

**EVADING ACCOUNTABILITY: CORPORATE  
MANIPULATION OF CHAPTER 11 BANKRUPTCY**

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**HEARING**  
BEFORE THE  
**COMMITTEE ON THE JUDICIARY**  
**UNITED STATES SENATE**  
ONE HUNDRED EIGHTEENTH CONGRESS  
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**EVADING ACCOUNTABILITY: CORPORATE  
MANIPULATION OF CHAPTER 11  
BANKRUPTCY**

**TUESDAY, SEPTEMBER 19, 2023**

UNITED STATES SENATE,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The Committee met, pursuant to notice at 10:03 a.m., in Room 226, Dirksen Senate Office Building, Hon. Richard Durbin, Chair of the Committee, presiding.

Present: Senators Durbin [presiding], Whitehouse, Klobuchar, Coons, Blumenthal, Hirono, Booker, Padilla, Ossoff, Welch, Graham, Grassley, Cornyn, Hawley, and Kennedy.

**OPENING STATEMENT OF HON. RICHARD J. DURBIN,  
A U.S. SENATOR FROM THE STATE OF ILLINOIS**

Chair DURBIN. This meeting of the Senate Judiciary Committee will come to order. Our hearing today is entitled, “Evading Accountability: Corporate Manipulation of Chapter 11 Bankruptcy.”

In October of 2021, Johnson & Johnson faced lawsuits from nearly 40,000 Americans who had been diagnosed with ovarian cancer or mesothelioma, allegedly caused by the company’s talcum-based pow—talc-based products.

Rather than defend against these claims in district court or settle with victims, Johnson & Johnson used a legal maneuver known as the “Texas Two-Step” in an attempt to skirt and limit accountability and liability.

Under this bankruptcy maneuver, J&J transferred its legal liabilities to a shell company called LTL Management. Johnson & Johnson then moved that shell company to a friendly jurisdiction, put it into bankruptcy, and asked the court to stay all litigation against the still-solvent and highly profitable parent company, Johnson & Johnson.

Johnson & Johnson is not the only wealthy corporation to use the bankruptcy system to try to limit exposure and evade accountability. We now turn to a video to detail some of these abuses.

[Video is presented.]

Chair DURBIN. Ms. Naranjo was a witness at our earlier hearing and sadly has passed away.

I don’t come to this hearing as an expert in bankruptcy. My exposure to the subject is a law school course, and the fact that in my regular practice of law in the city of Springfield, Illinois, I was named a trustee in bankruptcy for a gas station. So I do not—I’ve

never played at the highest levels, but I think what we're addressing here is certainly the jurisdiction of this Committee, and timely, and appropriate for this hearing.

We acknowledge corporate bankruptcy plays an important role in our economy. It is meant to allow a company in financial distress to go before a bankruptcy court, agree to certain conditions, and, in exchange, get protection.

This provides space for the company to negotiate with its creditors to reach a compromise on how the company's debts will be addressed. All under the watchful eye of the bankruptcy court.

If all goes well, the debtor is given a fresh start, an opportunity to move on without the burden of unmanageable debt. That's the fundamental principle at the root of the bankruptcy system. The idea that financial calamity shouldn't be a death nail for every business. That innovation and risk can be good, and that the law should provide for second chances.

But if a company is going to be freed from its debts, there has to be some cost. The company has to accept oversight of the bankruptcy court. It has to compensate its creditors according to their interest. It has to limit its operation during the course of the proceedings.

Recently, certain corporations have decided they'd rather not accept that arrangement. They want all benefits of bankruptcy without the cost.

The video featured testimony from Kimberly Naranjo, a mesothelioma victim who testified last year, and as I mentioned, has since passed away. We are joined today by another mesothelioma victim, Justin Bergeron, a young father still fighting to hold Johnson & Johnson accountable.

While Johnson & Johnson's potential liability to Ms. Naranjo, Mr. Bergeron, and thousands of other Americans is substantial, it isn't something this company can't handle. At the time it executed the Texas Two-Step, Johnson & Johnson was valued at more than \$420 billion.

That year, it made nearly \$64 billion in profit. When the court rejected their attempt to use this maneuver as a "bad faith" scheme, Johnson & Johnson sent its shell company, LTL Management, back into bankruptcy a mere 2 hours later. Unbelievable.

We've seen a similar playbook used by 3M to try to avoid accountability for allegedly selling defective combat earplugs to our troops for more than 200,000 servicemembers.

We'll hear from Lori Knapp whose father tragically died of mesothelioma, allegedly caused by products manufactured by Georgia-Pacific, another corporation. She still hasn't been able to hold the company accountable due to this bankruptcy scheme.

These maneuvers are blatant attempts by wealthy corporations to bypass our tort system, to simply decline to be held liable. And we have every reason to expect that corporations, at least those with deep enough pockets, will continue to try to manipulate bankruptcy in similar ways.

That's not what the Congress intended when it created bankruptcy. It's not something we should allow to continue. With that, I'll turn to Ranking Member Graham for his opening statement.

**OPENING STATEMENT OF HON. LINDSEY O. GRAHAM,  
A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA**

Senator GRAHAM. Thank you, Mr. Chairman. I look forward to hearing from the witnesses.

I'm not an expert in bankruptcy either, but the whole goal is to have a global settlement.

In the case of *Johnson & Johnson*, I think millions of dollars were offered and under bankruptcy law, fraudulent transfers are prohibited and you have a litigation model to make these claims. So we'll sit here and listen to see if that litigation model the powers of judges needs to be changed by statute.

But the goal of bankruptcy is to take a company, try the best you can to make claimants whole, but allow a reorganization so people can move forward rather than just—multi-district litigation seems not to work. So I understand the purpose of bankruptcy. I understand the litigation model as claimants can set aside mergers. They think they're fraudulent in the eyes of the court. So we will deal with that.

But one thing we're not dealing with is a broken border. I don't know if you saw yesterday, there's 2,000 people on a train coming out of Mexico, cheering and yelling because they're coming to our southern border.

Eventually, sometime, somewhere, I hope the Democratic majority will take a little bit of time—and everything's important, but I can't think of anything more important than to stop what I think is literally an invasion of the country.

People are being released by the thousands because there's no space left. And we've got to deal with this. We've got to—we've got to, as a Senate, come up with a solution. The House passed a border security plan. You may not like it, but at least they did it. It's time for us, Mr. Chairman, to take this problem seriously because it is a life and death situation on multiple levels.

Chair DURBIN. Senator Graham, I share your concern about this challenge, and, as you know, we're scheduled to sit down tomorrow for the opening conversation about this. I hope it leads to a bipartisan response, which we've seen in the past and need to have again.

This issue of bankruptcy is shared not only with the full Committee, but certainly the Subcommittee on Federal Courts, which has jurisdiction over the Bankruptcy Code.

I'm going to recognize Senator Sheldon Whitehouse, Chair of that Subcommittee, for an opening statement.

**STATEMENT OF HON. SHELDON WHITEHOUSE,  
A U.S. SENATOR FROM THE STATE OF RHODE ISLAND**

Senator WHITEHOUSE. Thank you, Chair Durbin and Ranking Member Graham, for holding this hearing on this important topic. Last February, Senator Kennedy and I held a hearing, with the Chairman's support, in my Federal Courts Subcommittee to highlight a way that corporations have been abusing the bankruptcy system.

That was the then-emerging maneuver known as the Texas Two-Step. This ploy allows large corporations on solid financial footing, like Johnson & Johnson and Georgia-Pacific, well-known names, to

shirk responsibility for damage their products have caused, and delay paying due compensation for Americans they have hurt.

During that hearing, I outlined four main reasons the Texas Two-Step is a problem.

First, it violates the fundamental bankruptcy principle that a company must open up all of its assets and liabilities to creditors in exchange for being forgiven its debts and allowed to start anew.

Second, it denies individuals their day in court, and denies victims a jury of their peers.

Third, it encourages forum shopping by corporations to take advantage of more favorable locations.

Fourth, the Texas Two-Step enmires victims in protracted bankruptcy proceedings, robbing them of precious time.

Proponents of the Texas Two-Step argue that this maneuver is better for victims than resolving claims through the tort system because it supposedly delivers compensation faster and more equitably than litigation.

But look at the facts. The earliest Texas Two-Step bankruptcy, which started in 2017 with Georgia-Pacific, is still unsolved—unresolved after 6 years.

As for equity and fairness, take the fact that when Johnson & Johnson attempted to use the Texas Two-Step to resolve tens of thousands of claims against it for cancer caused by its talc products, the company's initial proposal of a \$2 billion settlement fund and its subsequent \$8.9 billion settlement offer were both dismissed by courts after they determined that there was no justification for Johnson & Johnson's subsidiary to declare bankruptcy in the first place, given Johnson & Johnson's financial strength.

Put all this together, and it sure looks like a dirty trick where a company flushed with cash tries to put its assets out of reach, and then bogs down tort claimants in bankruptcy proceedings to drag out for years with only a thin funding agreement as a promise to pay out compensation.

In that hearing last February, we heard from Kimberly Naranjo, whose testimony just appeared in the Chairman's video. She was diagnosed with terminal mesothelioma after using Johnson & Johnson baby powder. She sued Johnson & Johnson, and her claim was halted along with 38,000 others once Johnson & Johnson undertook the Texas Two-Step and put its talc liabilities into bankruptcy proceedings.

During Kimberly's brave and moving testimony, she told us how when she learned that she could file a lawsuit and have it decided by a jury, she saw a path forward for her family. She believed that justice would be done, and that her loved ones would be taken care of even after she was gone. She was filled with hope. That hope was taken from her when Johnson & Johnson used the Texas Two-Step to avoid giving Ms. Naranjo, and others, their day in court.

In her concluding remarks that day, she spoke powerfully about how time is something we too often take for granted. She was scared for her family and the prospect that after she passed nothing would come to resolution for years. Ms. Naranjo died in January of this year.

People are dying while corporations try out this bankruptcy trick to see if they can make it stick. I continue to hope that we can

work in a bipartisan fashion to address this abuse of our bankruptcy process, and to make sure that injured victims get the day in court that our Constitution entitles them to. Thank you, Chairman.

Chair DURBIN. Thank you, Senator Whitehouse. Senator Kennedy is Ranking Member of the Subcommittee. Do you wish to make a statement?

Senator KENNEDY. [Voice is off microphone.]

Chair DURBIN. Thank you very much.

Today, we welcome five witnesses. I'll introduce the Majority witnesses, then turn to Ranking Member Graham to introduce the Minority witnesses.

Our first witness is Erik Haas, worldwide vice president of litigation at Johnson & Johnson, a position he's held since 2020. Previously, a partner at Patterson Belknap Webb & Tyler.

We're also joined by Professor Melissa Jacoby, the Graham Kenan Professor of Law in the University of North Carolina at Chapel Hill School of Law. Professor Jacoby has written extensively on bankruptcy and is an expert on the issue.

Our final witness is Lori Knapp. Ms. Knapp's father, Ed Chapman, passed away from mesothelioma, a result of asbestos poisoning. Ed was prevented from pursuing his claim against Georgia-Pacific due to the company's use of this same Texas Two-Step maneuver.

Ms. Knapp is here today to help us understand how this maneuver has a direct, real-life impact on American families. Ranking Member GRAHAM, would you like to introduce your witnesses?

Senator GRAHAM. Yes, Mr. Chairman.

Mr. Stephen Hessler is a partner at Sidley Austin in New York City, leads the firm's global restructuring group. He has more than two decades of experience representing debtors, creditors, and investors in large and complex Chapter 11 cases, restructuring, acquisitions, and related litigation. He received his B.A. from the University of Michigan, has a J.D. from the University of Michigan Law School.

Mr. Samir Parikh—that pretty close?

Professor PARIKH. Yes.

Senator GRAHAM. Good. Is the Robert E. Jones Professor of Advocacy and Ethics at Lewis & Clark Law School in Portland, Oregon. His research and writing focuses on a variety of business law and bankruptcy issues, including mass tort restructuring, fraudulent transfer law, and forum shopping. He received his B.A. from the University of Miami and his J.D. from the University of Michigan Law School.

Chair DURBIN. Thank you, Senator Graham. I'd ask the witnesses to please stand for the administration of the oath. If you'll raise your right hand.

[Witnesses are sworn in.]

Let the record reflect that all the witnesses have answered in the affirmative. And Mr. Haas, you'll be the first to testify. You have 5 minutes, and then after all the panel has testified, Members will each have 5 minutes for questions. Please proceed.

**STATEMENT OF ERIK HAAS, WORLDWIDE VICE PRESIDENT,  
LITIGATION, JOHNSON & JOHNSON, ARMONK, NEW YORK**

Mr. HAAS. Thank you, sir. Chairman Durbin, Ranking Member Graham, and the Members of the Committee, thank you for the opportunity to participate in today's hearing.

Mr. Chairman, you asked that we speak today to LTL's recent bankruptcy filings, which were brought to effectuate an equitable and efficient resolution of mass tort litigation that had forced J&J's stand-alone consumer product subsidiary into a loss position in 2020.

LTL's proposed bankruptcy resolution contemplated the payment of an unprecedented \$8.9 billion to resolve all claims alleging that the subsidiary's talc powder products caused cancer. That unprecedented offer, understandably, was supported by the court-appointed mediators and counsel representing the vast majority of the talc claimants, who described it as a significant victory that would provide expeditious, substantial, and fair compensation.

The offer also was supported by Johnson & Johnson, which agreed to provide financial backing for LTL's proposed bankruptcy resolution that, as the Third Circuit recognized, the company had no obligation to provide.

Thus, far from evading accountability as suggested by the title of this hearing, the proposed resolution would've afforded all talc claimants compensation in a timely manner, a result that is not possible in the tort system for at least three important reasons.

First, J&J and its subsidiary have won the overwhelming majority of cases tried in court. The company has prevailed because the talc claims that are contrived by the plaintiff bars are utterly meritless.

Those claims have been refuted by decades of research by medical experts around the world that support the safety of consumer talc, as well as the findings by the FDA, and other health agencies, that cosmetic talc does not cause cancer. Because the science is clear, most claimants have received and will receive absolutely nothing from litigating in the torts system.

And second, regardless of the merits, trying the tens of thousands of existing cases would take thousands of years. This means that most claimants will never ever have their day in court.

Third, only bankruptcy provides the tools that allow both current and future claimants the ability to participate in and receive compensation from the resolution progress—process.

Congress legislated those tools into Section 524(g) of the Code, which provides that asbestos mass torts like ours are properly addressed by a bankruptcy trust covering current and future claims.

So, with the support of counsel representing the vast majority of claimants, there was a strong likelihood of securing the requisite vote in favor of LTL's bankruptcy plan.

Indeed, our goal going into bankruptcy was simply to let the claimants to decide for themselves, with a vote on the proposed plan, whether it was in their own best interest.

Unfortunately, the claimants never had that opportunity be to be heard because the case was transferred to the Third Circuit, which adopted a novel standard that required the bankruptcy court to dismiss.

The Third Circuit adopted that novel standard at the urging of mass tort lawyers representing a small minority of claimants, mostly mesothelioma lawyers, whose business model is predicated on the possibility of winning one-off jackpot verdicts from which they will take up to a 40 percent fee. This mass tort litigation business model is not in the best interest of claimants, should not be dictating bankruptcy policy, and is a scourge facing U.S. companies today.

Although compelled to dismiss the case, the bankruptcy court also stated that LTL had made remarkable progress toward a fair, efficient, and expeditious settlement. And the court strongly encouraged LTL to continue to pursue a global resolution through bankruptcy. We intend to follow the bankruptcy court's directive to achieve a resolution that is in the best interest of and is supported by the claimants.

In the end, the claimant's vote should be what matters. We urge this Committee to support legislation to clarify that the proposed resolution, like ours, should get to a vote. Let the people vote.

[The prepared statement of Mr. Haas appears as a submission for the record.]

Chair DURBIN. Thank you, Mr. Haas. Professor Jacoby.

**STATEMENT OF MELISSA B. JACOBY, GRAHAM KENAN PROFESSOR OF LAW, UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, CHAPEL HILL, NORTH CAROLINA**

Professor JACOBY. [Voice is off microphone.]

Chair DURBIN. Make sure your microphone is turned on. There we go.

Professor JACOBY. Thank you.

When I first learned about bankruptcy, and its impact on laws and procedures all over the country, and indeed the world, it felt like a new set of power tools. And like the power tools one might have in a workshop, there's a temptation to use them broadly and, say, try to use them to fix problems, never mind what the instruction manual is telling us about the warnings of doing so.

So I'd like to draw a broader frame around what's happening in Chapter 11. The understandable role that some of these extraordinary interventions that bankruptcy offers plays, and why they are a difficult fit for, really, all mass tort cases, but need special care in certain situations so that they're not misused.

So these power tools—and we'll talk about the automatic stay, to use the jargon. We can talk about the discharge. We can talk about the majority getting to bind dissenters and change their rights forever.

These rules work fairly smoothly in the vast majority of big Chapter 11 commercial cases. We're talking about bond holders, and lenders, and other investors. Debts as we typically understand them.

That's why it makes sense to impose an immediate injunction, which is a very big deal for a Federal court to do. But Congress says it's automatic in the bankruptcy situation, typically to stop debt collection. It's a different story to talk about stopping jury trials to determine liability about wrongdoing in the first place.

And then we get to the permanent alteration of legal obligations.

Big companies already get broader, permanent legal relief than financially distressed consumers do, and it is a very significant fact that you don't need unanimous consent. You can't bind dissenters with the majority—that overrides a lot of other law.

And it's one thing to do that in cases involving robust debates over interest rates and other terms. It's completely different in a series of cases that are about managing lawsuits, creating an alternative justice system not to negotiate with banks and hedge funds and the like.

So they're overriding not just normal debt collection, they're overriding how ordinary law determines liability for wrongdoing in the first place. So guardrails are really essential here.

Now, there are a lot of cases we could talk about, but Mr. Haas is here in talking about *J&J*. So I'll turn there. I think that Mr. Haas and I agree on some meaningful things. We agree that bankruptcy has very unique features. Those power tools cannot be found elsewhere.

And it's understandable why even profitable corporations would want to use them and argue that they're efficient. I think we aspire for fair outcomes for all. I agree that all people need ethical representation and deserve it from their lawyers, whether they are an injured person or a big corporation.

And I think that the bankruptcy system should be used for its intended purpose as, I think, Mr. Haas was suggesting. But we have very different conceptions of what that means.

So Congress did not create bankruptcy to be the complaint department about plaintiffs' lawyers in the civil justice system, or a forum to hash out the science when it hasn't gone—when the other courts have not always seen *J&J*'s position on this. And we can talk about the MDL, and the FDA, and other things, if people would like.

Congress did not intend lawsuits to be stripped into a separate subsidiary. I think this history of 524(g) for asbestos really—imagine the entire operating company being in the bankruptcy. That was the design of *Johns Manville*. That's how it was created.

And the Third Circuit decision is fully in the mainstream of the bankruptcy system and fully consistent, I think, with what Congress had in mind.

The Fourth Circuit standard by contract is not particularly well respected.

Now, I understand that *J&J* has the right to suggest it knows best, what for all the claimants.

In my remaining time, I just want to highlight that *J&J* has an incentive to find whatever number of claimants, however vetted or not vetted they are, and consider them the majority. It's very hard to get a handle on the entire universe.

At the very least, mesothelioma and ovarian cancer claimants deserve a different voice. They are in different situations, and within them have different experiences. So, thank you.

[The prepared statement of Professor Jacoby appears as a submission for the record.]

Chair DURBIN. Thank you, Professor Jacoby. Mr. Hessler.

**STATEMENT OF STEPHEN E. HESSLER, PARTNER,  
SIDLEY AUSTIN LLP, NEW YORK, NEW YORK**

Mr. HESSLER. Chairman Durbin, Ranking Member Graham, Members of the Committee, thank you for inviting me to testify. The title of today's hearing indicates meaningful criticism, or, at least, a skepticism of certain facets of present bankruptcy practice. I believe much of that narrative, even though well intended, rests on an incomplete understanding of the text design and the application of the Bankruptcy Code.

That said, I do also believe the Committee's emphasis on accountability today is entirely appropriate.

As with any detailed body of law, Chapter 11, of course, always may benefit from continual reform. I will not repeat my written testimony in these opening remarks, though I do want to summarize briefly two key themes. How both Congress in drafting Chapter 11 and bankruptcy court judges in applying Chapter 11, how they do enforce accountability by corporate debtors.

First, the Bankruptcy Code and Bankruptcy Rules are replete with provisions through which Congress thoroughly requires Chapter 11 debtors to justify their decisions and actions—all subject to bankruptcy court approval, and all subject to a vast array of powerful rights granted to stakeholders to protect and pursue their claims against corporate debtors. My testimony has set forth in detail more than a dozen Code mechanisms that embody the following principles. Upon filing for Chapter 11 protection, a debtor is immediately, repeatedly, and consistently subject to disclosure requirements that vastly exceed those imposed upon public companies not in bankruptcy.

I believe Congress plainly intended these transparency mechanisms to advance the due process rights of a debtor and every constituency impacted by that debtor's bankruptcy, with severe consequences imposed upon the debtor if it fails to satisfy those obligations.

Stated generally, filing for Chapter 11 protection means a corporation affirmatively places itself under Federal court supervision. The bankruptcy court must authorize not only a debtor's entry into and exit from Chapter 11, but it must authorize every action of substantive import to be taken by the company at all times subject to notice, and an opportunity to object by all parties in interest before the court.

Put simply, if a corporation is seeking to evade accountability by manipulating Chapter 11, it must overcome stakeholder opposition and bankruptcy court oversight every step of the way. And if that effort is flailing, the debtor can't simply quit Chapter 11 and walk away from bankruptcy court supervision unless the judge expressly grants permission to leave.

Next, Congress in the Bankruptcy Code also provided stakeholders with multiple procedural and substantive mechanisms to combat potential improper debtor conduct. These provisions include expansive standing and discovery rights, the ability to seek to lift the automatic stay of litigation against the debtor, the ability to seek the appointment of a trustee or examiner to run, or investigate the debtor. Taken together, these provisions are designed to ensure that a debtor may not misuse Chapter 11 to shield, hire,

hide, or transfer away assets from stakeholders that have a legal right to that value.

Finally, from my perspective as a practitioner, what is largely missing from this debate is the centrality of bankruptcy court judges in enforcing accountability. To the extent that critical inquiry is directed at the important question of whether the Bankruptcy Code is susceptible to abuse, the massive disclosure and compliance obligations that Congress included in the Bankruptcy Code make it difficult for a corporate debtor to attempt to hide, much less successfully advance, an impermissible purpose.

Even assuming otherwise, the adversarial tools that Congress provided to stakeholders in Chapter 11 serve as a deterrent and, if needed, a remedy from manipulation. Proving that there is widespread evasion of accountability, therefore, would logically imply that there's a breakdown in the application of Chapter 11, which brings into focus the indispensable role of bankruptcy court judges. My testimony sought to address a few arguments that are raised, but given my time, I'll just touch briefly on two.

One implied criticism is that because bankruptcy court judges are not appointed under Title III, and bankruptcy courts do not have jury trials, that it's suboptimal for bankruptcy court judges to resolve issues involving mass tort allegations, which might otherwise be entitled to a State or Federal court jury trial.

As a threshold but critical clarification, Chapter 11 addresses the resolution of claims against a debtor. It is not the substantive law that governs liability for those alleged claims. Beyond providing for bankruptcy court rulings to be appealed to higher courts, Congress also specified that any and—party in interest may ask the district court to withdraw the reference of a Chapter 11 case, in whole or in part, from the bankruptcy court so that one or more issues can be heard by an Article III judge as appropriate. May I make one more quick point?

Chair DURBIN. [Gesture is made for approval.]

Mr. HESSLER. Thank you for the extra time. The last point I would just want to make is just as a practical matter. Recent rulings in certain high-profile mass tort Chapter 11 cases, I think, speak for themselves. And that's perhaps the most straightforward and compelling response to a contention that bankruptcy court judges are somehow failing to enforce the accountability provisions that Congress enshrined in the Bankruptcy Code. Thank you. I appreciate the opportunity to answer questions.

[The prepared statement of Mr. Hessler appears as a submission for the record.]

Chair DURBIN. Thanks, Mr. Hessler. Professor Parikh.

**STATEMENT OF SAMIR D. PARIKH, ROBERT E. JONES PROFESSOR OF ADVOCACY AND ETHICS, LEWIS & CLARK LAW SCHOOL, PORTLAND, OREGON**

Professor PARIKH. I would like to thank the Committee for inviting me to testify today. It is a great honor to be here.

My name is Samir Parikh. I'm the Robert E. Jones Professor of Advocacy and Ethics at Lewis & Clark Law School.

A recent discussion about mass tort bankruptcies have certainly provided a lot of fire, but not a lot of light. So I'd like to step back

for a second and ask a very simple question. What are our process objectives here? What are policymakers trying to accomplish by resolving mass tort cases?

I argue that the clear objective should be to provide meritorious claimants the recovery they deserve on the shortest timeline. If that is the guiding light, then you can see why bankruptcy may be the optimal venue in many mass tort cases.

Well, why did we land here? Well, we can take a step back and just look at it from the perspective of, well, what's on the table? What are the resolution options that are available? Mass tort cases oftentimes cannot be resolved through class aggregation under Rule 23 of the Federal Rules of Civil Procedure.

Supreme Court jurisprudence at the turn of the century made it very clear if a case has future claimants or too many individualized issues regarding damages and causation, then that case cannot be resolved through Rule 23. So that's been taken off the table.

So what's stepped into the void? Multi-district litigation stepped into that void. MDL has had a lot of successes, but it has a mixed reputation. So MDL cannot offer a global settlement. MDL cannot marshal claims in State court or claims held by future claimants.

Okay. So what does MDL offer? It offers an arena to have a settlement negotiation. Okay. But as we all know, just because parties are talking doesn't mean that settlement can be reached. That's why a lot of cases in MDL drag on for years—5 years, 7 years, 10 years. Keep in mind, this is a captive process. Claimants cannot opt out. They can't just say, I don't want to be here anymore. I'd like to have my day in court. That is not an option.

MDL also lacks transparency, and that's why a lot of claimants have voiced their displeasure with it. So this is the reason why a lot of corporate defendants, a lot of stakeholders have started to opting into bankruptcy.

So what does bankruptcy offer? Well, bankruptcy offers global settlement. You can marshal claims in Federal court and in State court, you could marshal claims held by current claimants and future claimants. Bankruptcy also offers the settlement model where parties can have that negotiation that they could have in an MDL.

If they can reach resolution, that's great. That can be confirmed.

But if they can't, the bankruptcy court judge is authorized to intervene. At that point, the judge can estimate the aggregate value of all the claims in a particular case. The corporate debtor can take that information and make a settlement offer to victims.

If claimants decide that this is a fair offer, they can vote accordingly. If a super majority feel that way, that settlement can go forward and a plan can be confirmed. That's a very powerful option.

Also, bankruptcy offers a lot of transparency that shines a very bright light on these proceedings, which is very valuable.

It's hard to say bankruptcy's perfect. Bankruptcy's not perfect. There's lots of things that could be fixed. I just have three things I'd like to note very quickly.

First and foremost is Section 524(g). That only applies to cases that involve asbestos claims. I think 524(g) should be amended to expand and include all mass tort cases. That way you get uniformity in process and outcomes.

Also, when we think about future claimants, they have a representative appointed in bankruptcy cases. This is called a future claimant's representative. That person's appointed by the bankruptcy court. The process to appoint this individual is fundamentally broken and needs to be revisited.

The final piece is nonconsensual non-debtor releases. These releases play a vital role in finding resolution in many mass tort cases. Without them, resolution would not be possible.

Under this arrangement, a third-party makes a significant contribution to a victim settlement trust. In exchange, civil claims against that party related to the case are channeled to that trust.

Once again, it provides many cases of meaningful recovery and enhanced recovery for claimants in these cases. So it's very valuable.

I believe Section 5(24)—or excuse me, I believe the Bankruptcy Code actually supports these types of releases, but the language could be amended to make it very clear that this form of relief is available.

In concluding, I would just like to note, going back to the—where I started, you know, what's the objective here? I feel like that doesn't get discussed a lot. The objective is, once again, trying to find meritorious claimants the recovery they deserve on the shortest timeline.

If that is the guiding light, I do believe bankruptcy is oftentimes the optimal venue in many mass tort cases. I hope we have time to talk about how to improve that platform instead of merely talking about how to tear that platform down. I thank the Committee for this time, and I look forward to your questions.

[The prepared statement of Professor Parikh appears as a submission for the record.]

Chair DURBIN. Thank you, Professor. Ms. Knapp.

**STATEMENT OF LORI KNAPP, GREENEVILLE, TENNESSEE**

Ms. KNAPP. Thank you for inviting me to be here. My dad, Ed Chapman, died from asbestos cancer caused by asbestos found in drywall products that he worked with in the 1970s.

He and a small group of other workers, about 10 men in total, worked on many projects together using the same products and tools. At least three of those men died from mesothelioma—a cancer so rare that, generally, only 1 in 100,000 people get it.

These men have been wiped out by asbestos. The asbestos products that killed my dad were manufactured by and sold by Georgia-Pacific and other companies. Georgia-Pacific knew that their product was incredibly dangerous, but continued to sell them.

In 1971, Georgia-Pacific's secret internal documents acknowledged workers would get sick from asbestos and that they would sue Georgia-Pacific. But Georgia-Pacific didn't care.

Instead, they—in the same documents, they callously announced a plan to blame these men for their own cancer.

My dad taught me that we are all accountable for our own actions. When my dad got sick, he hired lawyers to hold these companies accountable for sickening him, and for killing his friends. Dad was able to sue some of the companies, like Union Carbide, in the Florida court system.

Other companies, like United States Gypsum, were actually bankrupted by their asbestos liabilities years before my dad had claims. So he still claimed against the trust and tried to get some of the money that was left.

Georgia-Pacific though is not bankrupt. But they got a free pass. They filed the Texas Two-Step forcing the victims to compromise their right to a jury trial, and to accept a reduced settlement in the bankruptcy court. My dad chose to fight. He refused to go along with the blackmail, and he died without being able to see justice.

Georgia-Pacific filed its bankruptcy before my dad got sick. The stay that was put into place protecting Georgia-Pacific has remained in place for over 6 years.

Meanwhile, it has been business as usual for Georgia-Pacific, which has paid \$5 billion in profits to Koch Industries while the victims have received zero. Nothing.

When my dad's case went to trial in March of 2020, all the defendants that had not settled were in the courtroom. My dad was too sick to be able to attend, and he was isolated. But the lawyers and I were in court. This was literally right before COVID shut down the courts. But my dad had very little energy and couldn't really be exposed to a lot of people. So he stayed in the hotel. All the other companies negotiated settlements. This was the best he could hope for because there was no magic wand to make the cancer go away.

Georgia-Pacific has gotten away with letting people die. My dad died an excruciating, horrible death that he did not deserve. In the meantime, Georgia-Pacific's bankruptcy, he never got a chance to see any kind of justice from them.

To make matters worse, the delay will likely mean that Georgia-Pacific and Koch Industries escape any accountability for what they did to my father, which is a windfall for Charles Koch who is already the 20th richest person in the world.

Under Florida law, if an individual is harmed but dies before their trial, their claim for pain and suffering dies with them. Even if Georgia-Pacific's fake bankruptcy is thrown out, Georgia-Pacific will argue that my dad's estate has no claim.

And make no mistake, my dad was brutalized—had an agonizing suffering and a humiliation from this asbestos cancer. My husband and I cared for my dad during the last months of his life. I can personally attest to the horrible experience that my dad suffered.

It is wrong that Georgia-Pacific continues to try to dodge accountability. When Koch Industries bought Georgia-Pacific, it knew Georgia-Pacific's asbestos products had sickened and killed thousands of Americans. That didn't stop Koch Industries because Georgia-Pacific is a massively profitable company.

Bankruptcy is for people and companies that can't pay their bills. These Texas Two-Step fake bankruptcies have turned the bankruptcy courts into a sham where profitable companies go to avoid responsibilities they're fully capable of paying.

America was founded on the principle that all men are created equal. But the reality of the Texas Two-Step bankruptcy is that they allow huge, profitable companies to delay or avoid entirely taking responsibility for their actions.

My dad was my hero. He was a devoted husband. While my dad was struggling with his asbestos cancer, his wife, my stepmother, Ruth, developed pancreatic cancer. It was devastating to my dad.

He was struggling for his own life, and now he was trying to take care of his wife that was dying. My dad never quit taking care of himself, and he never quit trying to take care of Ruth. But slowly the cancer consumed him. Seeing them through to the end was important to my dad.

The fact that Georgia-Pacific, with all of its profits, was effectively immune from responsibility, frustrated and confused my dad. How could a company that was massively profitable, whose products you see in nearly every bathroom, every office, every building, every restaurant, every school, file for bankruptcy? And how could the rights be put on indefinite hold due, while Georgia-Pacific sends billions of dollars of profits to Koch Industries?

It pains me to know that this abuse of this bankruptcy system has been now copied by other massively profitable companies, like Johnson & Johnson. This is wrong. Asbestos products have devastated American workers and their families.

When profitable companies file for bankruptcy, for the express purpose of avoiding juries by stranding sick Americans in the bankruptcy system, while the companies continue business as usual, that's abuse and it needs to stop.

My dad was a fighter. He saw things through to the end. My dad was not my biological father. He married my mother when I was an infant, but he's the only dad I've ever known. And I couldn't have asked for a better dad. Right before he died, my dad drove himself to the Okeechobee County Courthouse, and he legally adopted me.

While that never mattered to me, he was my dad no matter what. It did matter to him, and he was going to finish the job of being my father. And he made sure he finished the job. Dad taught me to speak up against injustice and abuse, and to hold myself and others accountable for their actions.

And Dad taught me to see things through to the end. I am here to honor him by continuing his fight, by seeing it through to the end, and making sure that Georgia-Pacific doesn't get away with this abuse. I ask you to do the same. Thank you.

[The prepared statement of Ms. Knapp appears as a submission for the record.]

Chair DURBIN. Thank you, Ms. Knapp, for telling us about your dad, and reminding us, at the heart of this issue that we are debating is not a Bankruptcy Code, but a real human being who lost their lives because of exposure to asbestos. And simply, were trying to find their day in court. Thank you very much for that.

We now will go through the rounds of questioning of 5 minutes by each Senator.

Mr. Haas, I understood bankruptcy in a basic form to say, you're a company and you have more debts than you have assets. And you go into court and say, I want to be discharged from this debt, I'm prepared to pay whatever I can. I want a fresh start.

So I take a look at Johnson & Johnson and say, does that fit in this situation? That they would go to bankruptcy court?

[Poster is displayed.]

In October, 2021, when LTL first filed bankruptcy, Johnson & Johnson had a market capitalization of approximately \$420 billion. 2022, year following LTL's bankruptcy filing, Johnson & Johnson generated \$94.9 billion in sales and \$63.9 billion in profit. September, 2022, Johnson & Johnson announced a \$5 billion stock buyback. Johnson & Johnson paid a dividend in every quarter since LTL declared bankruptcy, returning even more money to shareholders.

You've dismissed the claims against you for possible asbestos in your product, calling them "meritless junk science," "one-off," and beyond that. And yet, you put a valuation through LTL of \$8.9 billion in these claims.

How can you have it both ways? How can you be a profitable corporation worth that much money and say these meritless claims were worth \$8.9 billion and you shouldn't be responsible for them?

Mr. HAAS. Chairman Durbin, the—

Chair DURBIN. Turn the microphone on, please. Microphone. Thank you.

Mr. HAAS. The entity that sold and manufactured the talc was Johnson & Johnson's Consumer Inc. and it was in a loss position in 2020, the year before the LTL entity went into bankruptcy.

So JJCI could have gone itself into bankruptcy. This is not a story about J&J, it's a story about JJCI, Johnson & Johnson's Consumer Inc.

In the transaction that we undertook in order to put—create LTL into place, LTL in bankruptcy, well we actually provided the claimants—the talc claimants with more recourse, more assets than they would've had had we not done the transaction if JJCI as the enterprise had gone into bankruptcy alone.

So what we were able to accomplish is two things, which were, as the Third Circuit recognized, the objective of the Bankruptcy Code. One is to optimize the recourse available to claimants, and the second is to make sure that viable enterprises can go forward to the extent possible—

Chair DURBIN. Mr. Haas, there's something missing here. Why would you create LTL, which made no products whatsoever, but simply was there as the repository of some funds for any liability, if, in fact, the underlying company that made this product in question—the company was worth so few assets at the time? It doesn't follow.

Let me ask you another question. I think I read somewhere that your company, Johnson & Johnson, has changed the formulation of their baby powder over the years. Is that true?

Mr. HAAS. Johnson & Johnson Consumer Inc., the subsidiary, changed the formulation to take talc out and use corn starch instead. And they did that in 2020 because the demand for talc had gone down because of the advertising by—

Chair DURBIN. And it had nothing do with potential liability in a tort suit?

Mr. HAAS. Excuse me?

Chair DURBIN. It had nothing to do with your potential liability in a tort suit?

Mr. HAAS. No. To the contrary. As we stated at the time, it had to do with the demand that had decreased due to false and mis-

leading advertising by the plaintiffs' bar. And that is at core what is the issue here. These claims are meritless. But nonetheless, even though they were——

Chair DURBIN. Meritless, but worth \$8.9 billion?

Mr. HAAS. The \$8.9 billion was an amount that we did not come up with. It is a number that the claimants came up with. The vast—counsel for the vast majority of claimants approached us with an offer. And they approached us and they said, if you are willing to pay \$8.9 billion, we will take that. We claimants will take it. And that's why we went back into bankruptcy because we did so with written agreements from counsel for the vast majority of claimants——

Chair DURBIN. Vast majority of claimants, which, of course, means that others who wanted their day in court for establishing their own recovery wouldn't have that chance.

Mr. HAAS. In bankruptcy, in order for a plan to be confirmed, you need—for this particular type of plan, you need a super majority of plaintiffs. Not just the vast majority, but a super majority. And that plan needs to be confirmed by the bankruptcy court.

So that plan would've been approved only into the extent that the super majority of claimants and the court determined it was the right thing to do. Our intent going into bankruptcy was to simply let the claimants and the court decide whether or not this was the appropriate resolution. Because, again, this was a plan that came to us—that was proposed to us as a resolution that was in the best interest of claimants.

And the reason for that is twofold. One, we were winning the majority of cases in the tort system. So most claimants get nothing, absolutely nothing from litigating tort system. Second——

Chair DURBIN. You make two arguments here. Meritless. Claimants get nothing. They were recovering nothing. And yet somebody comes up with a figure of \$8.9 billion and you jump at it?

Mr. HAAS. Right. And that is——

Chair DURBIN. You can't have it both ways. You just can't argue both ways. You went into bankruptcy court to limit the liability of Johnson & Johnson CI or Johnson & Johnson. And luckily, at least at one or two different levels, the courts have said, this is a sham, this is a maneuver in the court, which is not anticipated by the Bankruptcy Code. Senator Graham.

Senator GRAHAM. Finish your thought, Mr. Haas.

Mr. HAAS. Thank you. The bankruptcy court in dismissing the second time, actually encouraged, and that's the words of the court, quote, "strongly encouraged," end quote, urged us to continue the process—to go forward with the bankruptcy negotiations, and to go back into bankruptcy to get it done. And why? Because the claimants supported the plan.

So even though the bankruptcy court recognized that under the Third Circuit's novel new standard, which is different than every other circuit court in the country, the bankruptcy court said, nonetheless, you should go forward and do it because it's in the best interest of all claimants.

And in the end, that is the key. Because if you're in the tort system, most of the claimants would receive zero, and it would take 3,000 years to have adjudicated the cases that had been filed at the

time of the bankruptcy, let alone the additional thousands that it had been added thereafter. So the only way to get an equitable, efficient resolution was through this process.

And you asked, why would we spend \$8.9 billion? Litigation expenses. There were hundreds and millions of dollars being spent litigating meritless claims year after year, after year, after year. And yes, there was a desire to put a stop to that. And the way to put a stop to that, that was in the best interest of all parties—to claimants, was the proposed resolution they made.

Senator GRAHAM. Thank you. Mr. Hessler, mass tort litigation, are you familiar with that at all?

Mr. HESSLER. [Voice is off microphone.]

Senator GRAHAM. Okay. You need to put your mic on.

Mr. HESSLER. Yes.

Senator GRAHAM. So if you have a situation where a lot of people have been allegedly hurt, mass tort litigation allows for the consolidation of the claims. Right?

Mr. HESSLER. Yes, Senator.

Senator GRAHAM. Okay. And that's to get things moving quicker. You form a class, people enter into the class, and you can litigate for the entire class. The goal of that is to do what?

Mr. HESSLER. Get to a consensual resolution as quickly—

Senator GRAHAM. Okay.

Mr. HESSLER [continuing]. As possible.

Senator GRAHAM. Bankruptcy, in terms of settling outstanding litigation, has its own system. Is that correct?

Mr. HESSLER. It does have its own set of Federal bankruptcy rules. They're notionally consistent with the Federal Rules of Civil Procedure, but they actually move fast.

Senator GRAHAM. But the goal of this is to have claimants come in, resolve the matter, bring closure in a more expedited fashion—

Mr. HESSLER. Yes, Senator.

Senator GRAHAM [continuing]. Than general litigation. Professor Parikh, in the *Johnson & Johnson* case, did the system work, in your view?

Professor PARIKH. Did the system work in *Johnson & Johnson*? Well, the case was dismissed. We didn't necessarily get a chance to see that settlement be realized. So that's why I mentioned earlier this idea of going back to this objective, you know, getting meritorious claim into the recovery they deserve on the shortest timeline. That thinking was that would've been possible if this settlement would've been allowed to move forward.

Senator GRAHAM. Okay. So in terms of how to settle these claims, do you think bankruptcy—what changes would you recommend we make to the bankruptcy system?

Professor PARIKH. I outlined some of those in my oral statement. I think making one section of the Code applicable to all mass tort cases, that would be very valuable—the idea of improving the integrity of the system.

When we think about who's representing future claimants, of course, these victims are not in the room. Someone has to represent their interests. The process of appointing that person has to be addressed to address, you know, due process concerns.

And then also this idea of having the tools as Professor Jacoby mentioned. Right? So in bankruptcy, we have these power tools. Sometimes they are essential to reaching resolution, one of which is the third-party releases. These releases under very limited circumstances can be extremely—

Senator GRAHAM. Well, you're trying to encourage people to put money into the system, but what they get in return is finality. Right?

Professor PARIKH. Exactly.

Senator GRAHAM. Yes.

Professor PARIKH. Exactly. And the idea is that that could improve—

Senator GRAHAM. Yes.

Professor PARIKH [continuing]. Victim recovery.

Senator GRAHAM. I mean, you know, trying to get claimants a pot of money people can apply for in real time. Well, fascinating discussion.

One thing I would say to the Committee is that there are different ways to resolve litigation—mass tort litigation, major claims against big companies. In social media, there is no model like this. So we may not agree on how to resolve this issue, but if you're harmed by social media, you have nothing. Zero. Zip.

That's where I hope the Committee can come together and create rights of actions to the millions of Americans who are being abused without any opportunity to have their day in any court or any system.

Chair DURBIN. Thank you, Senator. Senator Whitehouse.

Senator WHITEHOUSE. Thank you, Chairman.

Welcome, Professor Jacoby. I see that the lawyer/witnesses who support the corporate Two-Step have maneuvered to outnumber you, 3-to-1, on this panel. So stand your ground. It's good to have you here.

Ms. Knapp offered a pretty compelling point, which is that by virtue of stalling her dad's recovery until after he had died, the system—the corporate—potentially liable party here was able to extinguish his pain and suffering claims. Make them vanish.

Whereas, if they'd had to address them while he was alive, they would be a part of his recovery. Is that a legitimate use of delay by corporate defendants, and is it a real problem? Is she stating something that is a significant problem we should pay attention to?

Professor JACOBY. Senator Whitehouse, I think your question goes to the very different environment of mass tort cases, especially proceeded by divisive mergers where there's not an operating company in bankruptcy.

And the great majority of commercial, big corporate Chapter 11s, that I believe that Mr. Hessler spends his time on, where it's less likely that one would fall into this circumstance, there should be many tools to keep Chapter 11s moving.

If anything, some Chapter 11s may go too quickly, but that is not what's happening here in these divisive merger cases. They are indeed stalled and—

Senator WHITEHOUSE. And the consequences are—

Professor JACOBY [continuing]. There are real consequences.

Senator WHITEHOUSE. That's what I was trying to get you to—

Professor JACOBY. I'm sorry, Senator Whitehouse. Life and death. And I think that is very important. It's bankruptcy. And the experts in bankruptcy talk a lot about money, and, of course, they do. And in a lot of situations, that's all that's at stake.

These kind of claims involve accountability, making sure something like this doesn't happen again, honoring and acknowledging misconduct, and letting people tell their stories. And bankruptcy is not designed for all of those things. Maybe it could be. So I am very worried about the concerns that you raised, Senator Whitehouse.

Senator WHITEHOUSE. So let's talk a little bit more about money. Mr. Haas made the point that the Johnson & Johnson bankruptcy fund measured favorably against the assets of the subsidiary, JJCI.

It strikes me that Johnson & Johnson controls what assets are in JJCI. There are innumerable ways within a corporate structure of moving assets between subsidiaries.

Why should the argument that, we're doing better than our divided subsidiary would provide, be given any credence at all when that measure—when that bar can be driven right to the ground by the very people who are seeking to dodge their responsibilities?

Professor JACOBY. This question, again, goes to, I think, a division we see between the average commercial case and what's going on, especially, in the divisive merger cases, designed only for personal injury, wrongful death claims, and other mass tort context.

Typically, corporate form is honored in bankruptcy. That the entity that has filed, we look to that. There are tools—I think as Senator Graham mentioned—such as fraudulent transfer to consider various corporate transfers. We also do need to look at non-bankruptcy tort law—

Senator WHITEHOUSE. Quick interruption—

Professor JACOBY. Of course.

Senator WHITEHOUSE [continuing]. On fraudulent transfers. Are you aware of any fraudulent transfer challenge in a Texas Two-Step—type proceeding that has ever succeeded?

Professor JACOBY. It takes a long time to tee them up. I believe they're underway, but it may be years—

Senator WHITEHOUSE. Haven't succeeded yet.

Professor JACOBY [continuing]. Until they were resolved.

Senator WHITEHOUSE. Got it. Okay. And then, what is the risk of forum shopping here—where a big corporation that's doing business all over the country can pick the jurisdiction in which they love the bankruptcy judge the most, because he's the worst judge for plaintiffs and the best judge for the corporation?

Professor JACOBY. These cases involve two layers of forum shopping.

One is opting one's problems into the bankruptcy regime in the first place, rather than State court, rather than the MDL, other Federal courts, or fora.

Then we get to the question that bankruptcy's corporate venue choices are unlike any other Civil Procedure Rules I'm aware of in the Federal system.

The amount of latitude given to a big enterprise to choose its forum does not match how we typically do personal jurisdiction, how we typically do venue rules. And that does give a lot of latitude.

I think there are a lot of reasons that a particular court might be selected. But this is a continuing issue really in the full range of corporate bankruptcy cases, but also we can see in mass tort cases.

Senator WHITEHOUSE. Thank you.

Chair DURBIN. Thanks.

Senator WHITEHOUSE. My time's expired, and you're holding up—very well outnumbered.

Chair DURBIN. Thanks, Senator Whitehouse. Senator Grassley.

Senator GRASSLEY. Yes. Professor Parikh, why are large corporations like Johnson & Johnson turning to the bankruptcy system to resolve these tort cases? But that leads me to your opinion. Should our focus be on the bankruptcy system or, more appropriately, on a broken mass tort system?

Professor PARIKH. That's a great question, Senator Grassley. I do think probably there's enough problems going around where both deserve some attention. But I do think the reason why a lot of companies are opting into bankruptcy for the reasons I noted in my oral statement, which is that if you are seeking global settlement on an expedited timeline, bankruptcy offers that.

Also in terms of there's a fear that there are a lot of non-meritorious claims entering the system, MDL has not proven adept at addressing that phenomenon. And bankruptcy may not be adept at it either, but, at least, that it has represented an option at this point.

So that's—I think that's the reason why a lot of corporate debtors are opting into bankruptcy, hoping to have finality, hoping to have certainty, but also hoping to settle this quickly. And that can be very good for victims—the idea of getting a recovery on a short timeline.

Remember, these cases in MDL—if the bankruptcy didn't exist, these cases would be sent back to the MDL process. You don't get your day in court in MDL. You're a—you're captive of that system. We should be very clear about that. You do not get your day in court. There are bellwether trials, but that's it. So you're along for the ride as a claimant in that process as well. It has a lot of benefits for the right type of case, but most modern mass tort cases are not going to thrive and reach resolution in an MDL process.

Senator GRASSLEY. Okay. Mr. Haas, can you tell us what will happen if Johnson & Johnson's current pledge of \$8.9 billion runs out, and how will Johnson & Johnson ensure that talc claimants achieve a fair measure of justice into the necessary future as long as the talc claims arise?

Mr. HAAS. Currently, we are in the tort system. So we will be litigating in the tort system until such a point in time that we reach another arrangement with the claimants as recommended by the bankruptcy court. And in the tort system, sir, Johnson & Johnson prevails in the vast majority. The overwhelming majority of the cases, 76 percent of the cases that have been tried.

So, to the extent that we will be litigating in the tort system, that \$8.9 billion will fund litigation for decades and decades to come. In which case, we believe, based upon the track record to date, that we will prevail in most of those cases because these claims are meritless. But it will take decades.

The plaintiffs in the last bankruptcy hearing affirmatively represented and told the court that you can try no more than 20 cases a year. At that rate, it won't just be the 3,000 years to try the existing cases, but it would be 20,000 years to try the cases that they say now exist. So ultimately, at the end of the day, the \$8.9 billion is going to go to one place—lawyers who are litigating this case. A bankruptcy resolution would provide—and it is the only way to provide, in the short-term, an equitable resolution not only for the current claimants, but the future claimants. That is the only way that these claimants will receive their money.

Senator GRASSLEY. If your settlement is approved, what would be the minimum settlement for each individual plaintiff?

Mr. HAAS. That ultimately is decided by the plaintiff lawyers through what's called the TDP process which they set up—a tort distribution process. Effectively what it is, the number that is relevant from the company's perspective is the \$8.9 billion that they requested that we provide as a condition of making that resolution. So ultimately, that is in the hands of the plaintiff lawyers.

Senator GRASSLEY. Okay. Mr. Hessler, outside of the divisional merger context, how often do you encounter nonconsensual third-party releases in these tort cases?

Mr. HAAS. Outside of the bankrupt—oh, I'm sorry.

Mr. HESSLER. Is that for me?

Senator GRASSLEY. Yes.

Mr. HESSLER. Outside of the mass tort context—to make sure I understand your question—how often are the third-party—the non-consensual third-party releases litigated? Within a narrow confine of the United States Trustee's Office, frequently brings objections to third-party releases in the mass tort context. It's going to be litigated almost every time that it's included in a plan.

Senator GRASSLEY. Okay. Thank you very much.

Chair DURBIN. Thanks, Senator Grassley. Senator Klobuchar.

Senator KLOBUCHAR. Thank you very much, Mr. Chairman, and thank you for calling this important hearing.

After a company files for Chapter 11, employees risk, as we all know, losing their livelihoods, health benefits, pensions, through no fault of their own. These are things that workers have worked hard for and have earned.

I'm going to focus, I think, the nature of my questions on you, Professor Jacoby. This issue has become relevant in a big way in my State because just last month, Yellow Corp., one of the largest LTL carriers in the country, filed for bankruptcy. This bankruptcy jeopardizes the livelihood and health benefits of many hardworking Minnesotans, including 480 Minnesota Teamsters.

Do you agree that it is important that the bankruptcy process protects workers, including collective bargaining agreements, wage claims, health benefits, and retiree pensions?

Professor JACOBY. Yes, I do, Senator. And I certainly think that was an animating force of Chapter 11, to begin with. The idea of allowing companies to restructure to provide worker protections to save jobs.

Senator KLOBUCHAR. And how are the interests of a bankrupt company's employees currently treated under the Bankruptcy

Code, and how would you improve bankruptcy protection for workers?

Professor JACOBY. Well, one thing that I worry about is that workers can be used as a justification to ask for things that aren't actually in the Bankruptcy Code—very quick going concern sales, and other kinds of deals.

And often that's premised on saving jobs—that this quick sale will save jobs, that agreeing to a loan at a very high interest rate will save jobs. And yet there's often no guarantee. It's often not in the—if we read the fine print of the sale agreement, there may be no guarantees.

So I would like—I think there should be more examination of jobs—what happens to jobs, and the quality of those jobs in that kind of scenario. And I think we need to look at employment as well as in the union context, given so many of the companies that file for bankruptcy may not be unionized.

Senator KLOBUCHAR. Mm-hmm. Right. So are you talking about changing some of the provisions in law then?

Professor JACOBY. I think that could be warranted. I think it also makes sense to continue to look at what kind of protection is given to worker claims.

There are certain priority claims in the Bankruptcy Code that, often it's suggested, could be updated to give increased protection. And sometimes, in some cases, even admit those administrative priority claims or other priority claims are not honored as they should be. So I think that should be looked at, too.

Senator KLOBUCHAR. Mm-hmm. So the U.S. Trustee, a component of the Department of Justice, which is tasked, right, with overseeing the administration of these bankruptcy cases—so the Trustee plays a really important role in bankruptcy proceedings and represents the interests of the public. This often means ensuring that the interests of a debtor's unsecured creditors are represented.

How can Congress work with the U.S. Trustee—it's a different way to do this—to ensure that the interests of employees and pensioners are properly represented and protected during a reorg.

Professor JACOBY. So the complicated job that the Government watchdog has, which is what essentially the U.S. Trustee program and the Department of Justice is, is they're supposed to appoint a committee that speaks for a full range of creditors.

And yet, we know, even within a mass tort case, the creditors are not an equal footing. They may not have equal strength of claim. So it's hard to have one for another. We expand that when we're talking about workers—how to make sure a committee is properly representative of those who need protection.

If the committee does not incorporate the full range, what other mechanisms can there be to get the constituencies a seat at the negotiating table? Because bankruptcy's supposed to be about that collaboration. They need a seat at the table.

Senator KLOBUCHAR. And how could the Bankruptcy Code be improved—this is my last question—to better ensure that harmed consumers are respected during the restructuring negotiations, and you talk about victims, as well, in your testimony?

Professor JACOBY. Sure. Well, that's a—I would love to think about that a longer time, and I'm happy to follow up with you. I do think that in terms of individuals, real humans, your constituents, who find themselves in a bankruptcy and say, "What am I doing here?" They need more of a voice in the process. The concept of procedural justice. That the process has to seem fair, independent of what the outcome is.

And I think maybe many of us, I won't want to speak for anyone else, could agree on that. That there's more that the individuals can—that can be done to recognize their individual voice because they are not a mass, even if there are a lot of them. They're individuals with very different situations, and we need more recognition of that during a bankruptcy.

It's not enough in a mass tort case to have that in a trust afterward. Those are private organizations, essentially, and very hard to see what's happening there. We need more procedural justice during a big Chapter 11 bankruptcy case.

Senator KLOBUCHAR. Okay. Thank you.

Chair DURBIN. Thanks, Senator Klobuchar. Senator Kennedy.

Senator KENNEDY. Thank you, Mr. Chairman. Mr. Haas, you're with Johnson & Johnson. Is that right?

Mr. HAAS. Yes, sir.

Senator KENNEDY. How is that stakeholder capitalism working out for you?

Mr. HAAS. How is it working for Johnson & Johnson? It's one of the greatest honors of my life.

Senator KENNEDY. Okay. I see where you, Johnson & Johnson, has joined with a number of other good American companies, JP Morgan—he's not a company, Mr. Colin Kaepernick, on his issue of police brutality, Procter and Gamble, Facebook, Apple.

You all pledged \$50 billion to, quote, "be a force for social change and fight injustice"—\$50 billion is a lot of money. How is that commitment consistent with what you're asking us to do here today?

Mr. HAAS. Sir, I'm not aware of the particular commitments you're referencing, but I could say dispositive—

Senator KENNEDY. Try to give me an answer—it's got to be right.

Mr. HAAS [continuing]. I could say dispositively that the consistency is, in the end, to ensure that each and every act that the company takes is consistent with our credo—

Senator KENNEDY. Okay.

Mr. HAAS [continuing]. And our credo puts the public and our patients first.

Senator KENNEDY. Right. Let me ask the professor a few basic questions because I'm still learning about this issue. Johnson & Johnson took it—oh, before I do, I forgot to ask you [points to Mr. Haas] one question: How many talc cases have you tried to verdict?

Mr. HAAS. There have been 42 cases that have gone to verdict. Of those, we have prevailed in 32.

Senator KENNEDY. Okay. So you've lost 10?

Mr. HAAS. Yes.

Senator KENNEDY. Okay. And what were the total damages in the 10 that you lost?

Mr. HAAS. The damages range dramatically—

Senator KENNEDY. Just give me a total.

Mr. HAAS. I don't know the total. I can give you an approximate. The highest one was in the billions.

Senator KENNEDY. Okay. All right.

Professor, I don't want to just pick on Johnson & Johnson, but they're the one here. Let me pick on Georgia-Pacific. Okay? I don't want to pick on anybody. I'm learning on this issue.

But let's call them Corporation A, gets sued en masse with respect to mass torts, they spin off the liabilities to a shell corporation, and that shell corporation files Chapter 11 bankruptcy. Right?

Professor PARIKH. Sure.

Senator KENNEDY. Is that legal under the Bankruptcy Code?

Professor PARIKH. Is that legal? The Code does not restrict that necessarily. The courts have found that there are a variety of bases to reject that sort of action. So courts have been pretty active in this space. I should probably—Senator Whitehouse left, but—

Senator KENNEDY. What's—what's the consensus? I mean, some bankruptcy judges say this is a legitimate use of the Bankruptcy Code, I presume. Other bankruptcy judges say no it's not, and it's dismissed. Is that a fair statement?

Professor PARIKH. That is a fair statement. I think that it's the nuance here, if you don't mind—

Senator KENNEDY. What's the national—

Professor PARIKH [continuing]. I can flesh it out a little bit.

Senator KENNEDY. What's the national consensus on this?

Professor PARIKH. I think the national consensus is that this is a proper action under State law, but to the extent there is some sort of impropriety, bankruptcy court judges are very well positioned to police that, as we've seen in the *LTL* case.

So it's not that Senator Whitehouse pointed out I was supporting Texas Two-Step. I am not supporting Texas Two-Step. I'm merely providing that—

Senator KENNEDY. So a bankruptcy judge has—

Professor PARIKH [continuing]. The extent there is a malfeasance, it could be addressed.

Senator KENNEDY [continuing]. The authority to say this is an abuse of the Code. Right?

Professor PARIKH. Exactly.

Senator KENNEDY. And how many—

Professor PARIKH. The courts can address that.

Senator KENNEDY [continuing]. Have done that?

Professor PARIKH. Well, the most prominent one is *LTL*. So in the Third Circuit now, there's a very rigorous—

Senator KENNEDY. Is there—

Professor PARIKH [continuing]. Test.

Senator KENNEDY [continuing]. A split among the circuits?

Professor PARIKH. There is, there is. So the Fourth Circuit, we were talking about forum shopping earlier, that would encourage forum shopping. Absolutely.

Senator KENNEDY. Okay. Is there a case before the Supreme Court to resolve this?

Professor PARIKH. No.

Senator KENNEDY. I bet there's one coming. I mean, and what are you—what are you asking us to do today? The Pro—let me start with Mr. Haas, again. What are you asking us to do today?

Mr. HAAS. The ask, from our perspective, to Congress would be to make uniform that very issue you just identified, whether—what is the standard with respect to dismissing a case?

Now, there's a distinction between the propriety of a Texas Two-Step—let's call it that, it's a divisional merger statute—and the question of what is a standard that you apply when you dismiss a case?

Our case was not dismissed because of anything to do with the Texas Two-Step. Nobody challenged the Texas Two-Step in our case. In fact—

Senator KENNEDY. Mr. Haas, you just had a golden opportunity to answer my question.

Let me ask you, Mr. Parikh—and you [turns to Mr. Haas] didn't do it. Professor, tell me what you think we should do today?

Professor PARIKH. I think—

Senator KENNEDY. What do you think Congress should do?

Professor PARIKH. I think there are very large issues here. I think, as I mentioned before, 524(g) needs to be amended to capture all mass tort cases. Once that's done, you can have uniformity in process and procedure with all these cases. Some involve asbestos, some don't.

The Code could be revised to provide clarity on whether third-party releases can be part of a plan. I think that'd be very helpful, and, of course, the future claim is represented. If that could be modified, have some more integrity in that selection process, those pieces together, I think, would really improve the process.

Senator KENNEDY. Thank you. Thank you, Mr. Chairman.

Chair DUBIN. Senator Kennedy asked a good question. We tried to follow through on it, as to just what were the verdicts or the settlements in these cases? We—some of it is hard to come by very quickly.

But there was one case in Missouri, it was \$4.69 billion for a group of 20 claimants, reduced on appeal to \$2 billion. To give you a range here.

But remember the offer from Johnson & Johnson through LTL was for \$8.9 billion for 60,000 claimants. Put that in perspective.

Next up, I believe, is Senator Hirono.

Senator HIRONO. Thank you, Mr. Chairman. Professor Parikh, you mentioned that what we describe as a Texas Two-Step is a proper action under State law. Those two States being Texas and Delaware, those are the only two States that allow for divisive mergers. Is that not so?

Professor PARIKH. It's also Pennsylvania and Arizona—a lot of them.

Senator HIRONO. Oh, so there's a third State.

So I have a question for Professor Jacoby. The Texas Two-Step that we're talking about today, which is, as I said, also possible under Delaware, and now we're told Pennsylvania law, relies on a quirk of State corporate law. But it is far from clear to me that a State fraudulent transfer law would actually allow these divisive mergers to be treated as anything other than fraudulent transfers.

In any event, shouldn't we establish some sort of Federal minimum standard to prevent a race to the bottom among the States all trying to create innovative ways to attract corporations consid-

ering bankruptcy? So what used to be just Texas and Delaware, now Pennsylvania is getting in on the action, as far as I can tell, enabling Texas Two-Steps.

So should we be considering some sort of a minimum kind of standard to make it a lot harder for people to avoid this kind of litigation?

Professor JACOBY. So the—certainly, if a case is properly within the domain of the bankruptcy system, as that’s defined in the constitution—which I think of it more narrowly than some of my colleagues here—then you certainly have the right, when a case is in that domain, to set additional rules.

And we have an example of that now where Federal fraudulent transfer law can apply to divisive merger bankruptcies—that is being teed up in, I believe, the Western District of North Carolina cases. And that’s true even if State law seeks to declare in a statute or a court that under State law it would not qualify for fraudulent transfer.

So, yes, Federal bankruptcy cases and Congress has the authority to set rules in the bankruptcy regime, and that has already—there already is a law to start that. It takes a lot of work to make it apply. It can take years.

Senator HIRONO. What is the law that starts that process that established some sort of a Federal standard for fraudulent transfers?

Professor JACOBY. It is Section 548 of the Bankruptcy Code.

Senator HIRONO. There just seems to be something wrong with these divisive mergers that enables a corporation to establish another entity, which then files for bankruptcy so that they can get out from under the kind of litigation that they would otherwise be subject to. So even under the kind of mass torts situation, isn’t there a way for settlements to occur?

Professor JACOBY. The vast majority of torts—mass tort settlements occur outside of bankruptcy. I think it’s interesting to look at the opioid cases. There was a lot of attention. And of course, one is going to the Supreme Court, the *Purdue Pharma* case.

There have been several others about the importance of those settlements, and I don’t take anything away from the opioid abatement money that would come from them. But they are a small fraction of the total settlement value. The idea that one cannot settle mass tort actions outside of bankruptcy, I don’t think—

Senator HIRONO. I think so.

Professor JACOBY [continuing]. Holds up.

Senator HIRONO. And also the vast—wouldn’t you say the vast majority—or majority of tort cases are settled?

Professor JACOBY. The vast majority of nearly all lawsuits are settled—

Senator HIRONO. That’s right.

Professor JACOBY [continuing]. Or dismissed early. So a day in court can mean more than the trial. It means starting the process, having discovery, being able to ask questions, and then deciding to have a resolution. And taking the result, win or lose.

Senator HIRONO. And the thing about Chapter 11 bankruptcy is it has nothing to do with liability or they—having any kind of discovery that leads to concerns about liability. And usually when you

do enter—do discovery, you can pretty much be able to argue the strength of liability, which also—which then encourages parties to settle. Isn't that so?

Professor JACOBY. So I do want to emphasize that the bankruptcy system does use rules of procedure, does have discovery. The question is what it's used for and how much control claimants may have in that process.

I also do—if you'll indulge me, the vetting of these claims, I think corporate defendants have an incentive in the mass tort context to defer that. And so we don't have that discovery.

Senator HIRONO. It seems to me that the discovery in a bankruptcy case has to do with whether X owes Y any money. In the case of a tort, there's negligence, there are damages, there are all kinds of other issues that arise. And that's why I just don't think that the bankruptcy laws particularly apply in a tort situation, even though these cases may take a long time. Thank you, Mr. Chairman.

Chair DURBIN. Senator Hawley.

Senator HAWLEY. Thank you, Mr. Chairman.

Mr. Haas, if I could just come back to you. Let me ask you about the *Ingham* case. I'm sure you remember that case. That was the one litigated in my State, in the State of Missouri, 22 plaintiffs who alleged that your baby powder caused ovarian cancer. By the way, didn't the FDA find that there were traces of asbestos in your baby powder?

Mr. HAAS. The FDA outsourced to a lab that found asbestos—a trace amount of asbestos in one lot. And 150 studies thereafter were done of that batch and found no asbestos. And if there was asbestos—

Senator HAWLEY. Okay, okay—

Mr. HAAS [continuing]. In that—

Senator HAWLEY [continuing]. Okay. That's a lot of—that's quite the word salad, but if we just compress, I think the answer is yes. Right? Did the FDA find that there were traces of asbestos in your baby powder test?

Mr. HAAS. No. Ultimately—

Senator HAWLEY. No?

Mr. HAAS. No. Ultimately—

Senator HAWLEY. The Third Circuit got that wrong? I just read it in their opinion.

Mr. HAAS. Ultimately, if the—

Senator HAWLEY. Wait, wait, wait. Answer my question. The Third Circuit was wrong about that? I just read it in their opinion. They said the FDA found traces of asbestos in your baby powder.

Mr. HAAS. The FDA outsourced to a lab that found a trace amount of asbestos—

Senator HAWLEY. Okay, then the answer is yes.

Mr. HAAS [continuing]. Thereafter—

Senator HAWLEY. So let's go back to the *Ingham* case then. I think it's a relevant question. Do you remember what the verdict was in the *Ingham* case? What the jury found, what they awarded?

Mr. HAAS. As the Chair properly stated, it was initially \$4.6 billion for a consolidated trial of 22 plaintiffs. That was reduced thereafter to \$2.2 billion.

Senator HAWLEY. \$2.24 billion, finally, on appeal. That's a lot of money. That's one case—22 plaintiffs, 20 at the end of the day because of the appeal. You were facing how many additional cases after that?

Mr. HAAS. We had thousands of thousands of cases.

Senator HAWLEY. Thousands of tens of thousands. Right?

Mr. HAAS. That's correct.

Senator HAWLEY. Okay. So one set of plaintiffs gets 2-plus billion dollars. You have the potential for—by that math, tens of billions more. Right?

Mr. HAAS. No, not necessarily. Because you recall, most claimants lose and receive zero. Why don't—

Senator HAWLEY. So what you do is—well, after the *Ingham* case, your company panics. And what you do is, you then decide, "Oh my gosh, we can't—we can't possibly do this. We can't—we don't want to pay these plaintiffs this kind of money." So you then create a separate company for the sole purpose of declaring bankruptcy and making sure that the tens of thousands of other plaintiffs get scraps.

Mr. HAAS. The proposal that we had would never succeed and would not have succeeded, but for the support of the claimants that had made the proposed resolution. We went to—

Senator HAWLEY. I have no idea—

Mr. HAAS [continuing]. Bankruptcy court—

Senator HAWLEY [continuing]. What you're saying.

I thought it was plaintiffs who sued you [holds up documents] that went all the way to the Third Circuit where they said you couldn't do what you're trying to do.

You're saying that they actually—you're saying the plaintiffs wanted this? They like the Texas Two-Step? The plaintiffs want to be denied their day in court and denied recovery?

Mr. HAAS. The majority of claimants'—counsel representing the majority of claimants, yes, do want this resolution because most claimants receive nothing.

Senator HAWLEY. Let's talk about you—

Mr. HAAS. That was an aberrant one-off—

Senator HAWLEY. Let's talk about what you did.

First of all, I think it's outrageous—the idea that plaintiffs—plaintiffs want to be denied their day in court. That's why they took you to court. That's why the Third Circuit ruled against you.

Let's talk about what you did. Here is an abbre—according to the Third Circuit—an abbreviated—abbreviated version of how you tried to avoid actually paying out liability.

Old Consumer, which was one of your subsidiaries, merged into Chenango Zero, LLC, a Texas limited liability company, wholly owned subsidiary of J&J, with Chenango Zero surviving the merger.

Chenango Zero then affected a divisional transfer—a divisional merger, rather, under the Texas Business Code by which two new Texas limited liabilities were created: Chenango One and Chenango Two—and Chenango Zero ceased to exist.

Then Chenango One converted into a North Carolina limited liability company and changed its name to LTL. Chenango Two then merged into Currahee Holding Company, the direct parent com-

pany of LTL. Currahee survived the merger, and then changed its name to Johnson & Johnson Consumer Incorporated.

Are you here to tell us that you think that this is a great way to proceed—and is fair to the consumers who had asbestos in their baby powder?

Mr. HAAS. Indeed. The claimants after that transaction had access to more recourse than they did before, which is exactly—

Senator HAWLEY. More recourse?

Mr. HAAS [continuing]. Which is exactly the—

Senator HAWLEY. You created—in the words of the Third Circuit, you created a company with the sole purpose of sending it into bankruptcy so you could limit your liability. Here's what I don't understand, Johnson & Johnson is a hugely profitable company. Isn't it?

Mr. HAAS. This is—where we're talking about the subsidiary—

Senator HAWLEY. Oh, I know, you own them all. You own them all. So aren't you hugely profitable?

I mean, how much money did you make on the COVID vaccine, for example?

Mr. HAAS. Nothing. Actually, we made nothing—

Senator HAWLEY. You got billions of dollars in subsidies from the Federal Government. Taxpayers have paid you billions.

How much did you make on opioids? All those opioids you prescribed? How much did you make on that over the years?

Mr. HAAS. I do not have that information.

Senator HAWLEY. Really? I thought it was curious when you said that your company credo was to always put the public first.

Mr. HAAS. It is.

Senator HAWLEY. Was that what you were doing when you were lying to doctors and patients about the addictive nature of opioids?

Mr. HAAS. We did—

Senator HAWLEY. Is that why your company agreed to billions of dollars in settlements with States and other localities because of what you did to further the opioid crisis?

Mr. HAAS. We prevailed in the only two cases that were tried, and the jury determined—

Senator HAWLEY. You settled for billions of dollars and I brought one of those suits, and it's the proudest thing I ever did as attorney general of the State of Missouri.

Your company has made billions of dollars on American consumers, multiple times lying to them. And the idea of that you now are looking actively for ways to limit the liability for further torts you have committed against the American people, I think is outrageous. Absolutely outrageous.

And if you want to know why the American people don't trust huge corporations, it's because of companies like yours. And I would just say to my colleagues, if you want to know why private rights of action are so darn important, and why we need to use them against the Big Tech companies, this is the reason why. One jury verdict got \$4.6 billion.

That's a hammer. Companies fear it. They fear it. It's why they're trying to distort the Bankruptcy Code to avoid it. We need to give more Americans the ability to get that recourse in court,

and we need to change the Bankruptcy Code to make sure that companies like J&J can't avoid it. Thank you, Mr. Chairman.

Chair DURBIN. Thanks, Senator Hawley. Senator Coons.

Senator COONS. Thank you, Mr. Chairman. And thank you for this hearing, and for the opportunity for us to examine some of these issues.

I'll transition to a topic I understand hasn't been thoroughly explored, but that also has the potential consequence of plaintiffs being denied the ability to recover. And that's nonconsensual non-debtor agreements.

And I'd like to ask, if I could, both professors to comment on this. Professor Jacoby, should non-debtor agreements include an opt-out provision so claimants can choose to file legal claims instead of being bound by the liability release?

And if they do get an opt-out, if that were to happen, what effect would there be? Would we see fewer nonconsensual non-debtor agreements, and what effect would it have on how much money is available to claimants as, for example, happened in the mass tort case against Purdue Pharma?

Professor JACOBY. Individual claimants should be presented the option of whether they will release, consensually, by contract, like they could do outside of bankruptcy or not.

The discharge power in the Bankruptcy Code does allow the majority to bind dissenters with respect to the liability of the debtor. I do not believe that extends to direct liability—

Senator COONS. Hmm.

Professor JACOBY [continuing]. Of third-parties.

So it has to be by contract, and we'll see what the Supreme Court says about *Purdue Pharma*.

But the idea that the only way to ever get a deal done is to mandate a broader discharge—and that is really what it is. We're talking about personal liability for direct claims, not insurance proceeds put into a trust. Then, that is a—that is a huge extension of the bankruptcy power.

But lawyers are problem solvers. These corporations and their very excellent counsel will find a way forward. They do, in circuits that can't—that don't permit the same binding of third-party.

Senator COONS. Well, as you're implicitly referencing, the courts of appeal are currently split—

Professor JACOBY. Yes.

Senator COONS. And the Supreme Court has agreed to take the issue up this term. This is a split specifically on nonconsensual non-debtor agreements. Is there room for Congress to act? And if so, what do you think Congress should do in this particular area?

Professor JACOBY. Well, I—the way that the district court decision in *Purdue Pharma*, as well as the dissent in the Second Circuit of *Purdue Pharma*, lay it out, the current Code does not authorize third-party liability shields without consent.

Clearly, not everyone has bought into that. The Supreme Court claims they're going to have this on a fast track. The question is whether Senate—the Senate acts more quickly to clarify that or not.

But I do think it is important to distinguish between efforts to channel, say, insurance proceeds into a trust and guide claimants

to that trust, is different from direct personal liability of a third-party. That's really where the issue lies.

Senator COONS. Professor Parikh, any different views on these two questions— both, whether there should be an opt-out provision, and if so, what consequence that would have for what's available to claimants? And then what, if anything, Congress might take up and consider doing either before or after the Supreme Court acts?

Professor PARIKH. Yes, Senator. I think for nonconsensual non-debtor releases, I think the Bankruptcy Code does provide for them. They play a very large role in these cases in reaching resolution. Keep in mind that the claims are not extinguished, they're merely channeled to this trust.

I think the larger issue that once again almost never gets discussed is making sure these trusts are properly funded. That does not get discussed at all. And that's probably the much larger issue, from my perspective.

In terms of opt-out provisions, you can see in recent mass tort cases there are opt-out provisions, but there are lots of strings attached. You can opt out as a claimant, but your ultimate recovery is capped at which you otherwise would've received through the plan. So there's a strong disincentive not to opt out.

So with opt-out provisions, you know, we see them of course under Rule 23 when we think about class aggregation. There are always opt-out provisions. Plaintiffs' attorneys are very good at making sure that that's a limited option, but nevertheless, in bankruptcy, that option exists. But with all these strings attached, that's something that could be clarified through the Code.

Senator COONS. Survivors of child abuse and advocates have raised concerns about other bankruptcy procedures that have been involved in cases like the *Boy Scouts*, and *USA Gymnastics*, and others.

Are there reforms Congress should consider around claim filing deadlines or automatic stays that would specifically improve protection of survivors from harm in the bankruptcy process? Professor?

Professor JACOBY. Well, thank you for asking about that. One thing I would like to see, before I give an answer from my perspective, is, I would love for this body to get to hear from more of the survivors who have participated in those cases because I'm not sure they feel heard right now about—in the process.

The issue of bar dates and the proofs of claim, which I think you were asking about, which is very different than what we're seeing in the asbestos cases, where we, at least some of them, where we're not sure who the maj—it's hard to measure the majority if I don't know who all the claimants are.

But there's a lot of variation in mass tort cases, generally, about whether we have a universe of current claimants or not. I think I'm not sure that has to be uniform, but I think it cuts a lot of different ways.

For example, not having a bar date in a State that has a completely open statute of limitations, now in response to CHILD USA and other advocacy groups, about letting adults come forward in their time.

Not having a bar date and letting someone collect in the future honors the research about the time it takes to come to that decision. A bar date forces someone to make that decision at a time they might not be ready—or forever be foreclosed.

And again, to some of the discussion that's happened about releases and others, this is not just about the money. These claims are not being brought as far—again, it is—I don't want to speak for everyone because everyone's got their individual story.

But there are a lot of other interests at stake about accountability and ensuring this doesn't happen to other people that are in addition to the money—or sometimes even more important to the money.

Senator COONS. Yes.

Professor JACOBY. So I think we need that. We really need to factor that in. This system was not designed for them.

Senator COONS. Thank you. Thank you very much. Thank you, both. Thank you, Mr. Chairman, for your forbearance.

Chair DURBIN. Thanks, Senator Coons. Senator Blumenthal.

Senator BLUMENTHAL. Thanks very much, Mr. Chairman, and thanks for having this hearing.

As you have heard on a bipartisan basis, there's a lot of dissatisfaction, and, indeed, disgust with the bankruptcy system as it currently operates, and now impacts the lives of ordinary people.

Professor Jacoby, I have talked to many of those survivors of the gymnastics abuse that occurred. And they are very much on my mind as we talk about this issue. As you know, Larry Nassar's crimes came to light and implicated USA Gymnastics, which faced hundreds of lawsuits from gymnasts who alleged that the organization, in effect, was complicit and failed to protect them.

And USA Gymnastics declared bankruptcy. Litigation was halted, depositions stopped. And their attempt to hold the organization to account for those hundreds of cases of sexual abuse was stymied. And the public was deprived of a lot of the truth about what USA Gymnastics did to make it liable and responsible.

So I wonder whether there is a way, Professor Jacoby, to permit this process to go forward, that is, the legal process to go forward, at least with the discovery. You know, we call it discovery. It really, in that case, was discovery about what went wrong with USA Gymnastics.

Professor JACOBY. The bankruptcy system absolutely can accommodate that. Indeed, early discussions of mass tort bankruptcy, I think, anticipated that way more would be done through other civil processes. That this would not cut everything off.

The bankruptcy system also has the capacity within it to provide transparency that is sometimes missing way too much in mass tort bankruptcies for a variety of reasons.

But there are ways to use the coordination features of the bankruptcy system that don't shut everything down, that make sure the accountability mechanisms still work.

Now, whether that's the right home for all of this, people have different views. But if we're going to use it, that is absolutely essential.

Senator BLUMENTHAL. That's a relatively simple—and when I say relatively simple, compared to all the complexity of the system as it now operates, it seems relatively simple that we could reform.

Professor JACOBY. Yes. And in addition, I believe some cases do anticipate data repositories. I think the question is when and who has the information? A lot of it is very hard to access, not only for the public, but individual claimants.

There's information that's for lawyers' eyes only, and I think that makes—that makes people uncomfortable. People need to see it, not a couple years from now, but they need to be able to have access to it sooner.

Senator BLUMENTHAL. I want to turn to Purdue Pharma. As attorney general, I sued Purdue Pharma. I haven't been attorney general for a while, for 10 years, so I have no direct involvement in the pending case or the settlement. But what I know for sure is that between 1999 and 2021, opioid overdoses killed nearly 645,000 people in America.

And Purdue Pharma knew what it was doing because it knew when they settled a case that I brought against it, and then continued to fuel the addiction and substance abuse disorder that killed those people.

Let me cut right to the question here. And you all are aware of this case. In exchange for contributing about \$6 billion to the proposed settlement, the Sackler family, the individual Sacklers, have requested immunity from all current and future opioid lawsuits.

The family hasn't declared bankruptcy. They're not subject to any of their requirements of transparency that are imposed on other parties, and they are trying to use the process, in effect, to buy immunity without the consent of their victims.

I know that many of the survivors are supportive of the settlement, and I know why, because they want some compensation for the heartbreaking and unspeakable suffering that they have endured as a result of the wrongdoing of the Sacklers and the company.

But yesterday, Senators Warren, Welch, and I reintroduced the SACKLER Act, which would close the loophole that has permitted the families to try to avoid accountability and responsibility.

I'd like to ask any of the panelists who have an opinion on this issue to provide it.

Professor Jacoby, it looks like you may——

Professor JACOBY. I'd be——

Senator BLUMENTHAL. Have one.

Professor JACOBY [continuing]. Happy to, if you'd like. I just wanted to give my colleagues——

Senator BLUMENTHAL. Sure.

Professor JACOBY [continuing]. A chance.

So again, the—one question that always comes to mind is modeling legislation on a very specific case.

And if I recall—I have not seen your most recent legislation. What I do recall is that it was focused on the claims of government representatives, and also making sure that government representatives were not stopped during the bankruptcy from exercising their police and regulatory—and if that's not where this is, then I'll switch gears.

I think the part about making sure that the temporary injunction is not routinely expanded is quite important. It's something that came up in the *3M* bankruptcy. But it came up even more in *Purdue Pharma* because it stopped Government regulators, not just—not just private claims. So I am—I have a lot of sympathy for that.

I do have concerns about legislating only about Government for permanent releases because that does raise the question and possibly a negative implication that it's acceptable for private parties, and I am—I'm concerned about that question.

But I understand why Members of Congress think that a discharge in bankruptcy goes to a debtor—

Senator BLUMENTHAL. Mm-hmm.

Professor JACOBY [continuing]. Unless a creditor contracts—agrees to release their claim. That makes a lot of sense to me.

Professor PARIKH. Senator, may I just weigh in on this? Really quick statement to answer your question. A bankruptcy case does not halt criminal prosecutions. So, I just want to make sure that's clear.

Chair DURBIN. Thank you, Senator Blumenthal.

Senator BLUMENTHAL. Thank you.

Chair DURBIN. Senator Welch.

Senator WELCH. I want to pick up where Senator Hawley left off and where Senator Blumenthal left off.

I understand, by the way, Senator Hawley asked the question, J&J made \$27 billion last year?

Mr. HAAS. Is that a question—yes, I—

Senator WELCH. Yes. Is that right?

Mr. HAAS. I believe that's about the right amount—

Senator WELCH. All right.

Two—the second thing I want to say, bankruptcy, as I understand it, is very simple. You're broke. And you can get discharged from your debts, but you don't get discharged without putting all your assets in the pot. Is that right, Professor?

Professor JACOBY. That's right. And when we're talking about a company, Congress anticipated—

Senator WELCH. Okay.

Professor JACOBY [continuing]. Legislated, with an operating company.

Senator WELCH. And that if I want to declare bankruptcy, all the assets I have, all the debts I have are in the pot, and they get distributed according to the rules of bankruptcy. Right? Same for a company.

The tort system, which we've had forever, allows an individual who's been injured to sue me, to sue a company. And if I'm found liable by a jury, then I pay. Right? And— isn't that correct?

So what's happened here with the—going back to *Purdue Pharma*, it's really mystifying to me, and I think it is to a lot of folks.

They go into bankruptcy, and there's incredible evidence about the Sackler family individually—not only benefiting and becoming multi-billionaires, making contributions to the Sackler Gallery down here, having named buildings at universities—that they were part of the board, and they knew that the opioids they were selling were addictive.

They hired management consulting firms to actually boost sales. They did this knowing that people were dying and suffering, and they are in bankruptcy where the Sackler family has a Sackler rule for how bankruptcy works: They put all their liabilities in there, and some of their money, but they keep billions.

Is that how bankruptcy's supposed to work?

There are—I'm going to ask you, Mr. Haas, is—do you buy—do you buy that? Do you think the Sacklers, who had knowledge of what they did with their company and killed people—biggest drug dealers outside of the Mexican cartel—do you think that they have the right to use bankruptcy, but not put all of their billions into the pot so the people who they've injured can have their claims adjudicated?

Mr. HAAS. I'm not personally familiar with the facts of the *Purdue*—

Senator WELCH. Or, make it simple.

Mr. HAAS [continuing]. Case. But I would say it's a stark contrast. And it is actually demonstrating the legitimacy of what we did.

Senator WELCH. All right.

Mr. HAAS. So that distinction—

Senator WELCH. That is—let me—I get it, you're with Johnson & Johnson, you're different—

Mr. HAAS. Mm-hmm.

Senator WELCH [continuing]. I mean, everyone's—but the Sacklers were able to keep their individual billions safe, and get the full benefit of discharge and bankruptcy. That's what they're looking to get.

Mr. HAAS. So Senator, I just simply do not know the facts and circumstances. I believe the standard that is applied—or has been applied in that case depends upon the totality of the circumstances. And ultimately the question—and I'm not familiar—

Senator WELCH. Okay.

Mr. HAAS [continuing]. With which side it comes out—

Senator WELCH. The part—

Mr. HAAS [continuing]. Is whether it's in the best interest of the claimants.

Senator WELCH. It's in the best interest of the Sacklers—

Mr. HAAS. But—

Senator WELCH [continuing]. They keep billions.

Mr. HAAS. Sir, I'm not taking a position one way or the other—

Senator WELCH. All right.

Mr. HAAS [continuing]. But I just think—

Senator WELCH. The other thing that seems simple, I think, to everyday folks, if a company is being sued and it has assets, in the case of *Johnson & Johnson*, great company, \$27 billion in profits. The mechanism that's being set up is to protect Johnson & Johnson, not the plaintiffs.

Mr. HAAS. The mechanism that was utilized had nothing to do with Johnson & Johnson. It had to do with Johnson & Johnson Consumer Inc., a subsidiary that was in a loss position. So the question became, at that point in time, how best to protect claimants. And the divisional merger—

Senator WELCH. So—

Mr. HAAS [continuing]. That was undertaken put claimants in a better position. They had more recourse.

Senator WELCH. Do all the claimants—ma'am, you are a claimant. Right? Does that put you in the best position, right, and you're representing your dad?

Ms. KNAPP. Yes.

Senator WELCH. My condolences to you.

Ms. KNAPP. No. It wasn't in his best interest. I think that—I think that these companies are greedy, and they want to make it sound as if, though, the victims are greedy trying to get what should be given to them. But if they wait long enough, all the victims will die. And then what? Just keep stalling.

Senator WELCH. Nobody could say it better. Thank you. I yield back.

Chair DURBIN. Thank you very much to all the witnesses and my colleagues. This is a compelling subject. It is complicated, and yet it's very simple.

Ms. Knapp speaks for her father who died waiting for the moment to have his day in court. And Georgia-Pacific, in his case, found a way to avoid that reckoning, that confrontation, and justice was not served in his situation.

I still don't believe there is a credible argument that Johnson & Johnson should have been allowed to create this sham corporation and limit their liability.

When I think of all the Johnson & Johnson products that our family has used, that white cloud that's in every baby's room in America, and the trust we had in your company, I have to tell you it breaks my heart to think what it's facing today.

And that is, the reality that they're trying to avoid responsibility for their own conduct and their own products. And that, to me, is not right.

And I don't believe it's American. God knows, if anybody even conceived that the Bankruptcy Code would be used for this purpose, is just beyond me.

And the Sackler situation is disgusting. You know, they're sitting on billions of dollars, and say they're not going to put this on the table for distribution to the people who are deserving unless they get a Get Out of Jail Free card in the process.

Is that what our system of justice has turned out to be? I hope not.

I thank you for this hearing. There may be some written questions sent your way in the next few days, and if you'd answer them promptly, I would appreciate it very much.

And with that, the hearing stands adjourned.

[Whereupon, at 11:56 a.m., the hearing was adjourned.]

[Additional material submitted for the record follows.]

## A P P E N D I X

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# Johnson & Johnson

## Statement of

**Erik Haas**  
**World Wide Vice President, Litigation**  
**Johnson & Johnson**

before the

**Committee on the Judiciary, U.S. Senate**  
**September 19, 2023**

Chairman Durbin, Ranking Member Graham, and Members of the Committee, I am Erik Haas, and since November 2020 I have served as the World Wide Vice President of Litigation for Johnson & Johnson (J&J). In that capacity, I have oversight responsibility for J&J's litigations, including the bankruptcy cases filed by J&J's subsidiary LTL Management, LLC (LTL). It is an honor to appear before the Committee, and I thank you for the opportunity to respond to your inquiries today.

Mr. Chairman, you asked that we speak to LTL's recent bankruptcy filings, which were brought to effectuate an equitable and efficient resolution of mass tort litigation that had forced J&J's stand-alone consumer product subsidiary into a loss position in 2020. LTL's proposed bankruptcy resolution contemplated the payment of an unprecedented \$8.9 billion to resolve all claims alleging that the subsidiary's talc powder products caused cancer. That unprecedented offer understandably was supported by the court-appointed mediators and counsel representing the vast majority of the talc claimants.<sup>1</sup> The offer also was supported by J&J, which agreed to provide a financial backstop for LTL's proposed bankruptcy resolution that—as the Third Circuit Court of Appeals recognized—*the company had no obligation to provide*.<sup>2</sup> Far from “evading accountability,” as suggested by the title of this hearing, the proposed resolution would have afforded the talc claimants timely recourse and afforded them a stronger position than that available to them in the unpredictable and lengthy tort system.

Most significantly, the proposed bankruptcy resolution provided a potential recovery for *all* claimants, which was and is a result that cannot be achieved in the tort system. To start, J&J and its subsidiary have won the majority of cases tried in court, and most claimants received absolutely nothing from litigating in the tort system. The company has prevailed because the talc claims—contrived and fomented by the mass tort litigation plaintiffs' bar—are meritless. Those claims are refuted by decades of independent research and clinical evidence by medical experts around the world that support the safety of cosmetic talc, as well as the findings by FDA and other health agencies that cosmetic talc does not cause cancer. Further, trying the tens of thousands of talc cases filed as of the bankruptcy—let alone the thousands of additional cases threatened to be filed—would take more than 3,000 years. This impossibility means most claimants will never even

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<sup>1</sup> *In re LTL Mgmt., LLC*, 652 B.R. 433, 439–40 (Bankr. D.N.J. 2023).

<sup>2</sup> *In re LTL Mgmt., LLC*, 64 F.4th 84, 111 (3d Cir. 2023).

have their claims heard in the tort system. Lastly, only bankruptcy provides tools that allow similarly situated but unknown future claimants the ability to participate in the resolution process and ensure their ultimate compensation. In other words, the proposed resolution through bankruptcy was and is the only way to provide all claimants with a timely and predictable recovery.

With the support of counsel representing the vast majority of claimants, there was a strong likelihood of securing the requisite vote in favor of LTL’s plan. In most federal circuits, including in the Fourth Circuit where the case was commenced, the bankruptcy would have been allowed to proceed to a vote. Unfortunately, the claimants never had the opportunity to be heard. Instead, the case was transferred to the Third Circuit, where the appellate court adopted a novel standard not in the Bankruptcy Code that required the dismissal of the bankruptcy. It did so at the urging of mass tort lawyers representing a small minority of claimants who repeatedly espoused that they would never settle under any terms, as their business model is predicated on the possibility of winning a one-off jackpot verdict for which they will then claim 40% for their fees. This mass tort litigation business model is not in the best interests of the claimants, should not be dictating bankruptcy policy, and is a scourge facing U.S. companies today.

Constrained by the Third Circuit’s newly announced standard, the Bankruptcy Court presiding over the LTL matter felt compelled to dismiss the case. In so doing, however, the Bankruptcy Court also felt equally compelled to state that LTL had made “remarkable progress” toward a “fair, efficient, and expeditious settlement,” and “strongly encouraged” it to continue to pursue a global resolution—*through bankruptcy*.<sup>3</sup>

We respectfully submit that the Committee should support legislation to clarify that bankruptcy is an appropriate mechanism to effectuate the complete, equitable and efficient resolution of large mass tort litigation, such as the talc litigation.

#### ***The Mass Tort Litigation Business Model***

J&J is the world’s largest, most diversified healthcare products company. We are committed to using the full breadth of our history, our partnerships, our clinical and scientific expertise and our tireless commitment to patients to improve health outcomes around the world. Unfortunately, the primary threat we face in fulfilling that promise—and the greatest threat to the continued viability and prominence of many U.S. businesses—is the advent of excessive and meritless litigation, most notably mass tort litigation. There are two significant changes in law and rules governing litigation in the United States that have enabled the escalation of such litigation.

*First*, over the course of the last decade, courts have rolled-back restrictions on the ability of third parties to finance litigation. This has resulted in an extraordinary increase in the levels of litigation funding from private equity firms, hedge funds, traditional investment firms, and banks. Reports suggest that upwards of \$2.3 billion to \$5 billion per year is being invested by third party financiers in U.S. litigation.<sup>4</sup> Moreover, according to advisors to these funders, roughly 70% of

<sup>3</sup> *In re LTL Mgmt., LLC*, 652 B.R. at 455.

<sup>4</sup> Mark Popolizio, *Third-party Litigation Funding in 2022 -- Three Issues for Your Radar*, VERISK (Jan. 31, 2022), <https://www.verisk.com/insurance/visualize/third-party-litigation-funding-in-2022-----three-issues-for-your-radar/>.

this extraordinary funding is pouring into mass tort litigation.<sup>5</sup> This nearly boundless financing has fueled a mass tort litigation business model that starts with the lawyer contriving a theory of liability that is then used to solicit individuals to act as plaintiffs and to mislead the public who comprises the jury pools, the judiciary who adjudicates the claims and the legislatures that oversee the judicial process.<sup>6</sup> The sheer volume of financing reflects the extraordinary returns that the financed litigation has exacted from defendants, mainly U.S. businesses.<sup>7</sup>

*Second*, relaxation of ethical rules limiting attorney advertising is also driving the escalation in meritless filings. One need only drive down our nation's highways or turn on the television to see the explosion in attorney advertising, much of which makes false or misleading claims to solicit potential plaintiffs for mass tort actions. This advertising is funded by the litigation financiers, with the expectation of large payouts from the subsequent actions or settlements. These relentless media campaigns have generated extraordinary volumes of claims, which have swamped the nation's courts.<sup>8</sup> Right now, there are more than 400,000 claims pending in multi-district litigations (MDLs) alone.<sup>9</sup> More than 95% of these 400,000 claims are held in roughly 18 MDLs, all of which are mass tort litigations.<sup>10</sup> And this number does not account for the thousands of one-off lawsuits not coordinated in MDLs and pending in courts across the country, which according to reporting just last week have grown in number by nearly 90% in the last decade.<sup>11</sup>

The continual bombardment of TV, internet and other ads that demean the value of important FDA-approved medications and medical devices, among other consumer products, mislead people into making bad healthcare decisions, sometimes causing serious harm. Individuals relying on litigation-financed ad campaigns touting lawyer-contrived theories may forego the valid scientific testing required to ascertain the true cause of their malady (e.g., genetic history) or adopt less effective or more dangerous alternatives in lieu of appropriate treatments. In response to these concerns, the AMA and AARP have cautioned that fearmongering in lawsuit ads are "dangerous" (AMA) and have "frightened" patients into stopping critical care (AARP).<sup>12</sup>

<sup>5</sup> WESTFLEET ADVISORS, *THE WESTFLEET INSIDER: 2022 LITIGATION FINANCE MARKET REPORT 5-6* (2022) (referencing "portfolio" litigation, another term for mass tort litigation).

<sup>6</sup> *Asbestos Litigation*, THE TASC GROUP, <https://www.thetascgroup.com/case-study/asbestos/> (reciting the mesothelioma plaintiff bar's communication strategy to "try these cases in the court of public opinion, bring public pressure to bear on the courts and shed light on the issue for political leaders and members of Congress to act to change the laws").

<sup>7</sup> U.S. GOV'T ACCOUNTABILITY OFF., GAO-23-105210, *THIRD-PARTY LITIGATION FINANCING: MARKET CHARACTERISTICS, DATA AND TRENDS 22* (2022) ("For example, in 2021, one commercial funder reported a 93 percent return on invested capital on concluded assets since inception in one of its portfolios. Another commercial funder reported a 91 percent return on invested capital on completed investments in two of its funds since 2017.").

<sup>8</sup> Philip Goldberg, *How Mass Tort Litigation is Gaming the Judicial System*, BLOOMBERG LAW (Mar. 2, 2023), <https://news.bloomberglaw.com/us-law-week/how-mass-tort-litigation-is-gaming-the-judicial-system>; see generally LEX MACHINA, *PRODUCT LIABILITY LITIGATION REPORT* (2023).

<sup>9</sup> United States Judicial Panel on Multidistrict Litigation, *MDL Statistics Report – Distribution of Pending MDL Dockets by Action Pending* (Apr. 17, 2023),

[https://www.jpml.uscourts.gov/sites/jpml/files/Pending\\_MDL\\_Dockets\\_By\\_Actions\\_Pending-April-17-2023.pdf](https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Actions_Pending-April-17-2023.pdf)

<sup>10</sup> *Id.* As one commentator noted, "MDLs have grown considerably. There were 73 active MDLs in 2013—now there are 300, and 90% involve mass tort cases. Where earlier MDLs had a few dozen or hundreds of claimants, MDLs now regularly have thousands." Goldberg, *supra* note 8.

<sup>11</sup> LEX MACHINA, *supra* note 8, at 3.

<sup>12</sup> Press Release, Am. Med. Ass'n, *AMA Adopts New Policies on Final Day of Annual Meeting* (June 15, 2016), <https://www.ama-assn.org/press-center/press-releases/ama-adopts-new-policies-final-day-annual-meeting>; *Don't Let*

Yet the mass tort litigation plaintiffs' bar cites the mere existence and sheer volume of filings fomented by these advertising campaigns to suggest that the allegations asserted in the lawsuits have some legitimacy. The claims are allowed to proceed, resulting in coerced settlements to avoid litigation costs and aberrant verdicts, which the mass tort plaintiffs' bar argues justifies bringing even more actions that are not supported by scientific evidence. In the end, the cost of defending this vicious cycle of litigation is unsustainable, resulting in coerced settlements and the payouts upon which the third-party funders were betting. The cycle then continues, and if left unchecked, could place more and more U.S. businesses into a loss position.

***The Mass Tort Litigation Business Model Created The Talc Litigation***

The draconian consequences of the mass tort litigation business model are well illustrated by the proliferation of talc claims against the J&J subsidiary that operated its North American consumer products business—Johnson & Johnson Consumer Inc. (JJCI). In 2017, the mass tort litigation plaintiffs' bar brought a flood of lawsuits alleging that its 100+ year old talc products contain asbestos and cause cancer. The claims, which continue to grow in volume each year, were and are based on “junk science” presented by purported “experts” bought and paid by the plaintiffs' bar, which tout a false narrative about the alleged dangers of talc in advertisements they continue to run night and day.

These allegations are directly contrary to decades of scientific consensus from independent experts and regulatory agencies, as well as the robust talc testing protocols using the most sensitive methods that the company employed for years. To be clear: JJCI's talc products were and are safe, do not contain asbestos, and do not cause cancer. While we empathize with the individuals and their families who suffer from cancer, and understand the desire for answers, the company's talc products were not the cause of the cancer. The talc litigation is a disservice to the very cancer patients for which it is brought, who are deceived by their lawyers as to—and therefore do not seek to address—the true cause of their harm.

The rapid proliferation of the talc claims is a testament to the power of the mass tort litigation machine. In the span of just a few months, between 2016 and 2017, the company went from a few hundred claims to nearly 5,000. The pace only accelerated from there. For the period 2017 through 2019, the company was served, on average, with one or more talc-related complaints *every other hour of the day, every single day of the week*. By the time of the first LTL bankruptcy filing, JJCI faced nearly 40,000 lawsuits, filed in almost every state in the country, in both state and federal courts, with no end in sight.

The talc litigation also serves as a stark example of the limitations of the tort system to resolve the unique problems created by the mass tort litigation machine. The talc cases have been allowed to linger on the docket notwithstanding the meritless nature of the claims, as confirmed by the track record at trial. Of the small number of cases tried, the company has prevailed in the majority, leaving most claimants to recover nothing after years of waiting. Even where plaintiffs prevailed at the trial court level, the range of outcomes for similarly situated claimants was wildly

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*Lawsuit Ads Put You at Risk*, AARP (Mar. 18, 2018), <https://community.aarp.org/t5/Scams-Fraud/Don-t-let-Lawsuit-Ads-Put-You-at-Risk/m-p/1984308>.

divergent, with some being awarded low seven figures, and others ranging as high as hundreds of millions of dollars. And many of these verdicts did not withstand appellate review, sending some of these same claimants back to the queue for re-trial.

Moreover, the sheer magnitude of filings and the practical limitations on the pace at which the cases may be tried renders MDLs and the other tools offered by the tort system incapable of affording a timely resolution of the claims. From 2017 through the first LTL filing in October 2021, fewer than 50 cases reached trial. At that pace, the approximately 40,000 cases filed as of the first bankruptcy would take more than 3,000 years to resolve, and if the additional claims disclosed in the bankruptcy are pursued, it would take well over 20,000 years to resolve the talc litigation. And, of course, this does not even account for the unknown and unidentified future claimants that may surface in the coming decades for cancers that mass tort lawyers claim were caused by talc but did not manifest until years later, due to the long latency of such diseases.<sup>13</sup>

#### ***Johnson & Johnson Consumer Inc.'s Financial Distress***

This tsunami of talc litigation had a real and significant impact on JJCI's financial stability, a fact that is both indisputable and has been confirmed by every court who has examined LTL's bankruptcy. In 2019 alone, JJCI recorded a \$1.1 billion loss directly attributable to the extraordinary expense of adjudicating the talc litigation and the aberrant but large one-off verdicts rendered against JJCI.<sup>14</sup> The litigation costs and threat of additional verdicts, let alone the cost of defense, was unrelenting.

As the Bankruptcy Court noted: "Even without a calculator or abacus, one can multiply multi-million dollar or multi-billion dollar verdicts by tens of thousands of existing claims, let alone future claims, and see that the continued viability of all J&J companies is imperiled. . . . At the time of filing, the prospects of continued monthly \$10-20 million defense expenditures, with rapidly increasing numbers of new claims being filed, warranted seeking action in this Court."<sup>15</sup> In reaching that conclusion, the Bankruptcy Court explained that J&J's financial position was irrelevant to assessing the financial distress of JJCI, as a parent corporation has no general obligation to fund the liabilities of an independent subsidiary.<sup>16</sup>

Significantly, the Third Circuit did not challenge the Bankruptcy Court's findings that the talc litigation had left JJCI in financial distress. Instead, without adopting a specific standard for

<sup>13</sup> *In re LTL Mgmt., LLC*, 652 B.R. 433 at 449 ("This glacial pace coupled with the undeniable surge in the number of new actions means that the vast majority of claimants will not get the opportunity to seek recovery for years to come, if ever. The sluggish speed of the tort system—which plaintiffs' attorneys repeatedly acknowledged during trial—continues to trouble this Court.")

<sup>14</sup> *In re LTL Mgmt., LLC*, 637 B.R. 396, 417 (Bankr. D.N.J. 2022), *rev'd and remanded*, 58 F.4th 738 (3d Cir. 2023), and *rev'd and remanded*, 64 F.4th 84 (3d Cir. 2023) ("talc-related litigation was the 'primary driver' that caused J&J's entire Consumer Health segment 'to drop from a \$2.1 billion profit (14.8 percent of sales) in 2019 to a \$1.1 billion loss (-7.6 percent of sales) in 2020.'").

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* ("Claimants repeatedly have called to the Court's attention the market capitalization (\$450 billion) and stellar credit-rating of Debtor's indirect parent, J&J. Nonetheless, apart from voluntarily undertaking such an obligation or a judicial finding as to alter ego status, J&J (like all parent corporations) have no legal duty to satisfy the claims against its wholly-owned or affiliated subsidiaries.")

the requisite showing of distress, it found that, at least in this case, the parent company's agreement to provide a backstop for the proposed resolution meant that the debtor itself was not facing immediate financial distress.<sup>17</sup> Significantly, the Third Circuit acknowledged the "irony" of its decision to bar LTL from bankruptcy on the grounds that J&J had agreed to provide a financial backstop which "it was never required to provide to claimants."<sup>18</sup>

In short, to invoke the words of the Committee, every court that has reviewed the LTL bankruptcy has recognized that J&J was not "evading accountability" through "corporate manipulation of Chapter 11 bankruptcy." Rather, J&J was voluntarily backstopping a financially distressed entity in a good faith effort to facilitate a resolution for all claimants.

### *The Unique Tools Offered In Bankruptcy*

When one appreciates both the momentous impact of the mass tort litigation machine on U.S. business and the inherent limitations of the tort system, the propriety of LTL's decision to commence bankruptcy to pursue resolution of the talc litigation is clear. It is equally evident that there is a compelling need for uniform access to the unique tools afforded by bankruptcy.

Bankruptcy brings at least three unique resolution tools to bear that are not available in the tort system, even where the cases are coordinated in an MDL. *First*, and most importantly, bankruptcy is the only forum that facilitates the resolution of *all* claims, including future claims. The significance of this feature cannot be overstated for certain mass torts litigations, like the talc litigation, that are likely to involve a significant number of unknown and unidentifiable future claimants with latent injuries that may manifest years in the future. Through the appointment of a future claims representative, use of estimation, and the imposition of a channeling injunction, bankruptcy provides a means by which to value all claims, including future claims, while also accounting for, protecting, and binding future claimants. In other words, bankruptcy offers both a voice and a path to finality for all stakeholders.

*Second* and relatedly, bankruptcy addresses opt-outs through a bar date and other procedural mechanisms. Again, such tools create finality and a path to total or complete resolution that is simply lacking in mass tort litigation.

*Finally*, bankruptcy provides a single forum for all parties to address both state and federal claims, resulting in a uniform and unified set of outcomes for claimants who are similarly situated. Even setting aside the complexity of the future claims issue, MDLs cannot provide a path to complete resolution because they cannot bind state court litigation. Given the proliferation of lawsuits, some claims will inevitably remain in the state court system, as is the case in the talc litigation.

The outcome of LTL's efforts was frustrating not only for LTL and J&J, but also the 60,000 (and growing) talc claimants who publicly and vociferously voiced their support, through counsel, for a resolution that they fundamentally understood could only be achieved through bankruptcy. It

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<sup>17</sup> *In re LTL Mgmt., LLC*, 64 F.4th at 110 (While LTL faces "substantial future talc liability," its access to a funding agreement "mitigates any financial distress.").

<sup>18</sup> *Id.* at 110–11.

also shines a light on the critical inconsistency in the availability of bankruptcy's unique tools. Had LTL's case proceeded in the Fourth Circuit, where it was initially filed, it is likely that LTL would be well on its way to implementing its roundly supported, equitable, and efficient reorganization plan.

***LTL's Path Forward***

The Bankruptcy Court repeatedly found that LTL filed its cases with the legitimate intent to obtain an equitable and efficient resolution for all claimants.<sup>19</sup> LTL's proposed resolution for an unprecedented \$8.9 billion fund was and is supported by counsel for a majority of the claimants, who described the proposal as a "significant victory" that would "provide expeditious, substantial and fair compensation" for their clients.<sup>20</sup> The Bankruptcy Court echoed that sentiment in its final decision in the case, wherein it "strongly encouraged" the parties to pursue the resolution, including through another bankruptcy case.<sup>21</sup>

We intend to follow the Bankruptcy Court's directive, to achieve a resolution in the best interests of and supported by the claimants. We respectfully request the Committee's assistance in that regard. Had LTL's case proceeded in the Fourth Circuit, where it was originally filed, or had it been transferred to the Second Circuit, it surely would have survived. This split in circuits is one that the Supreme Court will need to address going forward. But this Committee can also bring clarity to the Code that will ultimately result in uniformity in its application.

\* \* \*

Thank you for the opportunity to provide these comments and appear before the Committee. I am hopeful that the work of this Committee will ensure that the bankruptcy system is used for its intended purpose and can uniformly serve as a tool by which to achieve fair outcomes for all interested parties.

I would be happy to answer any questions that you may have.

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<sup>19</sup> *In re LTL Mgmt., LLC*, 637 B.R. at 427 (The "Debtor filed this case to resolve the potentially crippling costs and financial drain associated" with the litigation and "far from a means to 'hinder and delay talc claimants,' a global resolution of these claims though the bankruptcy may indeed accelerate payment to cancer victims and their families."); *In re LTL Mgmt., LLC*, 652 B.R. at 455 ("The foundation for a fair, efficient, and expeditious settlement has been laid by the dogged efforts of the AHC, Debtor and other parties.")

<sup>20</sup> Tiffany Hsu, *Johnson & Johnson Reaches Deal for \$8.9 Billion Talc Settlement*, NY TIMES (Apr. 4, 2023), <https://www.nytimes.com/2023/04/04/business/media/johnson-johnson-talc-settlement.html>.

<sup>21</sup> *In re LTL Mgmt., LLC*, 652 B.R. at 455 ("This Court sees no reason why this type of settlement cannot be pursued in a context other than this current bankruptcy case, such as part of the pending Imerys chapter 11 bankruptcy proceeding in Delaware.")

Responses of Mr. Erik Haas, World Wide Vice President of Litigation, Johnson & Johnson, to Questions for the Record in the September 19, 2023, Hearing of the Committee on the Judiciary, United States Senate

**The Honorable Charles Grassley**

*1. The Ingham verdict against Johnson and Johnson ultimately resulted in a \$2.2 billion verdict for 20 plaintiffs. Does Johnson and Johnson believe that its currently offered \$8.9 billion will be sufficient to satisfy all future claims when a previous verdict for only 20 plaintiffs amounted to nearly a quarter of Johnson and Johnson's current total settlement offer? If Johnson and Johnson's \$8.9 billion settlement proposal is ultimately approved by the bankruptcy court following a successful bankruptcy filing, will Johnson and Johnson commit to funding its subsidiary, LTL beyond this figure if this amount runs out and proves insufficient to satisfy all future claims?*

The *Ingham* verdict, which is an outlier, demonstrates the benefits that a comprehensive resolution through bankruptcy can uniquely provide to all claimants, including both current and future claimants. Under the tort system, most claimants will not receive any compensation because, first, Johnson & Johnson Consumer Inc. has prevailed in the vast majority of cases as the science is clear that the company's products do not cause cancer;<sup>1</sup> and, second, it would take tens of thousands of years to try all of the cases that the plaintiffs' bar has generated against the company. Most claimants will receive nothing and never have their day in court. Instead of wildly divergent awards, the bankruptcy system enables courts and the claimants to review and consider a complete and final resolution that provides for the prompt and efficient resolution of all of the claims. For that reason, counsel representing a majority of the claimants has supported the \$8.9 billion fund proposed by Johnson & Johnson Consumer Inc. and supported by Johnson & Johnson.

Regarding the *Ingham* case itself, the verdict is inconsistent with the science. To date, Johnson & Johnson Consumer Inc. has reached verdicts in 15 ovarian cancer trials and prevailed at trial or on appeal in 14. *Ingham* is an outlier. This outlier result and outsized verdict is a direct result of the court allowing the 22 cases to proceed to trial in a consolidated fashion. Social science literature long ago and consistently established that such consolidation confuses jurors, prejudices defendants, and is therefore inconsistent with constitutional due process protections. The disconnect between the evidence at trial and the verdict in *Ingham* is perhaps best reflected in the identical amounts awarded to each plaintiff, regardless of each individual's medical or health situation.

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<sup>1</sup> As another appellate court ruled recently, the talc claims are predicated on unreliable, unsubstantiated, and unscientific expert opinions. *See Barden v. Brenntag N. Am., et al.*, 2023 N.J. Super. Unpub. LEXIS 1624 (N.J. App. Div. Oct. 3, 2023).

**The Honorable Thom Tillis**

*1. If Johnson & Johnson does not pursue a strategy through the bankruptcy courts, what is the estimate of how long it would take to litigate all of these cases through the federal courts and multidistrict litigation?*

Between 2017 through 2021, fewer than 50 talc-related cases reached trial. Extrapolating that pace to the 40,000 cases filed at the time of LTL Management's first bankruptcy filing, it would take more than 3,000 years to resolve these cases. If the additional claims cited in the bankruptcy proceedings are included, it would take more than 20,000 years to resolve the talc litigation.

*2. Johnson & Johnson has supported an \$8.9 billion resolution to the claims raised in the ongoing litigation. Does this settlement plan include compensation for both existing and future claimants?*

Yes, this amount includes compensation for existing and future claimants. The inclusion of future claimants is a unique feature of bankruptcy. Unlike traditional litigation, bankruptcy allows funds to be set aside for future claimants.

*3. In traditional litigation can settlements be reached that provide for compensation for future claimants?*

No.

*4. Why do you believe that the current choice of using bankruptcy court proceedings is the appropriate venue to compensate existing and future claimants?*

Bankruptcy is the most appropriate venue because it is the only judicial venue that can efficiently and equitably resolve the mass tort talc claims. First, bankruptcy provides a single forum for current and future claims at both the federal and state court level, allowing the court to address and resolve efficiently all claims at the same time. Second, by providing a single forum for all such claims, bankruptcy avoids the highly varied results of the mass tort system and is therefore more equitable for all claimants. Third, bankruptcy can provide finality by resolving all claims. For these reasons, counsel representing a majority of the claimants supported the proposed resolution and the \$8.9 billion fund offered by Johnson & Johnson Consumer Inc. and supported by Johnson & Johnson.

**STATEMENT OF  
STEPHEN E. HESSLER  
PARTNER, SIDLEY AUSTIN LLP  
BEFORE  
THE COMMITTEE ON THE JUDICIARY  
THE UNITED STATES SENATE  
SEPTEMBER 19, 2023  
HEARING ON  
EVADING ACCOUNTABILITY: CORPORATE MANIPULATION OF  
CHAPTER 11 BANKRUPTCY**

**Introduction**

**I. Enforcing Accountability—Congress**

**A. Debtor Obligations**

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**B. Stakeholder Rights**

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**II. Enforcing Accountability—Bankruptcy Court Judges**

**A. Background**

**B. Proper Context**

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**Introduction**

Mr. Chairman and members of the Committee, thank you for inviting me to testify at today's hearing. My name is Steve Hessler, and I am a partner at Sidley Austin LLP, and the head of our firm's restructuring group. In my career, I have primarily represented major corporations as company counsel in insolvency matters, though my practice also has included representing creditors, equity holders, investors, and other third parties in a wide variety of highly complex distressed situations. I have served clients from a range of industries, including telecommunications, energy, financial services, travel, gaming, hospitality, manufacturing, and real estate—and these cases have included some of the largest and most challenging chapter 11 reorganizations in history.

I have written and presented on several insolvency topics,<sup>1</sup> and this fall I will co-teach a course on corporate governance at the University of Chicago Booth School of Business. For many years I co-taught a class on distressed investing to law and business school students at the University of Pennsylvania, most recently as an Adjunct Full Professor of Finance at the Wharton School. I also co-founded the University of Pennsylvania Institute for Restructuring Studies, a multidisciplinary think tank focused on corporate insolvency issues.

From 2012-14, I was the co-chair of the Advisory Board on Administrative Claims, Critical Vendors, and Other Pressures on Liquidity for the American Bankruptcy Institute's Commission to Study the Reform of Chapter 11. I also have served on the Local Bankruptcy Rules Committee for the Southern District of New York and the New York City Bar Bankruptcy & Corporate Reorganization Committee.

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<sup>1</sup> See [www.sidley.com/en/people/h/hessler-stephen-e/#insights](http://www.sidley.com/en/people/h/hessler-stephen-e/#insights).

Lastly, I have previously testified before the Senate and House Judiciary Committees, most recently in November 2018,<sup>2</sup> in support of legislation to add a proposed chapter 14 to the Bankruptcy Code, to provide for the more effective restructuring of a failing systemically important financial institution (than is otherwise available under chapter 11 or title II of the Dodd-Frank Act).<sup>3</sup>

As before, please note the views expressed in my testimony, written and oral, are solely my own, and are not offered on behalf of my firm, any client, or other organization.

The title of today's hearing indicates meaningful criticism (or at least skepticism) of certain facets of present bankruptcy practice. I believe much of that negative narrative, even if well-intended, rests on an incomplete understanding of the actual text, design, and application of the Bankruptcy Code—and/or it is misdirected.

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<sup>2</sup> My prior testimonies are:

*Big Bank Bankruptcy: 10 Years After Lehman Brothers: Hearing Before the Comm. on the Judiciary*, 115th Cong. (2018) (statement of Stephen E. Hessler, Partner, Kirkland & Ellis LLP), available at <https://www.judiciary.senate.gov/imo/media/doc/Hessler%20Testimony.pdf>;

*The "Financial Institution Bankruptcy Act of 2017": Hearing Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary*, 115th Cong. 12 (2017) (statement of Stephen E. Hessler, Partner, Kirkland & Ellis LLP), available at <https://judiciary.house.gov/wp-content/uploads/2017/03/Hessler-Testimony.pdf>;

*The "Financial Institution Bankruptcy Act of 2015": Hearing Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary*, 114th Cong. 61 (2015) (statement of Stephen E. Hessler, Partner, Kirkland & Ellis LLP), available at <https://judiciary.house.gov/sites/evo-subsites/judiciary.house.gov/files/2016-02/Hessler-Testimony-1.pdf>; and

*The "Financial Institution Bankruptcy Act of 2014": Hearing Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary*, 113th Cong. 60 (2014) (statement of Stephen E. Hessler, Partner, Kirkland & Ellis LLP), available at <https://judiciary.house.gov/sites/evo-subsites/judiciary.house.gov/files/2016-02/Hessler-Testimony.pdf>.

<sup>3</sup> Although not (yet) adopted by the Senate, predecessor legislation to Chapter 14 was passed by the House Judiciary Committee in September 2014, March 2016, and April 2017—and passed by the full House in December 2014, April 2016, and April 2017.

I therefore also believe the Committee’s emphasis on accountability is entirely appropriate. As with any detailed body of law—featuring hundreds of pages of statutory language, informed by decades of practice norms and voluminous precedent—the Bankruptcy Code of course always may benefit from continual reform. But Congress deliberately designed the Bankruptcy Code and Bankruptcy Rules to require monumental accountability by corporate debtors, and those protective mechanisms demonstrably are being enforced by Bankruptcy Courts.

Accordingly, my testimony is organized as follows. Part I will summarize some of the litany of provisions Congress has included in the Bankruptcy Code and Bankruptcy Rules to ensure maximal transparency and compliance by corporate debtors and to provide stakeholders with robust rights to defend their interests against any attempts to circumvent these Congressional imperatives. Part II will then explore the critical role of Bankruptcy Court Judges in safeguarding the proper functioning of corporate bankruptcies.

#### **I. Enforcing Accountability—Congress**

The Constitution provides “Congress shall have Power . . . [t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.”<sup>4</sup> Congress exercised that power in enacting the Bankruptcy Code in 1978 (and various amendments in the years since),<sup>5</sup> as implemented via the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), adopted in 1983 (and also amended routinely).<sup>6</sup>

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<sup>4</sup> U.S. Const. art. I, § 8.

<sup>5</sup> 11 U.S.C. §101 et. seq.

<sup>6</sup> 11 U.S.C. App. §1001 et. seq.

The dictionary defines “accountability,” for an organization, as being “required to justify [its] actions [or] decisions.”<sup>7</sup> To that end, the Bankruptcy Code and Bankruptcy Rules are replete with provisions by which Congress directly and thoroughly requires chapter 11 debtors to justify their actions and decisions—all subject to Bankruptcy Court approval *and* subject to an array of powerful rights expressly granted to stakeholders to protect and pursue their interests in and claims against debtor corporations. The following is merely a sampling of these extensive safeguards, but even this snapshot illustrates that any assertion that corporations may “manipulate” chapter 11 to “evade accountability” is belied by the Congressional prerogatives already embedded in the Bankruptcy Code and Bankruptcy Rules.

**A. Debtor Obligations**

**1. Disclosure/Transparency**

Upon filing for chapter 11 protection, a debtor corporation is immediately, repeatedly, and consistently subject to disclosure requirements that vastly exceed those imposed upon public companies not in bankruptcy (and otherwise governed by Securities and Exchange Commission rules and regulations). Congress plainly intended these transparency mechanisms to advance the due process rights of a debtor and every constituency impacted by its bankruptcy—with severe consequences imposed upon the debtor if it fails to satisfy its obligations.

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<sup>7</sup> *Accountable*, OED.com, [https://www.oed.com/dictionary/accountable\\_adj?tab=meaning\\_and\\_use#36720555](https://www.oed.com/dictionary/accountable_adj?tab=meaning_and_use#36720555) (last visited Sept. 17, 2023).

(a) *Corporate Ownership Statement*

In conjunction with commencing a case, a debtor “shall file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation.”<sup>8</sup>

Further, “[t]he debtor shall file a supplemental statement promptly upon any change in circumstances that renders the corporate ownership statement inaccurate.”<sup>9</sup>

(b) *Lists of Creditors and Equity Holders*

A debtor must file lists of its creditors<sup>10</sup>—including specifically the name, address, and legal nature and amount of the claims of its largest unsecured creditors (which would include litigation claimants)<sup>11</sup>—and its equity security holders.<sup>12</sup>

If a debtor fails to disclose this information, the Bankruptcy Court may convert the chapter 11 reorganization case to a chapter 7 liquidation or dismiss it entirely.<sup>13</sup>

(c) *Schedules and SOFAs*

A debtor also must file promptly comprehensive schedules of its assets and liabilities, and its current income and expenditures, as well as statements of its financial affairs (SOFAs).<sup>14</sup> A debtor is further required to provide notice to affected parties if it

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<sup>8</sup> Fed. R. Bankr. P. 7007.1, 1007(a)(1).

<sup>9</sup> *Id.* at 1007(a)(1).

<sup>10</sup> 11 U.S.C. § 521(a)(1).

<sup>11</sup> Fed R. Bankr. P. 1007(d); Official Form No. B 204.

<sup>12</sup> Fed R. Bankr. P. 1007(a)(3).

<sup>13</sup> 11 U.S.C. § 1112(e); Fed. R. Bankr. P. 1017(a).

<sup>14</sup> 11 U.S.C. § 521(a)(1)(B); Fed. R. Bankr. P. 1007(b).

amends these filings, and parties in interest can move to compel the debtor to make amendments.<sup>15</sup>

On this front as well, if a chapter 11 debtor fails to disclose this information, the Bankruptcy Court may convert the case to a chapter 7 liquidation or dismiss it entirely.<sup>16</sup>

*(d) Section 341 Meeting*

Within 21 to 40 days after a debtor commences a chapter 11 case, Section 341 of the Bankruptcy Code directs the United States Trustee’s Office—Department of Justice bankruptcy lawyers with the broad mandate to advance the public interest<sup>17</sup>—to preside at a meeting of creditors and examine a representative of the debtor, with testimony under oath and recorded verbatim electronically, about the financial information in the schedules and SOFAs, with the transcript made publicly available.<sup>18</sup>

Here also, if a chapter 11 debtor fails to fulfill its obligations under Section 341, the Bankruptcy Court may convert the case to a chapter 7 liquidation or dismiss it.<sup>19</sup>

*(e) MORs*

Chapter 11 debtors must file Monthly Operating Reports (MORs)<sup>20</sup> “so as to facilitate compilation of data and maximum possible access of the public, both by physical

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<sup>15</sup> Fed. R. Bankr. P. 1007(h).

<sup>16</sup> *See note 13 supra.*

<sup>17</sup> 11 U.S.C. § 307; 28 U.S.C. §§ 581-586.

<sup>18</sup> 11 U.S.C. § 341(a); Fed. R. Bankr. P. 2003; *see also, e.g.*, U.S. Dep’t of Justice Office of the U.S. Trustee for Region 2, Operating Guidelines and Reporting Requirements for Chapter 11 Debtors and Trustee, U.S. (revised March 1, 2023), at 2, [https://www.justice.gov/ust-regions-r02/file/region\\_2\\_operating\\_guidelines.pdf/download](https://www.justice.gov/ust-regions-r02/file/region_2_operating_guidelines.pdf/download).

<sup>19</sup> 11 U.S.C. § 1112(b)(4)(G).

<sup>20</sup> 28 C.F.R. § 58.8; 11 U.S.C. §§ 1106(a)(1), 1107(a).

inspection at one or more central filing locations, and by electronic access through the Internet or other appropriate media.”<sup>21</sup> To that end, “[t]he information required to be filed in the [MORs] . . . shall be that which is in the best interests of debtors and creditors, and in the public interest in reasonable and adequate information to evaluate the efficiency and practicality of the Federal bankruptcy system.”<sup>22</sup>

Failure by a debtor to file its MORs on time and with requisite information is remediable by conversion or dismissal of its chapter 11 case.<sup>23</sup>

*(f) Disclosure Statement*

A debtor may not solicit votes on a chapter 11 plan of reorganization, the key prerequisite to finishing bankruptcy successfully, until the debtor has transmitted to holders of claims and interests a “written disclosure statement approved, after notice and a hearing, by the court as containing adequate information,”<sup>24</sup> which means “information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor’s books and records . . . to make an informed judgement about the plan.”<sup>25</sup>

2. Bankruptcy Court Oversight

Stated generally, filing for chapter 11 protection means a corporation affirmatively places itself under federal court supervision. The Bankruptcy Court must authorize not

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<sup>21</sup> 28 U.S.C. § 589b(b).

<sup>22</sup> *Id.* § 589b(c).

<sup>23</sup> 11 U.S.C. § 1112(b)(4)(F), (H).

<sup>24</sup> *Id.* § 1125(b).

<sup>25</sup> *Id.* § 1125(a)(1).

only a debtor’s entry into and exit from chapter 11, but also *every* action of substantive import proposed to be taken by the company—at all times subject to notice to (and an opportunity to object for) all parties in interest. The upshot of this dynamic of omnipresent Bankruptcy Court oversight is the opposite of “evading accountability”—a chapter 11 filing actually gives a debtor’s stakeholders *more* influence in the company’s affairs than they would have outside of bankruptcy.

(a) “*Good Faith*”

Although the term is not defined in the Bankruptcy Code, the conceptual requirement that a corporation must use bankruptcy in “good faith” pervades chapter 11.

Again, Congress drafted chapter 11 for the express purpose of facilitating the *reorganization* of debtors,<sup>26</sup> as distinct from chapter 7, which Congress drafted for the express purpose of facilitating the *liquidation* of debtors.<sup>27</sup> Section 1112 of the Bankruptcy Code provides:

[o]n request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter [11] to a case under chapter 7 or dismiss a case under this chapter [11], *whichever is in the best interests of creditors and the estate*, for cause . . . .<sup>28</sup>

Section 1112 also specifies more than a dozen instances of what suffices as “cause” to justify conversion or dismissal, including such catchall categories as “the absence of a reasonable likelihood of rehabilitation” or “gross mismanagement of the estate.”<sup>29</sup>

<sup>26</sup> See generally 11 U.S.C. §§ 1101-1195.

<sup>27</sup> *Id.* §§ 701-784.

<sup>28</sup> *Id.* § 1112(b)(1) (emphasis added).

<sup>29</sup> *Id.* § 1112(4)(A), (B).

Importantly, Bankruptcy Courts have also found that filing (or prosecuting) a chapter 11 case in “bad faith” also may be “cause” for conversion or dismissal.<sup>30</sup> And the Bankruptcy Code explicitly requires that the Court “shall confirm a [chapter 11 plan of reorganization] only if . . . [t]he plan has been proposed in good faith . . . .”<sup>31</sup>

In sum, it is axiomatic that corporate manipulation of chapter 11, especially for the purpose of evading accountability, cannot constitute good faith and would be cause for conversion or dismissal at any stage of the case.

*(b) Notice/Objection/Approval*

Like good faith, another near-universal requirement is that almost anything a corporate debtor wants to accomplish in chapter 11 requires notice to parties in interest, opportunity for stakeholders to object and be heard by the Bankruptcy Court, and approval by the Judge.

As an initial matter, when a corporation files for chapter 11 protection, it cannot access or spend any money without Bankruptcy Court permission. Accordingly, at the same time a debtor files its bankruptcy petition (to start the chapter 11 case), it also must file a series of “first day motions,” usually one to two dozen detailed pleadings that are heard by the Bankruptcy Court within 24 to 48 hours after the case is commenced, seeking authorization to continue to access bank accounts and spend cash for all typical financial

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<sup>30</sup> See, e.g., *In re LTL Mgmt., LLC*, 64 F. 4th 84, 102, 108 (3d Cir. 2023) (dismissing chapter 11 case after finding that the debtor did not meet the exacting gateway requirement for commencing a chapter 11 case set forth in Section 1112(b) of the Bankruptcy Code that a case must be filed in good faith); *In re Nat'l. Rifle Assoc. of America and Sea Girt, LLC*, 628 B.R. 262, 280-83 (Bankr. N.D. Tex. 2021) (finding that the bankruptcy cases commenced by the NRA and a newly formed affiliate created to facilitate the bankruptcy process were not filed in good faith because the primary purpose of the filing was to avoid a potential dissolution pursuant to a New York attorney general's enforcement action, and dismissing the case).

<sup>31</sup> 11 U.S.C. § 1129(a)(3).

and operational purposes, such as to pay employees, vendors, customers, landlords, government agencies (*e.g.*, taxes, customs duties), lenders, contract counterparties, *etc.* All parties in interest have the right to appear and be heard if they object to these proposed payments, but, because the hearing by necessity occurs quickly (so the debtor can continue its operations without interruption), the Bankruptcy Court typically approves the motions only on an interim basis—meaning the debtor has to return approximately one month later to (re)seek approvals on a final basis—thus giving parties the additional opportunity to present any opposition to the Bankruptcy Court (and, ideally, the opportunity to negotiate consensual resolutions with the debtor in advance of the hearing).<sup>32</sup>

Furthermore, during a case, every non-ordinary course transaction similarly requires this multi-step process of notice, opportunity to object, and Bankruptcy Court approval.<sup>33</sup>

Lastly, as noted above, the concluding step in a successful chapter 11 case is Bankruptcy Court confirmation of a plan of reorganization—which is subject not only to review and objection by any party in interest, but also requires at least one class of impaired creditors affirmatively to vote to accept the plan (without counting the votes of insiders).<sup>34</sup> Notably, if something goes wrong, and the debtor is unable to confirm a plan—or if the debtor finds its efforts stymied by objectors or the presiding Judge for any other reason—the debtor needs Bankruptcy Court approval to dismiss the case.<sup>35</sup>

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<sup>32</sup> See Fed. R. Bankr. P. 2002; *see also* 11 U.S.C. § 107(a); Fed. R. Bankr. P. 5005(a)(1).

<sup>33</sup> See 11 U.S.C. § 363(b)(1).

<sup>34</sup> *Id.* § 1129(a)(10).

<sup>35</sup> *Id.* § 1112(b).

In other words, if a corporation is seeking to evade accountability by manipulating chapter 11, it must overcome stakeholder opposition and Bankruptcy Court oversight every step of the way—and if that effort is flailing, the debtor cannot simply “quit” chapter 11 and walk away from Bankruptcy Court supervision unless the Judge expressly grants permission to leave.

### **B. Stakeholder Rights**

In addition to imposing the above transparency and compliance obligations on debtors, Congress in the Bankruptcy Code and Bankruptcy Rules also armed opposition stakeholders with an arsenal of protective measures to combat potential improper debtor conduct.

#### 1. Procedural Protections

##### *(a) Standing*

As an initial matter, any “party in interest,” including any creditor or equity holder (and any official or ad hoc creditor or equity committee), “may raise and may appear and be heard *on any issue* in a case under” chapter 11.<sup>36</sup> Notably, this expansive standing grant includes holders of tort or other litigation claims.<sup>37</sup> And as described above, it also includes the United States Trustee (again, Department of Justice bankruptcy lawyers acting on behalf of the public interest).<sup>38</sup>

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<sup>36</sup> *Id.* § 1109(b) (emphasis added).

<sup>37</sup> *See In re Global Indus. Technologies, Inc.*, 645 F.3d 201, 210 (3d Cir. 2011) (“The list of potential parties in interest in § 1109(b) is not exclusive. On the contrary, that section ‘has been construed to create a broad right of participation in Chapter 11 cases.’”).

<sup>38</sup> *See* Section A.1.d *supra*.

*(b) Discovery*

Once a company is subject to the chapter 11 process, “[o]n motion of any party in interest, the [Bankruptcy] [C]ourt may order the examination of any entity” relating “to the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter, which may affect the administration of the debtor’s estate, or the debtor’s right to a discharge” of liabilities.<sup>39</sup> This discovery right is generally broader than that under the Federal Rules of Civil Procedure, which limit the scope of discovery to matters that are relevant to a party’s claim or defense and proportional to the needs of the case.<sup>40</sup>

*(c) Lift Automatic Stay*

Filing for chapter 11 protection “operates as a stay, applicable to all entities, of [] the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced” before the petition date.<sup>41</sup> This “automatic stay” of litigation is one of the most valuable benefits chapter 11 provides to a debtor—especially a corporation facing significant alleged tort liabilities.

Conversely, Congress also provided stakeholders with the powerful ability to seek to lift the automatic stay. “On request of a party in interest and after notice and a hearing, the [Bankruptcy Court] shall grant relief from the [automatic stay], such as by terminating, annulling, modifying, or conditioning such stay [] for cause . . . .”<sup>42</sup> Filing a chapter 11

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<sup>39</sup> Fed. R. Bankr. P. 2004(a), (b).

<sup>40</sup> Fed. R. Civ. P. 26(b).

<sup>41</sup> 11 U.S.C. § 362(a)(1).

<sup>42</sup> *Id.* § 362(d)(1).

case with a “bad faith” motive of unjustifiably thwarting litigation claims may serve as cause to lift the automatic stay (if not to dismiss the case entirely).<sup>43</sup>

*(d) Trustee or Examiner*

If a corporation is using chapter 11 for a manipulative purpose, the Bankruptcy Court may wrest control away from the debtor’s directors and officers and appoint an independent party to serve as a trustee or examiner to run or investigate the company:

At any time after the commencement of the [chapter 11] case but before confirmation of a plan [of reorganization], on request of a party in interest or the United States [T]rustee, and after notice and a hearing, the court shall order the appointment of a trustee [] for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause . . . if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate . . . .<sup>44</sup>

Relatedly, if the Bankruptcy Court does not order the appointment of a trustee:

then at any time before the confirmation of a plan [of reorganization], on request of a party in interest or the United States [T]rustee, and after notice and a hearing, the court shall order the appointment of an examiner to conduct such an investigation of the debtor as is appropriate, including an investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor of or by current or former management of the debtor, if [] such appointment is in the best interest of creditors, any equity security holders, or other interests of the estate . . . .<sup>45</sup>

2. Substantive Protections

A corporation may not (mis)use chapter 11 to shield, hide or transfer assets away from stakeholders that have a legal right to that value.

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<sup>43</sup> *In re Porter*, 371 B.R. 739, 745 (Bankr. E.D. Pa. 2007) (citing several chapter 11 cases granting secured creditors stay relief on the basis of debtors’ bad faith).

<sup>44</sup> 11 U.S.C. § 1104(a).

<sup>45</sup> *Id.* § 1104(c)(1).

(a) Claims Process

Further to a debtor's filing of its lists of creditors and equity holders, and its schedules and SOFAs (explained above), the Bankruptcy Rules require that a register be kept on which parties in interest file proofs of claims, which state the legal nature and amount of an asserted right to payment from the debtor.<sup>46</sup> To confirm a plan of reorganization, a debtor must specify how every class of claims and interests will be treated (e.g., reinstated, paid in full or in part, extinguished without payment, *etc.*).<sup>47</sup> And after a plan has been confirmed and become effective, a chapter 11 case cannot be "fully administered" and thus closed by final decree until the debtor shows that every claim on the register has been fully and finally addressed before the Bankruptcy Court.<sup>48</sup>

(b) Avoidance Actions

As a general matter, the holder of a legally valid claim may recover only from the distributable value (such as cash, debt, or equity) of the specific chapter 11 debtor against which the claim is asserted. This does not mean, however, that a debtor can diminish or eliminate the amount of value available for repayment to stakeholders by moving such property or cash out of the corporation before filing for chapter 11, as any such transfers may be "avoided" by stakeholders through specific causes of action that Congress included in the Bankruptcy Code.

The first category of avoidance action is the preference claim, which allows the claw back of any transfer made to a creditor on account of a preexisting debt while the

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<sup>46</sup> Fed. R. Bankr. P. 3002(a)(b), 5005(a)(1).

<sup>47</sup> 11 U.S.C. § 1123(a).

<sup>48</sup> *Id.* § 350; Fed. R. Bankr. P. 3022.

debtor was insolvent, within 90 days of the petition date (or within one year if the transfer was made to an insider), if the transfer enabled the creditor to receive more than it would have in a chapter 7 liquidation.<sup>49</sup>

The second category of avoidance action is the actual or constructive fraudulent transfer claim. The former cause of action facilitates the claw back of any transfer made within two years of the petition date if the debtor “made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity.”<sup>50</sup> The latter does so if the debtor “received less than a reasonably equivalent value in exchange for such transfer” and was or became insolvent or undercapitalized before or as a result of the transfer.<sup>51</sup>

The third category of avoidance action is the unauthorized post-petition transfer claim. This cause of action facilitates the claw back, up to two years after the date of the applicable transfer, of transfers made after the commencement of the bankruptcy case that were not authorized by the Bankruptcy Code or Bankruptcy Court, enabling stakeholders to remedy transfers made in disregard of the notice, opportunity to object, and Court approval requirements under the Bankruptcy Code.<sup>52</sup>

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<sup>49</sup> 11 U.S.C. § 547(b).

<sup>50</sup> *Id.* § 548(a)(1)(A).

<sup>51</sup> *Id.* § 548(a)(1)(B)(i), (ii). In addition to creating its own actual and constructive fraudulent transfer claims, the Bankruptcy Code also permits assertion of actual and constructive fraudulent transfer claims under applicable non-bankruptcy law. *Id.* § 544(b).

<sup>52</sup> *Id.* § 549(a), (d).

While avoidance actions are property of the debtor’s estate, and thus the debtor has primary standing to bring them, creditors may seek derivative standing to file suit on behalf of the debtor if the debtor unjustifiably refuses to do so.<sup>53</sup>

## II. Enforcing Accountability—Bankruptcy Court Judges

From my practitioner perspective, largely (and problematically) absent from the “corporate manipulation” thesis is the centrality of Bankruptcy Court Judges in enforcing accountability. To the extent critical inquiry is directed at the important question of whether the Bankruptcy Code is susceptible to abuse, the litany of provisions highlighted above, taken together, indicates:

*First*, the massive disclosure and compliance obligations that Congress included in the Bankruptcy Code and Bankruptcy Rules make it difficult for a corporate debtor to attempt to hide, much less successfully advance, an impermissible purpose; *and*

*Second*, even assuming otherwise, the adversarial tools that Congress provided to stakeholders in chapter 11 serve as a formidable deterrent and, if needed, potent remedy for manipulation.

Proving there is widespread evasion of accountability therefore would logically imply there is a breakdown in the *application* of chapter 11—which, in turn, brings into focus the indispensable role of Bankruptcy Court Judges in this debate.

### A. Background

To level set briefly, within the federal court system, Congress established in each judicial district a Bankruptcy Court with one or more Bankruptcy Court Judges who are appointed to fourteen-year terms by the United States Court of Appeals for the circuit in

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<sup>53</sup> *Id.* § 1109(b); *see also id.* § 1103(c)(5).

which the district is located.<sup>54</sup> As distinct from Circuit and District Court Judges, who are appointed by the President and confirmed by the Senate to lifetime terms under Article III of the Constitution, Bankruptcy Court Judges serve as “judicial officers” of the District Court.<sup>55</sup>

Bankruptcy Court decisions are appealable, first, to the District Court, then to the Bankruptcy Appellate Panel or Court of Appeals; and, ultimately, certiorari may be sought from the Supreme Court.<sup>56</sup>

**B. Proper Context**

In my experience, arguments about one or more perceived shortcomings of modern bankruptcy practice either largely overlook or misapprehend preexisting Bankruptcy Code provisions or precedent. Somewhat more indirect (though I believe still relevant) reassurances are found in properly contextualizing Bankruptcy Court Judges within certain potential criticisms.

One argument is that because Bankruptcy Court Judges are not appointed under Article III, and Bankruptcy Courts do not have juries, it is suboptimal for Bankruptcy Court Judges to resolve any issues involving mass tort allegations (which might otherwise be entitled to state or federal court jury trials). As a threshold clarification, chapter 11 addresses the resolution of claims against a debtor; it is not the substantive law that governs liability for those alleged claims. Further, beyond providing for appeals of Bankruptcy Court rulings to higher courts, Congress also has specified that any party in interest may

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<sup>54</sup> 28 U.S.C. § 151.

<sup>55</sup> *Id.* § 152(a)(1).

<sup>56</sup> *Id.* § 158.

ask the District Court to “withdraw the reference” of a chapter 11 case (in whole or part) from the Bankruptcy Court, for cause shown—thus allowing one or more issues to be decided by an “Article III Judge” as appropriate.<sup>57</sup>

Another implied criticism seems to be that because they do not regularly adjudicate mass tort claims, Bankruptcy Court Judges may be less well-equipped to ensure tort claimants receive access to the Court. Here as well, beyond the reality that chapter 11 grants even broader standing to all stakeholders (not just plaintiffs and defendants), and provides even greater discovery rights than in a conventional (non-bankruptcy) state or federal court trial, Bankruptcy Court Judges are notably vigilant in enforcing parties’ rights to be heard. On a human level, presumably because of their deep experience dealing with challenging personal bankruptcy cases, Bankruptcy Court Judges are extraordinarily patient and assistive to parties before them, especially *pro se* litigants who may be unfamiliar with the unknown and intimidating forum in which they are appearing.

Lastly, recent rulings in certain high-profile mass tort chapter 11 cases speak for themselves, and serve as perhaps the most straightforward and compelling response to any contention that Bankruptcy Court Judges are somehow failing to enforce the accountability provisions that Congress enshrined in the Bankruptcy Code.

### **Conclusion**

Thank you again for inviting me to appear before you today. I appreciate the Committee allowing me to share my views. And I welcome the opportunity to answer any questions about my testimony.

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<sup>57</sup> *Id* § 157(d); Fed. R. Bankr. P. 5011(a).

RESPONSES OF STEPHEN HESSLER TO QUESTIONS SUBMITTED  
BY SENATOR GRASSLEY+1 212 839 5498  
SHESSLER@SIDLEY.COM

October 10, 2023

To: The Senate Committee on the Judiciary

Re: Follow Up Question for Stephen Hessler In Regards to the Record of the Hearing  
Entitled “Evading Accountability: Corporate Manipulation of Chapter 11  
Bankruptcy” on Tuesday, September 19, 2023Question for Stephen Hessler:

1. The *Purdue Pharma* case is under heightened scrutiny given the controversy surrounding non-consensual third party releases. Are non-consensual third-party releases a common feature of mass torts cases like *Purdue Pharma*’s which does not involve a divisional merger?

As a baseline, releases are an integral feature of essentially all major chapter 11 reorganizations. Section 1123(b)(3)(A) of the Bankruptcy Code provides that a chapter 11 plan may provide for “the settlement or adjustment of any claim or interest belonging to the debtor or to the estate.” Consistent with this statutory authorization, chapter 11 plans typically contain releases by the debtor of claims and causes of action which the debtor or the estate may have against non-debtor parties. In addition, chapter 11 plans typically contain releases of “derivative” claims that may be held by third parties, as courts generally agree that derivative claims belong to the estate of the debtor and so can be released by the debtor.

“Third party releases” are chapter 11 plan provisions that cause non-debtor parties (the “Releasing Parties”) to release other non-debtor parties (the “Released Parties”) from direct claims the Releasing Party has against the Released Party for liability for certain acts or omissions, which generally must be related to or in some way implicate the debtor or its estate. Third party releases are typically used to effect efficient and timely resolution of plan issues, build consensus and compromise over a plan, and avoid costly and uncertain litigation that may interfere with the reorganized debtor. Third party releases can be granted consensually, typically in connection with soliciting votes on a plan that contains such releases, or, in some jurisdictions, imposed

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nonconsensually by the Bankruptcy Court at the request of the plan proponent. Courts generally agree that consensual third party releases are permissible, but disagree about what is required for a Releasing Party to sufficiently manifest consent to release the Released Parties. For example: a release may be deemed consensual if granted by a party who votes to reject the chapter 11 plan but fails to affirmatively opt out of the releases; who is entitled to vote but fails to return a ballot/opt-out form; who is unimpaired under (and thus deemed to accept) the chapter 11 plan; or who is impaired and deemed to reject the chapter 11 plan. In counter-position to the “consensual” third party release is the nonconsensual third party release. A nonconsensual third party release is one in which the Releasing Party does not grant consent (in some form) to the release but is nonetheless barred by the court’s order from bringing the claim. The “majority view” is that nonconsensual third party releases are permissible in certain circumstances, although courts differ on what constitutes these permissible circumstances.

I am not aware of a comprehensive survey of third party releases in mass tort cases where a divisional merger was not implicated. I do note that many third party releases sought in bankruptcy cases, including mass tort cases, are consensual per the standard of the applicable court. In those cases where a nonconsensual third party release is sought, there is a varying degree of opposition to such releases – in some cases, only parties who are not Releasing Parties oppose the release, while in others there is broader opposition to the release and the release is nonetheless granted.

Sincerely,



Stephen E. Hessler

U.S. Senate Committee on the Judiciary  
Hearing on  
Evading Accountability: Corporate Manipulation of Chapter 11 Bankruptcy  
September 19, 2023

Written Statement of  
Melissa B. Jacoby  
Graham Kenan Professor of Law  
University of North Carolina at Chapel Hill  
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Thanks to Chair Durbin, Ranking Member Graham, and members of the committee for holding this hearing and inviting me to participate. Bankruptcy law has been a central focus of my professional life since I graduated from law school. My first post-law-school job was in the Northern District of Illinois bankruptcy court in Chicago. I later was a staff attorney for the National Bankruptcy Review Commission, a temporary body created by federal legislation in 1994 to comprehensively study the bankruptcy system. My roster of responsibilities included helping the commission examine big corporate bankruptcy cases, including those involving large numbers of personal injury and wrongful death claims and allegations of corporate wrongdoing. Since becoming a professor in 2000, I have published over forty scholarly publications on bankruptcy law and related topics. For its fall 2022 annual meeting, the National Conference of Bankruptcy Judges asked me to discuss issues closely related to today's hearing on a program that asked, with respect to big chapter 11 cases, "How Far is Too Far and is the Day of Reckoning Here?"

As I said then, and can restate now, some big companies, advised by large and elite law firms, have indeed gone too far, and the day of reckoning is past due. Retrofitting chapter 11 to manage and permanently cap liability for serious and widespread allegations of harm runs the risk of encroaching on democratic and constitutional values such as liberty, due process, federalism, and separation of powers. When profitable companies use a liability-only subsidiary with the objective to extract bankruptcy's extraordinary benefits to protect the entire corporate family, the risks are especially intolerable. I recommend modesty about what can be accomplished within the boundaries of a national bankruptcy system and adherence to the rule of law.

This written statement, prepared in a highly compressed time period, draws from four recent articles – *Sorting Bugs and Features of Mass Tort Bankruptcy*, 101 TEXAS LAW REVIEW 1745-1771 (2023); *Unbundling Business Bankruptcy Law*, 101 NORTH CAROLINA LAW REVIEW 1703-1761 (2023); *Fake and Real People in Bankruptcy*, 39 EMORY BANKRUPTCY DEVELOPMENTS JOURNAL 497-522 (2023); and *Shocking Business Bankruptcy Law*, 131 YALE LAW JOURNAL FORUM 409-427 (2021) – as well as the book, UNJUST DEBTS: HOW OUR BANKRUPTCY SYSTEM MAKES AMERICA LESS EQUAL, which will be published on June 11, 2024.

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The Bankruptcy Code is a remarkable statute in scope and effect. In enacting chapter 11, a mechanism for restructuring the debt of financially troubled businesses, on a bipartisan basis in 1978, Congress somewhat aggressively used the bankruptcy power embedded in the United States Constitution. The aspiration was to allow a viable but overindebted business to restructure its debts if enough stakeholders supported the reorganization. If stakeholders believed they would be better off with the business alive than dead, and the plan could satisfy a list of other requirements, then chapter 11 could help make that happen.

To that end, the Bankruptcy Code supplies legal benefits to corporate debtors that cannot not be found elsewhere in the legal system. Here are three of the most significant elements for today's hearing purposes.

One is the automatic stay. Given that Constitution limits the power of federal courts, the standard is typically very high for a federal court to enjoin people from their activities. The Bankruptcy Code contains a big exception: section 362 automatically imposes a temporary injunction to protect the debtor and property from creditors. Itself a significant exercise of coercive government power, this authorization is necessarily tethered to preservation of a financially distressed debtor and its property to achieve the broader objectives of the bankruptcy system.

The discharge is another key benefit federal bankruptcy law offers. Section 1141 of the Bankruptcy Code grants corporations a permanent alteration of nearly all legal rights upon chapter 11 plan confirmation. The discharge for big companies in chapter 11 is much broader than the discharge offered to financially distressed families. And unlike distressed families who undertake repayment plans, who generally only get debt relief if they finish their plans, big

companies get a discharge upon plan confirmation. The relief is not reversed if the reorganized company turns out to be unable to deliver on its plan's promises, which is not a rare occurrence.

A third, and related, benefit: although creditors vote on chapter 11 plans, a debtor does not need unanimous consent to get a plan confirmed that changes the rights of all claimants. The majority of creditors, as calculated under section 1126 of the Bankruptcy Code, essentially can bind dissenters to a plan.

It is no surprise these legal benefits look attractive to those beyond their intended beneficiaries. But these benefits are not available to everyone and are part of a package deal. The drafters of the Bankruptcy Code embedded these benefits into a process that intentionally alters and amplifies ordinary corporate governance. For example, companies in chapter 11 must share control with creditors and endure additional public oversight and scrutiny. All creditors of the company are to share the pain to some extent. Only a company under serious financial threat would be willing to endure the obligations to receive the benefits. That, at least, was the theory.

The topic of today's hearing lies at the intersection of two phenomena. The first is the position of some big and profitable enterprises that they know better than Congress how to efficiently deploy the perks of chapter 11, and thus should be able create liability-only subsidiaries that extract the benefits of chapter 11 to protect the full corporate family. The second is the use of chapter 11 to manage the costs and consequences of ongoing litigation – particularly to accomplish in chapter 11 what the Supreme Court has held cannot be done in class actions by binding dissenters to a deal.<sup>1</sup> Although many companies have used bankruptcy this way since the 1980s, and although Congress authorized some of this activity for asbestos claims in 1994, this type of case deserves careful attention.

One might ask, why *not* allow profitable companies, with no overindebtedness problems, to use chapter 11 if doing so could maximize economic value? Although the United States Supreme Court has rarely heard cases challenging the substantive scope of the Bankruptcy Clause, and none of them recent, some scholarship and caselaw suggest the clause carries an insolvency or related requirement.<sup>2</sup> Even if one does not want to go that far, surely this

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<sup>1</sup> Ortiz v. Fibreboard Corp, 119 S. Ct. 2295 (1999). See also Amchem Products, Inc. v. Windsor, 117 S. Ct. 2231 (1997); S. Elizabeth Gibson, Response to Professor Resnick: Will this Vehicle Pass Inspection?, 148 U. Pa. L. Rev. 2095, 2106-7 (2000); Ralph Brubaker, Assessing the Legitimacy of the "Texas Two-Step" Mass-Tort Bankruptcy, 42 Bankruptcy Law Letter Aug 2022.

<sup>2</sup> E.g., Thomas E. Plank, Bankruptcy and Federalism, 71 Fordham Law Review 1063 (2002).

extraordinary coercive federal power does not become available whenever someone in corporate America discovers it can maximize value by redeploying chapter 11's perks to do what is not permitted in class actions or in federal multidistrict litigation. If the bankruptcy power covered everything that might maximize value, it could swallow much of the legal world. Perhaps others can construct an argument for how the Commerce Clause or other authority justifies a national automatic stay and discharge and binding dissenters with majority vote that should be available to any company facing widespread allegations of causing harm. In that instance, certain features of bankruptcy could be added to other litigation systems without the package deal and gatekeeping that chapter 11 requires. In the meantime, access to chapter 11 must be bounded.

Some big enterprises have sought to justify their presence in bankruptcy through critiques of the civil justice system and other courts. Both LTL Management (the J&J subsidiary) and Aearo Technologies (the 3M subsidiary) filed a document they call an "informational brief" early in their chapter 11 cases. This document is now a regular feature of mass tort bankruptcy even though I am not aware of authority in rules of procedure for its filing. LTL Management's informational brief blamed the flaws of juries and plaintiffs' lawyers for its need for chapter 11. It also complained that the recusals by Justices Alito and Kavanaugh on J&J's certiorari petition from a Missouri ruling, followed by denial of J&J's petition by the United States Supreme Court, "work significant prejudice" and deprived the company of review of state court rulings.<sup>3</sup> Aearo called the multidistrict litigation consolidating claims against 3M "broken beyond repair," and called MDLs a "magnet for unvetted claims."<sup>4</sup>

These points do not connect neatly with an argument in favor of bankruptcy use. The bankruptcy court cannot review the state court rulings that the Supreme Court refused to take up. In any event, I am not here to defend all aspects of the civil justice system or MDLs, let alone everything that lawyers do – whether they represent injured people, big corporations, or any other client. Still, I wonder why the already hardworking bankruptcy system should be burdened with a new role as the complaint department about these other fora.

Defenders of bankruptcies preceded by divisive mergers also tout the virtues of tackling tort liabilities without disturbing the operations of an enterprise. Why bother commercial

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<sup>3</sup> Informational Brief of LTL Management LLC at 4, 43-50, 106, 109, 120, 125. In re LTL Management LLC, 21-30589 (Bankr. W.D.N.C. Oct. 14, 2021), docket #3.

<sup>4</sup> Informational Brief of Aearo Technologies at ii, 11, 42. In re Aearo Technologies, 22-2890 (Bankr. S.D. Ind. July 26, 2022, docket #12).

creditors and investors with an invasive bankruptcy if their interests can simply continue unaffected? This is not a new argument.<sup>5</sup> One answer is that the very structure of chapter 11 is premised on all creditors of an enterprise sharing the pain. The separation of liabilities from the operating business from which they came unravels the checks and balances of chapter 11 and commitments to creditor fairness. The idea that all creditors get to be paid in full in the ordinary course *except* for people alleging serious harm by the company not only is out of step with the design of chapter 11, but with broader efforts to deter corporate misconduct and wrongdoing.

The recent bankruptcies filed after divisive mergers under Texas law may seem especially brazen but as suggested above such strategies did not develop out of thin air. Over the intervening decades, since the earliest mass tort bankruptcies filed by a primary tortfeasor in an operating business, some caselaw has tolerated using the bankruptcy case of one entity to protect nondebtors temporarily and then permanently, however financially stable those nondebtors might be, and even if the nondebtors are alleged to have their own independent and direct responsibility for wrongdoing. Some circuit courts have been surprisingly welcoming of temporary injunctions protecting co-defendants on somewhat circular showings that protecting more defendants will help get a chapter 11 plan over the finish line.<sup>6</sup>

Going further, some chapter 11 debtors in tort-driven cases say actions by public officials designed for safety and welfare should be halted against the debtor and co-defendants while they try to get a majority of claimants to agree to a chapter 11 plan.<sup>7</sup> Even if the debtor and co-defendants make voluntary concessions to alleviate concerns about ongoing public harm, such concessions do not make the granting of such an injunction any less extraordinary or controversial an exercise of federal court power.

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<sup>5</sup> E.g., Ronald Barliant, Dimitri G. Karcazes, & Anne M. Sherry, From Free-Fall to Free-For-All: The Rise of Prepackaged Asbestos Bankruptcies, 12 A.B.I. Law Review 441, 459 (2004) (describing “Patronus Technique,” whereby a healthy large company creates special purpose entity to house asbestos liabilities and puts that entity into bankruptcy, and concluding that this separation of liabilities from the operating business was not what Congress had in mind when it enacted section 524(g) for asbestos bankruptcy). See also *In re Combustion Engineering, Inc.*, 391 F.3d 190 (3d Cir. 2004).

<sup>6</sup> Such case law was recently collected, and applied to a divisive merger context over a rigorous dissenting opinion, in *In re Bestwall LLC*, 71 F.4th 168 (4th Cir. 2023). Five 4th Circuit judges voted to rehear this case en banc and were outvoted by eight of their colleagues. Order, *In re Bestwall LLC*, 22-1127 (4th Cir. Aug 7, 2023), docket #82.

<sup>7</sup> *In re Purdue Pharmaceuticals LP*, 619 B.R. 38 (S.D.N.Y. 2020).

It is time to turn to the intersecting phenomenon of mass tort bankruptcy more generally. Especially given the limits on class actions imposed by the Supreme Court in cases like *Amchem* and *Ortiz*, and the boundaries on federal multidistrict litigation by statute, using bankruptcy to cap liability for present and future tort claims is a significant extension of bankruptcy authority that should not be taken lightly. When enterprises push the envelope in asking to manage and cap tort liabilities through bankruptcy, they explicitly or implicitly suggest that bankruptcy system is the most rational course of action to address these lawsuits even though it was not designed for this purpose. For example, in its informational brief, Purdue Pharma told readers that “bankruptcy is the only way to resolve the [opioid crisis] litigation rationally.” In a pleading seeking to halt litigation against third parties such as members of the Sackler family who were not themselves bankruptcy filers, Purdue Pharma further stated that “decades of experience demonstrates that bankruptcy is a proven and efficient vehicle to successfully, rationally, and equitably resolve such mass tort liability.”<sup>8</sup>

The more that I have looked the features of mass tort bankruptcy cases over time, the more questions arise about the metrics to support these assertions. It cannot be denied that billions of dollars’ worth of assets pass through these mass tort bankruptcy trusts. But one needs more granular information to assess whether these cases rationally and equitably resolve mass tort liability. Setting aside (just for now) major questions about how the system treats, and is perceived by, the real people who have found themselves and their grievances shifted out of the civil justice system into this unfamiliar territory, here are just a few of the money questions. Where does the money go? To what extent are recoveries consistent with predictions? To the extent the bankruptcy was aimed at changing the rights of future claimants as many of these cases are, how do those individuals fare relative to those who came earlier?

Mass tort bankruptcies and the resulting trusts are not as transparent as they could and should be and that makes it harder to know the answers for someone on the outside. A lot of information is hidden from public view or offered in forms that makes it hard to combine with other sources. But a few things can be said from research into particular trusts and more comprehensive studies of asbestos bankruptcies such as a 2010 RAND Institute report.

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<sup>8</sup> The “only”: Debtors’ Informational Brief at 4, *In re Purdue Pharma L.P.*, 19-23649 (Bankr. S.D.N.Y. Sept. 16, 2019), docket #17; “proven and efficient:” Complaint for Injunctive Relief at 30, *Purdue Pharma L.P. v. Commonwealth of MA et al.*, 19-0289 (Bankr. S.D.N.Y. Sept. 18, 2019), docket #1.

To start, existing data on asbestos cases suggest the plans coming out of these bankruptcies ascribe very different scheduled values to the same harm (such as a mesothelioma diagnosis) and predict varying levels of recovery on such claims. In the trusts sampled by the RAND institute for its 2010 report, for example, the scheduled value for mesothelioma claims varied from \$7,000 to \$1.2 million, with a median of \$126,000. The predicted payment percentage varied from 1.1 percent to 100% with a 25% median.<sup>9</sup>

With respect to people who seek recovery from the same trust, timing matters. There is a good chance that someone suffering from mesothelioma at the time of the bankruptcy received a markedly different level of compensation from someone who diagnosed even just a few years later.<sup>10</sup>

A few examples may be helpful. T H Agriculture & Nutrition, a subsidiary of Philips Electronics, filed for bankruptcy in 2008 and got its plan confirmed in 2009. Initial claimants, those able to participate and vote in the bankruptcy, received 100% of what they were promised (and some watchers of asbestos bankruptcies allege those promises were unduly generous). In 2011, when the trust started considering new claims – filed by people who did not have the opportunity to participate directly in the bankruptcy were bound by its result – recovery dropped to 30%. As of 2020, the payment percentage was 15%.<sup>11</sup>

In Babcock & Wilcox, a case filed in 2000 and resulting in a confirmed plan in 2006, the scheduled value of a mesothelioma claim was \$90,000 and had an initial payment percentage of 34% at plan confirmation. By 2010 the payment percentage was 15%. The current payment percentage is 6.3%.<sup>12</sup>

<sup>9</sup> See generally Lloyd Dixon, Geoffrey McGovern & Amy Coombe, *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts*, RAND Institute for Civil Justice xv, 36 (2010). For concerns about transparency and the difficulty of data access in asbestos bankruptcies, see *id.* at 45; S. Todd Brown, *How Long is Forever This Time: The Broken Promise of Bankruptcy Trusts*, 61 *Buff. L. Rev.* 537, 585 (2013).

<sup>10</sup> Other useful sources on variable recoveries in addition to the RAND Institute (2010) report include S. Todd Brown, *How Long is Forever This Time: The Broken Promise of Bankruptcy Trusts*, 61 *Buff. L. Rev.* 537 (2013); Marc C. Scarcella & Peter R. Kelso, *A Reorganized Mess: The Current State of the Asbestos Bankruptcy Trust System*, Mealey's Litigation Report 1, March 18, 2015.

<sup>11</sup> Kirk T. Hartley, David C. Christian, Marc C. Scarella, & Peter R. Kelso, *Prepackaged Plan of Inequity: The Financial Abuse of Future Claimants in the TH Agriculture & Nutrition 524(g) Asbestos Bankruptcy*, 11 Mealey's Asbestos Bankruptcy Report (Nov. 2011); Notice of TH Agriculture & Nutrition, LLC Asbestos Personal Injury Trust Regarding Payment Percentage (April 20, 2020).

<sup>12</sup> RAND (2010) at 76. Current payment percentage is listed on the trust website: [bwasbestostrust.com](http://bwasbestostrust.com) (last checked Sept. 17, 2023).

Halliburton's subsidiary started with a payment percentage of 100%, with a scheduled value of \$136,500 on a mesothelioma claim, when the case emerged from bankruptcy in 2004. By 2010, the payment percentage was 52.5%, and now is at 60%.<sup>13</sup>

That latter example is a reminder that payment percentages can go up just as they go down. The J.T. Thorpe Company Successor Trust, a case confirmed in 2004, had a scheduled value for a mesothelioma claim of \$100,000 and an initial payment percentage of 18%. The payment percentage was 38% at the time of the Rand Institute report. As of 2018, the percentage was 23%.<sup>14</sup>

Although asbestos raises some especially thorny challenges for predicting recoveries, including continuing flows of new claims alleging non-work exposure and illnesses that could have non-asbestos causes, uncertainty is neither a relic of the past nor exclusive to asbestos. The recent Mallinckrodt bankruptcies are a reminder that what the plan promises and what the plan delivers are often very different. A little more than a year after plan confirmation, \$1 billion of the funds promised for opioid compensation and abatement essentially evaporated.<sup>15</sup>

Chapter 11 was not designed to systematically resolve large numbers of unliquidated tort liabilities. In 1984, Congress amended section 157 of title 28 to require such claims, to the extent they arose in bankruptcy cases, to be tried by district courts. That is not a move one would make if one expected bankruptcy to become mass tort court.

To be sure, legislation in 1994 complicated the picture by retroactively blessing the Johns-Manville bankruptcy, one of the first two chapter 11 cases filed to address large numbers of asbestos claims. That case has itself been much studied and critiqued, in part because the trust the bankruptcy created itself had to be restructured in short order. Nonetheless, all claimants were directed to the trust for recovery, including those who did not participate in the case and discovered illness from exposure years into the future. Lobbied to ensure skittish investors of the legality of this structure, Congress added section 524(g) to the Bankruptcy Code within a broader reform act of miscellaneous amendments. Section 524(g), standing alone, could not and cannot

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<sup>13</sup> RAND (2010) at 91. Current payment percentages viewed on [diasbestostrust.org](http://diasbestostrust.org) (last checked Sept. 17, 2023).

<sup>14</sup> RAND (2010) at 116. JT Thorpe Company Successor Trust website (listing payment percentage as of May 25, 2018).

<sup>15</sup> The clearest summary I have heard of the resolution was at the first hearing in the second bankruptcy. The audio recording of that hearing is posted on the court docket. First-Day Hearing. In re Mallinckrodt, 23-11258 (Aug. 30, 2023), docket #158.

overcome the broader mismatch between the design of chapter 11 and the needs associated with large numbers of injured people who allege the debtor bears some responsibility.

The same law that created section 524(g) also created the National Bankruptcy Review Commission to conduct a comprehensive study of the bankruptcy system. That commission issued a final report in October 1997 recommending that Congress continue to legislate in the realm of mass tort bankruptcy, particularly if companies aimed to cap liability for future claims as well as current ones. Rather than recommending the extension of section 524(g) to non-asbestos contexts, the report recommended that Congress repeal that provision upon implementation of newer proposals. In addition to stifling innovation by authorizing only the Manville experiment, the commission said section 524(g) did not do enough to protect injured parties, particularly those who would not discover the harm until long after the bankruptcy was over. Given the range of alleged harms among claimants in many cases, the Commission noted more than one representative for future claims may be constitutionally necessary (assuming the structure is constitutional at all).<sup>16</sup>

That these proposals did not become law does not establish Congressional satisfaction with mass tort bankruptcies. At least with respect to asbestos, many members of Congress, on both sides of the aisle, were interested in taking courts out of the asbestos claim resolution business altogether, as the Supreme Court itself had suggested. The legislation would have moved such claims into an administrative regime overseen by the U.S. Department of Labor. Although the Fairness in Asbestos Injury Resolution Act did not get over the finish line, it is worth noting that supporters worried that that injured parties were receiving “only pennies on the dollar,” that injured parties endured long waits for compensation, and that too many resources were directed to those with modest or no impairment from asbestos exposure, leaving too little for those with severe diagnoses. Lawmakers opposed to the FAIR Act were not necessarily defenders of asbestos bankruptcies; they seemed to worry that the legislation borrowed too much from asbestos bankruptcies rather than too little.<sup>17</sup>

Why does this history matter to the topic of today’s hearing? The argument that even profitable corporations should be able to do something extraordinary through chapter 11 –

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<sup>16</sup> Final Report of the National Bankruptcy Review Commission 315-350 (Oct. 20, 1997).

<sup>17</sup> E.g., Hearing before the Committee on the Judiciary 109-817, The Fairness in Asbestos Injury Resolution Act, 109th Cong., 1st Session Jan. 11, 2005, serial no. J-109-2A.

permanently fix liability for present and future personal injury and wrongful death claims, to the benefit of the whole corporate family – is premised on the idea that the ends justify the means. That reasoning is inherently inadequate to overcome legal or constitutional critiques. But the assertion also needs to be interrogated on its own terms. At the very least, more transparency about these bankruptcies and the trust resolution process is essential.

Enterprises that consider using chapter 11 to manage allegations of serious harm to individuals also must do more during the bankruptcy case to respect the rights and interests of those individuals. One needs to step away from the abstract concept of “mass tort” and consider the actual people and the often life-changing diagnoses or harm they describe.

The differences among their experiences also should be taken into account. In many cases, injuries fall along a broad spectrum from minimum impairment to extreme suffering and death. Even if similarly harmed, people may have gathered disparate levels of proof linking their harm to the debtor enterprise and co-defendants. The more that a chapter 11 sweeps in lawsuits across state lines, the more the underlying law and statutes of limitations may vary.

The trusts these bankruptcy cases establish to compensate people may ultimately recognize these distinctions with a matrix or point system or other guidance, but these distinctions matter during the bankruptcy case itself, where key decisions are made that will be finalized in a plan. To give better protection to all claimants, the National Bankruptcy Review Commission recommended that a debtor create multiple classes of personal injury and wrongful death claimholders for voting and distribution purposes. Yet, the typical approach in a mass tort bankruptcy is to treat all present injured people as an undifferentiated mass.

As Congress wrote the rules, claims of higher dollar amount are supposed to have greater weight in voting and thus negotiations. The vote of a lender holding a \$10 million debt carries more impact than the vote of a lender holding a \$1 million debt. Mass tort bankruptcies have a norm of valuing each tort claim at the same dollar amount – one dollar, to be exact – regardless of severity of harm, strength of proof, or other differentiating factors. Given the strength of this norm, even claims liquidated through litigation or settlement or left unpaid are likely valued at one dollar for voting.

A chapter 11 debtor valuing all tort claims at one dollar could honor distinctions among injured individuals by putting claims of varying severity in separate classes (voting is conducted by class). Bankruptcy law permits separate classification with a rational justification. But

defendant enterprises often have no incentive to structure the plan in a way that maximizes the voice and leverage of each group.

An oft-stated rationale for valuing claims identically for voting, and classifying them together, is that vetting and reviewing during bankruptcy, as opposed to in the trust distribution process, would unduly slow the process. But in some cases some basic sorting information is already available and used to predict an estimated aggregate amount for the claims.

One also needs to consider how these norms affect negotiations leading up to the vote. Certainly corporate defendants are aware of these effects because they propose the classifications. Big enterprises can use this flattening of influence to their great advantage, as can lawyers for large numbers of plaintiffs with less severe or less vetted claims who have incentives to make a deal because their clients had weaker odds in the civil justice system.

Reviewing the voting rules for chapter 11 will help drive home the concerns. Bankruptcy law creates a high standard for a class to be counted as accepting a plan. Section 1126 of the Bankruptcy Code imposes a conjunctive test. The first part of the test counts the number of claims that voted in favor of the plan among everyone who voted. The plan needs to secure at least half in favor of the plan among those who vote at all. The asbestos bankruptcy provision, section 524(g), increased the threshold of the required percentage of supportive claims to 75 percent, and many mass tort cases use that threshold as a benchmark even if the case does not involve asbestos.

The second part of a conjunctive test is based on each claim's dollar value. Two-thirds of the total dollar amount among voting members of the class must support the plan. Mass tort bankruptcies that follow the norm invalidate this weighted voting element for tort claims, although not for other classes of claims in their plans, generating another source of inequality.

To make the issues more concrete, consider the Boy Scouts of America, which used chapter 11 to manage liability for sex abuse claims for itself as well as its local councils that did not file for bankruptcy, among others. The information filed by 82,500 detailed forms explaining their abuse claims showed the range of harms. Some claimants have reported being repeatedly raped by scout leaders. The abuse claim definition is broad enough to also encompass a scout touched inappropriately by a fellow scout. The compensation process via the trust, which is currently underway, will afford these people different levels of financial compensation. Recovery ranges from \$3,500 for survivors who selected the expedited payment process when

they voted on the plan to \$2.7 million. But the bankruptcy process of negotiations and voting treated them the same: each \$1, all in the same class.<sup>18</sup>

The Boy Scouts of America bankruptcy offers other types of gradations among survivors given its vast scope. The abuse occurred in different decades, with different direct perpetrators, in different parts of the country and in territories as far as Guam. Depending on the timing and details, the organization might have a lot of insurance potentially applicable to the incident or none at all. Depending on the location, the applicable local council may have deep pockets or shallow ones. The location also determines applicable tort law or other legal theories, and if the statute of limitations can be used as a defense. Some survivors were days away from picking a jury for a state court trial when the bankruptcy brought everything to a halt. Others never would have brought a lawsuit. All were in the same class, with claims valued at one dollar.

Another issue worth highlighting is the significant number of individuals who file paperwork to participate in the case but do not cast a vote on the plan that will determine their rights. When tallying whether a class has accepted a plan, bankruptcy law considers only claimants that voted one way or another. It excludes the nonvoters. Whatever the merits of that statutory choice – one might ask whether some sort of threshold of turnout should be required given the extraordinary legal impact of these cases – it is worth highlighting how many personal injury and wrongful death claimants are not voting in these consequential elections.

Here are two examples for now. In the the Boy Scouts of America bankruptcy, over 25,000 of the 82,500 abuse survivors did not cast a vote at all. Those figures come from two rounds of voting because the first round did not yield enough accepting votes to go forward. In Purdue Pharma's bankruptcy, almost 69,000 opioid survivors who filed paperwork in the bankruptcy did not vote one way or another on the plan – more than voted on the plan (slightly more than 58,000 in favor, 2,600 against).

Independent of the impact on the plan approval process under current law, these nonvoters should be visible to policymakers. Is abstention from voting a signal of some shortcoming in the communication process? Might they feel like their opinion does not matter in a system they did not select, that gives them no opportunity to opt out? These are just a few of

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<sup>18</sup> Facts about the plan are in *In re Boy Scouts of America*, 642 B.R. 504 (Bankr. D. Del. 2022), affirmed by *In re Boy Scouts of America*, 2023 WL 2662992 (D. Del. March 28, 2023).

the questions one would ask to determine how the bankruptcy system is experienced by the real people most directly affected by its extension to mass tort.

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Although this written statement has focused primarily on for-profit businesses, the reference to the Boy Scouts of America expands the conversation. Catholic dioceses continue to file chapter 11 cases to manage liability for sex abuse, a practice that started about twenty years ago. These cases raise the same issues as above: what should be the standard for access to chapter 11 for this purpose? To what extent do trusts deliver on their promises? How are survivors treated during the bankruptcy process itself? To state the obvious, these cases are about so much more than money, and thus even more of a signal of how far out of its original domain the bankruptcy system has moved.

Cases filed to manage sex abuse lawsuits need to be flagged for another reason: they tend to be a direct response to the prerogatives of state legislatures to change their statutes of limitations to give adult survivors of abuse their opportunity to seek recourse in the civil justice system. Nonprofit bankruptcy filers have not been shy about attributing their bankruptcies to state legislative choices. The policy choice to open statutes of limitations dovetails with research on childhood sexual abuse indicating that people are not ready to come forward publicly until later in life. Some legislatures such as New York have made other changes to ensure the state legislature's appropriate and timely handling of these challenging lawsuits.<sup>19</sup>

Although a lot of attention has gone to states with temporary windows to file claims, some states have permanently opened the statute of limitations for past child sex abuse. To the extent bankruptcies set bar dates that require filing claims or forfeiting the right to pursue one's rights, the federal bankruptcy system ends up disregarding the state policy choice to give adult survivors of abuse the time they need to decide about coming forward.

Might one conceptualize the use of bankruptcy more as a mechanism to deliver recovery than an override of state policy? The work of Professor Timothy Lytton, an expert in child sex

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<sup>19</sup> E.g., *In re Child Victims Act Cases Removed from State Court*, 2023 WL 5123396 (S.D.N.Y. Aug. 10, 2023) (reviewing Child Victims Act and New York's efforts to enable fair and prompt adjudication of child sex abuse cases, including a dedicated part of each court devoted to handling these cases).

abuse litigation, seems to suggest otherwise. He characterizes these legal actions as a channel for accountability, as well as an important vehicle to revert control to abuse survivors taken from them by abusers and inattentive (or worse) institutions long ago. Survivors hope to help prevent people from similarly suffering in the future. Whether or not tort litigation always fulfills these objectives, Professor Lytton has recently characterized institutions' use of bankruptcy as undermining them.<sup>20</sup> His concerns deserve careful attention in thinking about whether bankruptcy is a proper home for these matters and how it might become better attuned to these cases' needs.

Any forum for cases involving serious harm and traumatic events, as well as personal injury and death from hazardous products, must attend to more than financial recovery if it is to be seen as legitimate. That is a key lesson from decades of research on procedural justice and related concepts. If bankruptcy is really to be an accepted forum for such cases, those considerations should infuse the chapter 11 case itself, as well as the trust process.

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With some endorsement from Congress and courts, enterprises have repurposed chapter 11 bankruptcy and its significant legal benefits – a system designed for overindebted companies seeking to restructure largely voluntary debts – to manage large numbers of allegations of serious harm. Although the details have varied over time and across cases, the objective of many of these cases has been to cap financial responsibility for current and future claimants and limit recourse to the civil justice system. Perhaps it was inevitable that profitable companies facing widespread lawsuits would seek a way to reap the benefits with the least amount of cost. At the very least, that goes too far.

That overreach invites Congressional consideration of an underlying premise about proper chapter 11 use when a company is not overindebted in the traditional sense. There may be ways chapter 11 can help an overburdened company coordinate responses to widespread lawsuits that preserves rights of injured people and state policy prerogatives. But many enterprises are

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<sup>20</sup> Timothy D. Lytton, Tort Claims for the Coverup of Child Sexual Abuse: Private Litigation, Corporate Accountability, and Institutional Reform, 72 DePaul Law Review 289, 304-05, 322 (2023). See also Timothy D. Lytton, Holding Bishops Accountable: How Lawsuits Helped the Catholic Church Confront Clergy Sexual Abuse (Harvard U. Press 2008).

pushing chapter 11 well beyond those limits. That amounts to an extraordinary extension of the already significant national bankruptcy authority, and it deserves your careful attention.

## PREPARED STATEMENT OF LORI KNAPP, GREENEVILLE, TENNESSEE

My dad, Ed Chapman, died from asbestos cancer caused by asbestos in drywall products that he worked with in the 1970s. He and a small group of other workers – about 10 men in total – worked on many projects together, using the same products and tools. At least three of those men died from mesothelioma, a cancer so rare that generally only one in 100,000 people get it. These men have been wiped out by asbestos.

The asbestos products that killed my dad were manufactured and sold by Georgia Pacific and other companies. Georgia Pacific knew that its products were incredibly dangerous but continued to sell them. In 1971, Georgia Pacific's secret, internal documents acknowledged workers would get sick from asbestos and that they would sue Georgia Pacific. Georgia Pacific didn't care. In the same document Georgia Pacific callously announced its plan – to blame the contractors – like my dad – for their own disease.

My dad taught me that we are all accountable for our own actions. When dad got sick, he hired lawyers to hold the companies that poisoned him accountable for sickening him and killing his friends. Dad was able to sue some companies, like Union Carbide, in the Florida courts. Other companies, like United States Gypsum, were actually bankrupted by their asbestos liabilities years ago and dad made claims against the trusts that were set up to pay victims from the limited money left.

Georgia Pacific is not bankrupt but it got a free pass because it filed a Texas Two-Step bankruptcy to force victims to compromise their right to a jury trial and accept a reduced settlement in the bankruptcy court. My dad chose to fight. He refused to go along with blackmail – and died without being able to see justice served.

Georgia Pacific filed its fake bankruptcy before my dad got sick. The stay that was put into place protecting Georgia Pacific has remained in place for over 5 years. Meanwhile, it has been business as usual for Georgia Pacific, which has paid over Five Billion Dollars (\$5,000,000,000) in profit to Koch Industries while its victims get nothing.

When my dad's case went to trial in March 2020, all the defendants that had not settled were in the courtroom. My dad was too sick to be able to be in the courtroom and had to stay isolated in the hotel while his lawyers and I were in court. This was right before COVID shut down the courts and, in addition to having very little energy, dad could not risk being in a crowded courtroom.

All of the other companies negotiated settlements. This was the best he could hope for – there is no magic wand that could have cured his cancer.

But not Georgia Pacific. My dad died an excruciating, horrible, prolonged death from his asbestos cancer on November 16, 2020. Because of Georgia Pacific's bankruptcy filing, he never got a chance to seek justice from Georgia Pacific. To make matters worse the delay will likely mean Georgia Pacific and Koch Industries escape any accountability for what they did to my father – a windfall for Charles Koch, who is already the 20<sup>th</sup> richest person in the world.

Under Florida law, if an individual is harmed but dies from their injuries before trial, their claim for pain and suffering dies with them. Even if Georgia Pacific's fake bankruptcy is thrown out, Georgia Pacific will argue that my dad's estate has no claim. And make no mistake, my dad was brutalized by agonizing pain, suffering and humiliation from his asbestos cancer. My husband and I cared for my father during the end of his life and I can personally attest to the horrific ordeal dad experienced.

It is wrong that Georgia Pacific continues to try and dodge accountability. When Koch Industries bought Georgia Pacific, it knew Georgia Pacific's asbestos products had sickened and killed thousands of Americans. That didn't stop Koch Industries, because Georgia Pacific is a massively profitable company.

Bankruptcy is for people and companies that can't pay their bills. These Texas Two Step fake bankruptcies have turned the bankruptcy courts into a sham where profitable companies go to avoid responsibilities they are fully capable of paying. America was founded on the principle that all men are created equal. But the reality of Two-Step Bankruptcies is that they allow huge profitable companies to delay or avoid entirely taking responsibility for their actions.

My dad was my hero. And he was a devoted husband. While my dad was struggling with his asbestos cancer, my step-mother, Ruth, was diagnosed with pancreatic cancer. This was devastating to my dad, not only because the love of his life was dying, but also because his cancer prevented him from being able to fully care for Ruth. Dad never quit trying to help Ruth and he never quit fighting for his own life as the asbestos cancer slowly and painfully consumed him. Seeing them through to the end – was important to my dad.

The fact that that Georgia Pacific, with all its profits, was effectively immune from responsibility frustrated and confused my father. How could a company that was massively profitable – whose products you see in nearly every bathroom in every office building, restaurant, and school - file for bankruptcy? And how could his rights be put on indefinite hold due while Georgia Pacific sent billions of dollars of profits to Koch Industries?

It pains me to know that this abuse of the bankruptcy system has now been copied by other massively profitable companies, like Johnson & Johnson. This is wrong. Asbestos products have devastated American workers and their families. When profitable companies file for "bankruptcy" for the express purpose of avoiding juries by stranding sick Americans' in the bankruptcy system while the companies continue business as usual that's abuse. And it needs to stop.

My dad was a fighter. He saw things through to the end. Ed Chapman was not my biological father. He and my mother married when I was an infant. But he is the only dad I've ever known and I couldn't have asked for better. Right before he died, my dad drove himself to the courthouse and legally adopted me. While that never mattered to me – Ed was my dad no matter what - to him, it was the last thing he needed to do to finish the job of being my father. And he made sure

he finished the job. Dad taught me to speak up against injustice and abuse and to hold myself, and others, accountable for their actions. And dad taught me to see things through to the end. I am here to honor him by continuing his fight, by seeing it through to the end and making sure that Georgia Pacific doesn't get away with this abuse. I ask that you do the same. Thank you.

**WRITTEN STATEMENT OF SAMIR D. PARIKH<sup>1</sup>****“Evading Accountability: Corporate Manipulation of Chapter 11 Bankruptcy”**

Judiciary Committee  
United States Senate  
September 19, 2023

I would like to thank the committee for the opportunity to testify on the hearing topic, “Evading Accountability: Corporate Efforts to Side-Step Accountability Through Bankruptcy.” It is a great honor to be here. I am Samir Parikh, the Robert E. Jones Professor of Advocacy and Ethics at Lewis & Clark Law School. I should note that my statement reflects my own views, not the views of Lewis & Clark Law School, the American Law Institute, or the American College of Bankruptcy – organizations with which I am affiliated.

My statement begins with an executive summary and then unpacks some key issues in mass tort bankruptcies. I hope this statement will offer insight and perspective on matters that have been overlooked and misunderstood.

**EXECUTIVE SUMMARY**

Recent debate about mass restructurings involving Johnson & Johnson, Purdue Pharma LP, 3M, and Boy Scouts of America has provided a lot of fire but little light. In thinking about these cases, let's start with a simple question: What are the process objectives? What are we trying to accomplish when we think about resolving mass tort cases?

I argue that the primary objective in resolving mass tort cases should be to provide meritorious claimants the compensation they deserve on the shortest timeline. Claims arising out of similar facts should not receive wildly divergent recoveries – a result customarily seen when mass tort cases are resolved through jury trials across the country. Pursuit of this objective illuminates federal bankruptcy court as the optimal resolution venue for many cases. This

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conclusion is the result of bankruptcy's unique optionality and the limitations and deficiencies that characterize other claim aggregation processes.

Rule 23 of the Federal Rules of Civil Procedure is arguably the most well-known claim aggregation process in the US. But in the 1990s, the Supreme Court ruled that Rule 23's strictures exclude the vast majority of personal injury, mass tort cases. Multi-district litigation was subsequently embraced to fill the resolution void, but the process has evolved in ways that undermine the resolution model for many mass tort cases. MDL lacks Rule 23's fundamental safeguards that ensure process integrity, and victims rarely receive their "day in court" through this process. Further, MDL has practical limitations because courts cannot resolve claims in state court or those held by individuals for whom harm has not yet manifested, also known as "future victims." Most troubling, MDL lacks transparency, can be extremely protracted, and is plagued by backroom deals, the details of which remain hidden from the public.

In recent years, federal bankruptcy has emerged as a viable option to resolve personal injury, mass tort cases. Bankruptcy allows aggregation of state and federal claims held by both current and future claimants. Bankruptcy's automatic stay halts the litigation tsunami that squanders resources that should ultimately go to victims. Parties are able to focus on a global settlement. The promise of a comprehensive resolution draws parties to the bargaining table and encourages meaningful settlement talks, ending pointless posturing and attempts to curry public favor through the media. The bankruptcy court can rapidly estimate the aggregate value of all claims against the mass tort defendant for the purposes of formulating a plan of reorganization. Victims are able to vote on their proposed treatment, and inequitable plans can be voted down. Because there are few debtholders or other creditors typical of most chapter 11 cases, mass tort victims hold leverage in designing the final resolution. Naturally, the process is not perfect, but the primary infirmities can be addressed by the bankruptcy judge overseeing the case. Bankruptcy does not need new legislation or complicated statutory amendments to make the process work for mass tort stakeholders. That being said, I do believe that the process can be improved by making a few targeted adjustments to the Bankruptcy Code focused on improving the mechanics of Section 524(g) – the provision that governs asbestos cases in bankruptcy – and delineating the proper instances where a plan of reorganization containing nonconsensual, nondebtor releases can be confirmed.

Divisive mergers are the final issue discussed below. The maneuver known as the “Texas two-step” is certainly unorthodox and has received a lot of attention. But this is a minor actor in the mass tort theatre, and I fear that the issue is receiving far more attention than it deserves. Ultimately, those divisive mergers that inequitably transfer assets away from creditors can be attacked as a fraudulent transfer – an area of law in which bankruptcy courts are extremely experienced. And a bankruptcy case preceded by a divisive merger designed to defraud creditors can be dismissed as a bad faith filing. The means to police undesirable behavior in this context already exists, and we have recently seen courts fulfilling their gatekeeping function. I worry that congressional intervention on this point may produce unintended consequences and should not be prioritized when so many other, more important issues in the mass torts space are ignored.

Ultimately, bankruptcy offers the highest likelihood of providing deserving plaintiffs with a meaningful recovery on an expedited timeline. Without bankruptcy, these cases may have to be adjudicated on a case-by-case basis over the course of decades. Some victims may secure enormous recoveries through jury trials; others may receive nothing even though all these claims emerge from a similar nucleus of facts. This litigation option is slow, highly speculative, and resource intensive. MDL is the alternative but comes with many of these problems and adds a few more. I do not believe either option serves victims’ best interests.

Divergent recoveries are an inveterate aspect of our jury system. However, federal bankruptcy offers mass tort victims an alternative to this inequity. What platform is best designed to provide meritorious claimants the compensation they deserve on the shortest timeline? I assert bankruptcy is that platform for most mass tort cases. And I believe that this hearing should be about improving that platform, not tearing it down. I applaud this committee for devoting hearings to these important issues and hope to offer some insight.<sup>2</sup>

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<sup>2</sup> Please note that key parts of my statement are drawn from my extensive scholarship on mass tort bankruptcies, including Samir D. Parikh, *Opaque Capital and Mass Tort Financing*, 133 YALE L.J. FORUM (forthcoming 2023), available [here](#); *Scarlet-Lettered Bankruptcy: A Public Benefit Proposal for Mass Tort Villains*, 117 NW. U. L. REV. 425 (2022), available [here](#); Samir D. Parikh, *The New Mass Torts Bargain*, 91 FORDHAM L. REV. 447 (2022), available [here](#); Sergio Campos and Samir D. Parikh, *Due Process Alignment in Mass Restructurings*, 91 FORDHAM L. REV. 325 (2022), available [here](#); Samir D. Parikh, *Mass Exploitation*, 170 U. PA. L. REV. ONLINE 53 (2022), available [here](#); see also Samir D. Parikh, *Day-In-Court Ideal Is Distracting From Victim Recovery*, LAW360 (Mar. 16, 2023); Samir D. Parikh, *Bankruptcy is the Optimal Venue for Mass Tort Cases*, LAW360 (Feb. 28, 2022).

## I. JUDICIAL INFRASTRUCTURE OVERWHELMED

Mass torts involve private disputes but present a scale that distorts resolution options. These dynamics render private and legislative ordering of these cases difficult and misshapen. Consequently, the judiciary has assumed an oversized role with mixed results.

### A. *Elusive Class Aggregation*

Rule 23 of the Federal Rules of Civil Procedure delineates the infrastructure for qualifying class actions. Class actions are optimal for cases involving unified causation elements where victims hold negative value claims – a label that applies where the value of an individual victim’s claim is less than the transaction costs necessary to adjudicate the claim and secure that dollar value. Rule 23 allows members of a class to sue as representative parties on behalf of other victims who are similarly situated. The adjudication of the representatives’ claims invariably determines the resolution of those held by absent class members. Absent class members enjoy the right to subsequently opt out of settlements, but few do.<sup>3</sup>

Rule 23(e) allows for class certification for the sole purpose of settlement and has become the preferred resolution option. In these circumstances, a fiduciary represents absent class members and is tasked with protecting Due Process rights for all members. The court will not allow exit before it assesses the fairness, reasonableness, and adequacy of the settlement terms and the settlement process. Ultimately, Rule 23 creates a structural design that facilitates adjudication when necessary and settlement when possible, while also attempting to ensure procedural and constitutional integrity.

But class aggregation is not available for many mass tort cases. The Supreme Court addressed the propriety of Rule 23 certification in *Amchem Products v. Windsor*<sup>4</sup> and *Ortiz v. Fibreboard Corp.*<sup>5</sup> and limited the class action resolution option for the vast majority of mass tort cases.<sup>6</sup> In the years since *Amchem* and *Ortiz*, federal courts have reached a consensus: most personal injury, mass tort cases present too many individual issues surrounding causation and damages to satisfy Rule 23’s

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<sup>3</sup> See D. Brooks Smith, *Class Action and Aggregate Litigation: A Comparative International Analysis*, 124 PENN ST. L. REV. 303, 308 (2019).

<sup>4</sup> 521 U.S. 591 (1997).

<sup>5</sup> 527 U.S. 823 (1999).

<sup>6</sup> See Andrew D. Bradt & Theodore Rave, *Aggregation on Defendants’ Terms*, 59 B.C. L. REV. 1251, 1264 (2018); see also Thomas E. Willging & Shannon R. Wheatman, ATTORNEY REPORTS ON THE IMPACT OF *AMCHEM* AND *ORTIZ* 4 (2004).

requirements. Class actions have dropped out of the “available set of tools for attempting to settle [most] mass torts, absent some extraordinary willingness of settling defendants to allow some form of future claims to return to the tort system.”<sup>7</sup>

B. *MDL’s Infirmities*

*Amchem* and *Ortiz* ostensibly eliminated Rule 23’s class aggregation option for most mass tort cases. MDL’s rise was a rushed effort to address the gaping resolution void that emerged. Section 1407 of the U.S. Judicial Code creates the MDL infrastructure and allows one federal judge to streamline pretrial – general procedural – matters. At the conclusion of pretrial proceedings, however, the statute mandates that cases be remanded to the districts where they were originally filed. The MDL court is not intended to be a destination; it is merely a stop along the path to resolution.

I acknowledge that MDL has been instrumental in resolving complex cases and preserving the viability of the judiciary in the face of potentially overwhelming case volume. Nevertheless, MDL has evolved in ways that undermine the resolution model for many mass tort cases.<sup>8</sup> The promise of procedural streamlining is a mirage that has led parties into quicksand. The worst kept secret in mass tort litigation is that transferred cases do not return to their transferor courts. Only 3% of transferred cases escape MDL capture; 97% of transferred cases are resolved in the MDL court by dispositive motion or settlement.<sup>9</sup> Victims do not receive their “day in court.” And this number says nothing about the efficiency and equity of the resolution process. Keep in mind that there are no statutory requirements that an MDL court review or assess the integrity of any settlement or the settlement process itself. And most courts do not undertake such inquiries. Unfortunately, a structure consumed with efficiency through procedural devices undermines just outcomes if it lacks the ability to assure claim merit, defendant culpability, or settlement integrity.

All of these factors highlight victims’ lack of control in an MDL.<sup>10</sup> A truly surprising facet of the process is that victims are unable to exit. MDL judges are invested in these cases and have

<sup>7</sup> See Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 SUP. CT. REV. 183, 208 (2008).

<sup>8</sup> See Parikh, *The New Mass Torts Bargain*, *supra* note 2.

<sup>9</sup> U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., MDL STATISTICS REPORT – DISTRIBUTION OF PENDING MDL DOCKETS BY ACTIONS PENDING 6 (2018).

<sup>10</sup> See, e.g., Elizabeth Chamblee Burch & Margaret S. Williams, *Perceptions of Justice in Multidistrict Litigation: Voices from the Crowd*, 107 CORNELL L. REV. 1835 (2022).

exhibited a propensity to compel settlements that may be coercive to individual plaintiffs.<sup>11</sup> More fundamental, the process contravenes policy objectives by failing to deter undesirable behavior. Compelled settlements rarely consider culpability, heightening the possibility of extortion litigation. Deterrence is unrealized because there are significant lottery effects; in other words, corporate actors that conform their behavior to legal strictures are no better off than those that do not.

Further, unlike bankruptcy's public forum, MDL settlements can live in the shadows. Settlements do not need court approval, and confidentiality agreements invariably prevent publication or an assessment of the details. Corporate abuses do not come to light in a process where there are ostensibly no trials and no attempts are made to investigate malfeasance.

Ultimately, my objective is not to debate the MDL process's efficacy. The process has produced some successful outcomes, but no one can dispute that there exist significant structural deficiencies that render the process suboptimal for many mass tort victims.

## II. FEDERAL BANKRUPTCY

Bankruptcy's structural, procedural, and substantive benefits provide optionality that serves in sharp contrast to MDL's settlement fixation. For example, bankruptcy courts enjoy jurisdiction over all "civil proceedings arising under title 11, or arising in or related to cases under title 11."<sup>12</sup> The seemingly boundless reach of bankruptcy court jurisdiction allows the court to marshal all state and federal matters affecting a debtor in one single venue for prompt and efficient adjudication for the benefit of all stakeholders. MDL does not enjoy this reach. Further, bankruptcy's powerful automatic stay halts all creditor actions, including pending litigation against the debtor and can be extended to nondebtors in order to allow all key parties to focus on negotiating a global settlement. This reduces the risk of precious resources being squandered on one-off litigation matters that ultimately fail to move the parties any closer to settlement. I argue that these resources should be devoted to victims.

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<sup>11</sup> For example, in *In re Nat'l Prescription Opiate Litigation*, 290 F. Supp. 3d 1375 (J.P.M.L. 2017), Judge Polster stated that his sole goal was to see an immediate global settlement of the cases. He stated 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*." See *id.* at 4-6 (emphasis added).

<sup>12</sup> 28 U.S.C. §1334(b).

Most cases in bankruptcy – including those involving mass tort claims – enjoy a speed premium; to the extent that the case can be resolved quickly, additional funds can be devoted to creditors. The Bankruptcy Code authorizes courts to identify claims subject to pending litigation against the debtor and estimate the aggregate value of the claims that cannot be resolved in a timely manner.<sup>13</sup> Claims that could take decades to be tried and resolved outside of bankruptcy can be assessed within a matter months. Victims are allowed to participate in this process and argue for the valuation they believe is just. Keep in mind, the bankruptcy judge is not unilaterally deciding what each victim will receive. Rather, the judge is determining the total value of all claims against the debtor and allowing the debtor to propose a settlement to victims based on that figure. This settlement will be delineated in the debtor’s plan of reorganization. Victims are not bound by this offer. The United States Trustee appoints an official committee of tort claimants to represent the interests of all current claimants. This committee, which retains independent legal and financial advisors, plays a key role negotiating with the debtor to develop settlements that the committee can endorse and recommend for approval. Ultimately, bankruptcy allows these creditors to vote on whether they believe that the debtor’s proposal is the best offer they can secure.<sup>14</sup> In fact, victims – as a collective – could choose to reject the debtor’s offer. This would put pressure on the debtor. After a certain number of rejections, there is a distinct possibility that the court will dismiss the bankruptcy case, which could be disastrous for the debtor and other key-decision makers in the case.

I acknowledge that individual victim autonomy is sacrificed in bankruptcy, but that is the case in all aggregation processes involving thousands and thousands of claims.<sup>15</sup> Not every plaintiff can have her day in court when thousands of claims are outstanding. The defendant’s legal expenses would consume everything, leaving little for the vast majority of victims. I also acknowledge that the claim estimation process in bankruptcy has deficiencies. But bankruptcy court judges can easily address them. For example, if there are concerns about a bankruptcy court judge estimating personal injury claims, the judge could lift the automatic stay as to a particularly subset of cases and allow the MDL district court to adjudicate them.<sup>16</sup> The resultant rulings could help provide some concrete data

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<sup>13</sup> See 11 U.S.C. §502(c).

<sup>14</sup> In the Purdue Pharma bankruptcy case, more than 95% of the approximately 120,000 submitted votes were in favor of approving the debtor’s proposed plan of reorganization. See Parikh, *Scarlet-Lettered Bankruptcy: A Public Benefit Proposal for Mass Tort Villains*, *supra* note 2.

<sup>15</sup> See Parikh, *The New Mass Torts Bargain*, *supra* note 2.

<sup>16</sup> See Sergio Campos & Samir D. Parikh, *Due Process Alignment in Mass Restructurings*, *supra* note 2. Note that the bankruptcy court’s estimation of such claims does not actually fix the amount any creditor will receive for her injury.

that would help the bankruptcy judge in her claim assessment process. This hybrid joins the advantages of MDL, which offers a jurist experienced in adjudicating personal injury claims, and bankruptcy, which offers victims an accelerated recovery and the chance to vote on the treatment they will ultimately receive.

### III. AMENDING THE BANKRUPTCY CODE

The bankruptcy process may be the optimal means to resolve many mass tort cases, but it still needs refinement. I focus on three key areas below.

#### A. *Expanding Section 524(g) to Capture All Mass Tort Cases*

Section 524(g) of the Bankruptcy Code applies to only mass tort debtors facing asbestos exposure claims. Therefore, most modern mass tort cases are not subject to Section 524(g)'s various restrictions. Plans of reorganization in these cases operate outside of these parameters, often times undermining uniformity. I argue that Section 524(g) must be made applicable to all mass tort cases irrespective of the product, conduct, or events alleged to have caused the claims in order to further uniformity of process and outcomes.

I propose amending Section 524(g)(2)(B)(i)(I) to capture corporate debtors that have been named as defendants in personal injury actions, wrongful death actions, property damage actions, or any other civil actions resulting in mass liability or claims without regard to the type of product, conduct or events that allegedly gave rise to the claims. For example, this new subsection could capture claims that were aggregated as part of MDL and transferred to a single federal district court for pretrial proceedings. After this change, one section of the Code will guide disposition of key issues in all mass tort cases.

#### B. *Nonconsensual Nondebtor Releases*

##### 1. *Background*

On May 30, 2023, the Second Circuit Court of Appeals reversed the district court's order holding that the Bankruptcy Code does not permit nonconsensual nondebtor releases of direct claims and affirmed a bankruptcy court order approving a modified version of Purdue Pharma's plan of

reorganization<sup>17</sup> that contained such releases. The court ruled that Sections 105(a) and 1123(b)(6) of the Bankruptcy Code provide the statutory bases for the releases, and the releases were proper in light of the equitable considerations in the case.

In determining the validity of nonconsensual nondebtor releases in limited circumstances, the court established a rigorous seven-factor test<sup>18</sup> that focuses – in part – on whether the third party “contributed substantial assets to the reorganization” and if creditors “overwhelmingly voted in support of the plan.” The court also explained that a robust evidentiary basis would be necessary to support the grant. Indeed, the bankruptcy court is required to support each factor in the test with “specific and detailed findings.”<sup>19</sup> Finally, satisfaction of the seven factors is insufficient by itself to warrant approval. The granting of releases must also be assessed “against a backdrop of equity.”<sup>20</sup>

The Second Circuit’s ruling aligns with the majority of circuits that permit nonconsensual nondebtor releases but conflicts with precedent in the Fifth, Ninth, and Tenth Circuits. The ruling is on appeal before the Supreme Court, which granted certiorari on August 10, 2023.

The *Purdue* bankruptcy case has brought these releases into the spotlight. In that case, claimants voted overwhelmingly to approve the plan of reorganization.<sup>21</sup> In the aggregate, the vote was over 95% in favor of plan confirmation. We know from the victim statements submitted in the case that these individuals appreciated the consequences of the third-party releases, but they also understood that there was little chance of a meaningful recovery without a compromise with the Sackler family.

From 2008 to 2016, Purdue paid approximately \$10.4 billion in dividends to Sackler family

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<sup>17</sup> The releases delineated in the plan only applied where “a debtor’s conduct or the claims asserted against it [are] a legal cause or a legally relevant factor to the cause of action against the shareholder released party” and the released claims directly affect the res of the bankruptcy estate. *In re Purdue Pharma L.P.*, 69 F.4th 45, 70 (2d Cir. 2023).

<sup>18</sup> The seven factors require consideration of whether: 1) there is an identity of interests between the debtors and the released third parties “such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate”; 2) claims against the debtor and nondebtor are factually and legally intertwined; 3) the scope of the releases is appropriate; 4) the releases are essential to the reorganization and the plan’s successful implementation; 5) the nondebtor contributed substantial assets to the reorganization; 6) the affected class of creditors voted overwhelmingly in support of the plan; and 7) the plan provides for the fair payment of enjoined claims. *See id.*, at 79-82.

<sup>19</sup> *See id.*, at 79.

<sup>20</sup> *See id.*

<sup>21</sup> Over 95% of the personal injury classes voted to accept the plan, though a significant number of claimants did not vote at all.

members or Sackler-controlled entities.<sup>22</sup> There is an argument that these distributions were fraudulent conveyances that could be subject to claw back. But that prospect was filled with uncertainty. A significant portion of the transfers occurred outside the applicable statute of limitations, and approximately \$4.6 billion of the funds went to pay Purdue's federal and state taxes. The remaining balance (approximately \$1.5-2 billion) is predominantly in restricted spendthrift trusts overseas. How much would have to be spent to retrieve those funds? How many years would it take? The claimants understood all of this and voted accordingly. Consequently, the nondebtor releases were an essential part of convincing the Sackler family to contribute approximately \$6 billion to the estate.

Many mass tort cases cannot be resolved without the involvement and financial assistance of nondebtors.<sup>23</sup> This takes on greater significance in mass tort cases. A nondebtor may not be willing to contribute significant financial resources to a victims' settlement trust without assurances that certain civil claims will be channeled to that trust. Compelling participation may not be possible in many cases. Victim recoveries could be decimated without the funds this nondebtor offers.

## 2. *Preserving Nondebtor Releases*

The primary question is under what circumstances – if any – can a court confirm a plan of reorganization that contains nondebtor releases. The successful imposition of these releases must be rooted in the Bankruptcy Code's statutory language.

I believe that some releases are not particularly controversial. For example, consensual nondebtor releases should be enforceable in mass tort cases; these releases, which are contractual agreements outside the scope of Section 524(e) and otherwise permissible under the Bankruptcy Code, should not preclude confirmation of a plan of reorganization. Further, keep in mind that the

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<sup>22</sup> *In re Purdue Pharma*, 69 F.4th at 59.

<sup>23</sup> *Dow Corning* is another example. As explained by Professor Tony Casey, "[W]hen Dow Corning faced thousands of lawsuits related to defective breast implants, nondebtor releases facilitated a negotiated resolution that had failed several times without them. In exchange for a settlement of claims against them, solvent shareholders agreed to contribute to a settlement fund. The overwhelming majority of claimants (94%) supported the deal. But what about that last 6%? The court had a choice: use releases to force the 6% to go along or let things drag on for years or decades in uncertain litigation. The court chose the former in order to get desperately needed money to the victims. This was the right choice. As [Adam Levitin] noted in describing the releases in *Dow Corning*, 'The whole point of bankruptcy is to find the fairest deal possible for everyone involved,' and a resolution supported by an overwhelming majority of victims is 'a good thing that deserves praise.'" See Creditors Rights Coalition, Weekly Newsletter (Aug. 25), available at <https://creditorcoalition.org/weekly-news-august-25/>.

releases do not insulate third parties from any criminal prosecution. And the releases that appear in modern mass tort cases do not extinguish claims; rather, the claims are merely channeled to a victims' settlement trust for payment in accordance with distribution protocols.

I agree with the Second Circuit's *Purdue* opinion. The Bankruptcy Code does not prohibit nonconsensual nondebtor releases. Section 1123 contemplates the inclusion of such a provision in the plan premised, at least in part, on the notion that creditors receive various protections through the plan process. For example, creditors have the right to vote on the proposed plan and at least a supermajority of mass tort claimants must approve the plan. The confirmation process is also subject to judicial review to ensure that the plan is proposed in good faith and various safeguards exist for creditors.

The Second Circuit's opinion explains that the scope of these releases has to be extremely narrow and the evidentiary basis supporting this form of relief should be compelling. Once again, satisfaction of the seven-factor test is insufficient by itself. A court considering confirmation of a plan containing these releases must determine that there is an equitable basis supporting the inclusion of the releases.

I do not believe that these releases violate claimants' constitutional due process rights nor do I believe that the Bankruptcy Code precludes this type of relief. The fact that Section 524(g)(2) expressly allows for the injunction of claims against nondebtors should not be seen as eliminating that power in other cases. Indeed, the Bankruptcy Reform Act of 1994, which added Section 524(g) to the Bankruptcy Code, provided that Section 524(g)'s language should not be construed to "modify, impair, or supersede any other authority the court has to issue injunctions in connection with an order confirming a plan of reorganization."<sup>24</sup>

Ultimately, nondebtor releases do not extinguish claims. Releases, coupled with the confirmed plan of reorganization, merely channel claims to a victims' settlement trust for recovery. In these cases, the real issue is whether the settlement trust is properly funded to address all meritorious claims that could materialize over the course of years and perhaps decades. And that is why these releases can boost claimants' recoveries. Nondebtor parties receiving a release must make

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<sup>24</sup> See Bankruptcy Reform Act 1994, Pub. L. 103-394, §111(b), 108 Stat. 4106, 4117 (1994).

a substantial financial contribution to the case, one that will ultimately provide a significantly improved recovery for claimants.

If the Supreme Court ultimately reverses the Second Circuit in *Purdue*, I believe that Section 524(g) should be amended to include new language that acknowledges the propriety of nonconsensual nondebtor releases in those extremely limited cases where resolution may prove impossible without them.

C. *Future Claimants' Representative*

1. *Background*

Section 524(g) attempts to satisfy due process concerns in mass tort cases by requiring the appointment of a future claimants' representative (FCR) to advocate for future claimants affected by a channeling injunction.<sup>25</sup> The idea has considerable value in theory, but the execution has been alarming.

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<sup>25</sup> The Supreme Court's constitutional property doctrine establishes that a cause of action is a "property interest" of which a claimant cannot be deprived without due process of law. See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428–29 (1982). A party alleging contravention of the Due Process Clause must demonstrate a deprivation of a protected interest—life, liberty, or property—and show that the process afforded was constitutionally inadequate. See *In re Energy Future Holdings Corp.*, 949 F.3d 806, 822 (3d Cir. 2020). From that perspective, settlements can be conceptualized as a plaintiff selling their property—the cause of action—to the defendant and relinquishing their rights of ownership. Property owners should be involved in this sales process and enjoy the right to not sell. In rare cases where forced sales are necessary, they should "be preceded by notice and [an] opportunity for hearing." See *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950). However, rigid fidelity to procedural due process can be unreasonable in many instances, including in mass tort cases. See *Hansberry v. Lee*, 311 U.S. 32, 41 (1940). Future claimants—who must be included in the claim aggregation process—cannot be provided actual notice or their "day in court." See, e.g., Ryan C. Williams, *Due Process, Class Action Opt Outs, and the Right Not to Sue*, 115 COLUM. L. REV. 599, 620–21 (2015). But that does not necessarily preclude aggregation. Due process requires "only reasonable notice, and that reasonableness [is] to be evaluated by balancing the state's interest in [an] existing notice scheme against the 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). Contemporary case law establishes that interest representation can supplant actual notice and case participation for absent parties. See *Richards v. Jefferson Cnty.*, 517 U.S. 793, 798–99 (1996); see also *Dusenbery v. United States*, 534 U.S. 161, 167–68 (2002) (reaffirming applicability of *Mullane's* reasonableness test). But the unanswered question is, under what parameters is this deviation acceptable? The concept of adequate representation still lacks a concrete definition. See, e.g., Morris A. Ratner, *Class Conflicts*, 92 WASH. L. REV. 785, 791–92 (2017). Traditional interest representation is insufficient to address the anticommons problem in modern mass tort cases because the interests of current and future claimants are significantly misaligned. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 852–53 (1999). Current victims want to access settlement funds immediately, even if that ensures that future claimants face a famine. See *id.* Other stakeholders—including plaintiffs' attorneys and trial courts—are often willing to risk future claimants' recovery in order to secure final disposition of mass tort cases. See *id.* In many respects, due process represents one of the few safeguards for future claimants.

Section 524(g) requires the appointment of an FCR as part of its binding aggregation process. In a customary agency relationship, the parties to be represented select their agent. In mass tort agency, future victims are the principal and, of course, they are absent from the process. This dynamic raises the risk of exploitation. Primarily, the Bankruptcy Code fails to prescribe selection procedures for the FCR. The FCR is the sole representative for future claimants who customarily hold claims valued at hundreds of millions of dollars. These clients are unable to provide input for the selection process. Nevertheless, the FCR negotiates with the debtor and other stakeholders and is able to unilaterally bind all unknown class members.<sup>26</sup> The FCR has extraordinary power but operates without any client oversight. This lack of oversight is arguably unavoidable in mass torts, but the agency breakdown is even more pronounced than it seems. There is also no ex-post check. Future victims who later emerge and come to learn that the FCR agreed to extremely disadvantageous terms cannot opt out of the agreement, and they have no recourse against the FCR, who enjoys broad immunity for all actions aside from fraud, gross negligence, and willful misconduct.<sup>27</sup>

The Bankruptcy Code assigns the task of selecting the FCR to the bankruptcy court, without offering any further guidance. Bankruptcy courts have delegated this responsibility to the corporate debtor, the very party against whom the FCR will be negotiating. Invariably, the debtor is the only stakeholder who proposes FCR candidates and, in almost all cases, nominates only one.<sup>28</sup> Courts are not required to give any deference to this nomination, but they invariably approve the debtor's nominee without soliciting nominees from other stakeholders. Further, the standard of review adopted by most courts is that the FCR nominee be "disinterested," which represents an extremely low bar focused on whether the individual has any overt conflicts of interest.<sup>29</sup> Once a selection is made, courts do not review the adequacy of the FCR's representation.

<sup>26</sup> See 11 U.S.C. § 524(g)(4)(B).

<sup>27</sup> See S. Todd Brown, *Section 524(g) Without Compromise: Voting Rights and the Asbestos Bankruptcy Paradox*, 2008 COLUM. BUS. L. REV. 841, 897–902.

<sup>28</sup> See, e.g., *In re Duro Dync Nat'l Corp.*, No. 18-27963, 2019 WL 4745879, at \*5–6 (D.N.J. Sept. 30, 2019); *In re Fairbanks Co.*, 601 B.R. 831, 835–38 (Bankr. N.D. Ga. 2019); *In re Imerys Talc Am., Inc.*, No. 19-10289, 2019 Bankr. LEXIS 1452, at \*1, \*10–15 (Bankr. D. Del. May 8, 2019).

<sup>29</sup> See 11 U.S.C. § 101(14); *In re Duro Dync*, 2019 WL 4745879, at \*1. *But see In re Imerys Talc Am., Inc.*, 38 F.4th 361, 376 (3d Cir. 2022) (holding that an FCR's statutory mandate as a legal representative for future claimants requires it to satisfy the heightened duties owed by fiduciaries); *In re Fairbanks*, 601 B.R. at 839–41 (ruling that the "disinterestedness" standard was insufficient and reviewing the FCR nominee under the more demanding standards applicable to appointments of guardians ad litem).

The idea that the FCR would fail to be a zealous advocate may seem confusing at first but emerges with shocking clarity when one considers the capture risk involved in mass tort cases. A small pool of professionals manages the universe of mass tort bankruptcy cases, and the process is characterized by repeat players.<sup>30</sup> FCRs receive significant fees and, once appointed, immediately hire as legal counsel the law firm at which they are a partner, thereby amplifying the benefit. 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. FCRs seeking subsequent engagements face extreme pressures to avoid taking positions in one case that may alienate key parties who will be involved in future cases. The reality is that today's adversary could be tomorrow's client.

## 2. *The Proposal*

The Bankruptcy Code does not prescribe a process for appointing the FCR or the standard to be used for this selection. Courts have delegated this task to the corporate debtor. Of course, the debtor is the very party against whom the FCR will be negotiating. The most effective way to reduce obvious capture risk is to mandate that the U.S. Trustee (UST)—the party that already manages the committee appointment process under Section 1102 of the Bankruptcy Code— independently oversee FCR selection. A new statutory subsection to Section 524(g) should provide that the UST will compile a list of independent candidates and be tasked with selecting an FCR from this list subject to approval by the bankruptcy court. Parties in interest may nominate candidates, but the UST's master list should include candidates that the UST identifies independently. Further, the bankruptcy court should be authorized to remove an FCR after appointment if the court determines that the change is necessary to ensure adequate representation of future victims.

Corporate debtors currently control the nomination process, and many bankruptcy courts invariably approve lone nominees under the "disinterestedness" standard. This standard is used for

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<sup>30</sup> See, e.g., *In re Fairbanks*, 601 B.R. at 835, 841 ("[T]he danger is that the FCR is part of a closed group and has an incentive to advocate . . . so that the FCR remains in the group at the expense of future claimants. A[n FCR] who 'rocks the boat' . . . may not be in the next boat.").

evaluating agents in bankruptcy who are actively managed by their principals but is inappropriate in light of the lack of customary agency controls for future victims.

Conceptualizing the FCR as a guardian ad litem offers an improved framework.<sup>31</sup> The Federal Rules of Bankruptcy Procedure permit the court to appoint a guardian ad litem to represent an incompetent person who cannot appear in proceedings or otherwise represent themselves.<sup>32</sup> The Bankruptcy Code does not define guardian ad litem, but the “overarching purpose of the role is to protect the rights of persons in litigation who cannot represent themselves.”<sup>33</sup> Future victims are not incompetent in a traditional sense, but they are unable to appear in a proceeding or otherwise retain a representative. Courts have been willing to appoint guardians under similar circumstances in other contexts.<sup>34</sup> This new framework would result in a modified assessment of FCR candidates. Under the guardian model, the bankruptcy court must—in addition to finding that a candidate is disinterested, qualified, and competent—determine that a candidate will act as an objective, impartial, and effective advocate for future victims.

I have also argued that process integrity could be improved by adding additional representatives.<sup>35</sup> Condorcet Jury Theorem was formulated to assess the optimal size of a deliberative body and support the binding effect of majority and supermajority voting. The theorem has been applied by scholars assessing juries.<sup>36</sup> But the theorem has broader applications and posits an interesting proposition. Imagine that a person is choosing between two options: one is deemed correct and the other incorrect. Further assume that the probability that the person will choose the correct option is only slightly greater than 50 percent. The Condorcet Jury Theorem holds that having multiple individuals vote—instead of just one—significantly increases the probability that the correct option will be chosen.<sup>37</sup>

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<sup>31</sup> See Parikh, *The New Mass Torts Bargain*, *supra* note 2.

<sup>32</sup> Federal Rule of Civil Procedure 17 affords courts this authority, and Rules 7017 and 9014 of the Federal Rules of Bankruptcy Procedure make the rule applicable in bankruptcy proceedings. FED. R. CIV. P. 17; FED. R. BANKR. P. 7017, 9014.

<sup>33</sup> *In re Fairbanks*, 601 B.R. at 840.

<sup>34</sup> See, e.g., *Burress v. Blake*, No. 14-cv-35, 2016 WL 11475018, at \*3 (E.D. Tex. Dec. 1, 2016) (appointing guardian to review settlement on behalf of plaintiff who had disappeared prior to trial).

<sup>35</sup> See Parikh, *The New Mass Torts Bargain*, *supra* note 2.

<sup>36</sup> See, e.g., Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1498 (1999).

<sup>37</sup> See Paul H. Edelman, *On Legal Interpretations of the Condorcet Jury Theorem*, 31 J. LEGAL STUD. 327, 328 (2002).

The theorem provides a useful perspective from which to view the FCR construct. In mass tort bankruptcies, there are arguably “correct” choices that increase the likelihood of viable settlement trusts. The bankruptcy process can be redesigned to nudge FCRs toward these choices. The current formulation places too much power in the hands of one FCR. I argue that a true committee representing future victims is the optimal structure. Three FCRs should be appointed to negotiate on behalf of future victims. This small-scale committee reduces capture risk because distorted self-interest is more easily managed as additional individuals are added to a process that originally involved one decision-maker. Further, Condorcet Jury Theorem supports the idea that a true committee approach will improve decision-making.

To the extent applicable, the members of this new committee deserve some of the rights afforded to members of other committees. In particular, the new committee deserves the right to vote on any proposed plan of reorganization. Unsecured creditor voting in bankruptcy is premised on parties being organized into classes and on majority votes binding class members. Current victims in mass tort cases are organized in classes and vote on proposed plans of reorganization. Future claimants are organized in this fashion, but, under the existing framework, their representative does not vote. The Code should be modified so that a plan of reorganization can be confirmed only if both current and future claimants’ classes accept the plan. Two out of the three FCRs must vote in favor of a proposed plan in order for the future claimants’ class to be deemed to have accepted the plan. Finally, the statute should provide that an FCR may only vote in favor of a proposed plan if the FCR possesses a reasonable belief that the terms of the trust ensure that claims of similarly situated victims will receive substantially similar treatment.

#### IV. THE “DAY-IN-COURT” IDEAL

Improving recoveries for deserving victims is attainable only if we attempt to understand the key issues precluding resolution. Unfortunately, the resolution debate is distorted by a significant misconception. One of the primary arguments used to undermine the bankruptcy process is that victims lose their “day in court” – a reference to the Due Process Clause and the Seventh Amendment right to a jury trial. In fact, when 3M subsidiary Aearo Technologies filed for bankruptcy, MDL Judge Rodgers wrote that “hundreds of thousands of individual plaintiffs will be

deprived of their constitutional right to a jury trial.”<sup>38</sup> But the truth is that claimants lost that right the day the Combat Arms MDL was ordered. This is the case in almost every modern mass tort dispute.

The day-in-court argument assumes that this right is sacrosanct and bankruptcy deprives victims of the right. That is not entirely true. Certain mass tort claimants in bankruptcy could have their day in court through bellwether trials conducted by a federal district court with the bankruptcy court’s permission.<sup>39</sup> But I acknowledge that this is a small portion of the claimant pool. Mass tort plans of reorganization include an opt-out for claimants that allows those who exercise the right to have their day in court by bringing suit directly against the settlement trust. But there are a number of strings attached to this right. For example, in *Purdue*, the recovery for claimants who opted out was capped at the amount the claimant would have received if they had not opted out.<sup>40</sup> These restrictions certainly diminish a victim’s ability to enjoy their day in court. Supreme Court jurisprudence indicates that these restrictions are Constitutional,<sup>41</sup> but that doesn’t change the fact that something is lost.

The statement that mass tort claimants lose their day in court in bankruptcy is not inaccurate. It is incomplete, however, because mass tort claimants also lose their day in court in MDL. It is this corollary that is being intentionally avoided. For all intents and purposes, plaintiffs in the bankruptcy cases involving 3M, Johnson & Johnson, and Purdue Pharma were in a multidistrict litigation proceeding prior to the dispositive bankruptcy filing. Even if the relevant bankruptcy case was dismissed, the dispute would return to MDL. But MDL does not offer plaintiffs their day in court, either. Once a case becomes part of MDL, claimants cannot opt out to continue their litigation. Claimants must sit and wait, sometimes for years. This MDL reality has earned the process a significant amount of criticism.<sup>42</sup> MDL has bellwether trials, but that is just for a handful

<sup>38</sup> Order, *In re 3M Combat Arms Earplug Prod. Liab. Litig.*, Case No. 19-MD-02885 (N.D. Fla. August 16, 2022) [Docket No. 3389].

<sup>39</sup> See Campos and Parikh, *Due Process Alignment in Mass Restructurings*, *supra* note 2.

<sup>40</sup> See Disclosure Statement for Fifth Amended Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. and Its Affiliated Debtors, *In re Purdue Pharma, L.P.*, Case No. 19-23649 (Bankr. S.D.N.Y. 2021) [Docket No. 2983] at 22.

<sup>41</sup> See, e.g., *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (“We have recognized an exception to the [day-in-court ideal] when...a person, although not a party, has his interests adequately represented by someone with the same interests who is a party” or “where a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants, as for example in bankruptcy....” (citing *Martin v. Wilks*, 490 U.S. 755, 762 (1989) (citations omitted)).

<sup>42</sup> See, e.g., Elizabeth Chamblee Burch & Margaret S. Williams, *Perceptions of Justice in Multidistrict Litigation: Voices from the Crowd*, 107 CORNELL L. REV. 1835 (2022).

of claimants.<sup>43</sup> Finally, MDL settlements are conditioned on a limited number of opt-outs; the deal falls apart if the threshold is crossed. Therefore, plaintiffs' attorneys and consenting claimants are all incentivized to dissuade opt-outs. The impact of these efforts cannot be overstated.

Only a handful of the hundreds of thousands of claimants involved in these mass tort cases will ever get their day in court. The "day in court" ideal is invariably a fallacy in the mass torts context. But that is unavoidable in these type of cases. Attempting to preserve a day-in-court right for a few victims would significantly diminish the overall distribution to the victims' collective. Claim adjudication in this alternative reality would take decades. Initial judgments would exhaust funds, and lottery effects would leave the vast majority of claimants without restitution – an archetypical collective action problem that policymakers should not encourage. Attempting to formulate a "day in court" option in mass tort cases can actually do more harm than good for mass tort claimants.

Mass tort claimants invariably lose their day in court in bankruptcy *and* MDL, but that is a necessary evil when the legal system is forced to resolve thousands and thousands of claims. The "day in court" ideal permeates discussions about the optimal venue to resolve mass torts, but it should not play this influential role. Ultimately, the overriding objective in these cases should be securing meritorious claimants the recovery they deserve on the shortest timeline – a result that bankruptcy often furthers.

#### V. DIVISIVE MERGERS

The Texas Business Organizations Code (TBOC) defines "merger" to include a division of a business into two new entities. This process is referred to as a "divisive merger" and has been an obscure part of the TBOC since 1989.<sup>44</sup> A divisive merger allows a business to isolate valuable assets in an entity protected from creditor claims related to its primary operations.

How does the process work? In most cases, there is a corporate structure that includes at least one entity that holds valuable business operations but includes assets tainted by mass tort

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<sup>43</sup> For example, prior to the pending settlement, 3M's Combat Arms MDL was the largest MDL in history with over 200,000 claims, but there were only 16 bellwether trials.

<sup>44</sup> Arizona, Pennsylvania, and Delaware have adopted similar provisions but lack the case history supporting the practice.

liability (“InfectedCo”).<sup>45</sup> The conglomerate faces significant liability and may have already suffered adverse judgments or be involved in MDL. In order to effectuate a divisive merger, InfectedCo – invariably a Delaware entity – incorporates as a limited liability company under Texas state law. Relying on the TBOC, InfectedCo undergoes a corporate mitosis producing two new corporate entities. Let’s call them AssetCo and LiabilityCo. Under state law, InfectedCo is authorized to allocate assets and liabilities among the two new entities. LiabilityCo receives assets of nominal value and becomes solely responsible for all mass tort claims against InfectedCo. AssetCo receives all other InfectedCo assets and liabilities. InfectedCo is dissolved.

This process effectively isolates mass tort liability in LiabilityCo, unless the allocation constitutes a fraudulent transfer. To address this daunting risk, AssetCo and LiabilityCo sign various agreements designed to support what is ostensibly a shell company.<sup>46</sup> These agreements establish reciprocal indemnification obligations corresponding to the allocation of liabilities in the divisive merger. In other words, AssetCo and LiabilityCo (as well as other potential entities) agree to indemnify each other for all losses incurred in connection with their respective assets and liabilities. The agreements also require AssetCo and potentially other corporate entities to provide funding for all costs and expenses incurred by LiabilityCo to the extent LiabilityCo lacks sufficient funds to satisfy such obligations. These agreements arguably allow LiabilityCo to have the same ability to pay off its mass tort claims as InfectedCo did before the divisive merger.

The maneuver known as the “Texas two-step” is certainly unorthodox and has received a lot of attention. But this is a minor actor in the mass tort theatre, and I fear that the issue is receiving far more attention than it deserves. Those divisive mergers that in fact transfer assets away from creditors can be attacked under fraudulent transfer law, a claim that bankruptcy courts are experienced in assessing. And a bankruptcy case preceded by a divisive merger designed to defraud creditors can be dismissed as a bad faith filing.

Ultimately, I leave to other commentators the full-throated defense of divisive mergers. My position is that the means to police potentially undesirable behavior in this context already exists in the Bankruptcy Code, and we have recently seen courts fulfilling their gatekeeping function. I worry

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<sup>45</sup> See Parikh, *Mass Exploitation*, *supra* note 2.

<sup>46</sup> See *id.*

that congressional intervention on this point may produce unintended consequences and should not be prioritized when so many other, more important issues in the mass torts space are ignored.

**CONCLUSION**

There is a fair amount of hyperbole surrounding mass tort bankruptcies. The reality is far less salacious. Bankruptcy is the optimal venue for many personal injury, mass tort cases in light of what should be objective of this process: providing meritorious claimants the recovery they deserve on the shortest timeline.

RESPONSES OF PROF. SAMIR D. PARIKH TO QUESTIONS SUBMITTED  
BY SENATOR GRASSLEY

Question for Samir Parikh:

**1. In your opinion, are there problems of forum-shopping and venue abuse in bankruptcy litigation which Congress should be concerned about?**

Senator Grassley, thank you for this question. Forum shopping and judge shopping in bankruptcy are serious issues due to the ease with which corporate debtors can engage in these practices and the significant distortive benefits the practices can offer. The end result is that process and outcome uniformity is undermined.

These practices have been detailed exhaustively over the last decade. I include at the end of this answer (i) a November 9, 2021 letter to you and other senators from the National Association of Attorneys General and (ii) a February 26, 2018 letter to you and former Senator Feinstein from various professors of law that provide insight into the harm of forum shopping and pending legislation that could address the problem.

I will not restate the sound policy and practical reasons supporting venue reform. I would, however, like to explain that the current venue rules represent a historical anomaly and offer some simple changes that could be made to address the issue.

**I. Historical Clarification<sup>1</sup>**

Some commentators have argued that federal bankruptcy law has always been characterized by permissive venue rules for corporate debtors. As explained below, this assertion is false.

Section 2a(1) of the 1898 Bankruptcy Act established the venue rules for debtors. The section allowed “persons” adjudged bankrupt to file a petition in any jurisdiction that had “their principal place of business, resided or had their domicile for the preceding six months, or for a longer portion of the preceding six months than in any other jurisdiction.”<sup>2</sup> The section failed to distinguish between natural persons and fictitious business entities. Courts initially tasked with applying this venue rule to corporate debtors were forced to formulate their own definitions. The primary issue was whether the term “domicile” could apply to a corporation. Courts ruled that the term could in fact apply and indicated a corporation’s state of incorporation.

In 1934, Congress affirmed the judiciary’s approach by enacting section 77B. The new section allowed corporate debtors to file in their state of incorporation. But the National Bankruptcy Conference’s drafting committee (the “NBC Committee”) revisited the issue just a few years later and rejected this approach in Chapter X cases, which applied exclusively to large corporations with outstanding public debt or securities. Congress followed the NBC Committee’s recommendation and enacted section 128 of the Chandler Act, which effectively supplanted section 77B and allowed Chapter X debtors to file only in a jurisdiction where the debtor had its

<sup>1</sup> This section is drawn from Samir D. Parikh, *Modern Forum Shopping In Bankruptcy*, 46 CONN. L. REV. 159 (2013).

<sup>2</sup> Citations have generally been omitted.

principal place of business or its principal assets. The House Report to the Chandler Act explained the change:

In general, the bill sets up as the only valid criterion for jurisdiction the company's principal place of business, or the place of location of its principal assets. Selection of any other jurisdiction usually means conducting the reorganization at great distances from the place or places where the corporation does its business. It means putting investors to great expenses and difficulty if they wish to appear and participate in the proceedings. *It means, also, that inside groups who may be in control of a reorganization are able to search around for the jurisdiction in which they estimate it is least likely, for a number of reasons, that their conduct of the corporation will be examined; that they will be exposed to liability, and their perpetuation in office endangered.* These defects have been met and corrected by the bill, in limiting the venue of reorganization proceedings to the principal place of business or the location of the corporation's principal assets . . . .

This repudiation of the judiciary's interpretation of section 2a(1) of the 1898 Bankruptcy Act was endorsed in 1973 by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (the "JCUS Committee"). The JCUS Committee was tasked with drafting the new bankruptcy rules. Rule 116 was enacted to address venue issues. The rule provided unique and separate treatment for natural persons and fictitious entities. Rule 116(a) allowed corporate debtors to file only in a district where the debtor had its principal place of business or principal assets or where an affiliate of the debtor had already filed. The Advisory Committee Notes that accompanied the change acknowledged that the new rule was specifically derived from section 128 of Chapter X and explicitly "eliminate[d] the notion that residence or domicile may serve as a useful basis for determining venue of a corporation or partnership." The JCUS Committee reasoned that "[t]he place of incorporation [had] no relation to the business activity of the corporation . . . ."

A clear policy rationale supported the venue rules from 1938 to 1978. The Bankruptcy Reform Act of 1978 replaced Rule 116(a) with section 1472. The new section established one venue provision governing all debtors and eliminated the clear demarcation for individual and corporate debtors. Section 1472's legislative history provided no explanation for this consolidation of previously distinct venue provisions. Perhaps Congress intended to return to the venue rules under section 2a(1) of the 1898 Bankruptcy Act. However, if this was Congress's intent, the shift in the venue rules was drastic. For such a drastic change to be made without any discussion or explanation in the legislative history is highly unlikely. Further, if Congress did intend to allow a corporate debtor to rely on its state of incorporation for venue, it could have returned to the explicit language of section 77B of the 1934 amendments to the 1898 Bankruptcy Act. More likely, the genesis for section 1472 was the desire to simplify the language of the 1978 Bankruptcy Act, with unintended consequences regarding forum shopping. If Congress did in fact make such an oversight, its error was at least shared by legal commentators at the time. In fact, none of the law review articles that explained the 1978 Bankruptcy Act appreciated the significance of the venue rule changes; the majority of these articles did not even acknowledge that changes had been made.

In context, however, this oversight may not be as glaring as it first appears. At the time section 1472 was enacted, there were few large, multimillion-dollar bankruptcy cases, and forum shopping by such debtors was not a concern because venue provisions had not been abused. Without an understanding of the risk of forum shopping and lacking an appreciation of the unique harm that forum shopping in bankruptcy could pose, Congress, legal commentators, and scholars may have all viewed section 1472's changes as mere streamlining of an unnecessarily detailed provision.<sup>3</sup>

## II. Suggested Changes

I believe that a multifaceted approach is necessary to address the forum shopping quandary. In the event that current pending legislation fails to pass or an opportunity to modify statutory proposals arises, I suggest considering the following changes:

### Revisions To Section 1408:

- 1) Section 1408's language is ambiguous and groups individual debtors together with fictitious business entities. I think section 1408 should be eliminated as it currently exists. The bankruptcy code should return to Rule 116's language and provide separate subsections addressing natural persons and corporations.
- 2) Section 1408(2) should be replaced by a new provision that would allow a corporate debtor to file a bankruptcy petition in a district in which there is currently pending a case concerning such debtor's affiliate, general partner or partnership, as long as such debtor has a "meaningful connection" to the district. The term would be undefined in the code, and the judiciary would be allowed to develop the definition to curtail blatant forum shopping. A corporate debtor that relies on the affiliate filing hook but fails to establish the requisite connection to the district could have its case transferred to another district pursuant to rule 1014(a)(2). This new requirement will put the onus on debtor's counsel to select venue after careful deliberation.

### Revisions to the Bankruptcy Petition and the Federal Rules of Bankruptcy Procedure:

- 3) The bankruptcy petition should be revised so that a debtor must affirmatively state the specific section 1408 basis that supports its venue choice.<sup>4</sup>
- 4) There is currently no instruction to bankruptcy court judges to verify that a debtor's chosen venue is proper. A party that objects to the debtor's venue choice must file a transfer motion and bears the burden of proof. Rule 1014(a) should be modified to provide that courts must verify the propriety of the debtor's venue choice at the outset of the case or as soon as practicable. A corporate debtor should be obligated to file a form with its petition briefly explaining why the chosen venue is appropriate. The debtor should bear the burden of proof in any dispute regarding venue.

<sup>3</sup> Section 1472 was subsequently redesignated as section 1408.

<sup>4</sup> As it currently stands, the following bases are all grouped together: domicile, residence, principal place of business and principal assets. The debtor checks a box if any of these apply.

- 5) Rule 1014(a)(2) should be modified so that transfer is mandatory – not discretionary – in instances where a case is filed in the improper district unless transfer would cause irreparable damage to the estate.
- 6) 28 U.S.C. § 1292 should be amended to provide that a ruling on venue is to be considered interlocutory and appealable by any party in interest.
- 7) Rule 9011(b) should be modified to explicitly provide that by filing in a specific district, debtor's counsel is making a representation that there is a sound basis supporting that decision. To the extent that representation turns out to be erroneous, a bankruptcy judge should have the option of sanctioning the debtor's lead and local counsel. The sanction would be limited to the reasonable attorney's fees and other expenses incurred by any party that brought a transfer motion or otherwise contested the venue choice.

ATTACHMENT I - RESPONSES OF PROF. SAMIR D. PARIKH



**PRESIDENT**  
**Karl A. Racine**  
 District of Columbia  
 Attorney General

**PRESIDENT-ELECT**  
**Tom Miller**  
 Iowa  
 Attorney General

**VICE PRESIDENT**  
**Josh Stein**  
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**IMMEDIATE PAST PRESIDENT**  
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November 9, 2021

The Honorable Nancy Pelosi Speaker U.S. House of Representatives Washington, DC 20515	The Honorable Chuck Schumer Majority Leader U.S. Senate Washington, DC 20510
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The Honorable Kevin McCarthy Minority Leader U.S. House of Representatives Washington, DC 20515	The Honorable Mitch McConnell Minority Leader U.S. Senate Washington, DC 20510
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The Honorable Jerrold Nadler Chairman Committee on the Judiciary U.S. House of Representatives Washington, DC 20515	The Honorable Dick Durbin Chairman Committee on the Judiciary U.S. Senate Washington, DC 20510
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The Honorable Jim Jordan Ranking Member Committee on the Judiciary U.S. House of Representatives Washington, DC 20515	The Honorable Chuck Grassley Ranking Member Committee on the Judiciary U.S. Senate Washington, DC 20510
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Re: H.R. 4193 – Bankruptcy Venue Reform Act of 2021  
 S. 2827 – Bankruptcy Venue Reform Act of 2021

We support H.R. 4193, and S. 2827, the Bankruptcy Venue Reform Act of 2021<sup>1</sup>. Currently, corporations can file in any district in which they are incorporated, have their principal place of business or

<sup>1</sup> The wording of the two bills is virtually identical. The recently introduced Senate bill adds two provisions -- first, the addition of the words "or to the merger, dissolution, spinoff, or divisive merger" to the limitations provision in the wording for new Section 1408(c)(1) and second, the words "in whole or in part" to the language in Section 1408(c)(1)(B). We agree that both additions are useful clarifications that support the overall goals of the bill and ensure that it covers all forms of this conduct.

principal assets – or in any district where an affiliated entity, no matter how small or recently created, has filed bankruptcy using any of these provisions.

There have been numerous examples where corporations have taken advantage of this freedom: Eastern Airlines, based in Florida, filed in New York in the 1980s, relying solely on the location of its frequent flyer club subsidiary. Enron and Worldcom similarly were able to file in New York in 2001 and 2002 based on initial filings by single small subsidiaries affiliated there, even though they were based in Texas and Mississippi, respectively and had by far the largest amount of their operations in those states. General Motors, an iconic Michigan company, used a single dealership based in Harlem to allow it to file in New York in 2009 while Patriot Coal, which was headquartered in St. Louis and had subsidiaries in a number of coal states, filed in New York based on its incorporation of two new subsidiaries there (where it previously had *no* assets) the month before it filed in 2012. Similarly, the Herald newspaper, which had been publishing in Boston since 1846, filed bankruptcy in Delaware in 2017 and that same year, Venoco, LLC, a Denver-based company, also filed bankruptcy in Delaware following massive losses incurred from an oil spill from its Santa Barbara, CA operations. There are many other examples of such filings in venues that have nothing to do with a debtor's primary operations or business.

By incorporating a single subsidiary in a favored jurisdiction, corporations can engage in rampant forum shopping, allowing them to pick a court with favorable law on issues ranging from the merits of the claims against it to the applicable statutes of limitation, the fees that its lawyers will be able to command, and the releases it will seek to provide to its officers, insiders, and non-debtor third parties. This ability to control the law to be applied to one's affairs is not allowed in any other area of the law. At a minimum, it has encouraged placing cases in some of the most expensive legal markets in the country, contributing to the growing costs of these cases.

Under the current venue provisions, for many years the most significant bankruptcy cases were filed in the Southern District of New York or the District of Delaware despite neither being the natural venue for such filings. On a number of occasions this has been done through shell subsidiaries created solely for the purpose of enabling such a filing. The same issue has begun to arise in a few other districts in recent years and while we respect the expertise of the judges in these districts, we reject the argument that other judges are not equally capable of exercising an expertise in corporate cases, large or small or that there is something inherent in

those districts that makes those courts uniquely qualified to handle such cases. Moreover, by allowing debtors to choose their courts – and, in some instances their own judge from a group of only one or two – this inherently exposes those judges and their decisions to heightened scrutiny and criticism. That is particularly true when the ability to choose those courts and judges lies solely within the unilateral control of the debtor itself. No other defendant is allowed such freedom, but the current system plainly allows such abuse.

The issues arising from such forum shopping are problematic enough standing alone; they provide an even greater problem for the overall system in that, no matter how fairly the favored judges attempt to be in their rulings, the debtor's actions inevitably taint how other parties view them. The results from a bankruptcy case are already hard enough to accept for a party that sees itself as victimized by the debtor; that distrust can only be exacerbated if it sees the rulings as coming from a judge hand-picked by the debtor. As such, we agree with the bill's premise that "reducing forum shopping in the bankruptcy system will strengthen the integrity of, and build public confidence and ensure fairness in, the bankruptcy system," by making corporate debtors file in jurisdictions where they chose to place significant aspects of their basic business operations, not where they choose to litigate about the adverse effects of those operations.

The ability of debtors to limit their filings to a few chosen venues and/or judges is even more significant than in ordinary litigation in that bankruptcy cases have a national effect, yet the binding precedent in the large cases may only issue from a very few courts so there is no ability to assess differing views on the issues or to have those debates rise to higher levels on appeal. That limited ability to appeal and to have determinations made at the highest level (including by the Supreme Court) is particularly true in light of the extremely broad statutory and judge-made limits (such as the so-called "equitable mootness" doctrine) imposed on creditors seeking to appeal decisions that confirm plans. As such, the forum shopping process can result in debtors being able to pick not only the initial, but also, in many cases, the final arbiter of their fate.

Those problems are further underscored by the burdens imposed on those who already have suffered as a result of a corporate debtor's financial collapse who may then be forced to spend substantial additional amounts, travel long distances, and often hire additional local counsel simply to participate on an equal footing with the debtor. While the experience over the last 18 months as the courts have dealt with the COVID-19 pandemic have indicated that some of the worst of those effects can be mitigated by allowing telephonic/virtual appearances, no one doubts that the inability to appear in person or to engage in face-to-face discussions with others in

the case puts those in distant locales at a distinct disadvantage. Those disadvantages will reemerge as courts resume in-person hearings, even if they do retain some adaptations. Moreover, even with those alternative means of appearance, districts generally have retained their rules requiring local counsel for out-of-state parties, which can, in many instances, add substantial additional costs and burdens on a creditor that is already far from likely to be able to recover a meaningful amount of its claim.

In short, by ensuring that debtors whose operations have created adverse impacts on their neighbors are called to account in proximity to those same neighbors, H.R. 4193 and S. 2827 will greatly limit forum shopping while helping consumers and many other parties, large and small alike – including creditors, workers, retirees, shareholders, and small business vendors – to represent themselves without undue burden. The additional language in S. 2827 that bars recognition of a new trend of using “divisive mergers” to split a single entity into one company that retains the profitable operating assets and a second left with the burdensome liabilities of the original company and having only the latter file bankruptcy is a welcome addition.

As state attorneys general, we are charged with guarding our states’ financial interests, enforcing consumer protection laws, protecting our citizens from environmental pollution and combating wrongdoing in whatever form it takes. These duties are difficult enough when corporations file bankruptcy and claim to be financially unable to comply with their legal obligations. The difficulties are multiplied when bankruptcy law allows those debtors to seek relief in distant jurisdictions where the debtors hope to find rulings that are friendlier to their interests than to those of persons and agencies located far away and, at the very least, to greatly increase the difficulties imposed on those seeking to be heard in opposition to the debtor’s desires.

Accordingly, we agree with the tests set forth in H.R. 4193 and S. 2827, limiting where businesses may file by ensuring that they will do so in a jurisdiction in which their “principal assets” or their “principal place of business” are located, and ensuring that it is the *parent’s* status, not that of a minor affiliate, that will determine where the overall case will be heard. These provisions should go far to ensure that bankruptcies are filed in jurisdictions where debtors have the closest connections and where their filings will impose the largest impacts.

We also support the bills because of their provisions providing for a new rule to be drafted dealing with appearances by governmental attorneys. In our role as representatives of both the state and its aggrieved citizens, we often have to appear in distant jurisdictions because many debtors have nationwide operations that may

affect citizens in states all across the country. We recognize and accept that a consequence of this bill will be that we may need to appear in "home courts" of companies throughout the country, not just Delaware and New York. Each such court currently sets its own requirements for allowing non-local attorneys to appear, including deciding whether to charge an admission fee in each case, and /or to require that we must associate local counsel, even as to matters involving only our own state's laws.

This is by contrast to the Rules for Multidistrict Litigation, which similarly group entities from all over the country into a single litigation forum, but which allow *all* parties to appear by right and without local counsel. The 1994 Bankruptcy Code amendments (Sec. 304 of P.L. 103-394) does grant those rights to governmental child support creditors and this provision has worked without incident. This bill would require rules to be prescribed to similarly allow *all* government attorneys to appear without charge and without being required to associate local counsel. Most courts extend those privileges to counsel for the United States; the bill would simply provide the same treatment for other governmental entities, thus facilitating our ability to appear in bankruptcy courts without delay or unnecessary financial burdens.

For all these reasons, we strongly support this bill and urge you to advance its passage. As the chief legal officers of our states, we have a particular interest in ensuring that we and our citizens can protect our interests by effectively participating in these cases.

Sincerely



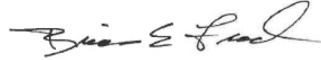
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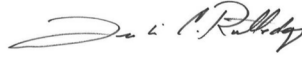
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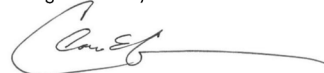
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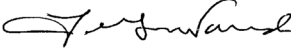
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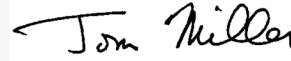
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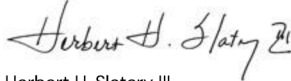
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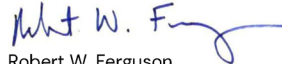


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**Bankruptcy Venue Reform**

S. 2282

February 26, 2018

The Honorable Charles E. Grassley  
Chairman  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510

The Honorable Dianne Feinstein  
Ranking Member  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510

We are law professors who teach and study bankruptcy. We write to support S. 2282, the “Bankruptcy Venue Reform Act of 2018,” bipartisan reform legislation introduced initially by Senators John Cornyn and Elizabeth Warren. The bill seeks to eliminate provisions in existing law that permit a corporate group to file bankruptcy, typically Chapter 11 reorganization cases, in some part of the country far removed from their principal place of business. Most often this results in a filing in Delaware, although filings are also made in New York and other districts far-removed from a corporation’s home base.

The bill adopts a simple, straight-forward rule to ensure that a bankruptcy case is filed in the federal district where the corporation has its principal assets or its corporate headquarters. For a public company registered with the SEC, its headquarters as specified in its filings with the SEC would presumptively be regarded as its principal place of business. In the case of a corporation with various subsidiaries, they would be permitted to follow the parent by filing in the parent’s home district. Any of us would be happy to answer staff questions about the details of the bill.

There have been academic debates about permitting businesses to forum-shop to certain courts that their management or lawyers may consider most favorable for their purposes, leaving behind the communities that supported them. Some claim that certain courts, notably bankruptcy courts in Delaware, have experience and expertise that makes them more efficient in large cases. Others suggest that the professional and community benefits of attracting such cases encourages those courts to look with too much favor on the compensation of managers and lawyers and on

the interests of large lenders rather than employees and investors. The latter concern is supported by the fact that the filing of a large case may give a community the economic equivalent of gaining a factory—hundreds of millions or even billions of dollars in professional fees and related services. Although the bankruptcy bench is notably professional and expert, it would be hard for anyone to be completely immune to the pressures generated by the prospect of these benefits.

In the end, however, the right policy may rest more upon the common-sense policies upon which all venue statutes rest. A bankruptcy proceeding should bring together all of the stakeholders in a corporation to deal with the crisis of financial distress that threatens them all. Its home base is the right place for them to gather to resolve that crisis as fairly and successfully as possible. It is the most predictable location for those extending credit or investing their careers in that enterprise. It is also the one least subject to manipulation for the benefit of insiders.

In response to the claims that the distortions of forum shopping are balanced by the availability of judicial expertise in certain courtrooms, one function we can perform as experts in the field is to assure the Congress that outstanding bankruptcy judges with substantial business experience are found all over the country. On the other hand, local expertise is often a more important element of an efficient and fair result. The bankruptcy judges in Manhattan are first-rate, but when they were recently asked to apply Texas real estate law in oil and gas cases, many observers thought the Texas bankruptcy courts would have been better equipped to get the right legal result.

It is important that bankruptcy proceedings be brought where there is likely to be convenient and affordable access to them by all of the stakeholders in a business. If a stakeholder does become aware of a troubling aspect of a distant proceeding, it may be difficult or impracticable for the stakeholder or the stakeholder's lawyer to attend, to investigate the relevant files, to talk to those who have followed the case, and so on. The local legal community in the distant venue may be close knit and frugal in the information it shares, while unconflicted local counsel may be hard to find and costly in proportion to their rarity.

Beyond the purely financial considerations, bankruptcies profoundly affect human lives. For that reason, justice must not only be done, but must be seen to be done. A proceeding in a court distant from the relevant community will most often fail this second test and therefore fail in an important part of its political, social, and economic role. The need for justice "to be seen to be done" encompasses not merely the importance of citizen confidence that justice is being sought, and is often achieved, in legal proceedings but also the public exposure of legal procedures or results that concern citizens. That public exposure can build momentum for improvement in our laws. To accomplish those ends, it is not enough that the result satisfies the

parties represented in court. Many still remember the employees of Enron, having lost their life savings in its collapse, standing in the street in front of its Houston headquarters stunned to find that its bankruptcy proceeding had been filed in Manhattan.

Not only does distance prevent participation by stakeholders, but affordable access is important for media and commentators who will report the proceedings to those who cannot attend. As those Enron employees could testify, a proceeding in a distant court will not receive the same degree or quality of media coverage as one filed in the company's principal place of business. Instead, such media coverage as there may be is likely to be found primarily in the financial press and perhaps in industry-specific publications, but not in the media upon which most citizens rely. The company and its strongest creditors will be able more easily to manage the limited news coming from the distant proceeding in ways useful to their purposes and to the image they want the matter to project to the public.

Of course, a company cannot file for bankruptcy in every town where it is important. But if it is required to file in its principal place of business or where its principal assets are located, it will be closer to the relevant citizenry and the media who serve them. A truly transparent proceeding, one in which the windows of the courtroom are not frosted by distance, will provide impetus for healthy debate about legal reforms and will give more stakeholders the comfort of feeling law is being justly applied. By contrast, the removal of proceedings to a distant place seems to defy common sense and may leave local citizens suspicious of the motives behind it. For example, the filing in Delaware by Energy Future put into a distant courthouse the financial future of the major supplier of electricity to millions of north Texans. It may not be coincidental that the case has languished in bankruptcy in part because of an inability to obtain the approval of the Texas regulators for the various resolutions that have been proposed.

There are many examples of the fate of businesses that are important to a particular region or state being resolved in a faraway city. One from the heartland is Hobbico, Inc.—the largest model hobby company in the world, and the largest U.S. distributor of radio-control and general hobby products. Although its headquarters is in Illinois, along with more than 330 of its employees who also own the company through an employee stock ownership plan, those employee-owners find that the fate of their company and their jobs now rests with a court located in Wilmington, Delaware.

A far from exhaustive list of other large companies filing far away from their headquarters includes: Los Angeles Dodgers (California), VeraSun Energy (South Dakota), Hawkeye Renewables (Iowa), SemCrude (Oklahoma), Smurfit-Stone Container (Illinois), Tribune Company (Illinois), Flying J (Utah), Corinthian Colleges (California), RadioShack (Texas), American Airlines (Texas), Woodbridge Group (California), Boston Herald (Massachusetts), KB Toys (Massachusetts), Tropicana Resort & Casino (Nevada), and

Washington Mutual (Washington). Forum shopping is not limited to large (mega) company cases either. From 2002-2016, nearly 270 companies with \$50 million or less in debts fled their home states to file in Delaware or New York, and that number increases to 400 for companies with debts of \$100 million.

As academics, we hope we have a little detachment from the everyday concerns that practicing lawyers may feel, which often include a natural resistance to change familiar procedures. In the long run, maintaining the connection between enterprises and their employees and communities will best serve all the purposes of bankruptcy law, including maximizing value and ensuring fairness. We hope the Congress will adopt S. 2282 and will be glad to help in any way we can.

Respectfully,

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College of Law  
The University of Iowa

Charles D. Booth  
Professor of Law  
Director, Institute of Asian-Pacific Business  
Law  
William S. Richardson School of Law  
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Ralph Brubaker  
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Laura N. Coordes  
Associate Professor of Law  
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Danielle D'Onfro  
Lecturer in Law  
Washington University School of Law

Sally McDonald Henry  
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Dan Keating  
Tyrrell Williams Professor of Law  
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Robert M. Lawless  
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Adam J. Levitin  
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Lynn M. LoPucki  
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Professor of Law  
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Angela Littwin  
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Lois Lupica  
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Marie T. Reilly  
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Penn State Law | Penn State University

Jay L. Westbrook  
Benno C. Schmidt Chair  
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William C. Whitford  
Emeritus Professor, Wisconsin Law School

**Questions from Senator Thom Tillis  
for Samir Parikh**

- 1. Multidistrict litigation is often the alternative to bankruptcy settlements in mass tort cases. Can you speak further about how some plaintiffs may be better served by the bankruptcy process? I'm interested in hearing about how plaintiffs may benefit both in terms of financial recovery and also the efficacy of the process.**

Senator Tillis, thank you for the opportunity to answer your question. As I noted in my oral testimony, At the turn of this century, the Supreme Court ostensibly eliminated Rule 23's class aggregation option for most mass tort cases. MDL's rise was a rushed effort to address the gaping resolution void that emerged. Section 1407 of the U.S. Judicial Code creates the MDL infrastructure and allows one federal judge to streamline pretrial – general procedural – matters. At the conclusion of pretrial proceedings, however, the statute mandates that cases be remanded to the districts where they were originally filed. The MDL court is not intended to be a destination; it is merely a stop along the path to resolution.

I acknowledge that MDL has been instrumental in resolving complex cases and preserving the viability of the judiciary in the face of potentially overwhelming case volume. Nevertheless, MDL has evolved in ways that undermine the resolution model for many mass tort cases.<sup>1</sup> The promise of procedural streamlining is a mirage that has led parties into quicksand. The worst kept secret in mass tort litigation is that transferred cases do not return to their transferor courts. Only 3% of transferred cases escape MDL capture; 97% of transferred cases are resolved in the MDL court by dispositive motion or settlement.<sup>2</sup> Victims do not receive their “day in court.” And this number says nothing about the efficiency and equity of the resolution process. Keep in mind that there are no statutory requirements that an MDL court review or assess the integrity of any settlement or the settlement process itself. And most courts do not undertake such inquiries. Unfortunately, a structure consumed with efficiency through procedural devices undermines just outcomes if it lacks the ability to assure claim merit, defendant culpability, or settlement integrity.

All of these factors highlight victims' lack of control in an MDL.<sup>3</sup> A truly surprising facet of the process is that victims are unable to exit. MDL judges are invested in these cases and have exhibited a propensity to compel settlements that may be coercive to individual plaintiffs.<sup>4</sup> More fundamental, the process contravenes policy objectives by failing to deter undesirable behavior.

<sup>1</sup> See Samir D. Parikh, *The New Mass Torts Bargain*, 91 FORDHAM L. REV. 447 (2022).

<sup>2</sup> U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., MDL STATISTICS REPORT – DISTRIBUTION OF PENDING MDL DOCKETS BY ACTIONS PENDING 6 (2018).

<sup>3</sup> See, e.g., Elizabeth Chamblee Burch & Margaret S. Williams, *Perceptions of Justice in Multidistrict Litigation: Voices from the Crowd*, 107 CORNELL L. REV. 1835 (2022).

<sup>4</sup> For example, in *In re Nat'l Prescription Opiate Litigation*, 290 F. Supp. 3d 1375 (J.P.M.L. 2017), Judge Polster stated that his sole goal was to see an immediate global settlement of the cases. He stated 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*.” See *id.* at 4-6 (emphasis added).

Compelled settlements rarely consider culpability, heightening the possibility of extortion litigation. Deterrence is unrealized because there are significant lottery effects; in other words, corporate actors that conform their behavior to legal strictures are no better off than those that do not.

Further, unlike bankruptcy's public forum, MDL settlements can live in the shadows. Settlements do not need court approval, and confidentiality agreements invariably prevent publication or an assessment of the details. Corporate abuses do not come to light in a process where there are ostensibly no trials and no attempts are made to investigate malfeasance.

Bankruptcy's structural, procedural, and substantive benefits provide optionality that serves in sharp contrast to MDL's settlement fixation. For example, bankruptcy courts enjoy jurisdiction over all "civil proceedings arising under title 11, or arising in or related to cases under title 11."<sup>5</sup> The seemingly boundless reach of bankruptcy court jurisdiction allows the court to marshal all state and federal matters affecting a debtor in one single venue for prompt and efficient adjudication for the benefit of all stakeholders. MDL does not enjoy this reach. Further, bankruptcy's powerful automatic stay halts all creditor actions, including pending litigation against the debtor and can be extended to nondebtors in order to allow all key parties to focus on negotiating a global settlement. This reduces the risk of precious resources being squandered on one-off litigation matters that ultimately fail to move the parties any closer to settlement. I argue that these resources should be devoted to victims.

Most cases in bankruptcy – including those involving mass tort claims – enjoy a speed premium; to the extent that the case can be resolved quickly, additional funds can be devoted to creditors. The Bankruptcy Code authorizes courts to identify claims subject to pending litigation against the debtor and estimate the aggregate value of the claims that cannot be resolved in a timely manner.<sup>6</sup> Claims that could take decades to be tried and resolved outside of bankruptcy can be assessed within a matter months. Victims are allowed to participate in this process and argue for the valuation they believe is just. Keep in mind, the bankruptcy judge is not unilaterally deciding what each victim will receive. Rather, the judge is determining the total value of all claims against the debtor and allowing the debtor to propose a settlement to victims based on that figure. This settlement will be delineated in the debtor's plan of reorganization. Victims are not bound by this offer. The United States Trustee appoints an official committee of tort claimants to represent the interests of all current claimants. This committee, which retains independent legal and financial advisors, plays a key role negotiating with the debtor to develop settlements that the committee can endorse and recommend for approval. Ultimately, bankruptcy allows these creditors to vote on whether they believe that the debtor's proposal is the best offer they can secure.<sup>7</sup> In fact, victims – as a collective – could choose to reject the debtor's offer. This would put pressure on the debtor.

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<sup>5</sup> 28 U.S.C. §1334(b).

<sup>6</sup> See 11 U.S.C. §502(c).

<sup>7</sup> In the Purdue Pharma bankruptcy case, more than 95% of the approximately 120,000 submitted votes were in favor of approving the debtor's proposed plan of reorganization. See Samir D. Parikh, *Scarlet-Lettered Bankruptcy: A Public Benefit Proposal for Mass Tort Villains*, 117 NW. U. L. REV. 425 (2022).

After a certain number of rejections, there is a distinct possibility that the court will dismiss the bankruptcy case, which could be disastrous for the debtor and other key-decision makers in the case.

As detailed in my answer to “Question 2” below, individual victim autonomy is sacrificed in bankruptcy, but that is the case in all aggregation processes involving thousands and thousands of claims.<sup>8</sup> Not every plaintiff can have her day in court when thousands of claims are outstanding. The defendant’s legal expenses would consume everything, leaving little for the vast majority of victims. I also acknowledge that the claim estimation process in bankruptcy has deficiencies. But bankruptcy court judges can easily address them. For example, if there are concerns about a bankruptcy court judge estimating personal injury claims, the judge could lift the automatic stay as to a particularly subset of cases and allow the MDL district court to adjudicate them.<sup>9</sup> The resultant rulings could help provide some concrete data that would help the bankruptcy judge in her claim assessment process. This hybrid joins the advantages of MDL, which offers a jurist experienced in adjudicating personal injury claims, and bankruptcy, which offers victims an accelerated recovery and the chance to vote on the treatment they will ultimately receive.

**2. Do plaintiffs in multidistrict litigation always “get their day in court” more so than plaintiffs who receive a settlement through a company’s bankruptcy proceedings?**

**The “Day in Court” Fallacy<sup>10</sup>**

Improving recoveries for deserving mass tort victims is attainable only if we attempt to understand the key issues precluding resolution. Unfortunately, the resolution debate is distorted by a significant misconception. One of the primary arguments used to undermine the bankruptcy process is that victims lose their “day in court” – a reference to the Due Process Clause and the Seventh Amendment right to a jury trial. In fact, when Aearo Technologies filed for bankruptcy, MDL Judge Rodgers wrote that “hundreds of thousands of individual plaintiffs will be deprived of their constitutional right to a jury trial.” But the truth is that claimants lost that right the day the Combat Arms MDL was ordered. This is the case in almost every modern mass tort dispute.

The day-in-court argument assumes that this right is sacrosanct and bankruptcy deprives victims of the right. That’s not entirely true. As noted above, certain mass tort claimants in bankruptcy could have their day in court through bellwether trials conducted by a federal district court with the bankruptcy court’s permission. But I acknowledge that this is a small portion of the claimant pool.

<sup>8</sup> See Parikh, *The New Mass Torts Bargain*, *supra* note 1.

<sup>9</sup> See Sergio Campos & Samir D. Parikh, *Due Process Alignment in Mass Restructurings*, 91 FORDHAM L. REV. 325 (2022). Note that the bankruptcy court’s estimation of such claims does not actually fix the amount any creditor will receive for her injury.

<sup>10</sup> This answer is derived in large part from my recent opinion piece, Samir D. Parikh, *‘Day-In-Court’ Ideal Is Distracting From Victim Recovery*, LAW360 (March 16, 2023). Internal citations have been omitted.

Mass tort plans of reorganization include an opt-out for claimants that allows those who exercise the right to have their day in court by bringing suit directly against the settlement trust. But there are a number of strings attached to this right. For example, in Purdue Pharma, the recovery for claimants who opted out was capped at the amount the claimant would have received if they had not opted out. These restrictions certainly diminish a victim's ability to enjoy their day in court. Supreme Court jurisprudence indicates that these restrictions are Constitutional, but that doesn't change the fact that something is lost.

The statement that mass tort claimants lose their day in court in bankruptcy is not inaccurate. It is incomplete, however, because mass tort claimants also lose their day in court in MDL. It is this corollary that is being intentionally avoided. The argument goes that bankruptcy prevents mass tort claimants from enjoying their day in court. But that is a false narrative. For all intents and purposes, plaintiffs in the bankruptcy cases involving 3M, Johnson & Johnson, and Purdue Pharma were in a multidistrict litigation proceeding prior to the dispositive bankruptcy filing. Even if the relevant bankruptcy case was dismissed, the dispute would return to MDL. But MDL does not offer plaintiffs their day in court, either.

Once a case becomes part of MDL, claimants cannot opt out to continue their litigation. Claimants must sit and wait, sometimes for years. This MDL reality has earned the process a significant amount of criticism.<sup>11</sup> MDL has bellwether trials, but that's just for a handful of claimants. 3M's Combat Arms MDL is the largest MDL in history with over 200,000 claims, but there have been only 16 bellwether trials. Finally, MDL settlements are conditioned on a limited number of opt-outs; the deal falls apart if the threshold is crossed. Therefore, plaintiffs' attorneys and consenting claimants are all incentivized to dissuade opt-outs. The impact of these efforts cannot be overstated.

Only a handful of the hundreds of thousands of claimants involved in these mass tort cases will ever get their day in court. The "day in court" ideal is invariably a fallacy in the mass torts context. But that is unavoidable in these type of cases. Attempting to preserve a day-in-court right for a few victims would significantly diminish the overall distribution to the victims' collective. Claim adjudication in this alternative reality would take decades. Initial judgments would exhaust funds, and lottery effects would leave the vast majority of claimants without restitution – an archetypical collective action problem that policymakers should not encourage. Attempting to formulate a "day in court" option in mass tort cases can actually do more harm than good for mass tort claimants.

Mass tort claimants lose their day in court in bankruptcy and MDL, but that is a necessary evil when the legal system is forced to resolve thousands and thousands of claims. The "day in court" ideal permeates discussions about the optimal venue to resolve mass torts, but it shouldn't. Ultimately, the overriding objective in these cases should be securing meritorious claimants the

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<sup>11</sup> See, e.g., Elizabeth Chamblee Burch & Margaret S. Williams, *Perceptions of Justice in Multidistrict Litigation: Voices from the Crowd*, 107 CORNELL L. REV. 1835 (2022).

largest recovery possible on the shortest timeline – a result that bankruptcy often furthers. This first principle should not be obscured by misguided arguments.


**American Tort Reform Association**

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September 18, 2023

The Honorable Dick Durbin  
 Chairman  
 Committee on the Judiciary  
 U.S. Senate  
 224 Dirksen Senate Office Building  
 Washington, D.C. 20510

The Honorable Lindsey Graham  
 Ranking Member  
 Committee on the Judiciary  
 U.S. Senate  
 224 Dirksen Senate Office Building  
 Washington, D.C. 20510

Re: Hearing on Use of the Chapter 11 Bankruptcy Process  
 to Address Overwhelming Mass Tort Litigation

Dear Chairman Durbin, Ranking Member Graham, and Members of the Committee:

Thank you for holding this hearing and for the opportunity to share the American Tort Reform Association's (ATRA) concerns with criticism of corporate use of the bankruptcy process as a means of responding to the unprecedented, overwhelming number of mass tort lawsuits, many of which are of meritless. We respectfully do not agree with the Committee's presenting this hearing as "Evading Accountability: Corporate Manipulation of Chapter 11 Bankruptcy." Rather, our bankruptcy laws were established precisely for situations, as are now occurring, in which a business suddenly faces tens of thousands or hundreds of thousands of dubious claims with the prospect of never-ending litigation that will cost millions of dollars to legal defense alone, even if it expects to prevail in the vast majority of cases. In such instances, bankruptcy laws provide a fair system for compensating claimants while allowing American businesses to continue contributing to the economy without being saddled and distracted by litigation.

ATRA is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms. Our mission is to establish and advance a predictable, fair, and efficient civil justice system through the enactment of legislation, filing *amicus curiae* (friend of the court) briefs in litigation, and public education. In recent litigation that will likely be discussed in this hearing, ATRA has voiced its concerns with restricting the ability of businesses that face overwhelming mass tort litigation to use the bankruptcy system.<sup>1</sup> We have also urged the House Oversight Committee to address the hidden use of funding from outside investors that has contributed to the rise of mass tort litigation.<sup>2</sup>

<sup>1</sup> ATRA filed *amicus* briefs in *In re: Bestwall, LLC* in the Fourth Circuit on July 24, 2023, *In re: LTL Mgm't, LLC* in the Third Circuit on February 21, 2023 and August 22, 2022, and *In re: Aeero Technologies, LLC* in the Seventh Circuit on December 19, 2022.

<sup>2</sup> Letter from Sherman Joyce, President, American Tort Reform Association to the Hon. James Comer, Chairman, and the Hon. Jamie Raskin, Ranking Member, House Comm. on Oversight and

Courts and Congress have historically recognized that the bankruptcy system is a valid means of addressing mass tort claims. In such cases, bankruptcy may be the best way for businesses to address overwhelming tort liability while continuing to contribute to society. Members of this Committee may be aware that the unique complexities of mass asbestos litigation led Congress to enact the Bankruptcy Reform Act of 1994, codified at 11 U.S.C. 524(g). That law ensures that the interests of claimants are protected while “simultaneously enabling corporations saddled with asbestos liability to obtain the ‘fresh start’ promised by bankruptcy.”<sup>3</sup> Section 524(g) “affirm[s] what Chapter 11 organization is supposed to be about: allowing an otherwise viable business to quantify, consolidate, and manage its debt so that it can satisfy its creditors to the maximum extent feasible, but without threatening its continued existence and the thousands of jobs that it provides.”<sup>4</sup> In passing this legislation, members reaffirmed that the bankruptcy process “is designed to help asbestos victims receive maximum value.”<sup>5</sup>

For decades, businesses facing mass tort claims have filed Chapter 11 petitions to address mass tort liabilities and the courts have consistently permitted them to do so. As a result, millions of people have received compensation for their claims, often in a prompt and efficient manner, while at the same time preserving beneficial aspects of those businesses. For example, there are more than 60 asbestos trusts in operation, holding billions of dollars to “compensate claimants expeditiously at minimal cost.”<sup>6</sup> Companies have also invoked Chapter 11 to address mass tort liabilities ranging from medical device product liability claims, such as those involving Dalkon Shield and silicone breast implants,<sup>7</sup> to train crashes and wildfire damage claims.<sup>8</sup>

The most common targets today include pharmaceutical, medical device, and consumer product manufacturers. In recent years, mass tort litigation has exploded as an entire industry has developed to generate it. Law firms and businesses known as “lead generators” spend extraordinary sums on lawsuit advertising, sometimes financed by an influx of outside investment in speculative litigation by outside sources (known as third party litigation funding).<sup>9</sup> Between 2017 and 2021, they invested \$6.8 billion on more than 77 million television ads.<sup>10</sup> Ads have also

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Accountability, Hearing on “Unsuitable Litigation: Oversight of Third-Party Litigation Funding,” Sept. 11, 2023.

<sup>3</sup> *In re Federal-Mogul Global Inc.*, 684 F.3d 355, 359 (3d Cir. 2012).

<sup>4</sup> 140 Cong. Rec. 28,358 (Oct. 6, 1994) (statement of Senator Brown).

<sup>5</sup> *Id.* (statement of Sen. Heflin).

<sup>6</sup> Mark A. Behrens, Asbestos Trust Transparency, 87 Fordham L. Rev. 107, 111-12 (2018).

<sup>7</sup> See *In re Dow Corning Corp.*, 280 F.3d 648 (6th Cir. 2002); *In re A.H. Robins Co.*, 88 B.R. 742 (E.D. Va. 1988), *aff’d*, 880 F.2d 694 (4th Cir. 1989).

<sup>8</sup> See *In re PG & E Corp.*, 617 B.R. 671 (Bankr. N.D. Cal. 2020), *appeal dismissed sub nom*, *McDonald v. PG&E Corp.*, 2020 WL 6684592 (N.D. Cal. Nov. 12, 2020), *aff’d*, 2022 WL 1657452 (9th Cir. May 25, 2022); *In re Montreal Maine & Atl. Ry., Ltd.*, 2015 WL 7431192 (Bankr. D. Me. Oct. 9, 2015), *adopted*, 2015 WL 7302223 (D. Me. Nov. 18, 2015).

<sup>9</sup> See U.S. Gov’t Accountability Office, GAO-23-105210, [Third-Party Litigation Financing: Market Characteristics, Data, and Trends 11-12](#) (Dec. 2022) (“GAO Report”).

<sup>10</sup> See Am. Tort Reform Ass’n, [Legal Services Advertising in the United States 2017-2021](#), at 4 (2022).

inundated social media. Sometimes presented as “medical alerts,” ads urge viewers who have taken a medication, been treated with a medical device, or used a consumer product to “call right now” because “you may be entitled to substantial compensation.” For example, spending on ads seeking plaintiffs for lawsuits blaming talcum powder or Roundup for a person’s cancer or alleging the blood thinner Xarelto led to side effects *each* has exceeded \$100 million.<sup>11</sup> Call centers, sometimes in other countries, gather medical and other information from those who respond, then package and sell potential claims to interested law firms. In some instances, strangers have solicited individuals for lawsuits by phone, apparently through misuse of their medical records.<sup>12</sup>

With minimal screening, claims are filed *en masse*. One law firm recently filed over 5,000 complaints in a mass tort docket in a single week.<sup>13</sup> Potentially viable claims may be buried among unsupportable ones. The strategy of the plaintiffs’ bar is to pressure companies to settle the litigation at incredible sums to avoid endless litigation and prolonged damage to their reputations, regardless of the merits of the individual cases. In litigation involving latent injuries, however, it is impossible for a company to settle unknown potential future claims through the tort system. Likewise, the mass tort system may breakdown when lawsuit advertising, the ease of filing claims, and a lack of verification of their validity leads to more claims than defendants and the courts can fairly handle. In those instances, use of the bankruptcy process offers a legitimate, needed means of fully resolving the litigation.<sup>14</sup>

But don’t take it from us, listen to what federal judges managing mass tort litigation have said about what is occurring. When overseeing an MDL of lawsuits targeting a medical device, the Chief Judge of the U.S. District Court for the Middle District of Georgia observed that lawyers file “cases that otherwise would not be filed if they had to stand on their own merit as a stand-alone action” in an MDL because they believe clear deficiencies in their claims will not be scrutinized when the claim is swept into a global settlement.<sup>15</sup> Another federal judge, who has overseen product liability mass tort litigation, explained that it is difficult to apply the ordinary procedural safeguards used to verify claims when “the volume of individual cases in a single MDL can number in the hundreds, thousands, and even hundreds of

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<sup>11</sup> See Roy Strom, *Camp Lejeune Ads Surge Amid ‘Wild West’ of Legal Finance, Tech*, Bloomberg Law, Jan. 30, 2023. Congress may be interested to learn if outside funders bankrolled the \$145 million spent, as of the end of 2022, on television and social media ads to solicit Camp Lejeune claims against the federal government, and, if so, what cut they may be taking from the \$6 billion authorized for veteran payments. *See id.*

<sup>12</sup> See Matthew Goldstein & Jessica Silver-Greenberg, *How Profiteers Lure Women Into Often-Unneeded Surgery*, N.Y. Times, Apr. 14, 2018.

<sup>13</sup> See David Nayer, *Analytics Show One Firm Filed Over 5,000 Lawsuits in a Week*, Law Street, Feb. 8, 2023.

<sup>14</sup> See *In re Plant Insulation Co.*, 734 F.3d 900, 905-06 (9th Cir. 2013) (“[G]iven the lengthy latency period of asbestos-related diseases, companies facing asbestos risks have no way finally to resolve or even effectively estimate their exposure.”).

<sup>15</sup> *In re Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig.*, 2016 WL 4705827, at \*2 (M.D. Ga. Sept. 7, 2016).

thousands.”<sup>16</sup> He cautioned that the “high volumes of unsupportable claims clog the docket, interfere with a court’s ability to establish a fair and informative bellwether process, frustrate efforts to assess the strengths and weaknesses of the MDL as a whole, and hamper settlement discussions.”<sup>17</sup> A Federal Advisory Committee on Civil Rules report provides a troubling estimate of the percentage of claims in MDLs that are unsupportable: 20% to 30% and, in some litigation, as many as 40% to 50%.<sup>18</sup>

In a mass tort litigation machine in which federal MDL dockets go from zero to tens of thousands of questionable claims in only a few months, many of which are meritless, companies must consider bankruptcy as a legitimate means of resolving cases while protecting the future viability of the business and the interests of its employees and other stakeholders.

ATRA is concerned that, recently, the U.S. Court of Appeals for the Third Circuit ruled that a company cannot invoke the federal bankruptcy process until it is in immediate “financial distress.”<sup>19</sup> This new precondition is contrary to Congress’s intent in enacting the bankruptcy law. Not only does it place bankruptcy out-of-reach for businesses facing never-ending litigation, it is against the interests of claimants, who will not have access to the business’s resources until they are depleted.<sup>20</sup> Requiring a business’s financial situation to be so dire that there is an imminent risk that it will collapse before allowing it to file for bankruptcy is also inconsistent with how the judiciary has historically applied the law. Over the past four decades, courts have consistently permitted businesses to file Chapter 11 petitions irrespective of the solvency of the debtor or the state, nature, and timing of the company’s financial distress.

Similarly, a bankruptcy court in Indiana recently denied a Chapter 11 stay petition seeking relief from hundreds of thousands of product liability lawsuits.<sup>21</sup> While six bellwether trials resulted in defense verdicts, ten trials concluded with verdicts ranging from \$1.7 million to \$77.5 million (with appeals pending).<sup>22</sup> Meanwhile, discovery in cases in the federal MDL proceeded in “waves” of 500 cases at a time.<sup>23</sup> In such situations, the Bankruptcy Code’s procedures, allowing for establishment of a settlement trust with sufficient resources to pay legitimate claims, provide a legitimate alternative to an overwhelmed MDL. Yet, even as the bankruptcy court recognized the unprecedented lawsuit “tsunami,” it denied the companies’ requested stay, finding the bankruptcy did not serve a “valid

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<sup>16</sup> Judge M. Casey Rodgers, *Vetting the Wether: One Shepherds View*, 89 UMKC L. Rev. 873, 873 (2021).  
<sup>17</sup> *Id.*

<sup>18</sup> Advisory Committee on Civil Rules, *Agenda Book*, Nov. 1, 2018, at 142.

<sup>19</sup> *In re: LTL Mgm’t, LLC*, 58 F.4th 738, 755 (3d Cir. 2023), *rehearing denied* (Mar. 22, 2023).

<sup>20</sup> *In re Plant Insulation Co.*, 734 F.3d at 906 (“[I]f such companies collapse and liquidate, untold numbers of future claimants will be left without recovery. Present claimants, however, want to get paid quickly and efficiently.”).


<sup>21</sup> *See In re Aearo Techs. LLC*, Nos. 22-02890-JJG-11, 2023 WL 3938436 (Bankr. S.D. Ind. June 9, 2023).

<sup>22</sup> *Id.* at \*3.

<sup>23</sup> *Id.* at \*4.

reorganizational purpose” because it viewed the defendants, which had not yet begun paying judgments, as “financially healthy.”<sup>24</sup>

If a business facing tens of thousands of lawsuits,<sup>25</sup> with thousands more expected in the future, that has already been hit with a single verdict for \$4.69 billion<sup>26</sup> and will need to spend immense sums on defense costs is not in sufficient “financial distress” to invoke our nation’s bankruptcy laws, who is? We also wonder, if a companies facing the largest MDL in history—over 343,000 claims with 260,000 currently pending and no end in sight, representing a staggering 30% of all cases currently pending in federal district courts<sup>27</sup>—cannot obtain a bankruptcy stay, who can?

Sincerely,  
  
 Sherman Joyce  
 President  
 American Tort Reform Association

cc: Members of the Senate Judiciary Committee

<sup>24</sup> See *id.* at \*17.

<sup>25</sup> Over five years, lawyers have filed nearly 39,000 claims against Johnson & Johnson claiming that its talcum powder products led to development of a client’s ovarian cancer or mesothelioma. See U.S. Jud. Panel on Multidistrict Litig., [MDL Statistics Report - Distribution of Pending MDL Dockets by Actions Pending](#), Aug. 15, 2023 (providing statistics for MDL -2738, *In re: Johnson & Johnson Talcum Powder Products Marketing, Sales Practices and Products Liability Litigation*). The bankruptcy court found that the value of all present and future claims may exceed tens of billions of dollars.

<sup>26</sup> *Ingham v. Johnson & Johnson*, 608 S.W.3d 663 (Mo. Ct. App. 2020), *cert. denied*, 141 S. Ct. 2716 (2021) (reducing \$4.69 billion verdict to twenty plaintiffs to \$2.24 billion).

<sup>27</sup> See U.S. Jud. Panel on Multidistrict Litig., [MDL Statistics Report - Distribution of Pending MDL Dockets by Actions Pending](#), Aug. 15, 2023 (providing statistics for MDL -2885, *In re: 3M Combat Arms Earplug Products Liability Litigation*).

## INTERNATIONAL BROTHERHOOD OF TEAMSTERS

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September 19<sup>th</sup>, 2023

### VIA ELECTRONIC TRANSMISSION

The Honorable Richard J. Durbin  
Chair  
United States Senate Committee on the Judiciary  
224 Dirksen Senate Office Building  
Washington, DC 20510

The Honorable Lindsey Graham  
Ranking Member  
United States Senate Committee on the Judiciary  
224 Dirksen Senate Office Building  
Washington, DC 20510

Dear Chair Durbin and Ranking Member Graham:

On behalf of the 1.2 million members of the International Brotherhood of Teamsters, I submit the following statement for the record on the Committee's scheduled September 19<sup>th</sup> hearing titled *Evading Accountability: Corporate Manipulation of Chapter 11 Bankruptcy*.

Article I, Section 8, of the United States Constitution authorizes Congress to enact "uniform Laws on the subject of Bankruptcies." Under this grant of authority, Congress has enacted federal bankruptcy laws that are designed to be uniformly applied and which are codified in the United States Bankruptcy Code. The Bankruptcy Code governs all bankruptcy cases.

A fundamental goal of the Bankruptcy Code is to give debtors a financial "fresh start" from burdensome debts while regulating disputes with and between the debtors' creditors. The Supreme Court, in a 1934 decision, *Local Loan Co v. Hunt*, 292 U.S. 234, 244 (1934) described the purpose of federal bankruptcy law as follows:

*[I]t gives to the honest but unfortunate debtor... a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.* (Emphasis Added)

To accomplish this goal, at the conclusion of a bankruptcy case, the bankruptcy court issues an injunction absolving the bankruptcy estate of any future litigation. It normally protects its shareholders and agents from such future litigation, as well.

Many, but not all, bankruptcy courts across the country also claim authority under the Bankruptcy Code to release non-debtor third parties, particularly CEO's, directors, lawyers, and corporate officers, from potential liability relating to or underlying the bankruptcy. The Bankruptcy Courts located within the jurisdiction of the United States Court of Appeals for the Third Circuit, including the very important Bankruptcy Court located in the District of Delaware,



are among those that claim authority to grant such releases to non-debtor third-party agents of a debtor.

The grant of third-party releases in bankruptcy cases is subject to significant abuse and can be used by wealthy and very powerful people to escape liability for their actions relating to wrongdoing committed by the companies they ran or owned. Earlier this summer, for example, the Second Circuit Court of Appeals issued a controversial decision approving a bankruptcy court's grant of a broad release from liability to the Sackler family in connection with potential mass tort liability relating to the infamous Purdue Pharma, which the Sackler family controls and which was a key peddler of opioids. On July 28, 2023, the United States filed a petition with the United States Supreme Court seeking to stay the implementation of that release and to overturn the underlying decision of the Second Circuit. The Supreme Court granted the stay and accepted the appeal on August 10, 2023. The case will be argued to the Supreme Court this coming December and a decision will issue from the Court thereafter.

In the meantime, we are confronted with pending bankruptcies that, like the Purdue Pharma bankruptcy, have wreaked havoc upon communities and working families across the country. As discussed below, one of these cases, the Yellow Corporation (formerly YRCW) bankruptcy pending in the Bankruptcy Court in Delaware raises significant issues of potential bankruptcy abuse and manipulation by well-connected business executives and high-ranking shareholders that have greatly harmed tens of thousands of working people. Specifically, on August 6, 2023, Yellow Corporation filed for protection under Chapter 11 of the Bankruptcy Code. In so doing, Yellow Corporation maintained control of the business as a "debtor in possession" under the Bankruptcy Code. Yellow Corporation's bankruptcy has caused the immediate loss of jobs for more than 30,000 employees as well as the loss of health care and retirement coverage for those employees and their families. Yellow is now operating as the Chapter 11 debtor-in-possession seeking not to reorganize but to quickly liquidate through an unorthodox, bifurcated auction process.

According to numerous congressional reports, Yellow Corporation and certain of its directors and high-level officers secured a \$700 million CARES Act loan in July 2020 through conduct that strongly suggests deceit, cronyism, and graft involving public officials of the highest ranks from the former Trump administration. Three years later, Yellow is now liquidating its assets. Since 2020, the Congressional Oversight Commission created by the CARES Act has issued five highly critical reports regarding the \$700 million loan to Yellow Corporation. The Commission's reports, along with an April 22, 2022, Staff Report of the Select Committee on the Coronavirus Crisis, delve deeply into the back-room manipulations engaged in by Yellow Corporation and certain of its current and former directors and officers, as well as former high-ranking Trump Administration officials. For example, the April 2022, Report verified that while Yellow Corporation was actively pursuing the CARES Act loan, its CFO at the time bragged to Yellow Corporation's creditors that, "**While we had our hand in the cookie jar, we thought we would try to get a little "catch up" capex (capital expenditure funds) while we were at it.**" (Emphasis Supplied).

Yellow Corporation and its directors and executives have remained deafeningly silent about the abuses identified in the above-referenced congressional reports. But, as demonstrated by a June 27, 2023, congressional report, the publication of these abuses continues to circulate.

The findings in those reports may provide fodder for civil suits against Yellow Corporation and certain of its current and former directors and officers.

The continued circulation of those reports may explain Yellow Corporation's decision to file bankruptcy filing under Chapter 11 of the Bankruptcy Code as a debtor-in-possession and to liquidate its assets.<sup>1</sup> Yellow Corporation is racing to liquidate its assets and is expected to request a release of liability for itself and its agents and representatives. As the debtor in possession in control of its liquidation, Yellow Corporation has great influence in the disposal of its assets and securing a bankruptcy release on an expedited basis. Yellow Corporation's expedited and unorthodox, bifurcated liquidation also effectively precludes any potential purchase of Yellow Corporation's assets who may want to reestablish operations as a new company and reemploy thousands of workers, a result that would benefit the national economy, thousands of workers and their communities, the United States tax base, and help mitigate ongoing national supply chain disruptions.

The timing of Yellow Corporation's bankruptcy filing, and the weeks leading up to it, as well as the unusual steps it has taken while it controls the bankruptcy as a debtor in possession deserve scrutiny. It may not be a mere coincidence, for example, that on June 27, 2023, the same day the Congressional Oversight Commission published its fifth report exposing the details related to Yellow Corporation's \$700 million CARES Act loan, Yellow Corporation chose to file a 57-page lawsuit that reads like a publicity stunt against the Teamsters, which represents 22,000 of Yellow Corporation's 30,000 now permanently laid off employees. In the lawsuit, Yellow Corporation claims that the Teamsters are to blame for the Yellow Corporation's inability to once again obtain bailout concessions and financing to keep its operation running. The timing of its lawsuit may have been designed to deflect attention away from the latest (June 27, 2023) Congressional report and findings by inventing a scapegoat as Yellow Corporation ran out of money. In fact, the lawsuit against the Teamsters is particularly ironic given that the Teamsters Union and its members have given Yellow Corporation over \$5 billion in wage and benefit concessions as well as massive work rule concessions over the past 13 years. The Teamster pension contributions of Teamsters members who worked for Yellow Corporation are barely at 25% of the 2009 contribution rate. In other words, it would take a Teamster hired at Yellow in the last thirteen years 100 years of work to receive what had been a 25-year pension. Additionally, dozens of Teamster health and welfare funds extended medical coverage without the requisite contributions to Yellow Corporation's Teamster members to facilitate Yellow Corporation's ability to continue stated objective of continuing its operations. In the end, however, Yellow Corporation chose to liquidate, not operate, and left the Teamster members, the Union and its funds holding an empty bag.

It is baffling that Yellow Corporation remains in control of its bankruptcy. Yellow Corporation's long-time director and Chairman of the Board, Matthew Doheny, is now Yellow Corporation's "Chief Restructuring Officer," and is being paid by the bankruptcy estate. Mr. Doheny had resigned his position as Chairman of the Board within weeks of the Yellow Corporation's bankruptcy filing. It is both unclear and troubling why Mr. Doheny serves as the

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<sup>1</sup> In June 2023, as it claimed to be running out of cash, Yellow Corporation's directors voted to pay themselves and high-ranking executives so-called "retention bonuses" allegedly designed to incentivize them to remain affiliated with Yellow Corporation and assist it in the winddown of its business, as recently reported by Bloomberg.

Chief Restructuring Officer in this bankruptcy. Yellow Corporation entered bankruptcy not to restructure its business but instead **with the sole purpose of liquidating it**. With authority granted to it under the Bankruptcy Code as a debtor in possession, moreover, Yellow Corporation, and its senior leadership team operate largely in the shadows of an expedited bankruptcy liquidation process that they themselves have planned and structured. They appear to be trying to fast-track the liquidation of the business before any responsibility can attach to them regarding their mismanagement of the business and the highly controversial \$700 million CARES Act loan that they received from the Trump Administration's Treasury Department during the 2020 presidential election season.

To ordinary citizens, including small businesspeople and working families alike, the Bankruptcy Code is so badly broken that its processes are themselves corrupt and lacking in all credibility. The Yellow Corporation bankruptcy is one of several examples supporting this conclusion. The Bankruptcy Code needs immediate overhaul and reform. Accordingly, a full-scale congressional and Department of Justice investigation of the Yellow Corporation and its agents and representatives who were involved in securing the \$700 million CARES Act loan in 2020 should be immediately undertaken to start the process of fixing the Bankruptcy Code and restoring fairness to its provisions.

Respectfully Submitted,



Sean M. O'Brien  
General President