

Dear NYU Colloquium Participants: This is a very rough draft of a piece coming out in the Yale Law Journal Forum, co-authored with Elizabeth Burch and Adam Zimmerman. Please forgive any inelegant drafting or inaccuracies as we continue to polish the paper and research our arguments and the nuances of bankruptcy. I look forward to the discussion.

Against Bankruptcy:

Public Litigation Values versus the Endless Quest for Global Peace in Mass Litigation

Abstract

Can bankruptcy court solve a public health crisis? Should the goal of “global peace” in complex lawsuits trump traditional litigation values in a system grounded in public participation and jurisdictional redundancy? How much leeway do courts have to innovate civil procedure?

These questions have finally reached the Court in *Harrington v. Purdue Pharma L.P.*, the \$6 billion bankruptcy that purports to achieve global resolution of all current and future opioids suits against the company and its former family owners, the Sacklers. The case provides a critical opportunity to reflect on what is lost when parties in mass torts find the “behemoth” litigation system unable to bring mass disputes to a close, when they charge multidistrict litigation as a “failure,” and when defendants contend that sprawling lawsuits across national courts have thrown them into unresolvable crisis that only bankruptcy can solve. The case is just one of many recent examples of extraordinarily unorthodox and creative civil procedure maneuvers—in both the bankruptcy and district courts—that push cases further away from the federal rules and the trial paradigm in the name of settlement.

Unlike ordinary state and federal trial courts, bankruptcy courts don’t generally lay blame for millions of deaths; they efficiently distribute resources. Petitioners in bankruptcy aren’t “victims” or “plaintiffs”; they are “creditors” with limited voting rights over the distribution of an estate. Bankruptcy courts don’t develop state tort doctrines. They don’t engage in broad discovery designed to reveal accountability and spur policy reform. They rarely utilize juries or hear testimony from tort victims, anxious to have their day in court; instead, testimony tends to focus on the debtor’s financial health.

Yet diverse defendants—many of whom, notably, are not even in financial distress-- from Catholic Diocese and Boy Scout abuse cases, to Johnson & Johnson talc, 3M’s earplugs, Revlon hair straighteners, and many more—have now looked to the bankruptcy court to use its inherent authority to invent new forms of procedure to find a path to global peace. Bankruptcy courts are attractive in part because they possess some powers that, ironically, state and Article III federal courts do not—they are the only American courts that can overcome federalism’s jurisdictional boundaries; they are only courts with the power to commandeer both state and federal litigants into a single forum and halt all other civil litigation no matter what court it is in. They

also have stretched their own equitable powers to allow innovative corporate maneuvers, as in Purdue, that cabin liability and preclude future litigation even for entities not in financial trouble. But bankruptcy court is not supposed to be a superpower of a court that trumps all others in public litigation; it is instead, an Article I court designed for efficient, private resolution of claims, centered on capturing private value for private actors—not the elaboration and development of law and public norms.

There is a long history of creative procedures in service of global settlement. As each fails to deliver what parties want, attorneys innovate a new. If the sole goal is money, perhaps bankruptcy is an answer. But money is often one of only several goals in litigation. From discovery and limited trials in opioids and tobacco, for example, evidence about the manufacturers’ behavior emerged that not only made companies accountable, but also help spur legislative policy change. Such evidence likely never would have come to light in a bankruptcy proceeding. There’s a reason that when Purdue filed for bankruptcy, victims of the opioid crisis cried that the company was avoiding “punishment.” Victims of the Catholic Diocese have recently charged that the Diocese’s chapter 11 filing deprived them their chance to tell their story and hold wrongdoers to account.

Forty years ago, in *Against Settlement*, Owen Fiss famously that civil lawsuits should be understood in light of the public good they serve, rather than the mere private ends of private dispute resolution and money changing hands. Unorthodox bankruptcies are just the latest chapter in a decades-long saga of unorthodox civil procedure development in the name of global peace—one that has largely escaped appellate review until now.

INTRODUCTION 3

I. UNORTHODOX CIVIL PROCEDURE AND THE LONG QUEST FOR PEACE 10

A. The High Stakes of Purdue’s Bankruptcy at the Court 11

B. A Brief History of the Elusive Quest for Global Peace..... 12

 1. Corporate Dispute Resolution. 13

 2. Class Actions. 13

 3. Multistate Attorney General and Other Government Actors..... 15

 4. Multidistrict Litigation..... 16

II. BANKRUPTCY TO THE RESCUE? 17

A. From Orthodox to Unorthodox 18

B. Unorthodox Procedures for Solvent Nondebtors to Achieve Global Settlement..... 20

 1. Channeling Injunctions and Nondebtor Releases for “Grifters” 20

 2. The Texas Two-Step 22

III. BANKRUPTCY AND LOST LITIGATION VALUES..... 23

A. Accountability and Plaintiff’s Day in Court..... 24

B. Due Process and Adequate Representation.....	26
C. Information Production.....	28
D. Substantive Law.....	29
E. Decentralized Decision making: Federalism and Reviewability.....	30
CONCLUSION	32

INTRODUCTION

“What the Court regards as folly is the contention that the tort system offers the only fair and just pathway of redress and that other alternatives should simply fall by the wayside. . . There is nothing to fear in the migration of tort litigation out of the tort system and into the bankruptcy system. . . . The bankruptcy courts offer a unique opportunity to compel the participation of all parties in interest . . . in a single forum with an aim of reaching a viable and fair settlement.”¹

Can bankruptcy court solve a public health crisis? Should the goal of “global peace” in complex lawsuits trump traditional litigation values in a system grounded in public participation and jurisdictional redundancy? How much leeway do courts have to innovate civil procedure?

These questions have finally reached the U.S. Supreme Court, albeit indirectly, in the Purdue Pharma bankruptcy settlement under review this Term—a bankruptcy deal that purports to resolve the thousands of tort claims against both the company and the family that owned it coming out of the national opioid crisis.² The case concerns just one of many recent examples of extraordinarily unorthodox and creative civil procedure maneuvers—in both the bankruptcy and district courts—that push cases further away from the federal rules and the trial paradigm in the name of settlement. How the Court decides the case will send a strong signal about whether the doors are open or closed to these kinds of off-the-books moves via bankruptcy, multidistrict litigation, or whatever comes next, in the dynamic and elusive quest for global peace in complex civil litigation.

Consider the risks. Unlike ordinary state and federal trial courts, bankruptcy courts don’t generally assign responsibility for widespread harm; they efficiently distribute resources. Petitioners in bankruptcy aren’t “victims” or “plaintiffs”; they are “creditors” with limited voting rights over the distribution of an estate. Bankruptcy courts don’t develop state tort doctrines. They don’t engage in broad discovery designed to reveal accountability and spur policy reform. They rarely utilize juries or

¹ LTL Mgmt., LLC, 637 B.R. 396, 414 (Bankr. D.N.J., Feb. 25, 2022).

² *In re Purdue Pharma L.P.*, 633 B.R. 53 (Bankr. S.D.N.Y. 2021), *vacated sub nom. In re Purdue Pharma L.P.*, 635 B.R. 36 (S.D.N.Y. 2021), *certificate of appealability granted*, No. 21 CV 7532 (CM), 2022 WL 121393 (S.D.N.Y. Jan. 7, 2022), and *rev’d and remanded sub nom. In re Purdue Pharma L.P.*, 69 F.4th 45 (2d Cir. 2023), *cert. granted sub nom. Harrington v. Purdue Pharma L.P.*, No. (23A87), 2023 WL 5116031 (U.S. Aug. 10, 2023).

hear testimony from tort victims, anxious to have their day in court; instead, testimony tends to focus on the debtor's financial health.

Nevertheless, increasingly complex and sprawling mass torts have created pressure for efficient and centralized settlement. The latest manifestation of this pressure is the unprecedented number of diverse defendants, including but beyond Purdue, that have recently filed for bankruptcy—from the Catholic Diocese and Boy Scout abuse cases, to Johnson & Johnson talc, 3M's earplugs, Revlon hair straighteners, and several other defendants in the massive national opioid litigation.³ All of these defendants, and many others, have turned to bankruptcy to compensate for what their court filings call the “failure” of traditional complex civil litigation.⁴ And they are calling on the bankruptcy court, just like they called on the multidistrict litigation court before it, and the class action court before that, to use inherent authority and creative applications of federal procedural rules to invent new forms of civil procedure to find a path to global peace. Many of these efforts have largely escaped appellate review—until now.

To grasp the unusual here, note that many of these new bankruptcy defendants are not even financially distressed. That's not why they have turned to bankruptcy court. Rather, the parties instead insist that bankruptcy court—which is *neither* a state court nor an Article III federal court—is surprisingly the only court with sufficient power to address the burden of nationwide litigation. Bankruptcy court's novel procedures—several of which were themselves developed by courts after the highly unmanageable asbestos litigation of the 1980s⁵—offer defendants the tantalizing prospect of something they have yet to obtain in over eighty years of complex litigation practice: a final and centralized end to litigation in the past, present, and future.

Our system wasn't designed for global peace in the first place. The American litigation system reflects our national federalism; we have two sets of robust litigating court systems, state and federal. The very existence of these two systems—despite the many salutary virtues of jurisdictional overlap—often impedes efficient global resolution of giant cases that raise common questions of liability. Yet pressure exerted by mass torts has given rise to a dynamic and rivalrous procedure system, in which old procedures are creatively adapted into new forms by indefatigable lawyers and judges. As new paradigms of unorthodox civil procedure emerge, we move farther away from

³ See, e.g., *In re LTL Mgmt., LLC*, 652 B.R. 433 (Bankr. Dist. N.J. 2023); *In re Revlon, Inc.*, No. 22-10760 (DSJ), 2023 WL 2229352 (Bankr. S.D.N.Y. Feb. 24, 2023); *In re Boy Scouts of Am.*, 642 B.R. 504 (Bankr. D. Del. 2022); *In re Mallinckrodt PLC*, 639 B.R. 837 (Bankr. D. Del. 2022); *In re Endo Int'l PLC*, No. 22-22549 (Bankr. S.D.N.Y. Aug. 16, 2022); *In re Aearo Technologies LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022); *In re Roman Catholic Church of Archdiocese of New Orleans*, 63 B.R. 593 (Bankr. E.D. La. 2021); *In re USA Gymnastics*, No. 18-09108-RLM-11, 2020 WL 1932340 (Bankr. S.D. Ind. Apr. 20, 2020); *In re PG&E Corp.*, No. 19-30088-DM, 2020 WL 1539254 (Bankr. N.D. Cal. Mar. 30, 2020); *In re Bestwall LLC*, 606 B.R. 243 (Bankr. W.D.N.C. 2019).

⁴ See, e.g., *In re: Purdue Pharma L.P.*, No. 19-23649-RDD, ECF No. 74 at 26 (Bankr. S.D.N.Y. Sept. 18, 2019 (“As long as pursuit of the Pending Actions fosters a race to the courthouse . . . claims against the estates will proceed by the luck of the draw instead of fairly and equitably under the principles of the Bankruptcy Code.”); Informational Brief of Aearo Technologies LLC, *In re Aearo Technologies*, No. 22-02890-JJG-11, ECF No. 12 at 1 (Bankr. S.D. Ind. July 26, 2022) (“Aearo turns to chapter 11 in the wake of the failure of the largest MDL in U.S. history to successfully advance the resolution of tort claims related to the Combat Arms earplug.”)

⁵ See *infra* Part II.

the traditional trial system's public values: transparency, accountability, participation, law development, due process, educating the public, and more.

The key question is what purpose the court system is supposed to serve in cases involving widespread public harms and, with it, how important it is to preserve the public-regarding aspects of litigation. Courts are already being forced to step in where legislative solutions have failed. Should we be surprised then, that litigants keep innovating procedural vehicles to achieve results that look more like wholesale policy responses than ordinary, public law development and individualized, participatory public dispute resolution?

Bankruptcy courts are attractive in part because they are the only American courts that can overcome federalism's jurisdictional boundaries; ironically, they are only courts with the power to commandeer both state and federal litigants into a single forum and halt all other civil litigation no matter what court it is in. But bankruptcy court is not supposed to be a superpower of a court that trumps all others in public litigation; it is instead, an Article I court designed for efficient, private resolution of claims, centered on capturing private value for private actors—not the elaboration and development of law and public norms.

The U.S. Supreme Court's first look at these issues comes this Term in *Harrington v. Purdue Pharma L.P.*,⁶ the \$6 billion Purdue Pharma bankruptcy that purports to achieve global resolution of all current and future suits against the company and its former family owners, the Sacklers. The case provides a critical opportunity for the Court and court-watchers alike to reflect on what is gained and what is lost when parties in mass torts find the “behemoth” litigation system unable to bring mass disputes to a close, when they charge multidistrict litigation as a “failure,” and when defendants contend that sprawling lawsuits across national courts have thrown them into unresolvable crisis.⁷

Defendants are calling on the bankruptcy court to go outside its formal rules, utilize its unique equitable authority, and provide a workaround to the basic federalist, law-generative, and publicly accountable features of our civil justice system in the name of basic and efficient financial settlement. No one claims this is an easy problem to solve. Far-flung suits across different state and federal courts pose massive challenges for any one effort to exercise formal jurisdiction over the entire case. With cities suing in federal courts, state attorneys general suing in their states, individuals and corporations in the mix in varied courts across the nation, and cases often numbering in the tens of thousands, how is one single, cross-cutting resolution possible? And is it even desirable?

There is a long history of creative procedures in service of these goals. Litigants' first modern attempts relied on what one of us has called “corporate settlement mills,” private claim resolution facilities that aggregated large numbers of victims' claims and settled them *en masse*.⁸ When those private settlement schemes proved unsatisfying,

⁶ *Harrington v. Purdue Pharma L.P.*, No. (23A87), 2023 WL 5116031 (U.S. Aug. 10, 2023).

⁷ Informational Brief of Aeero Tech. LLC at 6, *In re Aeero Tech. LLC* (Bankr. S.D. Ind. July 26, 2022) (No. 22-02890-JJG-11), ECF No. 12.

⁸ Dana A. Remus & Adam S. Zimmerman, *The Corporate Settlement Mill*, 10 VA. L. REV. 129 (2015); see also Rory Van Loo, *The Corporation as Courthouse*, 33 Yale J. Reg. 547, 549(2016); Nathaniel Donohue

businesses turned to public law to accomplish similar goals, especially the modern class action. But the federal class action has likewise proved too limited. The Supreme Court has made it exceedingly difficult to aggregate claims either with disparate injuries or from relying on different states' tort laws, even if just for settlement;⁹ in so doing they muted both the force and the attraction of the class action.

From class action's ashes, and thanks again to enterprising attorneys, rose multidistrict litigation (MDL)—the purportedly pre-trial-only aggregation mechanism that was devised for electrical utilities in the 1960s.¹⁰ MDLs were repurposed by creative lawyers and judges into the golden-child workhorse of modern massive mass-torts cases. MDLs now occupy a whopping 54% of the federal docket,¹¹ and have been widely held out as a way to bring cross-country litigation like opioids to a close.

Along the way, new plaintiffs emerged. State Attorneys devised ways to aggregate in the collective without formally filing aggregate litigation and while remaining in state courts.¹² More recently, municipalities and counties made an unprecedented effort to challenge the AGs' control of public litigation by filing cases in federal court via the MDL.

But MDL has proved controversial. MDL judges creatively attempt to exercise jurisdiction where formal jurisdiction does not lie; for instance, over parties with cases in state, not federal court. MDL lacks a formal mechanism to bind future claimants to any agreed-upon resolution (preclusion). And it raises constitutional concerns for aggregated plaintiffs unprotected by the due process safeguards of Rule 23. In the

& John F. Witt, *Tort as Private Administration*, 105 CORNELL L. REV. 1093 (2020) (describing how "insurers, and others are developing and managing claims resolution facilities that have turned the resolution of one-off tort claims in the United States into something akin to aggregate litigation or a public compensation program."

⁹ See, e.g., *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 609-10 (1997); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). But see *In re Hyundai & Kia Fuel Economy Litig.*, 926 F.3d 539 (9th Cir. 2019) (en banc) (permitting nationwide settlement nonetheless).

¹⁰ 28 U.S.C. § 1407; Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. REV. 1, 9-10 (2021).

¹¹ See United States Judicial Panel on Multidistrict Litigation, *Statistical Analysis of Multidistrict Litigation Under 28 U.S.C. § 1407 Fiscal Year 2022* 7 (2022), https://www.jpml.uscourts.gov/sites/jpml/files/JPML%20Fiscal%20Year%202022%20Report-12-9-22_0.pdf (reporting 392,374 actions in MDL); United States Courts, *Table 2.1—U.S. Courts of Appeals Judicial Facts and Figures* (2022), https://www.uscourts.gov/sites/default/files/data_tables/jff_2.1_0930.2022.pdf (reporting 32,512 cases pending in the circuit courts, except the Federal Circuit); United States Courts, *Table 3.1—U.S. Court of Appeals for the Federal Circuit Judicial Facts and Figures* (2022), https://www.uscourts.gov/sites/default/files/data_tables/jff_3.1_0930.2022.pdf (reporting 1,404 cases pending in the Federal Circuit); United States Courts, *Table 6.1—U.S. District Courts—Combined Civil and Criminal Judicial Facts and Figures* (2022), https://www.uscourts.gov/sites/default/files/data_tables/jff_6.1_0930.2022.pdf (reporting 688,528 cases pending in the district courts).

¹² Federal prosecutors also have played an outsized role. See Adam S. Zimmerman & David M. Jaros, *The Criminal Class Action*, 159 U. PA. L. REV. 1385 (2011). Some have argued the Department of Justice's asset forfeiture power was the source of an unusual "poison pill" in the Purdue bankruptcy deal. The provision would have triggered a complete forfeiture for all of Purdue's creditors to the United States government "unless Purdue's restructuring plan, including the release of the Sacklers, was approved by the bankruptcy court." Adam Levitin, *Purdue's Poison Pill: The Breakdown of Chapter 11's Checks and Balances*, 100 TEX. L. REV. 1079, 1083 (2023).

opioid litigation, the gravitational pull of the MDL and the sheer will, creativity, and ambition of the MDL district judge at first seemed enough to promise the resolution of thousands of state and federal cases in a single (federal) forum. Many cases indeed have been resolved in the opioids MDL, but it has not achieved the “global peace” that was promised. And so the door opens for yet another procedural innovation.

Enter bankruptcy. Purdue Pharma filed for bankruptcy on September 15, 2019. Two manufacturer defendants, Mallinckrodt and Endo, followed in October 2020 and August 2022.¹³ At the same time, around the country, defendants across a number of industries have filed for bankruptcy to resolve mass-tort claims one would expect to find in state or (Article III) federal court. In many of these cases, the company was not financially distressed when it filed, but rather was facing piecemeal litigation across the country that they argued was impossible to resolve without an exit ramp from the traditional mass-tort system. Many courts, in reviewing the propriety of these bankruptcy procedures have explicitly refused the invitation to opine on what the cases say about the “relative merits or demerits of the MDL.”¹⁴ And yet by raising the question and refusing to answer, the question hangs in the balance.

At present, most of the attention is fixated on Purdue, not only because it has been the focal point of the opioid litigation but because the validity of its bankruptcy agreement has a controversial component: it also releases another party from liability, namely, non-debtor individual members of the billionaire Sackler family. That aspect of the agreement is what the Court is reviewing this Term. But we are focused on a broader aspect of these developments that the Court may also be interested in: the swelling tide of bankruptcy cases as the purported salve for unresolvable mass litigation in our intentionally redundant and intentionally inefficient federalist litigation system.

What’s to be gained and what’s to be lost by the turn to bankruptcy? Trials are elusive in all court systems. Perhaps most importantly, bankruptcy solves the no-single-jurisdiction problem that is baked into a federalist system. The Bankruptcy Code, in section 362, offers a work around to our system’s purposeful division of jurisdiction between state and federal courts: it allows the bankruptcy court to halt all pending civil litigation, regardless of where filed, for a unified distribution of assets.¹⁵ No other court—not even the U.S. Supreme Court—can exercise jurisdiction in that way.¹⁶ Bankruptcy also solves the white-whale-of-preclusion problem; the Code, in section 105,¹⁷ gives the bankruptcy court broad equitable authority to bind all current and future claimants in a single proceeding without satisfying the complexities of Federal Rule of Civil Procedure 23’s class action or traditional preclusion doctrines.

¹³ *In re Mallinckrodt PLC*, 639 B.R. 837 (Bankr. D. Del. 2022); *In re Endo Int’l PLC*, No. 22-22549 (Bankr. S.D.N.Y. Aug. 16, 2022). These bankruptcies did not resolve all of the litigation coming out of opioid crisis. See, e.g., Jan Hoffman, *Drug Distributors and J. & J. Reach \$26 Billion Deal to End Opioid Lawsuits*, N.Y. Times, July 21, 2021.

¹⁴ *In re Aeero Technologies LLC*, 642 B.R. 891, 902 (Bankr. S.D. Ind. 2022).

¹⁵ 11 U.S.C. § 362. cite.

¹⁶ Adam Liptak, *Arizona Files Novel Lawsuit in Supreme Court Over Opioid Crisis*, N.Y. TIMES, July 31, 2019; *Arizona v. Sackler*, 140 S. Ct. 812 (2019).

¹⁷ 11 U.S.C. § 105.

But as we have shown in previous work, the “federalism problem” in complex civil litigation isn’t always a problem. There are benefits to redundancy in mass tort litigation. In opioids, the structural redundancy from the dueling systems produced important discovery, laid blame, and allowed for new doctrinal development around nuisance law that would not have happened had the MDL succeeded in keeping everything in one district court. And while preclusion is sometimes nice, preclusion without due process guardrails—a major concern also raised by MDL—is something to worry about.

The big question is why people bring lawsuits to resolve a public health crisis in the first place. If the sole goal is money, then perhaps bankruptcy is an answer. Experts have argued that payouts are maximized through bankruptcy because the Code can bind all mass-tort claimants, settle them at a premium, and use less protracted and less costly procedures than those demanded by Article III and state courts.¹⁸ But these assumptions are contestable. The bankruptcy statute doesn’t clearly bind public plaintiffs. And, despite the bankruptcy courts’ power grab, the Supreme Court has never actually settled that bankruptcy courts have power to resolve the claims of people without a present injury.

Bankruptcy itself is incredibly expensive. Johnson & Johnson’s failed attempts cost \$178 million in attorneys’ fees alone.¹⁹ And bankruptcy payouts to mass-tort plaintiffs hardly seem like its greatest selling point: plaintiffs killed by addictive opioids in *Purdue* stand to gain, between gain only between \$3,500 to \$48,000 a claim.²⁰ Moreover, funds promised in bankruptcy to victims may completely evaporate when creditors force a second bankruptcy without the victims’ consent, as occurred in the Mallinckrodt restructuring.²¹

More importantly, money is often one of only several goals. Those who defend bankruptcy’s use in this context rarely engage with the lost public-regarding values of litigation.²² The history of the tobacco lawsuits offers a prime example of these values, and the opioid story shares many of the same qualities. From discovery and limited trials in opioids and tobacco, evidence about the manufacturers’ strategy to encourage addictive use of their products emerged that not only made companies accountable, but also help spur legislative policy change. Such evidence likely never would have come to light in a bankruptcy proceeding. There’s a reason that when Purdue filed for bankruptcy, victims of the opioid crisis cried that the company was avoiding “punishment.” Victims of the Catholic Diocese have recently charged that the

¹⁸ See, e.g., Anthony Casey and Joshua Macey, *In Defense of Chapter 11 for Mass Torts*, 90 U. CHI. L. REV. 973 (2023); Sergio Campos and Samir D. Parikh, *Due Process Alignment in Mass Tort Restructurings*, 91 FORDHAM L. REV. 325 (2022).

¹⁹ Evan Oschner, *J&J Unit’s Failed ‘Two-Step’ Talc Bankruptcies Cost \$178 Million*, BLOOMBERG LAW (Oct. 4, 2023 5:00 AM), <https://news.bloomberglaw.com/bankruptcy-law/j-j-units-failed-two-step-talc-bankruptcies-cost-178-million>.

²⁰ Cici Yongshi Yu, *Opioid Victims Struggle With Purdue Pharma Settlement’s High Bar*, Bloomberg Law, Aug. 8, 2023, <https://news.bloomberglaw.com/health-law-and-business/opioid-victims-struggle-with-purdue-pharma-settlements-high-bar>

²¹ Dietrich Knauth, *Court OKs Mallinckrodt restructuring, \$1 billion cut to opioid settlement*, Reuters (Oct. 10, 2023, <https://www.reuters.com/business/healthcare-pharmaceuticals/mallinckrodt-gets-approval-restructuring-1-billion-cut-opioid-settlement-2023-10-10/#:~:text=As%20part%20of%20its%20previous,paid%20to%20a%20settlement%20trust>.

²² Casey and Macey, *supra* note ____

Diocese's chapter 11 filing deprived them their chance to tell their story and hold wrongdoers to account.²³ Accountability and plaintiffs' due process right to have their stories heard are core litigation values of our system.

Forty years ago, in *Against Settlement*, Owen Fiss famously argued in this journal that we should favor "justice" over "peace," and hence in-court resolution over settlement.²⁴ He argued that civil lawsuits should be understood in light of the public good they serve, rather than the mere private ends of individual dispute resolution and money changing hands.²⁵ A mass-tort action evolving out of a major public harm, whether it's a public health crisis or sexual abuse throughout a trusted institution, surely has the public good, public perception, and public policy in its sights.

We are not naïve. We know that more traditional litigation is not necessarily generating all of Fiss's public values either. For instance, only two percent of class action cases go to trial; only 1.5 % of MDLs.²⁶ The "day in court" is thus elusive there too. MDL judges also can be notoriously uninterested in developing state tort doctrine. MDL also lacks constitutional safeguards for adequate representation, so the voting rules in bankruptcy might theoretically give plaintiffs more.²⁷ And bankruptcy is often faster. Its asset allocation may be better.

We are not complex unorthodox civil procedure skeptics, either. We have written about some benefits of MDL and argued that unorthodox civil procedure may be an inevitable development of a procedure system that hasn't evolved with the times. But this turn to bankruptcy—especially when the defendant companies and individuals are solvent and nondebtor defendants are brought along for the ride—may be one step too far.

Unorthodox bankruptcies are just the latest chapter in a decades-long saga of unorthodox civil procedure development in the name of global peace. But that's not what the system was designed to do. Bankruptcy won't be the last form of unorthodox civil procedure, but its attraction highlights especially well the celebrated structural features of our civil system that at the same time impede global settlement: decentralized courts and due process rules that make it very difficult to bind disparate litigants and future litigants to a current settlement. The emergence of this new phenomenon in our litigation system also brings into relief its risks: the potential to

²³ See, e.g., Michael Gold, *Facing 200 Abuse Claims, Diocese Becomes U.S.'s Largest to Seek Bankruptcy*, N.Y. TIMES (Oct. 5, 2020), <https://www.nytimes.com/2020/10/01/nyregion/rockville-centre-diocese-bankruptcy.html>; Scott Maucione, *The Archdiocese of Baltimore Declares Bankruptcy Just As New Child Sex Abuse Law Passes*, NPR (Oct. 8, 2023), <https://www.npr.org/2023/10/08/1204545824/the-archdiocese-of-baltimore-declares-bankruptcy-just-as-new-child-sex-abuse-law>; Cf. Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 49-54 (1976).

²⁴ Owen Fiss, *Against Settlement*, 93 Yale L.J. 1073, 1085 (1984) (.

²⁵ *Id.*

²⁶ See Brief for the Chamber of Commerce as Amici Curiae Supporting Petitioner at 15, *Trans Union LLC v. Ramirez*, 141 S. Ct. 1910 (No. 20-297) (identifying percentage of class actions that reach trial); Eleanor Tyler & Robert Combs, *2023 Litigation Statistics Series: Multidistrict Litigation*, Bloomberg Law 1 (2023), <https://pro.bloomberglaw.com/reports/2023-multidistrict-litigation-report/>.

²⁷ We say "theoretically" because voting does not take into account difference between tort claims, other non-tort creditors votes may matter more, and votes can be gerrymandered. See Part II.B, *infra*.

upset longstanding norms of civil process, warp jurisdictional boundaries, and compromise the public goods that come from civil litigation.

I. UNORTHODOX CIVIL PROCEDURE AND THE LONG QUEST FOR PEACE

Unorthodox procedures in our federal system are common. Often, they come in the form of old tools repurposed for new situations or entirely new devices that tee off of, and expand on, traditional authorities. Generally, unorthodox procedures are the symptom, not the cause, that traditional legal procedures are no longer meeting evolving needs. We have chronicled such developments before: in Congress, with processes like fast-track procedures and omnibus bills; in the administrative state through “omnibus proceedings” and “agency class actions”; and in the court system, where the most salient development to date has been transformation of MDL into an aggressive, aggregate litigation consolidating mechanism to compensate for class action’s weaknesses.²⁸ In our civil litigation system, unorthodox procedures often are also a product of the substantial discretion already afforded to judges and parties under an array of statutes and court procedures.²⁹ These include equitable and gap-filling rules that allow courts to manage cases, as in Federal Rule of Civil Procedure 16, or “issue any order, process, or judgment that is necessary or appropriate” to fulfill a court’s fundamental objectives, as in bankruptcy.³⁰

Unorthodox doesn’t always mean “bad.” And sometimes procedures that come on the scene as unorthodox gradually become the new orthodoxy. But the appearance of procedural innovations usually suggests the persistence of an obstacle to be overcome, whether that’s an obstacle to legislation or an obstacle to aggregation or an obstacle to dispute resolution. Sometimes the goal is clear; those who view legislation as a social good want to be sure procedures are in place to enable it. Sometimes the goal is murkier, and that makes the appearance of unorthodox procedures harder to evaluate.

In the case of civil procedure, the goal of unorthodox procedure has become “global peace.”³¹ Single-forum resolution of complex aggregate claims is not necessarily as obvious an objective for the civil justice system as, say, enacting legislation might be for Congress. Global peace means the extinguishment of all parallel and future claims; a not-intuitive goal in a system that is premised on 51 state court systems and a parallel federal court system. Nor is global peace a necessarily obvious goal for a legal system that is predisposed to disfavor precluding new plaintiffs and giving them their day in court.

In the context of mass torts, three linked obstacles are salient reasons for the move toward the unorthodox. The first is grounded in the limitations of private contract and ordering. Corporations that hope to systematically settle far-flung claims

²⁸ Abbe R. Gluck et al., *Unorthodox Lawmaking, Unorthodox Rulemaking*, Colum. L. Rev. (2015).

²⁹ Alexandra D. Lahav, *Procedural Design*, 71 VAND. L. REV. 821 (2018); Pamela Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. Rev. 767 (2017); Gluck, *supra* note 28 at 1672; Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 426-27 (1982).

³⁰ 11 U.S.C. § 105(a); FED. R. CIV. P. 16; Foohey & Odinet, *supra* note __, at 1284.

³¹ Issacaroff & Witt, *supra*.

involving the same common questions cannot do so without some formal legal mechanism to deal with people who do not want to settle.

Second, the Supreme Court has made the formal litigation tool for organizing large numbers of common claims, class actions, increasingly difficult to certify. This is especially true for mass torts when individuals experience diverse harms, and especially when claims involve underlying state law torts from different jurisdictions. This death-by-doctrine of the mass-tort class action fed the quest for other aggregation mechanisms—like MDL, which although was created at approximately the same time as the modern class action, was quickly rediscovered as a “once in a lifetime” opportunity to globally resolve mass litigation.³²

Third, later-coming unorthodox aggregation mechanisms, like MDL, have had a hard time figuring out if they can constitutionally preclude non-consenting plaintiffs via settlement. In the opioids MDL, there were so many attempts at procedural innovation in the name of global resolution that the parties mandamused the presiding judge more than a whopping dozen times.³³

Like water in a raft that always finds the tiny hole to escape through, innovative attorneys on both sides of the “v” have been relentless in their efforts to curate new potential aggregate forms when previous efforts fail.³⁴ After one of the Supreme Court cases that did the most harm to expensive class actions, *Amchem v. Windsor*,³⁵ noted plaintiffs’ lawyers Elizabeth Cabraser and Sam Issacharoff wrote “The aggregation of mass harm cases in federal courts did not end with *Amchem* . . . it just took more experimental and less transparent forms.”³⁶ MDL was born from this determination and creativity. And then, when MDL failed to produce the global resolution desired, enterprising defendants’ attorneys cited being “driven by various interrelated shortcomings of and abuses in the tort system,” and turned to bankruptcy.³⁷

A. The High Stakes of Purdue’s Bankruptcy at the Court

The controversial \$6 billion bankruptcy commenced by Purdue Pharma—the former maker of OxyContin, purports to settle thousands of lawsuits by states, counties, cities, Native American tribes, and class-action plaintiffs for its role in the opioid epidemic. The formal question of unorthodox bankruptcy procedure that the Court will decide is whether solvent third parties—in this case the Sackler family—can rely on another corporate bankruptcy to avoid litigation without declaring bankruptcy themselves.

But how the Court resolves that formal question will have consequential effects for big questions that sit at the heart of the American litigation system. Depending on how one counts, nearly one out of every two pending cases on the federal docket is

³² Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2340 (2008).

³³ *In Re: National Prescription Opiate Litigation*, MDL 2804, No. 1:17-MD-2804 (N.D. Ohio) [confirm]

³⁴ Alexandra D. Lahav, *The Continuum of Aggregation*, 53 GEORGIA L. REV. 1393, 1394 (2019) (“Mass litigation is like water, the cases will move to the form of litigation that is most available ...”)

³⁵ 521 U.S. 591.

³⁶ Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. REV. 846, xx (2017)

³⁷ Informational Brief of Bestwall LLC at 5, *In re Bestwall LLC*, 606 B.R. 243 (Bankr. W.D.N.C. 2019) (No. 17-31795), ECF No. 12.

part of a major mass tort.³⁸ Already we are seeing glimmers of *unorthodox* unorthodox bankruptcy procedure, as some companies restructure and enter into contracts outside of bankruptcy in order to obtain more advantageous terms inside bankruptcy.³⁹

Newer mass-tort bankruptcies like the Purdue Pharma bankruptcy seek to take advantage of bankruptcy courts' unique power to use bankruptcy to centralize and resolve many forms of aggregate litigation in one single place, but outside of the traditional trial paradigm. If the Court allows non-debtors like the Sacklers to short-circuit litigation through bankruptcy, bankruptcy could evolve into the prime destination for mass litigation.

B. A Brief History of the Elusive Quest for Global Peace

It should not be surprising that parties to large, complex cases have long toiled in search of new ways to broker a single resolution. Mass civil harms affect people today, as well as populations whose injuries may not manifest for years.⁴⁰ Some may involve a single mass disaster,⁴¹ but they also may implicate evolving standards and conduct for whole industries and distribution chains. They are a national problem—in a federalist system.⁴²

In such cases, a global settlement offers something for both would-be plaintiffs and defendants. For plaintiffs, comprehensive bargains promise actual compensation for their injuries in their own lifetimes, an understandable goal in cases where the sheer volume of individualized trials could otherwise take decades. And, for defendants, global resolutions promise an orderly and predictable end to litigation risk, when a common course of conduct gives rise to hundreds or thousands of claims.⁴³

³⁸ MDL Statistics Report - Distribution of Pending MDL Dockets by Actions Pending, U.S. Jud. Panel On Multidistrict Litig. (Dec. 15, 2020), https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MD_L_Dockets_By_Actions_Pending-December-15-2020.pdf (product liability cases equals 322,443 cases out of a total of 330,816 cases pending on the MDL docket and more than half of the federal caseload of XX). This number, however, depends on whether one considers class actions, which dominate other non-product liability MDLs, to be multiple cases or a single case (which is how they are currently counted).

³⁹ Levitin, *supra* note 12, at _ (describing contractual terms negotiated by companies outside of bankruptcy with financial institutions and lenders where “the debtor—and the court—really have no choice but to take the deal” in bankruptcy in order to have the money necessary to continue operating and successfully restructure); Jeremy Hill, *Hedge Funds Elbow Aside Creditors in Fast-Tracked Bankruptcies*, BLOOMBERG (Dec. 17, 2020, 6:30 AM), <https://www.bloomberg.com/news/articles/2020-12-17/fast-tracked-bankruptcies-leave-some-creditors-in-the-dark> [<https://perma.cc/NPR6-WTQZ>].

⁴⁰ Geoffrey C. Hazard, Jr., *The Futures Problem*, 148 U. PA. L. REV. 1901, 1902 (2000) (describing the difficulty in evaluating toxic tort cases where injuries do not manifest for weeks, months, or years.)

⁴¹ Campbell Robertson, *In Town Where Train Derailed, Lawyers Are Signing Up Clients in Drones*, N.Y. Times, Feb. 24, 2023, <https://www.nytimes.com/2023/02/24/us/east-palestine-ohio-residents-lawsuits.html>; Campbell Robertson, *Ohio Attorney General Sues Norfolk Southern Over Derailment*, N.Y. Times, Mar. 14, 2023, <https://www.nytimes.com/2023/03/14/us/ohio-train-derailment-norfolk-southern-lawsuit.html>; ALM, *Pa. School Files Toxic Tort Suit Against Norfolk Southern Over East Palestine Derailment*, Law.Com, Mar. 24, 2023, <https://www.law.com/thelegalintelligencer/2023/03/24/pa-school-files-toxic-tort-suit-against-norfolk-southern-over-east-palestine-derailment/>.

⁴² Abbe R. Gluck, *MDL Nationalism, Federalism, and the Opioid Epidemic*, 70 DE PAUL L. REV. 321, 330 (2021) (discussing how civil procedure doctrine has faced growing pressure from the nationalization of the economy).

⁴³ For the large literature on “peacemaking” in mass torts, see e.g., Troy A. McKenzie, *Towards a Bankruptcy Model for Non-Class Aggregate Litigation*, 87 N.Y.U. 960, 961 n.1 (2012) (“I accept in this Article

But there's also a well-known secret about these same innovative efforts to obtain peace. Too much effort in that direction sometimes produces the opposite: rivalry from other litigation stakeholders concerned about any one forum or kind of litigant gaining too much power or seeking new and less expensive ways to settle large numbers of lawsuits.

1. Corporate Dispute Resolution.

The earliest efforts to adopt informal procedures to centralize and resolve large numbers of complex cases emerged in response to the rise of industrial accidents at the end of the Nineteenth Century.⁴⁴ Oftentimes, industries relied on intermediaries to broker and categorically settle on behalf of whole groups of immigrant workers injured on the shop room floor.

Take the Owens Corning National Settlement Program. As Congress considered legislation to respond to the growing number of asbestos claims in the litigation system, Owens Corning originally held up its own innovative, mass contract-based settlement program as a swift, effective, and inexpensive alternative to the litigation system.⁴⁵ By convincing over 100 of the leading plaintiff-side asbestos law firms to participate, it created a wholly owned subsidiary to administer its own private National Settlement Program and offered quick payouts according to transparent grids that relied on standardized medical criteria.⁴⁶

Others soon followed suit with similar settlements, which proved short-lived. New entrepreneurial plaintiff-side firms rejected programs like NSP, opted to return to the courts, developed new tools to litigate cases more efficiently, and extracted larger verdicts and settlements. Without the power of the state to offer some form of binding legal relief, such contractual vehicles always remain vulnerable to plaintiff-side law firms with disruptive litigation business models who rise to challenge established corporate settlement arrangements and promise higher awards to claimants.⁴⁷

2. Class Actions.

Class actions are of course the paradigmatic aggregation tool in the Federal Rules of Civil Procedure. But even as parties continue to turn to Rule 23 to aggregate, many

that, as a descriptive matter, peacemaking becomes the overriding goal as a mass tort reaches maturity"); Samuel Issacharoff & D. Theodore Rave, *The BP Oil Spill Settlement and the Paradox of Public Litigation*, 74 LA. L. REV. 397, 414 (2014); William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371, 372 (2001).

⁴⁴ Samuel Issacharoff & John F. Witt, *The Inevitability of Aggregated Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1575 (2004).

⁴⁵ See Abeln Testimony, *supra* note __, at 137-42.

⁴⁶ See Press Release, Owens Corning, Owens Corning Launches Integrex, New Service Business Offering Scientific Testing and Litigation Management (June 25, 1999), available at <http://www.prnewswire.com/news-releases/owens-corning-launches-integrex-new-service-business-offering-scientific-testing-and-litigation-management-78070432.html>; NAGAREDA, *supra* note **Error! Bookmark not defined.**, at 109-10 (2007)(describing how contractual agreements would later extend to over 100 asbestos plaintiff-side firms).

⁴⁷ Cf. J. Maria Glover, *Mass Arbitration*, 74 STAN. L. REV. 1283, 1289 (2022) (documenting rise of new plaintiff-side litigation business models that aggregate litigants through social media and other technologies, who challenge old models of corporate dispute resolution systems.)

have also resisted class actions over time, concerned that they were too limited for national-scale litigation.

The modern class action rules were actually borne out of a response to innovation—when a corporate defendant “ingeniously” sought to certify a declaratory class action involving thousands of people after they sued in a variety of state and federal courts. In *Pennsylvania R.R. v. United States*, 7,000 people sued dozens of corporate and governmental entities in state and federal courts across the country after an explosion. The defendant petitioned the court to certify a defendant class action to efficiently determine all common questions of liability—a solution the district court described as “so tempting that the plan deserves the closest scrutiny.”⁴⁸ Nevertheless, given the limits of federal jurisdiction—not to mention the potential due process considerations associated with enjoining thousands of lawsuits pending across federal and state court—the court found that it simply could not act without more formal legislation from Congress.⁴⁹

The Federal Advisory Committee charged with drafting the modern class-action rules cited the case for the proposition that courts should be wary of mass-tort class actions.⁵⁰ Nevertheless, Rule 23 transformed in its early years to centralize and resolve mass litigation. In the Agent Orange litigation, Judge Jack Weinstein became the “father” of the mass-tort class action and certified a settlement class that inspired a wave of mass-tort classes for over a decade.⁵¹

But in 1997, the Supreme Court substantially changed the course of the mass-tort class action in *Amchem v. Windsor*. Asbestos manufacturers sought to certify a sweeping class action to settle hundreds of thousands of claims involving anyone exposed to asbestos after 1993, even if they had not yet suffered an injury. In rejecting the class, the Court observed that it had never faced such a “sprawling” national class and that it did not raise common questions given the range of exposures, products, laws, and people implicated. Justice Ginsburg, who ultimately wrote the majority opinion, said the proposed settlement “changed” the class action into something far beyond what Congress intended.⁵²

In the years that followed, Justice Ginsburg’s interpretation of Rule 23 did not result in the careful subclassing and smaller actions that she had hoped for as an answer to commonality and representation issues she saw in *Amchem*. Instead, the case reflected a larger problem—sprawling nationwide tort actions, with multiple defendants across many states—rather than a unique event. As one commentator noted, the class-action framework after *Amchem* felt “less necessary and far less convenient.”⁵³ Leading plaintiffs’ attorney Elizabeth Cabraser argues that *Amchem*

⁴⁸ *Pennsylvania R.R. v. United States*, 111 F. Supp. 80, 85 (D.N.J. 1953)

⁴⁹ *Id.* at 91.

⁵⁰ See Rule 23(b)(3) Adv. Comm. Note (observing that, “in these cases,” including *Pennsylvania v. U.S.* “circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.”)

⁵¹ Jack C. Coffee, *Jack Weinstein: Last of the Mohicans? CLS Blue Sky Blog*, Dec. 21, 2021, <https://clsbluesky.law.columbia.edu/2021/12/02/jack-weinstein-last-of-the-mohicans/>

⁵² Abbe R. Gluck & Anne Joseph O’Connell, *The Orthodox, and Unorthodox, Rbg: Administrative Law and Civil Procedure*, 90 GEO. WASH. L. REV. 1532, 1554 (2022)

⁵³ Morris A. Ratner, *Class Conflicts*, 92 WASH. L. REV. 785, 843 (2017).

“transformed Federal Rule of Civil Procedure 23(b)(3)’s ‘superiority’ requirement into a mandate of perfection.”⁵⁴

It is important to note that *Amchem* and cases like it did not end the use of class actions to resolve mass torts. And class action innovations continue to this day.⁵⁵ But there is little question that *Amchem* introduced new structural limits that pushed creative lawyers to find other ways to achieve the aggregate resolutions they needed.

3. Multistate Attorney General and Other Government Actors.

State Attorneys General in the 1980s figured out a way to aggregate and settle without actually aggregating or undermining federalism. The AG “Multistate” was an innovation first developed by a small group of Attorneys General in the 198X litigation against XX to allow AGs from various states to file their own investigations and their cases in their own state courts, but share resources, discovery and leverage.⁵⁶ It has grown ever since to become the primary way AGs litigate national cases. As a result, State Attorneys General have produced some of the most elaborate settlements for some of the major public issues of our time (sometimes crowding out private litigation), including the National Tobacco Settlement, the National Mortgage Foreclosure Settlement,⁵⁷ and in the Opioid Litigation itself.

The most well-known State AG settlement was the landmark \$250 billion tobacco settlement (known as the Master Settlement Agreement) reached against the Big Five tobacco defendants in 1997.⁵⁸ While initially celebrated, the agreement quickly inspired criticism because its parameters did not satisfy public health experts, and many funds, which swelled state legislative coffers, never went towards smoking cessation and prevention.⁵⁹

Indeed, it was precisely this dissatisfaction that spurred a key innovation in the opioid MDL: Unhappy with the prospect of global deals brokered exclusively by state-level actors, -a new wave of local government litigants in the form of cities and counties—represented by private law firms on a contingency basis—sued even before the AGs in opioids and were central players in the federal MDL. The cities in the federal MDL generated tensions with the State AGs, who had planned suits in their own state courts, in the “old fashioned” way. The leverage exerted by the MDL was

⁵⁴ Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475, 1475-76 (2005).

⁵⁵ Adam S. Zimmerman, *The Class Appeal*, 89 CHI. L. REV. 1419 (2022) (tracing evolution of “appellate class actions,” “habeas class actions” and other novel class actions certified under the All Writs Act); Francis E. McGovern & William B. Rubenstein, *The Negotiation Class: A Cooperative Approach to Class Actions Involving Large Stakeholders*, 99 TEX. L. REV. 73 (2020) (tracing evolution of class action innovations).

⁵⁶

⁵⁷ Press Release, State Attorneys General, *Feds Reach \$25 Billion Settlement with Five Largest Mortgage Servicers on Foreclosure Wrongs*, National Association of Attorneys General (Feb. 9, 2012), available at <http://naag.org/state-attorneys-general-feds-reach-25-billion-settlement-with-five-largest-mortgage-servicers-on-foreclosure-wrongs.php>. Add cite to NFL Concussion.

⁵⁸ Robert L. Rabin, *The Tobacco Litigation: A Tentative Assessment*, 51 DePaul L. Rev. 331, 342 (2001)

⁵⁹ See Michael Janofsky, *Tiny Part of Settlement Money is Spent on Tobacco Control*, N.Y. Times, Aug. 11, 2001, at A11; Greg Winter, *State Officials are Faulted on Anti-Tobacco Programs*, N.Y. Times, Jan. 11, 2001, at A28.

enough to pressure state AGs to come to the federal table for settlement, at least sometimes, even though the state cases were outside the federal court's jurisdiction.⁶⁰

After opioids, other local entities have parroted these local actions. School systems and even water districts have joined cities to bring MDLs in federal court to litigate issues of national concern—from cases involving global warming, social media addiction in children, vaping in schools, and forever chemicals in rivers and streams— independent of state AG action.⁶¹

4. Multidistrict Litigation

Today, MDL has evolved into the primary forum for globally resolving mass disputes filed across the federal system. MDL was born into statute in 1968 to deal with massive antitrust litigation involving the electrical-equipment industry.⁶² The animating idea was that cases would be consolidated for pre-trial procedures to avoid duplicative efforts in multiple federal courts, and all suits would ultimately return to their original federal courts for disposition. But MDL has morphed into a centripetal force for global resolution of nationwide litigation. MDLs are highly unorthodox. More than 97% of MDL cases settle in the MDL court, not in their home-court jurisdiction. Unlike class actions, MDLs offer no opt out and no rules about representation; plaintiffs not infrequently find their filed cases dragged across the country against their will and their representation taken over by appointed counsel different from the one they hired, all thanks to how MDLs works as a venue transfer on steroids.

MDLs also allow for almost no appellate review. Because all the significant action in MDL is generally pre-trial, and because federal courts require instead a “final” order prior to appeal, there are very few opportunities to appeal the most determinative MDL decisions. With an eye toward settlement rather than motion practice, MDL judges sometimes so delve relatively little into the differences among diverse states’ tort laws—much less develop new tort law themselves.

Expansive notions of federal MDL court power—not formal jurisdiction really—vacuum cases out of state court and to the MDL bargaining table.⁶³ Parallel state actions are often asked to share discovery and settle at the federal-court table. Perhaps even more surprising, state case lawyers are often asked to contribute to the federal MDL’s attorney’s fees. And, in large MDLs, judges have insisted that each proceeding is too unique to be confined by the transsubstantive Federal Rules. That leads to customized procedural creations like special “census” tools aimed identifying all filed and unfiled cases in state and federal court, fact sheets in lieu of traditional complaints,

⁶⁰ E.g., Lauren Berg, *Walmart’s Opioid Deal Advances with States’ Participation*, LAW360 (Aug. 22, 2023, 10:10 PM); Emily Field, *Kroger to Pay Up to \$1.4B to End Opioid Claims*, LAW360 (Sept. 8, 2023 9:32 AM EST).

⁶¹ See, e.g., Memorandum of Law in Support of Plaintiffs’ Mot. for Preliminary Approval of Class Action Settlement, for Certification of Settlement Class and for Permission to Disseminate Class Notice at 1-5, *In re Aqueous Film-Forming Foams Prod. Liab. Litig.*, No. 2:18-mn-02873-RMG (D.S.C. Jul. 3, 2023), ECF No. 3370-1.

⁶² See Andrew Bradt, *A Radical Proposal: The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831, 854 (2017).

⁶³ Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 90-107 (2017).

Lone Pine orders that test expert evidence and cull claims without a motion for summary judgment, and bellwether mediations and trials.⁶⁴ A final mass settlement in an MDL can include “closure” provisions that attempt to bind like class actions—including “walk away clauses” that require close to 100% participation in the settlement, and terms that make participating attorneys recommend the settlement to all of their eligible clients or, more controversially, withdraw from representing any client who refuses to settle.⁶⁵

In re Opiates, the sprawling opioid MDL that gave rise to the Purdue bankruptcy, may have been the apotheosis of the creative and ambitious “MDL revolution.”⁶⁶ More than 2,800 municipalities, enabled by expert plaintiffs’ firms working on contingency sued dozens of manufacturers, distributors, and pharmacy defendants in federal courts across the country. The cases were quickly consolidated under the MDL statute and transferred to a single federal judge who announced at his first hearing that he did not think “depositions, and discovery, and trials” were the answer. His goal was to “do something meaningful to abate the crisis” within a year.⁶⁷

As the parties searched for a mechanism to organize and resolve all the claims, including claims by cities and counties that had not yet sued, plaintiffs’ attorneys, spurred on by the judge and a creative special master even invented a novel procedural mechanism—the so-called “negotiation class”—to collectively bind absent parties to an anticipated, lump-sum negotiated settlement.⁶⁸ Displeased, the Sixth Circuit chided: “What Plaintiffs fail to appreciate is that a new form of class action, wholly untethered from Rule 23, may not be employed by a court.”⁶⁹

Frustrated by the opioid MDL and others, creative lawyers adapted again—this time, turning to bankruptcy.

II. BANKRUPTCY TO THE RESCUE?

Seen in this context, bankruptcy has re-emerged as the latest forum promising global peace. This is not the first time bankruptcy has been used in this way. Long ago, Congress created a formal process for asbestos companies to resolve large volumes of claims in bankruptcy. Since that time, bankruptcy has been repurposed to become the final repository for personal injury claims over everything from Dalkon Shield intrauterine devices and silicone gel breast implants, to asbestos, hair relaxer, and air bags. If litigation truly does force a business into financial distress, bankruptcy rules exist precisely so that claims against that business proceed in an orderly way, regardless of where they are filed, and notwithstanding our traditional dual system of state and

⁶⁴ See, e.g., Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576 (2008) (“In a bellwether trial procedure, a random sample of cases large enough to yield reliable results is tried to a jury.”); Nora Freeman Engstrom, *Lone Pie Order* article.

⁶⁵ ELIZABETH CHAMBLEE BURCH, *MASS TORT DEALS: BACKROOM BARGAINING IN MULTIDISTRICT LITIGATION* 40-54 (2019) (describing creative use of closure provisions).

⁶⁶ Burch & Gluck, *supra* note 10.

⁶⁷ Transcript of Proceedings at 4, *In re Nat'l Prescription Opiate Litig.*, No. 17-md-2804 (N.D. Ohio Jan. 9, 2018), ECF No.

⁶⁸ Elizabeth Burch, William Rubenstein & Francis McGovern, *The Negotiation Class*, 104 *Judicature* 13 (2020).

⁶⁹ *In re National Opiate Litigation*, 976 F.3d 664, 672 (6th Cir. 2020).

federal courts. With guardrails in place, one could imagine why we might create a limited exception to our commitment to the traditional tort process, especially if the alternative would lead to an empty judgment against an insolvent defendant.

But bankruptcy was never designed for mass-tort plaintiffs.⁷⁰ As we show in Part II.A, Congress took a few tentative steps to provide process for asbestos plaintiffs in the 1980s, but those innovations—a special one-time codification of the Johns Mansville bankruptcy—soon spread in unintended and unforeseen ways far beyond the statutorily authorized boundaries.

Faced with the crush of mass-tort litigation outside asbestos and driven by the idea that “equity supersedes the strict requirements of the Code,” bankruptcy judges have adapted in unorthodox ways.⁷¹ It is one thing for equity to take hold for the “honest but unfortunate debtor” that the Supreme Court envisioned in the 1930s,⁷² or even a truly financially distressed entity; bankruptcy’s superpowers come with a cost: debtors must provide over all their assets and information about those assets to help pay creditors.⁷³

But it is another thing for financially sound nondebtors to wield bankruptcy’s shield against mass-tort plaintiffs. Without a congressional directive or express authority, repeat-player lawyers have aggressively innovated yet again to deliver bankruptcy’s finality for third-party tailcoat riders, like the billionaire Sackler family.⁷⁴ They’ve also used the corporate form creatively, cleaving companies like behemoth Johnson & Johnson into pieces in order to saddle one of the new spinoffs with the company’s mass-tort liabilities, then plunged it into bankruptcy while keeping its moneyed twin out of court.

These two innovations, combined with bankruptcy’s extant role in centralizing decentralized federalist claims and finally resolving past, present, and future claims against debtor corporations, go beyond other forms of “unorthodox” procedure and rulemaking that we have identified.

A. From Orthodox to Unorthodox

Congress did create a formal process for companies that declared bankruptcy in the wake of thousands of asbestos lawsuits. Section 524(g) was originally put in place to assure that the Johns Mansville Company could reorganize through bankruptcy to address the challenge of settling large volumes of present and future asbestos claims.⁷⁵

⁷⁰ Alan A. Resnick, *Bankruptcy as a Vehicle for Resolving Enterprise-Threatening Mass Tort Liability*, 148 U. PA. L. REV. 2045, 2046 (2000) (“When the Bankruptcy Code was enacted in 1978, Congress did not contemplate the unique problems caused by mass tort liability involving future, as well as present, claimants . . .”)

⁷¹ Peter M. Boyle, *Non-Debtor Liability in Chapter 11: Validity of Third-Party Discharge in Bankruptcy*, 61 FORDHAM L. REV. 421, 431 (1992).

⁷² *Loc. Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934).

⁷³ 11 U.S.C. §§ 541, 1125.

⁷⁴ See Melissa B. Jacoby, *Fake and Real People in Bankruptcy*, 39 EMORY BANKR. DEV. J. 497, 508 (2023); George W. Kuney, *Misinterpreting Bankruptcy Code Section 363(f) and Undermining the Chapter 11 process*, 83 AM. BANKR. L.J. 235 (2002).

⁷⁵ See Special Problems in Bankruptcy: Hearing Before the Subcomm. on Courts and Admin. Practice of the S. Comm. on the Judiciary, 102d Cong. 61-62 (1991) (statement of W.T. Stephens,

The new subsection recognized a limited “claim” for people who had been exposed to asbestos, but who had not yet become sick. Under 524(g), a new trust, funded by a company’s stock, would provide ongoing funding to compensate new asbestos claims.⁷⁶

Section 524(g) also allowed a very narrow group of defendants to receive the benefit of bankruptcy—only those who had declared bankruptcy themselves or who were derivatively liable for the same harm. These narrow nondebtor releases were used to maximize funds for asbestos reorganization plans by releasing claims against third parties who contribute substantial funds to the trust.

But there were problems with 524(g) for asbestos plaintiffs. Among them was that the structure did not allow for differentiation based on the severity of plaintiffs’ injuries. Everyone had the same vote to approve or reject a grand settlement. In response, Congress in 1994, created a commission to study the use of bankruptcy. That body ultimately recommended several preconditions before using bankruptcy to respond to a mass tort: The company had to be in real financial distress. Future claims, like a failure to warn about new dangers associated with a product, could not be released by the bankruptcy. Parties had limited rights to try cases in federal court to establish liability. No releases would be made to third parties.⁷⁷

The proposals for a new, expanded use of bankruptcy never became law, but the innovations under section 524(g) seeped well beyond asbestos. The Code contains an equity provision that allows bankruptcy courts to “issue any order, process, or judgment that is necessary or appropriate” to fulfill the Code’s provisions.⁷⁸ In some cases then, judges claim that “equity supersedes the strict requirements of the Code”⁷⁹ and argue that equity allows them to bypass due process speed bumps like adequate representation.

Take the Purdue Bankruptcy itself. In fall 2019, Purdue Pharma filed for Chapter 11 bankruptcy as part of a tentative deal struck with thousands of local governments, states, U.S. territories, hospitals, and other parties involved in the MDL. The bankruptcy filing immediately utilized Section 362—a provision that allows the court to halt all federal and state litigation, but supposedly excludes those brought by government entities—to bring everyone to the negotiating table. But this stay persisted for years and included all State Attorney general actions, class actions, and multidistrict litigation.⁸⁰ Although public litigation against other companies did continue outside of the bankruptcy, the locus of power over the public face of the nation’s most intractable public health litigations—Purdue Pharma and the Sackler family—shifted into a single,

Chairman of the Board, President, and Chief Executive Officer, Manville Corp.) *See also* Bookman & Noll, *supra* note 29, 771–72.

⁷⁶ *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 751-52, 771 (E. & S.D.N.Y. 1991), *vacated*, 982 F.2d 721 (2d Cir. 1992), *modified on reh'g*, 993 F.2d 7 (2d Cir. 1993).

⁷⁷ Melissa B. Jacoby, *Sorting Bugs and Features of Mass Tort Bankruptcy*, 101 TEX. L. REV. 1745, 1749-1752 (2023); Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 602, 108 Stat. 4106, 4147; Nat’l Bankr. Rev. Comm’n, *Bankruptcy: The Next Twenty Years* (1997)

⁷⁸ 11 U.S.C. § 105(a); Foohey & Odinet at 1284.

⁷⁹ Peter M. Boyle, *Non-Debtor Liability in Chapter 11: Validity of Third-Party Discharge in Bankruptcy*, 61 FORD. L. REV. 421, 431 (1992).

⁸⁰ Some question if the automatic stay, when used in this durable manner, go beyond the limits of protections under Rule 65 of the Federal Rules of Civil Procedure. *See* Jacoby, *supra* note 77, at 1762.

Article I court and away from the Article III federal court that had tried to use MDL to do the same thing. It also created the leverage that made even more unorthodox aspects of the deal possible: By adding \$6 billion to Purdue’s bankruptcy, the Sackler family, which made more than \$12 billion in profit from Purdue,⁸¹ claimed they too deserved protection from civil suits.

B. Unorthodox Procedures for Solvent Nondebtors to Achieve Global Settlement

Outside of a special procedure for asbestos, there was no express authority that allowed bankruptcy judges to protect nondebtors. But the allure proved too strong, as Purdue illustrates. Under that deal, Purdue could continue operating as a “public-beneficiary trust.” But Purdue’s owners, members of the Sackler family, were able to pay \$6 billion from their own pockets into the trust, while avoiding bankruptcy (and corresponding civil suits) themselves. They relied on an innovative pair of remedies to make the deal work: third-party releases and a channeling injunction that funneled lawsuits against them into the trust instead. Both mechanisms originated in § 524(g), but, as we discussed below, migrated into use under the bankruptcy court’s equitable authority under Section 105.

Now the impossible—the release of mass-tort claims against solvent people—happens via nondebtor releases and channeling injunctions. And it wasn’t long before innovative attorneys began to use corporate law to develop what’s become known as the Texas Two-Step: a plan to use divisional mergers to gain the benefit of bankruptcy for companies like Johnson & Johnson that are not financially distressed.

1. Channeling Injunctions and Nondebtor Releases for “Grifters”

The first technique corporate defendants have deployed—and the one now at issue before the Supreme Court—involves an attempt to use bankruptcy to release nondebtors (so-called “grifters”) from related tort claims by channeling those claims into a trust.⁸² Traditionally, channeling injunctions were designed to shield only the reorganized corporation (e.g., Purdue Pharma itself)—not others like the Sackler family who owns it.

Using nondebtor releases and channeling injunctions began in the 1980s when leading asbestos firm Johns-Manville Corporation filed for Chapter 11 bankruptcy, which allows a new corporation to emerge and continue operating.⁸³ Instead of suing Johns-Manville Corp., the idea was to use the channeling injunction to force present and future asbestos plaintiffs to seek compensation from the trust.⁸⁴ But whether the bankruptcy courts possessed the power to accomplish such a radical feat—discharging future mass-tort plaintiffs—remained uncertain.⁸⁵

⁸¹ Rachel Sandler, *The Sacklers Made More than \$12 Billion in Profit from OxyContin Maker Purdue Pharma*, *New Report Says*, FORBES (Oct. 4, 2019 6:16 PM), <https://www.forbes.com/sites/rachelsandler/2019/10/04/the-sacklers-made-12-to-13-billion-in-profit-from-oxycontin-maker-purdue-pharma-new-report-says/?sh=3c69c737477d>.

⁸² Lindsey D. Simon, *Bankruptcy Grifters*, 131 Yale L. J. 1154, 1157-60 (2022).

⁸³ *In re Johns-Manville Corp.*, 68 B.R. 618 (Bankr. S.D.N.Y. 1986).

⁸⁴ LLOYD DIXON ET AL., ASBESTOS BANKRUPTCY TRUSTS 5-6 (RAND 2010).

⁸⁵ Frank J. Macchiarola, *The Manville Personal Injury Settlement Trust: Lessons for the Future*, 17 CARDOZO L. REV. 583, 602-03 (1996).

Congress responded in 1994 by enacting § 524(g), which used the Johns-Manville proceeding as its blueprint. In the process—and only for asbestos cases—Congress specifically allowed bankruptcy courts to enter channeling injunctions to protect not only the debtor, but also nondebtor third parties with very specific financial relationships to the debtor like lenders, insurance companies, and past or present affiliate corporations.⁸⁶ It also required that supermajorities of asbestos claimants approve the reorganization plan.⁸⁷

Despite these limitations, nondebtor releases and channeling injunctions quickly spread beyond those confines and beyond asbestos, without even the minimal protections Congress created for asbestos bankruptcies. Before long, Dow Corning used the bankruptcy court’s general equitable powers under § 105(a) to channel all the women who claimed their silicone breast implants were defective into a trust with a reorganization plan that released both Dow Corning, its insurers, shareholders, doctors, and distributors from liability.⁸⁸ A.H. Robins used its bankruptcy to pull in all the women suing over its faulty Dalkon Shield contraceptive device and shielded the Robins family as well as the company’s officers, directors, and employees.⁸⁹ Delaco channeled claims by its Dexatrim diet pill users (who experienced heart problems and strokes) and protected not only its insurers, but also its supply chain—drug vendors and distributors.⁹⁰ These bankruptcy reorganizations provided a vital means to cram settlements down on nonconsenting mass-tort claimants.

Insurance companies and others who must arguably indemnify debtors for personal-injury claims are one matter, but as the foregoing examples show, protection for nondebtors has extended well beyond that.⁹¹ So it came as little surprise when defective airbag manufacturer Takata used its bankruptcy to protect car manufacturers,

⁸⁶ § 524(g)(4)(A)(ii)-(iii).

⁸⁷ 11 U.S.C. § 524(g) (requiring 75% consent of a class of asbestos claims to approve a channeling injunction). Critics have observed, however, that this requirement can be evaded by manipulating the pool of claimants who vote. *See, e.g., See Jacoby, supra note 77, at 1745 n.55; see also id. at 1756-58.*

⁸⁸ *In re Dow Corning Corp.*, 280 F.3d 648, 657-58 (6th Cir. 2002); *see also* Jason J. Jardine, *The Power of the Bankruptcy Court to Enjoin Creditor Claims Against Nondebtor Parties in Light of 11 U.S.C. §524(e)*: *In re Dow Corning Corp.*, 2004 B.Y.U. L. REV. 283, 298-300. Courts also rely on § 363(f) and (h), which “explicitly provide for the channeling of claims in this manner” and conclude that “[t]he court’s authority to channel claims is . . . ‘granted by implication,’ even absent statutory provisions.” *In re Johns-Manville Corp.*, 68 B.R. 618, 625 (Bankr. S.D. N.Y. 1986).

⁸⁹ Ralph Brubaker, *Mandatory Aggregation of Mass Tort Litigation in Bankruptcy*, 131 YALE L.J. F. 960, 961 (2022).

⁹⁰ *In re The Delaco Co.*, No. 04-10899 (Bankr. S.D.N.Y. Feb. 17, 2006); Gary Svirsky et al., *A Field Guide to Channeling Injunctions and Litigation Trusts*, 260 N.Y.L.J. July 16, 2018.

⁹¹ Some jurisdictions require only that a nondebtor claim that it needs to settle litigation to help reorganize the debtor, that it has contributed some assets to the plan, and that the settlement itself is substantively fair, before the nondebtor gets the benefits of bankruptcy minus the burdens. *E.g., In re W.R. Grace & Co.*, 468 B.R. 81, 144 (Bankr. Del. 2012). Other courts follow the additional factors in *Master Mortgage*. *E.g., In re Zenith Elecs. Corp.*, 241 B.R. 92, 110-11 (Bankr. Del. 1999) (citing *Master Mortgage Inv. Fund, Inc.*, 168 B.R. 930, 937 (Bankr. W.D. Mo. 1994)). A circuit split exists over nonconsensual nondebtor releases, with the Fifth, Ninth, and Tenth Circuits prohibiting them and the Fourth, Sixth, Seventh, and Eleventh Circuits permitting them. Ralph Brubaker, *Mandatory Aggregation of Mass Tort Litigation in Bankruptcy*, 131 YALE L.J. F. 960, 964 n. 15 (2022).

and USA Gymnastics released coaching families and individuals connected to sex abuser Dr. Larry Nassar’s training facility.⁹²

The insular practice of nondebtor releases and channeling injunctions, typically noticed only by bankruptcy gurus, catapulted into the public sphere when the wealthy Sackler family proposed adding \$6 billion to Purdue Pharma’s pot of assets in exchange for broad releases from its role in spawning the opioid crisis. The Sackers’ ask has—at last—garnered Supreme Court attention. As Ralph Brubaker argues, “the fundamental illegitimacy of nondebtor releases is of a constitutional magnitude, implicating constraints imposed by the separation-of-powers dimensions of both the Bankruptcy Clause and *Erie*’s constitutional holding.”⁹³

2. The Texas Two-Step

If the Court paves the way for creative uses of section 105, more than just third-party releases are at stake. Consider the so-called “Texas Two-step,” the more recent use of divisional mergers by corporate defendants seeking to shed mass-tort liabilities.

In simple terms, a company first uses authority granted by a state statute to divide itself into two new companies: “RichCo,” which receives all the company’s assets and operating business, and “PoorCo,” which inherits all the mass-tort liability plus a funding agreement saying that RichCo will foot the bill for PoorCo’s tort obligations.⁹⁴ Second, PoorCo files for Chapter 11. This is formally known as a “divisional merger,” a technique that typically has been invoked under Texas law by corporate defendants seeking to shed mass-tort liabilities—thus its more colloquial name, “Texas Two-Step.” But because this technique is also permitted in Delaware, the corporate home of many of the country’s Fortune 500, this tool carries national consequences.⁹⁵

Like nondebtor releases and channeling injunctions, in a divisional merger, a solvent defendant creatively relies upon the bankruptcy of another to obtain global peace. But the debate over whether it is appropriate centers on a different provision of the bankruptcy code: the requirement that companies file the bankruptcy petitions in good faith⁹⁶—something that was never at issue when Johns-Manville faced a tide of asbestos litigation,⁹⁷ when A.H. Robins Co. had only \$5 million in unrestricted funds to address the mounting DES crisis,⁹⁸ or when Dow Corning filed for Chapter 11 to rehabilitate itself in the wake of lawsuits over breast implants.⁹⁹ But questions of good faith abound in RichCo Johnson & Johnson’s spinoff of PoorCo, LTL Management LLC.

⁹² Simon, *supra* note 82, at 1178-79.

⁹³ Ralph Brubaker, *Mandatory Aggregation of Mass Tort Litigation in Bankruptcy*, 131 YALE L.J. F. 960, 965 (2022).

⁹⁴ Ralph Brubaker, *Assessing the Legitimacy of the ‘Texas Two-Step’ Mass-Tort Bankruptcy (Part II)*, 43 BANKR. L. LTR. 1, 2 (Apr. 2023).

⁹⁵ Tex. Bus. Orgs. Code § 1.002(55)(a) & tit. 1, ch. 10(a); Ariz. Rev. Stat. Tit. 29, ch. 6; Del. Code Ann. Tit. 6, § 18-217(b)-(c); Kan. Stat. Ann. § 17-7685a; Pa. Cons. Stat. Tit. 15, ch. 3(f).

⁹⁶ 11 U.S.C. § 1112(b).

⁹⁷ *In re Johns-Manville Corp.*, 36 B.R. 727, 730 (Bankr. S.D.N.Y. 1984).

⁹⁸ *In re A.H. Robins Co., Inc.*, 89 B.R. 555, 558 (Bankr. E.D.V.A. 1988).

⁹⁹ *In re Dow Corning Corp.*, 244 B.R. 673, 676-77 (Bankr. E.D. Mich. 1999).

Circuit courts have split over how to handle those sorts of dubious divisional mergers. In January 2023, the Third Circuit reversed Johnson & Johnson’s move to spin off its liability to talc claimants (who alleged that talc, possibly containing asbestos, caused ovarian cancer) into PoorCo, LTL Management LLC, which would file for bankruptcy.¹⁰⁰ RichCo Johnson & Johnson Consumer Inc. held all the valuable consumer products like Band-Aid, Tylenol, and Listerine. The case ultimately came down to whether RichCo J&J was in “financial distress.”¹⁰¹ It wasn’t.

The Fourth Circuit, where LTL’s bankruptcy was initially filed before it was transferred to New Jersey, came out the opposite way in *In re Bestwall, LLC*.¹⁰² There, Georgia-Pacific (RichCo), which makes tissue and packaging materials, spun off its asbestos liability into Bestwall, LLC (PoorCo), which filed for Chapter 11 in the Western District of North Carolina a month later and detailed the “shortcomings . . . and abuses in the tort system.”¹⁰³ PoorCo then requested a preliminary injunction to prevent third parties from pursuing asbestos-related personal-injury lawsuits that would be protected by a channeling injunction in its Chapter 11 plan. When the bankruptcy court granted the preliminary channeling injunction, a committee of asbestos claimants argued that the bankruptcy court had overstepped its jurisdiction. It could not, they posited, enjoin mass-tort litigation against a solvent RichCo like Georgia Pacific. But using a far higher standard for bad faith, the Fourth Circuit agreed with Bestwall.¹⁰⁴

The foregoing ad hoc bankruptcy procedures for nondebtors, procedures invoked under the court’s general equitable powers under Section 105(a) and never expressly authorized by Congress outside of asbestos, have achieved success where others have failed: a new vehicle for mandatory settlement of mass-tort victims’ claims against solvent nondebtors across all federal and state courts.¹⁰⁵ But at what cost?

III. BANKRUPTCY AND LOST LITIGATION VALUES

No system does all things. Bankruptcy is one response to the public problems mass torts present. But its chief advantage—an all-encompassing solution to a litigation onslaught whose primary focus is on efficient distribution of assets—is precisely what imperils many other litigation values. Perhaps those tradeoffs are clearer in the face of true insolvency, though we are uncertain. And, increasingly, many mass-tort defendants are not financially distressed when they turn to bankruptcy court for salvation.

If the goal of mass tort litigation were simply to privately reallocate assets, bankruptcy might produce superior value, although that is a conclusion that must be empirically tested. But our aim is to insist that mass tort litigation has many other

¹⁰⁰ *In re LTL Mgmt., LLC*, 58 F.4th 738, 763 (3d Cir. 2023).

¹⁰¹ *In re LTL Mgmt., LLC*, 64 F.4th 84, 102-07 (3d Cir. 2023).

¹⁰² 2023 WL 4066848 (4th Cir. June 20, 2023).

¹⁰³ Informational Brief of Bestwall LLC at 5, *In re Bestwall LLC*, 606 B.R. 243 (Bankr. W.D.N.C. 2019) (No. 17-31795), ECF No. 12

¹⁰⁴ *Carolin Corp. v. Miller*, 886 F.2d 693, 701 (4th Cir. 1989).

¹⁰⁵ Ralph Brubaker, *Mandatory Aggregation of Mass Tort Litigation in Bankruptcy*, 131 YALE L.J. F. 960, 966 (2022).

goals—and to insist as well that scholars extolling bankruptcy here engage with those goals more than they have.¹⁰⁶ Tort law, and public litigation more broadly, has many aims: deterring wrongdoers, empowering and compensating victims, generating public goods by making information available to regulators, fostering democracy and voice by allowing litigants and the public to participate in trials, developing legal doctrine, and ensuring a forum in which all citizens are viewed equally before the law.¹⁰⁷

For the last 25 years, scholars have proposed numerous ways to retrofit bankruptcy to better effectuate traditional litigation values, but their ideas have not impacted practice.¹⁰⁸ At the same time, our traditional litigation system itself has moved further and further away from the paradigm of discovery, law development, jury trial, and the individual day in court. We recognize that if proceedings in Article III federal and state courts are not delivering enough on traditional litigation values themselves, it may raise the stakes of eschewing the efficiency and finality of bankruptcy.

A. Accountability and Plaintiff's Day in Court

Accountability—placing fault—is a central reason why people sue. So too is the opportunity to tell one's side of the story. At the heart of *Martin v. Wilks* and *Mathews v. Eldridge*¹⁰⁹ lie the fundamental concept that every person is entitled their “day in court.”¹¹⁰ Jerry Mashaw long ago suggested that the opportunity to be heard is core to one's “dignity” as a litigant and so essential to equality.¹¹¹ As Tom Tyler observes, procedural legitimacy is about more than just outcomes: “When dealing with judicial authorities . . . people want to have an opportunity to . . . tell their side of the story . . . before decisions are made”¹¹²

It is true that most complex (and even much individual) litigation settles, and that settlements often intentionally avoid any acceptance of responsibility. It is true too that jury trials are increasingly rare. But unlike Rule 23(b)(3) class actions and even mandatory multidistrict litigation, no one can opt out of bankruptcy by dismissing their lawsuit and suing in state court instead. Bankruptcy courts almost never refer tort claims for trial, even though they have that option; resistance from the debtor, the norm against trials, and the ability of a majority of non-tort creditors to vote to approve the reorganization without trial all operate to prevent their use. Instead, when a defendant files for Chapter 11, pending tort claims—even if still unproved—are treated simply as debts to pay. Plaintiffs “win” in that sense, but without any adjudication. But the fact that plaintiffs resist the turn to bankruptcy makes clear that the system is not all about money.¹¹³

¹⁰⁶ Cf. Macey & Casey, *supra* note XX; Foohey & Odinet, *supra* note XX.

¹⁰⁷ See generally ALEXANDRA LAHAV, *IN PRAISE OF LITIGATION* (2017).

¹⁰⁸ E.g., NATIONAL BANKR. REVIEW COMM'N, *BANKRUPTCY: THE NEXT TWENTY YEARS* (1997); Pamela Foohey & Christopher K. Odinet, *Silencing Litigation Through Bankruptcy*, 109 VA. L. REV. 1261 (2023)

¹⁰⁹ *Mathews v. Eldridge*, 424 U.S. 319 (1976).

¹¹⁰ 490 U.S. 755, 762 (1989).

¹¹¹ Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 49-54 (1976).

¹¹² Tom R. Tyler, *The Psychology of Aggregation: Promise and Potential Pitfalls*, 64 DEPAUL L. REV. 711, 713 (2015).

¹¹³ See Jacoby, *supra* note 77.

Melissa Jacoby observes that bankruptcy judges are inclined not to treat corporate debtors “as culpable actors capable of independent wrongdoing,” which “makes bankruptcy an unreliable partner in the broader social project of deterring, punishing, and remedying serious corporate misconduct.”¹¹⁴

Nondebtors (“grifters”) arguably pose even bigger problems. In a products-liability case, all the parties in a chain of distribution—from manufacturers and distributors to commercial retailers—are potential defendants. But unorthodox bankruptcy moves that also release nondebtors deprive plaintiffs of this option. Indeed, the bankruptcy court in Purdue expressly said of the Sacklers that the deal was not “an adjudication of the claim ... it is part of the settlement, not a finding of liability.”

Take *Temple v. Synthes Corp.* where the facts concerned both a defective plate made for long-bone leg-type fractures and a doctor experimenting on the plaintiff without consent.¹¹⁵ When the Supreme Court allowed Billy Temple to sue the manufacturer and the doctor in separate lawsuits, it upheld plaintiffs’ right to choose when, where, and who to sue.¹¹⁶ But when bankruptcy courts allow solvent nondebtors to gain the vast protections bankruptcy offers by adding some money to the deal, they undermine plaintiffs’ substantive and procedure entitlements to sue those parties where and how they wish.¹¹⁷

The litigation coming out of September 11th attacks provides a powerful example of the importance of the day in court. Mediator Sheila Birnbaum (herself a prominent mass-torts defense attorney who represented Purdue) noted that “an obstacle to settlement for families who chose to litigate was that they did not have the chance to ‘tell the story of their loss.’” Birnbaum brought closure to the case by creating testimonial sessions, in which victims’ families could have their day in court. As Birnbaum put it “For some, it was important to tell their story to the airlines and to the mediator so the memory of the person they loved and lost was somehow more cherished.”¹¹⁸

For corporate defendants, bankruptcy too frequently serves as an especially effective means to silence claimants’ voices.¹¹⁹ Not only does filing create a deadline for mass-tort claimants to reveal themselves—one that, importantly, trumps state statutes of limitation—but it has become an especially powerful tool for short-circuiting bad press and civil trials, the principal opportunities plaintiffs have to tell their stories. Citing concerns about federalism and the substantive limits of the All

¹¹⁴ Melissa B. Jacoby, *Fake and Real People in Bankruptcy*, 39 EMORY BANKR. DEV. J. 497, 501 (2023).

¹¹⁵ 498 U.S. 5 (1990).

¹¹⁶ *Id.*

¹¹⁷ Ralph Brubaker, *Mandatory Aggregation of Mass Tort Litigation in Bankruptcy*, 131 YALE L.J. F. 960, 966-71 (2022).

¹¹⁸ 9/11 Mediator Sheila Birnbaum ‘65 Settles 92 of 95 Cases for \$500 Million, NYU L. News, https://www.law.nyu.edu/news/BIRNBAUM_9_11_MEDIATOR#:~:text=Birnbaum%20said%20an%20obstacle%20to,condolences%20from%20an%20airline%20representative (last updated Mar. 6, 2009). (

¹¹⁹ Pamela Foohey & Christopher K. Odinet, *Silencing Litigation Through Bankruptcy*, 109 VA. L. REV. 1261, 1266 (2023).

Writs Act, these same kinds of stays were once tried¹²⁰ and then rejected¹²¹ by courts in early mass-tort class actions. But today, these stays are par for the course in bankruptcy.

When the Archdiocese of Saint Paul & Minneapolis filed for chapter 11 bankruptcy on the eve of three civil trials,¹²² the court imposed a filing deadline on sex-abuse survivors. To salvage their tort claims, they had to come forward within six months, despite the psychological turmoil they faced and the much longer state-law statutes of limitations.¹²³ Revlon filed for bankruptcy before the release of a National Institute of Health report linking the company's hair straightening products to cancer. When the NIH report came out, the judge gave potential claimants just one month to file their claims—causing an uproar due to the much shorter window than most mass-torts claimants have. The Purdue bankruptcy court sealed Purdue Pharma's records, forcing news organizations to demand transparency that had long been denied in early civil trials.¹²⁴

Consider, in contrast, the jury trial against Johnson & Johnson in Oklahoma state court that resulted in a nearly \$500-million verdict in 2019. Although the verdict was eventually overturned on tort-law grounds, the trial produced discovery and testimony that exposed the company's actions. And the review on appeal, while it overturned the verdict, clarified the law of public nuisance in the state.¹²⁵

B. Due Process and Adequate Representation

Due process entails the right to be heard in a court with legitimate authority over you. To be sure, a plaintiff's individual day in court has eroded since *Martin v. Wilks*.¹²⁶ But, in aggregate cases, individuals often only participate, as Fiss has noted, through their “right of representation.”¹²⁷

With respect to courts' power, we have previously detailed our concerns about how MDL courts often purport to exercise jurisdiction over parties where jurisdiction

¹²⁰ *Ryan v. Dow*, 781 F. Supp. 902, 918 (E.D.N.Y. 1991), *aff'd*, 996 F.2d 1425 (2d Cir. 1993)(removing Texas state court action brought by plaintiffs under the All Writs Act, after they had participated in the federal class action settlement); *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855 (2d Cir. 1988).

¹²¹ *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28 (2002) (rejecting use of the All Writs Act to remove state court proceeding to federal court).

¹²² Pamela Foohey & Christopher K. Odinet, *Silencing Litigation Through Bankruptcy*, 109 VA. L. REV. 1261, 1299 (2023) (citing Jean Hopfensperger, *St. Paul Archdiocese Declares Bankruptcy, Calling it 'Fairest' Recourse*, STAR TRIBUNE (Feb. 2, 2015 1:30 PM)).

¹²³ *Id.* at 1300.

¹²⁴ Reporters Committee, *News Organizations Urge Federal Court to Unseal Judicial Records in Purdue Pharma Bankruptcy Case*, Reporter's Committee for Freedom of the Press (Nov. 23, 2020), <https://www.rcfp.org/unseal-purdue-pharma-bankruptcy/>. Unsealed documents from settled lawsuits against Purdue Pharma in Florida, West Virginia, and Washington led to a National Bureau of Economic Research working paper which found that “the introduction and marketing of OxyContin explain a substantial share of overdose deaths over the last two decades.” Abby E. Alpert et al., *Origins of the Opioid Crisis and its Enduring Impacts*, Nat'l Bureau of Econ. Rsch. Working Paper 26500 [available at: <https://www.nber.org/papers/w26500.pdf>].

¹²⁵ State ex rel. Hunter v. Johnson & Johnson, 499 P.3d 719 (Ok. 2021).

¹²⁷ Owen M. Fiss, *The Allure of Individualism*, 78 IOWA L. REV. 965, 970-71 (1993).

¹²⁷ Owen M. Fiss, *The Allure of Individualism*, 78 IOWA L. REV. 965, 970-71 (1993).

is lacking or questionable.¹²⁸ We also have raised concerns about what we call “plaintiffs’ process.”¹²⁹ Civil procedure is fixated on the due process of defendants. But MDL raises serious questions about plaintiffs’ due process rights, especially when plaintiffs’ cases are moved across the country, to different courts with new counsel, with no opportunity for opting out or to ensure counsel represents their interests.

In bankruptcy, the defendants are the ones who are filing; the defendants are choosing their fora in a way they do not generally get to do in ordinary procedure. And plaintiffs—regardless of where they live, who represents them, or whether and where they initiated their case—are forced to join them. While these moves are formally authorized in the bankruptcy context, thanks to the Section 362(a) stay, we wonder whether they are constitutionally justified if the debtor is not financially distressed or if nondebtor defendants also stand to benefit.

Indeed, in the 3M litigation, the bankruptcy court recognized that allowing 3M to escape the tort system risked turning bankruptcy courts into courts of “general jurisdiction.”¹³⁰ The court relied on this notion of improper authority even as it recognized that “most mass tort claims in a bankruptcy are resolved not through jury trials before a district court, but by consensual resolution through a plan of reorganization,” and that it is “also accurate to say that it is unlikely that all of the 290,000 [d]efendants will have a jury trial in the MDL.”¹³¹

With respect to representation, we note it is possible that bankruptcy court accords more protections than MDL. It is this right to adequate representation that we have argued is lacking in many MDLs, because there are no due process guardrails over counsel selection or subclassing according to interests. But bankruptcy still fares worse than class actions with respect to due process protections. To determine which claims can be grouped together, the Code requires only that they be “substantially similar.”¹³² And the debtor gets first crack at making this decision. The norm is to put mass-tort claimants into a single bucket—regardless of differences in insurance coverage ability, injury severity, or whether the injury has even manifested.¹³³

If blending claims or plaintiffs together creates a risk that those selected will favor one plaintiff group over another, then each group deserves its own representative.¹³⁴ As Richard Nagareda explained of *Amchem*, “[a] good deal, in itself, cannot make for a

¹²⁸ Burch & Gluck, *supra* note 10.

¹²⁹ Elizabeth Chamblee Burch & Abbe R. Gluck, *Plaintiffs’ Process: Civil Procedure, MDL, and A Day in Court*, 42 REV. LITIG. 225 (2023).

¹³⁰ *In re Aearo Technologies LLC*, No. 22-02890-JJG-11, 2023 WL 3938436, at *61 (Bankr. S.D. Ind. June 9, 2023) (“[R]equiring a valid bankruptcy purpose and a debtor in need of bankruptcy relief protects this Court’s jurisdictional integrity. Otherwise, a bankruptcy court risks becoming another court of general jurisdiction, which it most decidedly is not.”)

¹³¹ *In re Aearo Technologies LLC*, 642 B.R. 891, 902 (Bankr. S.D. Ind. 2022); *Cf. Stern v. Marshall*, 564 U.S. 462 _ (2011).

¹³² 11 U.S.C. § 1122(a).

¹³³ *E.g., In re AOV Indus., Inc.* 792 F.2d 1140, 1150 (D.C. Cir. 1986).

¹³⁴ *Amchem*, 521 U.S. at 627; PRINCIPLES OF THE L. OF AGGREGATE LITIG. § 2.07(a)(1)(B) (AM. LAW INST. 2010); Samuel Issacharoff & Richard A. Nagareda, *Class Settlements Under Attack*, 156 U. PA. L. REV. 1649, 1677–1701 (2008).

permissible class . . . because the permissibility of the class is what legitimizes the dealmaking power of class counsel in the first place.”¹³⁵

The current measures in bankruptcy that are unavailable in the class context, namely voting, have yet to accomplish meaningful representation. Before a reorganization plan is approved, it must be put to a vote by creditors and interest holders.¹³⁶ And, in theory, each mass-tort plaintiff with interest in the bankruptcy has a chance to approve or disapprove of the plan, though a “positive” vote binds dissenters too.¹³⁷

On the ground, however, voting has failed to provide adequate representation. First, placing mass-tort claimants into a single class gerrymanders power in the hands plaintiffs’ lawyers who can have a financial interest in ensuring that the plan goes through. Second, the vote occurs only among those who actually vote, and commentators have raised concerns about sufficient outreach and notice to current claimants—much less those who might have future claims.¹³⁸ In *Boy Scouts of America*, fewer than 57,000 of over 82,000 abuse victims voted, and 8,000 of those who voted cast votes against the plan.¹³⁹ In *Purdue Pharma’s* bankruptcy, 58,000 opioid survivors voted yes, 2,600 voted no, but 69,000—well over half of all survivors—didn’t vote at all.¹⁴⁰

C. Information Production

We have already detailed how information production, especially from big corporations, is another distinct benefit of litigation, especially aggregate litigation. Information production is often critical to another goal of public health-related tort litigation: to tee up issues for legislative intervention. From tobacco, to guns, to opioids, discovery has proved critical in illustrating tactics that encouraged users of dangers products to use them more and to use them more dangerously. For example, in one of the few tort cases to proceed to verdict against gun manufacturers, Connecticut litigants coming out of the Newtown school massacre produced discovery evidence that gun manufacturers’ advertising campaigns intentionally used video-game type military imagery to target young men prone to violence.¹⁴¹ Political actors often require such evidence to break legislative impasse and act against powerful industries.

But the kind of financial information that bankruptcy courts focus on—which can sometimes include robust disclosures about a debtor’s “assets and liabilities”—

¹³⁵ Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 183 (2003).

¹³⁶ 11 U.S.C. §1125(a).

¹³⁷ 11 U.S.C. § 1129; Edward J. Janger, *Aggregation and Abuse: Mass Torts in Bankruptcy*, 91 FORDHAM L. REV. 361, 368-73 (2022).

¹³⁸ See Jacoby, *supra* note 77, at 1766.

¹³⁹ *In re Boy Scouts of Am.*, 642 B.R. 504, 518 (Bankr. D. Del. 2022); See Jacoby, *supra* note 77, at 1756.

¹⁴⁰ See Jacoby, *supra* note 77, at 1756; RYAN HAMPTON, UNSETTLED: HOW THE PURDUE PHARMA BANKRUPTCY FAILED THE VICTIMS OF THE AMERICAN OVERDOSE CRISIS 215-20 (2021).

¹⁴¹ See First Amended Complaint at *13-15, *Soto v. Bushmaster Firearms International LLC*, No. FBTC156048103S, 2016 WL 2602550 (Ct. Super. Apr. 14, 2016) (alleging that Bushmaster “attract[s] buyers by extolling the militaristic and assultative qualities of their AR-15 rifles” and such marketing “dovetails with the widespread popularity of realistic and addictive first-person shooter games.”)

isn't the same kind of discovery into liability for health-harming industry behavior one saw flowing from tobacco, guns, or opioids. In opioids, productive discovery came through the MDL. Even more came through the persistence of decentralized litigation, as various cases in state courts contributed to what was revealed. And though it is true that bankruptcy courts have power to force disclosures,¹⁴² the Code likewise authorizes sealing public records, which, like confidentiality agreements governing discovery in mass-tort litigation, seems to get overused.¹⁴³

When the largest U.S. Roman Catholic Diocese filed for bankruptcy, commentators complained that the defendants were using the process to conceal information from the public.¹⁴⁴ The Survivors Network Advocacy organization argued, “Those secrets should come out and the men who allowed abuse to continue should be held responsible...Without full knowledge of what went wrong in these cases, we cannot hope to prevent them again in the future.”¹⁴⁵

D. Substantive Law

Development of state law—or the lack thereof—is another major problem we have written about in the MDL context.¹⁴⁶ To state the obvious, tort law would not have developed if courts did not render decisions. Today, creative tort lawyers continue to press fresh theories.

In opioids, plaintiffs' lawyers tried to apply age-old public nuisance theory to the epidemic, with mixed results. Now, other mass tort claimants are seeking to use the same theory. It was a surprise to some that public nuisance theory had not been more developed prior to opioids, especially after years of mass products-liability litigation. But aggregate national settlements, including and especially MDL, often generalize about state tort laws rather than develop them. This occurs despite the fact the Erie doctrine still requires federal courts to apply the substantive law of the several states and to recognize differences across them.¹⁴⁷

Judge Weinstein famously argued that courts could apply a generalized concept of tort law—what he called “national consensus” tort law—reasoning that states would likely adopt similar approaches to liability in the Agent Orange MDL.¹⁴⁸ MDL

¹⁴² 11 U.S.C. § 521(a) (requiring disclosure of assets and liabilities); FED. R. BANKR. P. 2015 (imposing monthly reporting requirements on changes, expenditures and assets in the estate); FED. R. BANKR. P. 2004 (permitting an examination of “any party in interest” which includes third parties, but only when related to “the acts, conduct, or property . . . of the debtor.”). *See also* Simon, *supra* note 82, at 1207.

¹⁴³ Melissa B. Jacoby, *Fake and Real People in Bankruptcy*, 39 EMORY BANKR. DEV. J. 497, 512 (2023); Elizabeth Chamblee Burch & Alexandra D. Lahav, *Information for the Common Good in Mass Torts*, 70 DEPAUL L. REV. 345 (2022);

¹⁴⁴ Michael Gold, *Facing 200 Abuse Claims, Diocese Becomes U.S.'s Largest to Seek Bankruptcy*, N.Y. TIMES (Oct. 5, 2020), <https://www.nytimes.com/2020/10/01/nyregion/29ockville-centre-diocese-bankruptcy.html>.

¹⁴⁵ Press Release, Survivors Network of Those Abused by Priests, Civil Lawsuits and a Decline in Attendance are to Blame According to Church Officials in Buffalo (May 12, 2022), https://www.snapnetwork.org/civil_lawsuits_and_a_decline_in_attendance_are_to_blame_according_to_church_officials_in_buffalo.

¹⁴⁶ *See* Burch & Gluck, *supra* note 10.

¹⁴⁷ *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)..

¹⁴⁸ *In Re Agent Orange Litig.*, 580 F. Supp. 690, 692-93 (E.D.N.Y. 1984).

judges have said they tend to “mush” state legal doctrine together when settlement is on the table. But this is a problem they can and should remedy—even if the goal is settlement. MDL judges have ample opportunities to review the applicability of state law or hear motions to dismiss, and some MDL judges are starting to focus on this kind of course correction.¹⁴⁹ States’ law on public nuisance developed through the opioid litigation in state courts where AGs brought their own actions.¹⁵⁰ Even in the Opioid MDL, some cases were remanded to transferor courts that applied local law in bellwether trials.¹⁵¹

Commentators have already documented how the steady increase of cases aggregated in federal courts has left us with a “hollowed out common law.”¹⁵² But for bankruptcy judges, the fit between state law and the industry behavior is rarely even on the table. If bankruptcy becomes the primary repository for resolving mass-tort claims, corporations will be able to avoid internalizing the costs of wrongdoing and the generous statutes of limitation that states may enact for claimants like sex-abuse survivors. New tort theories brought by plaintiffs in their suits may lie undeveloped, or never be raised at all. Innovation will come not through novel tort theories, but through procedural tweaks and adjustments that force the bankruptcy wagon to deliver a load it was never designed to hold.

E. Decentralized Decision making: Federalism and Reviewability

In the world of procedure, observations about the value of having multiple impartial decisionmakers are far from new. Robert Cover argued that jurisdictional redundancy has utility in reducing error and judicial bias and in encouraging salutary development of the common law through multiple layers of independent judicial review.¹⁵³ Cover and Aleinikoff made a parallel argument for benefits of a federalist court system, with concurrent jurisdiction in areas like torts.

Two of us have written elsewhere how multidistrict litigation circumvents federal appellate review and jurisdictional redundancy for mass torts.¹⁵⁴ Through its automatic stay, bankruptcy even more dramatically short circuits any hope of having decentralized decisionmakers.

When we add in the nondebtor releases, the impact goes further still. Nondebtors like the Sacklers have convinced bankruptcy courts to enjoin civil lawsuits against them under standards and circumstances that would never fly under the Anti-Injunction

¹⁴⁹ *Opinion and Order Regarding Application of the Court's Prior Rulings on Manifestation, Incidental Damages (Lost Time), and Unjust Enrichment to All Remaining Jurisdictions in Dispute (MDL Order No. 131 Issues)*, *In re Gen. Motors LLC Ignition Switch Litig.*, No. 14-md-02543 (S.D.N.Y. Sept. 12, 2018), ECF No. 6028; *See, e.g., In re Roundup Prods. Liab. Litig.*, No. 16-md-02741-VC (N.D. Cal. 2021).

¹⁵⁰ *In re Opioid Litig.*, No. 400000/2017 (N.Y. Sup. Ct. Dec. 30, 2021); *State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719 (Ok. 2021).

¹⁵¹ *City of Lake v. Purdue Pharma, L.P.*, 622 F. Supp 3d 584 (N.D. Ohio 2022); *City & Cty. of San Francisco v. Purdue Pharma L.P.*, 620 F. Supp. 3d 936 (N.D. Cal. 2022).

¹⁵² Florencia Marotta-Wurgler & Samuel Issacharoff, *The Hollowed Out Common Law*, 67 U.C.L.A. L. REV. 600 (2020).

¹⁵³ Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 646–75 (1981).

¹⁵⁴ Burch & Gluck, *supra* note 10.

Act.¹⁵⁵ The injunction issued in favor of the Sacklers even enjoined government actions, something the Bankruptcy Code arguably carves out of the protections afforded to even debtors themselves.¹⁵⁶

Bankruptcy can likewise stymie any hope a mass-tort claimant has for an appeal. In the Archdiocese of Saint Paul & Minneapolis case, for instance, abuse survivors had to seek compensation from a trust, which used a Survivor Claims Reviewer to determine individual awards. The only appellate option was to pay \$500 within ten days to appeal to the same reviewer.¹⁵⁷ As Lindsey Simon describes, the “Survivor Claims Reviewer may then, solely on his own discretion, decide to review his own decision, and the amount awarded to the claimant could either go up or down.”¹⁵⁸

When it comes to federalism, as noted, bankruptcy disrupts the constitutional court structures even more than does MDL overreach. Corporate defendants, not plaintiffs, get to choose where to file, which often dictates which judge they will receive, and which precedential norms will govern whether grifters can tag along. The result is that most mass-tort claimants will find themselves in a far-flung court; for state-court claimants who filed at home and expected local adjudication in local courts, these transfers may be particularly dramatic. The non-opt-out, often cross-country-to-a-strange-court-and-strange-lawyer venue transfer in MDL raises serious enough due process concerns, but at least there, plaintiffs’ claims are in a court designed to hear some cases on the merits, and are part of a system of apex courts—whether Article III federal courts or state courts—where law development and judicial review are expected at least some of the time.

Dispute resolution, payment, and closure alone do not generate public litigation values. Fiss’s arguments “against settlement” nearly forty years ago apply even more forcefully to bankruptcy.

The dispute-resolution story makes settlement appear as a perfect substitute for judgment... by reducing the social function of the lawsuit to one of resolving private disputes: In that story, settlement appears to achieve exactly the same purpose as judgment-peace between the parties-but at considerably less expense to society. . . . In my view, however, the purpose of adjudication should be understood in broader terms. . . [Judges’] job is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them....

. . . To be against settlement is not to urge that parties be ‘forced’ to litigate .
. . To be against settlement is only to suggest that when the parties settle,

¹⁵⁵ 28 U.S.C. § 2283; *In re Purdue Pharma L.P.*, 633 B.R. 53, 86 (Bankr. S.D.N.Y. 2021). Melissa Jacoby has dubbed this practice “tailgating.” Jacoby, *supra* note 77, at 1762.

¹⁵⁶ 11 U.S.C. § 362(b)(4); *In re Purdue Pharma L.P.*, 633 B.R. 53, 86 (Bankr. S.D.N.Y. 2021).

¹⁵⁷ Simon, *supra* note 82, at 1201.

¹⁵⁸ *Id.*

society gets less than what appears, and for a price it does not know it is paying. Parties might settle while leaving justice undone.¹⁵⁹

CONCLUSION

The significance of the Purdue Pharma bankruptcy settlement goes far beyond the narrow question of whether nondebtor releases are permissible in bankruptcy. It goes to the question of how much procedural innovation we are willing to tolerate in the name of global settlement, even if at the expense of the core public values of litigation. Approving the Sackler releases would galvanize even further the unorthodox use of bankruptcy to resolve mass torts for solvent companies. It would result in less information production, less law development, less judicial review, less federalist percolation, less due process, and fewer opportunities for plaintiffs to make their stories heard.

This won't be the last procedural innovation in the quest for global peace. The history of mass resolution demonstrates that the perpetual search for a global resolution forum is a natural and enduring feature of mass litigation. From private settlement to class action, to MDL, and now to bankruptcy, the story of mass torts is much as story about attorney and judicial inventiveness as it is as about law.

In the MDL context, we have been arguing for years now that some guardrails are needed to ensure that the benefits of MDL are not outweighed by its risks to constitutional protections. The same goes for bankruptcy. Otherwise, just as in MDL, bankruptcy will continue to evolve as an unorthodox procedural vehicle without barriers until it fails to satisfy the needs of certain kinds of claimants or state actors rebel at how it undermines federalism. Those actors will then do what all enterprising parties have done for the past forty years: they will innovate anew. The conversation will begin afresh without ever reaching the core point of Fiss's admonitions.

¹⁵⁹ Owen Fiss, *Against Settlement*, 93 Yale L.J. 1073, 1085 (1984)