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Defending "Second-Party" Releases in Mass Tort Bankruptcies

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DEFENDING "SECOND-PARTY" RELEASES IN MASS TORT BANKRUPTCIES

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ABSTRACT

The Bankruptcy Code enables corporate debtors to restructure their debts, including liability for tort damages. Recovery from an insolvent debtor poses daunting collective action problems for tort victims. By creating and funding a trust in bankruptcy, the liable company can streamline settlement and distribute available assets to give all claimants—including individuals who have been harmed by the company's past activity but are not yet aware of the harm—an aliquot portion of available funds.

Frequently, tort damages levied against a bankrupt company implicate not only the debtor but other related parties, like the company's insurers, directors and officers, corporate affiliates, and co-tortfeasors. The bankruptcy estate contains only the debtor's assets and the discharge granted in bankruptcy is given only to the debtor. Nevertheless, courts have often allowed third parties limited involvement as trust contributors. In exchange for money payments made into the trust, these third parties may also be released from future liability.

In Harrington v. Purdue Pharma*, the Supreme Court ruled that the Bankruptcy Code does not allow for third-party releases over the objection of creditors. As recognized by the dissent, this ruling will complicate efforts to recover assets for mass tort victims in bankruptcy. This Article argues that some*

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releases may be better termed "estate preservation releases" or even "second-party releases," and should be upheld even after the Supreme Court's ruling. Insurance proceeds frequently fall into this category. We argue that second-party releases remain lawful under a narrow reading of Purdue Pharma. *If not, Congress should pass legislation that permits their continued use.*

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INTRODUCTION

AnyCorp, Inc., a fictional business operating in the United States, has a serious problem. AnyCorp's business activities have resulted in the tortious harm of hundreds, maybe even thousands, of victims. It may be that AnyCorp's employed personnel have engaged in the sexual abuse of a vulnerable population.[1] It may be that AnyCorp's products have been laced with toxic chemicals, which will dramatically increase the cancer risk of a large number of consumers.[2] It may be that AnyCorp's products are innately dangerous and harmful, leading to injury and possibly death.[3] Whatever the reason, AnyCorp now faces enormous liability risk and likely insolvency, if not from the tort judgments themselves, from the legal costs and reputational damage caused by the ensuing lawsuits.[4]

Insolvency can mean the destruction of a company if creditors liquidate the company's assets in a race to recover their claims. But many companies—even those who may have engaged in past harmful behavior—can provide ongoing social value if permitted to continue operating.[5] The recovery of victims harmed by AnyCorp's behavior is bound up in AnyCorp's rehabilitation.[6] If AnyCorp can maximize the value of its assets by continuing as a going concern, having acknowledged and corrected its misbehavior (which is itself a social good) tort victims are more likely to be compensated. This is particularly true of future claimants—those tort victims who might not yet be aware of their injuries.

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1 *See, e.g.*, *In re* USA Gymnastics, 40 F.4th 775, 776 (7th Cir. 2022). The bankruptcy followed a flood of lawsuits brought by victims of sexual abuse at the hands of the organization's top doctor.

2 *See, e.g.*, *In re* Quigley Co., Inc., 383 B.R. 19, 21 (Bankr. S.D.N.Y. 2008). The debtor was in the business of developing, producing, and marketing asbestos-containing products.

3 *See, e.g.*, *In re* Dow Corning Corp., 86 F.3d 482, 485 (6th Cir. 1996). The bankruptcy reorganized a predominant producer of silicone gel breast implants, which induced autoimmune reactions in tens of thousands.

4 *See* Richard A. Nagareda, *Outrageous Fortune and the Criminalization of Mass Torts*, 96 MICH. L. REV. 1121, 1125 (1998) (noting that mass tort bankruptcy has become a vehicle for mortal condemnation of defendants).

5 *See* Samir D. Parikh, *Scarlet-Lettered Bankruptcy: A Public Benefit Proposal for Mass Tort Villains*, 117 NW. L. REV. 425, 465 (2022).

6 *See* Alan N. Resnick, *Bankruptcy as a Vehicle for Resolving Enterprise-Threatening Mass Tort Liability*, 148 U. PA. L. REV. 2045, 2050 (2000); Mark J. Roe, *Corporate Strategic Reaction to Mass Tort*, 72 VA. L. REV. 1, 6 (1986).

AnyCorp faces the best chances of rehabilitation through bankruptcy proceedings. Bankruptcy also helps to minimize the costs of recovery and maximize the chances of payout for AnyCorp's tort victims. Bankruptcy provides a harried debtor needed breathing room to accomplish a reorganization and brings all the debtor's creditors into collective resolution proceedings. The term "creditor" includes those who voluntarily lent money or entered into contractual agreements with the debtor and also those who have been injured by the debtor and can claim damages for their injuries.[7] Under standard common law proceedings, creditors of an insolvent debtor participate in a race to collect, and whichever creditor is fastest to collect may recover in full at the expense of future creditors. In contrast, in bankruptcy all creditors must participate in an orderly process. This constraint benefits slow movers like tort victims, whose claims require extensive litigation under state law. In addition, bankruptcy is uniquely able to preserve rights to compensation for future claimants who are presently unaware of their injuries.

The bankruptcy process includes an evaluation and distribution of the debtor's assets.[8] Often, this leads to complications for corporations involved in mass torts. A company like AnyCorp will often have liability insurance policies that represent the primary (sometimes, exclusive) source of recovery for victims. In addition, AnyCorp's directors and officers may be implicated in AnyCorp's tortious activities and there may be directors and officers ("D&O") insurance policies that cover these third parties. The company may have a parent or subsidiary that is not in bankruptcy but potentially liable for the same alleged misconduct; parent and subsidiary may also share insurance coverage. Other parties may be involved in the alleged tortious conduct, such that resolution of AnyCorp's bankruptcy will still not resolve all the tort victims' claims.

The creditors of an insolvent debtor are, whether they like it or not, placed in a situation of mutual competition for a limited pool of assets. Tort victims are typically some of the last to recover from a bankruptcy estate, and therefore particularly invested in maximizing estate assets and minimizing the costs of

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[7] *See* 11 U.S.C. § 101(10) (defining creditor as an entity with a claim against the debtor arising before the bankruptcy filing).

[8] Under chapter 7, all a corporate debtor's assets are liquidated and the proceeds distributed. In reorganization under chapter 11, assets may or may not be sold to repay creditors, but creditors must receive at least the value of the assets had they been liquidated in a chapter 7. *See id.* at § 1129(a)(7). In either chapter, the company may also be sold as a going concern, with creditors repaid from the proceeds of the sale. *See id.* at § 363. In chapter 11, all creditors have the opportunity to vote on the proposed plan of reorganization. *See id.* at § 1126.

distribution.[9] The persistent undercompensation of tort victims in cases of insolvency is a problem that has long plagued corporate and bankruptcy scholars.[10] One method of maximizing the financial compensation for tort victims, adopted with growing frequency,[11] has been to negotiate with non-bankrupt parties who are also implicated in the debtor's liability. Under the terms of the negotiation, the non-bankrupt parties contribute funds that will be distributed in the debtor's bankruptcy in exchange for a release from future legal actions.

Releases granted in bankruptcy proceedings generally fall into four distinct fact patterns: (1) release of the debtor's insurers; (2) release of parties affiliated with the debtor whose liability arises because of their affiliation, including directors, managers, partners, and shareholders; (3) release of parents, subsidiaries, or other corporate affiliates of the debtor; and (4) release of other unrelated parties who are co-liable with the debtor but have distinct legal responsibility.[12] These releases can facilitate the recovery for tort claimants by collapsing what would be a surfeit of litigation into a single bankruptcy proceeding. Insurers, who receive guarantees of global peace by virtue of the releases, agree to waive their rights to challenge victims' claims. Releases given to officers and directors obviate relevant indemnification agreements. When corporate affiliates are granted releases, the cross-claims and cross-guarantees they may have against the debtor are also resolved. In cases involving multiple unrelated defendants, releases facilitate mass settlements involving multiple

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9 Tort victims, as unsecured creditors, receive a pro rata portion of whatever funds are remaining after secured creditors have claimed their collateral and administrative expenses and other priority claims have been paid in full. *See id.* at §§ 503, 507. Administrative claims in mass torts can be particularly expensive, due to the high legal fees involved in litigating claims.

10 *See, e.g.*, Vincent S. J. Buccola & Joshua C. Macey, *Claim Durability and Bankruptcy's Tort Problem*, 38 YALE J. REG. 766, 770 (2021) (recommending a super-durability norm for tort claims to encourage corporations to better internalize the risks of tortious behavior); Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L.J. 1879, 1880 (1991) (arguing for the abolishment of limited liability for corporate torts); Roe, *supra* note 6, at 40–42 (suggesting veil piercing for the benefit of non-bargaining tort creditors); Thomas A. Smith, *A Capital Markets Approach to Mass Tort Bankruptcy*, 104 YALE L.J. 367, 411 (1994) (promoting a capital markets approach to valuing tort claims for an insolvent company); *Switching Priorities: Elevating the Status of Tort Claims in Bankruptcy in Pursuit of Optimal Deterrence*, 116 HARV. L. REV. 2541, 2543 (2005) (arguing for superpriority status for tort victims in bankruptcy); Hanoch Dagan, *Restitution in Bankruptcy: While All Involuntary Creditors Should Be Preferred*, 78 AM. BANKR. L.J. 247 (2004) (same); Luke Sperduto, *Three and a Half Rules for Tort Claims in (and out of) Chapter 11*, 95 AM. BANKR. L.J. 127, 127 (2021) (arguing for superpriority status for tort victims in and out of bankruptcy). Undercompensation is a particular risk for future claimants. *See, e.g.*, Yair Listokin & Kenneth Ayotte, *Protecting Future Claimants in Mass Tort Bankruptcies*, 98 NW. L. REV. 1435, 1447 (2004).

11 *See* Lindsey D. Simon, *Bankruptcy Grifters*, 131 YALE L.J. 1154, 1173 (2022).

12 *See* Daniel J. Bussel, *The Mass Tort Claimants' Bargain*, 97 AM. BANKR. L.J. 685, 728 (2023).

actors, which would otherwise necessitate years of litigation to sort out. In reorganization proceedings under chapter 11 of the Bankruptcy Code (the "Code"), settlement agreements can be confirmed over the objection of dissenters, eliminating the problem of individual holdouts and paving the way for faster, comprehensive resolutions.

The use of releases has not been without controversy, particularly in recent years. Many scholars considering the issue expressed deep reservations about using bankruptcy to provide releases for non-debtors.[13] More broadly, some commentators have questioned the use of bankruptcy to resolve mass torts generally, because most of the perceived benefits of bankruptcy—greater speed, efficiency, and cost savings in resolving claims—come from sidestepping standard procedural protections.[14]

But prior to the Supreme Court's ruling in *Harrington v. Purdue Pharma*,[15] federal courts frequently permitted the use of so-called third-party releases to bind claimants to settlements that would enjoin further action against non-debtors. Typically, releases were included in a chapter 11 plan, confirmed by a supermajority vote[16] and enforced even against dissenting creditors. Statutory justification for these releases was found in general provisions of the Code permitting plans to include "necessary and appropriate" provisions.[17] Under specific conditions involving asbestos liability, the Code provides explicit statutory authority for releases.[18] In *Purdue*, which dealt with opioids, not asbestos, the Court struck down the practice of issuing nonconsensual releases as "necessary and appropriate."[19] The decision did not provide a comprehensible theory that would explain the congressional sanction of releases in asbestos

[13] *See, e.g.*, Ralph Brubaker, *Mandatory Aggregation of Mass Tort Litigation in Bankruptcy*, 131 YALE L.J. F. 960 (2022); Simon, *supra* note 11; Adam J. Levitin, *The Constitutional Problem of Nondebtor Releases in Bankruptcy*, 91 FORDHAM L. REV. 429 (2022).

[14] *See, e.g.*, Abbe R. Gluck et al., *Against Bankruptcy: Public Litigation Values Versus the Endless Quest for Global Peace in Mass Litigation*, 133 YALE L.J. F. 525, 527–28 (2024); Pamela Foohey & Christopher K. Odinet, *Silencing Litigation Through Bankruptcy*, 109 VA. L. REV. 1261, 1263–64 (2023); J. Maria Glover, *Due Process Discontents in Mass-Tort Bankruptcy*, 72 DEPAUL L. REV. 535, 559 (2023); Melissa B. Jacoby, *Sorting Bugs and Features of Mass Tort Bankruptcy*, 101 TEX. L. REV. 1745, 1747 (2023); Listokin & Ayotte, *supra* note 10; Samir D. Parikh, *The New Mass Torts Bargain*, 91 FORDHAM L. REV. 447, 489 (2022).

[15] Harrington v. Purdue Pharma, LP, 603 U.S. 204 (2024).

[16] Voting is accomplished through classification of creditors. Within each class, the majority in number and a supermajority in the dollar amount of claims represented by the claims (two-thirds) of those who vote must approve the plan for the class to accept it. *See* 11 U.S.C. §§ 1122, 1126.

[17] *See, e.g.*, *id.* at §§ 105, 1123(b)(6).

[18] *See id.* at § 524(g).

[19] *See Purdue Pharma, LP*, 603 U.S. at 204.

cases, but not allow releases in similar factual situations. Instead, the Court fell back on a textualist understanding of how to interpret catch-all statutory provisions.[20]

In this Article, we defend the continued use of releases in mass tort bankruptcy cases to facilitate the liquidation—or better said, monetization—of estate assets for the benefit of creditors. We begin by asserting that bankruptcy is an appropriate resolution model for insolvent debtors like AnyCorp facing substantial mass tort liability.[21] We then place the use of releases in historical context to explain why they receive statutory sanction in asbestos cases but not in mass tort cases generally. We propose that releases are appropriately used to recover estate assets, if not to gather non-estate funds for distribution. We maintain that a reasonable interpretation of *Purdue* permits the ongoing use of estate-maximizing releases in all mass tort cases under section 1123(b)(3), but if necessary, we advocate for a legislative amendment confirming their legality. We thus clarify the distinction between releases used for estate maximization, what we call *second-party releases*,[22] and the third-party releases used for estate augmentation, which were struck down in *Purdue*.

Under the theory promoted in this Article, debtors in chapter 11 should be permitted to propose plans that release the debtor's insurer from future liability in appropriate circumstances. Under current law, an insurance policy held by the debtor is formally part of the bankruptcy estate, but the insurance proceeds, payable to the debtor's claimants, are not considered estate assets.[23] As a consequence, an insurer is under no legal obligation to simply surrender

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20 For a discussion of how much of bankruptcy practice relies on unwritten norms preserved by bankruptcy professionals, *see generally* DOUGLAS G. BAIRD, THE UNWRITTEN LAW OF CORPORATE REORGANIZATIONS (2022).

21 Much commentary has surrounded the advisability of permitting bankruptcy proceedings when the defendant is not clearly insolvent. *See, e.g.*, LTL Mgmt., LLC v. Those Parties Listed on Appendix A to Complaint (*In re* LTL Mgmt., LLC), 64 F.4th 84, 93 (3d Cir. 2023) (dismissing the Johnson & Johnson bankruptcy for lack of good faith on the grounds that the company was not in financial distress); Bussel, *supra* note 12, at 691 ("I see no reason to shut the courthouse door to solvent companies with genuine mass tort distress not otherwise in need of financial or operational restructuring . . . if we are able to create a substantively and procedurally fair bankruptcy mechanism for resolving those liabilities.") We do not tackle that issue here.

22 In common parlance, liability insurance involves a first party, the purchaser of the policy, a second party, the insurer, and a third party, who may bring claims against the policy. *See* Julia Kagan, *Third Party Liability Insurance Types*, INVESTOPEDIA (last updated June 14, 2023), https://www.investopedia.com/terms/t/third-party-insurance.asp.

23 *See* Annette W. Jarvis & Kenneth L. Cannon II, *Liability Insurance Settlements in Mass Tort Bankruptcy Cases*, 41 FED. BAR NEWS & J. 199, 200 (1994). *But see* Barry L. Zaretsky, *Insurance Proceeds in Bankruptcy*, 55 BROOK. L. REV. 373, 374–75 (1989) (arguing that insurance proceeds should be viewed as property of the estate).

proceeds to the estate without a trial and judgment upholding the claimants' right to payment. We argue that when claims against the policy exceed the policy cap, the insurance proceeds logically belong to the estate, and by statute, settlement of those claims with the insurer may be provided for under the bankruptcy plan.[24]

Expediating the recovery of insurance proceeds through second-party releases is also defensible as a matter of policy, and it is consistent with other Code provisions that maximize the debtor's estate. Second-party releases are uniquely efficient in reducing claimants' recovery costs. Even when a policy holder is in bankruptcy, insurers retain constitutional due process rights to challenge claims made under their policies. Litigation over claims can waste limited policies, thereby reducing the amount available to victims. As explained more fully below, state law sometimes permits tort victims to recover directly against the insurance policy, side-stepping the debtor's bankruptcy and further reducing the insurer's willingness to settle with the estate.[25] Second-party releases encourage the cooperation of insurers, thereby reducing the likelihood of litigation and permitting insurance proceeds to be managed as an estate asset. Federal preemption of state insurance laws might accomplish some of the same benefits, but doing so would vastly complicate state insurance regulation, likely increasing the costs and reducing the availability of insurance policies.

In contrast to second-party releases, third-party releases seek to maximize recovery for creditors by persuading third parties to pitch in funds drawn from outside the bankruptcy estate in exchange for an injunction against further liability. Few could argue with maximizing creditors' recovery as a general principle, but when it is accomplished in bankruptcy by coercively trading away creditors' rights against third parties it stretches bankruptcy law beyond its current limits. Although it may be more efficient in many mass tort cases to accomplish global peace through a single bankruptcy case, doing so may violate basic rights of due process for creditors. In contrast, second-party releases maximize creditor recovery but do not inhibit due process rights and so should be permitted even if third-party releases are prohibited.

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24 *See* 11 U.S.C. § 1123(b)(3).

25 *See, e.g.*, Sosebee v. Steadfast Ins. Co., 701 F.3d 1012, 1021 (5th Cir. 2012) ("The Louisiana Direct Action Statute explicitly states that when an insured is in bankruptcy, an injured person or his survivors may bring an action directly against the insurer without joining the insured."). Recent amendments to the law are consistent with this outcome. *See* LA. REV. STAT. ANN. § 22:1269 (2024) (permitting direct action against insurer if insured has filed for bankruptcy or is otherwise insolvent).

The *Purdue* case was a poor ambassador for releases. Members of the Sackler family were the sole owners of Purdue Pharma for several decades before the bankruptcy, and many served as officers and directors during the years the company marketed and sold opioids that the Sacklers allegedly knew were highly addictive. When the company came under scrutiny in the early 2000s, the Sacklers engaged in a "milking" scheme—a form of long-term looting—to transfer assets from the company to individual family members.[26] It is estimated that the Sacklers received approximately $11 billion in company revenue between 2008 and 2016 before filing for bankruptcy in 2019.[27] The transfers occurred so long before the bankruptcy that the withdrawn funds were beyond even the farthest reaches of applicable fraudulent conveyance statutes, effectively scattered and hidden, such that the only hope of recovery seemed to be the Sacklers' voluntary relinquishment. In negotiations, the Sacklers insisted on unequivocal releases in exchange.

Had the releases been limited to fraudulent conveyance claims that might have been pursued by the estate on behalf of the creditors, they would have been what we call second-party releases.[28] But the releases also purported to cover claims held directly by victims against members of the Sackler family for their independent actions in fraudulently promoting addictive opioids. The Supreme Court struck down the releases on the theory that they exceeded the limits of bankruptcy authority.[29] In doing so, the Court may have unintentionally eliminated a necessary tool for maximizing estate assets that we argue is (or should be) authorized under the Code. We here propose that courts should

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[26] Harrington v. Purdue Pharma, LP, 603 U.S. 204, 210 (2024).

[27] *Id.* at 211.

[28] Some courts have referred to these as "derivative" claims. This terminology is potentially confusing insofar as it borrows from a distinction made in corporate law. In a typical derivative lawsuit, the plaintiffs are shareholders seeking relief for harm done to the corporation on behalf of the corporation. The derivative action is contrasted with a "direct" claim, in which the shareholder would seek redress for harm done to the shareholder directly. *See* Tooley v. Donaldson, Lufkin & Jenrette, Inc. 845 A.2d 1031, 1036 (Del. 2004). Fraudulent conveyance claims can be direct under state law; an individual creditor can seek to avoid a fraudulent conveyance. *See, e.g.*, Uniform Voidable Transactions Act, § 4. But in bankruptcy these actions may be brought by the trustee or debtor in possession on behalf of the estate. *See* 11 U.S.C. § 544. In most circumstances, individuals are prevented from pursuing their direct claims in bankruptcy proceedings by the automatic stay, such that the filing transforms what would be direct actions into derivative ones. *See* Nebraska State Bank v. Jones, 846 F.2d 477, 478 (8th Cir. 1988) (a single creditor lacks standing to invoke the avoidance power of § 544). *See also* Brookfield Asset Mgmt. v. Rosson, 261 A.3d 1251, 1263 n.42 (Del. 2021) ("[T]he distinction between direct and derivative claims is frustratingly difficult to describe with precision[.]").

[29] *Purdue Pharma, LP*, 603 U.S. at 223–24.

interpret *Purdue* narrowly to permit continued use of second-party releases, or if not, that Congress should intervene.[30]

I. COLLECTIVE ACTION SOLUTIONS FOR MASS TORT VICTIMS

Bankruptcy offers creditors the opportunity to pursue collective recovery from an insolvent debtor. Many provisions of bankruptcy law are focused on minimizing the costs of that recovery. For example, claims are presumptively allowed with a mere pro forma proof of the claim.[31] If there has been no judgment, the dollar amount of claims is typically estimated for purposes of proposing the plan of reorganization.[32] This estimation is done pursuant to procedures established by the court, at a much lower cost than would be required to litigate the issues of liability. Rights to a trial are preserved by law, but individuals need not litigate if they consent to the plan's method for estimating and paying out claims.[33] The debtor's proposed plan typically includes a category of no-contest payouts, which permits claimants to receive some payment despite expending minimal or no effort to prove their claims.[34]

Bankruptcy proceedings also permit the resolution and inclusion of claims held by individuals who may not yet realize they have been harmed. The possibility of future claimants presents a thorny problem for any proposed resolution of mass torts: because such claimants are anonymous and unknown they cannot provide consent to any proposed resolution, and their interests will inevitably be subordinated to existing claims.[35] Although no system can

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[30] Although we find statutory justification for second-party releases, other scholars have argued that a revision of the Code would be necessary. *See, e.g.*, Peter M. Boyle, *Non-Debtor Liability in Chapter 11: Validity of Third-Party Discharge in Bankruptcy*, 61 FORDHAM L. REV. 421, 449–50 (1992).

[31] *See* 11 U.S.C. § 502(a).

[32] Anthony J. Casey & Joshua C. Macey, *Bankruptcy by Another Name*, 133 YALE L.J. F. 1016, 1049 (2024).

[33] Sergio Campos & Samir D. Parikh, *Due Process Alignment in Mass Restructurings*, 91 FORDHAM L. REV. 325, 338 (2022) (describing different methods used by courts to estimate claims); Casey & Macey, *supra* note 32, at 1036; Foohey & Odinet, *supra* note 14, at 1282 (claims estimation does not take away the right to litigate claims).

[34] These and other provisions justify the common description that bankruptcy promotes "rough justice." *See In re* Tribune Co., 972 F.3d 228, 245 (3d Cir. 2020); Jonathan C. Lipson & Pamela Foohey, *The End(s) of Bankruptcy Exceptionalism:* Purdue Pharma *and the Problem of Social Debt*, 46 CARDOZO L. REV. (forthcoming 2025).

[35] *See* Smith, *supra* note 10, at 382.

perfectly resolve this problem, bankruptcy provides the most efficacious approach of the various options.[36]

A. The Limits of Other Collective Remedies

Outside bankruptcy, claims for damages sounding in tort are enforced through the judicial process. The right to compensation for tort damages typically arises under state law, although diversity between the plaintiff and the defendant may justify federal jurisdiction. Accordingly, tort lawsuits may be brought in state or federal court. Torts get considerable attention in the legal field and in the news, but historically they have made up a relatively small percentage of state and federal caseloads.[37] It is reasonable to assume, given the costs and difficulty of bringing a lawsuit, that only a fraction of tort victims pursue legal recoveries, and a much larger number simply "lump it" when they are harmed.[38]

There is no universally accepted definition for what constitutes a "mass tort," but the term presupposes a large number of victims affected by a common wrong, often perpetrated by a single defendant. Unlike other types of civil claims, there are limited opportunities for tort victims to engage in collective action proceedings, such as class actions. This means that each individual plaintiff must generally pursue his own lawsuit against the tortfeasor.

Class actions permit multiple plaintiffs to benefit from a single judicial determination. In these lawsuits, one or more class members represent the class as named plaintiffs. Plaintiffs are not required to join the class and may instead pursue relief separately,[39] but it is often in their interests to take advantage of the combined synergies and negotiating power of the class. Rule 23 of the Federal Rules of Civil Procedure lays out the four essential requirements for class

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[36] Even those who criticize the use of bankruptcy for other reasons recognize that bankruptcy may be the best option to maximize victim payout. *See* Gluck et al., *supra* note 14, at 530 ("If the sole goal of litigation in public-health suits is money, then perhaps bankruptcy is an answer.").

[37] See CT. STAT. PROJECT, STATE CT. CASELOAD DIGEST 2018 DATA, at 10 (2020) (reporting that tort cases account for only four percent of civil caseloads). Of the tort cases brought in state court, a high percentage arise from automobile accidents. *Id.* The number of tort cases in federal courts has dramatically increased in recent years, as multidistrict litigation (MDL) has become increasingly popular. *See* Glover, *supra* note 14, at 546; Gluck et al., *supra* note 13, at 529 (describing MDLs as the "golden-child workhorse of modern massive mass-tort cases").

[38] *See* Lynn A. Baker & Andrew D. Bradt, *MDL Myths*, 101 TEX. L. REV. 1521, 1537 (2023) (observing that very few individual tort claims have a positive expected value when litigation costs are not shared).

[39] *See* Oztimurlenk v. United States, 162 Fed. Cl. 658, 669 (2022) (noting that Rule 23 contains permissive language, providing only for opt-in class actions).

certification in the federal system: (1) the class must be "so numerous that joinder of all members is impracticable;" (2) there must be common questions of law or fact; (3) the claims or defenses of named plaintiffs must be typical of the claims or defenses of the class; and (4) the named plaintiffs must adequately protect the interests of the class.[40] Beyond these requirements, a class action may only be maintained if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[41] It is this last prerequisite that tends to doom most efforts to certify a class of mass tort victims.

Two Supreme Court opinions, *Amchem Products, Inc. v. Windsor*[42] and *Ortiz v. Fibreboard Corp.*,[43] interpreted the requirement that commonality questions predominate to effectively prohibit the class action model for mass torts. Both cases involved allegations of asbestos exposure. Asbestos litigation swamped federal dockets beginning in the 1970s. In response, United States Supreme Court Chief Justice William H. Rehnquist appointed an Ad Hoc Committee on Asbestos Litigation in 1990 to address the issue and make recommendations on legislative remedies.[44] As observed by the Committee (and quoted in the Supreme Court's *Amchem* opinion):

> The most objectionable aspects of asbestos litigation can be briefly summarized: dockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victime' [sic] recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.[45]

Despite recognizing the inefficiency of prosecuting mass tort claims individually, the Supreme Court limited the use of class actions for mass tort claimants by imposing a narrow interpretation of what constitutes common questions of fact.

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40 FED. R. CIV. P. 23(a).

41 *Id.* at 23(b).

42 Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997). *See generally* Alex Raskolnikov, *Is There a Future for Future Claimants After* Amchem Products, Inc. v. Windsor*?*, 107 YALE L.J. 2545 (1998).

43 Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999).

44 *See Amchem Products*, 521 U.S. at 598–99.

45 THOMAS F. HOGAN, REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION, 2–3 (Mar. 1991).

In *Amchem*, plaintiffs and defendants whose asbestos cases had been consolidated into multidistrict litigation ("MDL") sought a streamlined mechanism for finally resolving claims. Some plaintiffs claimed damages for harmful medical complications, while others sought relief in anticipation of future physical injuries not yet manifested.[46] The steering committee formed by the defendants eventually settled pending asbestos-related lawsuits, but struggled to find a mechanism to resolve plaintiffs' claims without pending lawsuits.[47]

The parties ultimately presented the district court with a complaint identifying nine lead plaintiffs and designating them as representative of a class of persons who had been exposed to asbestos but had not yet filed a claim.[48] Based on a stipulation of settlement that proposed to compensate all class members according to an administrative mechanism and set schedule of payments,[49] the district court conditionally certified an opt-out class, meaning that notified class members could affirmatively exclude themselves from the class, but were presumed to be included absent objection.[50]

On appeal, the Third Circuit vacated certification on the grounds that common questions of fact were overwhelmed by differences in the factual background.[51] In affirming the decision of the Third Circuit, the Supreme Court explained, "class members in this case were exposed to different asbestos-containing products, in different ways, over different periods, and for different amounts of time; some suffered no physical injury, others suffered disabling or deadly diseases."[52] The Court was unpersuaded by arguments that the class action was never intended to be tried, such that class certification did not implicate intractable management problems.[53]

Based on the reasoning of *Amchem,* the Supreme Court subsequently reversed the Fifth Circuit in approving a class settlement in the *Ortiz* case, again on a finding of inadequate common issues of fact among the numerous claimants.[54] In that case, Fibreboard Corporation sought a global settlement to

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46 *Amchem Products*, 521 U.S. at 591.
47 *Id.* at 601–03.
48 *Id.* at 602.
49 *Id*. at 603–04.
50 *Id.* at 605–06.
51 *See Amchem Products*, 521 U.S. at 624.
52 *Id.* at 609.
53 *Id.* at 620.
54 *Ortiz*, 527 U.S. at 831–32.

resolve a stream of asbestos-related personal injury claims.[55] The proposed settlement would finally resolve asbestos claims by requiring claimants to recover exclusively from insurance proceeds. It was consummated through the formation of a single class, including all potential claimants who had not yet brought suit or who had voluntarily dismissed their claims without prejudice.[56] Despite the approval of the class settlement by both the district court and the Fifth Circuit, which both found adequate commonality by virtue of class members’ shared interest in maximizing funds for distribution, the Supreme Court reversed.[57] The Court’s reasoning in these cases thus largely eliminated class actions as a viable option for mass tort plaintiffs and defendants.[58]

Post-*Amchem* and *Ortiz*, mass tort victims are generally limited to traditional methods of dispute resolution; each plaintiff must pursue redress individually.[59] The one caveat to this statement is the use of MDL proceedings. The Multidistrict Litigation Act was passed in 1968 as a procedural mechanism to consolidate cases that might be pending in different districts but “involve[d] one or more common questions of fact” into a single district for coordinated pretrial proceedings.[60] As scholars have noted, MDL proceedings have a sort of split personality, insofar as they simultaneously enable aggregation but still respect the individual character of each case.[61] The limited procedural function of MDL consolidation does not create “new” litigation or fundamentally limit the rights of individual litigants to a trial.[62] However, it does lock parties into pretrial proceedings with no opportunity to exit until the proceedings are concluded.[63]

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55 *Id.* at 822.

56 *Id.* at 824–26.

57 *Id.* at 864–65.

58 The possibility of a class action in state court arguably remains viable, depending on the state court rules and the extent to which the Supreme Court’s opinion on federal rules is considered persuasive. However, normal minimum contacts would be required to bind members of a state court class action, limiting its utility in national mass tort cases.

59 Rules regarding interpleader may of course apply. *See* FED. R. CIV. P. 22.

60 28 U.S.C. § 1407(a). *See generally* Andrew D. Bradt, *Something Less and Something More: MDL’s Roots as a Class Action Alternative*, 165 U. PENN. L. REV. 1711 (2017) (observing that MDL is a more modest version of Rule 23(b)(3)). The MDL standard is significantly looser than the standard for class actions, requiring only common questions of fact without the requirement that they predominate.

61 *See, e.g.*, Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendants’ Terms:* Bristol-Myers Squibb *and the Federalization of Mass Tort Litigation*, 59 B.C. L. REV. 1251, 1296 (2018).

62 *See* Bradt, *supra* note 60, at 1715.

63 28 U.S.C. § 1407(a). *See* Bradt, *supra* note 60, at 1717; Parikh, *supra* note 14, at 476. *See also* Troy A. McKenzie, *Toward a Bankruptcy Model for Nonclass Aggregate Litigation*, 87 N.Y.U. L. REV. 960, 982, 994 (2012) (“Unless the MDL fails entirely, a plaintiff whose case has been consolidated in MDL proceedings will remain there until the parties reach a global resolution of the litigation.”). This can translate into uncertainty regarding the appropriateness of the typical contingency fee charged by attorneys in mass tort cases. *See id.* at

Because settlement agreements are frequently structured during this period, most cases are never remanded for trial.[64]

Consolidation of cases into MDL proceedings was primarily intended to protect the courts, not the parties: the fundamental motivation for the Multidistrict Litigation Act was to manage an overwhelming flood of cases.[65] Individual claimants can be left in limbo while MDL procedures go forward; if their cases are not selected as bellwethers, nor their attorneys as lead lawyers, they are entirely at the mercy of other parties to conduct pretrial discovery and motion practice.[66] More problematic, while new lawsuits may be added to the MDL and releases can be extended beyond the MDL cases,[67] the eventual settlement does nothing to acknowledge the needs or interests of future claimants. Nor are there procedures in place to protect against the possibility that current litigation will entirely exhaust a defendant's available assets.[68]

Insolvency is unlikely to sneak up on a defendant embroiled in mass tort MDL litigation. The history of asbestos litigation should put defendants on notice that claims arising from injuries—particularly those with a significant latency period[69]—have the potential to swamp a company even after the initial flood of cases have passed. When insolvency is imminent or even plausibly

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998 ("In aggregate litigation, in which economies of scale result from procedural consolidation by the courts and the pooling of information and resources by counsel, the cost of litigation should be much lower on a per-claimant basis.").

64 *See* Bradt, *supra* note 60, at 1717 ("MDLs typically lead to mass settlements, and it has always been rare that cases return home for trial.").

65 *See id.* at 1716 (detailing the intention behind the Multidistrict Litigation Act).

66 Arguably, this forces the parties to cooperate, although it may simply consolidate control over the litigation in the hands of a few repeat players. *See* Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. 1445, 1451–52 (2017) (observing that MDL lacks structural assurances of fairness raising questions about adequate representation). *But see* Baker & Bradt, *supra* note 38, at 1525 (defending the merits of MDL); Andrew D. Bradt & D. Theodore Rave, *It's Good to Have the "Haves" on Your Side: A Defense of Repeat Players in Multidistrict Litigation*, 108 GEO. L.J. 73, 94 (2019) (arguing that adding repeat players on the plaintiffs' side can balance the power in mass litigation and enable superior results).

67 *See generally In re* Vioxx Prods. Liab. Litig., 802 F. Supp. 2d 740, 760 (E.D. La. 2011) (observing that the private settlement agreement establishes a program for resolving pending or tolled state and federal claims). For a defense of MDL proceedings as promoting settlement, see Howard M. Erichson & Benjamin C. Zipursky, *Consent versus Closure*, 96 CORNELL L. REV. 265, 270 (2011).

68 For a defense of MDL proceedings in spite of these flaws, see Andrew D. Bradt et al., *Dissonance and Distress in Bankruptcy and Mass Torts*, 91 FORDHAM L. REV. 309, 313 (2022).

69 One study concluded that the latency periods for malignant mesothelioma and lung cancer associated with asbestos exposure were 33.7 and 40.1 years, respectively. *See* Da-An Huh et al., *Disease Latency According to Asbestos Exposure Characteristics Among Malignant Mesothelioma and Asbestos-Related Lung Cancer Cases in South Korea*, 19 INT'L J. ENV'T. RSCH. & PUB. HEALTH 1, 4 (2022).

threatened, the appropriate course of action is therefore to put the defendant into bankruptcy proceedings. Bankruptcy provides real advantages for plaintiffs in mass tort cases, at least three of which stand out: (1) they reduce the collective costs of recovery for tort victims by eliminating the need for a race to the courthouse; (2) they reduce the actual costs of recovery for most tort victims by permitting estimation of claims; and (3) they establish procedures to address the claims of tort victims who are not currently aware of their injuries, that is, future claimants.

B. The Costs of a "Race to the Courthouse"

Outside bankruptcy, tort claimants must pursue their claims against a defendant individually, even if those claims are consolidated into MDL proceedings. When the defendant is insolvent, claimants must compete in a kind of race for the defendant's limited resources. Victims who are the first to pursue their claims against the defendant may recover their damages in full, but later claimants may find the defendant's assets exhausted, either by the cost of litigation or the execution of prior judgments, or both. Each claimant is therefore incentivized to expend resources ensuring that his claim will be determined first.

In the competition for the debtor's limited assets, tort claimants engage in duplicative litigation efforts, costly for both plaintiffs and defendants. The process of collecting on successful claims may also destroy value by dismantling a profitable business through piecemeal execution on essential equipment or other operating assets. Even an unprofitable corporation may be worth more when liquidated as a going concern, but such a sale can require more time and patience than the typical tort victim is willing to allow, particularly when the victim's recovery is contingent on its ability to come ahead of others. The going-concern value of the company may therefore be sacrificed in the rush of individuals to recover.

Thomas Jackson recognized these "strategic costs" in his seminal work on the hypothetical creditors' bargain.[70] He observed that unsecured creditors find themselves in a type of prisoners' dilemma when confronted with a debtor's insolvency, insofar as each creditor has an incentive to take advantage of individual collection remedies even though it would be in the creditors' collective interests to act cooperatively.[71] Bankruptcy proceedings provide the

[70] *See* Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 YALE L.J. 857, 861–62 (1982).

[71] *See id.* at 862–63.

benefits of collective action to creditors by increasing the aggregate pool of assets for distribution and providing administrative efficiencies in that distribution.[72]

C. The Advantages of Collective Negotiation and Estimation of Claims

The advantages of bankruptcy are particularly helpful to tort victims, whose access to other forms of collective resolution are limited. Bankruptcy cases operate similarly to class actions and MDL as a form of collective resolution against a single defendant.[73] Like other collective action proceedings, bankruptcy reduces the costs of litigation for both plaintiffs and defendants by avoiding duplicative efforts at case resolution.[74] But going beyond what is possible in class actions and MDLs, bankruptcy can further discount litigation costs by short-circuiting normal litigation procedures: accelerating and broadening discovery,[75] side-stepping notice requirements when circumstances warrant,[76] and estimating claims against the bankruptcy estate based on limited findings of fact.[77]

Claims are defined under the Code to include all rights to payment, even unliquidated, contingent, and disputed claims, as might arise from allegations arising in tort.[78] For purposes of proposing a plan of reorganization, contingent and unliquidated claims may be estimated pursuant to statute to avoid the

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72 *See id.* at 864–66.

73 *See* Alexandra D. Lahav, *The Continuum of Aggregation*, 53 GA. L. REV. 1393, 1409 (2019) ("Understanding the class action, MDL, and bankruptcy as different forms of the same fundamental thing, rather than as separate spheres, is both an important intellectual contribution and one with a real practical payoff.").

74 *See* William Organek, *Mass Tort Bankruptcy Goes Public*, 77 VAND. L. REV. 723, 734 (2024). The advantages likely accrue far more to plaintiffs than defendants, insofar as defendants may prepare substantially the same defense for each of the cases brought against it and therefore enjoy some economies of scale. *See* David Rosenberg, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't*, 37 HARV. J. LEGIS. 393, 393–94 (2000). The advantages are greatest for plaintiffs with low or negative expected value tort claims. *See* Edward J. Janger, *Aggregation and Abuse: Mass Torts in Bankruptcy*, 91 FORDHAM L. REV. 361, 365–66 (2022).

75 Rule 2004 of the Federal Rules of Bankruptcy Procedures is often compared to a "fishing expedition" because it permits interested parties to obtain prelitigation discovery that may be broader in scope than what is permitted under the Federal Rules of Civil Procedure. The examination may relate to the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate, or to the debtor's right to a discharge. FED. R. BANKR. P. 2004(b)(1).

76 Pursuant to the Bankruptcy Code, the term "notice and a hearing" means notice "as is appropriate in the particular circumstances." 11 U.S.C. § 102(1)(A). The Code permits a court to act without a hearing if one is not requested and if the court determines there is expediency to act. *Id.* at § 102(1)(B).

77 Estimation of claims inherently leads to imprecision, and the possibility of error, both in overcompensating low-value claims and undercompensating high-value claims. *See* Gluck et al., *supra* note 14, at 531.

78 11 U.S.C. § 101(5)(A).

"undu[e] delay" of case administration.[79] Bankruptcy courts are given substantial deference in selecting a method for estimation, with choices reviewed for abuse of discretion.[80] When the bankruptcy plan involves the creation of a trust, the right to a jury trial before the district judge is preserved for claimants with personal injury or wrongful death claims, but most opt to have their claims estimated.[81] This is a calculated risk, as estimation errors are far more likely to prejudice than benefit a tort claimant.[82]

Bankruptcy proceedings thus have the capacity to truncate the factfinding, expert testimony gathering, and trial phases of the litigation. Further efficiency is possible through the consolidation of cases before a single judge, as in MDL proceedings, with the additional advantage that the judge may see cases through trial if necessary.[83] Consolidation, which can only occur before the district court due to Article III concerns,[84] is socially advantageous, encouraging efficiency

[79] *Id.* at § 502(c)(1). David Salsburg and Jack Williams have identified six possible models to estimate claims under § 502(c). These methods include (1) the face-value model, which accepts filed proofs of claim on their face; (2) the zero-value model, which assumes future claims are worthless; (3) the market theory model, which looks to the market to value claims; (4) the forced-settlement model, which estimates the claim within a range of amounts that the parties would be willing to accept in a hypothetical settlement; (5) the discounted value model, which discounts the forced-settlement model according to the probability of prevailing under nonbankruptcy law; and (6) the summary trial model, which requires a court to conduct an abbreviated hearing. David S. Salsburg & Jack F. Williams, *A Statistical Approach to Claims Estimation in Bankruptcy*, 32 WAKE FOREST L. REV. 1119, 1131–32, 1134–35, 1137 (1997).

[80] *See, e.g.*, *In re* Avaya Inc., 602 B.R. 445, 453 (S.D.N.Y. 2019) (quoting *In re* Windsor Plumbing Supply Co., 170 B.R. 503, 520 (Bankr. E.D.N.Y. 1994)) (internal citations omitted) ("Bankruptcy courts have wide discretion in choosing the process for estimating a claim. The methods used by courts have run the gamut from summary trials to full-blown evidentiary hearings to a mere review of pleadings, briefs, and a one-day hearing involving oral argument of counsel.").

[81] *See* 28 U.S.C. § 157(b)(5); 130 CONG. REC. S7619 (daily ed. June 19, 1984). The ability to estimate claims was a departure from earlier law, which had precluded contingent or unliquidated claims from participation in bankruptcy proceedings. Bankruptcy Act of 1898, ch. 541, § 103(a), 30 Stat. 544, 562–63 (repealed 1978). *See also* David Kauffman, Comment, *Procedures for Estimating Contingent or Unliquidated Claims in Bankruptcy*, 35 STAN. L. REV. 153, 155–56 (1982). This meant that tort claims were not discharged in bankruptcy. However, tort victims were also excluded from the distribution of the bankruptcy estate assets, even if that would be their only viable chance for recovery. *See Tort Claims and the Bankrupt Corporation*, 78 YALE L.J. 475, 476–77 (1969).

[82] When a defendant's aggregate tort liability is overestimated, the surplus is returned to the debtor-defendant, or to its designee. *See* Ralph Brubaker, *Mass Torts, the Bankruptcy Power, and Constitutional Limits on Mandatory No Opt-Outs Settlements*, 23 FLA. STATE U. BUS. REV. (forthcoming) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4892178).

[83] 28 U.S.C. § 157(b)(5) ("[P]ersonal injury tort and wrongful death claims [can] be tried in the district court in which the bankruptcy case is pending, or in the district court . . . in which the claim arose[.]").

[84] *See generally* Anthony J. Casey & Aziz Z. Huq, *The Article III Problem in Bankruptcy*, 82 U. CHI. L. REV. 1155, 1173–75 (2015). Some complications may arise when cases are transferred away from the district where MDL has been consolidated by virtue of the debtor filing for bankruptcy in a different venue. *See generally* John F. Nangle, *Bankruptcy's Impact on Multidistrict Litigation: Legislative Reform as an Alternative*

and consistent outcomes.[85] Having a single judge review all cases can remove the possibility of excessive deterrence arising from independent imposition of punitive damages across multiple cases in multiple courts.[86]

The cost of recovery in bankruptcy proceedings is therefore reduced for tort victims as a cumulative measure. This is highly desirable when there are insufficient funds to make all parties whole, and any dollar spent litigating claims on either side is one less dollar available to compensate plaintiffs.[87] The judge may determine individual rights to recovery without a prolonged courtroom trial, accelerating repayment and providing a decision at a fraction of the cost.[88] Claimants in bankruptcy proceedings may even avoid the direct costs of obtaining counsel,[89] relying instead on the appointment of a committee under the supervision of the U.S. Trustee.[90] Of course, many do retain counsel, often pursuant to agreements with plaintiffs' attorneys entered into before the debtor's bankruptcy or by hiring bankruptcy attorneys to represent them as creditors.[91]

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to Existing Mechanisms, 31 GA. L. REV. 1093, 1094, 1096 (1997). In such situations, creative solutions to permit continuity of the judge overseeing the litigation, including intra-circuit assignment of judges, may be warranted. *See generally id.* at 1110.

85 Some have argued for the benefits of multiple layers of independent judicial review, at least until a mass tort has become fully mature. *See* Gluck et al., *supra* note 14, at 560.

86 *See* Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475, 1509 (2005). Disallowance of punitive damages is standard practice in mass tort bankruptcy cases. *See* Douglas G. Smith, *Resolution of Mass Tort Claims in the Bankruptcy System*, 41 U.C. DAVIS L. REV. 1613, 1645 (2008).

87 It is the costs of asbestos litigation—including the squabbles between insurance companies, discussed in greater depth below—that encouraged Congressional action to amend the bankruptcy code to permit non-debtor releases in asbestos cases. One contemporary study of asbestos litigation estimated that plaintiffs recovered only forty percent of damages paid out. *See* Cimino v. Raymark Indus., Inc., 751 F. Supp. 649, 651 (E.D. Tex. 1990) (citing JAMES S. KAKALIK ET AL., COSTS OF ASBESTOS LITIGATION 40 (1983)).

88 *See* Cabraser, *supra* note 86, at 1477 ("Making asbestos victims wait longer for compensation or for their much-vaunted 'day in court' does not correspondingly lengthen their life spans, nor increase their tolerance for delay.").

89 The skills of a trial attorney may be largely inconsequential when a bankruptcy court estimates claims.

90 The Bankruptcy Code directs the U.S. Trustee to appoint a committee of unsecured creditors as appropriate. 11 U.S.C. § 1102(a)(1). The committee has powers and duties to investigate the debtor and participate in the formulation of a plan of reorganization. *Id.* at § 1103(c)(2)–(3). The costs of this committee, which are borne by the bankruptcy estate, may be unavoidable to creditors who might still prefer to hire their own counsel, and so make those creditors' total cost of attorneys' fees greater than they would be out of bankruptcy. However, the additional expense of the creditors' committee should be more than offset by cost savings elsewhere in bankruptcy proceedings, even for creditors who do retain counsel.

91 The dynamic between plaintiff's attorneys and bankruptcy attorneys can sometimes resemble a turf war. *See* Georgene M. Vairo, *The Dalkon Shield Claimants Trust: Paradigm Lost (Or Found)?*, 61 FORDHAM L. REV. 617, 652 (1992) (noting that many of the complaints against the trust were raised by plaintiffs' lawyers); s*ee also* Ishaq Kundawala, *Unveiling the Mystery, History, and Problems Associated with the Jurisdictional Limitations of Bankruptcy Courts Over Personal Injury Tort and Wrongful Death Claims*, 42 MCGEORGE L. REV. 739, 756 (2011) (suggesting that the preservation of jury trial rights in bankruptcy may have been motivated by lobbying).

Victims whose claims against the debtor/defendant are small, remote, subject to a statute of limitations, or otherwise problematic benefit the most from the estimation of claims in bankruptcy proceedings.[92] Because claims are deemed allowed unless a party in interest raises an objection,[93] victims no longer bear the burden of proof in establishing their claims. In many instances, plans proposing to resolve mass tort liability will include a baseline payout for claimants who can provide little to no proof of harm.[94] Bankruptcy proceedings thus permit victims to avoid the trauma of testifying about difficult experiences under cross-examination. This may be particularly relevant in situations where victims have been subject to sexual assault or where the harm caused may be similarly sensitive to discuss and difficult to prove. Many tort victims prefer the expedited payout to the prospect of a lengthy and invasive trial.[95] For those who seek procedural justice, jury trials remain an option, although the law should do more to ensure meaningful access.[96]

Corporate defendants also experience benefits from bankruptcy proceedings that reduce the social costs associated with resolving mass tort claims. Bankruptcy proceedings—by obtaining global settlement of all claims, past and future—provide an opportunity for companies to immediately realize risk, plan for the future, and construct a plan of repayment that permits the business to

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92 *See* Organek, *supra* note 74, at 733; Joseph F. Rice & Nancy Worth Davis, *The Future of Mass Tort Claims: Comparison of Settlement Class Action to Bankruptcy Treatment of Mass Tort Claims*, 50 S.C. L. REV. 405, 416–17 (1999).

93 11 U.S.C. § 502(a).

94 *See, e.g.*, Georgene M. Vairo, *Georgine, The Dalkon Shield Claimants Trust, and the Rhetoric of Mass Tort Claims Resolution*, 31 LOY. L.A. L. REV. 79, 133–38 (1997) (describing the claims evaluation process for the *A.H. Robins* case).

95 In the *A.H. Robins* case, the terms of the bankruptcy trust gave claimants the opportunity to engage in arbitration proceedings, including an opportunity for claimants to tell their story to the arbiters, frequently without formal discovery and evidentiary requirements. *See* Vairo, *supra* note 91, at 645–46 (describing the advantages for underrepresented claimants). *See also* Vairo, *supra* note 94, at 134 (observing that most claimants elected for quick resolution of claims at a low rate of compensation). *But see* Jacoby, *supra* note 14, at 1769 ("Harmed individuals want more than money when they seek redress.").

96 *See* Margaret I. Lyle, *Mass Tort Claims and the Corporate Tortfeasor: Bankruptcy Reorganization and Legislative Compensation Versus the Common-Law Tort System*, 61 TEX. L. REV. 1297, 1325 (1983); Rice & Davis, *supra* note 92 at 456. As noted by one set of scholars, "[a]ccountability – placing fault – is a central reason why people sue. So too is the opportunity to tell one's side of the story." Gluck et al., *supra* note 14, at 552. *See also* Bussel, *supra* note 12, at 698, n.42; Foohey & Odinet, *supra* note 14, at 1263. Even while making the case for the use of bankruptcy to resolve mass tort cases, Professor Bussel notes the "open secret" that settlement trusts and channeling injunctions in mass tort bankruptcies "usually make individual access to jury trials or punitive damages remote at best." Bussel, *supra* note 12, at 698, n.42*; see also* Rice & Davis, *supra* note 92, at 456. *But see* Casey & Macey, *supra* note 32, at 1035 ("Victims who want to litigate the amount of their claim before a jury in the tort system retain the right to do so after a bankruptcy settlement.").

continue as a going concern.[97] Ongoing tort lawsuits are profoundly disruptive to business operations, as they require top personnel to respond to discovery requests, sit for depositions, and otherwise participate in the litigation.[98] Uncertainty regarding the scope and frequency of future claims can impact a business's ability to determine appropriate settlement amounts.[99] It is preferable for the company to realize the full cost of tortious activities as quickly as possible, permitting the company to make a reasoned decision about whether continuation as a going concern is even feasible. When reorganization is possible, bankruptcy proceedings allow companies to increase the total payout to creditors by spreading it out over time, providing a greater recovery for all, including tort victims.[100]

D. The Problem of Future Claimants

The primary advantage of bankruptcy proceedings over other forms of collective action is the ability to preserve the right to compensation for future claimants, those victims who cannot directly participate in settlement proceedings because they are as-yet unaware of their injuries.[101] The plight of future claimants was observed most dramatically in asbestos cases, where the long periods of latency between exposure to asbestos and manifestation of

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[97] *See* Brubaker, *supra* note 82 ("A bankruptcy filing effectuates an immediate centralization, in *one* federal court, of the forum for resolving *all* tort claims against the debtor-defendant, in a way that is just not possible outside of bankruptcy.").

[98] *See* Mark J. Roe, *Bankruptcy and Mass Tort*, 84 COLUM. L. REV. 846, 856–62 (1984) (identifying operational issues associated with the overhang of large, contingent tort liability and arguing for early resolution).

[99] *See, e.g.*, Vairo, *supra* note 94, at 124–25 (observing that a previous settlement organized before the Dalkon Shield bankruptcy fell apart because more women participated than the fund could possibly pay).

[100] Reorganization plans also frequently include provisions that require companies liable for mass torts to undertake new safety protocols to ensure that the harm is not replicated. *See, e.g.*, Dennis Romero, *USA Gymnastics, hundreds of sex abuse survivors reach $380M deal in Nassar case*, NBC NEWS (last updated Dec. 13, 2021, 6:26 PM), https://www.nbcnews.com/news/us-news/usa-gymnastics-hundreds-sex-abuse-survivors-reach-380m-deal-nassar-cas-rcna8634 (reporting that settlement contained in the plan orders USA Gymnastics to implement policies and processes to protect athletes from abuse).

[101] The designation of future claimants presupposes that they hold "claims" under the Bankruptcy Code, thereby satisfying the various tests adopted by the courts for determining if the right to payment has arisen pre-petition. *See, e.g.*, Epstein v. Off. Comm. of Unsecured Creditors of Est. of Piper Aircraft Corp., 58 F.3d 1573, 1576–77 (11th Cir. 1995) (discussing the accrued state law claim test, the conduct test, and the prepetition relationship test, but ultimately adopting the "*Piper*" test); *In re* Grossman's Inc., 607 F.3d 114 (3d Cir. 2010) (finding that a claim can exist under the Code before a right to payment exists under state law). We do not weigh in on the respective advantages or disadvantages of these tests but note that the Third Circuit's decision in *Grossman's* to overturn its prior precedent *In re Frenville* was clearly correct. *See generally* Ralph R. Mabey & Annette W. Jarvis, *In re* Frenville*: A Critique by the National Bankruptcy Conference's Committee on Claims and Distributions*, 42 BUS. LAW. 697 (1987).

related injuries guaranteed that some victims would still be ignorant of the existence and the extent of their injuries long after other claims had been filed and litigated. The *Johns-Manville* bankruptcy is an apt example.

The Johns-Manville company, which provided insulation for commercial, industrial and residential buildings, filed for bankruptcy in 1982 to resolve a series of legal battles over its liability for asbestos exposure.[102] At the time of the bankruptcy filing, the company appeared to be fully solvent with a substantial net worth, but it faced more than 15,550 lawsuits with an average of 425 new filings brought every month.[103] The bankruptcy plan approved by the bankruptcy court required the company to form a trust, financed by insurance proceeds and the corporation's ongoing business operations, to satisfy both current and future liabilities.[104] The trust proved to be grossly underfunded, in part due to underestimation of the number of claims it was expected to administer. Formed in 1988, the trust was confronted with 60,000 claims by 1989 and more than 150,000 claims by early 1990.[105] The consequence was sadly predictable: the trust ran out of cash, requiring a reevaluation of trust procedures. Claimants who came later in the process were compensated at a much lower rate than those who filed claims early on.[106]

Fortunately, the experience of the Johns-Manville claimants led to more caution in future cases, or at least an increased awareness of the problem.[107] In the Bankruptcy Reform Act of 1994, Congress amended section 524 of the Code to authorize the approach taken in the *Johns-Manville* case, but requiring the trust to provide reasonable assurance that it would operate to compensate current and future claims in substantially the same manner.[108] Commonly referred to as

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[102] The company's founder, H.W. Johns, died of "dust phthisis pneumonitis" in 1898, although at the time there was no known connection of his death with asbestos. PAUL BRODEUR, OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL 12 (1985).

[103] *See In re* Johns-Manville Corp., 26 B.R. 405, 407 (Bankr. S.D.N.Y. 1983).

[104] For a history of and commentary on the Johns-Manville bankruptcy and the trust, see generally Frank J. Macchiarola, *The Manville Personal Injury Settlement Trust: Lessons for the Future*, 17 CARDOZO L. REV. 583 (1996).

[105] *See id.* at 603.

[106] *See id.* at 584. The earliest claimants received payment in full, whereas the percentage payout was only around five percent by 2022. *See* 2002 Trust Distribution Process (2021) https://www.cdc.gov/niosh/docket/archive/pdfs/NIOSH-015/010102-Exhibit5.pdf; Matt Mauney, Johns Manville, ASBESTOS (last updated Jan. 15, 2025), https://www.asbestos.com/companies/johns-manville/.

[107] *See* Ralph R. Mabey & Peter A. Zisser, *Improving Treatment of Future Claims: The Unfinished Business Left by the Manville Amendments*, 69 AM. BANKR. L.J. 487, 494–95 (1995) (observing that the status of future claims remained unsettled after *Johns-Manville* and the so-called Manville Amendments to the Code).

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

the "Manville Amendments" or sometimes the "asbestos amendments,"[109] these changes also mandated that a future claims representative approve any plan requiring future claimants to recover against a trust.[110]

Consideration of the rights of future mass tort claimants, and solicitude for their eventual compensation, is a powerful feature of bankruptcy law. [111] But few would argue that this feature is perfect, or even without serious, potentially unrepairable flaws.[112] Future claimants cannot meaningfully consent to any treatment under a bankruptcy plan because they are by definition unidentified at the time of the plan.[113] The interests of future claimants are likely to be subordinated to the conflicting incentives of all other parties who are present and able to advocate vigorously on their own behalf.[114] Future claims representatives are typically repeat players who are incentivized to pull their punches when advocating for future claimants to ensure the likelihood of future appointments.[115] Accurately estimating future claims is a thorny business, and courts have very little guidance in how best to do so.[116] Yet, despite all this, bankruptcy remains the best of a series of flawed methods to resolve mass tort claims—including future claims—when the debtor is insolvent.

Having explained the function of bankruptcy proceedings for mass tort claimants, we now turn to the introduction of releases as a tool to facilitate the maximum recovery for tort victims. We provide some historical context for the development of releases, discuss the relevant statutory bases for approving

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109 *See* Resnick, *supra* note 6, at 2073.

110 11 U.S.C. § 524(g)(4)(B)(i), (h)(1).

111 *See* Mabey & Zisser, *supra* note 107, at 488.

112 *See, e.g.*, G. Marcus Cole, *A Calculus Without Consent: Mass Tort Bankruptcies, Future Claimants, and the Problem of Third Party Non-Debtor "Discharge"*, 84 IOWA L. REV. 753, 791 (1999) (observing that future claimants cannot meaningfully consent and that using a future claims representative to give claimants virtual representation violates bankruptcy's equal treatment rules); Ralph R. Mabey & Jamie Andra Gavrin, *Constitutional Limitations on the Discharge of Future Claims in Bankruptcy*, 44 S.C. L. REV. 746, 785–86 (1993) (addressing the due process concerns inherent in treatment of future claims); Parikh, *supra* note 14, at 488–89 (describing the execution of the future claimants' representative as "alarming" insofar as the representative may not adequately defend claimants' rights).

113 *See* Cole, *supra* note 112, at 790 ("Future claimants have special characteristics that make them especially vulnerable: they are absent, invisible, and passive.").

114 *See* Edith H. Jones, *Rough Justice in Mass Future Claims: Should Bankruptcy Courts Direct Tort Reform?*, 76 TEX. L. REV. 1695, 1721 (1998) ("Holders of equity interests, trade creditors, and present plaintiffs will all seek to undervalue future claims in order to maximize their recoveries.").

115 *See* Parikh, *supra* note 14, at 490; Frederick Tung, *The Future Claims Representative in Mass Tort Bankruptcy: A Preliminary Inquiry*, 3 CHAP. L. REV. 43, 46 (2000).

116 *See* Deborah R. Hensler, *Bringing Shutts into the Future: Rethinking Protection of Future Claimants in Mass Tort Class Actions*, 74 U. MO. KAN. CITY L. REV. 585, 589 (2006); Jones, *supra* note 114, at 1715; Listokin & Ayotte, *supra* note 10, at 1467; Parikh, *supra* note 14, at 492.

releases, and address policy arguments for and against their use. We then round out the Section with an explanation of the Supreme Court's opinion in *Purdue Pharma*.

II. The Ad Hoc Solution of Third-Party Releases

The relevant terminology of third-party releases is difficult to trace—commentators have adopted various similar terms to describe the phenomenon[117]—but we here adopt the term ultimately accepted by the Supreme Court and used in the *Purdue Pharma* ruling.[118] Although not explicitly stated, the term almost always refers to *nonconsensual* releases. There is virtually no controversy over voluntary settlements made in connection with a bankruptcy case, even as between the debtor's creditors and non-debtors.[119] Instead, the relevant questions are whether such releases can be voted on and approved by a class, whether class members who fail to vote can be deemed to accept the releases, and most poignantly, whether releases can be enforced against class members who objected but were outvoted.

The analysis is complicated by the reality that releases may apply to different entities in different contexts. We will explore four categories of releases: (1) those affecting insurers; (2) those affecting managers, directors, and officers; (3) those affecting corporate affiliates; and (4) those purporting to shield unrelated joint tortfeasors from further liability.

A. A Brief History

The perceived need for releases arose early in the history of the Code. Perhaps the most influential use of releases was in a case that has already been introduced—the *Johns-Manville* bankruptcy. This case serves as a suitable example of releases affecting the debtor's insurers. Below, we also discuss the case of *A.H. Robins* as an example of a case involving releases for directors and officers of the company. Finally, we describe the releases involved in *Boy Scouts*

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117 *See, e.g.*, Ralph Brubaker, *Bankruptcy Injunctions and Complex Litigation: A Critical Reappraisal of Non-Debtor Releases in Chapter 11 Reorganizations*, 1997 U. ILL. L. REV. 959, 967 (1997); Cole, *supra* note 112, at 754.

118 *See, e.g.*, Harrington v. Purdue Pharma, LP, 603 U.S. 204, 223–24 (2024).

119 *See, e.g.*, Cole, *supra* note 112, at 784–85 (suggesting that bankruptcy courts may have no need – and no jurisdiction – to approve such settlements). *But see* Transcript of Oral Argument at 6, Harrington v. Purdue Pharma, LP, 603 U.S. 204 (2024) (No. 23-124) (Justice Thomas inquiring what provision in the Bankruptcy Code allows for consensual releases).

of America, which included considerable protections for business affiliates and other joint tortfeasors, as well as their insurers.[120]

1. Johns-Manville and Asbestos

The circumstances leading to the *Johns-Manville* bankruptcy and the general structure of the confirmed plan, including its use of a trust to channel claims against the company, have already been described above. Settlements with insurance companies were key to the funding of the trust. The asbestos exposure that caused the victims' injuries had occurred over a period of decades, during which time the company's insurance coverage had fluctuated considerably. Uncertainty as to which of multiple insurers should be liable for injuries created the potential for extensive litigation. To encourage contributions of the various insurance companies to the trust, the plan provided as a condition precedent that "the Bankruptcy Court would issue an injunction channeling all asbestos-related personal injury claims to the Trust," protecting the insurers from future liability.[121]

The bankruptcy court permitted the plan to be submitted to creditors. A total of 50,275 tort claimants—over ninety-five percent of claimants who cast a vote—accepted the plan, as did all other voting classes. Obviously, based on these numbers, some tort claimants opposed confirmation of the plan.[122] These claimants filed an appeal to the Second Circuit, but none of the grounds for appeal were directly aimed at the channeling injunction.[123] The court affirmed the bankruptcy plan over the claimants' objections.[124]

As explained above, the *Johns-Manville* case eventually led to the Manville Amendments, through which Congress explicitly blessed the mechanism used to obtain the cooperation and full participation of the Johns-Manville insurers. The statutory language adopted by Congress permits the entry of injunctions for claims that are to be paid out under a trust established pursuant to the terms of a plan of reorganization of which at least seventy-five percent of voting claimants

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[120] Different categories of releases are highlighted in each case for illustrative purposes, not to suggest that only one type of release was pursued in each case. In fact, these cases typically involved both second-party and third-party releases for the benefit of multiple parties.

[121] Kane v. Johns-Manville Corp., 843 F.2d 636, 640 (2d Cir. 1988).

[122] An even larger number may not have voted at all. Lack of participation is a common problem in bankruptcy cases generally, but especially in mass tort cases. *See* Jacoby, *supra* note 14, at 1756; Jonathan C. Lipson, *The Rule of the Deal: Bankruptcy Bargains and Other Misnomers*, 97 AM. BANKR. L.J. 41, 91 (2023).

[123] *Johns-Manville Corp.*, 843 F.2d at 638–39, 641.

[124] *Id.* at 650.

approve.[125] The statute is written to apply specifically to cases involving claims "allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products[.]"[126] But legislative history suggests that Congress had no intent to undermine similar injunctions issued in other contexts.[127]

2. *A.H. Robins and Implicated Officers*

Two years after the *Johns-Manville* case was confirmed but before passage of the Manville Amendments the A.H. Robins company also filed for bankruptcy in response to a flood of tort litigation arising from products liability claims.[128] In the early 1970s, A.H. Robins had produced the Dalkon Shield, a contraceptive device placed directly in a woman's uterus to prevent pregnancy.[129] The device caused pelvic infections leading to a long list of injuries including infertility and even death.[130]

A.H. Robins' liability was apparent. It had purchased rights to produce the Dalkon Shield without adequate research into its safety and efficacy, having no previous experience with contraceptive devices.[131] It aggressively marketed the device without the precautions recommended by the manufacturer,[132] and ignored warnings from the inventor of the Dalkon Shield and from its own quality control supervisor.[133] The company took active steps to suppress negative information regarding its product, up to and including reports that the Dalkon Shield was linked to the deaths of two young women who had become

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125 11 U.S.C. § 524(g)(1)(A), (g)(2)(B)(ii)(IV)(bb). In a normal plan process, a majority of voting claimants (representing at least two-thirds of the total claim amount) is required within each voting class for the plan to be confirmed. *Id.* at § 1126.

126 *Id.* at § 524(g)(2)(B)(ii)(I).

127 *See* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 111(b), 108 Stat. 4117 (1994) ("Nothing in subsection (a) [of § 524(g)], or in the amendments made by subsection (a), shall 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.").

128 *In re* A.H. Robins Co., 88 B.R. 742, 743 (E.D. Va. 1988).

129 *Id.*

130 As demonstrated over time, approximately 200,000 women were affected by asserted defects in the Dalkon Shield and subsequently filed claims in the bankruptcy case. *See* Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 675, 677 (1989).

131 *See* RICHARD B. SOBOL, BENDING THE LAW: THE STORY OF THE DALKON SHIELD BANKRUPTCY, 5 (1991).

132 *See id.* at 6.

133 *See id.* at 6–7. The callousness in ignoring these warnings is striking. In one retelling, a company employee reported concerns with the product to his superior, who responded angrily. When the employee insisted that his conscience required him to raise the issue, the superior replied that his conscience did not pay his salary. *Id.*

pregnant while using it.[134] When lawsuits began in late 1974, A.H. Robins took the aggressive position that it was plaintiffs' sexual and hygienic habits that were to blame for their infections, not the Dalkon Shield.[135] Nevertheless, jury verdicts assigning compensatory and often punitive damages began to imperil the company. In 1979, A.H. Robins lost a case involving severe medical consequences. The jury awarded almost $600,000 in compensatory damages and $6.2 million in punitive damages.[136] The punitive damages awarded in this and similar cases were frequently tied to the apparent disregard demonstrated by company management and the delay in recalling a dangerous product.[137]

By 1984 A.H. Robins had paid out more than $17 million in punitive damages awards over 7,700 cases, with another 3,500 cases actively pending.[138] Although the compensatory damages in these cases were covered by insurance, punitive damages were not.[139] The company attempted—unsuccessfully—to certify a nationwide class action in the district court to determine liabilities prior to filing.[140] It then filed for bankruptcy,[141] but sought to have the bankruptcy reference withdrawn to permit the district court to oversee the bankruptcy case.[142] The district court granted the motion to withdraw the reference, but managed the case with the help of the bankruptcy court; the two judges sat together and shared efforts in drafting opinions.[143]

The A.H. Robins company was largely a family-controlled business, with the Robins family owning almost half the outstanding shares and enjoying full management control.[144] Two members of the Robins family, father and son E.

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[134] *See id.* at 9.

[135] *See id.* at 12–13.

[136] SOBOL, *supra* note 131, at 14.

[137] *See id.* at 20.

[138] *See id.* at 23, 37.

[139] *See id.* at 37.

[140] *See id.* at 37, 41.

[141] At the time of the bankruptcy, A.H. Robins was one of the 400 largest corporations in the United States, selling over $5 billion in health care, pharmaceutical and consumer products. *See In re* A.H. Robins Co., 88 B.R. 742, 748 (E.D. Va. 1988).

[142] *See* 28 U.S.C. § 157(d) (stating that the district court may withdraw any case or proceeding referred to the bankruptcy court on its own motion or on timely motion of any party, for cause shown). Bankruptcy cases are under the jurisdiction of district courts, but are automatically referred to bankruptcy courts, staffed by judges appointed pursuant to Article I of the Constitution, pursuant to Congress' statutory scheme established in the modern bankruptcy code. This arrangement has been upheld, with reservations, by the Supreme Court. *See* Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665, 669–70 (2015).

[143] *See, e.g.*, *In re A.H. Robins Co.*, 88 B.R. at 742 (memorandum confirming plan of reorganization entered by both District Judge Robert R. Merhige Jr. and Bankruptcy Judge Blackwell N. Shelley).

[144] *See* SOBOL, *supra* note 131, at 5.

Claiborne Robins and E. Claiborne Robins, Jr., had served as CEO and president, respectively, during the relevant period.[145] Directors and officers of A.H. Robins faced personal liability on claims that they disseminated false and misleading information regarding the Dalkon Shield.[146] They were entitled to indemnification by the debtor under both the corporate by-laws and the applicable state law.[147]

Early in the case, A.H. Robins sought injunctive relief for its indemnified officers akin to an extension of the automatic stay. This relief was granted by the district court, and several claimants appealed. In evaluating the question, the Fourth Circuit acknowledged that the automatic stay was generally available only to the debtor, but found that "unusual circumstances" would justify its application to non-bankrupt co-defendants.[148] It upheld the injunction on the theory that actions against officers or employees of the debtor who are entitled to indemnification were like efforts to obtain possession or exercise control over the debtor's property, which were stayed under section 362(a)(3).[149]

The confirmed plan made the injunctions permanent as part of a broader deal that included trust contributions of $2.255 billion by the company and $5 million by the two A.H. Robins directors.[150] The Fourth Circuit again upheld the injunction on appeal, drawing on the doctrine of marshalling. The court was persuaded that permitting a suit against the company's directors "would affect the bankruptcy reorganization in one way or another such as by way of indemnity or contribution"[151] and would effectively defeat the plan.[152] More to the point, the court observed, "in all events, provision for payment in full of all [those affected by the injunction] has been made[,]"[153] suggesting the objectors had no reason to complain. Of course, provision for payment in full was based

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145 *See* Joe Taylor, *Family's Only Link to A.H. Robins is the Name Now*, GREENSBORO NEWS & REC. (last updated Jan. 26, 2015), https://greensboro.com/familys-only-link-to-a-h-robins-is-the-name-now/article_b6cdc5f1-e8b8-5376-8d7a-0ad74024baae.html.

146 *See In re A.H. Robins Co.,* 88 B.R. at 743–44 (describing a class action suit brought in 1977 against directors and officers).

147 *See* A.H. Robins Co., Inc. v. Piccinin, 788 F.2d 994, 1007 (4th Cir. 1986); *see also* VA. CODE §§ 13.1-697, 13.1-698.

148 *Piccinin*, 788 F.2d at 999 (internal quotations omitted).

149 *Id.* at 1001; 11 U.S.C. § 362(a)(3).

150 Sixth Amended and Restated Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code at 1, *In re* A.H. Robins Co., Inc., No. 85-01307 (Bankr. E.D. Va. March 28, 1988).

151 Menard-Sanford v. Mabey (*In re* A.H. Robins Co.), 880 F.2d 694, 701 (4th Cir. 1989).

152 *Id.* at 702.

153 *Id.* at 701.

on estimated values assigned by the court overseeing the bankruptcy, a process that claimants had previously challenged but lost.[154]

3. *Boy Scouts of America and Child Sex Abuse*

The following years saw the use of releases in many contexts and in many cases. A circuit split developed among the federal courts, with some courts regularly permitting releases and others taking a narrower view of what was permissible. When the Boy Scouts of America ("BSA") filed for bankruptcy in 2020, the availability of releases was a central issue in the case. Once a universally respected organization, the BSA experienced a slew of allegations that it had permitted the ongoing sexual abuse of young boys over decades.[155] Evidence came forth that the BSA had been aware of sexual abuse but had engaged in coverups and in some instances permitted accused abusers to continue involvement with the organization, which allowed them to commit further abuse.[156]

The scandal was messy. Not only did it involve unspeakable predation on innocent children, it implicated a broad structure of volunteer organizations. The BSA relied heavily on the work of 250 Local Councils, which are separate nonprofit entities spread across the country, each organized under the laws of its respective state.[157] Local Councils, although overseen by the BSA, were responsible for their own operations, owning and operating their own camps, and providing educational programs and leadership training to Scouts and volunteer leaders.[158] Beyond the Local Councils, tens of thousands of religious, civil, and community institutions were involved in accomplishing the BSA mission (the "Chartered Organizations").[159] The involvement varied, with some Chartered Organizations merely providing the use of a building, while others were intimately involved in recruiting, promoting, and volunteering for Scouting activities.[160] The extent to which the Chartered Organizations were implicated

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154 *Id.* at 698.

155 Although the BSA had fielded allegations of sexual abuse for years prior, many commentators point to a 2010 verdict for $1.4 million as the case that raised the issue to the front of public consciousness. *See* Aimee Green, *Portland sex abuse verdict leaves Boy Scouts vulnerable to more lawsuits*, THE OREGONIAN (Apr. 14, 2010, 12:35 AM), https://www.oregonlive.com/news/2010/04/portland_sex_abuse_verdict_lea.html.

156 For a retelling of the BSA sex abuse coverup, *see generally* PATRICK BOYLE, SCOUT'S HONOR (1994).

157 *In re* Boy Scouts of Am. & Del. BSA, LLC, 642 B.R. 504, 522 (Bankr. D. Del. 2022) [hereinafter *In re* BSA].

158 *See id.* at 522–23.

159 *Id.* at 523–24.

160 *Id.* at 524.

in the sex abuse—culpable of negligence, fraudulent concealment, and other tortious conduct—similarly varied.[161]

BSA, like Johns-Manville, had held multiple general liability insurance policies over the time period in which the abuse was alleged to occur.[162] These policies contained different limits with different deductible policies; some covered Local Councils, and some arguably covered Chartered Organizations as well.[163] The number and complexities of the entities implicated in the abuse claims, combined with the complication of insurance coverage, created a tangled thicket of legal questions. Hundreds of plaintiffs filed lawsuits alleging sexual abuse beginning as early as 1920, with some complaints containing separate allegations against the BSA, Local Councils, and Chartered Organizations, while others attributed tortious conduct to all defendants jointly.[164]

Through heroic mediation efforts, the BSA bankruptcy established a trust to which all abuse claims would be channeled for resolution.[165] The trust would be funded with assets contributed directly by the BSA, Local Councils, contributing Chartered Organizations, and insurers.[166] It would assume liability for all abuse claims, releasing the BSA and other third parties, including those who had contributed to the trust and their representatives.[167]

Relying on circuit precedent, the bankruptcy court approved the plan and the releases, overruling objections raised by claimants.[168] As observed by the court:

> By any measure, the scope and sheer number of releases contemplated in this Plan is extraordinary, if not unprecedented. . . . The size of the claimant pool is also unprecedented (so I am told), at least in the context of sexual abuse cases. . . . The amount contributed to the Settlement Trust is . . . also unprecedented (so I am told).

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161 *See id.* at 526.
162 *In re BSA*, 642 B.R. at 526–27.
163 *Id.* at 526–28.
164 *Id.* at 525–26.
165 *Id.* at 532. The estimated assets of the trust exceeded $6.5 billion. *Id.* at 616–17.
166 *Id.* at 536–37.
167 *In re BSA*, 642 B.R. at 586.
168 *Id.* at 587–88. The court did not approve the releases sought by The Church of Jesus Christ of Latter-Day Saints, on the grounds that it sought a release of all potential claims against the organization, not just Scouting-related claims. Scouting was the official activity program for all young men affiliated with the church for over a century, and claims often arose from the same facts, but the court was unconvinced that there was perfect overlap of claims and believed the settlement "stretche[d] third-party releases too far." *Id.* at 620.

> Given the unparalleled nature of this case, I do not make these decisions lightly.[169]

Drawing heavily from the reasoning of prior cases, the court concluded that the releases were "necessary to the reorganization both to confirm this Plan and to ensure that BSA's Scouting program continues."[170] The court reasoned that the insurers, potentially liable for claims brought not only against the BSA but also against Local Councils or Chartered Organizations, would not settle without obtaining global peace. Settlements with insurers would "permit these assets to be accessed more quickly and definitely[,]" providing a greater likelihood that victims would be compensated.[171] It was therefore universally advantageous to encourage the settlements by promising releases. Under the terms of the plan, which relied on an estimation of claims, abuse victims would be compensated in full.[172]

On appeal, the district court affirmed the decision to confirm the plan with the releases.[173] Largely echoing the bankruptcy court, it observed that "[t]here is no evidence that a BSA-only plan would have been feasible—either for the future of the BSA or as a means of providing compensation to Survivors."[174] Appellants sought a stay of the bankruptcy court's confirmation order, which was denied by both the district court and the Third Circuit.[175] Around the same time, the Supreme Court granted certiorari in *Purdue Pharma*.[176] The Supreme Court issued an administrative stay of the BSA case on February 16, 2024, but vacated the order a few days later.[177]

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169 *Id.* at 595–96. The court also noted that over eighty-five percent of voting abuse claimants had accepted the plan. *Id.* at 617. While all individuals whose claims against the debtor are impaired by the plan are entitled to vote, relatively few do so, particularly in mass tort cases. *See* Jacoby, *supra* note 14, at 1756.

170 *In re BSA*, 642 B.R. at 616.

171 *Id.* at 616–17.

172 *Id.* at 617. The court made sure to note that the individual perpetrators of the abuse would not receive releases under the confirmed plan. *Id.* at 592–93.

173 Nat'l Union Fire Ins. v. BSA (*In re* BSA), 650 B.R. 87, 138 (D. Del. 2023).

174 *Id.*

175 Memorandum Order, *In re* Boy Scouts of Am. & Del. BSA, LLC, 2023 WL 2891519 (D. Del. Apr. 11, 2023); Order, *In re* Boy Scouts of Am. & Del. BSA LLC, 2023 WL 9598837 (3d Cir. Nov. 2, 2023).

176 *See* John Kruzel & Andrew Chung, *U.S. Supreme Court halts Purdue Pharma bankruptcy settlement pending review*, REUTERS (Aug. 12, 2023), https://www.reuters.com/legal/us-supreme-court-scrutinize-purdue-pharma-bankruptcy-settlement-2023-08-10/.

177 Claimants v. Boy Scouts of Am., No. 23A741, 2024 WL 649309 at *1 (Feb. 16, 2024); Claimants v. Boy Scouts of Am., 144 S. Ct. 883 (2024). The back and forth led to much speculation among academics and commentators.

B. A (Limited) Statutory Basis

Before explaining the Supreme Court’s ruling in *Purdue* and its impact on releases, we pause at this juncture to identify the statutory basis and caselaw relied on by the courts evaluating releases. At the time the decisions described above were issued, there was no explicit statutory authorization for releases. Instead, courts found implicit statutory authorization to justify the practical use of releases to facilitate plan confirmation.

1. Section 524(g)

The 1994 Manville Amendments did provide clear statutory authorization for releases in the context of asbestos trusts. But releases have been granted in a far larger set of cases, both before and after the statute was passed.[178] The releases have also been applied to a broader swath of individuals than anticipated by the strict language of section 524(g).

Under the statute, injunctions are available within a plan for the benefit of non-debtor entities when claims arise by reason of:

> (I) the third party’s ownership of a financial interest in the debtor, a past or present affiliate of the debtor, or a predecessor in interest of the debtor;
>
> (II) the third party’s involvement in the management of the debtor or a predecessor in interest of the debtor, or service as an officer, director or employee of the debtor or a related party;
>
> (III) the third party’s provision of insurance to the debtor or a related party; or
>
> (IV) the third party’s involvement in a transaction changing the corporate structure, or in a loan or other financial transaction affecting the financial condition, of the debtor or a related party[.][179]

The injunction would also be valid against a transferee or successor in interest of the debtor.[180] Accordingly, owners, managers, insurers, financiers, and purchasers could all be protected using statutorily sanctioned releases.

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[178] *See* Resnick, *supra* note 6, at 2084.
[179] 11 U.S.C. § 524(g)(4)(A)(ii).
[180] *Id.* at § 524(g)(3)(A).

The stated congressional purpose of section 524 was to validate the use of the *Johns-Manville* trust to compensate victims, and to provide some reassurance that the case's plan of confirmation would remain settled law.[181] Other mass tort cases quickly adopted the trust model to pay out current and future tort victims. These cases did not necessarily involve asbestos claims and therefore operated outside the strict language of the statute. Releases moved beyond the statute in other ways, too. Managers, officers, directors, and insurers were all familiar recipients of nonconsensual releases, but the caselaw developed to include other parties, some completely unrelated to the debtor.

2. Section 1123(a)(5), (b)(3) and (b)(6)

Applying releases outside the limited context of asbestos poses no problem for those who recognize the Manville Amendments as merely sanctioning, rather than authorizing, their use. The bankruptcy court in the *Johns-Manville* case did, after all, approve the releases long before Congress drafted section 524(g). Nevertheless, bankruptcy is a code-based area of law, and courts have accepted that authorization for releases should arise from the Code. The limited language of section 524 requires courts to look elsewhere for authorization of releases that fall outside its scope.

Section 1123 has proved the most likely candidate. This part of the Code lays out the required and permissive elements of a plan in chapter 11 cases. Subsection (a) requires, for example, that all plans must specify which interests are impaired and must provide adequate means for the plan's implementation.[182] The parameters for providing "adequate means" are inclusive, leaving room for releases to constitute such means.[183]

Even more permissive language is found later in the same statutory provision. Subsection (b) provides that a plan may:

> (1) impair or leave unimpaired any class of claims, secured or unsecured, or of interests;
>
> (2) subject to section 365 of this title, provide for the assumption, rejection, or assignment of any executory

[181] *See* Mabey & Zisser, *supra* note 107, at 501 n.68 (observing that the Manville Amendments were adopted to fix the problems with the *Johns-Manville* case without otherwise disturbing the state of the law).

[182] 11 U.S.C. § 1123(a).

[183] *Id.* at § 1123(a)(5). The relevant language includes the phrase "such as[,]" followed by a list. *Id.*

contract or unexpired lease of the debtor not previously rejected under such section;

(3) provide for—(A) the settlement or adjustment of any claim or interest belonging to the debtor or to the estate; or (B) the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any claim or interest;

(4) provide for the sale of all or substantially all the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests;

(5) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims; and

(6) include any other appropriate provision not inconsistent with the applicable provisions of this title.[184]

Releases that facilitate preservation of estate assets—what we call second-party releases—are clearly permitted pursuant to subsection (b)(3). Subsection (b)(6) provides the most convincing statutory hook for third-party releases, which presumably fall under the language "any other appropriate provision."[185]

But under the clear language of the statute, the court cannot approve even "appropriate" plan provisions that are inconsistent with the rest of bankruptcy law. Opponents of third-party releases have argued that they are clearly inconsistent with section 524(e). That section states that, apart from some exceptions not relevant here, "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."[186] Some courts and commentators have interpreted this provision to constrain bankruptcy courts from discharging liabilities of a non-debtor.[187]

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[184] *Id.* at § 1123(b).

[185] *Id.* at § 1123(b)(6).

[186] *Id.* at § 524(e).

[187] *See, e.g.*, Blixseth v. Credit Suisse, 961 F.3d 1074, 1082 (9th Cir. 2020); Gillman v. Cont'l Airlines (*In re* Cont'l Airlines), 203 F.3d 203, 211 (3d Cir. 2000); Resorts Int'l v. Lowenschuss (*In re* Lowenschuss), 67 F.3d 1394, 1401–02 (9th Cir. 1995); Landsing Diversified Prop. v. Abel (*In re* W. Real Est. Fund, Inc.), 922 F.2d 592, 601 (10th Cir. 1990). *See also* Richard L. Epling, *Third-Party Releases in Bankruptcy Cases: Should There Be Statutory Reform?*, 75 BUS. LAW. 1747, 1747 (2020). *But see* Airadigm Commc'ns., Inc. v. FCC (*In re* Airadigm Commc'ns., Inc.), 519 F.3d 640, 656 (7th Cir. 2008) (ruling that section 524(e) does not bar a court from issuing a third-party release).

3. Section 105(a)

The permissive authority under section 1123 is a narrower basis for third-party releases than the statutory authority relied on by courts to permit expansion of the automatic stay. Whereas a release constitutes a permanent injunction against future lawsuits or efforts to recover, a stay is a temporary injunction, more frequently permitted and less strenuously opposed. Nothing in the Code explicitly permits courts to enjoin actions in chapter 11 against a non-debtor,[188] but courts have found authority in section 105(a), which states:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.[189]

The apparently broad grant of authority in this section has been used to justify considerable exercise of discretion, including authority to issue releases.[190] But the use of section 105(a) was somewhat curtailed by the Supreme Court's unanimous decision in *Law v. Siegel*, which subordinated the bankruptcy court's discretion to the "confines of" the Code.[191] The decision has led to some soul-searching within the community of bankruptcy professionals as to the extent that bankruptcy judges could rely on section 105(a) to exercise their "equitable powers."[192]

C. Disagreement and Criticism as to Scope of Third-Party Releases

Prior to *Purdue*, the majority of courts considering the question were convinced that the Code permitted releases, subject to careful scrutiny, extraordinary circumstances, and compliance with multi-factored tests. However, the circumstances under which releases were approved varied across courts.

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188 Such authority does exist for a codebtor in chapter 13. *See* 11 U.S.C. § 1301.

189 *Id.* at § 105(a).

190 *See, e.g.*, *In re Airadigm Commc'ns., Inc.*, 519 F.3d at 657; Menard-Sanford v. Mabey (*In re* A.H. Robins Co.), 880 F.2d 694, 701 (4th Cir. 1989). *But see* Purdue Pharma, LP v. City of Grande Prairie (*In re* Pharma, LP), 69 F.4th 45, 73 (2d Cir. 2023) (rejecting the supposition that section 105(a) supports the imposition of releases).

191 Law v. Siegel, 571 U.S. 415, 421 (2014).

192 *See, e.g.*, Hon. Michelle M. Harner & Emily A. Bryant-Alvarez, *The Equitable Powers of the Bankruptcy Court*, 94 AM. BANKR. L.J. 189 (2020).

1. *Circuit Splits*

i. *Those in Favor*

Before the Supreme Court ruled on the matter, six circuits (the Second, Third, Fourth, Sixth, Seventh and Eleventh Circuits) allowed non-consensual releases in chapter 11 plans.[193] Three circuits (the Fifth, Ninth and Tenth Circuits) did not.[194] The D.C. Circuit indirectly favored the minority view but never addressed the issue head-on.[195] Even courts that disallowed third-party releases seemed to implicitly acknowledge that, given the right set of facts, such prohibitions might be overcome.

A large subset of circuits followed the Fourth Circuit's decision in *A.H. Robins*, described above, and granted releases based on a finding of "unusual" facts in "rare" cases. For example, the Eleventh Circuit in *SE Property Holdings v. Seaside Engineering & Surveying* allowed releases where the technical expertise of the principals was an irreplaceable part of the future success of the reorganized company and the complaining parties were paid in full under the plan. There, the court found "such an order [was] fair and equitable under all the facts and circumstances."[196] In so ruling, the Eleventh Circuit noted the obvious—that the "inquiry is fact intensive in the extreme."[197]

In *In re Dow Corning*, the Sixth Circuit established a list of factors to consider in granting releases. These quantified factors would determine if sufficient "unusual circumstances" exist.[198] Factors include: (1) identity of interests between debtor and third party; (2) non-debtor contribution of substantial assets to the reorganization; (3) a finding that the injunction is essential to the reorganization; (4) overwhelming creditor support for the plan;

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[193] *See, e.g.*, *In re Pharma, LP*, 69 F.4th at 74; *In re* Millennium Lab Holdings II, LLC, 945 F.3d 126, 139–40 (3d Cir. 2019) (issuing a specific and limited holding as to the particular facts of the case); SE Prop. Holdings, LLC v. Seaside Eng'g & Surveying (*In re* Seaside Eng'g & Surveying), 780 F.3d 1070 (11th Cir. 2015); *In re* Airadigm Commc'ns., Inc., 519 F.3d 640 (7th Cir. 2008); Class Five Nev. Claimants v. Dow Corning Corp. (*In re* Dow Corning Corp.), 280 F.3d 648 (6th Cir. 2002); Menard-Sanford v. Mabey (*In re* A.H. Robins Co.), 880 F.2d 694 (4th Cir. 1989).

[194] *See, e.g.*, Bank of N.Y. Tr. Co., NA v. Off. Unsecured Creditors' Comm. (*In re* Pac. Lumber Co.), 584 F.3d 229 (5th Cir. 2009); Resorts Int'l v. Lowenschuss (*In re* Lowenschuss), 67 F.3d 1394 (9th Cir. 1995); Landsing Diversified Prop. v. Abel (*In re* W. Real Est. Fund, Inc.), 922 F.2d 592 (10th Cir. 1990); Am. Hardwoods, Inc. v. Deutsche Credit Corp. (*In re* Am. Hardwoods, Inc.), 885 F.2d 621 (9th Cir. 1989).

[195] *See In re* AOV Indus., Inc., 792 F.2d 1140 (D.C. Cir. 1986).

[196] *In re Seaside Eng'g & Surveying*, 780 F. 3d at 1078 (alteration in original).

[197] *Id.* at 1079.

[198] Class Five Nev. Claimants v. Dow Corning Corp. (*In re* Dow Corning Corp.), 280 F.3d 648 (6th Cir. 2002) (quotations omitted).

(5) payment in full of creditors affected by the injunction under the plan; (6) an opportunity for non-settling claimants to recover in full; and (7) specific findings to support the bankruptcy court's conclusions.[199]

The Seventh Circuit approved releases in *In re Airadigm Communications* as sufficiently narrow and essential for reorganization.[200] In so doing, the court acknowledged the fact-specific nature of its inquiry; the appropriateness of granting an injunction would, under its ruling, depend on the nature of the reorganization itself.[201]

Relying on the Seventh Circuit's reasoning in *Airadigm* and its own precedent in *Deutsche Bank v. Metromedia Fiber Network*,[202] the Second Circuit approved the third-party releases sought in *Purdue*. As explained in greater detail below, the court identified a list of seven factors to be considered when deciding on third-party releases.[203] Applying these standards to the case, the court concluded that "the bankruptcy court's detailed findings support approval of the Plan under each of the seven factors[.]"[204]

ii. Those Against

In contrast, the Ninth Circuit concluded that releases could only be appropriate under the specific terms of section 524(g). Only a few months after the *A.H. Robins* decision was rendered, the Ninth Circuit held in *In re American Hardwoods*[205] that the bankruptcy court lacked the power to enjoin a lender from enforcing its claim against third-party guarantors. It affirmed this interpretation in *In re Lowenschuss*, explaining:

> The numerous requirements of § 524(g) make it clear that this subsection constitutes a narrow rule specifically designed to apply in asbestos cases only, where there is a trust mechanism and the debtor can prove, among other things, that it is likely to be subject to future asbestos claims. . . . That Congress provided explicit authority to bankruptcy courts to issue injunctions in favor of the third parties in an

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199 *Id.* at 658.

200 Airadigm Commc'ns., Inc. v. FCC (*In re* Airadigm Commc'ns., Inc.), 519 F.3d 640, 656 (7th Cir. 2008).

201 *Id.* at 657.

202 *See* Deutsche Bank AG, London Branch v. Metromedia Fiber Network, Inc. (*In re* Metromedia Fiber Network, Inc.), 416 F.3d 136, 142 (2d Cir. 2005).

203 Purdue Pharma, LP v. City of Grande Prairie (*In re* Pharma, LP), 69 F.4th 45, 78–79 (2d Cir. 2023).

204 *Id.* at 82.

205 Am. Hardwoods, Inc. v. Deutsche Credit Corp. (*In re* Am. Hardwoods, Inc.), 885 F.2d 621, 626 (9th Cir. 1989).

> extremely limited class of cases reinforces the conclusion that § 524(e) denies such authority in other, non-asbestos, cases.[206]

Likewise, the Tenth Circuit held in *In re Western Real Estate Fund*[207] that "while a temporary injunction . . . may be warranted during the pendency of this bankruptcy proceeding" to facilitate a reorganization, "the stay may not be extended post-confirmation in the form of a permanent injunction that effectively relieves the non-debtor from its own liability to the creditor."[208] The court based its ruling on the finding that while section 524(a) "affords broad benefits to the debtor, . . . Congress did not intend to extend such benefits to third party bystanders."[209] In *In re Pacific Lumber Co.*[210] the Fifth Circuit similarly concluded that third-party releases are appropriate only in the context of section 524(g).[211]

Even with these explicit prohibitions on releases, both the Fifth and the Ninth Circuits have upheld limited exculpation provisions in chapter 11 plans.[212] These exculpation provisions have protected parties involved in the bankruptcy proceedings—directors and officers along with members of the unsecured creditors committee—from litigation arising from the bankruptcy itself.[213] The intent behind exculpation provisions is to incentivize participation in the bankruptcy case without fear of being sued. The authority for such clauses is found not only in section 1123(b)(6) but also in a finding that parties have limited qualified immunity for performing their statutory duties in bankruptcy.[214]

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206 Resorts Int'l v. Lowenschuss (*In re* Lowenschuss), 67 F.3d 1394, 1403 (9th Cir. 1995).

207 Landsing Diversified Prop. v. Abel (*In re* W. Real Est. Fund, Inc.), 922 F.2d 592, 601–02 (10th Cir. 1990).

208 *Id.*

209 *Id.* at 600.

210 Bank of N.Y. Tr. Co., NA v. Off. Unsecured Creditors' Comm. (*In re* Pac. Lumber Co.), 584 F.3d 229 (5th Cir. 2009).

211 *Id.* at 252.

212 *See, e.g.*, Nexpoint Advisors, LP v. Highland Cap. Mgmt., LP (*In re* Highland Cap. Mgmt., LP), 48 F.4th 419, 437–38 (5th Cir. 2022); Blixseth v. Credit Suisse, 961 F.3d 1074, 1082 (9th Cir. 2020).

213 In *Highland Capital Management*, for example, a former director launched a crusade of litigation against the debtor and management. *In re Highland Cap. Mgmt., LP*, 48 F.4th at 439.

214 *See In re Pac. Lumber Co.*, 584 F.3d at 253 (agreeing with other courts that the provision listing a creditors' committee's powers implies qualified immunity for actions within the scope of those duties); *see also* 11 U.S.C. § 1103(c).

2. *Academic Arguments*

Battle lines for and against releases were drawn within the academic community long before the *Purdue* ruling. Scholars wrote and submitted amicus briefs to the Supreme Court on both sides of the issue.[215] Law review articles have both condemned and defended the use of releases.[216] Some scholars have charted a middle ground, arguing for limits on releases or for adjustments to the Code or judicial procedure to prevent potential abuse.[217] How commentators view releases is largely linked to their views on bankruptcy's ability to resolve mass tort generally. As observed by Professor Daniel Bussel, when one views the problem to be solved as the distress of the mass tort litigation, the bigger picture naturally includes consideration of third parties who may also be financially responsible for the mass tort.[218]

The most ardent opposition to releases has relied primarily on constitutional due process concerns. Professor Ralph Brubaker has stated emphatically that third-party releases are fundamentally illegitimate and should be abandoned wholesale.[219] He argues that they violate the principle of separation of powers and the *Erie* doctrine, insofar as they represent federal common law making by courts.[220] Professor Adam Levitin argues that third-party releases are

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[215] *Compare* Brief of Adam J. Levitin as *Amicus Curiae* in Support of Petitioner, Harrington v. Purdue Pharma, LP, 69 F.4th 45 (2023) (No. 23-124) (arguing the Sackler release is unconstitutional); Brief for *Amici Curiae* Bankruptcy Law Professors in Support of Petitioner, Harrington v. Purdue Pharma, LP, 69 F.4th 45 (2023) (No. 23-124) (arguing the releases would grant a discharge beyond that permitted in the Bankruptcy Code); Brief for *Amici Curiae* Bankruptcy Law Professors Ralph Brubaker, Bruce A. Markell, and Jonathan M. Seymour In Support of Petitioner, Harrington v. Purdue Pharma LP, 69 F.4th 45 (2023) (No. 23-124) (arguing nonconsensual non-debtor release is a discharge of debt); *Amici Curiae* Brief of the Honorable Eugene Wedoff (Ret.) and Law Professors Sara Green, George Kuney, Stephen Lubben and Lawrence Ponoroff in Support of the Petitioner, Harrington v. Purdue Parma LP, 69 F.4th 45 (2023) (No. 23-124) (arguing there is no statutory authority for third-party releases in the Bankruptcy Code) *with* Brief of *Amici Curiae* Law Professors in Support of Respondents, Harrington v. Purdue Pharma. LP, 69 F.4th 45 (2023) (No. 23-124) (arguing the use of third-party releases is supported under the Bankruptcy Code's test and history).

[216] *Compare, e.g.*, Brubaker, *supra* note 13 and Jonathan M. Seymour, *Against Bankruptcy Exceptionalism*, 89 U. CHI. L. REV. 1925, 1978 (2022), *with* Anthony J. Casey & Joshua C. Macey, *In Defense of Chapter 11 for Mass Torts*, 90 U. CHI. L. REV. 973 (2023) and Resnick, *supra* note 6, at 2085.

[217] *See, e.g.*, Janger, *supra* note 74; Simon, *supra* note 11.

[218] *See* Bussel, *supra* note 12, at 732 ("Why not take the opportunity to resolve the litigation in its entirety including co-defendant liability for the same harm?").

[219] *See* Brubaker, *supra* note 13, at 964–65. *See also* Levitin, *supra* note 13, at 430–31.

[220] Brubaker, *supra* note 13, at 977. Brubaker seems to acknowledge that his opposition stems almost entirely from the lack of statutory authorization for the third-party releases. "Presumably, though, it is within Congress's discharge power under the Bankruptcy Clause to expressly authorize discharge of the obligations of even a nondebtor, such as Congress has done in § 524(g) of the Bankruptcy Code for certain asbestos claims." Brubaker, *supra* note 13, at 973.

unconstitutional because they exceed the framers' understanding of the bankruptcy clause and exceed the limits of Article III.[221] Professor Levitin therefore finds section 524(g) itself to be unconstitutional.[222]

The constitutionality of section 524(g) is a thorny problem for commentators who object to releases on constitutional grounds, or even as contrary to public policy. Congressional sanction of releases in asbestos cases begs the question why similar releases should not be available in other mass tort contexts.[223] There is no satisfying explanation why personal injury claimants harmed by asbestos exposure should benefit from the increased recovery made possible by the releases, but those harmed by other products or means should not. Likewise, there is no satisfying explanation why asbestos victims should be subject to coercive forfeiture of their claims against third parties, but others under near-identical circumstances are protected against such coercion. Either releases are constitutionally appropriate and warranted by public policy considerations, or they are not. The type of injury should not be the determining factor.

The Supreme Court has thus far upheld the constitutionality of section 524(g), although it declined to extend its protection to cases involving asbestos. The facts of *Purdue* were extremely complicated and compelling on both sides of the issue, making it a profoundly difficult test case for releases generally. The individuals to be released could not be less sympathetic in the eyes of the public.[224] The compensation offered in exchange for these releases was presumed to be some portion (but not all) of the sums "milked" from the company in the decade prior to the bankruptcy. However, it was widely agreed that the releases provided the highest likelihood that individual personal injury claimants would experience some recovery.[225] Otherwise, it seems almost certain that any recovery from the Sackler family would accrue to those claimants with the most power and resources at hand, likely federal or state governments that had brought their own claims against the company.[226] These

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[221] Levitin, *supra* note 13, at 436.

[222] *Id.* at 431.

[223] *See* Parikh, *supra* note 14, at 483.

[224] *See* Adam J. Levitin, *Purdue's Poison Pill: The Breakdown of Chapter 11's Checks and Balances*, 100 TEX. L. REV. 1079, 1081 (2022) (observing that Sacklers became the face of the pharmaceutical industry for the opioid crisis).

[225] This was partially a consequence of the previously negotiated agreement between the company and the government, which predicated the Department of Justice's forbearance from pursuing a criminal or civil forfeiture judgment—thereby eliminating the possibility of any recovery for tort victims—on plan confirmation. *See* Levitin, *supra* note 224, at 1118.

[226] *See* Organek, *supra* note 74, at 764.

challenging facts muddied the waters for the Court, further complicating the legal analysis on releases.

D. The Supreme Court's Intervention: Purdue Pharma

Prior to its bankruptcy, Purdue Pharma, LP was a large pharmaceutical company owned and controlled by members of the Sackler family.[227] The company's most famous product was OxyContin, an opioid prescription pain reliever that was heavily marketed as being less addictive and less subject to abuse than other pain medications.[228] Members of the Sackler family were deeply involved in the company's marketing strategies, and the company's success made them extremely wealthy.[229] But as is now commonly known, OxyContin was just as addictive as any other opioid.[230]

By 2007, corporate insiders were aware that significant civil liability was a real risk. They responded by increasing corporate distributions and draining corporate assets, leaving the company insolvent.[231] Withdrawn funds were sent offshore to overseas trusts and family-owned companies.[232] In 2019, the company filed for bankruptcy.[233] In the months before the filing, the Sackler family negotiated a pre-petition settlement framework with the Purdue Pharma board of directors that contemplated a global release of liability for the Sacklers.[234]

In 2021, the bankruptcy court approved a chapter 11 plan of reorganization that included third-party releases for the Sacklers in exchange for their

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227 Harrington v. Purdue Pharma, LP, 603 U.S. 204, 204 (2024).

228 *Id.*

229 In the year 2015, the Sackler family was identified as one of the top twenty wealthiest families in America with an estimated net worth of $14 billion. *In re* Purdue Pharma, LP, 635 B.R. 26, 40 (S.D.N.Y. 2021).

230 According to the Court, approximately 247,000 people died between 1999 and 2019 of prescription-opioid overdoses, not to mention the scores more that died from heroin and fentanyl overdoses after becoming addicted to prescription opioids. *Purdue Pharma, LP*, 603 U.S. at 209; *see* Brian Mann, *More Than a Million Americans Have Died from Overdoses During the Opioid Epidemic*, NPR (Dec. 30, 2021 at 10:26 AM), https://www.npr.org/2021/12/30/1069062738/more-than-a-million-americans-have-died-from-overdoses-during-the-opioid-epidemi. One study reported by the U.S. Department of Health and Human Services found that the economic costs of the opioid epidemic in the year 2017 exceeded $1.021 billion. *See* Feijun Luo et al., *State-Level Economic Costs of Opioid Use Disorder and Fatal Opioid Overdose – U.S. 2017*, 70 MORBIDITY & MORTALITY WEEKLY REP. 541, 541 (Apr. 16, 2021).

231 *See In re Purdue Pharma, LP*, 635 B.R. at 36.

232 *See id.* Some portion was also used to pay taxes. *See id.* at 57.

233 *See id.* at 35.

234 *See id.* at 58–59. The Chairman of the Board at that time testified before Congress that the amount contemplated was "somewhere around $3 billion or so[.]" *See id.* at 59.

contribution of $4.325 billion to the bankruptcy estate.[235] The releases would bind all claimants in the *Purdue* bankruptcy, even those who had voted against the plan and the releases.[236] The district court overturned the decision on appeal, concluding that the bankruptcy court lacked statutory authority to issue third-party releases.[237] The district court's opinion was in turn overruled by the Second Circuit, which reinstated the bankruptcy court's confirmation of the plan, with one alteration. During the pendency of the appeal, the Sackler family had agreed to increase their contribution in exchange for global peace from $4.325 billion to roughly $6 billion.[238]

1. The Second Circuit's Ruling

The Second Circuit found authority for third-party releases in sections 105(a) and 1123(b)(6) of the Code, contingent on the bankruptcy court making "sufficient factual findings" that would satisfy "certain equitable considerations."[239] These considerations included seven relevant factors, mirroring prior fact-specific approaches to third-party releases.[240]

> *First*, courts should consider whether there is an identity of interests between the debtors and released third parties, including indemnification relationships[.] . . .
>
> *Second*, courts should consider whether claims against the debtor and non-debtor are factually and legally intertwined, including whether the debtors and the released parties share common defenses, insurance coverage, or levels of culpability. . . .
>
> *Third*, courts should consider whether the scope of the releases is appropriate. . . .
>
> *Fourth*, courts should consider whether the releases are essential to the reorganization, in that the debtor needs the claims to be settled in order for the *res* to be allocated[.] . . .

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235 *See id.* at 70.

236 *See In re Purdue Pharma, LP*, 635 B.R. at 64.

237 *See id.* at 89. In so ruling, the court acknowledged the "long-standing conflict among the Circuits" on the question. *See id.* at 89. The court reached its conclusion despite having conflicting prior precedent—decided by the same judge two years prior—using a strict statutory evaluation. *See id.* at 89–90.

238 *See In re* Pharma., LP, 69 F.4th 45, 81 (2023).

239 *Id.* at 77.

240 The court relied heavily on its priority ruling in *In re Metromedia Fiber Network*, which had concluded that third-party releases are appropriate when an "important part in the debtor's reorganization plan" providing "substantial consideration." Deutsche Bank AG, London Branch v. Metromedia Fiber Network, Inc. (*In re* Metromedia Fiber Network, Inc.), 416 F.3d 136, 141–42 (2d Cir. 2005).

> *Fifth*, courts should consider whether the non-debtor contributed substantial assets to the reorganization. . . .
>
> *Sixth*, courts should consider whether the impacted class of creditors 'overwhelmingly' voted in support of the plan with the releases. . . .
>
> *Seventh*, . . . courts should consider whether the plan provides for the fair payment of enjoined claims.[241]

In upholding the releases for the Sacklers, the court emphasized the factually and legally intertwined nature of claims, the size of the proposed contribution, and the overwhelming approval of creditors. The court also praised the equity of the plan, noting the "additional concessions" made by the Sacklers therein, which included divestment from the opioid business worldwide.[242]

The case was appealed to the Supreme Court by the U.S. Trustee, who challenged the statutory basis for the Second Circuit's ruling. The Trustee argued that the Sacklers' proposed release was not authorized by the Code.[243] The Supreme Court agreed.

2. *The Supreme Court Majority's Statutory Interpretation*

The majority opinion striking down the third-party releases was succinct. It relied primarily on an interpretation of section 1123(b). The Court observed that subsections (1)–(5) of section 1123(b) all related to claims against the debtor or property of the debtor's estate. It concluded that applying section 1123(b)(6)'s catchall provision to claims and property of third parties would violate the canon of *ejusdem generis*.[244] Put in plain English, the Court observed that "one of these things is not like the others"[245] in a way that defied reasonable construction.[246] The Court was further persuaded by the argument that Congress had expressly permitted such releases only in the context of asbestos, pursuant to section 524(g).

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241 *In re Pharma LP*, 69 F.4th at 78–79.

242 *Id.* at 82.

243 Brief for Petitioner, Harrington v. Purdue Pharma, LP, 2023 WL 6220089 at *11 (2023).

244 *Id.* at *24.

245 *See, e.g.*, Sesame Street, *Sesame Street: One of These Things*, YOUTUBE (June 7, 2011), https://www.youtube.com/watch?v=rsRjQDrDnY8.

246 The opinion also equated release with the bankruptcy discharge, noting that the discharge was typically reserved for debtors. *See* Harrington v. Purdue Pharma, LP, 603 U.S. 204, 223 (2024) (dismissing the argument that a release is not a discharge on the grounds that "word games cannot obscure the underlying reality[]"). *See also* Boyle, *supra* note 30, at 429 (finding any attempt to distinguish between a discharge and an injunction an unpersuasive semantic exercise).

Recognizing objections raised by the dissent—that denying third-party releases would mean the loss of the Sacklers' participation and consequently a dramatic reduction in victims' recovery—the Court observed:

> Both sides of this policy debate may have their points. But, in the end, we are the wrong audience for them. . . . Someday, Congress may choose to add to the bankruptcy code special rules for opioid-related bankruptcies as it has for asbestos-related cases. Or it may choose not to do so. Either way, if a policy decision like that is to be made, it is for Congress to make.[247]

3. *The Dissent's Practical Concerns*

The dissent was triple the length of the majority opinion, emphasizing the lost opportunity for the overturned plan to "fashion fair and equitable relief for mass-tort victims."[248] It praised the bankruptcy court's use of discretion to solve the collective action problem posed by the debtor's insolvency. It bemoaned the loss of the negotiated agreement, which had secured an additional $6 billion settlement payment for victims.[249] It condemned the result as contrary to the goals of bankruptcy, because the non-released claims "could deplete the estate for the benefit of only a few and leave all the other creditors with nothing."[250] Finally, it observed the lack of a workable alternative.[251]

The problem identified by the dissent, and the preferred solution, was thus:

> In some cases—including mass-tort cases—it is not only the debtor company, but rather another closely related person or entity such as officers and directors (non-debtors), who may hold valuable assets and also be potentially liable for the company's wrongdoing. But it may be uncertain whether the victims can recover in tort suits against the non-debtors due to legal hurdles or difficulty reaching the non-debtors' assets. In those cases, a settlement may be reached: In exchange for being released from potential liability for any wrongdoing, the non-debtor must make substantial payments to the company's bankruptcy estate in order to compensate victims.[252]

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[247] *Purdue Pharma, LP*, 603 U.S. at 226.

[248] *See id.* at 227 (Kavanaugh, J. dissenting).

[249] *See id.* at 230 ("The opioid victims and their families are deprived of their hard-won relief.") (Kavanaugh J. dissenting).

[250] *See id.* at 231 (Kavanaugh, J. dissenting).

[251] *See id.* at 234 (Kavanaugh, J. dissenting).

[252] *See id.* at 235 (Kavanaugh, J. dissenting).

4. Lingering Questions

The ruling of the Court was deliberately narrow. For example, the Court was careful to note that its ruling did not call into question the availability of *consensual* third-party releases.[253] The Court declined to define what would qualify as a consensual release, leaving open the question of whether opt-out plans could still be approved.[254] The Court also did not opine on whether a plan that provided "full satisfaction" of claims against the third-party might be permissible, nor clarify what might constitute full satisfaction.[255] Furthermore, the Court declined to address whether its ruling would require the unwinding of plans that had already been confirmed and "substantially consummated," providing no clear definition of what might constitute substantial consummation.

The Court thus left largely unexplored the appropriate scope of third-party releases from a policy perspective and neglected to acknowledge or address the validity of second-party releases, the issue to which we now turn.

III. THE APPROPRIATE SCOPE OF RELEASES

Bankruptcy proceedings serve to reduce collective action costs for creditors generally, and mass tort victims particularly, by preserving value for distribution and minimizing creditors' recovery costs. Third-party releases are attractive to plan participants (both debtors and their creditors) because they can serve to increase the size of the distribution through the contributions of third parties and decrease recovery costs through the settlement of claims against the third parties. The coercive nature of the releases is consistent with the coercive nature of the bankruptcy plan generally. But there is an inherent tension in the application of a coercive bankruptcy injunction in favor of a party that is not actually in bankruptcy.

The Court has interpreted the Code to prohibit nonconsensual third-party releases outside of asbestos cases. But we propose that courts should continue to enforce second-party releases, used to settle claims against property of the debtor's estate. We find sufficient authority in the Code as written, but in the

[253] *Id.* at 226.

[254] In opt-out plans, members of the voting class who affirmatively object to the release are not bound by it, but those who stay silent are bound. *See, e.g.*, *In re* Smallhold, 2024 WL 4296938, at *1 (Bankr. D. Del. Sept. 25, 2024) (concluding after *Purdue* that a creditor cannot be deemed to consent to a third-party release without some affirmative expression of the creditor's consent).

[255] *See Purdue Pharma, LP*, 603 U.S. at 226.

alternative, argue for an amendment that would clarify their ongoing validity.[256] We argue that these releases are warranted not because of the type of harm caused in the case (asbestos-related or not), but rather by the connection between the releases and the debtor's estate.[257]

A. *Defining the Parameters of the Estate*

The debtor's estate contains all the debtor's property, including all legal and equitable rights that exist at the time of the filing or arise subsequent to it.[258] The debtor's rights to payments from other parties are thus part of the estate, whether or not those rights have been fully adjudicated. When a debtor is named beneficiary of an insurance policy, one might presume that the right to insurance proceeds would logically be property of the debtor's estate, but this presumption is called into question by state law regarding the distribution of insurance proceeds and by the contractual limitations placed on an insured's rights to insurance proceeds.[259] Under typical liability insurance contracts, the debtor is not directly entitled to the proceeds of an insurance policy; the debtor could not use those proceeds to fund operations, for example, and may not even be entitled to possess the proceeds. Instead, proceeds are designated for individuals with claims against the debtor that are covered under the insurance policy. Uncertainty regarding how these types of insurance proceeds should be treated in bankruptcy has driven much of the perceived need for releases in chapter 11 plans involving mass torts.[260]

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[256] The Court seemed to invite Congress to clarify the availability of releases by legislative amendment. Thus far, proposed legislative solutions have typically suggested the elimination of releases entirely, a result we believe would be harmful, if not disastrous, for mass tort victims in most cases. *See, e.g.*, Press Release, House Comm. on the Judiciary, Ranking Member Nadler Reintroduces the Nondebtor Release Prohibition Act of 2024 to Curb Corporate Abuses of the Bankruptcy System (Jul. 30, 2024).

[257] This approach is consistent with that taken by the American College of Bankruptcy in its amicus brief before the Supreme Court. *See* Brief of the American College of Bankruptcy as *Amicus Curiae* in Support of Neither Party, Harrington v. Purdue Pharma, LP, 603 U.S. 204 (No. 23-124) (2024) (asking the court to preserve third-party releases that protect the debtor's estate, including claims arising under insurance policies); *see also* Stephen W. Sather, *The Controversial Role of Third-Party Releases in Bankruptcy*, AM. BANKR. INST. L. REV., Winter 2023, at 71, 101.

[258] *See* 11 U.S.C. § 541(a)(1), (6), and (7). For individual debtors, earnings from services performed after the filing are explicitly excluded. *Id.*

[259] *See* Boyle, *supra* note 30; Jarvis & Cannon II, *supra* note 23, at 200; Zaretsky, *supra* note 23, at 398.

[260] *See generally* Feld v. Zale Corp. (*In re* Zale Corp.), 62 F.3d 746 (5th Cir. 1995); *see also id.* at 758 n.33.

1. *Debtor's Insurance Proceeds*

There are at least three problems that arise when a debtor seeks to include insurance proceeds in a distributional payout for claimants. First, there may be a legal dispute over whether the underlying facts give rise to an insurance payout. The insurer may not agree that the payout is warranted and may insist on litigating the issue. We might call this the problem of *unsettled insurers*. Second, although the debtor may be the named beneficiary of the insurance policy, state law or the policy itself may nevertheless provide that claimants are entitled to recover against the insurer directly. We call this the problem of *direct claims*. Third, an insurance policy may name more than one beneficiary, such that both the debtor and non-debtor third parties are covered by the policy. This is the problem of *shared insurance*. Each of these issues may reduce the amount of the policy proceeds available for distribution as part of the debtor's estate.

i. *Problem One: Unsettled Insurers*

Pursuant to the Code, entities that hold property of the estate that could be used by the trustee or debtor in possession "shall" account for and deliver such property to the estate.[261] But nothing in the Code requires these entities to abandon defenses they might have against the debtor's claim to the property. Unlike claims brought by creditors against the debtor, legal claims brought by the debtor against an insurer or any other outside party cannot simply be estimated and allowed as part of the bankruptcy estate. Insurers retain due process rights to test the limits of the applicable policy. Challenges to insurance coverage are likely to be fact intensive, including, for example, questions about whether the harm arose during the coverage period.[262]

Insurers have the option to settle the debtor's claim against the policy but cannot be compelled to do so.[263] In some cases, the insurer may have little incentive to settle.[264] Some insurance policies are written such that the total payout will also include any costs of defense. These are termed "wasting" policies; a term particularly appropriate when the debtor is insolvent, because any amount of the policy used to litigate claims is effectively wasted from the

[261] *See* 11 U.S.C. § 542(a).

[262] As explained above, this was a major question that arose in the *Johns-Manville* bankruptcy, when multiple insurance policies had offered coverage to the company over the decades of asbestos exposure in which the company was implicated.

[263] *See* Jarvis & Cannon II, *supra* note 23, at 200–01.

[264] *See id.* at 208.

perspective of claimants, whose distributions are reduced, lock-step, by the amount spent on litigation.[265] With wasting policies, the insurer may be economically ambivalent between litigating and paying claims. Worse, it may be incentivized to litigate up to the limits of the policy if it believes there is a possibility of avoiding coverage.

Adding to the complexity of the situation is the reality that the debtor negotiates with the insurer on behalf of the debtor's claimants. The debtor has no personal stake in the proceeds of the insurance, which will instead be designated for compensation of those with covered claims against the debtor. However, the debtor will need the proceeds to fund the proposed reorganization plan, which inevitably includes treatment of all claims against the debtor's estate, including those covered by insurance.

The availability of releases for insurance companies is a carrot to encourage insurers to settle with the bankruptcy estate, thus making proceeds available for claimants, rather than exhausting them in litigation. If that incentive is unavailable, debtors may seek alternative methods of coercing insurer cooperation or structure plans that function in spite of insurer objections. Recently, manufacturer Kaiser Gypsum Company, facing liability for asbestos exposure, proposed a plan of reorganization in chapter 11 that settled all uninsured claims using a bankruptcy trust, but preserved the rights of insured claimants to proceed directly against its insurer, Truck Insurance Exchange.[266] Truck Insurance had issued a particularly generous policy with no cap, requiring it to pay up to $500,000 per claim after the debtor's $5,000 deductible. The insurer's objections to the plan were ignored on the argument that the plan was "insurance neutral," insofar as it did not propose to change the insurer's obligations under the contract.[267] Certainly, any plan must permit insurers affected by the plan to raise objections, as the Supreme Court ultimately ruled.[268] That said, a plan that would permit tort victims to pursue their claims against insurers directly would have to comply with the contractual restrictions in the policy but otherwise does not run contradictory to the purposes of bankruptcy described above, nor does it negatively implicate maintenance of the debtor's

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265 *See* Gregory S. Munro, *Defense Within Limits: The Conflicts of "Wasting" or "Cannabalizing" Insurance Policies*, 62 MONT. L. REV. 131, 133 (2001).

266 *See* Truck Ins. Exch. v. Kaiser Gypsum Co., Inc., 602 U.S. 268, 271 (2024).

267 *See id.* at 268.

268 *See id.* at 285.

estate.[269] In most cases, however, there are limits to the insurance policy that will impact claimants.

In cases where the insurance policy is capped and thus unlikely to satisfy all liability claims against the debtor, the better policy move is to permit releases as an incentive for insurance companies to settle, rather than litigate, claims. This preserves the value of the policy proceeds for victims. Where claims of the insured's creditors covered by the insurance policy exceed the policy limits and where liability of the debtor has been determined as part of the bankruptcy case, the proceeds of that policy may be justifiably considered part of the debtor's estate. As one of us has elsewhere observed, the estate holds property subject to the same restrictions that the debtor had prepetition,[270] such that insurance proceeds will still be segregated to pay only claimants covered under the policy. But treating these proceeds as property of the estate will allow them to be distributed equitably among eligible claimants.[271]

Settlement with the insurer may be for an amount less than or equal to the policy cap. When liability is obvious and in excess of the policy cap, insurers may be willing to simply buy back the policy, contributing cash equal to the value of the policy in exchange for a full release of any liability.[272] In such cases, second-party releases for insurers should be permitted under section 1123(b)(3), insofar as they provide for settlement of what amounts to property of the estate. Buybacks have often been permitted even in jurisdictions where third-party releases are explicitly disallowed. In a buyback, the court does not issue a release, but the insurer has a clear defense to any future claims brought by plaintiffs after the fact. A ruling by the court that the insurer is free of future liability by virtue of the buyback functions or by fulfilling its contractual obligations by paying the policy limits into the estate for claimants under the policy is a preemptive acknowledgement of that defense. It is thus a cleaner mechanism to accomplish the same outcome. We further argue that similar

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269 *See* Bussel, *supra* note 12, at 743–44. Professor Bussel would support an insurance company's ability to raise objections to administrative resolution procedures, but objections should generally be overruled if the procedures effectuate collective resolution. *Id.* Presumably, state regulations can respond to situations in which insurers face insolvency, as might occur with similar generous policies in the case of mass tort liability.

270 *See* Jarvis & Cannon II, *supra* note 23, at 200 (citing to United States v. Whiting Pools, Inc. 462 U.S. 198, 204 n.8 (1983)).

271 *See* Zaretsky, *supra* note 23, at 387.

272 This occurred in the USA Gymnastics bankruptcy. *See generally* Third Amended Joint Chapter 11 Plan of Reorganization Proposed by USA Gymnastics and the Additional Tort Claimants Committee of Sexual Abuse Survivors, *In re* USA Gymnastics, No. 18-09108-RLM-11 (Bankr. S.D. Ind. Oct. 21, 2021). *But see* USA Gymnastics v. Liberty Ins. Underwriters, Inc., 46 F.4th 571, 576 (7th Cir. 2022) (affirming bankruptcy court's ruling that insurer was obligated to pay debtors' attorneys' fees in defending lawsuits).

releases should be granted even in cases where the debtor settles for less than the full value of the policy; there is no statutory restriction on the terms under which the settlement should be accomplished.[273]

If the insurer does not stipulate to liability, the liability is not determined as part of the bankruptcy case, or the insurance policy cap exceeds liability claims, proceeds are less clearly part of the debtor's estate.[274] But it may nevertheless be desirable to permit releases in these circumstances as a matter of legal policy, if doing so facilitates the recovery of the value of the insurance policy for claimants, permitting insurance proceeds to be equitably distributed. If courts interpret these releases as beyond the scope of section 1123(b)(3), we recommend a statutory amendment that would sanction their use when applied to insurers holding a policy for which the debtor is the named beneficiary.

ii. Problem Two: Direct Claim Beneficiaries

As explained above, the proceeds of an insurance policy are not unambiguously part of the debtor's estate, insofar as liability insurance policy proceeds are earmarked for the debtor's claimants.[275] This dynamic can lead to complications even if the insurer agrees to settle claims with the debtor. In some states, claimants hold direct rights to liability insurance proceeds and so may sue the insurer despite the bankruptcy and the automatic stay.[276]

Direct claims have the potential to interfere with the collective action function of bankruptcy. Bankruptcy proceedings maximize overall creditor recovery in part by constraining individual creditor efforts at recovery. When the debtor is insolvent, individualized recovery efforts are value-destroying, because creditors expend resources competing with each other for limited assets.[277] Creditors are incentivized to refrain from collection by the automatic stay and the promise of receiving an aliquot portion of the debtor's assets.[278] When the debtor is insured, the insurance proceeds become part of the debtor's

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[273] *See* 11 U.S.C. § 1123(b)(3)(A). As part of the plan, creditors will have the ability to vote against any settlement they deem to be unfair.

[274] *See generally* Jarvis & Cannon II, *supra* note 23.

[275] *See id.* at 200–01.

[276] Direct action statutes are found in Connecticut (Conn. Gen. Stat. § 38a-321); Georgia (O.C.G.A. § 46-7-12); Iowa (Iowa Code § 516.1); Kansas (K.S.A. § 66-1, 128); Louisiana (La. R.S. 22:655); Nebraska (R.R.S. Neb. § 44-508); New Jersey (N.J. Stat. § 17:28-2); and Wisconsin (Wis. Stat. § 632.24). Some of these states limit direct action claims to auto insurers. For a discussion of the policy justification for laws permitting direct action, *see* Zaretsky, *supra* note 23, at 376.

[277] *See* Jackson, *supra* note 70, at 862.

[278] *See* 11 U.S.C. § 362.

limited pot of money from which claimants might recover. If individual claimants can recover directly from the insurance policy proceeds, they may bypass the bankruptcy process, frustrating its purposes.

One solution to this problem could be to include specific prohibitions in the Code against direct claims when a debtor is named the beneficiary to an insurance policy. This prohibition would preempt state law to the contrary. The law might require, for example, that all direct claims against the policy be channeled to a single trust in mass tort cases.[279] This approach would have the same result as a release, insofar as it would effectively enjoin direct claims. Of course, an alternative, simpler approach would be to simply permit second-party releases under section 1123(b)(3), as we advocate here.

iii. Problem Three: Shared Insurance

Some insurance policies are written to cover more than one direct beneficiary. In such cases, the insurer may be reluctant to settle claims against the debtor without also obtaining protection from claims brought against other beneficiaries, who may or may not be liable for the same tortious behavior. Other beneficiaries will not voluntarily relinquish their rights to insurance proceeds, and bankruptcy law may not coercively extinguish their rights. Lack of clear statutory direction in this area creates highly litigable—read, costly—ambiguities in scenarios of shared insurance.[280]

Professor Bussel has argued that the proceeds of shared insurance policies should be channeled into the debtor's bankruptcy estate, coercively requiring a non-debtor beneficiary to participate in the trust.[281] There is some precedent for this position in asbestos cases. In the case *MacArthur Co. v. Johns-Manville Corp.*, a distributor of Johns-Manville's asbestos products claimed to be co-insured with Johns-Manville pursuant to a vendor endorsement.[282] The insurers had settled with Johns-Manville through its bankruptcy proceedings and received a release in return.[283] The distributor argued that its claims against the insurers were not part of the bankruptcy case and so could not be released, as they were beyond the reach of the bankruptcy court.[284] The court dismissed the

[279] *See* Bussel, *supra* note 12, at 744–46.
[280] *See* Bussel, *supra* note 12, at 748 (noting that section 502(e) and 509(c) of the Code may already provide for disallowance or subordination of such claims).
[281] *See id.*
[282] MacArthur Co. v. Johns-Manville Corp., 837 F.2d 89, 90 (2d Cir. 1988).
[283] *See id.*
[284] *See id.* at 91.

distributor's objections on the grounds that its purported interest in the insurance policies was "highly speculative."[285] The Second Circuit affirmed on the factual finding that the distributor's claims against the policies were entirely derivative of Johns-Manville's rights as the primary insured.[286]

This finding makes *MacArthur* an easier case than it might have been.[287] If the distributor were found to have an equal right to the insurance policy, the court would have had to decide whether and to what extent the proceeds of the policy should be considered part of the bankruptcy estate. This decision would impact not only the co-insured but also the co-insured's claimants. The analysis becomes even more sticky if claims brought against either insured party would render them insolvent, with or without insurance coverage. Bankruptcy provides no obvious mechanism for resolving this issue.

If all the proceeds of the shared insurance policies are channeled into one beneficiary's bankruptcy trust, it follows that the claims that could be brought against the non-debtor beneficiary must also be included in the trust. Otherwise, the non-debtor co-insured—or more precisely, the claimants of the non-debtor co-insured—are effectively deprived of property, because they would lose access to the shared insurance proceeds. Although bankruptcy frequently adjusts the property rights of creditors, as required by a debtor's insolvency, the reach of bankruptcy law is generally limited to adjusting property rights of the debtor's creditors against the debtor's property. As explained above, insurance proceeds are not unambiguously property of the debtor's estate, and they are certainly less so if shared with another entity. In cases of shared insurance, it is as if the debtor and the non-debtor have a joint interest in property. If the proceeds of the shared insurance are exclusively channeled to the debtor's bankruptcy trust to satisfy the debtor's claimants, only the debtor's interest is recognized. In order to balance the equation, courts that have permitted the channeling of shared insurance policies have also permitted the release of claims against the non-debtor beneficiary, effectively including the claimants of the non-debtor co-insured in the debtor's bankruptcy plan.[288]

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[285] *Id.*

[286] *Id.* at 93.

[287] *See, e.g.*, *In re* Forty-Eight Insulations, Inc., 149 B.R. 860 (N.D. Ill. 1992) (holding debtor subsidiary cannot extinguish rights of former parent company in shared policies).

[288] Often, the claimants of the debtor and the non-debtor co-insured are the same. For example, in the BSA bankruptcy, individual victims of sexual assault might have claims against both the Boy Scouts and its co-insured local council. By channeling the insurance policy into the BSA bankruptcy and providing releases to both the insurer and the co-insured, the case obviates the need for claimants to sue the local council separately, and the local council's right as an insured beneficiary is preserved.

We recognize the valid policy justifications for extending releases to cover the non-debtor beneficiaries of a shared insurance policy and their covered claimants. Doing so streamlines and facilitates incorporation of insurance proceeds into the debtor's bankruptcy estate. Without the use of releases, the proceeds of a shared insurance policy must be distributed according to other legal principles, as determined through separate legal proceedings. The parties would likely need to litigate what portion of the policy to which each is entitled. If the policy is insufficient to satisfy all the claims against both beneficiaries, the co-insured might also file for bankruptcy, creating a situation in which insurance proceeds would need to be divided between the two bankruptcy estates. But even with both parties in bankruptcy, litigation would still be necessary, imposing costs on all parties and correspondingly reducing the available distribution. Surely, it would be cleaner and easier to resolve all claims against the policy in a single proceeding.

However, we do not read section 1123(b)(3) to stretch that far. As we have described, the statute allows a plan to "provide for the settlement or adjustment of any claim or interest belonging to the debtor or to the estate."[289] The claims against a co-insured beneficiary would be held by the co-insured's claimants, not the debtor or the debtor's estate, and the portion of the proceeds used to satisfy those claims would be that portion designated for the co-insured, not the debtor. We do read the statute to say that a plan may provide for a settlement between the two insured parties, allocating the rights of their respective creditors to insurance proceeds.[290] But releases for co-insured parties are not second-party releases, as we have described them.

In the long term, the possibility of litigation on the issue of shared insurance may encourage the market to construct more certain language in relevant policies, clarifying the extent and limits of coverage in the event of a possible bankruptcy. The law may also develop a more elegant approach to accomplish the distribution of shared insurance policy proceeds. In the meantime, we recognize the limits of our proposal, which will resolve some of the issues arising with liability insurance in mass tort bankruptcies, but certainly not all.

[289] 11 U.S.C. § 1123(b)(3).

[290] Of course, any allocation agreed upon between the parties would also be subject to rules regarding fraudulent conveyance. In other words, the co-insured parties could not agree for one insolvent party to give up its rights to the insurance policy without receiving reasonably equivalent consideration. *See id.* at § 548.

2. *Indemnification of Directors and Officers*

Second-party releases may be applied outside the context of liability insurance. Although many of the releases previously offered to directors, officers, managers, and shareholders would be unavailable after the ruling in *Purdue*, we identify limited circumstances in which releases for these individuals should continue to be upheld as second-party releases. Our analysis would only support releases in favor of these individuals when the claims are "derivative." That is, second-party releases should be upheld when the claims might have been brought by the bankruptcy estate.

A corporation, as a legal fiction, cannot act for itself. Rather, the corporation's directors, managers, and employees act on its behalf. These individuals are personally liable for their tortious actions. Under the doctrine of vicarious liability, the corporation is also liable for the actions of its corporate agents. In most cases, the corporation is likely to have more available assets, and so lawsuits are frequently pursued against the corporate entity as the primary defendant, rather than the individual directors, managers, and employees. A related reason for proceeding in this fashion is the common use of indemnification agreements, pursuant to which the corporation acts as an effective insurer for its personnel.

Each state has its own legal framework establishing the scope and terms under which a corporation may indemnify directors and officers.[291] Indemnification statutes typically contain a mandatory part, delineating circumstances in which a corporation is *required* to indemnify directors and officers, and a permissive part, describing the extent to which a corporation *may* indemnify directors and officers.[292] States regulate indemnification provisions in part to prevent corporate officers from escaping liability for corporate looting, but also to ensure that corporate officials who are entirely innocent of misconduct can recover their litigation expenses.[293] Insofar as corporations provide social value, good public policy would encourage (or at least not discourage) qualified individuals from serving as directors and officers. Therefore, the law will shield individuals from the costs of legal challenges

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[291] *See, e.g.*, Robert P. McKinney, *Protecting Corporate Directors and Officers: Indemnification*, 40 VAND. L. REV. 737, 737 n.1 (1987) (listing all fifty states' indemnification statutes).

[292] *See* K.G. Jan Pillai & Craig Tractenberg, *Corporate Indemnification of Directors and Officers: Time for a Reappraisal*, 15 U. MICH. J.L. REFORM 101, 111 (1981).

[293] *See id.* at 111–12.

relating to their service to corporations, especially when they prevail on those challenges.[294]

However, indemnification clauses do not eliminate the distinction between corporate assets and the individual assets of officers and directors, nor the distinction between corporate liability and individual liability. If a corporate debtor files for bankruptcy, the property of the estate does not presumptively include the property of its officers and directors (even if they are also shareholders of the estate, under theories of limited liability). Nor does the bankruptcy filing affect claims against the individuals for their actions.

When officers and directors hold indemnification rights against the debtor, those rights amount to a claim against the bankruptcy estate. In many cases, indemnification rights may be separately insured, giving officers and directors rights against the insurance proceeds, either as direct beneficiaries or secondary beneficiaries.[295] In cases where liability does not exceed the policy benefit, this insurance should obviate the need for a release, because claims against the officers and directors can be paid through the policy. In situations where liability exceeds the policy benefit, either because the tortious behavior is not covered by the policy or the damages exceed the policy cap, individual officers and directors may have a claim against the debtor for the remainder under the indemnification agreement.[296]

It was this scenario that troubled the dissent in *Purdue*. The dissent observed that "creditor claims against indemnified non-debtors are essentially the same as creditor claims against the debtor business itself."[297] This conclusion presupposes that a bankrupt debtor is obligated to fulfill the terms of the indemnification, so that it is the same pool of money satisfying claims against both entities. But that presumption is belied by relevant Code provisions;[298] as

[294] Indemnification is superior to an alternative system in which directors and officers would negotiate for higher salaries to offset the risk of possible liability down the road, being more targeted and therefore more efficient.

[295] Historically, courts have excluded the proceeds of D&O insurance from the debtor's bankruptcy estate. *See* Louisiana World Expo., Inc. v. Federal Ins. Co. (*In re* Louisiana World Expo., Inc.) 832 F.2d 1391 (5th Cir. 1987).

[296] *See* George Ong, *Directors and Officers Insurance Proceeds in Bankruptcy: The Impact on an Estate and Its Claimants*, 13 BANKR. DEV. J. 235, 260 (1996). In many cases, tortious behavior not covered under an applicable insurance policy would likely fall outside the right to indemnification, i.e., for acts not taken in good faith.

[297] Harrington v. Purdue Pharma, LP, 603 U.S. 204, 239 (2024) (Kavanaugh, J., dissenting).

[298] *See* 11 U.S.C. §§ 502(e)(1)(B), 510(c); *see also* Boyle, *supra* note 30, at 441; Levitin, *supra* note 13, at 446.

observed by the majority opinion, the courts may disallow or equitably subordinate claims for indemnification.[299]

It may be that subordination of indemnification claims is undesirable as a policy matter. Indemnity rights reduce the risk of managing large corporations whose actions may cause damages far exceeding individuals' ability to compensate. But subordination of these claims may also be consistent with good policy. We can anticipate situations where indemnification might wrongfully shield individuals from the harmful effects of their actions. For example, if individual officers and directors have acted in bad faith, as was found in *Purdue*, they should not enjoy indemnification by the corporation.

As many observed, the Sacklers were not themselves in bankruptcy, although they were eligible to file.[300] If officers and directors are rendered insolvent, because the claims against them exceed their ability to pay, they may use the bankruptcy system to equitably distribute available assets. Individuals who have engaged in fraud or willful or malicious injury, both allegations that also arose in the *Purdue* context, cannot discharge those liabilities.[301] Granting releases to the Sacklers for their alleged fraud thus afforded them protections beyond what they would have enjoyed in their own bankruptcy proceedings, one of the objections to those releases raised by the majority opinion in *Purdue*. [302] Under the Court's ruling in *Purdue*, such releases cannot stand. If individuals like the Sacklers desire the benefits of the bankruptcy discharge, they must file for bankruptcy themselves.

But we encourage courts not to take the *Purdue* ruling too far. When the claims against officers and directors to be released are held by the corporation itself, we consider an offer of settlement terms to be sanctioned under section

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299 *Purdue Pharma, LP*, 603 U.S. at 225 n.7.

300 *See, e.g.*, Jason Jia-Xi Wu, *How do "Bankruptcy Grifters" Destroy Value in Mass Tort Settlements?* In re Purdue Pharma *as a Bargaining Failure*, 32 AM. BANKR. INST. L. REV. 243, 265 (2024). In contrast, insurance companies are one of the few entities that are excluded from bankruptcy altogether. *See* 11 U.S.C. § 109(b) (making all persons eligible for chapter 7 except railroads, domestic insurance companies, banks, and similar entities). The common explanation for this exclusion is that insurance companies are heavily regulated by state law, which provides for rehabilitation or liquidation proceedings under supervision of the state insurance commissioner. *See, e.g.*, *In re* Baldwin-United Corp., 55 B.R. 885, 907 (Bankr. S.D. Ohio 1985) (observing the role of the state insurance commissioner in supervising the solvency insurance companies).

301 *See* 11 U.S.C. § 523(a)(2), (4), and (6); Harrington v. Purdue Pharma, LP, 603 U.S. 204, 222 (2024).

302 *See Purdue Pharma, LP*, 603 U.S. at 222. The releases would also have protected the Sacklers from debt that is not dischargeable under section 1141(d)(6). *See also* Lipson & Foohey, *supra* note 34.

1123(b)(3).[303] Put another way, we believe the law does and should permit the debtor to negotiate directly with its own directors and officers to settle its own claims. Examples of claims held by the debtor might be derivative actions for wrong done against the corporation, or even for actions to recover fraudulent conveyances, which may be brought by individual creditors but accrue to the benefit of the estate in bankruptcy.[304] Had the *Purdue* plan limited the Sacklers' release to such claims, we believe the release should have been upheld, because the releases would have constituted "the settlement or adjustment of any claim or interest belonging to the debtor or to the estate[,]" and accordingly been authorized by statute.[305]

We also draw a distinction between third-party releases for liability arising from actions taken before bankruptcy and exculpation agreements releasing directors, officers, managers, and shareholders from liability for actions taken as part of a bankruptcy case. Most commentators find exculpation clauses to be innocuous[306] and they have historically been allowed even in those jurisdictions that have disallowed third-party releases.[307] The policy incentives behind exculpation clauses are consistent with provisions in the Code that prioritize repayment of trustees and provide limited qualified immunity. If exculpation agreements are struck down under the reasoning of *Purdue*, Congress should reinstate their enforceability through statutory amendment.

3. Affiliated Entities

The analysis for non-filing corporate affiliates of the debtor, such as a parent, subsidiary, or sister corporation, is similar to that of directors and officers, but with a twist. A common argument in favor of permitting third-party releases to corporate affiliates is that the debtor holds potential claims against the affiliate entity, and permitting others to act against the affiliate would reduce the debtor's likelihood of recovering those claims. In other words, the releases ensure that the debtor need not compete with other creditors for repayment from its affiliate. This argument was raised in *In re Caesars Entertainment Operating Company*,

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[303] The *Purdue* dissent also reached this conclusion. *See Purdue Pharma, LP*, 603 U.S. at 247 (Kavanaugh, J., dissenting).

[304] *See* 11 U.S.C. § 550(a); *see Purdue Pharma, LP*, 603 U.S. at 262 (Kavanaugh, J., dissenting).

[305] *See* 11 U.S.C. § 1123(b)(3)(A).

[306] *See, e.g.*, Christopher Hampson, *Bankruptcy Fiduciaries*, 110 IOWA L. REV. (forthcoming 2025); Sather, *supra* note 257, at 83.

[307] This is not to suggest they are entirely without controversy. *See, e.g.*, Nexpoint Advisors, LP v. Highland Cap. Mgmt., LP (*In re* Highland Cap. Mgmt., LP), 48 F.4th 419 (5th Cir. 2022) (exploring the appropriate scope of exculpation clauses).

which admittedly involved neither a mass tort nor a third-party release, but is nonetheless illustrative.

In *Caesars*, the parent corporation, Caesars Entertainment Corp. ("Caesars"), was alleged to have fraudulently conveyed assets of the debtor, Caesars Entertainment Operating Company ("Operating Company"), to a separate holding company, simultaneously purporting to eliminate valuable guaranties held by creditors.[308] Creditors wished to sue Caesars for the guaranties, but Operating Company persuaded the bankruptcy court to impose a temporary injunction against the lawsuits, to ensure that Operating Company's fraudulent conveyance claims would not be swamped in the ensuing litigation.[309] The debtor had argued that the guaranty suits would "thwart" its restructuring effort, "which depends on a substantial contribution from [Caesars] in settlement of [Operating Company's] claims against it[.]"[310] The possibility that the debtor's recovery might be diminished due to creditor collection efforts is arguably a concern for the preservation of the debtor's estate.

But this concern only arises when the affiliate entity (in the Caesars example, the parent) is insolvent. If the entity can fully pay all its obligations, there is no "race to the courthouse" from the debtor's perspective, and no real concern that the debtor will not be able to recover against the entity—by lawsuit or settlement—without the need for a third-party release. If the affiliate is insolvent, then logic suggests it should file its own bankruptcy proceeding, pursuant to which it may enjoy the benefits of the automatic stay and the discharge, again without the need for any release. Of course, a second-party release can and should still be granted if settlement can be reached regarding the debtor's claims against the affiliate.

4. Unrelated Joint Tortfeasors

The final category of releases authorized in the caselaw is by far the most expansive. Some plans have granted a release to entities wholly removed from the debtor in exchange for their contribution to the channeling trust. These contributions could not logically be called assets of the debtor's estate; they are instead negotiated settlement payments, except that the negotiation is

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308 Caesars Ent. Operating Co. v. BOKF, N.A. (*In re* Caesars Entm't. Operating Co.,) 808 F.3d 1186, 1187–88 (7th Cir. 2015). *See generally* SUJEET INDAP & MAX FRUMES, THE CAESARS PALACE COUP: HOW A BILLIONAIRE BRAWL OVER THE FAMOUS CASINO EXPOSED THE POWER AND GREED OF WALL STREET (2021).

309 *In re* Caesars Entm't. Operating Co., 808 F.3d at 1187–88.

310 *Id.* at 1188 (finding that section 105(a) permitted imposition of the injunction).

accomplished by the debtor on behalf of its creditors, whose participation might be limited to a class vote on the plan. Normally, a settlement over the objection of class members could not be accomplished: each individual plaintiff would have full control over the settlement of his claim against third parties.

Because the releases provide third parties with the opportunity to effectively piggyback on the debtor's bankruptcy to coercively settle mass tort claims, Professor Lindsey Simon has referred to this practice as "grifting."[311] Despite the presumptive manipulation suggested by that terminology, consolidated settlement can arguably improve case outcomes not only for the so-called "grifters," but for tort claimants as well. As explained above, the cost of litigating a tort case may be unrealistically high for many victims. Weaknesses inherent in other collective action models limit tort plaintiffs' options for streamlined resolution. Even efforts to put other joint tortfeasors through separate bankruptcy proceedings may be thwarted. At least some courts will not permit a company to be in bankruptcy without obvious financial distress, making bankruptcy for plainly solvent tortfeasors impossible, even if bankruptcy proceedings could preserve value by encouraging settlement.[312]

Third-party releases can encourage cooperation and facilitate global peace. Grand bargains involving scores of different parties, as we saw in the *Boy Scouts* case, would likely be impossible without them. But ultimately, the funds negotiated into the channeling trust are not estate assets. They are external to the bankruptcy case and to the bankruptcy debtor. One could imagine a world where bankruptcy law permitted the filing of entire industries (rather than individual debtors), without reference to whether individual entities were solvent. For example, the Code might permit all Roman Catholic Dioceses, parishes, schools, and other entities to file one omnibus bankruptcy case,[313] consolidating sex abuse claims and channeling them into a single trust, to which contributions would be made from the various entities based on estimates of their individual liability and capability to pay. This would be in essence an *ex post* system of diocese liability insurance, in which all participants would be required to contribute. While innovative and potentially cost-saving for victims, it would be

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311 *See generally* Simon, *supra* note 11.

312 *See, e.g.*, LTL Mgmt., LLC v. Those Parties Listed on Appendix A to Complaint (*In re* LTL Mgmt., LLC), 64 F.4th 84 (3d Cir. 2023) (requiring a putative debtor to be in financial distress to avoid dismissal for lack of good faith).

313 As of 2024, dozens of U.S. Catholic religious organizations have filed for relief in bankruptcy court. *See* Marie T. Reilly, *Now and At the Hour of Our Debt: Catholic Dioceses in Bankruptcy*, 85 CANON L. SOC. AM. 226, 230 (2023) (noting that 24 cases have concluded and 13 more are pending).

a dramatic departure from our present understanding of the limits of bankruptcy law.

As stated in the Supreme Court’s *Purdue* decision, the debtor’s estate is defined to include all the debtor’s assets.[314] Left unstated but assumed, the debtor’s estate is also limited to the debtor’s assets and does not reasonably include funds proffered by third parties in exchange for the court forcing the debtor’s creditors to release their claims against those third parties. Current bankruptcy law thus exercises no explicit jurisdiction over either those funds or those claims, even if their resolution could be streamlined through bankruptcy proceedings.

5. How Bankruptcy Laws Failed the Tort Victims in Purdue Pharma

The temptation to use creative solutions to add to the limited assets contributed by the debtor is strong in any case where claimants will otherwise be paid less than full compensation. The temptation is particularly strong in situations where claimants are involuntary creditors of the debtor who have been tortiously harmed. Justice cries out for tort victims to be compensated, and if full compensation cannot be accomplished through distribution of the debtor’s assets alone, it is alluring to expand that distribution by looking outside the limits of the debtor’s estate.

Purdue was a particularly attractive case for granting third-party releases, because of the heartbreaking damages caused by the debtor’s tortious behavior and consequential insolvency. The releases were offered in an effort to recover what many viewed as rightful estate assets because the Sacklers’ withdrawal of funds from the company could be considered fraudulent conveyances.[315] The pro rata portion of the $6 billion offered by the Sacklers in exchange for the releases was more than the average litigant could possibly hope to recover individually, and collectively more than what the debtor could likely recover through litigation.[316]

Presumably, tort claimants might have brought fraudulent conveyance actions against the Sacklers before the bankruptcy filing, had they been aware of the transfers and/or sufficiently organized to coordinate collective efforts. But

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[314] *See* Harrington v. Purdue Pharma, LP, 603 U.S. 204, 214 (2024).

[315] The funds pulled from the company beginning in 2007 would likely have satisfied the elements of a fraudulent conveyance, had the transfers occurred within the relevant statute of limitations. *See* 11 U.S.C. § 548.

[316] *See Purdue Pharma, LP*, 603 U.S. at 277–78 (Kavanaugh, J., dissenting).

state and federal governments, while they did sue the company and some individual officers relatively early, failed to recognize that the opioid pandemic would render Purdue Pharma insolvent, or that management was siphoning away company property. Individual claimants—many of whom were suffering from the debilitating effects of opioid addiction—were likely too unsophisticated to think of pursuing such a claim, and likely without resources to do so effectively.[317]

Perhaps the bankruptcy should have been brought sooner, before the company had been so thoroughly looted.[318] But the current system largely relies on voluntary bankruptcy filings, giving a debtor's management considerable control over the timing of the filing. Although corporate bankruptcy has always been intended for the benefit of creditors, and for much of history was initiated by creditors, modern law introduces strong disincentives for involuntary filings and affords no real incentives to those who do file.[319] Worse, the only creditors who can file are those holding an undisputed claim, which effectively eliminates the potential for an involuntary filing by tort victims who have not yet obtained a judgment.[320] Claimants who have already obtained a judgment against the debtor have no incentive to bring an involuntary case insofar as they may be able to recover from the debtor directly and thus "win" the race to the courthouse.[321] This leaves few likely prospects for an involuntary bankruptcy filing.

The most challenging aspect to claimant recovery for the *Purdue* victims—and one not rectified by our proposal here—is the difficulty of recovering from the Sacklers now. Based on the figures cited in the *Purdue* bankruptcy, and the near complete cross-over of liability claims between the company and the Sacklers themselves, the family is hopelessly insolvent. The best available collective remedy for recovering from an insolvent third-party co-liable with a bankruptcy debtor, now that *Purdue* has taken the offer of third-party releases largely off the table, is to put the third-party into its own bankruptcy proceeding. But a family cannot be considered a single debtor in bankruptcy, and there are no mechanisms for consolidating the bankruptcies of multiple unmarried

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[317] Side effects of opioid addiction can include homelessness, incarceration, and hospitalization, all of which interfere with an individual's ability to conduct litigation.

[318] As other scholars have noted, the Sackler family only decided to put the company into bankruptcy after losing motions to dismiss direct suits against them. Lipson & Foohey, *supra* note 34.

[319] *See generally* 11 U.S.C. § 303. *See also* Richard M. Hynes & Steven D. Walt, *Revitalizing Involuntary Bankruptcy*, 105 IOWA L. REV. 1127, 1127 (2020).

[320] Roe, *supra* note 6, at 3 n.9.

[321] Preference law may somewhat discourage this route, but as currently operated is an exceptionally weak deterrence. *See* Brook Gotberg & Richard Squire, *The Insecure Creditor's Dilemma* (forthcoming).

individuals. Accordingly, claimants seeking to recover from the individual Sacklers would need to obtain involuntary petitions—based on undisputed claims—against each family member. There are fifteen Sackler children born to the original three Sackler brothers, many of whom have their own families and children.

A separate concern is that bankruptcy largely recognizes state laws regarding spendthrift trusts and other asset partitioning devices. Thus, even if claimants could successfully bankrupt Richard Sackler, the former chairman and president of Purdue who was head of marketing and the moving force behind the devilment of OxyContin,[322] his personal assets are likely out of reach. It is probable that the *Purdue* claimants will never be made whole.[323]

CONCLUSION

Chapter 11 is not a perfect vehicle for the resolution of mass tort cases, but it is, to date, the most successful way to balance the rights of all parties when the defendant is insolvent. Mass tort bankruptcies like *Johns-Manville*, *A.H. Robins*, *Dow Corning* and others were successful because releases provided an avenue for accessing insurance proceeds, for dealing with shared insurance, and for providing for contributions from both related and unrelated third-party joint tortfeasors. *Purdue*, by limiting the use of releases in bankruptcy, has required significant reexamination of whether and how releases in bankruptcy can be used to facilitate the resolution of mass tort cases. Our proposal provides a pathway for recovering what is often the primary asset for compensating claimants in mass tort cases—insurance policy proceeds. In cases where liability and coverage are established, courts should recognize that policy proceeds constitute property of the estate, and the settlements regarding those policies may be provided for under the plan. This recharacterization of policy proceeds allows for second-party releases that should continue to be available even after *Purdue.*

322 Richard Sackler is the character portrayed by Matthew Broderick in the popular Netflix series *Painkiller*, the main villain in the popular retelling of the story of Purdue Pharma. Micah Fitzerman-Blue & Noah Harpster, *Painkiller*, NETFLIX (2023), https://www.netflix.com/title/81095069.

323 Negotiations in the wake of the Supreme Court's ruling raise the possibility that the Sackler family will increase their contribution and/or agree to only consensual releases. *See* Alexander Gladstone, *Purdue's Sacklers Back New Bankruptcy Settlement for Opioid Lawsuits*, WALL ST. J. (Jan. 13, 2025, 6:30 AM) https://www.wsj.com/articles/purdues-sacklers-back-new-bankruptcy-settlement-for-opioid-lawsuits-fc4df44d.