The Jerome Hall Lecture

The Bankruptcy Off-Ramp from Complex Civil Litigation: *Purdue Pharma*, Opioids, and Unorthodox Civil Procedure in Public Harms Cases

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"So, yes, bankruptcy law may serve to address some collective-action problems, but no one (save perhaps the dissent) thinks it provides a bankruptcy court with a roving commission to resolve all such problems that happen its way, blind to the role other mechanisms (legislation, class actions, multi-district litigation, consensual settlements, among others) play in addressing them."

\- *Harrington v. Purdue Pharma L.P.* (decided June 2024)[1]

For civil procedure scholars, bankruptcy has become exciting. Last year, the United States Supreme Court decided for the first time a case that implicated both the core of the national opioids litigation and one of the most important developments in modern civil procedure—namely, the enormous amount of unorthodox procedural innovation that is happening in the courts as parties strive to reach global settlement.[2]

The decision, *Harrington v. Purdue L.P.*, took almost seven months despite the grant of expedited review—an indication that the result was likely not easily reached. In June 2024, the Court, voting five to four, reversed the Second Circuit and rejected the approximately $10 billion Purdue Pharma bankruptcy settlement on the ground that it depended on a $6 billion contribution from the company's former family owners—the Sacklers—in exchange for releasing the Sacklers from all civil liability

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1. 603 U.S. 204, 220 (2024).
2. *Id.*

or future litigation over the crisis.[3] In other words, the Sacklers tried to use bankruptcy as an off-ramp to any civil litigation, present or future, in the process enhancing the deal for Purdue and the plaintiffs with funding.

Procedural innovation is not new. For the last forty years, enterprising lawyers have tried to stretch class actions and repurpose other procedural vehicles never intended to be class action substitutes—like the multi-district litigation statute also utilized in the opioids litigation[4]—to bring mass public harms cases to a close. Centralized single settlement in one court, in big complex civil litigations involving public harms, has long been the ultimate of litigation goals.

Bankruptcy is just the latest arrow in this quiver. What's unusual, however, is that bankruptcy is now being deployed by enterprising lawyers for companies that are not even in financial distress. Lawyers are turning to bankruptcy to take advantage of the bankruptcy court's special powers to centralize and finally resolve litigation disputes.

The *Purdue Pharma* case is not an outlier. Defendants ranging from Boy Scouts of America, Rite Aid, Catholic dioceses, 3M, Johnson & Johnson, and even USA Gymnastics have recently gone into bankruptcy court, citing what their filings call the "failure[s]" of our "behemoth" and "abus[ive]" mass tort system to justify leaving that system to seek resolution via bankruptcy court.[5] In other words, our ordinary complex civil procedure system—not financial distress—is the bankruptcy-process justifying event. That's unusual.

Some scholars celebrate this move and argue that bankruptcy's efficiencies outweigh any lost litigation process. They further claim that a bankruptcy court can always engage in a more trial-like process if it wants. But most bankruptcy scholars continue to affirm that bankruptcy culture simply does not work that way. Parties come to bankruptcy for efficient settlement and finalization, not precise claim valuation, discovery, or doctrinal development. The bankruptcy judge who tries to go in a different direction will face tensions between the values of the litigation process and his court's mission to protect the assets of the debtor and resolve the matter as quickly and cheaply as possible. Some courts may go further toward litigation, but most do not. That's not the mission, as typically understood, of the bankruptcy court.

The Supreme Court took the *Purdue Pharma* case to review one controversial bankruptcy maneuver: the fact that the Purdue bankruptcy settlement required plaintiffs not only to give up any future claims against Purdue but also required them to release future claims against the Sackler family, which owned Purdue. The Sacklers are not bankrupt. The company, not the Sacklers, filed for bankruptcy. But as part of the deal, the settlement forces the plaintiffs to release all their claims against the family. In other words, the family gets off the litigation hook completely, and the plaintiffs are deprived of their day in court against individuals they had wanted to hold accountable. As such, the case raised a highly significant civil

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3. *Id.* at 226–27.

4. 28 U.S.C. § 1407.

5. *See, e.g.*, Informational Brief of Aearo Technologies LLC at 1–2, *In re* Aearo Techs. LLC, No. 22-02890-JJG-11, 2023 WL 3938436 (Bankr. S.D. Ind. June 9, 2023), ECF No. 12; Informational Brief of Bestwall LLC at 5, *In re* Bestwall LLC, 606 B.R. 243 (Bankr. W.D.N.C. 2019) (No. 17-31795), ECF No. 12.

procedure and constitutional question, arising under both the Bankruptcy Code and the Due Process Clause, of whether bankruptcy court can force plaintiffs to give up their claims against a third party who is not the debtor. That was the question the Supreme Court took the case to review and the argument the Court ultimately rejected.

But the case is even more important than that. This was the Court's first look at these unorthodox, creative uses of bankruptcy and how they are displacing the traditional trial system—a system where we usually (at least ideally) have discovery, testimony, and law development. A system where we find accountability and have substantive appellate review.

Unlike ordinary state and federal trial courts, bankruptcy courts do not lay blame for millions of deaths. They efficiently distribute resources. Petitioners are not called victims, and they are not called plaintiffs. They are called creditors. They have limited voting rights over the distribution of the estate because there are usually other creditors too; it's not their own lawsuit. Bankruptcy courts do not typically create tort doctrine or engage in broad discovery that is designed to reveal poor industry practices. They do not decide accountability. They rarely utilize juries. They rarely hear testimony from tort victims about their injuries. Instead, they tend to focus on the debtor's financial position. Their ultimate goal is the expeditious distribution of limited resources.

The big question, therefore, is whether, in these mass tort cases involving big public harms, the goal of litigation is to deliver more than money. That question of the role of litigation is especially salient when mass torts come into courts after Congress and state legislatures have failed to solve the massive policy problems at stake, as in the case of the opioid crisis. Often, what plaintiffs seek is more than money.

I have been writing for almost a decade now about this phenomenon of what I call "unorthodox civil procedure."[6] It is the adapting of old procedural vehicles in the name of efficiencies: using new procedures to reach old goals. I view these developments as closely related to my work in a different field, legislation, where I have written about "unorthodox lawmaking": how Congress itself has adapted with procedures to get around obstacles to lawmaking.[7] It is interesting how structural complexities frustrate longstanding goals and lead to procedural innovation, regardless of the context, whether we are in the courts or in the legislature. It is also worth questioning whether those longstanding goals—whether they be centralized settlement or more lawmaking—are worth pursuing so aggressively. And it is also important to remember that the unorthodox often becomes the orthodox. The committee system in Congress was once viewed as highly unorthodox and today is perceived as a traditional part of the process we must try to protect. Multi-district litigation was once the paradigmatic unorthodox civil procedural vehicle, until bankruptcy made it look orthodox by comparison.

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6. Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669 (2017); Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. REV. 1 (2021).

7. Abbe R. Gluck, Anne Joseph O'Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789 (2015).

I am fortunate to have as a colleague one of the great giants of civil procedure, Owen Fiss. Fiss's famous essay, "Against Settlement," argued forty years ago that we should not rush to settle cases because litigation serves public values as well as private ones.[8] As he argued, many cases are not just about contracts; they are about public norms, policy, and constitutional law.[9]

The project at the core of this lecture is based on that article and stems from a collaboration with Professors Elizabeth Burch and Adam Zimmerman.[10] The questions we are asking are these: Why are so many mass tort cases going to bankruptcy? What is it about the regular trial process that drives parties out? And what is to be gained, and lost, from these increasingly unorthodox civil procedures?

I. PRELIMINARY MATTER: LEGAL STRUCTURES THAT CONTRIBUTED TO THE OPIOID CRISIS AND HOW THOSE STRUCTURES AFFECT THE PROMISE OF LITIGATION

Let us begin with what may be an obvious point, but something that I always make explicit when discussing the opioids litigation: Litigation cannot solve a public health crisis. We can talk about litigation's role in a public health crisis, but litigation cannot solve such a crisis.

The most important judge in the opioids litigation, Judge Dan Polster, the multi-district litigation judge presiding over 2,800 cases in federal court in Ohio, opened his first major hearing in 2018 by making it clear that litigation is, at most, a second-best policy solution when policymakers fail. He argued:

> The federal court is probably the least likely branch of government to try and tackle this, but candidly, the other branches of government, federal and state, have punted. So it's here.[11]

The other thing I always stress when we talk about the opioid crisis is that, even as law is being looked to as a solution, law is also the problem. Law is one of the reasons we had the opioid crisis in the first place.

The legal structures of our healthcare system created a perfect storm of overprescribing and undertreatment of substance use disorder that helped produce this crisis. One cannot consider how law and litigation might ameliorate a crisis without thinking about the limits of law. That question also relates to what we are actually trying to accomplish with litigation and what we can accomplish—and that in turn relates to what kind of litigation vehicles we use—whether that is traditional trials, bankruptcy, or something else. Are we primarily seeking money? Are we trying to achieve policy reforms? Accountability?

I could spend the entire lecture detailing the many structures that the legal system created that helped cause the opioid crisis. But then we will never get to bankruptcy.

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8. Owen M. Fiss, Commentary, *Against Settlement*, 93 YALE L.J. 1073 (1984).

9. *Id.* at 1085.

10. For our more detailed exposition, see Abbe R. Gluck, Elizabeth Chamblee Burch & Adam S. Zimmerman, *Against Bankruptcy: Public Litigation Values Versus the Endless Quest for Global Peace in Mass Litigation*, 133 YALE L.J.F. 525 (2024).

11. Transcript of Proceedings at 4, *In re* Nat'l Prescription Opiate Litig., No. 1:17-md-02804 (N.D. Ohio Jan. 9, 2018), ECF No. 71.

So a brief sketch of the legal structures that contributed to the opioid crisis will have to do.[12]

First, consider how the structure of our reimbursement system for Medicare and Medicaid contributed. Most of us have been asked to "rate your pain on a scale of one to ten." That question, and its prevalence, stemmed from the efforts of very well-intentioned people who determined in the 1990s that pain was being undertreated and being treated inequitably. The question was incorporated into an important patient questionnaire that helps determine how much money hospitals get for reimbursement under Medicare and Medicaid. Because doctors knew patients were now being asked that question, and that reimbursement was linked to it, they started paying more attention to, and sometimes overtreating, pain. That was problem number one, and it was a legal problem because it was linked to how we pay for healthcare in this country.

Problem number two: Our insurance system is set up to route too many people into primary care and too few people into substance use disorder, mental health, or orthopedic specialties. And it does not pay for the full range of non-pharmaceutical treatments that could substitute for opioids. The average primary care visit is fifteen minutes long.[13] Primary care doctors, until very recently, had little to no training in specialty areas like pain or substance use.[14] As a result, they needed, and most still do need, options that are easily covered by insurance, do not require follow up (as it is difficult for some patients to have a treatment that requires multiple appointments, and adherence to treatment also declines), and do not require a lot of training. A pill––opioids—provided a ready answer. Opioids. Not cognitive behavior therapy. Not physical therapy. Not mental health services.

Third, once individuals developed substance use problems, the standard of care, medication-assisted therapy, was extremely difficult to access because of legal rules that made it more difficult to access that treatment than virtually any other medication. These drugs utilize the same underlying drug as opioids to help patients discontinue use, similar in concept to the nicotine patch, and these legal rules about accessing them stemmed from concerns about abuse. One such legal obstacle is laws that required patients to go to a special location to get one of these gold-standard medications, methadone. One could not simply obtain it from the pharmacy or their primary care doctor. As to the other standard-of-care drug, buprenorphine, the irony is that buprenorphine is harder for doctors to prescribe than opioids. Laws on the books have created high barriers to prescribing buprenorphine by requiring more excessive training than virtually any other drug and, unlike any other drug, limiting the number of patients such doctors can treat at any one time. These barriers, in turn, made many doctors reluctant to treat.[15] COVID-19 produced some flexibilities in the

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12. The substance of this section is further detailed in Joseph R. Schottenfeld, Seth A. Waldman, Abbe R. Gluck & Daniel G. Tobin, *Pain and Addiction in Specialty and Primary Care: The Bookends of a Crisis*, 46 J.L. MED. & ETHICS 220 (2018).

13. David C. Dugdale, Rondald Epstein & Steven Z. Pantilat, *Time and the Patient-Physician Relationship*, 14 J. GEN. INTERNAL MED. S34, S36 (1999) (reporting average visit length findings).

14. Schottenfeld et al., *supra* note 12, at 229.

15. In 2024, major revisions to 42 C.F.R. Part 8—the source of federal regulations governing opioid use disorder medications—went into effect. *See* Medications for the

dispensation of methadone that have been permitted to continue, and post-COVID-19 legislation made prescribing buprenorphine somewhat less onerous for physicians. But barriers remain.

Fourth and finally, even if one could access medication-assisted therapy, one needs insurance for it. And at the height of the opioid crisis, more than half the states, including Indiana, still had not expanded Medicaid under the Affordable Care Act to include many low-income populations (Indiana has since expanded).[16] And that meant that even if patients were lucky enough to have a doctor who prescribed this therapy, they often could not afford it.

There is a lot more to say about the system, but my point is that, despite my position here that some forms of litigation are more productive in public harms cases than others, these structural and legal features of our health care system really put a limit on what any litigation can accomplish. Litigation cannot force states to expand Medicaid. It cannot force Congress to fund more substance use or pain medicine specialties. It cannot make the insurance system more generous. So litigation cannot solve this public health crisis.

But litigation can do some things that extend far beyond money. It can expose information about an industry's practices. The opioids litigation did that, showing steps the industry took to lead people to become dependent on the drug. Litigation has offered the same benefit in the gun context[17] and in the tobacco context.[18] Litigation can also make a policy issue, or the extent of a crisis, more salient for

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Treatment of Opioid Use Disorder, 89 Fed. Reg. 7528 (Feb. 2, 2024) (codified at 42 C.F.R. pt. 8). Changes included making some emergency COVID-19 measures permanent, such as allowing patients who meet certain criteria to obtain take-home doses of methadone from the first week of treatment and permitting some telehealth screening for initiation of buprenorphine and methadone. *The 42 CFR Part 8 Final Rule Table of Changes*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., https://www.samhsa.gov/medications-substance-use-disorders/statutes-regulations-guidelines/42-cfr-part-8/final-rule-table-changes [https://perma.cc/UZ7E-79E6] (Jan. 31, 2024). In addition, the 2023 Mainstreaming Addiction Treatment Act (MAT Act) removed the requirement for practitioners to apply for a waiver by submitting a Notice of Intent to the Federal Substance Abuse and Mental Health Services Administration (SAMHSA) before prescribing buprenorphine. *Waiver Elimination (MAT Act)*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., https://www.samhsa.gov/medications-substance-use-disorders/waiver-elimination-mat-act [https://perma.cc/R3WT-3UEM] (Nov. 6, 2024). The MAT Act also removed limits on the number of patients a provider may treat with buprenorphine at one time and ended certain reporting requirements. *Id.* But the MAT Act does not apply to methadone, and, under a related Act, providers must still undergo eight hours of training. *Training Requirements (MATE Act) Resources*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., https://www.samhsa.gov/medications-substance-use-disorders/training-requirements-mate-act-resources [https://perma.cc/M9UX-RCV2] (Nov. 6, 2024).

16. *Status of State Medicaid Expansion Decisions*, KFF (Feb. 12, 2025), https://www.kff.org/status-of-state-medicaid-expansion-decisions/ [https://perma.cc/R6QM-2BE2].

17. Soto v. Bushmaster Firearms Int'l, LLC, 202 A.3d 262, 275–79 (Conn. 2019).

18. Lilianna Phan & Kelvin Choi, *U.S. Young Adults' Awareness of the Master Settlement Agreement and Cigarette Industry Practices and Their Associations with Electronic Cigarette Industry and Health Risk Perceptions*, BMC PUB. HEALTH, Mar. 2023, at 1.

government officials, which this litigation also did. The federal government was fairly slow to wake up to the opioid problem. It took litigation in state and federal courts to get the federal government more engaged. Litigation can order private industry change, too, as we have seen some injunctive settlements doing that. Litigation can give victims a chance to tell their side of the story, educate others, and change norms about substance use disorder. And that has definitely happened. Litigation can lead to law development, for example, on the question of whether industry actors are subject to the tort of public nuisance for the opioid crisis—that has been an open question still in many states, and this litigation has moved the ball forward on that open question.[19] And litigation assigns blame—litigation says someone is at fault. Sometimes that act of blame-assigning leads to policy change, and, even if it does not, that accountability is often important to victims or their loved ones and is a motivation for suing. The issue is that the more unorthodox the litigation system becomes, the more we move away from the traditional litigation model and all the benefits we hope and expect from it.

II. PRECLUSION AS THE CRITICAL CONCEPT IN THE TURN TO BANKRUPTCY

What kind of problem did the defendants in the opioid context think that bankruptcy was going to help solve? There are actually two "problems." I put the word problem in quotation marks because those problems are actually core features of our civil procedure system that some defendants are now seeking to get around.

The first one is federalism. Our system is intentionally set up to decentralize litigation. It is set up to have cases in fifty-one state courts running simultaneously with cases in federal courts. That means no one court has complete jurisdiction—no one court has the authority to wrap all those cases into one lawsuit.

The second "problem" is preclusion. For first-year law students (and really for everyone), the opioids cases make clear that preclusion is exciting in real life. We do not have a procedural vehicle apart from the class action that provides sufficient due process protections that makes it acceptable for defendants to settle claims by parties today, absent parties, and future parties—that's the power of preclusion. That is what the defendants want. They want that certainty so that they can settle. Instead, our system is set up to favor the individual right to a day in court. We do not easily give people's rights away for the future.

So why bankruptcy? Bankruptcy courts, as many different defendants have realized, have access to special equitable powers that no other courts have. Bankruptcy courts are not Article III federal courts. And they are not state courts of

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19. *See* City & Cnty. of San Francisco v. Purdue Pharma L.P., 620 F. Supp. 3d 936 (N.D. Cal. 2022); *In re* Nat'l Prescription Opiate Litig., 622 F. Supp. 3d 584, 593–96 (N.D. Ohio 2022); Alyssa Aquino, *6th Circ. Asks Ohio Justices to Settle $650M Opioid Question*, LAW360 (Sept. 12, 2023, 2:31 PM), https://www.law360.com/articles/1720408/6th-circ-asks-ohio-justices-to-settle-650m-opioid-question [https://perma.cc/YJ6K-KG7D]; Dan McKay, *4th Circ. Sends Opioid 'Nuisance' Question to W.Va. Top Court*, LAW360 (Mar. 18, 2024, 8:16 PM), https://www.law360.com/healthcare-authority/articles/1814685/4th-circ-sends-opioid-nuisance-question-to-w-va-top-court [https://perma.cc/6JYS-9ZJP]. The Ohio Supreme Court recently opined (in the negative) on the public nuisance cause of action. *In re* Nat'l Prescription Opiate Litig., No. 2023-1155, 2024 WL 5049302 (Ohio Dec. 10, 2024).

general jurisdiction. They are creations of Congress. Yet defendants have seized on them because, paradoxically, they are arguably more powerful than other courts in ways that are highly relevant to public harms defendants' interests.

Here is why.[20] First, bankruptcy courts have statutory power to halt all claims, regardless of where they are, and bring them into one court. That means they can stop a state lawsuit, and they can stop a federal lawsuit. When the defendant files for bankruptcy, that court becomes the center of gravity and can draw any claims of liability—whether it's litigation risk or general bills—into that court. That is how bankruptcy court gets around the issue of personal jurisdiction and the federalism "problem." All of those cases can come before the one bankruptcy court because the bankruptcy process entitles defendants to resolve the assets in a single place. But it is worth noting that, while there is that halting and centralizing provision in the Bankruptcy Code,[21] there's nothing in the Bankruptcy Code that expressly allows the halting of litigation against nondebtors like the Sackler family; that's part of what was at issue in the case before the Supreme Court.

Defendants say that bankruptcy courts have equitable power to bind past, present, and future litigants—meaning they can resolve claims for now and forevermore. And some have argued that they also can bind nondebtors. Over time, many bankruptcy courts have expanded their scope and have indeed held that they can create schemes that allow them to resolve issues for third-party nondebtors as well. That is the power that the Court largely rejected in the *Purdue Pharma* case.

Most civil procedure students have heard of "managerial judging" and Federal Rule of Civil Procedure 16, the managerial judging rule.[22] Students and litigators alike know how far courts already go to manage cases efficiently and how creative judges sometimes get when they are doing that managerial work. That is what is happening with the move to bankruptcy, arguably to an extreme.

To the extent we grant that bankruptcy court has some extraordinary powers—and it does—that court is supposed to be used in the very limited situation where a company is in financial trouble, not where companies that are not in financial distress are going to the court because they say the tort system cannot get them what they want.

Bankruptcy court was not designed to be some kind of judicial superpower. As Justice Gorsuch's majority opinion in *Purdue Pharma* ultimately noted: "[N]o one . . . thinks . . . a bankruptcy court [has] a roving commission to resolve all such problems that happen its way, blind to the role other mechanisms (legislation, class actions, multi-district litigation, consensual settlements, among others) play in addressing them."[23]

III. UNORTHODOX CIVIL PROCEDURE AND MDL

Like it or not, the constitutional structure of our federalist system is not supposed to be this centralizing; it is supposed to be decentralizing. I will come back in a few

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20. The substance of this section is further detailed in Gluck et al., *supra* note 10.

21. *See* 11 U.S.C. § 362 (describing automatic stay).

22. FED. R. CIV. P. 16; *see generally* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 386–91 (1982).

23. Harrington v. Purdue Pharma L.P., 603 U.S. 204, 220 (2024).

minutes to the bankruptcy court development and its centralizing aspect, but I want to say a few words about the broader phenomenon of unorthodox civil procedure and, in particular, about multi-district litigation—why it has occupied so much academic attention, including my own.

The broader phenomenon we are seeing is one of a dynamic, complex, and constantly evolving system. Complex litigation is like a little stream of water in a raft that has a tiny hole, and it keeps searching for that little hole so it can get out. And if it cannot find that hole, it goes and searches for another hole.[24]

A brief history helps make this point clear. We all know that class actions were supposed to be the paradigm for aggregate litigation, but the Supreme Court has dramatically reduced, I would say even destroyed the utility of, many class-action and mass-tort claims. The Court has wreaked this damage through a series of decisions in which it held that classes cannot be certified when personal injuries differ greatly across the group or too many different states' laws are involved, both of which usually happen with mass health claims.

Not everyone is injured in the same way. And where there are lots of different state laws, which of course happens when plaintiffs are suing under the tort law of different states, the Court has argued that those pluralities make the class too incohesive. My own former and wonderful boss, Justice Ruth Bader Ginsburg, was in part responsible for this debacle. In *Amchem Products, Inc. v. Windsor*,[25] an opinion that, like the *Purdue Pharma* opinion, looked closely at the text of the law (in her case, the Federal Rules of Civil Procedure; in *Purdue Pharma*'s, the Bankruptcy Code) to find no indication of the broader powers the courts were claiming. Justice Ginsburg's opinion basically shut the doors to the courthouse for huge aggregate public harms cases.[26] She naively thought, as she wrote in that opinion, that if the Court simply told parties that they need to subclass—e.g., that they need to file twenty smaller class actions instead of one large one—that parties would do that. She could not have been more wrong. After the opinion, Professor Sam Issacharoff and Elizabeth Cabraser, two well-known plaintiffs' attorneys, wrote that the Court was naive if it thought that parties will resort to the inefficiencies of subclassing. Instead, Issacharoff and Cabraser argued, smart lawyers will always find a way to innovate different means of aggregating.[27]

They were right. Smart lawyers found multi-district litigation. And that brought massive procedural unorthodoxies of its own. And when multi-district litigation could not resolve the *Purdue Pharma* litigation, smart lawyers found bankruptcy. And now that the Court has sent a signal in the *Purdue Pharma* case that it may not be open to these creative procedural maneuvers, smart lawyers are likely to try something new. What that is remains to be seen.

Less than ten years ago, many lawyers had not heard the term "MDL." And the subject was not typically covered in most law school courses or even in civil

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24. *See* Alexandra D. Lahav, *The Continuum of Aggregation*, 53 GA. L. REV. 1393, 1394 (2019) ("Mass litigation is like water, the cases will move to the form of litigation that is the most available . . . .").

25. 521 U.S. 591 (1997).

26. *Id.*

27. *See* Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. REV. 846, 875 (2017).

procedure casebooks. Today, the words "multi-district litigation" are more familiar to many lawyers and civil procedure experts—largely thanks to the salience of the opioids litigation.

Yet many lawyers themselves were, and often still are, flabbergasted to learn that multi-district litigation now occupies some forty percent of the federal civil docket.[28] MDL today has morphed into an ad hoc procedural device that operates largely outside the federal rules under the guise of being authorized by the Rule 16 managerial judging rule. And it is all about the drive to settlement.

A little background for those who are not up to speed. Following *Amchem*, creative lawyers zeroed in on 28 U.S.C. § 1407, a statute that was enacted in 1968 for the purpose of organizing what was then a large volume of utility litigation in different courts around the country. The purpose of the statute was to consolidate those cases only for pretrial proceedings, like shared discovery, and then send the cases home for disposition.

Today, MDL is often utilized for something very different. When many similar cases are filed in federal courts across the country, MDL now operates like a venue transfer on steroids. MDL enables the federal courts to pull all similar horizontally filed cases into one single federal court regardless of whether that federal court has jurisdiction over the cases, regardless of whether plaintiffs want their cases transferred (they cannot opt out, unlike in class actions), and regardless of whether plaintiffs have counsel adequately representing their interests in the consolidated action. And they can do this because of the fiction that MDL is still only supposed to be about *pretrial* resolution. We have allowed this undermining of the usual due process protections we require for class actions—jurisdiction, opt-out in many cases, representation—in the name of efficient pretrial work. But the reality is only one percent of cases go back to their home jurisdictions.[29] All of the others settle in MDL court. So, de facto, everybody knows the MDL court is actually exercising real dispositive power.

In general, MDL courts are enormously procedurally creative. MDL judges have been known, for example, to devise new procedural processes to gather facts and winnow claims. Some judges describe MDL as "cowboy-on-the-frontier" procedure.[30] In the opioids MDL, the Court tried to innovate a new settlement procedure. The Sixth Circuit, which reviewed more than a dozen MDL moves in the opioid litigation, opined that "MDLs are not some kind of judicial border country, where the rules are few and the law rarely makes an appearance."[31]

I have previously written a great deal about the unorthodoxies of MDL, so I will just offer a few high-level points here. First, I am not a full MDL skeptic. I, along with many others, now believe that MDL has created access to court where the Supreme Court's stingy class action jurisprudence shut the door. There is a value in

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28. Margaret S. Williams, *The Effect of Multidistrict Litigation on the Federal Judiciary over the Past 50 Years*, 53 GA. L. REV. 1245, 1271 n.87, 1272 (2019).

29. Elizabeth Chamblee Burch & Margaret S. Williams, *Perceptions of Justice in Multidistrict Litigation: Voices from the Crowd*, 107 CORNELL L. REV. 1835, 1851 (2022) (citing *Statistical Analysis of Multidistrict Litigation Under 28 U.S.C. § 1407: Fiscal Year 2020*, U.S. JUD. PANEL ON MULTIDISTRICT LITIG., at 12 (2020)).

30. Gluck, *supra* note 6, at 1675.

31. *Id.*; *In re* Nat'l Prescription Opiate Litig., 956 F.3d 838, 844 (6th Cir. 2020).

this procedural mechanism that has brought parties like the opioids litigants into court. They would not have otherwise been able to exert the leverage they have exerted over defendants without aggregation, and so they benefited from these unorthodox procedural maneuvers. In my work with Elizabeth Burch, we are focusing now on guardrails for MDL rather than eliminating it—guardrails like more appellate review, adequate representation, more motion practice, and more law development. But that's mostly a story for another day.[32] I say "mostly" because the concerns we have about bankruptcy raise similar concerns to those we have raised about MDL. For example, we have concerns about the lack of law development and inadequate representation as we deviate further from the traditional trial and pretrial process. In the end, Burch and I conclude that there is a way to preserve public litigation values through MDL. The question is whether the same can be said for bankruptcy.

IV. OPIOIDS: MDL V. BANKRUPTCY

In the context of opioids, a couple of distinguishing features of MDL emerged that are worth highlighting. The first is federalism.[33] The opioids MDL was the first major MDL that saw 2,500 municipalities file in federal court on their own. They did not wait for the State Attorneys General (AGs) to file cases. Why? A primary reason was lessons learned from multistate tobacco litigation, where some cities felt they were left behind in settlements. So cities—represented by private lawyers, rather than their own AGs—filed opioids claims of their own in federal court. They were then all pulled into one federal jurisdiction under the MDL statute. That took the cases out of their localities, but it gave them a lot of leverage via centralization. Thousands of cities were litigating together at the same time that the State AGs were filing separately where they normally file—in their own, separate, fifty-one state courts.

How did the MDL deal with these parallel state lawsuits? People are often surprised to learn that the MDL used its numbers as leverage to pressure *state* cases to come into *federal* court. That is, the MDL judge convinced the State AGs to come to the federal bargaining table, despite the fact that the MDL court did not have jurisdiction over those cases. This was not a development novel to opioids. MDL courts often try to exert a lot of authority over parallel state cases. Sometimes MDLs share discovery work with parallel state cases; sometimes MDLs even require *state* lawyers to contribute to the *federal* lawyers' attorney's fees in these cases to compensate for the extent of the work being done on the federal side. MDL judges often aim to execute a global settlement even though the federal court does not have jurisdiction over all of the state cases too. Opioids was no different. The federal district judge overseeing the MDL, Judge Polster, brought everybody into his courtroom with the express goal of settlement.

Another striking feature of MDL is that plaintiffs cannot opt out. This is a major difference from a damages class action. Plaintiffs are forced to litigate. I mention this

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32. Gluck & Burch, *supra* note 6.

33. Abbe R. Gluck, *MDL Nationalism, Federalism, and the Opioid Epidemic*, 70 DEPAUL L. REV. 321 (2020).

because I want to be clear that whatever concerns one might have about bankruptcy, MDL also raises constitutional and practical concerns of its own. And this issue of jurisdiction over far-flung plaintiffs is an important one with MDL.

These inquiries are also important on a bigger-picture level because they tee up a really interesting theoretical question about the importance of plaintiffs' rights in civil procedure. Most law students learn civil procedure as a set of doctrines mostly about defendants' rights. The doctrines are all about what claims plaintiffs can bring against defendants, where plaintiffs can sue defendants, etc. But in fact, modern procedural vehicles like MDL start to raise questions about *plaintiffs'* rights. For example, does due process doctrine prevent plaintiffs from being dragged across the country? This question of procedural due process for plaintiffs is another topic that Burch and I have started to explore.[34]

Think about bankruptcy. Many diverse plaintiffs may have filed cases all over the country—then the defendant files for bankruptcy. And suddenly no matter where plaintiffs are or where they filed, they can no longer litigate at home. Their cases are pulled across the country, stuck in a bankruptcy court, deprived of a trial, and entangled in asset allocation, as opposed to whatever reason they might have filed the case in the first place.

Returning to MDL, many MDLs are, as mentioned, enormously creative when it comes to trying to devise procedures to engender settlement. The opioids MDL judge, with the help of plaintiffs' attorneys—including Cabraser and Issacharoff—invented, literally invented, a new form of procedure called the negotiation class action, which was an attempt to bind the parties to global settlement negotiations. It went up to the Sixth Circuit on a mandamus and was invalidated.[35]

Judge Polster, the opioids MDL judge, has been the subject of mandamus actions —urgent appellate review of the judge's actions—a dozen times in the last three years.[36] That's an enormous number of times, and it stems in part from the fact that we have very little interlocutory review of procedural decisions in the trial context, so litigants have no choice but to use the extraordinary mandamus remedy. That lack of appellate review is another concerning feature of unorthodox procedures like MDL. But the dozen mandamus actions is still a remarkable statistic. And for the record, I think Judge Polster has done a good job and worked very hard.

But it is also worth noting that Judge Polster is a judge who understood his mission from the beginning to be anything but traditional litigation. He openly resisted the idea that he was going to do anything like typical pretrial process. On the very first day of hearings in 2018, he stated:

> People aren't interested in depositions, and discovery, and trials. People aren't interested in figuring out the answer to interesting legal questions like preemption and learned intermediary, or unraveling complicated

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34. Elizabeth Chamblee Burch & Abbe R. Gluck, *Plaintiffs' Process: Civil Procedure, MDL, and a Day in Court*, 42 REV. LITIG. 225 (2023).

35. *In re* Nat'l Prescription Opiate Litig., 976 F.3d 664, 667 (6th Cir. 2020) (reversing district court's certification of negotiation class).

36. Gluck & Burch, *supra* note 6, at 60.

> conspiracy theories. So my objective is to do something meaningful to abate the crisis and to do it [this year].[37]

Perhaps we should not be surprised by this. After all, if mass tort cases are making their way into court because legislative solutions have failed, is it surprising that judges are trying to contribute to a solution? Sometimes it looks more like policy than traditional litigation. In some ways that is indeed what they are being asked to do. But even so, with all that power, with all of his ambition, and with all of his very good intentions, Judge Polster was not able to control the opioid litigation cases via MDL.

The cases did not stay centralized; the AGs went off on their own. And soon it looked like there would be no global peace, no single resolution, which has increasingly become the goal in these cases. So that little stream of water kept looking for a new hole. And then it discovered bankruptcy.

Let me now state the obvious again, namely that the sprawling nationwide duplicative litigation, which is the intentional, constitutional design of our federal and state courts, is today viewed as the problem to solve. But that is a problem of our own constitutional creation and our own design. And again, this idea that a new form of preclusion is needed to stop past, present, and future litigation is also a problem of our own construction, our own design. The "culprit" is our own Constitution. The constitutional doctrines around due process, which include preclusion doctrines, guarantee everyone a day in court absent extraordinary circumstances.

The challenge, however, is that the goalposts have moved. The economy today looks very different from the economy of 1789, and a nationwide economy presents challenges for a federalist system. Those challenges appear in many areas. Complex civil litigation with nationwide public harms is just a salient one.

So how are we going to deal with our constitutional design of civil litigation when the circumstances and goals have changed? Lawyers are going to look for ways to force a single mass final settlement. And just as MDL emerged as one new form of unorthodox civil procedure, bankruptcy is now doing the same.

V. AGAINST BANKRUPTCY—AND THE COMPLEX NOTION OF A "DAY IN COURT"

As noted, bankruptcy courts offer a profound exception to the federalist structure of our system because they uniquely can corral and control state and federal claims in the same court. Bankruptcy court is the only court in the entire country that has that power. And it is an Article I court created by Congress, not an Article III court whose powers are set forth in the Constitution. So there is something extraordinary about bankruptcy court's power, and that suggests it is important to cabin that power to appropriate circumstances.

It should be clear by now that much more is at stake than the specific issue with respect to Purdue and the Sacklers. The Court needs to recognize, and there are hints in *Purdue Pharma* that it now does, the broader implications of decisions upholding unorthodox uses of bankruptcy. Had *Purdue Pharma* come out the other way, judges

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37. Transcript of Proceedings at 4, *In re* Nat'l Prescription Opiate Litig., No. 1:17-md-02804 (N.D. Ohio Jan. 9, 2018), ECF No. 71.

and defendants would have been further emboldened to use bankruptcy unorthodoxly. Instead, the Court's holding recognizes to some extent what the system is losing—for claims to be "fully and fairly litigated in a public and open trial, that they be judged by an impartial jury, and that they be held accountable to those they have harmed"—by funneling all these cases into bankruptcy instead of the traditional trial process.[38]

Of course, there are counterarguments. One obvious one is that there are not many juries in ordinary mass tort cases anyway. And mass torts likewise often generate less than ideal amounts of law development because parties usually settle. As a result, plaintiffs do not always get their day in court there either.

In the opioids litigation, the litigation process did produce some of the benefits that the Court in *Purdue Pharma* seemed concerned about losing via bankruptcy. While the MDL was not "fully" litigated, a lot of very important information about the industry did come out in both the federal bellwether trials ordered by the MDL and in parallel state court trials. The district court in *Purdue Pharma* also expressly credited "[t]he extensive discovery in the Opioid MDL**,** and the discovery coordination it facilitated [that] revealed for the first time the involvement of certain members of the Sackler family in acts that Purdue had agreed not to commit as part of the 2007 Plea Agreement. . . . Unable to deny what was apparent from the Opioid MDL discovery, the corporation admitted that Purdue had engaged in aggressive efforts to boost opioid sales . . . ."[39]

And while there was not fifty states worth of law development on public nuisance coming out of the MDL/state trials process, there were more than a dozen court rulings that fleshed out the doctrine in ways it had not been developed before.[40] Those doctrines are already being deployed for other torts, whether it's Juul, guns, or something else.[41] And we did not get that law development in the tobacco cases because nearly all of them settled. So some progress is better than none.

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38. Harrington v. Purdue Pharma L.P., 603 U.S. 204, 212 (2024) (citing *In re* Purdue Pharma L.P., No. 7:21-cv-07532 (S.D.N.Y., Oct. 25, 2021), ECF Doc. 94, p. 21).

39. *In re* Purdue Pharma, L.P., 635 B.R. 26, 50 (S.D.N.Y. 2021).

40. *See, e.g.*, State *ex rel.* Hunter v. Johnson & Johnson, 499 P.3d 719 (Okla. 2021) (overturning verdict against Johnson & Johnson and rejecting public nuisance theory); People v. Purdue Pharma L.P., No. 30-2014-00725287-CU-BT-CXC, 2021 Cal. Super. LEXIS 31743 (Super. Ct. Orange Cnty. Dec. 14, 2021) (holding that plaintiff counties failed to prove that Allergan, Teva, Endo, and Johnson & Johnson created a public nuisance); *In re* Opioid Litigation, No. 400000/2 017 (N.Y. Sup. Ct. Jan. 28, 2020) (approving public nuisance theory of liability against Teva); *In re* Nat'l Prescription Opiate Litig., No. 2023-1155, 2024 WL 5049302 (Ohio Dec. 10, 2024) (holding that CVS, Walgreens, and Walmart cannot be held liable under Ohio's public nuisance statute, which abrogates common-law nuisance claims).

41. *See, e.g.*, Press Release, Letitia James, New York State Attorney General, Attorney General James Secures $462 Million from JUUL for its Role in the Youth Vaping Epidemic (Apr. 12, 2023), https://ag.ny.gov/press-release/2023/attorney-general-james-secures-462-million-juul-its-role-youth-vaping-epidemic [https://perma.cc/D9H3-CA9S] ("The lawsuit alleged that JUUL's conduct violated New York's . . . Common Law Public Nuisance . . . ."); Alex Ebert, *New Jersey Brands Gun Industry a 'Public Nuisance' in Lawsuits*, BLOOMBERG L. (Dec. 12, 2023, 3:03 PM), https://news.bloomberglaw.com/litigation/new-jersey-brands-gun-industry-a-public-nuisance-in-lawsuits [https://perma.cc/BT3N-EDQP].

What constitutes a "day in court" and "being heard" is a very complex question, especially when one is talking about aggregate litigation. More work needs to be done to distill the critical components, but my own initial sense is some pretrial process—some discovery, some ability for plaintiffs to tell their story—seems very important.

In this context, I always find a particular story about the 9/11 litigation very impactful.

The 9/11 Litigation Victim's Compensation Fund cases were assisted by a mediator who worked with the three percent of families that chose to litigate instead of submitting claims directly to the Fund for damages. This mediator, somewhat ironically, was Sheila Birnbaum, later Purdue's defense counsel. At the conclusion of her work, she commented on the challenge of holdouts. She realized that what she had to do to get people to close out and accept their damages award was create something that looked like a trial. So she brought the insurance companies, the airlines, everybody she could, to the table. And she let each of the families give testimony about who they lost, their grief, and who they wanted to blame. As she put it:

> There was an emotional response and they wanted to find that someone was responsible other than the terrorists because of the grief they were feeling . . . . For some, it was important to tell their story to the airlines and to the mediator so the memory of the person they loved and lost was somehow more cherished.[42]

It was the need for that day in court.

Consider another example. When the Catholic dioceses that are facing sexual abuse cases filed for bankruptcy, victims took to the media to complain that the dioceses were avoiding ordinary trial processes and instead using bankruptcy to avoid discovery and prevent victims from telling their story. This opportunity to be heard is what my colleague Jerry Mashaw once deemed essential to one's dignity as a litigant. In a famous article written right after the watershed procedural due process case of 1976, *Mathews v. Eldridge*, Mashaw argued that "a lack of personal participation causes alienation and a loss of that dignity and self-respect that society properly deems independently valuable."[43] My colleague Tom Tyler's important work on procedural legitimacy has likewise illustrated that, for most litigants, the legitimacy of the *process* is essential to accepting the legitimacy of the outcome; and that legitimate process helps legitimize even disappointing outcomes.[44] The more traditional litigation moves away from trial-like procedures and more toward settlement, the more salient the loss of participation may feel. Of course, to the extent

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42. *9/11 Mediator Sheila Birnbaum '65 Settles 92 of 95 Cases for $500 Million*, NYU L., https://www.law.nyu.edu/news/BIRNBAUM_9_11_MEDIATOR [https://perma.cc/P4XZ-DRQG].

43. 424 U.S. 319 (1976); Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge*: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 50 (1976).

44. *See* TOM R. TYLER, WHY PEOPLE OBEY THE LAW (2006).

that even ordinary trial processes these days have shifted toward settlement and away from participation, the trade-off with bankruptcy becomes less stark. The question is, what is that trade-off?

VI. EXAMPLES FROM LITIGATION: WHY BANKRUPTCY

The bankruptcy filings in many of the recent public harms cases are worth quoting because they give a flavor of what defendants, at least, think they are gaining with the move out of the traditional trial process. When Purdue filed for bankruptcy, it argued that bankruptcy was necessary for fairness in a system of complex and redundant lawsuits. They argued bankruptcy was needed "to level the playing field among similarly situated creditors to prevent one creditor from racing ahead of others to obtain an unfair advantage," and it was the "only viable" venue to resolve claims against the company.[45] But the bankruptcy court, when it released the Sacklers, was very clear that its process was not about accountability in the sense that traditional litigation process is. A global release, the bankruptcy court said, is "[not] an adjudication of the claim. . . . It is part of the settlement of the claim that channels the settlement funds to the estate."[46] It is a settlement, not a finding of liability. It is a contract, not laying blame. The court was clarifying here that no parties were being adjudicated as at fault simply because assets are being distributed.

Another well-known opioids litigant, Mallinckrodt, filed for bankruptcy, and a very generous settlement for $1.7 billion was allocated among various opioid claimants. Just a few months later, a creditor—someone who is owed money by the company—with higher priority (in bankruptcy, different creditors get different places in line) came in, and the court restructured the whole settlement in a second bankruptcy with $1 billion taken away from the opioid litigants who had settled in the first place.[47] The reason this can happen is that, in bankruptcy, unlike at trial, plaintiffs are not the only people at the table. They are, instead, sharing a room with a lot of other interests, including other creditors who may have higher priority than mass tort judgments or settlements.

Take the Revlon bankruptcy as another example. The claims at issue were that the company's hair relaxers had caused cancer. Normally in a mass tort, plaintiffs have, depending on the state, three to six years to file claims. But here, Revlon filed for bankruptcy. After it did so, the National Institutes of Health issued a report

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45. Debtors' Informational Brief at 49–50, *In re* Purdue Pharma L.P., 633 B.R. 53 (Bankr. S.D.N.Y. 2021) (No. 19-23649-RDD), ECF No. 17.

46. *In re* Purdue Pharma L.P., 633 B.R. 53, 98 (Bankr. S.D.N.Y. 2021).

47. Rick Archer, *Mallinckrodt Gets OK for New Chapter 11 Plan*, LAW360 (Oct. 10, 2023, 1:10 PM), https://www.law360.com/articles/1731043/mallinckrodt-gets-ok-for-new-chapter-11-plan [https://perma.cc/9YUD-VLSS]; *Drugmaker Mallinckrodt Emerges from Bankruptcy*, REUTERS (Nov. 14, 2023, 7:05 PM), https://www.reuters.com/markets/deals/drugmaker-mallinckrodt-emerges-bankruptcy-2023-11-14/ [https://perma.cc/4JR4-33R6]; *see also* Christine Minhee, *Narrative Histories of the More Eventful Opioid Settlements: Mallinckrodt*, OPIOID SETTLEMENT TRACKER, https://www.opioidsettlementtracker.com/globalsettlementtracker/#mallinckrodt [https://perma.cc/D8HV-48RB].

linking the hair relaxers to cancer.[48] Because the company was in bankruptcy, and so out of the traditional trial process, the bankruptcy judge was able to declare that plaintiffs had just a few months to file claims, or they were out of luck. In other words, the bankruptcy court viewed itself as able to short-circuit state statutes of limitations. There was a huge outcry, and the judge effectively replied: We know this is really difficult, but we have to finalize this.[49]

That is the culture of the bankruptcy court. That is why scholars who argue that bankruptcy can be used just like trial process are, in my view, naive. To the extent the bankruptcy courts run their courtrooms in ways that have some features of pretrial process, the culture and goals of the bankruptcy exert enormous pressure against doing so. The bankruptcy culture is to streamline, not to extend. The focus is on efficiency to preserve the assets of the estate, not drawn-out discovery, claim development, and months in court depleting limited assets.

In the 3M litigation, 3M used a variant of an increasingly popular maneuver called the "Texas Two-Step," which is not a Texan dance but a process that takes advantage of Texas corporate law. (A highly simplified explanation follows, with apologies to specialists.) The Texas legislature has allowed companies to partition the corporate form into two companies. If a company is facing a great deal of tort liability, it can give one company, say, the new little company, all of its tort liability, and send that company into bankruptcy. The new little bankrupt company pays off all the debts, and the parent company emerges free of the burden. So basically, the company can take all its tort liability, essentially put it on a sacrificial lamb, slaughter the lamb, and leave the parent released from any future liability.

In 3M's case, there was a good deal of pretrial process before the company engaged in the Texas Two-Step variant. That was indeed valuable. My argument is not that bankruptcy is never necessary, but that we lose public litigation values if we skip over trial process entirely and just jump into bankruptcy. For 3M, the company was in an MDL for three years over its allegedly faulty earplugs. It got frustrated with the ongoing proceedings and the lack of an end in sight. It already had a subsidiary that it could sacrifice. So it put all of its earplug-related liability on that subsidiary and then sent it into bankruptcy.

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48. Che-Jung Chang, Katie M. O'Brien, Alexander P. Keil, Symielle A. Gaston, Chandra L. Jackson, Dale P. Sandler & Alexandra J. White, *Use of Straighteners and Other Hair Products and Incident Uterine Cancer*, 114 J. NAT'L CANCER INST. 1636 (2022); *see also* Press Release, Nat'l Insts. of Health, Hair Straightening Chemicals Associated with Higher Uterine Cancer Risk (Oct. 17, 2022), https://www.nih.gov/news-events/news-releases/hair-straightening-chemicals-associated-higher-uterine-cancer-risk [https://perma.cc/B67K-DS2E].

49. *See* Order (1) Establishing Deadlines for (A) Submitting Proofs of Claim and (B) Requests for Payment Under Bankruptcy Code Section 503(b)(9), (II) Approving the Form, Manner and Notice Thereof, and (III) granting Related Relief, *In re* Revlon, Inc., No. 22-10760-DSJ, 2023 WL 2229352 (Bankr. S.D.N.Y. Feb. 24, 2023), ECF No. 688. In August 2024, the bankruptcy court ruled that Revlon's bankruptcy barred forty-two lawsuits alleging injuries from asbestos-contaminated talc products even though Revlon's plan did not include asbestos-specific procedures. The plaintiffs appealed, arguing that the lack of these procedures violates due process. James Nani, *Revlon Can Avoid Talc Lawsuits Through Bankruptcy, Judge Rules*, BLOOMBERG L. (Aug. 13, 2024, 2:53 PM), https://www.bloomberglaw.com/bloomberglawnews/bankruptcy-law/X92NHOP0000000 [https://perma.cc/J7P2-ZFB2].

The filings cited, over and over again, the "failure" of the MDL as justification for bankruptcy.[50] It is fascinating that, when the bankruptcy court best decided it could not go forward, the main reason, it held, was that doing so would threaten the integrity of the bankruptcy court and turn bankruptcy courts into "court[s] of general jurisdiction."[51] That's a very powerful statement, as it highlights how allowing the extension of bankruptcy court's unique powers beyond the limited content for which they are intended threaten to make bankruptcy courts the most powerful courts in the nation. No other federal court is a court of general jurisdiction—one that has power over any type of claim or party.

It is significant that this implied threat in 3M was echoed by the Supreme Court in its holding in the *Purdue Pharma* case. Recall that Justice Gorsuch wrote that bankruptcy, despite its productive powers, is not a "roving commission" to solve all litigation problems.[52] It is for companies in financial distress, not companies frustrated by a long MDL or third parties trying to escape future litigation. To hold otherwise, as both the 3M court and the Supreme Court recognized, would turn bankruptcy courts into uniquely powerful, all-purpose courts that could exert authority that no other courts can.

Other courts, like the Fourth Circuit, have allowed these maneuvers. The Fourth Circuit, in the Bestwall asbestos litigation over its tissue and packing products, decided to let the Texas Two-Step go forward due to the "shortcomings" and "abuses" in the tort system.[53] The Supreme Court denied review, over the arguments of both plaintiffs and members of the Senate who filed an amicus brief.

Interestingly enough, the 3M Judge himself, even as he refused to allow the Texas-Two Step and so kept the case in MDL, recognized that the MDL was not perfect either in terms of fullness or process:

> [M]ost mass tort claims in a bankruptcy are resolved not through jury trials before a district court, but by consensual resolution through a plan of reorganization . . . . it is also accurate to say that it is unlikely that all of the 290,000 Stay Defendants will have a jury trial in the MDL if the Pending Actions are not stayed.[54]

In other words, the claim is not that pretrial process in modern MDL or class actions always, or even often, produces the kinds of public litigation values this Essay is emphasizing. But, for now, they do so more often than bankruptcy, and again the question is what the right balance is between producing those benefits and efficiently resolving mass harms litigation. That is a difficult question, especially when victims are still alive and in need of funds to redress their injuries.

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50. Informational Brief of Aearo Technologies LLC at 1, *In re* Aearo Technologies LLC, 642 B.R. 891 (Bankr. S.D. Ind. 2022) (No. 22-02890-JJG-11).

51. *In re* Aearo Technologies LLC, No. 22-02890-JJG-11, 2023 WL 3938436, at *21 (Bankr. S.D. Ind. June 9, 2023).

52. Harrington v. Purdue Pharma L.P., 603 U.S. 204, 220 (2024).

53. Informational Brief of Bestwall LLC at 5, *In re* Bestwall LLC, 606 B.R. 243 (Bankr. W.D.N.C. 2019) (No. 17-31795); *see In re* Bestwall LLC, 71 F.4th 168, 181 (4th Cir. 2023).

54. *In re* Aearo Technologies LLC, 642 B.R. 891, 902 (Bankr. S.D. Ind. 2022).

The Texas Two-Step may be the next creative bankruptcy maneuver to reach the Supreme Court. In late July 2024, the Third Circuit rejected Johnson & Johnson's second attempt to use the Texas Two-Step to resolve liability related to its talc products (albeit without referring to the Texas Two-Step by name)—and Johnson & Johnson vowed to take the case to the Court, but did not ultimately do so.[55] At the same time, Johnson & Johnson pressed forward with a *third* bankruptcy attempt.[56] With the hopes of making this attempt stick, Johnson & Johnson gave the tens of thousands of claimants a chance to vote on a proposed settlement before it moved to the Southern District of Texas and tried to put its sacrificial subsidiary into bankruptcy.[57] According to some reports, some plaintiffs felt that the settlement was too small but, weary of the negotiations or facing terminal cancer diagnoses, voted "yes."[58] Although Johnson & Johnson's $8 billion settlement offer garnered enough support to pass the bankruptcy court's 75% approval threshold, a group of objectors have opposed Johnson & Johnson's plan, alleging lack of proof that the settlement is large enough to cover minimum payments to all creditors, a flawed voting process, and inappropriate use of asbestos-specific procedures.[59] The bankruptcy court rejected the settlement in March 2025, citing voting irregularities.[60]

In the meantime, following the Supreme Court's denial of review of the Fourth Circuit's holding in *Bestwall*, several senators who had supported review of the

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55. *In re* LTL Mgmt. LLC, Nos. 23-2971 & 23-2972, 2024 WL 3540467 (3d Cir. July 25, 2024); Zoey Becker, *J&J's Texas Two-Step Bankruptcy Maneuver Shut Down Again by Appeals Court*, FIERCE PHARMA (July 26, 2024, 11:48 AM), https://www.fiercepharma.com/pharma/jjs-texas-two-step-bankruptcy-maneuver-shut-down-again-appeals-court-ahead-vote-sweeping [https://perma.cc/XFL7-Y47H].

56. Dietrich Knauth, *With J&J Pushing a Third Talc Bankruptcy, Court Affirms Earlier Loss*, REUTERS (July 26, 2024, 1:27 PM), https://www.reuters.com/legal/litigation/with-jj-pushing-3rd-talc-bankruptcy-court-affirms-earlier-loss-2024-07-26/ [https://perma.cc/GJM2-XPGL].

57. Mike Spector, *The Battle Over J&J's Bankruptcy Plan to End Talc Lawsuits*, REUTERS (July 8, 2024, 10:00 AM), https://www.reuters.com/investigates/special-report/usa-lawsuits-johnson-and-johnson-bankruptcy/ [https://perma.cc/L4J3-XC2B].

58. *Id.*; Amanda Bronstad, *What's Next for Johnson & Johnson's Talcum Powder Litigation?*, LAW.COM (Dec. 26, 2024, 1:14 PM), https://www.law.com/2024/12/26/whats-next-for-johnson--johnsons-talcum-powder-litigation-/ [https://perma.cc/CN2W-MQ9P].

59. Steven Church & Jonathan Randles, *J&J Talc Deal Should Be Rejected in Bankruptcy, Holdouts Say*, BLOOMBERG L. (Jan. 27, 2025, 2:04 PM), https://news.bloomberglaw.com/bankruptcy-law/j-j-talc-deal-should-be-rejected-in-bankruptcy-holdouts-say [https://perma.cc/CQ4U-86HL].

60. The bankruptcy court held a two-week hearing in February 2025 to determine the fate of the settlement. *See* Dietrich Knauth, *J&J Begins Crucial Battle over $10 Billion Baby Powder Settlement*, REUTERS (Feb. 18, 2025, 5:28 PM), https://www.reuters.com/legal/jj-begins-crucial-battle-over-10-billion-baby-powder-settlement-2025-02-18/ [https://perma.cc/W67Q-PMJ5]; Amanda Bronstad, *Johnson & Johnson Pitches Final Arguments to Approve $10B Talc Bankruptcy Plan*, LAW.COM (Mar. 3, 2025, 2:57 PM), https://www.law.com/texaslawyer/2025/03/03/johnson--johnson-pitches-final-arguments-to-approve-10b-talc-bankruptcy-plan/ [https://perma.cc/58YX-9Y32]; David Segal, *Johnson & Johnson Loses in Court Again in Bid to Settle Talc Cases*, N.Y. TIMES (Mar. 31, 2025), https://www.nytimes.com/2025/03/31/business/johnson-johnson-bankruptcy-talc.html [https://perma.cc/PN9V-J489].

Texas Two-Step in that case proposed a bill that would prevent the Texas Two-Step from shielding the non-bankrupt portion of a company from liability.[61] Perhaps ironically, it was *litigation* over unorthodox bankruptcy maneuvers that made the issue salient enough to prompt Senate reaction. The saga is in a sense proof positive of the role litigation can play in making issues more salient and spurring policy change.

CONCLUSION

In Purdue's case, as the Court held, after the company filed for bankruptcy in 2019, "[m]embers of the Sackler family saw in that development an opportunity 'to get [their own] goals accomplished.'"[62] In return for their contribution of some $6 billion to the settlement, the Sacklers sought a release. The Court, in its decision, described the Sackler's request in powerful terms:

> [T]o void not just current opioid-related claims against the family, but future ones as well. It sought to ban not just claims by creditors participating in the bankruptcy proceeding, but claims by anyone who might otherwise sue Purdue. It sought to extinguish not only claims for negligence, but also claims for fraud and willful misconduct. And it proposed to end all these lawsuits without the consent of the opioid victims who brought them. To enforce this release, the Sacklers sought an injunction "forever stay[ing], restrain[ing,] and enjoin[ing]" claims against them. That injunction would not just prevent suits against the company's officers and directors but would run in favor of hundreds, if not thousands, of Sackler family members and entities under their control.[63]

The Court also flagged that not all of the creditor parties voted on the settlement. In Purdue's case, participation was low—as is often the case in bankruptcies; just twenty percent of the Purdue creditors voted, and thousands of the opioids plaintiffs voting opposed the plan. "Our system of justice," opposing plaintiffs wrote, "demands that the allegations against the Sackler family be fully and fairly litigated in a public and open trial, that they be judged by an impartial jury, and that they be held accountable to those they have harmed."[64]

The U.S. Bankruptcy Trustee, eight states, and some cities joined their objections. And while the Supreme Court's holding was largely based on the text of Bankruptcy Code and the argument that the bankruptcy court had overread its powers under the

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61. Dietrich Knauth, *US Senate Bill Aims to Curb Texas Two-Step Bankruptcies*, REUTERS (July 23, 2024, 6:01 PM), https://www.reuters.com/legal/government/us-senate-bill-aims-curb-texas-two-step-bankruptcies-2024-07-23/ [https://perma.cc/LDQ8-22R6].

62. Harrington v. Purdue Pharma L.P., 603 U.S. 204, 211 (2024) (quoting *In re* Purdue Pharma L.P., No. 19–23649 (Bankr. S.D.N.Y., Aug. 18, 2021), ECF No. 3599, p. 35 (testimony of David Sackler)).

63. *Id.* at 211–12 (citations omitted).

64. Statement of Interest of the United States of America Regarding the Shareholder Release at 13, *In re* Purdue Pharma L.P., 635 B.R. 26 (S.D.N.Y. 2021) (No. 7:21-cv-07532), ECF No. 94.

statute, the decision itself, as should be evident from the excerpts I have provided throughout this Essay, recognizes the broader systemic dangers raised by the unorthodox use of bankruptcy in complex civil litigation.

In January 2025, Purdue announced a new $7.4 billion deal, which no longer provides the family with the controversial shield from future opioids suits. Yet the deal includes a new provision, which some experts have questioned, that requires future claimants to effectively set aside funds to assist in the legal defense of those cases.[65] The future of the settlement remains unknown.

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Let us end by returning to where we started. Can bankruptcy solve a public health crisis?

Bankruptcy is not the first instance of unorthodox civil procedure, and it will definitely not be the last. No matter what happens as further bankruptcy maneuvers are reviewed by courts, lawyers and judges will always be on the elusive quest for global peace, and they will continue to innovate.

But it is time to really press on what is being lost and what core features of the traditional trial process we want to strive to preserve. I am not arguing for bright lines. Bankruptcy or some other dispute resolution mechanism may indeed be an appropriate solution once there has been some fleshing out of claims and liabilities in traditional process—yielding some public litigation benefits. The fundamental question is whether civil litigation in public health cases produces public goods beyond dollars and final resolution. If so, then what parts of traditional complex civil procedure cause undue delays and obstacles that harm victims, and what aspects, on the other hand, should we strive to save, guard, and nurture?

65. Jan Hoffman, *Sacklers Up Their Offer to Settle Purdue Opioids Cases, with a New Condition*, N.Y. TIMES (Jan. 23, 2025), https://www.nytimes.com/2025/01/23/health/sacklers-purdue-settlement-opioids.html [https://perma.cc/5QSQ-3AYY].