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

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Against Bankruptcy?: Public Litigation Values Versus the Endless Quest for Global Peace in Mass Litigation

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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 Supreme 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 called "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

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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 anew. 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 helped 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

> *"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."*
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> - LTL Mgmt., LLC, 637 B.R. 396, 414 (Bankr. D.N.J., Feb. 25, 2022).

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 roughly $10 billion bankruptcy deal coming out of the national opioid crisis that purports to resolve the thousands of current and future tort claims against the company and—controversially—also against its former family owners, the Sacklers.[1] The case offers just one of many recent examples of 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—the end of all lawsuits—in complex civil litigation.

[1] *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).

Consider the risks. Unlike ordinary state and federal trial courts, bankruptcy courts don't generally assign responsibility for widespread harm; they preserve and efficiently distribute resources. Petitioners in bankruptcy aren't called "victims" or "plaintiffs"; they are called "creditors" with limited voting rights over the distribution of an estate. Bankruptcy courts don't typically develop state tort doctrines. They streamline. They don't engage in broad discovery designed to reveal accountability and spur policy reform. Instead, they focus on the debtor's financial health.[2] And, because bankruptcy's culture centers on efficiency and preserving assets, bankruptcy courts rarely utilize juries or hear testimony from tort victims anxious to have their day in court.[3]

These risks are intensely exacerbated when cases come to bankruptcy prematurely—often to escape litigation—and before matters like liability, applicable law, causation, and claim valuation are fully fleshed out. The Sacklers' deal is especially provocative in this regard, as it provides an unorthodox off-ramp from the tort system, preventing the thousands of opioid plaintiffs from ever litigating their cases against them. The narrow question the Court will decide is whether solvent third parties—like the Sackler family—can rely on the bankruptcy of a different entity to avoid lawsuits without declaring bankruptcy themselves. But we are focused on a broader aspect of these developments that may also interest the Court: the swelling tide of bankruptcy cases as the purported salve for unresolvable mass litigation in our intentionally redundant federalist litigation system.

Sprawling mass torts have created this pressure for centralized settlement. An unprecedented number of diverse defendants, including but beyond Purdue, have recently filed for bankruptcy—from the Catholic Diocese and Boy Scout abuse cases, to Johnson & Johnson talc, 3M earplugs, Revlon hair straighteners, and several other defendants in the massive national opioid litigation.[4] These defendants turn to bankruptcy to compensate for what their court filings call the "failure" of traditional litigation to expeditiously extinguish all lawsuits.[5] And they are calling on the bankruptcy court, just like they called on the multidistrict-litigation court before it and

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[2] *E.g.,* 11 U.S.C. § 521(a) (requiring disclosure of assets and liabilities).

[3] Personal injury and wrongful death claims can be tried in an Article III district court where a bankruptcy is pending. 28 U.S.C. § 157(b)(5); § 1411(a). But the pressure to resolve claims means that few bankruptcy cases actually go to trial. *See* S. Elizabeth Gibson, JUDICIAL MANAGEMENT OF MASS TORT BANKRUPTCY CASES 82-90 (Fed. Jud. Cntr. 2005).

[4] *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).

[5] *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.").

the class-action court before that, to use its 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 federal district court—is surprisingly the only court with sufficient power to address the burden of nationwide litigation.[6] Bankruptcy court's novel procedures offer the tantalizing prospect of something parties 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. The American litigation system reflects our national federalism: 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. Nevertheless, the pressure exerted by mass torts continues to push indefatigable lawyers and judges to innovate solutions—many of which distance us from the traditional trial system's public values: transparency, accountability, participation, law development, due process, educating the public, jurisdictional redundancy, and more.

Indeed, bankruptcy courts are attractive in part because they are the only American courts that can overcome federalism's jurisdictional boundaries; they are the only courts that, through Bankruptcy Code § 362, have 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 that trumps all others in public litigation.

The key question is what purpose the court system is supposed to serve in cases involving widespread public harm. 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?

There is a long history of creative procedures in service of these goals. In Part I we detail litigants' attempts at global resolutions, which, over time, have relied on private claim resolution facilities,[7] the modern class action, state attorney general multistate actions, and most recently and dramatically, multidistrict litigation (MDL).[8]

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[6] These concerns do not turn on differences between Article I and Article III power. They would also apply if Congress made bankruptcy judges Article III judges, as some recommend. *See* Nat'l Bankr. Rev. Comm'n the Next Twenty Years § 3.1, at 718 (1997).

[7] 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 & 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.").

[8] 28 U.S.C. § 1407; Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. REV. 1, 9-10 (2021).

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,[9] and have been widely hailed as a way to bring cross-country litigation like opioids to a close.

But MDL, as we have detailed elsewhere, has proved controversial—raising constitutional questions about the extent of the court's jurisdiction and whether MDL offers sufficient due process safeguard for plaintiffs.[10] And in the opioid litigation, despite the fact that the MDL's gravitational pull and the sheer ambition of district judge at first seemed enough to resolve thousands of state and federal cases in a single (federal) forum, it has not achieved the "global peace" that was promised. And so, the door opened for yet another procedural innovation.

Enter bankruptcy. As we detail in Part II, Purdue Pharma filed for bankruptcy on September 15, 2019. Two manufacturer defendants, Mallinckrodt and Endo, followed in October 2020 and August 2022,[11] actions mirrored by defendants across a number of industries to resolve mass-tort claims. Many courts, in reviewing the propriety of these bankruptcy filings, have explicitly refused the invitation to opine on what the cases say about the "relative merits or demerits of the MDL."[12] And yet by raising the question and refusing to answer, the question hangs in the balance.

What's to be gained and what's to be lost by the turn to bankruptcy? Trials are elusive in all court systems. But no other court—not even the U.S. Supreme Court—can exercise jurisdiction over both state and federal court cases in the same way.[13] Bankruptcy also solves the white-whale problem of preclusion; the Code, in section 105,[14] gives the bankruptcy court broad equitable authority to bind all current and future claimants in a single proceeding without satisfying the complexities of Rule 23's class action, the Anti-Injunction Act, or traditional preclusion doctrines.

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[9] *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).

[10] *See generally* Gluck & Burch, *supra* note X; Elizabeth Chamblee Burch & Abbe R. Gluck, *Plaintiffs' Process: Civil Procedure, MDL, and A Day in Court*, 42 REV. LITIG. 225 (2023).

[11] *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 the litigation coming out of the 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.

[12] In re Aearo Technologies LLC, 642 B.R. 891, 902 (Bankr. S.D. Ind. 2022).

[13] 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).

[14] 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.[15] There are benefits to at least some redundancy in mass tort litigation. Litigation can serve a variety of salutary goals in public harm cases, including testing the value of claims and holding wrongdoers accountable; unearthing valuable and often secreted industry information; and developing substantive law. In opioids, the structural redundancy from the dueling systems produced important discovery, assigned responsibility, 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 performs a valuable function for all parties, preclusion without due process guardrails for plaintiffs—a major concern also raised by MDL—is something to worry about.

If the sole goal of litigation in public health suits 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 claims, settle them at a premium, and use less protracted and less costly procedures than those demanded by Article III and state courts.[16] But these assumptions are contestable. The bankruptcy statute doesn't clearly bind public plaintiffs. And the Supreme Court has never actually settled that bankruptcy courts have the power to bind the claims of people like those exposed to asbestos but with no present injury.

Bankruptcy itself is also very expensive. Johnson & Johnson's failed attempts cost $178 million in attorneys' fees alone.[17] And bankruptcy payouts to mass-tort plaintiffs hardly seem like its greatest selling point: plaintiffs killed by addictive opioids in *Purdue* stand to gain only between $3,500 to $48,000 a claim.[18] Indeed, practitioners worry defendants enjoy more leverage over tort plaintiffs in bankruptcy and bankruptcy judges tend to be less generous than state courts—not least because of the wide latitude businesses enjoy over where and when they file for bankruptcy.[19] While that's an empirical claim in need of testing, the procedural point is that even if bankruptcy provides more uniform recovery across plaintiffs, those awards may not reflect the legal merits of plaintiffs' claims without meaningful opportunities to litigate in state and federal court.[20] Funds promised in bankruptcy to victims may also completely evaporate when creditors force a second bankruptcy without the victims' consent, as

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[15] Burch & Gluck, *supra* note 12.

[16] *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).

[17] 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.

[18] 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

[19] *See, e.g.,* Levitin, *supra* note **Error! Bookmark not defined.** (identifying judge-shopping problems in bankruptcy); Robert K. Rasmussen, *COVID-19 Debt and Bankruptcy Infrastructure*, 131 YALE L.J. F. 337, 356-61 (2021) (addressing judge-driven venue issues).

[20] *See* Gibson, *supra* note 3, at 82. Unlike asbestos bankruptcies in the 1980s, where litigation matured to the point at which defendants stopped contesting liability and general causation, *id.* at 82-83, the Sackler family did not face any trials before the Purdue bankruptcy.

occurred in the Mallinckrodt restructuring, or when other sophisticated creditors simply secure more favorable deals than tort claimants.[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, as well as opioids, offer a prime example of these values:. From traditional discovery in both contexts, evidence about manufacturers' strategy to encourage addictive use of their products emerged that not only made companies accountable, but also help spur legislative policy change.[23] Such evidence likely never would have come to light in a streamlined bankruptcy proceeding.

Those who argue the Bankruptcy Code could rather easily be used or "tweaked" to generate litigation values look to 28 U.S.C. 157, which delineates proceedings bankruptcy judges may preside over and specifies how district courts can hear related personal injury tort claims. As a practical matter, however, one rarely sees trials in bankruptcy; bankruptcy judges aren't routinely sending their cases out to district or state court to develop tort law or test claims. There's a reason why victims of the opioid crisis cried that Purdue was avoiding responsibility when it filed for bankruptcy, and why victims of the Catholic Diocese claimed that the Diocese's Chapter 11 filing deprived them of their chance to tell their story and hold wrongdoers to account.[24] That's not why parties turn to bankruptcy: Bankruptcy's culture is to streamline.[25] This may also explain why similar proposed reforms to mass tort bankruptcies have failed.

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.[26] 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.[27] As we detail in Part III, we likewise believe that public goods from litigation are at risk when mass-tort actions move into more unorthodox terrain.

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[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 ___

[23] *E.g.*, CONGRESSIONAL BUDGET OFFICE, THE OPIOID CRISIS AND RECENT FEDERAL POLICY RESPONSES (Sept. 2022); Brian Mann, *4 U.S. Companies Will Pay $26 Billion to Settle Claims They Fueled the Opioid Crisis*, NPR (Feb. 25, 2022 7:39 AM), https://www.npr.org/2022/02/25/1082901958/opioid-settlement-johnson-26-billion.

[24] *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).

[25] This may also explain why similar, proposed reforms to mass tort bankruptcies have failed. *See infra* Part II. A.

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

[27] *Id.*

We are not naïve. We know that more traditional litigation is not necessarily generating all of Fiss's public values either. For instance, only 2% of class-action cases go to trial; only 1.5 % of MDLs.[28] And in many cases, truly financially distressed defendants look to bankruptcy court only after litigating in state and federal courts. Indeed, once tort cases have matured and really fleshed out the merits, litigation values have been gained, and more process may be less valuable relative to bankruptcy's efficient procedure. But that's not what happened in the Sacklers' case. And is it these unorthodox maneuvers that short circuit all or most litigation goods that are our primary concern.

Our aim here is not to definitively resolve the question of whether nondebtor releases are *per se* unlawful or whether there may be some instances where they should be permitted. Defendants like the Sacklers, however, are calling on the bankruptcy court to provide a workaround to the basic federalist, law-generative, and publicly accountable features of our civil justice system in the name of efficient financial settlement. The case thus 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 and contend that sprawling lawsuits across national courts have thrown them into unresolvable crisis.[29] Much is at stake: Depending on how one counts, nearly one out of every two pending cases on the federal docket is part of a major mass tort.[30]

Bankruptcy won't be the last form of unorthodox civil procedure, but the emergence of this new phenomenon in our litigation system also brings into relief its risks: the potential to 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

How did we get to the point where bankruptcy became the resolution mechanism of choice for many corporate defendants? 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 expand on traditional authorities. Generally, unorthodox procedures are the symptom, not the cause, of traditional legal procedures 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 expedited rulemaking and "agency class actions"; and in the court system, where the most salient development until now has been transformation of MDL into an aggressive, coordinating mechanism to compensate for class action's weaknesses.[31]

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[28] *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/.

[31] Abbe R. Gluck et al., *Unorthodox Lawmaking, Unorthodox Rulemaking*, Colum. L. Rev. (2015). Michael D. Sant'Ambrogio & Adam S. Zimmerman, *Inside the Agency Class Action,* 126 Yale L. J. 1634 (2017).

In our civil litigation system, unorthodox procedures often emerge from the substantial discretion afforded to judges and parties under an array of statutes and court procedures.[32] These include equitable and gap-filling rules that allow courts to manage cases, as in Federal Rule of Civil Procedure 16, or to "issue any order, process, or judgment that is necessary or appropriate" to fulfill a court's fundamental objectives, as in Section 105 of the Bankruptcy Code.[33]

Unorthodox doesn't always mean "bad." We have previously written about some benefits of MDL, including how it has increased access to court.[34] 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, an obstacle to aggregation, or an obstacle to dispute resolution. Unorthodox civil procedure may be an inevitable development of a procedure system—and the doctrines that implement it—not evolving with the needs of a modern national economy. But as new procedures emerge, it is important to articulate the protections and values that may be lost if they are not rigorously preserved, even if within a new model.

A. A Brief Tour Through Obstacles to Aggregation and Finality

To understand the emergence of bankruptcy as an off-ramp to the tort system, reviewing previous procedural innovations is helpful—bankruptcy isn't the first and likely won't be the last. Today, the goal of most parties in aggregated cases is "global peace." Global peace means extinguishing nearly all[35] parallel as well as future claims (when there is a lag between exposure and injury), a not-intuitive goal in a system that is premised on 51 state court systems and a parallel federal court system with jurisdictional barriers between them. Nor is global peace a necessarily obvious goal for a legal system that is predisposed to disfavor precluding new plaintiffs and favor giving them their day in court.

In 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 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 class actions, the formal litigation tool for organizing large numbers of common claims with due process guardrails, increasingly

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[32] 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 _ at 1672; Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 426-27 (1982).

[33] 11 U.S.C. § 105(a); FED. R. CIV. P. 16; Foohey & Odinet, supra note _, at 1284.

[34] Gluck & Burch, supra note __; Adam S. Zimmerman, *The Bellwether Settlement*, 85 FORDHAM L. REV. 2275 (2017).

[35] Bankruptcy enthusiasts tend to overstate bankruptcy's benefits with respect to compelling 100% participation, MDLs and class actions frequently produce "global" peace with some holdouts or opt outs. Even in the context of the Opioid Litigation, a small number of non-participants was not seen as a threat to the $26B dollar global settlement with opioid distributors. Nate Raymond, *Drug Distributors, J&J Agree to Finalize $26 Bln Opioid Settlement*, Reuters, Feb. 25, 2022 (declaring 90% participation "sufficient" for deal).

difficult to certify. This is especially true for mass torts where the Supreme Court's high bar for commonality poses a challenge when individuals experience diverse harms and when claims involve different underlying state law torts from various jurisdictions. This near death-by-doctrine of the mass-tort class action fed the quest for other aggregation mechanisms—like MDL.[36]

Third, later-coming unorthodox aggregation mechanisms, like MDL, have had a hard time figuring out if they can constitutionally preclude (prevent from future litigation) non-consenting plaintiffs via settlement. In the opioids MDL, there were many attempts at procedural innovation in the name of global resolution, including an (ultimately unsuccessful) attempt to invent a new type of class action.[37]

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 repurpose, tweak, and curate new aggregate forms when previous efforts fail.[38] After one of the Supreme Court cases that substantially undermined expansive class actions, *Amchem Products, Inc. v. Windsor*,[39] two noted plaintiffs' lawyers wrote, "The aggregation of mass harm cases in federal courts did not end with *Amchem* . . . it just took more experimental and less transparent forms."[40] MDL was born from this determination and creativity. And then, when MDL failed to produce the global resolution desired, enterprising parties, "driven by various interrelated shortcomings of and abuses in the tort system," turned to bankruptcy.[41]

As we take a brief tour through the evolution of aggregation vehicles below, we note that they are not mutually exclusive. Today, creative lawyers sometimes combine different features of various unorthodox vehicles in a single litigation or borrow features from one model to innovate procedure in another. Here we do not focus on that dynamic feedback loop, but rather on the features of each mechanism that make them attractive lawyers and/or raise constitutional concerns.

A. Vehicles that Have Emerged to Overcome the Obstacles: Private Dispute Resolution, Class Action, Attorney General Multistate and MDL

Mass civil harms affect people today, as well as populations whose injuries may not manifest for years.[42] Some may involve a single mass disaster,[43] but they also may

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

[37] Francis E. McGovern & William B. Rubenstein, *The Negotiation Class: A Cooperative Approach to Class Actions Involving Large Stakeholders*, 99 Tex. L. Rev. 73 (2020).

[38] 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 ...").

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

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

[41] 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.

[42] 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.).

[43] Campbell Robertson, *In Town Where Train Derailed, Lawyers Are Signing Up Clients in Droves,* 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*

implicate evolving standards and conduct for whole industries and distribution chains. They are a national problem in a federalist system,[44] and so the complexity of the quest for single resolution is not surprising.

Global settlement offers something for both would-be plaintiffs and defendants. For plaintiffs, comprehensive bargains eliminate the race to the courthouse and 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 or consume limited funds. And, for defendants, global resolutions promise an efficient and predictable end to litigation risk, especially attractive when a common course of conduct gives rise to hundreds or thousands of claims, both present and future.[45]

It is worth emphasizing two more things at the outset. First, global peace does not equal "solving a public health crisis." As we detail in Part III, litigation produces outputs—such as accountability, information, law development, and money—that help spur legislative and industry reform, but litigation alone almost never solves the problem. And second, procedural innovation in the name of global peace sometimes produces rivalry from other litigation stakeholders concerned about any one forum or kind of litigant gaining too much power. That leads to innovation anew.

1. Corporate Dispute Resolution

The earliest efforts to adopt informal procedures to resolve large numbers of complex cases emerged in response to the rise of industrial accidents at the end of the Nineteenth Century.[46] Industries often relied on intermediaries to broker and categorically settle on behalf of whole groups of immigrant workers injured on the shop-room floor. These private, corporate forms of dispute resolution dominated throughout the Twentieth Century.[47]

Take the Owens Corning National Settlement Program, one of the few such programs for which there is public information. As Congress considered legislation to respond to the growing number of asbestos claims in the litigation system, Owens Corning held up its own innovative, mass contract-based settlement program as an inexpensive alternative to the litigation system.[48] By convincing over 100 of the leading plaintiff-side asbestos law firms to participate, it created a wholly owned subsidiary to

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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/.

[44] 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).

[45] 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 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) .

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

[47] H. LAURENCE ROSS, SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT (1980).

[48] See Abeln Testimony, *supra note _,* at 137-42.

administer its own private National Settlement Program (NSP) and offered quick payouts according to standardized medical criteria.[49]

Others followed with similar settlements, which proved short-lived. New entrepreneurial plaintiff-side firms entered the market and declined to participate in programs like the NSP; they opted instead to return to the courts, extracting larger verdicts and settlements. Without the power of the state to offer some form of broader binding legal relief, innovative plaintiff-side law firms with disruptive litigation business models rose to challenge established corporate settlement arrangements and promise higher awards to claimants.[50]

2. Class Actions

The modern class action rules were borne out of a response to another corporate defendant's innovation—when a railroad company in 1953 "ingeniously" sought to certify a declaratory class action after 7,000 plaintiffs sued dozens of corporate and governmental entities in state and federal courts across the country after an explosion.[51] Despite describing the idea as "so tempting that the plan deserves the closest scrutiny,"[52] the district court held that it simply could not act without more formal legislation from Congress.[53]

Reformers charged with revising the Rule 23 class action in 1966 cited the case for the proposition that courts should be wary of mass-tort class actions.[54] But despite caution from the Rule's drafters, a wave of mass-tort classes emerged in the 1980s and 1990s, after the famously creative Judge Jack Weinstein certified a settlement class for the more than two million sickened veterans in *Agent Orange*.[55] Nevertheless, the class action's guardrails for notice and representation were thought to protect plaintiffs and ensure due process—which in turn enabled preclusion, a key benefit that later-coming alternatives have struggled to emulate.

But in 1997, the Supreme Court substantially changed course in *Amchem Products, Inc. v. Windsor*.[56] 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

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[49] 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; RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT 109-10 (2007).

[50] Cf. J. Maria Glover, *Mass Arbitration*, 74 STAN. L. REV. 1283, 1289 (2022) (documenting new plaintiff-side business models that challenge corporate dispute resolution.)

[51] Pennsylvania R.R. v. United States, 111. F. Supp. 80, 85 (D.N.J. 1953).

[52] *Id.*

[53] *Id.* at 91.

[54] *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.").

[55] 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/

[56] 521 U.S. 591 (1997).

raise common questions given the range of exposures, products, laws, and people implicated.[57] Writing for the majority, Justice Ginsburg said the proposed settlement "changed" the class action into something far beyond what Congress intended.[58]

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 *Amchem*'s commonality and representation issues. As one commentator noted, the class-action framework after *Amchem* felt "less necessary and far less convenient."[59] Leading plaintiffs' attorney Elizabeth Cabraser argues that *Amchem* "transformed Federal Rule of Civil Procedure 23(b)(3)'s 'superiority' requirement into a mandate of perfection."[60]

It is important to note that *Amchem* and cases like it did not end the use of class actions to resolve mass torts. Class action innovations continue to this day, often within MDLs.[61] 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 Actions and Other Government Actors

State Attorneys General (AGs) in the 1980s figured out a new way to structurally aggregate and settle collectively without actually aggregating or undermining federalism. The AG "Multistate" was an innovation first developed by a small group of Attorneys General in the 1980s in environmental litigation and evolved to allow AGs to file cases in their own various state courts, but share resources, discovery, and leverage.[62] In the years that followed, State AGs used the multistate action to produce elaborate settlements for major public issues (sometimes crowding out private litigation), including Master Settlement Agreement for tobacco, the National Mortgage Foreclosure Settlement,[63] and in the opioid litigation itself.[64]

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[57] Id. at 622.

[58] 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).

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

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

[61] Adam S. Zimmerman, *The Class Appeal*, 89 CHI. L. REV. 1419 (2022) (tracing evolution); Francis E. McGovern & William B. Rubenstein, *The Negotiation Class: A Cooperative Approach to Class Actions Involving Large Stakeholders*, 99 Tex. L. Rev. 73 (2020) (detailing class action innovation").

[62];Jason Lynch, *Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation*, 108 COLUM. L. REV. 1998 (2001).

[63] *See, e.g.,* 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 athttp://naag.org/state-attorneys-general-feds-reach-25-billion-settlement-with-five-largest-mortgage-servicers-on-foreclosure-wrongs.php; State AGs, The Tobacco Settlement, www.staateag.org/initiaitves/the-tobacco-settlement; State Attorneys General Reach A $26 Billion National Opioid Settlement : NPR.

[64] *See, e.g.,* 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 athttp://naag.org/state-attorneys-general-feds-reach-25-billion-settlement-with-five-largest-mortgage-servicers-on-foreclosure-wrongs.php; State AGs, The Tobacco Settlement, www.staateag.org/initiaitves/the-tobacco-settlement; State Attorneys General Reach A $26 Billion National Opioid Settlement : NPR.

But the heyday didn't last. Dissatisfaction from localities and public health experts with how the AGs distributed money in their landmark $250 billion tobacco settlement spurred the key innovation in the opioid MDL that, in turn, also made the MDL harder to resolve:[65] Frustrated cities and counties—represented by private law firms on a contingency basis—sued on their own, even before the AGs became central players. The localities' actions generated tensions with the AGs, who had planned "old fashioned" multistate suits in their own state courts. Ultimately, the leverage exerted by the thousands of localities in MDL was enough to pressure the AGs to come to the federal table for settlement, at least sometimes, even though their own state cases were outside the federal MDL court's jurisdiction.[66]

Parroting opioids, school boards and even water districts are now joining cities to bring more MDLs in federal court to litigate issues of national concern—including global warming, social media addiction in children, vaping in schools, and forever chemicals in rivers and streams—independent of state AG action.[67]

4. Multidistrict Litigation

Finally, MDL has evolved into a principal 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.[68] The animating idea was that cases would be coordinated 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. Although there are sometimes bellwether trials in the MDL, trials are rare. Approximately 99% of MDL cases are resolved in the MDL, not in their home-court jurisdiction.[69] Unlike class actions, MDLs offer no opt-out and no formal rules about representation; plaintiffs not infrequently find their filed cases dragged across the country without consent and their representation taken over by appointed counsel different from the one they hired, all thanks to how MDL works as a venue transfer on steroids.

MDLs also allow for almost no appellate review. Because all the significant action is generally pre-trial, and because federal courts require a "final" order prior to appeal, there are very few opportunities to appeal even the most determinative MDL decisions. And with an eye toward settlement rather than motion practice, MDL judges

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[65] Experts complained that money swelled state legislative coffers instead of addressing cessation and prevention. *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.

[66] *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).

[67] *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.

[68] 28 U.S.C. § 1407; *see* Andrew Bradt, *A Radical Proposal: The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831, 854 (2017).

[69] Elizabeth Chamblee Burch & Margaret S. Williams, *Perceptions of Justice in Multidistrict Litigation: Voices from the Crowd*, 107 CORNELL L. REV. 1835, 1851 (2022).

sometimes delve unfortunately 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.[70] Parallel state actions are often asked to share discovery and settle at the federal-court table. State case lawyers are even often asked to contribute to the federal MDL's attorney's fees.[71] 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 fact sheets in lieu of traditional complaints and *Lone Pine* orders that test expert evidence and cull claims without a motion for summary judgment.[72] A final mass settlement in an MDL can include "closure" provisions that attempt to bind as many litigants as possible—including "walk away clauses" that require close to 100% participation in the settlement, terms that make participating attorneys recommend the settlement to all of their eligible clients and, more controversially, withdraw from representing any client who refuses to settle.[73] But MDL lawyers and judges have yet to figure out how to preclude litigants who have not yet filed—one of the class action's special powers.

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."[74] Thousands of 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.[75] His goal was to "do something meaningful to abate the crisis" within a year."[76]

As the parties searched for a mechanism to resolve all 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 settlement.[77] 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."[78] Frustrated by the opioid MDL and others, creative lawyers adapted again—this time, turning to bankruptcy.

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

[71] Burch & Gluck, *supra* note 12, at 14.

[72] See, e.g., Nora Freeman Engstrom, *The Lessons of* Lone Pine, 129 Yale L.J. 2 (2019).

[73] ELIZABETH CHAMBLEE BURCH, MASS TORT DEALS: BACKROOM BARGAINING IN MULTIDISTRICT LITIGATION 40-54 (2019).

[74] Burch & Gluck, *supra* note 12.

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

[76] *Id.*

[77] McGovern & Rubenstein, *supra* note XX.

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

II. BANKRUPTCY TO THE RESCUE?

Seen in this context, bankruptcy has-emerged as the latest forum promising global peace. This is not the first time bankruptcy has been used this way. Long ago, Congress created a formal process for financially distressed asbestos companies to resolve large volumes of claims. 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 hair relaxers and air bags. Bankruptcy is tantalizing in mass actions because it brings two extraordinary powers: the power to stay parallel litigation (along with all other claims against the debtor) regardless of where the litigation was filed, and the power to finally resolve all pending claims and bar future claims against the debtor company, including future tort lawsuits.

Bankruptcy rules exist precisely so that claims against businesses in financial distress can proceed in an orderly way, notwithstanding our traditional dual system of state and federal courts. But traditionally, legal claims are filed, tested, even valued first by the tort system before bankruptcy occurs. Bankruptcy was never designed as the primary vehicle for resolving mass-tort lawsuits.[79] But bankruptcy judges took Congress's special authorizations for asbestos cases as license to adapt in unorthodox ways.[80]

Below we discuss two recent such unorthodox moves. First, repeat-player lawyers have aggressively innovated to deliver bankruptcy's finality for third-party tailcoat riders, like the billionaire Sackler family in Purdue.[81] Second, behemoth companies like Johnson & Johnson have tried cleave off a piece of themselves and saddle that new piece with company's mass-tort liabilities—and then dispose of them in bankruptcy, the so called "Texas Two Step."

When combined with bankruptcy's role in centralizing decentralized federalist claims and finally resolving past, present, and future claims, these two innovations go beyond other forms of "unorthodox" procedure and rulemaking that we have identified, especially where entities aren't financially distressed and claims haven't first been fleshed out in the tort system. They not only shift power and leverage to defendants, but threaten to shut off traditional tort process—and with them the public benefits of litigating mass harm cases—entirely.

A. The High Stakes of Purdue's Bankruptcy Maneuver: Channeling Injunctions and Releases for Solvent Nondebtors to Achieve Global Settlement

In fall 2019, Purdue Pharma filed for Chapter 11 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 Bankruptcy Code § 362—a provision that allows the court to temporarily halt all federal and state

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[79] Alan A. Resnick, *Bankruptcy as a Vehicle for Resolving Enterprise-Threatening Mass Tort Liability,* 148 U. PA. L. REV. 2045, 2046 (2000).

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

[81] *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).

litigation—to bring everyone to the negotiating table.[82] This stay persisted for years, included all State AG actions, class actions, and multidistrict litigation, and also created the leverage that made the more controversial aspect of the deal possible.[83]

To complete the deal and assuage concerns that Purdue had lost value due to its family owners' "siphoning" company assets in advance of Chapter 11, Purdue's lawyers relied on an innovative pair of remedies in exchange for the Sacklers' personal $6 billion contribution: third-party releases from all future civil liability for the Sacklers and a channeling injunction that funneled already filed lawsuits against the Sacklers into the Purdue debtor trust instead.[84] This is the unorthodox bankruptcy procedure the Court granted certiorari to decide.

The stakes are high. Although public litigation against other companies involved in the opioid crisis 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 away from the state and federal trial courts into one, solitary bankruptcy proceeding.

Channeling injunctions, which permanently enjoin all lawsuits against certain parties and funnel them into a trust, are a core part of the maneuver. Initially, they were designed to shield only the reorganized corporation (e.g., Purdue Pharma itself)—not nondebtors like the Sackler family. Using nondebtor releases alongside channeling injunctions for third parties began in the 1980s when the bankruptcy court overseeing the Johns-Manville Corporation Chapter 11 filing relied on its broad equitable authority under Bankruptcy Code § 105 to do two things: (1) force present and future asbestos plaintiffs to seek compensation from the trust and (2) release asbestos plaintiffs' claims against nondebtor third parties with very specific financial relationships to the debtor.[85] Congress later blessed these maneuvers in the asbestos context by enacting § 524(g) to assure other asbestos defendants they could use the same strategy.[86]

This new § 524(g) recognized a limited "claim" for people who had been exposed to asbestos, but who had not yet become sick.[87] And instead of allowing plaintiffs to sue certain nondebtor defendants who could contribute to the trust in exchange for releases from liability, the channeling injunction would force present and future asbestos plaintiffs to sue the new bankruptcy trust, which would be funded by the debtor and its nondebtor affiliates.[88] These channeling injunctions thus protected both the debtor manufacturer and a narrow group of nondebtor third parties with specific financial relationships to the asbestos manufacturer like lenders, insurance companies,

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[82] Purdue Pharma, L.P., No. 19-BK-23649 (Bankr. S.D.N.Y. 2019).

[83] There is some question if the automatic stay, when used in this durable manner, goes beyond the limits of protections under Rule 65 of the Federal Rules of Civil Procedure. *See* Jacoby, *supra* note _, at 1762.

[84] Lindsey D. Simon, *Bankruptcy Grifters*, 131 YALE L. J. 1154, 1157-60 (2022).

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

[86] *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, Chairman of the Board, President, and Chief Executive Officer, Manville Corp.)

[87] Bookman & Noll, *supra* note X, at 771–72.

[88] *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).

and past or present affiliate corporations.[89] In exchange, released nondebtors had to contribute substantial funds to the trust, which facilitated settlement.

For asbestos claimants, § 524(g) required a supermajority to approve the reorganization plan.[90] But the voting structure did not differentiate based on the severity of plaintiffs' injuries. Everyone had the same vote to approve or reject the plan—regardless of whether they had mesothelioma or a far less severe disease. This led to worries that those who were sickest could have their vote diluted.

In response, Congress created a commission in 1994 to study the use of bankruptcy.[91] 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. And no releases would be made to third parties.[92] But none of these recommendations ever became law.

Meanwhile, nondebtor releases and channeling injunctions quickly spread beyond the authority Congress had granted for asbestos and without the minimal protections in § 524(g). With § 524(g) technically silent on the use of third-party releases outside of asbestos,[93] and the Code's equity provision allowing bankruptcy courts to "issue any order, process, or judgment that is necessary or appropriate" to fulfill the Code's provisions,[94] enterprising attorneys convinced some bankruptcy judges to issue channeling injunctions and nondebtor releases outside of asbestos.[95]

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 not only Dow Corning, but also its insurers, shareholders, doctors, and distributors from liability.[96] A.H. Robins Company used its bankruptcy to pull in all the women suing over its faulty Dalkon Shield contraceptive device and shield the Robins family as well as the

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[89] § 524(g)(4)(A)(ii)-(iii).

[90] 11 U.S.C. § 524(g) (requiring 75% consent of a class of asbestos claims to approve a channeling injunction). This requirement can be evaded by manipulating the pool of claimants who vote. *See, e.g.,* Jacoby, *supra* note 81, at 1745 n.55; *see also id.* at 1756-58.

[91] NAT'L BANKR. REV. COM'M BANKRUPTCY: THE NEXT TWENTY YEARS (1997).

[92] 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)

[93] *See, e.g.,* 140 Cong. Rec. H10,766 (daily ed. Oct. 4, 1994) (statement of Rep. Brooks) ("the special rule being devised for the asbestos claim trust/injunction mechanism is not intended to alter any authority bankruptcy courts may already have to issue injunctions").

[94] 11 U.S.C. § 105(a); Foohey & Odinet at 1284.

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

[96] *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).

company's officers, directors, and employees.[97] 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.[98] 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.[99] So it came as little surprise when defective airbag manufacturer Takata used its bankruptcy to protect car manufacturers, and USA Gymnastics used it to protect other individuals connected to sex abuser Dr. Larry Nassar's training facility.[100] This practice of nondebtor releases and channeling injunctions had been mostly noticed only by the bankruptcy gurus—until *Purdue*.

B. Unorthodox Bankruptcy's Next Maneuvers: The Texas Two-Step

If the Supreme Court in *Purdue* paves the way for creative uses of § 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 and avoid litigation.

In simple terms, a company first uses authority granted under state corporate law to divide itself into two new companies: "RichCo," which receives the company's assets and operating business, and "PoorCo," which inherits the mass-tort liability plus a funding agreement saying that RichCo will pay PoorCo's tort obligations.[101] Second, rather than litigating the all the tort claims it is given, PoorCo is poor enough to file for bankruptcy and take advantage not only of bankruptcy court's centralizing authority but also of the shift in leverage that that bankruptcy gives to the debtor. So, PoorCo files for Chapter 11. Formally known as a "divisional merger," this technique has typically been invoked under Texas law, 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.[102]

Circuit courts have split over how to handle divisional mergers. The debate centers on a different provision of the bankruptcy code: the requirement that companies file bankruptcy petitions in good faith[103]—something that was never at

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[97] Ralph Brubaker, *Mandatory Aggregation of Mass Tort Litigation in Bankruptcy*, 131 YALE L.J. F. 960, 961 (2022) (noting that like the Sacklers, the Robins family was accused of defrauding the public).

[98] *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.

[99] 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).

[100] Simon, supra note __ at 1178-79.

[101] Ralph Brubaker, *Assessing the Legitimacy of the 'Texas Two-Step' Mass-Tort Bankruptcy (Part II)*, 43 BANKR. L. LTR. 1, 2 (Apr. 2023); Samir D. Parikh, *Mass Exploitation*, PENN. L. REV. ONLINE 53, 57 (2022).

[102] 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).

[103] 11 U.S.C. § 1112(b).

issue in earlier unorthodox bankruptcy maneuvers like in John-Manville Corporation[104] or Dow Corning.[105]

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 LTL Management LLC, (the PoorCo) which would file for bankruptcy.[106] The case ultimately came down to whether LTL was really in "financial distress."[107] In holding it was not, the Third Circuit explained that testing a debtor's financial troubles was "necessary because bankruptcy significantly disrupts creditors' existing claims against the debtor."[108] Chapter 11, it recognized, gives courts the power "to give those businesses teetering on the verge of a fatal financial plummet an opportunity to reorganize on solid ground and try again, not to give profitable enterprises an opportunity to evade contractual or other liability."[109]

The Fourth Circuit came out the opposite way in *In re Bestwall, LLC*.[110] 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."[111] 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 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 higher standard for bad faith, which did not turn purely on financial distress, the Fourth Circuit sided with Bestwall.[112]

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The foregoing ad hoc bankruptcy procedures for nondebtors—procedures invoked under the court's general equitable powers under § 105(a) and never expressly blessed by Congress outside of asbestos—have achieved success where others have failed: enabling mandatory settlement of mass-tort victims' claims against solvent *non*debtors across all federal and state courts.[113] The problem isn't bankruptcy per se, it's the use of bankruptcy by nondistressed companies to escape the tort process, and the beneficial discovery, accountability, public participation, and claim testing that goes with it. Indeed, in the 3M bankruptcy litigation, the court recognized that allowing 3M to use bankruptcy to escape the tort system risked turning bankruptcy courts into

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

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

[106] *In re* LTL Mgmt., LLC, 64 F.4th 84(3d Cir. 2023).

[107] *Id.* at 102-07 (3d Cir. 2023).

[108] *Id.*

[109] Id. (internal quotation marks omitted).

[110] 2023 WL 4066848 (4th Cir. June 20, 2023).

[111] 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

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

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

courts of "general jurisdiction"[114]—as opposed to courts with special powers to help companies in special circumstances.[115]

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. Those tradeoffs are clearer in the face of true insolvency, but in that context there is often some tort litigation first—bankruptcy is not sought as a way to avoid litigation altogether.

If the goal of mass tort litigation were simply to reallocate assets, bankruptcy might produce superior value, though that is a conclusion that must be empirically tested, and many have suggested that tort creditors do worse than other bankruptcy claimants when they have to share the pie. Our aim is to insist that mass tort litigation has many other goals—and to insist as well that scholars extolling bankruptcy engage with those goals more than they have.[116]

Tort law, and public litigation more broadly, has many aims: deterring wrongdoers, empowering and compensating victims, testing and valuing claims, 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.[117]

For the last twenty-five years, scholars have proposed numerous ways to retrofit bankruptcy to better effectuate traditional litigation values, but their ideas have not impacted practice.[118] Those who argue the Bankruptcy Code could be amended to generate litigation values assume that bankruptcy judges will conduct trials, or refer cases to district and state court for doctrinal development, liability-related discovery, or bellwethers. As we have noted, such proposals have never progressed and the inefficiency and cost of such a scenario contravenes bankruptcy's efficient and cost-saving ideology as well as why companies turn to it in the first place. Parties seek out bankruptcy for its streamlined proceedings and to prevent ballooning litigation costs and the burdens of discovery. A world in which bankruptcy judges are adjudicating tort claims—or sending cases back and forth to district or state courts to do so—

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[114] 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.").

[115] Arguments that *litigation* itself is a special event that requires the bankruptcy court depends on a variety of false assumptions, including the notion that the existence of high-number single jury verdicts means that litigation is *per se* unaffordable—when of course such verdicts don't resemble payouts in mass settlements in court.

[116] Cf. Macey & Casey, supra note XX; Foohey & Odinet, supra note XX.

[117] *See generally* ALEXANDRA LAHAV, IN PRAISE OF LITIGATION (2017).

[118] *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)

seems unlikely regardless of the possibilities in the Code. Doing so would undermine bankruptcy's main attractions.

This is not to say that such guardrails would not be welcome, or even required especially for tort defendants who come to bankruptcy without first engaging in any pretrial tort process. But that may require a massive cultural shift in bankruptcy courts. At the same time, we recognize that the tort 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 undercuts claims that bankruptcy is a poorer alternative, especially given bankruptcy's efficiency and finality benefits. In previous work, we have argued how litigation values could be better elevated in MDL. In this Part, we offer a similar analysis for bankruptcy, identifying the core values that litigation provides and the risks unorthodox bankruptcy may pose to them.

A. Accountability, Plaintiffs' Rights, and A 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*[119] lie the fundamental concept that every person is entitled their "day in court."[120] Jerry Mashaw long ago suggested that the opportunity to be heard is core to one's "dignity" as a litigant and is essential to equality.[121] 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 . . . ."[122]

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, especially in aggregate litigation. And we share the view of scholars like Issacharoff and Resnik that aggregation is critical for individuals to access court.[123] We are not suggesting an impractical return to individual litigation.

But plaintiffs' rights are significantly burdened in bankruptcy. Unlike even mandatory multidistrict litigation, no one can opt out of bankruptcy by dismissing their lawsuit and suing in state court instead. And, as noted, bankruptcy courts almost never refer tort claims for trial. In addition to resistance from the debtor, the norms against trials and in favor of streamlining already discussed, the voting rules in bankruptcy have an additional impact: the ability of non-tort creditors to approve the reorganization without trial or pretrial process.

Not all plaintiffs' claims are equal, nor would they receive the same weight in court. When a defendant files for Chapter 11, pending tort claims—even if still unproved and merely just filed—are all treated simply as debts to pay. Plaintiffs "win"

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[119] *Mathews v. Eldridge*, 424 U.S. 319 (1976).

[120] 490 U.S. 755, 762 (1989).

[121] 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).

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

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in that sense, without any adjudication: Bankruptcy plans typically distribute resources without testing claims' merits or finding liability. This means that low-value claims may get overcompensated so long as the plan garners enough votes.

But the fact that many plaintiffs resist the turn to bankruptcy makes it clear that the system is not all about money.[124] 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."[125] And in some cases, prepackaged deals arrive in court with private terms and arrangements presented to the judge as a *fait accompli* that a bankruptcy court cannot meaningfully refuse.[126]

Nondebtors arguably pose even bigger problems for both accountability and plaintiffs' day in court. In a products-liability case, for example, all the parties in a chain of distribution—from manufacturers and distributors to commercial retailers—are potential defendants. 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's back without consent.[127] 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.[128]

But unorthodox bankruptcy moves that also release nondebtors deprive plaintiffs of this option and undermine their substantive and procedural entitlements to sue those parties where and how they wish.[129] Indeed, the debtor defendant chooses the forum and the plaintiffs' tort cases against nondebtors are shut down. All this without even the finding of accountability that—in addition to money—often motivates a lawsuit. 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."

Bankruptcy may also serve as an especially effective means to silence claimants' voices.[130] 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 a 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 Writs Act, these same kinds of stays were once tried[131]

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[124] *See* Jacoby, *supra* note X.

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

[126] *See, e.g.,* Levitin, *supra* note **Error! Bookmark not defined.**, at 1092; Melissa B. Jacoby & Edward J. Janger, *Ice Cube Bonds: Allocating the Price of Process in Chapter 11 Bankruptcy*, 123 Yale L.J. 862, 866 (2014).

[127] 498 U.S. 5 (1990).

[128] *Id.*

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

[130] Pamela Foohey & Christopher K. Odinet, Silencing Litigation Through Bankruptcy, 109 Va. L. Rev. 1261, 1266 (2023).

[131] *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

and then rejected[132] 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,[133] 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.[134] 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.

B. Due Process and Adequate Representation

Due process entails the right to be heard before a public body with legitimate authority over the parties. With respect to participation, in aggregate litigation, individuals' due process rights are often satisfied, as Fiss has noted, through their "right of representation"[135] by others who share and advance their interests. With respect to courts' power, we have previously detailed our concerns about how MDL courts often purport to exercise jurisdiction over parties where jurisdiction is lacking or questionable.[136]

We also have raised general concerns about what we call "plaintiffs' process."[137] Civil procedure is fixated on due process for defendants. But unorthodox civil procedure often raises serious questions about plaintiffs' due process rights, especially when plaintiffs' cases are moved across the country (as in MDL or bankruptcy), to different courts with new counsel, with little to no opportunity to opt out or ensure counsel represents their interests.

In bankruptcy, the defendants are the ones who are filing, 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 § 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 relied on this notion of improper authority to reject the filing, raising concerns about its own jurisdictional authority, even as it recognized that "most mass tort claims in a

participated in the federal class action settlement); *Yonkers Racing Corp. v. City of Yonkers,* 858 F.2d 855 (2d Cir. 1988).

[132] 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).

[133] 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)).

[134] Id. at 1300.

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

[136] Burch & Gluck, *supra* note X.

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

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 [p]laintiffs will have a jury trial in the MDL."[138]

With respect to representation, we note it is possible that bankruptcy court's voting measures accord 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 as there are in class actions. In bankruptcy, before a reorganization plan is approved, it must be put to a vote by creditors and interest holders.[139] In theory, each mass-tort plaintiff with a claim in the bankruptcy has a chance to approve or disapprove of the plan, though a "positive" vote binds dissenters too.[140]

On the ground, however, voting may fail to provide adequate representation. First, placing mass-tort claimants into a single class gerrymanders power in the hands of plaintiffs' lawyers whose financial interest in ensuring that the plan goes through may be at odds with claimants' desires, particularly if they have severe injuries.[141] 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 tort claims.[142] 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.[143] 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.[144]

Additionally, bankruptcy still fares worse than class actions with respect to due-process protections like adequate representation. To determine which claims can be grouped together, Chapter 11 requires only that they be "substantially similar," not that the grouping be free of disabling conflicts of interest as in class actions.[145] And the debtor gets first crack at drawing those lines. The norm is to put mass-tort claimants into a single bucket—regardless of differences in insurance coverage, injury severity, or whether the injury has even manifested.[146]

If blending claimants together creates a risk that their attorneys will favor one type of claimant over another, then each subgroup deserves its own representative.[147] As Richard Nagareda explained of *Amchem*, "[a] good deal, in itself, cannot make for a

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

[139] 11 U.S.C. §1125(a).

[140] 11 U.S.C. § 1129; Edward J. Janger, *Aggregation and Abuse: Mass Torts in Bankruptcy*, 91 FORDHAM L. REV. 361, 368-73 (2022).

[141] NAGAREDA, supra note X at 169.

[142] *See* Jacoby, *supra* note X, at 1766.

[143] *In re* Boy Scouts of Am., 642 B.R. 504, 518 (Bankr. D. Del. 2022); Melissa J. Jacoby, *Sorting Bugs and Features of Mass Tort Bankruptcy*, 101 TEX. L. REV. 1745, 1756 (2023); *See* Jacoby, *supra* note X, at

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

[145] 11 U.S.C. § 1122(a); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 627-28.

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

[147] *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."[148]

C. Information Production

Information production, especially from big corporations, is another distinct benefit of litigation, especially aggregate litigation.[149] And producing information is often critical to another goal of public health-related tort litigation: teeing up issues for legislative intervention. From tobacco, to guns, to opioids, litigants turned to the courts as a second-best solution after legislative action had failed. It was discovery in litigation that then proved critical in illustrating dangerous industry tactics.

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.[150] And the tobacco litigation elucidated damning information about industry practices. Political actors often require such evidence to break legislative impasse and act against powerful companies. Litigation cannot usually solve a public health crisis but it can produce settlements, information, and attention that spur the needed policy change.[151]

In bankruptcy, by contrast, the kind of financial information that courts focus on—which can sometimes include robust disclosures about a debtor's "assets and liabilities"—is not the same kind of discovery into liability for health-harming industry behavior one saw flowing from tobacco, guns, or opioid litigation. 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.

Though it is true that bankruptcy courts have power to force disclosures,[152] the Code likewise authorizes sealing public records, which, like confidentiality agreements governing discovery in mass-tort litigation, seems to get overused.[153] The Purdue bankruptcy court sealed Purdue Pharma's records, forcing news organizations to demand transparency.[154] And when the largest U.S. Roman Catholic Diocese filed for

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

[149] Elizabeth Chamblee Burch & Alexandra D. Lahav, *Information for the Common Good in Mass Torts*, 70 DEPAUL L. REV. 345 (2022).

[150] 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 assaultive qualities of their AR-15 rifles").

[151] Benjamin Ewing and Douglas Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L. J. 350 (2011)

[152] *See, e.g.*, 11 U.S.C. § 521(a) *See also* Simon*, supra* note #, at 1207.

[153] Melissa B. Jacoby, *Fake and Real People in Bankruptcy*, 39 EMORY BANKR. DEV. J. 497, 512 (2023); Burch & Lahav, *supra* note 174.

[154] 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

bankruptcy, commentators complained that the defendants were using the process to conceal information from the public.[155] 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."[156]

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.[157]

D. Substantive Law

Development of state law—or the lack thereof—is another major problem we have written about in the MDL context.[158] To state the obvious, tort law would not develop if courts did not render decisions. Today, creative tort lawyers continue to press fresh theories.

In the opioid context, for example, plaintiffs' lawyers tried to apply public nuisance theory to the epidemic, with mixed results. As AGs brought their own actions, they hammered out the contours of various states' laws.[159] And even in the Opioid MDL, some cases were remanded to transferor courts that applied local law in bellwether trials.[160] 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 even though the *Erie* doctrine still requires federal courts to apply the substantive law of the several states and to recognize differences across them.[161]

This is a problem that, as two of us argued,[162] MDL 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

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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].

155 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.

156 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.

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

158 *See* Burch & Gluck, *supra* note X.

159 *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).

160 *Cty 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).

161 See Gluck & Burch, supra at 64; *see* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

162 Gluck & Burch, supra.

to focus on this kind of course correction.[163] The path to address this problem in bankruptcy is less clear because of the lack of merits proceedings that we have already discussed. And, absent a requirement that the merits of tort cases get properly aired before filing, the lack of law development and fidelity to state substantive entitlements is particularly concerning where the debtor is not in distress.

Commentators have already documented how the steady increase of cases aggregated in federal courts has left us with a "hallowed out common law."[164] But for bankruptcy judges, the fit between state law and the industry behavior is rarely even on the table. New tort theories brought by plaintiffs in their suits may lie undeveloped, or never be raised at all.

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.[165] Cover and Aleinikoff made a parallel argument for the benefits of a federalist court system, with concurrent jurisdiction in areas like torts.[166] Two of us have written elsewhere how multidistrict litigation circumvents federal appellate review and jurisdictional redundancy for mass torts.[167]

Through its automatic stay, bankruptcy even more dramatically short-circuits the 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 suffice under the Anti-Injunction Act.[168] 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.[169]

Bankruptcy (like MDL) can stymie any hope a mass-tort claimant has for an appeal, another form of judicial redundancy. 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

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[163] 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; *In re* Roundup Prods. Liab. Litig., No. 16-md-02741-VC (N.D. Cal. 2021).

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

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

[166] Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1051 (1977). There are also benefits to redundancy across systems of civil, administrative, and criminal law. Adam S. Zimmerman, *Mass Settlement Rivalries*, 82 U. CIN. L. REV. 381 (2013).

[167] Burch & Gluck, *supra* note 11.

[168] 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 "tailgaiting." Jacoby, *supra* note 81, at 1762.

[169] 11 U.S.C. § 362(b)(4); *In re* Purdue Pharma L.P., 633 B.R. 53, 86 (Bankr. S.D.N.Y. 2021).

appellate option was to pay $500 within ten days to appeal to the same reviewer.[170] 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."[171] Of course, an overly formal approach to jurisdictional divides in mass litigation may push parties to informally coordinate behind closed doors in less publicly accountable ways and there are benefits to some coordination when national questions are implicated. Moreover, as different courts hear cases in different jurisdictions, there may be less need for redundancy as the litigation matures[172]—the same point we have made in suggesting that tort claims be fleshed out before they come to bankruptcy court.

When it comes to federalism, however, bankruptcy disrupts the constitutional court structures even more than other approaches. Corporate defendants, not plaintiffs, get to choose where to file, which often dictates which precedential norms will govern whether nondebtors can tag along. The result is that most mass-tort claimants will find themselves in a far-flung court without even a formal opportunity to opt out. For state-court claimants (including AGs) who filed at home and expected local adjudication in local courts, these transfers may be particularly dramatic. This 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 that is designed to hear some cases on the merits, and are part of a system of apex courts—whether federal courts or state courts—where law development and judicial review on the merits are expected at least some of the time.

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Dispute resolution, payment, and closure alone do not generate public litigation values. Fiss's arguments "against settlement" 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

[170] Simon, *supra* note #, at 1201.
[171] *Id.*
[172] See Frances E. McGovern, *Resolving Mature Mass Tort Litigation*. 69 Boston U. L. Rev. 659 (1989).

> settle, society gets less than what appears, and for a price it does not know it is paying. Parties might settle while leaving justice undone.[173]

CONCLUSION

The significance of the Purdue Pharma bankruptcy settlement goes far beyond the narrow question of whether nondebtor releases are generally permissible in bankruptcy, or whether the Sacklers' own release was legitimate. 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 core public litigation values. Approving the Sackler releases, or doing so without clear guardrails to prevent abuses and preserve some traditional tort process, would galvanize even further the unorthodox use of bankruptcy to resolve mass torts. 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 as much a story about attorney and judicial inventiveness as it is as about law. The tension between public litigation values and participation on the one hand and closure on the other has always permeated mass torts—particularly when the costs of coordinating large groups of claims overwhelm the ability of any one person to obtain meaningful relief in their lifetimes. Such closure may be justified in some cases, including bankruptcy. But, in those cases, courts carry a heavy burden to ensure that other foundational goals of our public adjudication system have been met.

In the MDL context, we have been arguing for years now that some guardrails are needed to ensure that MDL's risks to constitutional protections do not outweigh its benefits. The same goes for bankruptcy. Otherwise, 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 questions about what litigation in public harms cases is for and how to protect it.

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