WRITTEN STATEMENT OF SAMIR D. PARIKH[1]

"Evading Accountability: Corporate Manipulation of Chapter 11 Bankruptcy"

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

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

EXECUTIVE SUMMARY

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

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

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

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

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

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

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

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

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

I. JUDICIAL INFRASTRUCTURE OVERWHELMED

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

A. *Elusive Class Aggregation*

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

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

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

[3] *See* D. Brooks Smith, *Class Action and Aggregate Litigation: A Comparative International Analysis*, 124 PENN ST. L. REV. 303, 308 (2019).
[4] 521 U.S. 591 (1997).
[5] 527 U.S. 823 (1999).
[6] *See* Andrew D. Bradt & Theodore Rave, *Aggregation on Defendants' Terms*, 59 B.C. L. REV. 1251, 1264 (2018); *see also* Thomas E. Willging & Shannon R. Wheatman, ATTORNEY REPORTS ON THE IMPACT OF *AMCHEM* AND *ORTIZ* 4 (2004).

requirements. Class actions have dropped out of the "available set of tools for attempting to settle [most] mass torts, absent some extraordinary willingness of settling defendants to allow some form of future claims to return to the tort system."[7]

B. *MDL's Infirmities*

Amchem and *Ortiz* ostensibly eliminated Rule 23's class aggregation option for most mass tort cases. MDL's rise was a rushed effort to address the gaping resolution void that emerged. Section 1407 of the U.S. Judicial Code creates the MDL infrastructure and allows one federal judge to streamline pretrial – general procedural – matters. At the conclusion of pretrial proceedings, however, the statute mandates that cases be remanded to the districts where they were originally filed. The MDL court is not intended to be a destination; it is merely a stop along the path to resolution.

I acknowledge that MDL has been instrumental in resolving complex cases and preserving the viability of the judiciary in the face of potentially overwhelming case volume. Nevertheless, MDL has evolved in ways that undermine the resolution model for many mass tort cases.[8] The promise of procedural streamlining is a mirage that has led parties into quicksand. The worst kept secret in mass tort litigation is that transferred cases do not return to their transferor courts. Only 3% of transferred cases escape MDL capture; 97% of transferred cases are resolved in the MDL court by dispositive motion or settlement. [9] Victims do not receive their "day in court." And this number says nothing about the efficiency and equity of the resolution process. Keep in mind that there are no statutory requirements that an MDL court review or assess the integrity of any settlement or the settlement process itself. And most courts do not undertake such inquiries. Unfortunately, a structure consumed with efficiency through procedural devices undermines just outcomes if it lacks the ability to assure claim merit, defendant culpability, or settlement integrity.

All of these factors highlight victims' lack of control in an MDL.[10] A truly surprising facet of the process is that victims are unable to exit. MDL judges are invested in these cases and have

[7] *See* Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 SUP. CT. REV. 183, 208 (2008).
[8] *See* Parikh, *The New Mass Torts Bargain*, *supra* note 2.
[9] U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., MDL STATISTICS REPORT – DISTRIBUTION OF PENDING MDL DOCKETS BY ACTIONS PENDING 6 (2018).
[10] *See, e.g.*, Elizabeth Chamblee Burch & Margaret S. Williams, *Perceptions of Justice in Multidistrict Litigation: Voices from the Crowd*, 107 CORNELL L. REV. 1835 (2022).

exhibited a propensity to compel settlements that may be coercive to individual plaintiffs.[11] More fundamental, the process contravenes policy objectives by failing to deter undesirable behavior. Compelled settlements rarely consider culpability, heightening the possibility of extortion litigation. Deterrence is unrealized because there are significant lottery effects; in other words, corporate actors that conform their behavior to legal strictures are no better off than those that do not.

Further, unlike bankruptcy's public forum, MDL settlements can live in the shadows. Settlements do not need court approval, and confidentiality agreements invariably prevent publication or an assessment of the details. Corporate abuses do not come to light in a process where there are ostensibly no trials and no attempts are made to investigate malfeasance.

Ultimately, my objective is not to debate the MDL process's efficacy. The process has produced some successful outcomes, but no one can dispute that there exist significant structural deficiencies that render the process suboptimal for many mass tort victims.

II. FEDERAL BANKRUPTCY

Bankruptcy's structural, procedural, and substantive benefits provide optionality that serves in sharp contrast to MDL's settlement fixation. For example, bankruptcy courts enjoy jurisdiction over all "civil proceedings arising under title 11, or arising in or related to cases under title 11."[12] The seemingly boundless reach of bankruptcy court jurisdiction allows the court to marshal all state and federal matters affecting a debtor in one single venue for prompt and efficient adjudication for the benefit of all stakeholders. MDL does not enjoy this reach. Further, bankruptcy's powerful automatic stay halts all creditor actions, including pending litigation against the debtor and can be extended to nondebtors in order to allow all key parties to focus on negotiating a global settlement. This reduces the risk of precious resources being squandered on one-off litigation matters that ultimately fail to move the parties any closer to settlement. I argue that these resources should be devoted to victims.

[11] For example, in *In re* Nat'l Prescription Opiate Litigation, 290 F. Supp. 3d 1375 (J.P.M.L. 2017), Judge Polster stated that his sole goal was to see an immediate global settlement of the cases. He stated that "[p]eople aren't interested in depositions, and discovery, and trials. So my objective is to do something meaningful to abate this crisis and to do it [immediately]….[W]e don't need a lot of briefs and *we don't need trials*." *See id*. at 4-6 (emphasis added).

[12] 28 U.S.C. §1334(b).

Most cases in bankruptcy – including those involving mass tort claims – enjoy a speed premium; to the extent that the case can be resolved quickly, additional funds can be devoted to creditors. The Bankruptcy Code authorizes courts to identify claims subject to pending litigation against the debtor and estimate the aggregate value of the claims that cannot be resolved in a timely manner.[13] Claims that could take decades to be tried and resolved outside of bankruptcy can be assessed within a matter months. Victims are allowed to participate in this process and argue for the valuation they believe is just. Keep in mind, the bankruptcy judge is not unilaterally deciding what each victim will receive. Rather, the judge is determining the total value of all claims against the debtor and allowing the debtor to propose a settlement to victims based on that figure. This settlement will be delineated in the debtor's plan of reorganization. Victims are not bound by this offer. The United States Trustee appoints an official committee of tort claimants to represent the interests of all current claimants. This committee, which retains independent legal and financial advisors, plays a key role negotiating with the debtor to develop settlements that the committee can endorse and recommend for approval. Ultimately, bankruptcy allows these creditors to vote on whether they believe that the debtor's proposal is the best offer they can secure.[14] In fact, victims – as a collective – could choose to reject the debtor's offer. This would put pressure on the debtor. After a certain number of rejections, there is a distinct possibility that the court will dismiss the bankruptcy case, which could be disastrous for the debtor and other key-decision makers in the case.

I acknowledge that individual victim autonomy is sacrificed in bankruptcy, but that is the case in all aggregation processes involving thousands and thousands of claims.[15] Not every plaintiff can have her day in court when thousands of claims are outstanding. The defendant's legal expenses would consume everything, leaving little for the vast majority of victims. I also acknowledge that the claim estimation process in bankruptcy has deficiencies. But bankruptcy court judges can easily address them. For example, if there are concerns about a bankruptcy court judge estimating personal injury claims, the judge could lift the automatic stay as to a particularly subset of cases and allow the MDL district court to adjudicate them.[16] The resultant rulings could help provide some concrete data

[13] *See* 11 U.S.C. §502(c).

[14] In the Purdue Pharma bankruptcy case, more than 95% of the approximately 120,000 submitted votes were in favor of approving the debtor's proposed plan of reorganization. *See* Parikh, *Scarlet-Lettered Bankruptcy: A Public Benefit Proposal for Mass Tort Villains*, *supra* note 2.

[15] *See* Parikh, *The New Mass Torts Bargain*, *supra* note 2.

[16] *See* Sergio Campos & Samir D. Parikh, *Due Process Alignment in Mass Restructurings*, *supra* note 2. Note that the bankruptcy court's estimation of such claims does not actually fix the amount any creditor will receive for her injury.

that would help the bankruptcy judge in her claim assessment process. This hybrid joins the advantages of MDL, which offers a jurist experienced in adjudicating personal injury claims, and bankruptcy, which offers victims an accelerated recovery and the chance to vote on the treatment they will ultimately receive.

III. AMENDING THE BANKRUPTCY CODE

The bankruptcy process may be the optimal means to resolve many mass tort cases, but it still needs refinement. I focus on three key areas below.

A. *Expanding Section 524(g) to Capture All Mass Tort Cases*

Section 524(g) of the Bankruptcy Code applies to only mass tort debtors facing asbestos exposure claims. Therefore, most modern mass tort cases are not subject to Section 524(g)'s various restrictions. Plans of reorganization in these cases operate outside of these parameters, often times undermining uniformity. I argue that Section 524(g) must be made applicable to all mass tort cases irrespective of the product, conduct, or events alleged to have caused the claims in order to further uniformity of process and outcomes.

I propose amending Section 524(g)(2)(B)(i)(I) to capture corporate debtors that have been named as defendants in personal injury actions, wrongful death actions, property damage actions, or any other civil actions resulting in mass liability or claims without regard to the type of product, conduct or events that allegedly gave rise to the claims. For example, this new subsection could capture claims that were aggregated as part of MDL and transferred to a single federal district court for pretrial proceedings. After this change, one section of the Code will guide disposition of key issues in all mass tort cases.

B. *Nonconsensual Nondebtor Releases*

1. *Background*

On May 30, 2023, the Second Circuit Court of Appeals reversed the district court's order holding that the Bankruptcy Code does not permit nonconsensual nondebtor releases of direct claims and affirmed a bankruptcy court order approving a modified version of Purdue Pharma's plan of

reorganization[17] that contained such releases. The court ruled that Sections 105(a) and 1123(b)(6) of the Bankruptcy Code provide the statutory bases for the releases, and the releases were proper in light of the equitable considerations in the case.

In determining the validity of nonconsensual nondebtor releases in limited circumstances, the court established a rigorous seven-factor test[18] that focuses – in part – on whether the third party "contributed substantial assets to the reorganization" and if creditors "overwhelmingly voted in support of the plan." The court also explained that a robust evidentiary basis would be necessary to support the grant. Indeed, the bankruptcy court is required to support each factor in the test with "specific and detailed findings."[19] Finally, satisfaction of the seven factors is insufficient by itself to warrant approval. The granting of releases must also be assessed "against a backdrop of equity."[20]

The Second Circuit's ruling aligns with the majority of circuits that permit nonconsensual nondebtor releases but conflicts with precedent in the Fifth, Ninth, and Tenth Circuits. The ruling is on appeal before the Supreme Court, which granted certiorari on August 10, 2023.

The *Purdue* bankruptcy case has brought these releases into the spotlight. In that case, claimants voted overwhelmingly to approve the plan of reorganization.[21] In the aggregate, the vote was over 95% in favor of plan confirmation. We know from the victim statements submitted in the case that these individuals appreciated the consequences of the third-party releases, but they also understood that there was little chance of a meaningful recovery without a compromise with the Sackler family.

From 2008 to 2016, Purdue paid approximately $10.4 billion in dividends to Sackler family

[17] The releases delineated in the plan only applied where "a debtor's conduct or the claims asserted against it [are] a legal cause or a legally relevant factor to the cause of action against the shareholder released party" and the released claims directly affect the res of the bankruptcy estate. *In re* Purdue Pharma L.P., 69 F.4th 45, 70 (2d Cir. 2023).

[18] The seven factors require consideration of whether: 1) there is an identity of interests between the debtors and the released third parties "such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate"; 2) claims against the debtor and nondebtor are factually and legally intertwined; 3) the scope of the releases is appropriate; 4) the releases are essential to the reorganization and the plan's successful implementation; 5) the nondebtor contributed substantial assets to the reorganization; 6) the affected class of creditors voted overwhelmingly in support of the plan; and 7) the plan provides for the fair payment of enjoined claims. *See id*., at 79-82.

[19] *See id*., at 79.

[20] *See id*.

[21] Over 95% of the personal injury classes voted to accept the plan, though a significant number of claimants did not vote at all.

members or Sackler-controlled entities.[22] There is an argument that these distributions were fraudulent conveyances that could be subject to claw back. But that prospect was filled with uncertainty. A significant portion of the transfers occurred outside the applicable statute of limitations, and approximately $4.6 billion of the funds went to pay Purdue's federal and state taxes. The remaining balance (approximately $1.5-2 billion) is predominantly in restricted spendthrift trusts overseas. How much would have to be spent to retrieve those funds? How many years would it take? The claimants understood all of this and voted accordingly. Consequently, the nondebtor releases were an essential part of convincing the Sackler family to contribute approximately $6 billion to the estate.

Many mass tort cases cannot be resolved without the involvement and financial assistance of nondebtors.[23] This takes on greater significance in mass tort cases. A nondebtor may not be willing to contribute significant financial resources to a victims' settlement trust without assurances that certain civil claims will be channeled to that trust. Compelling participation may not be possible in many cases. Victim recoveries could be decimated without the funds this nondebtor offers.

2. *Preserving Nondebtor Releases*

The primary question is under what circumstances – if any – can a court confirm a plan of reorganization that contains nondebtor releases. The successful imposition of these releases must be rooted in the Bankruptcy Code's statutory language.

I believe that some releases are not particularly controversial. For example, consensual nondebtor releases should be enforceable in mass tort cases; these releases, which are contractual agreements outside the scope of Section 524(e) and otherwise permissible under the Bankruptcy Code, should not preclude confirmation of a plan of reorganization. Further, keep in mind that the

[22] *In re Purdue Pharma*, 69 F.4th at 59.

[23] *Dow Corning* is another example. As explained by Professor Tony Casey, "[W]hen Dow Corning faced thousands of lawsuits related to defective breast implants, nondebtor releases facilitated a negotiated resolution that had failed several times without them. In exchange for a settlement of claims against them, solvent shareholders agreed to contribute to a settlement fund. The overwhelming majority of claimants (94%) supported the deal. But what about that last 6%? The court had a choice: use releases to force the 6% to go along or let things drag on for years or decades in uncertain litigation. The court chose the former in order to get desperately needed money to the victims. This was the right choice. As [Adam Levitin] noted in describing the releases in *Dow Corning*, 'The whole point of bankruptcy is to find the fairest deal possible for everyone involved," and a resolution supported by an overwhelming majority of victims is 'a good thing that deserves praise.'" *See* Creditors Rights Coalition, Weekly Newsletter (Aug. 25), available at https://creditorcoalition.org/weekly-news-august-25/.

releases do not insulate third parties from any criminal prosecution. And the releases that appear in modern mass tort cases do not extinguish claims; rather, the claims are merely channeled to a victims' settlement trust for payment in accordance with distribution protocols.

I agree with the Second Circuit's *Purdue* opinion. The Bankruptcy Code does not prohibit nonconsensual nondebtor releases. Section 1123 contemplates the inclusion of such a provision in the plan premised, at least in part, on the notion that creditors receive various protections through the plan process. For example, creditors have the right to vote on the proposed plan and at least a supermajority of mass tort claimants must approve the plan. The confirmation process is also subject to judicial review to ensure that the plan is proposed in good faith and various safeguards exist for creditors.

The Second Circuit's opinion explains that the scope of these releases has to be extremely narrow and the evidentiary basis supporting this form of relief should be compelling. Once again, satisfaction of the seven-factor test is insufficient by itself. A court considering confirmation of a plan containing these releases must determine that there is an equitable basis supporting the inclusion of the releases.

I do not believe that these releases violate claimants' constitutional due process rights nor do I believe that the Bankruptcy Code precludes this type of relief. The fact that Section 524(g)(2) expressly allows for the injunction of claims against nondebtors should not be seen as eliminating that power in other cases. Indeed, the Bankruptcy Reform Act of 1994, which added Section 524(g) to the Bankruptcy Code, provided that Section 524(g)'s language should not be construed to "modify, impair, or supersede any other authority the court has to issue injunctions in connection with an order confirming a plan of reorganization."[24]

Ultimately, nondebtor releases do not extinguish claims. Releases, coupled with the confirmed plan of reorganization, merely channel claims to a victims' settlement trust for recovery. In these cases, the real issue is whether the settlement trust is properly funded to address all meritorious claims that could materialize over the course of years and perhaps decades. And that is why these releases can boost claimants' recoveries. Nondebtor parties receiving a release must make

[24] *See* Bankruptcy Reform Act 1994, Pub. L. 103-394, §111(b), 108 Stat. 4106, 4117 (1994).

a substantial financial contribution to the case, one that will ultimately provide a significantly improved recovery for claimants.

If the Supreme Court ultimately reverses the Second Circuit in *Purdue*, I believe that Section 524(g) should be amended to include new language that acknowledges the propriety of nonconsensual nondebtor releases in those extremely limited cases where resolution may prove impossible without them.

C. *Future Claimants' Representative*

1. *Background*

Section 524(g) attempts to satisfy due process concerns in mass tort cases by requiring the appointment of a future claimants' representative (FCR) to advocate for future claimants affected by a channeling injunction.[25] The idea has considerable value in theory, but the execution has been alarming.

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

Section 524(g) requires the appointment of an FCR as part of its binding aggregation process. In a customary agency relationship, the parties to be represented select their agent. In mass tort agency, future victims are the principal and, of course, they are absent from the process. This dynamic raises the risk of exploitation. Primarily, the Bankruptcy Code fails to prescribe selection procedures for the FCR. The FCR is the sole representative for future claimants who customarily hold claims valued at hundreds of millions of dollars. These clients are unable to provide input for the selection process. Nevertheless, the FCR negotiates with the debtor and other stakeholders and is able to unilaterally bind all unknown class members.[26] The FCR has extraordinary power but operates without any client oversight. This lack of oversight is arguably unavoidable in mass torts, but the agency breakdown is even more pronounced than it seems. There is also no ex-post check. Future victims who later emerge and come to learn that the FCR agreed to extremely disadvantageous terms cannot opt out of the agreement, and they have no recourse against the FCR, who enjoys broad immunity for all actions aside from fraud, gross negligence, and willful misconduct.[27]

The Bankruptcy Code assigns the task of selecting the FCR to the bankruptcy court, without offering any further guidance. Bankruptcy courts have delegated this responsibility to the corporate debtor, the very party against whom the FCR will be negotiating. Invariably, the debtor is the only stakeholder who proposes FCR candidates and, in almost all cases, nominates only one.[28] Courts are not required to give any deference to this nomination, but they invariably approve the debtor's nominee without soliciting nominees from other stakeholders. Further, the standard of review adopted by most courts is that the FCR nominee be "disinterested," which represents an extremely low bar focused on whether the individual has any overt conflicts of interest.[29] Once a selection is made, courts do not review the adequacy of the FCR's representation.

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[26] *See* 11 U.S.C. § 524(g)(4)(B).

[27] *See* S. Todd Brown, *Section 524(g) Without Compromise: Voting Rights and the Asbestos Bankruptcy Paradox*, 2008 COLUM. BUS. L. REV. 841, 897–902.

[28] *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).

[29] *See* 11 U.S.C. § 101(14); *In re Duro Dyne*, 2019 WL 4745879, at *1. *But see In re* Imerys Talc Am., Inc., 38 F.4th 361, 376 (3d Cir. 2022) (holding that an FCR's statutory mandate as a legal representative for future claimants requires it to satisfy the heightened duties owed by fiduciaries); *In re Fairbanks*, 601 B.R. at 839–41 (ruling that the "disinterestedness" standard was insufficient and reviewing the FCR nominee under the more demanding standards applicable to appointments of guardians ad litem).

The idea that the FCR would fail to be a zealous advocate may seem confusing at first but emerges with shocking clarity when one considers the capture risk involved in mass tort cases. A small pool of professionals manages the universe of mass tort bankruptcy cases, and the process is characterized by repeat players.[30] FCRs receive significant fees and, once appointed, immediately hire as legal counsel the law firm at which they are a partner, thereby amplifying the benefit. Therefore, the promise of multiple engagements is a truly distortive incentive for these individuals. This promise can incentivize an FCR to discount their invisible clients' interests. FCRs seeking subsequent engagements face extreme pressures to avoid taking positions in one case that may alienate key parties who will be involved in future cases. The reality is that today's adversary could be tomorrow's client.

2. *The Proposal*

The Bankruptcy Code does not prescribe a process for appointing the FCR or the standard to be used for this selection. Courts have delegated this task to the corporate debtor. Of course, the debtor is the very party against whom the FCR will be negotiating. The most effective way to reduce obvious capture risk is to mandate that the U.S. Trustee (UST)—the party that already manages the committee appointment process under Section 1102 of the Bankruptcy Code—independently oversee FCR selection. A new statutory subsection to Section 524(g) should provide that the UST will compile a list of independent candidates and be tasked with selecting an FCR from this list subject to approval by the bankruptcy court. Parties in interest may nominate candidates, but the UST's master list should include candidates that the UST identifies independently. Further, the bankruptcy court should be authorized to remove an FCR after appointment if the court determines that the change is necessary to ensure adequate representation of future victims.

Corporate debtors currently control the nomination process, and many bankruptcy courts invariably approve lone nominees under the "disinterestedness" standard. This standard is used for

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

evaluating agents in bankruptcy who are actively managed by their principals but is inappropriate in light of the lack of customary agency controls for future victims.

Conceptualizing the FCR as a guardian ad litem offers an improved framework.[31] 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.[32] 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."[33] 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.[34] This new framework would result in a modified assessment of FCR candidates. Under the guardian model, the bankruptcy court must—in addition to finding that a candidate is disinterested, qualified, and competent—determine that a candidate will act as an objective, impartial, and effective advocate for future victims.

I have also argued that process integrity could be improved by adding additional representatives.[35] Condorcet Jury Theorem was formulated to assess the optimal size of a deliberative body and support the binding effect of majority and supermajority voting. The theorem has been applied by scholars assessing juries.[36] 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.[37]

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[31] *See* Parikh, *The New Mass Torts Bargain*, *supra* note 2.

[32] 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.

[33] *In re Fairbanks*, 601 B.R. at 840.

[34] *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).

[35] *See* Parikh, *The New Mass Torts Bargain*, *supra* note 2.

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

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

The theorem provides a useful perspective from which to view the FCR construct. In mass tort bankruptcies, there are arguably "correct" choices that increase the likelihood of viable settlement trusts. The bankruptcy process can be redesigned to nudge FCRs toward these choices. The current formulation places too much power in the hands of one FCR. I argue that a true committee representing future victims is the optimal structure. Three FCRs should be appointed to negotiate on behalf of future victims. This small-scale committee reduces capture risk because distorted self-interest is more easily managed as additional individuals are added to a process that originally involved one decision-maker. Further, Condorcet Jury Theorem supports the idea that a true committee approach will improve decision-making.

To the extent applicable, the members of this new committee deserve some of the rights afforded to members of other committees. In particular, the new committee deserves the right to vote on any proposed plan of reorganization. Unsecured creditor voting in bankruptcy is premised on parties being organized into classes and on majority votes binding class members. Current victims in mass tort cases are organized in classes and vote on proposed plans of reorganization. Future claimants are organized in this fashion, but, under the existing framework, their representative does not vote. The Code should be modified so that a plan of reorganization can be confirmed only if both current and future claimants' classes accept the plan. Two out of the three FCRs must vote in favor of a proposed plan in order for the future claimants' class to be deemed to have accepted the plan. Finally, the statute should provide that an FCR may only vote in favor of a proposed plan if the FCR possesses a reasonable belief that the terms of the trust ensure that claims of similarly situated victims will receive substantially similar treatment.

IV. THE "DAY-IN-COURT" IDEAL

Improving recoveries for deserving victims is attainable only if we attempt to understand the key issues precluding resolution. Unfortunately, the resolution debate is distorted by a significant misconception. One of the primary arguments used to undermine the bankruptcy process is that victims lose their "day in court" – a reference to the Due Process Clause and the Seventh Amendment right to a jury trial. In fact, when 3M subsidiary Aearo Technologies filed for bankruptcy, MDL Judge Rodgers wrote that "hundreds of thousands of individual plaintiffs will be

deprived of their constitutional right to a jury trial."[38] But the truth is that claimants lost that right the day the Combat Arms MDL was ordered. This is the case in almost every modern mass tort dispute.

The day-in-court argument assumes that this right is sacrosanct and bankruptcy deprives victims of the right. That is not entirely true. Certain mass tort claimants in bankruptcy could have their day in court through bellwether trials conducted by a federal district court with the bankruptcy court's permission.[39] But I acknowledge that this is a small portion of the claimant pool. Mass tort plans of reorganization include an opt-out for claimants that allows those who exercise the right to have their day in court by bringing suit directly against the settlement trust. But there are a number of strings attached to this right. For example, in *Purdue*, the recovery for claimants who opted out was capped at the amount the claimant would have received if they had not opted out.[40] These restrictions certainly diminish a victim's ability to enjoy their day in court. Supreme Court jurisprudence indicates that these restrictions are Constitutional,[41] but that doesn't change the fact that something is lost.

The statement that mass tort claimants lose their day in court in bankruptcy is not inaccurate. It is incomplete, however, because mass tort claimants also lose their day in court in MDL. It is this corollary that is being intentionally avoided. For all intents and purposes, plaintiffs in the bankruptcy cases involving 3M, Johnson & Johnson, and Purdue Pharma were in a multidistrict litigation proceeding prior to the dispositive bankruptcy filing. Even if the relevant bankruptcy case was dismissed, the dispute would return to MDL. But MDL does not offer plaintiffs their day in court, either. Once a case becomes part of MDL, claimants cannot opt out to continue their litigation. Claimants must sit and wait, sometimes for years. This MDL reality has earned the process a significant amount of criticism.[42] MDL has bellwether trials, but that is just for a handful

[38] Order, *In re 3M Combat Arms Earplug Prod. Liab. Litig.*, Case No. 19-MD-02885 (N.D. Fla. August 16, 2022) [Docket No. 3389].
[39] *See* Campos and Parikh, *Due Process Alignment in Mass Restructurings*, *supra* note 2.
[40] *See* Disclosure Statement for Fifth Amended Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. and Its Affiliated Debtors, In re Purdue Pharma, L.P., Case No. 19-23649 (Bankr. S.D.N.Y. 2021) [Docket No. 2983] at 22.
[41] *See, e.g.*, Ortiz v. Fibreboard Corp., 527 U.S. 815, 846 (1999) ("'We have recognized an exception to the [day-in-court ideal] when...a person, although not a party, has his interests adequately represented by someone with the same interests who is a party'" or "where a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants, as for example in bankruptcy...." (*citing* Martin v. Wilks, 490 U.S. 755, 762 (1989) (citations omitted)).
[42] *See, e.g.*, Elizabeth Chamblee Burch & Margaret S. Williams, *Perceptions of Justice in Multidistrict Litigation: Voices from the Crowd*, 107 CORNELL L. REV. 1835 (2022).

of claimants.[43] Finally, MDL settlements are conditioned on a limited number of opt-outs; the deal falls apart if the threshold is crossed. Therefore, plaintiffs' attorneys and consenting claimants are all incentivized to dissuade opt-outs. The impact of these efforts cannot be overstated.

Only a handful of the hundreds of thousands of claimants involved in these mass tort cases will ever get their day in court. The "day in court" ideal is invariably a fallacy in the mass torts context. But that is unavoidable in these type of cases. Attempting to preserve a day-in-court right for a few victims would significantly diminish the overall distribution to the victims' collective. Claim adjudication in this alternative reality would take decades. Initial judgments would exhaust funds, and lottery effects would leave the vast majority of claimants without restitution – an archetypical collective action problem that policymakers should not encourage. Attempting to formulate a "day in court" option in mass tort cases can actually do more harm than good for mass tort claimants.

Mass tort claimants invariably lose their day in court in bankruptcy *and* MDL, but that is a necessary evil when the legal system is forced to resolve thousands and thousands of claims. The "day in court" ideal permeates discussions about the optimal venue to resolve mass torts, but it should not play this influential role. Ultimately, the overriding objective in these cases should be securing meritorious claimants the recovery they deserve on the shortest timeline – a result that bankruptcy often furthers.

V. DIVISIVE MERGERS

The Texas Business Organizations Code (TBOC) defines "merger" to include a division of a business into two new entities. This process is referred to as a "divisive merger" and has been an obscure part of the TBOC since 1989.[44] A divisive merger allows a business to isolate valuable assets in an entity protected from creditor claims related to its primary operations.

How does the process work? In most cases, there is a corporate structure that includes at least one entity that holds valuable business operations but includes assets tainted by mass tort

[43] For example, prior to the pending settlement, 3M's Combat Arms MDL was the largest MDL in history with over 200,000 claims, but there were only 16 bellwether trials.

[44] Arizona, Pennsylvania, and Delaware have adopted similar provisions but lack the case history supporting the practice.

liability ("InfectedCo").[45] The conglomerate faces significant liability and may have already suffered adverse judgments or be involved in MDL. In order to effectuate a divisive merger, InfectedCo – invariably a Delaware entity – incorporates as a limited liability company under Texas state law. Relying on the TBOC, InfectedCo undergoes a corporate mitosis producing two new corporate entities. Let's call them AssetCo and LiabilityCo. Under state law, InfectedCo is authorized to allocate assets and liabilities among the two new entities. LiabilityCo receives assets of nominal value and becomes solely responsible for all mass tort claims against InfectedCo. AssetCo receives all other InfectedCo assets and liabilities. InfectedCo is dissolved.

This process effectively isolates mass tort liability in LiabilityCo, unless the allocation constitutes a fraudulent transfer. To address this daunting risk, AssetCo and LiabilityCo sign various agreements designed to support what is ostensibly a shell company.[46] These agreements establish reciprocal indemnification obligations corresponding to the allocation of liabilities in the divisive merger. In other words, AssetCo and LiabilityCo (as well as other potential entities) agree to indemnify each other for all losses incurred in connection with their respective assets and liabilities. The agreements also require AssetCo and potentially other corporate entities to provide funding for all costs and expenses incurred by LiabilityCo to the extent LiabilityCo lacks sufficient funds to satisfy such obligations. These agreements arguably allow LiabilityCo to have the same ability to pay off its mass tort claims as InfectedCo did before the divisive merger.

The maneuver known as the "Texas two-step" is certainly unorthodox and has received a lot of attention. But this is a minor actor in the mass tort theatre, and I fear that the issue is receiving far more attention than it deserves. Those divisive mergers that in fact transfer assets away from creditors can be attacked under fraudulent transfer law, a claim that bankruptcy courts are experienced in assessing. And a bankruptcy case preceded by a divisive merger designed to defraud creditors can be dismissed as a bad faith filing.

Ultimately, I leave to other commentators the full-throated defense of divisive mergers. My position is that the means to police potentially undesirable behavior in this context already exists in the Bankruptcy Code, and we have recently seen courts fulfilling their gatekeeping function. I worry

[45] *See* Parikh, *Mass Exploitation*, *supra* note 2.
[46] *See id*.

that congressional intervention on this point may produce unintended consequences and should not be prioritized when so many other, more important issues in the mass torts space are ignored.

CONCLUSION

There is a fair amount of hyperbole surrounding mass tort bankruptcies. The reality is far less salacious. Bankruptcy is the optimal venue for many personal injury, mass tort cases in light of what should be objective of this process: providing meritorious claimants the recovery they deserve on the shortest timeline.