

# Mass Tort Bankruptcy Goes Public

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*Large companies like 3M, Johnson & Johnson, Purdue Pharma, and others have increasingly, and controversially, turned from multidistrict litigation to bankruptcy to resolve their mass tort liability. While corporate attraction to bankruptcy's unique features partially explains this evolution, this Article reveals an underexamined driver of this trend and its startling results: government intervention. Governments increasingly intervene in high-profile bankruptcies, forcing firms into insolvency and dictating the outcomes in their bankruptcy cases. Using several case studies, this Article demonstrates why bankruptcy law should subject such governmental actions to greater scrutiny and procedural protections. Governments often assume multiple incompatible roles in these cases, appearing simultaneously as representatives of injured citizens, creditors in their own right, and sovereigns with broader social duties and regulatory powers. These overlapping identities create conflicts of interest that bankruptcy law does not currently police, which can encourage governments to coercively privilege their monetary recoveries over the monetary and dignitary claims of their citizens. This Article argues that bankruptcy law should apply the aggregate litigation concepts of exit, voice, and loyalty to ensure that bankruptcy outcomes are not distorted by governmental intervention. Reciprocally, if mass tort liability does not migrate entirely to bankruptcy, the fiduciary duties and consensual restructuring support agreements of bankruptcy can improve other forms of mass tort resolution.*

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## INTRODUCTION

In late 2021, Greg Gordon, a partner in the bankruptcy practice of the global law firm Jones Day, counseled his client on a bankruptcy strategy that he later described, perhaps modestly, as “the greatest innovation in the history of bankruptcy.”<sup>1</sup> His client was Johnson & Johnson (“J&J”), a company that at first blush had no business being in bankruptcy at all. This storied consumer products company had a market capitalization of more than \$450 billion and a credit rating better than that of the federal government.<sup>2</sup> However, J&J recently lost a multibillion-dollar case against a handful of litigants who claimed that the company’s talc-based baby powder caused mesothelioma and ovarian cancer.<sup>3</sup> With such a large verdict being granted in favor of only a few plaintiffs, the prospect of thousands of similar suits posed a major business threat.<sup>4</sup> The company estimated that it would spend tens of billions of dollars in legal defense alone.<sup>5</sup> Thus, J&J followed Gordon’s advice: it formed a subsidiary called LTL Management LLC (“LTL”), transferred all of its tort liabilities to LTL, and sought bankruptcy protection for LTL.<sup>6</sup> Despite substantial public controversy and accusations that J&J undertook this corporate restructuring to avoid liability,<sup>7</sup> the judge permitted LTL’s bankruptcy filing to proceed. He

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1. Dan Levine & Mike Spector, *Special Report How a Bankruptcy ‘Innovation’ Halted Thousands of Lawsuits from Sick Plaintiffs*, REUTERS (June 23, 2022, 10:25 AM), <https://www.reuters.com/article/bankruptcy-tactics-two-step/special-report-how-a-bankruptcy-innovation-halted-thousands-of-lawsuits-from-sick-plaintiffs-idINL1N2YA01V> [https://perma.cc/RW3V-79R8].

2. Brief for Amici Curiae by Certain Complex Litigation Law Professors in Support of Motion of the Official Committee of Talc Claimants to Dismiss Debtor’s Chapter 11 Case at 10, *In re LTL Mgmt., LLC*, 58 F.4th 738 (3d Cir. 2023) (No. 22-2003), ECF No. 91, 2022 WL 2800926.

3. Informational Brief of LTL Management LLC at 1–2, *In re LTL Mgmt., LLC*, No. 21-30589 (Bankr. W.D.N.C. 2022), ECF No. 3 [hereinafter *LTL* Informational Brief] (this was the fifth-largest personal injury verdict in U.S. history, and was subsequently reduced to around \$2.1 billion).

4. *See id.* at 125 (“From January 2020 to the present, however, the company has been served on average with one or more ovarian cancer complaints *every hour of the day, every single day of the week.*”).

5. *See* Declaration of John K. Kim in Support of First Day Pleadings at 14–15, *In re LTL Mgmt., LLC*, No. 21-30589 (Bankr. W.D.N.C. 2022), ECF No. 5; *see also* *In re LTL Mgmt., LLC*, 637 B.R. 396, 417–18 (Bankr. D.N.J. 2022) (“As highlighted in Debtor’s Reply Memorandum, even plaintiffs’ attorneys have recognized the substantial exposure facing Debtor . . . [stating] ‘if the last seven jury awards in mesothelioma trials are any indication . . . then my Committee’s constituents’ claims are worth ten[s] of billions of dollars.’” (fourth alteration in original)).

6. *See* *In re LTL Mgmt.*, 637 B.R. at 401–02 (describing the actions taken by J&J to form LTL and seek bankruptcy).

7. *See* Michael A. Francus, *Texas Two-Stepping Out of Bankruptcy*, 120 MICH. L. REV. ONLINE 38, 38, 42 (2022) (calling the Texas Two-Step a fraudulent transfer and stating that J&J used it to “handle the mass tort liabilities” which “threatens the tort recovery of tens of thousands of talc claimants”); *see also* Mark Roe & William Organek, *[Texas Two-Step and the Future of Mass*

agreed that bankruptcy was better than any other aggregate litigation<sup>8</sup> mechanism for maximizing recoveries for victims, achieving global finality, avoiding inconsistent verdicts across multiple fora, and reducing litigation expenses.<sup>9</sup>

The U.S. Court of Appeals for the Third Circuit dismissed LTL's bankruptcy filing on January 30, 2023,<sup>10</sup> but not before other companies took note of the success of this bankruptcy "innovation," dubbed the "Texas Two-Step" in the popular press.<sup>11</sup> For instance, 3M, the industrial conglomerate, faces hundreds of thousands of liability claims for allegedly faulty earplugs it manufactured. These claims were consolidated into the largest multidistrict litigation ("MDL") proceeding<sup>12</sup> in the country, with this single proceeding accounting for around one-third of *all* cases pending in *all* federal courts nationwide.<sup>13</sup> Following J&J, 3M placed a subsidiary in bankruptcy in July 2022 to avoid the MDL proceeding and use bankruptcy instead to resolve its liability.<sup>14</sup> Meanwhile, more and more companies facing huge mass tort liability in connection with pharmaceuticals, medical devices,

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*Tort Bankruptcy Series] The Texas Two-Step: The Code Says It's a Transfer*, HARV. L. SCH. BANKR. ROUNDTABLE (July 19, 2022), <https://blogs.harvard.edu/bankruptcyroundtable/2022/07/19/texas-two-step-and-the-future-of-mass-tort-bankruptcy-series-the-texas-two-step-the-code-says-its-a-transfer/> [https://perma.cc/Q83T-A4M6] (explaining why some fears of this type of maneuvering may be overstated).

8. The term "aggregate litigation" describes any procedural mechanism to consolidate multiple actions into one forum for efficiency purposes. *See* Alexandra D. Lahav, *The Continuum of Aggregation*, 53 GA. L. REV. 1393, 1394 (2019) (describing aggregate litigation in the forms of "the class action, multidistrict litigation (MDL), and bankruptcy" and stating "they are now understood to represent a continuum for resolving large-scale disputes").

9. *See In re LTL Mgmt.*, 637 B.R. at 425–29 (suggesting the bankruptcy code may be a superior method for addressing mass tort injuries, especially when future victims must be compensated).

10. *In re LTL Mgmt., LLC*, 64 F.4th 84, 93 (3d Cir. 2023). LTL subsequently filed for bankruptcy a second time, hoping to fit within the new test established under Third Circuit law. This second filing, however, was also dismissed. *In re LTL Mgmt., LLC*, 652 B.R. 433, 436 (Bankr. D.N.J. 2023). As of this writing, the appeal of the dismissal of this second filing is pending before the Third Circuit. Grant of Permission for Leave to Appeal Pursuant to 28 U.S.C. Section 158(d)(2)(A), *In re LTL Mgmt., LLC*, No. 23-8045 (3d Cir. Oct. 20, 2023), ECF No. 19.

11. *See, e.g.*, Levine & Spector, *supra* note 1.

12. For a basic explanation of MDLs, *see infra* notes 57–64 and accompanying text.

13. Informational Brief of Aearo Techs. LLC at 1, *In re Aearo Techs. LLC*, No. 22-02890-JJG-11 (Bankr. S.D. Ind. July 26, 2022), ECF No. 12. 3M is Aearo's indirect corporate parent. *Id.*

14. Despite this, to date 3M has been less successful in its maneuvers than J&J. *See, e.g.*, Jonathan Randles & Bob Tita, *3M's Bankruptcy Setback Deepens Earplug Litigation Troubles*, WALL ST. J., <https://www.wsj.com/articles/3ms-bankruptcy-setback-deepens-earplug-litigation-troubles-11661976054> (last updated Aug. 31, 2022, 7:10 PM) [https://perma.cc/DLX5-H97N] (describing 3M's various difficulties in its attempts "to shield itself from a mountain of personal-injury lawsuits" and "[m]ark[ing] a departure from a string of court decisions expanding the powerful legal tools of bankruptcy to Johnson & Johnson" and other companies). Nevertheless, Aearo's appeal from dismissal of its bankruptcy case is currently pending before the Seventh Circuit. Order Granting and Consolidating Appeals, *Aearo Techs., LLC v. U.S. Tr.*, No. 22-2606 (7th Cir. Aug. 28, 2023), ECF No. BL-132.

e-cigarettes, and other products could turn to bankruptcy to resolve their mass tort liability.<sup>15</sup> In fact, bankruptcy's use as a mass tort resolution mechanism is not limited to high-profile cases of grievous *physical* injury. For example, the bankruptcy of FTX, a cryptocurrency exchange, will likely be the vehicle through which hundreds of thousands of potential tort claims for fraud, breach of fiduciary duty, negligence, and other causes of action against the company are likely to be resolved, rather than through hearings in front of traditional state or federal courts.<sup>16</sup>

While these corporate machinations have received much attention, both the media and scholarship have overlooked the increasingly central, often troubling, and largely understudied role that *governments* play in such bankruptcies. Even though governments ostensibly intervene in bankruptcy cases to protect and support their citizens, it is often the interests of individual tort victims that are most harmed by government intervention in bankruptcy. These victims—suffering from cancer, addiction, financial loss, and other injuries because of a tortfeasor's conduct—often find their recoveries diluted and their wishes ignored because governments use bankruptcy law to pursue policy objectives at the expense of the victims they purport to represent.<sup>17</sup> This fact gives greater resonance to a mostly overlooked line from Judge Kaplan's opinion in the original case permitting LTL's bankruptcy filing. In permitting the bankruptcy to go forward, “[t]he Court must also factor in the negative impact of ongoing regulatory investigations by *state attorneys general*.<sup>18</sup> While J&J was concerned with the tens of billions of dollars in liability it might eventually face

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15. See Cathy Ta & Brianna Bilter, *Litigation Coverage: Survey of Mass Tort Litigation and Potential Texas Two-Step Filings*, REORG (May 10, 2022, 8:00 AM), [https://app.reorg.com/v3#/items/intel/1937?item\\_id=177360](https://app.reorg.com/v3#/items/intel/1937?item_id=177360) [<https://perma.cc/W533-3UAQ>].

16. See, e.g., Max Zahn, *Downfall of FTX and Ex-CEO Sam Bankman-Fried: By the Numbers*, ABC NEWS (Dec. 13, 2022, 1:35 PM), <https://abcnews.go.com/Business/downfall-ftx-ceo-sam-bankman-fried-numbers/story?id=95151677> [<https://perma.cc/8TDZ-RHPN>]; Adversary Complaint for Declaratory Judgment & Violations of Common Law, *In re FTX Trading Ltd.*, No. 22-11068 (Bankr. D. Del. Dec. 27, 2022), ECF No. 321 (class action adversary proceeding filed in FTX bankruptcy); Statement of the Official Committee of Unsecured Creditors in Respect of the Debtors' Draft Plan of Reorganization & Accompanying Term Sheet at 1–3, *In re FTX Trading*, No. 22-11068 (July 31, 2023), ECF No. 2103 (describing the disappointment of the Official Committee of Unsecured Creditors that the Debtors' draft plan fails to, among other things, “properly allocate[ ] value to the creditors most injured by the fraud that occurred”).

17. When a mass tort defendant files for bankruptcy, it becomes a debtor in bankruptcy parlance, while plaintiffs against the company—whether individuals, companies, or governments—become creditors in the bankruptcy. When discussing bankruptcy, this Article will mostly refer to debtors and creditors, rather than defendants and plaintiffs. Nevertheless, the reader should remember that “individual creditors” are individuals who were allegedly injured, often seriously, by a tortfeasor's conduct.

18. *In re LTL Mgmt., LLC*, 637 B.R. 396, 419 (Bankr. D.N.J. 2022) (emphasis added), *rev'd*, 6 F.4th 84 (3d Cir. 2023).

against tort victims, it was downright terrified by the *trillions* of dollars in liability that was and could be asserted against it by *governments*.<sup>19</sup> Victims, too, should have feared this possibility, since (as described below) states used their massive claims in LTL's bankruptcy to obtain negotiating leverage, money, and other relief at the expense of victims.

My aim in this Article is to explore the heretofore underexamined—and frequently problematic—role of the government in mass tort bankruptcy cases. In addition to highlighting why and how governments have intervened in bankruptcy to advance their own ends, the Article proposes ways that courts and Congress can empower victims so they can vindicate their monetary and dignitary rights. Until now, public attention has spurred legislative proposals to prevent corporations from taking unfair advantage of the system.<sup>20</sup> A substantial debate has in the meantime considered whether tortfeasors abuse bankruptcy to get a “free pass,” or if bankruptcy can instead provide an important alternative to other forms of aggregate litigation and thereby maximize recoveries for injured victims.<sup>21</sup> Contributing to

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19. Motion of the Ad Hoc Committee of States Holding Consumer Protection Claims Seeking Relief with Respect to the Order Establishing Mediation Protocol at 2, *In re LTL Mgmt.*, 637 B.R. 396 (No. 21-30589), ECF No. 1939 [hereinafter *LTL* States Mediation Motion].

20. See, e.g., Lauren Pansegrouw & Jessie (Ziyu) Lin, *[Purdue Pharma Bankruptcy Series] Senate Judiciary Subcommittee Hearing on “Evading Accountability: Corporate Manipulation of Chapter 11 Bankruptcy”: A Recap*, HARV. L. SCH. BANKR. ROUNDTABLE (Sept. 26, 2023), <https://bankruptcyroundtable.law.harvard.edu/2023/09/26/purdue-pharma-bankruptcy-series-senate-judiciary-committee-subcommittee-hearing-on-evading-accountability-corporate-manipulation-of-chapter-11-bankruptcy-a-recap/> [https://perma.cc/JH8Y-VBCK] (describing various positions taken at a Senate Judiciary Committee hearing held in September 2023 on the use of bankruptcy to resolve tort liability); *Durbin Highlights Johnson & Johnson’s Shameful “Texas Two-Step” Maneuver on Senate Floor*, U.S. SENATE COMM. ON THE JUDICIARY (Feb. 15, 2022), <https://www.judiciary.senate.gov/press/dem/releases/durbin-highlights-johnson-and-johnsons-shameful-texas-two-step-maneuver-on-senate-floor> [https://perma.cc/98N9-G7BY]; see also Nondebtor Release Prohibition Act of 2021, S. 2497, 117th Cong. § 4 (requiring that courts dismiss bankruptcy cases in cases of divisional mergers that intend or have the foreseeable effect of separating assets from liabilities of potential debtors and assigning or allocating at least a substantial portion of liabilities to a debtor).

21. See Ralph Brubaker, Response, *Mandatory Aggregation of Mass Tort Litigation in Bankruptcy*, 131 YALE L.J.F. 960, 962–65 (2022) (expressing concern about bankruptcy “grifters” and advocating for Supreme Court intervention); Anthony Casey & Joshua Macey, *[Texas Two-Step and the Future of Mass Tort Bankruptcy Series] A Qualified Defense of Divisional Mergers*, HARV. L. SCH. BANKR. ROUNDTABLE (June 28, 2022), <https://bankruptcyroundtable.law.harvard.edu/2022/06/28/texas-two-step-and-the-future-of-mass-tort-bankruptcy-series-a-qualified-defense-of-divisional-mergers/> [https://perma.cc/8B7U-CQHV] (“Over the last forty years, Chapter 11 has been invoked to facilitate settlement in dozens of large mass tort cases. Without Chapter 11, these value-preserving settlements would have never been possible.”); Troy A. McKenzie, *Toward a Bankruptcy Model for Nonclass Aggregate Litigation*, 87 N.Y.U. L. REV. 960, 963 (2012) (arguing that bankruptcy “serves as a better model for judging when to use, and how to order, nonclass aggregation of mass tort litigation” compared to MDL); Samir D. Parikh, *The New Mass Torts Bargain*, 91 FORDHAM L. REV. 447, 455 (2022) (discussing bankruptcy’s potential to “resolve mass tort claims efficiently”); Alan N. Resnick, *Bankruptcy as a Vehicle for Resolving Enterprise-Threatening Mass Tort Liability*, 148 U. PA. L. REV. 2045, 2048

this debate, this Article seeks to bring attention to the conflicted role that governments can play in these cases (which I term “public mass tort bankruptcies”) and to suggest ways to place guardrails around government overreach in public mass tort bankruptcies.

Closer inspection of several recent, high-profile mass tort bankruptcies complicates the legislative and academic debates by revealing the important and overlooked role of government intervention in these cases. Public mass tort bankruptcies enable governments to use bankruptcy law for their own benefit, often at the expense of individual tort victims, despite assertions by states that they are intervening in these cases *on behalf of* the very victims they shortchange.<sup>22</sup> This Article focuses attention on the essential and controversial role that governments can play in these cases. It also draws on analytical tools used in aggregate litigation scholarship to increase the say that victims have in their cases and ensure that governments adequately represent the interests of victims when governments intervene in mass tort bankruptcies.

As it turns out, governments are uniquely capable of employing bankruptcy to further their own ends because of their simultaneous roles as representatives of injured citizens, creditors in their own right, and sovereigns with broader social duties and regulatory powers.<sup>23</sup> These overlapping and at times incompatible positions can lead to intense conflicts of interest. Governments, as *parens patriae*,<sup>24</sup> often bring claims on behalf of their citizens following major mass torts because the sheer number of private wrongs elevates them to a public concern.<sup>25</sup> Through these *parens patriae* actions, governments can

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(2000) (“The purpose of this Article is to discuss the positive features of the present bankruptcy system that, in general, make it a fair and effective vehicle for dealing with mass tort liability.”); Lindsey D. Simon, *Bankruptcy Grifters*, 131 YALE L.J. 1154, 1159 (2022) (“From a claimant’s perspective, channeling injunctions may extinguish their litigation . . . . If left unchecked, bankruptcy can serve as an accelerant for the gravest due-process threats facing mass-tort victims.”).

22. See, e.g., Joinder of the Ad Hoc Committee of States Holding Consumer Protection Claims in Support of the Motion of States of New Mexico & Mississippi for Certification of Direct Appeal to the U.S. Court of Appeals for the Third Circuit at 3, *In re LTL Mgmt.*, 637 B.R. 396 (No. 21-30589), ECF No. 46 (enforcement by states of their consumer protection laws is “necessary for the protection of their citizens” (emphasis added)).

23. See Elysa M. Dishman, *Class Action Squared: Multistate Actions and Agency Dilemmas*, 96 NOTRE DAME L. REV. 291, 318 (2020) (“AGs must consider the interests of the state, general public, and *parens patriae* group members in determining the balance between injunctive relief, civil penalties, and public compensation.”).

24. *Parens patriae* litigation is brought by the state as “father of the country” on behalf of citizens. Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 493 n.22 (2012).

25. See *id.* at 497–99 (emphasizing the similar goals of *parens patriae* state suits and private class actions); see also Dishman, *supra* note 23, at 301 (“[P]arens patriae group members are usually the real parties of interest in the action.”).

assert overwhelming liability that pushes a company into bankruptcy. Once the company is in bankruptcy, government finds itself not in the back seat as one creditor among many<sup>26</sup> but in the driver's seat of the case—forming committees, leading negotiations, opening special mediations, selectively pursuing claims, and achieving settlements that favor the government over other claimants. Governments have used this leverage to set the terms of bankruptcy sales transactions, pad public budgets, advance political careers, and even implement federal healthcare policy. However, these interventions often come at the expense of the monetary and dignitary demands of individual creditors who were directly injured by the actions of the tortfeasor.

Part I analyzes why companies are increasingly turning to bankruptcy to resolve mass tort liability, and why governments are turning to litigation—both outside of and within bankruptcy—to address mass torts. The first Section explains that companies are drawn to using bankruptcy to resolve mass tort liability because bankruptcy's unique procedures offer efficiency gains for companies and private benefits for their owners.<sup>27</sup> In addition, bankruptcy judges in recent high-profile cases have been willing to permit controversial tactics in service of corporate use of bankruptcy to resolve mass tort liability. Yet governments have also driven growth in public mass tort bankruptcies. The next Section shows how legislative gridlock,<sup>28</sup> favorable procedures,<sup>29</sup> and the ability to benefit politically from bringing tortfeasors to justice have contributed to a surge in public health litigation by public attorneys, which can often lead to bankruptcy filings. Finally, as will be demonstrated in Part II, governments use bankruptcy to achieve policy goals that might be impossible outside of bankruptcy. With companies being drawn to

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26. See MARK J. ROE & FREDERICK TUNG, BANKRUPTCY AND CORPORATE REORGANIZATION: LEGAL AND FINANCIAL MATERIALS 347 (4th ed. 2016) (“[G]overnment entities often find themselves as simple creditors in bankruptcy proceedings—most typically relating to claims for unpaid taxes . . .”).

27. See McKenzie, *supra* note 21, at 999, 1003–05 (noting efficiencies of the bankruptcy system, including its venue rules which enable “venue for all trials in mass tort litigation involving the debtor-defendant [to] be drawn into a single district”); Parikh, *supra* note 21, at 469–79 (outlining issues with class actions and MDL litigation as reasons that “[c]orporate defendants have started invoking bankruptcy preemption, fleeing one deficient resolution structure for another”); Simon, *supra* note 21, at 1162 (describing “the value of filing as a strategic maneuver to effectuate or coerce a global settlement” as a main factor driving mass tort bankruptcies).

28. See Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 TEX. L. REV. 43, 46 (2018) (political polarization “may cause legislative gridlock, prompting unilateral” executive action).

29. See Nora Freeman Engstrom & Robert L. Rabin, *Pursuing Public Health Through Litigation: Lessons from Tobacco and Opioids*, 73 STAN. L. REV. 285, 292–99, 310–16 (2021) (using examples of cigarette and opioid litigation to show how public health litigation may succeed where private litigation struggles).

bankruptcy—and governments eager to use litigation, and ultimately bankruptcy, for their own purposes—it is little wonder that public mass tort bankruptcies have become more numerous and prominent.

Part II of this Article exposes how governments can cause bankruptcy filings, hijack negotiations in bankruptcy, advance their own monetary interests at the expense of their citizens, and use bankruptcy to achieve policy goals that would be impossible—either politically or legally—outside of bankruptcy.<sup>30</sup> Several examples demonstrate how public mass tort bankruptcies can unfold in ways that differ dramatically from typical bankruptcies and typical mass tort litigation. These cases show how intervention by conflicted governments can lead to disturbing consequences. Ultimately, they suggest that the current system may be ill-equipped to handle the conflicts of interest inherent in public mass tort bankruptcies, and that we should be cautious when encouraging government intervention in bankruptcies to achieve policy goals.<sup>31</sup>

Part III argues that public mass tort bankruptcies do not fit well within existing scholarship on bankruptcy and explores the implications of this mismatch. The first Section describes how bankruptcy is usually conceptualized as a way for *private actors* to resolve *financial disputes* that primarily affect *only the parties to a dispute*.<sup>32</sup> However, this results in an explanatory gap for public mass tort bankruptcies, in which *public actors* seek to resolve *quasi-political problems* that affect *everyone*.<sup>33</sup> Failing to grapple with this distinction may lead bankruptcy proceedings to undervalue individual creditors' nonmonetary demands and overlook governmental conflicts of interest in service of maximizing financial recoveries. Aggregate litigation scholars, on the other hand, center resolving conflicts of interest and ensuring procedural fairness in their analysis of aggregate litigation. The second Section delves into the approach taken by aggregate litigation scholars outside of the bankruptcy context in order to suggest

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30. See Jared A. Elias & George Triantis, *Government Activism in Bankruptcy*, 37 EMORY BANKR. DEVS. J. 509, 512 (2021) (government intervention in bankruptcy can serve as a "force multiplier" for implementing government policy).

31. See, e.g., Jared A. Elias & George Triantis, *The Administrative State in Bankruptcy*, 72 DEPAUL L. REV. 323, 324 (2023) ("[A]dministrative agencies are missing opportunities to leverage the bankruptcy process to achieve policy goals.").

32. See Douglas G. Baird, Anthony J. Casey & Randal C. Picker, *The Bankruptcy Partition*, 166 U. PA. L. REV. 1675, 1680–86 (2018) (explaining bankruptcy's concern with "maximizing the value of the estate, not on the total return to creditors as a group" and noting that creditor actions against third parties should largely lie outside of bankruptcy).

33. See Adam J. Levitin, *Bankruptcy's Lorelei: The Dangerous Allure of Financial Institution Bankruptcy*, 97 N.C. L. REV. 243, 288 (2019) ("Bankruptcy scholarship has only just started grappling with the increased use of bankruptcy to manage political problems.").

that public mass tort bankruptcies could benefit from this distinct scholarly perspective and a different set of policies.

I turn to this objective in Part IV, proposing reforms to reduce conflicts of interest, limit coercion, and improve outcomes for victims of public mass tort bankruptcies. First, individual creditors should be able to voice their opinion by voting on settlements in public mass tort bankruptcies where governments intervene as representatives of victims and as proprietary creditors. Next, governments could more loyally and faithfully represent individual victims if they were required to undertake the types of fiduciary duties to other creditors that are common in bankruptcy. Finally, these measures would be further strengthened if judges took a more active approach in public mass tort bankruptcies, ensuring that individual creditors were fully informed about their cases and reviewing governmental settlements to ensure they were not coercive. Importantly, most of these proposals could be accomplished without congressional intervention.

Collectively, these reforms build on aggregate litigation scholarship that acknowledges that resolution of private law disputes can at times have public law-like effects.<sup>34</sup> They acknowledge governments' important, but conflicted, role while requiring courts to take more seriously what, beyond dollars and cents, creditors claim to be most important to them. In some ways, bankruptcy may be the most powerful procedural vehicle available to bring all claimants together into a single forum, thereby potentially incentivizing defendants to make higher settlement payments in exchange for global peace. Nevertheless, this Part ends by acknowledging that bankruptcy may never fully supplant the well-entrenched MDL procedure for aggregate litigation. Despite this reality, MDLs could also benefit by incorporating specific bankruptcy practices like committee-based fiduciary duties and consensual agreements to support satisfactory settlements. The Article then briefly concludes.

## I. WHY ARE PUBLIC MASS TORT BANKRUPTCIES BECOMING MORE COMMON?

This Part aims to answer two interrelated questions: (1) Why do corporations seek to aggregate mass tort claims against them, and why are they increasingly turning to bankruptcy for these purposes? (2) Why have governments turned to litigation rather than legislation to address

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34. See Richard A. Nagareda, *Class Actions in the Administrative State: Kalven and Rosenfeld Revisited*, 75 U. CHI. L. REV. 603, 629 (2008) (discussing how class actions sometimes try to achieve public policy goals that have eluded legislative solutions).

mass torts? The answers provided in this Part can be summarized as follows: (1) Bankruptcy is becoming the forum of choice for mass tortfeasors because it supplies debtors benefits unavailable under other forms of aggregate litigation. (2) Litigation outside of and within bankruptcy permits governments to overcome political polarization, support private litigation efforts, and obtain victories that help the political careers and finances of those who prosecute them. When put together, these two trends have led to, and should continue to lead to, more public mass tort bankruptcies, even if bankruptcy is not the ultimate goal of either corporations or governments.

#### *A. Bankruptcy Is Increasingly the Forum of Choice for Mass Tortfeasors*

Aggregate litigation plays an essential role in the resolution of mass torts. Without some form of aggregation, it might be impossible for plaintiffs to extract value from their otherwise small- or negative-value claims,<sup>35</sup> and it might similarly be impossible for defendants to obtain finality and global peace.<sup>36</sup> Some also argue that aggregate litigation can increase recoveries for plaintiffs<sup>37</sup> and enhance judicial efficiency.<sup>38</sup> In recognition of these likely benefits, the United States has no fewer than three, sometimes distinct but sometimes overlapping, methods of aggregation to resolve mass torts: class actions, MDLs, and bankruptcy.<sup>39</sup> Despite some criticism of aggregation,<sup>40</sup> it is seen as a crucial alternative to inefficient and unfair case-by-case adjudication of

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35. See Sergio J. Campos, *Mass Torts and Due Process*, 65 VAND. L. REV. 1059, 1077 (2012) (discussing why a class action is considered superior in small claims litigation); see also Maureen Carroll, *Class Action Myopia*, 65 DUKE L.J. 843, 845 (2016) (“[S]caling-up from individual to class-wide recoveries can create economic viability where none existed before . . . .”); Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 430 (2006) (explaining why class actions “do far more good than harm”); cf. Carnegie v. Household Int’l, Inc., 376 F.3d 656, 661 (7th Cir. 2004) (“The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30.”). A negative-value claim is one that, after accounting for the expense of pursuing the claim, would yield a negative recovery.

36. Lahav, *supra* note 8, at 1407–08.

37. See *infra* notes 49–52 and accompanying text.

38. See Linda S. Mullenix, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 NW. U. L. REV. 511, 522 (2013) (discussing how class actions in mass tort cases were seen as “efficient and economical”).

39. Lahav, *supra* note 8, at 1394.

40. See Gilles, *supra* note 35, at 373–75 (describing multiple threads of criticism of class actions); Valerie J. Watnick, *The “Roundup” Controversy: Glyphosate Litigation, Non-Hodgkin’s Lymphoma, and Lessons for Toxics Regulation Going Forward*, 30 N.Y.U. ENV’T L.J. 1, 49–51 (2022) (describing inefficiencies in mass tort aggregate litigation); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625 (1997) (discussing an Advisory Committee’s warning that mass tort class actions are inappropriate when “individual stakes are high and disparities among class members great”).

mass torts. One commentator even characterizes the development of some type of aggregate litigation mechanism as “inevitable,” with its particular procedures “tak[ing] on whichever form most easily allows [it] to travel toward settlement.”<sup>41</sup>

### 1. The Benefits of Aggregation

When claims are widely dispersed, aggregation can create value for plaintiffs and defendants.<sup>42</sup> Aggregation allows plaintiffs to share the costs and risks of litigation, lowering unit costs for litigants and enabling litigation of negative-value claims.<sup>43</sup> Aggregation can also make it economically rational to invest more funds into particular litigation claims that may face strong defenses and be expensive to litigate, but are likely to have a large payoff.<sup>44</sup> Similarly, some also argue that by providing sufficient scale to support hiring elite law firms, aggregate litigation can offer a welcome counterbalance to the benefits that defendants, as repeat players, might have in hiring top-quality representation.<sup>45</sup> On the defendant’s side, aggregation lowers the unit cost of litigation and fosters finality by eliminating contingent litigation liability.<sup>46</sup>

On a more fundamental level, aggregate litigation should incentivize a global resolution of all claims by solving the anticommons<sup>47</sup> problem faced by holders of dispersed claims. When claims are widely dispersed, defendants would prefer to resolve all claims at once to avoid unnecessary costs and unfavorable verdicts.<sup>48</sup> A

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41. Lahav, *supra* note 8, at 1394.

42. D. Theodore Rave, *Governing the Anticommons in Aggregate Litigation*, 66 VAND. L. REV. 1183, 1192 (2013).

43. *Id.* at 1192–93; *see also supra* note 35 and accompanying text.

44. Campos, *supra* note 35, at 1074–76. If litigants are more heterogenous, some may choose to opt out and pursue their own claims rather than “champion” smaller claimholders. Francis E. McGovern & William B. Rubenstein, *The Negotiation Class: A Cooperative Approach to Class Actions Involving Large Stakeholders*, 99 TEX. L. REV. 73, 85 (2020).

45. See Andrew D. Bratt & D. Theodore Rave, *It’s Good to Have the “Haves” on Your Side: A Defense of Repeat Players in Multidistrict Litigation*, 108 GEO. L.J. 73, 88–101 (2019) (“Adding repeat players on the plaintiffs’ side can help balance the power in mass litigation.”).

46. See Rave, *supra* note 42, at 1194–95 (describing disproportionate risks associated with individual, nonsettling plaintiffs); *see also* D. Theodore Rave, *When Peace Is Not the Goal of a Class Action Settlement*, 50 GA. L. REV. 475, 507 (2016) (discussing the value of aggregation to defendants).

47. A tragedy of the commons exists when a common resource is overused because there are too few people who can exclude others from using it. Its mirror image, a tragedy of the anticommons, exists when a common resource is *underused* because there are too *many* individuals who can exclude others from using it. Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 624 (1998).

48. Rave, *supra* note 42, at 1193–95. This is less true when claims are small and homogenous—in such cases, defendants may only be willing to pay for a waiver of aggregation

cohesive group of plaintiffs could theoretically extract a “peace premium” from defendants in exchange for a global settlement,<sup>49</sup> but since each claimholder possesses an individual veto right over whether their claim joins the aggregate,<sup>50</sup> they can hold up the formation of a complete aggregate by threatening to opt out.<sup>51</sup> Aggregation can resolve the tragedy of the anticommons by limiting,<sup>52</sup> or altogether removing—by contract, statute, or another method—a plaintiff’s right to opt out.<sup>53</sup>

## 2. Why Not Class Actions or MDLs?

With the benefits of aggregation in mind, the next question is why defendants are choosing bankruptcy with increasing regularity. Following several Supreme Court cases that limited the usefulness of class actions for mass torts,<sup>54</sup> MDLs and bankruptcy are the two remaining viable alternatives for aggregate litigation of mass torts.<sup>55</sup> MDLs have seen explosive growth in recent years and currently constitute over one-third of all pending federal civil litigation.<sup>56</sup> Briefly, MDLs consolidate pretrial proceedings for suits that have already been filed.<sup>57</sup> While the MDL statute envisions that consolidated cases will be remanded for individual trial, in practice most MDL judges steer

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rights, rather than complete peace. *See* Rave, *supra* note 46, at 507; *see also* McGovern & Rubenstein, *supra* note 44, at 85–89 (discussing differences between homogenous and heterogeneous classes).

49. Rave, *supra* note 42, at 1195. *But see* Ralph Brubaker, *Assessing the Legitimacy of the “Texas Two-Step” Mass-Tort Bankruptcy*, BANKR. L. LETTER, Aug. 2022, at 1, 10 (describing how some are “extremely skeptical that [the peace premium] exists” and any premium is instead captured by counsel).

50. Rave, *supra* note 42, at 1198–99; *see also* Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 CALIF. L. REV. 1259, 1264 (2017) (noting an MDL claimant’s “ultimate control over her claim”).

51. Lee Anne Fennell, *Commons, Anticommons, Semicommons*, in RESEARCH HANDBOOK ON THE ECONOMICS OF PROPERTY LAW 35, 42–43 (Kenneth Ayotte & Henry E. Smith eds., 2011).

52. *See* Rave, *supra* note 42, at 1197–98 (describing how, for some kinds of claims, “the defendant may be willing to pay something to settle an incomplete aggregation but would be willing to pay a considerable peace premium for a settlement that includes the claims at a the threshold”); *see also* Rave, *supra* note 46, at 494–98 (discussing aggregation’s effect of shifting the default rule from potential plaintiffs’ nonparticipation to participation).

53. Rave, *supra* note 42, at 1213.

54. *See, e.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 619–28 (1997); Ortiz v. Fibreboard Corp., 527 U.S. 815, 864–65 (1999).

55. *See* Elizabeth Chamblee Burch, *Litigating Together: Social, Moral, and Legal Obligations*, 91 B.U. L. REV. 87, 88, 94–95 (2011) (discussing lawyers’ effort to replace class actions).

56. Nora Freeman Engstrom, *The Lessons of Lone Pine*, 129 YALE L.J. 2, 7 (2019); Informational Brief of Aeero Techs. LLC, *supra* note 13, at 1 n.3.

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

parties to settlements instead of remanding the cases.<sup>58</sup> Although MDLs may have been designed with mass tort resolution in mind,<sup>59</sup> as described below, MDLs are imperfect aggregation mechanisms.

First, MDLs have jurisdictional, binding, and procedural limitations. Jurisdictionally, MDLs fail to encompass cases that can only be brought in state court, such as those brought by state or local governments or those not otherwise removable to federal court.<sup>60</sup> Next, even though parties cannot exit an MDL once their suits are drawn in, MDLs do not bind parties that have not filed suit. This means that the successful completion of an MDL does nothing to bar future suits.<sup>61</sup> Parties can also opt out of a settlement once reached.<sup>62</sup> These limitations on binding parties create “adverse selection” problems that can disincentivize the largest settlement offers because it is possible that only weaker claimants may settle, leaving defendants to litigate against stronger, later-filing ones.<sup>63</sup> Finally, the MDL statute provides few express procedural protections, making outcomes reliant upon judicial discretion. A judge could choose to aggressively manage a case, support disclosure to facilitate an informed and beneficial settlement, and then review a settlement’s terms—or she could choose not to.<sup>64</sup> This variability can cause some parties and commentators to view MDLs as “captive negotiation process[es]” with few procedural protections that neither plaintiff nor defendant can fully control.<sup>65</sup>

Believing that “surrendering autonomy can be welfare enhancing,”<sup>66</sup> reformers have recently proposed including a precommitment mechanism as part of MDL practice.<sup>67</sup> Known as the “negotiation class,” it would allow litigants to design, and then commit

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58. *Id.* at 1715–17.

59. Andrew D. Bradt, “*A Radical Proposal*: The Multidistrict Litigation Act of 1968, 165 U. PA. L. REV. 831, 834 (2017).

60. See *infra* note 160 and accompanying text.

61. See Howard M. Erichson, *What MDL and Class Actions Have in Common*, 70 VAND. L. REV. EN BANC 29, 36–37 (2017) (contrasting the power to bind nonparties in class actions with the lack thereof in MDL and the impacts of this dynamic).

62. Bradt & Rave, *supra* note 50, at 1264, 1271; see also McKenzie, *supra* note 21, at 996–97.

63. Rave, *supra* note 46, at 527.

64. See Bradt & Rave, *supra* note 50, at 1261–62 (“[P]erhaps the most controversial issue is . . . whether the MDL judge should review settlements and reject them if they are unfair.”).

65. Parikh, *supra* note 21, at 454; see also Elizabeth Chamblee Burch & Margaret S. Williams, *Perceptions of Justice in Multidistrict Litigation: Voices from the Crowd*, 107 CORNELL L. REV. 1835, 1910–14 (2022) (nonrandom survey data from participants express dissatisfaction with MDLs). But see Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendants’ Terms: Bristol-Myers Squibb and the Federalization of Mass-Tort Litigation*, 59 B.C. L. REV. 1251, 1257 (2018) (“[D]efendants are thought to favor MDL because it creates a streamlined opportunity for global settlement without the risks associated with class certification or parochial state courts.”).

66. Rave, *supra* note 42, at 1188.

67. McGovern & Rubenstein, *supra* note 44, at 90–116.

in advance to, voting thresholds for *binding* approval of any settlement and an allocation formula for distributing the proceeds among members of the class.<sup>68</sup> This would incentivize defendants to offer a large enough settlement to meet the approval threshold to which plaintiffs precommitted. However, the negotiation class in the opioid MDL was rejected by the Sixth Circuit Court of Appeals as running afoul of the Federal Rules of Civil Procedure, and establishment of a negotiation class has not been attempted in another federal court since.<sup>69</sup> Nevertheless, as will be discussed below, bankruptcy already includes mechanisms that accomplish similar goals.

### 3. Why Bankruptcy?

The preceding Subsection described several shortcomings MDLs have in resolving mass tort liability. This Subsection describes why bankruptcy is an attractive alternative for debtors and creditors. Bankruptcy solves many of MDL's limitations, while providing debtors, debtors' owners, and creditors with additional powers that are not available in any other form of aggregation. Despite criticisms,<sup>70</sup> bankruptcy is used by mass tortfeasors because it is the most powerful aggregation mechanism available. This power also potentially benefits creditors if facilitating aggregation leads to quicker or larger recoveries, or even a peace premium.

Various aspects of bankruptcy respond directly to each of the MDL shortcomings discussed above. First, bankruptcy's jurisdiction is broad, stretching even to controversies that are only "related to" a bankruptcy case<sup>71</sup> and to cases that might not otherwise qualify for federal jurisdiction<sup>72</sup> or class certification.<sup>73</sup> Next, bankruptcy avoids

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68. *Id.* at 94 & n.74.

69. Linda S. Mullenix, *The Short Unhappy Life of the Negotiation Class*, 56 MICH. J.L. REFORM 613, 617, 680 (2023).

70. See, e.g., Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 313–14 (2011); 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 (1999); Troy A. McKenzie, *The Mass Tort Bankruptcy: A Pre-history*, 5 J. TORT L. 59, 72–76 (2012).

71. 28 U.S.C. § 1334(b); see also Douglas G. Smith, *Resolution of Mass Tort Claims in the Bankruptcy System*, 41 U.C. DAVIS L. REV. 1613, 1651 (2008) ("[M]ass tort claims constitute a prototypical example of the kind of claims that fall within bankruptcy courts' broad related to jurisdiction.").

72. See 28 U.S.C. § 157(b)(5) (stating that a district court hearing a bankruptcy case can try personal injury tort and wrongful death claims or order those claims to be heard by the district court in the district where the claim arose); see also Brubaker, *supra* note 21 at 999 ("The essential architecture for mandatory consolidation of mass tort claims against nondebtors is already present in existing bankruptcy law.").

73. See Bradt, *supra* note 59, at 844–45; McKenzie, *supra* note 21, at 983.

adverse selection and encourages higher-value aggregate settlements by prohibiting opting out of a bankruptcy proceeding<sup>74</sup> and setting a date by which all claims against the debtor must be filed.<sup>75</sup> Bankruptcy even allows for, and at times requires, the appointment of a future claims representative to protect the interests of potential claimants who may not yet, but will at some future date, manifest symptoms resulting from the activities of the tortfeasor.<sup>76</sup> Bankruptcy may also be the only way for defendants to “free claims from MDL capture”,<sup>77</sup> rather than having cases languish for years, as can occur in MDLs,<sup>78</sup> debtors in a bankruptcy case have substantial control over the pace and progress of a case.<sup>79</sup> Greater aggregative power, more control, and increased certainty all promote bankruptcy as an alternative increasingly preferred by defendants to resolve their mass tort liability.

Bankruptcy not only directly responds to the shortcomings of MDLs, it also has additional features that encourage its use in resolving mass tort liability. Bankruptcy’s automatic stay pauses all litigation against the debtor and bars new litigation, forcing all potential litigants to the negotiating table and limiting the debtor’s litigation expenditures.<sup>80</sup> Bankruptcy also requires summary estimation of unliquidated claims,<sup>81</sup> avoiding the delay, expense, and unfairness often

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74. 11 U.S.C. §§ 501, 502, 1141. If a creditor did not participate, their claims would be disallowed or discharged in their absence.

75. Such “bar dates” are typically far shorter than a corresponding statute of limitations. See R. Stephen McNeill, *Avoiding the Unavoidable: A Practitioner’s Guide to Federal Governmental Creditor Fraudulent Conveyance Actions*, 92 AM. BANKR. L.J. 335, 350–51 (2018) (stating that government creditors generally have “180 days to file a proof of claim” and that the statute of limitations is longer); *see also* Smith, *supra* note 71, at 1641 (noting the bar date “provides ‘finality’ regarding the universe of asserted claims”).

76. 11 U.S.C. § 524(g)(4)(B)(i); Yair Listokin & Kenneth Ayotte, *Protecting Future Claimants in Mass Tort Bankruptcies*, 98 NW. U. L. REV. 1435, 1443 (2004) (“Bankruptcy courts have frequently appointed legal representatives to represent classes of future claimants in mass tort cases.”). The future claims representative owes fiduciary duties to the claimants it represents. *In re Imerys Talc Am., Inc.*, 38 F.4th 361, 376–78 (3d Cir. 2022). Nevertheless, critics note that the future claims representative is often selected by the debtor—“the very party against whom [she] will be negotiating”—with little court oversight. Parikh, *supra* note 21, at 490.

77. Parikh, *supra* note 21, at 454.

78. *Id.* at 476.

79. See David A. Skeel, Jr., *Competing Narratives in Corporate Bankruptcy: Debtor in Control vs. No Time to Spare*, 2009 MICH. ST. L. REV. 1187, 1198–1204. Of course, debtors can, and often do, use this control to delay proceedings and obtain settlement leverage.

80. As noted below, governments sometimes argue that the stay does not apply to their claims so they can use bankruptcy to their advantage. *Infra* notes 183–185, 207–213, and accompanying text; *see* Simon, *supra* note 21, at 1163 n.25; *see also* Ellias & Triantis, *supra* note 31, at 329 (“Government units often contend that they fall under an exception to the automatic stay . . . because their roles as regulator are different from that of a creditor with pecuniary interest, or they may seek relief from the stay for cause.”).

81. 11 U.S.C. § 502(c).

associated with multiple trials and inconsistent verdicts.<sup>82</sup> Moreover, bankruptcy includes a mechanism for majoritarian decisions to bind holdouts—implementing procedures discussed in greater detail in the next Part akin to the overruled negotiation class described earlier. This process adds to the credibility of bankruptcy’s promise of finality, enabling higher settlements.

Bankruptcy also provides several further benefits unavailable in any other form of aggregate litigation. First, bankruptcy permits a permanent discharge of all liabilities for the debtor, which acts as a powerful preclusive device.<sup>83</sup> In tandem with the discharge, bankruptcy courts can channel all present and future claims that might be brought against the debtor to a settlement fund, facilitating the finality that debtors seek.<sup>84</sup> Perhaps most controversially, bankruptcy courts can also grant third parties (such as owners of companies facing mass tort liability, who may themselves also face substantial liability) a release from liability—even over the objections of parties that would prefer to litigate—in exchange for making financial contributions to the bankruptcy estate.<sup>85</sup> Finally, bankruptcy judges have adopted a welcoming attitude toward resolving mass tort liability in bankruptcy, with judges in high-profile bankruptcies like Purdue Pharma<sup>86</sup> and LTL<sup>87</sup> citing bankruptcy as the ideal procedural forum in which to resolve mass tort liability and maximize recoveries for victims. In sum, bankruptcy’s broad jurisdiction, ability to bind dissenters, additional pro-debtor powers, and supportive judicial outlook collectively make it a powerful tool in the corporate liability reduction toolbox.<sup>88</sup>

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82. See *infra* note 272 and accompanying text.

83. 11 U.S.C. § 1141(a), (c), (d)(1); Smith, *supra* note 71, at 1649–50.

84. Smith, *supra* note 71, at 1649; Simon, *supra* note 21, at 1167–68.

85. See Ralph Brubaker, *Bankruptcy Injunctions and Complex Litigation: A Critical Reappraisal of Non-debtor Releases in Chapter 11 Reorganizations*, 1997 U. ILL. L. REV. 959, 961–67 (criticizing this practice); Simon, *supra* note 21, at 1167–71 (third-party releases may be too entrenched to remove from the bankruptcy system entirely). The propriety of such nonconsensual third-party releases is currently being litigated at the Supreme Court as part of the Purdue Pharma bankruptcy. Abbie VanSickle & Jan Hoffman, *Supreme Court Pauses Opioid Settlement with Sacklers Pending Review*, N.Y. TIMES (Aug. 10, 2023), <https://www.nytimes.com/2023/08/10/us/supreme-court-purdue-pharma-opioid-settlement.html> [https://perma.cc/ED9W-GJWP].

86. *In re Purdue Pharma, L.P.*, 633 B.R. 53, 58 (Bankr. S.D.N.Y. 2021) (stating “[b]ankruptcy cases present a unique and perhaps the only means to resolve the collective problem” of mass torts), *vacated*, 635 B.R. 26 (S.D.N.Y. 2021), *rev’d*, 69 F.4th 45 (2d Cir. 2023), *cert. granted*, 144 S. Ct. 44 (Aug. 10, 2023) (mem.).

87. *In re LTL Mgmt., LLC*, 637 B.R. 396, 428 (Bankr. D.N.J. 2022) (stating that using a settlement trust in bankruptcy is “a preferred approach to best serve the interests of injured tort claimants”), *rev’d*, 64 F.4th 84 (3d Cir. 2023).

88. See Jared A. Elias, *[Texas Two-Step and the Future of Mass Tort Bankruptcy Series] Upending the Traditional Chapter 11 Bargain*, HARV. L. SCH. BANKR. ROUNDTABLE (June 21, 2022), <https://bankruptcyroundtable.law.harvard.edu/2022/06/21/texas-two-step-and-the-future->

### B. Increasing Government Intervention in Mass Tort Bankruptcies

The prior Section explains the numerous advantages for debtors that choose to use bankruptcy to resolve mass tort liability. But governments, too, often prefer bankruptcy. This Section explores the trends that increasingly lead governments to bring investigations and suits that can result in mass tort bankruptcies and encourage their participation in any bankruptcy cases that may subsequently be filed.

Government interventions in mass tort cases—and in the bankruptcies that sometimes follow—have grown, and will continue to grow, for a variety of reasons. First, legislative gridlock and polarization has increased at the federal and, to a lesser extent, state level.<sup>89</sup> This has made it challenging to implement federal, or even state, legislative solutions to a wide variety of problems that are, or could arguably be classified as, mass torts.<sup>90</sup> With no legislative fixes in the offing, governments at all levels have turned to greater use of litigation-based remedies.<sup>91</sup> As a result, subnational governments (and, at times, the federal government) have become leading plaintiffs in a host of cases that might previously have been resolved by statute, such as those related to tobacco use, gun violence, subprime mortgages, environmental degradation, sugar regulation, and the opioid crisis.<sup>92</sup>

In many such cases, what little legislative action has occurred has counterintuitively *encouraged* litigation. So-called “super preemption” laws, generally implemented by more conservative state legislatures to hamstring the actions of liberal cities within those states, make it nearly impossible for local governments to legislate or regulate in connection with certain activities within their jurisdictions.<sup>93</sup> However, these laws generally do not prohibit localities from *suing* over such issues. This is especially true when there is bipartisan agreement regarding the harmfulness of the issue in question, substantial public funds have been expended in connection

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of-mass-tort-bankruptcy-series-upending-the-traditional-chapter-11-bargain/ [https://perma.cc/4LHV-DDHQ] (describing the business benefits of such liability reduction).

89. Lemos & Young, *supra* note 28, at 50–62 (surveying the vast literature on this subject).

90. *Id.* at 53 (noting that gridlock leads to less, and less effective, legislation).

91. See Sarah L. Swan, *Plaintiff Cities*, 71 VAND. L. REV. 1227, 1285 (2018) (stating that “the inertia and gridlock that has occurred at multiple levels of government has helped to create the political space” to encourage litigation-based solutions).

92. See Michael L. Rustad & Thomas H. Koenig, *Parents Patriae Litigation to Redress Societal Damages from the BP Oil Spill: The Latest Stage in the Evolution of Crimtorts*, 29 UCLA J. ENV’T L. & POL’Y 45, 81–84 (2011) (describing how state attorneys general have used the *parents patriae* in various contexts to protect public safety).

93. See Sarah L. Swan, *Preempting Plaintiff Cities*, 45 FORDHAM URB. L.J. 1241, 1255–57, 1261 (2018) (such laws can have a “chilling effect” by threatening contravening local officials with severe penalties).

with remediation, and there is a clear (and hopefully deep-pocketed) wrongdoer.<sup>94</sup> Many mass torts fit this bill, and public litigation of this sort can be seen as one more way that governmental officials democratically represent the will of the electorate.<sup>95</sup> With legislative and regulatory approaches often blocked, litigation may be one of the few viable alternatives for government action in the mass tort arena.<sup>96</sup>

The broad impact, huge costs, and political salience of recent mass torts have led to a recognition by many that litigation plays an important role in achieving redress.<sup>97</sup> The examples above demonstrate that this is likely true of the opioid crisis,<sup>98</sup> and a similar dynamic may play out with e-cigarette makers, oil companies, per- and polyfluoroalkyl substances (“PFAS”) manufacturers, and others. As governments spend more money to mitigate the harms caused by mass torts, they begin to look to the entities that cause the mass torts for reimbursement.<sup>99</sup> It should come as little surprise that governments at all levels, seeking to make do with limited budgets, would target tortfeasors to reimburse prior proprietary expenses or to prepare for new ones.<sup>100</sup>

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94. See *id.* at 1255–57, 1261–63 (describing the impacts of “super preemption” laws and overcoming partisan divides); see also Swan, *supra* note 91, at 1243–44 (noting the success of “plaintiff city claims” against corporations for “harms to the public, which are the result of third-party wrongdoing, and for which, accordingly, those third-party wrongdoers should bear the cost”).

95. Margaret H. Lemos, *State-Local Litigation Conflicts*, 2021 WIS. L. REV. 971, 976–77.

96. See Kathleen S. Morris, *Expanding Local Enforcement of State and Federal Consumer Protection Laws*, 40 FORDHAM URB. L.J. 1903, 1924 (2013) (lower levels of government can maintain autonomy by “exercising prosecutorial discretion, prosecuting public interest litigation, and negotiating settlements in the public interest”).

97. See Engstrom & Rabin, *supra* note 29, at 350–53 (describing regulatory and behavioral changes in light of litigation).

98. Estimates vary widely, but all agree that the costs are massive. The CDC estimated almost \$1 trillion in economic costs from opioid use disorder and fatal opioid overdoses in 2017. Feijun Luo, Mengyao Li & Curtis Florence, *State-Level Economic Costs of Opioid Use Disorder and Fatal Opioid Overdose—United States 2017*, 70 CDC MORBIDITY & MORTALITY WKLY. REP. 541 (2021), <https://www.cdc.gov/mmwr/volumes/70/wr/mm7015a1.htm> [https://perma.cc/KZ4Q-ESKQ]. Another study found that opioid overdose, misuse, and dependence account for more than \$140 billion in direct and indirect costs annually. PEW CHARITABLE TRS., THE HIGH PRICE OF THE OPIOID CRISIS, 2021: INCREASING ACCESS TO TREATMENT CAN REDUCE COSTS (2021), <https://www.pewtrusts.org/en/research-and-analysis/data-visualizations/2021/the-high-price-of-the-opioid-crisis-2021> [https://perma.cc/ZKL5-CH7S].

99. Swan, *supra* note 93, at 1261 (attributing bipartisan support for mass tort litigation to “the prospect of refilling state coffers and recouping the losses caused by the litigated harms”); see also, e.g., Opposition of Nevada Counties & Municipalities to Motion for Preliminary Injunction at 7, *In re Purdue Pharma L.P.*, 633 B.R. 53 (Bankr. S.D.N.Y. 2021) (No. 19-23649), ECF No. 33 [hereinafter *Purdue* Nevada Opposition] (“Nevada counties and municipalities seek redress for the financial burdens they have been forced to bear as a result of the misconduct of numerous manufacturers and distributors . . . that contributed to the opioid epidemic in Nevada . . . .”).

100. Lemos & Young, *supra* note 28, at 70–71 (states sought reimbursement from tobacco manufacturers, opioid manufacturers, and others for related public health expenditures); Swan, *supra* note 91, at 1282.

Prior experience has also demonstrated that tortfeasors might only be brought to the negotiating table through coordinated action by multiple governments.<sup>101</sup> Mass tort defendants would regularly use divide-and-conquer strategies against private plaintiffs and individual governments, settling or causing them to drop their cases without acknowledging wrongdoing. This strategy was pioneered by Big Tobacco, which vowed to (and did) fight every case brought against it for decades.<sup>102</sup> In such cases, synchronized actions filed by a large number of governments can turn the tide, forcing large settlements.<sup>103</sup> Governments thus play an instrumental role in mass tort litigation because their number, size, resources, and unique claims can neutralize the most powerful defenses of mass tortfeasors.<sup>104</sup>

Government intervention is also essential, and likely to increase, because unlike for private individuals, governments face few procedural barriers in bringing aggregate litigation. While procedural barriers to private mass tort class actions may have rendered them “virtually extinct,”<sup>105</sup> government actions brought on behalf of private citizens, which “play[ ] a role similar to that of the private class action,” have blossomed.<sup>106</sup> State attorneys general, as public officials, are typically presumed by courts to be representing the public interest when they bring litigation—such deference is not typically accorded to private class counsel.<sup>107</sup> Courts also apply permissive standards on standing, causation, and judicial review of the reasonableness of a settlement.<sup>108</sup> This is especially true of consumer protection and *parens patriae* litigation, where the state may be the only entity empowered to bring suit.<sup>109</sup> In fact, LTL recently complained of private litigants “[c]o-opting” governments to bring claims that otherwise could not be brought.<sup>110</sup>

Finally, and most concretely, governments will likely continue to intervene in mass tort bankruptcies because doing so “brings home

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101. Dishman, *supra* note 23, at 307–08 (coordinated efforts permit states to “demand greater compensation for their combined state residents”).

102. Engstrom & Rabin, *supra* note 29, at 295–99.

103. *See id.* at 302–05 (within four years of suit being brought by states, tobacco companies settled for \$206 billion—the largest settlement in U.S. litigation history).

104. *Id.* at 349–50; *see also* Lemos, *supra* note 95, at 986 (“For better or worse, state law does sometimes give the AG access to certain kinds of claims while withholding the same advantages from both private litigants and local governments.”).

105. Burch, *supra* note 55, at 88.

106. Lemos, *supra* note 24, at 488; *see also* Dishman, *supra* note 23, at 293–94 (some have consequently called for greater use of *parens patriae* suits).

107. Lemos, *supra* note 24, at 489, 492.

108. *Id.* at 499–510.

109. *Id.* at 497–98.

110. LTL Informational Brief, *supra* note 3, at 115.

the bacon”—for governments and the people that run them. The enormous Master Settlement Agreement against the tobacco companies may have been an outlier in terms of its size, but it taught states important lessons about the power of public litigation.<sup>111</sup> Governments have recovered billions of dollars in recent years from other *parens patriae* litigation, while also achieving significant nonmonetary victories.<sup>112</sup> Public attorneys—many of whom are elected officials—benefit politically from bringing such suits and claiming victory when obtaining monetary settlements.<sup>113</sup> Bringing cases and then settling them (even for less than full value) during an election year can provide supportive headlines for reelection efforts.<sup>114</sup> As seen above, a similar logic motivates increased government intervention in bankruptcy, since intervenors can obtain substantial financial recoveries and “enact policies that would have been blocked” outside of the bankruptcy system.<sup>115</sup> As companies proceed into the bankruptcy system, it is natural that governments and elected officials will follow them—or even push them—for the governments’ own benefit.

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This Part has set out to explain two phenomena: (1) why bankruptcy is increasingly becoming a preferred forum for corporate defendants seeking to globally resolve mass tort liability, and (2) why governments are increasingly litigating mass tort liability. Following from this, the next Part examines how governments benefit from intervention in bankruptcy cases, often at the expense of the victims they purport to protect.

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111. See, e.g., Micah L. Berman, *Using Opioid Settlement Proceeds for Public Health: Lessons from the Tobacco Experience*, 67 U. KAN. L. REV. 1029, 1037 (2019) (describing settlement dispersion and states’ aim to “reduce tobacco use and deal with the attendant public health problems”).

112. See Michael L. Rustad & Thomas H. Koenig, *Reforming Public Interest Tort Law to Redress Public Health Epidemics*, 14 J. HEALTH CARE L. & POL’Y 331, 337 (2011) (“Public health *parens patriae* litigation is an important legal mechanism to address toxic torts and other products-related calamities . . . . [P]otent societal remedies are necessary to defend the public’s health and well-being.”).

113. Lemos, *supra* note 24, at 498; see also Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 B.C. L. REV. 913, 967–68 (2008) (“[S]ome political observers claim that the abbreviation for the attorney general, ‘AG,’ stands for ‘aspiring governor.’” (quoting Brooke A. Master, *States Flex Prosecutorial Muscle*, WASH. POST., Jan. 12, 2005, at A1)).

114. Lemos, *supra* note 24, at 525–26, 526 n.167.

115. Ellias & Triantis, *supra* note 30, at 513.

## II. GOVERNMENTS BENEFIT, AND VICTIMS SUFFER, FROM GOVERNMENT INTERVENTION IN BANKRUPTCY

Typical bankruptcies resolve financial disputes between private debtors and private creditors arising from consensual business transactions. Other than as creditors for unpaid taxes, governments typically play only a minor role in most bankruptcies, so the literature “has largely ignored the question of how we should evaluate the government’s role in the bankruptcy system.”<sup>116</sup> In public mass tort bankruptcies, governments assume far more prominent roles because they intervene both as representatives of individual claimants and as creditors with their own proprietary claims.<sup>117</sup> With a fixed pot of money available for all creditors, maximizing government recoveries almost certainly reduces recoveries by the individual victims those governments represent. Moreover, these conflicts are exacerbated because governments can use sovereign powers that are simply unavailable to individual creditors. Governments can take advantage of bankruptcy’s permissive settlement rules to obtain extraordinary, and legally tenuous, financial or injunctive relief, or contravene the wishes of individual creditors or the public at large. Governments sometimes also use powers outside of bankruptcy to influence (or even coerce) decisions made by debtors in bankruptcy. Finally, governments can capture bankruptcy’s committee process, engaging in strong-arm mediation tactics or unilaterally agreeing to resolutions that favor their monetary interests over the monetary and nonmonetary recoveries of their citizens. This Part demonstrates how governments at all levels can cause, influence the course of, and benefit financially and politically from mass tort bankruptcies.

### *A. Governments Use Bankruptcy to Make Ultra Vires Policy*

Government intervention in bankruptcy supplements governments’ traditional tools of appropriation and regulation,<sup>118</sup> allowing them to achieve goals that might otherwise be constitutionally impermissible or run against the stated goals of voters. This Section offers examples of how federal and state governments have used bankruptcy to make policy on an ad hoc, nonlegislative basis that

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116. Adam Feibelman, *Bankruptcy and the State*, 38 EMORY BANKR. DEVS. J. 1, 4 (2022).

117. See Lemos, *supra* note 24, at 513 (conflicting interests between proprietary and representative claims in public litigation are “all but unavoidable”); see, e.g., *Purdue Nevada Opposition*, *supra* note 99, at 11–15 (describing the state’s representative and proprietary claims).

118. See generally Ellias & Triantis, *supra* note 30 (exploring the interplay between governments and the bankruptcy system).

affects health policy—not a traditional bankruptcy concern—and implicates deep federalism concerns.

In the bankruptcy of Purdue Pharma, an opioid maker owned and controlled by the Sackler family, actions taken by the federal government established important—and controversial<sup>119</sup>—limitations around the possible settlement options available to Purdue, the Sacklers, and their creditors.<sup>120</sup> Claims for trillions of dollars were brought against Purdue by federal, state, and local governments.<sup>121</sup> However, the company was worth only a fraction of this amount, and the claims of the federal government had priority over all other claims against the company.<sup>122</sup> Thus, the federal claims threatened to consume all of the company's value, leaving none for any other creditor.<sup>123</sup> Nevertheless, the federal government agreed to a settlement with the company—and only the company—that would reduce the amount of its claims, assign them a lower priority, and credit payments made to the states toward amounts Purdue owed to the federal government (the “Federal Settlement”).<sup>124</sup> The Federal Settlement would make it possible for states and individuals to recover billions from Purdue, while without it they would recover nothing. However, the Federal Settlement was conditioned upon Purdue emerging from bankruptcy as a “public benefit company”<sup>125</sup> that would be owned indirectly by the states and would continue to sell opioids to the public.<sup>126</sup> If the public

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119. See Adam J. Levitin, *Purdue's Poison Pill: The Breakdown of Chapter 11's Checks and Balances*, 100 TEX. L. REV. 1079, 1110–20 (2022) (analyzing Purdue's settlements with the DOJ).

120. *In re Purdue Pharma L.P.*, 69 F.4th 45 (2d Cir. 2023), cert. granted sub nom. Harrington v. Purdue Pharma L.P., 144 S. Ct. 44 (Aug. 10, 2023) (mem.). Purdue's settlement remains under appeal at the Supreme Court as of this writing.

121. See Disclosure Statement for Fifth Amended Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. & Its Affiliated Debtors at 25, *In re Purdue Pharma L.P.*, 633 B.R. 53 (Bankr. S.D.N.Y. 2021) (No. 19-23649), ECF No. 2983 [hereinafter *Purdue Disclosure Statement*] (“The approximately 10% of the Proofs of Claim that did state an amount asserted, in the aggregate, claims of over \$140 trillion.”).

122. See Addendum to Proof of Claim on the United States of America, Modified Form 410: Non-opioid Claimant Proof of Claim Form, Claim Number 137798 at 2, *In re Purdue Pharma*, 633 B.R. 53 (No. 19-23649) (filing a proof of claim number form on behalf of the DOJ); Addendum to Proof of Claim on the United States of America, Modified Form 410: Non-opioid Claimant Proof of Claim Form, Claim Number 137848 at 13–14, *In re Purdue Pharma*, 633 B.R. 53 (No. 19-23649) (filing a proof of claim form on behalf of the DOJ); 18 U.S.C. § 3613(e) (“No discharge of debts in a proceeding pursuant to any chapter of title 11, United States Code, shall discharge liability to pay a fine pursuant to this section, and a lien filed as prescribed by this section shall not be voided in a bankruptcy proceeding.”).

123. Declaration of Jesse DelConte at 5, *In re Purdue Pharma*, 633 B.R. 53 (No. 19-23649), ECF No. 3411 (observing that, if all federal claims were pursued, other creditors would receive “seventeen ten-thousandths of a cent (.0017) of distributable value” on their claims).

124. Plea Agreement with Purdue Pharma L.P. at 4–6, *In re Purdue Pharma*, 633 B.R. 53 (No. 19-23649), ECF No. 1828-2.

125. *Id.* at 10–11.

126. *Purdue Disclosure Statement*, *supra* note 121, at 127.

benefit company construct was not approved, the Federal Settlement would be withdrawn, and the federal government would likely take all value available for all other creditors.

Although many creditors supported the Federal Settlement because of the value it would provide, some creditors objected because it functioned as a “‘poison pill’ that . . . would lock in the outcome of the bankruptcy.”<sup>127</sup> Even though all other creditors were excluded from the negotiation of the Federal Settlement, it would have a profound impact on them. Some states, initially, preferred liquidation of the company to taking ownership of a public benefit opioid producer.<sup>128</sup> In addition, many individual victims thought any funds the federal government recovered should be used as restitution for them, and some unsuccessfully sought to subordinate the federal government’s claims to their own.<sup>129</sup> Yet the bankruptcy court overlooked the conflicting desires among federal, state, and individual claimants. Instead, it overruled all objections to the settlement, finding it to be reasonable almost exclusively because it maximized the financial recoveries of all creditors.<sup>130</sup> The settlement was incorporated into the final plan of reorganization, leaving creditors—states and victims alike—with the Hobson’s choice of either acceding to state ownership of Purdue or potentially seeing their recoveries diminished entirely. Although fewer than twenty percent of eligible creditors voted, almost all of those who did eventually voted in favor of the plan that incorporated the settlement.<sup>131</sup>

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127. Levitin, *supra* note 119, at 1114; *see also* The Official Committee of Unsecured Creditors’ Statement Regarding Motion of Debtors Pursuant to 11 U.S.C. § 105 & Fed. R. Bankr. P. 9019 Authorizing & Approving Settlements Between the Debtors & the United States & Request for Certain Modifications in the Proposed Form of Order Approving the Same at 5, *In re Purdue Pharma*, 633 B.R. 53 (No. 19-23649), ECF No. 1920 [hereinafter *Purdue* Settlement UCC Statement] (“[T]he public benefit company provisions of the Proposed DOJ Resolution are akin to a ‘poison pill,’ cautioning creditors that any challenge to such an outcome necessarily will result in the catastrophic dilution of creditors’ claims.”).

128. Declaration of Michael Atkinson in Support of the Statement of the Official Committee of Unsecured Creditors in Support of Confirmation of the Sixth Amended Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. & Its Affiliated Debtors at 18, *In re Purdue Pharma*, 633 B.R. 53 (No. 19-23649), ECF No. 3460 [hereinafter *Purdue* Plan Support Letter].

129. Complaint & Motion to Subordinate the Claims & Liens of the U.S. at 1–2, 4, *In re Purdue Pharma*, 633 B.R. 53 (No. 19-23649), ECF No. 3699.

130. *See* Transcript of Hearing Before Judge Robert D. Drain at 223–50, *In re Purdue Pharma*, 633 B.R. 53 (No. 19-23649), ECF No. 2073 [hereinafter *Purdue* DOJ Settlement Transcript] (recording Judge Drain’s evaluation of the agreement’s fairness and describing the merits of the settlement).

131. *In re Purdue Pharma*, 633 B.R. 60–61; *see also* Jonathan C. Lipson, *The Rule of the Deal: Bankruptcy Bargains and Other Misnomers*, 97 AM. BANKR. L.J. 41, 91 (2023) (“[F]ewer than 20% of the 618,194 claimants entitled to vote—and fewer than 50% of the subset of claimants with personal injury claims—cast any ballot on Purdue Pharma’s plan.”).

The exact reasons for the federal government's decision to structure and condition the settlement in this fashion remain the subject of speculation.<sup>132</sup> However, one plausible explanation is that the government sought to use Purdue's bankruptcy to further federal healthcare policy in ways that otherwise would be foreclosed.<sup>133</sup> The federal government had no interest in shutting Purdue down completely. Had it wished to do so, it could have pursued the full payment of its claims. In fact, the federal government could have put Purdue out of business entirely by excluding it from federal medical reimbursement programs.<sup>134</sup> Instead, as noted during the settlement hearing, the federal government used the bankruptcy to maintain Purdue as a national opioid supplier.<sup>135</sup>

Despite more than five hundred thousand overdose deaths since 1999,<sup>136</sup> the CDC and FDA continue trying to balance the need for a consistent opioid supply for chronic pain management with its potential risks, rather than banning opioids entirely.<sup>137</sup> New regulations note the importance of opioids in a variety of care settings.<sup>138</sup> Moreover, millions of Americans also suffer from opioid use disorder in part because of past overprescription. Regulators have said that opioid-based treatment for those already suffering from addiction and opioid use disorder is

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132. See, e.g., Letter from Elizabeth Warren, Sen., to William Barr, Att'y Gen. of U.S. (Nov. 17, 2020), <https://www.warren.senate.gov/imo/media/doc/2020.11.17%20Letter%20to%20DOJ%20Requesting%20Information%20re%20Settlement%20Agreement%20with%20Purdue.pdf> [<https://perma.cc/U2G9-MLEZ>] (highlighting the peculiarity of the conditional settlement).

133. See Elias & Triantis, *supra* note 31, at 332 (noting that intervention in bankruptcy could help governments achieve policy goals).

134. See *Purdue* DOJ Settlement Transcript, *supra* note 130, at 230–31 (highlighting the federal government's "substantial rights inherent in its criminal enforcement power, including precluding all of the debtors from continuing in business, or effectively continuing in business").

135. See *id.* at 166 (attorney for nonconsenting states noting that one of the "fundamental concerns" of the federal government is to "have a continuing-to-operate Purdue, which is a source of supply" of opioids).

136. *Understanding the Opioid Overdose Epidemic*, CDC, <https://www.cdc.gov/opioids/basics/epidemic.html> (last updated Aug. 8, 2023) [<https://perma.cc/35YK-YW4S>].

137. See, e.g., *CDC Guideline for Prescribing Opioids for Chronic Pain—United States, 2016*, CDC (Mar. 18, 2016), <https://www.cdc.gov/mmwr/volumes/65/rr/rr6501e1.htm> [<https://perma.cc/39Y4-DEPE>] (providing guidelines for assessing when to prescribe opioids); *Opioid Medications*, FDA (Mar. 29, 2021), <https://www.fda.gov/drugs/information-drug-class/opioid-medications> [<https://perma.cc/UKU9-QD8P>] [hereinafter FDA Guidance] (same); Patricia J. Zettler, Margaret Foster Riley & Aaron S. Kesselheim, *Implementing a Public Health Perspective in FDA Drug Regulation*, 73 FOOD & DRUG L.J. 221, 222 (2018) (noting the need to balance the harms of opioid overprescription with the need to ensure that "prescription opioids are available for the evidence-based management of pain").

138. See Jan Hoffman, *C.D.C. Proposes New Guidelines for Treating Pain, Including Opioid Use*, N.Y. TIMES (Feb. 10, 2022), <https://www.nytimes.com/2022/02/10/health/cdc-opioid-pain-guidelines.html> [<https://perma.cc/WA2V-RETR>] (reporting on new proposed recommendations to "step back from the notion of one-size dosing fits all" and focusing on individualized care needs).

essential and that abrupt discontinuation of opioids could be harmful.<sup>139</sup> With companies exiting the opioid business (in part because of government suits against them),<sup>140</sup> the government may have acted to ensure that opioids continue to be produced. In short, by conditioning its settlement on Purdue's emergence as a state-owned source of opioid medication, the federal government may have been acting to secure the supply of opioids for those who need them while aiming to mitigate their potential harms.<sup>141</sup> Of course, this ran contrary to the desires of many individual victims, who wanted Purdue to be liquidated and all opioid sales to cease.<sup>142</sup>

Purdue's bankruptcy allowed the federal government to leverage the size and unique character of its claims to "dragoon" recalcitrant states into accepting a settlement that would likely have violated traditional federalism principles if pursued directly.<sup>143</sup> Under the settlement—*negotiated between Purdue and the Department of Justice*, and not any other party—states would be forced to take ownership of a newly nationalized opioid manufacturing company that would continue to produce opioids in furtherance of the federal government's healthcare policy. Skillful use of Purdue's bankruptcy process enabled the federal government to coercively deputize the states as adjuncts of federal drug policy, over their express objection, without requiring any congressional appropriations. As separate sovereigns, states could not be required to accept this responsibility—but since the states' recoveries depended upon the Federal Settlement, they were all but compelled to acquiesce.<sup>144</sup> The financial benefits of the settlement locked in Purdue's emergence as a public benefit company.

States took advantage of the public benefit company construct foisted upon them to achieve something that may have been impossible

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139. FDA Guidance, *supra* note 137.

140. See, e.g., Emma Newburger, *Johnson & Johnson Confirms Opioid Business Has Ended in \$230 Million Settlement with New York*, CNBC (June 26, 2021, 10:29 AM), <https://www.cnbc.com/2021/06/26/jj-agrees-to-stop-selling-opioids-in-230-million-settlement-with-new-york.html> [https://perma.cc/4UTY-RHMN] ("Johnson & Johnson has agreed to a \$230 million settlement with New York state that bars the company from promoting opioids and confirmed it has ended distribution of such products within the United States.").

141. See, e.g., *Purdue* DOJ Settlement Transcript, *supra* note 130, at 145–146 (Assistant U.S. Attorney describing the importance of opioid abatement and the need to balance anti-diversion mechanisms with producing revenue to abate the opioid crisis).

142. See *Purdue* Plan Support Letter, *supra* note 128, at 31 (presenting various parties of interest expressing that Oxycontin sales should cease entirely and Purdue should be liquidated).

143. *Printz v. United States*, 521 U.S. 898, 928 (1997) (state officers cannot be "dragooned" . . . into administering federal law" (quoting *Mack v. United States*, 66 F.3d 1025, 1035 (9th Cir. 1995) (Fernandez, J., dissenting))).

144. Cf. *Nat'l Fed'n of Indep. Bus. V. Sebelius*, 567 U.S. 519, 581 (2012) ("In this case, the financial 'inducement' Congress has chosen is much more than 'relatively mild encouragement'—it is a gun to the head.").

otherwise: ownership of a multibillion-dollar company that could supplement their budgets on an ongoing basis. Post-bankruptcy, Purdue will still be expected to provide revenue to its owners—the states—from the sale of opioids.<sup>145</sup> Unlike with revenue from the tobacco Master Settlement Agreement, which states repurposed for a host of uses beyond healthcare and smoking cessation,<sup>146</sup> states committed to using all funds from the bankruptcy exclusively for opioid abatement purposes.<sup>147</sup> Yet state resources are fungible, so money from the sale of opioids will free up other state resources to be used for other politically desirable purposes.<sup>148</sup> More directly, states (and their localities) will have discretion regarding *who* receives much of the settlement funds, giving those in control of this intrastate allocation additional political power.<sup>149</sup>

Boosters hope that the public benefit company structure will prevent states from extracting undue profits from Purdue.<sup>150</sup> The company's charter requires it to balance abatement, the interests of communities affected by opioid sales, and the financial interests of the states that will own it.<sup>151</sup> However, the company may well find this balancing act impossible. Since all profits from the company will go to abatement, states will be incentivized to increase sales of opioids, thus possibly undermining the very purpose of the public benefit company.<sup>152</sup> Moreover, the terms of the court-approved bankruptcy plan of reorganization stipulate that the company must be sold to a nongovernmental third party within a fixed period of time and the proceeds of all sales will be distributed for abatement purposes.<sup>153</sup> This will further motivate the states to ensure that the company maximizes

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145. *Purdue Disclosure Statement*, *supra* note 121, at 136–37.

146. Berman, *supra* note 111, at 1037–38.

147. *In re Purdue Pharma L.P.*, 633 B.R. 53, 75 (Bankr. S.D.N.Y. 2021), *vacated*, 635 B.R. 26 (S.D.N.Y. 2021), *rev'd*, 69 F.4th 45 (2d Cir. 2023), *cert. granted*, 144 S. Ct. 44 (Aug. 10, 2023) (mem.).

148. Cf. Michael S. Greve, *Compacts, Cartels, and Congressional Consent*, 68 MO. L. REV. 285, 354–55, 362 (2003) (noting how the tobacco Master Settlement Agreement “act[s] like a uniform (and perpetual) national tobacco sales tax” for the benefit of states).

149. See generally National Opioid Abatement Trust Distribution Procedures at 4–29, *In re Purdue Pharma*, 633 B.R. 53 (No. 19-23649), ECF No. 3715-1 (setting parameters on states' uses of National Opioid Abatement Trust funds).

150. Notice of Filing of Thirteenth Plan Supplement Pursuant to the Sixth Amended Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. & Its Affiliated Debtors at 730, *In re Purdue Pharma*, 633 B.R. 53 (No. 19-23649), ECF No. 3528 [hereinafter *Purdue Thirteenth Plan Supplement*].

151. *Id.* at 729–30.

152. See *Purdue DOJ Settlement Transcript*, *supra* note 130, at 245, 249 (noting the potential conflict of interest even for a public benefit company and the impossibility of removing conflicts completely by a bankruptcy judge).

153. *Purdue Thirteenth Plan Supplement*, *supra* note 150, at 726, 737–40.

opioid sales, perversely counteracting the very abatement efforts the public benefit company is meant to fund.<sup>154</sup>

Despite the real conflicts of interest caused by governments acting as representatives of victims, creditors seeking financial recoveries, and sovereigns with broader policy agendas, governments were able to use bankruptcy to achieve indirectly what they likely could not achieve through legislation. This entire structure—a nationwide company owned jointly by all fifty states, which produces profits *through the sale of opioids*, profits which states and localities could then distribute at their discretion, all achieved without any legislative action or additional taxes—only became possible by aggressive federal and state government intervention in the bankruptcy process.

### *B. Governments Contribute to, or Cause, Mass Tort Bankruptcy Filings*

Through suits, investigations, and changes in law, governments may contribute to, or even cause, bankruptcy filings. As described in greater detail in Part I, overwhelming governmental liability can strengthen companies' desire to consolidate claims against them into a single forum. This Section offers examples of how government intervention can be the proximate cause of a bankruptcy filing and why companies may recognize bankruptcy as the only viable mechanism to bring all claims—even those outside of the jurisdiction of MDLs—into a single court.

For example, in Purdue Pharma's filings to the bankruptcy court, the company noted that it never considered itself to face serious risk from product liability suits; from 2008 to 2019, it paid a total of \$342 million in settlements, as compared to net profits of \$10.6 billion over that same period.<sup>155</sup> Yet by the time of Purdue's bankruptcy filing in September 2019, about 2,250 actions, asserting trillions of dollars of damages, had been filed against the company by almost every state attorney general and thousands of localities.<sup>156</sup> This onslaught of government litigation, brought by governments on their own claims and on behalf of their citizens, was the proximate cause of Purdue's bankruptcy filing.<sup>157</sup>

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154. Cf. Samir D. Parikh, *Scarlet-Lettered Bankruptcy: A Public Benefit Proposal for Mass Tort Villains*, 117 NW. U. L. REV. 425, 429–31 (2022) (proposing adoption of a public benefit model for mass tort bankruptcies).

155. The Raymond Sackler Family's Proposed Findings of Fact & Conclusions of Law at 162, *In re Purdue Pharma*, 633 B.R. 53 (No. 19-23649), ECF No. 3441-1 [hereinafter *Purdue Findings*].

156. Debtors' Informational Brief at 41, *In re Purdue Pharma*, 633 B.R. 53 (No. 19-23649), ECF No. 17 (comprising more than eighty-five percent of actions pending against the company).

157. *Purdue* Disclosure Statement, *supra* note 121, at 69.

A similar story can be told about several other public mass tort bankruptcies. Litigation and investigations by more than one thousand governmental claimants were among the key events leading to the bankruptcy filing of Insys, another opioid maker, in July 2019.<sup>158</sup> Crucially, although most of the actions brought against Insys were consolidated into an MDL proceeding, Insys explained that a major rationale for its bankruptcy filing was to consolidate more than two hundred actions brought by local governments that were not consolidated into the MDL.<sup>159</sup> In fact, many of these actions *could not* be consolidated into the MDL for jurisdictional reasons, since actions brought by state public attorneys cannot be removed to federal court.<sup>160</sup> As a result, a bankruptcy filing was likely the only option available to Insys if it wanted to consolidate all claims against it into a single forum.

Endo, another pharmaceutical company and opioid manufacturer, similarly found itself with little choice but to file for bankruptcy in August 2022 after more than three thousand suits were filed against it, over eighty percent of which were brought by state and local governments.<sup>161</sup> As with Insys, while the majority of actions against Endo have been incorporated into an MDL proceeding, hundreds of actions against the company remain pending in federal and state courts around the country.<sup>162</sup> But Endo's multiframe difficulties are perhaps even more acute than those faced by Insys: the Judicial Panel on Multidistrict Litigation, the body that oversees pending MDLs,<sup>163</sup> ruled in April 2022 (several months before Endo's bankruptcy filing) that it would no longer transfer newly commenced or newly

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158. Disclosure Statement for Second Amended Joint Chapter 11 Plan of Liquidation Proposed by Insys Therapeutics, Inc. & Its Affiliated Debtors at 28–29, 32, *In re Insys Therapeutics, Inc.*, Nos. 19-11292 (Bankr. D. Del. Dec. 4, 2019), ECF No. 956 [hereinafter *Insys Disclosure Statement*].

159. Debtors' Opening Brief in Support of Their Motion for a Preliminary Injunction Pursuant to 11 U.S.C. § 105(a) at 9–10, 18–19, *In re Insys Therapeutics, Inc.*, No. 19-11292 (Bankr. D. Del. June 10, 2019), ECF No. 3.

160. *See* Mississippi *ex rel.* Hood v. AU Optronics Corp., 571 U.S. 161, 168 (2014) (holding suits brought by states under their *parens patriae* powers may not be removable to federal court); Postal Tel. Cable Co. v. Alabama, 155 U.S. 482, 487 (1894) (holding that states are not citizens for purposes of diversity jurisdiction); *see also* Bradt & Rave, *supra* note 65, at 1258 (explaining that cases can be transferred to MDLs only “so long as those cases were filed in (or removed to) a district court that would have personal jurisdiction under applicable state law and the Fourteenth Amendment”).

161. Debtors' Complaint for Injunctive Relief at 54, *In re Endo Int'l PLC*, No. 22-22549 (Bankr. S.D.N.Y. Sept. 9, 2022), ECF No. 1; Declaration of Mark Bradley in Support of Chapter 11 Petitions & First Day Papers at 26, *In re Endo Int'l PLC*, No. 22-22549 (Bankr. S.D.N.Y. Aug. 17, 2022), ECF No. 19 [hereinafter *Endo First Day Declaration*].

162. Debtors' Complaint for Injunctive Relief, *supra* note 161, at 57.

163. 28 U.S.C. § 1407(a).

removed opioid actions to the national opioid MDL.<sup>164</sup> Without the MDL, bankruptcy was likely the only option for Endo to avoid litigating in an ever-proliferating number of forums.<sup>165</sup>

As described above, the much-maligned bankruptcy filing of LTL, the talc liability subsidiary of J&J, was also motivated in part by the desire to manage the claims brought by attorneys general. At the time of the bankruptcy filing, claims by two states had been filed, while claims by another forty-two states and the District of Columbia were tolled.<sup>166</sup> State suits could be far more costly to J&J than suits by individuals; moreover, a victory by one state would likely result in copycat actions since every state has similar consumer protection laws.<sup>167</sup> Perhaps more troubling for LTL, several states noted that “the same analysis that governs *state* police power actions governs *federal* regulatory enforcement actions.”<sup>168</sup> Thus, state action, which could lay the groundwork for future federal action against J&J, greatly elevated the company’s concerns about liability and contributed to its bankruptcy filing.

The above examples represent some of the major companies to file for bankruptcy as a result of a large number of government actions being brought against them.<sup>169</sup> Following the court’s decision

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164. See Memorandum of Law in Support of Motion for a Preliminary Injunction Pursuant to Section 105(a) of the Bankruptcy Code at 16 n.9, *In re Endo Int’l PLC*, No. 22-22549 (Bankr. S.D.N.Y. Sept. 9, 2022), ECF No. 3 (“[T]he JPML announced that it would no longer transfer opioid actions that are newly commenced or removed to federal court to the Opioid MDL.”).

165. See, e.g., Memorandum of Law in Support of Motion to Extend the Preliminary Injunction at 7, *In re Endo Int’l PLC*, No. 22-22549 (Bankr. S.D.N.Y. June 30, 2023), ECF No. 80:

The substantial progress made toward both a value-maximizing sale and ultimate resolution of the Chapter 11 Cases would be jeopardized, however, if the Debtors were now compelled to litigate the scope of the automatic stay and its application to the Covered Actions on a case-by-case, claim-by-claim basis for hundreds (or thousands) of actions or, alternatively, were forced to return to litigating the merits of the nationwide opioid actions that previously required the focus and attention of the company and management team and cost the company hundreds of millions of dollars in legal expenses.

166. Debtor’s Sur-reply in Opposition to Motions to Dismiss Chapter 11 Case at 12, *In re LTL Mgmt., LLC*, 637 B.R. 396 (Bankr. D.N.J. 2022) (No. 21-30589), ECF No. 1444.

167. See Motion of States of New Mexico & Mississippi for Certification of Direct Appeal to the United States Court of Appeals for the Third Circuit at 16, *In re LTL Mgmt., LLC*, No. 22-01231 (Bankr. D.N.J. Nov. 03, 2022), ECF No. 37 [hereinafter *LTL* Motion to Appeal] (rationalizing certification because “the Stay Opinion and Order will affect proceedings far beyond this case” since “[e]very state has consumer protection laws,” and “the same analysis that governs *state* police power actions governs *federal* regulatory enforcement actions”).

168. *Id.*

169. The bankruptcy filing of Aearo Technologies LLC, a subsidiary of 3M embroiled in the country’s largest MDL proceeding, shows how the approval of the Texas Two-Step bankruptcy of LTL has motivated other companies to file for bankruptcy to resolve mass tort liability (as well as the limits of such a strategy). However, the bankruptcy of Aearo lies beyond the scope of this Article since, as of this writing, no material government actions have been filed against the

permitting LTL's bankruptcy filing to proceed, other companies facing an onslaught of government investigations or litigation may be tempted to place a subsidiary into bankruptcy, such as the e-cigarette maker Juul<sup>170</sup> or even oil supermajor ExxonMobil.<sup>171</sup> As another example, suits by cities and states against manufacturers of PFAS, a class of chemicals that can cause long-lasting contamination, have also led to major verdicts and could prompt bankruptcy filings by PFAS manufacturers like those by Insys, Endo, and LTL.<sup>172</sup> In short, the filing of a public mass tort bankruptcy is no longer only a decision made privately between debtors and creditors. Instead, it is now an issue of broader public concern because of government intervention and thus becomes subject to the conflicts of interest that arise from government intervention.

### C. Governments Change Laws to Influence Bankruptcy Cases

Scholars have noted that governments can leverage their nonbankruptcy powers to influence the trajectory of a bankruptcy.<sup>173</sup> In this sense, governments are little different than important creditors in typical cases who use strong-arm tactics to protect their interests.<sup>174</sup> However, governments can influence bankruptcies in ways that no private creditor can. By passing laws or exercising regulatory authority, governments change the types of cases that enter bankruptcy and the

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company—the MDL consists of exclusively private suits. *See generally In re 3M Combat Arms Earplug Prods. Liab. Litig.*, No. 19-md-2885, 2022 U.S. Dist. LEXIS 230132, at \*1 (N.D. Fla. Dec. 22, 2022) (precluding 3M from shifting liability to Aearo subsidiary).

170. *See Harvard Zhang, Juul, Lenders Working with Advisors to Evaluate Options After FDA Bans Company's Products, REORG* (June 24, 2022, 1:22 PM), [https://app.reorg.com/v3#/items/intel/17973?item\\_id=182552](https://app.reorg.com/v3#/items/intel/17973?item_id=182552) [<https://perma.cc/CN3L-VU6G>]; *see also Christina Jewett & Julie Creswell, Juul Reaches \$462 Million Settlement with New York, California and Other States*, N.Y. TIMES (Apr. 12, 2023), <https://www.nytimes.com/2023/04/12/health/juul-vaping-settlement-new-york-california.html> [<https://perma.cc/ZB95-NH53>].

171. *See Susanne Rust & Rosanna Xia, State Accuses Exxon Mobil of Deceiving Public, Perpetuating 'Myth' of Plastics Recycling*, L.A. TIMES (Apr. 28, 2022), <https://www.latimes.com/environment/story/2022-04-28/california-blames-exxonmobil-for-plastic-pollution-crisis> [<https://perma.cc/P6AU-GRWT>]; *Rebecca Picciotto, California Suit Against Chevron, Exxon, Shell, Others, Alleges Public Deception on Climate Change*, CNBC (Sept. 18, 2023, 11:51 AM), <https://www.cnbc.com/2023/09/18/california-sues-chevron-exxon-oil-giants-on-climate-change-deception.html> [<https://perma.cc/CR8P-ACJN>].

172. *See Alex Wolf, Trillions in PFAS Liabilities Threaten Corporate Bankruptcy Wave*, BLOOMBERG L. (Oct. 24, 2023, 9:15 AM), <https://news.bloomberglaw.com/bankruptcy-law/trillions-in-pfas-liabilities-threaten-corporate-bankruptcy-wave> [<https://perma.cc/Y9QW-R33H>].

173. Ellias & Triantis, *supra* note 30, at 535–38 (describing how PG&E's emergence from bankruptcy depended on California legislative reforms, which Sacramento provided in exchange for policy concessions and guaranteed payments by PG&E to favored constituencies).

174. *See Ellias & Triantis, supra* note 31, at 334 (stating that secured creditors "control most large Chapter 11 cases" and that governments have acted similarly in a small number of bankruptcies).

ways those cases are resolved.<sup>175</sup> A potentially idiosyncratic example of this can be found in the bankruptcy filing of the Boy Scouts of America. Following mounting allegations of sexual abuse that stretched back decades, many states passed laws that retroactively extended the statutes of limitations for private litigants to bring suit against the organization.<sup>176</sup> These changes “placed tremendous financial pressure” on the organization and were all but certainly the proximate cause of its bankruptcy filing.<sup>177</sup> These laws, while perhaps justifiable, present an extreme example of a government’s ability to use nonbankruptcy powers to influence corporate bankruptcies.

Less dramatic examples of legislative action can still raise questions regarding when a government might benefit as a bankruptcy claimant, since state law sets many of the rules applicable to bankruptcy cases. LTL’s “Texas Two-Step” bankruptcy was enabled by a quirk in Texas corporate law that permits a Texas company to divide itself into two companies and allocate its assets and liabilities among them.<sup>178</sup> Texas law further provides that the allocation from such a “divisive merger” occurs without “any transfer or assignment having occurred,” possibly eliminating the availability of fraudulent transfer remedies because one could argue that under Texas law, no transfer has in fact occurred.<sup>179</sup> This provision is likely one reason why J&J chose Texas for its divisive merger, and other companies may follow its lead. Some have argued that successor liability could defeat the worst outcomes of the Texas Two-Step,<sup>180</sup> but this too is a question that could

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175. See *id.* at 350 (“[A]n activist approach [by governments] engages with the bankruptcy process and exploits its advantages to further public policy goals . . . .”).

176. Amended Disclosure Statement for the Modified Fifth Amended Chapter 11 Plan of Reorganization for Boy Scouts of America & Delaware BSA, LLC at 77–78, *In re Boy Scouts of Am. & Del. BSA, LLC*, 642 B.R. 504 (Bankr. D. Del. 2022) (No. 20-10343), ECF No. 6445.

177. *Id.* at 78.

178. TEX. BUS. ORGS. CODE ANN. § 1.002(55) (West 2022); *id.* § 10.008(a)(4) (West 2015).

179. *Id.* § 10.008(a)(2); Adam Levitin, *The Texas Two-Step: The New Fad in Fraudulent Transfers*, CREDIT SLIPS (July 19, 2021, 10:50 AM), <https://www.creditslips.org/creditslips/2021/07/the-texas-two-step.html> [<https://perma.cc/UNY4-FFE7>] (explaining that a division is defined as a “merger” under Texas Law because “if there’s no transfer in a divisive merger, then there cannot be a fraudulent transfer”). A fraudulent transfer occurs when a debtor transfers funds to another party and it either (a) makes such transfer “with actual intent to hinder, delay, or defraud” a creditor, or (b) “receive[s] less than a reasonably equivalent value” in exchange for the transfer and at the time the transfer was made was insolvent or became insolvent as a result of the transfer. 11 U.S.C. § 548(a).

180. Judith K. Fitzgerald & Adam J. Levitin, *[Texas Two-Step and the Future of Mass Tort Bankruptcy Series] A Different Look at Sec. 548 and Concluding Thoughts*, HARV. L. SCH. BANKR. ROUNDTABLE (Nov. 1, 2022), <https://bankruptcyroundtable.law.harvard.edu/2022/11/01/texas-two-step-and-the-future-of-mass-tort-bankruptcy-series-a-different-look-at-sec-548-and-concluding-thoughts/> [<https://perma.cc/C9C4-UUBK>].

vary under the laws of different states.<sup>181</sup> States are not only powerful creditors in mass tort bankruptcies, but they are also to a large extent the rule setters for the remedies available for addressing liabilities under the Bankruptcy Code.<sup>182</sup> It is not impossible to imagine future legislative or regulatory changes being made by governments to favor their position as claimants over the positions of individual claimants in a mass tort bankruptcy.

As discussed in greater detail below, governments can also claim that their suits, but not those of individuals, are free from bankruptcy's automatic stay on litigation against a debtor.<sup>183</sup> The automatic stay on all pending litigation against a debtor during a bankruptcy proceeding provides an express exception for actions brought by governments under their "police and regulatory power," which governments claim applies to the *parens patriae* claims they bring in mass tort bankruptcies.<sup>184</sup> The mere threat of some government suits proceeding while all personal suits are paused could alter settlement dynamics in a case. This may explain why the judge in the LTL bankruptcy was so reticent to permit government suits to proceed, since "[i]t seems patently unfair to permit the States to proceed while others—*particularly those who allege more direct, personal harm*—must wait."<sup>185</sup> Nevertheless, future rulings could go the other way, giving governments a distinct advantage over individual claimants by virtue of their police and regulatory powers outside of bankruptcy.

A final illustration comes from Purdue's bankruptcy, where states used their unique sovereign powers to bring representative *parens patriae* claims in order to extract around \$1 billion in additional payments from the Sacklers that would not be shared with individuals. Purdue's plan of reorganization initially provided that the controlling Sackler family would make payments of around \$4.5 billion to creditors in exchange for a release of all civil liability.<sup>186</sup> Although this plan was

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181. See *In re 3M Combat Arms Earplug Prods. Liab. Litig.*, No. 19-md-2885, 2022 U.S. Dist. LEXIS 230132, at \*18–19 (N.D. Fla. Dec. 22, 2022) (noting the choice of law issues in the case and providing that it would have organized the litigation very differently had 3M "changed its position on successor liability early on").

182. See *Butner v. United States*, 440 U.S. 48, 54–55 (1979) (explaining that the Bankruptcy Act generally defers to state law for the determination of property rights in the assets of a bankrupt's estate).

183. See 11 U.S.C. § 362(a) (providing for automatic stays); *supra* note 74; *infra* notes 207–213 and accompanying text.

184. 11 U.S.C. § 362(b)(4).

185. *In re LTL Mgmt., LLC*, 645 B.R. 59, 87 (Bankr. D.N.J. 2022) (emphasis added).

186. See generally William Organek, "A Bitter Result": *Purdue Pharma, a Sackler Bankruptcy Filing, and Improving Monetary and Nonmonetary Recoveries in Mass Tort Bankruptcies*, 96 AM. BANKR. L.J. 361 (2022) (explaining that the Sackler family would be released from all civil liability

approved by the bankruptcy court, a handful of states objected. They claimed that the bankruptcy court could not extinguish their unique *parens patriae* claims.<sup>187</sup> The objecting states won on appeal and leveraged their victory to seek additional funds from the Sacklers.<sup>188</sup> In exchange for additional payments—*which would not be shared with individual victims*—the objecting states agreed to drop their opposition to the plan.<sup>189</sup> This and other actions taken by the holdout states caused District Court Judge McMahon to remark that “where the Objecting States are concerned, it really is all about the money, specifically *how much money the Sacklers are prepared to pay to ‘buy peace.’*”<sup>190</sup> Only states could bring the claims they did because of powers granted to them outside of the confines of the Bankruptcy Code, and states were almost entirely alone in objecting to the plan confirmation.<sup>191</sup> Yet the claims that supposedly could not be extinguished were claims that states could only bring on behalf of their citizens.

As a result of the actions of the holdout states, the amount paid by the Sacklers was indeed higher. But the allocation of this payout to only the states demonstrates how governments can use their powers outside of bankruptcy to influence the bankruptcy. It also provides an example of how the conflicts of interest that arise when governments intervene simultaneously as claimants, representatives, and sovereigns can reduce the recoveries of the victims that governments ostensibly represent in the bankruptcy.

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associated with Purdue in exchange for contributing several billion dollars to the reorganization and relinquishing their ownership in Purdue).

187. See, e.g., Appellant’s Principal Brief at 10, *In re Purdue Pharma, L.P.*, 635 B.R. 26 (S.D.N.Y. 2021) (No. 21-07532), ECF No. 192.

188. *In re Purdue Pharma*, 635 B.R. at 26.

189. See Mediator’s Fourth Interim Report at 5–7, *In re Purdue Pharma, L.P.*, 633 B.R. 53 (Bankr. S.D.N.Y. 2021) (No. 19-23649), ECF No. 4409 [hereinafter *Purdue* Mediator’s Fourth Report]; Statement of the Official Committee of Unsecured Creditors in Support of Motion of Debtors Pursuant to 11 U.S.C. §§ 105(a) & 363(b) for Entry of an Order Authorizing & Approving Settlement Term Sheet & Joinder in the Debtors’ Reply in Support Thereof at 5, *In re Purdue Pharma*, 633 B.R. 53 (No. 19-23649), ECF No. 4492 (“[T]he Sacklers will . . . provide additional funding for the vital governmental abatement programs already contemplated under the Plan . . . . No such parallel monetary benefit will accrue to the ‘private’ claimants, the trusts for whose benefit will continue to be funded in fixed amounts under the terms of the Plan.”); cf. Dishman, *supra* note 23, at 295 (“AGs can ‘steal’ [from other states] by allocating greater portions of settlements to their own states, with other AGs either oblivious or indifferent to the theft because of voter ignorance.”).

190. Order Conditionally Granting Debtors’ & Allied Parties’ Motion for a Certificate of Appealability at 2 n.1, *In re Purdue Pharma*, 635 B.R. 26 (No. 21-07532), ECF No. 301 (emphasis added).

191. See *In re Purdue Pharma*, 635 B.R. at 36–38.

#### *D. Governments Use the Tools of Bankruptcy in Ways That Shortchange Victims*

Governments increasingly take active roles in committees, mediations, and settlements in public mass tort bankruptcies to advance their own interests. Recall that governments bring suit, and therefore intervene as creditors in public mass tort bankruptcies, primarily as *parens patriae* claimants on behalf of all individual victims within their jurisdiction. Individual claimants, meanwhile, also participate in these cases, seeking both monetary recoveries and vindication of their dignitary rights.<sup>192</sup> One might expect that the goals of individuals and their governmental representatives would largely align, since governmental claims are brought on behalf of individuals. Nevertheless, once in bankruptcy, governments can use bankruptcy committees, mediations, and restructuring support agreements to pursue their own interests at the expense of the monetary and nonmonetary interests of the victims they represent.

##### 1. Governments Form Ad Hoc Committees and Act for Themselves

Bankruptcy requires the appointment of an official committee, consisting of major creditors, that has a fiduciary duty to “adequately represent[ ]” all unsecured creditors.<sup>193</sup> Governments, as the largest unsecured claimants against mass tort debtors, would normally be expected to serve on this committee, but current law makes governments ineligible to do so.<sup>194</sup> Instead, governments form ad hoc committees to influence a case, with members of these committees only possessing fiduciary duties to *their own members* rather than all creditors.<sup>195</sup> These committees are common in public mass tort bankruptcies and often advocate for their own narrower interests despite contrary views of other creditors. This would be typical in a corporate bankruptcy, where one would expect a sophisticated group of creditors to seek the best deal it could get for itself. However, this

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192. See *infra* note 255 and accompanying text; *Purdue Mediator’s Fourth Report*, *supra* note 189, at 7–8 (providing a forum for victims to address the Sackler family would “serve the ends of justice”).

193. Andrew DeNatale, *The Creditors’ Committee Under the Bankruptcy Code—A Primer*, 55 AM. BANKR. L.J. 43, 44 (1981).

194. 11 U.S.C. § 1102(b)(1); United States Trustee’s Objection to Motion Seeking Appointment of Official Committee of Public Entities Pursuant to 11 U.S.C. §§ 1102(a) & 105(a) at 3–4, *In re Insys Therapeutics, Inc.*, No. 19-11292 (Bankr. D. Del. July 10, 2019), ECF No. 265 [hereinafter *Insys* U.S. Trustee’s Objection].

195. 11 U.S.C. § 1102(a)(1)-(2); 7 COLLIER ON BANKRUPTCY ¶ 1103.05(2) (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2023) (“A member of a committee owes a fiduciary duty to the class the committee represents.”).

“everyone for themselves” philosophy is far more problematic for governments acting on behalf of injured victims in public mass tort bankruptcies.

For example, in Purdue’s bankruptcy, the official committee and a large number of other constituencies (including, most prominently, individual claimants) proposed the creation of a \$200 million opioid emergency relief fund.<sup>196</sup> The fund, to be independently managed, would have given money to organizations that were not already recipients of government opioid remediation funding.<sup>197</sup> However, an ad hoc committee of states objected to the fund because they “would not agree in advance to any terms governing the types of organizations” that could receive funds.<sup>198</sup> This committee of states also “made clear that [they] would not support [the fund] unless the money went directly to the States . . . rather than being controlled by a neutral oversight board.”<sup>199</sup> Despite the efforts of the official committee and other creditors, and the obvious ways that such a fund could help victims, the states’ seemingly parochial objections and their manifest conflicts of interest ultimately stood in the way of creating the fund.<sup>200</sup> Thus, even though states claimed to intervene to help their citizens, state interests prevented the establishment of the fund sought by citizens. And, partly as a result of this, no victim or organization in the Purdue bankruptcy has received any payment to date.

## 2. Governments Seek Special Treatment in Mediations

Government intervention in court-ordered mediation also plays an important role in mass tort bankruptcies. Mediations can be confidential and wide-ranging, allowing parties to resolve a case’s most significant issues. This Subsection details how governments have used mediations in the bankruptcies of LTL, Purdue Pharma, and Endo to maximize their own recoveries at the expense of the citizens they represent in their *parens patriae* capacity.

In the LTL bankruptcy, for instance, mediation was ordered among the debtor, the official committees, and a representative of potential future claimants.<sup>201</sup> An ad hoc committee formed by the

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196. *Purdue Plan Support Letter*, *supra* note 128, at 30.

197. *Id.* at 30.

198. *Id.* at 31.

199. *Id.*

200. *See id.* (stating that the official committee “believes that the failure to establish [the fund] remains one of the great disappointments of the Chapter 11 cases”).

201. Order Establishing Mediation Protocol at 4–7, *In re LTL Mgmt., LLC*, 637 B.R. 396 (Bankr. D.N.J. 2022) (No. 21-30589), ECF No. 1780.

attorneys general of forty states and the District of Columbia following the rejection of their attempt to join the official committee tried to intervene in this mediation.<sup>202</sup> The court ultimately permitted the states to join the mediation.<sup>203</sup> Yet in recognition of the unique status of the states' claims, it ordered a separate mediation, between only the debtor and the ad hoc committee of states, regarding the claims held by the states.<sup>204</sup> While the mediation proceedings themselves remain confidential,<sup>205</sup> it appears likely that states would defend their own interests at this separate mediation, even at the expense of the citizens they represent (and mediate with) in the mediation that includes all parties.<sup>206</sup>

To further buttress their negotiating position in their separate mediation, states are also seeking an exception from bankruptcy's automatic stay on litigation. This exception, however, would apply *only to their claims*, and not those brought by individual creditors. Shortly after LTL's bankruptcy filing, LTL successfully petitioned the bankruptcy court to enjoin suits against nondebtor parent company J&J.<sup>207</sup> In granting this motion, the bankruptcy court noted that without the injunction, victims would be harmed because suits would deplete available proceeds and insurance coverage, impair mediation efforts, and delay recoveries for victims.<sup>208</sup> Despite the possibility that these risks would apply with even greater force to the massive claims brought against J&J by the states, the states have appealed this decision to the Third Circuit, arguing that *their claims*—but *not* the claims of *individuals*—should be permitted to proceed against J&J.<sup>209</sup> In fact, the states have argued that these *parens patriae* claims are completely distinct from those brought by individuals against LTL and

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202. *LTL States Mediation Motion*, *supra* note 19, at 2.

203. Amended Order Establishing Mediation Protocol at 5, *In re LTL Mgmt.*, 637 B.R. 396 (No. 21-30589), ECF No. 2300 [hereinafter *LTL Amended Mediation Order*].

204. Order Appointing Co-mediator at 2, *In re LTL Mgmt.*, 637 B.R. 396 (No. 21-30589), ECF No. 2370.

205. *LTL Amended Mediation Order*, *supra* note 203, at 8–11.

206. As a minor, but telling, example of this possibility, the states have negotiated to have LTL pay for their fees in connection with this separate mediation, despite objection from the U.S. Trustee that this would unfairly benefit some creditors over others. Order Authorizing the Debtor to Enter into the Reimbursement Agreement at 3, *In re LTL Mgmt.*, 637 B.R. 396 (No. 21-30589), ECF No. 2585. No such agreement exists for any other party in the other mediation; other creditors, such as individual victims, will likely have legal costs taken out of any eventual recovery against LTL.

207. See *In re LTL Mgmt.*, LLC, 645 B.R. 59, 74–75, 87 (Bankr. D.N.J. 2022) (granting debtor's motion to enjoin suits brought against parent J&J).

208. *Id.* at 71–72, 74, 77.

209. *LTL Motion to Appeal*, *supra* note 167.

therefore cannot be enjoined by any bankruptcy court.<sup>210</sup> States have also argued that permitting their claims to proceed could lead to consumer protection verdicts that could facilitate mediation with J&J.<sup>211</sup> However, if, as the states argue, their claims are fundamentally different from those brought by individuals, then it appears that any value for the mediation provided by such verdicts would only help the states, rather than the victims. Moreover, if state claims are so different from individual claims, then it is not clear that states are in fact intervening on behalf of injured citizens, or that by bringing their distinct claims they could adequately represent the claims of individuals. The bankruptcy court, for its part, rejected the contention that state claims were fundamentally distinct from individual claims.<sup>212</sup> Instead, the court found that allowing these claims to proceed separately would ultimately harm the “uniform, timely, and equitable resolution of the Talc Claims for the benefit of injured parties.”<sup>213</sup>

It remains too early to tell the ultimate impact of these maneuvers on the LTL bankruptcy, especially following the recent Third Circuit reversal.<sup>214</sup> However, we can look to results in other cases to see how government actions in mediation affected outcomes. In Purdue’s bankruptcy, for example, the official committee (as the fiduciary of *all* unsecured creditors) recounted how states and localities were single-minded in their desire to maximize their financial recoveries at the expense of other participants. States and localities were united in their beliefs that “as sovereigns, they are entitled to most of the value received” in the case; they “should be in control of how such value is allocated to other creditor groups and ultimately used”; and they are “the arbiter of the strength of all creditors’ claims, including their own.”<sup>215</sup> Given these statements by the official committee, it seems possible that states argued for their own interests even at the expense

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210. *See id.* at 8 (arguing that state sovereignty interests should permit the states to enforce their claims against J&J).

211. Objection of the Ad Hoc Committee of States Holding Consumer Protection Claims to Debtor’s Motion for an Order (I) Preliminarily Enjoining the Prosecution of the New Mexico & Mississippi State Actions & (II) Granting a Temporary Restraining Order Pending a Further Hearing at 8, *In re LTL Mgmt., LLC*, No. 22-01231 (Bankr. D.N.J. Aug. 12, 2022), ECF No. 21.

212. *In re LTL Mgmt.*, 645 B.R. at 73–74, 76–77.

213. *Id.* at 87.

214. *In re LTL Mgmt., LLC*, 64 F.4th 84 (3d Cir. 2023). New Mexico and Mississippi continue to pursue these claims on the appeal to the Third Circuit of the dismissal of LTL’s second bankruptcy filing, arguing that if LTL’s bankruptcy is not dismissed, “the States may not be enjoined from proceeding with state-law consumer protection actions in state court against Johnson & Johnson, Inc . . . and its affiliates.” Counter-Statement of the States of Mississippi & New Mexico of Issues to Be Presented on Appeal & Counter-Designation of Items to Be Included in the Record on Appeal from Dismissal Opinion and Order at 2, *In re LTL Mgmt., LLC*, No. 23-12825 (Bankr. D.N.J. Sept. 21, 2023), ECF No. 1416.

215. *Purdue* Plan Support Letter, *supra* note 128, at 19.

of the victims they ostensibly represent in Purdue's bankruptcy, and suggests that they could take a similar approach in LTL or other cases.

The conflicts of interest intrinsic to the governments' role as proprietary and representative claimants became even more apparent in the behavior of governments in the lead-up to the mediation in Purdue's bankruptcy. To strengthen their negotiating position *against* their citizens before the mediation began, states and localities refused to mediate with individual claimants until after the governments had agreed how they would allocate any value they received among themselves.<sup>216</sup> This understandably left some victims feeling that they were treated unfairly in the bankruptcy process.<sup>217</sup> Rather than police this behavior, however, the bankruptcy court relied on a confidential mediation process that took these conflicted positions as a given.<sup>218</sup>

This united front was especially important when determining how to treat claims Purdue held against governments and the fate of Purdue's residual value. In the years preceding Purdue's bankruptcy, the company paid billions in taxes to state and local governments that could plausibly be clawed back as fraudulent transfers under the Bankruptcy Code.<sup>219</sup> While tort creditors and others believed this money should be returned by governments and redistributed to them,<sup>220</sup> governments vigorously contested this possibility.<sup>221</sup> Purdue might have more aggressively pursued its fraudulent transfer claims against governments had these governments been less active in the mediation. Instead, states and localities used the mediation to ensure that their tax receipts were not subject to clawback. The allocation of Purdue's residual value—a substantial portion of the total settlement proceeds available for creditors—was also decided in the mediation. The final plan will grant governments all of Purdue's residual value, while all

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216. *Id.* at 20.

217. See, e.g., Hearing in Furtherance of Settlement Term Sheet at 75–76, *In re Purdue Pharma* L.P., 633 B.R. 53 (Bankr. S.D.N.Y. 2021) (No. 19-23649), ECF No. 4539 (“The real beneficiaries of this settlement are the states . . . [T]he actual human beings who suffered actual harm are the most deserving yet we are the least protected. Sadly, the government interests come first.”).

218. See Mediators’ Report at 8, *In re Purdue Pharma*, 633 B.R. 53 (No. 19-23649), ECF No. 2548 (summarizing the general result of the mediation without offering any specific confidential information).

219. *Purdue Findings*, *supra* note 155, at 228–39. Transfers to creditors made while a company is insolvent can often be reclaimed by the debtor as a “fraudulent transfer.” 11 U.S.C. § 548(b).

220. *Purdue Plan Support Letter*, *supra* note 128, at 19.

221. See *In re Purdue Pharma*, 633 B.R. at 91 (“[O]ver 40 percent of the asserted avoidable transfers . . . went to pay taxes . . . and, of course, [the state and local governments] intend to keep the tax payments.”).

other claimants will receive only a small, fixed payment.<sup>222</sup> This residual value is likely to grow because, as described above, Purdue will remain an operating company owned by the states with an incentive to maximize operating revenue and, thus, residual value.<sup>223</sup> Government intervention in the mediation, in brief, appeared to help government recoveries at the expense of individual recoveries.

### 3. Governments Use Restructuring Support Agreements to Lock in Favorable Treatment

A final example of governments using bankruptcy negotiations to obtain better deals for themselves than for the individuals they represent comes from the public mass tort bankruptcy of Endo. Endo negotiated with its financial creditors prior to its bankruptcy. This culminated in a restructuring support agreement<sup>224</sup> (“RSA”) entered into between the company and a group of its financial creditors, with the support of more than thirty state attorneys general.<sup>225</sup> RSAs have become common in corporate bankruptcies but have been criticized in part because they can lock in the path that a bankruptcy will take to the detriment of some creditor constituencies.<sup>226</sup> Endo’s RSA was typical in that any material deviation from its terms would permit the financial creditors to terminate the RSA, thereby throwing the case into chaos and likely reducing recoveries for everyone.<sup>227</sup> But Endo’s RSA was particularly troubling because its terms were negotiated *before the company’s bankruptcy commenced*, between only Endo and certain financial creditors (with support from state governments), with no

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222. *Purdue Plan Support Letter*, *supra* note 128, at 21. A similar payment structure was used in Insys’ bankruptcy. *Insys Disclosure Statement*, *supra* note 158, at 61–62 (government claims are “more speculative, but perhaps with higher potential values . . . due to the sheer number of” governmental entities involved).

223. *Purdue Plan Support Letter*, *supra* note 128, at 21; *Purdue Disclosure Statement*, *supra* note 121, at 106.

224. A restructuring support agreement is a voluntary, binding agreement among creditors (and sometimes the debtor) to support a bankruptcy restructuring that has certain agreed-upon characteristics. See Edward J. Janger & Adam J. Levitin, *Badges of Opportunism: Principles for Policing Restructuring Support Agreements*, 13 BROOK. J. CORP. FIN. & COM. L. 169, 170–71 (2018) (“RSAs potentially offer a salutary bridge between the efficiencies of a quick sale and the procedural protections of a plan, but they also pose a potential avenue for abuse of the bankruptcy process.”).

225. *Endo First Day Declaration*, *supra* note 161, at 37.

226. See Edith Hotchkiss, Karin S. Thorburn & Wei Wang, *The Changing Face of Chapter 11 Bankruptcy: Insights from Recent Trends and Research*, 15 ANN. REV. FIN. ECON. 351, 351, 357–58 (2023) (explaining out-of-court restructuring through distressed exchanges have “increased significantly with the 2007–2008 financial crisis” but are “potentially coercive in nature”).

227. Notice of Filing of Restructuring Support Agreement at 27–32, *In re Endo Int’l PLC*, No. 22-22549 (Bankr. S.D.N.Y. Aug. 17, 2022), ECF No. 20 [hereinafter *Endo RSA*].

input from individual victims. Perhaps as a result, the RSA treats state creditors more favorably than individual victims.<sup>228</sup>

Endo's RSA sets forth the terms of three voluntary opioid trusts—one each for state and local governments, tribal units, and private claimants. Of the \$550 million to be dedicated to these trusts, \$85 million would be allocated to the private trust and \$15 million would be provided to the tribal trust. However, the bulk of the funds—\$450 million—would go to the trust for state and local governments.<sup>229</sup> What may be more concerning is that the payment terms for funding each trust differ: the public and tribal trusts must be funded with periodic payments made annually over a ten-year period (with an immediate payment of more than \$50 million required), while Endo can delay funding any portion of the private trust for a full ten years.<sup>230</sup> This means that states may receive payments for a full decade before any payments go to private claimants.<sup>231</sup>

Governments, perhaps rightly, could argue that they are entitled to the bulk of the distributions because their claims were the largest. But because the parties agreed on the RSA outside of court before the bankruptcy commenced, this contention was not, and will not be, tested. Instead, the states gave their support to this agreement before any member of the general public could even have learned of its existence, let alone object to it or vote on it.<sup>232</sup> This means that even if private creditors, such as individuals or companies, could demonstrate that they were entitled to a greater share of the company's distributions, they would be all but powerless to obtain any changes to the arrangement for fear of blowing up the RSA and the case. Individual victims will similarly be unable to object to the fact that while their payments are delayed, the payments that the governments representing them are slated to receive will continue apace.

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228. As with LTL's bankruptcy, Endo agreed to pay the fees of the professionals hired by the states to advise them on the settlement with the company. *Endo* First Day Declaration, *supra* note 161, at 32.

229. *Id.* at 37.

230. *Endo* RSA, *supra* note 227, at 181–84.

231. *Id.* Ironically, in this case it was the *federal* government that objected, arguing that the plan proposed in *In re Endo* was impermissible because it would make payments to these state, local, and tribal governmental units while failing to make payment on the priority claims that the federal government asserted against the company. *See generally* Objection of the United States of America to the Debtors' Motion for an Order (I) Establishing Bidding, Noticing, & Assumption & Assignment Procedures, (II) Approving Certain Transaction Steps, (III) Approving the Sale of Substantially All of the Debtors' Assets & (IV) Granting Related Relief -&- Memorandum of Law in Support of Motion to Appoint Chapter 11 Trustee, *In re Endo Int'l*, No. 22-22549 (Bankr. S.D.N.Y. July 18, 2023), ECF No. 2460. As of this writing, this motion remains pending and the company and the Department of Justice are engaged in mediation.

232. *See Endo* RSA, *supra* note 227, at 181.

These examples show how governments have been able to use the bankruptcy process to protect and advance their own interests over those of their own citizens through committees, mediations, and RSAs.<sup>233</sup> Deft use of bankruptcy's unique institutional framework can allow governments to negotiate windfalls for themselves that might be challenging to obtain outside of bankruptcy.<sup>234</sup>

Of course, one might argue that the government is acting on behalf of citizens when it obtains this money. The government might be best positioned to resolve the complex and society-wide impact of public health issues like the opioid crisis. Moreover, as long as it spends the money on the citizens, the government's ability to collect and deliver funds at scale will provide better outcomes than individual recoveries. There is some truth to this, and certainly experience shows (and this Article discusses) the important role that governments play in bringing mass tortfeasors to the negotiating table and increasing recoveries. Many public health crises would likely benefit from a centralized and well-funded effort at prevention and abatement.

But this counterargument misses a couple of important points. First, it assumes a level of efficacy and sustained effort on the part of state and local governments that might be overly optimistic. Perhaps governments have learned from the mistakes of the tobacco Master Settlement Agreement and will focus all their efforts and funds on public health interventions—though, as described above, there is some reason to doubt this if governments argue against opioid abatement programs and politicize the disbursement of the funds they receive. Next, the contention that these funds are being used for the public benefit is difficult to square with the secretive, or even coercive, ways that governments use arcane bankruptcy procedures to achieve outcomes that appear to run counter to the interests of the victims. Some level of competition between governments and individual victims for a greater share of a fixed pot of money might be inevitable. But the resources that governments can bring to bear in such a competition outstrip the resources of individuals. Part of the purpose of this Article, as I explore further below, is to create a mechanism by which individual victims can have a greater say in recoveries from companies that cause public health crises.

Finally, and perhaps most fundamentally, a key issue with the government-mediated model of recovery from these companies is that it

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233. See Elias & Triantis, *supra* note 30, at 522 (explaining that government activism can be used to prefer some claimants over others).

234. See Elias & Triantis, *supra* note 31, at 325–26 (urging greater interventions by governments in bankruptcies to achieve their regulatory goals).

does little to aid those that were most directly harmed by the activities of these companies—the individual victims and their families. Funds transferred to governments operate prospectively and are distributed across the jurisdictions in which they operate. Thus, in the case of the opioid crisis, these funds may help finance expanded training for first responders, mental health services, purchases of overdose reversal medication, and other good causes.<sup>235</sup> (Of course, they might also be used to subsidize causes that might be tangentially related to the abatement of the public health crisis in question.) But such procedures may be of limited benefit to individuals who have been previously harmed as part of the opioid crisis or their families—the ones who have been the most directly, and gravely, hurt as a result of the opioid crisis. Perhaps these individuals should have a greater share of the recovery, or a greater say in how funds are distributed, than society at large (or its elected representatives). One might analogize this (albeit imperfectly) to restitution proceedings in the fraud or consumer protection contexts. These types of cases harm society at large: they create additional compliance burdens for companies and consumers, they reduce trust among individuals in society and between individuals and essential actors like merchants, and they make markets less efficient in ways that increase costs for everyone. Of course, this harm is far smaller than the harm suffered by the direct victims and immediate families of the fraud or consumer protection cases. States and the federal government, therefore, often pursue the remedies of forfeiture, restitution, or disgorgement for these victims.<sup>236</sup> They do so even when it leads to smaller recoveries for the governments.<sup>237</sup> All of this suggests that even if the government can play an important role in these cases, the conflicts of interest present—and exacerbated by

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235. See, e.g., Notice of Filing of Tenth Plan Supplement Pursuant to the Sixth Amended Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. & Its Affiliated Debtors at 24–34, *In re Purdue Pharma L.P.*, 633 B.R. 53 (Bankr. S.D.N.Y. 2021) (No. 19-23649), ECF No. 3232 (listing more than one hundred different approved uses).

236. See, e.g., 15 U.S.C. § 7246(a) (authorizing penalty and disgorgement proceeds to be provided for the benefit of victims); see also Alice W. Dery, *Interplay Between Forfeiture and Bankruptcy*, 66 DEPT JUST. J. FED. L. & PRAC. 117, 118 (2018) (examining the benefits and limitations of forfeiture as compared to bankruptcy); Theresa A. Gabaldon, *Equity, Punishment, and the Company You Keep: Discerning a Disgorgement Remedy Under the Federal Securities Law*, 105 CORNELL L. REV. 1611, 1612–13 (2020) (discussing widespread use of the disgorgement remedy in federal courts); Verity Winship, *Fair Funds and the SEC’s Compensation of Injured Investors*, 60 FLA. L. REV. 1103, 1107 (2008) (explaining how monetary penalties can both deter bad behavior and obtain a measure of recovery for victims).

237. In other cases, states have prioritized individual recoveries over state recoveries. See, e.g., Dishman, *supra* note 23, at 339–40 (describing a consumer protection settlement Arizona reached with General Motors where around eighty-five percent of payments were set aside for affected consumers).

aspects of the bankruptcy process—could be recognized and policed to improve outcomes for victims.

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This Part demonstrated the many ways that recent public mass tort bankruptcies have challenged bankruptcy's ability to deal with conflicts of interest and the broader social issues raised by public mass tort bankruptcies. Governments have contributed to, or even caused, bankruptcies to remedy public wrongs. Public entities have taken the lead on committees, in mediation, and in settlements, and they have used their sovereign powers exogenous to bankruptcy to influence the course of bankruptcy. This raises potential conflicts of interest because of the multiple, competing roles that governments assume in public mass tort bankruptcies. Finally, and possibly most significantly, government intervention has resulted in major policy wins that may have been infeasible—legally or politically—without bankruptcy's unique rules and negotiation framework. In short, this Part has explored concrete examples of *how* government can benefit from intervening in bankruptcy proceedings. The next Part steps back to analyze how the incentives inherent in the bankruptcy process differentiate it from other forms of aggregate litigation and might make it unreasonable to expect a different result without modifying aspects of the current system for use in mass tort cases.

### III. CAN BANKRUPTCY LAW RESOLVE THESE CONFLICTS OF INTEREST?

The prior Part demonstrated the ways governments have used mass tort bankruptcy to benefit their own interests at the expense of victims. While bankruptcy is a powerful aggregation mechanism and has been used in several high-profile mass tort cases for this reason, as a private law financial dispute resolution process first and foremost it is not designed to address the broader social questions raised by public mass tort bankruptcies. It also does little to mediate the conflicts of interest that typify public mass tort bankruptcies because of governments' competing roles as creditors, representatives, and sovereigns. Since public mass tort bankruptcies are likely to become more common, this Part suggests drawing on lessons from how scholars of other forms of aggregate litigation manage these issues.

### *A. Bankruptcy Privileges Financial Recoveries and Overlooks Conflicts of Interest*

Bankruptcy has a long history of being used to resolve mass tort liability, but because most cases involve more conventional financial disputes, the system is not designed with mass tort resolution in mind. Instead, bankruptcy is typically conceived as a species of court-mediated private ordering focused primarily on maximizing monetary value for creditors and rehabilitating the debtor.<sup>238</sup> This Section outlines bankruptcy's theoretical goals, how statute and practice implement these goals, and why this can lead to problems in public mass tort bankruptcies.

Bankruptcy, many suggest, is contractarian in nature; the "prevailing view"<sup>239</sup> on bankruptcy's purpose states that bankruptcy is meant to mimic the bargain that creditors would have made with one another before insolvency to maximize their financial recoveries had they been able to overcome transaction costs.<sup>240</sup> Bankruptcy is meant to foster a deal to increase creditor recoveries, and many provisions that further this goal are relevant to mass tort bankruptcies. A bankruptcy filing imposes a stay on litigation to reduce dissipation of a debtor's assets and force parties to negotiate. It makes available to creditors all value the debtor might have outside of bankruptcy, as well as the value of bankruptcy-specific causes of action.<sup>241</sup> Debtors have a fiduciary duty to maximize value for the benefit of all creditors,<sup>242</sup> who must be paid according to a set priority scheme.<sup>243</sup> As described above, bankruptcy requires the appointment of an official committee to represent all

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238. See Resnick, *supra* note 21, at 2050 ("The protection of the business enterprise by preserving its going concern value, thereby maximizing value for distribution to creditors, is central to the reorganization process.").

239. Anthony J. Casey, *Chapter 11's Renegotiation Framework and the Purpose of Corporate Bankruptcy*, 120 COLUM. L. REV. 1709, 1711 & n.3 (2020).

240. See Thomas H. Jackson, *Bankruptcy, Non-bankruptcy Entitlements, and the Creditors' Bargain*, 91 YALE L.J. 857, 859–60 (1982) (describing the "creditors' bargain" approach to viewing bankruptcy as "a system designed to mirror the agreement" creditors would likely reach among themselves if they had negotiated beforehand); Douglas G. Baird & Thomas H. Jackson, *Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy*, 51 U. CHI. L. REV. 97, 100 (1984) ("[B]ankruptcy law at its core should be designed to keep individual actions against assets . . . from interfering with the use of those assets favored by the investors as a group."); Mark J. Roe & Frederick Tung, *Breaking Bankruptcy Priority: How Rent-Seeking Upends the Creditors' Bargain*, 99 VA. L. REV. 1235, 1239 (2013) ("[B]ankruptcy's standard positive and normative conceptualization is contractarian, viewing bankruptcy as . . . a hypothetical creditors' bargain . . . ." (footnote omitted)).

241. 11 U.S.C. §§ 541, 544-545, 547-548.

242. 7 COLLIER ON BANKRUPTCY, *supra* note 195, ¶ 1108.10(4).

243. 11 U.S.C. §§ 507, 1129(b).

unsecured creditors but also permits ad hoc committees to represent the interests of their members. Bankruptcy also encourages parties to settle claims during cases to avoid the time and expense of litigation.<sup>244</sup> Finally, to exit bankruptcy, a debtor proposes a plan of reorganization that can be voted on by creditor classes and, under certain circumstances, bind dissenting creditors to prevent holdouts<sup>245</sup> from derailing a value-maximizing deal.<sup>246</sup> Bankruptcy's procedural requirements disable strategic behavior by individual class members while preventing a plan from being scuttled by disgruntled creditor classes so long as it meets basic and well-understood fairness requirements.<sup>247</sup> These provisions work to ensure that a broad swath of relevant parties have a say in the process, but they also demonstrate bankruptcy's focus on quantifiable financial recoveries.

The ultimate impact of these provisions is to establish a system that privileges private ordering, value-maximizing deals, and monetary recoveries over other interests, such as nonmonetary concerns or dignitary rights.<sup>248</sup> This understanding of bankruptcy has had two consequences relevant for the purposes of this Article. First, this can lead to a tendency for bankruptcy practice to evolve toward more and more extreme deals, justified by value maximization and freedom of contract in the face of other important values (or, at times, even provisions of the Bankruptcy Code). A focus on economic value maximization at the expense of other considerations can lead to blatant violations of procedural requirements<sup>249</sup> or court approval of ostensibly value-maximizing deals that really serve only to enrich a subset of

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244. FED. R. BANKR. P. 9019; *see also* David A. Skeel, Jr. & George Triantis, *Bankruptcy's Uneasy Shift to a Contract Paradigm*, 166 U. PA. L. REV. 1777, 1781 (2018) (explaining that consensual settlements are granted deference); Casey, *supra* note 239, at 1716 ("[Bankruptcy provides] a renegotiation framework designed to minimize the parties' ability and incentives to hold each other up.").

245. 11 U.S.C. §§ 1126(c), 1129(a)(8), 1129(b); *cf.* McGovern & Rubenstein, *supra* note 44, at 85–90, 104–05 (failure to bind heterogeneous classes limits the ability of defendants to provide a peace premium).

246. 11 U.S.C. § 1129(b); *see also* McKenzie, *supra* note 21, at 997–98, 1016–17 (contrasting bankruptcy's ability for groups to bind holdouts with other forms of aggregate litigation).

247. 11 U.S.C. § 1129(b)(1) (establishing that a plan can be crammed down if it "does not discriminate unfairly, and is fair and equitable").

248. *See* Baird et al., *supra* note 32, at 1676–77 ("[The focus of bankruptcy] is supposed to be on maximizing the value of the assets in the estate and not on how decisions might improve the outside assets or fortunes of the stakeholders."); *see also* Andrew D. Bradt, Zachary D. Clopton & D. Theodore Rave, *Dissonance and Distress in Bankruptcy and Mass Torts*, 91 FORDHAM L. REV. 309, 316–18 (2022) (comparing bankruptcy's financial focus with other forms of aggregate litigation).

249. *See generally* Lynn M. LoPucki, *Chapter 11's Descent into Lawlessness*, 96 AM. BANKR. L.J. 247 (2022) (documenting procedural failures in bankruptcy courts).

creditors.<sup>250</sup> As shown in the previous Part, conflicts of interest may be overlooked or accepted as an unpleasant part of quickly finalizing a deal, especially in mass tort bankruptcies.<sup>251</sup> Parties can claim exigent circumstances to achieve controversial outcomes, and over time such behavior can become normalized.<sup>252</sup> As government intervention in bankruptcy becomes more common, observers should be concerned that the types of behavior and conflicts of interest described in Part II could become normalized as well.

The second consequence of focusing only on monetary disputes among parties to a bankruptcy is that it diminishes the importance of the nonmonetary considerations and society-wide effects that typify public mass tort bankruptcies. These cases affect many more individuals and groups than other bankruptcies and have large shares of involuntary creditors.<sup>253</sup> They reach even beyond direct tort victims to society at large.<sup>254</sup> In such cases, creditors often look for broader vindication of dignitary or nonmonetary rights: to be heard, to understand what happened, to receive an apology, and to prevent similar wrongs in the future.<sup>255</sup> But these difficult-to-quantify values may be challenging to square with bankruptcy's financial focus,<sup>256</sup> and they may run headlong into the conflicts of interest that enable governments to privilege their recoveries over those of their citizens. This suggests that traditional conceptions of bankruptcy may be ill-equipped to deal with the realities of public mass tort bankruptcies.

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250. See Levitin, *supra* note 119, at 1091, 1094, 1097–99 (describing value-maximizing deals including DIP financing agreements, asset sales, and RSAs). See generally Jared A. Elias & Robert J. Stark, *Bankruptcy Hardball*, 108 CALIF. L. REV. 745 (2020) (arguing that developments in Delaware state courts have led to an increase in control opportunism in bankruptcy cases and that bankruptcy law provides too little protection for creditors against such opportunist behavior).

251. See Jared A. Elias, Ehud Kamar & Kobi Kastiel, *The Rise of Bankruptcy Directors*, 95 S. CAL. L. REV. 1083, 1087 (2022) (describing the prevalence of bankruptcy director conflicts); Simon, *supra* note 21, at 1162 (describing how mass tort bankruptcy is used “as a strategic maneuver to effectuate or coerce a global settlement”); Brubaker, *supra* note 85, at 976 n.61 (explaining that the legal representative of all mass tort bankruptcy creditors “will face irreconcilable conflicts by representing all . . . claimants with respect to all claims against the debtor and against any released third parties”).

252. See, e.g., *In re Aegean Marine Petroleum Network, Inc.*, 599 B.R. 717, 726–27 (Bankr. S.D.N.Y. 2019) (criticizing how relief, once granted sparingly, can become standard practice).

253. Simon, *supra* note 21, at 1165.

254. See, e.g., The Multi-state Governmental Entities Group’s Opposition to Debtors’ Motion for a Preliminary Injunction at 6, *In re Purdue Pharma L.P.*, No. 19-08289 (Bankr. S.D.N.Y. Oct. 3, 2019), ECF No. 37 (“The [opioid] epidemic harms every economic class, race, gender, and age group, killing more than 115 Americans every day.”).

255. Rachel Bayefsky, *Remedies and Respect: Rethinking the Role of Federal Judicial Relief*, 109 GEO. L.J. 1263, 1288–93, 1300–05 (2021).

256. Bradt et al., *supra* note 248, at 318 (explaining that bankruptcy and MDLs “seek[ ] similar ends, [but] do so through very different mechanisms, and in service of very different values”).

### *B. Aggregate Litigation Scholarship Provides a Different Approach*

Lessons from scholarship on other forms of aggregate litigation can empower participants to manage the difficulties of public mass tort bankruptcies. Scholars note the tendency of aggregate litigation to affect not just the parties to a controversy but the broader public.<sup>257</sup> Yet aggregate litigation is rife with conflicts of interest, and reducing these conflicts of interest (often referred to as principal-agent costs in the literature) is one of the primary motivators of aggregate litigation scholarship.<sup>258</sup> Ever since scholars noted that aggregate plaintiffs and their attorneys may have different incentives in pursuing and settling aggregate litigation, much attention has been paid to minimizing the potential misalignment between clients (principals) and their lawyers (agents).<sup>259</sup> For example, some lawyers who take cases on a contingency-fee basis may look to settle cases earlier than their clients might want, while others may seek to pursue aspects of cases that clients may not want to litigate in order to generate more legal fees.<sup>260</sup> At the limit, the role of principal and agent is effectively reversed, with cases being led by attorneys and clients left without influence in their own case.<sup>261</sup> In fact, principal-agent costs may be even more prevalent in *parens patriae* litigation brought by states, since individual states aggregate individual claims, but then the claims of states are themselves aggregated into what is effectively a class action of actions brought by state attorneys general.<sup>262</sup> Thus, to a far greater degree than with bankruptcy, contending with conflicts of interest is central to aggregate

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257. John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 672 (1986); *see also* Alexandra D. Lahav, *The Political Justification for Group Litigation*, 81 FORDHAM L. REV. 3193, 3197 (2013) ("[Aggregate litigation] can also provide a forum for debate about significant political issues, and lawsuits may be a catalyst for this debate."); Engstrom & Rabin, *supra* note 29, at 354 (2021) (explaining that litigation can "serve as a catalyst" for broader political, regulatory, and social change).

258. *See* Lahav, *supra* note 8, at 1406 ("Perhaps more ink has been spilled on the principal-agent problems in class actions than any other subtopic in aggregate litigation.").

259. *E.g.*, Troy A. McKenzie, *Internal and External Governance in Complex Litigation*, 84 LAW & CONTEMP. PROBS. 207, 210, 213–14 (2021).

260. Coffee, *supra* note 257, at 678–80, 686–89; *see also* McGovern & Rubenstein, *supra* note 44, at 84 (noting that concern about agent self-dealing is a substantial feature in legal literature).

261. *See* Coffee, *supra* note 257, at 683–84 ("[U]nless the client is willing to invest in the action by bearing litigation expenses, the attorney will still make the critical investment decisions, thereby reversing the normal roles of principal and agent."); Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. REV. 846, 853 (2017) (describing "absent class members").

262. *See* Dishman, *supra* note 23, at 293–95 ("[N]ew agency costs arise when two layers of 'class action' interact in multistate actions. Put more simply, class action squared problems create temptations for AGs to 'borrow' and 'steal' from one another in multistate actions in ways they could not if they acted alone.").

litigation scholarship. To avoid these conflicts or limit their impact, aggregate litigation scholars focus on reducing agency costs and thereby ensuring representational adequacy.<sup>263</sup> This, in turn, is accomplished through the application of the mechanisms of exit, voice, and loyalty.<sup>264</sup>

Exit—the right to “vote with one’s feet” and opt out of representation—allows litigants to alter the behavior of their representatives. If agents do not act faithfully toward their principals, mechanisms which empower the principals to exit the group act as a powerful sanction that potentially reduces lawyers’ recoveries or even leads to the dissolution of the group.<sup>265</sup> Voice, by contrast, is the right of members of a group to express their views—within the group or to the court—in order to pressure for internal changes to the leadership, goals, methods, or key decisions of the collective.<sup>266</sup> Loyalty, or the removal of conflicts of interest, forms the third prong of the analysis.<sup>267</sup> Procedural protections, such as imposing fiduciary duties on representatives and requiring neutral supervision of settlement terms, can supplement exit and voice to ensure that litigants are loyally, and thus adequately, represented.<sup>268</sup> The struggle to balance exit, voice, and loyalty remains an essential part of the design of any aggregate litigation mechanism.

Two other concerns that animate aggregate litigation scholars are due process concerns and outcome consistency. First, the due process right of every litigant to pursue or settle their own case, rather

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263. See McKenzie, *supra* note 259, at 214 (offering that class attorneys are faithful “only when agency costs—such as the potential for the fiduciary to shirk or act disloyally—are minimized”).

264. John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 376–77 (2000); Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 341–42 (noting ubiquity of these concepts in the literature); see ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* 3–5, 77–79 (1970) (describing the interplay among these terms).

265. See HIRSCHMAN, *supra* note 264, at 4 (“[A]s membership declines, [] management is impelled to search for ways and means to correct whatever faults have led to exit.”); see also Coffee, *supra* note 264, at 434 (explaining that competition can reinforce principal-agent loyalty).

266. See HIRSCHMAN, *supra* note 264, at 4 (“[M]embers express their dissatisfaction directly to management or to some other authority to which management is subordinate or through general protest . . .”).

267. See Coffee, *supra* note 264, at 380 (defining loyalty as “representational adequacy”). Hirschman’s conception of loyalty was quite different. See HIRSCHMAN, *supra* note 264, at 76–105 (framing loyalty as an institutional barrier to exit similar to protective tariffs in emerging local industries).

268. See Cabraser & Issacharoff, *supra* note 261, at 852 (“[C]lass action law should insist on the loyalty of agents and the importance of individual ability to exit as guarantors of systemic legitimacy.”); Coffee, *supra* note 264, at 399–406 (arguing that representational adequacy can be achieved by compensating plaintiffs’ attorneys based on the recovery of the subclass). See HIRSCHMAN, *supra* note 264, at 77–79 (showing how by raising the price of exit, loyalty “serve[s] the socially useful purpose of preventing deterioration from becoming cumulative”).

than be unfairly bound by decisions made in another case, always stands in the background of any aggregate litigation.<sup>269</sup> The failure of the MDL negotiation class described above shows a stark philosophical break from bankruptcy's reliance on binding mechanisms to maximize value.<sup>270</sup> Second, aggregate litigation scholars note the "deep tension in civil litigation" between the tradition of individualized adjudication and the need to treat similarly situated litigants similarly.<sup>271</sup> Since one-by-one lawsuits can lead to lottery-like results,<sup>272</sup> aggregate litigation often relies on claims matrices that allocate damages on a formulaic basis.<sup>273</sup> Nevertheless, nonmonetary rights or goals, such as dignitary or injunctive relief, might be even more difficult to value. And as we have seen, this can lead bankruptcy courts to overlook them.

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This Part described why bankruptcy's financial focus and pro-settlement standards may exacerbate, rather than resolve, the conflicts of interest inherent in public mass tort bankruptcies. It explored how aggregate litigation scholarship wrestles with these conflicts through the paradigms of exit, voice, and loyalty, while noting other key concerns raised in the literature. The final Part of this Article suggests policy changes, informed by the case studies in Part II and the scholarly approaches outlined in this Part, that could limit the ill effects of government intervention and improve outcomes for victims in public mass tort bankruptcies.

#### IV. IMPROVING OUTCOMES IN PUBLIC MASS TORT BANKRUPTCIES

This Part explores ways to improve outcomes in public mass tort bankruptcies. It proposes redefining exit, voice, and loyalty in a manner that accounts for bankruptcy's unique ability to bind dissenters and government's roles as creditor, representative, and sovereign. These

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269. See, e.g., *Martin v. Wilks*, 490 U.S. 755, 761–62 (1989) ("[I]t is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment . . . in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940))).

270. Bradt et al., *supra* note 248, at 317–18 (comparing an MDL judge who "said she does not focus on preserving value," with a bankruptcy judge who "used the word 'value' six times" in his remarks).

271. Alexandra D. Lahav, *The Case for "Trial by Formula,"* 90 TEX. L. REV. 571, 573–74 (2012).

272. See Howard M. Erichson, *Mass Tort Litigation and Inquisitorial Justice*, 87 GEO. L.J. 1983, 2016 (1999) (arguing that mass tort litigation can take the appearance of a lottery).

273. See Simon, *supra* note 21, at 1179–81, 1200–02; see also Lahav, *supra* note 271, at 591 (explaining that even though claims matrices standardize treatment, "how litigants are treated in relation to one another is an important, if neglected, element of procedural justice").

concepts can ensure that governments adequately represent the victims they intervene to protect, while placing safeguards around government actions that prioritize their own monetary interests over the monetary and nonmonetary recoveries of victims. Finally, this Part demonstrates how, even if mass torts do not migrate entirely to bankruptcy, concepts from bankruptcy can still enhance mass tort resolution in MDLs. Bankruptcy's committee and voting structure, the fiduciary duties it imposes, and its consensual precommitment agreements can ensure fairer treatment of similarly situated creditors while potentially maximizing settlement recoveries.

#### *A. Recasting Exit, Voice, and Loyalty for Public Mass Tort Bankruptcies*

Exit, voice, and loyalty can help us evaluate whether a party has been adequately represented in aggregate litigation. Exit can be used to express dissatisfaction with a representational relationship, while not exiting can lead us to conclude that a principal is happy with the representation.<sup>274</sup> Meanwhile, without voice—notice and an opportunity to be heard, if not to actually participate in the litigation and shape the strategy it takes—a claimant cannot be said to be in control of her case.<sup>275</sup> Finally, loyalty is demonstrated through unconflicted representation, meaning that representatives cannot put their own interests first by pressuring clients to accept settlements that might result in larger fees or quicker payments for attorneys.<sup>276</sup> This Section considers how exit, voice, and loyalty can be applied to public mass tort bankruptcies to limit governmental coercion in settlements and help victims vindicate nonmonetary rights.

##### 1. Exit Is Nonexistent in Public Mass Tort Bankruptcies

Since “the prevailing view is that the judgment in a state case is binding ‘on every person whom the state represents as *parens patriae*,’” an individual (or a group of individuals) has no right to opt out of a government settlement, pursue its own claims, or keep its options open until a later date.<sup>277</sup> Public mass tort bankruptcies exacerbate this problem for individual litigants since they could be doubly bound, both by state judgments and by bankruptcy procedures. Even if a court found that an individual was not bound by a *parens patriae* suit, as described

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274. Coffee, *supra* note 264, at 419; Cabraser & Issacharoff, *supra* note 261, at 863.

275. See Lemos, *supra* note 24, at 507; *see also* Coffee, *supra* note 264, at 409, 412.

276. See Erichson, *supra* note 61, at 31–32.

277. Lemos, *supra* note 24, at 500 (internal quotation marks omitted).

above, dissenters can nevertheless be bound by a bankruptcy plan that meets statutory requirements. Although supporters of bankruptcy believe that its coercive binding power can help maximize the peace premium, public mass tort bankruptcies appear to bolt shut the exit doors for litigants. Given that bankruptcy's binding power over future creditors is one of its hallmarks, this lack of exit is unlikely to change.

## 2. Voice Can Be Amplified in Public Mass Tort Bankruptcies

Individuals have diminished voice in the prosecution of a *parens patriae* case. Since courts assume that state attorneys general will adequately represent their citizens, it is therefore "unnecessary for those individuals to take a hand in," or express their voice in, such litigation.<sup>278</sup> Voice is deliberately limited because a *parens patriae* suit is meant to represent a broader conception of the public interest than any individual or group of litigants could, so state attorneys could reasonably pursue one case or settlement at the expense of another.<sup>279</sup> Though elections are cited as a potential control on abuse, as we have seen, government participation in potentially confidential mediation can make monitoring by interested individuals very difficult.<sup>280</sup> Elections are also imperfect remedies because they may be too blunt to influence any particular case, or may only come after a settlement is accepted.<sup>281</sup> In addition, officials may be reticent to pursue major donors or employers within their jurisdiction.<sup>282</sup>

Yet public mass tort bankruptcies can permit the exercise of voice, especially in the service of achieving the types of nonmonetary goals often undervalued in bankruptcy. To start, scholars have recognized that voice, more than exit, is particularly important in cases where nonmonetary goals are sought by parties.<sup>283</sup> Exit can often be misinterpreted. Voice is far clearer; express disapproval of a particular

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278. *Id.* at 508.

279. *Id.* at 518.

280. *Id.* at 520.

281. Dishman, *supra* note 23, at 317.

282. See Lemos, *supra* note 24, at 515 ("Corporate donors rarely want attorneys general to maximize recoveries for injured citizens; instead, the political savvy move will often be a slap on the wrist."); see also Laura Strickler, *Opioid Firms Kept Donating to State AGs While Negotiating Settlements*, NBC NEWS (Sept. 10, 2019, 10:56 AM), <https://www.nbcnews.com/politics/elections/opioid-firms-kept-donating-state-agss-while-negotiating-settlements-n1050671> [https://perma.cc/SR45-TGDA] (noting that both the Republican Attorneys General Association and its Democratic counterpart were taking hundreds of thousands of dollars from organizations that were being sued for their role in the opioid crisis).

283. See Coffee, *supra* note 264, at 419 n.134 ("Where the action primarily seeks non-pecuniary goals, 'voice' may well be preferred checking mechanism by which to control attorney opportunism.").

part of a settlement, especially a hard-to-quantify nonmonetary provision, is by comparison easy to understand. In normal circumstances, bankruptcy empowers individuals to exercise their voice through its framework of committees, mandatory disclosure of the key terms of reorganization plans, and votes by all creditors.<sup>284</sup> Considered together, these protections secure a baseline financial recovery for individual creditors while empowering them to seek either greater financial recovery or vindication of dignitary concerns.

Voice has been used successfully to vindicate nonmonetary, dignitary concerns in public mass tort bankruptcies where governments play a more limited role in the day-to-day aspects of the case, such as in the bankruptcy of the Boy Scouts of America. The official committee of tort claimants—led by nine sexual abuse victims advocating on behalf of all victim-creditors—persuaded the victim-members to reject the initially proposed plan of reorganization.<sup>285</sup> Further mediation ensued, leading to a new settlement.<sup>286</sup> The new settlement included a variety of nonmonetary provisions important to victims, including implementing stronger youth protection for future Scouts, establishing a memorial for abuse victims, and creating a path to reaching Eagle Scout status for victims who discontinued their participation.<sup>287</sup> Notably, *the new settlement did not include any additional funds for victims*.<sup>288</sup> Nevertheless, these changes were important enough that the second plan was approved.<sup>289</sup>

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284. 11 U.S.C. §§ 1103, 1125; *see also* McKenzie, *supra* note 21, at 1008–09, 1017 (noting that the bankruptcy process “counterbalances competing interests through a number of institutional arrangements”).

285. “Reject and Vote No on the Plan,” *Say Boy Scouts of America Sexual Abuse Survivors*, PR NEWSWIRE (Oct. 22, 2021, 1:10 PM), <https://www.prnewswire.com/news-releases/reject-and-vote-no-on-the-plan-say-boy-scouts-of-america-sexual-abuse-survivors-301406787.html> [<https://perma.cc/CCH6-2TBE>].

286. See Soma Biswas, *Boy Scouts Fall Short of Desired Vote on \$2.7 Billion Abuse Settlement*, WALL ST. J., <https://www.wsj.com/articles/boy-scouts-fall-short-of-desired-vote-on-2-7-billion-abuse-settlement-11641364299> (last updated Jan. 5, 2022, 1:18 PM) [<https://perma.cc/KZA6-Y2UW>].

287. *See Comparison of Youth Protection*, TORT CLAIMANTS COMM. IN THE BOY SCOUTS OF AM. BANKR. CASES 4, [https://web.archive.org/web/20220317002126/https://www.tccbsa.com/\\_files/ugd/c1f98e\\_6ebcb2e89c8e4176b834e80c707ebf4b.pdf](https://web.archive.org/web/20220317002126/https://www.tccbsa.com/_files/ugd/c1f98e_6ebcb2e89c8e4176b834e80c707ebf4b.pdf) (last visited Jan. 29, 2024) [<https://perma.cc/XQ6E-SZ5K>] (including in the new plan supported by the TCC a requirement that “[l]ocal [c]ouncils [are] required to submit evidence of compliance with youth protection, including training, incident review and reporting.”).

288. *Letter from Tort Claimants Committee*, TORT CLAIMANTS COMM. IN THE BOY SCOUTS OF AM. BANKR. CASES (Feb. 15, 2022), <https://web.archive.org/web/20230206095812/https://www.tccbsa.com/tcc-letter> [<https://perma.cc/UT9D-KPY7>].

289. Alex Wolf, *Boy Scouts’ Bankruptcy Plan Gets Support of 86% of Abuse Victims*, BLOOMBERG L. (Mar. 11, 2022, 1:30 PM), <https://news.bloomberglaw.com/bankruptcy-law/boy-scouts-bankruptcy-plan-gets-support-of-86-of-abuse-victims> [<https://perma.cc/L8V8-5CED>].

Voice worked as it should in the Boy Scouts' bankruptcy and can be made to work in other cases where government plays a more pervasive role. If public officials come to see nonmonetary relief as "critically important as a matter of public policy," whether due to their own beliefs or political pressure, then arguing for dignitary relief can help them bolster their reputations and political fortunes.<sup>290</sup> In the bankruptcy of Purdue Pharma, the creation of a broad document repository and the removal of the Sackler name from cultural institutions were two important—if imperfect—examples where voice was used by individual victims to ensure that their nonmonetary and dignitary goals were not overlooked.

The initial settlement proposal in Purdue's bankruptcy would have, among other things, created a public document repository hosting nonprivileged documents produced by Purdue in the case brought against it by the United States.<sup>291</sup> While the idea of a document repository was supported by all constituencies—individuals, governments, and even the company—the details mattered greatly. Academic critics quickly noted that the proposed repository would be inadequate because it would be limited to documents from the company and therefore would *not* contain relevant documents created by or for the Sacklers or their other entities.<sup>292</sup> Support for the proposal by the Official Committee of Unsecured Creditors was conditioned on creating a satisfactory repository, which it viewed as "both a key element of the Plan Settlement and a crowning achievement of these Chapter 11 Cases."<sup>293</sup> Representatives for children suffering from neonatal abstinence syndrome—a debilitating condition caused by maternal abuse of opioids during pregnancy—criticized attempts by the Sacklers to keep documents out of the repository.<sup>294</sup> The Ad Hoc Committee on

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290. Lemos, *supra* note 24, at 527.

291. Notice of Hearing on Motion of Debtors Pursuant to 11 U.S.C. § 105 & Fed. R. Bankr. P. 9019 Authorizing & Approving Settlements Between the Debtors & the United States at 8, *In re Purdue Pharma L.P.*, 633 B.R. 53 (Bankr. S.D.N.Y. 2021) (No. 19-23649), ECF No. 1828.

292. See Motion for Leave to File Brief of Bankruptcy Professors as *Amici Curiae* in Opposition to the Proposed Settlement Between the United States & the Debtors at 25–26, *In re Purdue Pharma*, 633 B.R. 53 (No. 19-23649), ECF No. 1913 ("[T]hat repository will contain only the *Debtor's* documents. To the extent that (as seem likely) important conduct occurred at *non-Debtor* entities under the Sackler Family's control, those documents are unlikely to come to light."); see also *Purdue* Settlement UCC Statement, *supra* note 127, at 9–10 ("Debtors will create and host a public document repository containing the *non-privileged* documents in their possession, custody, or control . . .").

293. Statement of the Official Committee of Unsecured Creditors in Support of Confirmation of the Sixth Amended Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. & Its Affiliated Debtors at 61, *In re Purdue Pharma*, 633 B.R. 53 (No. 19-23649), ECF No. 3459 (emphasis added).

294. *Ex Parte* Motion of The NAS Children Ad Hoc Requesting a Court Order Authorizing Examinations Pursuant to Federal Rules of Bankruptcy Procedure 2004 & 9006 of Mundipharma

Accountability, a committee formed by individual creditors to push for the release of internal communications by Purdue and the Sacklers,<sup>295</sup> wrote that the specific types of documents included in the repository would be “material factors for creditors considering whether to support” any settlement with the company.<sup>296</sup> States, too, acknowledged the importance of the document repository, agitating for further expansion of the document repository.<sup>297</sup>

In addition to advocating for greater disclosure, these and other stakeholders criticized the initial settlement proposal because it failed to specify whether and how cultural institutions would be able to remove the Sackler name from their buildings.<sup>298</sup> States, following on critiques by individual victims, objected to this part of the settlement as well, with almost two dozen objecting states calling for strengthened protections for nonprofits that sought to reject Sackler naming rights.<sup>299</sup> Eventually, pressure for the document repository and naming rights appears to have influenced the decisions of public officials. About twenty-five states rejected the first settlement offered by the Sacklers, which would have (1) created a limited document repository, (2) offered no naming rights concessions, and (3) included payments by the Sacklers of around \$4.5 billion.<sup>300</sup>

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Documents Within the Dominion & Control of the ICSP at 8–9, *In re Purdue Pharma*, 633 B.R. 53 (No. 19-23649), ECF No. 2340-2 (“[The Sacklers] have sought to keep certain documents sealed, redacted, or hidden from both NAS Children Ad Hoc and, by extension, the general public without justification. This is particularly troubling to understand and to reconcile . . .”).

295. Natasha Lennard, *The New Fight to Hold Purdue Pharma and the Sacklers Accountable for the Opioid Crisis*, INTERCEPT (July 29, 2020, 7:00 AM), <https://theintercept.com/2020/07/29/purdue-pharma-bankruptcy-sacklers/> [<https://perma.cc/Y7CK-NM4L>].

296. Objection of the Ad Hoc Committee on Accountability to Disclosure Statement for First Amended Chapter 11 Plan of Reorganization of Purdue Pharma L.P. & Its Affiliated Debtors at 10, *In re Purdue Pharma*, 633 B.R. 53 (No. 19-23649), ECF No. 2745 [hereinafter, *Purdue CoA Objection*].

297. The Ad Hoc Group of Non-consenting States’ Objection to the Debtors’ Motion to Approve (I) the Adequacy of Information in the Disclosure Statement, (II) Solicitation and Voting Procedures, (III) Forms of Ballots, Notices & Notice Procedures in Connection Therewith, & (IV) Certain Dates with Respect Thereto at 34–35, *In re Purdue Pharma*, 633 B.R. 53 (No. 19-23649), ECF No. 2762.

298. See *Purdue CoA Objection*, *supra* note 296, at 10–11 (“[T]he Sacklers’ right to have their name glorified is one that should be extinguished . . . What will happen to the Sackler naming rights is a material factor for creditors considering whether to support the Plan.”).

299. Taylor Dafoe, *Dozens of State Attorneys General Want to Allow Museums to Remove the Sackler Name from Their Walls Regardless of Gift Contracts*, ARTNET (Mar. 18, 2021), <https://news.artnet.com/art-world/purdue-pharma-allow-museums-to-remove-sackler-name-1952953> [<https://perma.cc/2J24-XNT3>].

300. See generally Mediator’s Report, *In re Purdue Pharma*, 633 B.R. 53 (No. 19-23649), ECF No. 3119 (summarizing the mediation outcomes between the Non-consenting States and Purdue Pharma). For more information on the Sackler’s first settlement, see Organek, *supra* note 186, at 369–70.

Following rejection by these states, negotiations continued. A new settlement was announced that was accepted by fifteen of the previously rejecting states. The changes made to the settlement were primarily nonmonetary and included the following: (1) “[a] material expansion of the scope of the public document repository” to include certain types of privileged documents and documents created by the Sacklers in connection with Purdue; (2) a prohibition on new Sackler naming rights until the family met the terms of the settlement; and (3) extra payment of only \$50 million (i.e., an increase of only 1.1 percent, to be split among all states).<sup>301</sup> This strongly suggests that it was not the small increased payments but the nonmonetary benefits provided to individual victims that led to its acceptance. Though neither the expansion of the repository nor the prohibition on future naming rights would help victims monetarily, they were hugely important to individual litigants.<sup>302</sup> Media coverage highlighted the perception that the Sacklers were hiding their involvement in the opioid crisis, and attorneys general who accepted the settlement argued publicly that the settlement would provide transparency for victims.<sup>303</sup> The settlement therefore provided political benefits, allowing state officials to publicize their ability to bring previously hidden documents to light while urging the federal government to bring criminal prosecution (without needing to engage in this difficult and costly criminal prosecution themselves).<sup>304</sup>

If the document repository was one of the most significant factors in driving fifteen states to accept the settlement, additional developments in the case caused the remaining holdout states to accept it as well. Following an adverse appellate ruling at the District Court,<sup>305</sup> the Sacklers and the company commenced an additional round of confidential mediation with the holdout states. The mediation resulted in an agreement for additional payments and additional restrictions on Sackler philanthropy. The Sacklers ultimately agreed to provide around \$1 billion of additional cash payments, though these additional payments would be significantly discounted because they would be

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301. Mediator’s Report, *supra* note 300, at 2–3, 16–17.

302. *See In re Purdue Pharma*, 633 B.R. at 114 (attorney for individual claimants testified that the repository was more important than the settlement payments).

303. *See, e.g.*, WBUR Wire & News Servs., *Healy: Purdue Settlement Will Unlock Sackler Secrets*, WBUR, <https://www.wbur.org/news/2021/07/08/maura-healey-sackler-family-lawsuit-settlement> (last updated July 8, 2021) [<https://perma.cc/NK6G-EVPG>].

304. *See, e.g.*, Jan Hoffman, *15 States Reach a Deal with Purdue Pharma, Advancing a \$4.5 Billion Opioids Settlement*, N.Y. TIMES (July 8, 2021), <https://www.nytimes.com/2021/07/08/health/purdue-pharma-opioids-settlement.html> [<https://perma.cc/4X28-SQYB>].

305. *In re Purdue Pharma*, L.P., 635 B.R. 26, 38 (S.D.N.Y. 2021).

spread over almost twenty years.<sup>306</sup> Importantly, however, the Sacklers agreed to permit any cultural institution in the United States to reject their naming rights and remove their name from the organization.<sup>307</sup> The states even extracted a statement of regret from the Sacklers.<sup>308</sup> Together, states said the newly revised settlement caused the Sacklers to “apologize in dollars, words, and actions.”<sup>309</sup> In exchange, the holdout states dropped their opposition to the settlement. On top of the previously agreed-upon temporary ban on new naming rights, granting institutions a right to remove the Sackler name implemented a key request of individual victims, one which provided individuals and states limited monetary value but substantial dignitary value. Cumulatively, the revised settlements demonstrate how, when public pressure can be effectively channeled and the incentives of public officials can be properly aligned with those of individual victims, public mass tort bankruptcies can achieve the nonmonetary outcomes sought by victims.

As the previous examples show, voice can play an important role in vindicating dignitary rights in public mass tort bankruptcies. Voice can be made louder and more effective by introducing democratic elements to bankruptcy settlements involving governments, requiring a neutral examiner’s report investigating all parties, and amplifying communication from individuals to other case constituencies. First, standards for settlements made by debtors in bankruptcy, which are approved under Bankruptcy Rule 9019, reflect bankruptcy’s financially focused orientation.<sup>310</sup> Standards for court approval of settlements made under Rule 9019 are extremely deferential toward the debtor and in the main require the court to weigh (1) whether a settlement will benefit the estate and its creditors more than continued dispute, and (2) the extent of creditor support.<sup>311</sup> Such settlements also do not require approval by any other creditor—unlike plans of reorganization, which require a vote by the creditor body.

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306. See Organek, *supra* note 186, at 388–90 (“While the Sacklers nominally agreed to pay an additional \$1 billion, payment over eighteen years significantly reduces the real burden of such disbursements.”).

307. *Purdue* Mediator’s Fourth Report, *supra* note 189, at 6.

308. Taylor Dafoe, *In New Settlement Discussions, the Sackler Family Agrees to Allow Any Museum to Remove Its Name Without Penalty*, ARTNET (Mar. 4, 2022), <https://news.artnet.com/art-world/sackler-museums-2080782> [<https://perma.cc/X4TC-P3QH>] (explaining that states called the statement an apology, while a group representing victims characterized it as “horrendous”).

309. E.g., William Tong (@AGWilliamTong), X (Mar. 3 2022, 10:08 AM), <https://twitter.com/AGWilliamTong/status/1499416546288205831> [<https://perma.cc/75W2-JCUP>].

310. FED. R. BANKR. P. 9019.

311. See *In re Iridium Operating LLC*, 478 F.3d 452, 462 (2d Cir. 2007) (identifying “each affected class’s relative benefits ‘and the degree to which creditors either do not object to or affirmatively support the proposed settlement’” as one factor in the multifactor test for evaluating settlements under Rule 9019).

Such deference and nondemocratic decisionmaking may be appropriate when resolving private financial disputes, but as is apparent from Purdue’s settlement with the federal government, this standard is insufficiently protective of individual claimants in public mass tort bankruptcies. Rule 9019 should be amended so that any settlement made between a governmental unit and a debtor that materially impacts the financial or nonfinancial rights of individual claimants cannot be approved without an affirmative vote by a supermajority of those individuals.<sup>312</sup> Settling parties should also be required to communicate the terms of a settlement to those who will vote.<sup>313</sup> This will ensure that claimants can voice their concerns, steer the direction of a settlement, and determine whether it meets their objectives, all while discouraging overtly unfavorable settlements. This change would also place decisions about assessing the tradeoffs between monetary and nonmonetary recoveries in the hands of those who are best positioned to value them—the victims themselves.<sup>314</sup>

Another key predicate to exercising voice is being informed about the value of one’s claims, so one can consider whether litigation or settlement is best.<sup>315</sup> Bankruptcy permits broad discovery, but this discovery often takes place under protective orders, which prevent dissemination of discovery material beyond those bound by the order.<sup>316</sup> Balancing the need for confidentiality to facilitate settlement and the need for public disclosure to inform individual decisionmaking requires challenging case-by-case determinations. Nevertheless, rolling disclosure of key documents can be aided by a judicial orientation that values amplifying voice and vindicating the nonmonetary claims of litigants.<sup>317</sup> Disclosure could also be assisted by a more muscular role for examiners, who are often not appointed even in cases where the law

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312. Cf. Lindsey D. Simon, *The Guardian Trustee in Bankruptcy Courts and Beyond*, 98 N.C. L. REV. 1297, 1332–33 (2020) (proposing approval of settlements by a neutral “aggregate settlement guardian”).

313. See Cabraser & Issacharoff, *supra* note 261, at 859 (describing court-authorized communications as part of an evolving and salutary trend in MDLs); Bradt & Rave, *supra* note 50, at 1278, 1284–87 (discussing the ability of some judges to serve as “information intermediaries” that help “provid[e] easily digestible signals that voters can use on election day”).

314. Cf. Dishman, *supra* note 23, at 337, 341–45 (suggesting additional voter monitoring of settlements reached by state attorneys general).

315. See Bradt & Rave, *supra* note 50, at 1264 (discussing the importance of access to information MDL parties’ informed decisionmaking); see also Dishman, *supra* note 23, at 342 (noting the difficulty of getting data on the value of state settlements).

316. See, e.g., *In re Teligent, Inc.*, 640 F.3d 53, 56 (2d Cir. 2011).

317. See Simon, *supra* note 21, at 1209–10 (arguing that “key documents and disclosures should be shared publicly” in order to “maximize disclosure and increase claimant access to information”).

appears to require them to be appointed.<sup>318</sup> The examiner should be empowered to investigate private and governmental participants in a case to form an accurate and neutral narrative of the events that led to the bankruptcy. The examiner's report should be made available to all claimants before or concurrently with any solicitation of approval of a bankruptcy plan, granting yet another opportunity for individual claimants to voice their (dis)satisfaction with the direction of a case.

A final aspect of amplifying individual creditors' voice in public mass tort bankruptcies is ensuring that they feel heard and understood throughout a case. If individuals feel excluded or ignored during the case, rational apathy toward the outcome is a likely result.<sup>319</sup> This could explain why, despite a Herculean effort to notify potentially millions of individual creditors, only around six hundred thousand individual creditors submitted a claim, and only around one-fifth of those voted on Purdue's plan.<sup>320</sup> The large proportion that did not participate likely felt excluded from, and silenced by, the process. If individual creditors are not actively included, they may be unwilling to exercise their voice and thus guide their litigation. Public mass tort bankruptcies should include a mandatory hearing during which a sample of individual creditors can have "a meaningful opportunity for victims to be heard" on how the mass tort impacted their lives and what they hope the case can accomplish.<sup>321</sup> Knowing that such a hearing will occur may encourage individual victims to avoid rational apathy and use their voice to influence a case.

### 3. Loyalty Should Be Proven in Public Mass Tort Bankruptcies

A state's loyalty to its citizens is effectively assumed by courts: "[T]here is no mechanism for an inquiry into the adequacy of representation in *parens patriae* suits akin to that mandated by Rule 23."<sup>322</sup> Instead, courts presume that attorneys general will

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318. See 11 U.S.C. § 1104(c) (defining the circumstances wherein an examiner may be appointed); *see also* Jonathan C. Lipson & Christopher Fiore Marotta, *Examining Success*, 90 AM. BANKR. L.J. 1, 9–10 (2016) (noting that bankruptcy examiners "are not used as Congress expected—and that their underuse appears to correlate to worse outcomes").

319. See Coffee, *supra* note 264, at 382, 422, 424–26 (discussing rational apathy).

320. *In re Purdue Pharma L.P.*, 633 B.R. 53, 59–61 (Bankr. S.D.N.Y. 2021); 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. & Its Debtors at 5, 10, *id.* (No. 19-2369), ECF No. 3722.

321. *Purdue Mediator's Fourth Report*, *supra* note 189, at 8; *see also* Lahav, *supra* note 257, at 3205 (noting such a hearing is not "a replacement for substantive justice, but it . . . recognizes that the dignity of the individuals is an important part of court proceedings" which "is a special function of the courts in a democratic society").

322. Lemos, *supra* note 24, at 503.

represent a state's citizens merely because they are public officials.<sup>323</sup> Courts do not approve the terms of parens patriae settlements,<sup>324</sup> and they discount the existence of financial conflicts because public attorneys typically do not themselves receive payments for settlements.<sup>325</sup> However, such a myopic view misses the very real political, pecuniary, and reputational benefits of aggressive public enforcement.<sup>326</sup> Governments and even individual agencies often keep a share of any settlement for themselves.<sup>327</sup> Governments also have reason to accept settlements that are lower than individual litigants may want. This could be because of the reputational benefits of obtaining a settlement and publicly announcing it.<sup>328</sup> This could also be because governments often use private contingency attorneys, who often favor an early settlement and thus an early payday, to prosecute parens patriae cases.<sup>329</sup> Ensuring loyalty is even more challenging in parens patriae litigation involving many states; in such actions some states take leading roles, leaving the voters in follower states without loyal agents and involved agents.<sup>330</sup> Governmental conflicts of interest abound in public mass tort bankruptcies, and loyalty should therefore be supervised.<sup>331</sup>

Victims in public mass tort bankruptcies can be assured loyal and unconflicted government representation by using bankruptcy's existing committees and fiduciary duties. Governments acting as representatives should be required to join an official committee and undertake such committee's fiduciary duties toward all creditors. A reasonable reading of the Bankruptcy Code likely does not permit this in most cases,<sup>332</sup> so the Code should be amended to require that they

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323. 6 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE – CIVIL § 24.03(4)(a)(v)(A), LEXIS (database updated Dec. 2023).

324. Lemos, *supra* note 24, at 504.

325. *Id.* at 506–07.

326. See Dishman, *supra* note 23, at 317–18 (“[Attorneys general] face unique conflicts of interest, even if they are purely motivated by the public good.”).

327. Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement*, 127 HARV. L. REV. 853, 856–57 (2014).

328. *Id.* at 875–79.

329. See Paul Harzen Beach, *The Parens Patriae Settlement Auction*, 52 GONZ. L. REV. 455, 472–76 (2017) (noting that “[c]onflicts of interest pose agency costs” litigation which are “especially daunting in aggregate litigation given the inherently misaligned incentives between class counsel and class members”).

330. Dishman, *supra* note 23, at 324.

331. See Lemos, *supra* note 24, at 549 (highlighting the assumption that state attorneys general always adequately represent the interests of individuals in public suits is unfounded); cf. Feibelman, *supra* note 116, at 22 (arguing that government intervention for “purely compensatory or financial objectives . . . should be viewed with skepticism”).

332. See 11 U.S.C. § 1104(a)(1) (providing for appointment of an official committee); *id.* § 1102(b)(1) (“[A committee] shall ordinarily consist of the persons, willing to serve, that hold the

join an official committee and be bound by the same fiduciary duties to all creditors in their representative capacity. Representative suits litigated or settled by governments on behalf of their citizens “plainly qualif[y] as the sort of adjudicative action to which basic due process protections attach.”<sup>333</sup> Such due process protections include the right to unconflicted representation, a standard that is not met when governments act in direct opposition to the interests of their citizens *because the governments have a stake in the outcome of the case*. Public mass tort bankruptcies create opportunities for governments to enrich themselves at the expense of their citizen-principals. By requiring governments to undertake these fiduciary duties, and permitting individual litigants to enforce them, individual litigants can ensure a base level of loyalty from the governments that claim to represent them.

Though one prominent commentator has argued that *parens patriae* suits should not preclude similar suits by individuals,<sup>334</sup> this would be unworkable in the bankruptcy context. This is because bankruptcy’s aggregation powers are designed around its ability to preclude future suits. Adding procedural protections like enforceable fiduciary duties would offer a preferred solution in the bankruptcy forum. Of course, governments will also have proprietary interests, and governments should be permitted to advocate for those on their own or as part of ad hoc committees. But special treatment for government suits does not make sense if governments are using the hook of *parens patriae* representation to advocate for their proprietary interests.

Another way to ensure loyalty would be to insist on a more searching judicial review of standards for settlement when governments act in both a representative and a proprietary capacity. A further amendment to Rule 9019 could require judges to review settlements in public mass tort bankruptcies to ensure that they are not coercive and that they further the interests of the represented parties. Merely giving a judge a formal role in assessing a settlement could prevent some of the most coercive settlements from being offered.<sup>335</sup> Indeed, this is a skill that bankruptcy judges already use informally. For example, the judge in the Purdue bankruptcy noted in several hearings that he felt portions of the releases that would immunize the

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seven largest claims against the debtor . . .”); *id.* § 101(41) (“The term ‘person’ includes individual, partnership, and corporation, but does not include governmental unit [other than under limited circumstances not relevant to these cases] . . .”); *see also* *Insys U.S. Trustee’s Objection* *supra* note 194, at 3–4 (stating that only “persons” can serve on official committees, and “persons” does not include governmental units).

333. Lemos, *supra* note 24, at 540.

334. *Id.* at 546.

335. *See* Bradt & Rave, *supra* note 50, at 1286 (highlighting the power of judges to signal certain shortcomings of proposed settlements).

Sacklers from civil liability—and therefore could be seen as among the most coercive in the entire case—were too broad, and he ultimately revised them from the bench prior to approving them.<sup>336</sup> Similarly, the judge in the LTL bankruptcy warned the debtor that he would guard against attempts to reduce the parent company's talc liability exposure under its funding agreement—seeking to allay the very concerns raised by creditors in challenging the bankruptcy filing.<sup>337</sup> While the judicial action in both cases was directed at private parties, there is no reason judges could not intervene to reduce coercion by government parties.<sup>338</sup>

Bankruptcy judges are often required by statute to make determinations that ensure creditors are informed enough to voice their opposition and that representatives are loyal to them. A judge must evaluate whether a disclosure statement, which summarizes a plan of reorganization's key terms, contains sufficient information to "enable . . . a hypothetical investor . . . to make an informed judgment about the plan."<sup>339</sup> In evaluating whether this "adequate information" standard is met, judges must consider "the complexity of the case, the benefit of additional information to creditors and other parties in interest, and the cost of providing additional information."<sup>340</sup> A similar adequate information standard could be applied to any Rule 9019 settlement that would trigger the voting rule proposed above. Judges could determine whether parties are sufficiently informed to vote, and whether a settlement on balance furthers the interests of the parties being represented by governments. In fact, proposals for improving MDLs have already called for a judge to serve as an "[a]dequate [i]nformation [i]ntermediary" to protect the interests of clients who might otherwise be led astray by disloyal counsel.<sup>341</sup> Applying bankruptcy's adequate information standards could ensure loyalty by protecting individual claimants from some of the worst conflicts of interest in public mass tort bankruptcies.

### *B. Bankruptcy's Ready-Made Tools for MDLs*

Though public mass tort bankruptcies are increasing in number and importance, they are unlikely to completely supplant MDLs as the

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336. *In re Purdue Pharma, L.P.*, 633 B.R. 53, 105 (Bankr. S.D.N.Y. 2021).

337. *In re LTL Mgmt., LLC*, 637 B.R. 396, 423–24 (Bankr. D.N.J. 2022).

338. See Dishman, *supra* note 23, at 348–50 (explaining that courts could scrutinize settlements negotiated by attorneys general in multistate actions to increase judicial monitoring and reduce agency costs).

339. 11 U.S.C. § 1125(a)(1).

340. *Id.*

341. Bradt & Rave, *supra* note 50, at 1284.

most common form of aggregate litigation.<sup>342</sup> Therefore, this Section highlights practices used in public mass tort bankruptcies that could be incorporated into MDLs with government intervention to maximize victim recoveries.

Although MDL's supporters see it as a powerful aggregation device, increasing government intervention may mean that MDL's shortcomings may be more significant than currently appreciated. Governments can maintain suit outside of the MDL process, either because their cases cannot be consolidated or because they believe they may fare better outside of the MDL. Companies, in turn, may be less willing to settle for full value if sizable government claims are not included in the deal. The inability of MDLs to compel government participation will likely become more important as government participation in mass tort litigation increases.

Supporters of MDLs point to their "split personality," combining individually controlled cases within a superstructure of aggregation.<sup>343</sup> But this control is largely a fiction—cases are managed by a steering committee of attorneys appointed by the MDL judge that makes all material decisions in a case.<sup>344</sup> Individual clients receive little ongoing information regarding their case and have little input into these decisions.<sup>345</sup> Moreover, lead attorneys do not have a well-developed fiduciary duty toward their clients, either in statute or under common law.<sup>346</sup> This is because the MDL procedure assumes that individual plaintiffs have their own counsel for their cases. Furthermore, the MDL statute does not provide for judicial review of settlements, leading some to (potentially improperly) review settlements while others approve (potentially improper) settlements without review.<sup>347</sup> In attempting to circumvent the doctrinal limitations of class actions, MDLs may end up introducing aggregating and loyalty problems.

Scholars of MDLs could draw lessons from public mass tort bankruptcies to maximize plaintiff recoveries while ensuring

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342. See Lahav, *supra* note 8, at 1402 ("MDL, class actions and bankruptcy are understood by most commentators as overlapping and merging methods for resolving large-scale multi-plaintiff disputes.").

343. E.g., Bradt, *supra* note 57, at 1719 ("[MDLs are] a temporary coordination of cases for limited proceedings and a close-knit consolidation under the plenary control of a single judge.").

344. Bradt & Rave, *supra* note 50, at 1271.

345. *Id.* at 1288.

346. Charles Silver, *The Responsibilities of Lead Lawyers and Judges in Multidistrict Litigations*, 79 FORDHAM L. REV. 1985, 1987–88 (2011); see also *Casey v. Denton*, No. 17-cv-00521, 2018 WL 4205153, at \*6 (S.D. Ill. Sep. 4, 2018) ("[T]he hallmarks of a traditional fiduciary duty relationship are absent from the MDL context . . . .").

347. Bradt & Rave, *supra* note 50, at 1276 ("Essentially, the judges are damned if they do and damned if they don't.").

interclaimant fairness. First, MDLs could incorporate bankruptcy-style committees, with some owing fiduciary duties to the entire class of plaintiffs and others owing duties only to their committee members.<sup>348</sup> These independent and overlapping fiduciary duties could be created by contract or court order.<sup>349</sup> As proposed above in the bankruptcy context, governments should also be required to join these committees and be bound by such fiduciary duties. Rather than receiving limited information, individual litigants would be apprised of their case through regular updates and would receive a formal, court-vetted document, like a bankruptcy disclosure statement, describing the case and the settlement to them. Incorporating these bankruptcy-like procedures into MDLs with government intervention would better assure governmental loyalty than is possible under existing MDL practices.

In addition, any claims matrix that is used in a case could also better account for the damages claimed by governments by distinguishing between proprietary and representative governmental claims. This would give individual litigants more insight into how the decisions about their awards were made. It would also empower litigants to negotiate with governments for an appropriate share of the claims brought on their behalf. Doing this could also facilitate an understanding by those involved that the final result of a case treated similarly situated individuals, and similarly situated governments, in a similar manner.

Finally, even though the negotiation class is currently disfavored in MDLs, a variation on bankruptcy's precommitment device—the RSA—could be implemented in its place. Such a “settlement support agreement” could possibly increase the value of aggregate settlements without running afoul of the Federal Rules of Civil Procedure in the same way that doomed the negotiation class. By consensually obligating claimants to support a settlement that met criteria specified by the plaintiffs themselves, a settlement support agreement would work to bind claimants in a way akin to bankruptcy's voting procedures. Implementing a settlement support agreement might require changes to the ways that professional conduct rules governing aggregate settlements are currently interpreted.<sup>350</sup>

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348. Cf. McKenzie, *supra* note 21, at 1021 (discussing, but dismissing, a proposal for MDL committees appointed by judges based on claim inventory size).

349. See *Casey*, 2018 WL 4205153, at \*1 (the roles and duties of participants in an MDL proceeding are defined by an agreement that becomes a court order).

350. See MODEL RULES OF PRO. CONDUCT r. 1.8(g) (AM. BAR ASS'N 1983) (barring participation by a lawyer in representing multiple clients in an aggregate settlement unless each clients gives

Nevertheless, a settlement support agreement, if successful, could potentially increase the amount that defendants offer to settle MDL cases.

## CONCLUSION

Debtors look to globally resolve their mass tort liability through bankruptcy because only bankruptcy can bring together all claims, bind holdouts, and even provide debtors and their third-party owners with a full release of liability. If the decision in the LTL bankruptcy really does “open the floodgates” to more mass tort bankruptcy filings, governments are unlikely to be far behind.<sup>351</sup> Governments participate in these cases because the political and financial incentives for doing so are too great to ignore. Governments can push companies into bankruptcy, and then can use bankruptcy’s opacity and pro-settlement standards to achieve huge financial benefits and overcome institutional limits on their powers. Yet the parties who are most in need of financial recompense and for whom dignitary rights can be said to matter most—victims of mass torts, as individual claimants—often appear as afterthoughts in public mass tort bankruptcies. Though ostensibly spoken for by the debtor, governmental units, official committees, and themselves, the interests of individual victims seem least protected in these actions. Using well-established aggregate litigation concepts to amplify voice, ensure loyalty, and protect nonmonetary and dignitary rights, public mass tort bankruptcies can be made to work for both the individual victims and society at large. Finally, if mass torts continue to remain in the MDL system, bankruptcy can still provide a useful set of tools for fairly maximizing recoveries. Government intervention in mass torts, whether in bankruptcy or MDLs, need not harm individual creditors.

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informed consent, confirmed in writing); Rave, *supra* note 42, at 1186–87, 1246–57 (discussing the prevailing aggregate settlement rule and proposals to modify it).

351. *In re LTL Mgmt., LLC*, 637 B.R. 396, 428 (Bankr. D.N.J. 2022).