NOTES

"OTHERWISE CONSISTENT": A DUE PROCESS FRAMEWORK FOR MASS-TORT BANKRUPTCIES

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Bankruptcies now dominate mass-tort litigation. Defendants file for bankruptcy because the class action and multi-district litigation devices have failed to deliver parties meaningful finality, and new legal tools—nondebtor releases, complex claims-processing schemes, and the Texas Two-Step—have made bankruptcy a more attractive forum for resolving mass-tort liabilities. Troublingly, litigants, courts, and scholars struggle to consistently evaluate a reorganization plan's legitimacy. This Note takes a novel approach, arguing federal preclusion law and due process principles of exit, voice, and loyalty provide the best framework for evaluating a mass-tort bankruptcy. Bankruptcy resolutions are generally "otherwise consistent" with due process because they substitute claimants' exit rights for voice rights. Whether a reorganization plan violates due process depends not on the formal legal tools mass-tort debtors deploy but on whether those tools infringe upon claimants' voice rights or undermine aggregate litigation's core goals of finality and equitable redress. This Note concludes that bankruptcy remains a valuable forum for resolving complex mass-tort crises and identifies several cases that can guide future stakeholders.

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Introduction

Mass-tort cases almost always end in settlement.[1] Corporate defendants view "global peace," a single resolution of substantially all their current and future tort liabilities through claim preclusion,[2] as their top priority in litigation.[3] Piecemeal litigation generates significant uncertainty that deters investors, limits access to credit markets,

[1] *See* Richard A. Nagareda, Mass Torts in a World of Settlement ix (2007) ("[T]he endgame for mass tort dispute is not trial but settlement.").

[2] "Under the doctrine of claim preclusion, a final judgment forecloses 'successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit.'" Taylor v. Sturgell, 553 U.S. 880, 892 (2008) (quoting New Hampshire v. Maine, 532 U.S. 742, 748 (2001)).

[3] *See* Samuel Issacharoff, *The Governance Problem in Aggregate Litigation*, 81 Fordham L. Rev. 3165, 3174–75 (2013) [hereinafter Issacharoff, *The Governance Problem*] (discussing the "peace premium" defendants pay to achieve a global settlement).

and, at worst, threatens insolvency.[4] Similarly, plaintiffs have incentives to settle. As a practical matter, their sheer numbers overwhelm the judiciary and prevent relief.[5] Attempts to try cases to conclusion often lead to arbitrary and inconsistent outcomes,[6] undermining aggregate litigation's core goal of equity among injured parties.[7] And, plaintiffs who want to try cases often face defendants ready to confront a possibly existential financial risk through protracted litigation on every individual issue.[8] For plaintiffs, this means that even if they win, transaction costs will likely consume a majority of the money meant to redress their injuries.[9]

Without a deal that offers defendants sufficient finality, plaintiffs may not recover anything. For instance, in the worst stretch of the asbestos litigation crisis, over four hundred plaintiffs, in a class of more than three thousand, died while waiting for a jury to hear their case.[10] Presently, opioid victims and their families plead for a swift resolution to recover and rebuild from the epidemic's debilitating effects.[11] Ultimately, because litigation incentives on both sides of mass-tort litigation converge, "aggregate solutions are inevitable and aggregation takes on whichever form most easily allows cases to travel towards settlement."[12]

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4 Samir D. Parikh, *The New Mass Torts Bargain*, 91 Fordham L. Rev. 447, 462 (2022) [hereinafter Parikh, *New Bargain*].

5 Douglas G. Smith, *Resolution of Mass Tort Claims in the Bankruptcy System*, 41 U.C. Davis L. Rev. 1613, 1627 (2008); *see* Jud. Conf. Ad Hoc Comm. on Asbestos Litig., Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation 19 (1991) ("It is unrealistic to believe that individual trials can provide relief.").

6 Smith, *supra* note 5, at 1627.

7 Sullivan v. DB Invs., Inc., 667 F.3d 273, 340 (3d Cir. 2011) (en banc) (Scirica, J., concurring); *see* Alexandra D. Lahav, *The Continuum of Aggregation*, 53 Ga. L. Rev. 1393, 1404 (2019) (arguing all forms of aggregate litigation "strive for the same goal: efficient and fair resolution of large numbers of claims").

8 *See, e.g.*, Cimino v. Raymark Indus., Inc., 751 F. Supp. 649, 651–52 (E.D. Tex. 1990) (noting defendant asbestos producers remained determined for decades to "repeatedly contest in each case every contestable issue involving the same products, the same warnings, and the same conduct"), *aff'd in part, vacated in part*, 151 F.3d 297 (5th Cir. 1998); *In re* 3M Combat Arms Earplug Prods. Liab. Litig., No. 3:19-MD-2885, 2022 WL 17853203, at *2 (N.D. Fla. Dec. 22, 2022) (explaining 3M waged a "[s]corched earth battle . . . against every theory of liability alleged in this litigation").

9 *See Cimino*, 751 F. Supp. at 651 (describing this phenomenon in asbestos litigation and noting "plaintiffs receive only $.39 from each litigation dollar").

10 *Id.*

11 *See, e.g.*, Cheryl Juaire, Opinion, *I Lost Two Sons to Opioids. But I Don't Want the Purdue Pharma Settlement Blocked.*, Wash. Post (Jan. 12, 2022), https://www.washingtonpost.com/opinions/2022/01/12/do-no-block-settlement-with-purdue-pharma-sacklers [https://perma.cc/3BAM-DREL].

12 Lahav, *supra* note 7, at 1394.

Now, bankruptcy has re-emerged as that forum.[13] Recent high-profile, mass-tort bankruptcies encompass claims spanning opiates[14] to baby powder[15] and airbags[16] to earplugs.[17] Two trends have led to this point. First, the usual means of resolving widespread tort liabilities, namely class action[18] or quasi-class[19] settlements enabled by the Multi-District Litigation ("MDL") statute,[20] have been unable to help parties achieve global peace. Ambitious attempts to resolve the most pressing cases have failed to deliver finality, either because the issues' scope exceeded the tools' preclusive capacities[21] or because unique dynamics prevented coordination on private settlements.[22]

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[13] Bankruptcy was a popular choice for asbestos companies after the Supreme Court decertified several class settlements in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 Sup. Ct. Rev. 183, 208–10 [hereinafter Issacharoff, *Private Claims*]. The forum proved an attractive, but not prominent, option for other kinds of product liability cases too. *See, e.g.*, A.H. Robins Co. v. Piccinin, 788 F.2d 994, 996 (4th Cir. 1986) (Dalkon Shield intrauterine device); *In re* Dow Corning Corp., 280 F.3d 648, 653 (6th Cir. 2002) (silicone gel breast implants).

[14] *In re* Purdue Pharma L.P., 633 B.R. 53, 58 (Bankr. S.D.N.Y.), *vacated*, 635 B.R. 26 (S.D.N.Y. 2021), *rev'd and remanded*, 69 F.4th 45 (2d Cir. 2023), *cert. granted sub nom.* Harrington v. Purdue Pharma, L.P., No. 23-124, 2023 WL 5116031 (U.S. Aug. 10, 2023).

[15] *In re* LTL Mgmt., LLC, 637 B.R. 396, 400, 407 (Bankr. D.N.J. 2022), *rev'd and remanded*, 58 F.4th 738 (3d Cir. 2023).

[16] *In re* TK Holdings Inc., No. 17-11375 (BLS), 2018 WL 1306271, at *1 (Bankr. D. Del. Mar. 13, 2018).

[17] *In re* Aearo Techs. LLC, 642 B.R. 891, 896 (Bankr. S.D. Ind. 2022).

[18] In the last decade and a half, the class action resurged. Consolidation in MDLs before class certification and settlement, a near certainty in the current state of play, abates many of the concerns animating the Court's opinions in *Amchem* and *Ortiz*, mainly that absent plaintiffs have no incentive or ability to participate in class litigation. Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. Rev. 846, 848–49 (2017) (adding "concerns over representational legitimacy have been tamed, if never fully domesticated").

[19] Judge Weinstein coined the term "quasi-class" to label the string of private agreements secured after consolidation in an MDL and bolstered by the "general equitable power of the court." *In re* Zyprexa Prods. Liab. Litig., 433 F. Supp. 2d 268, 271 (E.D.N.Y. 2006); *see also In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., MDL No. 05–1708, 2008 WL 682174, at *18 (D. Minn. Mar. 7, 2008) (adopting the quasi-class concept); *In re* Vioxx Prods. Liab. Litig., 574 F. Supp. 2d 606, 611 (E.D. La. 2008) (same). The academy has adopted the term as well. *See, e.g.*, Troy A. McKenzie, *Toward a Bankruptcy Model for Nonclass Aggregate Litigation*, 87 N.Y.U. L. Rev. 960, 984–88 (2012) [hereinafter McKenzie, *Toward Bankruptcy*] (championing bankruptcy as a superior alternative to the quasi-class resolution model).

[20] 28 U.S.C. § 1407.

[21] *See In re* Nat'l Prescription Opiate Litig., 976 F.3d 664, 677 (6th Cir. 2020) (decertifying the negotiation class action as outside the bounds of Rule 23); *see also* Francis E. McGovern & William B. Rubenstein, *The Negotiation Class: A Cooperative Approach to Class Actions Involving Large Stakeholders*, 99 Tex. L. Rev. 73, 76–78 (2020) (discussing the coordination problem that the negotiation class should resolve).

[22] *See* Francis E. McGovern, *The Tragedy of the Asbestos Commons*, 88 Va. L. Rev. 1721, 1721–25 (2002) (arguing coordination and anticommons problems prevented efficient

Bankruptcy provides a viable outlet for litigants to exit the tort process and regain control over their litigation.[23] Second, the development of new legal strategies increased Chapter 11's scope while decreasing its unique costs. Defendants commonly deploy nondebtor releases,[24] complex claim-processing schemes,[25] and the Texas Two-Step[26] when seeking refuge in bankruptcy court. The significant concern is that these tactics, especially when combined, foreclose plaintiffs from meaningful relief and enable tortfeasors to discharge their liability for cents on the dollar.[27]

Troublingly, bankruptcy law and legal literature lack a sufficient doctrine for consistently evaluating a reorganization's legitimacy[28]: when, and by what metrics, should a mass-tort bankruptcy provoke judicial skepticism? Caselaw and literature commonly frame the question

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resolution of the asbestos crisis); Joseph Krakoff, The Opioids Litigation "Through Erie's Glass Darkly": Parens Patriae Suits and the Problem of National Coordination 7–8 (Jan. 31, 2022) (unpublished note) (on file with the New York University Law Review) (identifying unique coordination issues between county plaintiffs and state Attorneys General that hampered the opioid MDL's ability to efficiently resolve litigation).

[23] *See* Sergio Campos & Samir D. Parikh, *Due Process Alignment in Mass Restructurings*, 91 Fordham L. Rev. 325, 336–39 (2022) (explaining how MDLs have become troubling for both victims and defendants, and noting bankruptcy provides "a far more hospitable forum that offers accelerated global settlement"); Parikh, *New Bargain*, *supra* note 4, at 479 ("In the last few years, many defendants subject to—or facing the prospect of being subject to—an MDL, including 3M, Johnson & Johnson, Purdue Pharma, Boy Scouts of America, and USA Gymnastics, have turned to bankruptcy." (citation omitted)).

[24] *See, e.g.*, *In re* Purdue Pharma, L.P., 635 B.R. 26, 75 (S.D.N.Y. 2021) (discussing nondebtor, non-derivative releases, which extend the reach of bankruptcy's finality to defendants not party to the bankruptcy proceeding and often doing so without claimants' consent).

[25] *See* Lindsey D. Simon, *Bankruptcy Grifters*, 131 Yale L.J. 1154, 1159 (2022) (noting reorganization plans often include complex settlement schemes that mirror the result of individual, quasi-class, or class resolutions but lack the procedural due process of an Article III court).

[26] *See, e.g.*, *In re* LTL Mgmt., LLC, 637 B.R. 396, 404 (Bankr. D.N.J. 2022) (explaining Johnson & Johnson's unique maneuver enabled by Texas corporate law that allowed the company to isolate liabilities into a subsidiary, which filed for bankruptcy).

[27] *See id.* at 416 ("Throughout their submissions and oral argument, Movants have decried Debtor's . . . efforts to 'cap' the liabilities owing the injured parties."); Mike Spector, Benjamin Lesser, Disha Raychaudhuri, Dan Levine & Kristina Cooke, *How Corporate Chiefs Dodge Lawsuits over Sexual Abuse and Deadly Products*, Reuters (Nov. 7, 2022), https://www.reuters.com/investigates/special-report/bankruptcy-tactics-releases [https://perma.cc/7SS7-JZAR] (arguing nondebtor releases supply recipients with "the benefits of bankruptcy protection without the associated financial or reputational damage").

[28] Justice Ginsburg used "legitimacy" to describe the core question in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997). The legitimacy question describes the bounds of acceptable aggregation. *See* Troy A. McKenzie, *Internal and External Governance in Complex Litigation*, 83 L. & Contemp. Probs. 207, 207–09 (2021) [hereinafter, McKenzie, *Governance in Complex Litigation*] (arguing concepts of internal and external governance shape the legitimacy question in complex litigation and "convey[] a mood about the propriety of the litigation").

as one of statutory interpretation[29] or policy.[30] Sometimes, whether the Bankruptcy Code permits a specific tactic becomes the dispositive question in a case.[31] Normally though, parties choose the bankruptcy venue with favorable precedent.[32] And still, the resolution of one statutory issue says nothing about those tactics plainly permitted by the Code but which nonetheless demand exacting judicial scrutiny. Policy arguments provide more guidance in identifying problematic bankruptcy practices, but the extra-legal modality offers little to objectors attempting to vindicate their rights or defendants seeking a predictable resolution in the bankruptcy system.[33]

This Note seeks to fill a gap in the literature through two principal contributions. First, this Note makes the novel argument that federal preclusion law and its familiar due process principles of exit, voice, and loyalty provide the best framework for evaluating modern mass-tort reorganization plans. Recent literature has just begun to take a due process approach to mass-tort bankruptcies,[34] but this Note will be the first to justify the application of an exit, voice, and loyalty lens with normative and doctrinal arguments.[35] Second, this Note will identify the various

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[29] *See, e.g*, *In re Purdue Pharma*, 635 B.R. at 89 (concluding the Bankruptcy Code does not authorize a release of third-party claims against nondebtors); Ralph Brubaker, *Bankruptcy Injunctions and Complex Litigation: A Critical Reappraisal of Non-Debtor Releases in Chapter 11 Reorganizations*, 1997 U. Ill. L. Rev. 959, 996 n.130 (arguing the Bankruptcy Code denies courts the power to issue nondebtor releases, thereby avoiding any constitutional infirmity); Ralph Brubaker, *Mandatory Aggregation of Mass Tort Litigation in Bankruptcy*, 131 Yale L.J. F. 960, 960 (2022) (same) [hereinafter Brubaker, *Mandatory Aggregation*].

[30] *See, e.g.*, *In re LTL Mgmt.*, 637 B.R. at 411–14 (discussing the inability of MDLs to resolve recent mass torts and suggesting bankruptcy is the superior avenue for claimant relief); *see generally* Simon, *supra* note 25 (suggesting nondebtors abuse the bankruptcy system to obtain finality in mass torts and suggesting best practices modeled after the *Takata* bankruptcy); Adam J. Levitin, Purdue*'s Poison Pill: The Breakdown of Chapter 11's Checks and Balances*, 100 Tex. L. Rev. 1079 (2022) (detailing policy solutions to counteract issues of illusory appellate review, coercive restricting transactions, and judge-shopping in Chapter 11).

[31] *See, e.g.*, *In re Purdue Pharma*, 635 B.R. at 89.

[32] *See, e.g.*, Levitin, *supra* note 30, at 1128–50.

[33] *See, e.g.*, Simon, *supra* note 25, at 1206, 1215 (recognizing the barriers to courts naturally adopting her suggested reforms to bankruptcies that employ nondebtor releases, and noting that courts would have to "organically" reject plans that do not comport with ideal policy).

[34] *See, e.g.*, Pamela Foohey & Christopher K. Odinet, *Silencing Litigation Through Bankruptcy*, 109 Va. L. Rev. (forthcoming 2023) (manuscript at 1) (taking a procedural justice, rather than preclusion-based, approach to due process in mass-tort bankruptcies).

[35] Several authors have recently applied the tripartite framework to mass-tort bankruptcies, but this burgeoning argument still requires a complete doctrinal defense. *See* Jonathan C. Lipson, *"Special": Remedial Schemes in Mass Tort Bankruptcies*, 101 Tex. L. Rev. 1773, 1787 (2023) (asserting proceduralists assess aggregate litigation through exit, voice, and loyalty); William Organek, *Mass Tort Bankruptcy Goes Public* 42–43

pressure points that courts should address when scrutinizing potentially impermissible uses of the Bankruptcy Code. This assessment indicates, contrary to the suggestion of recent literature, that neither bankruptcy's built-in lack of exit nor its new tools pose inherent threats to the forum's ability to achieve a legitimate mass-tort resolution. Ultimately, bankruptcy provides sufficient structural assurances of claimants' voice and advances aggregate litigation's core goals—equitably compensating claimants while achieving finality—to render many reorganization plans "otherwise consistent" with due process.[36]

Part I supplies an overview of Chapter 11 of the Bankruptcy Code and recent developments in mass-tort bankruptcies. Part II explains federal preclusion law and related due process limitations, and it argues due process blesses novel solutions that provide *any sufficient combination* of exit, voice, and loyalty rights in light of pertinent statutory or policy justifications. Bankruptcy generally guarantees due process to claimants by substituting exit for voice. Part III applies that framework to mass-tort bankruptcies. It highlights the various factors that courts should scrutinize when confirming bankruptcy plans: (1) whether the plan's intricacies hamper claimants' voice rights, either by denying participation or diluting the value of an individual's vote in confirming the bankruptcy plan; and (2) whether the plan guarantees the rough justice typical of an aggregate resolution or contains mechanisms designed to limit plaintiff recovery and award tortfeasors cheap grace.

I
Anatomy of a Chapter 11 Mass-Tort Bankruptcy

Bankruptcy is a *procedural* device. A debtor files for bankruptcy to resolve claims or debts created by substantive law external to the bankruptcy proceeding.[37] The Code shares its chief goal—to centralize all claims against a debtor for collective resolution—with the class action, interpleader, and other joinder devices throughout the Federal Rules of Civil Procedure.[38] Additionally, bankruptcy courts often struggle with

(Feb. 22, 2023) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4284113 [https://perma.cc/K3HJ-GNAW] (noting "aggregate litigation scholars focus on . . . ensuring representational adequacy" through "exit, voice, and loyalty").

[36] Taylor v. Sturgell, 553 U.S. 880, 895 (2008) (establishing the standard for special statutory schemes, such as bankruptcy, to claim preclude nonparties).

[37] *See* Butner v. United States, 440 U.S. 48, 54–55 (1979) (noting that, outside limited provisions addressing fraudulent security interests or improper preferences, "Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law").

[38] *See* McKenzie, *Toward Bankruptcy*, *supra* note 19, at 999–1000 (citing Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 Yale

the same issues that plague their analogs on the aggregation continuum: due process limitations on their preclusive power[39] and the practical difficulties of mass-tort litigation, including problems of coordination[40] and equity.[41]

However, Congress developed the Bankruptcy Code to address a set of concerns separate from those mass torts pose or other procedural devices are meant to solve. While those aggregation devices found within the Rules of Civil Procedure or Title 28 of the U.S. Code focus on the just and speedy resolution of civil cases,[42] bankruptcy's fundamental aim is to give the debtor a fresh start through an equitable discharge of their encumbering debt.[43] Bankruptcy's distinct policy goals explain why Congress equipped the Code with more powerful centralization and finality features than those of traditional procedure mechanisms.[44]

Part I discusses how bankruptcy effectuates efficient and equitable mass-tort resolutions. First, bankruptcy centralizes widespread litigation before one judge, making it an ideal forum for solving mass torts. Second, the Code's automatic discharge, equality protections for claimants, and voting structure enable parties to achieve an equitable global resolution. Third, new tools have lowered the costs of using bankruptcy and expanded its potential benefits of centralization and finality beyond those of the Code's traditional applications. This Part concludes by framing the

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L.J. 857 (1982)) (arguing bankruptcy is simply another form of aggregation with similar goals to the class action and quasi-class, and suggesting the law should recognize the non-bankruptcy elements in bankruptcy); Brubaker, *Mandatory Aggregation*, *supra* note 29, at 999–1003 (suggesting litigants and courts use bankruptcy's strong centralizing function as a superior version of multi-district litigation).

[39] *See Taylor*, 553 U.S. at 891, 893–95 (listing private settlements, class actions, and bankruptcy as narrow exceptions, circumscribed by due process, to the American tradition that each person is entitled to their day in court).

[40] *See* McGovern, *supra* note 22, at 1754–55 (addressing bankruptcy in his seminal article on coordination problems in mass-tort litigation); McKenzie, *Toward Bankruptcy*, *supra* note 19, at 1001 (discussing coordination problems).

[41] Equity broadly demands similar plaintiffs receive similar compensation, but several specific equity issues recur in aggregate litigation. *See* Lahav, *supra* note 7, at 1405–06 (discussing how equity concerns arise in aggregate litigation, including in bankruptcy proceedings). The distinction between present (currently injured) and future (injury has yet to materialize) plaintiffs poses the greatest concern for courts and commentators. *See, e.g.*, Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 383–84 [hereinafter Issacharoff, *Governance and Legitimacy*] (identifying the future plaintiffs' inequitable treatment as the Supreme Court's animating concern in *Amchem* and *Oritz*).

[42] *See* FED. R. CIV. P. 1 (declaring the rules should "secure the just, speedy, and inexpensive determination of every action and proceeding").

[43] *See* Loc. Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (stating bankruptcy's central goal is to give the "honest but unfortunate debtor . . . a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt").

[44] *See supra* note 38.

importance of this background. A due process approach to mass-tort bankruptcies best resolves the tensions that underlie the differences in the preclusive scope of normal bankruptcy procedures, more recent reorganization plans, and their counterparts in civil procedure.

A. An Outline of Chapter 11

1. Initiation and Centralization

Typically, a creditor collects their debts through an individual lawsuit, but when a debtor owes too much to multiple creditors, a race to the courthouse ensues.[45] Each creditor hopes to be the lucky claimant who collects on a judgment before the debtor's assets deplete. A bankruptcy case's first steps address this problem by bringing parties and property related to the debtor within the court's jurisdiction and halting all pending actions against the debtor. The bankruptcy court becomes the central forum where creditors can litigate or bargain to arrive at an acceptable collective resolution.

A bankruptcy case normally begins when the debtor files a petition for relief in federal district court.[46] As a matter of practice, district courts then refer such cases to the specialized bankruptcy courts within their district.[47] The debtor's petition automatically establishes a bankruptcy estate, bringing *all* the debtor's property within the *exclusive* jurisdiction of the bankruptcy court, even if the property is in the possession of another party or claimant.[48] Exclusive jurisdiction over the debtor's assets forces all interested parties into the bankruptcy court because they cannot collect any of the debtor's assets without appealing to the only institution with authority over them.[49]

The debtor's petition also engages the bankruptcy court's subject matter jurisdiction over three types of claims: those that "arise under" the Code, "aris[e] in" a bankruptcy case, or are "related to" a bankruptcy case.[50] This last subset of the bankruptcy court's jurisdiction is the most expansive. "Related to" jurisdiction reaches any matter that "might

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[45] *See generally* 7 COLLIER ON BANKRUPTCY ¶ 1100.01 (16th ed. 2023) (overviewing Chapter 11's policies and principles).

[46] 28 U.S.C. § 1334. However, creditors may involuntarily force a debtor into bankruptcy under certain conditions. 11 U.S.C. §§ 301, 303.

[47] McKenzie, *Toward Bankruptcy*, *supra* note 19, at 1002 n.156.

[48] *See* 28 U.S.C. § 1334(e)(1) (establishing the bankruptcy court's exclusive jurisdiction over the bankruptcy estate); 11 U.S.C. § 541(a) (listing the types of property within the bankruptcy estate).

[49] *See* McKenzie, *Toward Bankruptcy*, *supra* note 19, at 1002–03 (confirming the jurisdictional provision makes the bankruptcy court a "gatekeeper").

[50] 28 U.S.C. § 157(a).

have any 'conceivable effect'" on the debtor's estate.[51] The Bankruptcy Code takes an expansive view of the term "claim" as well, covering not only pre-existing debts but future, contingent, or unmatured obligations.[52] For example, a company that produced a carcinogenic product will still be able to benefit from bankruptcy even if a significant portion of the claimants against them will not become injured until years after the bankruptcy concludes.[53] Such comprehensive jurisdiction is necessary to prevent the aforementioned race to the courthouse and to equip the bankruptcy court with sufficient power to achieve effective reorganization.[54]

Additional features of both the Bankruptcy Code and Title 28 of the U.S. Code combine to ensure a bankruptcy court can assert its jurisdiction and sit as a proper venue to adjudicate related claims. Bankruptcy Rule 7004 authorizes nationwide service of process,[55] making it easy for bankruptcy courts to assert personal jurisdiction.[56] The bankruptcy removal statute further permits the bankruptcy court to remove *state* court claims that fall within its jurisdiction.[57] This stands in contrast to the MDL statute, for instance, which only consolidates claims already within the federal system.[58] Finally, 28 U.S.C. § 157(b)(5) can consolidate all creditors' personal injury claims related

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[51] *In re* Cuyahoga Equip. Corp., 980 F.2d 110, 114 (2d Cir. 1992) (quoting *In re* Turner, 724 F.2d 338, 340–41 (2d Cir. 1983)); *accord* Celotex Corp. v. Edwards, 514 U.S. 300, 307–08 (1995) (noting the Code's "choice of words suggests a [jurisdictional] grant of some breadth").

[52] 11 U.S.C. § 101(5); *see In re* Piper Aircraft Corp., 169 B.R. 766, 773 (Bankr. S.D. Fla. 1994) ("Congress intended the broadest possible definition of claim when it enacted the Code."). *But see* 11 U.S.C. § 1141(d)(1)(A) (discharging only those debts "that arose before the date of such confirmation" of a plan).

[53] *See* Laura B. Bartell, *Due Process for the Unknown Future Claim in Bankruptcy—Is This Notice Really Necessary?*, 78 Am. Bankr. L.J. 339, 340–48 (2004) (describing the three common tests that define "claim" under the Code but confirming bankruptcy courts generally will discharge future mass-tort claims).

[54] *See Celotex*, 514 U.S. at 308.

[55] Fed. R. Bankr. P. 7004(d).

[56] *See* Reynolds v. Behrman Cap. IV L.P., 988 F.3d 1314, 1325 (11th Cir. 2021) (analyzing whether the defendants' contacts with the nation as a whole satisfied Fifth Amendment due process), *cert. denied*, 142 S. Ct. 239 (2021). Few courts have found that a bankruptcy judge has violated due process when exercising personal jurisdiction over a claim in the United States. McKenzie, *Toward Bankruptcy*, *supra* note 19, at 1003 n.162 (citing Diamond Mortg. Corp. of Ill. v. Sugar, 913 F.2d 1233, 1244 (7th Cir. 1990)).

[57] 28 U.S.C. § 1452(a); *see* Brubaker, *Mandatory Aggregation*, *supra* note 29, at 1000 & n.180 (noting the removal statute refers to claims or causes of action, rather than civil actions, making it a more surgical device that frustrates common litigation tactics used to prevent removal of state cases).

[58] *See* 28 U.S.C. § 1407 (reaching civil actions that "are pending in different districts"); Krakoff, *supra* note 22, at 8 (arguing *parens patriae* claims' current unremovability, and subsequent inability to be consolidated in an MDL, creates a tragedy of the commons in the opioid litigation).

to the bankruptcy in the district in which the bankruptcy case is pending. Though bankruptcy courts lack the authority to adjudicate personal injury or wrongful death claims—or to even estimate the claims' value to make distributions from estate assets[59]—the statute essentially suggests the district court judge sitting across the street should undertake those tasks in service of the bankruptcy proceeding.[60] In all, there is little to no room for related litigation to escape bankruptcy's central forum, allowing parties to litigate common issues and negotiate a global resolution in the form of a reorganization plan. The bankruptcy court thus exercises a "unique jurisdictional arsenal" that creates a superior venue for resolving sprawling mass-tort cases.[61]

Finally, the Code provides one of the most critical tools in facilitating coordination and preventing any run on a debtor's estate: an automatic stay. The debtor's petition acts as an *order* for relief, enjoining all actions or proceedings against the debtor or the estate's property.[62] Debtors, especially in mass-tort cases, may also move to extend the automatic stay's reach to litigation against other related parties.[63] This means all tort cases against the debtor (or a nondebtor) cannot continue, even if they are not transferred before the bankruptcy court. Further, the stay prevents any party with a judgment against the debtor from collecting on it.[64]

> "By removing time as a factor in determining which creditors recover (and how much they recover) from the debtor's assets, the automatic stay thus addresses . . . the risk that a claimant who is first in time may receive greater compensation than a future claimant, even if the future claimant is more seriously injured and more deserving of enhanced compensation."[65]

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[59] However, bankruptcy courts can estimate personal injury or wrongful death claims for the limited purpose of formulating a plan of reorganization. *See* 11 U.S.C. § 502(c) (directing the bankruptcy court to estimate the value of "any contingent or unliquidated claim, the fixing or liquidation of which . . . would unduly delay the administration of the case").

[60] *See* Brubaker, *Mandatory Aggregation*, *supra* note 29, at 999–1003 (contending Section 157(b)(5) allows a bankruptcy court to operate as a superior forum to the MDL because the district court can try personal injury cases); Campos & Parikh, *supra* note 23, at 357–59 (arguing district and bankruptcy courts should coordinate bellwether trials to support mass-tort reorganizations).

[61] Parikh, *New Bargain*, *supra* note 4, at 481.

[62] 11 U.S.C. § 362(a).

[63] *See, e.g.*, *In re* LTL Mgmt., LLC, 637 B.R. 396, 404 (Bankr. D.N.J. 2022) (extending the automatic stay to LTL's parent, Johnson & Johnson); A.H. Robins Co. v. Piccinin, 788 F.2d 994, 1016 (4th Cir. 1986) (affirming the stay of plaintiffs' suits against the debtor and all co-defendants).

[64] 11 U.S.C. § 362(a)(2).

[65] McKenzie, *Toward Bankruptcy*, *supra* note 19, at 1004.

The stay may also provide crucial breathing room for a distressed debtor to recover financially.[66]

The stay's power can make it the first focal point of litigation in the bankruptcy case. The Code requires debtors to file for bankruptcy in good faith, and, while judges must enter findings on the matter before confirming the plan, any interested party can file an objection.[67] This fact-intensive inquiry generally leaves room for mass-tort debtors to reorganize under Chapter 11,[68] but the Third Circuit's recent ruling in *LTL Management, LLC* may close the courthouse to some mass-tort restructurings. The court's conclusion that LTL did not file in good faith was specific to the debtor's financial stability, but the ruling made clear to future mass-tort debtors that financial distress—in other words, strict necessity—is implicit in the good faith requirement.[69] Couched within Judge Ambro's opinion is also a broader theme that bankruptcy should be a forum of last resort for aggregate litigation.[70] This Note will later argue the Third Circuit's position is overbroad and unnecessary given bankruptcy's procedural protections.[71] Nonetheless, it is clear the automatic stay has become not just a subject of routine motion practice but also a nexus for larger debates about how federal courts can and should adjudicate mass torts.[72]

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66 *Cf.* Richard A. Nagareda, Robert G. Bone, Elizabeth Chamblee Burch & Patrick Woolley, The Law of Class Actions and Other Aggregate Litigation 786 (3d ed. 2020) (noting Combustion Engineering's bankruptcy litigation afforded the company enough time to recover financially and contribute more money to its second reorganization plan).

67 *See Chapter 11 – Bankruptcy Basics*, U.S. Courts, https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics [https://perma.cc/W8KV-YEFA] [hereinafter *Chapter 11 Basics*] (explaining Chapter 11).

68 The test for good faith is whether the bankruptcy petition serves a "valid bankruptcy purpose" and is not used "primarily as a litigation tactic." *In re* 15375 Mem'l Corp. v. Bepco, L.P., 589 F.3d 605, 609 (3d Cir. 2009). Mass-tort bankruptcies have generally met this standard. *See, e.g.*, *In re* Johns-Manville Corp., 36 B.R. 727, 737–40 (Bankr. S.D.N.Y. 1984) (holding that a petition to resolve asbestos liabilities under Chapter 11 did not demonstrate bad faith); *In re* Dow Corning Corp., 244 B.R. 673, 676 (Bankr. E.D. Mich. 1999) (finding a petition motivated by liabilities from silicone-gel breast implants was not in bad faith).

69 *See In re* LTL Mgmt., LLC, 64 F.4th 84, 93 (3d Cir. 2023) ("Good intentions—such as to protect the J&J brand or comprehensively resolve litigation—do not suffice alone. What counts to access the Bankruptcy Code's safe harbor is to meet its intended purposes. Only a putative debtor in financial distress can do so.").

70 *See id.* at 102–04 (discussing the risks of premature bankruptcy filings, including the possibility that future claims are undervalued, and pointing to bankruptcies that occurred after extensive tort litigation as models for acceptable mass-tort bankruptcies).

71 *See infra* Section II.C.

72 *See In re LTL Mgmt.*, 64 F.4th at 111 ("[Good faith] ensures that claimants' pre-bankruptcy remedies—here, the chance to prove to a jury of their peers injuries claimed to be caused by a consumer product—are disrupted only when necessary."); *In re* Aearo Techs. LLC, No. 22-02890-JJG-11, 2023 WL 3938436, at *21 (Bankr. S.D. Ind. June 9, 2023) (adopting a financial distress requirement in the absence of "a Congressional intervention that clarifies . . . when . . . debtors involved in mass tort litigation may file for bankruptcy");

These features of the Bankruptcy Code support its central aim of equitably restructuring a debtor, and they do so by acting on an important underlying premise: that sprawling litigation can benefit from a single forum with the ability to efficiently manage and adjudicate related litigation.

2. Reorganization: Equity, Voting, and Discharge

A bankruptcy proceeding normally ends in one of two ways: liquidation or reorganization. Chapter 7 governs liquidation proceedings. The debtor receives a fresh start in exchange for the liquidation and distribution of all the debtors' assets, excluding certain exempt properties.[73] In essence, a Chapter 7 debtor sells all their assets to satisfy as much of their debt as possible before beginning anew. Chapter 11, on the other hand, focuses on reorganizing the debtor's estate.[74] Chapter 11 adopts the principle of going concern: simply, bankruptcy law recognizes that both the debtor and creditors will benefit more if the profitable business (or person) can continue to operate normally.[75] Chapter 11 also keeps the debtor in possession of the business and estate, ensuring the business can operate as profitably as possible.[76] The recent wave of mass-tort cases is comprised of almost exclusively Chapter 11 filings because they permit the company to survive after committing to a reorganization plan that resembles a settlement.[77]

Bankruptcy litigation occurs over the confirmation and administration of the reorganization plan because confirmation of the bankruptcy plan triggers the Code's discharge provision.[78] The discharge provision is the debtor's prize, precluding all claimants from litigating their claims against the debtor even if the claimant did not participate in the bankruptcy proceeding or file a claim for compensation under the plan.[79]

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cf. In re 3M Combat Arms Earplug Prods. Liab. Litig., No. 3:19-MD-2885, 2022 WL 17853203, at *2–4 (N.D. Fla. Dec. 22, 2022) (sanctioning 3M for filing for bankruptcy in bad faith to halt years of litigation and progress in resolving earplug liabilities through the MDL and tort systems).

[73] *See Chapter 7 – Bankruptcy Basics*, U.S. COURTS, https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-7-bankruptcy-basics [https://perma.cc/XL5M-VTVR] (explaining Chapter 7).

[74] *Chapter 11 Basics*, *supra* note 67.

[75] *See id.* At the outset of a Chapter 11 bankruptcy case, the court may appoint a trustee who monitors the business to ensure it operates properly. *See* 11 U.S.C. § 704 (outlining the trustees' duties).

[76] *Id.* This feature may also abate corporate officials' concern that filing for bankruptcy might jeopardize their jobs, ensuring a company will take advantage of the bankruptcy laws when doing so benefits everyone.

[77] *See, e.g.*, *supra* notes 14–17 (citing Chapter 11 cases).

[78] 11 U.S.C. § 1141(d)(1).

[79] *Id.* § 1141(d)(1)(A)(i)–(iii).

The reorganization plan's key features are the classification of claims against the debtor and the compensation for each class of claims.[80] The debtor must also file a disclosure statement, which informs the creditors, trustees, and other interested parties about the plan and the debtor's background.[81] Subject to the approval of the court, the disclosure plan will generally include a summary of the reorganization plan, a description of the debtor's assets, and the plan's confirmation procedures and requirements.[82]

Any reorganization plan must adhere to the absolute priority rule, which establishes tiers of impaired creditors for purposes of recovery;[83] in other words, the plan does not guarantee lower tiers of creditors full recovery. Claimants with higher priority—secured creditors, for instance—must receive compensation from a debtor's estate before any class of claims with a lower priority—unsecured creditors, such as tort claimants—recovers.[84]

The Bankruptcy Code adds to the absolute priority rule through its core tenet of equality of distribution among creditors.[85] Two provisions are of import. First, a reorganization plan may only classify substantially similar claims together.[86] Second, a reorganization plan must guarantee the same treatment for each claim within a class.[87] These requirements go beyond the absolute priority rule. "[T]hat is, two . . . unsecured claims of the same priority may not necessarily be considered substantially similar."[88] Even though the Code generally treats tort claimants as unsecured creditors for purposes of priority,[89] their claims may be sufficiently different as a factual or legal matter to justify separate classification.[90] These principles also provide a bulwark against plans

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80 *See id.* § 1123 (detailing the contents of a reorganization plan).

81 *Id.* § 1125(b).

82 *See id.* § 1125(a)(1) (setting forth information that typically meets the "adequate information" standard demanded by the disclosure requirement).

83 *Id.* § 1129(b)(2).

84 *See id.* (codifying the priority distinction between secured and unsecured creditors).

85 *See* Begier v. IRS, 496 U.S. 53, 58 (1990) ("Equality of distribution among creditors is a central policy of the Bankruptcy Code.").

86 11 U.S.C. § 1122(a).

87 *Id.* § 1123(a)(4). While dissimilar claims may never be classified together, a plan may separate similar claims if the debtor "advance[s] a legitimate reason supported by credible proof." *In re* Chateaugay Corp., 89 F.3d 942, 949 (2d Cir. 1996).

88 McKenzie, *Toward Bankruptcy*, *supra* note 19, at 1007.

89 Christopher M.E. Painter, *Tort Creditor Priority in the Secured Credit System: Asbestos Times, the Worst of Times*, 36 Stan. L. Rev. 1045, 1049 (1984).

90 For instance, courts may separate claims by degree—based on the dollar value of their injuries—or kind—based on type of injury—to obtain more precise voting groups. *See* Melissa B. Jacoby, *Sorting Bugs and Features of Mass Tort Bankruptcy*, 101 Tex. L. Rev. 1745, 1757 nn.76–78 (2023) (identifying asbestos bankruptcies and Purdue Pharma's case as examples of reorganization plans that separated mass-tort claims into different

that integrate creative class gerrymanders meant to sway confirmation proceedings.[91] In sum, by enforcing the equality of creditors through statutory mandate, the Code materially advances aggregate litigation's core goal of horizontal equity.

To develop these classes, the bankruptcy court typically must estimate the value of claims.[92] Estimation is vital to establishing proper classes in run-of-the-mill bankruptcy cases but takes on a special role in mass-tort reorganizations. Estimation is critical to establishing a debtor's total liability, which impacts their contribution to the reorganization plan. If the estimation process produces an inaccurate result, then many injured individuals, likely future claimants, may not receive adequate or equitable recovery.[93] Courts have the flexibility to determine the best method for claim estimation,[94] but estimation hearings often collapse into a battle of the experts.[95]

Effective classification also enables the critical stage of the bankruptcy proceeding: voting. Claimants must vote on the reorganization plan before the bankruptcy judge can confirm it. The Bankruptcy Code treats each class individually for voting purposes, and a class, including the dissenting claimants within the class, accepts a plan when (1) those with two-thirds of the value of the class's claims and (2) a majority by the number of claims vote for the plan.[96] Ideally, a reorganization plan receives sufficient support from all classes. However, a class with sufficient cohesiveness might attempt to extract more money out of the debtor by withholding votes. The Bankruptcy Code pre-empts such maneuvers through its "cramdown" procedure. If the court finds that the reorganization plan does not "discriminate unfairly" and is ultimately "fair and equitable," it may confirm the plan over a class's dissent.[97] The risk that a class's strategic holdout may fail drives claimants toward the negotiating table, ensuring each class secures the

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classes). *But see In re* Boy Scouts of Am., 642 B.R. 504 (Bankr. D. Del. 2022) (classifying all direct-abuse claims together).

91 *See infra* notes 309–22 (discussing attempts to "pack" and "crack" different constituencies to pass a bankruptcy plan).

92 11 U.S.C. § 502(c).

93 *See* Parikh, *New Bargain*, *supra* note 4, at 491–92 ("Bankruptcy courts must estimate the aggregate value of future claims . . . . The significance of the final number cannot be overstated; it will be transformative for the case and all affected victims.").

94 *See* Bittner v. Borne Chem. Co., 691 F.2d 134, 135 (3d Cir. 1982) (noting Congress intended for courts to estimate claims with "whatever method is best suited to the particular contingencies at issue").

95 *See* Parikh, *New Bargain*, *supra* note 4, at 492 & nn.348–49 ("Estimation hearings are multiday affairs filled with conflicting expert witness testimony.").

96 11 U.S.C. § 1126.

97 *Id.* § 1129(b)(1).

best outcome through active bargaining and participation rather than through obstruction.[98]

A critical feature of the Code's voting procedure is the creation of individual and group voting rights.[99] Centralizing a case into a single forum encourages participation as a practical matter,[100] but the Code's guarantee of voting rights formalizes individual voice well beyond what is available in other forums. Yet, the individual right to vote in a bankruptcy proceeding does not guarantee one's preferred outcome, as the Code ties each claimant's fate to those of their class *and* the entire proceeding. It is therefore almost inevitable that every bankruptcy plan precludes at least one nonconsenting claimant from relitigating their tort claims in future proceedings. Nonetheless, as the rest of this Note will detail, the Chapter 11 process that culminates in these voting procedures—which strike an effective balance between individual control over the litigation process and the necessity of a final collective resolution—can routinely meet constitutional due process minima, even despite many of the developments discussed in the next Section.

B. Modern Developments and Issues in Mass-Tort Bankruptcies

1. Nondebtor Releases: The Channeling Injunction, 524(g), and Current Uses

Bankruptcy's principal limitation as an aggregation device is that its jurisdiction and discharge provisions are generally cabined to the debtor.[101] However, mass-tort litigation normally produces multiple defendants allegedly responsible for similar conduct. Multi-district litigation consolidates *all* plaintiffs and defendants litigating a common issue.[102] In doing so, an MDL produces greater efficiencies in litigation on common pretrial issues, but more importantly, it also creates a central forum for all affected parties to negotiate a truly global settlement. Bankruptcy's focus on the debtor generally makes it a single-defendant

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98 *See* McKenzie, *Toward Bankruptcy*, *supra* note 19, at 1008 & n.183 (citing Richard F. Broude, *Cramdown and Chapter 11 of the Bankruptcy Code: The Settlement Imperative*, 39 BUS. LAW. 441, 450–54 (1984)) (confirming the rarely-used cramdown procedure prevents "dissenting claimants from blocking a plan that serves the interests of claimants more broadly").

99 *See id.* at 1008–09 ("[A] collective resolution system that takes into account group and individual consent . . . , although now prominently found in the Bankruptcy Code, originates in equitable principles not strictly tied to any language of the Code itself.").

100 *See* Cabraser & Issacharoff, *supra* note 18, at 876 (arguing centralization before one MDL judge encourages litigant participation).

101 *See* 11 U.S.C. § 1141(d)(1) (discharging "the debtor from any debt").

102 *See* 28 U.S.C. § 1407(a) (enabling consolidation of all "civil actions involving one or more common questions of fact . . . for coordinated or consolidated pretrial proceedings").

forum. In response, bankruptcy litigants developed the nondebtor release, which allows the bankruptcy court to extend a reorganization plan's discharge or automatic stay to *other* mass-tort defendants' liabilities *without* demanding they declare bankruptcy.[103] This gives rise to the due process concern that nondebtor, mass-tort defendants may cheaply receive their global peace through a mechanism that does not afford claimants sufficient notice, voice, or compensation. However, the nondebtor release's history demonstrates that reorganization plans may properly include them.

This tool's development began with the Johns-Manville Corporation and its carcinogenic asbestos products. The company filed for bankruptcy to seek protection from the number of future claims that were projected to overwhelm its resources.[104] The parties settled on a "creative solution"[105] effectuated by an expansive use of the bankruptcy court's general equitable powers under Section 105(a)[106]: the creation of a settlement trust to compensate all current and future asbestos claimants.[107] The reorganization plan also included a *channeling injunction*, which required injured parties to bring all asbestos-related claims against the trust and prohibited them from pursuing the assets of the reorganized Manville Corporation, its subsidiaries, or insurance providers.[108] The trust-and-injunction structure provided novel protection for third parties and set the stage for modern-day practice.[109]

Congress then blessed the Manville trust structure through the 1994 addition of Section 524(g) to the Bankruptcy Code.[110] However, 524(g) is specific to asbestos-related demands.[111] The Section sets forth

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103 *See generally* Simon, *supra* note 25 (chronicling the development of the nondebtor release and arguing procedural and substantive checks can limit their potential problems); Brubaker, *Mandatory Aggregation*, *supra* note 29 (arguing the Supreme Court should prevent lower courts from issuing nondebtor releases because neither the Bankruptcy Code nor the Constitution authorizes them).

104 *In re* Johns-Manville Corp., 97 B.R. 174, 176 (Bankr. S.D.N.Y. 1989).

105 H.R. Rep. No. 103-835, at 40 (1994).

106 11 U.S.C. § 105(a) ("The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.").

107 *See In re Johns-Manville*, 97 B.R. at 176–78 (outlining the reorganization plan).

108 *In re* Johns-Manville Corp., 68 B.R. 618, 624 (Bankr. S.D.N.Y. 1986).

109 *See* Nagareda et al., *supra* note 66, at 755–56 (noting the novelty of the Manville reorganization because channeling injunctions normally "shield only the reorganized corporation (Manville itself)—not others like its potential investors").

110 11 U.S.C. § 524(g); *see generally* Travelers Indem. Co. v. Bailey, 557 U.S. 137, 155 (2009) (providing background).

111 *See* 11 U.S.C. § 524(g)(2)(B)(i)(I) (limiting the injunction to actions for damages allegedly caused by asbestos-related products).

requirements for how to establish and fund an asbestos trust,[112] but four specific features warrant attention. First, the Code requires the trust to treat present and future claimants equitably.[113] Second, to effectuate that requirement, the bankruptcy court must appoint separate counsel to represent future claimants in proceedings.[114] The futures representative ensures the bankruptcy proceeding affords future claimants due process[115] while also providing a mechanism for their input into the plan's distribution metric, which values each claim filed against the trust. A case cannot proceed without the representative's acquiescence.[116] Third, Section 524(g) adds a supermajority requirement to Chapter 11's usual voting procedures. At least seventy-five percent of "the claimants whose claims are to be addressed" must vote in favor of the plan.[117] Finally, the Code permits channeling injunctions to cover third parties with special financial relationships to the debtor.[118] These principal provisions on the creation, scope, and confirmation of a reorganization plan have become highly influential in bankruptcy practice and aggregate litigation.[119]

Shortly after the Manville bankruptcy, mass-tort defendants facing liabilities for an array of product-liability suits sought to mimic the Manville plan.[120] The Dow Corning Corporation, for instance, filed for Chapter 11 relief from lawsuits concerning their silicone gel breast implants, which allegedly caused autoimmune issues.[121] The Sixth Circuit's opinion confirmed that courts could replicate Manville and

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112 *See* Lloyd Dixon, Geoffrey McGovern & Amy Coombe, Asbestos Bankruptcy Trusts: An Overview of the Trust Structure and Activity with Detailed Reports on the Largest Trusts 8 (2010), https://www.rand.org/pubs/technical_reports/TR872.html [https://perma.cc/N3TV-9VMM] (summarizing the requirements).

113 11 U.S.C. § 524(g)(2)(B)(ii)(V) (requiring the trust to treat all asbestos demands in "substantially the same manner" regardless of the timing of those demands).

114 *Id.* § 524(g)(4)(B)(i).

115 *See In re* Combustion Eng'g, Inc., 391 F.3d 190, 234 n.45 (3d Cir. 2004) ("Many of these requirements are specifically tailored to protect the due process rights of future claimants."); *id.* at 245 ("In the resolution of future asbestos liability, under bankruptcy or otherwise, future claimants must be adequately represented throughout the process.").

116 *See* 11 U.S.C. § 524(h)(1)(c) (conditioning the effect of injunctions issued prior to the enactment of the statute on an appointed legal representative not objecting to the plan).

117 *Id.* § 524(g)(2)(B)(ii)(IV)(bb). Critically, future demands are treated separately from claims and are not included in this vote. Nagareda et al., *supra* note 66, at 758.

118 11 U.S.C. § 524(g)(4)(A)(ii)–(iii).

119 *See* Principles of the Law of Aggregate Litigation § 3.17 [hereinafter Principles of Aggregate Litigation] (Am. L. Inst. 2010) (modeling a procedure for aggregate private settlements after 524(g)).

120 *See, e.g.*, A.H. Robins Co. v. Piccinin, 788 F.2d 994, 996 (4th Cir. 1986) (Dalkon Shield intrauterine device); *In re* Dow Corning Corp., 280 F.3d 648, 653 (6th Cir. 2002) (silicone gel breast implants).

121 *In re Dow Corning*, 280 F.3d at 653–64.

524(g) with Section 105(a)'s grant of general equitable authority to address the gambit of mass-tort issues, making way for bankruptcy as a common aggregate litigation tool.[122]

The *Dow Corning* opinion also paved the groundwork for courts to expand the scope of a channeling injunction to more remote nondebtors. The Manville bankruptcy court extended a liability shield to investors because it feared the reorganization would fail without their contribution.[123] But, the Sixth Circuit's test[124] and subsequent doctrine do not hold a view that the channeling injunction must be strictly necessary for a reorganization. Rather, courts have come to approve nondebtor releases if such an injunction is "necessary to do the [specific] deal embodied in the plan of reorganization."[125] Purdue Pharma's bankruptcy case presents such use of the nondebtor release.[126] The bankruptcy court confirmed a reorganization plan relieving the Sackler family, who owned and operated Purdue during the opioid epidemic, from personal liability, in part because the family contributed $4.326 billion to the settlement fund.[127]

Thus, in many circuits, current law supports the expansion of nondebtor releases to other mass-tort defendants facing lawsuits related to those of the debtor so long as the nondebtors promise a substantial contribution to the reorganization trust.[128] Critically, the substantial contribution requirement is not simply a condition of the

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122 *See* Simon, *supra* note 25, at 1175 (explaining how *Dow Corning* "[e]mboldened . . . other debtors facing mass-tort exposure").

123 NAGAREDA ET AL., *supra* note 66, at 755–56.

124 *See In re Dow Corning*, 280 F.3d at 658 (identifying the seven prerequisite conditions that define when a bankruptcy presents the "unusual circumstances" needed to justify a channeling injunction as "necessary" under Section 105(a) (citations omitted)).

125 Brubaker, *Mandatory Aggregation*, *supra* note 29, at 988; *see In re* Centro Grp., LLC, No. 21-11364, 2021 WL 5158001, at *3 (11th Cir. Nov. 5, 2021) (per curiam) (citing *In re Dow Corning*, 280 F.3d at 658) (permitting a nondebtor release even though it was "not to ensure success for a reorganized entity by eliminating liability against third parties but . . . to facilitate a settlement agreement").

126 *See* Simon, *supra* note 25, at 1202 (discussing Purdue and noting the general trend of nondebtor releases now covering more codefendants with tenuous legal links to the debtor).

127 *In re* Purdue Pharma L.P., 633 B.R. 53, 97–98 (Bankr. S.D.N.Y. 2021). The Second Circuit recently reversed the "district court's order holding that the Bankruptcy Code does not permit nonconsensual third-party releases of direct claims" and affirmed the bankruptcy court's approval of Purdue's reorganization. *In re* Purdue Pharma L.P., 69 F.4th 45, 85 (2d Cir. 2023). The Supreme Court then stayed the Second Circuit's mandate to the lower courts and granted certiorari on the statutory question, halting the Purdue bankruptcy until the Court issues judgment after full briefing and oral argument. Harrington v. Purdue Pharma, L.P., No. 23-124, 2023 WL 5116031 (U.S. Aug. 10, 2023).

128 *See* Gary Svirsky, Tancred Schiavoni, Andrew Sorkin & Gerard Savaresse, *A Field Guide to Channeling Injunctions and Litigation Trusts*, 260 N.Y. L.J., July 16, 2018 (concluding these "criteria are not as limiting as may at first appear").

Bankruptcy Code. As this Note will later explain, due process tests the fit between the release claimants grant and the peace premium they receive; releasing claims against nondebtors without adequate compensation—as defined through claimant voice and vigorous pre-settlement litigation—undermines the legitimacy of bankruptcy resolutions.[129]

2. *Case Management and Claims-Processing Schemes*

Mass-tort bankruptcies require significant factual and administrative work. They must establish a distribution scheme to classify and value each injury, and they need a mechanism to process claims and resolve disputes or objections. As a result, bankruptcy judges have accepted the mantle of active case managers,[130] conducting pretrial litigation on matters that advance the parties' formulation of an equitable compensation-distribution metric. Further, the Bankruptcy Code affords parties flexibility in administering tort trusts, giving rise to procedural designs that borrow from class actions or other aggregate devices. Here, the due process is in the details: whether these extra features frustrate claimant recovery, somehow limit exit, voice, and loyalty rights, or actually enhance claimants' process rights can change the outcome of a case.

Section 105(d) of the Bankruptcy Code empowers judges to hold status conferences with any party and enter any order "necessary to further the expeditious and economical resolution of the case."[131] Bankruptcy courts typically schedule early status conferences to set ground rules on notices and filings and schedules for motions practice.[132] Further, bankruptcy judges make two critical rulings at the outset of litigation: issuing a bar date—the date by which claimants must file their proof of claims[133]—and establishing the information claimants must provide

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129 *See infra* Section III.B.2.

130 *See* McKenzie, *Toward Bankruptcy*, *supra* note 19, at 1004 (citing Harvey R. Miller, *The Changing Face of Chapter 11: A Reemergence of the Bankruptcy Judge as Producer, Director, and Sometimes Star of the Reorganization Passion Play*, 69 Am. Bankr. L.J. 431, 433–40 (1995)) (recognizing the rise of the managerial bankruptcy judge).

131 11 U.S.C. § 105(d)(1).

132 *See* S. Elizabeth Gibson, Fed. Jud. Ctr., Judicial Management of Mass Tort Bankruptcy Cases 7–8 (2005) (outlining best practices for bankruptcy judges dealing with mass-tort reorganizations).

133 Fed. R. Bankr. P. 3003(c)(3) provides that courts "shall fix" a bar date. Many courts interpret the rule as only requiring the courts set a bar date at some point in the future so long as the court has "good cause" for not setting one as soon as possible. *See, e.g.*, *In re* Eagle-Picher Indus., Inc., 137 B.R. 679, 680–81 (Bankr. S.D. Ohio 1992) (citing Reid v. White Motor Corp., 886 F.2d 1462, 1472 n.14 (6th Cir. 1989), *cert. denied*, 494 U.S. 1080 (1990)).

on their proof of claim forms.[134] These orders set the pace of litigation during the consolidated proceeding and define how much information parties have about the universe of claimants when negotiating a reorganization plan and establishing claimant recovery.

Though bankruptcy courts are limited in their ability to adjudicate personal injury and wrongful death claims, recent coordination with district courts has been able to overcome this statutory quirk. In some mass-tort cases, district judges withdraw their reference to the bankruptcy court and instead adjudicate important pretrial orders on discovery, declaratory relief of the debtor's tort liabilities, and evidentiary issues themselves.[135] District courts may even lift the automatic stay to permit bellwether trials, sample cases orchestrated to value claims, and facilitate compromise on the reorganization plan.[136] These new moves effectively mirror the case management techniques MDL judges frequently employ to facilitate settlement.[137]

Bankruptcy courts use their statutory discretion to confirm complex reorganization plans that borrow features from other aggregate settlements.[138] The Takata bankruptcy, for instance, offered claimants (a) the ability to opt out of the bankruptcy proceedings and re-enter the tort system at will if their suit was against certain nondebtors[139] and

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134 *See* Gibson, *supra* note 132, at 75 (noting debtors will request more specific proof of claims forms and "will have to determine whether and to what extent Rule 3001(a) permits the court to impose such special proof of claim requirements on mass tort claimants"); *id.* at 75–77 (providing examples of mass-tort bankruptcies that required specialized proof of claims forms, which requested information about the alleged injuries, the brand name of the asbestos installed, the date of installation, and an estimate of damages caused by the asbestos).

135 *See, e.g.*, *In re* A.H. Robins Co., 59 B.R. 99, 105 (Bankr. E.D. Va. 1986) (listing the seventeen categories of issues that the district court withdrew from their initial reference to the bankruptcy court); *In re* Dow Corning Corp., 215 B.R. 526, 527–30 (Bankr. E.D. Mich. 1997) (recommending the district court withdraw its reference to the bankruptcy court—the author of the opinion—on "omnibus objections," such as *Daubert* motions and summary judgment, for practical and statutory reasons).

136 *See* Campos & Parikh, *supra* note 23, at 357–58 (recommending district courts lift the automatic stay to permit bellwether trials and citing *In re* PG&E Corp., No. 19-bk-30088, 2019 WL 3889247 (Bankr. N.D. Cal. Aug. 16, 2019), as an example); Gibson, *supra* note 132, at 87 & nn.379–80 (discussing different trial approaches to resolving common mass-tort issues but noting "none [have] actually been used" in bankruptcy proceedings at that point in time).

137 *Compare* notes 132–36 and accompanying text, *with* Nagareda et al., *supra* note 66, at 652–56 (discussing the broad authority MDL judges employ, and detailing case management techniques such as fact sheets, which provide an overview of the plaintiff's case, and bellwether trials).

138 *See* Simon, *supra* note 25, at 1180 n.135 (confirming "mass-tort settlements outside of bankruptcy often end in settlement schemes that pay out of a similar trust structure").

139 *See id.* at 1178 (citing PSAN PI/WD Trust Distribution Procedures at 37, *In re* TK Holdings, No. 17-11375 (Bankr. D. Del. Mar. 26, 2018), ECF No. 2505-2) (explaining certain claimants may seek relief in the court system after exhausting the Trust's procedures).

(b) many opportunities for individualized review and appeal where claimants could share independent evidence for personalized compensation not wholly based on a rigid schedule.[140] On the other hand, the Purdue Pharma bankruptcy plan channeled claims into a "labyrinthian structure of trusts" that consumed a significant percentage of assets available for administrative oversight.[141]

Reorganization plans, like any other aggregate settlement, have the potential to impose hardships on claimants attempting to navigate a purposefully complex settlement design or afford claimants substantive and procedural protections that enhance the legitimacy of the aggregate resolution. It is no surprise that many modern reorganizations attempt to hinder claimant recovery through procedural guardrails,[142] but a debtor's motivation to limit liability—in essence, pursue their fiduciary duty—should not alone be sufficient to invalidate reorganization plans. As the rest of this Note will demonstrate, due process caselaw can help separate impermissible and permissible claims-processing schemes.

3. The Texas Two-Step

Defendants increasingly use their corporate subsidiaries and partners to maneuver their tort liabilities into bankruptcy. For instance, in October 2021, Johnson & Johnson's subsidiary, LTL Management, sought bankruptcy relief from a slew of claims alleging their talc-based baby powder products caused ovarian cancer and mesothelioma.[143] However, LTL did not produce, distribute, market, or profit from J&J's baby powder products. Nonetheless, its petition asserted responsibility for all talc-related tort liabilities attributed to J&J, an argument enabled by Texas corporate law.[144]

Once a corporation—inevitably of Delaware origin—re-incorporates under Texas state law, the first step begins: the company splits into two entities, assigning certain liabilities and assets to each.[145] The recreated parent company will retain effectively all the assets of the original, and the newly created subsidiary will become "the dumpster

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140 *Id.* at 1180.

141 *Id.* at 1190 & n.176.

142 *See id.* at 1203.

143 Jesus Jiménez, *Johnson & Johnson Subsidiary Seeks Bankruptcy Protection to Handle Talc Product Claims*, N.Y. Times (Oct. 14, 2021), https://www.nytimes.com/2021/10/14/business/johnson-johnson-bankruptcy-talc-claims.html [https://perma.cc/VN5D-UC4D].

144 *See In re* LTL Mgmt., LLC, 637 B.R. 396, 400–02 (Bankr. D.N.J. 2022) (providing background on the creation of LTL Management and its bankruptcy petition).

145 Samir D. Parikh, *Mass Exploitation*, 170 U. Pa. L. Rev. Online 53, 58–59 (2022) [hereinafter Parikh, *Mass Exploitation*].

for all of [the parent's] mass tort liability."[146] At this stage, the companies also execute some sort of funding agreement, which obligates the recreated parent company to pay for all litigation expenses and tort liabilities the subsidiary will incur.[147] Then, the subsidiary files a Chapter 11 petition, engages the automatic stay, and moves to extend the stay to the nondebtor parent corporation.[148]

The potential for abuse is readily apparent. By placing the new assetless subsidiary into bankruptcy, the parent company could compensate claimants less than it would if the original corporation had simply entered bankruptcy itself. After a Texas Two-Step, the bankruptcy court and claimants may be unable to fairly negotiate a reorganization plan because they lack sufficient access to the parent company's financials and management personnel.[149] And, the nature of the funding agreement, which may allocate funds through a schedule rather than a lump sum, can limit recovery if liabilities outpace the assets supplied to the subsidiary under the agreement.[150] Further, the agreement may fail to provide contingencies if the parent company collapses in the interim and cannot meet its financial obligations to the subsidiary-debtor.[151] The Two-Step amplifies the already plentiful concern that mass-tort bankruptcies artificially limit claimant recovery.

Objectors in *LTL* made such arguments. But, the New Jersey bankruptcy court denied their motion and found the Two-Step permissible under the Bankruptcy Code.[152] The Third Circuit recently reversed on grounds formally unrelated to the Two-Step,[153] but the opinion stressed the importance of safeguarding a critical feature of due process in the traditional tort system—claimants' right to a trial by jury.[154] Though rejected in this instance, the Two-Step lives on for another court date,[155]

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146 *Id.*

147 *See id.* ("Mass tort defendants argue that this agreement—which is the linchpin to defending against a fraudulent transfer claim—ensures that [the subsidiary] has the same ability to pay off its mass tort claims as [the parent] did before the divisive merger.").

148 *See In re LTL Mgmt.*, 637 B.R. at 400–02 (discussing how LTL moved to extend the automatic stay to "certain third parties").

149 *Cf.* Parikh, *Mass Exploitation*, *supra* note 145, at 59 (highlighting the Texas Two-Step's attractiveness to parent companies who would prefer not to subject their financials and employees to Chapter 11 proceedings).

150 *Id.* at 69.

151 *Id.*

152 *In re LTL Mgmt.*, 637 B.R. at 407–08, 409, 416–17 (arguing bankruptcy can efficiently resolve mass torts, and recognizing J&J's open-wallet approach to the case, one where the company did not seek to shield any assets).

153 *In re* LTL Mgmt., LLC, 64 F.4th 84, 93, 110–11, 110 n.19 (3d Cir. 2023).

154 *Id.* at 764.

155 *See, e.g.*, *In re* Bestwall LLC, 71 F.4th 168, 173–74 (4th Cir. 2023) (affirming a district court's preliminary injunction barring third-party asbestos claims from proceeding against Bestwall's nondebtor affiliates, which were created through a Texas Two-Step).

but it does so under a clear warning that formal corporate divisions cannot escape a bankruptcy court's equitable mandate.[156]

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Each of the three maneuvers that define the modern bankruptcy landscape raises serious policy concerns. In almost all the above cases, litigants have funneled their policy concerns through statutory questions: For instance, does Section 105(a) permit nondebtor releases, or does the Code's requirement that debtors file for bankruptcy in good faith prevent litigants from using the Texas Two-Step? Courts may disagree as a matter of statutory interpretation or, like in *LTL*, believe that objectors' policy arguments, though well-taken, do not justify a complete statutory prohibition of the reorganization at bar. However, few courts on the front line of these issues have confronted the question of when such maneuvers, though permitted by the Bankruptcy Code, go too far. The following two Parts begin to sketch a framework to enable courts and litigants to answer that question.

II
Preclusion and Due Process: Bankruptcy's Doctrinal Foundations

Bankruptcy, like all aggregate litigation, lives by preclusion. Courts can only achieve judicial economy, defendants will only secure global peace, and plaintiffs will only receive worthwhile compensation if they prevent the relitigation of common issues.[157] Through the doctrine of claim preclusion, a final judgment "forecloses 'successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit.'"[158] Typically, courts assess whether

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156 Shortly after losing the Third Circuit appeal, J&J refiled for bankruptcy after reaching an $8.9 billion settlement with attorneys representing tens of thousands of talc claimants. Tiffany Hsu, *Johnson & Johnson Reaches Deal for $8.9 Billion Talc Settlement*, N.Y. Times (Apr. 4, 2023), https://www.nytimes.com/2023/04/04/business/media/johnson-johnson-talc-settlement.html [https://perma.cc/T8QG-3EZM]. The bankruptcy court then dismissed J&J's second petition. *In re* LTL Mgmt., LLC, No. 23-12825 (MBK), 2023 WL 4851759, at *17 (Bankr. D.N.J. July 28, 2023).

157 *See* Principles of Aggregate Litigation, *supra* note 119, § 2.02 cmt. e ("There is no point to the aggregate treatment of common issues in litigation if such treatment will not alleviate, as a practical matter, the need to revisit the same issues in other proceedings."); *id.* § 3.10 cmt. b ("Global peace may best serve the interests of all parties."); *see also supra* notes 5–12 and accompanying text.

158 Taylor v. Sturgell, 553 U.S. 880, 892 (2008) (quoting New Hampshire v. Maine, 532 U.S. 742, 748 (2001)). Issue preclusion, on the other hand, only prevents parties from relitigating specific issues of fact or law under certain conditions. *Id.*

preclusion applies by first looking at the parties in the prior litigation.[159] But, to achieve meaningful finality, aggregate proceedings must often bind potential claimants *not* party to the proceeding.[160] Thus, parties to aggregate litigation attempt to find the easiest route to securing a judgment that adheres to the special preconditions for *nonparty* claim preclusion.[161]

The Fifth Amendment's Due Process Clause[162] supplies the primary limitation on nonparty preclusion because the Court has long protected one's right to pursue a cause of action as a core property interest,[163] and federal preclusion law "runs up against the 'deep-rooted historic tradition that everyone should have [their] own day in court.'"[164] The Court in *Taylor v. Sturgell* set forth only six limited exceptions where federal common law may bind nonparties to prior federal court judgments.[165] Two of them govern a significant portion of the aggregate litigation landscape. Under *Taylor*'s third category, prior litigation conducted by someone who adequately represents a nonparty with the same interests may preclude the nonparty from relitigating claims.[166] Class action lawsuits fall within this exception.[167] *Taylor*'s sixth and final category includes special statutory schemes, such as bankruptcy.[168] *Taylor*'s critical move, which builds on a footnote from *Martin v. Wilks*, is to classify the Bankruptcy Code's discharge features as a basis for invoking the federal common law of preclusion.[169]

The implications of Justice Ginsburg's *Taylor* opinion are twofold. First, *Taylor* makes federal preclusion law and its unique due process considerations the doctrinal foundation for any bankruptcy case. That is,

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159 *See id.* (noting claim and issue preclusion prevent "*parties* from contesting matters they had a full and fair opportunity to litigate" (emphasis added) (quoting Montana v. United States, 440 U.S. 147, 153–54 (1979))).

160 *See supra* notes 104–19 and accompanying text (discussing the specific problems future claimants pose to tortfeasors and the measures bankruptcy takes to bind them to the reorganization plan).

161 Lahav, *supra* note 7, at 1394.

162 U.S. CONST. amend. V; *see also* U.S. CONST. amend. XIV § 1.

163 *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 807 (1985) (citing Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306 (1950)).

164 *Taylor*, 553 U.S. at 892–93 (quoting Richards v. Jefferson County, 517 U.S. 793, 798 (1996)).

165 *Id.* at 893–95. The Court also rejected a seventh category: virtual representation. *Id.* at 904.

166 *Id.* at 894.

167 *Id.*; Hansberry v. Lee, 311 U.S. 32, 41 (1940).

168 *Taylor*, 553 U.S. at 895 (quoting Martin v. Wilks, 490 U.S. 755, 762 n.2 (1989)); *see also* Ortiz v. Fibreboard Corp., 527 U.S. 815, 859–61 & n.34 (1999) (stating Rule 23 and bankruptcy may preclude relitigation, and comparing the (b)(1)(B) limited-fund class to Chapter 11 bankruptcies).

169 *Taylor*, 553 U.S. at 895 (quoting *Martin*, 490 U.S. at 762 n.2).

an application of the Bankruptcy Code may only result in an effective reorganization when it is "otherwise consistent" with due process.[170] Even if Congress authorized any of the modern trends in mass-tort bankruptcies, a reorganization plan would not withstand objection if those provisions transgressed the limitations due process establishes. Second, as a result, courts can regulate the whole of aggregate litigation. The fact that mass torts present the same concerns, regardless of the procedural posture, tends to create a hydraulic effect.[171] Parties will flow to the forum with the easiest path to finality. Inconsistencies across the aggregate litigation landscape may push settlements to forums—even outside the court system—where parties receive no robust protections.[172] But *Taylor* confirms that all aggregation techniques share more than goals and features; they share an identical legal foundation that proscribes their outer bounds. Through preclusion and due process, courts can advance aggregate litigation's core goals—horizontal equity, sufficient guarantees of procedural justice, and finality—no matter the procedural box.

For those reasons, this Note builds on *Taylor*'s test—whether bankruptcy's statutory scheme is "otherwise consistent" with due process—to evaluate a reorganization's legitimacy.

A. Solving the "Otherwise Consistent" Puzzle: Exit, Voice, and Loyalty

Taylor's six distinct categories are helpful guideposts for courts and litigants attempting to frame nonparty preclusion issues, but scholarly criticism rightfully exposes the overly rigid and reductive approach to due process the categories denote.[173] In separating bankruptcy from class actions, Justice Ginsburg softly implies different standards govern the preclusive effect of class actions and bankruptcies. For instance, *Taylor* expands on its third category of adequate representation, detailing all

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170 *Id.* at 895.

171 *See* Lahav, *supra* note 7, at 1394 ("Mass litigation is like water, the cases will move to the form of litigation that is the most available, be it the class action, a consolidation of individual cases under the auspices of the MDL, or bankruptcy.").

172 *See* Sullivan v. DB Invs., Inc., 667 F.3d 273, 336 (3d Cir. 2011) (en banc) (Scirica, J., concurring); *see* Cabraser & Issacharoff, *supra* note 18, at 875 ("The aggregation of mass harm cases in federal courts did not end with *Amchem* and *Ortiz*—it just took more experimental and less transparent forms.").

173 *See, e.g.*, Victor Petrescu, *Crash and Burn:* Taylor v. Sturgell*'s Radical Redefinition of the Virtual Representation Doctrine*, 64 U. Mia. L. Rev. 735, 737 (2015) (arguing *Taylor*'s "rigid categorical approach is inferior to a factual analysis based on flexible standards"); *see also* Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. Rev. 193, 195, 288 (1992) (lamenting the "uniform and relatively strict application of preclusion rules," and advocating for context-dependent standards based on the strength of one's "normative claim to participate at all").

of its requirements.[174] On the other hand, the opinion provides no guidance on when a reorganization violates due process, leaving black-letter doctrine as a seemingly tautological bootstrap.[175] However, *Taylor*'s silence on bankruptcy's due process minima should not be taken as a suggestion that outer bounds on its preclusive capacities do not exist. Nor should the opinion's distinct categorization of nonparty preclusion create a hermetic seal between the standards that govern each category. Rather, the Court's requirement that bankruptcy be "otherwise consistent" with due process harkens back to foundational principles that guided the development of preclusion through representation: exit, voice, and loyalty.

Professor Albert O. Hirschman, building on prior literature in economics on markets, firms, and local governments, famously synthesized the tripartite framework of exit, voice, and loyalty to provide a unified theory of why organizations decline.[176] Professors Samuel Issacharoff[177] and John C. Coffee, Jr.[178] made the significant contribution of framing the Court's class action jurisprudence through that well-established governance model from democratic theory and corporate law. Their insights took hold because of the innate similarities between aggregate litigation, polities, and businesses, but also because due process doctrine easily meshes with the tripartite framework.[179]

Exit typifies the response of an unhappy consumer in a marketplace, investor in a corporation, or litigant in an aggregate proceeding; they can purchase a different product, sell their shares, or opt out.[180] Exiters simply leave displeasing collective arrangements. Voice, on the other hand, is an attempt to actively change an objectionable state of

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174 *Taylor*, 553 U.S. at 900 (citations omitted).

175 *See* Martin H. Redish & William J. Katt, Taylor v. Sturgell*, Procedural Due Process, and the Day-in-Court Ideal: Resolving the Virtual Representation Dilemmas*, 84 Notre Dame L. Rev. 1877, 1887–88 (2009) ("[A]t no point has [the Court] articulated any firm conceptual grounding or theoretical rationale for . . . why a litigant's right to have her day in court should be protected . . . or why exceptions to that rule are nevertheless permitted in certain situations."). No Supreme Court opinion has expanded beyond the one-sentence assertion about bankruptcy in *Martin*'s footnote. *See, e.g.*, *Taylor*, 553 U.S. at 895 (citing Martin v. Wilks, 490 U.S. 755, 762 n.2 (1989)); Ortiz v. Fibreboard Corp., 527 U.S. 815, 846 (1999) (citing *Martin*, 490 U.S. at 762 n.2); Richards v. Jefferson County, 517 U.S. 793, 798–99 (1996) (citing *Martin*, 490 U.S. at 762 n.2).

176 *See* Albert O. Hirschman, Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States, at vii (1970) (hoping to apply his framework to market competition, America's two-party system, the Vietnamese government, and divorce).

177 Issacharoff, *Governance and Legitimacy*, *supra* note 41, at 366.

178 John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 Colum. L. Rev. 370, 371 (2000) [hereinafter Coffee, *Class Action Accountability*].

179 McKenzie, *Governance in Complex Litigation*, *supra* note 28, at 209–10.

180 Coffee, *Class Action Accountability*, *supra* note 178, at 377.

affairs.[181] Think of constituents voting in elections for a new slate of representatives or shareholders choosing to remove corporate directors. Finally, loyalty in the litigation arena refers to the fiduciary duties of claimants' representatives.[182] An attorney must zealously advance their client's interests, or a class representative must adequately represent their peers. Together, these levers give form to an organization's legitimacy and abate decline.[183] As a result, a sufficient guarantee of at least part of the due process triad provides a basis for preclusion on rationales of adequate representation,[184] participation,[185] or consent.[186]

1. Loyalty: Aligned Incentives

Hansberry v. Lee, a suit by white homeowners to enforce a racially restrictive covenant, begins the adequate representation canon.[187] The Court affirmed that an adequate representative could bind absent class members[188] but found no proper class existed in a prior suit that could preclude the current litigation.[189] That some homeowners, such as

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181 Hirschman, *supra* note 176, at 30. However, this conception of voice differs slightly from the term's use in describing values of procedural justice. *See* Foohey & Odinet, *supra* note 34 (manuscript at 1) (highlighting procedural justice's core tenets of participation and individual dignity, and arguing recent mass-tort bankruptcies silence claimants and undermine these values).

182 Coffee, *Class Action Accountability*, *supra* note 178, at 377. However, this conception of loyalty differs from Hirschman's original thesis, which posits loyalty as a flexible concept that negotiates between an individual's choice to exhibit displeasure through exit or voice. *See* Hirschman, *supra* note 176, at 78 ("[L]oyalty holds exit at bay and activates voice.").

183 *See* Hirschman, *supra* note 176, at 120 (confirming voice and exit guide "a firm or organization back to efficiency after the initial lapse"). Commentators also frame the issue as one of agency costs. *See* Coffee, *Class Action Accountability*, *supra* note 178, at 439 ("Exit, voice, and loyalty have different costs and produce different benefits. Recognizing them as potential functional substitutes represents the rational first step toward reducing the agency costs of class action governance.").

184 *See* David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 Notre Dame L. Rev. 913, 937 (1998) (observing that early class action law measured due process by adequacy of representation, not consent or the right to opt-out); Taylor v. Sturgell, 553 U.S. 880, 900 (2008) (holding adequate representation only requires aligned interests, some procedural protections, and, possibly, notice).

185 *See* Robert G. Bone, *The Puzzling Idea of Adjudicative Representation: Lessons for Aggregate Litigation and Class Actions*, 79 Geo. Wash. L. Rev. 577, 593 (2011) [hereinafter Bone, *Lessons for Aggregate Litigation*] ("The right to intervene is said to justify binding class members because it gives them an opportunity to participate, which is what their day-in-court right guarantees."); *Taylor*, 553 U.S. at 895 (noting judgments may bind nonparties who assumed control over the litigation).

186 *See* Bone, *Lessons for Aggregate Litigation*, *supra* note 185, at 592 ("The standard account of opt-out as a basis for preclusion relies on consent."); *Taylor*, 553 U.S. at 893 (explaining parties may agree to be bound by judgments).

187 Hansberry v. Lee, 311 U.S. 32, 32 (1940).

188 *Id.* at 42–43.

189 *Id.* at 44.

the Hansberrys' seller, wished to sell their property to Black families proved not all homeowners' interests were "identical."[190] In *Hansberry*, loyalty finds its simplest form: A representative can bind others who share their interests, but due process cannot consider as loyal an agent pursuing goals completely antithetical to those of their principal.[191]

The sister cases of *Amchem* and *Ortiz* revisited *Hansberry*'s central issue in a modern context. In both cases, class action settlements sought to finalize a global resolution for all the defendants' asbestos claims. Additionally, in both cases, the Court rejected the settlements because the named parties and their attorneys could not "fairly and adequately protect the interests of the class."[192] The representatives, who were already injured, had the concrete incentive to receive substantial immediate payments, but absent, future plaintiffs, who were putatively bound by the representatives' decisions, would have preferred an evergreen fund with inflation protection for when their injuries eventually manifested.[193] The class attorneys also had separate personal incentives to reap greater fees from presently-injured plaintiffs already within their client inventory.[194] These conflicts are notably not as severe as the conflict in *Hansberry*. In pressing similar arguments on causation or liability, *Amchem* and *Ortiz*'s class representatives and counsel had at least some incentive to fight for future plaintiffs and secure payment for them. Thus, by focusing on misaligned incentives despite common overarching goals, the Court defined the scope of preclusion through each "separate constituency" and its unique interests.[195] Loyalty rights thus

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190 *Id.*

191 *See id.* at 45–46 ("[The] representatives . . . do[] not afford that protection to absent parties which due process requires. . . . In seeking to enforce the agreement the plaintiffs in that suit were not representing the petitioners here whose substantial interest is in resisting performance.").

192 FED. R. CIV. P. 23(a)(4) (conditioning class certification on a finding that "the representative parties will fairly and adequately protect the interests of the class"); *see* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625–28 (1997) (describing the host of reasons why the parties to the proposed settlement did not adequately represent absent plaintiffs); Ortiz v. Fibreboard Corp., 527 U.S. 815, 856–59 (1999) (drawing on *Amchem* to dissect the conflicts of interests that undermined adequate representation).

193 *Amchem*, 521 U.S. at 625; *Ortiz*, 527 U.S. at 857.

194 *See Amchem*, 521 U.S. at 601, 606, 608 (discussing inventory plaintiffs, related conflicts, and objections); *Ortiz*, 527 U.S. at 855 (noting inventory plaintiffs "obtained better [settlement] terms than the class members" did); *see also* Coffee, *Class Action Accountability*, *supra* note 178, at 438 ("A cohesive subclass means little if the subclass counsel's incentives are to achieve an aggregate settlement, even at high cost to the subclass."); Issacharoff, *Governance and Legitimacy*, *supra* note 41, at 387 (noting loyalty rights are compromised "when class counsel has the structural incentive to favor one portion of the class relative to another").

195 *Amchem*, 521 U.S. at 627; *see* Coffee, *Class Action Accountability*, *supra* note 178, at 399 ("*Amchem*'s variation on this theory is that only a representative who shares the

counsel against preclusion where representatives—party or attorney—undercut absent claimants' interests simply by pursuing their own.[196]

2. *Voice: The Opportunity to be Heard*

"The fundamental requisite of due process of law is the opportunity to be heard,"[197] which is meaningless without "notice reasonably calculated, under all the circumstances, to apprise interested parties . . . of the action and afford them an opportunity to present their objections."[198] In typical litigation, voice fully legitimizes the judicial process; individuals who participate in the litigation receive their day in court.[199] Yet, the central problem of mass-tort litigation is that full participation is impossible, if not counterproductive.[200] Aggregate litigation developed to account for practical limitations on voice rights, permitting targeted intervention where class members' goals conflicted with those of their representatives. Rule 23, for instance, incorporates the "longstanding practice of allowing nonnamed class members to object" to settlement certifications, and timely objectors may appeal adverse rulings to take control of the litigation.[201] Though these tools are generally poor outlets for claimants' voice,[202] *Amchem* and *Ortiz*, which both came to the Supreme Court on appeal from objectors,[203] demonstrate that even limited voice rights can effectively guard against loyalty failures.[204]

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narrow, parochial interests of the subclass can be trusted to negotiate for their interests exclusively, rather than for the general good or best interests of the entire class.").

196 *See* Valley Drug Co. v. Geneva Pharms., Inc., 350 F.3d 1181, 1189 (11th Cir. 2003) ("A fundamental conflict exists where some party members claim to have been harmed by the same conduct that benefitted other members of the class.").

197 Grannis v. Ordean, 234 U.S. 385, 394 (1914).

198 Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950).

199 *See* Bone, *Lessons for Aggregate Litigation*, *supra* note 185, at 585 ("The process-based dimension of the day-in-court right aims to implement this participation principle, and it does so by guaranteeing personal control over the presentation of evidence, choice of arguments, and other litigation decisions.").

200 *See* Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 Fordham L. Rev. 1177, 1191–92 (2009) (observing active participation in large class actions would be "entirely unworkable" and potentially defeat the purpose, and potential advantages, of designating some to represent the class).

201 Devlin v. Scardelletti, 536 U.S. 1, 11 (2002) (holding absent class members may appeal a settlement certification if they timely object at the fairness hearing); *see also* Fed. R. Civ. P. 23(e)(5) (governing class-member objections).

202 Issacharoff, *The Governance Problem*, *supra* note 3, at 3173.

203 *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 605 (1997); Ortiz v. Fibreboard Corp., 527 U.S. 815, 827 (1999).

204 *See* Patrick Woolley, *Rethinking the Adequacy of Adequate Representation*, 75 Tex. L. Rev. 571, 573 (1997) ("Affording class members such a right of intervention will . . . significantly improve the quality of representation afforded even to absent class members."); *see also* Cabraser & Issacharoff, *supra* note 18, at 867 (explaining participation in class settlements through individual attorneys in MDLs secures loyalty rights because

Perhaps more importantly, voice may provide ex-post insights into the adequacy of a collective resolution.[205] The Bankruptcy Code, for instance, provides a formal voting mechanism to judge the creditor committee's representation—only when enough creditors approve the plan will the court bind absent or dissenting parties.[206] The class action settlement adopts this structure too. Rule 23 requires judges to find both the representation and resulting settlement agreement adequate before certifying the deal.[207] Courts often find class member voice critical to their decisions to approve class settlements.[208] In effect, voice can indicate collective consent to a beneficial result.[209]

3. Exit: Inferring Consent and Bolstering Voice

Exit is perhaps the defining feature of modern class action jurisprudence. Rule 23(b)(3) class actions, which include nearly all classes seeking monetary relief,[210] guarantee each class member the ability to opt out of the lawsuit.[211] The drafters of the 1966 revision to Rule 23 originally included the opt out as a "construct" designed to provide some individual protection to absent plaintiffs[212] in the new, "adventuresome"[213] class device. Later, though, *Phillips Petroleum Company v. Shutts* set

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a diversity of views monitors class attorneys and voice alleviates the pressure on judicial inquiries into a class representative's typicality).

205 *See* Issacharoff, *The Governance Problem*, *supra* note 3, at 3173–74 ("Voice in the class action setting is first and foremost about the merits of the results.").

206 *Supra* notes 96–98 and accompanying text.

207 *See* FED. R. CIV. P. 23(e)(2), (e)(2)(A) (permitting the court to approve a class settlement only "on finding that it is fair, reasonable, and adequate," which includes an inquiry into whether "the class representatives and class counsel have adequately represented the class").

208 *See, e.g.*, *In re* NFL Players Concussion Injury Litig., 821 F.3d 410, 433 (3d Cir. 2016) (relying on the fact that the 3,900 players were represented by approximately 300 attorneys and that many "sets of [absent class members'] eyes review[ed] the settlement terms" to conclude "their interests were adequately represented"); *In re* Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig., 895 F.3d 597, 605 (9th Cir. 2018) (highlighting the "overwhelming early participation in the settlement," among other facts, as support for its "strength"); Rutter & Wilbanks Corp. v. Shell Oil Co., 314 F.3d 1180, 1188 (10th Cir. 2002) (indicating participation in the settlement approval process can cure inadequate representation).

209 Issacharoff, *The Governance Problem*, *supra* note 3, at 3173–74 ("[Voice] provide[s] a very rough calculus of the consent of the absent and generally passive class members to the results of representation.").

210 *See* NAGAREDA ET AL., *supra* note 66, at 274–75 (noting plaintiffs are unlikely to recover damages through (b)(2) class actions after Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011)).

211 FED. R. CIV. P. 23(c)(2)(B)(v).

212 Samuel Issacharoff & Peter Zimroth, *An Oral History of Rule 23: An Interview with Professor Arthur Miller*, 74 N.Y.U. ANN. SURV. AM. L. 105, 117 (2018).

213 Benjamin Kaplan, *A Prefatory Note*, 10 B.C. IND. & COM. L. REV. 497, 497 (1969).

forth the crucial holding that "due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class . . . ."[214] In *Shutts*, the defendant objected to the court's assertion of personal jurisdiction over all absent plaintiffs in the (b)(3) class. The Court rejected the claim, noting personal jurisdiction's goals to protect defendants from being drawn into unfriendly forums did not apply with equal force to plaintiffs.[215] Together, the levers of exit, voice, and loyalty, along with the rationale that the class structure was designed to benefit absent parties,[216] created a proper ground for courts to presume consent to their jurisdiction.[217]

Though *Shutts* focused on personal jurisdiction, exit plays an important role in due process generally.[218] The threat of exit ensures adequate representation by reducing representation's rewards. Significant exit undermines the global peace that defendants require and prevents plaintiffs' attorneys from recovering their substantial fees.[219] For that reason, exit may also enhance the power of participation and voice; representatives are more likely to pay attention to concerns when failure to address those concerns could undermine the representative's interests.[220] And in the settings where voice outlets are limited, exit functions as a proxy for voice. As one commentator put

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214 472 U.S. 797, 812 (1985).

215 *Id.* at 808–09 (describing the difference between defendants, who face adverse judgments, and absent plaintiffs, who are bound only when their interests are adequately represented and, thus, benefit).

216 *See id.* at 810 ("[A]n absent class-action plaintiff . . . may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection."); Bone, *Lessons for Aggregate Litigation*, *supra* note 185, at 592 n.64 ("If it is proper to infer consent from a failure to opt out, the consent must be conditioned on the class action being structured to assure a good outcome.").

217 *See Shutts*, 472 U.S. at 812 (citing Keeton v. Hustler Mag., Inc., 465 U.S. 770 (1984) (framing the jurisdiction question as one of consent)).

218 *See generally* Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 Notre Dame L. Rev. 1057 (2002) (discussing the importance of exit to preclusion doctrine, not simply jurisdiction). *But see* Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After* Phillips Petroleum Co. v. Shutts, 96 Yale L.J. 1, 31 (1986) (arguing an alternative ground for personal jurisdiction renders the consent rationale unnecessary, meaning only adequate representation, notice, and an opportunity to be heard may be sufficient due process).

219 *See* John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 Colum. L. Rev. 288, 309 (2010) (noting exit's power in litigation governance because opt-outs reduce the number of aggregated claims and, thus, the settlement value of the case and the likely fee award to class counsel).

220 *See* Hirschman, *supra* note 176, at 82 ("The chances for voice to function effectively as a recuperation mechanism are appreciably strengthened if voice is backed up by the *threat of exit*, whether it is made openly or whether the possibility of exit is merely well understood to be an element in the situation by all concerned.").

it, claimants can "vote with their feet."[221] Because exit creates a strong inference of consent and provides additional assurance of adequate representation, courts have been quick to constitutionalize the right as a due process limitation on preclusion, independent of *Shutts*'s jurisdictional inquiry.[222]

B. Flexible Procedure: Finding the Permissible Mix

Crucial to Hirschman's conception of exit, voice, and loyalty is that legitimate governance need not guarantee each facet of the tripartite framework.[223] Nor is there a specific formula that all successful organizations follow.[224] Indeed, Hirschman regarded as the central advantage of his formulation that "it points immediately to a variety of remedies or a combination of them."[225] Organizations should use any individual feature or combination of exit, voice, and loyalty to achieve their goals in the unique circumstances they face.[226]

Due process draws upon this logic too. Black-letter doctrine emphasizes that due process is a flexible, not technical, concept and calls for procedural protections commensurate to situational demands.[227] Indeed, *Mathews v. Eldridge*'s three-part test displays that flexibility at its clearest, calibrating the amount of process required to the interests on all sides of a given case, the risk that one may erroneously lose out, and the added value of additional procedure.[228] Though the factors outlined in *Mathews* do not translate neatly to preclusion law,[229]

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221 Coffee, *Class Action Accountability*, *supra* note 178, at 421; *see also* Cabraser & Issacharoff, *supra* note 18, at 863 ("The implicit assumption was that class members speak by exiting."). *But see* Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1562 (2004) (arguing the low level of opt-outs might simply suggest rational indifference on the part of absent class members rather than indicating adequate representation).

222 *See, e.g.*, Brown v. Ticor Title Ins. Co., 982 F.2d 386, 390–92 (9th Cir. 1992) (holding a Rule 23(b)(1)–(b)(2) settlement could not preclude monetary claims because precluding Brown without an opt-out opportunity would violate due process), *cert. denied*, 511 U.S. 117 (1994); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 363 (2011) (framing *Shutts*'s opt-out requirements as due process minima, not a jurisdictional precondition).

223 *See* HIRSCHMAN, *supra* note 176, at 120 (beginning his final chapter by noting an optimal mix of exit and voice is elusive, as exit normally displaces voice or vice versa).

224 *See id.* at 124 (explaining his approach cannot yield "a firm prescription for some optimal mix of exit or voice").

225 *Id.* at 123 (emphasis omitted).

226 *See id.* at 126 (concluding organizations should adapt by alternating between exit and voice, or a combination thereof, "as the case may be").

227 Mathews v. Eldridge, 424 U.S. 319, 334 (1976) (citations omitted).

228 *Id.* at 334.

229 Bone, *Lessons for Aggregate Litigation*, *supra* note 185, at 595 n.77 (citing 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,

they exhibit the broader principle that applies with equal force: how much process is due to bind an absent party should be commensurate to the benefits those bound parties expect to receive. So long as the available protections—whether exit, voice, or loyalty *individually*, or a *combination* thereof—sufficiently ensure adequate representation, enable participation, or furnish an inference of consent *given the case's stakes*, absent plaintiffs have received due process.[230]

Thus, preclusion mechanisms that rely on exit, voice, and loyalty can supplement deficiencies in one of the prongs by providing additional assurances of another. Or, they can completely substitute one piece of the tripartite framework for another and still guarantee due process rights. For this reason, bankruptcy and class actions, or even the different types of class actions, normally comport with due process despite distinct exit, voice, and loyalty arrangements.

1. Supplementing Deficiencies in Exit, Voice, or Loyalty

The development of class action jurisprudence confirms this argument. The central problem after *Amchem* and *Ortiz* was curing disloyalty.[231] Initial attempts to address the problem drew on suggestions from the Court, using structural assurances to self-reinforce loyalty rights within the preexisting class structure. Principally, subclasses afforded distinct interest groups their own representation.[232] Attorneys strategically settled cases before potential conflicts arose—what doctrine has come to call the ex-ante or veil-of-ignorance approach to loyalty rights.[233] Courts also took an active role in settlement

47–49 (1976)) ("The Court's cost-benefit balancing test fits adjudication awkwardly at best and, insofar as it implements a utilitarian approach, is at odds with the day-in-court right."). *But see* Steven T.O. Cottreau, Note, *The Due Process Right to Opt Out of Class Actions*, 73 N.Y.U. L. Rev. 480, 512 (1998) (arguing *Mathews* should guide when absent plaintiffs receive exit rights).

230 *See* Coffee, *Class Action Accountability*, *supra* note 178, at 378 ("Even in defining the constitutional minimum required by the Due Process Clause, the trade-offs among these elements can be critical. Their relative importance depends greatly on the context. . . . Thus, a properly nuanced theory should recognize that sometimes one element can serve as a functional substitute for another."); Principles of Aggregate Litigation, *supra* note 119, § 2.02 cmt. b (characterizing preclusion based on representation through correlated factors—interest overlap, consent, participation, and control—and arguing strength in one or some of the factors can supplement weakness in others).

231 *See In re* Hyundai & Kia Fuel Econ. Litig., 926 F.3d 539, 559 (9th Cir. 2019) ("[T]he 'heart' of the problem [in *Amchem*] was the class members' conflicting interests.").

232 *See, e.g.*, *In re* Literary Works in Elec. Databases Copyright Litig., 654 F.3d 242, 256–57 (2d Cir. 2011); *In re* NFL Players Concussion Injury Litig., 821 F.3d 410, 432 (3d Cir. 2016).

233 Class representatives sit behind a veil of ignorance when there is a chance they may fall into any potential subclass, meaning equitable treatment of all class members best maximizes their personal outcomes. *See* Uhl v. Thoroughbred Tech. & Telecomms., Inc.,

certifications, assuming a fiduciary duty to the class and rigorously analyzing deals for hints of collusion.[234]

However, these tactics proved ineffective over time. Not all judges viewed themselves as stewards keeping the class action device afloat; ex-ante bargaining cannot work in all cases, especially in the most vexing mass-tort litigations where injured parties have manifested a diverse set of maladies; and sub-classes threatened to undermine the class structure by spawning regressive litigation[235] and increasing competition among attorneys.[236] Instead, litigants and courts have added extra exit and voice protections to certify class settlements over loyalty objections.[237]

The additional back-end opt out is one of the most ambitious attempts to leverage exit to supplement loyalty deficiencies. Wyeth settled a nationwide class action worth $3.75 billion for heart-related issues allegedly linked to their diet drug, fen-phen.[238] Notably, the district judge relied on the "several meaningful opt out rights" guaranteed by the settlement as powerful structural protections for absent plaintiffs.[239] For Professor Nagareda, the additional exit opportunities clearly buoyed the legitimacy of the class settlement, even if they presented practical problems.[240]

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309 F.3d 978, 985–86 (7th Cir. 2002) (finding, where a class of homeowners sued a cable company to recover for use of their property in laying fiber-optic cables, adequate class representatives because no one knew on whose property the cable would lie). *But see* Stephenson v. Dow Chem. Co., 273 F.3d 249, 261 (2d Cir. 2001) (finding inadequate representation and ignoring the veil-of-ignorance approach), *aff'd in part, vacated in part*, 539 U.S. 111 (2003).

234 *See* Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 279–80 (7th Cir. 2002) ("[T]he district judge in the settlement phase of a class action suit [is] a fiduciary of the class."); *see also* Cabraser & Issacharoff, *supra* note 18, at 860 (noting "the easy judicial assumption . . . [was] that only the courts stood between the class and potential maltreatment—hence, the courts were called upon to act as the fiduciaries for the absent class members").

235 *See* Coffee, *Class Action Accountability*, *supra* note 178, at 374–75 (arguing the litigation over subclassing itself threatens to undermine the class mechanism's efficiency).

236 *See* Morris A. Ratner, *Class Conflicts*, 92 WASH. L. REV. 785, 785 (2017) (explaining subclassing has disappeared from the lower courts in favor of other assurances of fairness that "do not involve fostering competition among subclass counsel").

237 *See* Cabraser & Issacharoff, *supra* note 18, at 860–63 (highlighting the shift).

238 *See* NAGAREDA ET AL., *supra* note 66, at 491–92 (providing an overview of the fen-phen litigation).

239 *In re* Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig., No. 1203, 2000 WL 1222042, at *49 (E.D. Pa. Aug. 28, 2000), *aff'd without opinion*, 275 F.3d 34 (3d Cir. 2001); *see In re* Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig., 431 F.3d 141, 145–46 (3d Cir. 2005) (rejecting a collateral attack on the settlement); *see also* NAGAREDA ET AL., *supra* note 66, at 491 (explaining plaintiffs could opt out during an initial 120-day period, upon diagnosis of a mild heart valve abnormality, or upon diagnosis of a severe heart valve disease).

240 *See* NAGAREDA, *supra* note 1, at 143–51 (recounting the struggles in administering the settlement regime); Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass*

More recently, though, litigants have enhanced their voice in the settlement process, leading to a string of successful class resolutions that could have been viewed as "exceptional" after *Amchem* and *Ortiz*.[241] The MDL statute only transfers claims filed in court, meaning MDL plaintiffs have an attorney to speak to their concerns.[242] In addition, advancements in communication technology, such as e-mail, social media, and Zoom, substantially lower transaction costs and facilitate participation in even the most mundane consumer cases.[243] The resolution of substantially all of the National Football League's concussion litigation establishes the importance of these seemingly ordinary developments. Despite inheriting many of *Amchem*'s most serious problems—a large plaintiff class, a diverse set of injuries, and conflicts between present and future plaintiffs—the Third Circuit affirmed class certification with ease.[244] Judge Ambro noted *Amchem*'s concern that uninjured, absent plaintiffs generally have little incentive to protect their rights but found no reason for such concern in the case before him: NFL players, even those without injuries, had a robust set of individual attorneys, actively coordinated with other class members, and took other significant steps to secure their rights and interests.[245] "[W]ith so many sets of eyes reviewing the terms of the settlement, the overwhelming majority of retired players elected to stay in the class and benefit from the settlement. We thus have little problem saying that their interests were adequately represented."[246]

2. Substituting Exit, Voice, or Loyalty

More than merely supplementing another weakness in the tripartite framework, exit, voice, or loyalty can completely substitute for each other while maintaining the legitimacy of a litigation procedure.

Tort Class Action, 115 Harv. L. Rev. 747, 796–822 (2002) (defending the back-end opt-out as a ground for procedural legitimacy).

241 Cabraser & Issacharoff, *supra* note 18, at 859.

242 *Id.* at 851; *see In re* NFL Players Concussion Injury Litig., 821 F.3d 410, 433 (3d Cir. 2016) (noting "3,900 players are represented, in turn, by approximately 300 lawyers").

243 Cabraser & Issacharoff, *supra* note 18, at 866 (suggesting the "stunningly large claim rates in overcharge cases involving milk or Red Bull indicate just how sweeping is this transformation").

244 *See* Nagareda et al., *supra* note 66, at 222–34 (regarding *NFL Concussion* as "unusual" against the backdrop of *Amchem* and *Ortiz* but recognizing the importance of the MDL proceeding and plaintiff involvement).

245 *In re NFL Concussion*, 821 F.3d at 433; *see In re* NFL Players' Concussion Inj. Litig., 307 F.R.D. 351, 381 (E.D. Pa. 2015) (observing all NFL players "and their families think of themselves as a discrete group, and many continue to interact with one another because they all shared the common experience of professional football").

246 *In re NFL Concussion*, 821 F.3d at 433.

Hirschman's work grapples with the reality that exit or voice are not present in every organization. Of principal import is his deconstruction of captured polities in democracies. Hirschman rejects the assumption that captive voters are powerless because they cannot exit; instead, exitless political situations *inspire* and *enhance* voice,[247] which can be an equally effective means for securing a group's goals.[248] To Hirschman, the critical precondition for legitimacy is not a complete triad but simply sufficient outlets for groups to advocate for their interests.[249]

Due process doctrine readily adopts the same view.[250] The seminal case of *Mullane v. Central Hanover Bank & Trust Company*[251] is highly influential. Though best known for its articulation of the standard for reasonable notice, *Mullane* affirms the viability of discharge procedures predicated solely on loyalty.[252] At issue was a New York statute that allowed small trusts to invest their funds in a larger trust for common administration.[253] The statute also created a judicial mechanism to resolve all claims by beneficiaries related to the common trust's management.[254] Representatives were appointed to protect the interests of different beneficiary groups, but none of the beneficiaries could

247 *See* HIRSCHMAN, *supra* note 176, at 70, 70–74 (explaining the power captured groups possess and how voice enables them to wield their influence).

248 *See id.* at 70 ("[A] party which is beleaguered by protests from disgruntled members because they dislike proposed 'wishy-washy' platforms or policies will often be tempted to give in to these voices because they are very real here and now, while the benefits that are to accrue from wishy-washiness are highly conjectural.").

249 *See id.* at 69–71, 125–26.

250 *Taylor*'s recitation of formal doctrine makes this point readily apparent; for instance, it does not require more than loyalty to bind absent class members. *See supra* notes 174, 184–86, and accompanying text. Further, Rule 23(b)(1) and (b)(2) class actions do not guarantee opt-out (or even notice) rights. *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 362–63 (2011). This is so because those rules address indivisible remedies. *See* PRINCIPLES OF AGGREGATE LITIGATION, *supra* note 119, § 2.04(b) (defining indivisible remedies as those where "the distribution of relief to any claimant as a practical matter determines the application or availability of the same remedy to other claimants"). In other words, necessity or overwhelming efficiencies under the circumstances warrant limitations on due process guarantees. *See id.* § 2.07(c) cmt. h (explaining how mandatory aggregation might advance due process); *Wal-Mart*, 564 U.S. at 362–63 (noting "[p]redominance and superiority are self-evident" in (b)(2) classes and that the Rule's drafters "thought (rightly or wrongly) that notice has no purpose when the class is mandatory"). As an example, Rule 23(b)(1)(B) classes bind all members to the outcome of a limited fund action because individualized resolutions might inequitably distribute the fund's proceeds, or the fear of that outcome might create a rush-to-the-courthouse. *See generally* Ortiz v. Fibreboard Corp., 527 U.S. 815, 832–42 (1999) (describing the equitable origins of limited funds and the rationale behind their mandatory nature).

251 339 U.S. 306 (1950).

252 *Cf.* Campos & Parikh, *supra* note 23, at 340–43 (arguing *Mullane* justifies mandatory bankruptcy proceedings).

253 *Mullane*, 339 U.S. at 307.

254 *Id.* at 309.

exit, and notice was only distributed via newspaper advertisement.[255] While the Court demanded all known beneficiaries receive notice via direct mail, it found newspaper advertisement to be sufficient due process for unknown beneficiaries.[256] The opinion supplied two reasons why the statutory regime could resolve absent beneficiaries' claims with limited notice. First, the scheme adequately protected the beneficiaries' interests. Beneficiaries had distinct representatives, but notice would also reach at least some class members, any of whom could act to protect themselves and the absent beneficiaries if needed.[257] Second, and critically, additional procedure "would impose a severe burden on the plan, and would likely dissipate its advantages."[258] In essence, the Court found loyalty rights solely sufficient *in light* of the State's objective to economically resolve litigation over the trust's administration.[259]

At bottom, *Mullane* is no more than a recitation of general due process principles—how much process is due depends on the circumstances—and its logic follows the type of balancing that *Mathews* crystallized.[260] But as a formal matter, its subject falls into the same doctrinal box as bankruptcy: a probate proceeding that is otherwise consistent with due process.[261] It therefore ties a neat bow on this Part, formally integrating bankruptcy into the larger due process jurisprudence and suggesting bankruptcy only needs to supply voice in light of the peace premium aggregate litigation may secure.

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255 *Id.* at 309–10.

256 *Id.* at 319–20. These unknown beneficiaries were mainly those who had contingent or future interests in the fund. *Id.* at 317. Thus, they were akin to future (uninjured) plaintiffs in modern mass torts.

257 *Id.* at 319.

258 *Id.* at 318.

259 *Id.* ("[Questions of whether there should be additional procedure] are practical matters in which we should be reluctant to disturb the judgment of the state authorities.").

260 *See supra* notes 227–30 and accompanying text.

261 The Supreme Court has regularly held probate and bankruptcy proceedings to similar due process standards. *See* Tulsa Pro. Collection Servs., Inc. v. Pope, 485 U.S. 478, 491 (1988) (citing *Mullane*, 339 U.S. at 318–19) (drawing on bankruptcy's due process requirements for probate proceedings); Taylor v. Sturgell, 553 U.S. 880, 895 (2008) (grouping "bankruptcy and probate proceedings" as special statutory schemes that may preclude future litigation). Scholars also view *Mullane* as influential in preclusion doctrine. *See* Sergio J. Campos, *Mass Torts and Due Process*, 65 Vand. L. Rev. 1059, 1114 (2012) ("*Mullane* . . . articulat[es] a procedural scheme in which an action permissibly binds those absent because (1) it would be self-defeating to require more and (2) the relevant entitlements are adequately protected."); McKenzie, *Toward Bankruptcy*, *supra* note 19, at 1019 & n.232 (citing *Mullane* to argue "[l]essons on aggregation can be drawn from bankruptcy without hesitating to consider those jurisdictional distinctions").

C. Exit, Voice, and Loyalty in Bankruptcy

Bankruptcy is normally consistent with due process, even though it automatically discharges claims against the debtor. Nonetheless, the principal objection to mass-tort bankruptcies is the lack of exit afforded to claimants. Professor Brubaker, for instance, relies heavily on exit's ability to undermine settlement value for defendants; he argues exit is key to ensuring defendants actually purchase claimants' right to sue rather than simply appropriate them.[262] This Note demurs such arguments, fully accepting the benefits of exit[263] but concluding nonetheless that exit is not a necessary condition for preclusion.[264] The Bankrupcy Code provides a host of loyalty rights,[265] and, in limited situations, parties grant exit rights for claims against nondebtors.[266] But ultimately, bankruptcy's legitimacy derives from voice, which substitutes for limited exit rights, and the Code's objectives[267] justify that substitution under the circumstances.

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262 Brubaker, *Mandatory Aggregation*, *supra* note 29, at 992–93 (citing NAGAREDA, *supra* note 12, at xi); *cf.* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 621 (1997) (citing John C. Coffee Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1379–80 (1995)) (arguing settlements secured without the threat of litigation are inadequate because class representatives are "disarmed").

263 *See supra* notes 214–22 and accompanying text (explaining how exit guarantees due process).

264 Scholars also reject the premise of the "peace premium," arguing any premium transfers to attorneys rather than to the claimants themselves. Brubaker, *Mandatory Aggregation*, *supra* note 29, at 993 & n.141. Insofar as bankruptcy's legitimacy depends on its statutory goals, which include providing claimants equitable recovery, this argument directly calls into question a reorganization's compliance with due process. As this Note will discuss in Part III, bankruptcy courts can guard against the common methods by which attorneys appropriate claimants' recovery, ensuring peace premiums justify an aggregate resolution.

265 The largest unsecured creditors form a committee to represent major constituencies, and, subject to court approval, those creditors retain counsel to monitor the debtor. 11 U.S.C. § 1102; *see* McKenzie, *Toward Bankruptcy*, *supra* note 19, at 1020 (arguing bankruptcy's structure makes sure "lawyers appearing before the court represent claimants who hold a significant stake in the bankruptcy case"). The U.S. Trustee also has the power to appoint lawyers to the creditors' committee or to object to applications for attorneys' fees if they are excessive or if the attorney did not make a substantial contribution to the case, reducing the chance of attorney self-dealing. *Id.*; *see also* 11 U.S.C. §§ 503(b)(3)(D), (b)(4). The Trustee also monitors the debtor to ensure compliance with reporting requirements. *Chapter 11 Basics*, *supra* note 67. Despite well-founded concerns about self-dealing within the bankruptcy bar, *see* DAVID A. SKEEL, JR., DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA 75–89 (2001) (discussing the power of the bankruptcy bar and its "disreputable" aspects), the Code provides significant structural guarantees in loyalty rights.

266 *See* Simon, *supra* note 25, at 1204 (providing a table of recent mass-tort bankruptcies and the features of their reorganization plans); *see also* Foohey & Odinet, *supra* note 34 (manuscript at 42–43) (advocating for opt-out rights in bankruptcy, and arguing such rights will strengthen claimant voice).

267 *See supra* notes 39–43 and accompanying text (discussing equity, coordination, and finality).

To reiterate, bankruptcy enhances voice through two mechanisms. First, bankruptcy centralizes all litigation on an issue into one forum, enhancing coordination among all interested parties, providing a single judge to hear complaints from a diverse set of claimants, and creating committees to empower claimants' individual lawyers.[268] Much like they can in MDLs, individuals can raise their concerns and participate in bankruptcy proceedings.[269] Centralization and coordination make voice a reality. Second, bankruptcy grants voting rights to claimants, formalizing voice as a precondition to ratifying a reorganization plan.[270] Here, voice becomes a quasi-exit right. Individuals have their say in whether the reorganization adequately represents their interest, but the ability to veto a plan is also a group exit opportunity.[271]

Claimants can also receive equitable recovery that renders these protections sufficient under the circumstances. Bankruptcy, by coordinating for an aggregate resolution, reduces the costs of piecemeal litigation and fosters global peace along with its attendant settlement premium.

The Code's "good faith" requirement may overlap with the goals-of-aggregate-litigation aspect of the due process analysis. By asking whether the debtor filed for bankruptcy under permissible conditions, the court essentially questions whether the Code's purpose would be advanced by servicing the case.[272] The Third Circuit's recent opinion in *LTL* sets the tone for future mass-tort cases. Before *LTL*, restructuring in the face of sudden, expansive liabilities and obtaining relief from the vast uncertainty that accompanies mass-tort litigation appeared well

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268 *See supra* Section I.A.1 (discussing bankruptcy's centralization and coordination mechanisms).

269 *See* McKenzie, *Toward Bankruptcy*, *supra* note 19, at 1022 ("Claimants are unable to exit, but all have their own attorneys who, in theory, could actively represent them."); *see also* Meryl Kornfield, *Opioid Victims Confront Purdue Pharma's Sackler Family: 'It Will Never End for Me*,' Wash. Post (Mar. 11, 2022), https://www.washingtonpost.com/business/2022/03/10/opioid-purdue-pharma-bankruptcy-sackler [https://perma.cc/9RQB-A8MY] (covering bankruptcy hearings where individual claimants had the opportunity to speak).

270 *See supra* Section I.A.2 (discussing bankruptcy's voting mechanism); *supra* note 117 and accompanying text (highlighting § 524(g)'s additional voting requirements).

271 *See In re* LTL Mgmt., LLC, 637 B.R. 396, 416–17 (Bankr. D.N.J. 2022) ("It is appropriate to note that the true leverage remains where Congress allocated such leverage, with the tort claimants who must approve of any plan employing a § 524(g) trust by a 75% super majority."); *In re* Bestwall LLC, 606 B.R. 243, 251 (Bankr. W.D.N.C. 2019) ("[C]laimants will be afforded due process in this case as a result of . . . the active participation and support of the Committee, . . . the affirmative vote of at least 75% of asbestos claimants . . . , and . . . approval of the plan of reorganization by both this Court and the District Court . . . ."), *aff'd*, 71 F.4th 168 (4th Cir. 2023).

272 *See supra* notes 67–72 and accompanying text.

within the purview of the Code.[273] Now, though, the Third Circuit's turn toward a strict necessity rationale[274] appears to move bankruptcy closer to the limited-fund class action despite bankruptcy's stronger procedural guarantees.[275] There is also considerable debate about whether a good faith filing may result in a reorganization plan that goes beyond the intended purpose of the Code. The use of the non-derivative release is particularly troublesome to scholars and courts.[276]

These critiques are more than the statutory issues discussed earlier in this Note; they raise substantial questions about whether bankruptcy and its ability to preclude subsequent litigation should fit on the aggregate litigation continuum at all.[277] Indeed, they rebuff the premise that mass-tort claimants can secure a peace premium through bankruptcy's

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[273] *See supra* notes 120–29 and accompanying text (discussing successful mass-tort bankruptcies or bankruptcies challenged on other grounds); *supra* notes 152–54 and accompanying text; *cf.* Lawrence Ponoroff & F. Stephen Knippenberg, *The Implied Good Faith Filing Requirement: Sentinel of an Evolving Bankruptcy Policy*, 85 NW. U. L. REV. 919, 973 (1991) ("[T]he public company filing is never dismissed on bad faith grounds; and filings by economically viable companies making tactical use of the bankruptcy system are occasionally dismissed on this basis.").

[274] *See In re* LTL Mgmt., LLC, 64 F.4th 84, 101–05, 111 (3d Cir. 2023) (discussing precedent, relevant mass-tort cases, and legislative history, which lead to the conclusion that the good faith requirement "ensures that claimants' pre-bankruptcy remedies—here, the chance to prove to a jury of their peers injuries claimed to be caused by a consumer product—are disrupted only when necessary").

[275] A court can only certify a Rule 23(b)(1)(B) limited-fund action if the defendant is insolvent. Ortiz v. Fibreboard Corp., 527 U.S. 815, 838 (1999) (requiring "the inadequacy of the fund to pay all the claims"); *cf.* State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 533–34 (1967) (permitting interpleader on an insurance policy that could not satisfy all claims). This requirement ensures a limited-fund action maintains equity's original necessity rationale. *Ortiz*, 527 U.S. at 838. Such circumstances justify the class action's mandatory nature—eliminating exit—without granting voice rights as a substitute. In contrast, while bankruptcy eliminates exit, it affords claimants significant voice rights. As a result, bankruptcy has greater "wiggle room" in the due process framework, permitting legitimate aggregate resolutions without exit *and* a strict necessity rationale. Advancing legitimate collective resolutions that foster equitable relief for all should justify bankruptcy reorganizations. *See Ortiz*, 527 U.S. at 861 (acknowledging whether mandatory aggregation may be justified by greater plaintiff recovery "is at least a legitimate question, which we leave for another day"); Campos & Parikh, *supra* note 23, at 344 (arguing courts should "simply defer to the bankruptcy court's determination of appropriateness because bankruptcy is a recognized 'special remedial scheme' that permits the use of mandatory procedures" (citation omitted)).

[276] *See* Brubaker, *Mandatory Aggregation*, *supra* note 29, at 990–92, 991 & n.131 (arguing third-party releases serve no policy objective and the Code's purpose is only fulfilled when an insolvent entity files for bankruptcy to discharge its *own* debts); *In re* Purdue Pharma, L.P., 635 B.R. 26, 90 (S.D.N.Y. 2021) (rejecting the nondebtor releases in Purdue's reorganization plan), *rev'd and remanded*, 69 F.4th 45 (2d Cir. 2023), *cert. granted sub nom.* Harrington v. Purdue Pharma, L.P., No. 23-124, 2023 WL 5116031 (U.S. Aug. 10, 2023).

[277] *See* McKenzie, *Toward Bankruptcy*, *supra* note 19, at 1018 (discussing possible objections to comparisons between bankruptcy and other forms of aggregate litigation); *cf. In re LTL Mgmt.*, 64 F.4th at 102–05, 107 (arguing the risks associated with premature bankruptcy filings counsel against filing for bankruptcy without immediate financial

structure, instead believing modern trends inherently favor defendants. In the case of *LTL*, they question whether bankruptcy is anything but a last resort for mass-tort cases. This Note rejects wholesale attempts to sever bankruptcy from the world of aggregate litigation. Genuine peace premiums—not strict necessity—guaranteed by voice rights ensure bankruptcy is "otherwise consistent" with due process. As Part III will demonstrate, class action and bankruptcy cases have developed targeted inquiries to ensure equitable resolutions for plaintiffs.

III
Due Process Applied: A Framework for Mass-Tort Bankruptcies

This Note has established that bankruptcy is generally "otherwise consistent" with due process because it advances a legitimate purpose—resolving liabilities for debtors and equitably compensating claimants—while affording substantial voice protections to those bound by a final judgment.[278] In a class action, adequate representation provides legitimacy. The named plaintiff chooses the forum, and the court ensures the named plaintiff's actions best advance the interests of the class. In bankruptcy, the defendant initiates the proceedings and attempts to bind the other side. The claimants' chief source of resistance is their voting ability: they can reject a plan outright. In more extreme cases, the bankruptcy court may initiate a cramdown over a dissenting class,

distress, and noting projections of financial distress must account for the likelihood that other aggregate settlements resolve their liabilities before filing for bankruptcy).

[278] *Supra* Sections II.B.2–II.C. Though this Note does not address these issues completely, its framework supports two additional circumstances where reorganization plans are presumptively permissible. First, near-insolvent companies that file for Chapter 11 bankruptcy should receive a presumption of permissibility. A necessity rationale would justify severe limitations on exit, voice, and loyalty rights. *See supra* notes 250 & 275 (making this argument); *In re LTL Mgmt.*, 64 F.4th at 101–03, 110 (acknowledging necessity can displace claimants' pre-bankruptcy rights). Second, reorganization plans premised on *individual* consent are presumptively permissible. After all, one who agrees to be bound by a judgment has had their day in court. Taylor v. Sturgell, 553 U.S. 880, 893 (2008) (citing Restatement (Second) of Judgments § 40 (Am. L. Inst. 1980)). Two claimants easily fall within this category: a claimant who votes in favor of a plan, *In re* Washington Mut., Inc., 442 B.R. 314, 355 (Bankr. D. Del. 2011), and a claimant who timely submits a claim for recovery under a plan, *In re* Chassix Holdings, Inc., 533 B.R. 64, 80 (Bankr. S.D.N.Y. 2015). Additionally, those claimants who do not exercise exit rights consent to a reorganization plan. When claimants receive exit rights, *Shutts*'s logic should apply with full force; they can sit back and permit their group-voting and loyalty protections to vindicate their interests. Further, with exit opportunities available, the claimant can exercise a stronger voice. Debtors must provide a generous offer to claimants because they must not only win enough votes to confirm a plan but also disincentivize enough opt-outs to make the reorganization economical. Simply put, legitimacy abounds when claimants receive exit, voice, and loyalty protections in bankruptcy. *See, e.g.*, *In re* CJ Holding Co., 597 B.R. 597, 601 (S.D. Tex. 2019) (Rosenthal, C.J.) (precluding a claimant because they consented to the nondebtor release by not objecting or opting out).

suggesting again that overriding notions of fairness (and the fruits of a peace premium) can supplement the consent of some claimants to bind the whole. Ultimately, then, the plan's legitimacy will boil down to two questions: whether a reorganization plan infringes upon claimants' voice rights, either directly or indirectly, and whether claimants secure a genuine peace premium (or the debtor uses bankruptcy to achieve "cheap grace").

A. Protecting Individual and Group Voice

Bankruptcy's voting procedures reflect a compromise between group and individual voice rights.[279] Formally, individual claimants have the right to vote on the confirmation of a bankruptcy plan, and courts recognize individual votes as important indicia of consent. However, one's right to vote is circumscribed by the rights of the class to which the claimant belongs; the Code generally requires concurrent majorities of each class of claimants to confirm a plan.[280] This structure reflects the careful compromise Congress crafted when writing the Bankruptcy Code and also, for the purposes of this Note, highlights that any reorganization plan must not limit either group or individual voice rights. Individual voice rights afford claimants a real opportunity to participate, and they incentivize adequate representation from counsel on the claimants' committee. Group voice rights, on the other hand, empower the class to decide whether the plan benefits the collective on balance. Both are necessary to the legitimacy of any reorganization plan.

This Section thus identifies common threats to individual and group voice rights. Deprivations of individual voice rights are relatively clear: the plan denies claimants their right to participate in the bankruptcy proceedings. Group voice rights face two threats. First, a reorganization plan dilutes the votes of a class of claimants to ease the passage of the plan. Second, a plan includes functional limitations on the group's ability to vote against the plan.

1. Individual Rights: Voice Denial

Individuals have fewer voice rights in aggregate litigation than in typical lawsuits. Nonetheless, common forms of aggregate resolutions guarantee at least some opportunity to be heard.[281] Voting rights are the most visible manifestation of this opportunity: rarely would a

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279 *See supra* notes 96–100.

280 11 U.S.C. § 1129(8)(A).

281 *See* Section II.A.2 (describing voice rights generally).

bankruptcy court ever permit a plan to prevent claimants from voting. The most common denial of voice rights comes when parties collude to deny claimant participation; they exclude individuals from the bargaining table that bankruptcy's centralization features foster.[282] Two cases stress the severity of such a deprivation.

The first case, *In re Motors Liquidation Company*, addressed the question whether an asset sale and its discharge of related claims, arising out of General Motors' bankruptcy during the financial crisis, could preclude plaintiffs from filing suit over potentially lethal ignition-switch defects.[283] The Second Circuit held that it could not.[284] The panel's holding rested on formal notice doctrine—that the claimant received notice by publication rather than by mail[285]—but their discussion of the potential prejudice to claimants from the lack of notice drives at the underlying theme. Simply, the Second Circuit could not say that the result of the proceedings would have been the same had the claimants received notice and their opportunity to bargain over the terms of the sale order.[286] Even though there were no *formal legal grounds* claimants could pursue to demand the court change the terms of the sale,[287] the sale order resulted from polycentric negotiations in a fluid forum between multiple stakeholders.[288] So even the little negotiating leverage claimants had in the complex balancing of interests made their "opportunity to participate in the proceedings . . . meaningful" and their exclusion a violation of due process.[289]

The second case, *Czyzewski v. Jevic Holding Corporation*, came to the Supreme Court after the Third Circuit approved a "structured dismissal" of a Chapter 11 reorganization.[290] Jevic was a trucking company owned by a private equity firm, and it filed for bankruptcy in 2008. Two lawsuits followed. One was an action by truck drivers who requested relief under a federal statute that guaranteed sixty days' notice before Jevic could lay them off, and the other was by unsecured creditors

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282 I attribute this argument to Dean McKenzie and his helpful comments.

283 829 F.3d 135, 143 (2d Cir. 2016) (noting the defect could turn off the ignition, shut off the engine, disable steering and braking, and deactivate the car's airbags).

284 *Id.* at 170.

285 *Id.* at 161.

286 *Id.* at 163.

287 *Id.* at 162.

288 *Id.* at 163.

289 *Id.* at 164 ("[W]hile we cannot say with any certainty that the outcome would have been different, we can say that the business circumstances at the time were such that plaintiffs could have had some negotiating leverage . . . ."); *see id.* at 163–66 (describing claimants' bargaining leverage, including the mere threat of additional class action litigation, and finding a due process violation).

290 580 U.S. 451, 457 (2017).

alleging fraudulent conveyance.[291] Despite the Code's priority scheme requiring Jevic to pay the truck drivers before the unsecured creditors, Jevic negotiated a structured dismissal that disposed of both lawsuits but only compensated the unsecured creditors.[292] In effect, Jevic cut the truck drivers out of the negotiation. The Court held that the bankruptcy court erred in approving this scheme.[293] Justice Breyer relied on the Code's formal priority structure, but the clear message from the court rang true to due process principles: The bankruptcy court's approval of the structured dismissal cost the claimants "a *chance* to obtain a settlement that respected their priority."[294]

In both cases, discharges approved without active participation and negotiation of claimants could not withstand judicial scrutiny. Notably, *Jevic* focused on the statute rather than due process doctrine, but scholarship already accepts the Court's opinion as expressing larger principles about how bankruptcy courts should operate.[295] And Justice Breyer's careful attention to the non-consensual nature of these releases in the context of a fluid negotiation dovetails neatly with the crux of the Second Circuit's due process holding in *Motors Liquidation*. Both recognize that voice rights empower individuals beyond the mere right to vote and secure an opportunity to participate in bankruptcy's public forum.

The right applies to all claimants, but bankruptcy courts must also grapple with the difficulties in providing future claimants a seat at the table. In cases where future plaintiffs clearly understand their status and are actively involved in the litigation, courts do not confront such difficulties.[296] However, many mass torts harm plaintiffs who are rationally inattentive to the proceedings because the risk of injury or the expected value of recovery is too low to justify the effort.[297]

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291 *Id.* at 458–62.

292 *Id.* at 460–61.

293 *Id.* at 464 (holding bankruptcy courts cannot approve structured dismissals that do not follow ordinary priority rules without affected creditors' consent).

294 *Id.* at 464 (emphasis added) ("Or, if not that, they lost the power to bring their own lawsuit on a claim that had a settlement value of $3.7 million.").

295 *See, e.g.*, Levitin, *supra* note 30, at 1120 (arguing *Jevic* is not "tethered solely to priority-skipping transactions" and its core rationale "is that parties cannot 'hack the bankruptcy process to achieve their desired result'"); Brubaker, *Mandatory Aggregation*, *supra* note 29, at 989–90 (arguing *Jevic* stands for the broader principle that bankruptcy courts should be skeptical of "necessary" tactics that may tend towards abuse).

296 *See* Cabraser & Issacharoff, *supra* note 18, at 861–70, 876–77 (discussing absent-party participation in class actions and referring to *NFL Concussion* as the doctrinal shift in recognizing class-member voice).

297 *Id.* at 859 (citing Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 628 (1997)); *see In re* Chassix Holdings, Inc., 533 B.R. 64, 80 (Bankr. S.D.N.Y. 2015) (refusing to imply consent

In these cases, courts must appoint and properly manage a future claims representative.[298]

This is a due process obligation to ensure the futures' loyalty rights.[299] In such a situation, the representative protects the futures' interests through aggressive negotiation to "minimize the risk of a prematurely insolvent settlement trust."[300] If the futures' counsel is too easily drawn into collusive arrangements, then the arrangement may undermine fundamental due process rights, even if the court formally provides notice. This is a particular worry in bankruptcy. Repeat players dominate, and the representative position can be quite lucrative.[301] Attorneys in that position thus have powerful personal incentives to sell out the futures,[302] and it is all the easier to sell out clients when you have never met any of them.[303] Bankruptcy courts must buck the problematic trend of deferring to the debtor's suggestion for the future claims representative.[304] Instead, they must appoint zealous advocates and continue to monitor for possible inadequate representation down the road. With futures, only a loyal representative assures their due process right to participate.

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from exit opportunities because the relatively small recoveries from the bankruptcy "could easily have prompted an even higher-than-usual degree of inattentiveness").

298 *Cf.* Bartell, *supra* note 53, at 370 (distinguishing between the group of claimants for whom constructive notice would be effective because they can recognize their interest in the case and those who require a representative because they are too inattentive or unable to recognize their interest in the proceeding).

299 *See In re* Combustion Eng'g, Inc., 391 F.3d 190, 245 (3d Cir. 2004) (confirming "future claimants must be adequately represented throughout" the bankruptcy process, and holding the failure to appoint a futures representative violated due process).

300 Campos & Parikh, *supra* note 23, at 347; *see also supra* notes 114–16 and accompanying text (discussing a future claims representative under Section 524(g)).

301 Campos & Parikh, *supra* note 23, at 350.

302 *Id.* (citing *In re* Fairbanks Co., 601 B.R. 831 (Bankr. N.D. Ga. 2019)) ("[T]he promise of multiple engagements is a truly distortive incentive for these individuals. This promise can incentivize [a future claims representative] to discount their invisible clients' interests.").

303 *See* Satterwhite v. City of Greenville, 557 F.2d 414, 425 (5th Cir. 1977) (Gee, J., dissenting) (characterizing the class action as "a headless lawsuit with, in effect, no plaintiff"), *vacated*, 578 F.2d 987 (5th Cir. 1978) (en banc), *vacated*, 445 U.S. 940 (1980); *Shakedown Street*, Forbes (Feb. 11, 2008, 5:54 PM), https://www.forbes.com/2008/02/11/lerach-milberg-weiss-biz-cz_nw_0211lerach.html?sh=571b34f28cea [https://perma.cc/2CYK-NZKW] (quoting super-lawyer William Lerach's boast, "I have the greatest practice of law in the world. I have no clients").

304 *See* Mark D. Plevin, Leslie A. Epley & Clifton S. Elgarten, *The Future Claims Representative in Prepackaged Asbestos Bankruptcies: Conflicts of Interest, Strange Alliances, and Unfamiliar Duties for Burdened Bankruptcy Courts*, 62 N.Y.U. Ann. Surv. Am. L. 271, 301 (2006) ("In almost every asbestos bankruptcy case [as of 2006], the bankruptcy court has granted the debtor a presumptive right to select the [future claims representative].").

2. *Group Rights: Vote Dilution and Class Exit*

Group voice rights in bankruptcy provide legitimacy to a resolution because they evince collective consent. If a group believes the reorganization plan will not advance their interests, they can reject it—in a sense, the voting structure creates quasi-exit rights.[305] However, consent relies on several assumptions that a specific case may not support. First, the voting scheme must properly classify claims to represent distinct interests. Vote dilution is a critical concern. Second, each class of claimants must have a real choice. If the debtor functionally limits claimants' ability to vote against a reorganization plan, then the groups' votes do not indicate any support or consent for the settlement.

Effective voting rights require proper classification because bankruptcy's voting structure relies on concurrent approval from all classes.[306] This first means courts must pay careful attention to how they value claims.[307] If a bankruptcy court groups high-value and low-value claims together because they believe them to be similar based on incorrect valuations, then the misclassification may dilute the voice of a constituency entitled to their own group voting rights. Low-value claimants who benefit the most from a settlement's peace premium and avoided litigation costs could outvote the fewer number of high-value claimants with a distinct interest in pursuing their own jury verdicts in the tort system. This Note will discuss the issue in greater detail in the next Section, but, to preview, courts should permit sufficient discovery, motion practice, and bellwether trials before confirming a reorganization plan.[308] Collaboration with the district court or multi-district litigation judge will ease that process.

Further, gerrymandering voting classes is a real concern. To borrow from the law of democracy, courts must guard against attempts to "pack" and "crack" different constituencies.[309] Cracking a class into many different ones may appear to pose little issue because it formally maintains a group's right to vote. Still, as the Fifth Circuit succinctly warned lower courts: "[T]hou shalt not classify similar claims differently in order to gerrymander" compliance with the Code.[310] Isolating

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305 *See supra* note 271 (suggesting bankruptcy's voting structure gives claimants bargaining leverage).

306 *See* 11 U.S.C. § 1129(a)(8) (requiring that each impaired class accept a plan before a court can approve it).

307 *See supra* notes 92–95 and accompanying text (explaining claim evaluation and its importance).

308 *See infra* Section III.B.1.

309 *See* Gill v. Whitford, 138 S. Ct. 1916, 1924 (2018) (describing packing and cracking in the voting context).

310 *In re* Greystone III Joint Venture, 995 F.2d 1274, 1279 (5th Cir. 1991), *cert. denied*, 506 U.S. 821 (1992); *accord In re* Bos. Post Rd. Ltd. P'ship, 21 F.3d 477, 482 (2d Cir. 1994); *In re*

claimants who will vote against a reorganization plan from the subset of the class that will vote for its approval will permit the debtor to move for a cramdown because a cramdown can only occur when at least one class of impaired claimants votes in favor of the plan.[311] As a result, the debtor could effectively disenfranchise many claimants and limit their ability to participate in the bankruptcy proceeding; their meaningless votes provide no bargaining leverage.

Packing in bankruptcy dilutes the votes of claimants by grouping a class with another that is numerically sufficient to ensure the combined class approves the plan.[312] Such tactics effectively silence the subsumed claimants. Misevaluation can certainly create packed classes; an errant evaluation might deem what should be two distinct classes as one.[313] Relatedly, classes that include claimants with meritless claims pose a significant issue; debtors may permit classes to fill with claims that have zero settlement value in the tort system to tilt the bankruptcy vote.[314] Lastly, debtors may deliberately attempt to pack claims through any number of artful moves when drafting their reorganization plan.

In re Combustion Engineering presents a concrete example.[315] Combustion Engineering ("CE") filed for bankruptcy with a "prepackaged" reorganization plan that CE and its creditors settled

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Bryson Props., XVIII, 961 F.2d 496, 502 (4th Cir.), *cert. denied*, 506 U.S. 866 (1992); *In re* Holywell Corp., 913 F.2d 873, 880 (11th Cir. 1990).

311 *In re Greystone*, 995 F.2d at 1278–80 ("Greystone faced a dilemma in deciding how to obtain the approval of its cramdown plan by at least one class of 'impaired' claims, as the Code requires." (citing 11 U.S.C. § 1129(a)(10))); *see also* Levitin, *supra* note 30, at 1112–13 (explaining the Department of Justice forced Purdue to create a separate classification for them so "Purdue would have the tools in hand to confirm a plan of reorganization over the objection of all creditors other than DOJ").

312 This is different from the definition as used in voting rights cases. *See Gill*, 138 S. Ct. at 1924 ("Packing means concentrating one party's backers in a few districts that they win by overwhelming margins.").

313 *See supra* notes 307–08 and accompanying text.

314 This strategy may become particularly popular among debtors because it turns a finality barrier into a boon. In MDLs, defendants—and even some courts—complain the "combination of advertising-induced filing of masses of unvetted claims and a preordained expectation of settlement often create a high-volume cudgel that inflates settlement value, or . . . precludes any reasonable settlement." Informational Brief of Aearo Techs. LLC at 24, *In re* Aearo Techs. LLC, 642 B.R. 891 (Bankr. S.D. Ind. 2022) (No. 1:22-bk-02890); *see also In re* Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig., No. 4:08-MD-2004 (CDL), 2016 WL 4705807, at *2 (M.D. Ga. Sept. 7, 2016) (suggesting MDLs have the "unintended consequence of producing more new case filings of marginal merit in federal court, many of which would not have been filed otherwise"). In bankruptcy, however, these claimants may now become a powerful and consistent voting bloc for debtors' plans precisely because their claims are meritless: some compensation from a bankruptcy plan is better than none from the tort system. LTL's second filing raised this concern, as they announced an agreement with attorneys who purported to represent tens of thousands of claimants. Hsu, *supra* note 156.

315 391 F.3d 190 (3d Cir. 2004).

upon before filing the petition.[316] The plan created a settlement trust under Section 524(g) to resolve all of CE's asbestos liabilities.[317] However, to ensure the plan's approval, CE slightly impaired the value of the claims of many creditors who negotiated the prepackaged settlement, enabling the creation of one impaired-tort-claimant class.[318] Ultimately, claimants who received ninety-five percent of the value of their claims comprised most of the unsecured creditor class, which also included claimants who received less than half that amount.[319] The plan thus grouped claimants with a strong financial incentive to approve the plan with those who had the direct opposite desire.[320] The Third Circuit rejected that arrangement on multiple statutory and due process grounds,[321] but the opinion's thrust was clear: packing the voting groups undermined any of the "indicia of support by affected creditors" necessary to approve the plan.[322]

Finally, even if a court crafts proper voting classifications, those groups must still have the option to reject the plan. If voting rights are formally offered but functionally illusory, then the consent and participation rationales underlying due process dissipate; courts would impute choice where none exists.[323] Take the Purdue Pharma bankruptcy as an example. Over ninety-five percent of the voting creditors cast their ballots in favor of the reorganization plan.[324] Normally, that level of approval should easily permit courts to find the plan adequately represents claimants' interests.[325] However, the Department of Justice had

316 *Id.* at 201.

317 *Id.*

318 *Id.*

319 *Id.* at 244.

320 *See id.* at 244–45.

321 *Id.* at 242–47 (holding the creation of stub claims—claims that receive ninety-five percent of their value—constitutes an artificial impairment in contravention of the Code and implicates due process because some voting claimants were not adequately represented in the pre-petition negotiations).

322 *Id.* at 245 (citation omitted).

323 Courts are hostile to functional limitations on exit in class action settlements. *See, e.g.*, *In re* Inter-Op Hip Prosthesis Prod. Liab. Litig., No. 01-4039, 2001 WL 1774017, at *1 (6th Cir. Oct. 29, 2001) (expressing "serious doubts as to the legitimacy of the proposed class" because the "significant financial disincentives on the right to opt out . . . raise due process concerns"). The comparison is apt because absent class action plaintiffs "vote with their feet." *See supra* note 221 and accompanying text.

324 *See* Levitin, *supra* note 30, at 1118.

325 *Cf.* 11 U.S.C. § 1126(c) (deeming a class of claims to accept a reorganization when creditors "that hold at least two-thirds in [value] and more than one-half in number" of the class's claims vote in favor of the plan). But, the detailed figures from Purdue's vote add an additional wrinkle: most claimants did not cast their ballot. Jacoby, *supra* note 90, at 1757. This could reflect the normal level of claimant engagement. After all, the literature on undervoting in Chapter 11 cases is sparse. *Id.* Still, that only a minority of claimants confirm a plan should bear on "the comprehensibility and fairness of bankruptcy to tort

reached a plea agreement with Purdue, requiring, under penalty of a $2 billion criminal forfeiture, that it restructure into a public benefit corporation.[326] If the creditors did not approve the bankruptcy plan, then the Department of Justice could seize all of Purdue's assets.[327] Under that threat, no court should conclude claimants exercised their voice rights. As Professor Levitin succinctly puts it:

> The choice creditors faced was not between Purdue's plan versus a [sic] possible plan that might have paid them more. It was a choice between Purdue's plan and a forfeiture of all value to DOJ. That was no choice at all. The effect of the poison pill was to render the creditor vote—normally the heart of the Chapter 11 process—little more than a formality.[328]

B. Rough Justice: Guaranteeing a Peace Premium

At the center of almost every mass-tort bankruptcy is the question whether the debtor's (and nondebtors') use of the Code will foil claimant recovery.[329] Courts, for instance, frequently justify their approval of reorganization plans on the basis that it produces the best outcome for all—that it provides a swift resolution that saves all parties significant litigation costs, guarantees finality, and thus induces defendants to pay a generous settlement.[330] But, such reasoning is not a mere response to claimants' objections. Just as necessity justified historical aggregations in the courts of equity,[331] the finding that a settlement adequately

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claimants," *id.*, and, perhaps more importantly, whether the vote represents the "indicia of support by affected creditors" necessary to satisfy due process, *In re* Combustion Eng'g, Inc., 391 F.3d 190, 245 (3d Cir. 2004) (citation omitted).

326 *See* Levitin, *supra* note 30, at 1113–14 (explaining the "superpriority" claim the DOJ had on Purdue's assets through the provision, and observing that a successful reorganization would reduce the penalty to $225 million).

327 *Id.* at 1115.

328 *Id.* at 1118.

329 *See, e.g.*, *In re* LTL Mgmt., LLC, 637 B.R. 396, 416 (Bankr. D.N.J. 2022) (addressing whether Johnson & Johnson's Texas Two-Step "ring-fenced, concealed, or removed" any recovery from plaintiffs), *rev'd and remanded*, 58 F.4th 738 (3d Cir. 2023); *In re* Purdue Pharma L.P., 633 B.R. 53, 94 (Bankr. S.D.N.Y. 2021) ("Are the Sacklers paying a 'settlement premium' in their settlements [such that they are paying more] than they would pay in litigation[?]"), *vacated*, 635 B.R. 26 (S.D.N.Y. 2021), *rev'd and remanded*, 69 F.4th 45 (2d Cir. 2023), *cert. granted sub nom.* Harrington v. Purdue Pharma, L.P., No. 23-124, 2023 WL 5116031 (U.S. Aug. 10, 2023).

330 *See In re Purdue Pharma*, 633 B.R. at 93–94 (noting settlements should not be evaluated in a vacuum, and suggesting the reorganization plan produces the peace premium for claimants after considering "catastrophic" costs of pursuing the Sacklers' overseas funds).

331 *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 832–42 (1999) (describing the necessity rationale behind the limited fund's equitable origins).

compensates claimants plays a critical role in modern due process analysis;[332] it helps strike the proper balance between exit, voice, and loyalty in any bankruptcy proceeding.

Often, critics attack bankruptcy resolutions on the grounds that any peace premium is unverifiable and often contradicted, or, in the alternative, debtors and attorneys capture the lion's share of the value from saved litigation costs.[333] But, courts can readily police such outcomes. As this Section will demonstrate, bankruptcy courts have ample authority to ensure reorganization plans sufficiently fund claimant recovery. Again, class action law and multi-district litigation practice provide crucial guidance.

1. Valuing Claims

Early mass-tort settlements, whether secured through bankruptcy or class actions, exposed the frailty of payment projections when constructing settlement trusts for present and future claims.[334] The lesson from these failures was resoundingly clear: Successful mass-tort resolutions require adequate discovery and litigation to afford parties the necessary information to value claims and project future injuries.[335] Class action doctrine formally recognizes that reality. Several circuits incorporate a presumption of fairness—premised on adequate representation by counsel, arms-length negotiation, and vigorous pre-settlement discovery and litigation—into their scrutiny of class action settlements.[336] Bankruptcy courts could easily adapt this analysis to their review of reorganization plans. U.S. Trustees and bankruptcy

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[332] *See* Section II.B.2–C (discussing how substantive recovery or statutory objectives can ensure procedures remain consistent with due process); *cf.* Stephenson v. Dow Chem. Co., 273 F.3d 249, 260–61 (2d Cir. 2001) (finding an inadequately funded class settlement violated absent claimants' due process rights), *aff'd in part, vacated in part*, 539 U.S. 111 (2003).

[333] *See, e.g.*, Brubaker, *Mandatory Aggregation*, *supra* note 29, at 993 & n.141.

[334] *See, e.g.*, NAGAREDA ET AL., *supra* note 66, at 491–92 (noting the number of plaintiffs in the fen-phen litigation almost doubled the settlement's projections); *id.* at 757 (recounting that "just a few years after [the Johns-Manville trust's] creation, the trust was insolvent").

[335] Campos & Parikh, *supra* note 23, at 356–57 (explaining, aside from the Manville trust, "most settlement trusts . . . pursuant to § 524(g) remain solvent and have not needed to dramatically reduce pro rata distributions"); *In re* LTL Mgmt., LLC, 64 F.4th 84, 103–04 & n.13 (3d Cir. 2023) (holding the A.H. Robins claimants' trust out as an example of the benefit of pre-bankruptcy tort litigation to value claims).

[336] *See In re* NFL Players Concussion Inj. Litig., 821 F.3d 410, 436 (3d Cir. 2016) (applying the presumption when "(1) the negotiations occurred at arms length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected"); Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 116 (2d Cir. 2005) (citing MANUAL FOR COMPLEX LITIGATION (THIRD) § 30.42 (1995)).

courts are no strangers to policing collusive lawyering.[337] Adequate voice and voting, instead of representation and exit, enables courts to rely on claimants' support or rejection of a plan.[338] And, academic literature,[339] along with judicial expertise,[340] has developed the categorization of a "mature mass tort" to signify the sufficient development of pre-settlement litigation issues.

The remaining question then is *how* (or *where*) to facilitate litigation before confirming any reorganization plan. Judge Ambro's recent opinion dismissing Johnson & Johnson's bankruptcy petition expressed doubt that bankruptcy is the proper forum for valuing claims. He noted the risks of a "premature filing" because bankruptcies reorganizing immature mass-tort liabilities have led to insolvent settlement funds.[341] Instead, a "long[]history of litigation outside of bankruptcy" provided "better guideposts" to bankruptcy courts.[342] This argument ultimately frames the opinion's financial distress requirement[343] as a prophylactic measure—and an unnecessary one at that. The recognition that reorganizations benefit from significant discovery and pre-confirmation litigation does not justify a measure that restricts litigants from bankruptcy courtrooms. Part of the allure of bankruptcy is not simply the ability to discharge claims but its possibly superior centralization mechanisms.[344] Indeed, Judge Ambro's chief example, the A.H. Robins bankruptcy over Dalkon Shield tort liabilities, illustrates the promise of bankruptcy as a claim-valuation venue.[345]

To avoid the Code's limitation on bankruptcy courts' authority to advance personal injury litigation, the district court in the A.H. Robins bankruptcy selectively withdrew its reference to the bankruptcy judge.[346] This did not dismiss the bankruptcy petition or remove the

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337 *See supra* note 265 (discussing the U.S. Trustee's role in guarding loyalty rights).

338 *See supra* Sections II.B.2; II.C; III.B.1 (addressing the importance of voice in bankruptcy).

339 *See* Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. Rev. 659, 688–94 (1989) (suggesting ways to resolve "mature mass torts").

340 *See In re* Chevron U.S.A., Inc., 109 F.3d 1016, 1018 (5th Cir. 1997) (defining "maturity" by "a series of verdicts over time").

341 *In re* LTL Mgmt., LLC, 64 F.4th 84, 102–03 (3d Cir. 2023).

342 *Id.* at 103.

343 *See supra* notes 69–72 (discussing the financial distress requirement and its relation to the broader aggregate litigation landscape).

344 *See supra* Section I.A.1 (discussing bankruptcy's centralization and coordination features); Brubaker, *Mandatory Aggregation*, *supra* note 29, at 999–1003 (disfavoring expansive use of bankruptcy's discharge features but suggesting litigants and courts employ bankruptcy's strong centralizing function as a superior version of multi-district litigation).

345 *In re LTL Mgmt.*, 64 F.4th at 103 n.13 (discussing A.H. Robins).

346 *In re* A.H. Robins Co., 59 B.R. 99, 105 (Bankr. E.D. Va. 1986).

bankruptcy judge from the case. Instead, the pair of judges "conducted all proceedings jointly" and facilitated extensive discovery on the common issues, such as expert testimony on general causation.[347]

Admittedly, A.H. Robins remains a unique example of collaboration,[348] but the growth of the common law of complex litigation provides more opportunities to merge the best of both Article III and bankruptcy adjudication. For instance, Professor Issacharoff and Dean McKenzie suggest the Judicial Panel on Multi-District Litigation should consolidate MDLs and bankruptcies on the same mass-tort issues into a single district, thereby expanding the repertoire of tools available to the MDL judge, pairing a possibly inexperienced bankruptcy judge with an accomplished mass-tort adjudicator, and eliminating friction between competing proceedings.[349] Further, Professors Campos and Parikh advocate for selective lifts of the automatic stay to permit bellwether trials.[350] To them, the bankruptcy court's selective use of the automatic stay in *In re PG&E Corporation* to "help[] with the imperfect method of estimating claims" represents an important step toward taking seriously claim evaluation in resolving mass torts.[351]

In all, courts possess the case management repertoire to efficiently and properly value claims for the purposes of aggregate settlement. Class action law's presumption of fairness provides the guideposts to structure pre-settlement litigation, and bankruptcy judges should deploy their unique consolidation and coordination tools to that effect.

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347 *In re* A.H. Robins Co., 88 B.R. 742, 743, 746–47 (E.D. Va. 1988), *aff'd*, 880 F.2d 694 (4th Cir. 1989).

348 *See* Gibson, *supra* note 132, at 87 & nn.379–80 (noting many calls for experimentation in mass-tort bankruptcies go unanswered).

349 Samuel Issacharoff & Troy A. McKenzie, *Managerialism and Its Discontents*, Rev. Litig. (forthcoming 2023) (manuscript at 16). The MDL statute's capacious language appears to give sufficient discretion to transfer such cases, *see In re* Phar-Mor, Inc., Sec. Litig., No. 959, 1994 WL 41830, at *1 n.2 (J.P.M.L. Jan. 31, 1994) ("Because federal bankruptcy jurisdiction is vested in district courts, the Panel has never found any jurisdictional impediment to transfer of adversary proceedings as tag-along actions in multidistrict dockets."), but the Judicial Panel on Multi-District Litigation has also recognized that "the transferee judge and the bankruptcy judge need not sit in the same district to be able to coordinate informally to address any matters arising in the MDL that implicate the bankruptcy proceeding," *In re* Takata Airbag Prods. Liab. Litig., 84 F. Supp. 3d 1371, 1373 n.4 (J.P.M.L. 2015).

350 Campos & Parikh, *supra* note 23, at 357–58.

351 *Id.* at 358 (quoting *In re* PG&E Corp., No. 19-bk-30088, 2019 WL 3889247, at *2 (Bankr. N.D. Cal. Aug. 16, 2019).

2. *Policing Abusive Settlement Terms and Tactics*

After ascertaining the proper value of claims, bankruptcy courts must ensure any reorganization plan awards comparable value to claimants.

In many successful mass-tort reorganizations, this should not pose an issue. Debtors and defendants commonly approach aggregate resolutions with an open wallet, willing to fund settlement trusts as necessary[352] and guaranteeing value to claimants.[353] For instance, despite Johnson & Johnson's Texas Two-Step, the company's funding agreement included a "triple A-rated payment obligation for LTL's liabilities," requiring it to pay at least $61.5 billion (over $1.5 million per plaintiff)[354] to fulfill those obligations.[355] This trend is not surprising. Defendants place incredible value on the mere fact of finality,[356] and their strongest opportunities to limit recovery are through wins in key pretrial motions and bellwethers. Success in those stages will lower individual claims' settlement value and, thus, a defendant's overall liability.

Of course, there are instances where defendants attempt to fence off a significant portion of their assets from claimants. 3M's recent effort to place its subsidiary into bankruptcy—only funding the entity with enough cash to deliver just over $4,000 per plaintiff, a wholly insufficient amount in light of the recent bellwether verdicts—is such an example.[357] But clear monetary deficiencies are relatively easy to detect with adequate claim valuation, and blatant restrictions on claimant recovery generally provoke judicial skepticism.[358] Indeed, the judge presiding

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352 *See, e.g.*, *In re* NFL Players Concussion Inj. Litig., 821 F.3d 410, 423 (3d Cir. 2016) (including an uncapped fund for retired players).

353 *See* Simon, *supra* note 25, at 1204 (listing bankruptcies that guarantee payment-in-full of all awarded claim amounts and those where the dollar value awarded reflects values awarded outside of bankruptcy). *But see* Brubaker, *Mandatory Aggregation*, *supra* note 29, at 993 n.140 (arguing that such classifications may be misleading because *Takata*, for instance, did not award punitive damages).

354 *In re* LTL Mgmt., LLC, 64 F.4th 84, 94 (3d Cir. 2023) (noting J&J faced around 38,500 actions).

355 *Id.* at 106, 110.

356 *See* Richard Marcus, *A Legend in His Own Time, and A Fixer for Mass Tort Litigation*, 84 L. & Contemp. Probs. 183, 187–88 (2021) (explaining news reports of a settlement agreement can cause a corporation's stock price to rise, such as Bayer's announcement of a potential agreement leading to a seven percent stock price increase).

357 Robert Klonoff, *3M's Bankruptcy Maneuver Raises Issues For Justice System*, Law360 (Aug. 11, 2022), https://www.law360.com/articles/1518112/3m-s-bankruptcy-maneuver-raises-issues-for-justice-system [https://perma.cc/YYH8-J22A].

358 *See* Nagareda et al., *supra* note 66, at 786 (citing *In re* Combustion Eng'g, Inc., 391 F.3d 190, 201 (3d Cir. 2004)) (explaining the bankruptcy court only confirmed Combustion Engineering's bankruptcy plan after its parent corporation contributed $200 million more to the futures' fund); *id.* at 488 (citing *In re* Inter-Op Hip Prosthesis Liab. Litig., 204 F.R.D. 330, 351–52 (N.D. Ohio 2001)) (suggesting the court only approved the

over 3M's MDL took the bankruptcy filing as such a bad-faith tactic that she pierced the corporate veil, preventing 3M from shifting any liability to its corporate subsidiaries, with the court's inherent power to sanction litigation abuses.[359]

Alternatively, complex trust administration may impose significant procedural hurdles that prevent claimants from accessing their compensation. Under the Purdue Pharma bankruptcy plan, claimants had to submit a claim form, separate from their proof of claim, within 90 days of receiving it.[360] Claimants had the opportunity to appeal the award granted by the administrator, but they would have to pay a $1,000 fee—a significant portion of their likely settlement—which the trust would refund only if the appeal was successful.[361] Courts must guard against both limitations on aggregate compensation by debtors and plans designed to functionally limit recovery to individual claimants.[362]

Further, the scope of the settlement release must fit the value afforded to plaintiffs. In the class action context, incongruencies between the scope of a settlement's release and the cause of action alleged by the plaintiffs suggest disloyalty—that plaintiffs' attorneys deliver the defendants a sweetheart deal in exchange for substantial fees.[363] The same inference applies to bankruptcy, but any mismatch might point to inadequate voice—that the debtor manipulated the bankruptcy process to remove some parties from the bargaining table, failed to disclose necessary information for group votes, or gerrymandered classes to achieve their desired result. Possible incongruencies typically occur because the discharge either releases unrelated causes of action or claims against unrelated defendants.

Inter-Op settlement after the Swiss parent corporation infused substantial assets into its subsidiary, which held all the liabilities); *In re* Purdue Pharma L.P., 633 B.R. 53, 89 (Bankr. S.D.N.Y. 2021) (discussing the corporate veil that protects the Sacklers' overseas assets); *cf.* Standard Fire Ins. Co. v. Knowles, 568 U.S. 588, 596 (2013) (preventing a putative class representative from stipulating to damages less than $5 million).

359 *See In re* 3M Combat Arms Earplug Prods. Liab. Litig., No. 3:19-MD-2885, 2022 WL 17853203, at *7 (N.D. Fla. Dec. 22, 2022) ("These bad faith abuses 'transcend[] the interests of the parties in' this litigation and 'so violate the judicial process' that only the harshest penalty is appropriate." (citation omitted)).

360 Simon, *supra* note 25, at 1190–91.

361 *Id.* at 1194 & n.194.

362 *See id.* at 1203 (observing a trend toward "increased procedural roadblocks . . . that reduce recovery and deter challenges" in recent reorganizations to discharge opioid and sexual abuse liabilities).

363 *See, e.g.*, Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 283–84 (7th Cir. 2002) (finding inadequate representation where a reverse-auction settlement sold off unrelated claims against a separate defendant for no compensation); Staton v. Boeing Co., 327 F.3d 938, 961 (9th Cir. 2003) (considering troublesome a release from all breach of contract claims despite the class lawsuit only alleging racial discrimination, and adjusting class counsels' fees accordingly).

Releasing unrelated causes of action presents the greatest concern. Notice mainly comes from the fine print, which many claimants may not fully understand.[364] And broad releases revive troubles with valuation. Not only are bankruptcy courts—or any lawyer for that matter—unable to predict the full universe of possible claims against a debtor, but, even if they could, there would be no feasible way to properly value them. It is therefore easy to understand how releasing unrelated causes of action could deliver an unearned windfall for debtors. When rejecting a plan that discharged "every conceivable claim—both federal and state claims—for an unspecified time period stretching back to time immemorial," a district court judge did not mince words: its "sheer breadth . . . can only be described as shocking."[365] In contrast, successful mass-tort bankruptcies generally only release claims related to the common product or tort. In *Takata*, the bankruptcy court only channeled personal injury, wrongful death, or other similar claims related to the airbag inflator.[366] Similarly, J&J's use of the Texas Two-Step meant they could *only* release talc-related liabilities; they assigned LTL essentially no other legal obligations.[367] Voter approval of a targeted discharge ultimately reflects an agreed-upon bargain between the debtor and claimants.

The second axis—releases to nondebtors—has been the subject of much of this Note.[368] These present less of a concern. Typically, *who* a bankruptcy plan benefits is more easily recognizable and receives more publicity in a case than *what* the plan releases.[369] Further, nondebtor releases are not entirely different from a class action settlement that releases related co-defendants. So long as the additional party adequately compensates the class for the release, courts do not have trouble affirming a settlement as fair, reasonable, and adequate. To that effect,

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364 *See* Dorothy Coco, *Third-Party Bankruptcy Releases: An Analysis of Consent Through the Lenses of Due Process and Contract Law*, 88 Fordham L. Rev. 231, 263–64 (2019) (explaining bankruptcy documents are difficult to read because of their capitalized, italicized, and bolded text that makes comprehending even clear writing difficult).

365 Patterson v. Mahwah Bergen Retail Grp., Inc., 636 B.R. 641, 655 (E.D. Va. 2022).

366 Disclosure Statement for Third Amended Joint Chapter 11 Plan of Reorganization of TK Holdings, Inc. and Its Affiliated Debtors at 20–21, *In re* TK Holdings, Inc., No. 17-11375-BLS (Bankr. D. Del. Jan. 5, 2018) (No. 1630).

367 *See In re* LTL Mgmt., LLC, 64 F.4th 84, 109 (3d Cir. 2023).

368 *See supra* Section I.B.1 (detailing the origins of the channeling injunction and modern nondebtor releases).

369 *See, e.g.*, Assoc. Press, *Takata Settles with Injured Drivers to Exit Bankruptcy*, USA Today (Feb. 12, 2018), https://www.usatoday.com/story/money/cars/2018/02/12/takata-settles-injured-drivers-exit-bankruptcy/328396002 [https://perma.cc/8PY4-47H2] (noting the Takata bankruptcy indemnified other auto-manufacturers); Meryl Kornfield, *Judge Overturns Deal Giving Purdue Pharma's Sackler Family Civil Immunity from Opioid Claims*, Wash. Post (Dec. 16, 2021), https://www.washingtonpost.com/business/2021/12/16/purdue-pharma-sackler-ruling [https://perma.cc/UZ6J-2ARC] (highlighting the nondebtor release in the title of their coverage of the Purdue bankruptcy).

nondebtors must make a substantial contribution to the settlement trust before a bankruptcy court extends the channeling injunction to cover a nondebtor.[370] There is a fear that debtors will attempt to extend aid to more tenuously related nondebtors.[371] Formal doctrine offers some relief, requiring an "identity of interests" between the debtor and nondebtor.[372] But more importantly, claimant consent to the substantial contribution through their approval of the bankruptcy plan assuages many of these anxieties. So long as claimants assent to an aggregate sum with an understanding of the scope of the release they are granting, courts should generally find the involvement of nondebtors otherwise consistent with due process.

Conclusion

The juxtaposition of many similar cases throughout this Note demonstrates that the formal moves accompanying bankruptcy resolutions do not themselves raise concern. Creative uses of corporate veils, claims processing schemes, or nondebtor releases may "accrue to the benefit of all, or nearly all, stakeholders."[373] Ultimately, context permits courts to discern whether a bankruptcy plan is "otherwise consistent" with due process—that is, whether it constitutes a debtor's attempt to shield themselves from paying claimants just compensation or an intent to accept rough justice as the price of finality. This Note sets forth the following table to summarize its application of exit, voice, and loyalty to modern trends in mass-tort bankruptcies.

Grading Mass-Tort Bankruptcies

	Voice Rights				Rough Justice		
Case	No Voice Denial	Future Claims Representative	Legitimate Voting Classes	Ability to Reject	Claim Valuation	Open-Wallet Approach (No Ring-Fenced Assets)	Congruent Settlement Terms & Payment
A.H. Robins	✓	✓	✓	✓	✓	✓	✓
Takata	✓	✓	✓	✓	✓	✓	✓
Johnson & Johnson		✓		✓		✓	✓
Purdue Pharma	×	✓	✓	×	×	×	✓
Combustion Engineering	×	×	×	✓	✓	×	×
3M/Aearo					✓	×	×

✓ indicates no due process issue likely occured, but an × indicates such an issue likely occured. Some columns are blank because the case did not mature enough to make an accurate assessment.

370 *See In re* Dow Corning Corp., 280 F.3d 648, 658 (6th Cir. 2002) (requiring the nondebtor to contribute "substantial assets to the reorganization" to obtain coverage).

371 *See supra* note 126.

372 *In re* Dow Corning, 280 F.3d at 658.

373 *In re* LTL Mgmt., LLC, 64 F.4th 84, 111 (3d Cir. 2023).

The takeaways are two-fold. First, a plethora of bankruptcies, including A.H. Robins, Takata, and, putatively, Johnson & Johnson, may legitimately preclude subsequent litigation. But in these cases, courts must remain skeptical and vigilant. After all, debtors only file for bankruptcy because the Code can offer significant financial relief at the expense of claimants. Purdue Pharma stands as a cautionary tale; the fact that claimants had no rational choice but to accept the plan clouds their seemingly overwhelming assent to the case's resolution. Even where a court may readily find several markers of legitimacy, attention to aggregate litigation's state of play remains critical.

Second, and finally, some courts' interpretations of the Bankruptcy Code are more restrictive than due process requires. The Third Circuit's imposition of a financial distress standard imputes a necessity condition that the Constitution does not demand to preclude plaintiffs, and some circuits interpret the Code to prevent nondebtor releases. The Supreme Court's review of Purdue's reorganization may shift nationwide bankruptcy practice in that direction. Hopefully, just as *Amchem* and *Ortiz* once did for courts and practitioners of class action law, these retrenchments provide a crucial warning about the due process issues enmeshed in mass-tort bankruptcies but leave sufficient room for the form of aggregate litigation to eventually achieve its goals of coordination, equitable redress, and finality to the extent the Constitution permits. Otherwise, the settlement imperative will push these cases to less transparent and regulated fora, resulting in resolutions none would find consistent with due process.