution of unfiled claims, even claims of future victims who may not have suffered any harm at the time of bankruptcy. See PRINCIPLES OF THE L. OF AGGREGATE LITIG. § 1.01 cmt. e (AM. L. INST. 2010) (using the term "claimant" to refer to both plaintiffs with filed claims and those without filed claims).

12. See Parikh, *New Mass Torts Bargain*, *supra* note 10, at 452.

13. See FED. R. CIV. P. 23(b)(3), 23(c)(2)(B) (providing that for classes certified under 23(b)(3), "the court must direct to class members the best notice that is practicable under the circumstances"); see also Sergio J. Campos, *Mass Torts and Due Process*, 65 VAND. L. REV. 1059, 1062–63 (2012) (citing sources supporting the premise that class actions for mass torts are generally disfavored).

14. Because the Bankruptcy Code and bankruptcy procedures are federal in nature, the Due Process Clause of the Fifth Amendment, rather than the Fourteenth Amendment, applies. See U.S. CONST. amend. V.

15. See, e.g., *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

16. See, e.g., *In re Nat'l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio filed Dec. 12, 2017); see also *In re Purdue Pharma*, No. 19-bk-23649 (Bankr. S.D.N.Y. filed Sept. 15, 2019); *In re Insys Therapeutics, Inc.*, No. 19-bk-11292 (Bankr. D. Del. filed June 10, 2019).

17. See, e.g., *In re Boy Scouts of Am.*, No. 20-bk-10343 (Bankr. D. Del. filed Feb. 18, 2020); *In re USA Gymnastics*, No. 18-bk-09108 (Bankr. S.D. Ind. filed Dec. 5, 2018); *In re Archdiocese of St. Paul & Minneapolis*, No. 15-bk-30125 (Bankr. D. Minn. filed Jan. 16, 2015).

18. See Francis E. McGovern & William B. Rubenstein, *The Negotiation Class: A Cooperative Approach to Class Actions Involving Large Stakeholders*, 99 TEX. L. REV. 73,

Nevertheless, mass tort claimants are all victims of the same conduct. As a result, to recover, each claimant must prove “common” issues of law and fact with respect to that conduct.¹⁹ The proliferation of common issues of liability in mass tort litigation therefore also defines the mass tort and binds the claimants. These twin aspects of mass torts—(1) the heterogeneity of the victims’ injuries and (2) the “commonality of issues” of liability²⁰—distinguish mass torts from other “high-volume” litigation.²¹ This dynamic not only precludes global resolution of many mass tort cases, but it can lead to a doomsday scenario in bankruptcy.

Imagine, for example, a mass torts bankruptcy involving both current and future victims.²² Imagine further that the case produces a plan of reorganization that relies on a channeling injunction to force all victims to seek recovery by filing claims against a settlement trust. All defendants and affiliated parties enjoy a form of immunity through the channeling injunction and nonconsensual, third-party releases. A group of future victims then emerges fifteen years after the bankruptcy case is closed. This group holds high-value claims but faces a prematurely insolvent settlement trust. The plan of reorganization does not contain a contingency plan to address this scenario and creates an outcome where similarly situated victims will receive wildly disparate recoveries.²³

The victims in this example have only one argument: the claims representative in bankruptcy did not adequately represent future victims and agreed to an underfunded settlement trust approved by the bankruptcy court. By failing to adequately represent the interests of the future victims, the

85–90 (2020) (discussing the heterogeneity of claimants in mass tort and similar litigation involving a mix of large and small claims).

19. See David Rosenberg & Kathryn E. Spier, *Incentives to Invest in Litigation and the Superiority of the Class Action*, 6 J. LEG. ANALYSIS 305, 305–06 (2014) (analyzing situations, particularly in the context of mass torts, in which “numerous plaintiffs [have] claims against a single defendant based on causes of action for damages or equitable relief that present *the same or similar legal and factual scenarios*” (emphasis added)).

20. See Elizabeth Chamblee Burch, *Constructing Issue Class Actions*, 101 VA. L. REV. 1855, 1875–76 (2015) (noting distinction in mass torts between the commonality of the defendant’s conduct and the heterogeneity of the plaintiff’s eligibility for relief); see also Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 965 (1993).

21. See Hensler & Peterson, *supra* note 20, at 965–66; see also Robert H. Klonoff, *COVID-19 Aggregate Litigation: The Search for the Upstream Wrongdoer*, 91 FORDHAM L. REV. 385 (2022).

22. Asbestos exposure cases are the archetype. In these cases, harm may not manifest for decades after exposure due to extended latency periods. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 598 (1997) (noting the long latency periods among victims in proposed asbestos class action).

23. See, e.g., Disclosure Statement for Joint Chapter 11 Plan of Reorganization of Imerys Talc America, Inc. and Its Debtor Affiliates Under Chapter 11 of the Bankruptcy Code at 41, *In re Imerys Talc Am., Inc.*, No. 19-10289 (Bankr. D. Del. May 15, 2020), ECF No. 1715; Disclosure Statement for Third Amended Joint Chapter 11 Plan of Reorganization of TK Holdings Inc. and Its Affiliated Debtors at 144–47, *In re TK Holdings, Inc.*, No. 17-11375 (Bankr. D. Del. Jan. 5, 2018), ECF No. 1630.

representative and the bankruptcy process did not satisfy due process.²⁴ If successful, potential remedies could involve dissolving the immunity shields distributed as part of the confirmation process. The global resolution reached decades earlier would be unwound. This represents the ultimate doomsday scenario.

Can bankruptcy procedures be modified to minimize the risk of this doomsday scenario? We believe that the risk dissipates to the extent the bankruptcy process can ensure that the interests of future victims are better protected.²⁵ This Essay argues that there are two particularly compromised pillars that could render the process unconstitutional. First, we argue that procedural and substantive changes should be made to the appointment process for the future claimants' representative (FCR). The FCR should be empowered and incentivized to vigorously advocate for the interests of future victims. Simple modifications—including delineating reasonable nomination and selection processes for FCRs—will help reduce the capture risk that all FCRs face.²⁶ Second, we argue that the claim estimation process under the Bankruptcy Code is deficient and increases the risk of an underfunded victims' trust. We propose collaboration between the bankruptcy court—which enjoys comprehensive, binding authority—and the nonbankruptcy, district court—which has comparative trial and discovery advantages, as well as experience with adjudicating personal injury claims. More specifically, the bankruptcy court can strategically lift the automatic stay²⁷ for individual mass tort claimants to litigate their claims in federal

24. *Cf.* *Stephenson v. Dow Chemical, Co.*, 273 F.3d 249, 261 (2d Cir. 2001) (concluding that class action settlement of Agent Orange claims did not satisfy due process when the fund for future victims went insolvent prior to the filing of the plaintiffs' claims), *aff'd by an equally divided court in part, vacated on other grounds in part*, 539 U.S. 111 (2003). *Stephenson* differs in material respects from the procedures for future victims in bankruptcy but highlights the due process implications of the doomsday scenario we explore here. *See infra* Part III.

25. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 319 (1950) (holding that in a settlement process of mass claims against a common trust administrator, there is no requirement of individualized notice because those who receive notice are "likely to safeguard the interests of all, since any objections sustained would inure to the benefit of all"); *Hansberry v. Lee*, 311 U.S. 32, 42–43 (1940). As discussed below, there is some case law that suggests, without holding, that due process may require a stronger right to a "day in court," although the extent of that right may be adequately addressed under existing bankruptcy procedures. For further discussion, see *infra* Part III.

26. For example, to improve the representation of the FCR, the bankruptcy court can empower the FCR and present claimants' attorneys to work with and rely on the efforts of MDL's "common benefit attorneys." Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 105, 112 (2010). In doing so, the representatives can invest in common issues at a similar scale as the mass tort defendant. *See Campos, supra* note 13, at 1074–76 (discussing economies of scale in investing in common issues); Rosenberg & Spier, *supra* note 19 (showing, through a game-theoretic model, the scale advantages of joint investment in common issues). This greater investment in common issues, particularly issues of general causation and categories of harm, would reduce the risk of an underfunded fund for future victims by maximizing the total liability of the defendant.

27. *See Parikh, Bankruptcy Is Optimal Venue for Mass Tort Cases, supra* note 8 ("[B]ankruptcy's powerful automatic stay halts all creditor actions, including pending

court or even in state court. In doing so, the bankruptcy court can coordinate with nonbankruptcy courts to allow expedited discovery and trial for a sample of representative cases that can provide guidance in estimating the aggregate value of cases pending before the bankruptcy court.²⁸

Ultimately, an FCR who aggressively advocates for the interests of future victims will insist on greater accuracy in the estimation of claims. Congruently, a process that provides greater accuracy in claim estimation will substantially improve the representation provided by the FCR. Both pieces work together to increase the probability of a sufficiently funded settlement trust, which negates the need for future victims to assert due process claims. Our proposal has the potential to create a coordinated global resolution process for mass torts that can withstand decades of shifting sands.

Legal literature has overlooked the possibility of mass tort settlements in bankruptcy being unwound due to a failure to satisfy constitutional strictures. This Essay uncovers this possibility and proposes the means to avoid it.

I. MASS TORTS

Mass torts involve a single defendant who has engaged in tortious conduct that injures a large group of dispersed, individual victims.²⁹ Asbestos exposure is the archetype,³⁰ but other examples abound—including fraudulent or negligent marketing of opioids,³¹ defects in mass-produced consumer products³² and wartime herbicides like Agent Orange,³³ defective medical devices,³⁴ carcinogenic side effects caused by pharmaceuticals,³⁵

litigation against the debtor and can be extended to nondebtors in order to allow all key parties to focus on negotiating a global settlement.”).

28. This is commonly used in MDLs through the use of bellwether trials and mediations. *See, e.g.,* Alexandra D. Lahav, *A Primer on Bellwether Trials*, 37 *REV. LITIG.* 185 (2018); Adam Zimmerman, *The Bellwether Settlement*, 85 *FORDHAM L. REV.* 2275 (2017).

29. *See* RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT* xv–xvi (2007); Campos, *supra* note 13, at 1067–72 (citing Nagareda).

30. MDL 875, which consolidates all federally filed asbestos claims in the United States, is the oldest active MDL in the nation. *See* STEPHEN J. CARROLL, DEBORAH HENSLER, JENNIFER GROSS, ELIZABETH M. SLOSS, MATTHIAS SCHONLAU, ALLAN ABRAHAMSE & J. SCOTT ASHWOOD, *ASBESTOS LITIGATION* 110 (2005), <https://www.rand.org/pubs/monographs/MG162.html> [<https://perma.cc/4TZX-BRKL>] (click on “PDF file” under “Full Document”) (explaining that asbestos exposure cases represent the “longest-running mass tort litigation in the United States”); *see also* DEBORAH R. HENSLER, *ASBESTOS LITIGATION IN THE UNITED STATES: A BRIEF OVERVIEW* (1991), <https://www.rand.org/pubs/papers/P7776.html> [<https://perma.cc/PQ8R-YNGG>] (click on “PDF file”).

31. *In re Nat’l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio filed Dec. 12, 2017); *see also In re Purdue Pharma*, No. 19-bk-23649 (Bankr. S.D.N.Y. filed Sept. 15, 2019); *In re Insys Therapeutics, Inc.*, No. 19-bk-11292 (Bankr. D. Del. filed June 10, 2019).

32. *E.g., In re Roundup Prods. Liab. Litig.*, 364 F. Supp. 3d 1085, 1088–89 (N.D. Cal. 2019) (discussing failure-to-warn claims involving Roundup weed killer).

33. *See generally* PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* (1986).

34. *See* Karen Kenney, *Dalkon Shield Gives Birth to a Generation of Lawsuits*, *CHI. TRIB.* (Apr. 30, 1985), <https://www.chicagotribune.com/news/ct-xpm-1985-04-30-8501260779-story.html> [<https://perma.cc/A4WY-DDSR>].

35. *See* HAN W. CHOI & JAE HONG LEE, *PRINCIPLES AND PRACTICE OF PHARMACEUTICAL MEDICINE* 688–702 (3d ed. 2011) (discussing DES litigation).

sexual abuse involving religious institutions,³⁶ sexual abuse involving nonreligious institutions,³⁷ and other cases involving severe personal injury.³⁸

Mass torts all share two important features. The first feature, which has attracted significant attention from both courts and scholars, is that mass tort claimants are heterogeneous. This is clearly seen in the asbestos cases. For example, in *Amchem Products, Inc. v. Windsor*,³⁹ the U.S. Supreme Court addressed the certification of a proposed class to settle asbestos claims. The Court described the class members in this way:

[C]lass members in this case were exposed to different asbestos-containing products, in different ways, over different periods, and for different amounts of time; some suffered no physical injury, others suffered disabling or deadly diseases [Moreover,] [s]tate law governed and varied widely on such critical issues as “viability of [exposure-only] claims [and] availability of causes of action for medical monitoring, increased risk of cancer, and fear of future injury.”⁴⁰

In this case, the Court listed the primary ways mass tort claimants often diverge based on (1) the injury suffered, (2) the extent of the injury, (3) the specific cause of the injury, and (4) the law that applies to the injury.⁴¹ All of these differences are a function of the variance among the mass tort claimant population and temporal and geographical dispersion.⁴²

But mass torts have a second noteworthy feature. Unlike other high-volume litigation, such as automobile accidents or cases involving COVID-19,⁴³ the claimants in a specific mass tort are all victims of the same conduct.⁴⁴ This is because mass torts are caused by a common decision by the mass tort defendant, such as whether to include glyphosate in weed killer,⁴⁵ whether to aggressively market opioids despite their addictive qualities,⁴⁶ or whether to ignore repeated signs of sexual abuse being perpetrated by an organization’s agents or volunteers.⁴⁷ Because the liability

36. See, e.g., *In re* Archdiocese of St. Paul & Minneapolis, No. 15-bk-30125 (Bankr. D. Minn. filed Jan. 16, 2015).

37. See, e.g., *In re* Boy Scouts of Am., No. 20-bk-10343 (Bankr. D. Del. filed Feb. 18, 2020); *In re* USA Gymnastics, No. 18-bk-09108 (Bankr. S.D. Ind. filed Dec. 5, 2018).

38. *In re* NFL Players’ Concussion Inj. Litig., 301 F.R.D. 191, 195 (E.D. Pa. 2014) (discussing head injury claims of former NFL players).

39. 521 U.S. 591 (1997).

40. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 609–10 (1997) (third and fourth alterations in original) (quoting *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 626–28 (3d Cir. 1996)).

41. *Id.*

42. PRINCIPLES OF THE L. OF AGGREGATE LITIG. § 1.02 cmt. b(1)(B) (AM. L. INST. 2010).

43. See Klonoff, *supra* note 21.

44. See Campos, *supra* note 13, at 1067–72 (noting the “predominance of common issues” in mass torts caused by the commonality of the mass tort defendant’s conduct); see also Sergio J. Campos, *The Commonality of Causation*, 46 OHIO N. L. REV. 229, 241–46 (2020) (noting that mass torts involve a “single choice” that affects a large number of plaintiffs).

45. *In re* Roundup Prods. Liab. Litig., 364 F. Supp. 3d 1085 (N.D. Cal. 2019).

46. *In re* Nat’l Prescription Opiate Litig., No. 17-md-02804 (N.D. Ohio filed Dec. 12, 2017).

47. *In re* Boy Scouts of Am., No. 20-bk-10343 (Bankr. D. Del. filed Feb. 18, 2020).

of mass tort defendants will depend on facts concerning that common decision, determining liability will involve issues of law and facts common to the class.⁴⁸

The commonality of the mass tort defendant's liability stands in stark contrast to the heterogeneity of the mass tort claimant's injuries. Even though the defendant's common decision caused each of the plaintiffs' injuries, those injuries can vary significantly in all of the ways identified above. These factual and legal issues must also be proven in order for any mass tort claimant to recover, but, unlike issues concerning liability, these issues will typically be unique and idiosyncratic to each claimant.⁴⁹

The commonality of the mass tort defendant's liability and the heterogeneity of the mass tort claimants' injuries raises significant problems in the resolution of mass torts. One issue that has garnered significant attention is the conflicts that naturally arise among mass tort claimants. The heterogeneity of the mass tort claimants can lead to conflicts among claimants with respect to the terms of any global settlement or global resolution of the defendant's mass tort liability. For example, as recognized by the Supreme Court in the context of asbestos litigation, and as particularly relevant here, there is an inherent conflict between "the currently injured, [whose] critical goal is generous immediate payments" and "exposure-only plaintiffs," who seek to "ensur[e] an ample, inflation-protected fund for the future."⁵⁰ These conflicts have led courts and scholars to insist on, for example, opt-out rights to allow claimants to protect themselves from these conflicts.⁵¹

But a second issue that deserves much greater attention concerns the disparity in incentives to invest in common issues. Assume that both mass tort defendants and claimants are each generally rational about investment decisions and thus will only invest in litigation to the extent that it will lead to a greater payoff.⁵² For example, a claimant will not invest anything that

48. Campos, *supra* note 13, at 1071; *see also* Burch, *supra* note 20, at 1856–57.

49. *See* PRINCIPLES OF THE L. OF AGGREGATE LITIG. § 1.02 cmt. b(1)(B) (AM. L. INST. 2010) (noting that mass torts involve "the need for individual evidence of exposure, injury, and damages"); *see also* Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 831–32 (1997) (noting that, in mass tort cases, "there is an immediate need to shift downstream and find fact after fact with regard to each individual plaintiff").

50. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 (1997).

51. PRINCIPLES OF THE L. OF AGGREGATE LITIG. § 2.07.

52. Formally, one can devise a simple model for litigation in which a rational party will only invest in litigation (e.g., legal research, discovery, expert witnesses, attorneys' fees) to the extent it increases the probability of recovery. Under such a simple model, both claimants and defendants seek to optimize their gains and losses based on three factors: (1) the damages recoverable (or the liability that may be imposed), L ; (2) the probability of L being imposed by the court, P ; and (3) the costs of the litigation process itself, C_P for plaintiffs and C_D for defendants. Under this model, plaintiffs seek to maximize their net expected recovery, or $PL - C_P$, while defendants seek to minimize their total expected litigation costs, or $PL + C_D$. This model is generally well accepted by law and economics scholars and is frequently used in the literature. *See* STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 389–418 (2004) (examining the basic theory of litigation); *see also* Sergio J. Campos, Christopher S. Cotton & Cheng Li, *Deterrence Effects Under Twombly: On the Costs of*

costs more than their expected payoff.⁵³ Similarly, a rational defendant will not invest in litigation more than they would have to pay in expected liability. Accordingly, both parties will have an incentive to tailor their litigation investments in attorneys' fees, legal research, discovery, trial preparation, experts, and investigation to their respective expected payoffs.

In mass torts, the prevalence of common issues concerning liability puts the defendant at a distinct advantage relative to the claimants. While claimants will only invest in common issues relative to their *individual* payoffs, a rational defendant investing in common issues will be sensitive to the *aggregate* potential liability associated with that issue. To take a simple example, a single mass tort claimant may forgo hiring a \$10,000 expert if their claim is worth only \$5,000. However, a defendant facing one thousand \$5,000 claims is far more inclined to retain a \$10,000 expert if one is available.⁵⁴

A rational defendant will invest in common issues based on their aggregate liability, unaffected by how plaintiffs are organized.⁵⁵ Indeed, regardless of whether the plaintiffs proceed separately or group together—using voluntary joinder, class action, MDL, or bankruptcy—the rational defendant will invest in common issues as if it were facing the plaintiffs acting as a collective, unified whole.

The inherent advantage that the mass tort defendant has in investing in common issues is exacerbated by the heterogeneity of the mass tort claimants. Ideally, mass tort claimants would organize to jointly invest in common issues. Their heterogeneity, however, introduces collective action problems that prevent this from happening. There are, most obviously, the transaction costs of finding other claimants and agreeing to jointly invest in common issues. But the internal conflicts that arise from heterogeneity inherently introduce a “tragedy of the commons” situation.⁵⁶ Some claimants free ride off the work of others, or other claimants use their “veto” power to frustrate collective efforts. Indeed, the opt-out rights insisted on to protect against such conflicts have the counterintuitive result of making it harder, not easier, for the claimants to overcome their collective action

Increasing Pleading Standards in Litigation, 44 INT'L REV. L. & ECON. 61 (2015) (using this model to address pleading standards in civil litigation).

53. Small-claims litigation is an example where, given the filing fees alone, “only a lunatic or a fanatic sues for \$30.” *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (Posner, J.).

54. To illustrate the point much more abstractly, with respect to common issues, claimant #1 of a class, π_1 , will only invest in a common issue with respect to their own recovery, L_1 . In contrast, a mass tort defendant will invest in a common issue with respect to the entire liability associated with the issue, and thus will invest based on the entire class of claimants ($\pi_1 \dots \pi_n$) and their losses ($L_1 + L_2 \dots L_n$). See *supra* note 52 and accompanying text.

55. See David Rosenberg, Essay, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't*, 37 HARV. J. ON LEGIS. 393, 395 (2000); see also Rosenberg & Spier, *supra* note 19, at 315–16 (formally noting that defendant investment in common issues considers total liability, regardless of whether the claimants proceed separately or collectively).

56. Campos, *supra* note 13, at 1085–88; see also Parikh, *New Mass Torts Bargain*, *supra* note 10, at 460–61.

problems and invest in common issues at a similar scale as the mass tort defendant.⁵⁷

Accordingly, the two core features of mass torts—(1) the heterogeneity of the claimants and (2) the commonality of issues of liability—lead to a situation in which the mass tort defendant has significant power and leverage in the resolution process.⁵⁸ The mass tort defendant can use its organizational advantage to invest in common issues at a scale that the claimants cannot possibly match without the help of collective procedures. Indeed, this can allow the mass tort defendant to impose cheap “bargains” on the inherently divided mass tort claimants unless the resolution process can be amended to prevent this unfair advantage.

II. RESOLUTION OF MASS TORTS IN BANKRUPTCY

A bankruptcy filing presents a dramatically destabilizing event for a corporation. Nevertheless, increasing numbers of corporations facing mass tort liabilities are pulling this lever, including 3M, J&J, Purdue Pharma, the Boy Scouts of America, and USA Gymnastics. The motivation to file for bankruptcy is multifaceted and frequently misunderstood, a result of resolution deficiencies and opportunities throughout the judiciary as a whole.

A. *The Rise of Bankruptcy Preemption*

Corporate tortfeasors in large mass tort cases face the global-settlement imperative.⁵⁹ Key stakeholders and settlement funding partners will come to the negotiation table only if a substantial amount of all victim claims⁶⁰ can be aggregated and resolved. Piecemeal settlements fail to address the black clouds that deter investment and limit borrowing.⁶¹ Supreme Court precedent has made class aggregation unavailable for the vast majority of mass torts.⁶² Indeed, most personal injury mass torts present too many individual issues of causation and damages to satisfy Rule 23(b)(3)’s predominance and superiority requirements.⁶³

57. Campos, *supra* note 13, at 1079–81.

58. See Rosenberg, *supra* note 55, at 394 (noting that in mass tort cases, “[w]ith class-wide aggregation of the defense interest, the defendant exploits economies of scale to invest far more cost-effectively in preparing its side of the case than plaintiffs can in preparing their side”).

59. See, e.g., Parikh, *New Mass Torts Bargain*, *supra* note 10, at 461 (coining the phrase).

60. The phrase “all victim claims” as used herein includes all claims held by current and future victims pending in both state and federal court.

61. There are exceptions, such as when a defendant benefits from piecemeal litigation by “dividing and conquering” plaintiffs. See, e.g., Eric A. Posner, Kathryn E. Spier & Adrian Vermeule, *Divide and Conquer*, 2 J. LEG. ANALYSIS 417, 439, 459 (2010) (“Divide and conquer strategies also appear in a variety of settings where a unitary litigant faces a group of opponents. These include tort settings, for example, where a defendant is being sued by a group of separate plaintiffs who will enjoy economies of scale in litigation.”).

62. See Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 SUP. CT. REV. 183, 212–13.

63. See Andrew D. Bradt & Theodore Rave, *Aggregation on Defendants’ Terms: Bristol-Myers Squibb & the Federalization of Mass-Tort Litigation*, 59 B.C. L. REV. 1251, 1264 (2018); see also THOMAS E. WILLGING & SHANNON R. WHEATMAN, ATTORNEY REPORTS

Facing a tsunami of asbestos claims in the 2000s, the federal judiciary turned to the MDL process to facilitate settlements in one centralized court.⁶⁴ The initial results were encouraging, and the process emerged as the most viable resolution mechanism for asbestos and non-asbestos personal injury mass tort claims. Unfortunately, the MDL process has evolved in ways that undermine the resolution model for most mass tort cases. This trajectory has created a captive negotiation process for victims and defendants subject to an MDL.⁶⁵ Indeed, the MDL statute directs the district court to remand transferred cases at the conclusion of relatively accelerated pretrial proceedings.⁶⁶ However, cases languish—sometimes for years—as the process holds parties captive until a settlement is reached.⁶⁷ MDLs have other suboptimal facets,⁶⁸ but the loss of autonomy and the possibility of coerced settlements are the most troubling for victims and defendants.⁶⁹

Bankruptcy is the only exit available to corporate defendants trapped in an MDL. Bankruptcy preemption provides access to an alternative resolution process and halts MDL proceedings for the debtor. For some entities, this release from captivity would be sufficient motivation to pursue bankruptcy, but the incentives go further.

Bankruptcy preemption ushers corporate tortfeasors into a far more hospitable forum that offers accelerated global settlement. Bankruptcy courts enjoy jurisdiction over all claims against the debtor, regardless of

ON THE IMPACT OF *AMCHEM* AND *ORTIZ* 4 (2004), https://www.uscourts.gov/sites/default/files/amort02_1.pdf [<https://perma.cc/9U7A-MRHW>].

64. This was, of course, after the Supreme Court rejected attempts to provide global settlements using Rule 23 class actions. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 609–10 (1997); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999).

65. *See* Parikh, *New Mass Torts Bargain*, *supra* note 10, at 475 (“As of September 30, 2018, approximately 156,511 actions were pending in front of forty-eight transferee district courts. From 1968 through September 30, 2018, transferee courts had received and resolved approximately 516,593 cases. Of these civil actions, only 16,728 were remanded for trial. In other words, only 3 percent of transferred cases escaped MDL capture; 97 percent of transferred cases are resolved in the MDL court by dispositive motion or settlement.” (citations omitted)).

66. *See* Richard Marcus, *Cure-All for an Era of Dispersed Litigation?: Toward a Maximalist Use of the Multidistrict Litigation Panel’s Transfer Power*, 82 TUL. L. REV. 2245, 2264–65 (2008).

67. *See, e.g., In re Patenaude*, 210 F.3d 135 (3d Cir. 1999) (transferred cases languished for over seven years); *see also* Andrew D. Bradt, “A Radical Proposal”: *The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831, 836 (2017) (“[T]here is no right to opt out of an MDL proceeding—once you’re in, you’re in, often for years until pretrial proceedings have concluded.”); Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm*, 23 WIDENER L.J. 97, 126 (2013) (explaining that MDL 875 for asbestos litigation was commonly known as the “black hole” because transferred cases did not return to their transferor courts and were never actually resolved).

68. *See* Parikh, *New Mass Torts Bargain*, *supra* note 10, at 457–60; Parikh, *Bankruptcy Is Optimal Venue for Mass Tort Cases*, *supra* note 8.

69. Parikh, *New Mass Torts Bargain*, *supra* note 10, at 477–78 (“Agency principles break down in the MDL process because the agents—plaintiffs’ attorneys—are invariably immune from the instructions and wishes of the principals, the victims. Cases are guided by steering committees, and plaintiffs’ attorneys and the MDL judge exercise absolute resolution control. A truly surprising facet of the process is that victims are unable to exit.” (citations omitted)).

whether they were filed in federal or state court.⁷⁰ The bankruptcy court is authorized to estimate the value of the claims that cannot be resolved in a timely manner—in a mass torts setting, this describes just about all victim claims, including unfiled claims held by future victims.⁷¹ As noted above, although the MDL court can often persuade the parties to settle, such persuasion is controversial and not always successful.⁷² In contrast, bankruptcy courts can proceed directly to estimating claim value for purposes of establishing a victims’ settlement trust. Bankruptcy courts do not need to persuade the parties to settle as an alternative to the bankruptcy process. Settlement *is* the bankruptcy process.

Section 502(c) of the Bankruptcy Code delineates the unique estimation process in bankruptcy.⁷³ A bankruptcy court is authorized to estimate the value of any contingent⁷⁴ or unliquidated⁷⁵ claim, “the fixing of which . . . would unduly delay⁷⁶ the administration of the case.”⁷⁷ In other words, the court is authorized to assign a dollar value to certain claims—including claims that have not been filed in the case⁷⁸—to allow a debtor to formulate a global settlement offer for claimants.⁷⁹

70. See 11 U.S.C. § 101(5).

71. See *id.* § 502(i).

72. See Transcript of Proceedings at 4, 9, *In re Nat’l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio Jan. 9, 2018), ECF No. 58 (Judge Dan A. Polster explained that “[p]eople aren’t interested in depositions, and discovery, and trials So my objective is to do something meaningful to abate this crisis and to do it [immediately] [W]e don’t need a lot of briefs and *we don’t need trials.*” (emphasis added)).

73. 11 U.S.C. § 502(c).

74. A contingent debt is “one which the debtor will be called upon to pay only upon the occurrence or happening of an extrinsic event which will trigger the liability of the debtor to the alleged creditor.” *Fostvedt v. Dow (In re Fostvedt)*, 823 F.2d 305, 306 (9th Cir. 1987) (quoting *Brockenbrough v. Comm’r*, 61 B.R. 685, 686 (Bankr. W.D. Va. 1986)).

75. “A claim is liquidated ‘when . . . the amount due may be ascertained by computation or reference to the contract out of which the claim arises.’” *In re S. Cinemas, Inc.*, 256 B.R. 520, 534 (Bankr. M.D. Fla. 2000) (quoting *In re Flaherty*, 10 B.R. 118, 120 (Bankr. N.D. Ill. 1981)).

76. Whether the fixing or liquidation of a claim will “unduly delay” the administration of the bankruptcy case is a matter of judicial discretion, and the analysis depends on the “probable duration of the liquidation process as compared with the future uncertainty due to the contingency in question.” *In re Roman Cath. Archbishop of Portland*, 339 B.R. 215, 222 (Bankr. D. Or. 2006).

77. 11 U.S.C. § 502(c)(1).

78. *In re Motors Liquidation Co.*, 591 B.R. 501, 530 (Bankr. S.D.N.Y. 2018) (“[C]ourts [may] estimate the claims of *future victims* who, by definition, cannot file proofs of claim because their injuries have not yet manifested.”).

79. Bankruptcy courts must have jurisdiction over a claim before the value of that claim may be estimated for distribution purposes. See 11 U.S.C. § 157(b). And bankruptcy courts lack jurisdiction over personal injury tort or wrongful death claims. See 28 U.S.C. § 157(b)(2)(B) (specifically excluding these types of claims from “core” bankruptcy proceedings). Bankruptcy courts, however, have identified a loophole in this restriction. The statute does not prevent courts from estimating these claims to allow the debtor to formulate a plan of reorganization that will channel all current and future claims against the debtor to a settlement trust for assessment and payment. See, e.g., *A.H. Robins Co. v. Piccinin (In re A.H. Robins Co.)*, 788 F.2d 994, 1012 (4th Cir. 1986); see also *In re Motors Liquidation Co.*, 591 B.R. at 531–32 (explaining that courts may estimate “the amount of liability for the debtor to set up the fund and push through plan confirmation”).

When estimating claims, the bankruptcy court is “required [to] evaluate claims pursuant to the legal rules which may govern the ultimate value of the claim.”⁸⁰ But the court enjoys wide latitude; § 502(c) does not prescribe any particular process for estimating claims.⁸¹ Bankruptcy courts can utilize “whatever method is best suited to the particular contingencies at issue.”⁸² Courts have made full use of this grant of discretion, employing a variety of unorthodox methodologies to estimate high-value claims, including arbitration,⁸³ record review,⁸⁴ summary trial,⁸⁵ evidentiary hearing,⁸⁶ and simple review of pleadings and briefs.⁸⁷

The possibility of estimating the value of both state and federal claims held by current and future victims is made more tantalizing by the bankruptcy court’s ability to grant nonconsensual, third-party releases. The bankruptcy process offers full liability releases for the debtor as well as other parties that provide substantial contribution to the resolution of the case.⁸⁸ This offer of immunity entices affiliated corporate entities and insurance companies to help fund the victims’ settlement trust. In exchange, the debtor’s plan of reorganization imposes a channeling injunction that diverts all victims’ claims to the trust. The result is full immunity for protected parties.⁸⁹ The disparate puzzle pieces are forged together in the debtor’s plan of

80. *In re Perry*, 425 B.R. 323, 342 (Bankr. S.D. Tex. 2010).

81. S. ELIZABETH GIBSON, FED. JUD. CTR., JUDICIAL MANAGEMENT OF MASS TORT BANKRUPTCY CASES 90 (2005), https://www.uscourts.gov/sites/default/files/gibsjudi_1.pdf [<https://perma.cc/2PQY-CBRY>] (“[N]either section 502(c) nor any provision of the Bankruptcy Rules provides any guidance about the method the judge should use.”).

82. *In re Hoffinger Indus., Inc.*, 307 B.R. 112, 118 (Bankr. E.D. Ark. 2004); *see also In re G-I Holdings, Inc.*, Nos. 01-30135 & 01-38790, 2006 WL 2403531, at *2 (Bankr. D.N.J. Aug. 11, 2006) (courts should determine “the appropriate method of estimation in light of the particular circumstances of the bankruptcy case before it”); *In re Chavez*, 381 B.R. 582, 587 (Bankr. E.D.N.Y. 2008) (“Neither the Bankruptcy Code nor the Federal Rules of Bankruptcy Procedure provide any procedures or guidelines for estimation.” (quoting *DeGeorge Fin. Corp. v. Novak (In re DeGeorge Fin. Corp.)*, No. 99-32300-02, 2002 WL 31096716, at *10 (D. Conn. July 15, 2002))).

83. *See, e.g., Maxwell v. Seaman Furniture Co. (In re Seaman Furniture Co. of Union Square, Inc.)*, 160 B.R. 40, 42 (S.D.N.Y. 1993).

84. *See, e.g., In re Perry*, 425 B.R. 323, 343 (Bankr. S.D. Tex. 2010).

85. *See, e.g., In re Baldwin-United Corp.*, 55 B.R. 885, 899 (Bankr. S.D. Ohio 1985).

86. *See, e.g., In re Nova Real Est. Inv. Tr.*, 23 B.R. 62, 65 (Bankr. E.D. Va. 1982).

87. *See, e.g., In re Lane*, 68 B.R. 609, 613 (Bankr. D. Haw. 1986).

88. *See Parikh, New Mass Torts Bargain, supra* note 10, at 483.

89. Third-party releases are extremely controversial. *See Adam J. Levitin, The Constitutional Problem of Nondebtor Releases in Bankruptcy*, 91 FORDHAM L. REV. 429 (2022). The Purdue Pharma reorganization plan initially sought to grant the entire Sackler family comprehensive releases from conduct related and unrelated to Purdue Pharma and its business, and protected any type of civil misconduct, including fraud, gross negligence, willful misconduct, and deliberate ignorance. *See Parikh, Mass Exploitation, supra* note 8, at 65. The order confirming the plan of reorganization was appealed and recently vacated. *See id.* Purdue has appealed the ruling to the Second Circuit, and oral arguments were held in late April 2022. *See Jeremy Hill, Purdue Pharma Opioid Settlement Appeal to Proceed in Late April*, BLOOMBERG L. (Mar. 23, 2022, 10:40 AM), <https://news.bloomberglaw.com/health-law-and-business/purdue-pharma-opioid-settlement-appeal-to-proceed-in-late-april> [<https://perma.cc/T2EE-W585>].

reorganization—an elaborate contract that offers comprehensive resolution but that must be approved by creditors, including current victims.

The Bankruptcy Code contains provisions that allow debtors to circumvent the holdout problem plaguing these cases outside of bankruptcy. The debtor is authorized to place claimants into different voting classes.⁹⁰ Each class is allowed to vote on whether to accept the treatment proposed by the debtor’s plan.⁹¹ But a class, and all the claimants in that class, are deemed to have “accepted” a debtor’s plan and their treatment as long as a majority of claimants vote in favor of the plan.⁹² This design allows debtors to circumvent the unanimity requirement that often exists outside of bankruptcy.⁹³

These factors work together to increase the likelihood that the debtor will be able to formulate a resolution that it finds attractive and then convince the necessary number of victims to approve it. But policy makers have struck a Faustian bargain. There is a fundamental flaw embedded in this structure—one that will not manifest for years, perhaps decades, but could undermine the entire resolution model.

B. The Risks of Blind Reliance

Mass torts present myriad complexities that deter resolution, but defendants have discovered an efficient and accelerated resolution path in bankruptcy. The process has the capacity to address the claims of future victims while offering resolution certainty to defendants. The entire process is premised on awarding immunity to the corporate defendant, insurers, and affiliated individuals and entities through a channeling injunction. In exchange, funds are placed in trust to compensate current and future victims relatively equally. This model demands at least one significant leap of faith, though. How can a defendant satisfy due process as to future victims when many of these claimants do not know they will manifest harm and may not even know they were exposed to tortious conduct?

As we explore in the next part, the Supreme Court has been unwilling to resolve this question, content to instruct courts to accept the best due process procedures available under the circumstances.⁹⁴ Oddly enough, the new

90. 11 U.S.C. § 1122.

91. *Id.* § 1126.

92. The code also requires that claimants holding two-thirds of the value of claims within each class must vote in favor of the plan for the plan to be approved. *Id.* § 1126. Section 524(g) applies to cases with claims based on exposure to asbestos and requires that 75 percent of the voting victims must vote in favor of the plan for it to be confirmed. *Id.* § 524(g). This section does not apply to non-asbestos mass tort cases. *Id.*

93. This holdout accommodation does not remove all complexity from the process. Securing consent from each creditor class can still be difficult. Therefore, the code contains a “cramdown” option, which allows a court to confirm a plan, even if not all creditor classes have consented, as long as the class has been treated fairly and equitably and the plan does not discriminate unfairly. *See id.* § 1129(b)(1).

94. Due process “requires only reasonable notice, and that reasonableness [i]s to be evaluated by balancing the state’s interest in the existing notice scheme against the

mass torts bargain, which has been used repeatedly over the last few years, is built on an untested premise: future victims can be forced to accept pro rata settlements and claim extinguishment even though they never received notice of the case, lack opt-out rights, and have no recourse against key parties.

III. TWO PILLARS RAISING DUE PROCESS CONCERNS

As explored in the last part, mass tort defendants have discovered an efficient and accelerated resolution path in bankruptcy. But this process must still satisfy due process. This may be difficult given the presence of future victims. Can the bankruptcy process afford such victims due process when traditional methods of protecting their interests, such as providing notice or an opportunity to opt out, are unavailable?

In this part, we discuss the relevant law on due process and the compromised pillars of the bankruptcy structure that threaten to undermine constitutional strictures.

A. *Due Process in Mass Tort Settings*

Under the Due Process Clause of the U.S. Constitution, “[n]o person . . . shall be deprived of life, liberty or property without due process of law.”⁹⁵ Although the term “due process” does not have a precise, “technical conception,”⁹⁶ the Supreme Court has emphasized that “[t]he fundamental requisite of due process of law is the opportunity to be heard,”⁹⁷ which entails notice “reasonably calculated . . . to apprise interested parties . . .”⁹⁸

Despite this strong language, the Court has interpreted the Due Process Clause to permit representative procedures that adjudicate the rights of absent claimants, so long as the procedures “fairly insure[] the protection of the interests of absent parties.”⁹⁹ *Mullane v. Central Hanover Bank & Trust Co.*¹⁰⁰ is instructive. The Court in *Mullane* reviewed a New York banking statute that permitted small trusts to invest in one aggregate trust for common administration.¹⁰¹ The statute permitted periodic judicial proceedings that

individual’s interest in receiving additional notice.” Robert G. Bone, *Rethinking the “Day in Court” Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 216 (1992).

95. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law.”). As bankruptcy proceedings are enabled under federal law, we will focus on the Fifth Amendment’s Due Process Clause, although the law surrounding procedural due process is the same for both.

96. *Gilbert v. Homar*, 520 U.S. 924, 930 (1997) (“‘[D]ue process,’ unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.” (quoting *Cafeteria & Rest. Workers v. McElroy*, 367 U.S. 886, 895 (1961))).

97. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) (alteration in original) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)).

98. *Id.*

99. *Hansberry v. Lee*, 311 U.S. 32, 42–43 (1940) (discussing a class certified under Illinois state law); see also Bone, *supra* note 94, at 214–19 (discussing *Hansberry*).

100. 339 U.S. 306 (1950).

101. *Id.* at 307–09.

settled all claims by beneficiaries concerning management of the trust.¹⁰² At these proceedings, representatives were appointed to represent different classes of beneficiaries, none of the beneficiaries could opt out of the proceedings, and the only notice provided was a newspaper ad.¹⁰³

Mullane is often cited for the proposition that due process requires notice “reasonably calculated . . . to apprise interested parties.”¹⁰⁴ However, the *Mullane* Court did not require actual notice or an opportunity to opt out for those beneficiaries who could not be located because, among other things, they had contingent or future interests.¹⁰⁵ According to the Court, to require more than newspaper notice “would impose a severe burden on the plan, and would likely dissipate its advantages.”¹⁰⁶ Moreover, those absent would be adequately represented by those present in the proceedings.¹⁰⁷

As demonstrated by *Mullane*, the Court has permitted representative proceedings that adjudicate the interests of future victims when the interests of those absent are adequately represented and when requiring more would, in fact, undermine the interests of the claimants.¹⁰⁸ Indeed, the Court would later apply the same due process standards it articulated in *Mullane* to the bankruptcy context, noting that “[p]robate proceedings are not so different in kind that a different result is required here.”¹⁰⁹

The Supreme Court provided more guidance in the mass tort context in two decisions involving asbestos settlement class actions, *Amchem Products, Inc. v. Windsor*¹¹⁰ and *Ortiz v. Fibreboard Corp.*¹¹¹ Although both decisions focused exclusively on Rule 23, the Court addressed concerns that can be understood as a “subtle revisitation of the law governing due process” with respect to mass torts.¹¹²

The first case, *Amchem*, involved a class action proposed to globally settle the asbestos claims of presently injured claimants with unfiled claims and “future” or “exposure-only” claimants who had not yet manifested injury.¹¹³ There, the Court concluded that it could not certify the class action under Rule 23 because, among other things, the proposed class action could not

102. *Id.* at 309.

103. *Id.* at 309–10.

104. *Id.* at 314; *see also* Christine B. Bartholomew, *E-Notice*, 68 DUKE L.J. 217, 225 (2018) (highlighting that “*Mullane v. Central Hanover* [is the] seminal case for notice”); *In re Placid Oil Co.*, 753 F.3d 151, 155–56 (5th Cir. 2014) (noting that “the Supreme Court’s opinion in *Mullane*” is “the origin[] of due process jurisprudence in the pre-discharge notice context”).

105. *Mullane*, 339 U.S. at 317.

106. *Id.* at 318.

107. *Id.* at 319.

108. *See* Campos, *supra* note 13, at 1114 (recognizing that “*Mullane* . . . articulat[es] a procedural scheme in which an action permissibly binds those absent because (1) it would be self-defeating to require more and (2) the relevant entitlements are adequately protected”).

109. *See* *Tulsa Pro. Collection Servs., Inc. v. Pope*, 485 U.S. 478, 491 (1988).

110. 521 U.S. 591 (1997).

111. 527 U.S. 815 (1999).

112. Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 352 (discussing *Amchem* and *Ortiz*).

113. 521 U.S. at 604.

demonstrate that “the representative parties will fairly and adequately protect the interests of the class.”¹¹⁴ Specifically, the Court highlighted an inherent conflict between the presently injured, who prefer “generous immediate payments,” and the “exposure-only” plaintiffs, who preferred “an ample, inflation-protected fund for the future.”¹¹⁵ The Court suggested that the inherent conflict between the two groups would require the use of subclasses, with each subclass having a different, independent representative to protect the subclass’s interests.¹¹⁶

The second decision, *Ortiz*, builds on *Amchem* and is more relevant to the current bankruptcy treatment of mass torts.¹¹⁷ That case involved another class action settlement of asbestos claims, this time only involving claims against a defendant and a third-party insurer who both agreed to establish a limited fund to settle the claims.¹¹⁸ The fund was established to settle litigation concerning the insurer’s coverage of the claims.¹¹⁹ Like in *Amchem*, *Ortiz* included both presently injured and future victims.

Unlike in *Amchem*, the plaintiffs in *Ortiz* sought to certify a class action under Rule 23(b)(1)(B)—a category of class actions for situations in which individual litigation “as a practical matter, would be dispositive” of nonparties’ claims.¹²⁰ Class actions certified under Rule 23(b)(1)(B) do not require the court to provide claimants notice or a right to opt out.¹²¹ The *Ortiz* Court rejected the proposed settlement. It first interpreted Rule 23(b)(1)(B) as applying primarily to situations involving a limited fund that cannot satisfy the claims of all claimants.¹²² It then concluded that the use of Rule 23(b)(1)(B) was inappropriate because the proposed limited fund was fabricated by the settlement, with “Fibreboard . . . allowed to retain virtually all of its entire net worth.”¹²³

The Court also highlighted the tension between presently injured and future victims, suggesting that the class action attorneys accepted a lower amount to “favor the known plaintiffs.”¹²⁴ For the Court, this represented

114. *Id.* at 626; *see also* FED. R. CIV. P. 23(a)(4) (requiring a proposed class action to show that “the representative parties will fairly and adequately protect the interests of the class”). The Court also concluded that the proposed class action failed to satisfy the “predominance” requirement of Rule 23(b)(3), which requires that “questions of law or fact common to class members predominate over any questions affecting only individual members.” *Amchem*, 521 U.S. at 625; *see also* FED. R. CIV. P. 23(b)(3) (setting forth the “predominance” requirement).

115. *Amchem*, 521 U.S. at 626.

116. *Id.*

117. *See generally* *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

118. *Id.* at 815. The settlement was designed to end litigation involving the insurer’s coverage of the claims. *Id.*

119. *Id.*

120. FED. R. CIV. P. 23(b)(1)(B).

121. *See* FED. R. CIV. P. 23(c)(2)(A) (providing that, for classes certified under Rule 23(b)(1)(B), the court “may,” but not must, “direct appropriate notice to the class,” and further, is not required to provide class members an opportunity to opt out).

122. *Ortiz*, 527 U.S. at 842 (although recognizing that the terms of Rule 23(b)(1)(B) are more expansive, “[t]he prudent course . . . is to presume that when subdivision (b)(1)(B) was devised to cover limited fund actions, the object was to stay close to the historical model”).

123. *Id.* at 859.

124. *Id.* at 853.

“an egregious example of the conflict noted in *Amchem* resulting from divergent interests of the presently injured and future victims.”¹²⁵ This is on top of the difficulty of computing the total amount of claims, a task the district court below concluded that it could not assess accurately, although the Court assumed that a computation of the total was possible.¹²⁶

The Court further concluded that, given the conflict with the present and future victims, the mandatory proceeding in *Ortiz* was especially inappropriate given “our ‘deep-rooted historic tradition that everyone should have his own day in court.’”¹²⁷ Nevertheless, the Court did recognize that such a “day in court” is not strictly required, such as “where a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants, *as for example in bankruptcy or probate.*”¹²⁸

Both *Amchem* and *Ortiz* can be understood as requiring significant scrutiny of representative procedures in mass torts, with the *Ortiz* Court emphasizing that the day-in-court ideal is the rule and “the burden of justification rests on the exception.”¹²⁹ Nevertheless, *Amchem* and *Ortiz* align with *Mullane* in recognizing that mandatory proceedings can satisfy due process, with *Ortiz* even highlighting that special remedial schemes like bankruptcy can diverge from the day-in-court ideal.¹³⁰

Taken together, the Court’s decisions in *Mullane*, *Amchem*, and *Ortiz* provide the relevant parameters for understanding the due process requirements for resolving mass torts in bankruptcy. Indeed, bankruptcy courts that have wrestled with the due process implications of mass torts in bankruptcy have relied on these cases.¹³¹

Ortiz and *Mullane* provide foundational guidance on when procedures can deviate from the day-in-court ideal. But the reasoning in *Ortiz* suggests that the exception to the normal litigation process needs a special justification, and part of the Court’s focus on the limited fund model was to identify, in part, a situation in which a mandatory proceeding was justified as a matter of due process.¹³² Mandatory, non-opt-out proceedings are necessary for a

125. *Id.*

126. *Id.* at 850.

127. *Id.* at 846 (quoting *Martin v. Wilks*, 490 U.S. 755, 762 (1989)). For criticism of this day-in-court ideal, see Sergio J. Campos, *The Uncertain Path of Class Action Law*, 40 CARDOZO L. REV. 2223 (2019).

128. *Ortiz*, 527 U.S. at 846 (emphasis added) (citing *Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989)); see also *Taylor v. Sturgell*, 553 U.S. 880, 895 (2008) (noting that “in certain circumstances a special statutory scheme may ‘expressly foreclos[e] successive litigation by nonlitigants . . . if the scheme is otherwise consistent with due process’” (alterations in original) (quoting *Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989))).

129. *Ortiz*, 527 U.S. at 846.

130. See *id.*

131. See, e.g., *In re Combustion Eng’g, Inc.*, 391 F.3d 190, 245 (3d Cir. 2004) (relying on *Amchem* and *Ortiz* to address due process concerns with the handling of future asbestos liability under § 524(g)); see also *In re Placid Oil Co.*, 753 F.3d 151, 154–55 (5th Cir. 2014) (discussing *Mullane* in the context of due process requirements of notice for unknown creditors).

132. One coauthor has argued that mandatory proceedings are always justified for mass torts given the need to coordinate investment. See Campos, *supra* note 13, at 1066–67. In that

limited fund because, without such a proceeding, current victims can unilaterally recover at the expense of future victims.¹³³ This “race to the courthouse” reasoning has been used to justify other nonbankruptcy mandatory procedures.¹³⁴ *Mullane* is aligned with and permits deviations from the normal litigation process when insistence on notice, opt outs, and similar procedural rights may “dissipate” the underlying rights of the claimants.¹³⁵

This all suggests that deviation from the day-in-court ideal will depend on the appropriateness of the mass tort defendants’ filing for bankruptcy. When confronted with the issue, courts may insist on a “limited fund” to justify the mandatory procedures used in bankruptcy. They may also simply defer to the bankruptcy court’s determination of appropriateness because bankruptcy is a recognized “special remedial scheme” that permits the use of mandatory procedures.¹³⁶

It is also worth noting that current bankruptcy proceedings do not necessarily take away a claimant’s day in court. Claimants typically have the option, for example, to bring suits against the trusts in nonbankruptcy courts.¹³⁷ Although technically providing a day in court, such suits do not allow the claimant to challenge the defendant directly, or, more importantly, to challenge the sufficiency of the trust itself.

This leads to the two main due process concerns with mass tort resolution in bankruptcy. First, as highlighted by *Amchem* and *Ortiz*, a central due process concern is the tension between those “present” claimants and those “future” or “exposure-only” claimants who have not yet manifested an injury. More concretely, “future victims must be adequately represented

sense, all mass torts involve “limited funds” insofar as the funds are limited by the coordination efforts of the claimants. For more discussion of this with respect to the FCR, see *infra* Part IV.

133. See, e.g., PRINCIPLES OF THE L. OF AGGREGATE LITIG. § 2.04(b) (AM. L. INST. 2010) (concluding that mandatory proceedings are justified when remedies like limited funds are “indivisible,” such that “the distribution of relief to any claimant as a practical matter determines the application or availability of the same remedy to other claimants”).

134. See *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 533 (1967) (permitting interpleader procedure to process claims on a \$20,000 insurance policy that could not satisfy all claims).

135. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 317–18 (1950); see also *In re Placid Oil Co.*, 753 F.3d at 154–55 (noting in the bankruptcy context that, in *Mullane*, “[t]he Court specifically declined to impose upon the debtor ‘ordinary standards of diligence,’ given countervailing concerns for efficiency”).

136. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (citing *Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989)). It is worth noting that the issue of whether bankruptcy is filed in “good faith” is contested in some mass tort bankruptcies. See *In re LTL Mgmt., LLC*, 637 B.R. 396, 419 (Bankr. D.N.J. 2022) (concluding that the filing was in good faith because “the continued viability of all J&J companies is imperiled” by talc liability). For purposes of this Essay, we simply flag the issue and assume for due process purposes that mass tort defendants are filing for bankruptcy in good faith.

137. See *In re LTL Mgmt., LLC*, 637 B.R. at 413 (“[T]here have been numerous asbestos trusts implemented under § 524(g) which provide tort victims with choices between receiving guaranteed compensation under the trusts, or alternatively pursuing recovery against the trusts through jury trials.”).

throughout the process,”¹³⁸ with the Court in *Amchem*, *Ortiz*, and even *Mullane* expressing concern with the adequacy of representation of the future victims by those present.

In part, the concern with the adequacy of representation of the future victims can be addressed by the appointment of the FCR as a separate and independent representative. This is suggested by *Amchem*'s insistence on subclasses and *Ortiz*'s concern with current claimants perhaps settling for less at the expense of the future victims. Indeed, courts have rejected bankruptcy proceedings that have not provided a separate FCR.¹³⁹ But appointment of an FCR is insufficient by itself. The procedures surrounding the appointment and powers of the FCR also matter to the adequacy of representation of the future victims.

Second, a very real, concrete danger that underlies the concern for the future victims is the risk that any fund created for the claimants will be unable to comparably compensate current and future victims. The Court suggests this in *Ortiz*, pointing out the significant “hurdle” to “mak[ing] a sufficiently reliable determination of the probable total.”¹⁴⁰ This is the “doomsday” scenario we alluded to earlier, and there has been at least one nonbankruptcy situation in which a court has permitted parties to reopen a settlement for inadequate representation when the funds were exhausted.

In *Stephenson v. Dow Chemical Co.*,¹⁴¹ the U.S. Court of Appeals for the Second Circuit permitted a due process collateral challenge to a settlement involving Agent Orange claims because the settlement specifically excluded claims that manifested after 1994.¹⁴² In doing so, *Stephenson* reiterated the standard articulated in *Amchem*, *Ortiz*, and *Mullane* that adequacy of representation is the relevant due process standard.¹⁴³ *Stephenson* differs materially from the modern uses of bankruptcy for mass torts. Unlike in *Stephenson*, the settlement trusts used in the bankruptcy process do not exclude any mass tort claimants. Moreover, other circuit courts have prevented the relitigation of a court's previous determinations on the adequacy of representation.¹⁴⁴ Nevertheless, *Stephenson* provides evidence

138. *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 245 (3d Cir. 2004) (first citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625–28 (1997); then citing *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856 (1999); and then citing 11 U.S.C. § 524(g)(4)(B)(I)).

139. *See id.* (rejecting a bankruptcy resolution of asbestos claims where the future victims were not involved or represented in the creation of the settlement fund).

140. *Ortiz*, 527 U.S. at 850.

141. 273 F.3d 249 (2d Cir. 2001), *aff'd by an equally divided court in part, vacated on other grounds in part*, 539 U.S. 111 (2003).

142. *See id.* at 261.

143. *Id.* at 258 (noting that “[j]udgment in a class action is not secure from collateral attack unless the absentees were adequately and vigorously represented” (alteration in original) (quoting *Van Gemert v. Boeing Co.*, 590 F.2d 433, 440 n.15 (2d Cir. 1978))).

144. *See, e.g., In re Diet Drugs Prods. Liab. Litig.*, 431 F.3d 141, 146 (3d Cir. 2005) (noting that *Stephenson* “is inconsistent with circuit case law”); *see also* Kevin R. Bernier, Note, *The Inadequacy of the Broad Collateral Attack: Stephenson v. Dow Chemical and Its Effect on Class Action Settlements*, 84 B.U. L. REV. 1023, 1033–38 (2004) (noting that *Stephenson* erroneously relitigated the issue of adequacy of representation by erroneously concluding that the interests of the plaintiffs were not previously considered).

of a court, here the Second Circuit, showing a willingness to reopen proceedings to the extent that procedural protections do not, in fact, adequately protect future victims.

Accordingly, and assuming that the use of bankruptcy procedures is invoked in good faith, the law of due process in the bankruptcy context centers on (1) the adequacy of representation of the future victims and (2) successfully computing the necessary funds for the victims' settlement trust. As addressed below, proposals that address infirmities within these two pillars help ensure that the resolution of mass torts in bankruptcy accords with due process.

1. Understanding the FCR

As noted above, a future claimants' representative is tasked with representing the interests of future victims in mass restructurings.¹⁴⁵ Section 524(g) of the Bankruptcy Code mandates appointment of an FCR in cases involving claims based on exposure to asbestos as a prerequisite to the imposition of a channeling injunction.¹⁴⁶ The legislative history explains that this feature was included to help address due process concerns and has become a fixture of the process.¹⁴⁷ Indeed, an FCR is invariably appointed in mass restructurings that do not involve asbestos claims and are not subject to section 524(g).¹⁴⁸

Bankruptcy courts appoint FCRs and task them with negotiating with the mass restructuring debtor to determine the appropriate amount of funds for the settlement trust.¹⁴⁹ The channeling injunction deprives future victims of their day in court, and provisions of the bankruptcy plan will preclude these victims from opting out of any settlement reached in the case. The FCR is intended to minimize the risk that plaintiffs' lawyers, the debtor, insurance companies, and current victims collude to appropriate value from future victims, the group most impacted by a prematurely insolvent settlement trust.¹⁵⁰

145. 11 U.S.C. § 524(g)(4)(B).

146. *See id.*

147. *Injunctions in Mass Tort Cases in Bankruptcy: Hearing Before the Subcomm. on Econ. & Com. L. of the Comm. on the Judiciary*, 102d Cong. 76 (1992) (statement of Professor Kenneth N. Klee) ("My own view is that that [a due process] challenge should fail because, under *Mullane*, publication notice was given to unknown claimants, actual notice was given to known claimants, and a future claims representative was appointed for future victims. I would think that process should pass constitutional muster.").

148. *See, e.g.*, Disclosure Statement for Joint Chapter 11 Plan of Reorganization of TK Holdings Inc. and Its Affiliated Debtors at 58–59, *In re TK Holdings, Inc.*, No. 17-11375 (Bankr. D. Del. Nov. 15, 2017), ECF No. 1164.

149. 11 U.S.C. § 524(g)(4)(B).

150. Victim balkanization "is the process by which debtors pit current victims against future victims with a simple threat: any attempt to secure comparable recoveries across the victim class will lead to significant delays in case resolution and ultimately deprive current victims of any recovery in the short term." Parikh, *Mass Exploitation*, *supra* note 8, at 65–66; *see also* Parikh, *Scarlet-Lettered Bankruptcy*, *supra* note 10, at 463–65.

Without the FCR's consent, the court will not confirm a plan of reorganization that binds future victims through a channeling injunction.¹⁵¹ Consequently, the FCR occupies a unique and extremely influential position within the resolution model. Despite this prominence, we were unable to identify any judicial opinions assessing whether the FCR model in mass restructurings satisfies due process strictures.

The FCR is in a position to negotiate aggressively and minimize the risk of a prematurely insolvent settlement trust. This is the most daunting risk for victims because victims facing a prematurely insolvent trust have no recourse.¹⁵² The plan does not afford claimants a meaningful opt-out right.¹⁵³ The debtor has been dissolved. The debtor's parent entity and all insurance companies that contributed to the settlement have full immunity through nondebtor releases.¹⁵⁴ If the debtor's assets were sold through bankruptcy, the acquirer does not assume any pre-petition liability.¹⁵⁵ In this doomsday scenario, a disenfranchised tort victim has one course of action: argue that due process was unsatisfied, in which case the only remedy is to allow the victim to pursue causes of action against otherwise immune parties.

The need to avoid this outcome is clear, and the FCR is the linchpin. But this doomsday scenario could unfold even when an FCR has been appointed. As explored in the next section, what if the FCR failed to properly represent the interests of future victims?

2. Section 502(c) and Claim Estimation

The claim estimation process further complicates this dynamic. As noted above, § 502(c) allows bankruptcy courts to estimate the value of claims held by both current and future mass tort claimants.¹⁵⁶ In many cases, hundreds of millions of dollars of claims involving complex scientific theory,¹⁵⁷ medical evidence,¹⁵⁸ and convoluted causation assessments must be valued through an extremely truncated process. Resolution of these types of claims outside of bankruptcy would normally take years of litigation, beginning with numerous bellwether trials that would ideally produce representative rulings

151. 11 U.S.C. § 524(g)(4)(B).

152. See Parikh, *New Mass Torts Bargain*, *supra* note 10, at 489.

153. To date, plans in these cases have afforded claimants an opt-out right in name only. See Disclosure Statement for Fifth Amended Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. and Its Affiliated Debtors at 22, *In re Purdue Pharma L.P.*, No. 19-23649 (Bankr. S.D.N.Y. June 2, 2021), ECF No. 2969. Claimants who opt out may recover only the amount they otherwise would have received under the victims' trust liquidation procedures. See *id.*

154. See *id.*

155. See Parikh, *New Mass Torts Bargain*, *supra* note 10, at 494.

156. See *supra* note 71 and accompanying text.

157. See, e.g., *In re Garlock Sealing Techs., LLC*, 504 B.R. 71, 75 (Bankr. W.D.N.C. 2014).

158. See *id.*

that could ultimately be extrapolated for settlement guidance.¹⁵⁹ A very different process emerges in bankruptcy.

Cases involving asbestos claims can rely on the extensive valuation history that comes along with these types of claims.¹⁶⁰ Claim matrices for asbestos victims are readily available and allow for procedural shortcuts.¹⁶¹ But what about cases that do not involve asbestos claims? Modern mass tort cases rarely involve asbestos claims.¹⁶² Consequently, these cases lack historical guidance on claim value, which further highlights the deficiencies of the estimation process.

After an accelerated and incomplete discovery process, estimation devolves into a battle of experts.¹⁶³ Indeed, experts representing the debtor, the official committees, and other stakeholders present speculative conclusions that produce widely divergent financial estimates.¹⁶⁴ The bankruptcy court is tasked with sorting through this quagmire and selecting the estimation that it finds most plausible.¹⁶⁵ But the idea that the bankruptcy court will—after only a few days of hearings—be in a position to determine aggregate claim value is inexplicable.¹⁶⁶ Bankruptcy courts are inexperienced in adjudicating personal injury cases.¹⁶⁷ But the estimation process blithely overlooks this inexperience and allows jurists to liquidate

159. *See id.* at 74 (explaining that the victims' committee and the FCR offered settlement numbers "based upon an extrapolation from Garlock's history of resolving mesothelioma claims in the tort system").

160. *See id.* at 87 ("This court, however, is not the first to attempt a global estimation of asbestos liability and has the benefit of the collected experience of the courts that have previously conducted estimations [These cases] form a base on which the court's crystal ball can rest.").

161. *See id.*

162. *See* Parikh, *New Mass Torts Bargain*, *supra* note 10, at 453.

163. *See, e.g., In re Armstrong World Indus., Inc.*, 348 B.R. 111, 115, 125 (Bankr. D. Del. 2006) ("Although there is no dearth of well-compensated experts willing to assume the task of predicting the future asbestos personal injury liability of companies emerging from bankruptcy . . . the number of possible variables makes any pretense to certainty illusory.").

164. *See In re Owens Corning*, 322 B.R. 719, 725 (D. Del. 2005) (the low expert assessment of total liability was \$2.08 billion, while the high was \$11.1 billion); *Menard-Sanford v. Mabey (In re A.H. Robins Co.)*, 880 F.2d 694, 699 (4th Cir. 1989) (the range was \$600 million to \$7 billion); *Garlock Sealing*, 504 B.R. at 74 (the range was \$125 million to \$1.3 billion); *see also id.* at 86–87 (determining that plaintiffs' attorneys had withheld material exposure evidence that had unfairly inflated the debtor's liabilities and the practice was widespread, affecting many asbestos cases).

165. *See, e.g., In re Armstrong*, 348 B.R. at 134 ("Presented with three estimates of . . . pending and future asbestos personal injury liability . . . the Court . . . finds that \$3.1 billion is a reasonable prediction . . .").

166. *See* Edith H. Jones, *Rough Justice in Mass Future Claims: Should Bankruptcy Courts Direct Tort Reform?*, 76 TEX. L. REV. 1695, 1714 (1998).

167. *See id.* Bankruptcy judges' inexperience stems from the fact that they lack authority to adjudicate personal injury or wrongful death claims. *See* 28 U.S.C. § 157(b)(2)(B). Bankruptcy courts may not estimate personal injury or wrongful death claims for purposes of making a distribution from estate assets. Section 502(c), however, allows courts to estimate these claims in order to allow the debtor to formulate a plan of reorganization.

thousands of claims after failing to conduct a single jury trial, take any victim testimony, or assess historical data.¹⁶⁸

Many jurists refuse to undertake this task,¹⁶⁹ citing the process's systemic flaws.¹⁷⁰ Unfortunately, courts in modern mass restructurings must estimate claims. Plan confirmation is unavailable without this estimate.

In the next section, we explain how the reliance on the FCR and claim estimation process creates a significant risk that various predictions and assumptions made by the bankruptcy court will ultimately haunt the process—potentially unwinding a hard-fought global settlement in entirely unexpected ways.

B. Compromised Pillars

In his essay entitled *The New Mass Torts Bargain*, Professor Parikh details the deficiencies of bankruptcy's FCR selection and claim estimation processes.¹⁷¹ The fear is that these dynamics distort resolution outcomes and could create a constitutional quandary threatening victim recoveries.¹⁷²

1. The FCR Pillar

In mass restructurings, the FCR is the sole representative for future victims who customarily hold claims valued at hundreds of millions of dollars. Naturally, these clients do not provide input in the selection process, and the FCR operates without any client oversight. This creates a principal-agent problem that is arguably unavoidable in the context of mass torts, but the agency breakdown is even more pronounced than it seems. There is no ex-post check on the FCR. Future victims who later emerge and come to learn that the FCR agreed to disadvantageous terms lack meaningful opt-out rights¹⁷³ and cannot bring suit against the FCR, who enjoys broad immunity

168. *See In re Armstrong*, 348 B.R. at 115 (acknowledging that estimation under § 502(c) involves making “predictions which are themselves based on predictions and assumptions” (quoting *Owens Corning v. Credit Suisse First Bos.*, 322 B.R. 719, 721 (D. Del. 2005))).

169. *See In re Dow Corning Corp.*, 211 B.R. 545, 562 n.16 (Bankr. E.D. Mich. 1997) (refusing to adopt an estimation process and urging the parties to reach a consensual resolution).

170. *See, e.g., In re Armstrong*, 348 B.R. at 124 (“The best the court can do is to consider the expert reports, . . . while remaining vigilant to the potential bias that a party’s expert may have”) (quoting *In re Fed.-Mogul Glob., Inc.*, 330 B.R. 133, 156 (D. Del. 2005))).

171. Parikh, *New Mass Torts Bargain*, *supra* note 10.

172. Some may argue that we are overstating the risk because bankruptcy has produced numerous mass tort cases that have survived circuit court review. Keep in mind that the Supreme Court has repeatedly taken up the issue of entrenched bankruptcy practices, only to rule that the structures were unconstitutional and needed to be dismantled. *See, e.g., Stern v. Marshall*, 564 U.S. 462, 487–88 (2011) (holding that bankruptcy courts lack authority under Article III to enter final judgment on a variety of claims); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (holding that the Bankruptcy Code’s jurisdictional grant to non–Article III judges was unconstitutional); *Ashton v. Cameron Cnty. Water Improvement Dist.*, 298 U.S. 513 (1936) (holding nation’s first municipal bankruptcy law to be unconstitutional).

173. *See supra* note 153.

for all actions aside from fraud, gross negligence, and willful misconduct.¹⁷⁴ This dynamic creates the need for a true fiduciary, but the FCR may not fulfill that role.

The bankruptcy court overseeing the mass restructuring is tasked with selecting the FCR. Oddly, bankruptcy courts have delegated this responsibility to the corporate debtor—the very party against whom the FCR will be negotiating.¹⁷⁵ In these cases, the debtor proposes one FCR candidate.¹⁷⁶ Some courts have approved the debtor’s nominee without considering other nominees.¹⁷⁷ The only standard for these sole nominees is that they be “disinterested,” which represents an extremely low bar focused on whether the individual has any overt conflicts of interest.¹⁷⁸ The FCR is not a fiduciary for future victims and, once selected, is not monitored by the bankruptcy court.¹⁷⁹

The FCR model invites significant capture risk. A small pool of professionals control mass tort litigation, and the process is characterized by repeat players.¹⁸⁰ FCRs receive significant fees and retain as legal counsel the law firm at which they are a partner, thereby amplifying the benefit to them.¹⁸¹ Therefore, the promise of multiple engagements is a truly distortive incentive for these individuals. This promise can incentivize an FCR to discount their invisible clients’ interests.¹⁸² FCRs seeking subsequent engagements face extreme pressures to avoid taking positions that may alienate key parties who will be involved in future cases.¹⁸³

The FCR was designed to be a check on the code’s systemically deficient claim estimation process. If an FCR is unable or unwilling to serve that function, the estimation process can wreak havoc. The fear is that bankruptcy judges—with woefully incomplete information and after holding hearings over a mere handful of days—are forced to determine a valuation number for

174. See, e.g., Disclosure Statement for Third Amended Joint Chapter 11 Plan of Reorganization of TK Holdings Inc. and Its Affiliated Debtors, *supra* note 23, at 76; see also S. Todd Brown, *Section 524(g) Without Compromise*, 2008 COLUM. BUS. L. REV. 102, 159.

175. See Mark D. Plevin, Leslie A. Epley & Clifton S. Elgarten, *The Future Claims Representative in Prepackaged Asbestos Bankruptcies: Conflicts of Interest, Strange Alliances, and Unfamiliar Duties for Burdened Bankruptcy Courts*, 62 N.Y.U. ANN. SURV. AM. L. 271, 301–14 (2006) (“In almost every asbestos bankruptcy case to date, the bankruptcy court has granted the debtor a presumptive right to select the FCR.”). This delegation is akin to allowing the debtor to select class representatives and counsel for the official creditors’ committee.

176. See, e.g., *In re Duro Dyne Nat’l Corp.*, No. 18-27963, 2019 WL 4745879 (D.N.J. Sept. 30, 2019); *In re Fairbanks Co.*, 601 B.R. 831 (Bankr. N.D. Ga. 2019); *In re Imerys Talc Am. Inc.*, No. 19-10289, 2019 Bankr. Lexis 1452, at *10–15 (Bankr. D. Del. May 8, 2019).

177. See cases cited *supra* note 149.

178. See 11 U.S.C. § 101(14).

179. See Brown, *supra* note 174, at 159.

180. See, e.g., *In re Fairbanks*, 601 B.R. at 835, 841.

181. See Parikh, *New Mass Torts Bargain*, *supra* note 10, at 490.

182. *In re Fairbanks*, 601 B.R. at 835 (“The idea is that the [FCR] . . . will ‘go along to get along’ to the detriment of future victims in order to be selected for the next case.”).

183. See Troy A. McKenzie, *The Mass Tort Bankruptcy: A Pre-History*, 5 J. TORT L. 59, 78 (2012).

the aggregate value of all claims in a case.¹⁸⁴ This number will ultimately represent the corpus of the victims' trust and the entire amount available to both current and future victims. As noted above, victims' trusts in modern mass tort actions have absolutely no contingency plan in the event of premature insolvency.¹⁸⁵

2. The Claim Estimation Pillar

The reality is that a pliable FCR results in a settlement negotiation that is not held at arm's length. The risk of this type of suboptimal negotiation construct is evident in a number of different contexts, but the risk there is often mitigated by client or judicial oversight—two factors that do not exist in mass restructurings.

A rushed claim estimation process raises fears that the bankruptcy court will miscalculate the funds necessary to support a funded settlement trust. As noted above, ostensibly all active stakeholders benefit from plan confirmation, while an underfunded settlement trust disadvantages only one group: unknown victims, the group that is not actively engaged in the case. As Professor Parikh has explained, mass restructuring debtors adeptly engage in victim balkanization, an attempt to pit current victims against future victims in order to facilitate settlements that may actually create disparate treatment across victim classes.¹⁸⁶ The unspoken threat is that any attempt to fully fund the trust will lead to significant recovery delays for victims currently suffering. The corollary to this threat is that the risk of trust insolvency will be borne only by future victims. The result could be active stakeholders demanding prompt resolution and current victims accepting a moderately underfunded trust to avoid a protracted legal battle; after all, one of the benefits of the bankruptcy process is that victims can secure accelerated recoveries. But what happens if current victims are not willing to sacrifice this benefit?

3. The Due Process Stress Test

The ultimate fear with compromised pillars is an artificially suppressed settlement figure that creates an underfunded settlement trust. This underfunding has no material consequence to the debtor, professionals in the case, or current claimants. In fact, the consequences will not be apparent for years after the plan of reorganization is confirmed. A settlement trust that

184. In some cases, the bankruptcy court is asked to assess whether the amount of funds in the victims' settlement trust is a "reasonable prediction" so as to comply with the plan confirmation requirement that non-personal injury victims in these cases are not subject to unfair discrimination. See 11 U.S.C. § 1129(b)(1); *In re Armstrong World Indus., Inc.*, 348 B.R. 111, 115 (Bankr. D. Del. 2006).

185. See Parikh, *New Mass Torts Bargain*, *supra* note 10, at 493.

186. See Parikh, *Mass Exploitation*, *supra* note 6, at 65–66 (“[Victim balkanization] is the process by which debtors pit current victims against future victims with a simple threat: any attempt to secure comparable recoveries across the victim class will lead to significant delays in case resolution and ultimately deprive current victims of any recovery in the short term.”).

becomes insolvent in fifteen years as opposed to twenty-five years affects a subset of the victim class. But this result creates a scenario whereby two victims suffering comparable injuries due to tortious conduct committed by the same tortfeasor, and who hold similar damage claims, receive wildly different settlements, even though their claims were adjudicated through the same judicial process. Early claimants could receive full payment of their claims, while subsequent ones receive pennies on the dollar.¹⁸⁷ Disparate treatment on this scale undermines the process and basic concepts of equity embedded in the bankruptcy system.

Potentially disparate treatment raises another troubling possibility. Imagine a large group of future victims emerges fifteen years after the bankruptcy case is closed. This group holds high-value claims but—due to the channeling injunction—can seek recourse only against the settlement trust, which is prematurely insolvent. There is absolutely no contingency plan for addressing this scenario.¹⁸⁸ As noted above, these victims have no recourse against any key parties in the case.¹⁸⁹

The victims in this scenario have only one argument: the settlement trust is prematurely insolvent because the FCR failed to appropriately represent future victims' interests; as a result, the process failed to satisfy claimants' due process rights. If successful, the remedy would involve disregarding the immunity shields distributed as part of the confirmation process. The bargain imposed decades earlier would be unwound. This represents the ultimate doomsday scenario.

It is unclear whether bankruptcy's resolution framework for mass torts can withstand a due process attack. We believe that the general construct aligns with Supreme Court jurisprudence, but the execution may create exposure. As detailed below, we propose bolstering two pillars in the framework to address this possible deficiency.

IV. A PROPOSAL

The previous sections highlight the possibility of infirmities in the bankruptcy process forcing a court to unwind a global settlement years after a mass tort bankruptcy case has closed. The Supreme Court and Congress are both able to ostensibly eliminate this outcome, but we believe that the possibility of that intervention is remote. This part delineates our proposal

187. The victims' settlement trust in the Johns-Manville bankruptcy is the most prominent example. By the early 1990s, trust administrators realized that the trust had insufficient assets to pay prospective claimants the full value of their claims. Consequently, the trust was allowed to begin paying claimants a pro rata share of the liquidated value of their claim based on a percentage set by the trust. The percentage was initially set at 10 percent in 1995 but was brought down to only 5.1 percent by 2022. *See* 2002 TRUST DISTRIBUTION PROCESS (2021), <https://www.claimsres.com/wp-content/uploads/2016/11/2002-TDP-May-2021-Revision-1.pdf> [<https://perma.cc/3VQ5-QUL2>].

188. *See, e.g.*, Disclosure Statement for Joint Chapter 11 Plan of Reorganization of Imerys Talc America, Inc. and Its Debtor Affiliates Under Chapter 11 of the Bankruptcy Code, *supra* note 23; Disclosure Statement for Third Amended Joint Chapter 11 Plan of Reorganization of TK Holdings Inc. and Its Affiliated Debtors, *supra* note 23.

189. *See supra* notes 152–54 and accompanying text.

to bolster two compromised pillars in the bankruptcy framework to materially reduce the risk of the doomsday scenario.¹⁹⁰

A. *Rebuilding the FCR Construct*

Supreme Court jurisprudence supports the premise that if the FCR selected in a case proves to be inadequate, a plan of reorganization that contains a channeling injunction and debtor and nondebtor releases cannot bind future victims.¹⁹¹

The consequences of inadequate representation have received considerable attention in the class aggregation context. Rules 23(a)(4) and 23(g)(4) of the Federal Rules of Civil Procedure instruct that class representatives¹⁹² and class counsel¹⁹³ must “fairly and adequately protect the interests of the class.”¹⁹⁴ Class counsel ultimately selects and proposes the representative, but courts undertake a rigorous review. In many cases, the corporate defendant will object to the adequacy of representation, but not as an attempt to derail the class aggregation process—rather, because they realize that an ultimate settlement could be unwound if the representation is subsequently found to be inadequate.¹⁹⁵

Rule 23’s adequacy requirement is designed to reveal conflicts of interest and ensure that a class representative will represent the class “vigorously.”¹⁹⁶ Courts assessing the adequacy of representation have demanded a robust showing.¹⁹⁷ And this scrutiny extends to class counsel. Rule 23(g) delineates various criteria that the court must consider before appointing class counsel.¹⁹⁸

In the class aggregation context, court scrutiny does not stop after selection. Courts have accepted an ongoing obligation to monitor the

190. Professor Parikh provides normative proposals for improving the FCR construct in his essay, *The New Mass Torts Bargain*, 91 *FORDHAM L. REV.* 447 (2022). This section builds on those proposals but focuses on modifications that will help address due process infirmities.

191. *See, e.g.*, *Hansberry v. Lee*, 311 U.S. 32 (1940); *Stephenson v. Dow Chem. Co.*, 273 F.3d 249 (2d Cir. 2001), *aff’d by an equally divided court in part, vacated on other grounds in part*, 539 U.S. 111 (2003).

192. Naturally, in class aggregation, the class representative is an individual also asserting a claim against the defendant. Nevertheless, Rule 23’s approach is a useful analogy.

193. Rule 23 makes clear that “[w]hether or not formally designated interim counsel, an attorney who acts on behalf of the class before certification must act in the best interests of the class as a whole.” FED. R. CIV. P. 23 advisory committee’s notes to 2003 amendments (discussing FED. R. CIV. P. 23(g)(2)).

194. FED. R. CIV. P. 23(a)(4), 23(g)(4).

195. Note that, in class aggregation, the corporate defendant is incentivized to ensure adequate representation. Inadequate representation allows class members to argue that they are not bound by the settlement. Mass tort debtors do not have these same incentives.

196. *See Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170, 183–84 (3d Cir. 2012) (quoting *In re Cmty. Bank of N. Va.*, 622 F.3d 275, 290 (3d Cir. 2010)).

197. *See id.*

198. Rule 23(g) provides that, “[i]n appointing class counsel, the court . . . may consider any other matter pertinent to counsel’s ability to fairly and adequately represent the interests of the class” FED. R. CIV. P. 23.

performance of the class representative and counsel and have removed representatives in various cases.¹⁹⁹

Rule 23 may not represent a flawless approach, but it is a viable one. Unfortunately, few of the safeguards and practices delineated above are apparent in the FCR selection process. This result is due in part to statutory lapses. Section 524(g) originates the role of the FCR, and the general construct outlined there has shaped the FCR process in other mass tort cases not subject to § 524(g)'s strictures.²⁰⁰ But the section introduces the FCR as an afterthought, providing that the court must appoint “a legal representative for the purpose of protecting the rights of persons that might subsequently assert” claims against the victims’ trust.²⁰¹ The section provides no other guidance, even though the FCR is arguably the only means by which the bankruptcy process can satisfy due process strictures as to future victims. As noted above, this inattention has led courts to formulate divergent and deficient FCR selection processes and eschew monitoring responsibilities.

Our proposals are relatively straightforward. Primarily, § 524(g) of the Bankruptcy Code—which currently only applies to cases involving asbestos claims—should be modified to apply to all mass tort cases.²⁰² With that change, we could then shift to modifying the FCR nomination and selection processes. As noted in Part III.B, bankruptcy courts have delegated to the debtor the task of nominating individuals for the FCR position.²⁰³ The debtor is invariably the only party who makes a nomination. And they nominate just one person. The court then reviews this person under the extremely forgiving “disinterestedness” standard, asking only if the individual has any overt conflicts of interest.²⁰⁴ Acknowledging what may be a *fait accompli*, motions seeking the appointment of an FCR are simple documents that merely provide the nominee’s background and assert that there are no conflicts.²⁰⁵

It is unclear why the debtor has been afforded this significant level of control over the nomination process. The FCR position is extremely lucrative and prestigious.²⁰⁶ There is no shortage of qualified individuals

199. 7A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1765 (4th ed. 2008) (noting that “once class members demonstrate any degree of mistrust or the named party’s representational abilities or motives are questioned, courts give very careful attention to the Rule 23(a)(4) issue and may hold an evidentiary hearing to determine the matter”); *see also* Philips Petroleum v. Shutts, 472 U.S. 797, 812 (1985) (“[T]he Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members.”).

200. Section 524(g) applies to cases with claims based on exposure to asbestos. The section does not apply to non-asbestos mass tort cases.

201. 11 U.S.C. § 524(g)(4)(B).

202. For more details regarding the expansion of § 524(g), see Parikh, *New Mass Torts Bargain*, *supra* note 10, at 493.

203. *See supra* Part III.B.

204. 11 U.S.C. § 101(14).

205. *See* Debtor’s Motion for an Order Appointing James L. Patton, Jr., as Legal Representative for Future Asbestos Claimants, *In re Fairbanks Co.*, 601 B.R. 831 (Bankr. N.D. Ga. 2019) (No. 18-41768), ECF No. 117.

206. *See infra* note 208 and accompanying text.

who would be willing to fill this vital role in high-stakes cases. We propose amending § 524(g) to require that at least three nominees must be presented to the bankruptcy court, and only nominees proposed by the U.S. Trustee should be considered. The U.S. Trustee can certainly solicit nominees from the debtor and other stakeholders but should enjoy full discretion regarding which ones should be considered for the position.

In terms of selection, we propose amending § 524(g) to require that (1) the U.S. Trustee in identifying FCR nominees and (2) the bankruptcy court in appointing an FCR must believe that the individual will act as an objective, impartial, and effective advocate for future victims, as well as being disinterested and qualified for the position (the “Selection Criteria”).²⁰⁷

This rigorous review must also extend to the law firm that an FCR intends to retain. Naturally, once appointed, FCRs hire the law firms at which they are partners to represent them in the bankruptcy case.²⁰⁸ At the very least, the law firms selected to represent an FCR must be scrutinized. Bankruptcy’s permissive selection process has allowed one law firm to develop a monopoly of sorts in this space. Indeed, since 2000, Young Conaway has represented FCRs in twenty-three mass tort cases.²⁰⁹ This is no small feat considering the infrequency with which FCRs have been appointed in that period of time. We propose that selection of the FCR’s counsel receive the same scrutiny as the nomination and selection of the FCR itself. We also see the value in a statutory or court-created rule that an FCR may not retain a law firm in which they hold an interest.

The last proposal we make addresses the failure of bankruptcy courts to perform ongoing monitoring in these cases. As noted above, bankruptcy courts have eschewed their opportunity to monitor FCRs and their counsel.²¹⁰ Section 524(g) does not impose a monitoring requirement. We propose amending the section to require that the court assess the performance of the FCR and their counsel based on the Selection Criteria at three key stages of the case: (1) when an estimation hearing under § 502(c) is requested, (2) when the debtor files a disclosure statement, and (3) as part of any plan confirmation hearing.

We believe that these relatively minor changes will bolster the FCR pillar. The resulting interest representation model is more likely to withstand judicial scrutiny and produce better outcomes to avoid prematurely insolvent settlement trusts, thereby removing the need for future victims to pursue relief based on due process lapses.

207. One of us has already argued that conceptualizing the FCR as guardian ad litem presents an “improved framework.” Parikh, *New Mass Torts Bargain*, *supra* note 10, at 497.

208. This practice is typical, but it allows FCRs to double-dip by receiving compensation as an FCR and then sharing in the fees billed in the case by other attorneys at their firm. An FCR may argue that they are forced to share a portion of what they bill as an FCR with the other partners at their law firm, but that is the reality for partners at all law firms and would not justify double-dipping in the FCR context.

209. *See* Debtor’s Motion for an Order Appointing James L. Patton, Jr., as Legal Representative for Future Asbestos Claimants, *supra* note 205.

210. *See supra* Part III.B.

B. Recalibrating the Claim Estimation Process

Even with adequate representation of future interests through a robust and well-incentivized FCR role,²¹¹ there remains a risk that the settlement trust will not be able to satisfy all claims made against it. Indeed, in the nonbankruptcy context, the exhaustion of a class action settlement fund led to at least one successful due process challenge.²¹² Increasing the probability of a sufficiently funded settlement trust reduces the probability of future victims asserting due process claims and attempting to unwind the settlement. Reducing the risk of insolvency will require a robust claim estimation process that will sufficiently fund a settlement trust to satisfy all present and future claims at the level prescribed by the plan of reorganization.

1. History May Be Misleading

The risk of premature insolvency may appear to be relatively low. Aside from the Johns-Manville settlement trust,²¹³ most settlement trusts designed to address asbestos liability pursuant to § 524(g) remain solvent and have not needed to dramatically reduce pro rata distributions to claimants.²¹⁴ But the success of § 524(g) settlement trusts in asbestos actions may misrepresent the risk of insolvency for non-asbestos tort actions.

The claim estimation process, which establishes the amount of funds to be placed in any settlement trust, requires an estimation of the value of the tort claims the claimants have against the mass tort defendant-debtor. As noted earlier in discussing mass torts, the value of the claims will turn on (1) common issues of liability related to the mass tort defendant's conduct and (2) individual issues of damages related to the effect of the conduct on each claimant. Because significant asbestos litigation occurred in the 1970s and 1980s, the underlying issues of liability and damages were well established by the time that the first settlement trusts were developed.²¹⁵ As a "mature mass tort," the first trusts could rely on a wealth of previous decisions on liability and damages to estimate the range of claims that individuals may be able to bring in the future.²¹⁶ Given this extensive history of litigation, it is no wonder that the claim estimation process for asbestos claims was fairly accurate.

211. Improvements in the FCR construct will also improve the claim estimation process. This is because a better incentivized and independent FCR will advocate more vigorously for a settlement fund sufficient to satisfy future claims. Thus, adoption of our proposed changes to the FCR will have the further effect of reducing the risk of settlement trust insolvency.

212. See *Stephenson v. Dow Chemical, Co.*, 273 F.3d 249, 261 (2d Cir. 2001), *aff'd by an equally divided court in part, vacated on other grounds in part*, 539 U.S. 111 (2003); see also *supra* Part III.A (discussing *Stephenson*).

213. See *supra* note 187.

214. 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>].

215. For a concise history of this litigation, see Robreno, *supra* note 67, at 105–25.

216. See Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 660, 688–94 (1989) (discussing "mature mass torts," using asbestos as the classic example).

Other mass tort claims in the bankruptcy system may not be “mature.” For such claims, there has not been “full and complete discovery, multiple jury verdicts,” or “at least one full cycle of trial strategies.”²¹⁷ Estimating the value of unmaturing mass tort claims, however, will not have the informational benefit that comes from the extensive litigation of previous claims. This information void, coupled with the other factors described above, may result in inaccurate claim estimation that materially increases the risk of a prematurely insolvent settlement trust.

2. Inter-court Collaboration

We propose that bankruptcy courts reduce informational deficits by coordinating with nonbankruptcy courts to litigate a sample of such claims. In other words, bankruptcy courts should leverage the procedural and experiential advantages that nonbankruptcy courts possess in litigating claims on the merits. Inter-court coordination can allow the resolution process to capture (1) the speed and efficacy of the bankruptcy process and (2) the thoroughness and investigatory powers of the trial court.

Inter-court coordination has occurred in previous bankruptcy proceedings. For example, in bankruptcy proceedings involving A.H. Robins, a pharmaceutical company, the district court withdrew the reference with respect to certain issues related to debtor’s liability concerning the intrauterine device, Dalkon Shield.²¹⁸ The court withdrew the reference “upon representation that the major aspect of the case required the services of an Article III judge” and proceeded to conduct proceedings with the bankruptcy court.²¹⁹ Working together, the district court and bankruptcy court jointly engaged in an estimation hearing in which “the parties each conducted extensive discovery,” and the court “heard extensive medical, statistical, epidemiological, and other expert testimony.”²²⁰ The resulting estimation process benefited greatly from incorporating the unique strengths of the two courts.

Coordination between the bankruptcy court and the district court can occur without a withdrawal of reference. The bankruptcy court instead could “lift the stay selectively to permit full trials of a representative sampling of the aggregated claims.”²²¹ Selective lifting of the stay would mimic bellwether

217. *Id.* at 659 (defining mature mass torts).

218. *In re A.H. Robins Co.*, 88 B.R. 742, 743 (E.D. Va. 1988), *aff’d*, 880 F.2d 694 (4th Cir.), *cert. denied sub nom.* Menard-Sanford v. A.H. Robins Co., 493 U.S. 959 (1989).

219. *Id.*

220. *Id.* at 746–47. Interestingly, “[r]easonably early on in the proceedings, the Court had appointed Professor Francis E. McGovern as the Court’s expert to develop in cooperation with [other parties] a reliable data base to aid in analyzing and determining the aggregate value of Dalkon Shield claim.” *Id.* at 746. Francis McGovern later developed the concept of the “mature mass tort” and developed a distinguished career as a mass torts expert. *See* McGovern, *supra* note 216, at 692.

221. *Concurrent Committee Educational Session: Business Reorganization: Class Actions in Chapter 11 Cases: Proofs of Claim, Settlement and Confirmation*, 040109 ABI-CLE 139 (2009).

trials used in MDLs, “the results of which would then be extrapolated to the group as a whole.”²²² Indeed, selective lifting of the stay for certain claims would also allow coordination between federal bankruptcy courts and state courts. For example, in the bankruptcy case of the Pacific Gas & Electric Co. (“PG&E”), selective lifting of the stay was used to try state law claims related to forest fires in northern California.²²³ In that case, the bankruptcy court reasoned that selective lifting of the stay would “help[] with the imperfect method of estimating claims as must be done here in the bankruptcy court.”²²⁴

In proposing the coordination between bankruptcy and nonbankruptcy courts in the claim estimation process, we do not propose a specific mode of coordination. Nevertheless, we do want to emphasize that the comparative advantage of nonbankruptcy courts in determining the value of mass tort claims does not arise exclusively from trials themselves. Naturally, trials provide data points for estimating the value of claims. The real value, however, may stem from the opportunity afforded to the court to accurately assess factual and legal issues, as well as from the court’s experience in doing so in other similar cases. Ultimately, an accurate determination will depend on (1) the power and experience to investigate the merits of these issues and (2) the devotion and opportunity to investigate those merits.

For example, whether a mass tort claimant is likely to prevail on an important, common issue of liability will hinge on the claimant’s ability to obtain all relevant evidence concerning that issue and the amount of resources that the claimant devotes to investigating the issue. For mass torts, the issue of investment is particularly crucial, as the defendant’s greater stakes in common issues of liability inherently leads to significant investment in those issues.²²⁵

We recommend that any coordination between bankruptcy and nonbankruptcy courts focus on two important aspects of the litigation process: (1) the availability of discovery tools for the claimants to fully vet the claims and (2) the structuring of incentives of the representatives of the claimants. Although we want to preserve the efficiency and speed of bankruptcy proceedings, we encourage bankruptcy and nonbankruptcy courts to afford parties some level of discovery to investigate the underlying factual issues. As noted by one symposium participant, discovery is necessary “to know where the dead bodies are.” Similarly, great attention must be afforded to the incentives of the FCR and claimants’ other representative parties to eliminate discrepancies in investment levels between these parties and the debtor.

222. *See In re Dow Corning*, 211 B.R. 545, 571–72 (Bankr. E.D. Mich. 1997) (rejecting unitary-trial approach on common issue of liability concerning the debtor’s breast implants but expressing approval of the use of bellwether trials in appropriate circumstances).

223. *In re PG&E Corp.*, No. 19-bk-30088, 2019 WL 3889247 (Bankr. N.D. Cal. Aug. 16, 2019).

224. *Id.* at *2.

225. *See supra* Part I (discussing this important aspect of mass torts).

Ultimately, coordination between bankruptcy and nonbankruptcy courts in mass restructurings does not necessarily require elaborate, protracted bellwether trials. Indeed, estimation processes involving a few accelerated trials, bellwether mediations,²²⁶ or even consolidated proceedings like the one used in the A.H. Robins bankruptcy, could produce fairly accurate results and materially reduce the risk of a prematurely insolvent settlement trust.

CONCLUSION

The resolution of non-asbestos mass torts in bankruptcy is still a fairly new development. Our goal in formulating these preliminary proposals focused on rebuilding the FCR construct and facilitating inter-court coordination in the claim estimation process is not to criticize the development but to initiate a dialogue to guide it. Failure to satisfy due process requirements threatens global settlements in these bankruptcy cases, a disastrous result for all stakeholders. We hope our proposals minimize this risk and allow all parties to realize the full benefit of this new, potentially more efficient resolution process.

226. See Zimmerman, *supra* note 28, at 2275 (discussing the use of bellwether mediation in mass tort litigation).