COMMENT

FROM HISTORICAL TO CUTTING-EDGE: EQUITY RECEIVERSHIPS AS A TOOL TO RESOLVE MASS TORTS

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Recent scholarship has paid significant attention to the strategic exploitation of Chapter 11 reorganization procedures by corporations seeking to circumvent mass tort liability. The presence of these structural issues evoke serious concerns about the suitability of bankruptcy as a method for resolving mass tort claims and its role in deterring future wrongful conduct. However, reorganization procedures, like Chapter 11, do offer some advantages for mass tort claimants. By consolidating claims and enabling continued business operations during the pendency of proceedings, reorganization has the potential to more efficiently resolve mass tort claims and yield a greater pool of potential recovery for claimants.

This Comment presents an alternative method of reorganization to resolve mass torts. It suggests that equity receiverships—a once common remedial mechanism now displaced by Chapter 11—provides a process for reorganization that better ensures corporate accountability for tortious conduct. It also outlines a framework to revive equity receivership practice as a remedy for modern mass torts. A return of equity receiverships would provide a much-needed alternative to Chapter 11, enhancing the position of disadvantaged tort victims in our legal system and discouraging corporate debtors from using bankruptcy to minimize tort liability.

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INTRODUCTION

In recent years, so-called corporate “bankruptcy grifters” have strategically utilized Chapter 11 reorganization to circumvent mass torts liability.¹ Due to the automatic stay, the threat of channeling injunctions, and the relatively low priority of tort claimants in bankruptcy, mass tort claimants hold a weakened bargaining position in bankruptcy.² This results in Chapter 11 reorganization plans that commonly fail to adequately represent the plaintiffs’ interests and contain sweeping liability releases for conduct ranging “from . . . coal cleanup and wildfire deaths to . . . opioid abuse, child molestation, and sexual assault.”³ Bankruptcy also serves as an inadequate deterrent for future tortious activity, as Chapter 11’s procedures generally leave corporate leadership and ownership intact, and prioritizes recovery for

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¹ See generally Lindsey D. Simon, Bankruptcy Grifters, 131 YALE L.J. 1154, 1154 (2022) (explaining practices of “bankruptcy grifters” who abuse the Chapter 11 process).

² Id. at 1165; see also Vincent S.J. Buccola & Joshua C. Macey, Claim Durability and Bankruptcy’s Tort Problem, 38 YALE J. ON REGUL. 766, 773–74 (2021) (describing misuse of Bankruptcy Code).

³ Buccola & Macey, supra note 2, at 769; see also Simon, supra note 1, at 1157–58.
institutional creditors—providing fewer incentives for investors and lenders to intervene. Meanwhile, traditional forms of aggregate litigation—like class actions or multidistrict litigation—are slowly being displaced by Chapter 11 reorganization. Thus, many of the protections normally afforded to plaintiffs in litigation are now unavailable to mass tort claimants in bankruptcy.

Nevertheless, reorganization provides some advantages over traditional litigation for mass tort claims. Reorganization prevents insolvency and allows the debtor to access new capital, which may maximize the total assets potentially recoverable. Meanwhile, the corporate defendant may continue non-tortious activity stimulating economic activity, continuing valuable business initiatives, and retaining existing employment. For instance, corporations like Johnson & Johnson may face substantial liability for potentially carcinogenic products like talcum powder. However, Johnson & Johnson also provides other staple consumer health products “filling pharmacies, supermarkets, and medicine cabinets throughout the country and beyond.”

There is a massive social benefit in preventing insolvency for corporations like Johnson & Johnson, while still ensuring accountability for past misdeeds. However, corporations like Johnson & Johnson are also attempting to utilize Chapter 11 to evade responsibility for tortious acts.

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4 See Buccola & Macey, supra note 2, at 774–75 (noting how aspects of Chapter 11 limit compensation for tort creditors).
6 See infra Section II.A.
8 Id. at 319 (noting the benefit to creditors from a company’s increasing value and ability to attract new capital in a reorganization).
10 See In re LTL Mgmt., LLC, 64 F.4th 84, 94 (3d Cir. 2023) (“[O]ver 38,000 ovarian cancer actions... and over 400 mesothelioma actions were pending against Old Consumer and J&J when LTL filed its Chapter 11 petition. Expectations were for the lawsuits to continue, with thousands more in decades to come.”).
11 Id. at 92–93.
12 See Michael A. Francus, Texas Two-Stepping Out of Bankruptcy, 120 MICH. L. REV. ONLINE 38, 38 (2022) ("Johnson & Johnson is not filing for bankruptcy. Instead, it is dividing itself using an obscure Texas law, moving its assets into one business and its talc liabilities into another, and having the liability-laden business file for bankruptcy."); Andrew D. Bradt, Zachary D. Clopton & D. Theodore Rave, Dissonance and Distress in Bankruptcy and Mass Torts, 91 FORDHAM L. REV. 309, 310 (2022) ("The Texas Two-Step, however, allows a defendant to unilaterally opt out of litigation, without the headache of putting the company through bankruptcy, by spinning off a bespoke entity that it then takes into bankruptcy while the rest of the company operates normally."); Alex Wolf & Evan Oschner, J&J Cancer Claimants Demand More Money Before Third Bankruptcy, BLOOMBERG L., January 24, 2024, https://www.bloomberglaw.com/bloomberglawnews/bankruptcy-
This Comment presents an alternative remedy to resolve mass torts. Specifically, it suggests that equity receivership, a once common alternative to bankruptcy, offers a powerful tool to hold corporations accountable, while still offering the benefits that come with a Chapter 11 reorganization. Part I provides a background of equity receiverships and bankruptcy’s mass tort problem. Part II explains how receivership is a better alternative to bankruptcy to resolve mass tort claims. Part III addresses concerns with using receivership to resolve such mass torts. Finally, Part IV proposes a legislative change that would facilitate the use of this remedy in a Rule 23(b)(2) class action following a Chapter 11 petition. Overall, this Comment suggests that federal courts should more seriously consider receivership as an alternative to Chapter 11 in mass tort proceedings, which, if adopted, may serve as a promising deterrent to bankruptcy grifting.

I. BACKGROUND

A. The Equity Receivership & Historic Practice

Receivership is a long-established equitable remedy that dates back to the English Courts of Chancery and was carried forward in American federal jurisprudence since the Founding Era. The mechanism reached the height of its popularity between 1878 and 1898—when the United States lacked a bankruptcy statute—to address “the vast amount of litigation which ha[d] arisen . . . upon railroad mortgages.” Receiverships acted as a form of corporate reorganization, and became so widespread that about twenty

13 See 12 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE. § 2981 (3d ed. 1998) (“Precisely when the first receiver was appointed by a court is unknown, but the device was being used quite commonly as early as the reign of Queen Elizabeth I. . . . [T]he practice expanded as a result of the increasing willingness of courts of equity both in England and the United States to undertake the administration of the assets of corporations and other debtors when sufficient need was shown.”); cf. Garrard Glenn, The Basis of the Federal Receivership, 25 COLUM. L. REV. 474, 440–43 (1925).

percent of U.S. rail mileage was under receivership by 1894. The equity receivership functioned (and still functions) as follows:

A receivership was commenced by a [plaintiff’s] petition to the federal court . . . to appoint a receiver to take control of the corporate debtor’s assets. The receiver would take title to the assets, thereby stopping collection efforts by individual creditors. The receiver, while looking for a buyer for the assets, would continue to run the [corporation]. Eventually the creditors would be paid out of the proceeds of a foreclosure sale of the assets.

Simply put, the receiver acts as an “officer of the court” appointed “to take possession of and preserve pendente lite the fund or property in litigation.” While in possession, the receiver “maximizes assets available” for the prevailing parties and “facilitates an orderly and equitable distribution of those assets.”

The mechanism also acts as an aggregation device where any parties with claims against the corporate defendant or receiver may intervene and the appointing court may enjoin outside proceedings, both federal and state, that also seek to recover from the receivership. Under 28 U.S.C. § 1442(a)(3), a

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15 Hansen, supra note 14, at 378 (“In 1894, 20 percent of all railroad mileage in the United States was in the hands of receivers.”); see also Churchill Rodgers & Littleton Groom, Reorganization of Railroad Corporations Under Section 77 of the Bankruptcy Act, 33 COLUM. L. REV. 571, 571 (1933) (“Since 1870 there have been more than one thousand railroad receiverships.”).

16 Tabb, supra note 14, at 22.

17 Quincy, Missouri & Pac. R.R. Co. v. Humphreys, 145 U.S. 82, 97 (1892) (quoting Union Bank of Chi. v. Kansas City Bank, 136 U.S. 223, 236 (1890)); see also 28 U.S.C. § 754 (“A receiver appointed in any civil action or proceeding involving property, real, personal or mixed, situated in different districts shall . . . be vested with complete jurisdiction and control of all such property with the right to take possession thereof.”).


19 Wright & Miller explain the complexities of the aggregation procedure:

Section 754 of Title 28 gives the appointing court and the receiver exclusive jurisdiction and control over all of defendant’s property in whatever district it may be situated, provided that the receiver files copies of the complaint and his or her order of appointment in each district in which property is located. Among other things, this means that state or federal courts located in other districts may not exercise any control over defendant’s property within their territorial jurisdiction or over the receiver, that they have no power to grant leave to sue the receiver, and that the rights of creditors to the property under the control of the receiver are fixed as of the moment of his or her appointment. Thus, for example, when a receiver is appointed during the pendency of a creditor’s action, the creditor has a right to prosecute his or her action to judgment. However, that judgment serves only to liquidate the claim; it must be presented to the receivership court for payment. The creditor’s judgment does not result in a preference or give a right to execution against the receivership assets. In other words, all rights to the property in question must be adjusted by the appointing court for as long as it has jurisdiction, which is until the receivership is terminated. . . . Whichever court is entitled to retain control over the
federal district court has subject matter jurisdiction over all these claims. If other parties share in the liability owed by the corporation, the receiver may also sue those third parties for their relevant share in the liability owed.

Today, equity receiverships have largely been displaced by bankruptcy but are still authorized by Rule 66 of the Federal Rules of Civil Procedure, which requires receivership practice to “accord with the historical practice in federal courts or with a local rule.”

B. Bankruptcy’s Mass Tort Problem

Substantial scholarship has been dedicated to the abuse of Chapter 11 reorganization to resolve mass tort liability. The purpose of the federal Bankruptcy Code is to provide a “fresh start” for corporations facing impending financial distress or potential insolvency. In Chapter 11, a corporate debtor may do this by resolving its liabilities, including tort liability, through a reorganization plan (“settlement”). The plan must be approved by a vote, which requires support from enough creditors that their

property pursuant to the receivership, be it federal or state, has the power to enjoin interference by other courts should that become necessary.


12 See id.; see also Bos. & M.R.R. v. Sullivan, 275 F. 890, 892 (1st Cir. 1921) (“It is also well established that, where property is in the actual possession of a court, all persons entitled to participate in its ultimate distribution may be allowed to have their claims adjudicated under the jurisdiction acquired between the original parties.”).


21 28 U.S.C. § 754 (“A receiver . . . shall . . . be vested with complete jurisdiction and control of all such property . . . . He shall have capacity to sue in any district without ancillary appointment . . . .”).


23 See generally, e.g., Simon, supra note 1; Buccola & Macey, supra note 2, at 769; Edward J. Janger, Aggregation and Abuse: Mass Torts in Bankruptcy, 91 FORDHAM L. REV. 361 (2022).


25 Buccola & Macey, supra note 2, at 786–87.
total liability amounts to two-thirds of overall claims. The reorganization provides the debtor with a “fresh start,” that is, a release from all liabilities that arose pre-filing, and also offers global peace, that is, a final resolution of all claims arising from past conduct. But, in furthering these debtor-friendly goals of bankruptcy, Chapter 11 settlement plans commonly disfavor mass tort claimants, undermining the fundamental principles of deterrence and compensation that underly tort law.

In the 1980s and 1990s, bankruptcy began to be used to resolve mass tort claims in the asbestos context, with the bankruptcy of Johns Manville, the nation’s leading asbestos maker. At the time, there was substantial concern that, due to the long latency period for asbestos related health complications to occur, insurers may not be able to estimate overall liability to the extent it was capped in insurance policies and fairly pay out claimants from these allocated funds in ordinary litigation. Thus, Manville utilized a Chapter 11 reorganization trust to pay out mass tort claimants and establish the overall liability owed by both Manville itself and its third-party insurers. Congress even passed 11 U.S.C. § 524, an Act which officially authorized the use of bankruptcy for this purpose. At the time, the procedure was hailed as a major success and a Bankruptcy Review Commission, composed of jurists

26 11 U.S.C. § 1126(c)–(d). The Bankruptcy Code also requires at least half of numerical creditors to approve the plan. Id.
27 Katz, 546 U.S. at 364.
29 See John C.P. Goldberg, Twentieth-Century Tort Theory, 91 GEO. L.J. 537, 527 (2003) (“[T]he purpose of tort law is to deter socially undesirable conduct and to compensate any actual losses of welfare flowing from such conduct . . . .”).
31 Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 633 (1997) (Breyer, J., concurring in part and dissenting in part) (“Under the previous system . . . [t]he sickest of victims often go uncompensated for years while valuable funds go to others who remain unimpaired by their mild asbestos disease.”); see also Janger, supra note 23, at 376-77 (“The Manville case went forward because there were serious concerns about the company’s ability to honor all the ongoing asbestos claims while staying in business.”).
32 See Jacob King, Non-Consensual Third-Party Releases: The Problem or the Solution, 75 BAYLOR L. REV. 564, 580-81 (2003) (“[T]he Manville plan of reorganization attempted to consolidate and resolve virtually unlimited liability against the debtor corporation, and claims the debtor had against its insurers, arising out of asbestos products.”).
appointed by the President, Congress, and the Chief Justice, endorsed the further use of Chapter 11 to resolve mass torts.\textsuperscript{34}

But the Manville reorganization trust, like many others, soon faced serious problems. The number of future claimants greatly exceeded (by nearly double) the amount originally estimated, and the amount claimed by victims was also substantially larger (by up to forty percent) than predicted.\textsuperscript{35} Meanwhile, claimants were not guaranteed payout of their full claims.\textsuperscript{36} As a result, claimants whose symptoms presented themselves later received a payoff of only ten percent of the value of their claims.\textsuperscript{37} Meanwhile, weaker claimants (those exposed to asbestos but showing no symptoms) received full payouts so long as they claimed early.\textsuperscript{38} The Manville bankruptcy first demonstrated the serious issues with using Chapter 11 to resolve mass torts.

Despite these failings, corporations have expanded their use of bankruptcy to grift mass tort claimants. Recent Chapter 11 settlements have included broad releases for conduct ranging from “coal cleanup and wildfire deaths to . . . opioid abuse, child molestation, and sexual assault.”\textsuperscript{39} For example, Insys Therapeutics, a pharmaceutical corporation that contributed to the opioid epidemic, established a reorganization trust where claims were adjudicated by a non-appealable administrator and relief depended upon determinations by the insurer.\textsuperscript{40} As of 2022, the trust (established in 2020) only finalized one insurance claim.\textsuperscript{41}

Similarly, US Gymnastics used Chapter 11 to resolve sex abuse claims for the actions of longtime physician Larry Nassar.\textsuperscript{42} The reorganization plan limited recovery of claimants based on specified categories rather than through individualized inquiries, denied punitive damages, provided a short window to file a claim, and resolved claims against a number of third-

\textsuperscript{34} See \textit{NAT’L BANKR. REV. COMM’N, BANKRUPTCY: THE NEXT TWENTY YEARS} 47, 55, 320-22 (1997) (discussing the formation of the Commission and the amendments enacted to provide guidance on asbestos cases).
\textsuperscript{37} Smith, \textit{supra} note 30, at 1618–19.
\textsuperscript{38} Smith, \textit{supra} note 30, at 1620.
\textsuperscript{39} Buccola & Macey, \textit{supra} note 2, at 769.
\textsuperscript{40} Simon, \textit{supra} note 1, at 1191-92 (“Insys reached a $225 million settlement with the Department of Justice related to kickback payments that also required [their opioid spray] sale . . . Personal-injury claimants have no right to appeal claims-administrator determinations . . . . [A]ny recovery on approved claims will depend on recovery from insurance proceeds.”).
\textsuperscript{41} \textit{Id.} at 1992.
\textsuperscript{42} \textit{Id.} at 1195-97 (“[R]oilied with scandal and facing significant exposure from Nassar’s victims, USAG filed for bankruptcy in Indianapolis, where the company is headquartered.”).
parties—including coaches, a gymnastics facility, and the U.S. Olympic Committee.\textsuperscript{43}

In 2017, New Ulm Diocese similarly used Chapter 11 to release liability for clergy sex abuse lawsuits.\textsuperscript{44} This reorganization plan contained numerous procedural hurdles for claimants and released numerous third parties with greater assets, including parishes, from whom plaintiffs could have received more substantial recovery.\textsuperscript{45}

Recently, both Johnson & Johnson and 3M have attempted to use Chapter 11 to resolve products liability cases following unfavorable results in multidistrict litigation bellwether trials.\textsuperscript{46} Both companies believed they would fare better in bankruptcy proceedings.\textsuperscript{47}

\section*{II. Why Receivership Is Preferential to Bankruptcy for Mass Torts}

When a corporation files a Chapter 11 petition, all civil litigation against it is stayed pending resolution of the bankruptcy proceeding.\textsuperscript{48} In doing so, the Bankruptcy Code promotes forum shopping, potentially rewarding corporate defendants filing for bankruptcy with a friendlier venue to resolve mass torts. Although modeled after federal equity receiverships, Chapter 11 of the Bankruptcy Code has marked differences from receivership practice that largely disfavor tort claimants.\textsuperscript{49} Taking advantage of these serious structural constraints in bankruptcy, corporate defendants use Chapter 11 to grift mass tort claimants, commonly forcing tort plaintiffs to accept a Reorganization Plan that is less advantageous than a potential alternative settlement in aggregate litigation in a district court.\textsuperscript{50} These same structural constraints are not present in federal equity receiverships, thereby offering a more fair and equitable approach. Accordingly, receivership should be more strongly considered as an alternative to bankruptcy in resolving mass tort claims.

\textsuperscript{43} Id. at 1196–97.
\textsuperscript{44} Id. at 1201.
\textsuperscript{45} Id. at 1202.
\textsuperscript{46} Janger, supra note 23, at 378-80.
\textsuperscript{47} Id.
\textsuperscript{50} See generally Buccola & Macey, supra note 2, at 767–73.
A. Corporate Control

Corporate control is a major difference between Chapter 11 and equity receivership reorganizations. In Chapter 11, the corporate debtor retains control over its assets,\(^{51}\) except in rare circumstances.\(^{52}\) Retained corporate control does provide some advantages in a traditional reorganization: (1) it incentivizes debtors to seek reorganization rather than wait for insolvency, and (2) it allows the debtor—who is more familiar with the business’ operations—to lead business operations in lieu of an unfamiliar court appointee.\(^{53}\) But when bankruptcy results from tortious activity rather than less-than-stellar business decisions, these benefits disappear because the corporation’s existing course of business operations is the very activity the tort lawsuit is attempting to deter. As a result, Chapter 11’s “fresh start” immunizes corporate debtors from responsibility for their decision-making and potentially encourages future torts with knowledge of this impunity.\(^{54}\)

Indeed, Professors Buccola and Macey—using game theory-style analysis—identified numerous situations where a “CEO seeking to maximize shareholder value” is actually incentivized to undertake risky projects—with high potential for tort liability—so long as the corporation could resolve those liabilities in a Chapter 11 proceeding.\(^{55}\) Receivership changes this analysis, in part, because “receivership may interfere seriously with defendant’s property rights by ousting him or her from control, and sometimes even possession . . . .”\(^{56}\) This differs from Chapter 11 which “tends to entrench management and give it even greater authority as a debtor-in-possession.”\(^{57}\) By threatening corporate management with ouster and impairing stockholders’ ownership, receivership should create a substantial deterrent effect against tortious activity, that is unavailable in Chapter 11.

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\(^{51}\) 11 U.S.C. § 363(c).


\(^{53}\) Id. at 485 n.113 (discussing the pros and cons associated with leaving a debtor in possession or appointing a trustee in traditional bankruptcy proceedings).


\(^{55}\) Buccola & Macey, supra note 2, at 776–77.

\(^{56}\) CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2983 (3d ed. 1998).

\(^{57}\) John M. Tanner, Equitable Receivership as an Alternative to Bankruptcy, COLO. LAW., Dec. 2011, at 41 (describing one advantage of equitable receiverships as the reduced tendency to further empower existing management).
Furthermore, unlike corporate leadership, a receiver is not incentivized to grift mass tort liability. During pending Chapter 11 proceedings, corporate executives frequently engage in practices that reduce the potential value recoverable by tort claimants. For instance, corporate debtors may request liability releases for third parties—such as umbrella corporations, owners, or corporate executives themselves—also involved in unlawful conduct. Recently, Purdue Pharmaceutical, which faced substantial liability for claims relating to Oxycontin, conditioned its reorganization plan on the broad release of individual tort liability against its owners—the Sackler family, the propriety of which is currently pending before the Supreme Court. Johnson & Johnson also attempted to release its tort liabilities for potentially carcinogenic talc powder as a third-party in bankruptcy of one of its subsidiaries, LTL. Such third-party releases may reduce the total amount recoverable by tort claimants.

Another way corporate debtors can grift claimants is by favoring non-legacy creditors, entities with whom the corporation continues to interact (e.g., bondholders, vendors, and employees) during the pendency of bankruptcy. While in possession, corporate debtors can heavily compensate such creditors through contracts, sales, or by deeming them “[c]ritical vendors” in their day-to-day business operations, which reduces the total value of assets recoverable by tort plaintiffs. Chapter 11 provides a number of loopholes whereby a corporate debtor can do this, largely due to the difficulty in distinguishing between favorable treatment and critical business expenses. These practices reduce the deterrent effect of bankruptcy because institutional creditors—those whom the corporation may need to rely on for

58 See Buccola & Macey, supra note 2, at 774–75 (noting how debtors take advantage of bankruptcy proceedings to distribute value to their preferred creditors); In re LTL Mgmt., LLC, 64 F.4th 84, 96–97 (3d Cir. 2023) (noting Johnson & Johnson created subsidiaries to enter Chapter 11 bankruptcy to extinguish potential tort liability).

59 See generally Simon, supra note 1, at 1169; Ralph Brubaker, Mandatory Aggregation of Mass Tort Litigation in Bankruptcy, 131 YALE L.J. FORUM 960, 962–63 (2022) (discussing “nonconsensual nondebtor (or third-party) ‘releases,’ which extinguish creditors’ claims against a nondebtor without the consent (and even over the objection) of creditors”).

60 Simon, supra note 1, at 1188–89; see Harrington v. Purdue Pharma L.P., 144 S. Ct. 44, 44 (2023) (noting parties’ interests in arguing in the December 2023 Supreme Court session).

61 See In re LTL Mgmt., LLC, 64 F.4th at 96–97.

62 Simon, supra note 1, at 1157 (noting plaintiffs seeking to recover against firms in bankruptcy proceedings may be forced to recover from a limited pool of money).

63 See Buccola & Macey, supra note 2, at 774–75 (explaining how tort creditors fare worse than unsecured, non-legacy creditors).

64 Id. at 787–89 (discussing Section 363 sales); David A. Skeel, Jr., The Empty Idea of “Equality of Creditors”, 166 U. PA. L. REV. 699, 714–20 (2018) (detailing a number of ways debtors can evade creditor equality norms in Chapter 11, including executory contracts, critical vendor designation, and sales).

65 Skeel, supra note 64, at 714-720.
capital following the bankruptcy—may be fully compensated at the expense of tort claims. Thus, the corporate debtor faces few financial drawbacks by declaring bankruptcy and grifting tort claimants. Corporate debtors in receivership cannot engage in these sorts of grifting practices because they lack any corporate control.

In contrast, the receiver, when in possession, has no incentive to grift tort liability because they have a fiduciary duty to maximize corporate assets “for the benefit of the party ultimately proved to be entitled.” Like debtors in bankruptcy proceedings, the receiver may also resolve third-party claims by bringing suits against potential co-defendants or co-conspirators, but this method—unlike the reorganization plan in Chapter 11—benefits rather than harms tort claimants. Furthermore, unlike in bankruptcy, the debtor may not resolve third-party claims through a global settlement with the creditors, which would instead extinguish claims without any adversary proceeding. Thus, receivership provides many of the benefits of Chapter 11 bankruptcy without the drawbacks to mass tort claimants.

Indeed, the Securities and Exchange Commission (SEC) sometimes requests receiverships—the most common use of the procedure in modern times—in suits against corporations that have both legitimate and illegitimate business operations for exactly this reason. For instance, a federal court granted a receiver in the SEC’s suit against Stanford International Bank, which managed 129 legitimate subsidiaries but faced massive liability from a Ponzi scheme out of Antigua. There, rather than seek third party releases, the receiver brought suit against third-party co-conspirators to maximize overall recovery. Furthermore, the receiver retained Stanford International Bank’s legitimate “financial products, accounts, vehicles [and] ventures” until

66 See Buccola & Macey, supra note 2, at 774–75 (“Limited liability sets an upward limit on the recovery available to all creditors at the value of the debtor’s assets.”).
67 Id.
69 28 U.S.C. § 754 (“He shall have capacity to sue in any district without ancillary appointment.”).
70 See Digital Media Sols., LLC v. S. Univ. of Ohio, LLC, 59 F.4th 772, 774 (6th Cir. 2023) (rejecting bar order in receivership proceeding settling third-party claims).
71 See Buccola & Macey, supra note 2, at 772 (noting how receivership provides claim durability benefits for mass tort plaintiffs not available in bankruptcy).
74 Id. at 1219 (introducing the strategy employed by the Stanford receiver to maximize available funds for recovery).
liquidation was necessary to ensure “maximum and timely disbursement” for claimants.75 The Stanford International Bank reorganization provides a stark contrast to the treatment of mass tort claimants described above.

In sum, receivership is preferential for mass tort reorganizations because corporate debtors are ousted from control and unable to undermine the recovery process.

B. Improved Bargaining Power & Potential Recovery

Chapter 11 also has certain structural issues that incentivize tort claimants to accept less than ideal settlements. For instance, mass tort claimants are given relatively low priority for recovery in bankruptcy.76 This is, in part, because tort claimants are characterized as unsecured creditors, which means that they may recover only after secured creditors, that is, those with debts backed by collateral.77 Furthermore, as discussed earlier, Chapter 11 debtors, while retaining control of their corporate activities, may pay off debts to other, institutional unsecured creditors long before tort creditors have an opportunity to object to a reorganization plan.78 As the pot of potential recovery goes towards paying off institutional creditors, tort claimants lose substantial bargaining power throughout settlement negotiations.79

Chapter 11 also imposes a limited liability cap—an upper limit on the amount recoverable—on mass tort claimants. Specifically, the Bankruptcy Code instructs bankruptcy judges to estimate the liability of un-litigated tort claims if resolving these claims “would unduly delay the administration of the

77 See Buccola & Macey, supra note 2, at 774 (elucidating the means through which Chapters 11 debtors avoid recovery to unsecured creditors through the bankruptcy process).
78 Id. at 775 (“[T]ort creditors’ . . . claims are pure legacy liabilities and are treated as such.”); see also 11 U.S.C. § 1129(b)(1) (proscribing the process for objecting to a reorganization plan).
79 See Buccola & Macey, supra note 2, at 774 (noting how Chapter 11 settlement tends to undercompensate third-party victims).
This provision is commonly used in mass tort reorganization. As bankruptcy judges are not necessarily experts in tort law and the proceedings to determine these estimates are streamlined, these estimates may not reflect what would actually be awarded in district court. To add to the disparity, many bankruptcy judges do not include punitive damages in their calculations. Following reorganization, tort claimants may litigate the value of their claims or resolve their claims through a trust process established in the settlement. But claimants may not recover more than the liability estimated by the bankruptcy judge. This informational advantage as to the upper-limit of potential liability in future litigation gives corporate defendants a substantial advantage in settlement negotiations. Furthermore, the ability to avoid punitive damages has made bankruptcy attractive to particularly heinous tortfeasors, such as those engaged in sex abuse and opioid related cases.

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81 See Buccola & Macey, supra note 2, at 799. If there is no potential for delay, the bankruptcy court may adjudicate tort claims, except unliquidated personal injury tort or wrongful death claims. See S. ELIZABETH GIBSON, FED. JUDICIAL CTR., JUDICIAL MANAGEMENT OF MASS TORT BANKRUPTCY CASES 89 (2005). Thus, even in a hypothetical world where tort resolution would not cause undue delay, many mass torts involve these types of torts which are outside of the resolution jurisdiction of bankruptcy courts. Id. Although the bankruptcy court may not adjudicate such claims, paradoxically the court’s estimates may still cap liability for these claims. Id.

82 See Jones, supra note 80, at 1714–1716.

83 See Thomas C. Grant, How United States v. Noland Prohibits the Disallowance of Punitive Damages Claims in Chapter 11, 14 EMORY BANKR. DEV. J. 199, 204 (1997) (“Courts that have disallowed punitive damages claims have found that disallowance furthers three general policies: (1) punitive damages claims punish innocent creditors for a debtor’s wrongdoing; (2) the punitive and deterrent purposes of punitive damages are not served in bankruptcy; and (3) punitive damages claims frustrate a debtor’s ability to reorganize under chapter 11.”).

84 See Jones, supra note 82, at 1716.

85 See Gibson, supra note 81, at 89.

86 See Buccola & Macey, supra note 2, at 797–804.

87 See Simon, supra note 1, at 1194 n.198, 1196 (describing particularly heinous reorganization plans that excluded punitive damages); see also Grant, supra note 83, at 208 (“When a corporation faces massive punitive damages liability, it may be cheaper for the corporation to file chapter 11 and seek the disallowance of all punitive damages claims than to pay the punitive damages judgments in full.”). Disallowance of punitive damages may also substantially reduce the recovery available to mass tort claimants. See id. at 205–06 (“The A.H. Robins bankruptcy demonstrates that disallowing punitive damages claims against a solvent estate can be as inequitable as paying punitive damages claims at the expense of compensatory claims. Because the A.H. Robins bankruptcy estate was solvent, disallowing punitive damages claims did not affect compensatory claim holders, who would have been fully paid on their claims even without disallowance. Instead, disallowance benefited equity holders, who otherwise would not have been paid, at the expense of punitive damages claim holders, who otherwise would have been paid on their claims. In effect, the Robins court paid the
Finally, the Bankruptcy Code’s normal procedural safeguard for unsecured creditors, the reorganization plan vote, is less effectual for mass tort claimants because the debtor is commonly the only party that can submit a reorganization plan and thus, may functionally gerrymander the plan to garner the requisite votes. As discussed earlier, Chapter 11 provides several tools, whereby the debtor can satisfy other creditors at the expense of mass tort claimants in the reorganization. Even among mass tort claimants, reorganization plans may favor some groups over another. For instance, Combustion Engineering attempted to cleanse itself of asbestos liability by establishing a reorganization plan that overcompensated exposure-only claimants (low-value claims) but undercompensated symptomatic claimants (high-value claims). By privileging certain creditors over another, the plan received the requisite two-thirds vote despite undermining recovery for many mass tort claimants. Although the Third Circuit ultimately overturned Combustion Engineering’s plan, the incident demonstrated the ease by which corporations can manipulate different claims to get the requisite two-thirds vote. These structural defects, when combined, result in settlements that are generally unfavorable to tort claimants.

In response to these structural flaws, some have suggested proposals to reform Chapter 11 of the Bankruptcy Code. Indeed, Buccola and Macey analyzed the impacts of these proposed reforms to determine their deterrent effects. After surveying the literature, they identified two proposals that create adequate incentive structures. The first would be a super-priority for equity holders, who were responsible for the harm underlying the punitive damages judgments against the debtor corporation, at the expense of those most harmed by the corporation’s wrongdoing.

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88 11 U.S.C. § 1121(b) (granting the debtor an exclusive right to submit a Chapter 11 plan in the first 120 days); id. § 1121(d) (permitting extension of this time-period).
89 See Buccola & Macey, supra note 2, at 774–75; Skeel, supra note 64, at 714–20 (detailing a number of ways this can be achieved in Chapter 11); Anthony J. Casey & Joshua C. Macey, In Defense of Chapter 11 for Mass Torts, 90 U. CHI. L. REV. 973, 1018 (2023) (recognizing the improved bargaining position of the debtor that comes with being the first-mover in Chapter 11).
90 Skeel, supra note 64, at 718–720 (discussing how the debtor can undermine the equality of creditors in reorganization plan).
91 In re Combustion Eng’g, Inc., 391 F.3d 190, 270–32, 238–39 (3d Cir. 2004).
92 Id. at 201 n.4, 238–39 (explaining that a reorganization may be approved by a two-thirds, claims-weighted vote, and that proponents of the proposed reorganization supported the plan because it privileged their own claims). The Third Circuit ultimately overturned the plan. Id. at 248–49.
93 Id. at 248–49. The Third Circuit overturned the plan due to other structural faults but made no determination on the legality of potential vote manipulation. Id. at 247.
94 Buccola & Macey, supra note 2, at 773–95.
95 Id. Buccola and Macey also determined that Chapter 11 actually harms economic productivity by encouraging corporations to take on more secured debt than necessary. Id. at 774–78.
96 Id. at 781–811.
tort claimants in bankruptcy. But the authors note that such an approach would also disadvantage financial creditors whose clearly established claims may be undercompensated if the un-litigated tort claims are overestimated.

The second is claim durability—namely, that the reorganization finally resolve all liabilities except those in tort and allow tort claimants to pursue their claims in district court, notwithstanding the bankruptcy. But such a resolution undermines the purpose of reorganization: global peace and a fresh start for the corporate debtor. Indeed, the Supreme Court has disfavored the use of aggregate litigation to resolve mass torts—otherwise resolvable in a reorganization—out of fears that it may undermine global peace principles underlying the Bankruptcy Code and disadvantage non-tort creditors.

Thus, both incentivizing proposals—when implemented within the confines of the Bankruptcy Code—seemingly raise serious concerns as well.

Unlike the aforementioned Chapter 11 reform proposals, receivership addresses the shortcomings of Chapter 11 without similar flaws. For instance, unlike in a reorganization plan submitted by a debtor, the order of priority in receivership has a “tendency” to “favor the tort creditors” as much as their non-tort counterparts. This is because, under equity practice, a receiver must be “fair and equitable” among all claimants, secured and unsecured, when distributing funds. In addition to this traditional rule in equity, any settlement made in a Rule 23 class action must treat claimants “equitably relative to each other.” Thus, tort claimants in equity receiverships are generally as satisfied as their non-tort counterparts. But such equitable treatment does not disfavor other creditors because:

The aim of the receivership . . . usually [is] not, as in traditional bankruptcy, a prompt liquidation with the sale of assets and payment of the proceeds to creditors. The aim [is] rather to administer the assets, often over years, to scale down or extend fixed money obligations, and generally to restore an ailing enterprise to health.

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97 Id. at 781–83.
98 Id. at 781–83.
99 Id. at 783–84.
100 Id. at 811–12 (explaining that creditors typically prefer plans that create a successor entity that is free from the litigated liabilities).
103 Skeel, supra note 64, at 710–14.
104 FED. R. CIV. P. 23(e)(2)(D).
105 See Payne, supra note 102, at 690–91.
Accordingly, unlike with bankruptcy’s undue delay requirement, the receivership is not incentivized to promptly liquidate assets, but rather ensures complete disposition (not estimation) of claims to provide full and complete compensation. In this instance, all creditors may be treated equally without prejudicing the rights of each other.

Furthermore, non-tort creditors may intervene in a receivership proceeding to have their claims resolved within the proceeding. In doing so, the receiver can adequately account for both tort claims and the needs of other financial creditors. Accordingly, receiverships provide some benefits associated with claim durability, that is, waiting until claims are adjudicated, without undermining other creditors and sacrificing global peace.

C. Procedural Protections

The Chapter 11 liability estimation has been criticized for undermining procedural rights of mass tort claimants since it lacks the right to trial by jury, a guarantee of full payment of claims, and adequate safeguards against intra-creditor and/or third-party conflicts of interests. Furthermore, bankruptcy judges have limited expertise in tort matters which can make them unsuited to accurately estimate overall liability. Receivership, especially as a remedy in a Rule 23(b)(1) class action, resolves all these issues by placing them before a greater subject matter expert (the district judge), retaining the right to a jury trial, and ensuring full recovery. Rule 23 also provides additional procedural protections like a guarantee of adequate representation, notice, disclosure of third-party arrangements prior to settlement, and

107 Id.
108 See Bos. & M.R.R. v. Sullivan, 275 F. 890, 892 (1st Cir. 1921) (“It is also well established that, where property is in the actual possession of a court, all persons entitled to participate in its ultimate distribution may be allowed to have their claims adjudicated under the jurisdiction acquired between the original parties.”).
109 See Jones, supra note 80, at 1714–16; Simon, supra note 1, at 1204; Skeel, supra note 64, at 710–14; In re Combustion Eng’g, Inc., 391 F.3d 190, 238–39 (3d Cir. 2004).
110 See Jones, supra note 80, at 1714–16.
111 See supra Sections I.A, II.B. It is unclear whether jury trials are mandated by the Seventh Amendment in receivership proceedings. Compare 12 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2985 (3d ed. 1998) (“Procedurally, the appointment of a receiver does not infringe the right to a jury trial.”), with Barton v. Barbour, 104 U.S. 126, 133–34 (1881) (suggesting Seventh Amendment jury trial right is inapplicable because receivership is an equitable remedy). However, FED. R. CIV. P. 39(c) permits the federal district court to discretionary impanel an advisory jury, even if the Seventh Amendment right does not attach.
112 FED. R. CIV. P. 23(a)(4).
113 Id. 23(c)(2).
114 Id. 23(e)(2)(C)(iv), (e)(3).
managerial judging in assessing the adequacy of any settlement. These procedural protections provide mass tort claimants with substantial protections against potential grifting in settlement negotiations, protections that may not exist in such a robust manner when negotiating a Chapter 11 reorganization plan.

D. Claim Durability & The Futures Problem

Another major concern raised with the use of bankruptcy to resolve torts is the so-called “futures problem.” Namely, the situation where “a claimant cannot presently prove a causal connection between an injury” and the purported tortious act—such that liability cannot be fully adjudicated in a mature claim. In these situations, there is a “conflict between earlier-in-time and later-in-time creditors,” which “pits those whose claims have matured at the time of a company’s bankruptcy against those whose claims are contingent or unmatured.” Accordingly, when the reorganization plan is negotiated, future tort claimants lack adequate representation because current claimants’ interests are adverse to their own, and the future claimants cannot monitor or represent their interests in the existing proceeding, at least while their identities are unknown. In addition, it is difficult to estimate contingent or unmatured liability in the mass tort context—leading to overcompensation for current claimants and depleting funds for future claimants, which also causes an inequitable distribution of funds for analogous claims. Indeed, this situation was apparent in the Johns Manville asbestos bankruptcy, where the reorganization fund “rapidly depleted,” causing “late arriving claimants” to receive “far less compensation than early claimants.”

As discussed earlier, global peace and fresh start principles in bankruptcy finally resolve all claims, including future claims, such that liability is capped for any future claimants. Thus, “[t]o the extent that a firm knows that it will not have to fully compensate its future tort victims, it has too little

115 Id. 23(e). Bankruptcy has some but not all of these protections. See Bank of Am. Nat’l Tr. & Sav. Ass’n v. 203 N. LaSalle St. P’ship, 526 U.S. 434, 441–42 (1999) (listing those procedural protections available in Chapter 11 and how they may differentiate between different classes of impaired debtors).
117 Id. at 1903.
118 Buccola & Macey, supra note 2, at 769 n.12.
119 Listokin & Ayotte, supra note 36, at 1438.
120 Id.; Hazard, supra note 116, at 1908–10.
121 Listokin & Ayotte, supra note 36, at 1436.
122 See supra Section II.B (discussing, inter alia, the liability cap); Hazard, supra note 116, at 1906–10 (discussing the means to finally resolve future claims in bankruptcy proceeding).
incentive to take care to prevent accidents in the first instance." And many have argued claim durability and successor liability are necessary to effectuate these flaws in the Bankruptcy Code. But, unlike the strict claim preclusion in bankruptcy, preclusion in equity receiverships is based on the equitable doctrine of laches. Under laches, a claim is only precluded “when the party seeking relief has not exercised due diligence in presenting his claim.” Thus, early courts heard post-filing and post-receivership claims if the party was unable to assert them earlier. And the Supreme Court’s early jurisprudence explicitly recognized tort claims are not barred by laches if they were not cognizable during the receivership proceeding. Accordingly, laches provides an avenue to resolve tort claims in a manner that does not implicate the concerns of impairing or precluding future claims present in bankruptcy.

E. Plaintiff’s Choice

Bankruptcy does offer some benefits that would be commonly unavailable in receivership—namely, speedier resolution and the ability to resolve future claims. As discussed, receivership cannot provide these same advantages.

124 See Frederick Tung, Taking Future Claims Seriously: Future Claims and Successor Liability in Bankruptcy, 49 CASE W. RSRV. L. REV. 435, 442 (1999) (suggesting successor liability is needed to address the issue of future claims in bankruptcy); Buccola & Macey, supra note 2, at 806–07 (arguing for a claim durability norm to address mass tort abuses in bankruptcy).
125 Buchler v. Black, 226 F. 703, 707 (9th Cir. 1915) (“But even if the corporation had ground for impeaching the title acquired by Black at the receiver’s sale on account of his fiduciary relation to the company—and the appellant is in no stronger position to attack it than would have been the corporation—the right to the relief sought is barred by the appellant’s laches.”); Methods of Attacking Receiverships, 47 YALE L.J. 746, 763 (1938) (“[I]f the creditor is not guilty of laches, there is virtually no limit upon the assertion of his rights.”); Geoffrey C. Hazard, Jr., John L. Gedid & Stephen Sowle, An Historical Analysis of the Binding Effect of Class Suits, 146 U. PA. L. REV. 1849, 1866–74 (1998) (discussing the historical basis of preclusion through laches in English Chancery Courts).
126 12 MOORE’S FEDERAL PRACTICE § 60.83 (2023).
127 See Kansas City S. R. Co. v. Guardian Tr. Co., 240 U.S. 166, 177 (1916) (holding the Trust Company is not barred by laches because it tried to become a party to the foreclosure); MacNamee v. Bankers’ Union for Foreign Com. & Fin., 25 F.2d 614, 618 (2d Cir. 1928) (holding none of the claimants was barred by laches prior to receivership on the grounds of equity); Winget v. Rockwood, 69 F.2d 326, 322–33 (8th Cir. 1934) (“The rule in equity as to the defense of laches is similar to the Minnesota statute of limitations in that time does not begin to run until knowledge of the facts constituting the alleged fraud are brought home to the aggrieved party.”).
129 NAT’L BANKR. REV. COMM’N, BANKRUPTCY: THE NEXT TWENTY YEARS 318–50 (1997) (discussing the pros and cons of bankruptcy, such as speedy resolution).
130 See N. Pac. Ry. Co. v. Boyd, 228 U.S. 482, 502 (1913) (noting receiver proceeding cannot resolve claims unknown at the time of the receivership); Amchem Products, Inc. v. Windsor, 521
Since bankruptcy provides streamlined proceedings to estimate tort liability, the faster pace of a reorganization may be preferred by some tort claimants, especially those whose harms are life-threatening. But when fully litigated in district court, the slow pace of receivership may increase transaction costs—like those necessary to hear suits against third-parties, finally resolve existing claims, and to remunerate the receiver— which are unlikely to be as high in bankruptcy. Thus, in some circumstances, mass tort claimants may prefer to resolve their claims through a swift bankruptcy rather than a drawn out receivership proceeding.

As discussed earlier, bankruptcy may also resolve the claims of future mass tort claimants whose injuries are not manifested at the time of litigation. Receivership is unable to do this as non-parties to the proceeding retain claim durability. There is widespread debate over whether resolution of future claims is actually beneficial for mass tort claimants. In cases where a corporation is facing near-certain insolvency, resolution of future claims may be necessary for future claimants to recover anything at all. But, in other circumstances, conflicts of interest and liability estimation issues may undermine the use of bankruptcy.

The major benefit of receivership is that it is a remedy that plaintiffs must request, and the district court may, in its discretion, decide to grant. Thus, in a receivership regime, bankruptcy remains open as an avenue to resolve mass tort claims—either by a determination by plaintiffs or by a district judge. Nevertheless, the potential for a receivership provides a strong deterrent against bankruptcy grifting by the corporate debtor. In sum,

U.S. 591 (1997) (holding future claims may not be resolved through class action process); see supra note 73 (discussing the slow pace of receiverships).

131 GIBSON, supra note 5, at 25.

132 Stanley, supra note 73, at 1230 (“Similar to class action attorneys, receivers also take substantial fees from any recovery; this in turn reduces the recovery of defrauded investors.”); Id. at 1230 n.77 (detailing the transaction costs of the Stanford receivership; Casey & Macey, supra note 89, at 1005–06 (discussing the reduced administrative costs associated with a reorganization plan and third party releases as opposed to protracted litigation).


134 Boyd, 228 U.S. at 502 (“For if such contract reorganization was consummated in good faith and in ignorance of the existence of the creditor, yet when he appeared and established his debt, the subordinate interest of the old stockholders would still be subject to his claim in the hands of the reorganized company.”).

135 Hazard, supra note 116, at 1906–10 (discussing the pros and cons of resolving future claims in mass torts actions).


137 See supra Section II.D (discussing how such procedures in Chapter 11 can harm future claimants).

138 See Chase Manhattan Bank, N.A. v. Turabo Shopping Ctr., Inc., 683 F.2d 25, 27 (1st Cir. 1982) (“We believe that the district court was well within its discretion in appointing a receiver . . . .”).
receivership levels the playing field between mass tort claimants and corporate defendants.

III. POTENTIAL CONCERNS WITH USING RECEIVERSHIPS TO RESOLVE MASS TORTS

A. Equitable Concerns

One major potential barrier to this proposal is the judgment rule that previously governed receiverships. Specifically, in early history, an equity receivership was generally only granted following a successful judgment in a court of law, with a few recognized exceptions to this doctrine.139 This practice was indicative of the traditional principle that “equity follows the law,” that is, that one could not ask a court for equitable relief until they had exhausted all remedies and proceedings at law.140 At the height of receiverships, the Supreme Court stressed the greatest obstacle to using the remedial mechanism to resolve torts was an inability to join “a claim properly cognizable only at law” in “the same pleadings with a claim for equitable relief.”141 But, in 1938, the Supreme Court merged law and equity in federal courts, permitting plaintiffs to seek both equitable and legal relief in the same pleadings and adjudicate them in a single proceeding.142 Some contemporary scholars believed this would remove the final barrier to using equity receiverships to resolve mass torts.143

But the Supreme Court has recently questioned a court’s ability to use traditional equitable remedies that “interfere with the debtor’s use of his

139 Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 321 (1999) (“[W]e are not inclined to speculate upon the existence or applicability to this case of any exceptions, and follow the well-established general rule that a judgment establishing the debt was necessary before a court of equity would interfere with the debtor’s use of his property.”); id. at 320 n.5 (“Some cases suggested that there was an exception where the debt was admitted or confessed, at least if the creditor possessed an interest in the debtor’s property.”).

140 Note, The Equity Receivership in Mass Tort, 60 YALE L.J. 1417, 1421 (1951) (“This rule is based on the old division between law and equity and rooted in the idea that a non-judgment creditor has not yet pursued his remedy at law and therefore cannot seek equitable relief.”).


142 8 MOORE’S FEDERAL PRACTICE § 38 App. 102 (2023) (“Under the Federal Rules, the unification of law and equity was achieved by substituting the civil action for separate suits at law and in equity, so that it became possible to present all claims and defenses, both legal and equitable, in the same action. Indeed, the Rules compel the parties to present all facets of the matter in controversy that involve a single claim.”); see also Ross v. Bernhard, 396 U.S. 531, 539 (1970) (discussing merger of law and equity).

143 See Note, supra note 140, at 1424 (“The elimination of the division between law and equity should make the restrictive doctrine obsolete in all jurisdictions.”); cf. Procedural Devices for Simplifying Litigation Stemming from a Mass Tort, 63 YALE L.J. 493, 516 (1954) (“Only in states where attachment may precede suit can the defendant be expected to accept the stigma of receivership.”).
property” without following this traditional judgment rule or the Supreme Court’s previously recognized exceptions. In Grupo Mexicano, in a 5-4 portion of the decision authored by Justice Scalia, the Court reasoned that the merger between law and equity only applied to procedural rules and characterized these types of equitable remedies as substantive. Thus, the majority argued that the use of such remedies must conform with historical practice.

Grupo did not explicitly address equity receiverships, but its reasoning could arguably apply to them. Still, this approach is odd. The Supreme Court historically reasoned that to appoint a receiver “at the commencement of an action” at law, only “a union of legal and equitable relief in the same action” would be necessary. Furthermore, receiverships are authorized by Rule 66 of the Federal Rules of Civil Procedure, which governs procedural, not substantive rights. Finally, some States that merged law and equity allowed pre-judgment receiverships, a fact the Supreme Court had even referenced in an opinion. Accordingly, it seems that receiverships were largely viewed as procedural rather than substantive devices.

Nevertheless, Rule 66 requires that receiverships “accord with the historical practice in federal courts or with a local rule.” Thus, if no local rule controls, the Grupo rationale has some force. Accordingly, this Comment will assume Grupo’s rationale does apply and examines the use of receiverships in line with the historical limitations on equity practice.

144 Grupo Mexicano de Desarrollo, 527 U.S. at 321.
145 Id. at 322 (“Respondents argue . . . that the merger of law and equity changed the rule that a general creditor could not interfere with the debtor’s use of his property. But the merger did not alter substantive rights. ‘Notwithstanding the fusion of law and equity by the rules of Civil Procedure, the substantive principles of Courts of Chancery remain unaffected.’”).
146 Id. at 324.
147 The Court in Grupo did cite to some receivership cases in coming to its conclusion. See id. at 320–23 nn.4–6 (citing cases about receivership).
148 Scott v. Neely, 140 U.S. 106, 114 (1891); see also supra note 140, at 1420–25 (describing the division of law and equity as the primary obstacle to the use of receiverships in mass torts).
149 See 28 U.S.C. § 2072(b) (“Such rules shall not abridge, enlarge or modify any substantive right.”); cf. Pusey & Jones Co. v. Hanssen, 261 U.S. 491, 497 (1923) (“[T]he appointment of a receiver is merely an ancillary and incidental remedy. . . . appointment determines no substantive right, nor is it a step in the determination of such a right. It is a means of preserving property which may ultimately be applied toward the satisfaction of substantive rights.”). The statutes governing receiverships, 28 U.S.C. § 754 and id. § 959, are also placed under Title 28 of the U.S. Code, which itself “mostly concerns civil procedure.” Turkiye Halk Bankasi A.S. v. United States, 143 S. Ct. 940, 941 (2023).
150 Scott, 140 U.S. at 114 (“Whatever control the State may exercise over proceedings in its own courts, such as a union of legal and equitable relief in the same action is not allowed in the practice of the Federal courts.”); Note, supra note 140, at 1424 n.36 (citing cases that allow receivership for non-judgment creditors).
151 FED. R. CIV. P. 66.
Traditionally, the Supreme Court recognized several exceptions to the judgment rule. Two are relevant to this Comment. They require: (1) a debt acknowledged by the defendant, and either (2) an interest in the property created by contract or some distinct legal proceeding ("legal interest exception"), or (3) an admission by the defendant of insolvency ("admitted debt exception"). Insolvency in federal equity jurisprudence was defined as an "inability to pay debts as they become due in the usual course of business." This differs from the modern understanding of insolvency—which focuses instead on the ability to pay off all debts with an immediate liquidation of assets. The proposal below will conform with these recognized exceptions as they were understood in historical practice.

B. Constitutional Concerns

Another concern with receivership is its consistency with the Fifth Amendment’s Takings Clause. The Fifth Amendment establishes that “private property [shall not] be taken for public use, without just compensation.” There may be a concern that receivership impairs the Fifth Amendment rights of shareholders whose value in and control over the corporation is impaired throughout the procedure.

Nevertheless, there are various explanations in the case law for why receiverships do not violate the Fifth Amendment. One explanation is purely originalist—that the unquestioned use of equity receiverships since the Founding strongly implies it is a constitutional use of the judicial power under Article III.

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152 John K. Beach, Judgment Claims in Receivership Proceedings, 30 YALE L.J. 674, 674 (1921) (noting exceptions to equitable receiverships).
153 Scott, 140 U.S. at 113 (discussing the legal interest exception); D.A. Tompkins Co. v. Catawba Mills, 82 F. 780, 783 (C.C.D.S.C. 1897) (same); Pusey & Jones Co., 261 U.S. at 500 (discussing when insolvency exception applies).
156 See infra Part II.
157 U.S. CONST. amend. V.
158 Brooklyn Tr. Co. v. R.A. Sec. Holdings, 134 F.2d 164, 165 (2d Cir. 1943) (Hand, J.) (“[T]he appointment of a chancery receiver [...] has long been a valid exercise of judicial power.”); see U.S. CONST. art. III, § 2 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . .”).
traditionally does not truly take title to the property but only temporarily takes it into the custody of the court pending resolution. Put differently, receivership is an in rem proceeding whereby the court temporarily seizes the property it is concerned is being used wrongfully. In *Calero-Toledo*, the Supreme Court found that such traditional in rem procedures do not invoke the Takings Clause because they amount to a determination of wrongdoing by the property itself but do not constitute a judgment against or taking from the owner. Such in rem proceedings do not present constitutional concerns so long as the owner has an opportunity to assert his property rights in court. For this reason, civil asset forfeiture (warrantless property seizures of illicit items prior to a legal judgment) is permissible today. As the Supreme Court noted, “[t]o the extent that such forfeiture provisions are applied to lessors, bailors, or secured creditors who are innocent of any wrongdoing, confiscation may have the desirable effect of inducing them to exercise greater care.” This rationale is equally applicable to receiverships.

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159 See *Brooklyn Tr. Co.*, 134 F.2d at 165 (finding no violation of the 5th Amendment because any interference with the exercises of corporate franchises would be temporary and through a chancery receiver); Wiswall v. Sampson, 55 U.S. 52, 65 (1852) (“The effect of the appointment is not to oust any party of his right to the possession of the property, but merely to retain it for the benefit of the party who may ultimately appear to be entitled to it[.]”); *Union Bank of Chi. v. Kansas City Bank*, 136 U.S. 223, 236 (1890) (“[T]he utmost effect of [a receiver’s] appointment is to put the property from that time into his custody as an officer of the court, for the benefit of the party ultimately proved to be entitled, but not to change the title, or even the right of possession in the property[.]”); *Great W. Mining & Mfg. Co. v. Harris*, 198 U.S. 561, 572–75 (1905) (noting a receiver does not get title to property); *Royal Indem. Co. v. Am. Bond & Mortg. Co.*, 289 U.S. 165, 168 (1933) (“The decree in equity and its execution by officers of the court did not change the ownership of the assets or of the business. The corporation continued to have the only business owned before the appointment of receivers . . . .”); *Birmingham Tr. & Sav. Co. v. Atlanta, Birmingham. & Atl. Ry. Co.*, 271 F. 731, 738 (N.D. Ga. 1921) (“The primary object of a receivership is to preserve the property, which is taken into custody of the court, until the rights of all concerned in it can be ascertained and effectuated.”).


162 See United States v. James Daniel Good Real Prop., 510 U.S. 43, 52–62 (1993) (relying on multi-factored test to establish a Due Process hearing requirement for real property civil asset forfeitures); see also id. at 78 (O’Connor, J., dissenting) (“[W]e have already held that property owners have a due process right to a prompt *postseizure* hearing, which is sufficient to protect the owner’s interests.” (emphasis added)).


165 See *Lurig Collieries Co. v. Interstate Coal & Dock Co.*, 281 F. 265, 270 (S.D.N.Y. 1922) (Hand, J.) (“The origin and nature of the [receivership] bill stamps it as in rem. It is to reach the assets of the debtor and apply them to the creditors. As such it goes directly against the assets themselves in substitution for attachment and execution.”).
Another justification is textual—that the property under receivership is not taken for “public use” but rather for the party ultimately entitled in litigation—thus, failing to invoke the Fifth Amendment altogether.\footnote{See \textit{Wiswall}, 55 U.S. at 65 ("The effect of the appointment is not to oust any party of his right to the property of the property, but merely to retain it for the benefit of the party who may ultimately appear to be entitled to it; and when the party entitled to the estate has been ascertained, the receiver will be considered his receiver[.]").} Like in a Chapter 7 bankruptcy, shareholders’ property rights are diminished only to the extent they are owed to others, even if this means they receive no return on investment.\footnote{See \textit{Bankruptcy: What Happens When Public Companies Go Bankrupt}, SEC (Feb. 3, 2009), https://www.sec.gov/reportspubs/investor-publications/investorpubsbankrupt\#:\#:\#text=Stockholders%20do%20not%20have%20opportunity%20to%20file%20claims [https://perma.cc/U4C8-HF3G] (discussing bankruptcy practice); Payne, \textit{supra} note 102, at 690 (discussing how process is same in receivership).} But any assets remaining following liquidation in Chapter 7 must be returned to the shareholder.\footnote{See \textit{Payne, supra} note 102, at 700–01 (describing the Ringling Brothers case where the court negotiated the return of a corporation in a receivership to its owners after its debt was paid off); Graselli Chem. Co. v. Aetna Explosives Co., 352 F. 456, 462 (2d Cir. 1918) ("[W]hen the deferred dividends are paid out of the surplus profits . . . . the control thereof will pass to the common stockholders, where it was when the court took possession of the property . . . .").} Similarly, if the corporation earns enough profits during the receivership to pay off all claimants, the receivership must immediately cease and return the property to shareholders.\footnote{This rationale is drawn by the analogies to receiverships used to justify similar procedures in the Bankruptcy Act. See \textit{Brooklyn Tr. Co. v. R.A. Sec. Holdings}, 134 F.2d 164, 165 (2d Cir. 1943).} Thus, both procedures are for private, not public, use—namely, they only impair property rights for the benefit of a private party in litigation.

A final justification is that the power for the receiver to take possession is now, in part, provided by statute, 28 U.S.C. § 754, which is a valid use of Congress’ bankruptcy power.\footnote{Statutory authorization was also central to the \textit{in rem} rationale in \textit{Calero-Toledo v. Pearson Yacht Leasing Co.}, 416 U.S. 663, 682–91 (1974).} In earlier versions of the Bankruptcy Code, creditors were able to sue a debtor and request an involuntary reorganization, under receivership, of their assets.\footnote{See \textit{Brooklyn Tr. Co. v. R.A. Sec. Holdings}, 134 F.2d 164, 165 (2d Cir. 1943).} Furthermore, the current Bankruptcy Code also permits involuntary bankruptcies in certain circumstances.\footnote{Cont’l Ill. Nat’l Bank & Tr. Co. v. Chi., Rock Island & Pac. Ry. Co., 294 U.S. 648, 672, 680 (1934) (utilizing a similar analogy to receivership practice to justify use of bankruptcy powers).} The Supreme Court has held such exercises of the bankruptcy power do not contravene the Fifth Amendment and analogized these provisions of the bankruptcy statute to equity receiverships.\footnote{See 11 U.S.C. § 303 (permitting involuntary bankruptcies).} Thus, like the analogous provisions of the bankruptcy statute, the constitutionality of receiverships can also be grounded in the bankruptcy power.\footnote{Cont’d Ill. Nat’l Bank & Tr. Co. v. Chi., Rock Island & Pac. Ry. Co., 294 U.S. 648, 672, 680 (1934) (utilizing a similar analogy to receivership practice to justify use of bankruptcy powers).}
There is no reason to believe these long-standing justifications of receiverships no longer apply. Thus, this Comment will assume such principles still govern the use of equity receivership today.

C. Novelty Concerns

A final concern may be that the proposed use of receiverships is too novel and has not been tested in practice. But this is not the case. In 1944, a Connecticut state court utilized an equity receivership to resolve mass tort liability resulting from the Ringling Brothers Hartford circus fire. Following the incident, the “victims of the tragedy faced irreparable loss,” deaths and injuries, while “the circus [was in] utter ruin,” likely facing insolvency. Due to the Ringling Brothers’ potential insolvency, the Connecticut court opted to proceed with an equity receivership:

[T]he bar of Hartford . . . devised a procedure whereby a receiver was appointed, the claims of the victims were arbitrated with a minimum of litigation and expense, and the circus went about its business, turning in its profits for the satisfaction of claims until, after a period of six years, the damages determined by the arbitrators were paid in full.

Following its successful reorganization, Ringling Brothers became one of the most successful circuses in history and continued operating until 2017. The use of receivership in such a manner received mass acclaim, and some contemporaries argued more courts should use the procedure for mass torts liability. But the idea never caught traction.

175 Note, supra note 140, at 1418.
177 Id. at 806.
179 See Jacobs, 103 A.2d at 806 (praising the handling of the receivership); Note, supra note 140, at 1425 (advocating for use of the Ringling solution more broadly).
180 This is likely because the 1966 Rules Amendment created a new avenue to resolve mass torts through the Rule 23 class action procedure. See Irving R.M. Panzer & Thomas E. Patton, Utilizing the Class Action Device in Mass Tort Litigation, 21 TORT & INS. L.J. 560, 560 (1986) (explaining the process and difficulties for resolving mass torts claims through class action procedure). But recent jurisprudential developments have made this procedure more difficult. See David Marcus, The Short Life and Long Afterlife of the Mass Tort Class Action, 165 U. PA. L. REV. 1565, 1566 (2017) (noting the decline of Rule 23 in the mass tort context following the Supreme Court’s jurisprudence in the Amchem case and the subsequent diminishment of mass tort class actions). Chapter 11 reorganization has now largely filled this gap. See Simon, supra note 1, at 1162 (“[B]usinesses are increasingly using Chapter 11 filings as an efficient way to deal with outsized liabilities and debt.”).
Although it is not necessarily of the same scale as mass torts today, the 1944 Ringling Brothers proceeding demonstrated that receiverships can be extremely successful in resolving mass tort liability. Since the Class Action Fairness Act generally now places mass tort class actions under the jurisdiction of federal courts, this Comment presents a proposal by which federal courts may adopt a similar remedy.\textsuperscript{181}

IV. THE PROPOSAL

A. A Proposed Procedure—One Way to Utilize Equity Receivership to Resolve Mass Torts

This Comment suggests that the automatic stay in bankruptcy, 11 U.S.C. § 362, should contain an exception whereby it will not apply to any mass tort action requesting a receiver. This may be done by adding the following language to 11 U.S.C. § 362(b)(2)(A): “(vi) for the establishment of a federal equity receiver. Should, in a suit in tort, a federal receiver, in conformity with section 754 of title 28, be vested with jurisdiction or control over any property of the estate, as defined in section 541 of this title, any proceeding under this title shall be stayed.” Furthermore, a provision should also be added to stay the bankruptcy proceeding so long as an action for a receiver is ongoing. Should these amendments be passed, I propose the procedure below to resolve mass tort liability through an equity receivership. Due to the historical limitations on the remedy that may apply following \textit{Grupo}, a relatively complex procedure is proposed.\textsuperscript{182}

First, receivership likely cannot be requested in the original tort proceeding because there is no admitted debt.\textsuperscript{183} Plaintiffs must pursue their claims using the existing mechanisms at law—either individual, multidistrict, or class action litigation.\textsuperscript{184} The remedy proposed would be available only if the corporate defendant declares bankruptcy and submits a Chapter 11 reorganization plan.\textsuperscript{185} The proposal below would not apply to a Chapter 7
liquidation where—unlike in Chapter 11—substantial abuse of the Bankruptcy Code is not reported.\textsuperscript{186}

To utilize the proposed remedy, the reorganization plan must list mass tort claims as impaired, that is, an admission that the debtor cannot fulfill their pre-petition legal, equitable, or contractual obligations with respect to these claimants.\textsuperscript{187} The corporate debtor would need to list such debts as impaired in order to release their liability in a Chapter 11 proceeding—a necessary step for bankruptcy grifting.\textsuperscript{188} But the reorganization plan, by listing mass tort claims as impaired debts, also (1) serves as an admission of debt due to the plaintiffs\textsuperscript{189} and (2) provides a temporary interest in the property to the claimants.\textsuperscript{190} Furthermore, by declaring Chapter 11 bankruptcy, the corporate debtor also admits insolvency, in the equitable sense, namely that it is unable “to pay debts as they become due in the usual course of business.”\textsuperscript{191}

Thus, at this point, a receiver may be appointed consistent with the traditional limitations on the remedy. First, there is (1) a debt acknowledged by the defendant and (2) an interest in the property created by some distinct legal proceeding (legal interest exception).\textsuperscript{192} Second, there is also (1) a debt acknowledged by the defendant and (2) an admission by the defendant of insolvency, as defined in equity jurisprudence (admitted debt exception).\textsuperscript{193} Either of these circumstances conforms with the historic limitations in which a receiver may be appointed.\textsuperscript{194}

\textsuperscript{186} See Simon, supra note 1, at 1212.
\textsuperscript{188} Id.
\textsuperscript{189} 11 U.S.C. § 1124.
\textsuperscript{190} See FED. R. BANKR. P. 3018(a) (providing creditors with a temporary interest in the property prior to voting); Gibson, supra note 81, at 131–32 (noting that 3018(a) permits courts to temporarily allow claims). It is probably stronger to rely on the “admitted debt” exception—since the interest created is only temporary. FED. R. BANKR. P. 3018(a). But this exception also provides an alternate basis to grant the receivership in line with historical exceptions.
\textsuperscript{191} See Oklahoma, supra note 154, at 261; In re LTL Mgmt., LLC, 64 F.4th 84, 101 (3d Cir. 2023) (noting Chapter 11 is justified when a corporation “ha[s] trouble paying debts or impaired access to capital markets”).
\textsuperscript{192} Scott v. Neely, 140 U.S. 106, 113 (1891).
\textsuperscript{193} Pusey & Jones Co. v. Hanssen, 261 U.S. 491, 500 (1923).
\textsuperscript{194} See supra Section III.B (discussing the limitations on receivership based on historic practice and Supreme Court precedent). To the extent that a court may be hesitant to utilize such historic exceptions, legislation may be helpful to clarify that a receiver may be appointed in such circumstances. A similar provision for the appointment of a receiver existed in earlier versions of the Bankruptcy Code. See Cont’l Ill. Nat’l Bank & Tr. Co. v. Chi., Rock Island & Pac. Ry. Co., 294 U.S. 648, 672, 680 (1935).
Second, once such a Chapter 11 reorganization plan is submitted, the mass tort claimants should bring a Rule 23(b)(1)(B) class action in court. These class actions are permissible in a “limited fund” scenario where “numerous persons make claims against a fund insufficient to satisfy all claims.” The Supreme Court has recognized that the prerequisite circumstances for a 23(b)(1)(B) class action and Chapter 11 reorganization are commonly co-extensive. Furthermore, a reorganization plan that includes impaired debts itself creates a limited fund scenario—there are not enough liquid assets to pay off all debts. By utilizing a Rule 23 class action, the tort claimants can streamline aggregation and receive procedural protections in their receivership proceeding.

A Rule 23(b)(1)(B) class action is advantageous for mass tort claimants. Namely, the action need not satisfy Rule 23(b)(3)’s predominance and superiority requirements—the most common bar to a mass tort class action. Mass torts are rarely certified under 23(b)(3) because they generally involve conflict of laws and other individualized legal issues (e.g., affirmative defenses, causation) which tend to fail these requirements. Mass tort certification is substantially easier under Rule 23(b)(1) because these bars are no longer presented. By seeking 23(b)(1) certification, plaintiffs can get the procedural protections of Rule 23, discussed in detail above, with fewer hurdles to class certification.

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198 See Amchem, 521 U.S. at 614.
199 See FED. R. CIV. P. 23(e) (detailing procedural protections in class actions).
200 See Sergio J. Campos, Mass Torts and Due Process, 65 VAND. L. REV. 1059, 1067 (2012) (“At first glance, mass tort litigation cannot possibly satisfy the predominance requirement given the variance of the plaintiffs on many fact and legal issues.”); Robert H. Klonoff, Class Actions in the Year 2026: A Prognosis, 65 EMORY L.J. 1569, 1599–1600 (2016) (“In a series of cases dating back to the late 1960s (with a temporary retreat in the 1980s), courts ruled that personal injury class actions usually failed to satisfy the predominance and manageability requirements of Rule 23(b)(3). . . . Courts are now entrenched in ruling that, in most personal injury class actions, individual issues outweigh common issues, thus disqualifying such actions on predominance and manageability grounds.”); Robert Klonoff, The Future of Aggregate Litigation in the United States, in THE CAMBRIDGE HANDBOOK OF CLASS ACTIONS 71, 81 (Brian T. Fitzpatrick & Randall S. Thomas eds., 2021); Castano v. Am. Tobacco Co., 84 F.3d 734, 749 (5th Cir. 1996) (explaining the difficulties for Rule 23(b)(3) certification in mass tort claims).
201 Id.
202 FED. R. CIV. P. 23(b)(1).
203 See supra Section II.C (discussing, inter alia, procedural protections available under Rule 23).
Third, the plaintiffs would motion for a receiver in the class action proceeding. To do this, the motion must be brought in the same district as the bankruptcy proceeding, as that district would already have in rem jurisdiction over the corporate assets. The legislative change proposed would permit such a proceeding to continue in district court rather stay the proceeding. In weighing the motion, the district court would consider the existing factors governing the appointment of receivers: (1) potential for fraudulent conduct on the part of the defendant; (2) imminent danger that property would be lost, concealed, injured, diminished in value, or squandered; (3) the inadequacy of alternative remedies (likely in bankruptcy); (4) the probability that harm to plaintiff by denial of the appointment would be greater than the injury to the parties opposing appointment; (5) the plaintiff’s probable success in the action; and (6) the possibility of irreparable injury to plaintiff’s interests in the property. Should the district court deny the motion, any further proceeding would be stayed under the Bankruptcy Code.

Should the district judge grant the motion, the legislative change proposed would stay the bankruptcy proceeding. Functionally, this moves the proceeding from bankruptcy to district court. The creditors in the Chapter 11 proceeding would be able to intervene in the receivership proceeding in the

204 This paper presumes that Rule 23 would not impair any of the inherent aggregation powers of a federal court under existing equity receivership law. See supra Section I.A (discussing the aggregation procedure as understood in historic practice).


206 Chase Manhattan Bank, N.A. v. Turabo Shopping Ctr., Inc., 683 F.2d 25, 26–27 (1st Cir. 1982). In weighting these factors, the court should note the “rules governing receiverships are very similar to those developed to deal with the remedy of injunction, though a receivership may be more drastic since it takes property out of the defendant’s possession and places it in the hands of the receiver.” James R. Farrand, Ancillary Remedies in SEC Civil Enforcement Suits, 89 HARV. L. REV. 1779, 1789 n.65 (1976).

district court. The district court could resolve all claims brought against the property—by the original or intervening parties—through either litigation or settlement, adhering to the procedural protections mandated by Rule 23.

The district court would also appoint a receiver under Rule 66. Throughout the course of litigation, the receiver would take possession of and continue to operate the corporation to “maximize[] assets available” for the prevailing parties. The receiver should also bring claims against any third parties who may share in the liability, like corporate directors or insurance providers, thus increasing potential recovery and minimizing the potential cost to plaintiffs, who may otherwise pursue separate litigation. Furthermore, receivership will aggregate claims against the corporate debtor, and as judgments are made, the receiver must “facilitate[] an orderly and equitable distribution of those assets.” This may involve continuing to run the company until there are enough profits to satisfy recovery, liquidating corporate assets when doing so can satisfy claims, and even potentially selling the corporation altogether to satisfy a judgment. The district court must also dissolve the receivership if profits made during proceedings can satisfy all claimants. Otherwise, the receivership will continue to exist until all litigation is resolved and claimants are satisfied.

B. Merits of the Proposed Approach

Under this proposal, mass tort claimants would receive greater recovery and procedural protections than in either normal litigation or a Chapter 11

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208 Bos. & M.R.R. v. Sullivan, 275 F. 890, 892 (1st Cir. 1921) (“It is also well established that, where property is in the actual possession of a court, all persons entitled to participate in its ultimate distribution may be allowed to have their claims adjudicated under the jurisdiction acquired between the original parties.”).

209 See supra Section I.A. (discussing how equity receivership functioned as a form of aggregation); see also Section II.C (discussing procedural protections).

210 FED. R. CIV. P. 66.


212 Stanley, supra note 73, at 1219 (explaining how this was undertaken in the Stanford International Bank receivership).

213 Zacarias, 945 F.3d at 902; see also supra Section I.A (discussing the aggregation procedure in a receivership).

214 Jacobs v. Ringling Bros.-Barnum & Bailey Combined Shows, Inc., 103 A.2d 805, 805–06 (Conn. 1954) (discussing how this was done in the Ringling Brothers receivership).

215 Stanley, supra note 73, at 1218–22 (discussing how this was done in the Stanford International Bank receivership).

216 Buchler v. Black, 226 F. 703, 706–07 (9th Cir. 1915) (discussing how this was permissible in a receivership).

217 Payne, supra note 102, at 700–01; Graselli Chem. Co. v. Aetna Explosives Co., 252 F. 456, 462 (2d Cir. 1918).

218 Payne, supra note 102, at 698–701.
reorganization. The approach also retains agency for defendants—namely, the corporate defendant’s decision to file for bankruptcy and impair tort claims in a reorganization plans—necessary pre-requisites for this procedure to come into effect. Indeed, a corporate defendant could easily choose to litigate those claims outside of bankruptcy court instead. Accordingly, this approach is a deterrent to corporations like 3M and Johnson & Johnson, who use Chapter 11 as a failsafe when bellwether trials or other litigation look unfavorable.

This proposal, by removing corporate control, discourages profitable debtors and third-party non-debtor corporate directors (e.g., the Sackler family) or umbrella companies (e.g., Johnson & Johnson) from utilizing bankruptcy as a means to grift mass tort liability by “receiving many of the substantive and procedural benefits” of bankruptcy while “incurring only a fraction of the associated burdens.” The Third Circuit recently clarified that “absent [a good faith showing of] financial distress, there is no reason for Chapter 11 and no valid bankruptcy purpose” in using the Code to resolve mass torts. This procedure disincentivizes such misuse of bankruptcy, which has been widely documented in academic literature.

By implementing receiverships after bankruptcy is filed, this proposal does raise one prudential concern not yet addressed—plaintiff abuse. This proposed procedure could be used by mass tort claimants with weak or small claims to undermine a legitimate Chapter 11 reorganization triggered by financial distress. Alternatively, the procedure may otherwise be used by a few claimants to undermine an otherwise fair Chapter 11 settlement. These situations could undermine reorganization, as the value of corporate shares may decline precipitously if the case moves into receivership. Although this is a fair concern, there is one safeguard against such misuse: The decision to appoint a receiver is at the discretion of the trial judge—not the plaintiff acting alone.

In judging whether to appoint a receiver, a district court must factor the “inadequacy” of alternative remedies, “the injury to the parties opposing appointment,” and “[the] plaintiff’s probable success in the action.” Where mass tort claims are not driving the re-organization, the plaintiff’s case is weak, or the alternative Chapter 11 plan is fair, the district court may deny a motion for a receiver. District courts are familiar with making such decisions.

219 See generally supra Section II.C (discussing the procedural protections of receiverships).
221 Simon, supra note 1, at 1154; see also Buccola & Macey, supra note 2, at 776–77.
222 In re LTL Mgmt., LLC, 64 F.4th 84, 101 (3d Cir. 2023).
223 See, e.g., Simon, supra note 1, at 1154; Buccola & Macey, supra note 2, at 776–77.
224 Chase Manhattan Bank, N. A. v. Turabo Shopping Ctr., Inc., 683 F.2d 25, 27 (1st Cir. 1982).
225 Id.
determinations because “rules governing receiverships are very similar to those developed to deal with the remedy of injunction.” As with all relief, this proposal assumes judges will act in good faith employing “the utmost caution and grant[ing] only in cases of clear necessity to protect plaintiff’s interests.”

In proposing this framework for the modern use of equity receiverships, this proposal does not seek to make receivership the default method to resolve mass torts. Rather, it seeks to rectify mass tort claimants’ extremely disfavored position in Chapter 11 proceedings. By allowing mass tort creditors to remove claims from bankruptcy and potentially litigate them, plaintiffs are given substantially more bargaining power within Chapter 11 settlement negotiations. Such bargaining power is akin to that which mass tort plaintiffs normally have in aggregate litigation—the ability to pursue their claims if the opposing party does not agree to a fair settlement. Under this proposal, corporate defendants are simply incentivized to reach a Chapter 11 settlement that treats mass tort claimants fairly and equitably.

Should defendants instead try to grift mass tort claimants in their proposed reorganization, this proposal provides mass tort claimants with a powerful remedy by removing to district court. But removal, when accompanied by receivership, does not prejudice non-tort creditors who may also resolve their claims. Thus, receivership provides global peace and a fresh start. Furthermore, continued business operations benefit society by spurring economic activity and retaining existing employment. In doing so, this proposal offers the benefits of reorganization—like that in Chapter 11—without the Bankruptcy Code’s drawbacks for mass tort claimants.

CONCLUSION

Equity receivership is a long-forgotten mode of corporate reorganization that has potentially useful applications in today’s society. This is especially

226 Farrand, supra note 206, at 1789 n.65.
228 See Buccola & Macey, supra note 2, at 768-69.
229 Ortiz v. Fibreboard Corp., 527 U.S. 815, 860 n.34 (1999) (expressing concern that litigation of limited fund torts may prejudice non-tort creditors).
230 Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 364 (2006). Indeed, the proposal may also provide global peace because the refusal to bring some claims during a receivership may bar them from being brought later under the doctrine of laches. Buchler v. Black, 226 F. 703, 707 (9th Cir. 1915). Thus, like a class action, receivership may provide the defendant with global peace against future litigation. But the rules and exceptions of this doctrine in equity are complex and thus not discussed in detail in this Comment.
true for mass tort claimants whom bankruptcy greatly disfavors and whose claims, when unsettled, properly belong before a jury in district court. Indeed, some scholars have argued that bankruptcy should be reformed to act more like receiverships when dealing with mass tort claimants. But this Comment asks why receivership itself—a remedy courts are still authorized to use—should not itself be utilized.

Receivership provides an attractive alternative in mass tort cases. This Comment provides one proposal by which mass tort claimants may take advantage of the remedy. The proposed procedure gives mass tort victims an alternative avenue to vindicate claims, when corporate debtors attempt to grift their recoveries in bankruptcy. In doing so, it seeks to incentivize corporate debtors to adopt fairer practices when negotiating a Chapter 11 settlement. Should corporate debtors fail to do so, the proposed procedure would provide an avenue for relief that accomplishes many of the aims of reorganization without the drawbacks that commonly disadvantage tort claimants. Regardless of whether this proposal is adopted, it is clear that courts, scholars, and legislators must more seriously consider receiverships as a tool to resolve mass torts.

In 1925, one scholar noted that when a tort claimant sought relief in a receivership reorganization, the district judge’s actions would demonstrate that “every humanitarian impulse is in his favor.” In 2024, we must ask why bankruptcy no longer reflects this long-established “tendency” of federal courts to “favor the tort creditors.” The policy of courts should be to facilitate—not hamper—just and complete relief. The proposed use of this long-established equitable remedy—receivership—will empower federal courts to grant such, much-needed relief to victims of mass torts.

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232 See, e.g., Buccola & Macey, supra note 2, at 772; see also Skeel, supra note 65, at 709.
233 This proposal is consistent with the historic limitations on equity receiverships. See supra Section III.B (discussing the historic conditions for creating equitable receiverships). But, without such constraints, equity receiverships may arguably be requested directly in district court. See Note, supra note 140, at 1421. There is, however, widespread debate as to whether a declaration of Chapter 11 bankruptcy would undermine such a request. Antonio M. DiNizo Jr., Battle of the Bayou: Placing A Receiver in the Right Position During A Bankruptcy Proceeding, 30 ST. THOMAS L. REV. 290, 305–14 (2018) (discussing a circuit split over whether bankruptcy displaces a receiver in deeper detail). The statutory provision suggested would resolve any ambiguity as to that issue as well.
234 Payne, supra note 102, at 691.
235 Id.