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Due Process Discontents in Mass-Tort Bankruptcy

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DUE PROCESS DISCONTENTS IN MASS-TORT BANKRUPTCY

*J. Maria Glover**

INTRODUCTION

The 28th Annual Clifford Symposium on Tort Law and Social Policy's topic, *Litigating the Public Good: Punishing Serious Corporate Misconduct*, arrived right at a critical inflection point in the world of mass torts.† The Symposium itself, held in June 2022, came on the heels of an earthshattering decision issued by Judge Michael Kaplan in February 2022 by the United States Bankruptcy Court for the District of New Jersey approving Johnson & Johnson's petition to shift its billions of dollars in tort liability, along with thousands of talc-related tort claims, out of ongoing multi-district litigation (MDL) proceedings and against a new subsidiary Johnson & Johnson created and then put into bankruptcy a mere forty-eight hours later.¹ While the Symposium's participants were working with the *Law Review's* Editors on revisions to their Symposium pieces, the United States Court of Appeals for the Third Circuit heard oral argument on appeal from the bankruptcy court's opinion blessing the Johnson & Johnson maneuvers.² On January 23, 2023, the Third Circuit repudiated Johnson & Johnson's bankruptcy petition, finding that its bankruptcy petition was

* Professor of Law, Georgetown University Law Center. I am grateful to Andrew Bradt, John Beisner, Elizabeth Chamblee Burch, Brian Fitzpatrick, Samuel Issacharoff, Robert Klonoff, Adam Levitin, Troy McKenzie, Theodore Rave, and Adam Zimmerman for insightful discussions. Thank you to all the participants in the 28th Annual Clifford Symposium on Tort Law and Social Policy (DePaul University College of Law, June 2022). I would like to thank David Hume, Kaylee Otterbacher, Eloy Rodriguez La Brada, and Ashley Stewart for excellent research assistance.

† Unless otherwise explicitly stated, this paper is current as of March 9, 2023 regarding the cases of Johnson & Johnson and 3M; all other cases detailed herein are current as of December 2022.

1. *In re LTL Mgmt., LLC*, 638 B.R. 291, 323–24 (Bankr. D.N.J. 2022) (explaining that LTL Management was created on October 12, 2021 and filed for bankruptcy on October 14, 2021).

2. Oral Argument, *In re LTL Mgmt., LLC*, 58 F.4th 738 (3d. Cir. Sept. 19, 2022) (available at <https://www.ca3.uscourts.gov/oral-argument-recordings>).

not filed in good faith.³ As matters currently stand, Johnson & Johnson is appealing this decision and litigation is ongoing.⁴

If ultimately permitted to proceed on appeal, Johnson & Johnson's maneuvers, known in public discourse as the "Texas Two-Step," would usher in a sea change to the world of mass torts. Multi-billion-dollar corporate defendants would no doubt follow Johnson & Johnson onto the dance floor and two-step their way right out of mass-tort proceedings in MDL and into bankruptcy, dragging mass-tort claimants onto the mandatory dance floor right along with them. And indeed, just five months after the bankruptcy court's decision in Johnson & Johnson, 3M, "[f]ollowing in the footsteps" of other "successful" endeavors to shift tort liability through the bankruptcy system, placed a subsidiary into bankruptcy in the United States Bankruptcy Court for the Southern District of Indiana in an attempt to flee "the largest MDL in [U.S.] history," encompassing "over 230,000 hearing-injury claims brought primarily by U.S. military servicemembers and veterans" arising from 3M's sales of Combat Arms Earplugs.⁵ In a "surprise" opinion⁶ issued on August 26, 2022—which now stands in stark contrast with United States Bankruptcy Court Judge Michael Kaplan's broad-sweeping embrace of Johnson & Johnson's Two-Step mass-tort bankruptcy maneuvers—Judge Jeffrey J. Graham rejected Aearo's petition and request for a stay of the MDL proceedings.⁷ 3M filed a Notice of Appeal to the United States Court of Appeals three days later,⁸ and the Seventh Circuit granted 3M's petition for an expedited appeal in October 2022.⁹

3. *In re LTL Mgmt., LLC*, 58 F.4th 738 (3d Cir. 2023).

4. *See In re LTL Mgmt., LLC*, No. 22-2003 (3d Cir. Feb. 13, 2023); Vince Sullivan, *J&J Talc Unit Seeks 3rd Circ. Rehearing on Ch. 11 Dismissal*, LAW360, Feb. 15, 2023.

5. Informational Brief of Aearo Technologies LLC at 5–6, 20, *In re Aearo Techs. LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022) (No. 22-02890).

6. Alison Frankel, *Bankruptcy as MDL Escape Hatch? Not so Fast, Judge Tells 3M in "Surprise" Decision*, REUTERS (Aug. 29, 2022), <https://www.reuters.com/legal/litigation/bankruptcy-mdl-escape-hatch-not-so-fast-judge-tells-3m-surprise-decision-2022-08-29/>.

7. Opinion and Order at 2, *In re Aearo Techs. LLC*, 642 B.R. 891 (Bankr. S.D. Ind. Aug. 26, 2022) (No. 22-50059). Judge Kaplan in *In re LTL Mgmt. LLC* approved Johnson & Johnson's two-step maneuver where Judge Graham rejected 3M's similar maneuver. *See In re LTL Mgmt. LLC*, 638 B.R. 291 (Bankr. D.N.J. Feb. 22, 2022).

8. Notice of Appeal, *In re Aearo Techs. LLC*, 642 B.R. 891 (Bankr. S.D. Ind. Aug. 29, 2022) (No.22-50059).

9. In that same month, the United States Court of Appeals for the Eleventh Circuit granted 3M's request to temporarily stay an August 16, 2022 order from Florida District Court Judge Casey Rogers, prohibiting 3M from challenging her earlier MDL rulings in U.S. Bankruptcy Court. *See In re 3M Combat Arms Earplug Prods. Liab. Litig.*, No. 22-12796 (11th Cir. Oct. 12, 2022).

The Two-Step Bankruptcy maneuvers at the center of Johnson & Johnson and 3M will continue to be litigated across various courts in the coming months, and likely years. One would expect nothing less when with cases involving attempted escape by two of the most high-profile and highly solvent corporate defendants from two of the largest mass tort MDLs in history—into the mandatory claims resolution processes of bankruptcy. At the time this Symposium piece was written, the state of play of Johnson & Johnson’s gamble before the Third Circuit was still uncertain. Despite Johnson & Johnson’s recent loss in the Third Circuit, the analysis offered herein is not confined to the outcome of that litigation—neither revised maneuvers and variations nor corporate attacks on the MDL process are likely to disappear. As Johnson & Johnson’s appeal presages, corporate defendants have shown keen interest in escaping MDL and gaining easy access to binding structures for mass-tort claims resolution. Hence, this Article is not confined to a particular litigation outcome or to one particular legal state of affairs. The far-reaching analysis in this Article draws from particular cases, but it is not thereby reducible to them.

Whatever their litigation outcomes, then, these Two-Step cases portend a sea change in the world of mass torts. This Article sketches the development, manifestation, and possible future mutations of this phenomenon in order to propose that these Two-Step maneuvers do not simply raise concerns under “good” and “bad faith” conceptions of bankruptcy. Rather, and despite appearances, these “new” “bankruptcy” maneuvers raise “old” due process concerns that fall squarely within the province of complex litigation doctrine and theory. This Article both descriptively situates and normatively reframes the “new” bankruptcy-as-MDL-escape phenomenon as one grounded in and affected by foundational concerns and due process principles in mass-tort aggregate litigation.

Mass torts have long created some of the most difficult regulatory challenges in the United States.¹⁰ Every mass tort is unique, and each uniquely challenging. Because of this, a host of devices exist and have been deployed to manage and resolve complex mass torts. And while this is generally a good thing, cunning and clever litigants seek to use and mold these devices to their clients’ strategic advantage. This has led to a trend of one particular mechanism dominating the mass-tort landscape for a period of time until one side grows dissatisfied, at which point the system will pivot to another: the pendulum swings

10. See generally RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT* (Univ. Chi. Press 2007).

from one mechanism to the next. Indeed, the Two-Step Mass-Tort Bankruptcies represent the latest, and perhaps most dramatic, effort to force the pendulum of mass-tort resolution to swing in a different direction.

Part I of this Article begins by situating mass-tort history as a history of pendulum swings between procedural mechanisms for resolving them. Part I briefly traces the history following the promulgation of the 1966 amendments to Federal Rule of Civil Procedure 23 through the late 1990s, when the class action device was the dominant mechanism for resolving mass torts.¹¹ As Part I goes on to explain, though, after an accumulation of defense-side victories as part of a larger (and largely successful) campaign to retrench the class action device, the pendulum swung away from the class action as a mechanism for resolving mass torts, and towards the more flexible MDL device. And in the last two decades, MDL, along with the oft-concomitant bellwether trial model for which defense-side interests lobbied, became the dominant mass-tort resolution mechanism.¹²

As Part II traces, however, the mass-tort pendulum is now swinging away from MDL and towards bankruptcy. Of course, bankruptcy is not new in the world of mass torts. Large mass torts can generate large liability. Should liability grow too large, some defendants may be looking at the prospect of reorganization in bankruptcy to preserve assets for future claims. Although bankruptcy is not new in the world of mass torts, defense interests today are deploying bankruptcy in ways that bear little resemblance to its historical origins. Historically, then, reorganization in bankruptcy has been used to ensure equitable treatment among claimants against an “honest but unfortunate debtor,” who is given a chance to emerge from reorganization with a “fresh start.”¹³ Defendants’ use of bankruptcy to resolve mass torts evolved slightly from there: perfectly solvent defendants, who were not “unfortunate debtor[s]” sought to obtain the benefits of bankruptcy without any of its burdens. In these instances, a non-debtor third party would latch itself onto the named debtor’s bankruptcy filing—which, in turn, released the non-debtor from liability under the channeling injunctions featured in the named debtor’s filing. This ex-

11. See generally Richard Marcus, *Bending in the Breeze: American Class Actions in the Twenty-First Century*, 65 DEPAUL L. REV. 497 (2016).

12. See generally David L. Noll, *MDL as Public Administration*, 118 MICH. L. REV. 403 (2019).

13. See, e.g., *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007) (“The principal purpose of the Bankruptcy Code is to grant a ‘fresh start’ to the ‘honest but unfortunate debtor.’”) (quoting *Grogan v. Garner*, 498 U.S. 279, 286–87 (1991)).

panded the use of bankruptcy, but still, there existed some legitimate debtor.

As Part II subsequently explicates, highly solvent defendants today are deploying “new” strategies to resolve mass-tort claims through mandatory bankruptcy proceedings. Excoriating “MDL Hell” as little more than one “big, slowly accruing transaction cost,”¹⁴ large and highly-solvent defendants are engaging in complex corporate maneuvering to get out of mass-tort MDL, unilaterally move all claimants into mandatory bankruptcy proceedings against spun-off or subsidiary entities with no direct access to the defendant’s assets, and to resolve all claims by way of a mandatory global deal. Should these maneuvers succeed, the giant pendulum swings out of MDL, and bankruptcy would be felt far and wide. As such, these maneuvers deserve careful study.

Part III provides two case studies of the two most high-profile “Two-Step” bankruptcies. First, it offers a detailed case study of Johnson & Johnson’s “Texas Two-Step” to resolve talc claims. Johnson & Johnson is not the first to attempt to escape MDL and force mass-tort claims into bankruptcy, but it is certainly one of the most high-profile examples of these “Two-Step” bankruptcies in particular and of broad-sweeping procedural warfare campaigns in general. Accordingly, Part III also provides a (briefer) case study of 3M’s Two-Step maneuvers. These Two-Step maneuvers have been roundly criticized, particularly on the grounds that they constitute a “bad faith” use of bankruptcy, which defendants like Johnson & Johnson and 3M dispute.

Finally, Part IV takes a crucial step back. Obscured from view by these equitable questions of “bad faith” bankruptcy and the complex procedural maneuvering involved in corporate attempts at escape from MDL, however, are fundamental questions of mass-tort due process. Part IV thus takes this broader view and situates these “new” “Two-Step” bankruptcy maneuvers within the larger mass-tort context in which they operate and seek to fundamentally alter. At bottom, bankruptcy in the context of mass-tort claim resolution is aimed at achieving the same fundamental goal as any other resolution mechanism: A fair, efficient, and equitable resolution of the underlying mass-tort disputes. The resolution of mass-tort claims often takes the form of a final “global arrangement” or “global deal.” This has long

14. Andrew D. Bradt et al., *Dissonance and Distress in Bankruptcy and Mass Torts*, 91 *FORDHAM L. REV.* 309, 315 (2022).

been true not just as a descriptive matter,¹⁵ but as a normative matter as well. Rigid and purist anti-settlement arguments aside,¹⁶ achieving finality or global peace by way of settlements or other arrangements is a long-standing and central aim in complex litigation and mass torts.¹⁷ Part IV concludes by outlining these criticisms, and notes that, while these Two-Step bankruptcies no doubt raise difficult questions as a matter of bankruptcy law and doctrine, these questions do not capture fully some of the fundamental problems these “new” bankruptcies raise as a matter of long-standing, or “old,” conceptions of mass-tort due process.

I. A HISTORY OF PENDULUM SWINGS IN MASS-TORT RESOLUTION: FROM CLASS ACTIONS TO MDL

The regulatory apparatus in the United States relies on *ex post* enforcement. The objective is to “impos[e] consequences on those who violate substantive law *after* the resulting harms have occurred.”¹⁸ Such enforcement is spearheaded by a diffuse set of private regulators, and often through litigation. Achieving effective *ex post* regulation through private enforcement requires three facets. First, the existence of a legal right for which redress may be sought.¹⁹ Second, private individuals, usually as litigants, to assert those rights—which the Supreme Court has characterized as subject to the protections of the Due Process Clause.²⁰ And third, mechanisms through which those rights can be effectuated.

15. See generally, e.g., Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1574 (2004); J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U. L. REV. 1713 (2012); NAGAREDA, *supra* note 10, at 7, 53 (describing settlement as the “dominant trend” and “real endgame” in mass tort litigation).

16. See generally and compare Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984), with Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 FORDHAM L. REV. 1177 (2009) (critiquing Fiss).

17. See, e.g., *Colella v. Univ. of Pittsburgh*, 569 F. Supp. 2d 525, 530 (W.D. Pa. 2008) (“The strong public policy and high judicial favor for negotiated settlements of litigation is particularly keen ‘in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation.’”).

18. J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1145 (2012).

19. See JOHN C.P. GOLDBERG & BENJAMIN ZIPURSKY, *RECOGNIZING WRONGS* 37–38 (Harv. Univ. Press 2020); see generally ROBIN L. WEST, *CIVIL RIGHTS: RETHINKING THEIR NATURAL FOUNDATION* (Cambridge Univ. Press 2019) (describing various legal rights for which individuals may seek remedy).

20. NAGAREDA, *supra* note 10, at 58 (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807 (1985); *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950)).

Traditional tort litigation is a classic example of *ex post* regulation through private enforcement. In traditional tort litigation, when an individual is injured, the law empowers them to bring suit against those responsible for their injuries. In addition to gaining redress for the victims, these suits also create a deterrent effect that discourages the wrongful conduct that caused the injuries.²¹ Mass torts, where tortious misconduct affects large numbers of broadly dispersed persons, have long been regulated through private enforcement.

Mass torts have created some of the biggest regulatory challenges in the United States—especially for the judiciary, which has been tasked with resolving them.²² Issues like numerosity, geographic dispersion, temporal dispersion, causal dispersion,²³ and heterogeneity among claimants (despite common questions and issues vis-à-vis defendants' conduct)²⁴ can and do put pressure on any procedural system. Judicial procedural systems, in general, were imagined for a more bilateral world than the one of mass torts.²⁵ As such, achieving global resolution of claims and other goals of our civil justice system in mass torts remains difficult.

Given the diffuse nature of mass torts, claims are often aggregated to effectuate regulatory aims. Accordingly, mass torts have long called for a variety of aggregate procedural mechanisms and tools. In the last five-and-a-half decades, lawmakers, the Rules Advisory Committee to the Federal Rules of Civil Procedure, civil justice commenters, judges, and other practitioners have worked to develop and refine a set of tools and mechanisms for resolving mass torts. Across hundreds of thousands of claims, a host of devices—including class actions under Federal Rule of Civil Procedure 23, MDL consolidations under 28 U.S.C. § 1407, state MDL-type consolidations, reorganizations in bankruptcy, and multifarious combinations thereof—have been deployed to manage and resolve complex mass torts.

These mechanisms vary in several ways. For instance, and to greater and lesser degrees, they differ as a matter of precise procedural structures (and strictures), availability of procedural opportunities (and re-

21. *Id.* at 6–7.

22. *See, e.g., id.*; SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* (2010); Glover, *supra* note 18.

23. *See generally* NAGAREDA, *supra* note 10; JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* (Nw. Univ. Press 1995).

24. *See generally* NAGAREDA, *supra* note 10; *see also* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (A.L.I. 2010) (discussing the tendency in mass torts toward some level of claimant heterogeneity).

25. *See, e.g.,* NAGAREDA, *supra* note 10, at xiii; J. Maria Glover, *Mass Arbitration*, 74 *STAN. L. REV.* 1283 (2022); Issacharoff & Witt, *supra* note 15.

strictions), and level of procedural flexibility (and rigidity). They also differ in that some of them, like the class action and MDL device, operate within the procedural and doctrinal frameworks of Article III courts, whereas bankruptcy operates within Article I courts.

Having an array of different tools for resolving mass torts at one's disposal is generally a good thing. Different cases will call for procedural mechanisms, or different combinations of mechanisms, to resolve efficiently, fairly, and equitably. Selecting the appropriate mechanism will—or at least should—depend on the exigencies of the particular mass-tort case. Litigants will often seek to harness those differences, even the most granular distinctions, for strategic advantage.²⁶ This is particularly true in the world of mass torts, where the economic and regulatory stakes are high.

A litigant's potential to achieve broad-sweeping, long-term strategic advantage not just within a single mass tort, but across the mass-tort landscape is well understood by repeat-player plaintiff- and defense-side interests. Thus, while any one mass-tort mechanism may occupy a dominant position in the mass-tort landscape for some period of time, one side or another—often defendants—will grow dissatisfied with its perceived disadvantages. Small-scale procedural warfare tactics to recalibrate the disfavored mechanism in their favor may grow into larger campaigns to eliminate the device altogether or to abandon it wholesale for a separate mechanism that defendants believe strategically advantages them. Of course, the latter is not usually said aloud; after all, defense-side interests are particularly adept at arguing that it is in fact plaintiffs who are not receiving equitable treatment by way of the dominant mechanism.

Against this backdrop, the overall history of mass-tort mechanisms is not so much an arc bending in one general direction as it is a series of pendulum swings from one dominant mechanism to another in response to procedural warfare. Momentum for these pendulum swings tends to gather as either plaintiffs-side or defense-side interests accumulate various procedural victories (or defeats). Section A begins by tracing briefly that, following the promulgation of the 1966 amendments to Federal Rule of Civil Procedure 23, which created the modern class action, class actions became the dominant mechanism for resolving mass torts.²⁷ After an accumulation of defense-side victories

26. See generally J. Maria Glover, *A Regulatory Theory of Legal Claims*, 70 VAND. L. REV. 221 (2017) (discussing the theoretically incoherent uses of individualistic and collectivist conceptions of claiming by plaintiffs- and defense-side interests for strategic gain). See also generally Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181 (2004).

27. Marcus, *supra* note 11, at 499–500.

as part of a larger (and largely successful) campaign to retrench the class action device, the pendulum swung away from the class action as a mechanism for resolving mass torts, and towards the more flexible MDL device. Section B traces how, in the last two decades, MDL, along with the oft-concomitant bellwether trial model for which defense-side interests lobbied, became the dominant mass tort resolution mechanism.²⁸

A. *The Rise and Fall of Class Actions in Mass Torts*

The 1966 amendments to Federal Rule of Civil Procedure 23 have been described as the “‘big bang’ of modern class-action litigation.”²⁹ It was widely “believed that the class action device [as modified] was a salutary tool for the administration of justice.”³⁰ Not only were class actions used “to enable injunction suits to enforce civil rights,” as the Rule’s drafters described one of the Rule’s key purposes, attorneys in the years following 1966 began to include claims for monetary relief in class actions, and throughout the 1970s, courts began certifying mass tort cases as class actions “in increasing number.”³¹

At first, “courts were reluctant . . . to permit the certification of sprawling class actions, especially in the mass torts area.”³² As class actions progressed in the 1970s and 1980s, however, courts became more and more receptive to the use of class actions—including, and perhaps especially—for resolving complex mass tort claims.³³ As dockets swelled, courts turned to class actions to resolve various mass tort claims, such as those related to asbestos injuries³⁴ and Agent Orange exposure.³⁵

Widespread use of the class action to resolve mass tort claims occurred despite the fact that the Rule’s drafters did not actually intend for Rule 23 to be used principally for mass-tort litigation.³⁶ Indeed, the Advisory Committee “tried to guard against that” by noting that,

28. See generally Noll, *supra* note 12.

29. Marcus, *supra* note 11, at 500.

30. Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 732 (2013).

31. Marcus, *supra* note 11, at 499–502 (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997)).

32. Issacharoff & Klonoff, *supra* note 16, at 736.

33. Marcus, *supra* note 11, at 499–500 (describing the brief “golden age” of mass-tort class actions).

34. See, e.g., *In re Sch. Asbestos Litig.*, 789 F.2d 996 (3d Cir. 1986), *cert. denied*, 479 U.S. 852 (1986); *Jenkins v. Raymark Indus.*, 782 F.2d 468 (5th Cir. 1986) (review granted under 28 U.S.C. § 1292(b)).

35. See generally *In re Agent Orange Prods. Liab. Litig.*, MDL No. 381 (E.D.N.Y. 1979).

36. Andrew D. Bradt, “A Radical Proposal”: *The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831, 867 n.229 (2017).

due to heterogeneity among mass tort claimants, “individual issues would usually predominate” over common issues—making use of the device thus inappropriate.³⁷ The Committee ultimately advised against allowing class certification under Rule 23(b)(3) for large mass torts.³⁸

The class action device, however, provided a much-needed procedural solution to ever-growing docket congestion problems driven by mass tort claim filings. By the mid-1980s, courts “[r]esponding to dockets clogged with mass torts cases . . . became far more receptive to approving major class actions.”³⁹ Litigants brought mass tort claims stemming from asbestos, Agent Orange, tobacco, and medical devices as class actions, ultimately “result[ing] in numerous multi-million dollar and billion dollar settlements.”⁴⁰ By the 1990s, the class action device had become the dominant mechanism for mass-tort claim resolution.⁴¹

During the same time period, however, judicial attitudes toward the class action began to shift. This change has been attributed in part to “isolated—but highly publicized—instances of [class action] abuse.”⁴² But it also arose from a broad, strategic campaign “by the defense bar, the U.S. Chamber of Commerce, multiple Republican presidential administrations, and various defense-side interest groups” to cut back or even eliminate class actions.⁴³ The campaign to retrench the class action tool was waged on all fronts—in the press, before Congress, within the Executive using the judicial appointment process, and in the courts. And it was highly successful.

Defendants then secured a series of litigation victories, including decisions that required plaintiffs to pay for notice to absent class members, imposed stricter damages requirements on state law claims,⁴⁴ and injected considerations of class certification’s effect on

37. Marcus, *supra* note 11, at 502.

38. *Id.*; *see also* Bradt, *supra* note 36, at 867 (“Rules Committee member John Frank sought to delete proposed Rule 23(b)(3) entirely on the ground that a rule facilitating such ‘mass accident’ class actions would open the door to serious due process abuses for absent plaintiffs represented by unscrupulous lawyers.”)

39. Klonoff, *supra* note 30, at 736.

40. *Id.* at 736–38.

41. Marcus, *supra* note 11, at 504.

42. Klonoff, *supra* note 30, at 732.

43. *See, e.g.*, Glover, *supra* note 25, at 1289; STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION 25–62 (2017).

44. Marcus, *supra* note 11, at 503.

defendants' pressure to settle into the Rule 23 analysis.⁴⁵ Rule 23(f), approved in 1998, provided for interlocutory review for the class certification decision, and was deemed the make-or-break moment in litigation for its tendency to press defendants to settle or plaintiffs to drop their case. And in 2005, Congress passed the Class Action Fairness Act (CAFA), which more easily permitted class-action defendants to remove class cases from state to federal courts.⁴⁶ Defendants also successfully eliminated access to the class-action device by way of class-action prohibitions in private arbitration agreements for employees and consumers.⁴⁷

The dominance of the class-action device for mass torts was brought to a halt in 1997 and 1999 by way of two watershed decisions by the Supreme Court. In *Amchem v. Windsor* and *Ortiz v. Fibreboard*, both involving asbestos-related personal injury claims, the Supreme Court made it much harder to achieve global resolution of mass-tort claims with Rule 23 class certification. Together, *Amchem* and *Ortiz*, put a stop—or at least a very pregnant pause—to the certification of mass-tort claims as class actions,⁴⁸ and “created a vacuum for aggregate mass-tort litigation.”⁴⁹

Nature abhors a vacuum. Restricting the then-dominant resolution mechanism did not eliminate mass harm or claims from those injured by it. A new mechanism was needed. As it turned out, the MDL statute⁵⁰ was “[h]iding in plain sight.”⁵¹ Starting in the early aughts, MDL emerged as the dominant mode for resolving mass torts since the early aughts,⁵² as the next sub-section traces.

45. See generally *Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995) (Posner, J.).

46. Klonoff, *supra* note 30, at 739–40, 743–44.

47. See, e.g., Klonoff, *supra* note 30, at 815–16; J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3060–61 (2015); Brian T. Fitzpatrick, *The End of Class Actions?*, 57 ARIZ. L. REV. 161, 164–65 (2015); Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of “AT&T Mobility v. Concepcion,”* 79 U. CHI. L. REV. 623, 645–46 (2012); Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2808 (2015).

48. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997); *Ortiz v. Fibreboard Corp.* 527 U.S. 815, 821 (1999).

49. Bradt, *supra* note 36, at 845.

50. 28 U.S.C. § 1407.

51. Bradt, *supra* note 36, at 845.

52. See *Ortiz*, 527 U.S. at 840. Class actions have enjoyed a small resurgence in the world of mass torts in recent years, see, e.g., Deepwater Horizon Econ. & Prop. Damages Settlement Agreement, as amended on May 2, 2012, *In re BP/Deep Horizon Oil Spill Class Litig. & Settlement*, MDL No. 02179 (E.D. La. May 3, 2012); Class Action Settlement Agreement, *In re Nat. Football League (NFL) Players' Concussion Injury Litig.*, MDL No. 2323 (E.D. Pa. June 25, 2014); see also Robert H. Klonoff, *Class Actions Part II: A Respite from the Decline*, 92 N.Y.U.

B. Multi-District Litigation (MDL) Emerges as the Dominant Mechanism for Mass Torts

In the early aughts, MDL emerged as the principal mechanism for resolving mass-tort claims in the wake of the decisions in *Amchem* and *Ortiz* (coupled with the defense bar's actions to thwart the class action more generally, as detailed above),⁵³ MDL emerged as the principal mechanism for resolving mass-tort claims.⁵⁴ While federal MDL consolidation has long served as the principal procedural mechanism for coordinating and resolving products liability mass tort cases, state courts also routinely coordinate and resolve mass-tort claims.⁵⁵

In 2014, the Duke Law Center for Judicial Studies reported that 36% of all cases in federal court were part of a pending MDL. The vast majority of those cases involved mass torts, including product liability or defective drug cases.⁵⁶ Duke Law's updated study found that, in 2017, 42% of pending civil cases in federal court were comprised of MDLs, and of "the MDLs pending in August 2018, 90% of them were consolidated," most of which involved products liability mass-tort claims.⁵⁷ In 2019 alone, nearly 14,000 cases were resolved in MDL.⁵⁸

L. REV. 971, 974 (2017), but by no stretch do class actions dominate the mass-tort regulatory landscape.

53. See *supra* Part I.A.

54. See, e.g., Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendants' Terms: Bristol-Myers Squibb and the Federalization of Mass-Tort Litigation*, 59 B.C. L. REV. 1251, 1261 n.40 (2018) (citing William B. Rubenstein, *Procedure and Society: An Essay for Steve Yeazell*, 61 UCLA L. REV. DISC. 136, 144 n.40 ("In the wake of *Amchem* and *Ortiz* . . . MDLs have become the form for resolution of mass tort matters.")); Margaret S. Thomas, *Morphing Case Boundaries in Multidistrict Litigation Settlements*, 63 EMORY L.J. 1339, 1346–47 (2014) ("As reliance on Rule 23 has diminished, MDL has ascended as the most important federal procedural device to aggregate (and settle) mass torts."); Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After Ortiz*, 58 U. KAN. L. REV. 775, 798 (2010) (tracing the "massive increase in MDL aggregate litigation" that occurred from 2004–2008).

55. See, e.g., *Beeman v. Shell Oil Co.*, No. 93-047363 (Tex. Dist. Ct. Harris Cnty. Feb. 16, 1995); *Wright v. Malt-o-Meal Co.*, No. PI 98-8931 (Minn. 1999); *Ranitidine Prods. Cases*, JCCP No. 5150 (Sup. Ct. Alameda Cnty.); *Abilify Prods. Cases*, JCCP No. 4998 (Sup. Ct. S.F. Cnty.); *Zoltavax Prods. Cases*, JCCP No. 4962 (L.A. Cnty.); *Union Carbide v. Adams*, 166 S.W.3d 1 (Tex. Jud. Panel Multidistrict Litig. 2003); *In re Tasigna Prods. Liab. Litig.*, Case No. 6345 (Law Div. Bergen Cnty., N.J.); *In re Taxotere Litig.*, Doc. No. MID L 4998-18 (Middlesex Cnty., N.J.).

56. DUKE LAW CENTER FOR JUDICIAL STUDIES, STANDARDS AND BEST PRACTICES FOR LARGE AND MASS-TORT MDLs xi (2014) (available at https://judicialstudies.duke.edu/sites/default/files/centers/judicialstudies/standards_and_best_practices_for_large_and_mass-tort_mdls.pdf).

57. BOLCH JUDICIAL INSTITUTE, GUIDELINES AND BEST PRACTICES FOR LARGE AND MASS TORT MDLs vii (2d ed. 2018) (available at <https://scholarship.law.duke.edu/bolch/5/>).

58. UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, MULTIDISTRICT LITIGATION TERMINATED THROUGH SEPTEMBER 30, 2019 (available at https://www.jpml.uscourts.gov/sites/jpml/files/JPML_Cumulative_Terminated_Litigations-FY-2019.pdf).

Authority to resolve these claims in MDL comes from federal statute: 28 U.S.C. § 1407.

The MDL statute provides “for coordinated and consolidated pre-trial proceedings” for “civil actions involving one or more common questions of fact.”⁵⁹ To effectuate the statutory mandate, the Judicial Panel on Multidistrict Litigation (JPML), a panel of seven federal judges appointed by the Chief Justice of the United States Supreme Court, may, on its own motion or motion of any party, transfer “such action[] . . . to any district” court.⁶⁰ The MDL statute also mandates that, at the conclusion of pretrial proceedings, the cases be remanded to the districts from which they were transferred.⁶¹ It is this feature of the MDL statute that gives it the flexibility to deal with many of the due process challenges that plagued class certification of mass-tort claims in the 1990s and early 2000s, particularly involving asbestos-related injuries. And that was by design.

The primary objective of the MDL statute was to provide a mechanism for addressing complex mass cases, particularly those relating to mass tort products liability.⁶² Historical accounts of the MDL statute reveal that its origins lie in what was, in the 1950s, an unprecedented challenge for the federal courts, namely the massive (and massively complex) antitrust litigation involving the electrical-equipment industry.⁶³ It was in this booming category of litigation that judges first began to play an active role in negotiations between the parties and to hold hearings to approve the fairness of the settlement⁶⁴—even though nothing required them to do so. This set the stage for how complex mass settlements would be supervised by judges in many MDLs to come. Indeed, by the time the electrical-equipment cases were resolved, “other judges had begun to come to the Committee for advice and aid.”⁶⁵ On the heels of this success, what is now the MDL

(noting that 13,474 cases were “remanded” back to their original district courts in 2019, thus terminating the MDL).

59. 28 U.S.C. § 1407(a).

60. *Id.* § 1407(d).

61. *Id.* § 1407(a). *See also* Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35 (1998).

62. *See* Bradt, *supra* note 14, at 312.

63. *See, e.g.*, Stephen B. Burbank, *Procedure and Power*, 46 J. LEGAL EDUC. 513, 515 (1996) (discussing “[t]he crisis emerging from the electrical equipment antitrust cases”).

64. *See* Bradt, *supra* note 36, at 859; *see also* CHARLES A. BANE, *THE ELECTRICAL EQUIPMENT CONSPIRACIES: THE TREBLE DAMAGES ACTIONS* 259, 261 (1973) (the “settlements were made subject to court approval” notwithstanding the fact that “[s]uch approvals were not required by federal rules in any of the cases”).

65. Bradt, *supra* note 36, at 862 n.198.

statute was approved by the Judicial Conference in 1964 and enacted by Congress in 1968.

MDL is now widely viewed by prominent players—such as judges and practitioners—as a “remarkably effective” vehicle for resolving mass tort claims,⁶⁶ in part because of its ability to deal more flexibly with the due process concerns that arise with mass torts than the class action—which, recall, was never intended to resolve mass torts in the first place. In fact, the Civil Rules Advisory Committee that promulgated Rule 23 referenced the then-ongoing MDL statute drafting process, pointing out that, “[c]urrently the Coordinating Committee on Multiple Litigation,” (which was in the process of developing what would become the MDL statute), “is charged with developing methods for expediting such massive litigation.”⁶⁷ Along these lines, in their memoranda to the Civil Rules Advisory Committee, Professors Benjamin Kaplan and Albert Sacks of Harvard Law School had noted that “multidistrict litigation,” more so than class certifications, would be necessary . . . [for] widespread tort cases.”⁶⁸

On this score, MDL harnesses the efficiencies of consolidation of cases into a unitary package before a single judge through temporary coordination while *also* preserving the individual character of the cases destined for remand,⁶⁹ whereas a class action cannot. Under the MDL statute, “all of the involved parties in a single proceeding [can be gathered] before a judge who can flexibly guide the case to a resolution.”⁷⁰ Transferee judges then have the flexibility to tailor the structure of the litigation to the particular exigencies of the consolidated cases, including by way of strategic uses of coordination *and* decentralization to bring about resolution of claims.⁷¹

66. See, e.g., Andrew D. Bradt, *Something Less and Something More: MDL's Roots as a Class Action Alternative*, 165 U. PA. L. REV. 1711, 1718–19 (2017).

67. Fed. R. Civ. P. 23 advisory committee's notes on the 1966 Amendments.

68. Bradt, *supra* note 66, at 1728 (first quoting Coordinating Comm. For Multiple Litigation, Bulletin No. 20, to the Judges Before Whom Electrical Equipment Antitrust Cases are Pending (Nov. 27, 1963) (reporting the judges who had met with Professors Kaplan and Sacks, and that “[t]he consensus was that the proposed rule change would be most beneficial for resolving . . . ambiguities of class actions, but that a general solution of the problems posed by multiple litigation w[ould] require more comprehensive treatment.”); then quoting Memorandum to the Chairman and Members of the Advisory Committee on Civil Rules 5 (Dec. 2, 1963)).

69. See 28 U.S.C. § 1407(a).

70. Bradt, *supra* note 66, at 1718 (citing Deborah R. Hensler, *The Role of Multi-Districting in Mass Tort Litigation: An Empirical Investigation*, 31 SETON HALL L. REV. 883, 903 (2001) (“When the JPML granted a multi-districting motion, a case was much more likely to reach a collective resolution than when the motion was denied.”).

71. See generally, e.g., D. Theodore Rave & Francis E. McGovern, *A Hub-and-Spoke Model of Multidistrict Litigation*, 84 LAW & CONTEMP. PROBS. 21 (2021); Francis E. McGovern, *Judicial Centralization and Devolution in Mass Torts*, 95 MICH. L. REV. 2077, 2088 (1997) (discussing

Judge Pointer's handling of the cases in *In re Silicone Gel Breast Implant Products Liability Litigation* in the 1990s provides one clear illustration of how strategic decentralization and "bellwether" cases can effectively speed tort maturation and resolution. As commentators have traced, *In re Silicone Gel Breast Implants* was a particularly complex and challenging "mega mass tort": It involved several manufacturers, dozens of products marketed over an extended period, present claimants, and future claimants. Further, defendants had different involvement with the development of silicone breast implants and had different financial situations.⁷² Judge Pointer responded to the complex exigencies of the litigation by way of strategic disaggregation, and more specifically, by way of remanding "test-case" groups of cases back to their transferor courts.

Judge Pointer remanded one particular group back to the District of Oregon, where the district judge, Judge Jones, appointed a panel of scientific advisors to help him evaluate the parties' scientific evidence. Relying upon the advice of that panel, Judge Jones excluded the plaintiffs' causation evidence and entered summary judgment on the more than seventy cases in that test-case group.⁷³ Through the bellwether cases resolved by Judge Jones, Judge Pointer and the entire litigation benefited from the ability of the MDL mechanism to draw upon strategic disaggregation.

Judge Pointer's test-case strategy in *In re Silicone Gel Breast Implants Products Liability Litigation*); Brian T. Fitzpatrick, *Many Minds, Many MDL Judges*, 84 LAW & CONTEMP. PROBS. 107, 107 (2021) (contending that "decentralization" is "good for the legal decisionmaking that takes place in MDLs."); Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 WIDENER L.J. 97 (2013); Sam C. Pointer, Jr., *Reflections by a Federal Judge: A Comment on Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute*, 73 TEX. L. REV. 1569 (1995). For example, some MDL judges have made strategic use of disaggregation and decentralization to speed tort maturation by way of "test" or "bellwether" trials in other judicial fora. These trials can be used for a variety of purposes, including to test the merits of issues like causation and damages and to investigate the strength of key evidence. See generally, e.g., *In re Vioxx Prods. Liab. Litig.*, 760 F.Supp.2d 640, 644 (E.D. La. 2010); *In re Propulsid Prod. Liab. Litig.*, 208 F.R.D. 133 (E.D. La. 2002); *In re Welding Fume Prods. Liab. Litig.*, 2010 WL 7699456 (N.D. Ohio 2010); *In re C.R. Bard, Inc. Pelvic Repair Sys. Prods. Liab. Litig.*, 810 F.3d 913 (4th Cir. 2016); see also generally Rave & McGovern, *supra*, at 22 (describing the MDL transferee court as the "hub," during which the transferee "judge will identify sensible groupings of parties and claims for strategic disaggregation as test cases.").

72. Rave & McGovern, *supra* note 71, at 29; McGovern, *supra* note 71, at 2088 (discussing Judge Pointer's test-case strategy in *In re Silicone Gel Breast Implants Products Liability Litigation*).

73. See generally *Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387 (D. Or. 1996).

This “bellwether trial” model has been used in an array of mass tort MDLs.⁷⁴ It involves jury resolution of a handful of select cases to give the parties a sense of how the legal and factual issues play out, on the ground, in the different cases that make up the larger MDL.⁷⁵ MDL transferee judges frequently order bellwether trials of representative cases to be conducted in the MDL court (where permitted) and in other federal courts by way of the remand provision in § 1407.⁷⁶ MDL judges have built decades of experience with the bellwether model, and over time have refined the selection methods for bellwethers to ensure that they are representative of the overall range of cases.⁷⁷

Bellwether trials and consolidated trials are particularly helpful in driving global resolution when the question of defendants’ liability ultimately turns on a single common issue (or single set of common issues).⁷⁸ Judge Carl B. Rubin’s use of a consolidated trial in *In re Richardson-Merrell, Inc., “Bendectin” Products Liability Litigation*⁷⁹ is illustrative. In *Bendectin*, Judge Rubin ordered a consolidated trial to

74. See generally, e.g., *In re Vioxx Prods. Liab. Litig.*, 522 F.Supp.2d 799 (E.D. La. 2007); *In re Fosamax Prods. Liab. Litig.*, 645 F.Supp.2d 164 (S.D.N.Y. 2009); *In re Zimmer Durom Hip Cup Prods. Liab. Litig.*, MDL No. 2158 (D. N.J. 2010); *In re C.R. Bard, Inc., Pelvic Repair Sys. Prods. Liab. Litig.*, 810 F.3d 913 (4th Cir. 2016); *In re DePuy Orthopedics, Inc.*, 870 F.3d 345 (5th Cir. 2017); *Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995); *In re Welding Fume Prods. Liab. Litig.*, MDL No. 1535 (N.D. Ohio 2003); *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, MDL No. 2047 (E.D. La. 2009); *In re Xarelto (Rivaroxaban) Prods. Liab. Litig.*, MDL No. 2592 (E.D. La. 2014); *In re Bard IVC Filters Prods. Liab. Litig.*, MDL No. 2641 (D. Ariz. 2015); *In re Davol Inc./C.R. Bard Inc., Polypropylene Hernia Mesh Prods. Liab. Litig.*, MDL No. 2846 (S.D. Ohio 2018); *In re 3M Combat Arms Earplug Prod. Liab. Litig.*, MDL No. 2885 (M.D. Fla. 2019).

75. See generally Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323 (2008).

76. *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 526 U.S. 26 (1998) (interpreting 28 U.S.C. § 1407 as limiting the authority of the transferee judge to transfer action to itself for trial); *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 155 F. Supp. 2d 1069 (S.D. Ind. 2001) (bringing all claims in front of a single judge by way of a consolidated amended complaint, or master complaint).

77. For instance, judges recognize the potential pitfalls of allowing the parties to choose the test cases. See Fallon, et al., *supra* note 75, at 2363–64; *In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1019 (5th Cir. 1997) (observing that test trials selected by parties were not “bellwether trial[s],” but instead, they are “simply a trial of fifteen (15) of the ‘best’ and fifteen (15) of the ‘worst’ cases contained in the universe of claims involved in [the] litigation.”). Accordingly, judges have moved toward ordering “the parties to select test cases randomly or limit the selection to cases that the parties agree are ‘typical’ of the mix of cases.” FEDERAL JUDICIAL CENTER MANUAL FOR COMPLEX LITIGATION 360 (4th ed. 2004). See also *In re Chevron U.S.A., Inc.*, 109 F.3d at 1019.

78. See, e.g., *In re C.R. Bard, Inc., Pelvic Repair Sys. Prods. Liab. Litig.*, 2019 WL448579 at *7 (S.D. W. Va. Mar. 12, 2019); *In re Exxon Valdez*, 270 F.3d 1215 (9th Cir. 2001); *Watson v. Shell Oil Co.*, 979 F.2d 1014, 1017–20 (5th Cir. 1992), *reh’g granted*, 990 F.2d 805 (5th Cir. 1993), *other reh’g*, 53 F.3d 663 (5th Cir. 1994).

79. *In re Richardson-Merrell, Inc., “Bendectin” Prods. Liab. Litig.*, MDL No. 486 (S.D. Ohio 1981).

test the merits of plaintiffs' claims, particularly with regard to the issue of causation. Throughout the litigation, defendants maintained that Bendectin was safe.⁸⁰ The jury in the consolidated trial in *Bendectin* agreed, concluding that plaintiffs had not, in fact, established that the use of the anti-nausea medication Bendectin during pregnancy was a proximate cause of birth defects. Following that ruling, "the litigation dwindled away" as "plaintiffs' lawyers concluded that the cases were unwinnable."⁸¹

Unencumbered by a single procedural mechanism, a single class settlement, or, in some cases, even a single forum, MDL is able to achieve global resolution of even the thorniest mass torts, by way of a vast array of tools and techniques. Especially over the past two decades, MDL judges have also built vast networks of federal judges, state judges, bankruptcy judges, and extra-judicial officers to aid with the resolution of cases.⁸² Along these lines, MDL judges have coordinated with state judges on discovery, pretrial orders, test trials, and bellwether trials, among others.⁸³ Indeed, coordination with state judges was yet another strategy Judge Pointer deployed in *In re Silicone Gel Breast Implants*; in particular enlisting the help of state judges to assist with the common discovery program and to resolve difficult issues of state law that the federal courts were less-well-equipped to handle.⁸⁴ Learning from Judge Jones' approach, Judge Pointer later appointed a national science panel whose findings in-

80. See generally, e.g., Joseph Sanders, *The Bendectin Litigation: A Case Study in the Life Cycle of Mass Torts*, 43 HASTINGS L.J. 301 (1992).

81. Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 979–80 (1993).

82. See, e.g., FEDERAL JUDICIAL CENTER MANUAL FOR COMPLEX LITIGATION, *supra* note 77, at 442 (noting that "[i]n scheduling *Daubert* proceedings in a dispersed mass tort case, an MDL judge should explore opportunities to coordinate scheduling with state courts handling parallel cases" and that "[f]ederal and state judges have successfully conducted joint *Daubert* hearings"); Alexandra D. Lahav, *Recovering the Social Value of Jurisdictional Redundancy*, 82 TUL. L. REV. 2369, 2387 (2008); Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 642 (1981); *In re Zyprexa Prods. Liab. Litig.*, 2006 WL 898105 at *1 (E.D.N.Y. Apr. 6, 2006).

83. See generally Francis E. McGovern, *Toward a Cooperative Strategy of Federal and State Judges in Mass Tort Litigation*, 148 U. PA. L. REV. 1867, 1889 (2000); FEDERAL JUDICIAL CENTER MANUAL FOR COMPLEX LITIGATION, *supra* note 77, at 232–35 § 20.312; see also, e.g., *Dunlavy v. Takeda Pharm. Am., Inc.*, 2012 WL 3715456 (W.D. La. 2012) (discussing coordination in Actos product liability litigation); *In re Yasmin & YAZ (Drospirenone) Mktg., Sales Prac. & Prod. Liab. Litig.*, MDL No. 2100 (S.D. Ill. 2018); *In re Zyprexa Prods. Liab. Litig.*, 238 F.R.D. 539, 541 (E.D.N.Y. 2006); *In re Air Crash Near Pittsburgh, Pa.* on Sept. 8, 1994, MDL No. 1040 (W.D. Pa. 1994); *In re Abbott Laboratories Omniflox Prods. Liab. Litig.*, MDL No. 1004 (N.D. Ill. 1994).

84. See generally Sam C. Pointer, Jr., *Reflections by a Federal Judge: A Comment on Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute*, 73 TEX. L. REV. 1569 (1995). See also, e.g., Rave & McGovern, *supra* note 71.

formed many of the other cases in the overall litigation.⁸⁵ Many MDL judges appoint scientific and technical experts and advisory panels to help them evaluate scientific or other highly technical evidence.⁸⁶

Global resolution of mass tort cases in MDL has been achieved by way of consolidated trials;⁸⁷ opt-out class settlements under Rule 23(b)(3);⁸⁸ through reorganization plans in bankruptcy for certain insolvent defendants in the MDL, and in coordination with bankruptcy judges;⁸⁹ via contractual settlements pursuant to the aggregate settlement rule;⁹⁰ or through some combination of techniques and arrangements⁹¹ among others.⁹²

85. See, e.g., *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, MDL No. 926 (N.D. Ala. 1992).

86. See generally Howard M. Erichson, *Mass Tort Litigation and Inquisitorial Justice*, 87 GEO. L.J. 983 (1999); *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 318 F.Supp.2d 879 (C.D. Cal. 2004); *In re Joint E. & S. Dists. Asbestos Litig.*, 830 F. Supp. 686, 693 (E. & S.D.N.Y. 1993); *In re A.H. Robins Co., Inc.*, 88 B.R. 742, 746 (E.D. Va. 1988).

87. See, e.g., *In re C.R. Bard, Inc., Pelvic Repair Sys. Prods. Liab. Litig.*, MDL No. 2187, 2018 WL 4220671 at *1–2 (S.D.W. Va. Sept. 5, 2018) (describing the “seven MDLs assigned to [the Court] by the Judicial Panel on Multidistrict Litigation concerning the use of transvaginal surgical mesh . . . [of which] there are more than 16,000 cases currently pending, approximately 1,500 of which are in the Bard MDL”); *In re Exxon Valdez*, 270 F.3d 1215 (9th Cir. 2001); *Watson v. Shell Oil Co.*, 979 F.2d 1014, 1017–20 (5th Cir. 1992), *reh’g granted*, 990 F.2d 805 (5th Cir. 1993), *other reh’g*, 53 F.3d 663 (5th Cir. 1994); *In re Richardson-Merrell, Inc., “Bendectin” Prods. Liab. Litig.*, MDL No. 486 (S.D. Ohio 1981).

88. See, e.g., Order Granting Final Approval of the 2.0-Liter TDI Consumer and Reseller Dealership Class Action Settlement, *In re Volkswagen “Clean Diesel” Mktg., Sales Pracs., & Prods. Liab. Litig.*, MDL No. 2672, 2016 WL 6248426 (N.D. Cal. Oct. 25, 2016); Deepwater Horizon Econ. & Prop. Damages Settlement Agreement, as amended on May 2, 2012, *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex. on Apr. 20, 2010*, MDL No. 2179 (E.D. La. May 3, 2012); Class Action Settlement Agreement, *In re NFL Players’ Concussion Injury Litig.*, MDL No. 2323 (E.D. Pa. June 24, 2014)).

89. See generally *In re A.H. Robins Co., Inc.*, 88 B.R. 742, 746 (E.D. Va. 1988) (describing pre-Chapter 11 filing efforts to resolve outside of bankruptcy); *In re Silicone Gel Breast Implants Prod. Liab. Litig.*, MDL No. 926 (N.D. Ala. 1992); see generally THE NATIONAL JUDICIAL COLLEGE, RESOURCE GUIDE FOR MANAGING COMPLEX LITIGATION (2010); see also, e.g., NAGAREDA, *supra* note 10; J. Maria Glover, *Mass Litigation Governance in the Post- Class Action Era: The Problems and Promise of Non-removable State Actions in Multi-district Litigation*, 5 J. TORT L. 3 (2012).

90. See, e.g., *In re Vioxx Prod. Liab. Litig.*, MDL No. 1657 (E.D. La. 2005); *In re Am. Med. Sys., Inc., Pelvic Repair Sys. Prods. Liab. Litig.*, MDL No. 2325 (S.D. W. Va. 2012).

91. See generally, e.g., *In re Silicone Gel Breast Implants Prod. Liab. Litig.*, 174 F.Supp.2d 1242 (N.D. Ala. 2001) (combination of bankruptcy and individual settlements); see also Rave & McGovern, *supra* note 71, at 24; see also Bradt, *supra* note 66, at 1719 (citing Arthur R. Miller, *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative*, 64 EMORY L.J. 293, 310 (2014) (stating that MDL is quite useful “especially . . . when class certification is unlikely because the litigants in the individual cases can be shepherded toward a global settlement by the transferee judge”).

92. Myriam Gilles & Gary Friedman, *The Issue Class Revolution*, 101 B.U. L. REV. 133, 136–37 (2021) (arguing that *issue classing* from Fed. R. Civ. P. 263(c)(4)—whereby “plaintiff eligibility issues are no longer addressed in the class action . . . are instead addressed in follow-on cases for individual relief,” *i.e.* “a separate action for declaratory relief . . . serves as a prelude

Equipped with the flexibility of the MDL statute, an extensive set of techniques, and decades of experience, MDL has successfully resolved the most complex torts involving some of the country's largest controversies. From the (relatively) simple⁹³ to some of the most complex and difficult public health and regulatory challenges of the twenty-first century.⁹⁴ The types of cases that have been resolved in MDL span the breadth of the mass tort and products liability landscape—from airplane crashes and train derailments to defective earplugs, defective drugs, and defective medical devices—just to name a few.⁹⁵ The adaptiveness of MDL, combined with the vast mass tort experience that judges have built and refined over the course of decades, has even enabled global resolution of cases in the grandfather of all mass torts—*asbestos*.⁹⁶ To be sure, for some time, hundreds of *asbestos* cases in MDL 875 languished in federal court, in no small part because singular global solutions had “proven ineffective.”⁹⁷ After Judge Robreno took over MDL 875 in 2008, however, he strategically deployed a wide range of tools and mechanisms to the move the cases to resolution, which was ultimately achieved (as it had to be) by way of multiple arrangements.

In many senses, the rise of MDL has been hailed as “a success story”—its positive features have made it “the dominant structure of mass-tort litigation.”⁹⁸ If nothing else, it has proven “an exceptionally

to follow-on cases for damages”—should be resuscitated for “class actions” and “mass torts” after “it was waylaid by a pair of influential circuit court decision in the mid-1990s”).

93. See, e.g., *In re Volkswagen “Clean Diesel” Mktg., Sales Pracs., & Prods. Liab. Litig.*, MDL No. 3875 (N.D. Cal. 2015) (MDL involving class members owning a specific type of Volkswagen seeking to recover for similar damages due to vehicle’s misleading “clean diesel” label).

94. See, e.g., *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex.*, on Apr. 20, 2010, MDL No. 02179 (E.D. La. 2010) (providing economic and medical relief to various parties affected by the BP/Deep Horizon oil spill); *In re NFL Players’ Concussion Injury Litig.*, MDL No. 2323 (E.D. Pa. 2012) (MDL featuring claimants who were injured at different times and in different ways with various claims and defenses).

95. See, e.g., *In re 3M Combat Arms Earplug Prod. Liab. Litig.*, MDL No. 2885 (M.D. Fla. 2016); *In re Amtrak Train Derailment in Phila., Pa.* on May 12, 2015, MDL No. 2654 (E.D. Pa. 2015); *In re Yasmin & Yaz (Drospirenone) Mktg., Sales Pracs. & Prods. Liab. Litig.*, 692 F.Supp.2d 1012, 1015 (S.D. Ill. 2010), *aff’d sub nom.*; *Walton v. Bayer Corp.*, 643 F.3d 994 (7th Cir. 2011); *In re Zimmer Nexgen Knee Implant Prods. Liab. Litig.*, 218 F.Supp.3d 700, 703–04 (N.D. Ill. 2016), *aff’d sub nom.* *In re Zimmer, NexGen Knee Implant Prods. Liab. Litig.*, 884 F.3d 746 (7th Cir. 2018); *In re Wright Med. Tech. Inc., Conserve Hip Implant Prods. Liab. Litig.*, 127 F.Supp.3d 1306, 1314 (N.D. Ga. 2015); *In re Air Crash over the S. Indian Ocean* on Mar. 8, 2014, 946 F.3d 607, 610 (D.C. Cir. 2020), *cert. denied sub nom.* *Wood v. Boeing Co.*, 141 S. Ct. 451 (2020).

96. For some time, hundreds of thousands of *asbestos* cases in MDL 875 languished in federal court, in no small part because singular global solutions had proven infeasible. See *In re Asbestos Prods. Liab. Litig.*, MDL No. 875 (E.D. Pa. 1991).

97. Robreno, *supra* note 71, at 126, 157, 168.

98. Bradt, *supra* note 36, at 842.

powerful tool” for resolving the myriad problems of aggregate disputes.⁹⁹ “Plaintiff-side firms have come to appreciate the ability to join forces to achieve parity with well-resourced defendants. Defendants recognize the opportunity to litigate all claims in a single forum where they can both efficiently perform discovery and motion practice and eventually achieve peace, whether through victory on a dispositive motion or through settlement.”¹⁰⁰ Defendants, in particular, often prefer the organized, coordinated, and unitary processes of federal MDL, which are less risky than class certification but offer similar promise of global peace.¹⁰¹

Momentum is building for a pendulum swing away from MDL as a mass-tort resolution mechanism, dominant or otherwise, and towards a mass corporate exodus from MDL and into bankruptcy. In a redux version of essentialist arguments that were once leveled against the class action as mass-tort-resolution mechanism,¹⁰² highly solvent corporate defendants now argue that MDL cannot effectively or fairly resolve mass-tort claims. Thus, they have no choice but to seek refuge from MDL by way of the mandatory claims-resolution process in bankruptcy to handle tort liabilities. Bankruptcy, they contend, should be viewed as the only way forward in difficult mass-tort cases (that is, of course, until they no longer think it should be). The next section explores this shift.

II. THE PENDULUM SWING TO BANKRUPTCY AS CORPORATE ESCAPE HATCH FROM MDL

Bankruptcy has always had a place in the mass-tort universe. Reorganization in bankruptcy has historically served the unique benefit of preserving “unfortunate debtors’” assets for future claimants when liabilities threaten the future solvency of that debtor. Section A briefly charts this history. Section B, however, traces how bankruptcy is being

99. *Id.* at 842.

100. *Id.* at 835–36.

101. Bradt, *supra* note 66, at 1718; Glover, *supra* note 89, at 43 (explaining that defendants so prefer the consolidation of federal MDL that they frequently seek to put an end to parallel state litigation).

102. Mass-tort class actions have been experiencing a bit of a resurgence in recent years, in no small part because judges have developed case-management innovations that are responsive to due process constraints but enable judges and litigants to harness the positive features unique to Rule 23 as to efficiency and finality. *See generally In re Oil Spill by Oil Rig “Deepwater Horizon” in the Gulf of Mex.*, on Apr. 20, 2010, 910 F.Supp.2d 891 (E.D. La. 2012); *In re NFL Players’ Concussion Injury Litig.*, 307 F.R.D. 351 (E.D. Pa. 2015).

unmoored from its historical origins in order to provide a corporate escape hatch from MDL.

A. *A Brief History of Bankruptcy in Mass Torts*

Bankruptcy has a fairly long history in mass torts. As Troy McKenzie has unearthed, it even has a “pre-history.” In July 1944, predating both Chapter 11 Reorganization and the modern bankruptcy code, a catastrophic fire destroyed the Ringling Brothers Circus, leaving 169 people dead and more than 500 people seriously injured. In its wake, plaintiffs filed thousands of suits against Ringling Brothers seeking millions of dollars in damages.¹⁰³ At the time, however, Ringling Brothers’ liquidation value was \$500,000 at best, so the victims’ only realistic source of compensation would be through the circus’s future earnings.¹⁰⁴ However, Connecticut state law provided a remedy of “equity receivership,” which plaintiffs’ attorneys sought unopposed.¹⁰⁵ A receiver was appointed, the plaintiffs allowed the circus’s management to remain in place, and the business resumed operation, generating profits once more.¹⁰⁶ Plaintiffs’ attorneys and Ringling Brothers agreed to a claims resolution process and, within six years, plaintiffs’ damages were paid in full.¹⁰⁷ “The effectiveness of the Ringling Brothers receivership . . . foreshadow[ed] that a Chapter 11 reorganization” made available following the enactment of the Bankruptcy Code in 1978,¹⁰⁸ “could be seen as a natural solution to the problem of resolving mass tort claims.”¹⁰⁹

This so-called “natural” solution of Chapter 11 reorganization in bankruptcy in mass torts was soon put to the test. In the 1970s, Johns-Manville was a Fortune 500 company and the world’s largest manufacturer of asbestos.¹¹⁰ After a breakthrough scientific study linked asbestos exposure to cancer, Johns-Manville was flooded with litigation: In 1976, the number of annual filings was 159; by 1982, it was around 6,000.¹¹¹ In 1982, keenly aware of the threat additional litigation posed to its survival, Johns-Manville Corporation filed for Chapter 11—a

103. Troy A. McKenzie, *The Mass Tort Bankruptcy: A Pre-History*, 5 J. TORT L. 59, 61 (2012).

104. *Id.* at 61–62.

105. *Id.* at 66–67.

106. *Id.* at 67.

107. *Id.* at 68.

108. Arthur L. Moller & David B. Foltz Jr., *Chapter 11 of the 1978 Bankruptcy Code*, 58 N.C. L. REV. 881, 881 (1980) (describing the consolidation of Chapter 11 in the Bankruptcy Code in 1978 as creating a “more expeditious and more equitable business reorganization procedure”).

109. McKenzie, *supra* note 103, at 72.

110. Frank J. Macchiarola, *The Manville Personal Injury Settlement Trust: Lessons for the Future*, 17 CARDOZO L. REV. 583, 591 (1996).

111. *Id.* at 592.

move described as “unusual” because the business was still solvent, with gross revenues over two billion dollars per year.¹¹² The centerpiece of the deal for resolving Manville’s growing asbestos liabilities was “the establishment of a Trust, which was assigned the liability for past and future asbestos . . . claims Asbestos victims were to be treated as creditors of the corporation and file claims with the Trust, while Johns-Manville continued its operations.”¹¹³ Once established, the Manville Trust became a separate juridical entity from Johns-Manville, now the Manville Corporation. Manville then sought a channeling injunction from the bankruptcy court, which—as the name suggests—would be used to “channel” all claims, present and future, against the Johns-Manville Trust—and only the Manville Trust.¹¹⁴

The Manville deal was controversial. Critics argued that the bankruptcy amounted to a “bad faith maneuver,” as “Chapter 11 would allow [Manville] to effectively regulate the rate of payments made to the victims” and “manipulat[e] the Chapter 11 law to serve a purpose that it was not structured to serve.”¹¹⁵ Moreover, Manville investors were worried that critics were right—that the deal would not survive scrutiny. The “bad faith” issue was never resolved, however, because authorization for the Manville deal came in 1994, by way of an asbestos-claim-specific Congressional amendment to the Bankruptcy Code, § 524(g). In both intent and effect, § 524(g) “retroactively blessed . . . the Manville bankruptcy.”¹¹⁶ It also provided a way forward for other asbestos firms that had found themselves facing insolvency in the face of ever-increasing asbestos personal-injury claims.

Accordingly, Congress blessed the trust + injunction mechanisms for asbestos firms facing asbestos liability that would exceed existing assets, but only those that met the “high standards with regards to the rights of claimants, present and future, as displayed in the [Manville bankruptcy]”—standards that would help safeguard the due process rights of claimants.¹¹⁷ Section 524(g) was meticulously crafted to that effect, imposing a number of limitations on its use to ensure claimant consent and representation, as a matter of due process. On this score, Congress commented that, in drafting § 524(g), it was “concerned that full consideration be accorded to the interests of future claimants,

112. *Id.* at 596.

113. *Id.*

114. *Id.* at 601.

115. *Id.* at 597.

116. Troy A. McKenzie, *Toward a Bankruptcy Model for Nonclass Aggregate Litigation*, 87 N.Y.U. L. REV. 960, 1014 (2012).

117. H.R. REP. 103-835 at 41 (1994).

who, by definition, do not have their own voice.”¹¹⁸ Congress’s concern was alleviated in the Manville deal—which was reached prior to the passage of § 524(g)—because the “bankruptcy court appointed a special representative for the future claimants” and the “special representative was centrally involved in *formulating* the plan and *negotiating* support for it among the other creditors.”¹¹⁹ As the Manville court had explained, the channeling injunction was designed to protect the due process rights of the future claimants: “[R]emember who due process will serve in this reorganization. The . . . purpose of the Injunction is to preserve the rights and remedies of those parties, who by an accident of their disease cannot even speak in their own interest.”¹²⁰

To protect claimants from arbitrary deprivation of the value of their claims, Congress set forth explicit requirements that must be met for a trust/injunction mechanism to have a binding effect. Chief among those requirements was (1) *necessity*—a showing by the debtor that reorganization and the creation of a trust were necessary to bring about equitable treatment among present and future claimants; and (2) *representation*—that present claimants must confirm a plan by a 75% margin and that the court must appoint a legal representative to protect the interest of future claimants as well. Along these lines, § 524(g) also “require[d] the appointment of a future claims representative”; and “impose[d] specific supermajority voting rules on top of the usual plan confirmation voting requirements.”¹²¹ If (and only if) those requirements were satisfied, § 524(g) allowed for the issuance of “a channeling injunction and a trust for the payment of asbestos injury claims that manifest themselves in the future.”¹²² These two require-

118. *Id.* at 40; U.S.C.C.A.N. 3340, 3349.

119. H.R. REP. 103-835 at 40 (1994) (emphasis added).

120. *Matter of Johns-Manville Corp.*, 68 B.R. 618, 627 (Bankr. S.D.N.Y. 1986).

121. McKenzie, *supra* note 116, at 1014; see generally, Lindsay Simon, *Bankruptcy Grifters*, 131 YALE L.J. 1154, 1173–75 (2022) (describing the congressional history of 524(g) post-*Manville*); Sergio Campos & Samir D. Parikh, *Due Process Alignment in Mass Restructurings*, 91 FORDHAM L. REV. 325, 346–47 (2022) (describing the role of the 524(g) future claims representative and suggesting that the current setup is still potentially problematic for victim representation and recovery).

122. McKenzie, *supra* note 116, at 1014 (citing and describing § 524(g)(1) and § 524(g)(2)(B)(i)); Samir D. Parikh, *Mass Exploitation*, 170 PA. L. REV. ONLINE 53, 62–63 (2022) (describing non-debtor releases and channeling injunctions); Joshua M. Silverstein, *Overlooking Tort Claimants’ Best Interests: Non-Debtor Releases in Asbestos Bankruptcies*, 78 UMKC L. REV. 1 (2009) (noting how “non-debtor releases” can be “abuse[d]”); Sander L. Esserman & David J. Parsons, *The Case for Broad Access to 11 USC 524(g) in Light of the Third Circuit’s Ongoing Business Requirement Dicta in Combustion Engineering*, 62 N.Y.U. ANN. SURV. AM. L. 187 (2006) (contesting the “ongoing business” dictum in *Combustion Engineering* because (i) “the absence of such a requirement broadens the availability of relief and maximizes creditor recovery in a manner consistent with the Bankruptcy Code” and (ii) “the absence of such a requirement provides a greater sense of clarity and certainty concerning the availability of §524(g) to

ments—necessity and representation—have been used to safeguard the due process rights of present and future claimants subject to trust/injunction mechanisms in other post-Manville bankruptcy proceedings. Since Johns-Manville, other asbestos defendants headed for insolvency used § 524(g) to handle present and future asbestos claims.¹²³ Other “unfortunate debtor” corporate defendants have used § 524(g)-like arrangements in similar circumstances.¹²⁴

That bankruptcy has long been used in the mass-tort universe is not surprising. Some of bankruptcy’s unique features make it a particularly able tool for addressing certain challenges that can arise in large mass torts, particularly those involving future claims. As with other mass-tort resolution tools, whether the unique features of bankruptcy will be more or less appropriate will depend on the exigencies of particular cases. The unique benefit of bankruptcy for mass-tort defendants seeking global peace is, chiefly claimants’ mandatory participation by way of channeling injunctions in a trust. But this tends to come at the expense of what would otherwise be claimants’ due process rights to opt out of a global deal, to pursue their own “day in court,” and to seek to maximize their own individual financial interests. And in certain contexts—like the decades-long (and counting) mass-tort behemoth of asbestos personal-injury claims—some level of sacrifice of these due process protections by way of mandatory claim-

companies facing asbestos liability”); William P. Shelly et al., *The Need for Transparency Between the Tort System and Section 524(g) Asbestos Trusts*, 17 NORTON J. BANKR. L. & PRAC. 257, 258 (2008) (arguing that a lack of “transparency” in 524(g) proceedings is “inhibiting efforts to achieve fairness in allocating liability to defendants”); S. T. Brown, *Section 524(g) Without Compromise: Voting Rights and the Asbestos Bankruptcy Paradox*, 2008 COLUM. BUS. L. REV. 841, 843–44 (2008) (analyzing *In Re Combustion Engineering* and critiquing the “paradox” in which “the only way for debtors to obtain the asbestos plaintiff votes required to have a reorganization plan confirmed is to accept terms that will render the plan unconfirmable or, at least, unable to withstand a sustained challenge on appeal”); Katharine Anand, *Demanding Due Process: The Constitutionality of the § 524 Channeling Injunction and Trust Mechanisms that Effectively Discharge Asbestos Claims in Chapter 11 Reorganization*, 80 NOTRE DAME L. REV. 1187, 1191 (2005) (arguing that “§ 524(g) and (h) are unconstitutional under the Fifth Amendment, and Congress must find another solution to the mass asbestos tort problem”).

123. See generally, e.g., *In re Combustion Eng’g, Inc.*, No. 03-10495-JFK, 2005 WL 8169097 (Bankr. D. Del. Dec. 19, 2005).

124. For instance, in *In re Combustion Engineering*, a nearly-insolvent asbestos debtor proposed a pre-packaged reorganization that created a two-trust setup: one for current claimants and another for futures, complete with a channeling injunction towards both and funneling all future claims towards those trusts instead of the debtor itself. The pre-pack was rejected on appeal to the Third Circuit on account of concerns vis-à-vis the inclusion of non-debtor releases, and Judge Scirica also expressed that a number of due process concerns were raised by the negotiation and structure of gerrymandered voting blocks. See *In re Combustion Eng’g, Inc.*, 391 F.3d 190, 233–47 (3d Cir. 2004). On remand, the plan was approved after removing third-party liability and adding more funds to the pot. See *In re Combustion Eng’g, Inc.*, 2005 WL 8169097, at *6.

resolution in bankruptcy is authorized because, with a truly financially strapped defendant, full preservation those interests of present claimants, would come at the expense of any compensation for future claimants. In such situations, bankruptcy is not only a useful, but likely indispensable, tool for resolving mass tort claims in a way that ensures equitable treatment among claimants.

Historically, then, resolving mass torts through use of bankruptcy tools has occurred, and has been conditioned upon, the extent to which use of that tool in a given instance aligns with the foundational goals of mass-tort mechanisms: namely, to provide for global peace of present and future claims by way of arrangements that treat claimants equitably and in whose negotiations claimants were represented. In contrast, new attempts to use bankruptcy in mass torts are less aligned with those foundational goals than they are with defendants' desire to obtain significant strategic advantages—particularly at the bargaining table—by escaping MDL, removing claimants' direct access to the defendant, and forcing claimants into mandatory claim-resolution.

B. Bankruptcy as Corporate Escape Hatch from MDL

Highly solvent—one might even say “fortunate”—corporate defendants have, in recent years, sought to obtain the benefits of bankruptcy without taking on the concomitant burdens. This began by defendants using what bankruptcy scholar Lindsay Simon has referred to as “bankruptcy grifting,” which occurs when a non-debtor but related third party, “without filing for bankruptcy” itself, “latch[es] itself onto [the named debtor’s bankruptcy filing]” allowing the non-debtor parties to join the debtor’s channeling injunctions or releases. The grift occurs, Simon explains, because bankruptcy reorganization is sought by the non-debtor in order to “receive the benefits of a Chapter 11 reorganization without incurring any of the associated costs.”¹²⁵ Principal examples of this “bankruptcy grifting,” include the bankruptcy plans in Purdue Pharma’s resolve of opioid claims against it and non-debtor third parties (including members of the Sackler family) and in USA Gymnastics (USAG) in relation to claims regarding the Larry Nassar sexual-abuse scandal.

In *In re Purdue Pharma, L.P.*, the bankruptcy court dealt with the series of lawsuits brought against Purdue Pharma and, subsequently, the Sackler family members as named defendants for their role in the

125. Simon, *supra* note 121, at 1157.

opioids crisis.¹²⁶ Purdue Pharma submitted a Chapter 11 filing along with a *Manville*-style pre-packaged bankruptcy plan for all present and future claimants; the bankruptcy stay then put a hold on the 2,900 civil actions against Purdue and 400 civil actions against the Sacklers personally that were currently pending in MDL.¹²⁷

After months of negotiations, the pre-packaged plan was approved verbally by Southern District of New York (SDNY) Bankruptcy Judge Drain on September 1, 2021 and filed on September 17, 2021.¹²⁸ Ultimately, the proposed plan: (1) establishes “nine ‘creditor trusts’ that will fund opioid abatement efforts” and personal injury claims; (2) provides that the Sackler family will contribute \$4.275 billion toward the settlement trust in exchange for the release of claims against the family and related entities; (3) includes a channeling injunction applied to all claims against Purdue and the released parties (notably: including the Sackler family and related entities); (4) requires Purdue “to create a public document depository;” and (5) funnels all of Purdue’s remaining assets into a new company, terminating Purdue.¹²⁹

Most importantly, the Sackler family’s contribution to the settlement trust was strictly contingent on the release of all claims against them and their related entities.¹³⁰ It became clear that “Purdue’s bankruptcy was thus a critical part of a strategy to secure for the Sacklers a release from any liability for past and even future opioid-related litigation without having to pursue personal bankruptcy.”¹³¹ Objectors appealed Judge Drain’s confirmation, taking issue with the release of claims against third parties who are not official debtors.¹³² In December 2021, SDNY Judge Colleen McMahon held that the Bankruptcy Code does not permit courts to release non-derivative third-party claims against non-debtors¹³³ and vacated the bankruptcy

126. *In re Purdue Pharma, L.P.*, 633 B.R. 53, 64 (Bankr. S.D.N.Y. Sept. 17, 2021) [hereinafter *Purdue I*] *vacated sub nom.*

127. *See id.* at 60.

128. *See id.* at 64; *In re Purdue Pharma, L.P.*, 635 B.R. 26 (Bankr. S.D.N.Y. Dec. 16, 2021) [hereinafter *Purdue II*].

129. *See Purdue II*.

130. *See id.* at 58–59.

131. *Id.* at 59.

132. *See id.* at 68, 77.

133. *Id.* at 78. Non-derivative claims are defined to mean those “that are not derivative of Purdue’s liability, but are based on the Sacklers’ own, individual liability, predicated on their own alleged misconduct and the breach of duties owed to claimants other than Purdue.” *Id.* at 90. The authority to release derivative claims, Judge McMahon held, is not beyond the power of the bankruptcy court. *See id.* at 66–67.

confirmation.¹³⁴ The Second Circuit granted Purdue's appeal in January 2022; the court has yet to release a decision.¹³⁵

Similarly, USAG—facing a plethora of lawsuits related to Larry Nassar's abuse of gymnasts—set up a trust “funded by insurance policies and other settlement contributions.” Also similar to Purdue: The trust, in exchange, released associated non-debtors, including the United States Olympic & Paralympic Committee, the Karolyi coaching family, Twistars, and other related individuals and entities.¹³⁶ In approving the plan, the bankruptcy court did not concern itself with the question of whether USAG was receiving the benefits of bankruptcy—including mandatorily binding claimants with monetary damages claims to claims through the trust—without the requisite burdens.

Given the expansive use of non-debtor releases by Purdue and USAG, these examples represent a sea-change in the use of bankruptcy in mass torts: non-debtors completely disassociated from the bankruptcy process receive all of its benefits with none of its pitfalls. The flourishing of these non-debtor releases is, Simon argues, where “bankruptcy grifters have gone too far.”¹³⁷ And yet, another limit-pushing maneuver waits in the wings: releasing the would-be debtor *itself* through a scapegoat spin-off company put through bankruptcy. This new maneuver, called the “Two-Step,” is the subject of Part III, which provides case studies of the “Two-Step” maneuver in Johnson & Johnson Talc and 3M Earplugs.

III. A TALE OF TWO “TWO-STEPS”: JOHNSON & JOHNSON AND 3M CASE STUDIES

Mass-tort defendants Johnson & Johnson and 3M have, in just the last two years, invoked the “protections” of bankruptcy for very different reasons and pursuant to very different conditions than in bankruptcies of mass-torts past. These defendants employ a series of complex corporate maneuvers, by which highly solvent defendants spin off new or repurpose corporate subsidiary entities for the sole purpose of taking on the parent defendants' mass-tort liabilities. As part of that corporate process, the parent-company defendants construct contractual arrangements that provide both the dollar amounts

134. *Id.* at 118.

135. See *In re Purdue Pharma, L.P.*, No. 22-00085 (2d Cir. Jan. 27, 2022) (granting motion to appeal).

136. See Findings of Fact, Conclusions of Law, and Order Confirming the Third Amended Joint Chapter 11 Plan of Reorganization, *In re USA Gymnastics*, No. 1:18-bk-09108 at 8 (Bankr. S.D. Ind. Dec. 16, 2021).

137. See generally Simon, *supra* note 121.

for and conditions under which the new entity can complete its designated function of absorbing tort liabilities. Once these contractual arrangements are inked, the parent immediately puts the “new debtor” into bankruptcy, seeks a stay of pending tort claims in MDL, and requests a channeling injunction to channel all claims against the “new debtor.” As a result, defendants unilaterally force pending mass-tort claims out of MDL and into mandatory claim-resolution proceedings in bankruptcy against a “new” defendant—extracting themselves from the process altogether.

When presented to the courts for review, these bankruptcy filings are presented under the *guise* of § 524-type arrangements. And to be sure, defendants cloak these so-called bankruptcy arrangements with many of the superficial formalities of previous § 524(g) deals. Scratch just beneath the surface of the formal designations, however, and these arrangements depart in fundamental respects from those deals and the strictures of § 524(g) itself. Rather than take on the full panoply of burdens, obligations, and conditions of § 524(g), defendants simply cherry-pick the most advantageous elements of the § 524(g) claim-resolution apparatus and declare the channeling injunction against the spun-off entity as a “necessity” that derives from, in their account, MDL’s total failure as a tort-resolution mechanism. Specifically, the bankruptcy petitions for the spun-off entities, along with the funding arrangements underlying them, purport to (1) impose mandatory processes for the global resolution of mass-tort claims (2) against a substituted debtor in the form of the spun-off and now “bankrupt” corporate entity (3) pursuant to defendants’ unilaterally designed terms for the (limited) funding of that entity.

Section A provides a detailed case study of the first high-profile “Two-Step” bankruptcy: Johnson & Johnson’s talc claims. Precise understanding of the various maneuvers in the Johnson & Johnson “Two-Step” is critical, as it is positioned to be deployed as a model, a template even, for a potential wave of mass-tort bankruptcies pursuant to similar maneuvers. Indeed, 3M can be rightly conceptualized as an early mover in Johnson & Johnson’s footsteps: Barely four months after Judge Kaplan issued a broad opinion approving Johnson & Johnson’s shifting of liability to a subsidiary, LTL Management, in bankruptcy, 3M put its own subsidiary, Aearo, into bankruptcy for the same purpose. Section B provides a briefer case study of 3M’s “Two-Step” maneuvers in relation to its combat earplug liabilities in MDL.

A. *Case Study 1: Johnson & Johnson's "Texas Two-Step" Bankruptcy in Mass Torts*

Johnson & Johnson (J&J) has a market capitalization of over \$450 billion and a credit rating better than the U.S. Government. When people hear the name "Johnson & Johnson," they typically think Band-Aids® and Johnson's® Baby Powder. Since 2009, when the first lawsuit was filed, J&J has been embroiled in mass-tort litigation in MDL regarding its own Johnson's® Baby Powder. Despite J&J having long branded its talc baby powder as "clinically proven mild[]," scientific studies, including a 2019 FDA study, reveal that Johnson's® Baby Powder contains amphibole asbestos and fibrous talc.

Claims against J&J really began to mount after a 2013 trial in *Berg v. Johnson & Johnson*, in which the plaintiff, Deane Berg, alleged that she had developed ovarian cancer as a result of genital exposure to Johnson's® Baby Powder. The jury awarded no damages but found in favor of the plaintiff. After that verdict was issued, more than 1,300 ovarian cancer lawsuits were filed against J&J by the end of 2015. In 2020, in *Ingham v. Johnson & Johnson*,¹³⁸ a jury issued a \$4.69 billion verdict (reduced to \$2.25 billion on appeal) for the plaintiff. Additional claims poured in, with claimants alleging that amphibole asbestos and fibrous talc can increase the risk of and cause ovarian cancer with perineal and genital application of the powder, and that exposure to asbestos-contaminated talcum powders can cause mesothelioma.¹³⁹

From January 2020 to September 2021, J&J, along with Johnson & Johnson Consumer, Inc. (Old JJCI),¹⁴⁰ spent "roughly \$3.6 billion" in talc-litigation.¹⁴¹ In May 2020, J&J and Old JJCI announced the discontinuation of talc-based baby powder in the United States and Canada.¹⁴² Even after the discontinuation of talc-based baby powder in 2020, J&J still faced more than 38,000 talc-related lawsuits. These cases were consolidated in MDL in the United States District Court for the District of New Jersey. Since litigation began, there have been

138. *Ingham v. Johnson & Johnson*, 608 S.W.3d 663 (Mo. Ct. App. 2020), *reh'g and/or transfer denied* (July 2020), *transfer denied* (Nov. 3, 2020), *cert. denied*, 141 S. Ct. 2716 (2021).

139. Original TCC's Motion to Dismiss, *In re LTL Mgmt., LLC*, No. 3:21-bk-30589 (Bankr. D.N.J. Dec. 1, 2021).

140. According to LTL Management's bankruptcy filing in 2021, in 1979, Johnson & Johnson Consumer, Inc., (Old JJCI) took on liabilities associated with J&J's baby powder, even though J&J continued to be named as the defendant in all talc-related cases (and never contested the designation). J&J launched Johnson's Baby Powder in 1894. *See* Voluntary Petition Under Chapter 11, *In re LTL Mgmt.*, No. 3:21-bk-30589 (Bankr. D.N.J. Oct. 14, 2021).

141. *In re LTL Mgmt., LLC*, 637 B.R. 396, 427 n.31 (Bankr. D.N.J. 2022).

142. *Id.* at 401 (citing Expert Report of Gregory K. Bell, Ph.D. ¶ 17).

forty-nine talc trials.¹⁴³ In eighteen of them, a verdict was reached in J&J's favor; seventeen in claimants' favor.¹⁴⁴ Eight resulted in mistrials, and six settled.¹⁴⁵

J&J maintains that its baby powder is safe.¹⁴⁶ But rather than proceed with that contention in MDL bellwether trials or to negotiate a settlement of pending claims, J&J engaged in a complex set of maneuvers to escape MDL. Those maneuvers, through which J&J spun off a new corporate entity, dumped its talc liabilities into the new entity, and, forty-eight hours after creating that new entity, put it into bankruptcy, have come to be known as the "Texas Two-Step" (TTS).

Despite its name, the TTS in this context does not refer to a quaint ballroom dance. Instead, the TTS is the name for a two-part legal strategy involving Texas law and bankruptcy court. Step one of the TTS involves creating a new company into which the parent corporation's debts are transferred. This process is called a "divisive merger." The maneuver is christened the TTS because this "divisive merger" is a creature of Texas law. Specifically, a 1989 provision of the Texas Business Organization Code allows for a Texas company to split itself through a "divisive merger": from one company may be born two. Pennsylvania, Arizona, and Delaware have followed suit in fashioning a similar provision.¹⁴⁷

The rationale for the provision was for "small businesses . . . to isolate valuable assets in an entity protected from creditor claims related to the primary operations."¹⁴⁸ Under the Texas Code, a suffering company develops a merger plan that redistributes assets and liabilities and submits the plan to the Secretary of State.¹⁴⁹ The assets and liabilities of the original company are either redistributed to the offshoot or subsidiary companies or, if the original company "does not survive," all of the assets and liabilities pass on to the offshoots/subsidiaries (depending on the merger plan).¹⁵⁰ In other words, the original intent of the provision was to protect small businesses that were struggling with

143. *Id.* at 412.

144. *Id.* at 413 (citing Expert Report of Gregory K. Bell, Ph.D.).

145. *Id.*

146. See, e.g., Roni Caryn Rabin & Tiffani Hsu, *Johnson & Johnson Feared Baby Powder's Possible Asbestos Link for Years*, N.Y. TIMES (Dec. 14, 2018). If that is true—and if the history of mass-torts MDL's like Bendectin are any guide—J&J's success on that contention would tend to make the claims against it go away. Sanders, *supra* note 80.

147. Parikh, *supra* note 122, at 57 n.22; *In re LTL Mgmt., LLC*, 637 B.R. at 424 (noting "that several other states have since enacted similar statutes, see, e.g., 15 PA. CONS. STAT. § 361; ARIZ. REV. STAT ANN. § 29-2601; DEL CODE ANN. tit. 6, § 18-217(b)-(c)").

148. Parikh, *supra* note 122, at 58.

149. *In re LTL Mgmt., LLC*, 637 B.R. at 422.

150. *Id.*

insolvency by allowing them to sunder and remodel their company to guard against total collapse and dysfunction. A business *B* handling matters *x* could create a subsidiary *C* to handle creditors for a certain matter *y*, permitting *B* to operate on *x* while *C* bears particular liabilities to *y*.

At first blush, both the procedure and the purpose of the Texas “divisive merger” provision sounds fairly straightforward (whatever one makes of the oxymoronic nature of the terms “divisive merger”). And for many years after the 1989 provision’s enactment, the operation of the provision largely tended to align, unremarkably, with the straightforward purpose. Recently, though, large and wholly solvent corporations have become wise to the ways in which a “divisive merger” under this provision can serve as a critical first (of two) steps towards shielding assets against mass tort claims. Once the divisive merger has been completed, the second step of the TTS is to take the newly created company and put it into Chapter 11 bankruptcy, thereby shifting tort claimants into the bankruptcy proceedings. Add an old-fashioned channeling injunction and mandatory claims trust and the parent company—the would-be, better yet, *should-be* debtor—is almost entirely removed from the picture. While J&J is not the first corporate defendant to use the TTS, it is by far the largest and most high-profile to do so. Furthermore, J&J’s experience with personal injury claims related to its talc powder also serves as a test balloon for the strategy among other large and solvent corporations more broadly.

On October 12, 2021, Old JJCI entered into a corporate restructuring by which it ceased to exist,¹⁵¹ and through “a series of intercompany transactions, Old JJCI assumed responsibility for all claims alleging that J&J’s talc-containing Johnson’s Baby Powder caused ovarian cancer and mesothelioma.”¹⁵² In the words of Judge Kaplan, Bankruptcy Court Judge for the District of New Jersey, “[t]he labyrinthine progression toward the creation” of the current Debtor (LTL Management), against which J&J seeks to have all talc claims channeled, is “somewhat overwhelming.”¹⁵³

The machinations of this divisive merger were many and complex. J&J’s goal, however, was simple: It sought to “globally resolve talc-related claims through a Chapter 11 bankruptcy without subjecting the entire Old JJCI enterprise to a bankruptcy proceeding.”¹⁵⁴

151. Kim Declaration, *In re LTL Mgmt*, No. 3:21-bk-30589 15, 22–23 (Bankr. D.N.J. Oct. 14, 2021).

152. *In re LTL Mgmt, LLC*, 637 B.R. at 400 (citing Kim Decl. at ¶¶ 15, 32).

153. *Id.* at 399, 401.

154. Kim Declaration, *In re LTL Mgmt*, No. 3:21-bk-30589, ¶ 21 (Bankr. D.N.J. Oct. 14, 2021).

A mere forty-eight hours after creating LTL Management, J&J put it into bankruptcy in the United States Bankruptcy Court in the Western District of North Carolina.¹⁵⁵ The petition was subsequently moved to the United States Bankruptcy Court for the District of New Jersey—J&J’s home state. Step two of the Texas Two-Step dance is complete. Like § 524(g) bankruptcy reorganizations, to which J&J analogizes its LTL Management bankruptcy petition, central to the global resolution of pending talc claims against J&J, is a channeling injunction and mandatory claims trust against LTL Management. Enter the “LTL Management Funding Agreement and Settlement and Trust” (J&J/LTL Funding Agreement/Trust).

As with so many things in J&J’s MDL-to-bankruptcy progression, the J&J/LTL Funding Agreement/Trust is set up to do double duty—to complete its own “two-step,” if you will. *First*, the J&J/LTL Funding Agreement/Trust, which seems properly executed under the letter, if not necessarily the intent, of Texas divisive merger corporate law functions both in corporate form and in the bankruptcy filing as financial arrangement for the funding of LTL Management. As such, it sets forth the terms by which J&J and Old JJCI will fund the newly created LTL Management.

Second, the J&J/LTL Funding Agreement/Trust, which was included as part of LTL Management’s bankruptcy petition, is also the vehicle for introducing the terms, conditions, and parameters for the resolution of talc claims against LTL Management. This is unsurprising, given that LTL Management’s sole purpose is to absorb talc liabilities. Thus, the terms, conditions, and limitations governing J&J’s funding of LTL Management for purposes of resolving talc claims are inextricably intertwined with the specific financial terms, conditions, and limitations of LTL Management’s operation in resolving those claims. In short, the J&J/LTL Funding Agreement looks a lot like any other claims trust—but one drafted entirely by the defendants.

This smaller “two-step” for the J&J/LTL Funding Agreement/Trust and the larger, capital-letter “Two-Step” by which J&J created LTL Management and then put it into bankruptcy together effectuate a powerful one-two punch against talc claimants, who were excluded from the divisive merger process (as one would expect), but are

155. See, e.g., Jonathan Randles et al., *How Bankruptcy Could Help Johnson & Johnson Corral Vast Talc Litigation*, WALL ST. J. (Nov. 12, 2021), <https://www.wsj.com/articles/how-bankruptcy-could-help-johnson-johnson-coral-vast-talc-litigation-11626773400>. The case was later transferred to the U.S. Bankruptcy Court for the District of New Jersey before Judge Michael Kaplan. See also *In re LTL Mgmt., LLC*, 637 B.R. at 399–400 (explaining that LTL Management was created on October 12, 2021, and filed for bankruptcy on October 14, 2021).

thereby also excluded from the drafting of the J&J/LTL Funding Trust.¹⁵⁶

B. Case Study 2: 3M Follows J&J's Lead in 3M Combat Arms Earplug Products Liability Litigation

3M, “[f]ollowing in the footsteps” of other “successful” endeavors to avoid liability through the bankruptcy system, placed several of its subsidiaries into bankruptcy in an attempt to flee the largest MDL in U.S. history, encompassing “more than 230,000 hearing injury claims,” which were “brought primarily by U.S. military servicemembers and veterans” arising from 3M’s sales of Combat Arms Earplugs.¹⁵⁷ After a series of 27 bellwether trials found 3M liable for over \$200 million in damages, 3M contended that “the tort system [was] no longer a viable forum to resolve this litigation.”¹⁵⁸

Like J&J, 3M attacked the MDL mechanism itself, arguing that the “cases [could not] be reasonably settled based on the extant record” and bemoaned that “the bellwether trial process” which found overwhelmingly against 3M, “ha[d] done nothing to help.”¹⁵⁹ 3M therefore sought to halt the development of the MDL in its tracks “through a[n] . . . automatic stay” to relitigate the core issues afresh, and to resolve claims under “the Bankruptcy Code’s comprehensive process for administering and equitably resolving claims using . . . resolution procedures that focus on the key scientific and factual issues gauged by federal evidentiary rules.”¹⁶⁰ In other words, 3M hoped for bankruptcy court to serve as a second bite at the apple, a clean slate where it could relitigate evidentiary issues it had already lost and take damages determinations away from a jury, or even a judge, and instead take them into its own hands.

Also similar to J&J, 3M sought to extricate itself from claimants’ reach and to force MDL claimants into the mandatory resolution of claims in bankruptcy against Aearo, a 3M subsidiary. 3M, therefore, proposed “a plan of reorganization” for Aearo, which purported to

156. *See infra* app.

157. Informational Brief of Aearo Technologies LLC at 5, *In re Aearo Techs. LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022) (No. 22-02890); Order, *In re 3M Combat Arms Earplug Prods. Liab. Litig.*, No. 3:19-md-2885, 2021 WL 765019, at *1 (N.D. Fla. Feb. 28, 2021).

158. Informational Brief of Aearo Technologies LLC at 11, 43, *In re Aearo Techs. LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022) (No. 22-02890); Dave Simpson, *3M Hit With \$2.2M Verdict In Latest Earplug Bellwether Trial*, LAW360, (May 2, 2022) <https://www.law360.com/articles/1489159/3m-hit-with-2-2m-verdict-in-latest-earplug-bellwether-trial>.

159. Informational Brief of Aearo Technologies LLC at 42, *In re Aearo Techs. LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022) (No. 22-02890).

160. *Id.* at 12.

“resolve[] all Combat Arms-related claims against Aearo and 3M.”¹⁶¹ The cornerstones of this reorganization should now be familiar. 3M would put its subsidiaries, including principally Aearo Technologies LLC, into bankruptcy, pursuant to a “settlement trust” backed by a “commitment from 3M . . . to pay . . . claims,” pursuant to the trust’s terms and conditions (under which 3M maintains that funding is potentially unlimited, without much specification). At this juncture, a point of precision bears emphasis. The “two-step” in 3M’s maneuver was to remove access to the parent company’s assets by way of placing a pre-existing subsidiary into bankruptcy. Johnson & Johnson’s “two-step” involved creating a spun-off entity under Texas corporate law (hence the “Texas Two-Step”). Both functionally and strategically, however, the maneuvers by Johnson & Johnson and 3M seek to achieve the same ends: To move, unilaterally, plaintiffs’ tort claims out of MDL without plaintiffs having any representation in the decision; to avoid adverse rulings against it in the MDL; to cut off plaintiffs’ direct access to the parent company defendant and its assets; to deprive mass-tort plaintiffs of their possible day in court; and to subject all of the combat-earplug claimants to a mandatory claims resolution plan in bankruptcy. All of these things would shift settlement leverage, significantly and—as I explain in further detail—likely irreparably—in 3M’s and Johnson & Johnson’s favor.

As with the J&J/LTL Funding Agreement/Trust, the 3M Settlement Trust is actually a contract between the parent company defendant on the one hand (3M) and the designated bankruptcy debtor subsidiaries into which 3M seeks to channel its earplug liabilities on the other (Aearo). As such, and again similar to J&J, the process by which the 3M/Aearo Claims Trust was generated did not include earplug claimants, and the terms of the 3M trust were drafted and designed unilaterally by 3M. Critically, of course, 3M sought to operationalize the trust by way of “a permanent channeling injunction and a third-party release of 3M” which would require all “Combat Arms-related claims” past and future, be brought against the trust rather than 3M.¹⁶²

IV. THE J&J AND 3M “TWO-STEP” BANKRUPTCIES IN MASS-TORT BANKRUPTCY CONTEXT

The prevailing judicial and scholarly analysis of both the Johnson & Johnson and 3M “Two-Steps” has largely focused on their legitimacy

161. *Id.* at 57.

162. *Id.*

(or not) as a matter of “good faith” or “bad faith” bankruptcy (the Third Circuit’s rejection of J&J’s maneuver turned precisely on these grounds). Bankruptcy scholars have roundly criticized these Two-Step bankruptcies. According to these scholars, these Two-Step bankruptcies enable defendants like J&J and 3M to receive all of the benefits of bankruptcy—closure, finality, mandatory participation by plaintiffs, preclusion, injunctive bar—without the burdens of threatened insolvency, direct access by claimants to the parent company, or the due process hurdles of class actions and MDL.¹⁶³ Moreover, it is argued these petitions do not align with the fundamental purpose of Chapter 11 itself, which is aimed at “protect[ing] honest but unfortunate debtors who are willing to subject themselves and their assets to the supervision of the Court” by way of a “good faith filing” with a “valid reorganizational purpose.”¹⁶⁴ J&J’s creation of LTL Management, and subsequent placement of LTL Management into bankruptcy, serves no reorganizational or rehabilitative purpose for an “honest, unfortunate debtor.” Nor does it “maximiz[e] estate value for the benefit of creditors;” to the contrary, the gambit appears to be “*minimizing* estate value to the detriment of J&J’s tort victims.”¹⁶⁵ For these reasons, these scholars argue, the use of bankruptcy in these cases constitutes bad faith.¹⁶⁶

While defendants like J&J and 3M dispute critics’ accusations of “bad faith”—whatever that might mean in the hands of a bankruptcy judge’s expansive and equitable discretion—it is not clear to me that either J&J or 3M are making a particular effort to hew to the historical underpinnings of bankruptcy. In their submissions to various courts, both J&J and 3M gesture to the longstanding historical justification for the use of bankruptcy in mass torts: The necessity of the bankruptcy mechanism to ensure equitable treatment of claimants by way of preserving the continued operation of the defendant company. Invoking the justificatory language behind the enactment of § 524(g), J&J argues that its TTS will “produce an equitable resolution of both current and future talc claims by means of a settlement trust established pursuant to §105 or §524(g), that can promptly, efficiently, and fairly compensate claimants.” J&J also argues that MDL’s slow pace

163. Cf. Lindsey D. Simon, *The Settlement Trap*, 96 IND. L.J. 661, 666 (2021).

164. Memorandum of Law of Amici Curiae by Certain Law Professors in Support of Motion of the Official Committee of Talc Claimants to Dismiss Debtor’s Chapter 11 Case, *In re LTL Mgmt., LLC*, No. 3:21-bk-30589, at 2, 5 (Bankr. D.N.J. Feb. 4, 2022).

165. *Id.* at 2.

166. See generally, e.g., Simon, *supra* note 163, at 677; Campos & Parikh, *supra* note 121, at 340–46.

with unresolved talc lawsuits could put J&J—a \$400 billion entity—in “financial distress,” which J&J leaves wholly unspecified.

Dig a little further, however, and J&J’s conception of equitable treatment of claimants bears little resemblance to the historical justification for mass-tort bankruptcy. Because J&J is not insolvent, nor can it credibly argue that talc liabilities pose any real threat to its future solvency, reorganization in bankruptcy is not needed to ensure that corporate assets must be protected against depletion by present claimants at the expense of future claimants. J&J simply contends that its use of bankruptcy benefits claimants as a general matter. It does not demonstrate how this is so, other than to launch broadsides against “the tort system,” which it says disadvantages claimants as a general matter, by way of “inefficiencies, inequities, and delay.”¹⁶⁷ J&J also takes broad aim at the jury system, arguing that it disadvantages claimants because it is “a lottery in which a few plaintiffs have obtained recoveries ranging from tens of millions to multiple billions in dollars, while others have been denied recoveries completely.”¹⁶⁸

3M similarly analogizes its “tort claims morass” to that of the Johns-Manville bankruptcy,¹⁶⁹ claiming that the trust and channeling injunction, jointly, is the only way to “achieve both fairness and finality in the Combat Arms litigation.”¹⁷⁰ 3M claimed not only that its particular MDL was “doomed . . . from the outset,” but that it is “broken beyond repair” and “simply cannot be sorted out in the MDL or in the traditional tort system.” As with J&J, 3M lacks the dire financial condition that makes resolution in bankruptcy appropriate. Indeed, the Indiana Bankruptcy Court found, “3M’s most recent SEC filings show it to be strong financially with no going concern warnings.”¹⁷¹

At bottom, J&J’s and 3M’s principal and actually proffered justifications for invoking bankruptcy hinge not on historical conceptions about preserving assets to achieve equitable treatment of claimants, but upon that Article I courts in bankruptcy are simply better poised to resolve mass torts *for defendants* than are Article III judges in “MDL Hell.” The *raison d’être* for the bankruptcy petitions in J&J and 3M thus depart in fundamental ways from the traditional justifications underlying mass-tort bankruptcies under § 524(g). Neither J&J nor 3M are, by any stretch of the imagination, “honest but unfortu-

167. *In re LTL Mgmt. LLC*, 637 B.R. 396, 404 (Bankr. D.N.J. 2022).

168. *Id.*

169. Informational Brief of Aearo Technologies LLC at 52–53, *In re Aearo Techs. LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022) (No. 22-02890).

170. *Id.* at 57.

171. *In re Aearo Techs. LLC*, 642 B.R. 891, 900 (Bankr. S.D. Ind. 2022).

nate debtor[s]” in need of a “fresh start.” Thus, despite analogizing their respective circumstances and proposed reorganization plans to § 524(g), neither J&J nor 3M rely principally, or even substantially,¹⁷² on the traditional conception of bankruptcy as a vehicle by which an “honest but unfortunate debtor” can obtain a “fresh start” to justify their maneuvers. This intimates, as I will suggest in a moment, that we err if we remain strictly within a bankruptcy framework to understand these maneuvers—we must instead take a step back and properly understand these corporate connivances as taking place within, and striking at the heart of, mass tort and aggregate litigation more generally.

Thus far, the Two-Step has received mixed results. Initially, J&J’s arguments proved successful. In March 2022, Chief Judge Kaplan of the United States Bankruptcy Court for the District of New Jersey issued an opinion, agreeing with J&J. Judge Kaplan, in a broad-sweeping opinion, rejected arguments that the LTL Management bankruptcy filing was conducted in “bad faith.” Using a “totality of the circumstances” test,¹⁷³ he concluded that the creation of LTL Management “serve[d] a valid bankruptcy purpose” and was not filed “to obtain a tactical litigation advantage.”¹⁷³ On the first conclusion—that the creation and bankruptcy filing of LTL Management “served a valid bankruptcy purpose”—the judge found it compelling that J&J’s maneuver took place within the general 2021 Corporate Restructuring Plan, detailed above. In particular, he noted that although LTL Management was incorporated in Texas “only days before implementation” and hours before filing for bankruptcy, the maneuver was fully compliant with Texas law.¹⁷⁴ Score one for corporate formalities.

In support of the second conclusion—that J&J did not create LTL Management for tactical advantage—Judge Kaplan directly entered the ring of the MDL vs. bankruptcy match-up that J&J set up in its filings. Specifically, the judge criticized the “continued litigation in state and federal courts” that have resulted in only forty-nine verdicts since 2014. Judge Kaplan heralded bankruptcy as an “optimal venue” for redressing the mass harms like the ones in talc. Finally, he went on to criticize “academics, commentators, and even policymakers” who

172. A debtor need not be fully insolvent to invoke Chapter 11, of course. *See, e.g.*, Robert J. Keach, *Solvent Debtors and Myths of Good Faith and Fiduciary Duty*, AM. BANKR. INST. J. 26 (2005) (“Solvent debtors are capable of filing plans in ‘good faith’ and, thus, confirming plans of reorganization.”).

173. *In re LTL Mgmt. LLC*, 637 B.R. 396, 399, 407, 421–22 (Bankr. D.N.J. 2022).

174. *Id.* at 422.

had used “distasteful . . . insidious phrases . . . in reference to the bankruptcy courts.”¹⁷⁵

But on January 30, 2023, the Third Circuit rebuked LTL Management’s bankruptcy filing and dismissed its Chapter 11 petition.¹⁷⁶ The three-judge panel held that LTL Management, the sole debtor under consideration, was not in financial distress, which is a requirement of Chapter 11 filing.¹⁷⁷ Judge Thomas L. Ambro, writing for the panel, said that because LTL “held assets having a value at least equal to its liabilities and had financial capacity sufficient to satisfy its obligations as they became due” that it was not sufficiently in financial distress to require reorganization under Chapter 11.¹⁷⁸

While J&J requested *en banc* review of the case and can still appeal to the U.S. Supreme Court, the Two-Step maneuver remains a critical hurdle for due process rights in complex litigation. Indeed, the Third Circuit’s emphasis on the lack of financial necessity—rather than the due process problems the maneuver raises—in LTL’s bankruptcy filing is illustrative: due process concerns with the TTS are profoundly mystifying to those working in this space given the conceptual misdirection associated with how the Two-Step and its mutations and variations are framed. The Third Circuit’s limiting their rebuke of the maneuver to its lacking financial necessity demonstrates the extent to which we must continue to sound the alarm on the due process problems the TTS presents.

In the case of 3M, Indiana Bankruptcy Court Judge Jeffrey Graham rejected 3M’s motion to enjoin all current actions against 3M. In so doing, Judge Graham underscored that while “[t]here has been some suggestion that the bankruptcy process is the *only* avenue by which the claimants may globally settle the Claims . . . this is not so.”¹⁷⁹ Directly responding to 3M’s criticism of the MDL itself, Graham stated, “[t]he fact that the bellwether trials conducted in the MDL have not yet yielded a global settlement does not mean that the MDL itself is broken.”¹⁸⁰ He held that “Section 362(a)(1) [of the Bankruptcy Code], while broad, generally protects only the debtor, not non-bankrupt co-debtors like 3M.”¹⁸¹

175. *Id.* at 409–10.

176. *In re LTL Mgmt., LLC*, 58 F.4th 738 (3d Cir. 2023).

177. *Id.* at 754–60.

178. *Id.* at 762.

179. *In re Aeero Techs. LLC*, 642 B.R. 891, 895, 902 (Bankr. S.D. Ind. 2022).

180. *Id.* at 902.

181. *Id.* at 904.

Before Judge Graham handed down his ruling, Northern District of Florida Judge M. Casey Rodgers, who was charged with overseeing the MDL before the parties filed in bankruptcy, stated that “[f]rom the start, Aearo was a party to this litigation in name only.”¹⁸² Judge Rodgers hypothesized that 3M, “displeased with the rulings of this Court and the bellwether jury verdicts . . . [is] attempting to evade the 3M primacy narrative but only—and *admittedly*—because it no longer fits the companies’ strategic objectives.”¹⁸³ She diagnosed Aearo’s filing of Chapter 11 bankruptcy as “a scheme to escape the MDL” and noted her “concern[] over 3M Company’s sudden, bankruptcy-eve about-face regarding the entity responsible,” stating that “the Court agrees that 3M Company’s new narrative bears the hallmark characteristics of a successor liability defense.”¹⁸⁴

It is likely that reasonable minds can differ as to whether, under the law of bankruptcy, these sorts of arrangements are properly characterized as having been undertaken in bad faith and/or for no valid reorganizational purpose.¹⁸⁵ The diametrically opposite opinions of Judge Kaplan in J&J and Judge Graham in 3M illustrate this point well enough. Beyond this, though, questions of whether a bankruptcy filing was pursued in “bad faith” is, as a matter of bankruptcy law and doctrine, an equitable and discretionary framework; as such, one would expect different conclusions on the question in different cases.

Regardless of the results of any single case (and cases are ongoing), at a conceptual and theoretical level, the “bad faith” line of analysis is incomplete; it fails to capture some of the fundamental mass-tort due process concerns with these arrangements. This Article therefore takes a step back and situates these “Two-Step” bankruptcies in the historical mass-tort bankruptcy context in which they purport to operate and would substantially alter.

182. Order, at 1, 3 *In re* 3M Combat Arms Earplug Prods. Liab. Litig., MDL No. 2885 (Aug. 14, 2022).

183. *Id.* at 6.

184. *Id.* at 6, 8.

185. This is true in no small part because the question of whether a bankruptcy petition represents “bad faith” is fundamentally an equitable, fact-intensive, and judge-specific determination. Thus far, then, equitable inquiries into “bad faith” and “good faith” use of bankruptcy have not produced clear answers about whether and under what conditions this new approach to mass-claim resolution is categorically appropriate. The antipodal views of Judge Kaplan in J&J and Judge Rodgers in 3M on this score illustrate this. Outside those opinions, though, and at least to the extent one can credibly analogize these arrangements to § 524(g) (however high a level of abstraction such analogies require), the “bad faith” arguments raised in J&J are nearly identical to those raised in the context of Johns Manville and § 524(g). It is beyond the scope of this Article to say whether the bankruptcy doctrine of “bad faith” *could* provide a vehicle by which some or all of the answers are reached. That said, for the foregoing reasons, I suspect it could not.

Indeed, at a higher level, the Two-Step defendants and their “bad faith” critics are largely talking past one another.¹⁸⁶ Given that many of the “bad faith” critiques stem directly from the Two-Step bankruptcies’ departure from the traditional justifications and purposes of mass-tort bankruptcy reorganizations, this makes sense. These defendants, however much they gesture to those traditional conceptions of mass-tort bankruptcy, do not at all seek to situate their uses of bankruptcy within their boundaries—a fact that of course has not escaped their critics’ notice. On the contrary, a close look at the arguments raised by J&J and 3M reveals that defendants hope to secure access to bankruptcy in mass torts on the basis of fundamentally *new* justifications. Defendants make one of those justifications quite explicit: To escape MDL. The second they leave more implicit: To resolve mass-tort obligations on their own turf and on their own terms.

At this juncture, two critical points bear mention. One, nothing in this Article is meant to say that bankruptcy is necessarily an inappropriate or undesirable tool for resolving mass torts. Nor is it to reject the possibility that bankruptcy’s use in mass torts could be expanded, whether in ways that scholars have suggested or otherwise, to resolve mass-tort claims efficiently and fairly.¹⁸⁷ At bottom, whether and to what extent bankruptcy is a more or less effective tool for resolving mass torts are inquiries beyond the scope of this Article. In any event, these questions will not often lend themselves particularly well to abstract responses —answers to them often depend on the exigencies of a particular set of cases, the relative superiority or inferiority of alternative tools for managing and resolving that set of cases, and the case management and supervisory capacities of the relevant bankruptcy

186. It is beyond the scope of this Article (and the Author’s core expertise) to engage in, much less try to resolve, these broad and thorny questions of bankruptcy law and doctrine. It is similarly beyond the scope of this Article to say whether the “bad faith” doctrine in bankruptcy, either as is now or as it might be refined and developed in the future, *could* be used to offer much-needed, cross-cutting guidance on what guardrails ought to be in place for mass-tort bankruptcies that do not hew to the traditional conceptions and justifications of mass-tort bankruptcies past. It is also beyond the scope of this Article to resolve questions about whether and in what ways established understandings about the constraints on the use of bankruptcy as a mass-tort tool ought to be reconceptualized and expanded.

187. Indeed, as a descriptive matter, the use of bankruptcy in mass-torts has occurred outside of the rigid confines of total insolvency (indeed, Chapter 11 does not require as much). See Keach, *supra* note 172, at 26. As a normative matter, some scholars have argued that this descriptive state of affairs is not only desirable, but fails to go far enough. Sergio J. Campos, *Mass Torts and Due Process*, 65 VAND. L. REV. 1059, 1115 (2012) (arguing that a solution would be “the use of (1) an insurance fund, to reduce the risk that future claimants will not recover because of bankruptcy or limits on successor liability, and (2) damages scheduling, to reduce the risk that present claimants rig the rules to recover on a preferred basis”); see generally Campos & Parikh, *supra* note 121.

judge, just to name a few. Moreover, these questions also raise broader, higher-level questions—chief among them whether, to what extent, and in what ways existing bankruptcy law ought to be refined and developed so as to provide necessary guardrails for ensuring fairness, equity, and efficiency in the resolution of mass-tort claims. At any rate, many of these questions necessitate further empirical research into, and normative and theoretical scholarship about, MDL and bankruptcy as mass-tort mechanisms.

Two, none of this is to suggest that MDL is without flaws or that efforts at improving the MDL process should not be continued.¹⁸⁸ And none of this is meant to take a position as to whether the MDL system has become unable, as a descriptive matter, to resolve mass torts, as defendants like J&J and 3M suggest. On the latter point, though, I sincerely doubt this is the case.

It is important nonetheless to point out that defendants' broadsides against MDL do not exist in a strategic vacuum. Maybe they detest MDL *so much* that literally anything would be better. But much in the foregoing portions of this Article suggest that defendants are not running to bankruptcy because MDL in Article III is irredeemably flawed, much less that those defendants are joining various reform-minded MDL scholars, whose work they cite, in honest efforts to improve the MDL system. Instead, these defendants principally seek to use a change in forum to obtain rather substantial benefits for themselves. Benefits, it must be added, that defendants could not have obtained in MDL.

The second principal reason defendants are pursuing these Two-Step maneuvers from MDL to bankruptcy is one they do *not* make explicit. The benefits defendants seek to obtain by way of moving from MDL in Article III to bankruptcy in Article I are not just substantial on their own terms (which they are), but they also achieve a substantial and likely irreversible alteration of the bargaining dynamics between plaintiffs and defendants in the litigation more broadly. As the final section of this Article outlines, this gambit has significant implications for the mass-tort universe, and it raises difficult and fundamental questions about due process in mass torts.

There is a long-term gambit at work in the Two-Step bankruptcies. Should these Two-Step bankruptcies succeed, they would catalyze a significant transformation of the mass-tort landscape by way of procedural warfare. The ultimate results of such a transformation are hard to predict, given that procedural warfare is not without its unintended

188. See, e.g., *supra* Part II.B.

consequences.¹⁸⁹ As currently designed, however, the benefits of the transformation would inure to large corporate defendants. Highly solvent defendants are not here to *use* bankruptcy as a mass-tort resolution tool so much as to achieve, by way of the formal designation of bankruptcy in Article I, what could never be achieved in Article III: Namely, the resolution of mass torts according to their own terms and at their own declared price. And this strategic gambit, should it succeed, raises serious and fundamental questions of mass-tort due process.

Just on their own procedural terms, the tactics and maneuvers employed by J&J and 3M to reorganize in bankruptcy depart from mass-tort bankruptcies past. The tide shifted from the debtor entity/defendant *itself* reorganizing in bankruptcy to preserve assets for futures claimants, to the debtor entity/defendant still *itself* reorganizing yet *also* shielding related entities from liability, to now: The highly solvent defendant removing itself from the equation entirely, siphoning off liability onto another entity the defendant has created to be or designated as the “new” debtor. Substantively, this maneuver poses a much more significant threat to claimants—present and future alike.

What clearly emerges from the case studies in this Article is that “Two-Step” bankruptcy maneuvers allow corporate defendants, unilaterally, to engineer and alter the bargaining dynamics decidedly in defendants’ favor. J&J and 3M’s use of bankruptcy does not just move the players to the settlement around, it fundamentally changes the game. In so doing, the Two-Step bankruptcies highlight at least two longstanding and difficult questions familiar to the world of mass torts in general, and at the intersection of aggregate litigation in MDL and bankruptcy in particular. One, should mass torts be resolved in bankruptcy, as opposed to other mass-tort mechanisms like MDL and class actions?¹⁹⁰ Two, if so, what, if any, guardrails must be put in place to protect the due process rights of claimants to ensure fairness and equitable treatment?¹⁹¹ These questions are of significant regulatory and constitutional import.

189. See generally Glover, *supra* note 25.

190. See, e.g., Norman N. Kinel, *The “Texas-Two-Step” Firestorm: This Is No Dance!*, NAT’L L. REV. (Feb. 22, 2022) <https://www.natlawreview.com/article/texas-two-step-firestorm-no-dance> (discussing arguments for and against use of bankruptcy as mass-tort resolution mechanism); Campos, *supra* note 187.

191. On this score, there is a great deal of disagreement, both as to what such guardrails would need to look like, but more fundamentally *whether* any guardrails must be introduced to deal with the Two-Step maneuvers. Of course, the first matters little if the second is resolved against the development and imposition of new guardrails or these “new” mass-tort bankruptcies. Accordingly, and for at least this reason, this Article grapples principally with this second, fundamental, disagreement.

Mass-tort claims have long been challenging to resolve because of these longstanding due-process considerations, which stem from a claimants' right to her "day in court." Due process protections of "adequate representation" and "opt out" exist in no small part to ensure equitable treatment of mass-tort claimants despite the oft-diminished operation of adversarial norms in mass litigation. Against this backdrop, the "new" Two-Step mass-tort bankruptcies share two common, and deeply concerning, elements.

First is the lack of claimant representation, adequate or otherwise, throughout the process of forming and drafting the plan of reorganization. Consider on this score, the J&J reorganization. Talc claimants were not represented, adequately or otherwise, at any time during the reorganization of J&J and creation of LTL Management—an entity that exists only as a direct response by J&J to the talc-claims MDL litigation for the sole purpose of absorbing and resolving J&J's liabilities pursuant to those claims. Likewise, claimants were not represented, adequately or otherwise, during the design, formation, or execution of the "Funding Agreement" at the heart of the reorganization of J&J, LTL Management, and other J&J entities, which sets forth the terms, conditions, and processes by which talc claims would be resolved. And again, claimants were not represented, adequately or otherwise, when J&J put LTL Management into bankruptcy forty-eight hours after creating it, nor during the process of drafting the LTL Management petition for bankruptcy, thereby binding claimants to the mandatory exchange of their claims, as well as their rights to their day in court and right to opt out. How can claimants receive adequate representation in the resolution of their claims if they were not even present to the deal (the funding agreement and reorganization) around which the resolution is structured? Are claimants "adequately represented" when plans for resolving claims are developed chiefly, if not exclusively, by the defendant-company? It is talismanic that an adversary cannot be one's representative in negotiations. And yet, that is precisely what the complex maneuvers in the Two-Step bankruptcies studied here achieve.

Moreover, due process concerns about equitable treatment of claimants in mass torts do not simply disappear by way of a forum change to Article I or a shift to Article I bankruptcy procedures. To ensure due process protections for claimants in bankruptcy, scholars have focused on back-end protections like futures representatives and other procedures regarding the voting procedures on a final bank-

ruptcy plan.¹⁹² Whatever protections may or may not be needed on the back-end, it is far from obvious that *ex post* procedures and safeguards (including additional negotiation and voting by the claimants) in the bankruptcy court could possibly be cure “adequate representation” defects that occurred pre-petition. In fact, back-end protections would seem to do little to undo the damage already done: The bargaining dynamics for any back-end negotiations, procedures, or otherwise has been unilaterally shifted by defendants into their own favor by way of the very maneuvers that forced claimants into a bankruptcy proceeding in the first place.

Second, due process has long given claimants the right to “opt out”—to pursue their “day in court” and go it alone, should they so choose. These “new” bankruptcy maneuvers deprive mass-tort claimants of this right. To be sure, the “day in court” right is not absolute. However, exceptions to this right are narrow and few. Bankruptcy has long existed as a mechanism by which one of those exceptions—necessity—is effectuated. In Article III, preservation of opt-out rights has been operationalized by various mechanisms, most clearly implicated among them the requirement that the certification of a mandatory class for monetary damages only be done in the presence of what the Supreme Court in *Ortiz v. Fibreboard* deemed an actually “necessary” limited fund.¹⁹³ The terms of reorganization of the “new” mass tort defendants are contained in corporate Funding Agreements and Trusts. Included therein is the amount at which the parent company will fund a spun-off entity. Once that spun-off entity is put into bankruptcy, by way of a bankruptcy petition to which the Funding Agreement and Trust is attached, the amount for funding the spun-off entity becomes, effectively, the limits of the corpus of assets to which mass-tort claimants have access. The Supreme Court has made clear that such artificial constraints on the claimant fund run afoul of due process protections for claimants. The Two-Step bankruptcies seem to constitute a blatant end-run around the Supreme Court’s decision in *Ortiz*. In J&J, it is falsely manufactured. Without it, claimants are being forced into mandatory claim-resolution processes and to trade their right to a day in court without having had any say—any representation—in that particular process of “exchange.”

As already mentioned, it is axiomatic that one cannot be adequately represented by their adversary. Yet that is precisely what occurred in both LTL’s and Aearo’s transition to bankruptcy. As one would ex-

192. See Campos & Parikh, *supra* note 121, at 328–31.

193. *Ortiz*, 527 U.S. at 819, 863.

pect from a process in which mass-tort claimants are “represented” only by their adversaries, the effect would be to shift significantly the bargaining dynamics of the litigation in defendants’ favor, and to place mass-tort claimants in a significant “position of weakness.”¹⁹⁴ And this is on top of one of the most significant bargaining advantages that would inure to corporate defendants—avoiding adverse rulings in the MDL forum and therefore depriving claimants of the leverage that inures from those rulings.

Importantly, these and other potential due process concerns are introduced by the defendants’ maneuvers themselves. Indeed, none of the foregoing is to say a bankruptcy court lacks the ability to faithfully oversee bankruptcies, including with an eye towards the due process concerns that follow mass torts into that forum. Instead, it is to say that due process concerns like these would tend to evade the bankruptcy forum. These due process defects and the bargaining advantages they would generate for mass-tort defendants like J&J and 3M are not likely to be cured in the bankruptcy proceeding *ex post*. Instead, they would be baked into it. Both J&J’s and 3M’s maneuvers, which are inextricably intertwined with both mass-tort MDL and mass-tort bankruptcy, occurred outside the purview of both MDL and bankruptcy. As such, it risks evading the scrutiny of both fora. This provides too ample an opportunity for corporate defendants to end-run around fundamental and long-established constitutional strictures of due process in mass litigation.

CONCLUSION

The Two-Step mass-tort bankruptcies, on their own terms, have largely avoided due process scrutiny. This is in no small part because corporate defendants have constructed an erroneous conceptual “bankruptcy” frame around what are effectively mass-tort settlements that misdirects analysis away from due process and towards incomplete and, at times, inaccurate formalist labels. This conceptual misdirection and my unpacking of it is the subject of future work.

In some senses, the Third Circuit’s recent rejection of Johnson & Johnson’s gambit on the narrow grounds of “bad faith” filing, rather than on due process grounds, cuts both ways. On the one hand, it is probably good that the audacious move of self-bankrupting did not get past the bankruptcy blush test. On the other hand, however, the narrowness of the Third Circuit’s decision leaves fundamental con-

194. See *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 788 (3d Cir. 1995).

cerns of due process for another day, another case, and another set of (perhaps less audacious-in-appearance) maneuvers. This narrowness also leaves conceptual misdirection to persist, and to distract from many of the fundamental issues and rights at stake.

Critically, these component parts of a corporate restructuring and subsequent bankruptcy are now *also* and *principally* component parts of what is effectively a mass-tort deal. Therefore, the legitimacy of any deal, and the processes that produced it, is not principally a question of corporate form or corporate law, or solely a question of equitable bankruptcy doctrine. Instead, the legitimacy of any mass-tort deal must be determined by reference to “old” mass-tort precepts and principles. Viewed, as they must be, within this broader conceptual lens, we can begin to answer the many difficult mass-tort questions these Two-Step bankruptcies raise.

APPENDIX

This Appendix supplements the Article, *Due Process Discontents in Mass-Tort Bankruptcy* in this edition of the *DePaul Law Review* and provides a diagram of the process and component steps of the corporate restructuring described in Part III.A.¹⁹⁵

One. Old JJCI’s then-direct parent company, Janssen Pharmaceuticals, Inc. (a wholly owned subsidiary of J&J), organized a company it named Currahee Holding Company, Inc. (Currahee) to become the new direct parent of Old JJCI.

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Janssen Pharmaceuticals, Inc. Currahee Holding Co. Inc.

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Old JJCI

Two. Currahee Holding Co. then organized a company it named Chenango Zero LLC, which it incorporated in Texas as a limited liability company, as its own wholly owned subsidiary.

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Currahee Holding Co. Inc.

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Old JJCI

Chenango Zero LLC [Texas LLC]

Three. Old JJCI then merged with Chenango Zero LLC, and Old JJCI ceased to exist.

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195. There are additional complexities to some of the corporate name changes. I have omitted those that I believe unduly clutter the diagram while adding little or nothing to the understanding of the maneuvers.

Currahee Holding Co. Inc.

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Old JJCI — Chenango Zero LLC [Texas LLC]

Four. J&J and Currahee agreed to a funding agreement, whereby J&J and Currahee were the payors to Chenango Zero LLC, the payee.

Five. Using the Texas Business Organizations Code provision governing divisive mergers, Chenango Zero LLC effected a divisional merger where Chenango Zero LLC was dismantled, and through which two new LLC's were created: Chenango One LLC and Chenango Two LLC, to divide the assets and liabilities of Old JJCI/Chenango Zero LLC.

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Currahee Holding Co. Inc.

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Chenango Zero LLC [divisionally merged under TX BOC, creating Chenango One LLC and Chenango Two LLC]

Six. Chenango Two LLC merged with and into Currahee.

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Currahee Holding Co. Inc. [merged with] Chenango Two LLC

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Chenango One LLC [Texas LLC]

Seven. Currahee changed its name to Johnson and Johnson Consumer Inc. ("New JJCI").

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Currahee Holding Co. Inc./Chenango Two LLC Renamed “New JJCI”

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Chenango One LLC [Texas LLC]

Eight. Chenango One LLC converted from a Texas LLC into a North Carolina LLC.

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“New JJCI”

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Chenango One LLC [*Changed to North Carolina LLC*]

Nine. Chenango One LLC, now a North Carolina LLC, changes its name to LTL Mgmt LLC. LTL Mgmt assumed responsibility for Old JJCI’s talc-related liabilities in this 2021 corporate restructuring, and it also received Old JJCI/Chenango’s rights under the funding agreement between J&J and Currahee-Chenango Two/New JJCI as payors and Chenango One LLC-LTL Mgmt LLC as payees. \$6 million was placed in LTL Mgmt LLC’s bank account after its creation.

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“New JJCI”

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Chenango One LLC [NC LLC] Renamed LTL Mgmt, LLC [NC LLC] (funded with \$6 million from Old JJCI/J&J)

Ten. As part of the 2021 Corporate Restructuring, LTL Mgmt LLC is made the direct parent of a North Carolina LLC, Royalty A&M LLC (Royalty), which owns a portfolio of royalty revenue streams, including those based on third-party sales of LACTAID, MYLANTA, and

ROGAINE products.¹⁹⁶ Old JCCI organized Royalty as a direct subsidiary of LTL Mgmt, and after an exchange between Old JJCI and Royalty for ownership of Royalty’s full equity, Old JJCI contributed \$367.1 million to LTL Mgmt LLC. This brought LTL Mgmt LLC’s value to \$373.1 million, not including the Funding Agreement with New JJCI and J&J. Under that agreement, “J&J and New JJCI . . . are obligated to pay ‘any and all costs and expenses’ up to the value of New JJCI *excluding* the talc liability that LTL incurs during its bankruptcy case, ‘including the costs of administering the Bankruptcy Case’ to the extent necessary.”¹⁹⁷

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“New JJCI”

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LTL Mgmt, LLC [NC LLC] (additional \$367.1 from Old JJCI by way of Old JCCI’s receipt of Royal’s full equity)

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Royalty A&M LLC (full equity given to Old JJCI, which was then used to fund LTL Mgmt)

196. *In re* LTL Mgmt., LLC, 637 B.R. 396, 402 (Bankr. D.N.J. 2022) (citing Expert Report of Saul E. Burian, Ph.D., 15).

197. Funding Agreement at 5–6, included in Annex 2 to Kim Decl., (emphasis added).