Sorting Bugs and Features of Mass Tort Bankruptcy

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In 1997, after two years of study, the National Bankruptcy Review Commission recognized bankruptcy's potential as a forum to address mass tort problems. It emphasized, however, that Congress needed to do much more to ensure due process, address major risks of under-compensation and inconsistent compensation, and reduce uncertainty about the lawfulness of these cases. United States Supreme Court cases invalidating particular limited-fund class actions raised the stakes, casting doubt on certain analogous bankruptcy practices.

Congress adopted neither the Commission's proposals nor others on the topic. Mass tort bankruptcy practice continued without legislative clarifications or improvements, culminating in recent high-profile and controversial cases.

Revisiting earlier reform discussions helps reveal how much bugs, rather than features, drive some mass tort bankruptcies. Defendants gravitate to bankruptcy to do extraordinary things that have weak statutory and constitutional support and are in tension with principles of due process, not to mention federalism and separation of powers. The design of mass tort bankruptcies also tends to blunt the effective operation of standard Chapter 11 protections meant to empower individual creditors—tools that often are cited as making bankruptcy "better" for mass tort than other aggregate litigation fora. That makes the system overly reliant on group representation measures in mass tort cases in ways that are inconsistent with both bankruptcy law and constitutional principles. The analysis here invites skepticism about whether the system can lawfully and fairly deliver the level of global resolution that debtors and their co-defendants demand.

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Introduction

The first time I wrote about mass torts and aggregate litigation was as a scribe. The 1994 law that authorized use of the federal bankruptcy system to restructure asbestos liabilities also created a National Bankruptcy Review Commission.[1] Congress gave this Commission two years and a modest budget to study the American bankruptcy system and propose improvements.[2] As a staff attorney to this Commission, analyzing the role of the bankruptcy system in responding to "mass future claims" was one of my assignments.

A law to restructure largely commercial, largely voluntary debts is not an obvious home for mass torts. Some of the biggest issues in mass tort—determining liabilities present and future personal injury and wrongful death, the scope of insurance coverage for such allegations—cannot be resolved adequately in bankruptcy court. Nonetheless, the Commission's work reflected that injured people might be better off if a financially struggling enterprise survived.

In its final Report, published October 20, 1997, the Commission opined that bankruptcy's existing protections, combined with the enclosed proposals, would make bankruptcy better and fairer than class actions (at the time, multidistrict litigation (MDL) was not a common comparator).[3] The Commission advocated for more statutory infrastructure to give injured parties due process; promote equality of treatment among claimants, no

1. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 602, 108 Stat. 4106, 4147. For the asbestos amendments, see 11 U.S.C. § 524(g)(2)(B)(i)(I).

2. See Bankruptcy Reform Act of 1994 §§ 608, 610, 108 Stat. at 4149–50 (detailing the Commission's responsibilities and allocating $1,500,000 for its budget).

3. NAT'L BANKR. REV. COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS 339–41 (1997) [hereinafter COMMISSION REPORT], https://govinfo.library.unt.edu/nbrc/reportcont.html [https://perma.cc/WG75-BHV6]. When the Commission concluded deliberations, the Supreme Court had decided *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591 (1997), but not *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

matter the timing of their injuries; and provide greater legal clarity on what bankruptcy can and cannot do.[4]

In 1998, this very law review published a skeptical response to the Commission proposals.[5] The author, the Honorable Edith Hollan Jones of the United States Court of Appeals for the Fifth Circuit, was the Commission's only Article III judge member.[6] Among other things, Judge Jones critiqued the Report's "veneer of chirpy optimism" about bankruptcy's utility for mass torts, especially given the due process challenges associated with cutting off rights of future injured parties.[7] A special committee of the Judicial Conference of the United States likewise doubted the Commission proposals would satisfy due process requirements.[8]

Congress adopted neither the Commission's proposals nor others. Mass tort bankruptcy practice nonetheless continued without legislative clarifications or improvements, culminating in envelope-pushing filings. Lawyers in the newer cases not only tout Chapter 11 as the best, or, indeed, the only way to find global peace, but they explicitly cast aspersions on juries, multidistrict litigation, and other parts of the civil justice system.[9]

While not all relief-seekers will get everything they want, modern big-bankruptcy practice undercuts the package deal of Chapter 11 meant to empower creditors to help chart the fate of a bankrupt enterprise and its restructuring. Moreover, lawyers, defendants, and some plaintiffs' lawyers gravitate to bankruptcy to do extraordinary things that have weak statutory and constitutional support. It is far from obvious that bankruptcy can deliver the level of global finality that some demand of it.

Part I of this Article offers context by going back to the 1990s and early 2000s, framed by two sets of sources. The first is the Commission's final

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4. *See* COMMISSION REPORT, *supra* note 3, at 315–17 (listing proposals pertaining to treatment of mass future claims in bankruptcy).

5. Hon. Edith H. Jones, *Rough Justice in Mass Future Claims: Should Bankruptcy Courts Direct Tort Reform?*, 76 TEXAS L. REV. 1695 (1998).

6. *See* COMMISSION REPORT, *supra* note 3, at 53–57 (detailing the Commission's membership).

7. Jones, *supra* note 5, at 1722.

8. *See* U.S. JUD. CONF. COMM. ON THE ADMIN. OF THE BANKR. SYS., REPORT OF THE SUBCOMMITTEE ON MASS TORTS, *reprinted in* Georgene Vairo, *Mass Torts Bankruptcies: The Who, the Why, and the How*, 78 AM. BANKR. L.J. 93, 135 (2004) [hereinafter REPORT OF THE SUBCOMMITTEE ON MASS TORTS] ("[I]t is unclear whether the Due Process Clause permits either constructive notice or use of a future claims representative as a complete substitution for notice when meaningful notice cannot be given."). Judge Jed Rakoff served as the chair of the subcommittee. *Id.* at 149.

9. *See* Informational Brief of Aearo Technologies LLC at 42–43, *In re* Aearo Techs. LLC, No. 22-02890 (Bankr. S.D. Ind. July 26, 2022), ECF No. 12 (declaring that the MDL is "broken beyond repair" and calling the bellwether trials tainted); Informational Brief of LTL Management LLC at 44, 103, *In re* LTL Mgmt. LLC, No. 21-30589 (Bankr. W.D.N.C. Oct. 14, 2021), ECF No. 3 (complaining that juries are unable to manage evidence relating to claims against J&J and are manipulated by plaintiffs' attorneys in need of a new mass tort now that traditional asbestos litigation no longer sustains their practices).

Report from 1997. The second highlights the scholarship, including two Federal Judicial Center books published in 2000 and 2005, of Professor Elizabeth Gibson, whose expertise lies at the intersection of civil procedure, federal courts, and bankruptcy.

Fast forwarding to today, Part II considers important structural features of bankruptcy that in real life fall short in claimant protection. It also looks at examples of extraordinary relief defendants seek in bankruptcy that lack strong foundation. This Part draws examples from primary-source research on recent mass tort bankruptcies.

I. Then

A 1978 overhaul of corporate reorganization law set the stage for its creative use beyond the commercial debt restructuring for which it was designed. Lacking a strict insolvency requirement or automatic installation of an independent trustee, Chapter 11 of the 1978 Bankruptcy Code allowed big companies to reorganize while retaining significant control.[10] Implementing broad definitions of "claim" and "debt," debtors could sweep many parties into a case—including, said courts, those who technically did not yet have a cause of action under state law.[11]

Experimentation with mass tort bankruptcy began in the 1980s, primarily with asbestos.[12] Once Congress enacted § 524(g), widely known to be modelled on the (ultimately troubled) Manville bankruptcy and trust, asbestos bankruptcies had *some* express Congressional authorization for *some* case features.[13] A body of case law and research led commentators to

10. *See* Lynn M. LoPucki & William C. Whitford, *Corporate Governance in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 141 U. PA. L. REV. 669, 679–80 (1993) (explaining the various authorities retained by the debtor's management team under Chapter 11).

11. *See* Theresa J. Pulley Radwan, *Not So Friendly to* Frenville*: The Split Among Courts Regarding Accrual of Claims in Bankruptcy*, 68 BAYLOR L. REV. 728, 728–29 (2016) (noting the Bankruptcy Code imposes an automatic stay on claims against the debtor that accrued before filing of bankruptcy petition, "preventing [creditors] from taking action on the claim outside of the bankruptcy process").

12. The A.H. Robins bankruptcy, filed in 1985, was an early non-asbestos case overseen mainly by District Judge Robert Merhige. *See* Michael Isikoff, *A.H. Robins Files Bankruptcy Petition*, WASH. POST (Aug. 22, 1985), https://www.washingtonpost.com/archive/politics/1985/08/22/a-h-robins-files-bankruptcy-petition/319d4e74-7140-4ee4-be04-746fe7929ed8/ [https://perma.cc/HP8F-HCDK] (chronicling the company's filing and describing the earlier Manville asbestos bankruptcy); Barnaby J. Feder, *What A.H. Robins Has Wrought*, N.Y. TIMES (Dec. 13, 1987), https://www.nytimes.com/1987/12/13/business/what-a-h-robins-has-wrought.html [https://perma.cc/3R5J-K75Q] (discussing Judge Merhige's involvement with the proceedings).

13. While § 524(g) authorizes certain acts in an asbestos bankruptcy, it does not go as far as some cases have tried to push it. 11 U.S.C. § 524(B)(i)(I); *see In re* Combustion Eng'g, Inc., 391 F.3d 190, 200, 234–38 (3d Cir. 2004) (vacating confirmation of plan with features exceeding authority of § 524(g) and bankruptcy law).

characterize asbestos as a mature tort amenable to global resolution.[14] So-called maturity did not guarantee good results; asbestos cases have been marked by inconsistent recoveries, with a mix and volume of injured parties that varied from predictions, among other dilemmas.[15] Depending on when injured parties sought compensation, claimants have received a lot or a little compensation for identical harms, or less compensation for later serious harms, while others received larger payouts for earlier modest injuries.[16]

Perhaps seeing the asbestos experience more positively than the empirical research suggests, lawyers have expanded the use of bankruptcy into new territories, like sexual abuse, or products liability disputes that lack the depth of research and long-time case development associated with asbestos. It is almost as if the lack of statutory guardrails was an attraction rather than a warning sign.

Things could have gone very differently.

A. Mass Future Claims Proposals

After a two-year study and review of many early publications on mass tort bankruptcies and alternative aggregations (as the Report's bulky footnotes attest), the National Bankruptcy Review Commission recognized bankruptcy's potential in responding to mass torts when they generate significant financial harm for a company.[17] But, as the proposals described below suggest, Congress needed to step in to improve due process for future claimants, address significant risks of undercompensating future injured parties, and create more certainty that this extension of bankruptcy power is indeed not only authorized but also rule-bound, given its extraordinary

14. *See* Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 659 (1989) (defining mature litigation as having "full and complete discovery, multiple jury verdicts, and a persistent vitality in the plaintiffs' contentions"). *But see* Thomas E. Willging, *Beyond Maturity: Mass Tort Case Management in the Manual for Complex Litigation*, 148 U. PA. L. REV. 2225, 2245 (2000) (questioning the overlap between maturity and successful aggregation).

15. *See* S. Todd Brown, *How Long Is Forever This Time? The Broken Promise of Bankruptcy Trusts*, 61 BUFF. L. REV. 537, 537–39 (2013) (revealing how bankruptcy trusts fail to ensure adequate recovery for individuals who discover asbestos harmed them in the future); Marc C. Scarcella & Peter R. Kelso, *A Reorganized Mess: The Current State of the Asbestos Bankruptcy Trust System*, MEALEY'S ASBESTOS BANKR. REP., Feb. 2015, at 1 ("[M]any of these current asbestos trusts have experienced a dramatic, premature depletion of funds."); LLOYD DIXON, GEOFFREY MCGOVERN & AMY COOMBE, ASBESTOS BANKRUPTCY TRUSTS xvii tbl.S.2 (Rand Inst. for C.J. 2010) (displaying financial circumstances of trusts over time and across companies); Frances E. McGovern, *Filings by Companies with Asbestos Liabilities*, 24 DEL. LAW., Winter 2006/07, at 18, 20 (observing how elasticity of asbestos claims complicates prediction of future claims).

16. *E.g.*, Kirk T. Hartley, David C. Christian II, Marc C. Scarcella & Peter R. Kelso, *Pre-Packaged Plan of Inequity: The Financial Abuse of Future Claimants in the T H Agriculture and Nutrition 524(g) Asbestos Bankruptcy*, 11 MEALEY'S ASBESTOS BANKR. REP., Nov. 2011, at 1–2; Brown, *supra* note 15, at 538–39.

17. COMMISSION REPORT, *supra* note 3, at 315.

features. The Bankruptcy Code needed to speak clearly on mass tort bankruptcies; in existing cases, uncertainty suppressed the going concern value of reorganized companies and reduced or made volatile claimants' recovery, among other consequences.[18]

The Commission did not support expanding § 524(g), the asbestos track, to other contexts; indeed, the Report suggested Congress should repeal that provision upon implementation of these newer proposals to avoid confusion.[19] In addition to stifling innovation by being modeled on a single company's (Manville) Chapter 11 reorganization plan to reassure markets of the lawfulness of its restructuring, § 524(g) did not do enough to protect injured parties, particularly those who would discover those injuries in the future.[20] To avoid sticky constitutional and statutory questions, § 524(g) allotted future injured parties a status short of "claim" while still purporting to substantially alter their rights.[21] The structure gave outsized leverage to plaintiffs' lawyers representing large numbers of claimants, whatever the validation or severity of their injuries, undermining the equality-of-distribution objectives that helped justify use of bankruptcy in the first place.[22]

The Commission proposed to make mass future claims a subset of the Bankruptcy Code's existing claim definition.[23] Holders would thus be vested with all the bankruptcy law rights associated with holding claims, including but not limited to voting.[24] The Commission noted more than one future claims representative may be constitutionally necessary given disparity of injuries and other factors; indeed, the Commission anticipated the debtor would create multiple classes of personal injury and wrongful death holders for voting and distribution purposes.[25]

The prize for getting through the revised Chapter 11 process was substantial: clean title to the reorganized entity free of these liabilities.[26] However, for any type of Chapter 11 restructuring, the Commission did *not*

18. *See id.* at 319–20, 322 (discussing issues that emerged from lack of statutory guidance on mass tort bankruptcies and proposing a statutory definition for "mass future claims").

19. *Id.* at 347.

20. *See, e.g.*, *id.* at 319–21 (listing shortcomings of § 524(g)); *id.* at 347 (proposing repeal of § 524(g)).

21. *See id.* at 321 (noting that asbestos injuries were treated as future "demands" rather than claims, which meant that these parties did not get other protections of the Bankruptcy Code.)

22. *See id.* at 321, 323–25 (explaining how changes to the Bankruptcy Code made in response to asbestos suits created issues with the concept of equality of distribution for future litigants).

23. *Id.* at 9 (Proposal 2.1.1). The proposed definition of mass future claims included mass contract claims but excluded government police and regulatory claims. *Id.* at 328–29.

24. *Id.* at 326 (Proposal 2.1.1).

25. *Id.* at 330–33, 332 nn.824–25.

26. *See id.* at 11 (Proposal 2.1.5) (proposing that trustees be allowed to dispose of property after satisfying the requirements for treating mass future claims and that courts be allowed to issue and enforce injunctions precluding claimholders from suing future purchasers).

support the nonconsensual nondebtor releases so prevalently demanded today; the Commission supported only expressly consensual releases with a separate approval process.[27]

In light of limits on the federal bankruptcy power, the Commission recognized that mass future claims should be addressed in bankruptcy only when there was sufficient claim maturity and financial threat to the enterprise (the words "massive" and "mass" are related, after all).[28] With mass claims' focus on litigation arising from use of a single product,[29] there is no sign that the Commission anticipated or endorsed use of bankruptcy in response to something like childhood sex abuse, let alone on a national and multi-decade scale. And the Commission made clear that its proposals would *not* cut off claims arising from, say, the continued duty to warn about product hazards *after* plan confirmation.[30]

The Commission also recommended that Congress authorize estimation of mass future claims for a wide range of purposes.[31] But because bankruptcy judges are not Article III judges (the Commission recommended changing that),[32] the Commission recognized that an Article III judge likely would have to conduct some estimations of personal injury and wrongful death claims.[33]

Other elements of the Commission Report would have restrained defendants' choices in using bankruptcy for mass tort. For example, bankruptcy has no equivalent to the Judicial Panel of Multidistrict Litigation, which selects where the consolidated matters will go. Bankruptcy attracts defendants who would like to pick their court without having to persuade a panel of judges of the virtues of their preference or to challenge where

27. *See id.* at 537–39 (outlining the Commission's recommendations for voluntary releases and specific processes for use); *id.* at 24 (Proposal 2.4.13) (recommending that releases of nondebtors be enforceable only with respect to parties that agree to release those nondebtor liabilities). These release proposals, contained in the "General Issues in Chapter 11" section of the report, apply to all Chapter 11 cases. *See id.* at 451, 456 (listing release proposal in General Issues section).

28. *Id.* at 327. A sufficient track record to estimate or predict value would be required. *Id.* at 328. The conjunctive definition of mass future claim included that the amount of liability is "reasonably capable of estimation." *Id.* at 9 (Proposal 2.1.1).

29. *Id.* at 323.

30. *Id.* at 347–48.

31. *See id.* at 343 (describing the flexibility of the Commission's estimation proposal); *id.* at 10 (Proposal 2.1.3) (recommending that courts be able to estimate and determine the amount of mass future claims).

32. *Id.* at 35 (Proposal 3.1.1).

33. COMMISSION REPORT at 342 & n.852; *see also* 28 U.S.C. § 157(b)(5) ("The district court shall order that personal injury tort and wrongful death claims shall be tried in [one of several district court options]."); *In re* Gawker Media LLC, 571 B.R. 612, 620 (Bankr. S.D.N.Y. 2017) (noting that Title 28 "does not define 'personal injury' or 'personal injury tort'" and concluding that physical harm and severe psychic harm requires "trauma or bodily injury or psychiatric impairment beyond mere shame or humiliation"); *In re* Byrnes, 638 B.R. 821, 827, 829 (Bankr. D.N.M. 2022) (following *Gawker*).

plaintiffs bring their lawsuits. Under the governing statute, large enterprises, with many subsidiaries and the ability to create more, have far greater flexibility in selecting their bankruptcy forum than they would in other federal litigation contexts.[34] In response to concerns about these practices, the Commission proposed a sharp restriction on venue. The Commission proposed to prohibit corporate debtors from filing in a district "based solely on the debtor's incorporation" and to restrict the ability to use a small subsidiary's venue options as a basis for the location of a much larger corporate parent.[35] Overall, the objective was to shift corporate bankruptcy venue into a debtor's principal place of business or location of principal assets.[36]

In summary, the Commission posited bankruptcy as having advantages over other options for mass tort management under some circumstances.[37] And yet there were conditions on the Commission's endorsement: the system needed stronger protections for people who later discover injuries and statutory clarifications of the authority of the bankruptcy system to tackle this problem, coupled with the assumption that Chapter 11's ordinary norms, checks, and balances would be fully operational.[38] The Commission did not endorse nonconsensual third-party releases.[39] This package was combined with other structural reforms, such as restrictions in corporate venue law and Article III status for bankruptcy judges.[40] For better or worse, these likely would have charted a different path for mass tort bankruptcies than what is seen today.

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34. *See* Melissa B. Jacoby, *Corporate Bankruptcy Hybridity*, 166 U. PA. L. REV. 1715, 1731–32 (2018) (identifying departures of bankruptcy venue law from other federal venue laws).

35. COMMISSION REPORT, *supra* note 3, at 37 (Proposal 3.1.5).

36. *Id.* at 771.

37. *See id.* at 334 ("Bankruptcy also yields a jurisdictional advantage; filing for bankruptcy automatically enjoins actions pending in state or federal court. In addition, the bankruptcy court can obtain personal jurisdiction over all parties with an interest in the debtor and can consolidate both state and federal law suits in one forum."); *id.* at 336 (arguing that bankruptcy may be more protective than limited fund class actions with regard to representation of future claimants).

38. The Commission observed:

> [T]he very aspects of bankruptcy that make it an anathema to some lawyers, with rules requiring collective action, extraordinary disclosure requirements, and regular and extensive court supervision from the inception of the case, make bankruptcy more protective of future claimants because it is a forum that mandates scrutiny of all arrangements. The fundamental structure of the bankruptcy system, with restrictions such as the "absolute priority rule," provides safeguards for the interests of mass future claimants that are unmatched in the class action system.

Id. at 339–40.

39. *Id.* at 537–39.

40. *Id.* at 35–36 (Proposal 3.1.2), 37 (Proposal 3.1.5).

B. Comparisons and Warnings

Even this more modest imagining of mass tort bankruptcy was vulnerable to constitutional concerns and other critiques. This subpart focuses on the mass tort bankruptcy work of Professor S. Elizabeth Gibson published from 2000 to 2005. Much of the analysis was published in two Federal Judicial Center books.[41] Professor Gibson's assessments bear highlighting because of her crossover expertise in bankruptcy, federal courts, and civil procedure.

In the book published in 2000, Professor Gibson compared limited fund class actions and bankruptcy.[42] One of bankruptcy's advantages, she found, is requiring that *all* creditors share the pain associated with a company's financial distress.[43] Bankruptcy also allowed each (identifiable) claimant to cast a vote on a plan after meaningful disclosures regarding proposed treatment.[44] Structural protections associated with Chapter 11 plan confirmation were also among bankruptcy's benefits.[45] Professor Gibson did not characterize nonconsensual *non*debtor releases as a strong advantage for bankruptcy because, especially outside of the asbestos context, authorization for these releases was largely unclear at best.[46]

District judges handling class actions held an advantage over bankruptcy judges, Professor Gibson concluded, in assessing the overall fairness of a mass tort resolution.[47] Based on information available at the time, Professor Gibson posited that limited fund class actions were likely less expensive than bankruptcy, with fewer layers of professional fees.[48]

Professor Gibson found neither bankruptcy nor class actions to be inherently better at accurately calculating or estimating tort liability.[49] Both settings presented risk of premature resolution resulting in a significant

41. S. ELIZABETH GIBSON, CASE STUDIES OF MASS TORT LIMITED FUND CLASS ACTION SETTLEMENTS & BANKRUPTCY REORGANIZATIONS (Fed. Jud. Ctr. 2000) [hereinafter GIBSON 2000], https://www.uscourts.gov/sites/default/files/masstort_1.pdf [https://perma.cc/W4SJ-CRE7]; S. ELIZABETH GIBSON, JUDICIAL MANAGEMENT OF MASS TORT BANKRUPTCY CASES (Fed. Jud. Ctr. 2005) [hereinafter GIBSON 2005], https://www.uscourts.gov/sites/default/files/gibsjudi_1.pdf [https://perma.cc/LTX3-NCY9].

42. GIBSON 2000, *supra* note 41, at 1.

43. *Id.* at 5, 28.

44. *Id.* at 19.

45. *See id.* at 19 (listing additional creditor protections, including claimants' right to vote on the plan).

46. *See id.* at 29 (suggesting that proposed amendments "might provide clearer statutory authority for the use of bankruptcy to resolve mass torts").

47. *Id.* at 6, 25.

48. *Id.* at 6.

49. *Id.* at 23.

undervaluation of liability or investment in settling claims that might ultimately lack merit.[50]

Also in 2000, in a mass tort symposium with just a sliver devoted to bankruptcy, Professor Gibson recommended modesty about bankruptcy as a forum to definitively resolve mass tort problems.[51] While Professor Gibson agreed that the Commission's proposals would increase certainty, she noted that the amendments might not sufficiently address the Supreme Court's concerns in *Amchem Products, Inc. v. Windsor*[52] and *Ortiz v. Fibreboard Corp.*,[53] particularly with regard to adequate representation of future injured parties with different types and severity of harm.[54] The common use of a single future claims representative in bankruptcy, including when injuries fell along a spectrum of severity, was in tension with the lessons of these cases.[55] Professor Gibson also noted that the protections commonly touted as making bankruptcy better for claimants can lose their force depending on how the case unfolds and the structure of Chapter 11 plans.[56] And, importantly, she saw bankruptcy as an option only if mass tort liability threatened the viability of a company.[57]

Professor Gibson's 2005 book is a study in mass tort bankruptcy case management.[58] She did not presume that bankruptcy judges would be the exclusive jurists.[59] In addition, while the book's focus is oversight guidance, the text reveals concerns about the foundations of mass tort bankruptcy.

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50. *Id.* at 24.

51. *See* S. Elizabeth Gibson, *A Response to Professor Resnick: Will this Vehicle Pass Inspection?*, 148 U. PA. L. REV. 2095, 2106–08, 2116 (2000) ("[Supreme Court cases] thus suggest that the Constitution, not just the current version of Rule 23, prohibits the certification of broadly defined settlement classes of tort claimants with varying and potentially conflicting interests. If so, the reasoning of these decisions would also seem to apply to classifications in bankruptcy."). For a discussion of the symposium's focus, see generally Stephen B. Burbank, *Foreword: Causes and Limits of Pessimism*, 148 U. PA. L. REV. 1851 (2000).

52. 521 U.S. 591 (1997).

53. 527 U.S. 815 (1999).

54. *See* Gibson, *supra* note 51, at 2113, 2115–16 (explaining that, despite the Commission's recommendation, only one person is typically appointed to represent all future claimants).

55. *See id.* at 2115–16. This a concern for current claimants, too. *See also id.* at 2106 ("Before accepting the argument that bankruptcy offers an advantage [to class actions], one must determine why bankruptcy is permitted greater flexibility in classification than class actions possess."); *id.* at 2112 ("My concern is that in this bankruptcy context, the ability of all members of the class to vote on the plan may not sufficiently ensure that the voices of each distinct subgroup will be adequately heard [because less severe injuries tend to drive approval of plans].").

56. *Id.* at 2109, 2112–13.

57. *Id.* at 2099.

58. GIBSON 2005, *supra* note 41, at 2.

59. *See id.* at 8, 11–12, 14 (providing examples of beneficial district judge involvement, including withdrawing jurisdictional reference from bankruptcy courts, addressing *Daubert* issues involving tort liability, and utilizing judges with experience with allegations and claims).

Professor Gibson worried that Chapter 11 plan voting norms, including a common practice of valuing all tort claims at $1 for voting purposes,[60] were getting little judicial scrutiny.[61] She characterized as unresolved the issue of whether constitutionally adequate notice can be provided to so-called future claimants.[62] Even the Congressional blessing of channeling future asbestos demands toward a trust "does not and cannot resolve the constitutional issues raised by the treatment of future claims in a mass tort bankruptcy."[63]

This second book also recognized the range of mass tort settings and the implications for achieving fair and final resolutions.[64] The complexity of estimation and related processes would be amplified, for example, if a company disclaimed all responsibility for alleged harm while also trying to cut off all liability in perpetuity.[65]

II. Now

The details of modern cases, developed without the Commission proposals in effect, aggravate rather than alleviate Professor Gibson's concerns about due process and underperformance of Chapter 11's checks and balances.[66]

A. Examples of Weakened Bankruptcy Protections in Mass Tort Cases

1. Classification and Voting.—Individual voting, with claims weighted by monetary value and classified by severity, could be responsive to the Supreme Court's concerns expressed in the class action context.[67] Yet, as explained below, mass tort bankruptcy norms limit the protections.

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60. *See, e.g.*, *In re* A.H. Robins Inc., 880 F.2d 694, 698 (4th Cir. 1989) (holding that the practice constituted "at most harmless error" and citing Kane v. Johns-Manville Corp., 843 F.2d 636, 641–47 (2d Cir. 1988), for support).

61. GIBSON 2005, *supra* note 41, at 133.

62. *Id.* at 63; *see also id.* at 63–64 (noting the Supreme Court's conflicting signals in Amchem Prod., Inc. v. Windsor, 521 U.S. 591, 628 (1997), relative to general Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950), guidance).

63. GIBSON 2005, *supra* note 41, at 60–62.

64. *Id.* at 88, 99.

65. *Id.* at 96–97.

66. In addition to not offering reassurances on the constitutionality and legality of mass tort bankruptcy, the Supreme Court has emphasized that pragmatism cannot trump other restrictions on the exercise of judicial power in the bankruptcy context. *See, e.g.*, Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973, 987 (2017) (citations omitted) (quoting Law v. Siegel, 571 U.S. 415, 427 (2014)) ("We cannot 'alter the balance struck by . . . statute . . . ,' not even in 'rare cases.'"); Stern v. Marshall, 564 U.S. 462, 500–01 (2011) (rejecting arguments that would justify bankruptcy judges entering final orders in broader range of disputes).

67. *See Amchem*, 521 U.S. at 627 ("[S]ettling parties, in sum, achieved a global compromise with no structural assurance of fair and adequate representation for the diverse groups and

Bankruptcy law gives the debtor the first opportunity to determine which claims are sufficiently similar to be grouped in classes for voting and equal treatment.[68] Bankruptcy law also gives the debtor flexibility to separately classify claims with similar legal priority.[69]

However classified, bankruptcy law measures a class's acceptance of a plan two ways:

> A class of claims has accepted a plan if such plan has been accepted by creditors . . . that hold at least two-thirds in [dollar] amount and more than one-half in number of the allowed claims of such class held by creditors, other than any entity designated under subsection (e) of this section, that have accepted or rejected such plan.[70]

Like in political elections, tabulation is limited to claimants who cast a vote.[71] Like in political elections, though, we should ask why people register to vote and then do not exercise that right.[72] Why go through the trouble of filing a timely claim in a bankruptcy case (assuming there is a process, known as a "bar date," for doing so at all), which sometimes involves extensive and intimate disclosures, and then not exercise the right to vote on a restructuring plan that could change your rights forever?

In the Boy Scouts of America bankruptcy, over 82,000 individuals filed abuse claims;[73] fewer than 57,000 cast a vote (and of that number, more than 8,000 voted against the plan that cut off their rights against the debtor as well as a huge number of nondebtors).[74] The favorable vote of opioid survivors in

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individuals affected. Although the named parties alleged a range of complaints, each served generally as representative for the whole, not for a separate constituency."); Ortiz v. Fibreboard Corp., 527 U.S. 815, 831–32 (1999) (reversing after the district court took almost no steps to ensure protection of potentially conflicting interests of claimant categories).

68. 11 U.S.C. §§ 1122–23.

69. 7 COLLIER ON BANKRUPTCY ¶ 1112.03[6] (16th ed.).

70. 11 U.S.C. § 1126(c).

71. *See id.* (tabulating only claimants who cast a vote one way or another).

72. *Cf. The NPR Politics Podcast: Why People Don't Vote*, NPR (Dec. 16, 2020, 4:45 PM), https://www.npr.org/2020/12/16/947182471/why-people-dont-vote [https://perma.cc/TA8Z-JRDM] (considering the causes of that phenomenon in the political context).

73. *In re* Boy Scouts of Am., 642 B.R. 504, 518 (Bankr. D. Del. 2022).

74. Supplemental Declaration of Catherine Nownes-Whitaker of Omni Agent Solutions Regarding the Submission of Votes and Final Tabulation of Ballots Cast in Connection with the Limited Extended Voting Deadline for Holders of Claims in Class 8 and Class 9 on the Third Modified Fifth Amended Chapter 11 Plan of Reorganization for Boy Scouts of America and Delaware BSA, LLC at Exhibit A: Final Tabulation Summary—Class 8 and Class 9 at 2, *In re* Boy Scouts of Am., 642 B.R. 504 (Bankr. D. Del. 2022) (No. 20-10343), ECF No. 9275-1. Boy Scouts involved a second solicitation after additional settlements. *In re* Boy Scouts of Am., 642 B.R. at 550. About three thousand fewer people voted in this round compared to the first round. *Compare id.* at 538 (identifying 53,596 Class 8 votes), *with id.* at 550 (listing 56,536 as the number of Class 8 votes after the second round). The Boy Scouts bankruptcy voting was complicated by several additional factors. First, in the first solicitation, survivors may have voted on different versions of

Purdue Pharma's bankruptcy garnered approximately 58,000 acceptances and approximately 2,600 rejections, but an even greater number—almost 69,000—did not vote.[75] I have seen no systematic studies of undervotes, which are likely happening to some extent in all types of Chapter 11 cases. It seems relevant to understanding the comprehensibility and fairness of bankruptcy to tort claimants.

Now to the norms. One is to place personal injury claimants into a single class, rather than grouping by severity or other distinguishing factors that the Supreme Court in *Amchem* and *Ortiz* suggested might be necessary in the class action context.[76] Another is to value all at $1 per claim for voting purposes regardless of severity.[77] Creditors with claims of greater magnitude lose the leverage the voting rules were supposed to give them and that commercial creditors get to use.[78] This norm concentrates the power of plaintiffs' lawyers who solicit especially large numbers of clients whose claims may be less vetted, less severe, or both, relative to others.[79]

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the plan, which was in flux during the voting period. *See* Transcript of Boy Scouts of America Official Tort Claimants Committee Town Hall at 3 (Oct. 28, 2021), https://www .tccbsa.com/_files/ugd/c1f98e_cef49fdbf76c41afb8d0561a8a5104ae.pdf [https://perma.cc/DDE3-8DFX] (describing efforts to revise settlements underlying plan while voting was underway). Second, the ballot spanned twenty-two pages, exceeding the capacity of the envelope supplied for ballots. *Id.* at 16. If survivors didn't return pages 1, 5, 6, 8, and 17, their votes might be challenged or disregarded and their responses to certain questions misunderstood. *Id.* at 16–17.

75. *See* Final Declaration of Christina Pullo of Prime Clerk LLC Regarding the Solicitation of Votes and Tabulation of Ballots Cast on the Fifth Amended Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. and its Affiliated Debtors at 5, 10, *In re* Purdue Pharma L.P., No. 19-23649 (Bankr. S.D.N.Y. Aug. 2, 2021), ECF No. 3372 [hereinafter Final Declaration] (reporting that of 130,488 total non-NAS PI claims, 60,796 of those claims cast a vote). Other categories of claimants, such as third-party payor claims, had an even bigger undervote. *See id.* (reporting that of 467,121 third-party payor claims, only 45,512 cast votes).

76. The Boy Scouts bankruptcy is a modern example. *See In re* Boy Scouts of Am., 642 B.R. at 535–36 (characterizing all direct-abuse claims as Class 8 claims). As examples of exceptions, a few earlier asbestos cases offered special voting procedures by disease category. GIBSON 2005, *supra* note 41, at 132. The Purdue Pharma bankruptcy separated neonatal abstinence syndrome (NAS) claims from other personal injury claims by subclass. *See* Final Declaration, *supra* note 75, at 10 (designating claim categories).

77. *E.g.*, Gibson, *supra* note 51, at 2112.

78. *See, e.g.*, *id.* at 2112 & n.81 (providing an example from *In re* A.H. Robins Inc., 880 F.2d 694 (4th Cir. 1989), where the vast majority of supporting claimants did not have sufficiently severe injuries to file lawsuits).

79. *See* RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT 112 (2007) (describing how the bankruptcy process "enhance[s] the leverage of plaintiffs' lawyers to demand generous payouts" for large volume of claimants they represent even when that would be to the detriment of other claimants); Brown, *supra* note 15, at 537–38 ("[T]he lawyers who speak for the largest blocks of current claimants have the power to dictate trust claim qualification criteria and settlement values, control key appointments, and structure trust governance provisions to preserve their influence over the trusts post-confirmation."); *id.* at 557 ("These attorneys who can deliver sufficient votes to satisfy the supermajority vote requirement exercise considerable control over the design of the trust, appointments to leadership roles within the trust, and the distribution procedures that define the process for reviewing and paying claims.").

The Boy Scouts of America bankruptcy illustrates these norms. The Boy Scouts broadly defined abuse claims in type and over many decades.[80] Over 82,000 individuals alleged some sort of abuse.[81] The rights and harms of scout survivors varied. Proposed recovery under the restructuring plan ranged from a few thousand to several million dollars.[82] Some survivors alleged repeated rape by scout leaders.[83] Others alleged groping by a fellow scout.[84] Some survivors alleged abuse in states with open statutes of limitations, while others were in states that would have made recovery through the tort system very difficult.[85] Some survivors had been in local councils with significant assets, while others' local councils had limited resources.[86] Insurance coverage varied.[87]

Following the norm, the Boy Scouts' bankruptcy plan gave equal voting power, one dollar, to all survivors alleging childhood sex abuse in scouting.[88] I have found no reliable documentation on the severity and documentation of the 8,000 survivors who voted against the plan relative to those who voted in favor. Whatever the benefits and efficiencies of this approach, does this common practice fulfill the Bankruptcy Code's objectives for empowering individual creditors that allege greater harms? How does it square with worries about the representation and power of claimants with disparate injuries?[89]

2. Best Interest of Creditors Test.—Bankruptcy law gives creditors multiple layers of rights. Some rights are class based.[90] Others can be raised by individuals regardless of the crowd. For example, even if outvoted in their classes, an individual objecting creditor is entitled to a showing that a

80. *See Survivors*, BOY SCOUTS OF AM. RESTRUCTURING WEBSITE, https://cases.omniagentsolutions.com/content/index?clientid=3552&vid=792910#0 [https://perma.cc/P2EE-TSEZ] (defining sexual abuse to include numerous types of sexual conduct, misconduct, and behavior that occurred to a claimant under the age of 18 at the time of the abuse).

81. *In re* Boy Scouts of Am., 642 B.R. at 534.

82. *Id.* at 543.

83. *See id.* (listing Claims Matrix Values for abuse by adult perpetrators).

84. *See id.* (listing Claims Matrix Values for abuse by youth perpetrators).

85. *See* Amended Disclosure Statement for the Modified Fifth Amended Chapter 11 Plan of Reorganization for Boy Scouts of America and Delaware BSA, LLC at 33–34, *In re* Boy Scouts of Am., No. 20-10343 (Bankr. D. Del. Sept. 30, 2021), ECF No. 6445 (sorting states into scaling-factor groups based on predicted difficulty of recovery).

86. *See Local Council Analysis*, TORT CLAIMANTS COMM., https://www.tccbsa.com/local-council-analysis [https://perma.cc/E59P-AQ55] (compiling summaries of each council's assets).

87. *See In re* Boy Scouts of Am., 642 B.R. at 526–31 (describing the various policies implicated by the proceedings).

88. *See id.* at 537 n.137 ("Each claimant in Classes . . . 8 and 9 voted his/her/its claim in the amount of $1.00 . . . ."); *id.* at 535–36 (categorizing all abuse claims as Class 8 or 9 claims).

89. *See* Gibson, *supra* note 51, at 2111–12 (discussing concerns raised by the Supreme Court's *Amchem* decision).

90. *See, e.g.*, 11 U.S.C. § 1129(b) (listing objections that only dissenting classes can make).

proposed plan will give her at least as much as she would receive in a Chapter 7 liquidation.[91]

Mass tort cases mute the impact of this test. By the test's very nature, one needs a discrete claim value for an individualized evaluation.[92] If claimants are not permitted to be allocated values for purposes of voting and participation, that information will not be available. Back in 2000, Professor Gibson identified the consequence: "It is possible, therefore, that the outvoted large tort claimants will not actually receive as much as the Bankruptcy Code supposedly guarantees them."[93] Although some might say this is not a worry to the extent that mass tort plans propose to pay claims in full, plans may not deliver what they promised.[94]

This norm again heightens the power of undifferentiated group representation by repeat-player lawyers behind closed doors. Group representation is a supplement, not a substitute, for individual creditor rights both in the bankruptcy process itself and external rights such as that to a jury trial.[95] However efficient it might be to rely only on large group representation to resolve legal rights of large numbers of people alleging harm, that approach is not consistent with the design of the Bankruptcy Code or the message of the Supreme Court's jurisprudence on mass torts in the class action context.

B. Examples of Off-Label Bankruptcy and Overbroad Objectives

This subpart considers examples of perks debtor-defendants and lawyers want from bankruptcy that have questionable statutory and constitutional foundations—as the Commission Report and Professor Gibson, among others, warned years ago. The issue is not a distressed business using bankruptcy when it has a mass tort problem *per se*, but the grandiosity of the quest—restricting the rights of people who may not learn

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91. 11 U.S.C. § 1129(a)(7)(A)(ii).

92. *See id.* § 1129(a)(7)(A) (requiring that each dissenting claim holder satisfy this test).

93. Gibson, *supra* note 51, at 2113. As others have discussed, the best interest of creditors under-protects mass tort claimants to the extent courts interpret the test to consider only the resources of the debtor, rather than those of nondebtors demanding permanent legal releases. *E.g.*, Lindsey D. Simon, *Bankruptcy Grifters*, 131 YALE L.J. 1154, 1212 (2022).

94. Ralph Brubaker, *Bankruptcy Injunctions and Complex Litigation: A Critical Reappraisal of Non-Debtor Releases in Chapter 11 Reorganizations*, 1997 U. ILL. L. REV. 959, 987–88 n.102. To that end, Brubaker concludes:

> The harm to the creditors is obvious when one realizes that the plan's promise of unimpaired treatment is just that—a promise—that may or may not come to pass . . . . [W]hen courts rely on promises or projections of full payment to creditors in approving non-debtor releases, the appeal to minimal creditor prejudice tends to ring hollow.

Id.

95. *See* 11 U.S.C. §§ 1123, 1129(a)–(b) (providing individual and group entitlements that are aggregative, not substitutes).

of injuries for years or decades and protecting hundreds and sometimes thousands of defendants even though they are not in bankruptcy.

Perhaps emblematic of treating bankruptcy as an invitation to innovate rather than an extraordinary set of federal court powers that should be used sparingly, consider the invention of a document filed by many debtors in mass tort bankruptcies labeled as an "informational brief." Given that I have been known to lament the reduced commitment to transparency in large Chapter 11 bankruptcies,[96] some might question my standing to complain about a document promising information. But this document is not an authorized pleading under the Bankruptcy Code or the Federal Rules of Bankruptcy Procedure.[97] It uses the federal court docket as an arm of public relations to shape news media coverage and reinforce taglines without evidentiary or pleading controls.[98] Reader, if you know of a case in which this document was bounced from the docket, please be in touch.

I need only say a few words about a consequential end game of mass tort bankruptcy as currently practiced: widespread nonconsensual third-party releases. It is extraordinary, but intended, that a case can result in debt cancellation for the *debtor* subject of a bankruptcy petition.[99] Outside of the Manville-approving amendment (that many asbestos bankruptcies tend to deviate from in any event), the Bankruptcy Code contains no express authority for permanently protecting nondebtors from the claims of objecting or unknowing third parties.[100] Recall that Professor Gibson was reluctant to call releases an advantage of bankruptcy because of their insecure foundation.[101] The Commission did not advocate for nonconsensual nondebtor releases as a feature of mass tort bankruptcy; indeed, the Commission said nonconsensual nondebtor releases should not be permitted.[102] Earlier work of Professor Ralph Brubaker contended these

96. *See, e.g.*, Melissa B. Jacoby, *Shocking Business Bankruptcy Law*, 131 YALE L.J.F. 409, 414 (2021) (contending that bankruptcy entitles claimants and the public access to a firm's financial information).

97. The informational brief is to be distinguished from a first-day declaration that is filed under penalty of perjury by someone with personal knowledge to support discrete requests for relief.

98. These documents do not inevitably work in defendants' favor. *See, e.g.*, *In re* 3M Combat Arms Earplug Prods. Liab. Litig., No. 3:19-2885, at 7, 16 (N.D. Fla. Dec. 22, 2022), ECF No. 3610 (order imposing sanctions) (citing informational brief from bankruptcy throughout order to support the imposition of sanctions in MDL).

99. 11 U.S.C. § 1141(d)(1)(A).

100. *In re* Purdue Pharma, L.P., 635 B.R. 26, 78 (S.D.N.Y. 2021), *perm. app. granted* 2022 WL 121393, at *2 (S.D.N.Y. Jan. 7, 2022).

101. *See* GIBSON 2000, *supra* note 41, at 29 (discussing the lack of clear statutory authority and uncertainty among bankruptcy judges).

102. COMMISSION REPORT, *supra* note 3, at 538.

releases were unconstitutional in addition to lacking statutory authority.[103] For those who contend that the touted benefits of releases flow to injured claimants, Professor Brubaker and others are dubious.[104] Even in cases that received court permission to grant broad releases, finality is far from inevitable.[105]

Below are several examples of practices that have received far less attention than nonconsensual nondebtor releases and nonetheless are consequential.

1. Displacing Mechanisms of the Civil Justice System

a. Tailgating.—Although permanent releases dominate the discourse, broad *temporary* injunctions protecting nondebtors *during* the case push

103. *See* Brubaker, *supra* note 94, at 996 & n.130; *see also* Ralph Brubaker, *Mandatory Aggregation of Mass Tort Litigation in Bankruptcy*, 131 YALE L.J.F. 960, 984 (2022) [hereinafter Brubaker, *Mandatory Aggregation*] ("As I have noted before, nonconsensual nondebtor releases impose a mandatory non-opt-out settlement of creditors' third-party nondebtor claims, wholly without regard to whether such a mandatory non-opt-out settlement is appropriate, permissible, or even constitutional."). Brubaker also argues that nondebtor-release lawmaking presents an *Erie* problem. *Id.* at 980. Other scholars have drawn similar unconstitutionality and lack-of-statutory-authority conclusions. *See, e.g.*, Adam J. Levitin, *The Constitutional Problem of Nondebtor Releases in Bankruptcy*, 91 FORDHAM L. REV. 429, 430–31 (2022) (concluding that all nonconsensual nondebtor releases are unconstitutional); G. Marcus Cole, *A Calculus Without Consent: Mass Tort Bankruptcies, Future Claimants and the Problem of Third Party Non-Debtor "Discharge,"* 84 IOWA L. REV. 753, 756 (1999) (arguing that bankruptcy courts lack authority to release nondebtors from current or future liabilities and that future claimants' rights are instead appropriately decided later by state courts).

104. *See* Brubaker, *Mandatory Aggregation*, *supra* note 103, at 993 (citing ELIZABETH CHAMBLEE BURCH, MASS TORT DEALS 63–64 (2019) and NAGAREDA, *supra* note 79, at xi) (identifying protected nondebtors and lawyers as primary beneficiaries of releases); *see also* BURCH, *supra*, at 64 (stating that "if these premiums exist, the gains unlocked in exchange for delivering peace" go to lawyers and not plaintiffs); NAGAREDA, *supra* note 79, at xi ("[T]he challenge lies in lending a structure to peacemaking that affords latitude for creativity to generate value but, at the same time, inhibits plaintiffs' lawyers and defendants from largely appropriating that value for themselves.").

105. One of the earliest asbestos bankruptcies, *Manville Corp*., generated disputes for decades. *See* Travelers Indemn. Co. v. Bailey, 557 U.S. 137, 142–43, 147 (2009) (granting certiorari in 2009 to resolve claims pertaining to the 1986 *Manville* settlement). Even in more recent mass tort cases, plan confirmation cannot guarantee an end to litigation over questions of scope. *See In re* W.R. Grace & Co., 13 F.4th 279, 284 (3d Cir. 2021) (citing "twenty-six years of litigation regarding the scope of . . . coverage" even after a Chapter 11 plan had been confirmed). W.R. Grace operated an asbestos and processing facility in Montana for decades and filed for bankruptcy in Delaware in the 1990s. *Id.* at 280, 284. It took ten years to get a confirmable restructuring plan, and the scope of the bankruptcy's impact continued to be questioned. *In re* W.R. Grace & Co., 475 B.R. 34, 63–64 (D. Del. 2012), *aff'd* 532 F. App'x 264 (3d Cir. 2013), 729 F.3d 311 (3d Cir. 2013), *and* 729 F.3d 332 (3d Cir. 2013); *see also* Darrell Ehrlick, *Libby Asbestos Worker Wins Historic $36.5M Award from Cascade County Jury*, DAILY MONTANAN (Feb. 18, 2022, 6:14 PM), https://dailymontanan.com/2022/02/18/libby-asbestos-worker-wins-historic-36-5m-award-from-cascade-county-jury/ [https://perma.cc/WS76-45ZB] (discussing jury verdict entered over two decades after the W.R. Grace bankruptcy).

creditor constituencies toward that outcome. The standard automatic stay authorized by § 362 of the Bankruptcy Code is extraordinary on its own. It expressly provides an injunction, literally automatic in most cases, applicable to all courts and fora, to protect the debtor, property of the debtor, and property of the bankruptcy estate.[106] To the extent mass tort defendants want protection of persons and acts that fall beyond this already-extraordinary law in a bankruptcy, the request at least should be subject to the stringent standards of Federal Rule of Civil Procedure 65.[107]

In big enterprise bankruptcies, debtors have obtained nationwide injunctions going well beyond the automatic stay's protection under a less stringent standard than in other federal litigation, persuading courts to give great weight to the assertion that these injunctions will advance the value-maximizing and reorganization objectives of the bankruptcy.[108] That test is inherently circular (and manipulable). And despite labels of temporary or preliminary, they sometimes are extended for years.[109] Some courts have approved debtors' demands to enjoin all *government* actions against the debtor and third parties, even though the Bankruptcy Code says the automatic stay does not apply to police and regulatory actions against the debtor, let alone others.[110]

Broad temporary injunctions protecting dozens or hundreds or thousands of nondebtors are not a planned design feature of bankruptcy law, and the fundamental legal and constitutional foundation for broad temporary injunctions should be questioned. Lawyers do not always persuade bankruptcy judges to temporarily protect their clients' co-defendants in mass tort or other bankruptcies.[111] But the commonality of obtaining broad

106. 11 U.S.C. § 362.

107. *See* FED. R. BANKR. P. 7065 (making Rule 65 applicable to adversary proceedings in bankruptcy cases); FED. R. CIV. P. 65 (prescribing requirements for injunctions).

108. *See* 2 COLLIER ON BANKRUPTCY ¶ 105.03 n.28 (16th ed.) (presenting caselaw adopting flexible bankruptcy-specific alternatives to traditional injunction standards, such as not requiring inadequate remedy at law or irreparable harm).

109. *See, e.g.*, Thirty-Second Amended Order Pursuant to 11 U.S.C. § 105(a) Granting Motion for a Preliminary Injunction at 3–9, Purdue Pharma L.P. v. Massachusetts (*In re* Purdue Pharma L.P.), Ch. 11 Case No. 19-23649, Adv. No. 19-08289, at 3–9 (Bankr. S.D.N.Y. Feb. 7, 2023), ECF No. 410 (chronicling the extensions to the preliminary injunction for over three years).

110. Dunaway v. Purdue Pharm. L.P. (*In re* Purdue Pharma L.P.), 619 B.R. 38, 57 (S.D.N.Y. 2020). Protection was conditioned on agreements by the Sacklers and Purdue Pharma. *In re* Purdue Pharma L.P., 633 B.R. 53, 86 (Bankr. S.D.N.Y. 2021) (requiring related parties to provide discovery), *rev'd on other grounds*, *In re* Purdue Pharma, L.P., 635 B.R. 26, 38 (S.D.N.Y. 2021), *perm. App. granted* 2022 WL 121393, at *2 (S.D.N.Y. Jan. 7, 2022). For an earlier warning that some government actions should not be permitted to go forward, see Kathryn R. Heidt, *Products Liability, Mass Torts and Environmental Obligations in Bankruptcy: Suggestions for Reform*, 3 AM. BANKR. INST. L. REV. 117, 146 (1995).

111. For two recent examples of court decisions closely studying the facts, see *In re* Aearo Techs. LLC, 642 B.R. 891, 903–07 (Bankr. S.D. Ind. 2022), and *In re* Mariner Health Cent., Inc., No. 22-41079, 2023 WL 187175, slip op. at *11–*20 (Bankr. N.D. Cal. Jan. 12, 2023).

temporary nondebtor relief, in the hope that the injunction will become permanent, vastly strengthens the hand of defendants in negotiations over the fate of large numbers of personal injury and wrongful death claimants. If injunctions exceeding the automatic stay are not possible in other aggregate litigation, why should they be so readily implemented in bankruptcy?

b. Setting Key Dollar Values Through Aggregate Estimation.—As Professor Gibson's analysis illustrated, bankruptcy was not supposed to be a shield from all litigation or a guarantee that a bankruptcy court would resolve everything. Other courts were expected to continue with some trials (call them bellwether or not). Yet, defendants and lawyers sometimes bring mass tort problems into bankruptcy because they want an alternative, not a supplement, to the civil justice system, including jury trials.[112] In addition to trying to halt all litigation, some mass tort defendants oppose using settlements as a blueprint for the global resolution they seek.[113] On what empirical basis, then, do they expect to limit the recovery of tort claimants forever?

Although the Third Circuit ordered dismissal of the LTL bankruptcy filed in 2021,[114] it is worth looking at how J&J tried to replace trials or use of settlement values with an aggregate estimation of talc liabilities. Unlike the survivors' request that a federal district judge estimate sex abuse claims in the Boy Scouts bankruptcy,[115] which never was acted on, J&J and LTL wanted ovarian cancer and mesothelioma claims estimated by a bankruptcy judge.[116]

The irony is that the statutory authorization of claim estimation is limited to, and is meant to achieve, the thing mass tort defendants (and some plaintiffs' lawyers) typically do not want: a provisional dollar amount for an

112. *See* Simon, *supra* note 93, at 1212–13 (charting efforts to prevent recourse to the civil justice system).

113. *See, e.g.*, Debtor's Statement on Proposed Next Steps in Chapter 11 Case at 9, *In re* LTL Mgmt. LLC, No. 21-30589 (Bankr. D.N.J. June 10, 2022), ECF No. 2473 (citing *In re* Garlock Sealing Techs., LLC, 504 B.R. 71, 74 (Bankr. W.D.N.C. 2014)) (critiquing use of settlement values for bankruptcy purposes, using the Garlock asbestos bankruptcy as an example).

114. *See In re* LTL Mgmt., LLC, 58 F.4th 738, 764 (3d Cir. 2023) (reversing the bankruptcy court's order denying the motions to dismiss and remanding with instruction to dismiss LTL's Chapter 11 petition).

115. Motion of the Future Claimants' Representative, the Official Committee of Tort Claimants, and the Coalition of Abused Scouts for Justice for Entry of an Order, Pursuant to 28 U.S.C. § 157(d) and Bankruptcy Rule 5011(a), Withdrawing the Reference of Proceedings Involving the Estimation of Personal Injury Claims at 2–3, *In re* Boy Scouts of Am., No. 20-10343 (Bankr. D. Del. 2021), ECF No. 2399.

116. Debtor's Statement on Proposed Next Steps in Chapter 11 Case, *supra* note 113, at 2–3.

individual claim that can be used to vote on and participate in the plan process.[117]

In any event, the official tort claimant committee and other plaintiffs strongly objected to LTL's proposal.[118] The bankruptcy court ordered a different estimation process featuring Kenneth Feinberg as a court-appointed expert: the court tasked Feinberg with preparing and filing a report, after holding non-public meetings and data exchanges with various parties, "estimating the volume and values of current and future ovarian and mesothelioma claims for which the debtor may be liable, whether arising in the United States or Canada."[119]

The Bankruptcy Code is silent on estimation in the aggregate as well as using the process for purposes other than provisional allowance to avoid delay for plan participation purposes.[120] Its authorization of the estimation of "claims" also does not cover unidentified future parties that the LTL estimation process and bankruptcy intended to embrace. The Bankruptcy Code does not specify what type of judge should conduct an estimation if it involves personal injury or wrongful death claims that bankruptcy judges cannot try. Although the Third Circuit ruled decades ago that bankruptcy judges can do estimation work "initially," that case involved an individual claim unrelated to personal injury or wrongful death.[121] Estimation in that case also did not cut off the creditor's right to liquidate the claim in a more appropriate forum; indeed, the bankruptcy court expressly preserved the creditor's right to later resume activity in state court.[122]

Some courts have distinguished between estimating and trying a personal injury or wrongful death case and found that bankruptcy judges

117. *See* 4 COLLIER ON BANKRUPTCY ¶ 502.04[1] & nn.1–2 (16th ed.) (citing H.R. Rep. 95-595, at 354 (1978); S. Rep. 95-989, at 22 (1978)) (emphasizing that the "essence of section 502(c) is that 'all claims against the debtor be converted into dollar amounts'").

118. *See* Official Committee of Talc Claimants' Statement in Response to Debtor's Reply in Support of the Need for Estimation at 2–3, *In re* LTL Mgmt., LLC, No. 21-30589 (Bankr. D.N.J. July 24, 2022), ECF No. 2771 ("[E]stimation serves no legitimate purpose in this case."); Response of Aylstock, Witkin, Kreis & Overholtz, PLLC in Opposition to Estimation Request in Debtor's Status Report at 1–2, *In re* LTL Mgmt. LLC, No. 21-30589 (Bankr. D.N.J. July 15, 2022), ECF No. 2723 (opposing estimation request of LTL).

119. Order Appointing Expert Pursuant to Federal Rule of Evidence 706, *In re* LTL Mgmt. LLC, No. 21-30589, at 2–3 (Bankr. D.N.J. Aug. 15, 2022), ECF No. 2881. For other examples of court-appointed experts in bankruptcy cases, see Melissa B. Jacoby, *Federalism Form and Function in the Detroit Bankruptcy*, 33 YALE J. REGUL. 55, 88–90 (2016).

120. *See* 11 U.S.C. § 502(c)(1) (providing for estimation of certain claims). Courts nonetheless have conducted estimations for purposes other than allowance for some time. *See* GIBSON 2005, *supra* note 41, at 90 (giving examples of estimation approaches); *see also* COMMISSION REPORT, *supra* note 3, at 10 (Proposal 2.1.3) (proposing explicit expansion of authorization).

121. *See* Bittner v. Borne Chem. Co., 691 F.2d 134, 135 (3d Cir. 1982) (involving piracy of trade secrets and proprietary information).

122. *See id.* (describing the bankruptcy court's reinstatement of its order disallowing the claim until it might be liquidated in state court).

therefore can estimate.[123] Estimation was not supposed to be dispositive, after all; it was supposed to enable the claimant to participate in the plan process.[124] But what if the intent of the (aggregate) estimation is not to determine individual claimants' ability to participate in the plan process, but to foreclose resort to the civil justice system for all time? Is that the functional equivalent of trial, at least for claimants who oppose a settlement but are ultimately outnumbered?[125] Was that not the end game of the LTL's 2021 bankruptcy and its estimation?[126]

Pragmatism, and aspirations that ends justify means, may motivate efforts to replace the civil justice system with something leaner, but at what cost? In July 2022, recognizing the range of verdicts among several dozen cases that had gone to trial, the LTL bankruptcy court said, "I think most of you or all of you could probably calculate on the back of an envelope a fair and accurate settlement estimation for these cases."[127] The court expressed the hope of completing estimation in about six months' time.[128] About six months later, Feinberg, who referred to his own appointment by the court as "creative," noted the delays in finding an economic modeler who could take on the work and the continuing inability to find a suitable epidemiologist.[129] Yet he assured the court that the absence of scientific help "is not slowing us down" from reaching an estimation that, he hoped, would lead to striking a

123. *See* GIBSON 2005, *supra* note 41, at 19; Luke Sperduto, *Three and a Half Rules for Tort Claims in (and out of) Chapter 11*, 95 AM. BANKR. L.J. 127, 141 n.57 (2021) (listing cases split on bankruptcy judges' authority to estimate personal injury and wrongful death claims).

124. *See* 4 COLLIER ON BANKRUPTCY ¶ 502.04[3] (16th ed.) (explaining that the function of estimation is to put estimated claims on equal footing with other claims to participate in plan process).

125. *See* Jones, *supra* note 5, at 1714 (discussing the extraordinary nature of bankruptcy-judge estimation of tort claims without the features of civil litigation); Sergio Campos & Samir D. Parikh, *Due Process Alignment in Mass Restructurings*, 91 FORDHAM L. REV. 325, 348–49 (2022) (critiquing the notion that bankruptcy courts can estimate large numbers of personal injury and wrongful death claims).

126. Transcript of Rulings at 5, 13, *In re* LTL Mgmt. LLC, No. 21-30589 (Bankr. D.N.J. July 28, 2022), ECF No. 2793 (stating that upon completion of the estimation report but before the court would consider adopting it, the court planned to direct parties to "in-person mandatory mediation"). In a December 2022 report in open court, Rule 706 expert Kenneth Feinberg again laid bare the aspiration: to use the threat of an official expert report on estimation as a tool to achieve a deal. Transcript of Order Appointing Expert, Debtor's Third Motion for Entry of an Order Extending Period Within Which the Debtor May Remove Actions, and Motion to Compel at 3, 14–15, *In re* LTL Mgmt. LLC, No. 21-30589 (Bankr. D.N.J. Dec. 23, 2022), ECF No. 3539 [hereinafter Transcript of December 20, 2022 Hearing] (asserting that all parties he has spoken to want to settle the case); *cf.* Notice of Maune Raichle Hartley French & Mudd, LLC's Motion to Disqualify Kenneth R. Feinberg as Rule 706 Expert and to Terminate Estimation at 14, 21, *In re* LTL Mgmt. LLC, No. 21-30589 (Bankr. D.N.J. Dec. 28, 2022), ECF No. 3553-1 (calling expert's remarks to court "demonstrably false" and expressing intent to fight to retain jury-trial rights of clients).

127. Transcript of Rulings, *supra* note 126, at 15, 18.

128. *See id.* at 11 (setting no deadline but hoping work would be done "before the weather starts getting cold").

129. Transcript of December 20, 2022 Hearing, *supra* note 126, at 4, 13, 16.

deal—settling "the case,"—among key constituents.[130] Feinberg did not mention that some injured parties might be opposed to such a deal, slowing the resolution of this case.

Given that the Third Circuit ordered dismissal of the 2021 LTL bankruptcy on other grounds,[131] the impact of the J&J talc estimation work is unclear. But the bankruptcy system has few one-offs. Others are likely to try the same approach.

2. Curtailing the Rights of People Who Have Yet to Learn of Their Injuries.—By now, one may have forgotten that the reform proposals of the Commission were framed around treating and protecting future injured parties—in part to maximize value of the enterprise but also to address due process concerns. An enterprise could reduce distress relating to mass torts in bankruptcy while not entirely foreclosing the rights of future claimants.[132] Cutting off the rights of people who discover injuries in the future is not necessarily required to stabilize an enterprise. Long demanding maximal finality, however, defendants seek to cap recoveries and limit recourse to the civil justice system or individualized evaluation for people who will not know of their injuries for years or decades or who may not even be born.[133] Unless they can be identified and given notice, and they are recognized as holding a claim under the Bankruptcy Code definition, they cannot exercise a right to vote in Chapter 11. Even when debtors hire claims administrators to find *current* claimants to meet due process requirements, the quality of the outreach for the target population has been questioned.[134] As should be clear by now, relieving even the debtor, let alone third parties not in bankruptcy, from unknown future liabilities is a far from trivial problem, not only pragmatically but constitutionally.[135]

The primary response to this non-trivial problem has been appointment of a future claims representative, albeit without the congressional authorization or guardrails that the Commission recommended. The future claims representative construct had support among scholars like Professor Kate Heidt, who closely studied the intersection of bankruptcy with

130. *Id.* at 13–15.

131. *See In re* LTL Mgmt. LLC, 58 F.4th 738, 746 (3d Cir. 2023) (ordering dismissal of LTL's 2021 bankruptcy case for lack of good faith because the firm was not in financial distress).

132. *See* Rhonda Wasserman, *Future Claimants and the Quest for Global Peace*, 64 EMORY L.J. 531, 589 (2014) (proposing a "hybrid system" to account for both concerns).

133. *See* Simon, *supra* note 93, at 1203 (concluding that cases reflect a shift toward broader protection for wide range of defendants but fewer litigation rights for plaintiffs).

134. *See* RYAN HAMPTON, UNSETTLED 215–16, 221 (2021) (discussing an "out-of-touch media list," lack of clear information about where to go and who to talk to about whether one would have valid claim in this bankruptcy, and relatively low number of personal injury claims filed in the bankruptcy relative to scope of opioid crisis).

135. *See* Cole, *supra* note 103, at 756 (asserting practical and jurisdictional infirmities).

environmental and tort claims before her death in 2005 at the age of fifty-one.[136] By contrast, now-Dean Marcus Cole did not see such virtual representation as overcoming the formidable barriers to changing the rights of so-called future claimants, particularly regarding nondebtors as so many mass tort cases try to do.[137]

Yet, since the early days of mass tort bankruptcy, scholars have critiqued the prevailing models of protection of future injured parties, including the representative model as commonly practiced.[138] Representatives are agents without known principals; these principals thus cannot monitor their agents.[139] The understanding in Chapter 11 is that the ideal outcome is a confirmable plan and that the representative will become an advocate for the plan as a whole.[140] If representatives advocate too hard and argue themselves out of a longer term job when their role implicitly is to get to "yes," will they be serious contenders to be recommended for the job by future debtors with mass tort liability? Like the Commission, a Judicial Conference committee warned over two decades ago that disparities among future plaintiffs' circumstances might necessitate multiple representatives if

136. *See* Heidt, *supra* note 110, at 127 (supporting the Bankruptcy Code providing for a future claims representative). Professor Heidt saw several justifications for future claims treatment in bankruptcy, including managing the risk that state law successor liability doctrines would block some injured parties from vindicating their rights no matter what a bankruptcy plan covered. *Id.* at 126.

137. Cole, *supra* note 103, at 787 ("[W]hat can third parties do . . . to protect themselves from lawsuits and claims filed by future claimants? Under a straightforward reading of the Code, and the way its structure interacts with other bodies of law, the answer is simple: *nothing*."); *id.* at 800 (concluding that permitting a bankruptcy plan to release nondebtors of obligations to future claimants is "destructive of the rule of law" and unauthorized).

138. *See, e.g.*, Thomas A. Smith, *A Capital Markets Approach to Mass Tort Bankruptcy*, 104 YALE L.J. 367, 383 (1994) (introducing the negative impacts of various psychological factors, judges' and attorneys' incentives, and strategic bargaining disadvantages on future claimants); Frederick Tung, *The Future Claims Representative in Mass Tort Bankruptcy: A Preliminary Inquiry*, 3 CHAP. L. REV. 43, 75, 78 (2000) (discussing the disadvantages the future claims representative herself faces); NAGAREDA, *supra* note 79, at 176 ("The lack of flesh-and-blood clients means that the futures representative—unlike lawyers for pending claimants—lacks the ability to threaten the debtor with mass tort litigation as an unpalpable alternative . . . ."); Yair Listokin & Kenneth Ayotte, *Protecting Future Claimants in Mass Tort Bankruptcies*, 98 NW. U. L. REV. 1435, 1439, 1447 (2004) (critiquing the model because of the lack of alignment of the representatives' incentives and because it tolerates unfair distributions of risk); *id.* at 1479, 1482 (arguing for use of a "certainty equivalent premium," including for voting purposes, to factor in "the uncertainty in the size of future claims, the magnitude of each individual's damages, the wealth of the injured individuals, the degree of risk aversion of the injured individuals, and the amount of insurance purchased"); Campos & Parikh, *supra* note 125, at 329–30 (critiquing future claims representative practices and proposing changes).

139. Tung, *supra* note 138, at 45; Listokin & Ayotte, *supra* note 138, at 1438.

140. *See* Tung, *supra* note 138, at 64 (discussing preference for a future claims representative who supports the reorganization plan).

the due process problems are to be surmounted.[141] Nonetheless, the typical number of future claims representatives in big mass tort bankruptcies is one.[142]

In the intervening years since the Commission's unenacted proposals, future claims representative work has proven to be a lucrative repeat-player business.[143] The representative and the team supporting the work collect fees, at least provisionally, from the bankruptcy estate *throughout* the case.[144] For example, the representative (who predicted about 11,000 future claimants) and his law firm received $8 million in compensation between early 2020 and the fall of 2022, and that was in addition to more than $10 million for the representative's insurance and financial professionals at other firms.[145] Survivors will wait much longer than such professionals for compensation.

Unlike their professionals, claimants' compensation is unlikely to be in full. Professor Brubaker warned that plans and trusts may not deliver what

141. *See* REPORT OF THE SUBCOMMITTEE ON MASS TORTS, *supra* note 8, at 138 ("A future claims representative must not only represent a cohesive class, free of conflicting objectives, but must have a reasonably specific idea of whom she represents and have the power to do so adequately.").

142. For example, the debtor sought and obtained one future claims representative in the 2021 LTL bankruptcy for both ovarian cancer and mesothelioma claimants. *See* Order Appointing Randi S. Ellis as Legal Representative for Future Talc Claimants at 2–3, *In re* LTL Mgmt. LLC, No. 21-30589 (Bankr. D.N.J. Mar. 18, 2022), ECF No. 1786 (ordering the appointment of a single legal representative of future claimants); *see also* Letter from Cullen D. Speckhart to Judge Michael B. Kaplan at 1–2, *In re* LTL Mgmt. LLC, No. 21-30589 (Bankr. D.N.J. Mar. 7, 2022), ECF No. 1650 (moving the court for a separate mesothelioma representative given the "divergent interests of mesothelioma and ovarian cancer claimants"). A single future claims representative in the Boy Scouts case was charged with advocating on behalf of scouts not yet eighteen when the bankruptcy was filed in 2020 as well as adults with repressed memory claims. *See* Order Appointing James L. Patton, Jr., as Legal Representative for Future Claimants, *Nunc Pro Tunc* to the Petition Date at 2, *In re* Boy Scouts of Am., No. 20-10343 (Bankr. D. Del. Apr. 24, 2020), ECF No. 486.

143. BURCH, MASS TORT DEALS, *supra* note 104, at 145; NAGAREDA, *supra* note 79, at 177.

144. 11 U.S.C. §§ 330–331.

145. *See* Combined Thirty-First Monthly Application of James L. Patton, Jr., as the Legal Representative for Future Claimants and Young Conaway Stargatt & Taylor, LLP as Counsel to the Legal Representative for Future Claimants for Allowance of Compensation and Reimbursement of Expenses for the Period from October 1, 2022 through October 31, 2022 at 2–4, *In re* Boy Scouts of Am., No. 20-10343 (Bankr. D. Del. Nov. 23, 2022), ECF No. 10719 (detailing payments received from work performed February 18, 2020 through September 30, 2022 excluding holdback percentage pending final approval); *see also* Twenty-Third Monthly Application of Ankura Consulting Group, LLC as Consultants to James L. Patton, Jr., Legal Representative for Future Claimants for Allowance of Compensation and Reimbursement of Expenses for the Period from September 1, 2022 through September 30, 2022 at 2, *In re* Boy Scouts of Am., No. 20-10343 (Bankr. D. Del. Oct. 26, 2022), ECF No. 10651 (summarizing applications between July 23, 2020 and September 30, 2022, which exceeded a total of $1.4 million); Thirty-Second Monthly Fee Application of Gilbert LLP as Insurance Counsel to the Legal Representative for Future Claimants for Allowance of Compensation and Reimbursement of Expenses for the Period December 1, 2022 through December 31, 2022 at 2, *In re* Boy Scouts of Am., No. 20-10343 (Bankr. D. Del. Jan. 24, 2023), ECF No. 10904 (listing a total of fees requested through November 30, 2022, exceeding $8.7 million).

they promise.[146] Empirical studies support his concern, with trusts sometimes falling way short of predictions.[147]

In the Boy Scouts bankruptcy, the debtor's expert presented evidence that abuse claims would be paid in full; no party offered an alternative expert or evidence at the confirmation hearing.[148] Yet, the silence stemmed from a deal among plan proponents, not a signal of agreement on the empirical proposition that survivors would be paid anywhere near that amount.[149] In any event, plans do not guarantee payment even if debtors argue during the plan confirmation process that full payment is a likely outcome.[150] Are those who discover severe injuries in the future supposed to assume they are better off by the presence of a well-compensated person negotiating for an unknown group of disparate injured people, versus other approaches?[151]

I have heard survivors say bankruptcy turned out to be not about justice, but just dollars and cents. Harmed individuals want more than money when they seek redress.[152] The role of representatives in protecting the nonmonetary interests of future claimants thus warrants greater attention. In the Boy Scouts bankruptcy, sex abuse survivors sought various non-monetary remedies, including youth protection, disclosure of names of abusers, written apologies, and the dissolution of scouting.[153] The Boy Scouts bankruptcy plan promised youth protection structural reform that survivors

146. *See* Brubaker, *supra* note 94, at 987 n.102 ("[W]hen courts rely on promises or projections of full payment to creditors in approving non-debtor releases, the appeal to minimal creditor prejudice tends to ring hollow."); *supra* note 94 and accompanying text.

147. *See supra* notes 15–16 and accompanying text.

148. *In re* Boy Scouts of Am., 642 B.R. 504, 537, 558, 562 (Bankr. D. Del. 2022).

149. *See* Amended Disclosure Statement for the Modified Fifth Amended Chapter 11 Plan of Reorganization for Boy Scouts of America and Delaware BSA, LLC at 91, *In re* Boy Scouts of Am., 642 B.R. 504 (Bankr. D. Del. Sept. 30, 2021) (No. 20-10343), ECF No. 6445 ("The Coalition, Tort Claimants' Committee and Future Claimants' Representative . . . believe that the potential value of the Abuse Claims is materially higher than $7.1 billion."); *id.* at 36 (identifying TCC estimation of value between $13.5–73.2 billion); *id.* at 37 (describing the future claims representative's estimate of $5 billion for future claims alone). If that rough estimate proves true, abuse claimants may recover more like 16.5% of their claims than anything near payment in full. Appellant D & V Claimants' Reply Brief at 26, Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Boy Scouts of Am. (*In re* Boy Scouts of Am.), Ch. 11 Case No. 20-10343, Adv. No. 22-1237 (D. Del. Dec. 21, 2022), ECF No. 110.

150. *See* Simon, *supra* note 93, at 1204 (providing examples of cases where payment-in-full was not guaranteed).

151. *See, e.g.*, Smith, *supra* note 138, at 433 (arguing instead for a "capital markets approach").

152. *See, e.g.*, Gillian K. Hadfield, *Framing the Choice Between Cash and the Courthouse: Experiences With the 9/11 Victim Compensation Fund*, 42 L. & SOC'Y REV. 645, 647–48 (2008) (reporting from a study the role of non-financial reasons, such as access to otherwise unavailable information and encouraging policy change, in shaping choice of remedy and the timing of the decision among those who were injured or suffered the loss of a family member in the terrorist attacks of September 11, 2001).

153. *See In re* Boy Scouts of Am., 642 B.R. 504, 526 (listing requested remedies other than dissolution of the Boy Scouts, which is mentioned periodically elsewhere).

helped negotiate.[154] I cannot find evidence that the future claims representative played a role in pursuing non-financial protections of scouts or other remedies.[155]

In short, bankruptcy practice has settled into a *pro forma* response to a fundamental question of due process for people who have yet to learn of their injuries. I do not think it can be easily assumed these plans satisfy *Amchem* and *Ortiz* issues.[156] Is the hope that no case will properly tee up the question for the appellate process?

Conclusion

In her 1998 critique, Judge Edith Hollan Jones warned, "bankruptcy law has been conducting a stealthy approach on those heights for nearly two decades, and it is time someone at the top posted a lookout."[157] The bankruptcy "solution" lawyers pitch as a path to global peace is not well grounded, but that should not be breaking news given the Commission's Report and Professor Gibson's publications, among other early analyses. The benefits that justified optimism are muted when foundational rules, on which commercial creditors regularly rely, do not operate similarly for personal injury claimants and sex abuse survivors. Some of bankruptcy's alleged advantages for mass tort are more loophole than intentional design.

Facing liability for allegedly dangerous products or failure to respond to sexual predation, lawyers for big enterprises are not shy about articulating their hope that the federal bankruptcy system will be a civil justice workaround. They say bankruptcy is the *only* rational resolution, citing the evergreen mantra of Chapter 11: maximize value. Yet, the restrictions lawyers and defendants hope to circumvent tend to come not from technicalities in other aggregate litigation, but from constitutional principles like due process, federalism, and separation of powers. As Professor Gibson suggested over two decades ago, bankruptcy offers no free pass from these principles.

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154. *Id.* at 540, 548–50.

155. The published confirmation decision associates the Youth Protection Plan with current claimants, not the futures representative. *See id.* (discussing that proposal).

156. *See* Gibson, *supra* note 51, at 2114–15 (suggesting that, although the Supreme Court recognized bankruptcy as a special remedial scheme, it does not function that way for future claimants represented by just one person and thus is not obviously an exception to the lessons of *Amchem* and *Ortiz*).

157. Jones, *supra* note 5, at 1695.

Asserting a goal of maximizing value does not make a matter fit the Constitution's bankruptcy clause.[158] If a tidy resolution encompassing all defendants and all persons with injuries cannot be accomplished through other aggregate litigation devices designed for the treatment of personal injury and wrongful death claimants, it is far from obvious that it can or should be done under the federal bankruptcy power.

158. For more on the transformation of Chapter 11 into an *à la carte* menu of standalone entitlements in ways that may exceed the Constitution's bankruptcy power, see Melissa B. Jacoby, *Unbundling Business Bankruptcy Law*, 101 N.C. L. REV. (forthcoming 2023).