

2022

The New Mass Torts Bargain

Samir D. Parikh
Lewis & Clark Law School

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Bankruptcy Law Commons](#), and the [Torts Commons](#)

Recommended Citation

Samir D. Parikh, *The New Mass Torts Bargain*, 91 Fordham L. Rev. 447 (2022).
Available at: <https://ir.lawnet.fordham.edu/flr/vol91/iss2/6>

This Symposium is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

THE NEW MASS TORTS BARGAIN

Samir D. Parikh*

Mass torts create a unique scale of harm and liabilities. Corporate tortfeasors are desperate to settle claims but condition settlement on the resolution of substantially all claims at a known price—commonly referred to as a global settlement. Without this, corporate tortfeasors are willing to continue with protracted and fragmented litigation across jurisdictions. Global settlements can be elusive in these cases. Mass torts are oftentimes characterized by heterogeneous victim groups that include both current victims and future victims—individuals whose harm has not yet manifested and may not do so for years. Despite this incongruence, future-victim claims must be aggregated as part of any global settlement. This is the tragedy of the mass tort anticommons: without unanimity, victim groups are unable to access settlement resources in a timely or meaningful way, but actual coordination across the group can be impossible.

Current resolution structures have proven ill-equipped to address the novel challenges posed by mass torts. Many cases cannot satisfy Federal Rule of Civil Procedure 23's ("Rule 23") requirements for class action certification because of too many individual issues surrounding causation and damages. Multidistrict litigation (MDL) is the most frequently invoked resolution structure, but the MDL process has infirmities. MDL lacks many of Rule 23's fundamental safeguards that protect process integrity and victim autonomy. MDL has become a captive settlement process. In response, a new strategy for resolving modern mass torts has emerged. Corporate defendants—including 3M, Johnson & Johnson, and Purdue Pharma—have turned to bankruptcy. These mass restructurings automatically halt the affected MDL cases and transfer proceedings to a bankruptcy court, a process I describe as "bankruptcy preemption." Unfortunately, bankruptcy preemption replaces one deficient structure with another. Mass restructuring debtors are exploiting statutory gaps in the U.S. Bankruptcy Code in order to bind victims through an unpredictable, ad hoc structure.

* Professor of Law, Lewis & Clark Law School; sparikh@lclark.edu. For helpful comments and conversations, I am grateful to Douglas Baird, Ronit Berkovich, Andrew Bradt, Sergio Campos, Zachary Clopton, Matt Donohue, Robert Klonoff, Charles Paternoster, Mark Roe, Michael Simkovic, and David Skeel. Chris Bolte and Elizabeth Stowe provided superb research assistance. Finally, I thank my family for their unwavering support. This Essay was prepared for the Symposium entitled *Mass Torts Evolve: The Intersection of Aggregate Litigation and Bankruptcy*, hosted by the *Fordham Law Review* on February 25, 2022, at Fordham University School of Law.

The new bargain creates myriad risks, including insolvent settlement trusts and disparate treatment across victim classes.

This Essay is the first to attempt a reconceptualization of how modern mass torts should be resolved and delivers an unprecedented normative construct focused on addressing anticommons dynamics through statutory amendments to the Bankruptcy Code. These changes, coupled with an evolved perspective on fundamental structural anomalies, are designed to improve predictability, efficiency, and victim recoveries.

INTRODUCTION.....	449
I. UNDERSTANDING THE MASS TORTS UNIVERSE.....	456
A. <i>General Characteristics of Complex Personal Injury Mass Torts</i>	457
B. <i>Mass Tort Anticommons and the Global Settlement Imperative</i>	460
II. THE EVOLUTION OF MASS TORTS	462
III. RESOLUTION STRUCTURES.....	466
A. <i>Regulatory Inaction and Legislative Failures</i>	466
B. <i>The Judiciary's Current Approach</i>	469
1. <i>Class Aggregation and Rule 23</i>	469
a. <i>The Mass Tort Carve Out</i>	472
b. <i>The Landscape After Amchem and Ortiz</i>	473
2. <i>MDL and Structurally Deficient Means</i>	473
a. <i>MDL Design</i>	474
b. <i>MDL Distortion</i>	475
c. <i>Market Response</i>	479
3. <i>The Promise of Bankruptcy Preemption</i>	479
a. <i>Chapter 11 Exceptionalism</i>	479
b. <i>Brief History of § 524(g)</i>	482
i. <i>Johns-Manville</i>	482
ii. <i>Section 524(g) Overlay</i>	483
IV. THE NEW BARGAIN	485
A. <i>Exempt Plans: The Debtor-Designed, Ad Hoc Structure</i>	485
B. <i>Due Process and the Future Claimants' Representative</i>	488
C. <i>Estimating the Value of Future Victims' Claims</i>	491
D. <i>Consequences of the New Bargain</i>	493
V. THE POSSIBILITY OF BANKRUPTCY SUPERPOSITION.....	494
A. <i>Structural and Substantive Objectives</i>	494
B. <i>Two Spheres of the Normative Construct</i>	496

1. Reassembling Agency Principles in the Selection Process for the Future Claimants' Representative	496
<i>a. Minimizing Capture Risk</i>	496
<i>b. Condorcet Jury Theorem and FCR Voting</i>	498
2. Codifying the Basic Structure	499
CONCLUSION	502

INTRODUCTION

Dr. Cicely Saunders's patients were hopelessly addicted to morphine. She prescribed the drug without hesitation and escalated doses on a predetermined schedule often independent of patient input. But rather than being vilified, Saunders was revered. As the mother of the modern hospice movement in 1960s London, her attention to pain management for dying cancer patients was revolutionary.¹ Her primary objective was to prevent suffering in a patient's final days. The threat of addiction was irrelevant. In fact, by 1970, Saunders was seeking an even more potent morphine drug.²

Saunders approached Napp Pharmaceuticals—a subsidiary of the U.S. corporation Purdue Pharma—with the idea of an intensified, slow-release morphine pill.³ Such a pill would alleviate pain in end-of-life scenarios and ensure a constant release of morphine to allow cancer patients to enjoy uninterrupted sleep at night. In 1981, Napp brought a medication called MS Contin to market, and it quickly became the gold standard for managing cancer patients' pain.⁴ Saunders rejoiced. Unfortunately, the unintended consequences of her simple request were cataclysmic.

In the late 1990s, cancer care represented a miniscule part of the prescription drug market,⁵ and profits from MS Contin were negligible.⁶ Purdue Pharma wanted more. But there was little possibility of expanding the patient demographic for MS Contin.⁷ Morphine was seen as a wildly addictive and potent drug reserved for terminal patients.⁸ Purdue needed to change the narrative.

1. See CHRIS MCGREAL, *AMERICAN OVERDOSE* 20 (2018).

2. See Christopher Glazek, *The Secretive Family Making Billions from the Opioid Crisis*, *ESQUIRE* (Oct. 16, 2017), <https://www.esquire.com/news-politics/a12775932/sackler-family-oxycontin/> [https://perma.cc/4SPY-ERTZ].

3. See *id.*

4. See *id.*; see also MCGREAL, *supra* note 1, at 27.

5. See Art Van Zee, *The Promotion and Marketing of OxyContin: Commercial Triumph, Public Health Tragedy*, 99 *AM. J. PUB. HEALTH* 221, 223 (2009) (in the late twentieth century, “the non-cancer-related pain market constituted 86% of the total opioid market”).

6. Prior to its foray into prescription narcotics, Purdue was a relatively small pharmaceutical company specializing in low-margin products, including earwax remover, laxatives, and antiseptics. See Glazek, *supra* note 2.

7. See *id.*

8. See *id.*

Purdue identified medical professionals proselytizing aggressive pain management for all patients, not just those with cancer.⁹ Saunders's system of escalating morphine doses appeared to be transformative. Could the system help individuals manage general chronic pain? Seizing on this question, Purdue undertook an inventive and depraved strategy. Instead of promoting a morphine pill like MS Contin, the company pivoted and decided to formulate pain medication containing oxycodone, a drug that is approximately 50 percent more potent than morphine, but with generally misunderstood effects.¹⁰ Purdue's field research indicated that physicians failed to appreciate oxycodone's addiction gravity.¹¹ The drug had not been stigmatized at that time.¹² Further, many physicians referred to the drug as "oxycodine"—an unfortunate malapropism that conjured images of codeine, a ubiquitous drug with limited addictive properties used for moderate pain.¹³

By 1990, the medical profession was adjusting its view of pain management,¹⁴ and Purdue stepped into this shifting landscape to offer the best pain medication ever created. In 1996, Purdue brought OxyContin to market, and prescriptions for the drug during that first year exceeded 300,000.¹⁵ A staggering six million OxyContin prescriptions were written in 2001.¹⁶ Sales topped one billion dollars for that year alone.¹⁷ By 2004, OxyContin was the most prevalent prescription opioid abused in the United States.¹⁸ And just four years later, Americans—who represent less than 5 percent of the world's population—were consuming more than 80 percent of the world's opioids.¹⁹

Purdue did not create the pain management movement; the company just monetized it better than anyone else. But the oversized profits the company

9. *See id.* Dr. Lynn Webster was part of a cohort that challenged the medical profession's aversion to potent and potentially addictive drugs for pain management. He now regrets his involvement, stating recently: "We thought we could restore the life of these people who are suffering Clearly, if I had an inkling of what I know now then, I wouldn't have spoken in the way that I spoke." *See* MCGREAL, *supra* note 1, at 26.

10. *See* Glazek, *supra* note 2.

11. *See id.*

12. *See id.*; *see also* MCGREAL, *supra* note 1, at 27 ("Oxycodone was a strange beast. While the public had heard of morphine and tended to have views about it, oxycodone was far less well known.").

13. *See* MCGREAL, *supra* note 1, at 27.

14. *See* Bethany McLean, "We Didn't Cause the Crisis": David Sackler Pleads His Case on the Opioid Epidemic, VANITY FAIR (June 19, 2019), <https://www.vanityfair.com/news/2019/06/david-sackler-pleads-his-case-on-the-opioid-epidemic> [<https://perma.cc/2UDN-RJKQ>].

15. *See* Glazek, *supra* note 2.

16. *See id.*

17. *See id.*

18. *See* McLean, *supra* note 14.

19. *See id.* On August 18, 2020, the state of New York asserted that Purdue had caused almost \$2.16 trillion in damages to various institutions and individuals throughout the United States. *See* Emily Field, *Purdue and Sacklers Caused \$2.16T in Damage, NY Says*, LAW360 (Aug. 18, 2020, 4:08 PM), <https://www.law360.com/articles/1302015/purdue-and-sacklers-caused-2-16t-in-damage-ny-says> [<https://perma.cc/4WB2-Y4JC>].

enjoyed were not merely first-mover premiums. Purdue created a sales strategy that suppressed the drug's addition risks.²⁰ Instead of targeting physicians who exclusively treated cancer patients, the company moved the drug into the mainstream by soliciting general practitioners, dentists, gynecologists, and physical therapists.²¹ To ensure profits, the company provided kickbacks to each cog in the distribution chain: wholesalers received rebates in exchange for keeping OxyContin off prior-authorization lists, pharmacists received kickbacks on their initial orders, patients received coupons for thirty-day starter kits, medical academics received grants for research on the benefits of pain management, and politicians received donations from the company and its founding family.²² Numerous other companies would replicate these tactics to promote their own pharmaceuticals, but Purdue was the alpha.

Purdue's conduct is not necessarily unique. Myriad businesses and institutions have obfuscated the harmful effects of consumer products and actively suppressed evidence of gross transgressions. The conduct and resultant harm have been described as mass torts. The sheer volume of claims and potential liabilities represent an existential threat to corporate tortfeasors. Defendants are anxious to resolve these cases, but there is an obstacle. Defendants demand global settlements—a term describing resolution of substantially all outstanding current and future claims at a known price.²³ Without a global settlement, corporate tortfeasors are willing to continue with protracted and fragmented litigation, in effect denying the victims' collective access to the settlement funds, or, at the very least, delaying access for an unacceptable period of time.²⁴

The global-settlement imperative amplifies resolution complexity. Many mass torts involve latent harm²⁵ and are characterized by heterogeneous victim groups.²⁶ One stratum includes current victims—those who have been affected by the defendant's tortious conduct and already exhibit harm. In many cases, there is a second stratum that includes future victims—those

20. See Glazek, *supra* note 2.

21. See *id.*

22. See *id.*; McLean, *supra* note 14.

23. See Peter Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 962 (1995).

24. See *id.* at 956.

25. Latent harm arises in situations where exposure to tortious conduct creates harm that will be realized at various points along an extended continuum. For example, exposure to asbestos fibers leads to a significantly higher risk of cancer. See Michael D. Green, D. Michal Freedman & Leon Gordis, *Reference Guide on Epidemiology*, in FED. JUD. CTR., REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 333, 348–49 (2d ed. 2000). But asbestos has a latency period of up to forty years. See *id.* Consequently, individuals exposed to asbestos fiber who develop cancer can see that development occur at any point forty years after exposure. See *id.* Some individuals may not even realize that they were exposed to asbestos fibers until many years later.

26. See Francis E. McGovern & William B. Rubenstein, *The Negotiation Class: A Cooperative Approach to Class Actions Involving Large Stakeholders*, 99 TEX. L. REV. 73, 76 n.3 (2020) (“Classes may be characterized by heterogeneity along axes other than claim value . . .”).

who have been affected by the defendant's tortious conduct but may not exhibit harm for years or decades. Individuals exposed to asbestos present a good example of this phenomenon, but the dynamic exists in many other cases.²⁷ Further complicating resolution is that some future victims are entirely unknown and unknowing, meaning that they cannot be identified by the defendant and they themselves do not know they have been exposed to significant tortious conduct.

These cases present unique anticommons dynamics. In an anticommons model, a large group of individuals enjoy restricted access to a scarce resource.²⁸ The use is restricted because each individual in the group is endowed with the unfettered right to exclude others from using the resource.²⁹ When multiple individuals hold exclusion rights, transaction costs preclude coordination, and the resource at issue cannot be accessed.³⁰ The resource invariably devolves over time. Modern mass tort litigation presents this dynamic. In these cases, there is a significant number of victims holding claims against a corporate defendant. The defendant has insurance proceeds and other capital for settlement of those claims. Current victims would like to consume those resources immediately. But the claims of future victims must somehow be included to satisfy the global-settlement imperative. Therefore, future victims unintentionally exercise exclusion rights. Anticommons dynamics are especially deleterious in mass tort cases, which hinge on claim aggregation. The question that emerges is how due process can be satisfied for individuals who may be unidentifiable and may not even know that they are victims.

The judiciary has developed structures that attempt to resolve anticommons dynamics. Once federal courts have jurisdiction over one mass tort case, aggregation of factually similar cases can occur through three primary means: (1) class certification under Rule 23 of the Federal Rules of Civil Procedure ("Rule 23"), (2) consolidation by the Judicial Panel on Multidistrict Litigation and transfer to a single district court, and (3) corporate bankruptcy under title 11 of the U.S. Code.

In the late twentieth century, these options worked together to formulate meaningful resolution avenues for the "elephantine mass of asbestos cases"³¹

27. See, e.g., *In re Boy Scouts of Am.*, No. 20-bk-10343 (Bankr. D. Del. filed Feb. 18, 2020) (future claimants exist in this case because survivors of sexual abuse often repress memories of abuse); Disclosure Statement for Joint Chapter 11 Plan of Reorganization of TK Holdings Inc. and Its Affiliated Debtors at 58, 68, *In re TK Holdings, Inc.*, No. 17-11375 (Bankr. D. Del. Nov. 15, 2017) (future claimants exist in this case because defective airbags have been installed in a number of unidentifiable vehicles and could deploy and injure a driver at some unforeseeable, future date).

28. See Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 670–76 (1998); Sergio Campos, *Mass Torts and Due Process*, 65 VAND. L. REV. 1059, 1086 (2012) (noting how mass tort litigation presents both commons and anticommons dynamics).

29. See Heller, *supra* note 28, at 673–74.

30. See *id.*

31. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999).

that threatened to overwhelm the judiciary.³² An asbestos defendant that could satisfy Rule 23's strictures was allowed to bind all victims and provide judicial supervision. Cases unable to satisfy Rule 23's strictures could still be resolved through MDL, which offers captive negotiation that facilitates out-of-court settlements.³³ Finally, defendants seeking a platform with more restructuring options could file for bankruptcy and access § 524(g) of the U.S. Bankruptcy Code. This section aggregates all victims' claims—including those held by future victims—and channels those claims to a settlement trust. In exchange for funding the trust, various parties receive immunity through a channeling injunction.³⁴ In order to balance this extraordinary benefit, § 524(g) installs procedural and substantive protections for victims and other stakeholders.

Over the last forty years, an immense canon of scholarship has emerged exploring the resolution dynamics of mass torts. This canon's light has been filtered through the prism of asbestos exposure cases, the archetype that has dominated the landscape. But modern mass tort cases rarely involve asbestos exposure claims, and new asbestos cases are dwindling.³⁵ Modern cases are more likely to involve opioid abuse,³⁶ sexual abuse involving religious institutions,³⁷ sexual abuse involving nonreligious institutions,³⁸

32. By 1991, there were 115,000 asbestos claims pending in federal and state courts. *See* DEBORAH R. HENSLER, ASBESTOS LITIGATION IN THE UNITED STATES: A BRIEF OVERVIEW 2 (1991), <https://www.rand.org/pubs/papers/P7776.html> [<https://perma.cc/PQ8R-YNGG>] (click on "PDF file").

33. *See infra* Part III.B.2.

34. *See* 11 U.S.C. § 524(g)(1)(A).

35. Over an eight-and-a-half-year period, the number of new federal cases decreased by 99 percent. 46,936 asbestos cases were filed and transferred to the asbestos MDL in 2010, but only twenty-one cases were transferred in 2018. As of June 30, 2019, only nine cases had been transferred. *See* JUD. PANEL ON MULTIDISTRICT LITIG., MDL-875—IN RE: ASBESTOS PRODUCTS LIABILITY LITIGATION (NO. VI): CUMULATIVE TOTALS (2019), <https://www.paed.uscourts.gov/documents/MDL/MDL875/MDL-875.jun30.2019.pdf> [<https://perma.cc/9AM5-ERLT>]. Only two asbestos bankruptcy cases were filed in 2019—the lowest number in any one year since 1996. *See* CROWELL & MORING LLP, CHART 1: COMPANY NAME AND YEAR OF BANKRUPTCY FILING (CHRONOLOGICALLY) 1, 4 (2020), <https://www.crowell.com/files/list-of-asbestos-bankruptcy-cases-chronological-order.pdf> [<https://perma.cc/4939-6FQC>]. The peak in the number of asbestos bankruptcy cases was in 2002, when thirteen cases were filed. *See id.*; *see also* STEPHEN J. CARROLL, DEBORAH HENSLER, JENNIFER GROSS, ELIZABETH M. SLOSS, MATTHIAS SCHONLAU, ALLAN ABRAHAMSE & J. SCOTT ASHWOOD, ASBESTOS LITIGATION 110 (2005), <https://www.rand.org/pubs/monographs/MG162.html> [<https://perma.cc/4TZX-BRKL>] (click on "PDF file" under "Full Document").

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

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

38. *See, e.g., In re Boy Scouts of Am.*, No. 20-bk-10343 (Bankr. D. Del. filed Feb. 18, 2020) (discussing claims related to sexual abuse of Boy Scouts); *In re USA Gymnastics*, No. 18-bk-09108 (Bankr. S.D. Ind. filed Dec. 5, 2018) (discussing claims related to sexual abuse of female gymnasts).

life-threatening diseases caused by common, everyday products,³⁹ and environmental disasters.⁴⁰

The emergence of a new strategy within the mass tort kingdom coincides with this shift. Mass tort defendants ensnared in MDL's captive negotiation process have sought to alter the bargain. These tortfeasors have reclaimed control by turning to the lone exit available. Only federal bankruptcy has the power to free claims from MDL capture.⁴¹ In the last few years, the most notorious defendants subject to—or facing the prospect of being subject to—an MDL, including 3M, Johnson & Johnson, Purdue Pharma, Boy Scouts of America, and USA Gymnastics, have escaped the MDL process by filing for bankruptcy.⁴² In each case, the filing transferred the adjudication of all claims against the entity at issue to the bankruptcy court and halted entirely any pending MDL process. I refer to this election as “bankruptcy preemption.” Unfortunately, bankruptcy preemption has just replaced one deficient structure with another.⁴³

Section 524(g) of the Bankruptcy Code applies only to mass tort cases that involve asbestos exposure claims. Therefore, it does not apply to the new wave of mass restructurings. Corporate tortfeasors have identified a statutory loophole that allows them to craft an entirely unprecedented bargain. By filing for bankruptcy, these cases escape from the MDL process. Once in bankruptcy, mass tort debtors fashion their own ex post, ad hoc resolution structure by cherry-picking attractive provisions and concepts out of § 524(g), incorporating them into a plan of reorganization, and convincing bankruptcy courts to enforce these provisions pursuant to their equitable powers under § 105 of the Bankruptcy Code.⁴⁴ These plans seize § 524(g)'s benefits without being subject to its procedural and substantive restrictions. As explored in detail herein, these “exempt plans” can create serious

39. See, e.g., *In re LTL Mgmt., LLC*, 637 B.R. 396 (Bankr. D.N.J. 2022) (dealing with claims related to exposure to talcum powder); *In re Imerys Talc Am., Inc.*, No. 19-bk-10289 (Bankr. D. Del. filed Feb. 13, 2019) (same); *In re Roundup Prods. Liab. Litig.*, 364 F. Supp. 3d 1085 (N.D. Cal. 2019) (dealing with claims related to exposure to herbicide). In the Roundup case, an estimated 125,000 individuals have alleged that Roundup weed killer, sold by a subsidiary of the global behemoth Bayer, causes non-Hodgkin's lymphoma. See Tom Hals, *Bayer to Rethink Roundup in U.S. Residential Market After Judge Nixes \$2 Bln Settlement*, REUTERS (May 27, 2021, 10:58 AM), <https://www.reuters.com/business/healthcare-pharmaceuticals/us-judge-rejects-bayers-2-bln-deal-resolve-future-roundup-lawsuits-2021-05-26/> [https://perma.cc/W2ZZ-L2NK]. The scientific community is split on the question. Bayer has proposed a \$10 billion settlement in the MDL proceedings, which includes a \$1.1 billion fund for future claims. See Pretrial Order No. 214, *In re Roundup Prods. Liab. Litig.*, No. 16-md-02741 (N.D. Cal. July 6, 2020), ECF No. 11182.

40. See, e.g., *In re PG&E Corp.*, No. 19-bk-30088 (Bankr. N.D. Cal. filed Jan. 29, 2019) (dealing with claims related to wildfires).

41. See *infra* Part III.B.3 (describing bankruptcy preemption).

42. See *infra* Part III.B.2.

43. A significant difference between the federal bankruptcy process and MDL is that a bankruptcy judge can easily intervene and adjust the process to address various deficiencies; an MDL judge does not enjoy this level of flexibility. See *infra* Part III.B.2.

44. Section 105 of the Bankruptcy Code allows the bankruptcy court to “issue any order, process, or judgment that is necessary or appropriate to carry out the provision of this title.” 11 U.S.C. § 105.

consequences for mass tort victims by implementing disparate treatment across settlement classes and increasing the risk of insolvent settlement trusts.

The Bankruptcy Code's current deficiencies allow for a distorted bargain, but the process also presents the possibility of an optimal resolution platform. Bankruptcy can encapsulate a superposition⁴⁵: it can layer multiple forms of delineated relief and revenue-generating mechanisms that are particularly impactful in mass tort cases. The potential exists to resolve mass tort claims efficiently, generate capital for the debtor, address anticommons problems, satisfy due process strictures, compel settlement of both federal and state actions, and instill comprehensive injunctions. All of these benefits are available if certain facets of the current platform can be corrected.

This Essay makes three contributions to the legal literature on mass torts, civil procedure, and financial restructuring. Primarily, this Essay is the first to identify the new mass torts bargain and delineate the distinguishing characteristics and unique resolution complexities it presents.

Second, this Essay conceptualizes how these new cases should be adjudicated and delivers an unprecedented, normative construct focused on solving the anticommons problem through statutory amendments to the Bankruptcy Code. The changes seek to resolve issues that are encapsulated in two spheres: The first involves the representative appointed in bankruptcy to negotiate on behalf of future victims and attempts to minimize capture risk and better align this representative's interests with those of their invisible clients. The second sphere involves an effort to amend § 524(g) to apply to these new mass tort cases and effect a comprehensive structural redesign to improve predictability, efficiency, and victim recoveries.

Third, mass tort legal literature has overlooked the intersection of tort litigation and bankruptcy. This Essay attempts to engage scholars from various disciplines to explore the divergent complexities—including anticommons dynamics and due process concerns—presented by this species of nonclass aggregate litigation.

This Essay proceeds in four parts. Part I defines the pernicious mass torts that are the subject of the Essay and shows how current resolution structures developed in response to asbestos exposure cases. The part also explains that modern mass torts rarely involve asbestos claims.

Part II explores how legislative failures and Rule 23 strictures have forced most mass torts into multidistrict litigation, a distorted process that has achieved practical results through structurally deficient means. This part identifies how many modern mass tort cases are exiting the MDL process by filing for bankruptcy.

Part III reveals how bankruptcy preemption is allowing mass tort defendants to exploit statutory loopholes and fashion an ex post, ad hoc resolution structure that seizes all of § 524(g)'s benefits but bears few of the

45. "Superposition" describes the combination of multiple distinct phenomena of the same type so that they coexist as part of the same event; the combination oftentimes creates a material enhancement.

burdens. There are many consequences, including insolvent settlement trusts that leave future victims without recovery for serious injuries.

Part IV explores the possibility of a bankruptcy superposition—the idea that targeted statutory modifications can yield a significantly enhanced resolution structure. The part presents my normative construct and illuminates how key substantive objectives can be furthered by focusing on two core spheres: (1) addressing disparate treatment of similarly situated victims by minimizing the systemic failures in the process for selecting a representative for future claimants and (2) amending § 524(g) to offer resolution options and impose restrictions on all mass tort cases.

Mass tort canon explores a bygone era of aggregate litigation. Emergence of a unique resolution strategy for mass torts has been underappreciated. This Essay is not only the first to identify this shift and the threats the new bargain poses, but also to present a comprehensive statutory revision to secure alignment between the need to efficiently resolve mass tort disputes and the ideal of protecting victims' rights. More broadly, I attempt to animate scholarly debate around this vital litigation area that is in the midst of an evolution.

I. UNDERSTANDING THE MASS TORT UNIVERSE

The term “mass tort” includes a panoply of idiosyncratic events distinguished by the type of conduct involved and scale of harm inflicted. Transgressions can be organized into one of five categories, with each category presenting unique dimensions based on case facts, causation, harm inflicted, and latency risk. The first four categories are (1) mass disasters,⁴⁶ (2) simple property damage mass torts,⁴⁷ (3) economic loss mass torts,⁴⁸ and

46. Mass disasters are localized, single-incident transgressions that harm an identifiable group of individuals. *See* JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* 16–18 (1995); *see also* RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT* xii (2007); L. Elizabeth Chamblee, *Unsettling Efficiency: When Non-Class Aggregation of Mass Torts Creates Second-Class Settlements*, 65 *LA. L. REV.* 157, 165–66 (2004). A wide swath of victims suffers significant personal injury. Causation is rarely disputed, and harm is not temporally dispersed.

47. Some mass torts result from a single defective product or a series of similar defective products. The product may harm the end user, but, in many cases, the claimant seeks replacement or repair of the defective product. *See* NAGAREDA, *supra* note 46, at 59; Anne E. Cohen, *Mass Tort Litigation After Amchem*, SC57 ALI-ABA 269, 276 (1998).

48. Economic loss torts arise in unique situations where individuals have suffered economic loss due to misconduct, but there is no accompanying physical injury or property damage. The typical example offered for this type of mass tort involves latent product defect cases. *See, e.g.*, Disclosure Statement for Joint Chapter 11 Plan of Reorganization of TK Holdings Inc. and Its Affiliated Debtors, *supra* note 27, at 58–59 (economic loss claims based on the theory that the Takata airbag recall reduced the market value of affected vehicles). Another example involves the quixotic Elon Musk. On August 7, 2019, Elon Musk tweeted that he was considering purchasing all the outstanding shares of Tesla, Inc. at \$420 per share. The stock price spiked after the announcement but then plummeted after Musk acknowledged that he had not undertaken the necessary diligence to assess if the proposal was even possible. Investor actions followed and were consolidated in the Northern District of California. *See generally In re Tesla, Inc. Sec. Litig.*, 477 F. Supp. 3d 903 (N.D. Cal. 2020).

(4) limited personal injury mass torts without latent injury;⁴⁹ none of the cases that fall into these categories are within this Essay's purview. Complex personal injury mass torts represent the final category and present the most pernicious mass tort quandaries, making them this Essay's focus.

A. *General Characteristics of Complex Personal Injury Mass Torts*

Complex personal injury mass torts⁵⁰ disorient private, legislative, and judicial resolution structures because of their scale, temporal dispersion, latent harm, and causation dilemmas. Victims of mass torts suffer significant physical, psychological, and emotional injuries. The number of victims affected is considerable. This dynamic creates geographic dispersion. Further, unlike mass disasters, victims' exposure to the tortious conduct at issue is temporally scattered across a broad timeline. For example, in the Takata airbag case, the installation of defective airbags in popular automobiles was the primary tortious conduct.⁵¹ The nature of the tort precluded prompt identification; injuries and deaths were initially attributed to the vehicular collision at issue, not the defective airbag.⁵² The first victim was identified in 2004, but a meaningful recall did not occur until 2014.⁵³ And a defective Takata airbag killed an individual just a few years ago.⁵⁴

Temporal dispersion is amplified by another factor. In many mass tort cases, multiple victims are exposed to tortious conduct, but the manifestation of harm occurs randomly over an extended period. For example, asbestos presents particularly vexing latency issues. A group of individuals who are exposed to asbestos have a significantly higher risk of contracting cancer than a comparable group that has not been exposed to the toxin.⁵⁵ But, as Professor Richard A. Nagareda explained, the exposed individuals "stand as players in a macabre lottery."⁵⁶ For most victims, the disease will emerge at different stages of their lives over the course of forty years.⁵⁷ Others may

49. Limited personal injury mass torts capture negligent transgressions that involve repeated actions or widely disseminated products, both of which create either minor personal injury on a large scale or significant personal injury on a relatively small scale. *See generally* NAGAREDA, *supra* note 46, at viii.

50. I do not attempt to formulate a list of features that apply to all mass tort cases. This part focuses on key features of many mass tort cases, with particular emphasis on the profile of modern mass tort cases that have sought bankruptcy protection.

51. *See* Sean McLain & Mike Spector, *With 54 Million to Go, This Airbag Recall Is Never Going to End*, WALL ST. J. (June 26, 2017, 5:43 PM), <https://www.wsj.com/articles/bankrupt-air-bag-maker-takata-means-to-keep-limping-along-1498477869> [<https://perma.cc/3WB9-MMPA>].

52. *See id.*

53. *See Timeline: Takata Air Bag Recalls*, REUTERS (May 19, 2019, 10:49 PM), <https://www.reuters.com/article/us-autos-takata-takata/timeline-takata-air-bag-recalls-idUSKBN0042QX20150520> [<https://perma.cc/7PXU-KRA2>].

54. *See* Tom Krisher, *Arizona Man Killed by Exploding Takata Airbag in Honda Civic Brings Death Toll to 24*, USA TODAY (Mar. 29, 2019, 10:34 PM), <https://www.usatoday.com/story/money/cars/2019/03/29/takata-airbag-death-exploding-bag-arizona-crash/3317448002/> [<https://perma.cc/WJ5H-E7E7>] (describing the death that occurred on June 11, 2018).

55. *See* Green et al., *supra* note 25, at 348–49.

56. *See* NAGAREDA, *supra* note 46, at xii.

57. *See id.*

experience absolutely no harm from their exposure.⁵⁸ This is the latency problem that plagues this type of mass tort: there can be a considerable time gap between exposure to tortious conduct and manifestation of harm.

For many of these mass torts, the long trail of harm creates a new type of victim and stratification in the victim class. These mass torts have traditional victims who suffer immediate harm due to the corporate tortfeasor's conduct. However, in addition to this group, there are individuals—referred to as future victims—who have been affected by the defendant's tortious conduct, but for whom harm will not manifest until some undetermined future point. Some of these future victims do not even know they have been exposed to tortious conduct; they cannot come forward themselves nor be identified by plaintiffs' attorneys. These unknown future victims cause further resolution complexity.

The interests and preferences of future victims do not align with current victims, which is one reason why class aggregation under Rule 23 is oftentimes unavailable. Traditional means of notice are infeasible, because these individuals do not identify as tort victims and cannot be identified by the corporate tortfeasor. As detailed in Part II, this stratification within the victim class complicates claim aggregation, a necessary prerequisite for resolution of mass torts.

Causation can also be extremely difficult to establish for mass tort victims.⁵⁹ Long latency periods allow for other variables to intervene in the causal chain.⁶⁰ This is further exacerbated when an individual suffers an injury that is fairly common in the general population.⁶¹ Imagine an individual who was exposed to asbestos fibers in their early twenties. After a lifetime of smoking cigarettes, this individual develops lung cancer in their sixties. Is this illness the result of asbestos exposure or years of cigarette smoking? Further, the effect of certain tortious conduct is difficult to understand.⁶² Scientific studies may reach diametrically opposed conclusions and mass tort cases frequently involve conflicting and speculative expert witness testimony.⁶³ For example, various studies indicate that a woman's use of talcum powder on her body does not increase

58. *See id.*

59. The mere possibility of a particular product or action causing the victim's harm is legally insufficient; generally, a direct, or proximate, causal relationship between the corporate tortfeasor's product or conduct and the victim's harm is necessary. *See, e.g.,* Kenneth R. Feinberg, *The Dalkon Shield Claimants Trust*, 53 *LAW & CONTEMP. PROBS.* 79, 82 n.8 (1990).

60. *See* Philip J. Harter, *The Dilemma of Causation in Toxic Torts* i-ii (Inst. for Health Pol'y Analysis, Selective Stud. of Health Pol'y Issues Monograph No. 101, 1985); David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 *HARV. L. REV.* 849, 856 (1984).

61. *See supra* note 46 and accompanying text.

62. *See generally* Paul Sherman, *Agent Orange and the Problems of the Indeterminate Plaintiff*, 52 *BROOK. L. REV.* 369 (1986).

63. *See, e.g.,* Devra Lee Davis, *The "Shotgun Wedding" of Science and Law: Risk Assessment and Judicial Review*, 10 *COLUM. J. ENV'T L.* 67 (1985); *see also* Wendy E. Wagner, *Ethyl: Bridging the Science-Law Divide*, 74 *TEX. L. REV.* 1291, 1294 (1996).

the risk of ovarian cancer,⁶⁴ but there is currently a lack of consensus in the scientific community.⁶⁵ This schism has led to a number of jury verdicts against Johnson & Johnson⁶⁶ and drove the company's talc subsidiary and Imerys—Johnson & Johnson's primary talc supplier—into bankruptcy.⁶⁷ Historically, the legal bases and scientific validity of the claims at issue in most mass tort cases were not resolved until many years after the cases settled.⁶⁸ The reason for this is that the sheer volume of claims demands prompt resolution, merit notwithstanding.⁶⁹

64. See Patti Neighmond, *Study Finds Talcum Powder Not Likely A Risk for Ovarian Cancer*, NPR (Jan. 7, 2020, 7:17 PM), <https://www.npr.org/sections/health-shots/2020/01/07/794386909/study-finds-talcum-powder-not-likely-a-risk-for-ovarian-cancer> [https://perma.cc/NY2K-T3CF] (explaining that a study of more than 250,000 women found no significant link between the use of talcum powder in the genital area and risk of ovarian cancer among women).

65. See generally Nicole M. Fletcher, Amy K. Harper, Ira Memaj, Rong Fan, Robert T. Morris & Ghassan M. Saed, *Molecular Basis Supporting the Association of Talcum Powder Use with Increased Risk of Ovarian Cancer*, 26 REPROD. SCIS. 1603 (2019) (study confirming the cellular effects of talc and providing support for previous reports linking use in the genital area to increased ovarian cancer risk).

66. See Joel Currier, *Talc Cancer Verdict of \$4.6 Billion from St. Louis Jury Sends "Very Powerful Message,"* ST. LOUIS POST-DISPATCH (July 13, 2018), https://www.stltoday.com/news/local/crime-and-courts/talc-cancer-verdict-of-4-6-billion-from-st-louis-jury-sends-very-powerful-message/article_c15e7f98-fce0-5a74-80ee-45371d5e98b1.html [https://perma.cc/A9VM-THHE]; Charles Toutant, *After \$750 Million Award in Talc Lawsuit, Johnson & Johnson Seeks New Punitive Damages Trial*, LAW.COM (April 22, 2020, 5:15 PM), <https://www.law.com/njlawjournal/2020/04/22/after-750-million-award-in-talc-lawsuit-johnson-johnson-seeks-new-punitive-damages-trial/?sreturn=20220607194517> [https://perma.cc/6SMH-DHNV].

67. Over 30,000 plaintiffs have talcum powder suits pending against Johnson & Johnson, which has a market capitalization of over \$400 billion. See Mike Spector, Jessica DiNapoli & Dan Levine, *J&J Exploring Putting Talc Liabilities into Bankruptcy*, REUTERS (July 19, 2021, 6:17 AM), <https://www.reuters.com/business/healthcare-pharmaceuticals/exclusive-jj-exploring-putting-talc-liabilities-into-bankruptcy-sources-2021-07-18/> [https://perma.cc/3KKZ-WPMT]. Johnson & Johnson has won some of these suits but faces staggering damage awards in the cases it has lost. See Peter Loftus, *Missouri Court Cuts Talc-Powder Verdict Against J&J to \$2.1 Billion*, WALL ST. J. (June 23, 2020, 3:15 PM), <https://www.wsj.com/articles/missouri-court-cuts-talc-powder-verdict-against-j-j-11592935876> [https://perma.cc/8YDP-NAM4]. On May 19, 2020, the company announced that it was discontinuing the sale of all talc-based baby powder in the United States. In October 2021, Johnson & Johnson executed a "divisive merger"—an extremely obscure maneuver that allowed for the isolation of all liability related to its talcum powder business in a new subsidiary called LTL Management. See Samir D. Parikh, *Mass Exploitation*, 170 U. PA. L. REV. ONLINE 53, 58 (2022). On October 14, 2021, LTL Management filed for bankruptcy. The other parts of the J&J empire stayed out of the process. See Rick Archer, *Johnson & Johnson Puts Talc-Spinoff into Ch. 11*, LAW360 (Oct. 14, 2021, 6:29 PM), <https://www.law360.com/articles/1431315/johnson-johnson-puts-talc-spinoff-into-ch-11> [https://perma.cc/EAQ5-RY5P]; Jonathan Randles, Becky Yerak & Andrew Scurria, *How Bankruptcy Could Help Johnson & Johnson Corral Vast Talc Litigation*, WALL ST. J. (Nov. 12, 2021), <https://www.wsj.com/articles/how-bankruptcy-could-help-johnson-johnson-corrall-vast-talc-litigation-11626773400> [https://perma.cc/9QHW-AZMB].

68. See WEINSTEIN, *supra* note 46, at 43.

69. See *id.*; see also Jef Feeley, *Pharmacies Face Peril Without Opioid Settlements*, JUDGE SAYS, BLOOMBERG L. (Apr. 7, 2021, 8:00 AM), <https://news.bloomberglaw.com/bankruptcy-law/pharmacies-face-peril-without-opioid-settlements-judge-says> [https://perma.cc/6UWN-

Resolving mass tort claims can present staggering transaction costs. The volume of claims causes significant resolution delay and precludes meaningful private negotiation and contracting.⁷⁰ Naturally, claim resolution is more viable if transaction costs can be reduced, but these costs cannot be managed without aggregating fragmented and dispersed victim claims in one forum—a result that hinges on access to some effective judicial process. Until there is aggregation in one forum, limited resources are expended for Pyrrhic victories that fail to move the war closer to resolution. Some structure is necessary to address the “inability of the private market to overcome the transactional barrier to the prosecution” of mass tort claims.⁷¹

B. Mass Tort Anticommons and the Global-Settlement Imperative

The final distinguishing feature of mass torts is the unique anticommons problem they present. The tragedy of the commons is a well-known theoretical model.⁷² The tragedy arises when a group of individuals have ostensibly unfettered privileges to use a scarce resource. No single individual in the group is allowed to exclude another from using the resource, nor can the group coordinate efforts to restrict access to the resource.⁷³ Each individual benefits directly from consumption and this benefit is greater than the delayed harm stemming from depletion risk, which is distributed evenly among the group.⁷⁴ Consequently, the individuals in the group do not internalize all the costs of their conduct. The tragedy is that “the total of resource units withdrawn from the resource will be greater than the optimal economic level of withdrawal.”⁷⁵ In other words, each individual acting rationally in their own self-interest will create collective action that results in the overconsumption—and, in many cases, the entire depletion—of the scarce resource.⁷⁶

Anticommons theory is the lesser-known sister model that presents the converse situation. In this model, a large group of individuals enjoys restricted access to a scarce resource.⁷⁷ The use is restricted because each individual in the group is endowed with the unfettered right to exclude others

X3RA] (explaining that even if claims against pharmacies lack a legal basis for liability, the idea that these defendants would try hundreds of cases all over the country is unrealistic).

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

71. See *id.* at 212.

72. See ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 2 (1990).

73. See *id.* Coordination obstacles oftentimes arise from excess transaction costs related to coordination as opposed to some sort of theoretical restriction.

74. See *id.*

75. See *id.* at 3.

76. Garrett Hardin developed the archetypical example of the tragedy. Imagine a pasture open to all animals of herders in the area. Each herder receives a direct benefit from their animals grazing in the pasture, and the risk of animals overgrazing on the pasture and destroying it is a delayed cost that is spread across all herders. “Each [herder] is locked into a system that compels him to increase his herd without limit [but the resource at issue is limited].” OSTROM, *supra* note 72, at 2–3.

77. See Heller, *supra* note 28, at 677.

from using the resource.⁷⁸ When multiple individuals hold exclusion rights, transaction costs preclude coordination, and the resource at issue cannot be accessed.⁷⁹ Invariably, the resource devolves naturally over time.

Mass torts offer a particularly unique example of an anticommons dynamic. There are a significant number of claims seeking compensation from a limited pool of settlement funds. Current victims—many of whom are suffering life-threatening illnesses—would like to consume these resources immediately. Plaintiffs’ attorneys have devoted significant resources to identifying and marshalling these victims. Consequently, current victims are able to coordinate and negotiate a mechanism that allows them to access promptly the trust fund resources. But there is a problem. Corporate tortfeasors are interested in resolving mass tort claims that represent an existential threat to their businesses, even if the merits of the claims are suspect. However, corporate tortfeasors demand global settlements—a term describing resolution of substantially all outstanding current and future claims at a known price.⁸⁰ Without a global settlement, corporate tortfeasors are willing to continue with fragmented and protracted litigation, in effect denying the victims collective access to the settlement funds, or, at the very least, delaying access for an unacceptable period of time.⁸¹

The global-settlement imperative exists because corporate tortfeasors are exposed to a destabilizing degree of uncertainty without a settlement that binds all current and future victims. More specifically, a settlement that allows certain defendants to “opt out” or carves out future victims creates the risk of material unaddressed claims.⁸² Such a settlement has significantly diminished value.⁸³ Indeed, victims with high-value claims will invariably opt out of the settlement in order to keep their recovery from being diluted in

78. See *id.*; see also Samir D. Parikh & Zhaochen He, *Failing Cities and the Red Queen Phenomenon*, 58 B.C. L. REV. 599, 628–29 (2017) (describing how the small pool of sovereign bonds in the 1970s required bondholder unanimity as a prerequisite to debt impairment).

79. See Heller, *supra* note 28, at 670–76.

80. See Schuck, *supra* note 23, at 962.

81. For example, in the Vioxx products liability litigation, Vioxx proposed a generous settlement of \$4.85 billion to eligible claimants, but plaintiffs’ counsel was required to secure consent of 100 percent of their clients; further, the settlement was void if less than 85 percent of all federal and state plaintiffs joined the settlement. See Alex Berenson, *Merck Agrees to Settle Vioxx Suits for \$4.85 Billion*, N.Y. TIMES (Nov. 9, 2007), <https://www.nytimes.com/2007/11/09/business/09merck.html> [<https://perma.cc/E8AM-M3MV>].

82. See McGovern & Rubenstein, *supra* note 26, at 78.

83. See *id.*; see also Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1555 (2004). The settlement in the fen-phen dietary supplement case failed due to multiple plaintiffs utilizing opt-out rights. See NAGAREDA, *supra* note 46, at 146–47. Further, the risk of victims exercising opt-out rights in mass tort cases is much higher than in traditional class action cases. In traditional class action cases, the value of an individual victim’s claim is less than the transaction costs necessary to adjudicate the claim. These victims benefit from class aggregation, which creates the scale necessary to pursue meaningful recovery. In mass tort cases, many victims hold extremely high-value claims and do not necessarily benefit from aggregation.

the general pool.⁸⁴ Further, future victims can emerge at any time and in unknown numbers, decimating otherwise profitable industries as they did for countless asbestos companies.⁸⁵ Lingering uncertainty creates a black cloud. The cloud suppresses market capitalization, because investors are forced to discount valuation of the corporate entity to account for the possibility that unaddressed claims will emerge and destroy. Credit markets are affected similarly, but the results are increased borrowing costs or—in the doomsday scenario—restricted access to credit. Corporate tortfeasors refuse to accept the possibility of either outcome.

Returning to the anticommons dynamic, we can see that corporate tortfeasors—as well as insurers, affiliated corporate entities, and other parties funding the settlement trust—invariably require substantially all victims to agree to specific disbursement terms before any one victim can access settlement funds. This edict gives individual victims unfettered exclusion power. The latency quandary adds further complexity. Many mass torts have future victims whose claims must be resolved as part of a global settlement, but for whom harm has not yet manifested. Current victims may be able to coordinate and negotiate a mechanism that allows them to access the trust fund resources, but future victims must be brought along. Modern mass torts present a unique obstacle that transcends traditional transaction cost issues. Further, some of the victims whose votes are necessary for securing unanimity are truly unknown, even to themselves. Coordination among members of this class is impossible, which can preclude—or at least greatly delay—access to settlement funds.

II. THE EVOLUTION OF MASS TORTS

The factual scenarios in mass tort cases form a rich tapestry. Cases involve wartime herbicides,⁸⁶ defective medical devices,⁸⁷ countless pharmaceutical

84. See Eisenberg & Miller, *supra* note 83, at 1555.

85. By 2007 “nearly all of the major [asbestos] manufacturers’ ha[d] declared bankruptcy.” LLOYD DIXON, GEOFFREY MCGOVERN & AMY COOMBE, ASBESTOS BANKRUPTCY TRUSTS: AN OVERVIEW OF THE TRUST STRUCTURE AND ACTIVITY WITH DETAILED REPORTS ON THE LARGEST TRUSTS 3 (2010), https://www.rand.org/pubs/technical_reports/TR872.html [<https://perma.cc/2DQY-Y4E9>] (click on “PDF file” under “Full Document”) (quoting AM. ACAD. OF ACTUARIES, OVERVIEW OF ASBESTOS CLAIMS ISSUES AND TRENDS 5 (2007)).

86. Agent Orange was a powerful herbicide used by U.S. military forces during the Vietnam War, affecting millions of veterans. See PETER H. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS 3–4 (1986).

87. The Dalkon Shield case involved a defective intrauterine birth-control device that caused pelvic infections, sterility, involuntary abortion, and death in thousands of women. See Karen Kenney, L.A. DAILY NEWS, *Dalkon Shield Gives Birth to a Generation of Lawsuits*, CHI. TRIB. (Apr. 30, 1985, 12:00 AM), <https://www.chicagotribune.com/news/ct-xpm-1985-04-30-8501260779-story.html> [<https://perma.cc/78N7-RZ5C>].

cases involving staggering side effects,⁸⁸ severe personal injuries,⁸⁹ and products-liability disputes.⁹⁰ But cases involving asbestos exposure have cast a long shadow across the landscape.⁹¹

For centuries, asbestos was regarded as a type of miracle mineral because it could “withstand punishing forces of fire, corrosion, and acid, while also [being] versatile enough to weave into textiles and line automobile brakes, retard shipboard fires, and bind rockets together.”⁹² In the 1960s, Dr. Irving Selikoff substantiated the harmful effects of asbestos inhalation.⁹³ The widespread use of asbestos ceased shortly thereafter, but the contagion had already spread: countless individuals had been directly exposed to asbestos fibers.⁹⁴ A series of isolated cases emerged in the early 1980s, but the filings accelerated quickly. By 1991, there were 115,000 asbestos claims pending in federal and state courts.⁹⁵ The “elephantine mass of asbestos cases”⁹⁶ threatened to overwhelm the judiciary.

88. DES—or diethylstilbestrol—is a synthetic estrogen that was approved by the U.S. Food and Drug Administration for the prevention of early miscarriage. During a twenty-year period starting in 1948, between three and four million women ingested DES in the United States. Unfortunately, female children of mothers who had ingested the drug “develop[ed] preneoplastic vaginal and cervical changes in adolescence or adulthood.” HAN W. CHOI & JAE HONG LEE, *PRINCIPLES AND PRACTICE OF PHARMACEUTICAL MEDICINE* 694 (3d ed. 2011).

89. In *In re National Football League Players’ Concussion Injury Litigation*, former players in the National Football League brought suits alleging that the league and executive members “concealed [the risks of head injuries] from the players.” 301 F.R.D. 191, 195 (E.D. Pa. 2014).

90. In 1962, Dow Corning began marketing silicone breast implants that consisted of a small silicone bag containing silicone gel. See MARCIA ANGELL, *SCIENCE ON TRIAL: THE CLASH OF MEDICAL EVIDENCE AND THE LAW IN THE BREAST IMPLANT CASE* 39 (1996). A small percentage of the implants would rupture, and the gel could migrate through an individual’s body, but Dow Corning did not believe that the gel posed any risk of harm. See *id.* at 39–43. In the 1990s, a wave of litigation brought substantial jury verdicts, even though studies failed to show any link between the implants and an increased risk of cancer. See David E. Bernstein, *The Breast Implant Fiasco*, 87 CALIF. L. REV. 457, 477–84 (1999). By the late 1990s, implant manufacturers were winning 80 percent of the cases that reached a verdict. See *id.* at 493 n.177. Nevertheless, in May 1995, Dow Corning filed for bankruptcy protection and structured a \$3.2 billion trust to settle tens of thousands of claims. Jeff Leeds, *Dow Corning Agrees to Pay \$3.2 Billion in Breast Implant Case*, L.A. TIMES (Nov. 10, 1998, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1998-nov-10-fi-41095-story.html> [<https://perma.cc/HA5S-S332>]. The bulk of silicone implant litigation was bereft of scientific evidence. See Bernstein, *supra*, at 477–84. In 2006, the U.S. Food and Drug Administration lifted the ban on silicone gel implants. See ANGELL, *supra*, at 44.

91. I acknowledge that asbestos cases are not the only type of personal injury mass tort, but these cases have eclipsed all others. Indeed, asbestos exposure cases have dominated this area and collectively represent the “longest-running mass tort litigation in the United States.” CARROLL ET AL., *supra* note 35, at 21. The tragedy has spurred an enormous canon of academic literature, countless studies, and exhaustive legislative and procedural changes. See HENSLER, *supra* note 32, at 7–8 (“Over the past half-dozen years, there has probably been more procedural innovation associated with asbestos litigation in federal and state courts than in any other single area of litigation.”).

92. Christopher F. Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 HARV. J. ON LEGIS. 383, 387 (1993).

93. See *id.* at 390.

94. See *id.* at 389 n.9.

95. See HENSLER, *supra* note 32, at 3.

96. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999).

The Judicial Conference of the United States established the Ad Hoc Committee on Asbestos Litigation to analyze the situation and propose solutions. The committee's 1991 report concluded that the "situation ha[d] reached critical dimensions and . . . the courts [were] ill-equipped to [handle this disaster]."⁹⁷ The committee recommended a "national solution" premised on congressional action creating a single forum for all federal and state court asbestos cases.⁹⁸ But the prospect of congressional intervention was dim.

In 1991, eight district judges petitioned the Judicial Panel on Multidistrict Litigation (JPML) to consolidate all asbestos cases in a single judicial district.⁹⁹ On July 29, 1991, under 28 U.S.C. § 1407, the panel created MDL 875 and transferred all 26,000 pending federal cases to Judge Charles R. Weiner for pretrial management.¹⁰⁰ MDL 875 has been in existence for almost thirty years and is the largest MDL in U.S. history.¹⁰¹

Asbestos cases present particularly complex latency issues and intriguing financial, procedural, and constitutional dynamics that have impacted various generations across the country. This litigation beast has fascinated and terrified policy makers and jurists. The expectation is that asbestos litigation will ultimately total over one million claims costing defendants and insurers over \$265 billion.¹⁰² The canon of mass tort scholarship is dominated by academic literature chronicling the asbestos litigation epidemic, diagnosing resolution defects and proposing structural, statutory, and jurisprudential modifications to tame the beast.

Asbestos exposure cases consumed the judiciary and produced a bespoke resolution structure. But the asbestos imprint has faded over time. Modern mass tort litigation rarely involves asbestos claims.¹⁰³ In fact, by 2007, "nearly all of the major [asbestos] manufacturers' ha[d] declared bankruptcy."¹⁰⁴

A new species of mass tort litigation has evolved over the last ten years. Numerous modern cases capture this shift, including those involving the

97. REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION 2 (1991).

98. *See id.* at 3.

99. *See* Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm*, 23 WIDENER L.J. 97, 111–12 (2013).

100. *See id.*

101. *See id.* at 100 n.4 (stating that MDL 875 is the largest MDL in U.S. history in terms of number of claims and cases transferred).

102. *See id.* at 105.

103. *See supra* note 35 and accompanying text.

104. DIXON ET AL., *supra* note 85, at 3 (quoting AM. ACAD. OF ACTUARIES, OVERVIEW OF ASBESTOS CLAIMS ISSUES AND TRENDS 5 (2007)).

opioid crisis,¹⁰⁵ sexual abuse involving nonreligious entities,¹⁰⁶ and product defects with significant latent injury risks.¹⁰⁷ These new cases do not present identical resolution obstacles, but they do highlight new strategies and

105. Purdue Pharma and Insys Therapeutics are just two examples. These manufacturers built a business model on the premise that if they could get their drugs into the hands of the general public, patients would become hopelessly addicted. See Joe Eaton, *How a Drugmaker Bribed Doctors and Helped Fuel the Opioid Epidemic*, AARP (Jan. 24, 2020), <https://www.aarp.org/health/drugs-supplements/info-2019/insys-opioid-bribery-case.html> [<https://perma.cc/E4VG-MQNF>] (“The longer the patient stayed on the drug, the higher the dose that they were going to use, and the more revenue it was going to be worth to us.” (quoting former Insys CEO Michael Babich)). Executives understood the devastation that would result. What they failed to appreciate was that the collective of depraved individuals willing to implement this type of strategy was extremely large, and a national crisis was the inevitable result. Societal, legal, and business pressures all aligned, and both cases quickly reached a mature litigation stage ready for settlement. This aligned with the objective of Judge Dan A. Polster, who oversaw the MDL and voiced a strong desire for a prompt out-of-court settlement of these actions. See Transcript of Proceedings at 4, *In re Nat’l Prescription Opiate Litig.*, No. 17-CV-02804 (N.D. Ohio Jan. 9, 2018), ECF No. 58. Judge Polster explained, “[M]y objective is to do something meaningful to abate this crisis and to do it [immediately] [W]e don’t need a lot of briefs and we don’t need trials.” *Id.* at 4, 9. But neither Purdue Pharma nor Insys Therapeutics settled with the victims of their transgressions as part of the MDL. Instead, they both filed for bankruptcy protection under Chapter 11 and exited those proceedings. See Eaton, *supra*.

106. The Boy Scouts of America (BSA) case demonstrates a radical new perspective on personal accountability in sexual abuse cases. In that case, staggering numbers of children and young adults were sexually abused by individuals working within the BSA organizations. Further, key executives at the national and local chapters were aware and refused to report the abuses, choosing to protect abusers from law enforcement and other organizations. BSA held records detailing abuse from as early as 1919. See Nina Feldman & Nicholas Pugliese, *New LawsUIT Reveals More Sexual Abuse Allegations Against Boy Scouts of America*, NPR (Aug. 7, 2019, 11:50 AM), <https://www.npr.org/2019/08/07/749041591/new-lawsuit-reveals-more-sexual-abuse-allegations-against-boy-scouts-of-america> [<https://perma.cc/7DUT-PU93>]. BSA’s plan of reorganization calls for the creation of a settlement trust funded by BSA cash and insurance proceeds, to which all victims’ claims will be channeled. See Disclosure Statement for the Chapter 11 Plan of Reorganization for Boy Scouts of America and Delaware SBA, LLC at 23–24, *In re Boy Scouts of Am.*, No. 20-10343 (Bankr. D. Del. Feb. 18, 2020), ECF No. 21.

107. Consumer products with significant latent injury risks continue to plague the marketplace. Many of these products are seen as safety mechanisms designed to actually protect end users or are innocuous products without the possibility of any negative effects. The Takata mass tort presents an example of the former. The Japanese conglomerate specialized in airbag systems and seat belts. See Disclosure Statement for Joint Chapter 11 Plan of Reorganization of TK Holdings Inc. and Its Affiliated Debtors, *supra* note 27, at 58–59. Unfortunately, the company installed defective airbags beginning in the early 2000s and failed to take corrective measures until 2014. The problem is particularly pernicious because Takata airbag systems were installed in over 40 million vehicles in the United States alone—roughly 16 percent of the 260 million vehicles on U.S. roads. Only a fraction of the affected vehicles have been recalled and repaired. See McLain & Spector, *supra* note 51. On February 5, 2015, the JPML centralized numerous proposed class actions against Takata and various automakers in a federal district court in Florida (the “Airbag MDL”). See *In re Takata Airbag Prods. Liab. Litig.*, 84 F. Supp. 3d 1371, 1371 (S.D. Fla. 2015). Shortly thereafter, Takata determined that pursuing an asset sale in bankruptcy was its most viable option. See generally Samir D. Parikh, *Scarlet-Lettered Bankruptcy: A Public Benefit Proposal for Mass Tort Villains*, 117 Nw. U. L. REV. 425 (2022) (raising doubts about this choice). After extensive negotiations, Takata and various affiliates filed for bankruptcy on June 25, 2017, and exited the Airbag MDL. See Disclosure Statement for Joint Chapter 11 Plan of Reorganization of TK Holdings Inc. and Its Affiliated Debtors, *supra* note 27, at 8.

expose the void that currently exists in resolution structures—a void that will be explored further in Part III.

Mass torts have evolved, but—as detailed in the following part—the only structures available to resolve them have not.

III. RESOLUTION STRUCTURES

Professor Michael A. Heller explains that, over time, close-knit groups may develop informal norms that help them access a resource efficiently, while ensuring uniform resource allocation across groups with misaligned interests.¹⁰⁸ But mass torts do not involve close-knit groups. A more realistic solution to the claim aggregation problem involves an aggressive legislative response to create a structure that binds all victims even without coordination. Unfortunately, the dream of a legislative *deus ex machina*¹⁰⁹ is long dead. What remains for those seeking resolution of modern mass tort litigation is an overreliance on the judiciary and the MDL process.

This part explores how legislative failures and Rule 23 strictures forced many mass torts into multidistrict litigation and federal bankruptcy court for a substantive resolution.

A. Regulatory Inaction and Legislative Failures

Regulatory agencies offer *ex ante* means to prevent mass torts. These measures are extremely attractive to policy makers.¹¹⁰ Enhanced regulatory oversight could theoretically keep defective products and perverse pharmaceuticals out of public hands, as well as prevent financial and other institutional crimes.¹¹¹ For example, a more diligent U.S. Food and Drug Administration (FDA) has the capacity to limit the introduction of highly addictive drugs into the market and restrict “off-label” prescriptions. Further, aggressive monitoring can be impactful in many cases even without meaningful enforcement.¹¹²

Unfortunately, regulatory agencies have failed to control excessive corporate risk-taking.¹¹³ One reason for this deficiency is that these bodies

108. See Heller, *supra* note 28, at 677–78.

109. The Greek phrase “*deus ex machina*” translated literally means “a god from a machine.” The phrase is often used to describe “unlikely saviors and improbable actions that bring order out of chaos in sudden and surprising ways.” *Deus ex machina*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/deus%20ex%20machina> [<https://perma.cc/4NVG-XT3E>] (last visited Oct. 7, 2022).

110. See Parikh & He, *supra* note 78, at 601 (explaining that, as the adage states, the best way to dismantle an atomic bomb is to not build it in the first place).

111. See NAGAREDA, *supra* note 46, at 10.

112. See Samir D. Parikh, *A New Fulcrum Point for City Survival*, 57 WM. & MARY L. REV. 221, 278 (2015) (“Studies demonstrate that people modify their behavior if they believe they are being monitored, even if the monitor cannot take any action against them.”).

113. Examples abound and stretch across various fields from pharmaceuticals, e.g., the FDA’s failure to police opioid manufacturers over a thirty-year period, see Abby Goodnough & Margot Sanger-Katz, *As Tens of Thousands Died, F.D.A. Failed to Police Opioids*, N.Y. TIMES (Dec. 31, 2019), <https://www.nytimes.com/2019/12/30/health/FDA-opioids.html> [<https://perma.cc/V4PK-4TDF>], to the financial sector, e.g., the U.S. Securities and Exchange

do not have sufficient resources. Over the last forty years, administrations led by individuals from both primary political parties have undertaken a concerted effort to minimize the purview of regulatory agencies.¹¹⁴ Funding for these agencies has similarly diminished over time.¹¹⁵ Most damning is the fact that modern mass torts oftentimes involve intentional misconduct, actions that present a high risk of significant civil penalties and even criminal prosecution. Nevertheless, corporate tortfeasors in these instances behave irrationally,¹¹⁶ making decisions infected by various heuristics¹¹⁷ and biases.¹¹⁸ Unethical corporate actors with this orientation and an intention to commit illegal acts can be policed only by aggressive internal and external controls.¹¹⁹ And governmental agencies are not positioned to meet this challenge.

Ex post legislative options are similarly limited. Under Article I of the U.S. Constitution, Congress enjoys the power to unilaterally alter preexisting rights through legislation.¹²⁰ Professor Nagareda urged Congress to pass legislation establishing a bespoke administrative framework for resolving mass tort claims.¹²¹ Under Professor Nagareda's proposal, government officials would identify mass tort cases of a certain scale.¹²² Claims in those cases would be pulled out of the tort system and managed in an administrative process where officials would distribute private funds to victims pursuant to a predetermined compensation matrix.¹²³ In exchange for funding the distribution, corporate tortfeasors would be absolved of further liability.¹²⁴

The idea is attractive in theory, but past congressional attempts to fashion an administrative resolution framework have failed. For example, in the late

Commission's failure to discover Bernie Madoff's fifty-year Ponzi scheme, even after repeated whistleblower notices detailing the intricacies of the scheme, *see* Marcy Gordon, *How Ponzi King Bernie Madoff Conned Investors and Seduced Regulators*, *FORTUNE* (Apr. 15, 2021, 5:41 AM), <https://fortune.com/2021/04/15/how-ponzi-king-bernie-madoff-conned-investors-and-seduced-regulators/> [<https://perma.cc/KS6J-MD6D>].

114. *See* NAGAREDA, *supra* note 46, at 10.

115. For example, the U.S. Securities and Exchange Commission was underfunded throughout the 2000s and chose to focus on certain financial crimes (e.g., insider trading) while generally ignoring others (e.g., Ponzi schemes). *See* Mark Schoeff, Jr., *SEC Seeks More Examiners, but SRO Idea Still Looming*, *INV. NEWS* (Apr. 25, 2012), <https://www.investmentnews.com/sec-seeks-more-examiners-but-sro-idea-still-looming-42349> [<https://perma.cc/XGK4-2MJ3>]. Bernie Madoff repeatedly mocked the SEC's attempts to detect his billion-dollar Ponzi scheme. *See* Robert Smith, *In Recordings, Madoff Offers Tips to Evade the SEC*, *NPR* (Sept. 10, 2009, 4:00 PM), <https://www.npr.org/templates/story/story.php?storyId=112725013> [<https://perma.cc/B7Q4-A9LF>].

116. *See* Robert Prentice, *Enron: A Brief Behavioral Autopsy*, 40 *AM. BUS. L.J.* 417, 417–24 (2003).

117. *See* Donald C. Langevoort, *Where Were the Lawyers?: A Behavioral Inquiry into Lawyers' Responsibility for Clients' Fraud*, 46 *VAND. L. REV.* 75, 102–03 (1993).

118. *See* Prentice, *supra* note 116, at 417–24.

119. *See* Hui Chen & Eugene Soltes, *Why Compliance Programs Fail—and How to Fix Them*, *HARV. BUS. REV.*, Mar.–Apr. 2018, at 116, 116.

120. *See* NAGAREDA, *supra* note 46, at 58–63.

121. *See id.* at 62.

122. *See id.*

123. *See id.*

124. *See id.*

1990s, the judiciary had been unable to resolve asbestos litigation, and the focus shifted to Congress.¹²⁵ From 1998 to 2005, over fifteen bills were introduced in Congress proposing changes to the way in which asbestos claims are resolved.¹²⁶ Almost every bill created a publicly administered resolution structure that was privately funded.¹²⁷ Asbestos manufacturers and insurance companies, among other stakeholders, agreed to fund the trust in exchange for being absolved of future liability.¹²⁸ Despite the overwhelming need for legislative intervention, all fifteen bills failed. Ultimately, “[t]he significant problem with a legislative solution has . . . to do with . . . politics . . . [and] the array of interests” that align and derail sweeping legislative proposals.¹²⁹ An ex post administrative framework is an unlikely solution to the mass tort quandary.

An additional legislative option is the idea of using public dollars to supplement victim compensation.¹³⁰ Congress has established administrative compensation programs in the past to address toxic torts. Unfortunately, the results undermine the efficacy of this proposal. For example, in 1969, Congress passed the Federal Coal Mine Health and Safety Act of 1969¹³¹ (the “Coal Mine Act”) to help coal miners suffering from black lung disease.¹³² The act allowed affected miners to receive workers’ compensation benefits and distributions.¹³³

The Coal Mine Act and its extensive amendments are considered a disaster.¹³⁴ In its 1980 report, the U.S. General Accounting Office highlighted various problems.¹³⁵ Primarily, the legislation was poorly drafted and created a fundamentally deficient payment infrastructure.¹³⁶ Further, the program was not well administered.¹³⁷ The Coal Mine Act’s legacy is that it significantly reduced the possibility that the federal government would consider administering a mass tort compensation program of any kind.¹³⁸

125. See Robreno, *supra* note 99, at 114.

126. *See id.*

127. See Elise Gelinas, *Asbestos Fraud Should Lead to Fairness: Why Congress Should Enact the Fairness in Asbestos Injury Resolution Act*, 69 MD. L. REV. 162, 168–69 (2009).

128. *See id.*

129. Edley & Weiler, *supra* note 92, at 400.

130. This approach may be particularly appealing because the United States does not have a comprehensive medical disability system, as do many developed countries.

131. Pub. L. No. 91-173, 83 Stat. 742 (codified as amended in scattered sections of 15 and 30 U.S.C.).

132. PETER S. BARTH, *THE TRAGEDY OF BLACK LUNG: FEDERAL COMPENSATION FOR OCCUPATIONAL DISEASE* 26–28 (1987).

133. *See id.*

134. *See* Schuck, *supra* note 23, at 970.

135. *See* BARTH, *supra* note 132, at 262.

136. *See id.* at 276.

137. *Id.* at 284. For example, a majority of miners received large compensation awards even when there was little medical evidence that they had black lung. *See id.* at 269. The legislation was “the epitome of political manipulation of the pork barrel process, under the guise of operating a workers’ compensation scheme.” *Id.* at 128.

138. *See id.* at 284 (“[Any program similar to the black lung program] would be an expensive blunder.”); *see also* Schuck, *supra* note 23, at 969 n.124 (“Congress has taken one

Legislators could do a lot to prevent mass torts or, at the very least, effectively compensate victims. But Congress has retreated from this challenge and ceded the space to the judiciary.

B. *The Judiciary's Current Approach*

Over thirty-five years ago, Professor David Rosenberg argued that mass tort litigation should be seen as a public-law dispute.¹³⁹ Because of the type and scale of harm suffered and the difficulty in resolving claims at an individual-claimant level, these cases demand a collective process focused on accelerated resolution, decreased transaction costs, some semblance of equity across claimant classes, and more generalized causation inquiries.¹⁴⁰ Mass tort cases are akin to public litigation involving court-ordered restructuring used to efficiently compensate victims while protecting their constitutional rights.¹⁴¹ Public interest cases—such as those involving school desegregation—impact communities far beyond those represented by the actual litigants.¹⁴²

Mass torts are indeed a hybrid. They are customary private disputes, but they also present a scale that transforms resolution options. These dynamics render private and legislative ordering of these cases difficult and misshapen.¹⁴³ Consequently, the judiciary has assumed an oversized role. As explored below, once federal courts have jurisdiction over one mass tort case, aggregation of factually similar cases occurs through three primary means: (1) certification of a class under Rule 23, (2) consolidation by the JPML and transfer to a single district court, or (3) corporate bankruptcy under title 11 of the U.S. Code.

1. Class Aggregation and Rule 23

Rule 23 offers the infrastructure that provides various options for qualifying class actions. This process attempts to address the private market's inability to overcome the transactional barrier to the resolution of voluminous private claims.¹⁴⁴ It offers judicial supervision and noncontractual aggregation. Class actions are designed for cases involving common causation elements in which victims hold negative-value claims—

lesson away from its experience with the black lung program: "Don't do it again.""). I acknowledge the relative success of the fund established to address claims for death or personal injury related to the 9/11 terrorist attacks. However, this fund came about as a result of a terrorist attack that was equated to an act of war, where the victims were described as casualties of war entitled to special consideration. See George Rutherglen, *Distributing Justice: The September 11th Victim Compensation Fund and the Legacy of the Dalkon Shield Claimants Trust*, 12 VA. J. SOC. POL'Y & L. 673, 678–79 (2005).

139. See generally Rosenberg, *supra* note 60.

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

141. See WEINSTEIN, *supra* note 46, at 40.

142. *Id.*

143. *Id.* at 204.

144. See Issacharoff, *supra* note 70, at 212.

a label that applies when the value of an individual victim's claim is less than the transaction costs necessary to adjudicate the claim and secure that dollar value.¹⁴⁵ Class actions overcome the incentive deficiencies that accompany negative-value claims "by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor" and by securing bargaining leverage that is otherwise unavailable.¹⁴⁶

The process has had a transformative effect on our jurisprudence. Rule 23 allows members of a class to sue as representative parties on behalf of other victims who are similarly situated.¹⁴⁷ The adjudication of the representatives' claims invariably determines the resolution of those held by absent class members. Absent class members enjoy the right to opt out of settlements, but few do because they invariably hold negative-value claims.¹⁴⁸

Rule 23 mandates that the court play an enhanced gatekeeper role. At the entry point, the trial court will certify a class only if the suit satisfies the criteria set forth in Rule 23(a) involving numerosity,¹⁴⁹ commonality,¹⁵⁰ typicality,¹⁵¹ and adequacy of representation.¹⁵² If these criteria are satisfied, the court must then determine the appropriate class type—among the three delineated in Rule 23(b)—for the claims at issue. The vast majority of class actions for money damages are brought under subsection (b)(3), which requires that questions of law or fact common to class members predominate over any questions affecting individual members.¹⁵³ This subsection also requires that class certification must be superior to other available methods of adjudication.¹⁵⁴

145. See McGovern & Rubenstein, *supra* note 26, at 81; see also Elizabeth Chamblee Burch, *Procedural Justice in Nonclass Aggregation*, 44 WAKE FOREST L. REV. 1, 11–24 (2009).

146. *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)).

147. See D. Brooks Smith, *Class Action and Aggregate Litigation: A Comparative International Analysis*, 124 PA. ST. L. REV. 303, 308 (2019).

148. See *id.*

149. The class must be so numerous that joinder of all members is impracticable. The requisite number of cases varies based on the dispute at hand. See *In re Modafinil Antitrust Litig.*, 837 F.3d 238, 252–53 (3d Cir. 2016).

150. Common questions of law or fact characterize the claims of class victims, and these common questions must find resolution in common answers. See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).

151. The claims or defenses of the representative parties are typical of the claims or defenses of the class. See, e.g., *Wiener v. Dannon Co.*, 255 F.R.D. 658, 666–67 (C.D. Cal. 2009).

152. The representative parties (1) will fairly and adequately protect the interests of the class and (2) should not have material conflicts of interest with absent class members. See, e.g., *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 855–56 (1999); see also *Eubank v. Pella Corp.*, 753 F.3d 718 (7th Cir. 2014) (overturning class settlement because lead class counsel was the lead class representative's son-in-law).

153. FED. R. CIV. P. 23(b)(3).

154. See Smith, *supra* note 147, at 309. This option is also the most popular form of class action in the United States. See *id.*

Rule 23(e) allows for class certification for the sole purpose of settlement and has become the preferred resolution option in mass tort cases.¹⁵⁵ In these circumstances, the trial court appoints a fiduciary for absent class members who is tasked with protecting due process rights for all members.¹⁵⁶ Rule 23 mandates adequate notice to the class and allows members to participate in proceedings or opt out of any settlement and pursue litigation individually.¹⁵⁷ Returning to its enhanced gatekeeper role, the court will not allow exit before it assesses the fairness, reasonableness, and adequacy of the settlement terms and the settlement process.¹⁵⁸ In order to fulfill this obligation, courts invariably appoint experts or other adjuncts to evaluate the settlement process and offer an additional layer of class protection.¹⁵⁹ Ultimately, Rule 23 creates a structural design that facilitates adjudication when necessary and settlement when possible, while also attempting to ensure procedural and constitutional integrity.¹⁶⁰ After decades of legislative inaction and failure, class aggregation was seen as perhaps the only viable option for addressing mass tort litigation.

However, the adequacy-of-representation requirement rendered many mass tort cases a poor fit within Rule 23's strictures.¹⁶¹ Plaintiffs' attorneys sought a way around this obstacle. A new theory emerged in the 1980s: instead of relying on class actions for case adjudication, the process could facilitate resolution of mass torts by merely serving as an enforcement device for out-of-court global settlements.¹⁶² Animated by this premise, plaintiffs' attorneys sought settlement class certification as a means to resolve mass torts.

155. See Troy A. McKenzie, *Toward a Bankruptcy Model for Nonclass Aggregate Litigation*, 87 N.Y.U. L. REV. 960, 965 (2012).

156. As explained by the Advisory Committee on Civil Rules, "[t]he central concern in reviewing a proposed class-action settlement is that it be fair, reasonable, and adequate." ADVISORY COMMITTEE ON CIVIL RULES 112 (2017), https://www.uscourts.gov/sites/default/files/2017-04-civil-agenda_book.pdf [<https://perma.cc/BL6U-K4PX>].

157. See Smith, *supra* note 147, at 310.

158. See *id.*

159. See, e.g., Class Plaintiffs' Motion for an Order Granting Final Approval of Settlement and Certification of Class and Subclasses, *In re Nat'l Football League Players' Concussion Inj. Litig.*, No. 12-md-02323 (E.D. Pa. Nov. 12, 2014), ECF No. 6423.

160. I do not dispute that the process is far from optimal. Rule 23's structure and implementation has received criticism. See Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 FORDHAM L. REV. 1177, 1188–90 (2009) (acknowledging that "class action settlement procedures are far from perfect and are often inadequate" and listing various deficiencies). Further, the process arguably represents a type of litigation extortion where excessive stakes coerce corporate defendants to settle claims that lack merit in order to avoid risking the corporate entity's survival. See Daniel Klerman, *Posner and Class Actions*, 86 U. CHI. L. REV. 1097, 1103–04 (2019).

161. FED. R. CIV. P. 23(b)(3) advisory committee's notes to 1966 amendments (explaining that mass tort cases were "ordinarily not appropriate" for class treatment because of the difficulty in identifying class representatives that could fairly and adequately protect class interests).

162. See NAGAREDA, *supra* note 46, at 72–73.

Many mass tort cases in the 1990s were certified and ultimately resolved.¹⁶³ It appeared that mass tort litigation had found a home.¹⁶⁴ However, at the end of the decade, the U.S. Supreme Court addressed the propriety of Rule 23 certification in *Amchem Products, Inc. v. Windsor*¹⁶⁵ and *Ortiz v. Fibreboard Corp.*¹⁶⁶ and altered the landscape.

a. The Mass Tort Carve-Out

There is considerable overlap between *Amchem* and *Ortiz*. Many of the same parties—most notably, plaintiffs’ attorneys—involved in *Amchem* were involved in *Ortiz*, and the settlements in both cases were drafted alongside one another despite the two-year gap in the cases’ timelines.¹⁶⁷ Consequently, it should come as no surprise that class certification in both cases met the same dire fate.

Amchem and *Ortiz* involved extensive asbestos liability and distinct anticommons dynamics. Indeed, settlement funds were available for victims, but defendants demanded a global settlement that would bind both current and future victims.¹⁶⁸ Current victims were selected as class representatives to represent the interests of the entire victims’ class, including future victims.¹⁶⁹ These representatives agreed to a settlement that bound all victims to a compensation scheme that failed to contain a meaningful opt-out option.¹⁷⁰ In other words, future victims were precluded from bringing individual claims against the defendants based on the agreement made by a group of claimants who held entirely distinct interests and incentives. In both cases, the settlement classes failed to assure the necessary level of cohesiveness of interests among named representative plaintiffs and future victims.¹⁷¹ The class design failed to provide essential structural protections against obvious conflicts of interest.

Individuals are generally not bound by a prior judgment unless they are a party to the proceeding and served with process.¹⁷² Precedent allows courts to deviate from this premise if structural safeguards ensure that a person who failed to receive notice of the prior proceedings was adequately represented

163. Jurists admitted that the asbestos crisis necessitated judicial flexibility. See *Jenkins v. Raymark Indus.*, 782 F.2d 468, 473 (5th Cir. 1986). And courts took comfort in the fact that mass tort cases were certified to exclusively pursue settlement. See McKenzie, *supra* note 155, at 969.

164. See Edith H. Jones, *Rough Justice in Mass Future Claims: Should Bankruptcy Courts Direct Tort Reform?*, 76 TEX. L. REV. 1695, 1697–98 (1998) (explaining that federal court class actions became a preferred resolution device during this period). *But see* FED. R. CIV. P. 23 advisory committee’s notes to 1966 amendments (disavowing the rule’s applicability to mass tort cases).

165. 521 U.S. 591 (1997).

166. 527 U.S. 815 (1999).

167. See Chamblee, *supra* note 46, at 212.

168. See *Amchem*, 521 U.S. at 600–01; *Ortiz*, 527 U.S. at 824–25.

169. See *Amchem*, 521 U.S. at 602–03; *Ortiz*, 527 U.S. at 825–27.

170. See *Amchem*, 521 U.S. at 604–05; *Ortiz*, 527 U.S. at 827.

171. See *Amchem*, 521 U.S. at 627–28; *Ortiz*, 527 U.S. at 856–57.

172. See McKenzie, *supra* note 155, at 977.

in those proceedings. The Supreme Court rejected the settlement class actions in *Amchem* and *Ortiz* because each settlement failed to provide adequate representation. This deficiency precluded any attempt to bind absent class members or extinguish their prospective right to sue individually.

b. The Landscape After Amchem and Ortiz

Amchem, *Ortiz*, and modern case law capture the Court's concern with structural and procedural integrity in class aggregation.¹⁷³ However, with these decisions, the Court limited the class action resolution option for the vast majority of mass tort cases.¹⁷⁴ In the years since *Amchem* and *Ortiz*, federal courts have reached a consensus: most personal injury mass torts present too many individual issues surrounding causation and damages to satisfy Rule 23(b)(3)'s predominance and superiority requirements.¹⁷⁵ Class actions have dropped out of the "available set of tools for attempting to settle most mass torts, absent some extraordinary willingness of a settling defendant to allow some form of future claims to return to the tort system."¹⁷⁶

This shift has produced an odd result. By limiting the class aggregation option, the Court—perhaps unintentionally¹⁷⁷—pushed these cases into a resolution framework that oftentimes fails to rigorously assess the integrity of the process or the settlements that result.

2. MDL and Structurally Deficient Means

Amchem and *Ortiz* ostensibly eliminated Rule 23's class aggregation option for most mass tort cases.¹⁷⁸ The rise of multidistrict litigation reflected an effort to address this gaping void, creating practical results with structurally deficient means.¹⁷⁹

173. See, e.g., *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 356 (2011); see also Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 747–48 (2013) (detailing the heightened burdens imposed on class action plaintiffs in maintaining their class status).

174. See Andrew D. Bradt & Theodore Rave, *Aggregation on Defendants' Terms: Bristol-Myers Squibb and the Federalization of Mass-Tort Litigation*, 59 B.C. L. REV. 1251, 1264 (2018); see also THOMAS E. WILLGING & SHANNON R. WHEATMAN, ATTORNEY REPORTS ON THE IMPACT OF *AMCHEM* AND *ORTIZ* ON CHOICE OF A FEDERAL OR STATE FORUM IN CLASS ACTION LITIGATION 4 (2004), https://www.uscourts.gov/sites/default/files/amort02_1.pdf [<https://perma.cc/9U7A-MRHW>].

175. See WILLGING & WHEATMAN, *supra* note 174, at 4.

176. Issacharoff, *supra* note 70, at 208 (footnote omitted). However, some courts have recently been more receptive to certifying mass torts. See, e.g., *Martin v. Behr Dayton Thermal Prods.*, 896 F.3d 405 (6th Cir. 2018).

177. In *Ortiz v. Fibreboard Corp.*, the Court suggested that the defendant Fibreboard's best option may be filing for bankruptcy. 527 U.S. 815, 850–51 (1999).

178. See Klonoff, *supra* note 173, at 745–55.

179. See NAGAREDA, *supra* note 46, at 174.

a. MDL Design

In the 1960s, electrical equipment antitrust cases threatened to overwhelm the judiciary.¹⁸⁰ In response, Chief Justice Earl Warren created a coordinating committee to fashion “uniform pretrial and discovery orders, national depositions, and central document depositories”¹⁸¹ This procedural streamlining miraculously resolved these cases by 1967.¹⁸² The promising results warranted codification. The Multidistrict Litigation Act of 1968¹⁸³ added § 1407 to the U.S. Judicial Code and created the Judicial Panel on Multidistrict Litigation.¹⁸⁴ On a motion of an interested party or on its own motion, the JPML may aggregate and transfer cases pending in federal court to one federal district court for pretrial proceedings.¹⁸⁵ The JPML does not consider cases in which trial is already underway.¹⁸⁶ The statute instructs the JPML to determine whether (1) “one or more common questions of fact are pending in different districts,” (2) transfer “will be for the convenience of parties and witnesses,” and (3) transfer “will promote the just and efficient conduct of such actions.”¹⁸⁷ The statute’s flexibility is evident. The inquiry of common questions of fact is easier to satisfy than Rule 23(b)(3)’s predominance requirement.¹⁸⁸

Section 1407’s overriding goal is to allow one federal judge to streamline pretrial matters that are generally procedural in nature.¹⁸⁹ At the conclusion of pretrial proceedings, however, the statute mandates that cases be remanded to the districts where they were originally filed.¹⁹⁰ The MDL court was not intended to be a destination; it is merely a stop along the path to resolution.¹⁹¹

180. Blake M. Rhodes, *The Judicial Panel on Multidistrict Litigation: Time for Rethinking*, 140 U. PA. L. REV. 711, 713 (1991).

181. *See id.*

182. *See id.*

183. Act of Apr. 29, 1968, Pub. L. No. 90-296, 82 Stat. 109 (codified at 28 U.S.C. § 1407).

184. Rhodes, *supra* note 180, at 714 (“The Panel is empowered to transfer to any federal district court ‘civil actions involving one or more common questions of fact . . . for coordinated or consolidated pretrial proceedings.’” (quoting 28 U.S.C. § 1407(a))).

185. 28 U.S.C. § 1407.

186. *See id.*

187. *Id.* § 1407(a).

188. For example, this was the case for the opioid abuse litigation. *See In re Nat’l Prescription Opiate Litig.*, 290 F. Supp. 3d 1375, 1378–79 (J.P.M.L. 2017) (“All of the actions can be expected to implicate common fact questions as to the allegedly improper marketing and widespread diversion of prescription opiates . . . and discovery likely will be voluminous.”).

189. H.R. REP. NO. 90-1130, at 2–3 (1968); *see also* S. REP. NO. 90-454, at 2 (1968). I acknowledge that § 1407 seeks efficiency and, by extension, legislators must have contemplated settlement disposition for cases. But there is no indication in the legislative history that policy makers contemplated settlement entirely displacing adjudication, which is what has materialized.

190. 28 U.S.C. § 1407(a).

191. *See* Andrew D. Bradt, “A Radical Proposal”: *The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831, 871 (2017).

In the last twenty years, MDLs have supplemented class actions for personal injury mass tort cases.¹⁹² MDL's growth has been meteoric; in 2019, 52 percent of all pending civil cases in federal court were in MDLs at the end of the prior fiscal year.¹⁹³ Mass tort dockets comprise only 23 percent of all MDLs, but those dockets represent the consolidation of over 125,000 civil actions, or over 96 percent of all pending actions included in all of the MDL dockets.¹⁹⁴ Lost in these numbers and resolution primacy is the fact that the MDL process has evolved in ways that undermine the resolution model for many mass tort victims.¹⁹⁵ This forced transformation explains why the statute fails to include safeguards essential for the role into which it has been thrust.

b. MDL Distortion

MDL has been instrumental in resolving complex cases and preserving the viability of the judiciary in the face of potentially overwhelming case volume.¹⁹⁶ But the promise of procedural streamlining is a mirage that has led parties into quicksand. “[T]he worst-kept secret in civil procedure” is that transferred cases do not return to their transferor courts and victims do not receive their day in court.¹⁹⁷ As of September 30, 2018, approximately 156,511 actions were pending in front of forty-eight transferee district courts.¹⁹⁸ From 1968 through September 30, 2018, transferee courts had received and resolved approximately 516,593 cases.¹⁹⁹ Of these civil actions, only 16,728 were remanded for trial.²⁰⁰ In other words, only 3 percent of transferred cases escaped MDL capture; 97 percent of transferred cases are resolved in the MDL court by dispositive motion or settlement.²⁰¹

192. See Dave Simpson, *MDLs Surge to Majority of Entire Federal Civil Caseload*, LAW360 (Mar. 14, 2019, 10:54 PM), <https://www.law360.com/articles/1138928/mdls-surge-to-majority-of-entire-federal-civil-caseload> [<https://perma.cc/R6BK-CC88>]; Thomas Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After Ortiz*, 58 KAN. L. REV. 775, 806 (2010).

193. Simpson, *supra* note 192.

194. See Thomas Metzloff, *The MDL Vortex Revisited*, JUDICATURE, Fall 2015, at 36, 41.

195. See JOHN C. COFFEE JR., *ENTREPRENEURIAL LITIGATION: ITS RISE, FALL, AND FUTURE* 132, 155 (2015).

196. See, e.g., *In re Volkswagen “Clean Diesel” Mktg., Sales Pracs. & Prods. Liab. Litig.*, 148 F. Supp. 3d 1367 (J.P.M.L. 2015).

197. Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation’s Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669, 1673 (2017); see also Samir D. Parikh, *Bankruptcy Is Optimal Venue for Mass Tort Cases*, LAW360 (Feb. 28, 2022, 1:25 PM), <https://www.law360.com/articles/1468363/bankruptcy-is-optimal-venue-for-mass-tort-cases> [<https://perma.cc/9DKN-NL2C>].

198. U.S. JUD. PANEL ON MULTIDISTRICT LITIG., *STATISTICAL ANALYSIS OF MULTIDISTRICT LITIGATION UNDER 28 U.S.C. § 1407 FISCAL YEAR 2018*, at 3 (2018), https://www.jpml.uscourts.gov/sites/jpml/files/JPML_Statistical_Analysis_of_Multidistrict_Litigation-FY-2018.pdf [<https://perma.cc/GE5Z-Q2UP>].

199. See *id.* at 7.

200. See *id.* at 3.

201. See *id.*

MDL should not be a captive settlement negotiation. The process should accommodate the possibility of cases being remanded at the conclusion of relatively accelerated pretrial proceedings.²⁰² Instead, cases languish—sometimes for years—as the transferee judge accommodates, cajoles, urges, and, in many cases, compels settlement.²⁰³ Adjudication is no longer an option, and the process predicated on efficiency has lost its way.²⁰⁴

For example, in *In re Patenaude*,²⁰⁵ transferred cases languished before the MDL judge for seven years.²⁰⁶ Plaintiffs sought to have the cases remanded, asserting that pretrial matters had been resolved years before.²⁰⁷ Their objections fell on deaf ears. The plaintiffs petitioned the U.S. Court of Appeals for the Third Circuit for a writ of mandamus to remand their cases for trial.²⁰⁸ The Third Circuit denied the writ because, in its estimation, pretrial proceedings were “ongoing,” even after seven years.²⁰⁹

In *In re National Prescription Opiate Litigation*,²¹⁰ the MDL court treated settlement as a *fait accompli*. At the initial hearing, Judge Dan A. Polster stated that his sole goal was to see an immediate global settlement of the cases.²¹¹ In fact, he stated unequivocally that trials were entirely unnecessary, and he would consider it a failure if he allowed the matter to proceed to litigation and adjudication.²¹² The shocking import of this statement was best captured by Professor Howard M. Erichson, who noted that “[i]t is one thing for a judge to say that abatement of [a] crisis is an important goal It is quite another thing to forswear litigation and adjudication altogether.”²¹³

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

203. See ROBERT KLONOFF, *FEDERAL MULTIDISTRICT LITIGATION IN A NUTSHELL* 243–60 (1st ed. 2020).

204. MDL 875 was commonly known as the “black hole” for asbestos litigation because transferred cases never returned to their transferor courts and were similarly never resolved. See Robreno, *supra* note 99, at 126; see also Eldon E. Fallon, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2330 (2008) (Judge Fallon, who presided over the Vioxx MDL, admitting that the process can “resemble a ‘black hole,’ into which cases are transferred never to be heard from again”).

205. 210 F.3d 135 (3d Cir. 2000).

206. *Id.* at 138.

207. *Id.*

208. *Id.*

209. *Id.* at 146.

210. 290 F. Supp. 3d 1375 (J.P.M.L. 2017).

211. Transcript of Proceedings, *supra* note 105, at 4, 9 (“People aren’t interested in depositions, and discovery, and trials So my objective is to do something meaningful to abate this crisis and to do it [immediately] [W]e don’t need a lot of briefs and *we don’t need trials.*” (emphasis added)).

212. See *id.* at 5–6, 9.

213. Howard M. Erichson, *MDL and the Allure of Sidestepping Litigation*, 53 GA. L. REV. 1287, 1291–92 (2019).

These tactics are not entirely unforeseeable. The statute forbids MDL judges from adjudicating cases;²¹⁴ compelling a settlement is the only means to effectuate immediate impact. And the MDL process is infected with the idea that settlement is a successful result under any circumstance.²¹⁵

As noted above, 97 percent of MDLs are either settled or resolved through a dispositive motion.²¹⁶ And, in fact, the supermajority of mass tort litigation is resolved through contractual settlements.²¹⁷ However, this number says nothing about the efficiency and equity of the resolution process.²¹⁸ Keep in mind that § 1407 seeks “just conduct,” but the statute fails to allow the JPML or the transferor court to assess the fairness of settlements or even direct the settlement process.²¹⁹ In other words, there are no statutory requirements for the MDL court to review or assess the integrity of a settlement process or any settlement reached by the parties.²²⁰ And, in the pursuit of expediency, many courts do not undertake such inquiries.²²¹ Unfortunately, a structure consumed with efficiency through procedural devices undermines just outcomes if it lacks the ability to assure claim merit, defendant culpability, and settlement integrity.²²² Further, these settlements have a significant practical limitation for many mass tort cases: claims of future victims—in addition to state law claims—cannot be aggregated as part of the settlement.²²³ A global settlement is unavailable for many defendants. Consequently, high-value suits could be filed even after an MDL is completed.²²⁴ And plaintiffs have the option of opting out of a settlement reached by the corporate defendant and plaintiffs’ counsel.²²⁵

Victims lack control in an MDL.²²⁶ Agency principles break down in the MDL process because the agents—plaintiffs’ attorneys—are invariably immune from the instructions and wishes of the principals, the victims.²²⁷

214. 22 U.S.C. § 1407(a) (“Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district court from which it was transferred unless it shall have been previously terminated.”).

215. See Erichson, *supra* note 213, at 1288, 1291–92; Chamblee, *supra* note 46, at 173, 221; Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394–404 (1978).

216. See *supra* note 201 and accompanying text.

217. See Chamblee, *supra* note 46, at 158.

218. See generally Erichson, *supra* note 213.

219. Chamblee, *supra* note 46, at 196.

220. See *id.*

221. See *id.*

222. See generally George L. Priest, *Procedural Versus Substantive Controls of Mass Tort Class Actions*, 26 J. LEGAL STUD. 521, 559–69 (1997).

223. See Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L. REV. 1769, 1775–76 (2005).

224. See Howard M. Erichson, *What MDL and Class Actions Have in Common*, 70 VAND. L. REV. EN BANC 29, 36–37 (2017).

225. Andrew D. Bradt, *Something Less and Something More: MDL’s Roots as a Class Action Alternative*, 165 U. PA. L. REV. 1711, 1715–16 (2017).

226. See Elizabeth Chamblee Burch & Margaret S. Williams, *Perceptions of Justice in Multidistrict Litigation: Voice from the Crowd*, 107 CORNELL L. REV. (forthcoming 2022) (on file with author) (manuscript at 22–33).

227. See *id.*

Cases are guided by steering committees,²²⁸ and plaintiffs' attorneys and the MDL judge exercise absolute resolution control.²²⁹ A truly surprising facet of the process is that victims are unable to exit.²³⁰ MDL judges are extremely invested in these cases and have exhibited a propensity to compel settlements that are coercive to individual plaintiffs.²³¹

More fundamentally, the process contravenes policy objectives and fails to deter undesirable behavior. Compelled settlements rarely consider culpability, heightening the possibility of extortive litigation.²³² Deterrence is unrealized because there are significant lottery effects; in other words, corporate actors that conform their behavior to legal strictures are no better off than those that do not. Culpability is not necessary for establishing liability, which creates perverse incentives. Further, MDL settlements can live in the shadows. Settlements do not need court approval, and confidentiality agreements invariably prevent publication or assessment of the details.²³³ Corporate abuses do not come to light in a process where there are no trials, and no attempts are made to investigate malfeasance. The MDL process was designed to efficiently resolve procedural matters and provide compensation for meritorious claims.²³⁴ But the process does not effectively further that goal. Resources that could go to actual victims are fragmented by fraudulent claims.²³⁵

Mass tort personal injury cases make up 90 percent of MDL civil actions.²³⁶ Consequently, the MDL distortion is having a profound effect on these types of cases.²³⁷ Because of extreme lottery effects, erosion of

228. See Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71, 73 (2015); Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519, 541.

229. See Martin H. Redish & Julie M. Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109, 110 (2015) ("[T]he current practice of MDL actually makes the modern class action appear to be the pinnacle of procedural due process by comparison.").

230. Bradt, *supra* note 191, at 836 ("[T]here is no right to opt out of an MDL proceeding—once you're in, you're in, often for years until 'pretrial proceedings' have concluded.").

231. MDL judges have various means to compel settlement. Primarily, judges will aggressively encourage parties to engage in settlement, including by appointing a special master who will be actively involved in ensuring meaningful discussions. See, e.g., Pretrial Order No. 6, *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs. & Prods. Liab. Litig.*, No. 15-MD-2672 (N.D. Cal. Jan. 19, 2016), ECF No. 973. Judges can also hold on to cases indefinitely and pressure settlement. Judges can focus initial discovery on information that is necessary to assess settlement positions and front-load important dispositive motions. See, e.g., *In re Nat'l Football League Players' Concussion Inj. Litig.*, 307 F.R.D. 351, 390 (E.D. Pa. 2015).

232. See sources cited *supra* note 160 (delineating extortion risks that some commentators believe plague class actions); see also Chamblee, *supra* note 46, at 196.

233. See Erichson, *supra* note 223, at 1770.

234. See *supra* Part III.B.2.

235. See *id.*

236. See Metzloff, *supra* note 194, at 41.

237. See Bradt & Rave, *supra* note 174, at 1301.

individual victims' rights, and a lack of predictability, some scholars have concluded that the MDL structure must be redesigned.²³⁸

c. Market Response

Compelled settlement with no prospect of adjudication may appear attractive in some cases, but the overall risks are daunting. Distorted use rarely creates an optimal structure, and it is no different with the MDL process. However, my objective is not to debate the MDL process's efficacy. The process has produced many successful outcomes, but no one can dispute that there exist numerous deficiencies.²³⁹ This Essay asserts that corporate defendants involved in modern mass tort litigation have identified these deficiencies and turned to the lone exit available. Only federal bankruptcy has the power to free claims from MDL capture.²⁴⁰ In the last few years, many defendants subject to—or facing the prospect of being subject to—an MDL, including 3M, Johnson & Johnson, Purdue Pharma, Boy Scouts of America, and USA Gymnastics, have turned to bankruptcy.²⁴¹ These mass restructurings transferred the adjudication of all claims against the entity at issue to the bankruptcy court and halted any pending MDL process.²⁴² I refer to this election as “bankruptcy preemption.”

Ultimately, corporate defendants are drawn to bankruptcy as a means to regain control over the resolution process. But bankruptcy preemption has just replaced one deficient structure with another.

3. The Promise of Bankruptcy Preemption

Corporate defendants have started invoking bankruptcy preemption, fleeing one deficient resolution structure for another. Market response supports the argument that—in many modern mass tort cases—Chapter 11 bankruptcy offers substantive advantages over multidistrict litigation.

a. Chapter 11 Exceptionalism

Bankruptcy scholars do not always agree on federal bankruptcy's purpose. This stems in part from how versatile the process has become. Much like the mass tort universe, corporate bankruptcies include an array of cases with idiosyncratic dimensions that do not fit neatly into defined categories, regardless of the level of abstraction to which a scholar may be willing to proceed. Nevertheless, most scholars and practitioners would agree that

238. See, e.g., Schuck, *supra* note 23, at 969 (describing MDL as a “costly, tragic, social policy failure”).

239. See, e.g., Burch & Williams, *supra* note 226.

240. See Parikh, *supra* note 197.

241. David Skeel, *The Populist Backlash in Chapter 11*, BROOKINGS INST. (Jan. 12, 2022), <https://www.brookings.edu/research/the-populist-backlash-in-chapter-11/> [<https://perma.cc/B976-GT6X>].

242. See Parikh, *supra* note 197.

corporate restructuring seeks to efficiently address contracting failure²⁴³ and the collective action problem²⁴⁴ while maximizing value and minimizing holdout²⁴⁵ and holdup²⁴⁶ risks. The restructuring takes place within a flexible statutory process that effectively aggregates claims, binds creditors, and offers myriad forms of relief available only in bankruptcy.

Bankruptcy's structural, procedural, and substantive benefits provide optionality that serves as a sharp contrast to MDL's settlement fixation.²⁴⁷ For example, the Federal Rules of Civil Procedure and Supreme Court precedent limit federal district courts' claim aggregation powers.²⁴⁸ Bankruptcy courts transcend these boundaries.²⁴⁹ Bankruptcy courts enjoy jurisdiction over all "civil proceedings arising under title 11, or arising in or related to cases under title 11."²⁵⁰ The seemingly boundless reach of bankruptcy court jurisdiction allows the court to marshal all matters affecting a debtor in one single venue for prompt and efficient adjudication for the benefit of all stakeholders.

Coupled with this powerful in rem jurisdiction is the bankruptcy court's in personam jurisdiction over parties involved in litigation related to the bankruptcy case.²⁵¹ In contrast to Rule 4 of the Federal Rules of Civil

243. See, e.g., Anthony J. Casey, *Chapter 11's Renegotiation Framework and the Purpose of Corporate Bankruptcy*, 120 COLUM. L. REV. 1709, 1715 (2020) ("[Contracting] failure arises because financial distress presents uncertainty that is not contractible [There are] too many parties . . . and too many contingencies . . . to define a set of [ex ante contract] rules for every scenario."); see also Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 92–93 (1989).

244. The collective action problem in this context describes creditors of a distressed company and the broad array of ex post bargaining and coordination problems they face, which—without some legislative intervention—would cause individual, self-interested behavior to diminish the value realized by the creditor collective. See, e.g., Douglas G. Baird & Randal C. Picker, *A Simple Noncooperative Bargaining Model of Corporate Reorganizations*, 20 J. LEGAL STUD. 311, 315 (1991). Scholars have recently argued that enhanced coordination among sophisticated creditors has suppressed the risks posed by collective action in many corporate bankruptcy cases. See David A. Skeel, Jr. & George Triantis, *Bankruptcy's Uneasy Shift to a Contract Paradigm*, 166 U. PA. L. REV. 1777, 1817 (2018); Douglas G. Baird & Robert K. Rasmussen, *Antibankruptcy*, 119 YALE L.J. 648, 653 (2010).

245. Holdout risk arises in situations where a certain threshold of consent from a group is necessary before specified action can be undertaken; the risk is that one or a few members of the group will withhold consent and seek a premium payment, even though the refusal to comply harms the group's collective interest. Because of class voting and other means of statutory and judicial compulsion, the bankruptcy process is able to minimize holdout risk in a way that is unavailable outside of bankruptcy.

246. Holdup risk arises in situations where creditors of a distressed company may be able to work most efficiently by coordinating, but they eschew cooperation because of concerns that they may give another creditor in their group oversized bargaining power and other advantages. See generally Casey, *supra* note 243.

247. See *supra* text accompanying notes 211–31.

248. See Jones, *supra* note 164, at 1704.

249. Sections 157 and 1334 of title 28 of the U.S. Code collectively grant jurisdiction over bankruptcy cases to federal district courts, while standing orders of reference in each district automatically refer these cases to bankruptcy courts.

250. 28 U.S.C. § 1334(b).

251. See McKenzie, *supra* note 155, at 1003.

Procedure, Federal Rule of Bankruptcy Procedure 7004 permits nationwide service of process.²⁵² These procedural dimensions work together to afford the bankruptcy court a unique jurisdictional arsenal that is useful in mass tort litigation, where cases populate federal and state courts across the country.

Further, the bankruptcy court is authorized to identify claims subject to pending litigation against the debtor and estimate the value of the claims that cannot be resolved in a timely manner.²⁵³ After estimation, claimants are allowed to participate in the proceedings but are subject to having their claims ultimately discharged through a plan of reorganization.²⁵⁴ Rather than fully adjudicating a dispute in the customary nonbankruptcy forum over the course of multiple years, a bankruptcy judge assesses and values these claims in order to allow the formulation of a settlement offer.

The ultimate goal of most reorganization proceedings is to formulate a binding settlement delineated in the debtor's plan of reorganization. In order for a plan to be approved for implementation, creditors must vote and ultimately approve its terms.²⁵⁵ Creditors are placed in classes based on the substance of their interests and claims.²⁵⁶ Claimants who do not receive the full satisfaction of their claim are deemed "impaired" and are allowed to vote.²⁵⁷ Each impaired class must vote in favor of the plan in order for it to be approved.²⁵⁸ However, unanimity is unnecessary. The Bankruptcy Code minimizes holdout risk by deeming a class to have voted to approve a plan when a majority of claimants vote to approve.²⁵⁹ Further, in order to avoid potential tyranny by the majority, claimants holding two-thirds of the value of claims within each class must also vote to approve the plan.²⁶⁰

Even with this holdout measure, securing consent from each creditor class can be difficult. Therefore, the code contains the colorfully described "cramdown" option, which allows a court to confirm a plan even if not all creditor classes have consented, as long as the class has been treated fairly and equitably and the plan does not discriminate unfairly.²⁶¹

In many respects, decreased individual autonomy and protection is the tax for settlement facilitated by bankruptcy aggregation. Once the plan is approved, it serves to bind all pre-petition claimants, even for those who voted against the plan or failed to participate in proceedings.²⁶² Plan confirmation includes powerful injunctions preventing various creditor

252. FED. R. BANKR. P. 7004; *Double Eagle Energy Servs., L.L.C. v. MarkWest Utica EMG, L.L.C.*, 936 F.3d 260, 264 (5th Cir. 2019) ("With nationwide service, the forum is the United States. So minimum contacts with the United States (Fifth Amendment due process) suffice . . .").

253. *See* 11 U.S.C. § 502(c).

254. *See id.* § 1141 (explaining the effect of plan confirmation).

255. *Id.* § 1129.

256. *Id.* § 1122.

257. *Id.* § 1124.

258. *Id.* § 1129.

259. *Id.* § 1126.

260. *Id.*

261. *See id.* § 1129(b)(1).

262. *See id.* § 1126(c) (explaining plan voting).

actions against the parties involved in the bankruptcy, as well as the reorganized debtor.²⁶³

b. Brief History of § 524(g)

In addition to the comprehensive resolution platform described above, federal bankruptcy offers a bespoke statutory provision for addressing mass torts with asbestos exposure claims. Section 524(g) was built on the foundation of *In re Johns-Manville Corp.*,²⁶⁴ the original asbestos bankruptcy case. Even after almost a quarter of a century without amendment, the section represents innovative problem-solving.

i. Johns-Manville

Johns-Manville Corporation was the largest producer of asbestos-containing products and, by the 1980s, faced a litany of suits.²⁶⁵ The company filed for bankruptcy in 1982, but the code did not have a specific statutory provision that provided guidance on how to address the billions of dollars in claims against the company.²⁶⁶ Consequently, the case languished for six years until stakeholders proposed transferring the payment of the asbestos liabilities to a settlement trust.²⁶⁷ Pursuant to the debtors' plan of reorganization, all asbestos claims—including those held by future victims—were channeled to a \$2.5 billion trust funded by the debtors and related parties.²⁶⁸ In return, asbestos claims could not be brought against the reorganized debtor or various other corporate entities involved in the bankruptcy case.²⁶⁹

The bankruptcy court formulated two ways of addressing due process concerns for future victims. Primarily, the court appointed a legal representative to negotiate on behalf of future claimants.²⁷⁰ Further, a voting proxy was used.²⁷¹ The court asserted that future victims' interests were materially aligned with the interests of current victims.²⁷² Based on this false premise, the court reasoned that *all* victims' interests would be protected if an overwhelming number of *current* victims approved the plan.²⁷³ The court required that at least 75 percent—as opposed to a mere majority as mandated by the code—of the members of the current victims' class had to approve the

263. *See id.* § 1141.

264. 68 B.R. 618 (Bankr. S.D.N.Y. 1986).

265. *See* DIXON ET AL., *supra* note 85, at 5.

266. *Id.* at 5–7.

267. *Id.* at 5.

268. *See In re Johns-Manville Corp.*, 68 B.R. at 621–27.

269. *Id.* at 638.

270. *See In re Johns-Manville Corp.*, 36 B.R. 743, 759 (Bankr. S.D.N.Y. 1984).

271. *See In re Johns-Manville Corp.*, 68 B.R. at 631–33.

272. *See id.* Scholars and jurists have rejected this notion. *See* McKenzie, *supra* note 140, at 74–76.

273. *See In re Johns-Manville Corp.*, 68 B.R. at 631–33.

plan in order for the class to be deemed to have accepted the plan, and the terms could bind current and future victims.²⁷⁴

The Manville Trust was expected to pay claimants close to 100 percent of the settlement value of their claims.²⁷⁵ The court anticipated the trust resolving approximately 83,000 to 100,000 claims, with a per claim value around \$25,000.²⁷⁶ The projections were wrong. By 1992, “more than 190,000 claimants were seeking compensation from the trust,”²⁷⁷ and the trust was deemed insolvent just a few years after its inception.²⁷⁸ The parties were forced to return to court to resolve the financial deficiency.²⁷⁹ The reorganized debtor contributed additional funds, and a new settlement was implemented whereby the trust would follow an alternative compensation plan that prioritized those with the most serious illnesses.²⁸⁰ This new directive evolved into the compensation matrix that is ubiquitous today.

ii. Section 524(g) Overlay

After watching the Johns-Manville case languish in bankruptcy for six years, the bankruptcy court forged the path forward with the simple idea that a successful end would justify the means. Congress could have taken the court’s creative—but significantly flawed—resolution design and improved it. Rather, Congress undertook a wholesale codification. In 1994, Congress added § 524(g) to the Bankruptcy Code.²⁸¹ Generally, the subsection allows debtors facing asbestos liabilities—and *only* those debtors—to fund a settlement trust to resolve all claims in exchange for a channeling injunction that provides immunity to the debtor, the reorganized debtor, and other entities, including parent corporations, acquirers of assets, and insurance companies.²⁸² The injunction’s scope is extremely broad, capturing “any right to or demand for payment that arises from the debtor’s underlying

274. See Frank J. Macchiarola, *The Manville Personal Injury Settlement Trust: Lessons for the Future*, 17 CARDOZO L. REV. 583, 583 (1995) (describing the plan as a “radical new use of bankruptcy law”).

275. See *id.* at 602.

276. Samuel Issacharoff, “*Shocked*”: *Mass Torts and Aggregate Asbestos Litigation After Amchem and Ortiz*, 80 TEX. L. REV. 1925, 1932 (2002).

277. See DIXON ET AL., *supra* note 85, at 6 (citing *History*, MANVILLE PERS. INJ. SETTLEMENT TR., <https://mantrust.claimsres.com/history/> [<https://perma.cc/C559-BMCV>] (last visited Oct. 7, 2022)).

278. See *id.*

279. See *id.*

280. See MANVILLE PERS. INJ. SETTLEMENT TR., 2002 TRUST DISTRIBUTION PROCESS (2021), <https://www.claimsres.com/wp-content/uploads/2016/11/2002-TDP-May-2021-Revision-1.pdf> [<https://perma.cc/WCD8-3WJ3>]. Unfortunately, the new directive allowed the trust administrator to pay claimants a pro rata share of the liquidated value of their claim based on a percentage set by the trust. The percentage was initially set at 10 percent in 1995 but was reduced to only 5.1 percent by 2022. See *id.*

281. 11 U.S.C. § 524(g).

282. *Id.* The benefits of § 524(g)’s channeling injunction are available only to debtors facing claims based on asbestos exposure. The section layers additional requirements on top of those already in place for debtors seeking confirmation of a Chapter 11 plan of reorganization. *Id.*

asbestos liabilities, regardless of when that right or demand arises, whether it was raised during the bankruptcy proceeding or is contingent on a future event.”²⁸³

Section 524(g) requires the bankruptcy court to find that the debtor faces substantial contingent, unfiled claims that threaten to preclude repayment.²⁸⁴ In response, the court may approve a plan of reorganization with a settlement trust and channeling injunction.²⁸⁵ The primary features of the plan are that (1) the trust is funded by securities or debt from the debtor for the benefit of present and future asbestos claims;²⁸⁶ (2) the channeling injunction prevents attempts to pursue any claims based on asbestos exposure against parties protected by the plan;²⁸⁷ (3) the trust owns a majority of the voting stock of the reorganized debtor, the parent company of the debtor, or a subsidiary of the debtor;²⁸⁸ (4) the trust pays present and future claims against the debtor and other protected parties;²⁸⁹ (5) the plan is approved by a 75 percent vote of current victims in number and by two-thirds of the voting claims in terms of claim value;²⁹⁰ and (6) a future claim representative is appointed to negotiate on behalf of future claimants but does not vote on the plan.²⁹¹ The court must have “reasonable assurance” that the trust will operate in a manner such that similar claims will be treated in substantially the same manner.²⁹²

Modern mass torts rarely involve asbestos claims; § 524(g) does not apply to these cases.²⁹³ Instead, mass tort debtors are fashioning their own *ex post*, *ad hoc* resolution structure by cherry-picking attractive provisions and concepts from § 524(g), incorporating them into a plan of reorganization, and convincing bankruptcy courts to enforce these provisions pursuant to their equitable powers under § 105.²⁹⁴ These plans seize § 524(g)’s benefits without being subject to its procedural and substantive restrictions.

283. *In re W.R. Grace & Co.*, 729 F.3d 311, 321 (3d Cir. 2013).

284. 11 U.S.C. § 524(g).

285. *Id.* § 524(g)(2).

286. *Id.* § 524(g)(2)(B)(i)(II).

287. *See* 140 CONG. REC. S14461, S14464 (1994) (statement of Sen. Howell T. Heflin) (“[The statutory injunction] assur[es] investors, lenders, and employees that the reorganized debtor has indeed emerged from Chapter 11 free and clear of all asbestos-related liabilities other than those defined in the confirmed plan This added certainty will ensure that the full value of such a trust’s assets—the securities upon which it relies in order to generate resources to pay asbestos claims—can be realized.”).

288. 11 U.S.C. § 524(g)(2)(B)(i)(III); *see, e.g., In re Plant Insulation Co.*, 734 F.3d 900, 906 n.2 (9th Cir. 2013).

289. 11 U.S.C. § 524(g)(2)(B)(ii)(V).

290. *Id.* § 524(g)(2)(B)(ii)(IV)(bb). The voting thresholds count only current victims who are generally advised by plaintiffs’ attorneys. Neither future claimants—beneficiaries of the trust—nor their appointed representative are included in the voting class. *See id.*

291. *Id.* § 524(g)(4)(B).

292. *See, e.g., In re Combustion Eng’g, Inc.*, 391 F.3d 190, 239 (3d Cir. 2004).

293. *See* 11 U.S.C. § 524(g)(2)(B) (noting that the subsection applies only to cases involving claims based on an exposure to asbestos or asbestos-containing products).

294. Section 105 of the Bankruptcy Code allows the bankruptcy court to “issue any order, process, or judgment that is necessary or appropriate to carry out the provision of this title.” *Id.* § 105(a). This provision has been construed to afford bankruptcy courts sweeping powers, and bankruptcy courts have not been shy about exploring the broadest reaches of the section’s power conferment. *See, e.g., In re Kaiser Aluminum Corp.*, 456 F.3d 328, 340 (3d Cir. 2006).

As detailed in the following part, a new bargain is being imposed on mass tort victims.

IV. THE NEW BARGAIN

Part III explored the limited resolution options available in mass tort cases. Legislative failure hoisted the problem onto the judiciary. In the 1990s, the Supreme Court ruled that Rule 23's strictures exclude many mass tort cases.²⁹⁵ In response, policy makers embraced MDL to serve a role for which it was not necessarily intended.²⁹⁶ Recognizing this incongruence, modern mass tort defendants have begun invoking bankruptcy preemption and exiting the MDL process.

This part explains how the bankruptcy process offers extensive options and a bespoke resolution provision for debtors facing asbestos exposure claims. But modern mass tort litigation rarely involves asbestos claims;²⁹⁷ § 524(g) is unavailable in these cases.²⁹⁸ Mass tort debtors are exploiting statutory gaps in the code to bind victims through an unpredictable, ad hoc structure.²⁹⁹ The impairment risks faced by future victims are significant. Three problems complicate the process.

A. *Exempt Plans: The Debtor-Designed, Ad Hoc Structure*

Professor Rosenberg's resolution paradigm for mass torts advocates for an *ex ante* victim's perspective, "which places individuals 'behind a veil of ignorance,' without information about their particular situation in the 'ex post' world-to-come of accident risk and scarce resources."³⁰⁰ In formulating key provisions of mass tort resolution structures, the paradigm advises policy makers to consider the results that individuals would seek if they knew they were to be mass tort victims seeking compensation from a limited asset pool but did not know the extent or temporal dispersion of their injuries.³⁰¹

The crux of Professor Rosenberg's construct is well known to bankruptcy scholars. Creditors' Bargain Theory has shaped bankruptcy policy for the last forty years.³⁰² The model "view[s] bankruptcy as a system designed to mirror the agreement one would expect . . . creditors to form among themselves were they able to negotiate such an agreement from an *ex ante* position."³⁰³ The theory offers a way to conceptualize solutions to pernicious

295. *See supra* Part III.B.1.b.

296. *See supra* Part III.B.2.

297. *See supra* notes 35–40 and accompanying text.

298. *See supra* Part III.B.3.b.ii.

299. *See discussion infra* Part IV.A.

300. David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831, 840 (2002).

301. *See id.*

302. Thomas H. Jackson, *Bankruptcy, Non-bankruptcy Entitlements, and the Creditors' Bargain*, 91 YALE L.J. 857, 860 (1982). *See generally* Douglas G. Baird & Thomas H. Jackson, *Fraudulent Conveyance Law and Its Proper Domain*, 38 VAND. L. REV. 829 (1985).

303. Jackson, *supra* note 302, at 860.

problems.³⁰⁴ A corollary to this theory is that a nondelineated, ad hoc resolution process will produce distorted results as litigants are driven by ex post, wealth-maximization strategies.³⁰⁵ In the mass tort context, this behavior is exemplified by the fear that current victims and plaintiffs' attorneys will coordinate with the corporate debtor and allow for disparate treatment of future victims.

Section 524(g) attempts to limit these ex post, wealth-maximization techniques, but the subsection applies only to mass tort debtors facing asbestos exposure claims.³⁰⁶ One may conclude that mass tort debtors excluded from § 524(g) are at a disadvantage. Quite the opposite is true. Excluded debtors are fashioning their own ex post resolution structure by cherry-picking attractive provisions and concepts from § 524(g), incorporating them into a plan of reorganization, and then convincing bankruptcy courts to enforce these provisions pursuant to their § 105 equitable powers.³⁰⁷ The technique creates what I refer to as an "exempt plan." An exempt plan seizes § 524(g)'s benefits—most notably the channeling injunction—without being subject to its restrictions.

For example, § 524(g) has an onerous 75 percent voting threshold that must be cleared before victims' classes can be deemed to have "accepted" the proposed plan.³⁰⁸ This threshold compromises the debtor's bargaining position by placing an inordinate amount of power in the hands of plaintiffs' attorneys, who are essential for convincing their clients to vote in favor of the plan.³⁰⁹ But exempt plans do not have to meet this voting threshold; a simple majority vote is sufficient pursuant to the structures seen in modern mass tort cases.³¹⁰ Further, § 524(g) prevents plans of reorganization from being approved without the consent of victim classes, precluding the debtor

304. The theory has recently received some criticism. *See, e.g.*, Casey, *supra* note 243. Professor Douglas G. Baird himself has cautioned against overreliance on the model. *See* Baird & Rasmussen, *supra* note 244, at 652–53. But I believe the theory does more than just advocate for efficiency. In the mass torts context, the theory provides a useful perspective from which to formulate policy design, independent of mere efficiency concerns.

305. *See* Rosenberg, *supra* note 300, at 833.

306. *See* discussion *supra* Part III.B.3.b.ii.

307. *See, e.g.*, Second Amended Joint Chapter 11 Plan of Liquidation of Insys Therapeutics, Inc. and Its Affiliated Debtors, *In re* Insys Therapeutics, Inc., No. 19-bk-11292 (Bankr. D. Del. Jan. 14, 2020), ECF No. 1095; *see also* Chapter 11 Plan of Reorganization for Boy Scouts of America and Delaware BSA, LLC, *In re* Boy Scouts of Am., No. 20-bk-10343 (Bankr. D. Del. Feb. 18, 2020), ECF No. 20. In fact, corporate debtors who were entitled to use § 524(g) have tried to ignore the subsection and convince bankruptcy courts to use § 105 to allow for an alternative structure. *See generally* *In re* Energy Future Holdings, Co., 949 F.3d 806 (3d Cir. 2020).

308. *See* 11 U.S.C. § 524(g)(2)(B)(ii)(V).

309. *See* NAGAREDA, *supra* note 46, at 175–76 (“The real bargaining leverage . . . lies with plaintiffs’ lawyers who control large inventories of present claims . . . [and] have the power effectively to veto any . . . plan.”).

310. *See supra* text accompanying notes 306–07.

from “cramming down” these classes.³¹¹ But exempt plans do not face this restriction.³¹²

Section 524(g) places peculiar requirements on the funding for victims’ trusts, including that (1) the reorganized debtor is obligated to make future payments to the trust and (2) the trust must be funded—at least in part—by securities of the reorganized debtor or an affiliated entity.³¹³ Further, the section requires that the victims’ trust must own a majority of the voting shares of the reorganized debtor³¹⁴—a troubling requirement that could chill equity investment in the business. Exempt plans do not have to abide by these funding restrictions.³¹⁵

As noted, § 524(g)’s channeling injunction and third-party releases are arguably the most valuable aspects of the bankruptcy process.³¹⁶ However, with limited exceptions, these benefits were designed to protect the debtor.³¹⁷ Nondebtor parties—including corporate parent and affiliate entities, as well as insurance companies and other financiers—would love to free ride and receive immunity. But these parties may only be protected if various onerous criteria under § 524(g)(4)(A)(ii) are satisfied.³¹⁸ Nondebtor parties have been unable to satisfy these criteria and have sought the injunction’s protections under alternative bankruptcy provisions.³¹⁹ These attempts have been unsuccessful.³²⁰ Modern mass tort cases are not subject to this restriction.³²¹ Exempt plans authorize channeling injunctions and third-party releases that protect a wide swath of nondebtor parties, including parent and affiliate corporate entities, insurers, professional advisors, board members,

311. See 11 U.S.C. § 524(g).

312. See, e.g., Disclosure Statement for Joint Chapter 11 Plan of Reorganization of TK Holdings Inc. and Its Affiliated Debtors, *supra* note 27, at 93 (delineating the debtors’ right to cram-down victim classes, if necessary).

313. See 11 U.S.C. § 524(g)(2)(B)(i)(II).

314. See *id.* § 524(g)(2)(B)(i)(III).

315. See *id.* § 524(g)(2)(B) (noting that the subsection applies only to cases involving claims based on an exposure to asbestos or asbestos-containing products).

316. See *supra* text accompanying notes 281–83.

317. See 11 U.S.C. § 524(e) (“Except as provided in subsection (a)(3), discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.”).

318. See, e.g., *In re Quigley Co., Inc.*, 676 F.3d 45, 47 (2d Cir. 2012) (finding injunction could not be extended to protect debtor’s parent entity); *In re Pittsburgh Corning Corp.*, 453 B.R. 570, 590 (Bankr. W.D. Pa. 2011) (finding injunction could not be extended to protect nondebtor-affiliated entity).

319. For example, in *In re Combustion Engineering, Inc.*, the debtor sought to extend the injunction’s protection to two affiliated entities but could not satisfy § 524(g)(4)(A)’s criteria. 391 F.3d 190, 236–37 (3d Cir. 2004). The debtor was able to convince the bankruptcy court to extend the injunction’s protections pursuant to the court’s § 105 equitable powers. *Id.* at 235. The Third Circuit rejected this action “[b]ecause . . . the general powers of § 105(a) cannot be used to achieve a result not contemplated by the more specific provisions of § 524(g).” *Id.* at 236–37.

320. See *id.*

321. See 11 U.S.C. § 524(g)(2)(B) (noting that the subsection applies only to cases involving claims based on an exposure to asbestos or asbestos-containing products).

and various administrative agents.³²² The most prominent examples of this are the releases the Sackler family received in the Purdue Pharma bankruptcy case.³²³ The necessary showing is merely that the protected party was necessary in formulating and implementing the victims' trust at issue.³²⁴

B. Due Process and the Future Claimants' Representative

Due process can protect future victims from exempt plans that diverge too aggressively from customary norms. Contemporary case law establishes that interest representation can satisfy due process, but it offers little guidance on what constitutes permissible design.³²⁵ Section 524(g) attempts to satisfy

322. See, e.g., Second Amended Joint Chapter 11 Plan of Liquidation of Insys Therapeutics, Inc. and Its Affiliated Debtors, *supra* note 307, at 73; see also Chapter 11 Plan of Reorganization for Boy Scouts of America and Delaware BSA, LLC, *supra* note 307, at 50–53.

323. See Parikh, *supra* note 67, at 63 (providing details of the Sackler family's releases). The order confirming the plan of reorganization in the Purdue case was recently vacated because of these releases, see Rick Archer, *Purdue Pharma's Ch. 11 Plan Is Unraveled on Appeal*, LAW360 (Dec. 16, 2021, 7:21 PM), <https://www.law360.com/articles/1449669/purdue-pharma-s-ch-11-plan-is-unraveled-on-appeal> [<https://perma.cc/C762-VY2N>], though Purdue has appealed, see Vince Sullivan, *Purdue Ch. 11 Appeal Can Go to 2nd Circ., NY Judge Rules*, LAW360 (Jan. 7, 2022, 3:40 PM), <https://www.law360.com/articles/1453543/purdue-ch-11-appeal-can-go-to-2nd-circ-ny-judge-rules> [<https://perma.cc/XS2N-7ELD>].

324. See, e.g., Disclosure Statement for Joint Chapter 11 Plan of Reorganization of TK Holdings Inc. and Its Affiliated Debtors, *supra* note 27, at 27.

325. The Supreme Court's constitutional property doctrine establishes that a cause of action is a "property interest" of which a claimant cannot be deprived without due process of law. See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428–29 (1982). A party alleging contravention of the Due Process Clause must demonstrate a deprivation of a protected interest—life, liberty, or property—and show that the process afforded was constitutionally inadequate. See *In re Energy Future Holdings Corp.*, 949 F.3d 806, 822 (3d Cir. 2020). From that perspective, settlements can be conceptualized as a plaintiff selling their property—the cause of action—to the defendant and relinquishing their rights of ownership. Property owners should be involved in this sales process and enjoy the right to not sell. In rare cases where forced sales are necessary, they should "be preceded by notice and [an] opportunity for hearing." See *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950). However, rigid fidelity to procedural due process can be unreasonable in many instances, including in mass tort cases. See *Hansberry v. Lee*, 311 U.S. 32, 41 (1940). Future claimants—who must be included in the claim aggregation process—cannot be provided actual notice or their "day in court." See, e.g., WEINSTEIN, *supra* note 46, at 126–27; Ryan C. Williams, *Due Process, Class Action Opt Outs, and the Right Not to Sue*, 115 COLUM. L. REV. 599, 620–21 (2015). But that does not necessarily preclude aggregation. Due process requires "only reasonable notice, and that reasonableness [is] to be evaluated by balancing the state's interest in [an] existing notice scheme against the individual's interest in receiving additional notice." Robert G. Bone, *Rethinking the Day in Court Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 216 (1992). Contemporary case law establishes that interest representation can supplant actual notice and case participation for absent parties. See *Richards v. Jefferson Cnty.*, 517 U.S. 793, 798–99 (1996); see also *Dusenbery v. United States*, 534 U.S. 161, 167–68 (2002) (reaffirming applicability of *Mullane's* reasonableness test). But the unanswered question is, under what parameters is this deviation acceptable? The concept of adequate representation still lacks a concrete definition. See, e.g., Morris A. Ratner, *Class Conflicts*, 92 WASH. L. REV. 785, 791–92 (2017). Traditional interest representation is insufficient to address the anticommons problem in modern mass tort cases because the interests of current and future claimants are significantly misaligned. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 852–53 (1999). Current victims want to access settlement funds immediately, even if that ensures that

due process concerns in mass tort cases by requiring the appointment of a future claimants' representative (FCR) to advocate for future victims affected by a channeling injunction. The idea has considerable value in theory. The execution has been alarming.³²⁶

Section 524(g) requires the appointment of an FCR as part of its binding aggregation process.³²⁷ In a customary agency relationship, the parties to be represented select their agent. In mass tort agency, future victims are the principal and, of course, they are absent from the process. This dynamic allows for exploitation.³²⁸ Primarily, the code fails to prescribe selection procedures for the FCR. This silence is surprising. The FCR is the sole representative for future claimants who customarily hold claims valued at hundreds of millions of dollars. These clients are unable to provide input for the selection process. Nevertheless, the FCR negotiates with the debtor and other stakeholders and is able to unilaterally bind all unknown class members.³²⁹ The FCR has "extraordinary, exclusive power" but operates without any client oversight.³³⁰ This lack of oversight is arguably unavoidable in mass torts, but the agency breakdown is even more pronounced than it seems. There is also no ex post check. Future victims who later emerge and come to learn that the FCR agreed to extremely disadvantageous terms cannot opt out of the agreement, and they have no recourse against the FCR, who enjoys broad immunity for all actions aside from fraud, gross negligence, and willful misconduct.³³¹

future claimants face a famine. *See id.* Other stakeholders—including plaintiffs' attorneys and trial courts—are often willing to risk future claimants' recovery in order to secure final disposition of mass tort cases. *See id.* In many respects, due process represents one of the few safeguards for future claimants.

326. My intent is not to assess whether the means of addressing claims held by future claimants can withstand constitutional scrutiny. The asbestos exposure canon holds that due process strictures are satisfied when an FCR is appointed to represent the interest of future claimants. My objective is to analyze how to improve the FCR appointment process and the execution of that office to fairly ensure that future claimants receive a recovery comparable to current victims. However, I acknowledge that the Supreme Court has not reviewed these bankruptcy provisions, and an argument could be made that the fundamentals of the current process are, in fact, constitutionally deficient. *See Sergio Campos & Samir D. Parikh, Due Process Alignment in Mass Restructurings*, 91 *FORDHAM L. REV.* 325 (2022) (exploring the constitutionality of mass tort outcomes in bankruptcy). This may sound naive, considering that this mechanism has been a part of numerous cases that have survived circuit court review. However, the Supreme Court has repeatedly taken up entrenched bankruptcy practices only to rule that the structures were unconstitutional and needed to be dismantled. *See, e.g., Stern v. Marshall*, 564 U.S. 462, 469, 503 (2011) (holding bankruptcy courts lack authority under Article III to enter final judgment on a variety of claims); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982) (holding the Bankruptcy Code's jurisdictional grant to non-Article III judges to be unconstitutional); *Ashton v. Cameron Cnty. Water Improvement Dist.*, 298 U.S. 513, 530–32 (1936) (holding nation's first municipal bankruptcy law to be unconstitutional).

327. 11 U.S.C. § 524(g)(4)(B).

328. Jones, *supra* note 164, at 1713.

329. *See* 11 U.S.C. § 524(g)(4)(B).

330. Jones, *supra* note 164, at 1713.

331. *See, e.g.,* Disclosure Statement for Joint Chapter 11 Plan of Reorganization of TK Holdings Inc. and Its Affiliated Debtors, *supra* note 27, at 124–25; *see also* S. Todd Brown,

The code assigns the task of selecting the FCR to the bankruptcy court, without offering any further guidance.³³² Bankruptcy courts have delegated this responsibility to the corporate debtor, the very party against whom the FCR will be negotiating.³³³ Invariably, the debtor is the only stakeholder who proposes FCR candidates and, in almost all cases, nominates only one.³³⁴ Courts are not required to give any deference to this nomination, but they invariably approve the debtor's nominee without considering anyone else or even soliciting nominees from other stakeholders.³³⁵ Further, the only standard of review adopted by courts is that the nominee be "disinterested," which represents an extremely low bar focused on whether the individual has any overt conflicts of interest.³³⁶ Once a selection is made, courts do not review the adequacy of the FCR's representation.³³⁷

The idea that the FCR would fail to be a zealous advocate may seem confusing at first but emerges with shocking clarity when one considers the capture risk involved in mass tort cases. A small pool of professionals manages the universe of mass tort bankruptcy cases, and the process is characterized by repeat players.³³⁸ FCRs receive significant fees and, once appointed, immediately hire as legal counsel the law firm at which they are a partner, thereby amplifying the benefit.³³⁹ Therefore, the promise of multiple engagements is a truly distortive incentive for these individuals. This promise can incentivize an FCR to discount their invisible clients'

Section 524(g) Without Compromise: Voting Rights and the Asbestos Bankruptcy Paradox, 2008 COLUM. BUS. L. REV. 841, 897–902.

332. See 11 U.S.C. § 524(g)(4)(B).

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

334. See, e.g., *In re Duro Dyne Nat'l Corp.*, No. 18-27963, 2019 WL 4745879, at *5–6 (D.N.J. Sept. 30, 2019); *In re Fairbanks Co.*, 601 B.R. 831, 835–38 (Bankr. N.D. Ga. 2019); *In re Imerys Talc Am., Inc.*, No. 19-10289, 2019 Bankr. LEXIS 1452, at *1, *10–15 (Bankr. D. Del. May 8, 2019).

335. See *In re G-I Holdings, Inc.*, Nos. 01-30135 & 01-38790, 2006 WL 2403531, at *2 (Bankr. D.N.J. Aug. 11, 2006).

336. See 11 U.S.C. § 101(14); *In re Duro Dyne*, 2019 WL 4745879, at *1. *But see In re Fairbanks*, 601 B.R. at 839–41 (ruling that the "disinterestedness" standard was insufficient and reviewing the FCR nominee under the more demanding standards applicable to appointments of guardians ad litem).

337. See Brown, *supra* note 331, at 899.

338. See, e.g., *In re Fairbanks*, 601 B.R. at 835, 841 ("[T]he danger is that the FCR is part of a closed group and has an incentive to advocate . . . so that the FCR remains in the group at the expense of future claimants. A[n FCR] who 'rocks the boat' . . . may not be in the next boat."); see also NAGAREDA, *supra* note 46, at 176–78.

339. For example, when selected as an FCR, James L. Patton, Jr., always hires Young Conaway Stargatt & Taylor, LLP, the firm at which he is an equity partner. See, e.g., Disclosure Statement for Joint Chapter 11 Plan of Reorganization of Imerys Talc America, Inc. and Its Debtor Affiliates Under Chapter 11 of the Bankruptcy Code at 18, *In re Imerys Talc Am., Inc.*, No. 19-10289 (Bankr. D. Del. May 15, 2020), ECF No. 1715.

interests.³⁴⁰ FCRs seeking subsequent engagements face extreme pressures to avoid taking positions in one case that may alienate key parties who will be involved in future cases.³⁴¹ The reality is that today's adversary could be tomorrow's client.³⁴²

The distortive pressures go further. Keep in mind that courts are not immune to self-interested behavior. A confirmed reorganization plan is to a bankruptcy judge what a global settlement is to an MDL judge: an unadulterated success.³⁴³ An amenable FCR greatly improves the likelihood of that result. An overly zealous FCR who risks creating an impasse could push the case into liquidation—an outcome that is considered to be a failure to jurists and bankruptcy professionals alike.

The FCR structure is extremely beneficial to the debtor and current victims because it allows them to overcome the anticommons problem and then leverage the other components of the bankruptcy process to secure settlement. Unfortunately, the nature of these disputes breaks down basic agency principles. Neither the code nor the judiciary offers a means to reassemble the pieces. Ultimately, accommodating FCRs receive rewards without consequences. A dereliction of duty is in the best interests of all parties at the bargaining table.

C. Estimating the Value of Future Victims' Claims

Bankruptcy courts must estimate the aggregate value of future claims³⁴⁴ in order to overcome the anticommons problem. Section 502(c) authorizes claim estimation for plan confirmation.³⁴⁵ The estimate is vital because the

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

341. *See* McKenzie, *supra* note 140, at 74–76.

342. In approving FCRs, courts regularly tout that a particular individual is qualified because the nominee has been selected in various other cases, *see In re Duro Dyne Nat'l Corp.*, No. 18-27963, 2019 WL 4745879, at *1 (D.N.J. Sept. 30, 2019), but fail to consider that appointing this familiar face should raise impartiality concerns. James L. Patton, Jr., has served as an FCR in eight different cases in just the last ten years. *See* Debtors' Motion for Entry of an Order Appointing James L. Patton, Jr., as Legal Representative for Future Claimants, *Nunc Pro Tunc* to the Petition Date at 14–16, *In re Boy Scouts of Am.*, No. 20-bk-10343 (Bankr. D. Del. Mar. 18, 2020), ECF No. 223; *see also* NAGAREDA, *supra* note 46, at 176–78 (noting the small pool of FCRs).

343. *See* Frederick Tung, *The Future Claims Representative in Mass Tort Bankruptcy: A Preliminary Inquiry*, 3 CHAP. L. REV. 43, 69–71 (2000).

344. There has been some debate whether the term “claim” as defined in the code can capture unfiled claims of future claimants. Bankruptcy courts would be precluded from adjudicating future claims if these claims are excluded from the definition of “claim.” However, courts have construed the term “claim” broadly, and I do not view this as a live controversy. *See* Jeld-Wen, Inc. v. Van Brunt (*In re Grossman's Inc.*), 607 F.3d 114, 125 (3d Cir. 2010); *see also* Disclosure Statement for Joint Chapter 11 Plan of Reorganization of TK Holdings Inc. and Its Affiliated Debtors, *supra* note 27, at 58.

345. Section 502(c) of the Bankruptcy Code allows bankruptcy courts to estimate contingent and unliquidated claims, but the statute appears to limit this estimation for purposes of allowance and voting. *See* FED. R. BANKR. P. 3018(a). Estimation for purposes of distribution—the reason estimation is sought in mass tort bankruptcies—is not explicitly authorized. *See id.* Nevertheless, courts have consistently undertaken estimation for plan confirmation—and presumably for distribution—in mass tort cases. *See, e.g., In re Garlock*

present value of the total of all victims' claims constitutes the debtor's trust liability. With that number, the key parties can begin the final design of the plan of reorganization. The significance of the final number cannot be overstated; it will be transformative for the case and all affected victims.

The code fails to provide instruction on estimation mechanics or methodology.³⁴⁶ Courts are instructed to choose "the appropriate method of estimation in light of the particular circumstances of the bankruptcy case before [them]."³⁴⁷ Consequently, this essential process devolves to a battle of experts.³⁴⁸ Indeed, experts representing the debtor, the official committees, and other stakeholders present highly speculative assessments that happen to perfectly align with their client's interests.³⁴⁹ The bankruptcy court is tasked with sorting this quagmire and selecting the estimation that it finds most plausible.³⁵⁰ But the idea that the bankruptcy court will, after a few days of hearings, estimate thousands of victims' claims totaling hundreds of millions of dollars is arguably absurd.³⁵¹ Bankruptcy courts rarely undertake this herculean task and, in fact, are precluded from adjudicating personal injury cases.³⁵² But the estimation process ignores this inexperience and allows these jurists to determine the aggregate value of claims, having

Sealing Techs., LLC, 504 B.R. 71, 74 (Bankr. W.D.N.C. 2014); *In re Armstrong World Indus., Inc.*, 348 B.R. 111, 124 (D. Del. 2006).

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

347. *In re G-I Holdings, Inc.*, Nos. 01-30135 & 01-38790, 2006 WL 2403531, at *2 (Bankr. D.N.J. Aug. 11, 2006).

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

349. Estimation hearings are multiday affairs filled with conflicting expert witness testimony. *See, e.g., In re Owens Corning v. Credit Suisse First Boston*, 322 B.R. 719, 721 (D. Del. 2005) (expert assessment of total liability ranging from a low at \$2.08 billion to a high of \$11.1 billion); *Menard-Sanford v. Mabey (In re A.H. Robins Co.)*, 880 F.2d 694, 699 (4th Cir. 1989) (ranging from \$600 million to \$7 billion); *In re Garlock Sealing*, 504 B.R. at 74 (ranging from \$125 million to \$1.3 billion). These hearings are also full of misleading evidence. *See, e.g., id.* at 86–87 (determining that plaintiffs' attorneys had withheld material exposure evidence that had unfairly inflated the debtor's liabilities, a practice that was widespread and affected many asbestos cases).

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

351. *See Jones, supra* note 164, at 1714–16.

352. *See id.* Bankruptcy judges lack authority to adjudicate personal injury tort or wrongful death claims. *See* 28 U.S.C. § 157(b)(2)(B). Bankruptcy courts may not estimate personal injury tort or wrongful death claims for purposes of making a distribution from estate assets. *See id.* Section 502(c) of the Bankruptcy Code, however, does not prevent courts from estimating these claims in order to allow the debtor to formulate a plan of reorganization, the terms of which creditors can agree to be binding. *See* 11 U.S.C. § 502(c).

never conducted a single jury trial, taken any victim testimony, or thoroughly assessed historical data.³⁵³

Some jurists have rejected the premise that bankruptcy judges can “accurately estimate the results of a series of extremely speculative problems” and have refused to undertake the task;³⁵⁴ all acknowledge the process’s systemic flaws.³⁵⁵ Nevertheless, many courts have no choice but to estimate claims. Plan confirmation is unavailable without this number.

D. Consequences of the New Bargain

Mass restructurings reveal bankruptcy’s structural and substantive deficiencies, which culminate in various practical consequences, including a lack of predictability, loss of victim autonomy, and suppressed recoveries. However, the most concerning of these potential consequences is disparate treatment between current and future victims. If current victims and plaintiffs’ attorneys are willing to coordinate with corporate debtors and other stakeholders, it could result in an underfunded victims’ trust that allows for immediate compensation but faces premature insolvency.³⁵⁶ The consequence of this coordination will not be apparent for years after the plan of reorganization is confirmed; indeed, there is a long latency period with this financial harm, just as there is a long latency period for many of the injuries that underlie these tort cases. Insolvent trusts create the unacceptable risk that mere temporal dispersion will allow one victim to receive a significant recovery while another similarly situated victim seeking compensation just a few years later receives nothing.

One would imagine that a process built around a compensation trust with a potential risk of insolvency would require some contingency plan. But exempt plans have absolutely no contingency plans for addressing prematurely insolvent trusts.³⁵⁷ Future victims have no recourse against the

353. See *In re Armstrong*, 348 B.R. at 124 (acknowledging that estimation under § 502(c) involves making “predictions which are themselves based upon predictions and assumptions” (quoting *In re Owens Corning v. Credit Suisse First Boston*, 322 B.R. 719, 721 (D. Del. 2005)); see also Campos & Parikh, *supra* note 326, at 357–59 (arguing for coordination between district and bankruptcy courts to allow for bellwether trials in these cases to inform the estimation process).

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

355. See, e.g., *In re Armstrong*, 348 B.R. at 115 (“The best the court can do is to consider the expert reports . . . ‘while remaining vigilant to the potential bias that a party’s expert may have’” (quoting *In re Fed.-Mogul Glob., Inc.*, 330 B.R. 133, 156 (D. Del. 2005))).

356. See Parikh, *supra* note 67, at 64 (“[Victim balkanization] is the process by which debtors pit current victims against future victims with a simple threat: any attempt to secure comparable recoveries across the victim class will lead to significant delays in case resolution and ultimately deprive current victims of any recovery in the short term.”).

357. See, e.g., Disclosure Statement for Joint Chapter 11 Plan of Reorganization of Imerys Talc America, Inc. and Its Debtor Affiliates Under Chapter 11 of the Bankruptcy Code, *supra* note 339, at 74 (failing to establish a contingency in the event of trust insolvency); Disclosure Statement for Joint Chapter 11 Plan of Reorganization of TK Holdings Inc. and Its Affiliated Debtors, *supra* note 27, at 110–89 (same).

corporate tortfeasor, because that entity was dissolved through the bankruptcy process. Future victims have no recourse against the reorganized debtor or acquirer of assets because those entities assume no liability for the corporate debtor's pre-petition conduct. Future victims lack meaningful opt-out rights.³⁵⁸ They also have no recourse against the FCR that accepted an underfunded plan or any other party, because all are either protected by a channeling injunction or enjoy immunity through the plan.³⁵⁹

Is all hope lost? Not necessarily. Current structural anomalies are allowing debtors to fashion a distortive new bargain. But bankruptcy is still the optimal venue for resolving many mass tort cases.³⁶⁰ As detailed below, revising a few bankruptcy provisions can create the most efficient and equitable option for modern mass tort cases.

V. THE POSSIBILITY OF BANKRUPTCY SUPERPOSITION

Part IV explained how mass tort defendants have begun invoking bankruptcy preemption and exiting the MDL process. Unfortunately, bankruptcy preemption has just replaced one deficient structure with another. But unlike the MDL process, bankruptcy has the potential to layer multiple forms of delineated relief and revenue-generating mechanisms that are particularly impactful for the resolution of mass tort cases. Transformative benefits are available if certain facets of the current platform can be corrected.

A. Structural and Substantive Objectives

Administrative peacemaking presents challenges. Professor Nagareda has explained that “the challenge lies in lending a structure to peacemaking that affords latitude for creativity to generate value but, at the same time, inhibits plaintiffs’ lawyers and defendants from largely appropriating that value for themselves.”³⁶¹ While this account is accurate, Professor Nagareda told only part of the story. In fact, the objective must go further. The structure must preserve value and ensure that plaintiffs’ lawyers, defendants, and *current victims* will not appropriate value to the detriment of future victims.

What are the goals of this process? The process must aggregate claims and then bind claimants; there must be a meaningful level of predictability in the delineation and execution of the process; defendants should enjoy relative finality and meaningful options to preserve enterprise value; plaintiffs’ recoveries should approximate litigation outcomes, and settlements should

358. To date, plans in these cases have afforded claimants an opt-out right in name only. See Disclosure Statement for Fifth Amended Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. and Its Affiliated Debtors at 12–13, *In re Purdue Pharma L.P.*, No. 19-23649 (Bankr. S.D.N.Y. June 3, 2021), ECF No. 2969. Claimants who opt out may recover only the amount they otherwise would have received under the liquidation procedures for the victims’ trust. See *id.*

359. See, e.g., Chapter 11 Plan of Reorganization for Boy Scouts of America and Delaware BSA, LLC, *supra* note 307, at 53.

360. See generally Parikh, *supra* note 197.

361. NAGAREDA, *supra* note 46, at xi.

be scrutinized for their fairness and integrity (more specifically, in this context, we want to avoid disparate treatment of similarly situated victims); lastly, all parties deserve resolution on an accelerated timeline.

The confluence of these objectives highlights the deficiencies of current options and historical proposals for structural modification. The mass tort canon is filled with radical proposals to more effectively resolve mass torts, including through unique compensation schemes,³⁶² wholesale transfer of bankruptcy court powers to nonbankruptcy courts,³⁶³ reliance on exotic financial instruments,³⁶⁴ and the creation of statutory superpriority for tort victims.³⁶⁵

Ultimately, historical proposals fail to address the novel challenges posed by modern mass restructurings. In the next section, I eschew radical reforms and return to the idea of a legislative solution implemented by the judiciary; a normative construct that minimizes misallocation risk and places the burden of alignment not on elaborate compensation schemes or financial markets, but on the bankruptcy court—the entity best positioned to bear this burden.

362. Professor Nagareda proposed modifying plaintiffs' attorneys' compensation to incentivize aggressive advocacy of both current and future claimants, but he did not provide any meaningful specifics about how such an elaborate deviation from accepted norms would be structured or if this one change would be sufficient to address other resolution obstacles. *See id.* at 232–38.

363. Professor Troy A. McKenzie advocated for the use of meaningful provisions from the Bankruptcy Code in nonbankruptcy aggregation proceedings. *See* McKenzie, *supra* note 155, at 1016–24. He acknowledged that this action is unlikely, *see id.*, and I agree with that assessment. I also question the use of bankruptcy as a *model* for resolving mass tort litigation, when modifying the process itself is a far easier and more likely legislative outcome. Also, the prevalence of bankruptcy preemption in modern mass torts impedes the viability of Professor McKenzie's proposal. *See also* Francis E. McGovern, *Asbestos Legislation II: Section 524(g) Without Bankruptcy*, 31 PEPP. L. REV. 233, 252–54 (2003) (proposing legislation that would ostensibly make § 524(g) available to mass tort defendants outside of bankruptcy and describing a settlement model that arguably mirrors the existing MDL process).

364. Professor Thomas A. Smith proposes the creation of a liquidating trust in which victims receive shares that they can sell in the capital markets when they need cash. *See* Thomas A. Smith, *A Capital Markets Approach to Mass Tort Bankruptcy*, 104 YALE L.J. 367 (1994). While certainly inventive, this proposal assumes a robust market for this type of security, which Professor Smith acknowledged was unlikely to exist. *See id.* at 429. Without a robust market, information gaps regarding the value of such shares would lead to extreme price discounting as investors bear assessment cost. This proposal places the burden of market failures on future claimants.

365. In 1984, a student note suggested that mass torts could be resolved more equitably if tort claimants were afforded a superpriority lien on debtor assets. *See* Christopher M.E. Painter, Note, *Tort Creditor Priority in the Secure Credit System: Asbestos Times, the Worst of Times*, 36 STAN. L. REV. 1045, 1080–83 (1984). The idea was embraced by academics in the late twentieth century. *See, e.g.*, Lynn M. LoPucki, *The Unsecured Creditor's Bargain*, 80 VA. L. REV. 1887, 1891 (1994); Barry E. Adler, *Financial and Political Theories of American Corporate Bankruptcy*, 45 STAN. L. REV. 311, 340 (1993); David W. Leebron, *Limited Liability, Tort Victims, and Creditors*, 91 COLUM. L. REV. 1565, 1569 (1991). But no congressional action followed. *See* Vincent S.J. Buccola & Joshua C. Macey, *Claim Durability and Bankruptcy's Tort Problem*, 38 YALE J. ON REG. 766, 783 (2021).

B. *Two Spheres of the Normative Construct*

This section develops a conceptual framework for an efficient and equitable mass tort resolution structure. The key substantive objectives of this structure can be furthered by focusing on two core spheres: (1) addressing disparate treatment of similarly situated victims by minimizing the systemic failures in the FCR process and (2) codifying the key aspects of the resolution overlay for mass tort cases.

Changes in these two spheres bring focus on the negotiation structure for these restructuring cases and solvency of resulting trusts. By bolstering judicial oversight and FCR advocacy and accountability, the process will maximize available trust funds and improve equality of distribution across victim classes. This improved negotiation structure allows for the elimination of various § 524(g) restrictions that fail to further key objectives, thereby streamlining the court's inquiry.³⁶⁶

1. Reassembling Agency Principles in the Selection Process for the Future Claimants' Representative

The FCR is the linchpin in addressing the anticommons problem in modern mass tort litigation, but this key figure lacks a statutory definition. The FCR is tolerated by the other stakeholders who seek global settlement. As detailed above, there is a material capture risk with FCRs that undermines the integrity of the resolution process.³⁶⁷ FCRs lack incentives to advocate zealously but, in many cases, they also lack the means. The FCR can be a terrible agent for future victims. The statutory revisions below seek to bring the FCR out of the shadows, more empowered.

a. *Minimizing Capture Risk*

The code does not prescribe a process for appointing the FCR or the standard to be used for this selection.³⁶⁸ Courts have delegated this task to the corporate debtor.³⁶⁹ Of course, the debtor is the very party against whom the FCR will be negotiating. The most effective way to reduce obvious capture risk is to mandate that the U.S. Trustee (UST)—the party that already manages the committee appointment process under § 1102 of the Bankruptcy Code—oversee FCR selection. A new statutory subsection to § 524(g)

366. Policy makers and jurists have spent too much time conceptualizing resolution design and interpreting § 524(g), guided by what the *Johns-Manville* court envisioned. This evaluative perspective should be abandoned. *See, e.g., In re Plant Insulation*, 734 F.3d 900, 906 (9th Cir. 2013) (“[T]he original *Johns-Manville* case is a distant memory[, and the present case] could hardly be more different . . .”). *Johns-Manville* was an idiosyncratic case, which forced the court to take extremely aggressive and desperate actions that were uniquely tailored to the problems at hand.

367. *See supra* Part IV.D.

368. *See* Motion of the United States Trustee to Appoint a Legal Representative for Future Asbestos Claimants at 7–13, *In re Fairbanks*, No. 18-41768 (Bankr. N.D. Ga. Dec. 31, 2018), ECF No. 157.

369. *See id.*

should provide that the UST will compile a list of independent candidates and be tasked with selecting an FCR from this list subject to approval by the bankruptcy court.³⁷⁰ Parties in interest may nominate candidates, but the UST's master list should include candidates that the UST identifies independently. Further, the bankruptcy court should be authorized to remove an FCR after appointment if the court determines that the change is necessary to ensure adequate representation of future victims.³⁷¹

Corporate debtors currently control the nomination process, and bankruptcy courts invariably approve lone nominees under the “disinterestedness” standard, which represents an extremely low bar focused on whether the individual has any overt conflicts of interest.³⁷² This standard is used for evaluating agents in bankruptcy who are actively managed by their principals but is inappropriate in light of the lack of customary agency controls for future victims.

Conceptualizing the FCR as a guardian ad litem offers an improved framework. The Federal Rules of Bankruptcy Procedure permit the court to appoint a guardian ad litem to represent an incompetent person who cannot appear in proceedings or otherwise represent themselves.³⁷³ The Bankruptcy Code does not define guardian ad litem, but the “overarching purpose of the role is to protect the rights of persons in litigation who cannot represent themselves.”³⁷⁴ Future victims are not incompetent in a traditional sense, but they are unable to appear in a proceeding or otherwise retain a representative. Courts have been willing to appoint guardians under similar circumstances in other contexts.³⁷⁵

This new framework would result in a modified assessment of FCR candidates. Under the guardian model, the bankruptcy court must—in addition to finding that a candidate is disinterested, qualified, and competent—determine that a candidate will act as an objective, impartial, and effective advocate for future victims. Courts should undertake a

370. This change aligns with the appointment powers afforded to the U.S. Trustee in other contexts. *See* 11 U.S.C. § 332 (directing UST to appoint consumer privacy ombudsman); *id.* § 333 (directing UST to appoint patient care ombudsman). The UST filed a motion seeking a similar process in *In re Fairbanks*. *See* Motion of the United States Trustee to Appoint a Legal Representative for Future Asbestos Claimants, *supra* note 368. Additional candidates were considered by the court. *See* Transcript of Hearing on the U.S. Trustee's Motion to Appoint a Legal Representative for Future Asbestos Claimants at 32–38, *In re Fairbanks*, No. 18-41768, at 32–38 (Bankr. N.D. Ga. Jan. 17, 2019), ECF No. 183. However, the debtor's nominee was ultimately selected. *See* Order on Appointment of Future Claimants' Representative at 3, *In re Fairbanks*, No. 18-41768 (Bankr. N.D. Ga. Apr. 17, 2019), ECF No. 260.

371. This language comports with the standard delineated in § 1102 of the Bankruptcy Code for removal of committee members. *See* 11 U.S.C. § 1102(a).

372. *See, e.g.*, Motion of the United States Trustee to Appoint a Legal Representative for Future Asbestos Claimants, *supra* note 368, at 9–10.

373. Federal Rule of Civil Procedure 17 affords courts this authority, and Rules 7017 and 9014 of the Federal Rules of Bankruptcy Procedure make the rule applicable in bankruptcy proceedings. FED. R. CIV. P. 17; FED. R. BANKR. P. 7017, 9014.

374. *In re Fairbanks Co.*, 601 B.R. 831, 840 (Bankr. N.D. Ga. 2019).

375. *See, e.g.*, *Burress v. Blake*, No. 14-cv-35, 2016 WL 11475018, at *3 (E.D. Tex. Dec. 1, 2016) (appointing guardian to review settlement on behalf of plaintiff who had disappeared prior to trial).

qualitative assessment that considers (1) how often a candidate has served as an FCR, (2) to which law firm or organization the candidate is affiliated, and (3) which party in interest—if any—nominated that candidate. Experience is important. But the utility of experience can, after a certain point, be overwhelmed by capture risk.

b. Condorcet Jury Theorem and FCR Voting

Condorcet Jury Theorem was formulated to assess the optimal size of a deliberative body and support the binding effect of majority and supermajority voting.³⁷⁶ The theorem has been applied by scholars assessing juries.³⁷⁷ But the theorem has broader applications and posits an interesting proposition. Imagine that a person is choosing between two options: one is deemed correct and the other incorrect. Further assume that the probability that the person will choose the correct option is only slightly greater than 50 percent. The Condorcet Jury Theorem holds that having multiple individuals vote—instead of just one—significantly increases the probability that the correct option will be chosen.³⁷⁸

The theorem provides a useful perspective from which to view the FCR construct. In mass restructurings, there are arguably “correct” choices that increase the likelihood of viable settlement trusts. The bankruptcy process can be redesigned to nudge FCRs toward these choices. The current formulation places too much power in the hands of one FCR. I argue that a true committee representing future victims is the optimal structure. Three FCRs should be appointed to negotiate on behalf of future victims.³⁷⁹ This

376. See generally Cheryl D. Block, *Truth and Probability—Ironies in the Evolution of Social Choice Theory*, 76 WASH. U. L.Q. 975 (1998).

377. See, e.g., Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1498 (1999).

378. See Paul H. Edelman, *On Legal Interpretations of the Condorcet Jury Theorem*, 31 J. LEGAL STUD. 327, 328 (2002).

379. I anticipate an argument that adding two additional FCRs would be cost prohibitive. But this argument overlooks the fact that modern mass tort cases are adjudicating thousands of claims through a multibillion-dollar settlement trust. In this context, total FCR fees are immaterial. For example, in the Takata bankruptcy case, the FCR’s fees totaled approximately \$1.42 million. Final Fee Application of Roger Frankel, the Future Claimants’ Representative, for Allowance of Compensation for Services Rendered and Reimbursement of Expenses Incurred for the Period of July 20, 2017 Through April 10, 2018, *In re* TK Holdings, Inc., No. 17-11375 (Bankr. D. Del. May 22, 2018), ECF No. 2865. The fees and expenses of the FCR’s professionals totaled approximately \$5.14 million. See Final Application for Compensation of Ashby & Geddes, P.A., as Co-Counsel to the Future Claimants’ Representative, for Allowance of Compensation for Services Rendered and Reimbursement of Expenses Incurred for the Period July 24, 2017 to April 10, 2018, *In re* TK Holdings, Inc., No. 17-11375 (Bankr. D. Del. May 22, 2018), ECF No. 2867; Final Application for Compensation of Gnarus Advisors LLC as Claims Evaluation Consultants to the Future Claimants’ Representative for the Period September 1, 2017 to April 10, 2018, *In re* TK Holdings, Inc., No. 17-11375 (Bankr. D. Del. May 22, 2018), ECF No. 2868; Final Fee Application of Greenberg Traurig, LLP for Compensation and Reimbursement of Expenses as Special Counsel to the Future Claimants’ Representative, *In re* TK Holdings, Inc., No. 17-11375 (Bankr. D. Del. May 22, 2018), ECF No. 2869; Summary of Final Fee Application of Frankel Wyrton LLP, as Counsel to the Future Claimants’ Representative, for

small-scale committee reduces capture risk because distorted self-interest is more easily managed as additional individuals are added to a process that originally involved one decision-maker.³⁸⁰ Further, Condorcet Jury Theorem supports the idea that a true committee approach will improve decision-making.³⁸¹

The members of this new committee deserve some of the rights afforded to members of other committees. In particular, the new committee deserves the right to vote on any proposed plan of reorganization. Unsecured creditor voting in bankruptcy is premised on parties being organized into classes and on majority votes binding class members.³⁸² Current victims in mass tort cases are organized in classes and vote on proposed plans of reorganization.³⁸³ Future victims are organized in this fashion, but, under the existing framework, their representative does not vote.

The code should be modified so that a plan can be confirmed only if both current and future victims' classes accept the plan.³⁸⁴ Two out of the three FCRs must vote in favor of a proposed plan in order for the future victims' class to be deemed to have accepted the plan. Finally, the statute should provide that an FCR may only vote in favor of a proposed plan if the FCR possesses a reasonable belief that the terms of the trust ensure that claims of similarly situated victims will receive substantially similar treatment.

2. Codifying the Basic Structure

Revising the FCR process is a necessary improvement but is insufficient standing alone. Codifying an improved resolution structure is necessary. Indeed, modern mass tort cases are not subject to § 524(g)'s various

Allowance of Compensation for Services Rendered and Reimbursement of Expenses Incurred for the Period of July 24, 2017 Through April 10, 2018, *In re TK Holdings, Inc.*, No. 17-11375 (Bankr. D. Del. May 22, 2018), ECF No. 2866. These costs represent less than 8 percent of the overall fees charged by legal professionals in the case, *see* Fee Examiner's Final Report Regarding Third Interim and Final Fee Application Requests of Weil, Gotshal & Manges LLP at 9, *In re TK Holdings Inc.*, No. 17-11375 (Bankr. D. Del. June 21, 2018), ECF No. 3011, and a fraction of the \$1.6 billion asset sale that was only possible because the corporate debtor was allowed to channel the claims of future claimants to the settlement trust. *See* Naomi Tajitsu, *Key Safety Systems Completes Deal to Acquire Air-Bag Maker Takata*, REUTERS (Apr. 11, 2018, 6:38 PM), <https://www.reuters.com/article/us-takata-sale-key-safety-systems/key-safety-systems-completes-deal-to-acquire-air-bag-maker-takata-idUSKBN1HI3CG> [<https://perma.cc/MN6U-C9TS>]. Further, approximately 80 percent of the costs associated with the Takata FCR were the professional fees of their legal and financial advisors. *See* Fee Examiner's Final Report Regarding Third Interim and Final Fee Application Requests of Weil, Gotshal & Manges LLP, *supra*, at 9. These fees likely will not fluctuate materially with the addition of two FCRs. Ultimately, cost is not a deterrent to adding two additional FCRs.

380. *See* Edelman, *supra* note 378, at 328.

381. *See id.*

382. For an impaired class to have deemed to have accepted a proposed plan of reorganization, a majority in number and claimants holding two-thirds of the aggregate value of claims must vote to approve the plan. *See* 11 U.S.C. § 1126(c).

383. *See id.* §§ 1122, 1126, 1129.

384. In other words, a revised § 524(g) will prevent plans from being crammed down on dissenting victims' classes, though cramdown will be available for other types of creditor classes. *See id.* § 1129(b)(1).

restrictions, but exempt plans in these cases seize all the benefits in fashioning an unpredictable, ad hoc resolution. Simply modifying the code so that all mass torts are subject to § 524(g) would be a half measure. As noted above, the section was drafted to address the unique problems posed by asbestos exposure cases. Merely subjecting all modern mass tort cases to the section would improve predictability but would fail to address the section's glaring substantive deficiencies. A more sweeping revision is warranted.

Primarily, § 524(g) must be made applicable to modern mass tort cases. I propose amending § 524(g)(2)(B)(i)(I) to capture corporate debtors that have been named as defendants in personal injury, wrongful death, or property damage actions (1) seeking recovery for damages allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products; (2) aggregated and transferred by the JPML to a single federal district court for pretrial proceedings; or (3) that the bankruptcy court determines contain substantial future demands for payment that cannot be addressed equitably without the subsection's protections. Affected corporate debtors wishing to include a channeling injunction in a plan of reorganization will be required to comply with the section. For most mass torts, bankruptcy courts would no longer be able to approve exempt plans pursuant to § 105, closing a significant statutory loophole.

Section 524(g)(2)(B)(ii) provides that victims' claims that are to be satisfied by the settlement trust must be organized into a separate class, and 75 percent of the members of that class must vote to approve the plan of reorganization for it to be confirmed.³⁸⁵ This requirement comes from the *Johns-Manville* court, which mistakenly believed that overwhelming support by current victims would indicate a good deal for future victims and address due process concerns.³⁸⁶ But this premise is entirely misguided. As detailed in Part III.B, the interests of current and future victims are misaligned. The 75 percent threshold gives courts a false impression that they have addressed disparate treatment. The requirement also puts too much power in the hands of a few plaintiffs' attorneys who represent the bulk of current victims.³⁸⁷ The debtor must appease this small group of attorneys in order to clear the daunting threshold, which places these individuals in a position to distort the distribution scheme to favor current victims.³⁸⁸ With the changes noted in this part, a new committee populated with three FCRs would be tasked with voting on the plan and determining what is in the best interests of future victims. Therefore, the basis for the 75 percent threshold disappears entirely, and the requirement should be eliminated.³⁸⁹

385. 11 U.S.C. § 524(g)(2)(B)(ii).

386. *In re Johns-Manville Corp.*, 68 B.R. 618, 630–32 (Bankr. S.D.N.Y. 1986).

387. *See, e.g.*, NAGAREDA, *supra* note 46, at 176–78.

388. *See id.*

389. Naturally, existing requirements would still apply, and a proposed plan could not be confirmed unless a majority of claimants and claimants holding two-thirds of claim value in a class vote to accept the proposed plan of reorganization. 11 U.S.C. § 1126(c).

Plans of reorganization that utilize a § 524(g) settlement trust should have a provision detailing how the risk of trust insolvency has been addressed. As described above, there is a risk that latent financial harm is embedded in many of these cases, and trusts could become insolvent prematurely.³⁹⁰ A new subsection should be added to § 524(g)(2)(B)(ii) that requires the bankruptcy court to have reasonable assurance that the settlement trust will not become insolvent prior to resolving all expected claims, pursuant to the compensation matrix delineated in the plan of reorganization. Currently, the court is required to have only a reasonable assurance that the trust will pay present and future claims in substantially the same manner.³⁹¹ But a prematurely insolvent trust may provide similarly meager distributions to both current and future victims. The current requirement is useful but does little to focus the court on the problem of the trust becoming insolvent prematurely.

The final major piece of this Essay's proposal involves entirely eliminating the requirements delineated in §§ 524(g)(2)(B)(i)(II) and 524(g)(2)(B)(i)(III). These restrictions unnecessarily inhibit the debtor's funding options in a failed attempt to tie the trust's fortunes to the reorganized debtor's post-petition success. These subsections fashion a poor proxy for eliminating the risk of insolvent trusts. Subsection II currently requires that the settlement trust be funded by the debtor's securities and an obligation to make future payments.³⁹² But the provision has no impact in practice. Debtors subject to asbestos exposure claims invariably fund settlement plans with insurance proceeds and capital contributions from parent entities or affiliates.³⁹³ In order to satisfy subsection II, parties place near-worthless securities in the settlement trust—or actually require the trust to purchase these securities—and then provide some nominal future payment obligation.³⁹⁴ These components fail to help the trust avoid insolvency.

Subsection III currently requires that the trust own a majority of the voting shares of the reorganized debtor or its affiliates.³⁹⁵ However, the crux of this requirement is easily circumvented. The reorganized debtor that emerges from the bankruptcy does not have to continue the business that initially made the corporate debtor profitable or maintain any meaningful operations. Indeed, many mass restructurings are characterized by asset sales that provide the primary means of value maximization,³⁹⁶ and often, the debtor's valuable assets and operations are sold to another party.³⁹⁷ In order to satisfy subsection III in these cases, asbestos plans have merely set up a dummy

390. *See supra* Part IV.D.

391. *See* 11 U.S.C. § 524(g)(2)(B)(ii)(V).

392. *Id.* § 524(g)(2)(B)(i)(II).

393. *See, e.g., In re Plant Insulation Co.*, 734 F.3d 900, 915 (9th Cir. 2013).

394. *See id.* at 907.

395. 11 U.S.C. § 524(g)(2)(B)(i)(III).

396. However, this approach has been criticized. *See* Parikh, *supra* note 107, at 430–31 (arguing that rushed asset sales can suppress realized proceeds).

397. *See, e.g.*, Disclosure Statement for Joint Chapter 11 Plan of Reorganization of TK Holdings Inc. and Its Affiliated Debtors, *supra* note 27, at 9.

reorganized debtor that holds various causes of action of questionable value but has no meaningful operations that could generate value to support a faltering trust.³⁹⁸ A majority ownership stake in these dummy entities has marginal value. Consequently, subsection III's requirement similarly fails to support the solvency of the settlement trust.

Ultimately, provisions that seek to create significant contingent liabilities that withstand the bankruptcy process undermine finality and are detrimental to value preservation. Investors and creditors will price the contingencies into the assessed value of any equity issued, asset sold, or debt borrowed by the debtor, which invariably destroys value. The primary benefits of the channeling injunction are eliminating the risk of discounting and maximizing asset values through the bankruptcy process.³⁹⁹ As we saw in *Johns-Manville*,⁴⁰⁰ § 524(g)'s current financing restrictions do not minimize the risk of an insolvent trust, but they do suppress the value of the debtor and the debtor's assets. The objective of these financing provisions should be to maximize the value of funds contributed to the settlement trust. Within these new statutory parameters, the debtor should be afforded flexibility and finality.⁴⁰¹

CONCLUSION

A new strategy has emerged in the mass tort kingdom. Corporate defendants trapped in multidistrict litigation are filing for bankruptcy and exiting one claim aggregation process for another. Bankruptcy allows some mass tort debtors to impose a new bargain on victims—one that could raise the risk of insolvent settlement trusts and disparate treatment across victim classes. This Essay proposes an unprecedented, normative construct that addresses anticommons dynamics and remedies statutory failings in order to improve predictability, efficiency, and victim recoveries.

398. See, e.g., Disclosure Statement for Joint Chapter 11 Plan of Reorganization of Imerys Talc America, Inc. and Its Debtor Affiliates Under Chapter 11 of the Bankruptcy Code, *supra* note 339, at 59–60 (setting up a dummy reorganized debtor to merely hold various causes of action of questionable value).

399. See 140 CONG. REC. 7989, 8021 (1994) (statement of Sen. Hank Brown) (“Without a clear statement in the code of a court’s authority to issue such injunctions, the financial markets tend to discount the securities of the reorganized debtor. This in turn diminishes the trust’s assets and its resources to pay victims.”).

400. The first Johns-Manville trust was deemed insolvent just a few years after inception. See DIXON ET AL., *supra* note 85, at 6.

401. As noted above, under my proposals, a corporate debtor seeking a channeling injunction must be able to offer the court “reasonable assurance” that the resulting settlement trust will not become prematurely insolvent. Debtors can certainly rely on the historical financing constructs captured in §§ 524(g)(2)(B)(i)(II) and 524(g)(2)(B)(i)(III) to make the necessary showing, but these features should not be a requirement.