ESSAY

MASS EXPLOITATION

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Modern mass tort defendants—including Johnson & Johnson, Purdue Pharma, USA Gymnastics, and Boy Scouts of America—have developed unprecedented techniques for resolving mass tort cases. Three weapons in this new arsenal are particularly noteworthy. Before filing for bankruptcy, corporate defendants undergo divisive mergers to access bankruptcy on their terms. Once in bankruptcy, these mass restructuring debtors curate advantageous provisions in the Bankruptcy Code to craft their own ad hoc resolution mechanism implemented through plans of reorganization. This maneuver facilitates questionable outcomes, including the third-party releases the Sackler family recently secured. Finally, a mass restructuring debtor can agree to convert its tainted business into a public benefit corporation after bankruptcy and devote future profits—no matter how speculative they may be—to victims in exchange for a reduced financial contribution to the victims' settlement trust.

The net effect of these legal innovations is difficult to assess because the intricacies are not fully understood. Debtors argue that these resolution devices provide accelerated and amplified distributions. And forum shopping has landed cases before accommodating jurists willing to tolerate unorthodoxy. The fear, however, is that mass tort victims are being exploited. The aggregation of these maneuvers may allow culpable parties to sequester funds outside of the bankruptcy court's purview and then rely on statutory loopholes to suppress victim recoveries. Mass restructuring debtors are also pursuing victim balkanization—an attempt to pit current victims against future victims in order to facilitate settlements that may actually create disparate treatment across victim classes.

This Essay is the first to identify and assess the new shadowed practices in mass restructuring cases, providing perspective on interdisciplinary dynamics that have

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eluded academics and policymakers. This is one of the most controversial legal issues in the country today, but legal academia has largely overlooked it. This Essay seeks to create a dialogue to explore whether a legislative or judicial response is necessary and what shape such a response could take.

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INTRODUCTION

In 1956, Battelle Memorial Institute (BMI) received an odd request. Johnson & Johnson (J&J) asked the relatively obscure research laboratory to analyze large deposits of talc mined in Italy.[1] Small amounts of "grit" permeated batches of talcum powder, rendering some product abrasive.[2] J&J wanted BMI to identify the source, explore methods to filter the offending particles from future batches, and comprehensively resolve the problem.

BMI produced a pair of reports (BMI Reports), which identified myriad particles and contaminates that contributed to abrasiveness.[3] In particular, BMI found in each talc sample a relatively small amount of tremolite. In exhausting detail, the BMI Reports explored how tremolite's "cleavage fragments" were likely causing abrasiveness in J&J's baby powder.[4] The BMI Reports, however, failed to appreciate the study's true significance: asbestos

1 *See* W.L. SMITH, BATTELLE MEM'L INST., STUDIES OF THE PHYSICAL PROPERTIES OF TALC, THEIR MEASUREMENT, AND COMPARISON TO JOHNSON & JOHNSON 1 (1957); *see also* W.L. SMITH, BATTELLE MEM'L INST., PROGRESS REPORT ON FURTHER STUDIES ON THE MEASUREMENT AND CORRELATION OF THE PHYSICAL PROPERTIES OF TALC TO JOHNSON AND JOHNSON (1958), https://s3.documentcloud.org/documents/5017501/1957-and-1958-Lab-Reports-on-Italian-Talc.pdf [https://perma.cc/X49L-2R5Q].

2 *See id.*

3 *See generally id.*

4 *See* Lisa Girion, *Johnson & Johnson Knew for Decades That Asbestos Lurked in its Baby Powder*, REUTERS (Dec. 14, 2018, 2:00 PM), https://www.reuters.com/investigates/special-report/johnsonandjohnson-cancer [https://perma.cc/M3GU-58KB].

is the more common name for the fibrous form of tremolite.[5] Talc particles contaminated with asbestos could cause cancer if inhaled or placed in areas where the particles could enter the body—a placement J&J's advertising had encouraged for decades.[6]

The BMI Reports' seismic consequences were not lost on J&J executives.[7] In subsequent years, the company purchased numerous talc mines searching for a clean talc source.[8] But an April 9, 1969 memo written by the J&J executive tasked with the company's talc supply acknowledged that tremolite was a common particle found in talc deposits and virtually impossible to eliminate.[9]

J&J never disclosed its fears to the Food & Drug Administration or its customers.[10] Further, its marketing campaign continued to encourage customers to sprinkle baby powder on their bodies; more specifically, women were encouraged to apply the powder to their perineal area.[11] Recent lawsuits alleging a link between the repeated application of talcum powder and ovarian cancer have forced the release of internal J&J documents.[12] New information has led to a modified view of talcum powder and a better understanding of its effects.[13] Adverse jury verdicts against J&J culminated in a $4.7 billion verdict against the company in 2018.[14] As of July 29, 2021, there were 38,200

5 Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 WIDENER L.J. 97, 102-03 (2013) ("Evidence produced during litigation has shown that at least some asbestos manufacturers were aware of the risks that asbestos exposure posed to miners and factory workers as early as the 1930s. In the 1960s, a prominent epidemiological study, directed by Dr. Irving Selikoff and others at Mount Sinai Hospital, described asbestos inhalation's harmful effects on insulation workers' health.").

6 Tiffany Hsu & Roni Caryn Rabin, *Johnson & Johnson to End Talc-Based Baby Powder Sales in North America*, N.Y. TIMES (July 27, 2021), https://www.nytimes.com/2020/05/19/business/johnson-baby-powder-sales-stopped.html [https://perma.cc/5WEU-TS5L].

7 In the 1960s, Dr. Irving Selikoff substantiated the harmful effects of asbestos inhalation. *See* Robreno, *supra* note 5; DEBORAH R. HENSLER, INST. FOR CIV. JUST., ASBESTOS LITIGATION IN THE UNITED STATES: A BRIEF OVERVIEW (1991).

8 *See* Girion, *supra* note 4.

9 *See* Memorandum from W. H. Ashton, Johnson & Johnson on Alternate Domestic Talc Sources File No. 101 to Dr. G Hildick-Smith (Apr. 9, 1969).

10 In fact, the company manipulated information in a 2009 report in order to convince the Food and Drug Administration to forgo placing a warning label on bottles of J&J's baby powder. *See* Jef Feeley & Anna Edney, *Unsealed Emails Show How J&J Shaped Report on Talc's Links to Cancer*, BLOOMBERG (Nov. 8, 2021, 11:07 AM), https://www.bloomberg.com/news/articles/2021-11-08/j-j-s-role-shaping-cancer-report-revealed-by-unsealed-emails [https://perma.cc/CS4J-X77R].

11 Chris Kirkham & Lisa Girion, *Special Report: As Baby Powder Concerns Mounted, J&J Focused Marketing on Minority, Overweight Women*, REUTERS (Apr. 9, 2019, 9:08 AM), https://www.reuters.com/article/us-johnson-johnson-marketing-specialrepo/special-report-as-baby-powder-concerns-mounted-jj-focused-marketing-on-minority-overweight-women-idUSKCN1RL1JZ [https://perma.cc/D3JG-HKLL].

12 *See id.*

13 *See id.*

14 The award was later reduced to $2.12 billion. *See* Jef Feeley, *Johnson & Johnson Talc Verdict Cut in Half to $2.1 Billion by State Court*, DETROIT NEWS (June 23, 2020, 4:31 PM), https://www.detroitnews.com/

talc-related cases pending against the company.[15] These lawsuits have been consolidated in multi-district litigation (MDL) in the U.S. District Court in New Jersey.

MDL consolidation is frequently the precursor to comprehensive settlement, but J&J has no intention of going gentle into that good night. The company recently executed a "divisive merger"—an extremely obscure maneuver that allowed for the isolation of all liability related to its talcum powder in one subsidiary. And on October 14, 2021, that subsidiary—LTL Management LLC—filed for bankruptcy while the other parts of the J&J empire stayed out of the process.[16]

Why would one of the most profitable companies in the world even consider bankruptcy?[17] This question is just one of many that arise in the brave new world of mass restructurings. My recent article unpacked the answer to this question and explained how federal bankruptcy offers mass tort defendants the ability to aggregate and resolve state and federal claims on an accelerated timeline in a forum that is particularly responsive to their preferences.[18] Bankruptcy resolution is the optimal process to resolve many modern mass tort cases, providing the greatest recovery for the victims' collective on the shortest timeline. But the process can still undermine victims' rights in ways that are obscured.

This Essay explores the new legal innovations and statutory exploitations that have become part of this process. The story starts before the bankruptcy filing. Divisive mergers, the state court process designed for small businesses,[19] are being used by corporate behemoths to file for bankruptcy on

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story/business/2020/06/23/johnson-johnson-talc-verdict-cut-half-billion-state-court/112001422 [https://perma.cc/9A3V-L5VG].

15 *See* Johnson & Johnson, Quarterly Report, 29 (Form 10-Q) (July 29, 2021).

16 *See* Rick Archer, *Johnson & Johnson Puts Talc Spinoff Into Ch. 11*, LAW360 (Oct. 14. 2021, 6:29 PM), https://www.law360.com/articles/1431315/johnson-johnson-puts-talc-spinoff-into-ch-11 [https://perma.cc/PN9Y-BQYN]; *see also* Jonathan Randles, Becky Yerak & Andrew Scurria, *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-corral-vast-talc-litigation-11626773400 [https://perma.cc/48PV-FPV3]. The bankruptcy case is currently pending before the U.S. Bankruptcy Court for the District of New Jersey. *See* Vince Sullivan, *J&J Talc Liability Unit's Ch. 11 Transferred to NJ*, LAW360 (Nov. 10, 2021, 3:09 PM), https://www.law360.com/bankruptcy/articles/1439777/j-j-talc-liability-unit-s-ch-11-transferred-to-nj [https://perma.cc/LQ27-3H3U].

17 Johnson & Johnson boasts a roughly $443 billion market value. *See* Mike Spector, Jessica Dinapoli & Dan Levine, *J&J Exploring Putting Talc Liabilities into Bankruptcy*, REUTERS (July 19, 2021, 6:17 AM), https://www.reuters.com/business/healthcare-pharmaceuticals/exclusive-jj-exploring-putting-talc-liabilities-into-bankruptcy-sources-2021-07-18 [https://perma.cc/B6LD-8MQS].

18 *See* Samir D. Parikh, *The New Mass Torts Bargain*, 91 FORDHAM L. REV. (forthcoming 2022) (manuscript at 5); *see also* Adam J. Levitin, *Purdue's Poison Pill: The Breakdown of Chapter 11's Checks and Balances*, 100 TEX. L. REV. (forthcoming 2022) (manuscript at 28).

19 *See* Cliff Ernst, *Divisive Mergers: How to Divide an Entity into Two or More Entities Under a Merger Authorized by the Texas Business Organizations Code*, 36 CORP. COUNS. REV. 233, 234-35 (2017).

their terms. Once inside the gates, mass restructuring debtors are exploiting statutory loopholes to fashion an ex post, ad hoc resolution structure that seizes all of the Bankruptcy Code's benefits with few of the costs. There are many consequences, including nondebtor releases that immunize malfeasance and insolvent settlement trusts that leave future victims without recovery for serious injuries. Finally, a revolutionary idea—which I refer to as the Public Benefit Proposal—theoretically allows a mass tort defendant to reduce its contribution to a victim settlement trust in exchange for agreeing to convert its business into a public benefit corporation and devote all profits to victims. This proposal purports to address the suppressed distributions seen in modern mass tort cases but could aggravate the risk of insolvent trusts.

I seek to make three primary contributions to the legal literature on mass torts, civil procedure, and financial restructuring. The result is primarily descriptive but serves a vital role in determining if corrective measures are necessary. This Essay is the first to identify the new shadowed practices, delineating the distinguishing characteristics and unique complexities they present.

Second, this Essay assesses these new maneuvers through the lens of victim recoveries. Mass defendants may be acting in ways that advantage some victims to the detriment of others. This Essay explores how the victim collective is not a monolith, and balkanization may be corporate defendants' true objective; pitting current victims against future victims by arguing that any attempt to fully compensate both groups will lead to significant recovery delays for victims currently suffering.

Finally, legal literature has overlooked the intersection of aggregate litigation and bankruptcy. This oversight has allowed shadowed practices to proliferate undetected. I hope to engage scholars from various disciplines to explore whether a legislative or judicial response is necessary and the optimal resulting framework.

I. GAINING ACCESS THROUGH DIVISIVE MERGERS

The Texas Business Organizations Code (TBOC) has an intentional quirk. "Merger" is defined to include a division of a business into two new entities.[20] This process is referred to as a "divisive merger"[21] and has been an obscure part of the TBOC since 1989.[22] The original design was to protect

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20 TEX. BUS. ORGS. CODE ANN. § 1.002(55) (West 2021).

21 I refer to this process as "corporate mitosis," which more accurately describes the result.

22 *See* Ernst, *supra* note 19, at 234 n.5. Arizona, Pennsylvania, and Delaware have adopted similar provisions but lack the case history supporting the practice. *See* Donald F. Parsons, Jr., R. Jason Russell & Koah M. Douds, *The Business Lawyer—Seventy-Five Years Covering the Rise of Alternative Entities,* 75 BUS. LAW. 2467, 2485 n.144 (2020). The limited enactment of this provision

small businesses—including cattle and farming operations—involved in potentially dangerous operations.[23] A divisive merger allows these businesses to isolate valuable assets in an entity protected from creditor claims related to the primary operations.

In the last few years, this quirk of Texas law has garnered a lot of attention. Mass tort defendants began relying on the divisive merger because it offers corporate defendants the ability to access bankruptcy on their terms.[24] This interest culminated with J&J's announcement in October 2021 that it was planning a divisive merger in order to isolate mass tort liability related to its iconic talcum powder in a new subsidiary.[25] And on October 14, 2021, that subsidiary, LTL Management LLC, filed for bankruptcy while the other parts of the J&J empire stayed out of the process.[26] Divisive mergers are now center stage in the growing mass tort wars.

But how does the process work? In most cases, there is a corporate structure that includes at least one entity that holds valuable business operations but includes assets tainted by mass tort liability ("InfectedCo"). The conglomerate faces significant liability and may have already suffered adverse judgments or be involved in multi-district litigation. A global settlement of all mass-tort liability is necessary[27] but would require InfectedCo and perhaps other subsidiaries to file for bankruptcy "subjecting the entire . . . enterprise[] and . . . many employees, suppliers, vendors, and creditors to a chapter 11 proceeding."[28] Bankruptcy represents the best resolution model,[29] but the corporate parent would prefer to avoid subjecting valuable assets to creditor recovery and convoluted business decisions to bankruptcy court scrutiny.

In order to effectuate a divisive merger, InfectedCo—invariably a Delaware entity—incorporates as a limited liability company under Texas state law. Relying on the TBOC, InfectedCo undergoes corporate mitosis producing two

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does not affect its utility. An entity wishing to pursue a divisive merger can simply incorporate in the necessary state and effect the maneuver.

23 *See* Ernst, *supra* note 19, at 235-38.

24 This maneuver has been used in other cases. *See, e.g.*, *In re* Bestwall LLC, 605 B.R. 43, 47 (Bankr. W.D.N.C. 2019); *In re* Aldrich Pump LLC, No. 20-30608, Adv. No. 20-03041, 2021 WL 3729335, at *1 (Bankr. W.D.N.C. Aug. 20, 2021).

25 *See, e.g.*, Randles, *supra* note 16.

26 *See* sources cited *supra* note 16.

27 *See* Parikh, *supra* note 18, at 4 (explaining the global settlement imperative facing corporate defendants).

28 *See* Declaration of Ray Pittard in Support of First Day Pleadings at 4-5, *In re* Aldrich Pump LLC, No. 20-30608, Adv. No. 20-03041, (Bankr. W.D.N.C. June 18, 2020) [hereinafter Pittard Declaration].

29 *See* Parikh, *supra* note 18, at 6, 27, 48 (explaining that (i) class aggregation is rarely an option when the victim class is populated with both current and future victims because a class representative cannot be appointed when victims have fundamentally divergent interests; and (ii) MDLs have turned into captive settlement processes that deprive many defendants of autonomy and options).

new corporate entities. Let's call them GoodCo and BadCo. Under state law, InfectedCo is authorized to allocate assets and liabilities among the two new entities.[30] BadCo receives assets of nominal value and becomes solely responsible for all mass tort claims against InfectedCo. In other words, BadCo becomes the dumpster for all of InfectedCo's mass tort liability. GoodCo receives all other InfectedCo assets and liabilities. InfectedCo is dissolved.

This process effectively isolates mass tort liability in BadCo, unless the allocation constitutes a fraudulent transfer.[31] To address this daunting risk, GoodCo and BadCo sign various agreements designed to prop up what is ostensibly a shell company. The "Support Agreement" establishes reciprocal indemnification obligations corresponding to the allocation of liabilities in the divisive merger.[32] In other words, this agreement obligates both GoodCo and BadCo to indemnify each other for all losses incurred in connection with their respective assets and liabilities.[33] The "Funding Agreement" serves a loftier goal. This agreement requires GoodCo to provide funding for all costs and expenses incurred by BadCo to the extent BadCo lacks sufficient funds to satisfy such obligations.[34] Mass tort defendants argue that this agreement—which is the linchpin to defending against a fraudulent transfer claim—ensures that BadCo has the same ability to pay off its mass tort claims as InfectedCo did before the divisive merger.

After these machinations, GoodCo can remain a Texas company but will most likely reincorporate in Delaware. BadCo domiciles itself in a jurisdiction that will facilitate forum shopping to a friendly bankruptcy venue. BadCo filing for bankruptcy is the final step.

A divisive merger allows the parent to isolate mass tort liabilities in one subsidiary and then have that subsidiary—and that subsidiary alone—file for bankruptcy. Mass tort defendants can access bankruptcy on their terms and potentially keep valuable assets out of victims' reach. Once inside the gates, the Bankruptcy Code's statutory loopholes raise exploitation risks.

II. AD HOC RESOLUTION IN BANKRUPTCY

Section 524(g) of the Bankruptcy Code is designed to provide structured relief to debtors facing claims based on asbestos exposure; only debtors facing

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30 TEX. BUS. ORGS. CODE ANN. § 10.003 (West 2021). The allocation must be made under a plan of division, which is not filed with the state.

31 *See* 11 U.S.C. § 548 (establishing the criteria for avoidance of a fraudulent transfer).

32 *See* Pittard Declaration, *supra* note 28, at 9 (detailing the responsibilities contemplated in the funding agreements, including indemnification); *see also* Adversary Complaint at 8-9, Off. Comm. of Asbestos Claimants v. Bestwall LLC (*In re* Bestwall), No. 17-31795, Adv. No. 20-03049 (Bankr. W.D.N.C. July 29, 2020) (same).

33 Pittard Declaration, *supra* note 28, at 8-10; Adversary Complaint, *supra* note 32, at 8-9.

34 Pittard Declaration, *supra* note 28, at 8-10; Adversary Complaint, *supra* note 32, at 8-9.

those types of claims fall within the section's purview.[35] The section also imposes various restrictions to protect asbestos victims. But modern mass torts rarely involve asbestos claims.[36] The new mass restructuring debtors are not subject to § 524(g) or any of the various victim protections found therein. This freedom has allowed mass restructuring debtors to impose a new bargain on victims.

A. *Section 524(g)*

Section 524(g) of the Bankruptcy Code is a bespoke statutory provision enacted to address mass restructurings involving asbestos exposure claims.[37] Generally, an asbestos debtor has the option to fund a settlement trust to resolve all victim claims. In exchange, the debtor receives immunity through a channeling injunction that redirects all claims to the settlement trust.[38] The injunction can also be extended to nondebtor parties, including a parent corporation, affiliated entities, acquirers of assets, and insurance companies.[39]

This structure is implemented through the debtor's plan of reorganization. The primary features include: (1) the creation of a victims' trust funded by the debtor, affiliated entities, and insurers for payment to pay all present and future asbestos claims; (2) a channeling injunction that prevents attempts to pursue any claims based on asbestos exposure against parties protected by the plan; and (3) a future claim representative appointed to negotiate on behalf of unknown, future victims and presumably satisfy Due Process strictures.[40]

B. *Exploiting Loopholes in the Bankruptcy Code*

Section 524(g) does not apply to most modern mass restructuring cases. One may conclude that these debtors lament their exclusion, but it's actually an opportunity. Excluded debtors are fashioning their own ad hoc resolution structures by extracting beneficial provisions and concepts out of § 524(g), dropping them into a plan of reorganization,[41] and then convincing a

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35 11 U.S.C. § 524(g)(2)(B) (explaining that the provision is limited to cases involving injury caused by exposure to asbestos or asbestos-containing products).

36 *See* Parikh, *supra* note 18, at 5.

37 *See id.* at 32-34 (explaining the history of § 524(g)).

38 *See* 11 U.S.C. § 524(g)(3)(A). The injunction's scope is extremely broad, capturing "any right to or demand for payment that arises from the debtor's underlying asbestos liabilities, regardless of when that right or demand arises, whether it was raised during the bankruptcy proceeding or is contingent on a future event." *In re* W.R. Grace & Co., 729 F.3d 311, 321 (3d Cir. 2013).

39 *See* 11 U.S.C. § 524(g)(4)(a)(ii).

40 *See* Parikh, *supra* note 18, at 34 (detailing these and three other primary features found in reorganization plans).

41 I refer to these as "exempt plans" because they are not subject to § 524(g)'s restrictions.

bankruptcy judge to bless the Frankenstein creation pursuant to her § 105[42] equitable powers.[43] These exempt plans enjoy § 524(g)'s benefits without the costs. For example, § 524(g) has a 75%-voting threshold that must be cleared before victims' classes can be deemed to have "accepted" the proposed plan—a requirement under the Code.[44] But exempt plans do not have to meet this voting threshold. A simple majority vote is sufficient.[45]

Section 524(g)'s channeling injunction and nondebtor releases are the most desirable features of the bankruptcy process. However, the channeling injunction envisioned by § 524(g) is intended to protect the debtor exclusively.[46] Nondebtor parties—including affiliated entities and insurance companies—would love to secure the injunction's protection. These parties may only be included in the injunction's broad protection if various onerous criteria under § 524(g)(4)(A)(ii) are satisfied.[47] Modern mass tort cases are not subject to this restriction. Exempt plans authorize channeling injunctions and third-party releases that protect a wide swath of nondebtor parties, including parent and affiliate corporate entities, insurers, professional advisors, board members, and various administrative agents.[48] Some releases are actually designed to protect nondebtor third parties from liability for conduct unrelated to the debtor or its business.[49] The debtor is merely

42 Section 105 of the Code allows the bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provision of this title." 11 U.S.C. § 105(a). This provision has been construed to afford bankruptcy courts sweeping powers, and bankruptcy courts have not been shy about exploring the broadest reaches of the section's power conferment. *See, e.g.*, *In re* Kaiser Aluminum Corp., 456 F.3d 328, 340 (3d Cir. 2006) (citing § 105(a) as vesting bankruptcy courts with broad equitable power, subject to the parameters of the bankruptcy code).

43 *See, e.g.*, Second Amended Joint Chapter 11 Plan of Liquidation at 70, *In re* Insys Therapeutics, Inc., No. 19-11292 (Bankr. D. Del. Jan. 14, 2020) [hereinafter Insys Plan of Reorganization] (relying on § 105 powers for injunctions and stays in a bankruptcy case); *see also* Fifth Amended Chapter 11 Plan of Reorganization at 102, *In re* Boy Scouts of Am., No. 20-10343 (Bankr. D. Del. Feb. 18, 2020) [hereinafter BSA Plan of Reorganization] (relying on § 105 equitable injunction power). In fact, corporate debtors who were entitled to use § 524(g) have tried to ignore the subsection and convince bankruptcy courts to use § 105 to allow for an alternative structure. *See In re* Energy Future Holdings, Corp., 949 F.3d 806, 825 (3d Cir. 2020) (chastising a party for "attempting to circumvent § 524(g)").

44 11 U.S.C. § 524(g)(2)(B)(ii)(IV)(bb).

45 *See* Parikh, *supra* note 18, at 36.

46 *See* 11 U.S.C. § 524(e) ("[D]ischarge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.").

47 *See, e.g.*, Pfizer Inc. v. Law Offices of Peter G. Angelos *(In re* Quigley Co, Inc.), 676 F.3d 45, 59-60, 62 (2d Cir. 2012) (holding that an injunction could not be extended to protect a debtor's parent entity); *see also* Parikh, *supra* note 18, at 36-37.

48 *See, e.g.*, Insys Plan of Reorganization, *supra* note 43, at 73; BSA Plan of Reorganization *supra* note 43 at 109-10, 112-13.

49 *See, e.g.*, Fifth Amended Joint Chapter 11 Plan of Reorganization at 113-14, *In re* Purdue Pharma L.P., No. 19-23649 (Bankr. S.D.N.Y. June 2, 2021) [hereinafter Purdue's Fifth Amended Plan] (releasing liability for tort, contract, fraud, negligence, and other forms of liability).

required to show that the protected party was necessary for formulating and implementing the victims' trust at issue—an extremely low bar to clear.[50]

Further, § 524(g) attempts to satisfy due process concerns in many mass tort cases by requiring the appointment of a future claimants' representative, or FCR, to advocate for unknown, future victims.[51] The FCR's approval is necessary before future victims' claims can be subject to a channeling injunction or other disposition.[52] This procedure has already been adopted in modern mass tort cases not subject to § 524(g).[53] Unfortunately, the procedure is inherently flawed.

The Code fails to prescribe selection procedures for the FCR, who has the exclusive power to bind unknown, future victims, but operates without any client oversight. This dynamic is arguably unavoidable when dealing with future victims, but the agency breakdown is more severe than it seems. Courts have delegated this responsibility to the mass restructuring debtor—the very party against whom the FCR will be negotiating.[54] Invariably, the debtor is the only stakeholder that proposes FCR candidates and, in almost all cases, nominates only one.[55] The only standard of review is that the nominee be disinterested—which represents an extremely low bar focused on whether the individual has any blatant conflicts of interest.[56] Once a selection is made, courts do not review the FCR's performance. Future victims lack opt out rights. Victims whose harm manifests on a longer timeline and who face extremely inequitable settlement terms have no recourse against the FCR,

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50 11 U.S.C. § 524(g)(4); *see also* Disclosure Statement for Third Amended Joint Chapter 11 Plan of Reorganization at 32-33, *In re* TK Holdings Inc., No. 17-11375 (Bankr. D. Del. Jan. 5, 2018) [hereinafter TK Holdings Third Amended Plan] (releasing liability for a broad category of liability of debtors and third parties).

51 *See* 11 U.S.C. § 524(g)(4)(B). Naturally, many mass tort cases do not involve unknown, future claimants and avoid the complexities created by the FCR.

52 11 U.S.C. § 524(h)(1)(c).

53 *See, e.g.*, TK Holdings Third Amended Plan, *supra* note 50, at 6 (noting the appointment of a future claimants' representative in a case not involving asbestos liability).

54 *See, e.g.*, Vara v. Duro Dyne Nat'l Corp. (*In re* Duro Dyne Nat'l Corp.), No. 18-15563, Adv. No. 18-15563, 2019 WL 4745879, at *6 (D.N.J. Sept. 30, 2019) ("[A] debtor—or any other party in interest—may nominate the future claimants' representative and [] a bankruptcy court may approve a debtor's nominee."); *In re* Fairbanks Co., 601 B.R. 831, 842-44 (Bankr. N.D. Ga. 2019) (allowing a debtor's nomination of the future claimants' representative to stand after conducting an independent analysis of his qualifications); *In re* Imerys Talc Am., Inc., No 19-10289, 2019 Bankr. LEXIS 1452, at *10-15 (Bankr. D. Del. May 8, 2019) (same).

55 *See In re* Duro Dyne Nat'l Corp., 2019 WL 4745879, at *1 (nominating one); *In re* Fairbanks Co., 601 B.R. at 833 (same); *In re* Imerys Talc Am., Inc., 2019 Bankr. LEXIS 1452, at *2 (same).

56 *See* 11 U.S.C. § 101(14) (defining a "disinterested person" as someone who is "not a creditor, an equity security holder, or an insider," is not or was not in the two years prior to filing an officer, director, or employee of the debtor, and "does not have an interest materially adverse" to any creditor of the debtor); *In re* Duro Dyne Nat'l Corp., 2019 WL 4745879, at *7-10 (holding that the "disinterested" standard under § 101(14) applies to the future claimants' representative, rather than the "appearance of impropriety" standard).

who enjoys broad immunity through the plan of reorganization for all actions aside from fraud, gross negligence, and willful misconduct.[57]

The idea that the FCR would fail to be a zealous advocate may seem confusing at first but emerges with shocking clarity when one considers the capture risk involved in mass tort cases. A small pool of professionals manages the universe of mass tort bankruptcy cases, and the process is characterized by repeat players. FCRs receive significant fees and, once appointed, immediately hire as legal counsel the law firm at which they are a partner, thereby amplifying the benefit. The promise of multiple engagements can incentivize an FCR to discount her invisible clients' interests.

Exempt plans produce distorted results. The Purdue Pharma bankruptcy case is just one example of this. After extensive rounds of negotiation with various governmental agencies and creditor committees, the Sackler family agreed to contribute approximately $4.3 billion to the victims' settlement trust.[58] In exchange, the debtor's plan provided comprehensive releases for (i) Raymond and Mortimer Sackler, (ii) all of their living and unborn descendants, (iii) all current and future spouses, and (iv) various associated parties that could include thousands of unknown individuals.[59] The initial releases insulated these protected parties from conduct unrelated to Purdue Pharma or its business and protected any type of civil misconduct—including fraud, gross negligence, willful misconduct, and deliberate ignorance.[60] It would have been extremely difficult to justify these releases if the company had been subject to § 524(g).[61] But without § 524(g)'s restrictions, the

57 *See, e.g.*, S. Todd Brown, *Section 524(g) Without Compromise: Voting Rights and the Asbestos Bankruptcy Paradox*, 2008 COLUM. BUS. L. REV. 841, 899 ("[B]ankruptcy plans routinely shield legal representatives from liability to future claimants for all but the most egregious misconduct.").

58 *See* Brian Mann, *The Sacklers, Who Made Billions from OxyContin, Win Immunity from Opioid Lawsuits*, NPR (Sept. 1. 2021, 7:33 PM), https://www.npr.org/2021/09/01/1031053251/sackler-family-immunity-purdue-pharma-oxcyontin-opioid-epidemic [https://perma.cc/QWR6-F8AM].

59 Memorandum of Law in Support of U.S. Trustee's Expedited Motion for a Stay of Confirmation Order at 6, *In re* Purdue Pharma, No. 19-23649 (Bankr. S.D.N.Y. Sept. 15, 2021) [hereinafter UST's Stay Motion].

60 Purdue's Fifth Amended Plan, *supra* note 49, at 113-14 (releasing liability for all "claims, counterclaims, disputes, obligations . . . .").

61 *See* Parikh, *supra* note 18, at 36-37 (discussing § 524(g)'s requirement that 75% of voting victim class members approve the plan and that the victim trust must be funded in part by the debtor's securities and also by the reorganized debtor). A nondebtor party can enjoy the protections of § 524(g)'s channeling injunction only if various onerous criteria are satisfied under § 524(g)(4)(A)(ii)—a task that has proven to be quite difficult. *See generally In re* Combustion Engineering, Inc., 391 F.3d 190, 236-37 (3d Cir. 2004) (barring the use of the general powers of § 105 to achieve a result not contemplated by § 524).

bankruptcy court approved Purdue's plan of reorganization[62] with the controversial Sackler family releases intact.[63]

Gaining access to bankruptcy facilitates expedited resolution. This prospect is transformative to current victims facing staggering health care costs, providing meaningful recoveries instead of endless courtroom delays. But there is a potential cataclysm imbedded in this process. In the rush to resolve these crises, jurists may accept settlements that place the risk of non-recovery on future victims. This is what I describe as victim balkanization. This is the process by which debtors pit current victims against future victims with a simple threat: any attempt to secure comparable recoveries across the victim class will lead to significant delays in case resolution and ultimately deprive current victims of any recovery in the short term.[64] This subtle threat permeates settlement discussions and raises the specter that the court will approve a resolution model that allows current victims to be first to the trough while leaving little for future victims whose claims are no less meritorious. The Public Benefit Proposal, explored below, adds further complexity to the quagmire by allowing mass tort defendants to offer a potentially illusory promise to victims in exchange for a reduced financial contribution.

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62 *See* Twelfth Amended Joint Plan of Reorganization at 123, *In re* Purdue Pharma L.P., No. 19-23649 (Bankr. S.D.N.Y. Sept. 2, 2021) [hereinafter Purdue's Twelfth Amended Plan] (releasing the parties from opioid liability); UST's Stay Motion, *supra* note 59, at 6 (stating that the reorganization plan included a release for the Sackler family); Rick Archer, *Purdue Pharma Ch. 11 Plan Gets OK With Sackler Releases*, LAW360 (Sept. 1, 2021, 4:39 PM), https://www.law360.com/articles/1417959/purdue-pharma-ch-11-plan-gets-ok-with-sackler-releases [https://perma.cc/8CWH-ZECW] ("The family members will be released from any opioid claims . . . ."); *see also* Vince Sullivan, *Rhode Island Balks at Mallinckrodt Ch. 11's CEO Release*, LAW360 (Oct. 13, 2021, 6:13 PM), https://www.law360.com/articles/1430837/rhode-island-balks-at-mallinckrodt-ch-11-s-ceo-release [https://perma.cc/LQC6-VHH8] (noting that, among others, Purdue Pharma's bankruptcy released non-debtor parties). Though arguably unprecedented, the Purdue's plan of reorganization had the support of virtually all significant stakeholders in the case. Nevertheless, Senator Warren and some of her Senate colleagues have proposed the *Nondebtor Release Prohibition Act of 2021*, which would virtually eliminate the use of non-consensual, non-debtor releases as to private claims. *See* S. 2497, 117th Cong. (2021); H.R. 4777, 117th Cong. (2021); Hailey Konnath, *Dems Unveil Bill Targeting Bankruptcy Releases Like Sacklers'*, LAW360 (July 28, 2021, 9:27 PM), https://www.law360.com/articles/1407713 [https://perma.cc/5QGJ-H9N5] ("The Nondebtor Release Prohibition Act of 2021 looks to eliminate the use of such non-consensual, third-party releases . . . .").

63 The order confirming the plan of reorganization was appealed and recently vacated. *See* Rick Archer, *Purdue Pharma's Ch. 11 Plan Is Unraveled on Appeal*, LAW360 (Dec. 16, 2021, 7:21 PM), https://www.law360.com/articles/1449669/purdue-pharma-s-ch-11-plan-is-unraveled-on-appeal [https://perma.cc/2TYW-9LAY]. Purdue has appealed the ruling. *See* Leslie Pappas, *Purdue Asks to Keep Lawsuits Frozen Pending Ch. 11 Appeal*, LAW360 (Dec. 21, 2021, 7:16 PM), https://www.law360.com/articles/1450909/purdue-asks-to-keep-lawsuits-frozen-pending-ch-11-appeal [https://perma.cc/A3NR-TBVY].

64 I acknowledge that victim balkanization was not present in the Purdue case but wish to note that this dynamic has emerged in other mass tort cases and may be an effective strategy in Johnson & Johnson's attempt to resolve its talcum powder liability.

III. THE REVOLUTIONARY PUBLIC BENEFIT PROPOSAL

Bankruptcy architecture provides two primary resolution models for corporate debtors with viable businesses. A debtor can restructure its business by using the Bankruptcy Code's various forms of relief and emerge as a new entity. A debtor may also sell some or substantially all of its assets through a § 363 asset sale[65] and use proceeds to satisfy creditor claims. But Purdue Pharma proposed something unprecedented in its bankruptcy case. Instead of selling its profitable business operations, the company sought to emerge from bankruptcy as a public benefit corporation.[66]

Purdue owns a business that could generate billions in future profits. Unfortunately, the business is tainted by the criminality and gross malfeasance committed by its executives. This taint could presumably destroy enterprise value and suppress bidder interest in any auction. In other words, Purdue could try to sell its scandalous—but otherwise profitable—business through an asset sale in bankruptcy, but the proceeds will most likely be materially less than what it would have otherwise received without its scarlet letter.[67] As an alternative, Purdue's plan of reorganization offered to continue the company's business operations after the bankruptcy case and devote profits to compensate victims of the opioid crisis.[68] This approach would also allow victims to enjoy a quasi-equity position. To the extent that the public

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[65] Section 363 of the Bankruptcy Code allows a debtor to sell all of its assets through court-supervised auction process. 11 U.S.C. § 363(b). In many circumstances, these sales represent the optimal means of securing funds to compensate creditors. *See generally* Douglas G. Baird, *The New Face of Chapter 11*, 12 AM. BANKR. INST. L. REV. 69 (2004).

[66] The genesis of the idea is unclear. In October 2020, the DOJ announced an agreement with Purdue Pharma as part of an attempt to resolve various federal claims against the company (the "PBP Agreement"). The PBP Agreement requires Purdue to emerge from bankruptcy as a public benefit corporation functioning entirely in the public interest. *See* Press Release, Dep't of Just., Justice Department Announces Global Resolution of Criminal and Civil Investigations with Opioid Manufacturer Purdue Pharma and Civil Settlement with Members of the Sackler Family (Oct. 21, 2021), https://www.justice.gov/opa/pr/justice-department-announces-global-resolution-criminal-and-civil-investigations-opioid [https://perma.cc/3HVR-889Y]. A number of Senators have argued that Sackler family members were the "driving force" behind the provision. *See* Letter from Tammy Baldwin, U.S. Sen. et al. to the Hon. William Barr, Att'y Gen. of the U.S. (Nov. 10, 2020) [hereinafter Baldwin Letter] https://www.baldwin.senate.gov/imo/media/doc/2020.11.10%20Senators%20to%20Barr%20re%20Purdue%20FINAL%20(001).pdf [https://perma.cc/L685-QAMF] ("Purdue and the Sackler family are the driving force behind the inclusion of the PBC in the agreement . . . ."). But this claim lacks substantiation. *See also infra* Part IV.C (explaining the public benefit corporation proposal).

[67] *See* Disclosure Statement for Third Amended Joint Chapter 11 Plan of Reorganization at app. B, 3-6, Exhibit 1, *In re* Purdue Pharma L.P., No. 19-23649 (Bankr. S.D.N.Y. May 24, 2021) (estimating discounted sale prices for Purdue's assets).

[68] Jeremy Hill, Sophie Alexander, Jef Feeley & Riley Griffin, *Sacklers to Exit From Complex Purdue Bankruptcy With Billions*, BLOOMBERG LAW (Sept. 2, 2021, 8:56 AM), https://news.bloomberglaw.com/health-law-and-business/sacklers-to-exit-from-complex-purdue-bankruptcy-with-billions [https://perma.cc/WNZ9-NGFS].

benefit corporation is wildly successful, victims will be able to participate in that windfall. Finally, any excess, residual profits from the reorganized debtor could be deployed to benefit the public at large. I refer to this concept as the Public Benefit Proposal.[69]

Purdue's design for a reorganized public benefit corporation has relatively simple mechanics. The primary covenants provide for the creation of a new limited liability company called Knoa Pharma.[70] Purdue's plan provides that Knoa must (i) fundamentally operate for the public benefit, (ii) consider long-term public-health interests relating to the opioid crisis in its decisionmaking processes, and (iii) employ transparent and sustainable management practices.[71] More specifically, Knoa must develop and distribute medicines to treat opioid addiction and reverse opioid overdoses.[72] The company will be run by a board of managers[73] selected by officials from the various states that brought suit against Purdue (the "Governmental Consent Parties") in consultation with the creditors' committee and the debtor.[74] The managers must be disinterested, independent, and experienced in one or more areas related to health care, law enforcement, or business administration.[75] A monitor is also part of the process and tasked with reviewing Knoa's compliance with its corporate covenants and bankruptcy court orders. Similar to the company's board, the monitor is selected by the Governmental Consent Parties in consultation with the creditors' committee and the debtor.[76]

Knoa will operate until 2024, at which time all assets will be sold and proceeds distributed pursuant to the plan waterfall.[77] Knoa must first satisfy all operating expenses; excess funds then flow to victim trusts and various

69 For a detailed explanation of the Public Benefit Proposal, see Samir D. Parikh, *Scarlet-Lettered Bankruptcy: A Public Benefit Proposal for Mass Tort Villains*, 117 NW. U. L. REV. (forthcoming 2022).

70 Matt Levine, Opinion, *The Purdue Bankruptcy Didn't Work*, BLOOMBERG (Dec. 23, 2021, 1:11 PM), https://www.bloomberg.com/opinion/articles/2021-12-23/the-purdue-bankruptcy-didn-t-work [https://perma.cc/G5FK-QF3S].

71 Purdue's Twelfth Amended Plan, *supra* note 62, at 22-23 (including this in the definition of "NewCo Governance Covenants").

72 *See In re* Purdue Pharma, L.P., No. 21-07532, 2021 WL 5979108, at *28 (S.D.N.Y. Dec. 16, 2021) ("[Knoa] will manufacture products, including Betadine, Denokot, Colace, magnesium products, opioids and opioid-abatement medications, and oncology therapies."); *see also* Levine, *supra* note 70.

73 There will be either five or seven managers. The ultimate design will be delineated in the order confirming the plan of reorganization. *See In re* Purdue Pharma L.P., 2021 WL 5979108, at *28.

74 *See* Purdue's Twelfth Amended Plan, *supra* note 62, at 71 (Section 5.4(d)) (describing the appointment of the NewCo managers).

75 *Id.* The Department of Justice is afforded the right to oversee the selection process but does not appear to have the ability to veto selections. *Id.*

76 *Id.* at 71-72 (Section 5.4(i)).

77 Disclosure Statement for Third Amended Joint Chapter 11 Plan of Reorganization, *supra* note 67, at app. F (describing the Knoa "Disposition Event" wherein the company will be dissolved by December 31, 2024); Purdue's Twelfth Amended Plan, *supra* note 62, at 63-64 (Section 5.2(f)) (describing the MDT, NewCo, and TopCo Priority Waterfalls).

state and local governments to support opioid abatement programs. Nevertheless, Purdue estimates that approximately $5.5 billion will be distributed to victims.[78]

The Public Benefit Proposal is intriguing because it offers a model for companies contemplating bankruptcy that hold extremely valuable assets tainted by corporate criminality. An attempt to sell these assets during a time of public fervor would be questionable. There is a high risk that value would be materially suppressed.[79] A full chapter 11 reorganization may be similarly futile. A mere rebranding will not remove the residual stain or address harsh public scrutiny. The Public Benefit Proposal is a type of deferred asset sale with a publicly conscious entity offering a philanthropy shield behind which assets can be cleansed.[80] This proposal could be instrumental in preserving value for companies that have engaged in evil—value that should ultimately be directed to victims.

Despite these platitudes, the Public Benefit Proposal could be used for a far less honorable purpose. The proposal could be implemented in a way that helps a mass restructuring debtor and perhaps its parent company reduce the mandatory up-front contribution to a victims' settlement trust, diminishing the financial burden while still securing nondebtor releases.[81] More specifically, a mass restructuring debtor could propose a plan that includes a large financial contribution to a victims' settlement trust but with a significant portion of this contribution derived from the future revenue of a reorganized public benefit corporation. Victims would bear the risk of overstated future revenue projections and subsequent insolvency.[82]

IV. ASSESSING THE NEW MANEUVERS

One could argue that the mere fact that mass tort defendants are pursuing these maneuvers establishes that victims will be disadvantaged. But such

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78 *See* Debtors' Memorandum of Law in Support of Confirmation of Debtors' Sixth Amended Joint Chapter 11 Plan of Reorganization at 150, *In re* Purdue Pharma L.P., No. 19-23649, (Bankr. S.D.N.Y. Aug. 5, 2021) [hereinafter Purdue Memorandum of Law].

79 *See, e.g.*, Lynn M. LoPucki & Joseph W. Doherty, *Bankruptcy Fire Sales*, 106 MICH. L. REV. 1, 3-4 (2007) (finding that distressed large public companies sell for only a fraction of book value).

80 *See* Parikh, *supra* note 69 (explaining the intricacies of the Public Benefit Proposal).

81 To be clear, this was apparently not the case in Purdue. The Sackler family was afforded various concessions, including third-party releases, but these concessions were not the result of promises regarding Knoa's future performance. Rather, these concessions—which were ultimately approved by virtually all significant stakeholders in the case—were made to secure a prompt settlement and avoid decades of litigation with the Sackler family. *See* Hill, *supra* note 68.

82 *See* Baldwin Letter, *supra* note 66, at 2 ("The plan allows Purdue to inflate the value of the settlement by relying on its own rosy analysis of the company's value and promising to pay the terms of a settlement out of the future profits of the company.").

conclusions represent mere speculation. In my recent article,[83] I explained the global settlement imperative and how bankruptcy is oftentimes the optimal means of satisfying the imperative because it aggregates claims and offers accelerated resolution and finality. Ultimately, there are myriad reasons why mass tort defendants are pulling the bankruptcy lever. But landmines persist. The material risk is that the new maneuvers could undermine victim recoveries. Indeed, corporate mitosis offers defendants the ability to sequester valuable corporate assets outside of bankruptcy. The Bankruptcy Code allows mass restructuring debtors to create an underfunded settlement trust that minimizes a debtor's financial burden. And the Public Benefit Proposal could represent an illusory promise that further heightens the risk of an insolvent settlement trust.

This Section explores these fears and offers some insight for the path forward.

A. *Divisive Mergers and Funding Agreement Infirmities*

Divisive mergers remove some barriers to a bankruptcy filing.[84] I believe that victims on the whole benefit by mass tort defendants accessing bankruptcy; without this option, victims would have to seek recovery on a case-by-case basis through the court system—a process that could take years—and hope for enough victories to force the mass tort defendant to the settlement table. But mass tort defendants are not restricted in accessing bankruptcy. That option is always available and cannot be infringed by creditors or contracts.[85] Divisive mergers allow mass tort defendants to access bankruptcy on their terms and potentially eliminate a source of creditor recovery.

Companies employing this maneuver have pointed out that the process is authorized under Texas state law and may be attacked only if assets are fraudulently transferred.[86] To address this risk, mass tort defendants seek cover behind the ubiquitous funding agreement, which presumably affords

83 *See* Parikh, *supra* note 18, at 4, 13 (describing the global settlement imperative).

84 *See supra* Part I (explaining how separating mass tort liability from valuable corporate assets creates a more palatable path into bankruptcy for mass tort defendants).

85 *See, e.g.*, The Bank of China v. Huang (*In re* Huang), 275 F.3d 1173, 1177 (9th Cir. 2002) (explaining that any contract term seeking to prohibit a bankruptcy filing is void as contrary to federal public policy).

86 *See* Cara Salvatore, *J&J May Court Trouble with "Texas Two-Step" Talc Gambit*, LAW360 (Sept. 20, 2021, 10:26 PM), https://www.law360.com/articles/1423468 [https://perma.cc/QEF7-BXT8] ("Moving money before bankruptcy in order to avoid paying back debts is the quintessential fraudulent transfer."); *see also* Bill Wichert, *NJ Court Won't Stop J&J's "Texas Two-Step" in Talc Suits*, LAW360 (Sept. 21, 2021, 5:26 PM), https://www.law360.com/articles/1423620/nj-court-won-t-stop-j-j-s-texas-two-step-in-talc-suits [https://perma.cc/PX8Z-2VP2] (detailing the Texas "Two-Step" bankruptcy maneuver that requires a clear finding of a fraudulent transfer to invalidate); *accord* Cara Salvatore, *J&J Won't Be Barred From 'Texas Two-Step' in Delaware Court*, LAW360 (Aug. 26, 2021, 9:06 PM), https://www.law360.com/articles/1416758/j-j-won-t-be-barred-from-texas-two-step-in-delaware-court [https://perma.cc/K5TB-KMXJ].

BadCo—the company that files for bankruptcy—the same repayment capabilities enjoyed by InfectedCo—the pre-bankruptcy iteration. But this statement is misleading. InfectedCo's valuable assets are excluded from the bankruptcy process. To the extent the bankruptcy process suppresses victim distributions, the corporate parent will benefit.

And funding agreements present their own infirmities. In mass tort bankruptcies from previous generations, responsible parties made large contributions to victims' settlement trusts in exchange for various protections.[87] These parties provided funds in lump sums. This arrangement avoided the fear of a responsible party's subsequent insolvency derailing the trust. But funding agreements today are designed to push risk onto victims.[88] Funding agreements seen so far make GoodCo—the healthy sister company of BadCo—responsible for BadCo's obligations. But the financial burden does not appear as a lump-sum obligation; instead, the agreement envisions what I refer to as drip financing. BadCo agrees to a monthly funding schedule based on invoices presented by the victims' trust.[89] These invoices are routed to GoodCo, which is obligated to fund expenses that are warranted under the governing documents and court orders.

Keep in mind that settlement trusts must invariably endure for decades. What if GoodCo failed just a few years after confirmation? The funding agreement is unsecured and unguaranteed. And there is no provision in the funding agreement that delineates a contingency plan if GoodCo cannot make the necessary payments. Further, there is no covenant restricting GoodCo from transferring assets. The import of this design emerges with amazing clarity: victims bear all insolvency risk. This outcome is at odds with the mass tort architecture that has dictated outcomes for the last 50 years.

Restricting divisive mergers through injunctive relief does not appear to be realistic.[90] However, divisive mergers that involve funding agreements that push insolvency risk onto victims should be viewed as fraudulent transfers because the financial backstop—GoodCo's assets—could very well prove to be a mirage. Bankruptcy courts should reject drip financing arrangements that lack insurance backstops, multiple corporate guarantees, or other

87 *See In re* Johns-Manville Corp., 68 B.R. 618, 621-22, 27 (Bankr. S.D.N.Y. 1986) (describing funding agreements in which a victims' trust was initially funded with a substantial amount of cash, to be supplemented yearly, and a reorganized company was protected from certain claims, including those for punitive damages, to ensure it remained viable to continue funding the trust).

88 *See* Pittard Declaration, *supra* note 28, at 9 (discussing the Funding Agreements and related financial obligations); *see also* Adversary Complaint, *supra* note 32, at 16-17 (describing funding agreements in *In re* Bestwall, *In re* Aldrich Pump, and *In re* Murray Boiler).

89 *See* Pittard Declaration, *supra* note 28, at 24-56; *see also* Adversary Complaint, *supra* note 32, at 11-12.

90 *See* sources cited *supra* note 86 (noting courts have refused to dismiss bankruptcy cases that follow divisive mergers).

financial safety nets. Ideally, settlement trusts would be funded by upfront contributions that help insulate the trust from subsequent cascading insolvencies. Ultimately, judicial intervention can easily address this potential inequity once jurists are made aware of these subtle tactics.[91]

B. *Simple Changes to Close Statutory Loopholes*

I acknowledge that mass restructuring debtors have exploited loopholes in the Bankruptcy Code to accelerate the plan confirmation process. Simple statutory amendments, however, could enhance process integrity and avoid disparate treatment across victim classes. Primarily, § 524(g) must be amended to capture all mass tort cases, including those that do not involve asbestos claims; this one change will limit the ability of nondebtor parties to secure releases or otherwise be protected by the channeling injunction. To minimize FCR capture risk, new § 524(g) should (i) require the appointment of three FCRs, (ii) allow only the United States Trustee—as opposed to the mass restructuring debtor—to propose viable candidates, and (iii) require that all candidates be disinterested, qualified, and competent to effectively represent future victims' interests.[92] Conceptually, these changes are relatively simple. As explored in my recent article, the final design will require a more comprehensive assessment of § 524(g)—a provision drafted almost three decades ago—to ensure alignment with modern policy objectives.[93]

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[91] In response to a prior draft, Professor Lynn LoPucki gently chided me for my apparent naivete. I argue that bankruptcy judges can easily limit exploitive debtor behavior. This much is true. However, many scholars will counter that rampant forum shopping in bankruptcy undermines the viability of this proposal. Corporate debtors can easily locate cases in any jurisdiction they choose. *See, e.g.,* LYNN M. LOPUCKI, COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS 19-24 (2005) (describing how "an era of rampant, routine forum shopping" leads to a decrease in bankruptcy cases for some jurisdictions); *see also* Samir D. Parikh, *Modern Forum Shopping in Bankruptcy*, 46 CONN. L. REV. 159, 163, 173-81 (2013) ("[T]he forum shopping phenomenon continues to plague the bankruptcy system . . . ."). And at least some judges are interested in securing these reputation-making cases. Therefore, there will always be a receptive court for these debtors, regardless of how easily corrective measures can be implemented. I acknowledge that forum shopping is bankruptcy's poisonous tree, bearing many fruits. However, statutory amendments cannot resolve many granular bankruptcy problems, and amendments to the Code happen infrequently. Judicial action invariably represents the most viable means for policing exploitive behaviors. Ultimately, forum shopping's specter must be acknowledged, but Congress is the only body capable of and willing to resolve that issue.

[92] *See* Parikh, *supra* note 18, at 46 (advocating for a more demanding standard of review but recognizing that the ultimate formulation must be left up to the bankruptcy court).

[93] *See id.*

C. *The Public Benefit Proposal and Illusory Promises*

The Public Benefit Proposal has allure. In the right context, the proposal can solve fundamental threats to asset value. There is a certain level of equitable balance in a company that has done evil being reorganized to fight that evil. The victims' collective, as the new owner of the reorganized entity, has the possibility of sharing in a shareholder windfall if the company experiences unexpected success after emerging from bankruptcy.

In the Purdue case, one fear with the public benefit model was that a lack of strong governance and oversight would prevent Knoa from fulfilling its lofty societal goals. And that may well be the case. But Knoa's mission is clear and supported by strong covenants enforced by the bankruptcy court. As noted above, the board of managers will be selected by state officials presumably representing victims' interests. Further, Knoa has a court-supervised monitor—also appointed by these state officials—tasked with reviewing Knoa's operations and reporting back to the bankruptcy court. And to the extent Knoa is incorporated in Delaware, there are various statutory provisions that limit actions contrary to a public benefit corporation's stated public mission.[94] These factors improve the likelihood that Knoa's lofty societal goals will be fulfilled.

The problem with the Public Benefit Proposal is that Knoa may fulfill its societal goals but fail to fulfill its financial ones. Purdue Pharma had $2.3 billion in net sales from OxyContin alone in 2010.[95] By 2018, net OxyContin sales were down to $810 million, before falling to $517 million in 2020.[96] Purdue estimates that Knoa will provide $5.5 billion to victims, but much of that value comes indirectly from supposed price discounts on anti-overdose drugs and opioid dependence treatments.[97] Further, Knoa will be sold or liquidated by 2024. Purdue's key patents for OxyContin are set to expire in 2025 and 2027, at which point generics will be an existential threat.[98] With that looming, it is unclear if Knoa will have any value by 2024. Once sold, a buyer of Knoa would not be bound by the Public Benefit Proposal and could abandon those principles entirely.

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94 *See* DEL. CODE. tit. 8, § 366(b) (2021) (requiring a public benefit corporation to issue biennial public benefit reports); *id.* § 367 (authorizing shareholder suits to enforce a stated specific public benefit); Leo E Strine, Jr., *Making It Easier For Directors to "Do the Right Thing"?*, 4 HARV. BUS. L. REV. 235, 243-45 (2014) (outlining provisions in the Delaware statute that create a duty for a public benefit corporation to focus on the public good).

95 Hill, *supra* note 68.

96 *Id.*

97 *See* Purdue Memorandum of Law, *supra* note 78, at 150 ("The majority of that $5.5 billion will be provided to creditor trusts . . . that will be used to fund opioid crisis abatement programs across the United States.").

98 *See* Hill, *supra* note 68.

Stepping outside of the Purdue case, one can see the Public Benefit Proposal's primary flaw. A mass restructuring debtor could overestimate the reorganized public benefit corporation's value and—based on that error—seek a substantial credit in its mandatory contribution to the victims' settlement trust. In such a case, the credit to the debtor would well exceed the ultimate benefit to victims. Courts should be open to a public benefit model for value preservation, but corporate beneficiaries of the proposal should receive credits on a staggered timeline informed by the public benefit corporation's future performance. To the extent that the Public Benefit Proposal finds its way into future mass restructuring cases, bankruptcy courts must be able to address this risk.[99]

Ultimately, the public benefit model could serve an essential value preservation role in upcoming cases. In our era of renewed personal accountability, I suspect more mass restructuring debtors will emerge with viable businesses but woefully tainted assets. In fact, J&J may consider a public benefit component for LTL Management; indeed, the company's talcum powder business is still extremely profitable and does not face the same legal challenges overseas that it does domestically.

CONCLUSION

This Essay attempts to delineate the new shadowed practices in mass restructuring cases and offer a few normative proposals to minimize victim exploitation risk. The ultimate result is primarily descriptive but serves a vital role in properly conceptualizing a complex problem in order to begin discussion. And, a lot of discussion is necessary to address the deficiencies in the machinery. This is one of the most controversial legal issues in the country today, but there is very little scholarship addressing it. I suspect many scholars and policymakers have been daunted because mass restructurings straddle various complex disciplines. I hope this Essay will initiate the interdisciplinary dialogue necessary to minimize further exploitation in this new iteration of aggregate litigation.

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99 *See* LOPUCKI, *supra* note 91; Parikh, *supra* note 91 (discussing the problem of forum shopping in the bankruptcy system).