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The Great Escape: Exploring Chapter 11's Allure to Mass Tort Defendants

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INTRODUCTION

At 19 years old, Cory Boland was prescribed opioid painkillers after a snowboarding accident left him with two plates and 24 screws in his arm.[1] Cory's mother described him as a "happy-go-lucky guy with a need for thrills."[2] Yet, the accident changed him, she said.[3] As a result of the pain from the accident, Cory repeatedly refilled his prescriptions—the beginning of an addiction that he would battle for years.[4] Cory's doctor suddenly moved away, leaving him with no prescriber for his painkillers.[5] Although the pills were gone, his addiction remained.[6] As a result, Cory turned to heroin.[7] After 11 years of battling addiction, Cory lost his life to an opioid overdose.[8]

Tragically, Cory's life was one of over 450,000 lives claimed by a crisis unabated to date—opioid addiction.[9] Historically, opioids were prescribed to terminally ill patients.[10] In the 1990s, however, pharmaceutical companies began aggressive marketing campaigns to expand the prescription opioid market to a larger and more lucrative group of patients and illnesses.[11] As manufacturers minimized the addictive

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* The author is grateful to Professor Margaret S. Thomas for her invaluable guidance and feedback on previous drafts, as well as Brittany W. Flanders and the editors of the *Louisiana Law Review* for their thoughtful edits.

1. Karen Boland, *A Mother's Guilt: My Personal Experience with the Opioid Crisis and What to Do About It*, USA TODAY (June 13, 2018, 5:00 AM), https://www.usatoday.com/story/opinion/2018/06/13/prescription-opioids-depression-accident-addiction-overdose-heroin-column/691348002/ [https://perma.cc/JWT7-3WTU].
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Prescription Opioids DrugFacts*, NAT'L INST. ON DRUG ABUSE, https://www.drugabuse.gov/publications/drugfacts/prescription-opioids [https://perma.cc/3Y5A-P32R] (last visited May 22, 2020).
10. Ben Lesser, *An Overview of the Opioid Epidemic*, DUALDIAGNOSIS.ORG, https://dualdiagnosis.org/infographics/history-of-the-opioid-epidemic/ [https://perma.cc/N2LL-9TZ6] (last updated May 22, 2021).
11. *Opioid Overdose Crisis*, NAT'L INST. ON DRUG ABUSE, https://www.drugabuse.gov/drug-topics/opioids/opioid-overdose-crisis [https://perma.cc/C4QH-FSHJ] (last visited May 27, 2020).

nature of opioids, the volume of prescriptions increased alongside the rising rates of overdose deaths.[12] Today, two million Americans suffer from opioid addiction.[13] To make matters worse, the epidemic's devastating effects are felt far beyond individual addicts.[14] Nearly 80 babies a day are born with opioid withdrawal symptoms.[15] Families of individuals suffering with opioid addiction are exhausting their resources on rehabilitation efforts.[16] In addition, the annual economic burden of prescription opioid abuse carried by the United States is estimated to be $78.4 billion.[17] Recognizing the magnitude of this problem, the United States Department of Health declared the opioid crisis a public health emergency.[18]

Communities began searching for someone to hold legally accountable, and from the beginning, all eyes were fixed on the pharmaceutical companies responsible for putting opioids on the

12. *U.S. Opioid Dispensing Rate Maps*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/drugoverdose/maps/rxrate-maps.html [https://perma.cc/FC9Z-PD3J] (last visited Mar. 5, 2020) (noting an increase in the overall national opioid prescribing rate starting in 2006 and peaking in 2012 at a rate of more than 81.3 prescriptions per 100 persons).

13. *Prescription Opioids DrugFacts*, *supra* note 9.

14. *Data and Statistics About Opioid Use During Pregnancy*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/pregnancy/opioids/data.html [https://perma.cc/D9JR-8RBW] (last visited July 16, 2021).

15. Neonatal Abstinence Syndrome results when infants are exposed to opioids in the womb. Withdrawal symptoms in babies include excessive crying, trembling, seizures, unstable temperature, sweating, and poor feeding and sucking. *Neonatal Abstinence Syndrome*, STANFORD CHILD.'S HEALTH, https://www.stanfordchildrens.org/en/topic/default?id=neonatal-abstinence-syndrome-90-P02387 [https://perma.cc/Z4FZ-YUDJ] (last visited Oct. 20, 2020).

16. *See* Geoff Mulvihill, *Opioid Victims Can Begin Filing Claims Against Purdue Pharma*, ABC NEWS (Jan. 24, 2020), https://abc3340.com/news/nation-world/opioid-victims-can-begin-filing-claims-against-purdue-pharma [https://perma.cc/9HAS-HDHR] (sharing the story of Dede Yoder, a mother who spent her whole retirement savings, approximately $200,000, on doctors' appointments and rehabilitation centers before losing her 17-year-old son to an opioid overdose).

17. *Opioid Overdose Crisis*, *supra* note 11 (explaining that the economic burden of prescription opioid misuse includes the costs of healthcare, lost productivity, addiction treatment, and criminal justice involvement).

18. *Public Health Emergency*, U.S. DEPT. OF HEALTH & HUMAN SERVS., https://www.phe.gov/emergency/news/healthactions/phe/Pages/opioid-6jul2020.aspx [https://perma.cc/3265-P95G] (last visited July 13, 2020).

prescription market.[19] Initially, families, on behalf of their lost loved ones, and individuals suffering from opioid abuse disorder filed suits against opioid manufacturers alleging defective design, failure to warn, and misrepresentation of product dangers.[20] Most of these individual suits were dismissed on summary judgment because of powerful defenses asserted by manufacturers.[21] Plaintiffs reacted by attempting to use class action suits.[22] Ultimately, most of these suits were unsuccessful due to procedural barriers that persist today.[23] As a result, mothers like Cory's and broken families across the nation were denied justice for their loved ones.[24]

In 2018, however, the tides turned when the federal government and thousands of plaintiffs including states, counties, and Native American tribes filed suits against the leading figures in the pharmaceutical drug industry.[25] The government plaintiffs sought redress for their debilitated social institutions and the massive amounts of funds expended on treating the opioid epidemic, including damages for lost productivity, health insurance, criminal justice, and substance abuse treatment.[26] Most of the

19. *See* Rebecca L. Haffajee, & Michelle M. Mello, *Drug Companies Liability for the Opioid Epidemic*, 377 N. ENGL. J. MED. 24 (2017).

20. *See id.*

21. *See, e.g.*, Koenig v. Purdue Pharma Co., 435 F. Supp. 2d 551 (N.D. Tex. 2006); Foister v. Purdue Pharma, L.P., F. Supp. 2d 693 (E.D. Ky. 2003); Franz v. Purdue Pharma Co., No. 05-CV-201-PB, 2006 WL 455998 (D.N.H. 2006); Price v. Purdue Pharma Co., 920 So. 2d 479 (Miss. 2006); Freund v. Purdue Pharma Co., No. 04-C-611, 2006 WL 482382 (E.D. Wis. 2006). It is difficult to persuade a jury that a pharmaceutical drug is defectively designed when it is approved by the Food and Drug Administration. In addition, most states recognize the learned intermediary doctrine as a defense available to manufacturers, which provides that a manufacturer's duty to warn is limited to warning prescribers, while prescribers are responsible for disclosing risks to patients. Furthermore, juries are sometimes persuaded by the argument that intervening factors, such as prescribing practice and patient behavior, contribute to the injury and thus preclude juries from holding manufacturers liable. *See* Haffajee & Mello, *supra* note 19.

22. *See* Haffajee & Mello, *supra* note 19.

23. *See id.* Certifying a class action requires a sufficient degree of similarity across claims, issues, and defenses that is often difficult to satisfy in mass tort cases. Judges are more likely to deny class certification where the factual and legal issues of liability differ between class members so dramatically that individualized questions overwhelm questions common to the class. *See* RICHARD L. MARCUS ET AL., COMPLEX LITIGATION 343–47 (6th ed. 2015).

24. *See* Haffajee & Mello, *supra* note 19.

25. *See, e.g.*, *In re* Nat'l Prescription Opiate Litig., 290 F. Supp. 3d 1375, 1379–80 (J.P.M.L. 2017).

26. *Id.* Suits were also filed in state courts across the country.

federal cases were handled through multidistrict litigation (MDL) in the Northern District of Ohio, and settlement negotiations were promising.[27] Following an influx of lawsuits, however, some pharmaceutical companies filed for Chapter 11 bankruptcy, placing an automatic stay on all pending and future litigation across the country.[28]

Mass tort litigation presents significant obstacles to resolution.[29] As exemplified by the opioid litigation, mass tort cases involve complex causation issues, high transaction costs, and numerous distinct classes of victims.[30] Typically, the judicial system relies on three main procedural devices to resolve mass tort litigation: (1) class actions, (2) multidistrict litigation, and (3) bankruptcy proceedings.[31] Procedural rules have important effects on litigation outcomes, and unfortunately, no system has proven to be flawless.[32]

Adding to these complexities, a common defense strategy has emerged among mass tort defendants in attempts to regain control of litigation.[33] Mass tort defendants are increasingly invoking Chapter 11 bankruptcy proceedings to escape unfavorable litigation.[34] The incentives for this practice are clear: the bankruptcy process offers significant and unique advantages to defendants facing enterprise-threatening liability that are not available elsewhere.[35] A closer look at the method, however, reveals several problems.[36] First, defendants are exploiting statutory loopholes in the Bankruptcy Code to bind both current and future claimants to settlement agreements while simultaneously discharging themselves from any future liability.[37] Second, reliance on Chapter 11 as a means for

27. *Id.*

28. *See, e.g.*, *In re* Purdue Pharma, No. 19-23649, 619 B.R. 38 (Bankr. S.D.N.Y. 2019); *In re* Insys Therapeutics, Inc., No. 19-11292 (Bankr. D. Del. filed June 10, 2019); *In re* Mallinckrodt Plc., No. 20-12522 (Bankr. D. Del. filed Oct. 12, 2020).

29. *See* William W. Schwarzer, *Settlement of Mass Tort Class Actions: Order Out of Chaos*, 80 CORNELL L. REV. 837 (1995).

30. *See id.*

31. *See* Alexandra D. Lahav, *The Continuum of Aggregation*, 53 GA. L. REV. 2 (2019) [hereinafter Lahav, *The Continuum of Aggregation*].

32. *See* THOMAS E. WILLGING, FED. JUD. CTR., APPENDIX C: MASS TORTS PROBLEMS & PROPOSALS: A REPORT TO THE MASS TORTS WORKING GROUP 8–22 (1999).

33. *See generally* Samir D. Parikh, *The New Mass Torts Bargain* FORDHAM L. REV. (forthcoming 2022).

34. *See id.*

35. *Id.*

36. *Id.*

37. *Id.*

resolving mass tort litigation is misplaced, and the goals of aggregate litigation are better served by MDL than bankruptcy.[38] This shift is significant; although the bankruptcy system undoubtedly offers some advantages to mass tort resolution, the system harbors many drawbacks as well.[39] This Comment argues that MDL is the superior option for resolving mass tort disputes.

This Comment begins by illustrating the complexities of mass tort cases that threaten the ability to achieve comprehensive resolution. Part I emphasizes that the very nature of mass tort litigation precludes resolution that is focused solely on individualized justice. Part II of this Comment surveys the evolution of aggregative systems for mass tort resolution, from its class action origins to its modern posture in MDL and Chapter 11 bankruptcy proceedings. Part III of this Comment contends that there is an emerging trend among corporate defendants to escape traditional litigation by filing for Chapter 11 bankruptcy. This Part argues that the abusive use of bankruptcy power is problematic because it accrues mostly to the benefit of corporate defendants. Further, this Part posits that MDL is a superior device for resolving mass tort litigation. Finally, Part IV proposes that Congress should revise the Bankruptcy Code to close statutory loopholes and to disincentivize the misuse of bankruptcy power by corporate tortfeasors. Part IV concludes by suggesting that Congress should enact specific legislation that reflects a higher standard for entering Chapter 11 proceedings to prevent bad faith filings, while ensuring that the bankruptcy forum is available to legitimate, good-faith defendants.

I. MASS TORT LITIGATION

For decades, the American judicial system has grappled with the fair and efficient resolution of mass tort liability.[40] A mass tort involves hundreds to thousands of victims injured by the harmful acts of one or more defendants.[41] Historically, mass injuries have been attributable to

38. *See generally* WILLGING, *supra* note 32, at 8–22.

39. *See* Parikh, *supra* note 33; *see also* Douglas G. Smith, *Resolution of Mass Torts in the Bankruptcy System*, 41 U.C. DAVIS L. REV. 1622, 1663 (2008).

40. *See* Alan N. Resnick, *Bankruptcy as a Vehicle for Resolving Enterprise-Threatening Mass Tort Liability*, 148 U. PA. L. REV. 2045 (2000).

41. *See id.*

toxic exposure,[42] products liability,[43] and disaster.[44] The sheer volume of claims sharing common issues and actors distinguishes mass torts from ordinary civil litigation.[45]

A. A Glance at the History of Mass Torts

Mass tort litigation has become more prevalent over the last 50 years, overwhelming court dockets and disrupting industries.[46] In the 1970s, a mass tort case emerged when thousands of United States Military veterans developed a variety of cancers as a result of exposure to the herbicide Agent Orange.[47] The veterans and their families sued the chemical

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42. *See, e.g.*, *In re* Joint E. and S. Dist. Asbestos Litig., 129 B.R. 710 (E.D.N.Y. 1991).

43. *See, e.g.*, *In re* Vioxx Prods. Liab. Litig., 501 F. Supp. 2d 789, 790 (E.D. La. 2007); *see also In re* Actos (Pioglitazone) Prods. Liab. Litig., No. 611-MD-2299, 2014 WL 2872299 (W.D. La. June 23, 2014).

44. *See, e.g.*, *In re* Terrorist Attacks on Sept. 11, 2001, No. 03-MDL-1570 (S.D.N.Y. 2016); *In re* Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico, on Apr. 20, 2010, 808 F. Supp. 2d 943, 963 (E.D. La. 2011); *In re* MGM Grand Hotel Fire Litig., 570 F. Supp. 913 (D. Nev. 1983).

45. *See* Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 965 (1993).

46. From June 2004 to June 2005, per federal judgeship, there were 532 actions filed, 480 pending actions, 522 terminations, and 19 completed trials. The median duration of civil actions from filing to trial was 22.9 months. From June 2018 to June 2019, per federal judgeship, there were 599 new actions filed, 682 actions pending, 634 terminations, and 17 completed trials. The median duration of civil actions from filing to trial was 27.2 months, with 16.1% of cases being over three years old. *See* U.S. CTS., FED. CT. MGMT. STAT.: U.S. DIST. CTS., https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0630.2020.pdf [https://perma.cc/ATR5-F2C6] (last updated on June 30, 2020). In the context of multidistrict litigation (MDL) in particular, the number of actions transferred to an MDL as tag-alongs from 1973 to 2019 has increased by approximately 5,206.96%. *See* U.S. JUD. PANEL ON MULTIDISTRICT LITIG., CALENDAR YEAR STATISTICS, CALENDAR YEAR SUMMARY OF JPML ACTIVITY 3–6 (1973–2019), https://www.jpml.uscourts.gov/sites/jpml/files/JPML_Calendar_Year_Statistics-2019_1.pdf [https://perma.cc/HM2P-7USR]; *see also* Hensler & Peterson, *supra* note 45, at 964 ("Lawyers, judges, and business executives no longer wonder whether or not there will be another mass tort, but rather what the next mass tort will be.").

47. *See In re* Agent Orange Prod. Liab. Litig., 475 F. Supp. 928 (E.D.N.Y. 1979); *see also* Alexis Abboud, *In re Agent Orange Product Liability Litigation (1979–1984)*, THE EMBRYO PROJECT ENCYCLOPEDIA (Apr. 4, 2017),

manufacturers of Agent Orange, and after five years of litigation, the parties agreed to a $180 million settlement.[48] The 1970s also marked the beginning of the asbestos litigation, the country's "longest-running mass tort litigation."[49] The litigation arose as a result of individuals' exposure to asbestos, which causes slowly manifesting and sometimes fatal diseases.[50] In the 1990s, mass products liability litigation ensued when the attorneys general of 46 states sued the tobacco industry's leading manufacturers for deceptive marketing practices and concealing the addictive properties of nicotine.[51] The states sought recovery for the costs incurred to support citizens suffering from chronic, smoking-related illnesses.[52] The tobacco litigation ended with the so-called master settlement agreement, which was recognized as "the largest redistribution of the costs of corporate wrongdoing" to date.[53]

The early 2000s witnessed a pair of mass disasters: the terrorist attacks of September 11th and the BP oil spill.[54] After the terrorist-orchestrated airplane crashes of September 11, 2001, injured parties and their family members filed thousands of lawsuits, pitting victims' families and sick

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https://embryo.asu.edu/pages/re-agent-orange-product-liability-litigation-1979-1984 [https://perma.cc/QQ89-Y8FH]; U.S. DEPT. OF VETERANS AFFAIRS, AGENT ORANGE, https://www.va.gov/disability/eligibility/hazardous-materials-exposure/agent-orange/ [https://perma.cc/ZW9H-4B2B] (last updated Sept. 18, 2020) ("Agent Orange was a tactical herbicide in the U.S. military used to clear leaves and vegetation for military operations mainly during the Vietnam War.").

48. According to the veterans' lawyers, "[t]he award was the largest ever won by a class of claimants who sued for wrongful injury." *See* Ralph Blumenthal, *Veterans Accept $180 Million Pact on Agent Orange*, N.Y. TIMES, May 8, 1984, at A1.

49. Stephen J. Carroll et al., *Asbestos Litigation*, RAND CORP., 2005, https://www.rand.org/pubs/monographs/MG162.html [https://perma.cc/HJA9-ASRW] (last visited Oct. 20, 2020).

50. *Id.*

51. *See generally* Gregory W. Taylor, *Big Tobacco, Medicaid-Covered Smokers, and the Substance of the Master Settlement Agreement*, 63 VAND. L. REV. 1081, 1095–96 (2010); *see also* Allison Torres Burtka, *The Tobacco Cases: Taking On Big Tobacco*, AM. MUSEUM OF TORT LAW (June 13, 2016), https://www.tortmuseum.org/the-tobacco-cases/ [https://perma.cc/R89H-G4NB].

52. *See generally* Taylor, *supra* note 51, at 1095–96.

53. *Id.*

54. *See* Chris Francescani & Scott Michels, *Who Should Pay for 9/11?*, ABC NEWS (Jan. 8, 2009, 12:10 AM), https://abcnews.go.com/TheLaw/story?id=3579255&page=1 [https://perma.cc/7WRF-32YF]; *see also* Reuters, *BP 2010 Oil Spill Settlement: A Timeline of Litigation*, NBC NEWS, https://www.nbcnews.com/news/us-news/bp-oil-spill-settlement-timeline-litigation-n385736 [https://perma.cc/G6VR-CMLT] (last updated July 3, 2015, 1:41 AM).

disaster-relief workers against airlines and the United States government.[55] With billions of dollars at stake, Congress established the "September 11th Victim Compensation Fund" to settle individual claims for injuries and deaths caused by the terrorist attacks and the debris removal efforts following the disaster in exchange for surrendering the right to file future lawsuits.[56] Then, in 2010, the Deepwater Horizon rig exploded, killing 11 workers and releasing "millions of barrels of crude oil into the Gulf of Mexico."[57] Individuals and businesses adversely affected by the Deepwater Horizon incident filed actions against BP—the multinational oil and gas firm responsible for the spill—for the loss of money and property, resulting in a $7.8 billion class action settlement.[58] The federal government and several states also litigated against BP for five years before reaching an $18.7 billion settlement—the "largest settlement with a single entity in U.S. history."[59] More recent mass tort litigation involves Big Pharmaceutical's opioids;[60] Monsanto's Roundup;[61] Juul Labs' e-

55. *See* Francescani & Michels, *supra* note 54.

56. *See Serving the 9/11 Community for Decades to Come*, SEPT. 11TH VICTIM COMP. FUND, https://www.vcf.gov [https://perma.cc/Y9PP-N5R7] (last visited Oct. 20, 2020) ("The signing of the 'Never Forget the Heroes, James Zadroga, Ray Pfeifer, and Luis Alvarez Permanent Authorization of the September 11th Victim Compensation Fund Act' in July 2019, fully funded the VCF to pay all eligible claims and extended the claim filing deadline to October 1, 2090.").

57. *See* Reuters, *BP 2010 Oil Spill Settlement: A Timeline of Litigation*, *supra* note 54.

58. *See id.*

59. *Id.*

60. *See, e.g.*, *In re* Nat'l Prescription Opiate Litig., No. 2804, 290 F. Supp. 3d 1375, 1379–80 (J.P.M.L. 2017); *In re* Purdue Pharma, No. 19-23649, 619 B.R. 38 (Bankr. S.D.N.Y. 2019); *In re* Insys Therapeutics, Inc., No. 19-11292 (Bankr. D. Del. 2019). More than 2,400 local and state governments filed lawsuits seeking to hold leading pharmaceutical manufacturers and distributors liable for the opioid epidemic plaguing their constituencies. *See* Colin Dwyer, *Your Guide To The Massive (And Massively Complex) Opioid Litigation*, NPR (Oct. 15, 2019), https://www.npr.org/sections/health-shots/2019/10/15/761537367/your-guide-to-the-massive-and-massively-complex-opioid-litigation [https://perma.cc/2HZF-QGQ4].

61. *In re* Roundup Prods. Liab. Litig., 214 F. Supp. 3d 1346 (J.P.M.L. 2016). Thousands of individuals filed lawsuits against Monsanto, the manufacturer of the herbicide Roundup, after contracting non-Hodgkin's Lymphoma because of exposure to the chemical. *Id.*

cigarettes;[62] and sexual abuse cases within USA Gymnastics,[63] the Catholic Church,[64] and Boy Scouts of America.[65]

B. Problems Posed by Mass Tort Disputes

The magnitude and complexity of mass tort litigation presents challenges to fair and efficient resolution for all parties involved.[66] Mass tort litigation is difficult to resolve because of (1) high transaction costs and delays; (2) complex factual and legal issues; (3) latent injuries and unidentifiable victims; and (4) the need for some semblance of finality.[67]

1. Costs and Delay

A principal problem posed by mass tort litigation is that because of the sheer volume of claims, it is expensive and time-consuming for the parties and courts.[68] One factor contributing to the high transaction cost is the repetition of discovery and adjudication for the same factual and legal issues.[69] Thousands of cases filed across the country means that the defendant must pay expenses associated with being brought into thousands

62. *In re* Juul Labs, Inc. Mktg., Sales Pracs. & Prods. Liab. Lit., 396 F. Supp. 3d 1366 (J.P.M.L. 2019). Consumers and government entities filed lawsuits against Juul Labs, Inc., the e-cigarette manufacturer controlling 75% of the e-cigarette market, alleging deception and misrepresentation for failing to disclose the dangerous chemicals in their products. Clifford Law, *Vaping – The Next Wave of Lawsuits*, X NAT'L L. REV. 266 (2020).

63. *See In re* USA Gymnastics, No. 18-09108, 2020 WL 1932340 (Bankr. S.D. Ind. 2020). Hundreds of gymnasts filed lawsuits against U.S.A. Gymnastics for sexual abuse endured by the victims from a former team doctor and team coaches. *Id.*

64. *See, e.g.*, *In re* Archdiocese of New Orleans, No. 20-10846, 2021 WL 454220 (Bankr. E.D. La. 2020); *In re* Archdiocese of St. Paul and Minneapolis, No. 15-30125, 553 B.R. 693 (Bankr. D. Minn. 2016). The New Orleans Archdiocese is the most recent branch of the Catholic Church to file for bankruptcy protection as a result of hundreds of sexual abuse lawsuits against the clergy. *In re Archdiocese of New Orleans*, 2021 WL 454220.

65. Thousands of survivors of childhood sexual abuse pursued claims against Boy Scouts of America for failing to protect them from abusive leaders. *See In re* Boy Scouts of Am., No. 20-10343, 2021 WL 1820574 (Bankr. D. Del. 2020).

66. *See* WILLGING, *supra* note 32, at 8–22; *see also* Schwarzer, *supra* note 29, at 837–38.

67. *See* WILLGING, *supra* note 32, at 8–22; *see also* Schwarzer, *supra* note 29, at 837–38.

68. *See* WILLGING, *supra* note 32, at 15.

69. *See id.*

of different courts and litigating the same issues time after time.[70] Moreover, the Seventh Amendment right to a jury trial affords all litigants their own day in court.[71] As a result, hosting thousands of trials and ruling on thousands of motions not only increases the cost to defendants, but also increases the time and labor of the courts.[72] These increased delays preclude many victims from obtaining relief and increased costs unfairly prejudice defendants.[73]

Furthermore, a massive influx of cases—in addition to already-encumbered federal dockets—precludes any practical resolution of mass torts on an individualized basis.[74] To illustrate, from June 2018 to June 2019, there were 599 new actions filed, 682 actions pending, 634 terminations, and 17 completed trials per federal judgeship on average.[75] The median duration of civil actions from filing to trial was 27.2 months, with 16.1% of cases being over three years old.[76] Clearly, federal dockets are already inundated.[77] Further, in the mass tort sphere, the Vioxx litigation alone involved over 30,000 litigants.[78] Similarly, the pelvic mesh litigation against seven leading medical device manufacturers encompassed over 100,000 claims.[79] With the exorbitant amount of claims

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70. *See* Schwarzer, *supra* note 29, at 837.

71. U.S. CONST. amend. XII.

72. *Id.*

73. *Id.*

74. U.S. CTS., FED. CT. MGMT. STAT.: U.S. DIST. CTS., https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0630.2020.pdf [https://perma.cc/5DTN-4N4P] (last updated on June 30, 2020).

75. In comparison, from June 2004 to June 2005, per federal judgeship, there were 532 actions filed, 480 pending actions, 522 terminations, and 19 completed trials. The median duration of civil actions from filing to trial was 22.9 months. *Id.*

76. *Id.*

77. *Id.*

78. *See, e.g.*, *In re* Vioxx Prods. Liab. Lit., 501 F. Supp. 2d 789 (E.D. La. 2007); *see also* Matthew Goldstein, *As Pelvic Mesh Settlements Near $8 Billion, Women Question Lawyers' Fees*, N.Y. TIMES (Feb. 1, 2019), https://www.nytimes.com/2019/02/01/business/pelvic-mesh-settlements-lawyers.html [https://perma.cc/RRK7-339J]. Vioxx, the arthritis painkiller manufactured by Merck & Co., caused at least 88,000 heart attacks and 38,000 deaths in users, spurring approximately 66,000 personal injury cases across the country. *See* Kristin Compton, *Vioxx Lawsuits*, DRUGWATCH, https://www.drugwatch.com/vioxx/lawsuits/ [https://perma.cc/E6RE-6Z6F] (last visited Nov. 10, 2020).

79. *See* Goldstein, *supra* note 78. Women across the country injured by the transvaginal mesh implants initiated over 108,000 lawsuits against leading medical device manufacturers. The claims alleged that the transvaginal mesh

and claimants involved in mass tort suits, the multiple, potentially duplicative adjudications result in increased costs and delays in the already over-burdened federal dockets.[80] Consequently, the inherent characteristics of mass tort litigation serve as barriers to efficient resolution.[81]

2. Complex Factual and Legal Issues

Another obstacle in mass tort litigation is that the novelty of some injuries entails intricate causation issues, often in areas of limited scientific knowledge.[82] Generally, courts have handled mass torts involving discrete disasters without substantial difficulty.[83] Other mass torts, however, have complex factual and legal issues, and consequently, pose much more complicated questions for courts.[84] This is because "most potentially toxic substances" do not have "a solid body of epidemiological evidence" for support.[85] Thus, it is difficult for scientists to know for certain whether a particular substance is the cause of a certain harm.[86] In effect, scientific uncertainty leads to legal uncertainty, as questions of causation that are difficult for scientific experts to answer are likely difficult for generalist judges and juries to answer as well.[87]

Adding to these complexities, not all mass torts are fungible.[88] Plaintiffs must prove not only general causation but also specific causation.[89] In other words, a plaintiff must show both that the defendant's conduct is capable of causing the alleged harm and that the conduct was a specific cause of a particular plaintiff's injuries.[90] Specific causation is "frequently speculative" because of the scientific uncertainty regarding the

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caused severe complications such as "pain, bleeding, infection, organ perforation, and autoimmune problems." *See* Michelle Llamas, *Transvaginal Mesh Lawsuits*, DRUGWATCH, https://www.drugwatch.com/transvaginal-mesh/lawsuits/ [https://perma.cc/4KUV-PT9J] (last modified Nov. 4, 2020).

80. *See* Schwarzer, *supra* note 29, at 837.

81. *See id.*

82. *See* WILLGING, *supra* note 32, at 10.

83. Examples of discrete disasters include "aircraft crashes, building collapses, and train wrecks." *See generally* Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 TEXAS L. REV. 1821, 1826 (1994).

84. MICHAEL D. GREEN, BENDECTIN AND BIRTH DEFECTS 314–15 (1996).

85. *Id.*

86. *See* WILLGING, *supra* note 32, at 11.

87. *See id.*

88. *See generally* McGovern, *supra* note 83, at 1821–22.

89. *See* Schwarzer, *supra* note 29, at 838.

90. *See* WILLGING, *supra* note 32, at 11.

harm of potentially toxic substances.[91] This uncertainty and speculation of causation results in either overinclusive or underinclusive outcomes to the detriment of both parties.[92] Hence, complex factual and legal issues create another impediment to resolving mass tort litigation.[93]

3. Future Injuries and Unidentifiable Claimants

Some mass tort cases involve injuries that are temporally dispersed over long periods of time.[94] In other words, some injuries may not present themselves immediately after an event or an exposure. These elastic mass tort cases create "long latency period[s] between a person's use or exposure to a harmful [substance] and the . . . manifestation of harm."[95] Elastic mass torts produce four different classes of claimants: present, identifiable, unidentifiable, and future unidentifiable.[96] First, present claimants are those "who have been exposed and have already developed some illness."[97] Second, identifiable claimants are "those who know that they have been exposed but do not yet show signs of illness."[98] This class of claimants is aware of the risk of future illness or can learn of that fact, "but they do not presently know that they will develop symptoms, when such symptoms will occur, or to what degree of severity" the symptoms may prevent themselves.[99] Third, unidentifiable claimants are those who have been exposed, but do not know of the exposure because their injuries have not yet manifested.[100] Lastly, future unidentifiable claimants are those "who have not yet been exposed but may be exposed in the future."[101] This class does not merely have unmanifested injuries; rather, the claimants are *unknowable* because they have the potential to be exposed at some point in the future.[102]

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91. *See id.* at 11 n.29.
92. *See* Schwarzer, *supra* note 29, at 838.
93. *See id.*
94. *See* Georgene Vairo, *Mass Torts Bankruptcies: The Who, The Why, and The How*, 78 AM. BANKR. L.J. 93 (2004).
95. *See* Resnick, *supra* note 40, at 2045.
96. *See* Vairo, *supra* note 94, at 31–32.
97. *See id.* at 31.
98. *Id.*
99. *Id.*
100. In *Amchem Prods., Inc. v. Windsor*, the Supreme Court called this class of unidentifiable claimants an "unselfconscious and amorphous" group. 521 U.S. 591, 628 (1997). *See also* Vairo, *supra* note 94, at 31–32.
101. *See* Vairo, *supra* note 94, at 31.
102. *See id.*

Mass tort disputes implicating claimant classes three and four are particularly problematic for resolution. First, as a constitutional matter, federal courts may only exercise jurisdiction over cases and controversies.[103] One essential and unwavering element of the case-or-controversy requirement is that parties have standing to sue.[104] Standing requires that a plaintiff has suffered a concrete injury-in-fact that is fairly traceable to the challenged conduct.[105] Accordingly, at the time a suit is brought, those who have not yet been exposed, or who have been exposed but have not yet manifested injuries, may not have standing to sue because they lack a concrete injury-in-fact.[106] Although these claimants cannot participate in the suit, mass tort settlements and judgments attempt to account for these classes of claimants so that they may recover once their injuries materialize.[107] The reality, however, is that funds are usually depleted by the time their injuries materialize, thus substantially limiting and potentially precluding anyone other than "present" claimants from recovering their share.[108] The Agent Orange litigation, for instance, provides a vivid illustration of this problem.[109] In that case, some individuals exposed to the chemical remained asymptomatic for as long as 33 years.[110] Thus, when the Agent Orange litigation commenced, these individuals had no indication of injuries from their exposure—rendering them unidentifiable victims.[111] By the time the victims' cancer manifested, however, the $170 billion settlement had run out of funds, and the victims had no recourse.[112] Still today, mass tortfeasors often have limited assets available to compensate victims.[113] Accordingly, latent injuries and unidentifiable victims pose significant problems for defendants' ability to predict the extent of potential claims and adequately compensate present and future claimants with available funds.[114]

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103. U.S. CONST. art. III, § 2.

104. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

105. *See id.*

106. *See* Samantha Y. Warshauer, *When Futures Fight Back: For Long-Latency Injury Claimants in Mass Tort Class Actions, Are Asymptomatic Subclasses the Cure to the Disease?*, 72 FORDHAM L. REV. 1219 (2004).

107. *See id.*

108. *Id.*

109. *See In re* Agent Orange Prod. Liab. Litig., 475 F. Supp. 928 (E.D.N.Y. 1979).

110. *See* Warshauer, *supra* note 106, at 1219.

111. *See id.*

112. *Id.*

113. *See* WILLGING, *supra* note 32, at 18.

114. *See id.*

4. Need for Finality

Finality is a central goal of litigation and is desired by all.[115] Mass tort defendants seek to make "global peace," legally foreclosing all, or nearly all, of the claims in the subject area of the litigation as a whole.[116] The incentive is to reconcile all claims to remove the threat of mounting and indefinite litigation.[117] Plaintiffs also benefit from comprehensive resolution because they receive closure from prosecuting their claims.[118] Furthermore, the judicial system benefits by resolving disputes that would otherwise linger indefinitely in court.[119] Yet the complexities inherent in mass tort litigation often inhibit litigants from the benefit of final peace.[120] The sheer volume of claims means that there is no natural termination to the litigation.[121] This concern is magnified by elastic mass tort cases that present unidentifiable future victims, as the injuries and the claimants develop successively over a long period of time.[122] Thus, achieving finality is a challenging goal in mass tort litigation.[123]

C. Rough Justice

Traditionally, the justice system has focused on individualized case treatment.[124] In the context of mass tort litigation, however, it is impossible to try each claim as its own separate case.[125] The federal judiciary is

115. *See id.* at 20–21.

116. *See* RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT 219 (2007).

117. *See* Morgan A. McCollum, *Local Government Plaintiffs and the Opioid Multi-District Litigation*, 94 N.Y.U. L. REV. 942 (2019) (defining global peace).

118. *See* WILLGING, *supra* note 32, at 20–21.

119. *See id.*

120. *Id.*

121. *Id.*

122. *See generally id.* at 19–21; Lahav, *The Continuum of Aggregation*, *supra* note 31, at 15.

123. See William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371, 372 (2001) ("In complex class actions, defendants purchase a commodity—finality. They buy from the plaintiffs' representative the plaintiffs' rights to sue."); *see also* WILLGING, *supra* note 32, at 20.

124. *See* Hensler & Peterson, *supra* note 45, at 961, 964.

125. *See* ALEXANDRA D. LAHAV, ROUGH JUSTICE 2–3 (2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1562677 [https://perma.cc/872R-6MCA] [hereinafter LAHAV, ROUGH JUSTICE].

inundated with cases.[126] Attempting to provide "individualized justice" to such large-scale disputes risks overwhelming the judiciary and preventing some victims from receiving any justice at all.[127] The pressures on the judicial system created by mass torts have rendered comprehensive aggregation procedures—such as class actions, MDL, and bankruptcy proceedings—"a logical, if not an indispensable, method" for enforcing the law and righting widespread wrongs.[128] These aggregative systems provide a vehicle for victims whose claims involve smaller losses that could not realistically be pursued alone.[129] This means, however, that some form of "rough justice" is not only warranted, but necessary.[130]

II. MODERN AGGREGATIVE SYSTEMS

There are three main aggregative systems for resolving mass tort litigation: (1) the class action; (2) multidistrict litigation (MDL); and (3) bankruptcy proceedings.[131] Although each embodies distinct procedural tools and limitations, these systems share a common objective: to foster the efficient and fair resolution of large-scale disputes.[132] These systems facilitate resolution in ways other than by a trial; namely by alternative dispute resolution, settlement, or pretrial disposition.[133] Class actions, multidistrict litigation, and bankruptcy were traditionally considered to be three separate "phenomena."[134] Now, however, scholars understand the systems as forming a "continuum" that allows parties to experiment with each and avail themselves of whichever form quickly results in settlement.[135]

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126. U.S. CTS., FED. CT. MGMT. STAT.: U.S. DIST. CTS., https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0630.2020.pdf [https://perma.cc/WLV5-A3DM] (last updated on June 30, 2020).

127. See LAHAV, ROUGH JUSTICE, *supra* note 125, at 2–3.

128. Schwarzer, *supra* note 29, at 839.

129. *See* Lahav, *The Continuum of Aggregation*, *supra* note 31, at 15.

130. *See* LAHAV, ROUGH JUSTICE, *supra* note 125, at 2–3 (explaining that "rough justice" is "the attempt to resolve large numbers of cases by using statistical methods to give plaintiffs a justifiable amount of recovery").

131. Lahav, *The Continuum of Aggregation*, *supra* note 31, at 2.

132. *Id.* at 12.

133. *See* LAHAV, ROUGH JUSTICE, *supra* note 125, at 2–3. Most frequently, mass tort cases are resolved by some form of aggregate settlement. *See* NAGAREDA, *supra* note 116 ("[T]he endgame for mass tort dispute is not trial but settlement."); Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L. REV. 1769, 1769 (2005).

134. Lahav, *The Continuum of Aggregation*, *supra* note 31, at 2.

135. *Id.*

A. The Demise of Mass Tort Class Actions

In 1966, Congress promulgated the modern class action to combat civil rights injustices by providing "global peace subject to judicial approval."[136] The class action is a suit in which the court allows one person or a small group of people to represent the interests of a larger group.[137] The Federal Rules of Civil Procedure outline the conditions for certifying a class action.[138] Specifically, Federal Rule of Civil Procedure 23(a) sets forth four prerequisites for class certification, which are widely referred to as "numerosity, commonality, typicality, and adequacy of representation."[139] In addition to satisfying Rule 23(a), a case must also comport with at least one of the categories detailed in Rule 23(b), which include "limited fund" class actions,[140] "injunctive or declaratory relief" class actions,[141] and "common question" class actions.[142]

Although the language of Rule 23 seems straightforward, the certification of class actions for mass tort cases is rare.[143] The Advisory Committee on the Rules of Civil Procedure 's notes to Rule 23 include a warning stating that mass torts are "ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present,

136. *Id.* at 3; *see* McCollum, *supra* note 117, at 942 (explaining that "[g]lobal peace means that a settlement legally forecloses all, or close to all, current and future litigation against the defendants through claim preclusion"); *see also* Lahav, *The Continuum of Aggregation*, *supra* note 31, at 2.

137. *Class Action*, BLACK'S LAW DICTIONARY (11th ed. 2019).

138. The court must first certify a class in order for the action to proceed as a class action. *See* MARCUS ET AL., *supra* note 23, at 214.

139. FED. R. CIV. P. 23(a)(1)–(4); MARCUS ET AL., *supra* note 23, at 200. The elements of Rule 23(a) are:

> (1) numerosity: the class must be so numerous that joinder of all members is impracticable; (2) commonality: there are questions of law or fact common to the class; (3) typicality: the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) adequacy of representation: the representative parties will fairly and adequately protect the interests of the class.

Oplchenski v. Parfums Givenchy, Inc., 254 F.R.D. 489, 492 (N.D. Ill. 2008) (internal citations omitted).

140. FED. R. CIV. P. 23(b)(1); MARCUS ET AL., *supra* note 23, at 267–85.

141. FED. R. CIV. P. 23(b)(2); MARCUS ET AL., *supra* note 23, at 285–99.

142. FED. R. CIV. P. 23(b)(3); MARCUS ET AL., *supra* note 23, at 299–362.

143. ELIZABETH CHAMBLEE BURCH, MASS TORT DEALS: BACKROOM BARGAINING IN MULTIDISTRICT LITIGATION 12 (2019).

affecting the individuals in different ways."[144] Some committee members opposed mass tort class actions because of victims' "loss of individual liberty" and the ability of counsel to bind victims that were not parties to the suit.[145] Over the years, a few mass tort class actions managed to surface.[146] Nevertheless, following a line of cases that can be interpreted as a judicial reaction against the excessive use of mass tort class actions, mass tort cases seldomly receive class certification today.[147]

In the 1990s, two Supreme Court decisions abruptly halted the practice of mass tort class actions.[148] Both cases involved a mass of asbestos-related personal injury claims against asbestos manufacturers.[149] In *Amchem Products, Inc. v. Windsor*, the Court struck down the parties' proposed settlement agreement, which attempted to use Rule 23(b)(3)[150] to certify a settlement-only class encompassing potentially millions of current and future class members.[151] Essentially, the proposed settlement class included all four types of mass tort claimants—present, identifiable, unidentifiable, and future unidentifiable claimants—all of which would be automatically bound to the settlement trust fund and precluded from pursuing their own claims, unless they chose to opt out of the class.[152] The Court overturned the mass tort settlement for two significant reasons.[153]

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144. FED. R. CIV. P. 23 advisory committee's note to 1966 amendment.

145. Andrew D. Bradt, *Something Less and Something More: MDL's Roots as a Class Action Alternative*, 165 U. PA. L. REV. 1711, 1719–21, 1726 (2017) (internal quotations omitted) [hereinafter Bradt, *Something Less and Something More*].

146. *See, e.g.*, *In re* Agent Orange Prod. Liab. Litig., 818 F.2d 145 (2d Cir. 1987) (certification of classes over military-contractor defenses); *see also, e.g.*, Jenkins v. Raymark Indus., 782 F.2d 468 (5th Cir. 1986) (certification of classes over state-of-the-art defenses).

147. See MARCUS ET AL., *supra* note 23, at 343; *see also* BURCH, *supra* note 143, at 15.

148. BURCH, *supra* note 143, at 13; *see* Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997); *see also* Ortiz v. Fibreboard, 527 U.S. 815 (1999).

149. *See Amchem*, 521 U.S. at 598; *see also Ortiz*, 527 U.S. 815.

150. *See Amchem*, 521 U.S. at 598. A class may be maintained if it satisfies Rule 23(a) and 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." FED. R. CIV. P. 23(b)(3).

151. BURCH, *supra* note 143, at 13; *see Amchem*, 521 U.S. at 598.

152. *Amchem*, 521 U.S. at 598–607; *see also* David Marcus, *The Short Life and Long Afterlife of the Mass Tort Class Action*, 165 U. PA. L. REV. 1565, 1575 (2017).

153. *Amchem*, 521 U.S. at 619–28.

First, the Court expressed concern about the disparate treatment across victim classes, as the proposed class limited the defendants' liability concerning absent class members that did not participate in the suit.[154] In particular, the court noted that individuals with current injuries want sufficient, immediate payments, but that goal is in tension with the interests of absent plaintiffs in ensuring an adequate, protected fund for the future.[155] The Court emphasized that the settling parties' failure to include any assurances of fair and adequate representation for the divergent class interests rendered representation inadequate.[156] Secondly, the Court determined that the proposed class could not meet Rule 23(b)(3)'s predominance requirement.[157] Specifically, the number of questions unique to each class of claimants regarding the nature of injury, causation, damages, and affirmative defenses predominated over any questions common to the class.[158] Accordingly, the *Amchem* decision demonstrates that the nature of personal injury mass torts makes it difficult, if not impossible, to satisfy the requirements of adequate representation and predominance necessary to certify a Rule 23(b)(3) class action.[159]

In *Ortiz v. Fibreboard*, the Supreme Court rejected another asbestos settlement with features similar to those it disapproved of in *Amchem*.[160] The proposition in *Ortiz* operated as a mandatory "limited fund" settlement class certified under Rule 23(b)(1)(B).[161] The defendant had already settled 45,000 claims but sought a "Global Settlement" that would bind present and future claimants.[162] The Court denied class certification of the claimants, noting the presence of the same deficiencies that pervaded the settlement-only class in *Amchem*.[163] Specifically, the

154. BURCH, *supra* note 143, at 13; *see Amchem*, 521 U.S. at 623–28.
155. BURCH, *supra* note 143, at 13; *see also Amchem*, 521 U.S. at 623–28.
156. BURCH, *supra* note 143, at 14; *see also Amchem*, 521 U.S. at 623–28.
157. *Amchem*, 521 U.S. at 623–25.
158. *Id.* (endorsing the Third Circuit's rationale that "[c]lass members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods. Some class members suffer no physical injury or have only asymptomatic pleural changes, while others suffer from lung cancer, disabling asbestosis, or from mesothelioma. . . . Each has a different history of cigarette smoking, a factor that complicates the causation inquiry.").
159. *See id.*
160. *See* BURCH, *supra* note 143, at 14.
161. *See id; see also* Ortiz v. Fibreboard, 527 U.S. 815, 825–28 (1999).
162. *See* BURCH, *supra* note 143, at 14; *see also Ortiz*, 527 U.S. at 823–25.
163. *See Ortiz*, 527 U.S. at 848–58.

proposed class did not sufficiently protect the interests of future victims.[164] Along with *Amchem* and *Ortiz*, subsequent Supreme Court decisions forged even more rigorous standards for class certification.[165]

The Supreme Court decisions in *Amchem* and *Ortiz* have certainly made it more difficult to resolve mass torts using Rule 23's settlement classes.[166] As a result, litigants shifted to reliance on MDL and Chapter 11 bankruptcy to achieve global peace.[167] Nevertheless, MDL only exacerbates the concerns illuminated by mass tort class actions.[168] Likewise, bankruptcy proceedings as a mechanism for mass tort resolution also suffer from some of the deficiencies plaguing mass tort class actions and MDL.[169]

B. Filling the Void with Multidistrict Litigation

MDL emerged partially as a reform for the restrictive characteristics of Rule 23 class actions.[170] Whereas representative plaintiffs file class actions on behalf of a large group of class members, MDL cases maintain their individuality but are consolidated and transferred to a single federal court for a more efficient pretrial process.[171] Congress established the statutory authority for MDL when it enacted 28 U.S.C. § 1407 to provide a framework for consolidating a multitude of cases with factual similarities

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164. *See id.* at 857.

165. See BURCH, *supra* note 143, at 15 n.31 (citing Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350–51 (2011)); Comcast Corp. v. Behrend, 569 U.S. 27, 34 (2013).

166. *See* Alexandra D. Lahav, *Mass Tort Class Actions – Past, Present, and Future*, 92 N.Y.U. L. REV. 998, 1008 (2017) ("Overall, there have been very few mass tort cases certified as settlement or other class actions over the nearly fifty-year period during which mass tort class actions have been theoretically available."); *see also* BURCH, *supra* note 143, at 15.

167. *See* 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. 405–07 (1999).

168. *See generally* BURCH, *supra* note 143, at 15.

169. *See infra* Part III.

170. *See* Bradt, *Something Less and Something More*, *supra* note 145, at 1719–21.

171. See FED. R. CIV. P. 23(a) (stating that "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all members. . . ."); *but see* 28 U.S.C. § 1407(a) (providing that "civil actions involving one or more common questions of fact . . . pending in different districts . . . may be transferred to any district for coordinated or consolidated pretrial proceedings.").

in the interests of justice, efficiency, and convenience.[172] The statute empowers the Judicial Panel on Multidistrict Litigation (JPML) to centralize actions pending in various federal courts to a single district court for coordinated pretrial proceedings.[173] This seven-judge panel appointed by the Chief Justice of the United States Supreme Court determines MDL status only by a concurrence of at least four judges and consent of the transferee district.[174] Centralization may be initiated either *sua sponte* by the JPML or upon motion by one of the parties.[175] Thereafter, the JPML provides notice to all parties potentially affected by consolidation and holds an evidentiary hearing where any affected party may offer evidence supporting or opposing transfer.[176]

The threshold inquiry for transfer is whether the subject cases entail complex, common questions of fact.[177] Once this standard is satisfied, cases are centralized and the transferee judge inherits the authority to decide all pretrial motions, including dispositive motions.[178] Actions filed subsequent to MDL centralization may receive "tag-along" status and be transferred to the MDL as well.[179] Finally, § 1407(a) mandates that once all pretrial matters have concluded, the JPML shall remand the remaining individual cases back to their original courts for trial.[180]

Today, MDL is the dominant procedure for mass tort litigation.[181] In fact, as of September 15, 2020, 180 MDL dockets are pending across 44 transferee districts.[182] Putting those numbers into perspective, 312,519 out

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172. 28 U.S.C. § 1407(a).

173. *Id.*

174. 28 U.S.C. § 1407(d). The receiving court of the MDL—the court chosen to conduct coordinated pretrial proceedings—is referred to as the "transferee district." Likewise, the presiding judge is referred to as the "transferee judge."

175. 28 U.S.C. § 1407(c).

176. *Id.*

177. 28 U.S.C. § 1407(a).

178. *Id.* Claimants and defendants subject to transfer have no right to appeal a transfer denial. *See* 28 U.S.C. § 1407(e). A party wishing to challenge a transfer grant, however, may petition for an extraordinary writ in the federal circuit court exercising jurisdiction over the transferee court. *Id.*

179. *See* Rules of Procedure of the Judicial Panel on Multidistrict Litigation, Rule 1.1(h), 199 F.R.D. 425, 427 (2001) (defining a "tag-along action" as "a civil action pending in a district court which involves common questions of fact with . . . actions previously transferred . . . under Section 1407").

180. 28 U.S.C. § 1407(a).

181. *See* Jay Tidmarsh & Daniela Peinado Welsh, *The Future of Multidistrict Litigation*, 51 CONN. L. REV. 771 (2019).

182. *MDL Statistics Report – Distribution of Pending MDL Dockets by District*, U.S. JUD. PANEL ON MULTIDISTRICT LITIG. (Sept. 15, 2020),

of 421,082 civil actions pending in federal district courts belong to MDL.[183] Although § 1407(a) requires individual remands at the conclusion of pretrial matters, realistically, only about 2.9% of cases ever return to their home courts.[184] Some cases are dismissed by dispositive motions, but the vast majority of MDL is resolved in settlement.[185] Meanwhile, a trend is emerging whereby corporate defendants escape MDL settlement negotiations by invoking Chapter 11 of the United States Bankruptcy Code.[186]

C. Resolving Mass Torts in Bankruptcy Court

Widespread dissatisfaction with the management and resolution of mass tort claims paved the way for other aggregative devices, like the bankruptcy system, to intervene.[187] The Bankruptcy Code did not originally provide for its use as a mechanism for resolving mass torts.[188] Yet, shortly after the Code's inception, litigants uncovered bankruptcy as a new aggregative device for resolving "seemingly intractable" mass tort disputes.[189] In particular, defendants facing multifarious asbestos-related liabilities saw the potential for Chapter 11 to provide a centralized forum and structured system for achieving global peace.[190] As a result, Congress reacted to asbestos defendants' innovation and codified § 524(g), a set of rules and protections for mass-tort-induced bankruptcies.[191] Importantly though, this section applies only to asbestos cases.[192]

1. Traditional Chapter 11 Reorganization

Finding its genesis in the Bankruptcy Reform Act of 1978, Chapter 11 aims to preserve a corporate entity's reorganization value over its

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https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-September-15-2020.pdf [https://perma.cc/NRB7-W8E4].

183. *Id.*

184. *See* McCollum, *supra* note 117, at 942.

185. *See* Judith Resnik, *From "Cases" to "Litigation,"* 54 L. & CONTEMP. PROBS. 5, 43 (1991).

186. *See* Parikh, *supra* note 33.

187. *See* Lahav, *The Continuum of Aggregation*, *supra* note 31, at 3.

188. Troy A. McKenzie, *Toward a Bankruptcy Model for Nonclass Aggregate Litigation*, 87 N.Y. L. REV. 960, 999 (2012).

189. *See id.*

190. Smith, *supra* note 39, at 1622.

191. 11 U.S.C. § 524(g).

192. *Id.*

liquidation value.[193] Chapter 11 provides for the reorganization of financially distressed business entities.[194] The primary goals of reorganization are to furnish the "equality of distribution to similar creditors in a collective proceeding while ameliorating the devastating effect that a huge liability may have on the worth of a business and . . . the compensation available to all victims."[195] Bankruptcy is an attractive device for mass tort resolution because of its central features of (1) forum centralization; (2) pervasive jurisdiction; and (3) power of finality.[196]

A bankruptcy case commences with the filing of a petition, whether voluntarily by the debtor or involuntarily by creditors.[197] Technically, insolvency is not a prerequisite to initiate a Chapter 11 case.[198] Rather, Chapter 11 imposes two good-faith requirements on the part of a debtor seeking refuge in the protections of the Code.[199] First, § 1129(b)(3) states that a Chapter 11 plan of reorganization shall be "proposed in good faith and not by any means forbidden by law."[200] The good faith requirement is defined by the common law.[201] Thus, standards differ depending on the jurisdiction.[202] Some courts require both objective futility and subjective bad faith to be evident in order to warrant a bad faith dismissal, while other courts only require evidence of either objective futility or subjective bad faith.[203] In addition, a second provision of the Code, § 1112(b)(4), sets

193. *See* JONES DAY, Comparison of Chapter 11 of the United States Bankruptcy Code (2007), https://www.jonesday.com/files/Publication/1ec093d4-66fb-42a6-8115-be0694c59443/Presentation/PublicationAttachment/e5b46572-7aeb-4c34-ab2e-bee2f8f3d3c2/Comparison%20of%20Chapter%2011%20(A4).pdf [https://perma.cc/E6PT-NYV7].

194. 11 U.S.C. § 301.

195. Resnick, *supra* note 40, at 2050 (internal citations omitted).

196. McKenzie, *supra* note 188, at 1018.

197. 11 U.S.C. §§ 301, 303.

198. *See* Mark G. Douglas, *Two Circuits Examine Chapter 11's Good Faith Filing Requirement*, JONES DAY (Jan./Feb. 2008), https://www.jonesday.com/en/insights/2008/01/two-circuits-examine-chapter-11s-goodfaith-filing-requirement [https://perma.cc/GN4W-FS7L].

199. *See* 11 U.S.C. §§ 1112(b)(4), 1129(b)(3); *see also* Douglas, *supra* note 198.

200. 11 U.S.C. § 1129(a)(3); *see also* Douglas, *supra* note 198.

201. *See* Carolin Corp. v. Miller, 886 F.2d 693, 699 (4th Cir. 1989).

202. *See id.*

203. In the case of *In re Capitol Food Corporation of Fields Corner*, the First Circuit held that the "imminent or threatened foreclosure on the debtor's interests in real property essential to successful reorganization efforts" is precisely the kind of financial distress contemplated by Chapter 11. 490 F.3d 21, 25 (1st Cir. 2007). In contrast, in *In re Premier Automotive Services, Inc.*, the Fourth Circuit held

forth a list of circumstances giving rise to cause for dismissal of a Chapter 11 case or conversion to a Chapter 7 liquidation.[204] Such instances include the "continuing loss to or diminution of the estate," the "inability to effectuate . . . [a] plan," or unreasonable delay by the debtor.[205] Although not explicitly listed in § 1112(b)(4), some courts hold that filing a Chapter 11 case in bad faith is cause for dismissal or conversion.[206] To ensure the debtor's good-faith filing, debtors must file a statement of financial affairs, a list of creditors, and a summary of assets and liabilities with the bankruptcy court.[207] In response, creditors may apply for the dismissal of a debtor's petition if it is perceived to be filed in bad faith.[208]

Once the petition is filed, and assuming it is not dismissed, the debtor must submit for court approval a disclosure statement regarding the plan of reorganization that sets forth "adequate information" to enable creditors to make an informed judgment on the plan.[209] Chapter 11 cases fall into two main categories: a "pre-packaged" case or a "freefall" case.[210] A freefall case is the traditional Chapter 11 reorganization.[211] In a so-called pre-packaged case, the debtor and creditors participate in negotiations prior to the filing for bankruptcy.[212] The debtor engages in soliciting plan acceptances before the reorganization plan is ever approved by the

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that an absence of good faith requires a showing of both "objective futility" and "subjective bad faith." 492 F.3d 274, 279–80 (4th Cir. 2007). There, the court dismissed the bankruptcy proceeding as having been filed solely to halt imminent eviction proceedings. *Id.* at 285. Thus, the court found that the Chapter 11 case was initiated in bad faith. *Id.* at 280. The Second Circuit holds that dismissal is warranted if there is "no reasonable likelihood that the debtor intended to reorganize and no reasonable probability that it would eventually emerge from bankruptcy proceedings." C-TC 9th Ave. P'ship v. Norton Co., 113 F.3d 1304, 1309 (2d Cir. 1997). The Third Circuit evaluates whether the petition serves a valid purpose for reorganization or whether it was filed "to obtain a tactical litigation advantage." *In re* Integrated Telecom Express, Inc., 384 F.3d 108, 120 (3d Cir. 2004).

204. *See* 11 U.S.C. § 1112(b)(4); *see also* Douglas, *supra* note 198.

205. *See* 11 U.S.C. § 1112(b)(4); *see also* Douglas, *supra* note 198.

206. *See* 11 U.S.C. § 1112(b)(4); *see also* cases cited *supra* note 203.

207. FED. R. BANKR. P. 1007(b) (2015).

208. *Id.*

209. 11 U.S.C. §§ 1121, 1125.

210. Sandra E. Mayerson, *Current Developments in Prepackaged Bankruptcy Plans*, 804 PLI/COMM 979, 981 (2000) ("The term prepackaged bankruptcy applies to plans where the negotiations and solicitation of acceptance occurred before commencement of a chapter 11 case.").

211. *See* McKenzie, *supra* note 188, at 999.

212. *See id.*

court.[213] In the absence of a pre-packaged case, however, the court usually must approve the disclosure statement before the debtor begins soliciting plan acceptances or creditors begin soliciting plan rejections.[214] For both types, the debtor has 120 days from the time of filing to propose a plan of reorganization, which may be extended 60 days by court order.[215] The plan of reorganization must (1) identify debts; (2) identify whether the creditor claims are priority, secured, or general unsecured, and the number of claims classified as each; (3) provide a determination of which debts will be paid in full, and which debts will be repaid in a percentage amount; (4) provide methods on how the debts will be paid; and (5) present guidelines as to how the company will operate while implementing the plan.[216]

The plan of reorganization creates various classes of creditors based on the substance of their claims but treats all members of a single class equally to each other.[217] The creditors can respond to the reorganization plan at a disclosure hearing, and the plan may be negotiated and modified as agreed to by the debtor.[218] In order to accept a plan of reorganization, creditors possessing impaired claims must vote by ballot to approve the plan.[219] To minimize holdout risk and to avoid abuse by the majority, an entire class of claims is deemed to accept a plan when both creditors holding two-thirds of the value of claims, as well as more than one-half of the claims in number, accept the plan.[220] Even if not all classes have approved the plan, however, the court can invoke its "cram-down power" to accept the plan as long as one class of creditors has approved it.[221] Still, the court must ensure that "the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan."[222] Finally, once the disclosure statement is approved and the ballots are collected, the bankruptcy court conducts a confirmation hearing to determine whether

213. *Id.*
214. 11 U.S.C. § 1125(b).
215. 11 U.S.C. § 1121(b)–(d).
216. 11 U.S.C. § 1123(a)–(b).
217. *See* McKenzie, *supra* note 188, at 999.
218. 11 U.S.C. § 1125(b).
219. 11 U.S.C. § 1126. "Impaired" refers to those creditors whose contractual rights are to be modified or who will be paid less than the full value of their claims under the plan.
220. 11 U.S.C. § 1126(c).
221. 11 U.S.C. § 1129(b).
222. 11 U.S.C. § 1129(b) (internal citations omitted).

the reorganization plan is feasible and whether the plan was proposed in good faith and according to the law.[223]

2. Prepackaged Bankruptcy, Asbestos-Related Liability, and § 524(g)

In 1973, the Fifth Circuit ruled that plaintiffs harmed by exposure to asbestos could hold manufacturers strictly liable for failure to warn of the risks associated with asbestos.[224] As a result, lawsuits against asbestos manufacturers flooded the courts based on strict liability theories.[225] One asbestos manufacturer, the Johns-Manville Corporation (Manville), became the first entity to use the bankruptcy court as a forum for resolving mass tort liability.[226]

In the 1970s, Manville was the nation's leading asbestos miner, distributor, and manufacturer.[227] By 1982, the corporation faced around 12,500 suits brought by over 16,000 claimants and an estimated $2 billion in potential liability.[228] Consequently, considering the massive amount of personal injury liability that it would likely face in the future, Manville filed for Chapter 11 bankruptcy.[229] The Manville plan of reorganization included a feature now known as a channeling injunction.[230] The function of a channeling injunction is twofold.[231] First, it channels all asbestos claims to a litigation trust fund that serves as the only source of recovery for claimants.[232] Second, it issues an injunction on the filing of asbestos personal injury claims against the reorganized debtor.[233] Importantly, the injunction applies to present and future claimants, unlike Rule 23(b)(3) and MDL settlements.[234] In fact, by binding absent claimants and freeing

223. 11 U.S.C. § 1128.

224. Borel v. Fibreboard, 493 F.2d 1076, 1091 (5th Cir. 1973); *see also* Carroll et al., *supra* note 49.

225. By 2002, individuals filed approximately 730,000 asbestos claims. *See* Carroll et al., *supra* note 49.

226. *See* Kane v. Johns-Manville Corp., 843 F.2d 636, 639 (2d Cir. 1988)*; see also* Adam Paul et al., *Resolving Mass Tort Liability Through Bankruptcy*, 37TH ANN. SE. BANKR. L. INST. (Apr. 14–16, 2011).

227. *See Johns-Manville Corp.*, 843 F.2d at 639.

228. Marianna Smith, *Resolving Asbestos Claims: The Manville Personal Injury Settlement Trust*, 53 L. & CONTEMP. PROBS. 27 (1990).

229. *Johns-Manville Corp.*, 843 F.2d at 639.

230. *See id.*; *see also* Paul et al., *supra* note 226, at 18.

231. *See Johns-Manville Corp.*, 843 F.2d at 639.

232. *See id.*

233. *See id.*

234. *See id.*

debtors from any future liability, channeling injunctions accomplish precisely what the Supreme Court prohibited in *Amchem*.[235]

Congress codified Manville's channeling injunction in § 524(g) of the Bankruptcy Code.[236] Section 524(g) allows debtors' reorganization plans to enjoin future personal injury, wrongful death, and property damage claims "seeking recovery for damages allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products."[237] Significantly, however, this section of the Code also imposes procedural protections designed to ensure that future creditors receive the same treatment as current creditors.[238] Specifically, § 524(g) explains how the trust must be funded and the specific findings that the bankruptcy court must make before binding future claimants to the channeling injunction.[239]

First, § 524(g) requires that the trust be "funded in whole or in part by the securities of 1 or more debtors involved in such plan and by the obligation of such debtor . . . to make future payments, including dividends."[240] This section further provides that the trust is to own a majority of the voting shares of each debtor, its parent corporation, or a subsidiary of each debtor.[241] Second, in order for the channeling injunction to bind future claimants, § 524(g) requires the bankruptcy court to make the following findings: (1) the debtor is likely to be subject to substantial future demands for payment arising out of the same or similar conduct or events that gave rise to the claims; (2) the actual amounts, numbers, and timing of such future demands cannot be determined; (3) pursuit of such demands outside the procedures proscribed by such plan is likely to threaten the plan's purpose to deal equitably with claims and future demands; (4) the plan is accepted by at least 75% of the class of claimants; and (5) the trust will operate through mechanisms such as structured, periodic, or supplemental payments, pro rata distributions, matrices, or periodic review of estimates of the numbers and values of present claims and future demands that provide reasonable assurance that the trust will be able to support present and future demands in substantially the same manner.[242] Additionally, although the Code does not otherwise expressly

235. *See supra* Section II.A.
236. 11 U.S.C. § 524(g).
237. *See* 11 U.S.C. § 524(g)(2)(B)(i)(I).
238. *See* 11 U.S.C. § 524(g)(2)(B)(i)–(ii) (detailing funding requirements and certain findings to be made by the bankruptcy court before applying the channeling injunction to future claimants).
239. *See* 11 U.S.C. § 524(g)(2)(B)(i)–(ii).
240. 11 U.S.C. § 524(g)(2)(B)(i)(II).
241. 11 U.S.C. § 524(g)(2)(B)(i)(III).
242. 11 U.S.C. § 524(g)(2)(B)(ii)(I)–(V).

authorize third-party releases, § 524(g) extends the injunction's protections beyond the debtor to release third parties that may be held derivatively liable for the debtor's conduct, such as affiliates, managers, executives, or insurers.[243] Again, the ability to write off third parties makes declaring bankruptcy a superior avenue for defendants, rather than class actions and MDL.[244]

Importantly, the channeling injunctions authorized by § 524(g) apply only to asbestos-related claims in Chapter 11 cases.[245] Thus, corporate debtors in other mass tort cases must rely on another provision of the Code to establish litigation trusts and channeling injunctions, specifically § 105.[246] Because non-asbestos-related mass tort defendants are unable to utilize § 524(g), these defendants instead appeal to the general equitable powers of bankruptcy courts under § 105 to create channeling injunctions that mimic those offered in § 524(g).[247] Although, facially, asbestos and non-asbestos defendants rely on two different sections of the code, in theory, the effect is the same.[248]

III. THE EMERGING TREND: EXITING MDL AND ENTERING CHAPTER 11

Mass tort defendants are increasingly invoking Chapter 11 bankruptcy proceedings to escape unfavorable litigation, seeking to discharge their current and future liabilities through channeling injunctions based on those in § 524(g).[249] The year 2019 marked an uptick in filings by non-asbestos, mass tort debtors in particular.[250] Recently, mass tort defendants involving

243. 11 U.S.C. § 524(g)(4)(A)(ii).

244. *See* Paul et al., *supra* note 226.

245. *See* 11 U.S.C. § 524(g)(2)(B)(i)(I) (stating that a channeling injunction is to be implemented pursuant to the reorganization plan of debtors named defendants "in personal injury, wrongful death, or property-damage actions seeking recovery for damages allegedly caused by the presence of, or exposure to, *asbestos or asbestos-containing products.*" (emphasis added)).

246. *See id.*; *see also* Paul et al., *supra* note 226.

247. *See* 11 U.S.C. § 105; *see also* Paul et al., *supra* note 226.

248. *See* Paul et al., *supra* note 226.

249. *See id.*

250. *See* Mark D. Plevin & Tacie H. Yoon, *A Look Back at Mass Tort Bankruptcy Cases in 2019 – Asbestos and Beyond*, CROWELL MORING (Jan. 22, 2020), https://www.crowell.com/NewsEvents/AlertsNewsletters/all/A-Look-Back-at-Mass-Tort-Bankruptcy-Cases-in-2019-Asbestos-and-Beyond [https://perma.cc/D2SV-R6TH] (providing a chart of mass tort bankruptcies filed in 2019).

Big Pharmaceutical's opioids[251] and sexual abuse cases within USA Gymnastics,[252] the Catholic Church,[253] and Boy Scouts of America[254] have all filed for Chapter 11 bankruptcy in the midst of extensive litigation. By appealing to the bankruptcy court's equitable powers under § 105, these debtors have availed themselves of the benefits of § 524(g) without complying with its restrictions.[255]

A. Chapter 11's Allure

Under the United States Bankruptcy Code, corresponding jurisdictional statutes, and a set of jurisprudential procedural tools, the bankruptcy system offers mass tort defendants certain advantages that are unavailable outside of bankruptcy.[256] Chapter 11 is attractive to mass tort defendants because of its power to achieve finality.[257] Specifically, the process provides closure to mass tort litigation by centralizing all claims before the bankruptcy court, discharging the liabilities of the debtor, and channeling future creditors to a trust from which claims are paid.[258] Meanwhile, Chapter 11 gives financially distressed debtors time to reorganize, revamp, and continue doing business so that the entity has the chance to survive.[259]

One of the most critical aspects of the bankruptcy system is its ability to resolve mass tort liability in a single, centralized forum.[260] This comprehensive resolution is accomplished through the bankruptcy court's expansive jurisdictional reach and the Code's automatic stay.[261] Section 157 of Title 28 of the United States Code grants the bankruptcy court the authority to consolidate all claims before it that are "related to" the

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251. *See, e.g.*, *In re* Nat'l Prescription Opiate Litig., 290 F. Supp. 3d 1375, 1379–80 (J.P.M.L. 2017); *In re* Purdue Pharma, No. 19-23649, 619 B.R. 38 (Bankr. S.D.N.Y. 2019); *In re* Insys Therapeutics, Inc., No. 19-11292 (Bankr. D. Del. 2019).

252. *See In re* USA Gymnastics, No. 18-09108, 2020 WL 1932340 (Bankr. S.D. Ind. 2020).

253. *See, e.g.*, *In re* Archdiocese of New Orleans, No. 20-10846, 2021 WL 454220 (Bankr. E.D. La. 2020); *In re* Archdiocese of St. Paul and Minneapolis, No. 15-30125, 553 B.R. 693 (Bankr. D. Minn. 2015).

254. *See In re* Boy Scouts of Am., No. 20-10343, 2021 WL 1820574 (Bankr. D. Del. 2020).

255. *See* Parikh, *supra* note 33; *see also* Smith, *supra* note 39, at 1663.

256. *See* Paul et al., *supra* note 226.

257. *See id.*

258. *See* McKenzie, *supra* note 188, at 1004.

259. *See* JONES DAY, *supra* note 193.

260. See 28 U.S.C. §§ 157(b)(5), 1334(b).

261. *See* 28 U.S.C. § 157(b)(5); 11 U.S.C. § 362(a).

bankruptcy proceedings.[262] Likewise, pursuant to 28 U.S.C. § 1334, the district court enjoys "original but not exclusive jurisdiction of all civil proceedings arising under . . . or related to cases under Title 11."[263] The Code grants bankruptcy courts such pervasive jurisdiction in order to encourage the efficient and expeditious resolution of all matters affecting the debtor.[264] In the case of *Pacor, Inc. v. Higgins*, the United States Third Circuit Court of Appeals interpreted "related to" jurisdiction broadly.[265] The court articulated the standard as "whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy."[266]

Another important aspect of Chapter 11 is the automatic stay.[267] The automatic stay is sweeping in scope; it halts almost all pending litigation in federal and state forums.[268] Upon the commencement of the bankruptcy case, the stay immediately enjoins all actions and proceedings against the debtor.[269] The significance of the automatic stay is threefold: (1) it protects corporate tortfeasors from collateral litigation; (2) it prevents creditors from depleting assets before others have the chance to recover; and (3) it eases consolidation efforts.[270]

Lastly, a significant benefit of Chapter 11 is the ability to discharge all claims against the debtor.[271] A confirmed reorganization plan becomes "the governing document setting forth the treatment of the rights and obligations of interested parties."[272] Through a channeling injunction, the bankruptcy discharge impacts individuals beyond those involved in plan confirmation; it is binding even on individuals who did not submit a proof of claim in the process, whether they were aware of their status as

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262. 28 U.S.C. § 157(b)(5).

263. 28 U.S.C. § 1334(b).

264. *See* Celotex Corp. v. Edwards, 514 U.S. 300 (1995) (quoting Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984)).

265. *See Pacor, Inc*., 743 F.2d at 994. The United States Supreme Court endorsed the *Pacor* test in *Celotex Corp.*, 514 U.S. 300.

266. *See id.*

267. 11 U.S.C. § 362(a).

268. *Id.*; *see* McKenzie, *supra* note 188, at 1004. However, the automatic stay will not stop the commencement or continuation of a criminal action or proceeding against the debtor, or the commencement or continuation of a civil action or proceeding for the establishment of paternity, domestic support obligations, child custody or visitation, or marriage dissolution. *See* Smith, *supra* note 39, at 1639.

269. 11 U.S.C. § 362(a); *see* McKenzie, *supra* note 188, at 1004.

270. *See* Smith, *supra* note 39, at 1639.

271. 11 U.S.C. § 1141(d)(1); *see* McKenzie, *supra* note 188, at 1004.

272. McKenzie, *supra* note 188, at 1006.

claimants or not.[273] A channeling injunction, modeled from the *Manville* plan of reorganization, directs all present and future creditors to a litigation trust and discharges the responsibility of the debtor, its related operating entities, and its insurers.[274] Consequently, any grievances that future claimants may have must be reconciled by the trust, not the reorganized debtor.[275] In effect, channeling injunctions protect the debtor from the threat of indefinite liability and give the debtor a "much stronger balance sheet" upon emergence as a reorganized entity.[276]

B. Challenging Chapter 11's Fitness for Mass Tort Resolution

The goals of aggregation are: "(a) enforcing substantive rights and responsibilities; (b) promoting efficient use of litigation resources; (c) facilitating binding resolutions of civil disputes; and (d) facilitating accurate and just resolutions of civil disputes by trial and settlement."[277] These goals will inherently conflict, and no procedural device will prove to be flawless.[278] Yet, reliance on Chapter 11 as a means for resolving mass tort litigation is misplaced.[279] Although Chapter 11's expansive jurisdiction and automatic stay may appear to be more efficient and convenient, surveying past mass tort bankruptcies reveals that its efficiency is merely an illusion. The goals of aggregate litigation are better accomplished through MDL than bankruptcy.[280]

1. Litigation Resources

Resolving mass tort disputes is an inherently costly and time-consuming process.[281] Bankruptcy cases are exceptionally expensive because of the forced submission to the oversight of courts, committees, and the U.S. Trustee.[282] In Chapter 11 cases, attorneys' fees are usually billed on an hourly basis, the court filing fee is almost six times higher than Chapter 7 and Chapter 13 filings, and debtors in possession owe

273. *See id.*
274. *See In re* Johns-Manville Corp., 843 F.2d 636, 640 (2d Cir. 1988).
275. *See* McKenzie, *supra* note 188, at 1006.
276. *See* 11 U.S.C. § 524(g)(2)(B)(i)–(ii); *see also* Paul et al., *supra* note 226.
277. AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.03 (2010).
278. *See* BURCH, *supra* note 143, at 15 n.31.
279. *See generally* Parikh, *supra* note 33.
280. *See generally id.*
281. *See* Paul et al., *supra* note 226.
282. *See* McKenzie, *supra* note 188, at 1010.

quarterly fees to the United States Trustee's Office while the case is pending.[283] In addition, the unfamiliarity with Chapter 11 terrain requires professional services that carry immense costs.[284] The debtor is responsible not only for the expenses of its attorneys, accountants, and professionals that it engages but also for the expenses of the official committees appointed in the proceeding.[285] Furthermore, the extensive requirements of providing notice to creditors have the potential to create "filing frenzies."[286] Especially in bankruptcy cases involving high-profile media magnets such as Purdue Pharma and Boy Scouts of America, this noticing process may provoke an influx of dubious claims or claims that may have never been pursued but for the bankruptcy.[287]

Additionally, Chapter 11 is a long and arduous process.[288] Initially, bankruptcy appears to provide an efficient forum for resolving mass torts because of its pervasive jurisdiction and comprehensive resolution in one single forum.[289] But such qualities do not necessarily guarantee the expeditious resolution of claims.[290] In fact, Chapter 11 bankruptcy cases often result in significant delay of final disposition.[291] Complex mass tort cases are notorious for lingering in bankruptcy court for over six years.[292] In part, the complexity of Chapter 11—with its disclosures, committees, hearings, special accounts, audits, votes, and oversight by the United States Trustee's Office—makes the process extremely arduous.[293] In addition, the Code provides that for a period of 120 to 180 days the debtor

283. The initial fee charged by attorneys just for filing the case most often exceeds $20,000. *See* Jonathon Petts, *Chapter 7 vs. Chapter 11 Bankruptcy in 2020: The Truth*, UPSOLVE, https://upsolve.org/learn/chapter-7-vs-chapter-11-explained/ [https://perma.cc/P598-KHDY] (last updated Oct. 20, 2020).

284. *See* Paul et al., *supra* note 226.

285. These committees can include "the official committee of unsecured creditors, it may also include an equity committee, a funded debt committee, and any other committee necessitated by the constituents in a particular case." *See id.*

286. *See id.*

287. *See id.*

288. *See id.*

289. *See* Vairo, *supra* note 94, at 27.

290. *See id.*

291. *See id.*

292. *See, e.g.*, *In re* Johns-Manville Corp., 843 F.2d 636, 639 (2d Cir. 1988) (lasting six years); *In re* Dow Corning Corp., 211 B.R. 545 (Bankr. E.D. Mich. 1997) (lasting nine years).

293. *See More About Chapter 11 Bankruptcy*, IN CHARGE DEBT SOLUTIONS, https://www.incharge.org/bankruptcy/chapter-11/ [https://perma.cc/SX8N-WQRZ] (last visited Feb. 8, 2022).

has the exclusive right to propose a plan of reorganization.[294] This exclusivity period is routinely extended in complex mass tort-induced bankruptcy cases.[295] The exclusivity period in conjunction with the automatic stay allows a debtor to "comfortably continue its business without fear of displacement by its creditors or competing plans of reorganization."[296] While these mechanisms are designed to quickly resolve all claims, in reality they create a privilege that shifts the process in the debtor's favor and diminishes claimants' leverage for settlement.[297]

In contrast, MDL tends to resolve relatively quickly.[298] *In re Vioxx Products Liability Litigation*, for example, reached a global settlement in only two years.[299] Despite encompassing over 20,000 claims, Judge Fallon used a combination of discovery orders, bellwether trials, and coordination with the judges and attorneys presiding over state cases to facilitate a global settlement.[300] Furthermore, because MDL provides an efficient, collective resolution of mass tort claims by streamlining pretrial proceedings, both litigants and the judicial system save resources.[301] Often, transactional costs would be too high for individuals to pursue claims on their own.[302] Importantly, through MDL, lower transactional costs allow the redress of wrongs that could not otherwise be righted.[303]

2. Facilitating Global Settlement

In mass tort disputes, the endgame is global settlement.[304] While both MDL and Chapter 11 proceedings have the power to facilitate global settlement, MDL does so more efficiently and fairly to all victim classes.[305] Whereas MDL judges assume the role of active case managers, bankruptcy

294. *See* 11 U.S.C. § 1121(b)–(d); *see also* Rice & Davis, *supra* note 167, at 435.
295. *See* Rice & Davis, *supra* note 167, at 441.
296. *See id.* at 435.
297. *See id.*
298. *See* Edward F. Sherman, *The MDL Model for Resolving Complex Litigation If a Class Action Is Not Possible*, 82 TUL. L. REV. 2205 (2008).
299. *See In re* Vioxx Prods. Liab. Litig., 501 F. Supp. 2d 789 (E.D. La. 2007).
300. *Id.*
301. 28 U.S.C. § 1407 (2000).
302. *See* Andrew D. Bradt, *"A Radical Proposal": The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831, 913 (2017) [hereinafter Bradt, *A Radical Proposal*].
303. *See id.*
304. JUDICIAL PANEL ON MULTIDISTRICT LITIGATION & FEDERAL JUDICIAL CENTER, TEN STEPS TO BETTER CASE MANAGEMENT: A GUIDE FOR MULTIDISTRICT LITIGATION TRANSFEREE JUDGES (2d ed. 2014).
305. *See* Rice & Davis, *supra* note 167, at 435.

courts engage in lax oversight.[306] Bankruptcy judges neither participate in settlement negotiations nor scrutinize attorneys' fees like MDL judges.[307] Transferee judges tend to play an active role in overseeing settlement negotiations and compelling party participation.[308] The majority of federal courts agree that public policy favors settlement of mass tort disputes.[309] Indeed, Federal Rule of Civil Procedure 16 provides that "facilitating settlement" is one purpose of a pretrial conference.[310] Perhaps the most significant advantage that the MDL court has in facilitating settlement is flexibility.[311] Largely unrestricted by procedural rules, MDL judges have developed a host of creative means for encouraging settlement.[312] Such measures include: (1) selecting liaison and steering committees;[313] (2) appointing magistrate judges or special masters to aide case management;[314] (3) conducting bellwether trials;[315] (4) issuing special orders;[316] (5) coordinating with attorneys in state cases;[317] and (6) using alternative dispute resolution mechanisms.[318]

Transferee judges appoint a number of attorneys to serve as lead counsel and sit on steering committees to collaborate in managing the litigation.[319] The court holds regular status conferences with lead counsel and committees, providing the judge with an opportunity to gauge the parties' progress in achieving the proceedings' objectives and to help to

306. *See* Vairo, *supra* note 94, at 31–32.

307. *See id.*

308. Martin H. Redish & Julie M. Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109, 129 (2015).

309. Sherman, *supra* note 298, at 2205.

310. FED. R. CIV. P. 16(A)(5).

311. Bloch Judicial Institute, *Guidelines and Best Practices for Large and Mass-Tort MDLs*, DUKE L. SCH. (Sept. 2018), https://judicialstudies.duke.edu/wp-content/uploads/2018/09/MDL-2nd-Edition-2018-For-Posting.pdf [https://perma.cc/UV25-5E2P].

312. *See* BURCH, *supra* note 143.

313. Redish & Karaba, *supra* note 308, at 109.

314. Bloch Judicial Institute, *supra* note 311.

315. *See* Melissa J. Whitney, *Bellwether Trials in MDL Proceedings*, FED. JUD. CTR. & J.P.M.L. (2019), https://www.fjc.gov/sites/default/files/materials/19/Bellwether%20Trials%20in%20MDL%20Proceedings.pdf [https://perma.cc/YG2U-XUNP].

316. *See* Elizabeth Chamblee Burch, *Nudges and Norms in Multidistrict Litigation*, YALE L.J. 64, 65 (2019) [hereinafter Burch, *Nudges and Norms*].

317. *See* Sherman, *supra* note 298, at 2205.

318. *See id.*

319. Redish & Karaba, *supra* note 308, at 109.

ensure that the court and all counsel are informed of significant developments.[320] In addition, transferee courts test the merit of claims early in the litigation by utilizing case-management orders such as plaintiff fact sheets.[321] Fact sheets require plaintiffs to produce information about their claims from the outset and are crucial to any settlement discussions.[322] Indeed, settlement negotiations are often delayed because the parties do not have enough information to assess the potential merit and value of individual claims.[323] Importantly, requiring plaintiffs to verify their claims at an early stage in the litigation addresses any concerns that MDL proceedings encourage unsubstantiated claims.[324]

A third method of promoting global settlement is through the use of "bellwether trials."[325] While § 1407(a) limits the transferee court's authority to pretrial matters only, the court may conduct trials of cases originally filed in the transferee's district and cases in which the parties waive objections to venue.[326] Transferee judges schedule bellwether trials in order to produce information about outcomes and claim values that assist the parties in negotiating a global settlement over the remaining claims.[327] In effect, bellwether trials provide momentum to settlement.[328] Another way transferee courts encourage settlement is by issuing a variety of special orders.[329] Sometimes, the mere threat of remand will spur settlement.[330] Lone Pine orders, which require plaintiffs to offer an expert report proving that the defendant's product or device caused their injuries, also help the court weed out frivolous claims and further encourage settlement.[331] Moreover, even without a formal order, transferee judges' express approval or disapproval is often enough to seal the settlement deal.[332] Litigants respect and defer to judges, so judicial endorsements are highly influential.[333]

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320. Bloch Judicial Institute, *supra* note 311.
321. *Id.*
322. *Id.*
323. *Id.*
324. *Id.*
325. *See* Whitney, *supra* note 315.
326. *See id.*
327. *See id.*
328. *See id.*
329. *See* Burch, *Nudges and Norms*, *supra* note 316, at 64–65.
330. Bloch Judicial Institute, *supra* note 311.
331. Lone Pine orders serve as case management orders that require plaintiffs to provide evidence to substantiate causation allegations or the extent of injuries. *See* Burch, *Nudges and Norms*, *supra* note 316, at 64–65.
332. *See* BURCH, *supra* note 143, at 99–101.
333. *See id.*

Another means of encouraging the parties to settle is by appointing a special settlement master to preside over negotiations.[334] Federal Rule of Civil Procedure 53 authorizes settlement masters to order the parties to meet for the purpose of engaging in meaningful settlement negotiations and to make recommendations to the court concerning the resolution of issues required to facilitate settlement.[335] Thus, settlement masters occupy many roles during litigation such as mediator, negotiator, subject matter expert, discovery manager, and judicial advisor.[336] Courts frequently appoint settlement masters to supervise settlement negotiations that require specialized knowledge or expertise that would otherwise be too time-consuming for a judicial officer.[337] Finally, MDL judges encourage, and often order, alternative dispute resolution (ADR) mechanisms to prompt settlement.[338] Such mechanisms include summary jury trials, mandatory court-annexed mediation, mandatory non-binding arbitration, and mini-trials.[339] Notably, the Judicial Panel on Multidistrict Litigation published a guide for MDL recommending the transferee judge to "encourage an early mediation process" always keeping "the endgame in mind."[340]

3. Accuracy and Fairness

A significant problem in aggregate litigation is "balancing the persistent need for efficient processing of claims in a system that relies on litigation for enforcement of rights with the foundational American norms

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334. *See* BURCH, *supra* note 143, at 101 (noting that Judge Woodlock appointed a special settlement master in the *Fresnius GranuFlo* litigation, and lead plaintiffs' attorneys conceded that "having the imprimatur of the Court on this settlement, especially given the number of claims," will make things "go more smoothly"). In *In re Zimmerman Durom Hip Cup Products Liability Litigation*, where plaintiffs sued the manufacturer of a faulty hip replacement device, the transferee judge stayed the MDL proceedings, ceasing all discovery efforts, bellwether trials, and remands, and required plaintiffs to enter into a private settlement program for 18 months or until they settled. *See In re* Zimmerman Durom Hip Cup Prods. Liab. Litig., No. 09-cv-04414 (D.N.J. May, 13, 2016); *see also* BURCH, *supra* note 143, at 102.

335. FED. R. CIV. P. 53.

336. *See* Wayne D. Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?*, 53 U. CHI. L. REV. 394, 395–98 (1987).

337. *See id.*

338. JUDICIAL PANEL ON MULTIDISTRICT LITIGATION & FEDERAL JUDICIAL CENTER, *supra* note 304.

339. *Id.*

340. *Id.*

of individual participation and a day in court."[341] The problem of future victims created by elastic mass tort litigation frustrates efforts to develop permanent solutions. The principal concern regarding future claims is the right to due process. The right to proper notice and an opportunity to be heard are pillars of the U.S. Constitution. Discharging future unidentifiable claimants "to whom meaningful individualized notice cannot be given and who cannot actually appear in the case" implicates due process concerns.[342] Indeed, "it is a drastic thing to cut off the rights of persons who are not parties"—especially those who are not even aware of their potential to be parties.[343] Congress addressed the issue of discharging future claims by codifying the *Manville* trust scheme in § 524(g).[344] Under this section, the appointment of a legal representative is required in order to protect the rights of those who may subsequently assert a future demand.[345] As previously mentioned, however, § 524(g) only mandates the future-claims representative for purposes of asbestos-related injury claims.[346] In other words, there are no statutory safeguards to ensure this protection in other mass tort bankruptcies that produce channeling injunctions under § 105.[347]

Despite the fact that mass torts in MDL are typically resolved by settlements, individuals have the choice to opt in to a settlement or to demand to litigate individually.[348] Unlike a bankruptcy proceeding, absent victims are not bound by MDL settlements.[349] Each plaintiff retains their individual identity, their chosen representation, and their chosen forum, as each case remains governed by the law of its original forum.[350] In effect, MDL preserves the traditional "norms of individual and decentralized control" embodied in American litigation, while simultaneously avoiding delay caused by repetitive rulings.[351] Thus, MDL balances the tensions between efficiency and retaining litigant autonomy—one important consideration that bankruptcy fails to adequately address.[352]

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341. Bradt, *A Radical Proposal*, *supra* note 302, at 913.
342. 11 U.S.C. § 524(g)(4)(B)(i); *see* Vairo, *supra* note 94, at 31–32.
343. *See* Bradt, *Something Less and Something More*, *supra* note 145, at 1721.
344. 11 U.S.C. § 524(g).
345. 11 U.S.C. § 524(g)(4)(B)(i).
346. *Id.*
347. *Id.*
348. Bradt, *A Radical Proposal*, *supra* note 302, at 914.
349. *Id.*
350. *Id.*
351. *Id.*
352. *See infra* Section III.B.3.

One of the most troubling implications for mass tort victims in Chapter 11 proceedings is that the bankruptcy process "systematically undercompensates tort creditors."[353] The primary reason tort victims are often undercompensated in bankruptcy proceedings is that their claims are subordinated to the claims of secured creditors.[354] By filing for Chapter 11, defendants increase the recoveries of secured lenders at the expense of tort victims.[355] This creates a substantial risk of insolvency that tort victims are forced to bear.[356] Ultimately, tort victims end up with token recoveries regardless of the severity of harm underlying their claims.[357] Meanwhile, the defendant is able to satisfy all of its debts, relieve itself from future liability, and restructure into a new entity.[358] Positioned last in line for recovery, tort claimants' only leverage is their ability to vote against the debtor's plan of reorganization, which is "worth little in practice."[359]

The bankruptcy process also suffers from a deficient system for valuing and estimating claims.[360] The debtor's total liability must be established in order to create a successful Chapter 11 reorganization plan.[361] Under the Bankruptcy Code, a debtor estimates its "contingent, unliquidated debt," and the bankruptcy court has original jurisdiction over the estimation proceeding.[362] This estimation process, however, is "not a trial on liability or an award of specific damages to individuals."[363] Rather, claims are estimated primarily for voting on the reorganization plan and for determining its feasibility.[364] The bankruptcy court is not authorized to hold a jury trial nor does the Code require that there be an actual trial before plan confirmation.[365] The bankruptcy system is accustomed to providing an administrative process that relies on the parties to reach a consensual resolution.[366] As a result, bankruptcy's truncated adversarial proceeding means that mass tort victims with distinct injuries may be

353. Vincent S.J. Buccola & Joshua C. Macey, *Claim Durability and Bankruptcy's Tort Problem*, 38 YALE J. ON REG. 766 (2021).
354. *See id.*
355. *See id.*
356. *See id.*
357. *See id.*
358. *See id.*
359. *Id.*
360. *See* Rice & Davis, *supra* note 167, at 442.
361. *See id.*
362. *See id.*
363. *See id.*
364. *Id.*
365. *Id.*
366. *Id.*

grouped together.[367] In the same vein, some creditors may be unfairly left out of their appropriate class.[368] The effects of producing such overinclusive or underinclusive classes are significant, as the reorganization plan treats all members of each class equally to the members of its own class for purposes of recovery.[369] Accordingly, there is a possibility that mass tort claimants may not receive the compensation they deserve.

Furthermore, bankruptcy courts do not scrutinize the plan of reorganization as closely as district judges presiding over class action and MDL negotiations and settlements.[370] Judges review class action settlements to ensure fairness of the negotiation process and resulting settlements.[371] Similarly, MDL transferee judges take an active role in settlement negotiations.[372] In contrast, bankruptcy courts in Chapter 11 cases preside over the estimation process and evaluate plan feasibility during the confirmation hearing yet are absent from plan negotiations.[373] The only time bankruptcy courts engage in a fairness inquiry is in the event that the creditors cannot agree on a plan and the court invokes its cram-down power.[374] This lack of judicial scrutiny further tilts the bankruptcy process in favor of mass tort defendants and discourages meaningful settlement efforts.[375]

IV. AMENDING THE BANKRUPTCY CODE

Congress created MDL specifically for resolving mass tort litigation unsuitable for resolution through class action and bankruptcy.[376] Mass tort defendants should be disincentivized from abandoning MDL unless there is a legitimate need for reorganization. Amending the Bankruptcy Code to provide for a strict reorganization-legitimacy standard is the first step toward this goal. Nevertheless, for the necessary mass tort-induced bankruptcies, the Bankruptcy Code should be amended to extend the

367. *Id.*
368. *Id.*
369. *See* Vairo, *supra* note 94, at 27.
370. *See* Rice & Davis, *supra* note 167, at 455.
371. *See id.*
372. Redish & Karaba, *supra* note 308, at 129.
373. *See* Rice & Davis, *supra* note 167, at 455–56.
374. *See id.* at 437. The Code's "cram down" provision allows the bankruptcy court to accept a plan of reorganization even over the objection of some claimant classes. *See* discussion *infra* Section II.C.1.
375. *See* Rice & Davis, *supra* note 167, at 455–56.
376. *See* BURCH, *supra* note 143.

provisions protecting asbestos-related cases to all cases involving elastic torts and latent injuries.

A. Proposed Legislation Requiring a Legitimate Showing of the Need for Reorganization

The purpose of Chapter 11 is to provide honest, financially distressed debtors with a new beginning.[377] To protect this privilege, the Bankruptcy Code requires good faith by the debtor when petitioning the court.[378] The standard for good faith varies by jurisdiction.[379] Some courts require both objective futility and subjective bad faith to be evident in order to warrant a bad faith dismissal, while other courts only require evidence of either objective futility or subjective bad faith.[380] In order to disincentivize corporate tortfeasors from invoking Chapter 11 protections solely for the purpose of escaping MDL, a precise standard for good-faith must be incorporated into the Bankruptcy Code.[381] The Bankruptcy Code should be amended to provide for a mandatory inquiry into the legitimacy of the entity's need for reorganization. Further, the inquiry should occur at the outset of the proceeding, once the petition is filed, rather than upon a creditor's showing or after the proposal of a reorganization plan. The bankruptcy court should be required to conduct a more critical analysis than the good faith inquiry that merely asks whether the proceeding was filed with good intentions and with the expectation of reorganization.

Specifically, the standard should test the legitimacy of the Chapter 11 filing by asking whether the debtor's potential tort liability both threatens the continuing vitality of the entity and substantially exceeds the debtor's ability to compensate all present and future creditors. Further, the standard should mimic the Third Circuit's test regarding whether the petition serves a valid purpose for reorganization or whether it was filed "to obtain a tactical litigation advantage."[382] This legitimacy standard will encourage only good faith filings and deter defendants from relying on bankruptcy as an easy "out." In effect, only entities with legitimate reorganization concerns will enter Chapter 11 proceedings, and such entities will be more inclined to cooperate with creditors, rather than to stall reorganization negotiations.

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377. *See* JONES DAY, *supra* note 193.

378. *See* 11 U.S.C. § 1129(b)(3); 11 U.S.C. § 1112(b)(4); *see also* Douglas, *supra* note 198.

379. *See* Carolin Corp. v. Miller, 886 F.2d 693, 699 (4th Cir. 1989).

380. *See id.*

381. *See* 11 U.S.C. § 1129(b)(3); 11 U.S.C. § 1112(b)(4).

382. *In re* Integrated Telecom Express, Inc., 384 F.3d 108, 119 (3d Cir. 2007).

B. Legitimate Reorganization Facing Elastic Mass Tort Liability Should be Subject to the Provisions of § 524(g)

Once mass tort defendants' Chapter 11 filings satisfy the legitimacy standard, then § 524(g)(2)(B)(i)(I) should be extended to encompass all mass tort bankruptcies involving elastic mass torts and latent injuries.[383] Section 524(g)(2)(B)(i)(I) should be amended to provide:

> (i) the injunction is to be implemented in connection with a trust that, pursuant to the plan of reorganization-
>
> (I) is to assume the liabilities of a debtor which at the time of entry of the order for relief has been named a defendant in personal injury, wrongful death, or property related actions ~~seeking recovery for damages allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products~~ *likely to subject the debtor to substantial future demands allegedly caused by the same or similar conduct that gave rise to the claims that are addressed by the injunction.*

There are two primary justifications for this change. First, Congress enacted § 524(g) in response to the "seemingly intractable" asbestos litigation.[384] What makes the asbestos litigation seemingly intractable is its elasticity, and that characteristic is not limited to asbestos alone.[385] Harm caused by the presence of or exposure to asbestos implicates all four victim classes.[386] Similarly, other product liability, toxic-exposure, and widespread-disaster mass torts involving latent harms also implicate all four victim classes and, thus, are properly included in the proposed statutory amendment.[387]

The opioid litigation illustrates this point.[388] The harm inflicted by the opioid epidemic is both temporally and geographically dispersed across the country, affecting state and local governments and their citizens for the last 40 years.[389] The various injuries resulting from the harm range across

383. *See* 11 U.S.C. § 524(g)(2)(B)(i)(I).

384. *See* McKenzie, *supra* note 188, at 999.

385. *See id.*

386. *See* 11 U.S.C. § 524(g)(2)(B)(i)(I).

387. *See, e.g.*, *In re* Agent Orange Product Liability Litig., 475 F. Supp. 928 (E.D.N.Y. 1979); *see also* discussions *supra* Section I.B.3.

388. *See In re* Nat'l Prescription Opiate Litig., 290 F. Supp. 3d 1375, 1379–80 (J.P.M.L. 2017); *In re* Purdue Pharma, Case No. 19-23649, 619 B.R. 38 (Bankr. S.D.N.Y. 2019).

389. *See id.*

all four victim classes. There are present identifiable victims that have been harmed by Purdue's conduct, such as the various states that bore the costs of rehabilitating their citizens.[390] Present identifiable victims also include individuals like Cory Boland's mother who exhausted her financial means on rehabilitating her son.[391] There are also future identifiable victims such as the babies yet to be born who, upon birth, will suffer from Neonatal Abstinence Syndrome as a result of their mothers abusing opioids during pregnancy.[392] Lastly, there are also future unidentifiable victims such as babies who also have yet to be born but may potentially be born with Neonatal Abstinence Syndrome if their mothers begin abusing opioids during pregnancy.[393] Just as the opioid crisis involves elastic torts and latent injuries, many mass tort injuries implicate all four victim classes and manifest over long periods of time. Therefore, all mass tort cases involving elastic torts, latent injuries, and enterprise-threatening liability that are subject to Chapter 11 reorganization should be covered by the same protections as asbestos-related claims.[394]

CONCLUSION

Mass tort defendants are exiting MDL and entering Chapter 11 bankruptcy proceedings in an attempt to regain control of the litigation.[395] Appealing to the bankruptcy court's all-writs powers under § 105, defendants are seizing the procedural advantages of § 524(g)—the provision applicable only to asbestos-related tort claims.[396] This trend is problematic because defendants are selecting favorable features of § 524(g) without being subject to its restrictions.[397] As the process stands, Chapter 11 benefits mass tort debtors while disadvantaging creditors.[398] Although the MDL framework is not flawless, it is the best available option for resolving mass tort litigation.[399] Nevertheless, Chapter 11 can serve as an appropriate device for resolving mass tort liability only when there is a legitimate need for reorganization. Therefore, the Bankruptcy

390. *See In re* Nat'l Prescription Opiate Litig., 290 F. Supp. 3d at 1379–80; *In re* Purdue Pharma, 619 B.R. 38.
391. Boland, *supra* note 1.
392. *Data and Statistics About Opioid Use During Pregnancy*, *supra* note 14.
393. *Id.*
394. *See* 11 U.S.C. § 524(g)(2)(B)(i)(I).
395. *See* Parikh, *supra* note 33.
396. *See id.*
397. *See id.*
398. *See id.*
399. *See id.*

Code should be amended to reflect a stricter good-faith standard for commencing a Chapter 11 case and to extend § 524(g)'s provisions to all elastic mass torts that proceed through bankruptcy. Ultimately, these amendments will disincentivize corporate tortfeasors from escaping MDL and will facilitate efficient, fair, and conclusive mass tort resolution.