

U.S. Senate Committee on the Judiciary
Hearing on
Evading Accountability: Corporate Manipulation of Chapter 11 Bankruptcy

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Written Statement of
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Thanks to Chair Durbin, Ranking Member Graham, and members of the committee for holding this hearing and inviting me to participate. Bankruptcy law has been a central focus of my professional life since I graduated from law school. My first post-law-school job was in the Northern District of Illinois bankruptcy court in Chicago. I later was a staff attorney for the National Bankruptcy Review Commission, a temporary body created by federal legislation in 1994 to comprehensively study the bankruptcy system. My roster of responsibilities included helping the commission examine big corporate bankruptcy cases, including those involving large numbers of personal injury and wrongful death claims and allegations of corporate wrongdoing. Since becoming a professor in 2000, I have published over forty scholarly publications on bankruptcy law and related topics. For its fall 2022 annual meeting, the National Conference of Bankruptcy Judges asked me to discuss issues closely related to today's hearing on a program that asked, with respect to big chapter 11 cases, “How Far is Too Far and is the Day of Reckoning Here?”

As I said then, and can restate now, some big companies, advised by large and elite law firms, have indeed gone too far, and the day of reckoning is past due. Retrofitting chapter 11 to manage and permanently cap liability for serious and widespread allegations of harm runs the risk of encroaching on democratic and constitutional values such as liberty, due process, federalism, and separation of powers. When profitable companies use a liability-only subsidiary with the objective to extract bankruptcy’s extraordinary benefits to protect the entire corporate family, the risks are especially intolerable. I recommend modesty about what can be accomplished within the boundaries of a national bankruptcy system and adherence to the rule of law.

This written statement, prepared in a highly compressed time period, draws from four recent articles – *Sorting Bugs and Features of Mass Tort Bankruptcy*, 101 TEXAS LAW REVIEW 1745-1771 (2023); *Unbundling Business Bankruptcy Law*, 101 NORTH CAROLINA LAW REVIEW 1703-1761 (2023); *Fake and Real People in Bankruptcy*, 39 EMORY BANKRUPTCY DEVELOPMENTS JOURNAL 497-522 (2023); and *Shocking Business Bankruptcy Law*, 131 YALE LAW JOURNAL FORUM 409-427 (2021) – as well as the book, UNJUST DEBTS: HOW OUR BANKRUPTCY SYSTEM MAKES AMERICA LESS EQUAL, which will be published on June 11, 2024.

The Bankruptcy Code is a remarkable statute in scope and effect. In enacting chapter 11, a mechanism for restructuring the debt of financially troubled businesses, on a bipartisan basis in 1978, Congress somewhat aggressively used the bankruptcy power embedded in the United States Constitution. The aspiration was to allow a viable but overindebted business to restructure its debts if enough stakeholders supported the reorganization. If stakeholders believed they would be better off with the business alive than dead, and the plan could satisfy a list of other requirements, then chapter 11 could help make that happen.

To that end, the Bankruptcy Code supplies legal benefits to corporate debtors that cannot be found elsewhere in the legal system. Here are three of the most significant elements for today's hearing purposes.

One is the automatic stay. Given that Constitution limits the power of federal courts, the standard is typically very high for a federal court to enjoin people from their activities. The Bankruptcy Code contains a big exception: section 362 automatically imposes a temporary injunction to protect the debtor and property from creditors. Itself a significant exercise of coercive government power, this authorization is necessarily tethered to preservation of a financially distressed debtor and its property to achieve the broader objectives of the bankruptcy system.

The discharge is another key benefit federal bankruptcy law offers. Section 1141 of the Bankruptcy Code grants corporations a permanent alteration of nearly all legal rights upon chapter 11 plan confirmation. The discharge for big companies in chapter 11 is much broader than the discharge offered to financially distressed families. And unlike distressed families who undertake repayment plans, who generally only get debt relief if they finish their plans, big

companies get a discharge upon plan confirmation. The relief is not reversed if the reorganized company turns out to be unable to deliver on its plan's promises, which is not a rare occurrence.

A third, and related, benefit: although creditors vote on chapter 11 plans, a debtor does not need unanimous consent to get a plan confirmed that changes the rights of all claimants. The majority of creditors, as calculated under section 1126 of the Bankruptcy Code, essentially can bind dissenters to a plan.

It is no surprise these legal benefits look attractive to those beyond their intended beneficiaries. But these benefits are not available to everyone and are part of a package deal. The drafters of the Bankruptcy Code embedded these benefits into a process that intentionally alters and amplifies ordinary corporate governance. For example, companies in chapter 11 must share control with creditors and endure additional public oversight and scrutiny. All creditors of the company are to share the pain to some extent. Only a company under serious financial threat would be willing to endure the obligations to receive the benefits. That, at least, was the theory.

The topic of today's hearing lies at the intersection of two phenomena. The first is the position of some big and profitable enterprises that they know better than Congress how to efficiently deploy the perks of chapter 11, and thus should be able create liability-only subsidiaries that extract the benefits of chapter 11 to protect the full corporate family. The second is the use of chapter 11 to manage the costs and consequences of ongoing litigation – particularly to accomplish in chapter 11 what the Supreme Court has held cannot be done in class actions by binding dissenters to a deal.¹ Although many companies have used bankruptcy this way since the 1980s, and although Congress authorized some of this activity for asbestos claims in 1994, this type of case deserves careful attention.

One might ask, why *not* allow profitable companies, with no overindebtedness problems, to use chapter 11 if doing so could maximize economic value? Although the United States Supreme Court has rarely heard cases challenging the substantive scope of the Bankruptcy Clause, and none of them recent, some scholarship and caselaw suggest the clause carries an insolvency or related requirement.² Even if one does not want to go that far, surely this

¹ Ortiz v. Fibreboard Corp, 119 S. Ct. 2295 (1999). See also Amchem Products, Inc. v. Windsor, 117 S. Ct. 2231 (1997); S. Elizabeth Gibson, Response to Professor Resnick: Will this Vehicle Pass Inspection?, 148 U. Pa. L. Rev. 2095, 2106-7 (2000); Ralph Brubaker, Assessing the Legitimacy of the “Texas Two-Step” Mass-Tort Bankruptcy, 42 Bankruptcy Law Letter Aug 2022.

² E.g., Thomas E. Plank, Bankruptcy and Federalism, 71 Fordham Law Review 1063 (2002).

extraordinary coercive federal power does not become available whenever someone in corporate America discovers it can maximize value by redeploying chapter 11's perks to do what is not permitted in class actions or in federal multidistrict litigation. If the bankruptcy power covered everything that might maximize value, it could swallow much of the legal world. Perhaps others can construct an argument for how the Commerce Clause or other authority justifies a national automatic stay and discharge and binding dissenters with majority vote that should be available to any company facing widespread allegations of causing harm. In that instance, certain features of bankruptcy could be added to other litigation systems without the package deal and gatekeeping that chapter 11 requires. In the meantime, access to chapter 11 must be bounded.

Some big enterprises have sought to justify their presence in bankruptcy through critiques of the civil justice system and other courts. Both LTL Management (the J&J subsidiary) and Aearo Technologies (the 3M subsidiary) filed a document they call an "informational brief" early in their chapter 11 cases. This document is now a regular feature of mass tort bankruptcy even though I am not aware of authority in rules of procedure for its filing. LTL Management's informational brief blamed the flaws of juries and plaintiffs' lawyers for its need for chapter 11. It also complained that the recusals by Justices Alito and Kavanaugh on J&J's certiorari petition from a Missouri ruling, followed by denial of J&J's petition by the United States Supreme Court, "work significant prejudice" and deprived the company of review of state court rulings.³ Aearo called the multidistrict litigation consolidating claims against 3M "broken beyond repair," and called MDLs a "magnet for unvetted claims."⁴

These points do not connect neatly with an argument in favor of bankruptcy use. The bankruptcy court cannot review the state court rulings that the Supreme Court refused to take up. In any event, I am not here to defend all aspects of the civil justice system or MDLs, let alone everything that lawyers do – whether they represent injured people, big corporations, or any other client. Still, I wonder why the already hardworking bankruptcy system should be burdened with a new role as the complaint department about these other fora.

Defenders of bankruptcies preceded by divisive mergers also tout the virtues of tackling tort liabilities without disturbing the operations of an enterprise. Why bother commercial

³ Informational Brief of LTL Management LLC at 4, 43-50, 106, 109, 120, 125, In re LTL Management LLC, 21-30589 (Bankr. W.D.N.C. Oct. 14, 2021), docket #3.

⁴ Informational Brief of Aearo Technologies at ii, 11, 42, In re Aearo Technologies, 22-2890 (Bankr. S.D. Ind. July 26, 2022, docket #12.

creditors and investors with an invasive bankruptcy if their interests can simply continue unaffected? This is not a new argument.⁵ One answer is that the very structure of chapter 11 is premised on all creditors of an enterprise sharing the pain. The separation of liabilities from the operating business from which they came unravels the checks and balances of chapter 11 and commitments to creditor fairness. The idea that all creditors get to be paid in full in the ordinary course *except* for people alleging serious harm by the company not only is out of step with the design of chapter 11, but with broader efforts to deter corporate misconduct and wrongdoing.

The recent bankruptcies filed after divisive mergers under Texas law may seem especially brazen but as suggested above such strategies did not develop out of thin air. Over the intervening decades, since the earliest mass tort bankruptcies filed by a primary tortfeasor in an operating business, some caselaw has tolerated using the bankruptcy case of one entity to protect nondebtors temporarily and then permanently, however financially stable those nondebtors might be, and even if the nondebtors are alleged to have their own independent and direct responsibility for wrongdoing. Some circuit courts have been surprisingly welcoming of temporary injunctions protecting co-defendants on somewhat circular showings that protecting more defendants will help get a chapter 11 plan over the finish line.⁶

Going further, some chapter 11 debtors in tort-driven cases say actions by public officials designed for safety and welfare should be halted against the debtor and co-defendants while they try to get a majority of claimants to agree to a chapter 11 plan.⁷ Even if the debtor and co-defendants make voluntary concessions to alleviate concerns about ongoing public harm, such concessions do not make the granting of such an injunction any less extraordinary or controversial an exercise of federal court power.

⁵ E.g., Ronald Barliant, Dimitri G. Karcazes, & Anne M. Sherry, From Free-Fall to Free-For-All: The Rise of Prepackaged Asbestos Bankruptcies, 12 A.B.I. Law Review 441, 459 (2004) (describing “Patronus Technique,” whereby a healthy large company creates special purpose entity to house asbestos liabilities and puts that entity into bankruptcy, and concluding that this separation of liabilities from the operating business was not what Congress had in mind when it enacted section 524(g) for asbestos bankruptcy). See also *In re Combustion Engineering, Inc.*, 391 F.3d 190 (3d Cir. 2004).

⁶ Such case law was recently collected, and applied to a divisive merger context over a rigorous dissenting opinion, in *In re Bestwall LLC*, 71 F.4th 168 (4th Cir. 2023). Five 4th Circuit judges voted to rehear this case en banc and were outvoted by eight of their colleagues. Order, *In re Bestwall LLC*, 22-1127 (4th Cir. Aug 7, 2023), docket #82.

⁷ *In re Purdue Pharmaceuticals LP*, 619 B.R. 38 (S.D.N.Y. 2020).

It is time to turn to the intersecting phenomenon of mass tort bankruptcy more generally. Especially given the limits on class actions imposed by the Supreme Court in cases like *Amchem* and *Ortiz*, and the boundaries on federal multidistrict litigation by statute, using bankruptcy to cap liability for present and future tort claims is a significant extension of bankruptcy authority that should not be taken lightly. When enterprises push the envelope in asking to manage and cap tort liabilities through bankruptcy, they explicitly or implicitly suggest that bankruptcy system is the most rational course of action to address these lawsuits even though it was not designed for this purpose. For example, in its informational brief, Purdue Pharma told readers that “bankruptcy is the only way to resolve the [opioid crisis] litigation rationally.” In a pleading seeking to halt litigation against third parties such as members of the Sackler family who were not themselves bankruptcy filers, Purdue Pharma further stated that “decades of experience demonstrates that bankruptcy is a proven and efficient vehicle to successfully, rationally, and equitably resolve such mass tort liability.”⁸

The more that I have looked the features of mass tort bankruptcy cases over time, the more questions arise about the metrics to support these assertions. It cannot be denied that billions of dollars’ worth of assets pass through these mass tort bankruptcy trusts. But one needs more granular information to assess whether these cases rationally and equitably resolve mass tort liability. Setting aside (just for now) major questions about how the system treats, and is perceived by, the real people who have found themselves and their grievances shifted out of the civil justice system into this unfamiliar territory, here are just a few of the money questions. Where does the money go? To what extent are recoveries consistent with predictions? To the extent the bankruptcy was aimed at changing the rights of future claimants as many of these cases are, how do those individuals fare relative to those who came earlier?

Mass tort bankruptcies and the resulting trusts are not as transparent as they could and should be and that makes it harder to know the answers for someone on the outside. A lot of information is hidden from public view or offered in forms that makes it hard to combine with other sources. But a few things can be said from research into particular trusts and more comprehensive studies of asbestos bankruptcies such as a 2010 RAND Institute report.

⁸ The “only”: Debtors’ Informational Brief at 4, *In re Purdue Pharma L.P.*, 19-23649 (Bankr. S.D.N.Y. Sept. 16, 2019), docket #17; “proven and efficient:” Complaint for Injunctive Relief at 30, *Purdue Pharma L.P. v. Commonwealth of MA et al.*, 19-0289 (Bankr. S.D.N.Y. Sept. 18, 2019), docket #1.

To start, existing data on asbestos cases suggest the plans coming out of these bankruptcies ascribe very different scheduled values to the same harm (such as a mesothelioma diagnosis) and predict varying levels of recovery on such claims. In the trusts sampled by the RAND institute for its 2010 report, for example, the scheduled value for mesothelioma claims varied from \$7,000 to \$1.2 million, with a median of \$126,000. The predicted payment percentage varied from 1.1 percent to 100% with a 25% median.⁹

With respect to people who seek recovery from the same trust, timing matters. There is a good chance that someone suffering from mesothelioma at the time of the bankruptcy received a markedly different level of compensation from someone who diagnosed even just a few years later.¹⁰

A few examples may be helpful. T H Agriculture & Nutrition, a subsidiary of Philips Electronics, filed for bankruptcy in 2008 and got its plan confirmed in 2009. Initial claimants, those able to participate and vote in the bankruptcy, received 100% of what they were promised (and some watchers of asbestos bankruptcies allege those promises were unduly generous). In 2011, when the trust started considering new claims – filed by people who did not have the opportunity to participate directly in the bankruptcy were bound by its result – recovery dropped to 30%. As of 2020, the payment percentage was 15%.¹¹

In Babcock & Wilcox, a case filed in 2000 and resulting in a confirmed plan in 2006, the scheduled value of a mesothelioma claim was \$90,000 and had an initial payment percentage of 34% at plan confirmation. By 2010 the payment percentage was 15%. The current payment percentage is 6.3%.¹²

⁹ See generally Lloyd Dixon, Geoffrey McGovern & Amy Coombe, *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts*, RAND Institute for Civil Justice xv, 36 (2010). For concerns about transparency and the difficulty of data access in asbestos bankruptcies, see *id.* at 45; S. Todd Brown, *How Long is Forever This Time: The Broken Promise of Bankruptcy Trusts*, 61 *Buff. L. Rev.* 537, 585 (2013).

¹⁰ Other useful sources on variable recoveries in addition to the RAND Institute (2010) report include S. Todd Brown, *How Long is Forever This Time: The Broken Promise of Bankruptcy Trusts*, 61 *Buff. L. Rev.* 537 (2013); Marc C. Scarcella & Peter R. Kelso, *A Reorganized Mess: The Current State of the Asbestos Bankruptcy Trust System*, Mealey's Litigation Report 1, March 18, 2015.

¹¹ Kirk T. Hartley, David C. Christian, Marc C. Scarella, & Peter R. Kelso, *Prepackaged Plan of Inequity: The Financial Abuse of Future Claimants in the TH Agriculture & Nutrition 524(g) Asbestos Bankruptcy*, 11 Mealey's Asbestos Bankruptcy Report (Nov. 2011); Notice of TH Agriculture & Nutrition, LLC Asbestos Personal Injury Trust Regarding Payment Percentage (April 20, 2020).

¹² RAND (2010) at 76. Current payment percentage is listed on the trust website: bwasbestostrust.com (last checked Sept. 17, 2023).

Halliburton's subsidiary started with a payment percentage of 100%, with a scheduled value of \$136,500 on a mesothelioma claim, when the case emerged from bankruptcy in 2004. By 2010, the payment percentage was 52.5%, and now is at 60%.¹³

That latter example is a reminder that payment percentages can go up just as they go down. The J.T. Thorpe Company Successor Trust, a case confirmed in 2004, had a scheduled value for a mesothelioma claim of \$100,000 and an initial payment percentage of 18%. The payment percentage was 38% at the time of the Rand Institute report. As of 2018, the percentage was 23%.¹⁴

Although asbestos raises some especially thorny challenges for predicting recoveries, including continuing flows of new claims alleging non-work exposure and illnesses that could have non-asbestos causes, uncertainty is neither a relic of the past nor exclusive to asbestos. The recent Mallinckrodt bankruptcies are a reminder that what the plan promises and what the plan delivers are often very different. A little more than a year after plan confirmation, \$1 billion of the funds promised for opioid compensation and abatement essentially evaporated.¹⁵

Chapter 11 was not designed to systematically resolve large numbers of unliquidated tort liabilities. In 1984, Congress amended section 157 of title 28 to require such claims, to the extent they arose in bankruptcy cases, to be tried by district courts. That is not a move one would make if one expected bankruptcy to become mass tort court.

To be sure, legislation in 1994 complicated the picture by retroactively blessing the Johns-Manville bankruptcy, one of the first two chapter 11 cases filed to address large numbers of asbestos claims. That case has itself been much studied and critiqued, in part because the trust the bankruptcy created itself had to be restructured in short order. Nonetheless, all claimants were directed to the trust for recovery, including those who did not participate in the case and discovered illness from exposure years into the future. Lobbied to ensure skittish investors of the legality of this structure, Congress added section 524(g) to the Bankruptcy Code within a broader reform act of miscellaneous amendments. Section 524(g), standing alone, could not and cannot

¹³ RAND (2010) at 91. Current payment percentages viewed on diiasbestostrust.org (last checked Sept. 17, 2023).

¹⁴ RAND (2010) at 116. JT Thorpe Company Successor Trust website (listing payment percentage as of May 25, 2018).

¹⁵ The clearest summary I have heard of the resolution was at the first hearing in the second bankruptcy. The audio recording of that hearing is posted on the court docket. First-Day Hearing, In re Mallinckrodt, 23-11258 (Aug. 30, 2023), docket #158.

overcome the broader mismatch between the design of chapter 11 and the needs associated with large numbers of injured people who allege the debtor bears some responsibility.

The same law that created section 524(g) also created the National Bankruptcy Review Commission to conduct a comprehensive study of the bankruptcy system. That commission issued a final report in October 1997 recommending that Congress continue to legislate in the realm of mass tort bankruptcy, particularly if companies aimed to cap liability for future claims as well as current ones. Rather than recommending the extension of section 524(g) to non-asbestos contexts, the report recommended that Congress repeal that provision upon implementation of newer proposals. In addition to stifling innovation by authorizing only the Manville experiment, the commission said section 524(g) did not do enough to protect injured parties, particularly those who would not discover the harm until long after the bankruptcy was over. Given the range of alleged harms among claimants in many cases, the Commission noted more than one representative for future claims may be constitutionally necessary (assuming the structure is constitutional at all).¹⁶

That these proposals did not become law does not establish Congressional satisfaction with mass tort bankruptcies. At least with respect to asbestos, many members of Congress, on both sides of the aisle, were interested in taking courts out of the asbestos claim resolution business altogether, as the Supreme Court itself had suggested. The legislation would have moved such claims into an administrative regime overseen by the U.S. Department of Labor. Although the Fairness in Asbestos Injury Resolution Act did not get over the finish line, it is worth noting that supporters worried that that injured parties were receiving “only pennies on the dollar,” that injured parties endured long waits for compensation, and that too many resources were directed to those with modest or no impairment from asbestos exposure, leaving too little for those with severe diagnoses. Lawmakers opposed to the FAIR Act were not necessarily defenders of asbestos bankruptcies; they seemed to worry that the legislation borrowed too much from asbestos bankruptcies rather than too little.¹⁷

Why does this history matter to the topic of today’s hearing? The argument that even profitable corporations should be able to do something extraordinary through chapter 11 –

¹⁶ Final Report of the National Bankruptcy Review Commission 315-350 (Oct. 20, 1997).

¹⁷ E.g., Hearing before the Committee on the Judiciary 109-817, The Fairness in Asbestos Injury Resolution Act, 109th Cong., 1st Session Jan. 11, 2005, serial no. J-109-2A.

permanently fix liability for present and future personal injury and wrongful death claims, to the benefit of the whole corporate family – is premised on the idea that the ends justify the means. That reasoning is inherently inadequate to overcome legal or constitutional critiques. But the assertion also needs to be interrogated on its own terms. At the very least, more transparency about these bankruptcies and the trust resolution process is essential.

Enterprises that consider using chapter 11 to manage allegations of serious harm to individuals also must do more during the bankruptcy case to respect the rights and interests of those individuals. One needs to step away from the abstract concept of “mass tort” and consider the actual people and the often life-changing diagnoses or harm they describe.

The differences among their experiences also should be taken into account. In many cases, injuries fall along a broad spectrum from minimum impairment to extreme suffering and death. Even if similarly harmed, people may have gathered disparate levels of proof linking their harm to the debtor enterprise and co-defendants. The more that a chapter 11 sweeps in lawsuits across state lines, the more the underlying law and statutes of limitations may vary.

The trusts these bankruptcy cases establish to compensate people may ultimately recognize these distinctions with a matrix or point system or other guidance, but these distinctions matter during the bankruptcy case itself, where key decisions are made that will be finalized in a plan. To give better protection to all claimants, the National Bankruptcy Review Commission recommended that a debtor create multiple classes of personal injury and wrongful death claimholders for voting and distribution purposes. Yet, the typical approach in a mass tort bankruptcy is to treat all present injured people as an undifferentiated mass.

As Congress wrote the rules, claims of higher dollar amount are supposed to have greater weight in voting and thus negotiations. The vote of a lender holding a \$10 million debt carries more impact than the vote of a lender holding a \$1 million debt. Mass tort bankruptcies have a norm of valuing each tort claim at the same dollar amount – one dollar, to be exact – regardless of severity of harm, strength of proof, or other differentiating factors. Given the strength of this norm, even claims liquidated through litigation or settlement or left unpaid are likely valued at one dollar for voting.

A chapter 11 debtor valuing all tort claims at one dollar could honor distinctions among injured individuals by putting claims of varying severity in separate classes (voting is conducted by class). Bankruptcy law permits separate classification with a rational justification. But

defendant enterprises often have no incentive to structure the plan in a way that maximizes the voice and leverage of each group.

An oft-stated rationale for valuing claims identically for voting, and classifying them together, is that vetting and reviewing during bankruptcy, as opposed to in the trust distribution process, would unduly slow the process. But in some cases some basic sorting information is already available and used to predict an estimated aggregate amount for the claims.

One also needs to consider how these norms affect negotiations leading up to the vote. Certainly corporate defendants are aware of these effects because they propose the classifications. Big enterprises can use this flattening of influence to their great advantage, as can lawyers for large numbers of plaintiffs with less severe or less vetted claims who have incentives to make a deal because their clients had weaker odds in the civil justice system.

Reviewing the voting rules for chapter 11 will help drive home the concerns. Bankruptcy law creates a high standard for a class to be counted as accepting a plan. Section 1126 of the Bankruptcy Code imposes a conjunctive test. The first part of the test counts the number of claims that voted in favor of the plan among everyone who voted. The plan needs to secure at least half in favor of the plan among those who vote at all. The asbestos bankruptcy provision, section 524(g), increased the threshold of the required percentage of supportive claims to 75 percent, and many mass tort cases use that threshold as a benchmark even if the case does not involve asbestos.

The second part of a conjunctive test is based on each claim's dollar value. Two-thirds of the total dollar amount among voting members of the class must support the plan. Mass tort bankruptcies that follow the norm invalidate this weighted voting element for tort claims, although not for other classes of claims in their plans, generating another source of inequality.

To make the issues more concrete, consider the Boy Scouts of America, which used chapter 11 to manage liability for sex abuse claims for itself as well as its local councils that did not file for bankruptcy, among others. The information filed by 82,500 detailed forms explaining their abuse claims showed the range of harms. Some claimants have reported being repeatedly raped by scout leaders. The abuse claim definition is broad enough to also encompass a scout touched inappropriately by a fellow scout. The compensation process via the trust, which is currently underway, will afford these people different levels of financial compensation. Recovery ranges from \$3,500 for survivors who selected the expedited payment process when

they voted on the plan to \$2.7 million. But the bankruptcy process of negotiations and voting treated them the same: each \$1, all in the same class.¹⁸

The Boy Scouts of America bankruptcy offers other types of gradations among survivors given its vast scope. The abuse occurred in different decades, with different direct perpetrators, in different parts of the country and in territories as far as Guam. Depending on the timing and details, the organization might have a lot of insurance potentially applicable to the incident or none at all. Depending on the location, the applicable local council may have deep pockets or shallow ones. The location also determines applicable tort law or other legal theories, and if the statute of limitations can be used as a defense. Some survivors were days away from picking a jury for a state court trial when the bankruptcy brought everything to a halt. Others never would have brought a lawsuit. All were in the same class, with claims valued at one dollar.

Another issue worth highlighting is the significant number of individuals who file paperwork to participate in the case but do not cast a vote on the plan that will determine their rights. When tallying whether a class has accepted a plan, bankruptcy law considers only claimants that voted one way or another. It excludes the nonvoters. Whatever the merits of that statutory choice – one might ask whether some sort of threshold of turnout should be required given the extraordinary legal impact of these cases – it is worth highlighting how many personal injury and wrongful death claimants are not voting in these consequential elections.

Here are two examples for now. In the the Boy Scouts of America bankruptcy, over 25,000 of the 82,500 abuse survivors did not cast a vote at all. Those figures come from two rounds of voting because the first round did not yield enough accepting votes to go forward. In Purdue Pharma’s bankruptcy, almost 69,000 opioid survivors who filed paperwork in the bankruptcy did not vote one way or another on the plan – more than voted on the plan (slightly more than 58,000 in favor, 2,600 against).

Independent of the impact on the plan approval process under current law, these nonvoters should be visible to policymakers. Is abstention from voting a signal of some shortcoming in the communication process? Might they feel like their opinion does not matter in a system they did not select, that gives them no opportunity to opt out? These are just a few of

¹⁸ Facts about the plan are in *In re Boy Scouts of America*, 642 B.R. 504 (Bankr. D. Del. 2022), affirmed by *In re Boy Scouts of America*, 2023 WL 2662992 (D. Del. March 28, 2023).

the questions one would ask to determine how the bankruptcy system is experienced by the real people most directly affected by its extension to mass tort.

Although this written statement has focused primarily on for-profit businesses, the reference to the Boy Scouts of America expands the conversation. Catholic dioceses continue to file chapter 11 cases to manage liability for sex abuse, a practice that started about twenty years ago. These cases raise the same issues as above: what should be the standard for access to chapter 11 for this purpose? To what extent do trusts deliver on their promises? How are survivors treated during the bankruptcy process itself? To state the obvious, these cases are about so much more than money, and thus even more of a signal of how far out of its original domain the bankruptcy system has moved.

Cases filed to manage sex abuse lawsuits need to be flagged for another reason: they tend to be a direct response to the prerogatives of state legislatures to change their statutes of limitations to give adult survivors of abuse their opportunity to seek recourse in the civil justice system. Nonprofit bankruptcy filers have not been shy about attributing their bankruptcies to state legislative choices. The policy choice to open statutes of limitations dovetails with research on childhood sexual abuse indicating that people are not ready to come forward publicly until later in life. Some legislatures such as New York have made other changes to ensure the state legislature's appropriate and timely handling of these challenging lawsuits.¹⁹

Although a lot of attention has gone to states with temporary windows to file claims, some states have permanently opened the statute of limitations for past child sex abuse. To the extent bankruptcies set bar dates that require filing claims or forfeiting the right to pursue one's rights, the federal bankruptcy system ends up disregarding the state policy choice to give adult survivors of abuse the time they need to decide about coming forward.

Might one conceptualize the use of bankruptcy more as a mechanism to deliver recovery than an override of state policy? The work of Professor Timothy Lytton, an expert in child sex

¹⁹ E.g., *In re Child Victims Act Cases Removed from State Court*, 2023 WL 5123396 (S.D.N.Y. Aug. 10, 2023) (reviewing Child Victims Act and New York's efforts to enable fair and prompt adjudication of child sex abuse cases, including a dedicated part of each court devoted to handling these cases).

abuse litigation, seems to suggest otherwise. He characterizes these legal actions as a channel for accountability, as well as an important vehicle to revert control to abuse survivors taken from them by abusers and inattentive (or worse) institutions long ago. Survivors hope to help prevent people from similarly suffering in the future. Whether or not tort litigation always fulfills these objectives, Professor Lytton has recently characterized institutions' use of bankruptcy as undermining them.²⁰ His concerns deserve careful attention in thinking about whether bankruptcy is a proper home for these matters and how it might become better attuned to these cases' needs.

Any forum for cases involving serious harm and traumatic events, as well as personal injury and death from hazardous products, must attend to more than financial recovery if it is to be seen as legitimate. That is a key lesson from decades of research on procedural justice and related concepts. If bankruptcy is really to be an accepted forum for such cases, those considerations should infuse the chapter 11 case itself, as well as the trust process.

With some endorsement from Congress and courts, enterprises have repurposed chapter 11 bankruptcy and its significant legal benefits – a system designed for overindebted companies seeking to restructure largely voluntary debts – to manage large numbers of allegations of serious harm. Although the details have varied over time and across cases, the objective of many of these cases has been to cap financial responsibility for current and future claimants and limit recourse to the civil justice system. Perhaps it was inevitable that profitable companies facing widespread lawsuits would seek a way to reap the benefits with the least amount of cost. At the very least, that goes too far.

That overreach invites Congressional consideration of an underlying premise about proper chapter 11 use when a company is not overindebted in the traditional sense. There may be ways chapter 11 can help an overburdened company coordinate responses to widespread lawsuits that preserves rights of injured people and state policy prerogatives. But many enterprises are

²⁰ Timothy D. Lytton, Tort Claims for the Coverup of Child Sexual Abuse: Private Litigation, Corporate Accountability, and Institutional Reform, 72 DePaul Law Review 289, 304-05, 322 (2023). See also Timothy D. Lytton, Holding Bishops Accountable: How Lawsuits Helped the Catholic Church Confront Clergy Sexual Abuse (Harvard U. Press 2008).

pushing chapter 11 well beyond those limits. That amounts to an extraordinary extension of the already significant national bankruptcy authority, and it deserves your careful attention.