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Research Report

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BETHANY SAUNDERS-MEDINA

Bankruptcy and Mass Torts After *Harrington v. Purdue*

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About This Report

In this report, we examine the implications of the U.S. Supreme Court's decision in *Harrington v. Purdue Pharma L.P.* on the resolution of mass-tort claims in the United States.[1] We provide evidence from a series of discussions with subject-matter experts (SMEs), including bankruptcy and mass-litigation experts from both the plaintiff and defendant sides of litigation. Initially, bankruptcy was modified with the goal of achieving global settlements in asbestos mass-tort cases, providing a structured process to aggregate claims and distribute compensation relatively equitably in the face of limited defendant assets. In recent decades, a growing number of mass-tort bankruptcies, beyond the asbestos context, have relied on nonconsensual third-party releases, which allow solvent affiliates, insurers, or related entities to obtain immunity from future tort claims in exchange for contributing to the bankruptcy resolution, even without individual claimant consent. The Supreme Court's decision in *Harrington* sharply curtailed this practice, holding that bankruptcy courts lack statutory authority to approve such releases in nonasbestos cases. This ruling eliminates a tool that had increasingly been used to shield nondebtor parties, secure their financial contributions, and facilitate comprehensive settlements. Several SMEs interviewed for this report argued that *Harrington* could significantly undermine the efficacy of bankruptcy court as a forum for resolving large-scale mass-tort litigation. However, the experts differed in their views on the magnitude and desirability of the change. Several argued that the ruling will make bankruptcy less attractive as a mass-tort resolution mechanism and hence shift reliance back to the multidistrict litigation system. More broadly, the decision reflects the long-standing tension between uniform global resolutions and individual claim autonomy, a tension with which the courts have struggled for decades. Finally, we explore the potential consequences of the landmark *Harrington* decision and highlight a possible need for legislative reforms to clarify bankruptcy's role in resolving mass torts beyond asbestos.

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[1] *Harrington v. Purdue Pharma L.P.*, 144 S. Ct. 2071 (2024).

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Summary

In recent years, bankruptcy has been used with increasing frequency as a strategy for resolving mass-tort litigation. Its appeal lies in the potential for global resolution—the ability to address all current and future claims against a defendant in a single, centralized process.[1] A key feature facilitating this capability has been the availability of nonconsensual third-party releases. These releases allow affiliated parties that have not declared bankruptcy themselves to be released from liability without requiring the unanimous approval of all mass-tort claimants and creditors. Often, these third parties contribute substantial sums to the bankruptcy estate in return for these releases.

Issue

In June 2024, the U.S. Supreme Court (SCOTUS) ruled in *Harrington v. Purdue Pharma L.P.* that the Bankruptcy Code does not permit nonconsensual third-party releases in cases not involving asbestos.[2] This ruling raises uncertainty about whether bankruptcy will remain a viable pathway for global resolution in contexts other than asbestos. Given bankruptcy's role as a mechanism for resolving mass torts, understanding the implications of *Harrington* is essential not only for mass-tort bankruptcies but also for the broader mass-tort landscape. For this report, we examined the implications of SCOTUS's decision by addressing the following questions:

1. How has *Harrington* changed the efficacy of bankruptcy in achieving global resolution of mass torts?
2. How might *Harrington* affect the strategies parties use in bankruptcy?
3. What are *Harrington*'s potential consequences for the future of mass-tort resolution?
4. What legislative and administrative responses might be considered to address the limitations imposed by *Harrington*?

There are numerous trade-offs between bankruptcy and other mechanisms for resolving mass torts, such as class actions and multidistrict litigation (MDL). Although *Harrington* does not directly alter many of these trade-offs, it does significantly alter bankruptcy's capacity to deliver global resolution—historically, one of its defining features. In this report, we do not attempt to fully assess the relative advantages or disadvantages of each mechanism. Instead, we concentrate on the specific ways *Harrington* has changed the strategic and legal utility of bankruptcy in mass-tort contexts, in which global resolution has been a central objective for defendants.

Approach

In addition to reviewing the *Harrington* decision itself, we reviewed other sources, including amicus briefs filed in the case, relevant judicial decisions, the eventual settlement agreement in the Purdue bankruptcy, and

[1] A global resolution is distinct from what is commonly called an *inventory settlement*, in which a defendant negotiates separate settlements with individual plaintiffs' firms to resolve only the current docket of claims they control.

[2] *Harrington v. Purdue Pharma L.P.*, 144 S. Ct. 2071 (2024).

the broader legal literature on bankruptcy and mass torts, including law review articles, legal treatises, legal periodicals, and articles in the general press.

Additionally, we conducted a series of 16 semistructured, not-for-attribution interviews over two years with subject-matter experts (SMEs) in mass torts and bankruptcy, including current and former judges, plaintiffs' attorneys, defense attorneys, and special masters. These interviews were augmented by a structured discussion at the October 2024 meeting of the advisory board of the RAND Feinberg Center for Catastrophic Risk Management and Compensation. With the help of a facilitator, 11 advisory board members and invited guests discussed the topics addressed in this report. Where appropriate, the ideas and insights shared during the discussion are reflected in this report.

Key Findings

How Has *Harrington* Changed the Efficacy of Bankruptcy in Achieving Global Resolution of Mass Torts?

Nonconsensual third-party releases have been heavily used in mass-tort bankruptcies for decades. *Harrington* introduces a significant change in this approach. The decision's key impacts include

- strengthened bargaining positions for mass-tort claimants
- increased likelihood of lengthier negotiations with potentially a lower chance of reaching global resolution
- a potential reduction in the third parties' willingness to contribute to settlement in bankruptcy because they might prefer to preserve resources for future legal challenges
- a potential decline in the attractiveness of divisional mergers, in which a company splits into two entities—one that assumes the company's tort liability and another that retains the operating business and assets, despite the ruling not directly addressing this issue
- a potential for improved outcomes for some mass-tort plaintiffs but the possibility of lower recoveries for those unlikely to pursue cases against third parties for various reasons.

How Might *Harrington* Affect the Strategies Parties Use in Bankruptcy?

For companies that continue to seek bankruptcy protection post-*Harrington*, we identified several potential work-arounds that could mitigate any negative impacts:

- Third parties could offer additional compensation to holdouts to secure unanimous support of the settlement or higher payments to those who agree to release third parties.
- A third party in a fully satisfied bankruptcy might argue that its liability is extinguished under the principle of preventing double recovery by plaintiffs.
- Judges could clarify what constitutes a *consensual* third-party release, potentially implementing opt-out systems (i.e., creditors that do not explicitly reject a third-party release in a bankruptcy plan are assumed to support it) or hybrid voting mechanisms.
- Parties could try to arrange prepackaged bankruptcies (or *prepacks*), in which all potentially exposed parties enter bankruptcy and agree to settlement terms before filing, which, in principle, would allow faster court approval.

Although these strategies might be explored by parties remaining in the bankruptcy system, their ultimate effectiveness and attractiveness to the various stakeholders remain uncertain. There was no consensus

among the SMEs we consulted regarding an obvious work-around to the *Harrington* decision. It seems there is no straightforward path to restoring the efficacy of bankruptcy in producing global resolution to the level that existed pre-*Harrington*.

What Are *Harrington*'s Potential Consequences for the Future of Mass-Tort Resolution?

Having addressed how *Harrington* might affect strategic decisionmaking within the bankruptcy forum, we now turn to *Harrington*'s implications for the broader mass-tort landscape:

- Parties might be less inclined to use bankruptcy to resolve mass torts, possibly shifting focus back to the MDL process, with its attendant pros and cons.
- Parties might continue to pursue bankruptcy without the expectation of extinguishing all claims, allowing most claims to be resolved while leaving third parties exposed to a much smaller number of claims in litigation. Bankruptcy plans could set aside funds to defend these claims, as happened in the post-*Harrington* renegotiation of the Purdue bankruptcy.
- Parties might be less inclined to employ divisional mergers if the company that divests the liability is unlikely to receive a third-party release.

What Legislative and Administrative Responses Might Be Considered to Address the Limitations Imposed by *Harrington*?

Several strategies could be used to mitigate *Harrington*'s effect on the ability of bankruptcy to achieve global resolution:

- Congressional modification of § 524(g) of the Bankruptcy Code could allow nonconsensual third-party releases in all mass torts, not just asbestos.[3] It is important to note that this cannot be achieved by simply replacing "asbestos" with "mass torts" in the language of 524(g). Many nuanced issues need to be considered, which could be difficult in a polarized Congress.
- Changes to the Federal Rules of Civil Procedure could standardize certain case management tools in MDLs by drawing on some procedural features that have supported resolution in mass-claim contexts.[4]
- Revitalization of class actions by revising the Federal Rules of Civil Procedure could address past deficiencies that SCOTUS identified in its *Amchem* and *Ortiz* decisions in the 1990s.[5] Some SMEs with whom we spoke said that rule changes were not necessary and that plaintiffs and defendants can already structure class actions in ways that would satisfy previous objections.
- Exploration of innovative financial strategies could increase. One such strategy would be liability divestiture transactions, in which firms with long-tailed tort liability transfer those obligations to an acquiring firm without court supervision as an alternative to bankruptcy or divisional merger. However, such strategies are practical only when the selling firm has adequate resources to pay the acquiring firm.

[3] 11 U.S.C. § 524(g).

[4] Committee on the Judiciary, U.S. House of Representatives, *Federal Rules of Civil Procedure* (2024).

[5] *Amchem Prods. v. Windsor*, 117 S. Ct. 2231 (1997); *Ortiz v. Fibreboard Corp.*, 119 S. Ct. 2295 (1999).

Concluding Remarks

It seems clear that, in the wake of *Harrington*, bankruptcy has become a less effective mechanism for achieving global resolution in mass torts. This decreased efficacy will likely reduce interest in bankruptcy and divisional mergers as strategies for resolving mass torts while also prompting a reassessment of other resolution mechanisms. Although, in this report, we identify several trade-offs in the pursuit of global resolution, a more comprehensive analysis of these trade-offs is necessary to determine the optimal path forward.

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CHAPTER 1

Introduction

Mass torts are inherently complex. Since their emergence, the legal system has faced challenges in developing procedures to address the number of claims involved in each mass tort while balancing various priorities, such as fairness, efficiency, a person's right to seek justice and control their case, the desire to compensate only legitimate claims, and defendants' desire to achieve a global resolution. In some ways, all of the different, overlapping mechanisms for resolving mass litigation—whether multidistrict litigation (MDL), class actions, and, increasingly in recent years, bankruptcy—balance these objectives, albeit often in very different ways and often weighing these objectives very differently. Bankruptcy, in particular, has proven to be a powerful tool for achieving global resolution by channeling all related claims into a centralized forum and facilitating comprehensive settlements, although critics would argue that this comes at the expense of other priorities.

The efficacy of bankruptcy in achieving global resolution for defendants has been fundamentally altered by the landmark U.S. Supreme Court (SCOTUS) decision in *Harrington v. Purdue Pharma L.P.*[1] The case marks a significant shift in how nonasbestos mass-tort cases can use bankruptcy to achieve global resolutions.[2] In a narrow 5–4 decision, SCOTUS held that the Bankruptcy Code does not permit nonconsensual third-party releases in Chapter 11 (reorganization) cases outside the asbestos context. This decision effectively prohibits bankruptcy courts from approving plans that release nondebtor parties from liability without the affirmative consent of affected claimants, thereby eliminating a strategy that had been accepted in some federal circuits but rejected or limited in others.[3]

Prior to the decision, the Purdue bankruptcy plan would have shielded the nondebtor Sackler family from opioid-related claims in exchange for contributions to a bankruptcy trust. Following the decision, the settle-

[1] *Harrington v. Purdue Pharma L.P.*, 144 S. Ct. 2071 (2024).

[2] In a bankruptcy case, the entity that files for bankruptcy is legally referred to as the *debtor*. In the case of mass-tort bankruptcies, the debtor company typically faces extensive liability arising from civil litigation, in which it serves as the defendant in numerous lawsuits filed by plaintiffs seeking compensation. Although the term *debtor* is standard in bankruptcy proceedings, for the purposes of this report, we typically use the term *defendant* to describe the company initiating the bankruptcy process and against which the tort claims are being asserted. Likewise, the party filing a claim against a debtor in bankruptcy is called a *creditor*. In this report, we sometimes use the term *plaintiff* rather than *creditor*. This terminology aligns with the mass-tort litigation context and helps avoid confusion by maintaining consistency with the broader civil litigation framework in which these parties are originally involved.

[3] The Court characterized its holding as narrow, stating that nothing in the opinion "[calls] into question consensual third-party releases" and that it does not "pass upon a plan that provides for the full satisfaction of claims against a third-party nondebtor." *Harrington* at 226. *See also* Kavanaugh, J., dissenting (emphasizing that consensual and full-satisfaction releases remain available and arguing that § 1123[b][6] supplies authority for them). In practice, a full-satisfaction plan would require that claimants receive the complete value of their claims (e.g., cash or equivalent consideration); in mass-tort settings, that is hard to establish because it often requires identifying all potential claimants (including latent-injury cohorts), projecting future incidence, and valuing uncertain harms, issues that are inherently contested. Accordingly, although the opinion leaves theoretical space for consensual releases and (in principle) full-satisfaction plans, the latter remain both legally undeveloped and operationally difficult in mass-tort cases.

ment now includes an opt-in mechanism allowing plaintiffs who agree to release the Sacklers from liability to receive a higher payment from the bankruptcy trust.[4]

Historically, bankruptcy was first employed in mass-tort litigation as a resolution mechanism for companies facing insolvency resulting from asbestos claims. Over time, its use has expanded to achieve global resolution in mass torts more broadly. Bankruptcy court provides a centralized forum for aggregating and resolving claims in an organized manner, particularly after SCOTUS rejected the class-action mechanism in *Amchem* and *Ortiz*.[5] Subject-matter experts (SMEs) we interviewed who were proponents of the bankruptcy system argued that it ensures that claimants, rather than competing for limited resources in a "race to the courthouse," are subject to a single uniform process in which a firm's assets are distributed in an equitable and structured way. Debtors and third parties contribute to compensation funds or bankruptcy trusts, incentivized by the bankruptcy system's ability to globally resolve prepetition liability, including tort claims.

In some mass-tort bankruptcies—particularly those involving asbestos—claims may include those held by people who are not yet symptomatic or have not filed suit but who were exposed to the harmful substance before the bankruptcy petition. These claims are treated as prepetition and may be discharged under special provisions, such as § 524(g) of the Bankruptcy Code.[6] In contexts other than asbestos, however, bankruptcy courts face more-significant limitations in extinguishing unknown or future claims. The ability to bind claimants who have not filed, and might not yet know whether they have a claim, often turned on the availability of consensual or nonconsensual third-party releases and a court's interpretation of what constitutes a claim under the Bankruptcy Code.[7]

Despite its increasing use in mass-tort resolution, the pre-*Harrington* use of bankruptcy drew vigorous criticism from plaintiffs' attorneys, legal scholars, and advocacy groups. Some of our SMEs argued that bankruptcy structurally disadvantages victims by denying them core procedural rights, such as the right to a jury trial and the leverage that accompanies traditional litigation and settlement negotiations. They contend that the estimation procedures used to value claims in bankruptcy are opaque and could yield lower recoveries than those available in tort litigation or MDL. These SMEs further argued that bankruptcy processes can dilute compensation for legitimate claimants by encouraging filings from claimants who might not other-

[4] Unlike other mass-tort bankruptcies, such as those involving asbestos or environmental exposure, *Purdue Pharma, L.P. v. City of Grande Prairie (In re Pharma L.P.)*, 69 F.4th 45 (2d Cir. 2023) did not involve a significant future-claim component. Most opioid-related claims had already been filed or were traceable to existing injuries, making it easier to structure claimant classes and assess compensation. In contrast, many mass torts involve latent or long-tail harms, in which injuries can manifest years after exposure. In those cases, releasing nondebtor parties, particularly from future claims, raises more-complex legal questions, especially when potential claimants cannot meaningfully consent because their injuries have not yet occurred or been discovered. As a result, the post-*Harrington* settlement model used in *Purdue*, which includes an opt-in mechanism, might be more difficult to replicate in mass-tort cases with substantial future-claimant populations.

[5] *Amchem Prods. v. Windsor*, 117 S. Ct. 2231 (1997); *Ortiz v. Fibreboard Corp.*, 119 S. Ct. 2295 (1999).

[6] 11 U.S.C. § 524(g).

[7] Under the Bankruptcy Code, a discharge generally applies only to claims that arose before the filing of the bankruptcy petition. *Claim* is broadly defined under 11 U.S.C. § 101(5) to include any right to payment, even if contingent or unliquidated, as long as it stems from prepetition conduct. In asbestos-related bankruptcies, § 524(g) provides a statutory mechanism to handle future claims—those based on prepetition exposure but not yet manifested. This includes appointing a future-claim representative (FCR) and creating a trust to process and pay such claims over time. Other than § 524(g), however, bankruptcy courts lack a clear statutory basis to extinguish claims held by individuals who have not yet been injured or whose claims would legally accrue only after the petition date. In *Harrington*, SCOTUS did not confront a § 524(g) scenario, and the plan did not include a formal mechanism for future claims. Instead, the controversy centered on whether the Sackler family could be released from liability for a broad set of prepetition claims, many asserted by individuals who had not filed or might not yet have discovered their injuries, through a nonconsensual third-party release.

wise pursue lawsuits while shielding corporate actors from the transparency and public scrutiny that accompany open court proceedings. This undermines the public benefit associated with open adjudication.[8]

A particularly controversial aspect of mass-tort bankruptcies, nonconsensual third-party releases effectively allowed solvent third parties, such as corporate owners (e.g., the Sackler family) and insurers, to secure broad liability shields without individual approval by all plaintiffs. The *Harrington* ruling ended this practice outside the asbestos context.[9] From the critics' perspective, this was a welcome correction, ensuring that nondebtor third parties could not release claims without the consent of the plaintiffs. Several of our SMEs noted that this decision could restore leverage to plaintiffs by forcing third parties—particularly, well-capitalized defendants—to negotiate directly with victims rather than using the bankruptcy process to obtain court-imposed releases.

The *Harrington* decision is part of a long-standing legal debate about how to best uphold traditional civil justice values in mass torts, in which case-by-case adjudication is practically impossible because of the extent of the harm and the number of plaintiffs involved. With this report, we aim to guide policymakers as they navigate the difficult decisions involved in balancing these conflicting imperatives.

Research Questions

According to the experts we interviewed for this report, after SCOTUS's decision, it is far from clear whether bankruptcy will continue to be a viable pathway for global resolution in contexts other than asbestos. Given bankruptcy's role as a mechanism for resolving mass torts, it is important to understand *Harrington*'s implications not only for mass-tort bankruptcies but also for the broader mass-tort landscape. In this report, we explore the implications of SCOTUS's decision by posing the following questions:

1. How has *Harrington* changed the efficacy of bankruptcy in achieving global resolution for defendants?
2. How might *Harrington* affect the strategies parties use in bankruptcy?

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[8] *See* Nora Freeman Engstrom, David Freeman Engstrom, Jonah B. Gelbach, Austin Peters, & Aaron Schaffer-Neitz, *Secrecy by Stipulation*, 74 Duke L.J. 99, 161 (2024) (stating that many scholars believe that "an important benefit—perhaps the primary benefit—of the tort system is its 'information-forcing function'"); Abbe R. Gluck, Elizabeth Chamblee Burch, & Adam S. Zimmerman, *Against Bankruptcy: Public Litigation Values Versus the Endless Quest for Global Peace in Mass Litigation*, 133 Yale L.J. 525 (2024); Assaf Jacob & Roy Shapira, *An Information Production Theory of Liability Rules*, 113 U. Chi. L. Rev. 1113, 1148–49 (2022); Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 Yale L.J. 350, 375 (2011) (explaining that "the tort system is a vital source of information gathering and intragovernmental feedback"); Abbe R. Gluck, *The Bankruptcy Off-Ramp from Complex Civil Litigation: Purdue Pharma, Opioids, & Unorthodox Civil Procedure in Public Harms Cases*, 100 Ind. L.J. 1253 (2025) (noting that lawyers and judges will continue to innovate to seek global resolution but that core values of civil justice can be lost); Pamela Foohey & Christopher K. Odinet, *Silencing Litigation Through Bankruptcy*, 109 Va. L. Rev. 1261 (2023) (arguing that, by using bankruptcy in this manner, corporations seek "to bypass procedural justice and to shut down discussion of their purported wrongdoings").

As we discuss in Chapter 2, these critiques remain contested. For example, some of our SMEs noted that MDLs rarely afford most plaintiffs a day in court and that that estimation, when grounded in robust data, need not undervalue claims. Others argued that bankruptcy can streamline compensation and reduce the inefficiencies of mass litigation, albeit at the cost of an individualized process.

[9] This is true, although § 524(g) explicitly permits nonconsensual third-party releases in asbestos bankruptcies with 75-percent claimant approval and a court finding that the releases are fair and necessary. Such releases in nonasbestos bankruptcies rested on varying interpretations of courts' equitable powers under 11 U.S.C. § 105(a) and 11 U.S.C. § 1123(b)(6). In nonasbestos bankruptcies, confirmation of a plan generally requires the approval of two-thirds in claim amount and one-half in number within each impaired class under 11 U.S.C. § 1126(c). Prior to *Harrington*, a minority of jurisdictions allowed third-party releases under certain conditions, but they were controversial and lacked uniform acceptance across circuits.

3. What are *Harrington*'s potential consequences for the future of mass-tort resolution?
4. What legislative and administrative responses might be considered to address the limitations imposed by *Harrington*?

There are numerous trade-offs between bankruptcy and other mechanisms for resolving mass torts, such as class actions and MDL. Although *Harrington* does not directly alter many of these trade-offs, it does significantly alter bankruptcy's capacity to deliver global resolution—historically, one of its defining features. We do not attempt to fully assess the relative advantages or disadvantages of each mechanism. Instead, we concentrate on the specific ways *Harrington* has changed the strategic and legal utility of bankruptcy in mass-tort contexts, in which global resolution has been a central objective.

Research Methods

In addition to analyzing the *Harrington* decision, we reviewed other sources, including amicus briefs filed in the case, relevant judicial decisions, the eventual settlement agreement in the Purdue bankruptcy, and the broader legal literature on bankruptcy and mass torts, including law review articles, legal treatises, legal periodicals, and articles in the general press.

We also conducted 16 semistructured, not-for-attribution interviews in the second half of 2024 and the first half of 2025 with SMEs in mass torts and bankruptcy. Interviewees included current and former federal judges, plaintiffs' attorneys, defense attorneys, restructuring professionals, and special masters with extensive experience in mass-tort litigation and bankruptcy. These people were selected to reflect a diversity of professional roles, institutional perspectives, and familiarity with both MDL and bankruptcy resolution mechanisms. The interviews and panel discussions included core questions about *Harrington*'s practical and strategic effects, particularly concerning the use of nonconsensual third-party releases, the feasibility of alternative settlement structures, and the likely evolution of mass-tort resolution strategies in both bankruptcy and the tort system. We also encouraged interviewees to share views on the comparative advantages and shortcomings of various mechanisms, including MDLs, class actions, and liability divestiture transactions, and to reflect on how these might change post-*Harrington*.

Another key component of our research involved a structured discussion held during the October 2024 meeting of the advisory board of the RAND Feinberg Center for Catastrophic Risk Management and Compensation. With the help of a facilitator, 11 advisory board members and invited guests discussed many of the topics addressed in this report. Where appropriate, the ideas and insights shared during the discussion are reflected in this report. We also received extensive comments on an earlier draft from several board members.

Finally, for our analysis of MDL, we used data derived from the U.S. Judicial Panel on Multidistrict Litigation's (JPML's) publications and the Federal Judicial Center's Integrated Database.[10]

Organization of This Report

The report is organized into five chapters and two appendixes:

- In Chapter 2, "Mechanisms for Resolving Mass Torts Pre-*Harrington*," we define *mass tort* and briefly outline the main mechanisms for resolving such claims, providing a high-level overview of some advan-

[10] Federal Judicial Center, Integrated Database (undated).

tages and disadvantages of each mechanism. Included is a description of pre-*Harrington* bankruptcy practices in the mass-tort context.

- In Chapter 3, "*Harrington*: What Did It Change?" we describe SCOTUS's decision in *Harrington.*
- In Chapter 4, "Consequences of *Harrington*," we examine the consequences of the decision, both for parties using bankruptcy to resolve mass-tort exposure and for the mass-tort landscape more broadly. We also address the post–SCOTUS decision settlement in the Purdue bankruptcy and what it suggests about the future of bankruptcy as a mass-tort resolution mechanism in contexts other than asbestos.
- Chapter 5, "Conclusions," provides final observations on *Harrington*'s potential implications for the use of bankruptcy in the future to resolve mass torts.
- Appendix A, "The U.S. Trustee Program and Its Role in Mass-Tort Bankruptcies," we describe the U.S. Trustee Program (USTP) and its role in mass-tort bankruptcies.
- Appendix B provides examples of mass-tort bankruptcies.

CHAPTER 2

Mechanisms for Resolving Mass Torts Pre-*Harrington*

As the number, type, and complexity of mass-tort cases have grown, the way they have been litigated, handled, and resolved has also changed. The impact of SCOTUS's decision in *Harrington* is best understood by putting it in the context of this evolution. In this chapter, we define *mass tort*, describe traditional mechanisms for resolving mass torts pre-*Harrington*, and offer a high-level overview of the advantages and disadvantages of each approach. We place particular emphasis on bankruptcy, given the relevance of the bankruptcy process for the purposes of an analysis of *Harrington*.

What Are Mass Torts?

Broadly, a mass tort is a category of civil legal actions in which a large number of people file claims for damages related to a common issue, often resulting from allegedly defective products, negligent or wrongful acts, or environmental hazards. These are challenging cases because of the extent of harm involved, and the number of victims often makes it impossible for cases to be individually tried because of the number of trials that would be necessary.[1]

Mass torts also sometimes involve temporal dispersion, in which injuries can occur or manifest at different times well into the future.[2] Staggered timing of harm or discovery of harm, often called *latency*, can complicate resolution. Depending on the mass-tort mechanism used, early claimants might exhaust a defendant's available resources, leaving those who sue later or are injured later with limited or no compensation, a pattern described as "the race to the courthouse" (i.e., those who make it to the courthouse first exhaust the defendant's resources and later, equally deserving plaintiffs are left with little or nothing). Moreover, attorneys representing early clients might prioritize them over later claimants, which prevents uniformity of compensation for all plaintiffs or, in some cases, any compensation at all.

More broadly, mass torts vary significantly in the timing and nature of injuries. Some are characterized by discrete injuries that manifest shortly after exposure, such as Stryker Rejuvenate and ABG II Hip Implant Products Liability Litigation (MDL No. 2441).[3] These claims are often more predictable and can be resolved

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[1] The *Manual for Complex Litigation* explains mass torts as follows:

> Mass torts litigation "emerges when an event or series of related events [injures] a large number of people or damage[s] their property." A mass tort is defined by both the nature and number of claims; the claims must arise out of an identifiable event or product, affecting a very large number of people and causing a large number of lawsuits asserting personal injury or property damage to be filed. (Federal Judicial Center, *Manual for Complex Litigation* § 22.1 [4th ed. 2004], in part quoting Advisory Comm. on Civil Rules and Working Group on Mass Torts, Report on Mass Tort Litigation 10 [Feb. 15, 1999])

[2] *See* Geoffrey C. Hazard, Jr., *Futures Problem*, 148 U. Pa. L. Rev. 1901 (2000); Yair Listokin & Kenneth Ayotte, *Protecting Future Claimants in Mass Tort Bankruptcies*, 98 Nw. U. L. Rev. 1435 (2003).

[3] U.S. District Court for the District of Minnesota, *Stryker Rejuvenate* (last visited Sep. 23, 2025).

through global settlements or inventory-style resolutions. Others, such as asbestos, silica, and per- and polyfluoroalkyl substance (PFAS) exposure cases, feature long latency periods, so injuries might not emerge for decades.[4]

Several mechanisms were used for resolving mass-tort claims pre-*Harrington*, which were typically used individually or in combination with other mechanisms. Class actions, MDL, and bankruptcy are the most common.[5] Each of these methods for resolving mass torts offers a distinct compensation approach, each involving a different set of compromises.[6] In the remainder of this chapter, we describe class actions and MDLs before turning to bankruptcy pre-*Harrington*.

Class Actions

A class action is a legal procedure in which one or more people bring legal action on behalf of a larger group (known as the *class*) against a defendant or multiple defendants for similar claims. Governed by Rule 23 of the Federal Rules of Civil Procedure (FRCP) or analogous state statutes, class actions allow people who have suffered similar harms to combine their claims into a single action, rather than filing individual lawsuits. Before proceeding, a court must certify the class—that is, it must find that Fed. R. Civ. P. 23 requirements, such as sufficient class size, shared legal or factual issues, and adequate representation, are met. Once the class has been certified, the action aggregates claims into a collective suit, typically binding current claimants who receive notice and have an opportunity to opt out. However, the ability to bind future claimants, especially those who have not yet manifested injury, raises due-process concerns and may be limited by the courts.[7]

Class actions present several advantages and disadvantages compared with other ways of addressing mass torts. Although we do not provide a comprehensive list of those pros and cons, we touch on a few of the prominent ones here.

Advantages of Class Actions

Advantages of class actions include the following:

- **Efficiency and cost-effectiveness:** Consolidating claims into a single lawsuit streamlines proceedings, potentially creating cost savings for the court, parties, and other stakeholders.

[4] One SME noted that these latent torts are more challenging to resolve outside bankruptcy because the universe of future claimants is harder to estimate and because compensating early claimants risks exhausting limited compensation resources.

[5] There are other mechanisms for resolving mass torts that we do not cover in this report. In some cases, no-fault systems are established, moving all claims into a governmental administrative system with a standardized compensation fund, avoiding the need for traditional litigation. For example, the National Vaccine Injury Compensation Program (sometimes referred to as the *Childhood Vaccine Compensation Fund*) was established in 1988 to provide compensation to individuals or families of children who suffer injuries or adverse reactions from certain vaccines. In other cases, victim-compensation funds (VCFs) or private compensation funds (PCFs) may be set up, often administered by a special master, to provide direct payments to victims, with VCFs typically being government-sponsored and PCFs privately established (Steven Garber, *Designing Compensation Programs for Individuals & Households After Man-Made & Natural Disasters in the United States* [RAND Corp., RR-1005-ICJ 2016]).

[6] *See* Alexandra D. Lahav, *The Continuum of Aggregation*, 53 Ga. L. Rev. 1394 (2019).

[7] For example, in *In re "Agent Orange" Prod. Liab. Litig.*, 996 F.2d 1425 (2d Cir. 1993), the court questioned whether future claimants who had not yet suffered harm could be adequately represented or bound by a class settlement, given the challenges in identifying them and providing effective notice. *See also Amchem*, in which SCOTUS emphasized the due-process limits of binding absent or future claimants in mass-tort class actions.

- **Access to justice:** Class actions provide a mechanism by which people with similar grievances can join, find legal representation, and bring suit for perceived harms even if the claims would have been too small to pursue individually, given the high cost of litigation.
- **Increased bargaining power for plaintiffs:** When bringing claims as a group, plaintiffs have more negotiating power, which can lead to larger settlements or judgments.
- **Deterrence of misconduct:** The ability for multiple plaintiffs to hold companies accountable for bad behavior might deter companies from committing illegal or unethical acts.
- **Active judicial management of cases:** The judge presiding over a class-action lawsuit is actively involved in supervising the litigation process, approves the final settlement and attorneys' fees, and generally ensures that class members' interests are represented fairly and that due-process concerns are addressed.
- **Global resolution:** A class action can result in a global resolution—a comprehensive agreement in which all or most claims related to an alleged harm are resolved.[8] Global resolutions are considered advantageous for the following reasons:
  - **Same treatment for similarly situated plaintiffs:** An advantage of global resolutions is that they ensure that similarly situated plaintiffs, such as plaintiffs with the same severity of injury, receive the same payment amounts.[9] Global settlements protect the absent litigant, who might not be in the litigation because their injury has not yet appeared because of a long latency period or because they have not filed for some other reason, by ensuring that any amount the absent litigant eventually receives will be consistent with what other similarly situated plaintiffs had received.
  - **Certainty and finality for defendants:** By definition, global settlements are intended to resolve numerous related claims through a single, comprehensive agreement, offering defendants a form of "global peace" that ends ongoing and future litigation related to the underlying conduct. In some circumstances, class actions can provide this finality by binding not only current claimants but also certain future claimants—specifically, those whose claims are already legally cognizable (i.e., have accrued) and who receive constitutionally adequate notice and an opportunity to opt out. This potential to bind a broad set of claimants allows defendants to estimate their total liability more predictably, which might lead them to offer more-generous settlements. However, class actions generally cannot bind individuals whose injuries have not yet manifested or whose claims have not legally accrued at the time of the settlement, especially if such potential plaintiffs cannot be identified or notified. This limits the utility of class actions in cases involving latent injuries or long latency periods, such as those involving toxic exposure or pharmaceuticals.[10]

[8] A global resolution is distinct from what is commonly called an *inventory settlement*, in which a defendant negotiates separate settlements with individual plaintiffs' firms to resolve only the current docket of claims that those firms control. Inventory settlements are common in MDLs and allow for individualized valuation of claims, but they rarely achieve finality. In mass torts involving latent injuries (e.g., cancers), such settlements might simply clear the current inventory of claims while new claimants continue to emerge in future years, making them a stopgap rather than a lasting solution. Global resolutions, in contrast, are intended to resolve both present and foreseeable future claims in a coordinated structure, often including claim estimation, contribution of assets by defendants and nondebtors (e.g., insurers or corporate affiliates), and the creation of a compensation fund. Although these resolutions might still allow individualized claim assessments (e.g., through tiered or matrix-based systems), they provide greater finality and predictability for defendants and centralized compensation for claimants.

[9] Although the horizontal equity of the settlement depends on the details of the settlement, the variation in compensation of similarly situated plaintiffs is generally likely to be smaller than it is with less global methods of resolving the litigation.

[10] Whether a class action can bind future claimants depends on the nature of the claims and the procedural protections provided. Courts have upheld the inclusion of future claimants in class settlements when the claims are legally cognizable at the time of settlement and class members receive adequate notice and representation (*e.g.*, *Ortiz*; *Amchem*). However, people with

– **Efficiency:** According to our interviewees, global settlements typically provide a greater measure of efficiency, resolving all claims much faster than they would be in either individualized trials or even a series of inventory settlements with different firms.[11] The practice of using grids to organize the compensation process aids in efficiency: They provide a framework for determining how much compensation each plaintiff should receive based on agreed-upon criteria.[12] The overall payment in a global settlement might be larger than in inventory settlements because defendants are willing to pay a premium for global resolution. Anecdotally, global settlement helps claimants and defendants avoid prolonged litigation.[13] Global settlements can also take advantage of economies of scale, both in terms of lawyer and court time, especially when a settlement grid is used, because, instead of individual negotiations, a claim administrator need only verify a specific injury.[14]

Disadvantages of Class Actions

SCOTUS's decisions in *Amchem* and *Ortiz* fundamentally limited the use of class actions for mass torts. The pair of decisions focused on inadequacies of the class-action mechanism for resolving complex personal injury claims, particularly in asbestos litigation and the limitations of Fed. R. Civ. P. 23 and the due-process clause when applied to mass torts involving both present and future claimants (see the box titled "*Amchem* and *Ortiz*").

In *Amchem*, the Court rejected a proposed settlement to globally resolve all present and future asbestos-related claims through a single class action. The decision turned on the settlement's failure to meet the certification requirements of Fed. R. Civ. P. 23—particularly, commonality, typicality, and adequacy of represen-

injuries that have not yet manifested or with claims that have not accrued generally cannot be bound, especially where notice is impracticable or representation is inadequate.

[11] Inventory settlements are common in MDLs and allow for individualized valuation of claims, but they rarely achieve finality. In mass torts involving latent injuries (e.g., cancers), such settlements might simply clear the current inventory of claims while new claimants continue to emerge in future years, making them a stopgap rather than a lasting solution.

[12] In bankruptcy cases, the grid is court-determined and requires creditor agreement; in VCFs managed by administrative agencies, the negotiation process leading to the grid often involves political pressures related to determining eligibility criteria or conditions for funding.

Although a global settlement can be structured in a variety of ways, they are typically based on some sort of grid in which the specific injury or severity determines a plaintiff's payment. This grid, however, can differ greatly depending on the system governing the resolution. For example, in class actions, the grid is reviewed and approved by the court. In contrast, the grid in MDLs typically emerges from negotiations between plaintiffs and defendants, often informed by the outcome of bellwether trials. Courts often conduct minimal review, leaving the settlement largely in the hands of the involved parties.

[13] Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 Calif. L. Rev. 1259 (2017).

[14] Although settlement grids promote administrative efficiency, they can raise fairness concerns when individual circumstances vary significantly. Many bankruptcy trusts, including those created in asbestos cases, include an option for individual review to account for such differences. Moreover, tort claimants in bankruptcy typically retain a right to litigate, either at the outset or if dissatisfied with their compensation under the grid. *See Class Five Nev. Claimants v. Dow Corning Corp.* (*In re Dow Corning Corp.*), 280 F.3d 648 (6th Cir. 2002); see also various § 524(g) asbestos trust procedures.

The issues raised here point to a broader set of concerns about the fairness and accuracy of claim administration systems, especially when compensation is determined using streamlined criteria, such as injury-only verification. Such systems can overlook causation or timing, potentially allowing compensation for injuries unrelated to the alleged harm or excluding valid claims because of documentation gaps. The court's role in approving these procedures is typically limited to reviewing the overall distribution plan rather than evaluating the fairness of individual awards. In certain contexts, such as claims involving minors, incapacitated persons, or wrongful death, additional judicial scrutiny is required. These concerns highlight an important area for future empirical and legal research, and we are currently undertaking a separate project focused on evaluating claim administration practices in mass-tort settlements.

Amchem and *Ortiz*

Two landmark SCOTUS cases, *Amchem* and *Ortiz*, significantly shaped the use of class actions to resolve mass torts.

In *Amchem*, the Court reviewed a proposed settlement of asbestos claims certified under Fed. R. Civ. P. 23(b)(3). The case involved a settlement class consisting of hundreds of thousands of individuals with widely varying types of asbestos exposure and injury timelines. Although the parties had negotiated a trust to compensate claimants, the Court rejected the settlement because the class representatives failed to adequately protect the interests of all members, especially those with future or latent injuries. The decision emphasized the importance of rigorous application of Fed. R. Civ. P. 23 requirements, even in the context of a settlement.

Two years later, in *Ortiz*, the Court considered a different kind of settlement: a limited-fund class under Fed. R. Civ. P. 23(b)(1)(B), which permits certification when a defendant's resources are inadequate to satisfy all claims. The Court again rejected the settlement, in part because the purported limited fund—largely, negotiated insurance proceeds—was not shown, through independent evidence, to be an actual ceiling on liability. The Court stressed that the validity of limited-fund certification must rest on objective proof of insufficiency and on procedures that fairly allocate compensation among claimants.

Congress responded to these limitations in the class-action context by enacting § 524(g) of the Bankruptcy Code. This provision created a special mechanism for asbestos-related bankruptcies that permits the creation of a trust to pay current and future claims and allows for the appointment of an FCR. Importantly, § 524(g) includes procedural protections, such as the requirement of a supermajority vote by claimants, that are absent from traditional class-action settlement mechanisms. Notably, because § 524(g) is specific to asbestos, its application is unaffected by SCOTUS's later decision in *Harrington*.

tation. The Court emphasized that future claimants, whose asbestos-related diseases had not yet manifested, had divergent interests from those of currently injured plaintiffs. These differences extended beyond the timing of injuries to include variations in the nature and severity of harm, proof of causation and exposure, governing state laws, and individual circumstances, such as age and other risk factors. Without adequate structural protections, such as subclassing or separate legal representation, the settlement posed a serious risk of favoring present claimants at the expense of those who might develop illnesses later. The Court reinforced that, in mass-tort class actions involving both present and future claims, careful attention must be paid to protecting all claimants' procedural and substantive rights.

Two years later, in *Ortiz*, the Court addressed a similar proposed class-action settlement involving asbestos claims, this time under Fed. R. Civ. P. 23(b)(1)(B) as a limited-fund class action.[15] The Court rejected the settlement, citing procedural deficiencies and violations of due process. A central concern was that the purportedly limited fund had been created through settlement negotiations rather than being demonstrably inadequate to cover all liability, as required by Fed. R. Civ. P. 23(b)(1)(B). The Court emphasized that, if parties seek to equitably resolve claims where the defendant's assets are insufficient to cover all liability, the appropriate forum is typically bankruptcy, which offers structured procedures for establishing a truly limited fund and ensuring fair treatment of all claimants. The *Ortiz* ruling underscored that limited-fund class actions must adhere strictly to procedural safeguards to protect absent and future claimants.

[15] A limited-fund class action, authorized under Fed. R. Civ. P. 23(b)(1)(B), is used in situations in which a defendant's assets or available insurance are insufficient to satisfy the claims of all class members, creating a risk that individual adjudications would effectively exhaust the fund or result in unequal treatment of similarly situated plaintiffs.

Amchem and *Ortiz* underscored the need for stringent procedural protections in mass-tort settlements, particularly where the interests of future claimants diverge from those of current plaintiffs. These decisions signaled the Court's reluctance to allow broad class-action settlements that compromise the interests of absent or future class members without procedural safeguards for those absent class members.[16]

Perhaps the most important takeaway from our brief summary of *Amchem* and *Ortiz* is that the shift from class actions to MDLs and, subsequently, to bankruptcy was not driven by any inherent superiority of MDLs or bankruptcy but rather by the limitations on the use of class actions in personal injury cases based on Fed. R. Civ. P. 23 and the due-process clause. Depending on the tort, adequately defining classes and subclasses with enough precision to resolve the mass tort can be difficult. The Court's rulings in *Amchem* and *Ortiz* made it significantly more difficult to certify settlement classes, prompting litigants to seek alternative forums that could better accommodate large-scale mass-tort claims.[17]

Multidistrict Litigation

In the wake of *Amchem* and *Ortiz*, parties increasingly sought other ways to bring actions for widespread harms. A primary alternative to class actions became MDL, a process consolidating pretrial proceedings but allowing for individual trials, theoretically ensuring personalized outcomes that do not bind future claimants. We first review trends in the number and size of MDLs and then briefly analyze their advantages and disadvantages compared with other methods for resolving mass litigation.

Figure 2.1 shows the number of cases in federal MDLs that were resolved, by year. The figure shows a dramatic upward trend beginning in 2009, although 2003 also saw the resolution of a large number of cases in the MDL for silicone gel breast implants.

In Figure 2.2, we plot MDLs by the year in which the entire MDL was terminated.[18] The size of the circle indicates the number of claims in the MDL. MDLs not terminated by 2022 are plotted in the last column of the figure. The 3M Combat Arms Earplugs and asbestos MDLs are far larger than the other MDLs, and to provide a better sense of the trends for the other MDLs, we repeat the findings in Figure 2.3, omitting 3M and asbestos. The resulting figure shows that the size of MDLs that have been terminated has been increasing and that a large number of MDLs had yet to be terminated by 2022.[19]

The MDL process has strengths and weaknesses.

Advantages of MDL

Like class actions, MDLs bring increased efficiencies—in this case, by streamlining pretrial proceedings for large numbers of cases. There are simply not enough courts to individually adjudicate pretrial motions

[16] Class actions continue to be used in cases not involving personal injury, such as in cases involving financial harm.

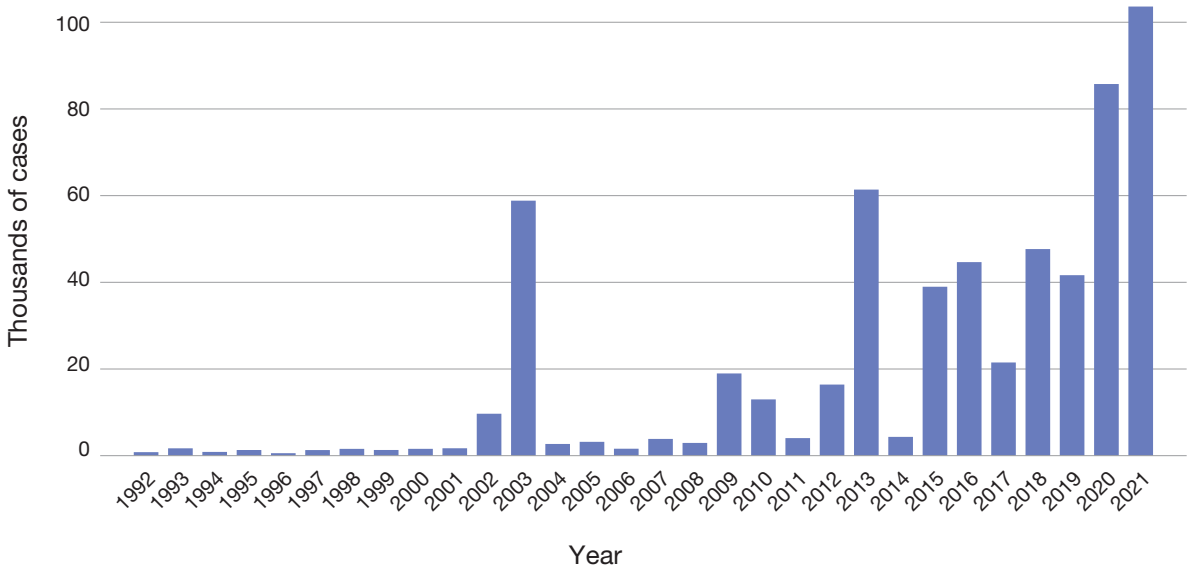
[17] For a recent example of a hybrid mass-tort resolution, see the Flint water crisis litigation. The settlement included both a certified class for certain injury claims and individual settlements negotiated on behalf of represented plaintiffs. Although it is atypical, the Flint case illustrates how complex mass-harm cases may blend procedural mechanisms to achieve broad resolution. *See In re Flint Water Cases*, 571 F. Supp. 3d 746 (E.D. Mich. 2021).

[18] The JPML indicates when an MDL has been terminated. An MDL is terminated when all cases have been settled, dismissed, or remanded to the transferor court.

[19] In some sense, this increase could explain the rise in the number of mass-litigation bankruptcies. As MDLs grow, the likelihood that the value of claims will exceed defendants' ability to pay will increase. Beyond this, defendants' desire to resolve mass litigation that affects their stock prices and ability to raise capital also grows. In short, *Harrington* comes at a time of heightened interest by defendants in the finality provided by the bankruptcy process.

FIGURE 2.1

The Number of Cases Resolved in the MDL System, by Year



SOURCES: Features data from Office of the Clerk, JPML, *Statistical Analysis of Multidistrict Litigation: 1992* (Oct. 1992); Office of the Clerk, JPML, *Statistical Analysis of Multidistrict Litigation: 1993* (Oct. 1993); Office of the Clerk, JPML, *Statistical Analysis of Multidistrict Litigation: 1994* (Oct. 1994); Office of the Clerk, JPML, *Statistical Analysis of Multidistrict Litigation: 1995* (Oct. 1995); Office of the Clerk, JPML, *Statistical Analysis of Multidistrict Litigation: 1996* (Oct. 1996); Office of the Clerk, JPML, *Statistical Analysis of Multidistrict Litigation: 1997* (Oct. 1997); Office of the Clerk, JPML, *Statistical Analysis of Multidistrict Litigation: 1998* (Oct. 1998); Office of the Clerk, JPML, *Statistical Analysis of Multidistrict Litigation: 1999* (Oct. 1999); Office of the Clerk, JPML, *Statistical Analysis of Multidistrict Litigation: 2000* (Oct. 2000); Office of the Clerk, JPML, *Statistical Analysis of Multidistrict Litigation: 2001* (Oct. 2001); Office of the Clerk, JPML, *Statistical Analysis of Multidistrict Litigation: 2002* (Oct. 2002); Office of the Clerk, JPML, *Statistical Analysis of Multidistrict Litigation: 2003* (Oct. 2003); Office of the Clerk, JPML, *Statistical Analysis of Multidistrict Litigation: 2004* (Oct. 2004); Office of the Clerk, JPML, *Statistical Analysis of Multidistrict Litigation: 2005* (Oct. 2005); Office of the Clerk, JPML, *Statistical Analysis of Multidistrict Litigation: 2006* (Oct. 2006); Office of the Clerk, JPML, *Statistical Analysis of Multidistrict Litigation: 2007* (Oct. 2007); Office of the Clerk, JPML, *Statistical Analysis of Multidistrict Litigation: 2008* (Oct. 2008); Office of the Clerk, JPML, *Statistical Analysis of Multidistrict Litigation: 2009* (Oct. 2009); Office of the Clerk, JPML, *Statistical Analysis of Multidistrict Litigation: 2010* (Oct. 2010); Office of the Clerk, JPML, *Statistical Analysis of Multidistrict Litigation: 2011* (Oct. 2011); Office of the Clerk, JPML, *Statistical Analysis of Multidistrict Litigation: 2012* (Oct. 2012); JPML, *Statistical Analysis of Multidistrict Litigation: Fiscal Year 2012* (Oct. 2012); JPML, *Statistical Analysis of Multidistrict Litigation: Fiscal Year 2013* (circa 2013); JPML, *Statistical Analysis of Multidistrict Litigation: Fiscal Year 2014* (circa 2014); JPML, *Statistical Analysis of Multidistrict Litigation: Fiscal Year 2015* (circa 2015); JPML, *Statistical Analysis of Multidistrict Litigation Under 28 U.S.C. § 1407: Fiscal Year 2016* (circa 2016); JPML, *Statistical Analysis of Multidistrict Litigation Under 28 U.S.C. § 1407: Fiscal Year 2017* (circa 2017); JPML, *Statistical Analysis of Multidistrict Litigation Under 28 U.S.C. § 1407: Fiscal Year 2018* (circa 2018); JPML, *Statistical Analysis of Multidistrict Litigation Under 28 U.S.C. § 1407: Fiscal Year 2019* (circa 2019); JPML, *Statistical Analysis of Multidistrict Litigation Under 28 U.S.C. § 1407: Fiscal Year 2020* (circa 2020); JPML, *Statistical Analysis of Multidistrict Litigation Under 28 U.S.C. § 1407: Fiscal Year 2021* (circa 2021).

NOTE: These cases were settled, dropped, dismissed, or remanded to the transferor court. Not all cases in an MDL need to be resolved at once. In an agreed-upon global settlement, there is a fair amount of clustering as plaintiffs opt in. In an inventory settlement, the clustering is often less pronounced because law firms settle with the defendant at different times. Some might be resolved while others remain open. This chart includes cases resolved by motions for summary judgment, which counted as dismissed in the JPML data.

for each individual case, and it is far more efficient to consolidate similar issues. MDLs also share the class action's advantages of increased bargaining power for plaintiffs and deterring corporate misconduct.

Moreover, MDLs provide a forum for resolution. In practice, the aim of the MDL judges is almost always to resolve the claims via settlement rather than to remand cases back to their transferor courts.[20] However,

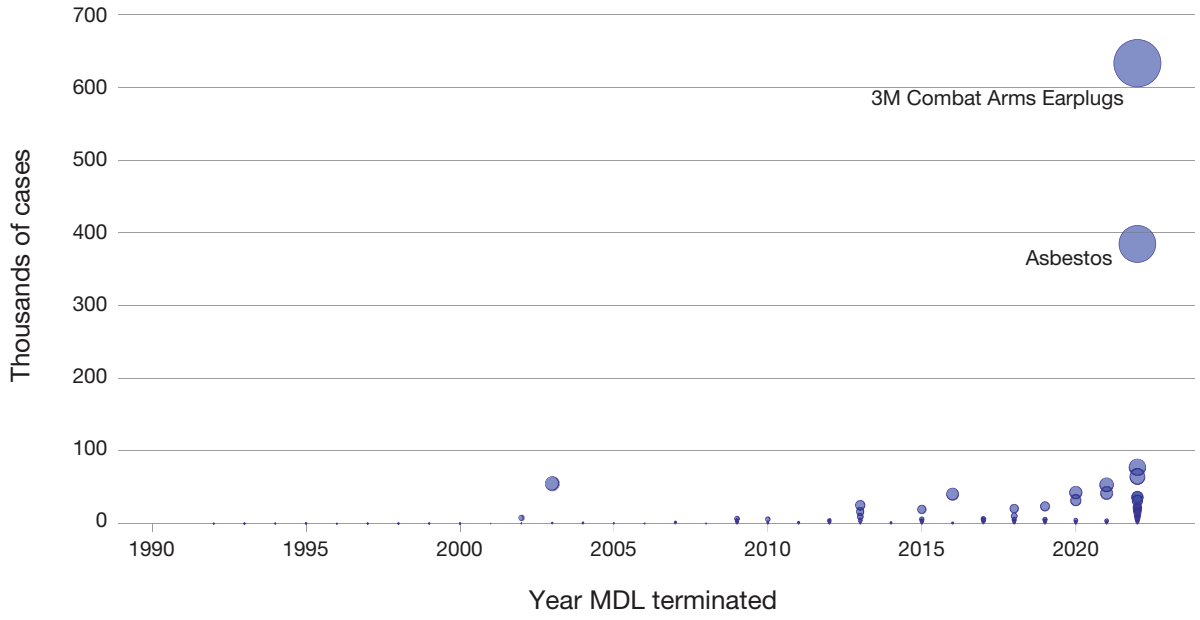
[20] The *Manual for Complex Litigation* notes of MDLs,

> Few cases are remanded for trial; most multidistrict litigation is settled in the transferee court. As a transferee judge, it is advisable to make the most of this opportunity and facilitate the settlement of the federal and any related state cases.

Federal Judicial Center, 2004, § 20.132. *See also* Stephen R. Bough & Anne E. Case-Halferty, *A Judicial Perspective on Approaches to MDL Settlement*, 89 UMKC L. Rev. (2021). The cases are sometimes resolved via summary judgment rather than settlement. *See* Nora Freeman Engstrom, *The Lessons of* Lone Pine, 129 Yale L.J. 2 (2019) (noting the increase in *Daubert* hearings and summary judgments—that is, challenges to allowing a jury to hear expert testimony—in MDLs).

FIGURE 2.2

The Number of Cases in Specific MDLs, by Year in Which the MDL Was Terminated



SOURCES: Features data from Office of the Clerk, 1992; Office of the Clerk, 1993; Office of the Clerk, 1994; Office of the Clerk, 1995; Office of the Clerk, 1996; Office of the Clerk, 1997; Office of the Clerk, 1998; Office of the Clerk, 1999; Office of the Clerk, 2000; Office of the Clerk, 2001; Office of the Clerk, 2002; Office of the Clerk, 2003; Office of the Clerk, 2004; Office of the Clerk, 2005; Office of the Clerk, 2006; Office of the Clerk, 2007; Office of the Clerk, 2008; Office of the Clerk, 2009; Office of the Clerk, 2010; Office of the Clerk, 2011; Office of the Clerk, 2012; JPML, 2012; JPML, 2013; JPML, 2014; JPML, 2015; JPML, 2016; JPML, 2017; JPML, 2018; JPML, 2019; JPML, 2020; JPML, 2021.

NOTE: These cases were settled, dropped, dismissed, or remanded to the transferor court. Not all cases in an MDL need to be resolved at once. In an agreed-upon global settlement, there is a fair amount of clustering as plaintiffs opt in. In an inventory settlement, the clustering is often less pronounced because law firms settle with the defendant at different times. Some might be resolved while others remain open. This chart includes cases resolved by motions for summary judgment, which counted as dismissed in the JPML data. MDLs that had not terminated by 2022 are included in the rightmost column of the figure. An MDL is terminated when all cases have been settled, dismissed, or remanded to the transferor court. The size of the circle indicates the number of cases in the MDL.

MDLs are less structured than class actions or bankruptcy, and judges' power to encourage settlement is far more limited with MDLs. In light of this, several experts have suggested to us that MDLs are only an aggregation mechanism that brings the parties together and allows plaintiffs and defendants to work out a resolution, which could involve bankruptcy or a VCF.

Another theoretical advantage of MDLs is that they sidestep some of the due-process concerns that class actions face. Unlike in a class action, each plaintiff in an MDL has their own individual case over which they theoretically maintain control. Similarly, plaintiffs in MDLs are not bound by any collective settlement or decision and have the option to participate or not participate in any settlement agreement.[21]

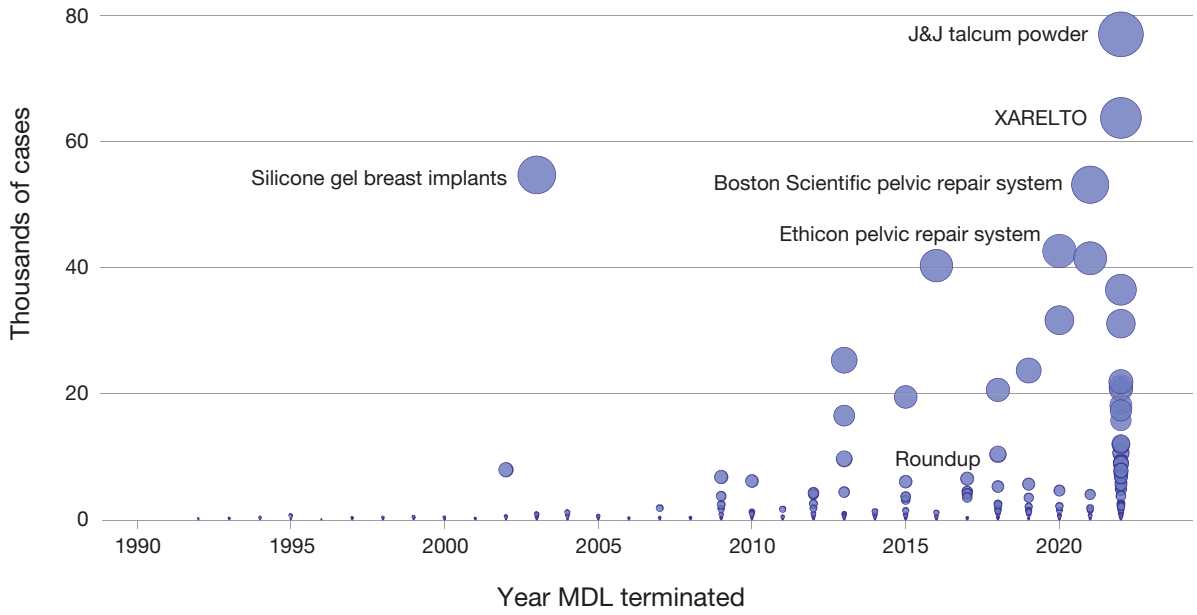
In practice, however, a settlement agreement may contain provisions that create strong incentives to participate in the settlement. For example, the agreement might require attorneys' withdrawal from the representation of any client who refuses to participate in the settlement.[22] Similarly, there are questions about the

[21] *See* Melissa B. Jacoby, *Sorting Bugs & Features of Mass Tort Bankruptcy*, 101 Tex. L. Rev. (2023).

[22] Elizabeth Chamblee Burch, *Mass Tort Deals: Backroom Bargaining in Multidistrict Litigation* 118, 127 (Cambridge Univ. Press 2019), and Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 Vand. L. Rev. 67 (2017) (describing attorney-withdrawal mechanisms in FOSAMAX, Vioxx, PROPULSID, and pelvic mesh agreements); D. Theodore Rave, *Closure Provisions in MDL Settlements*, 85 Fordham L. Rev. 2175 (2017). Nora Engstrom has noted that this could leave a plaintiff

FIGURE 2.3

The Number of Cases in Specific MDLs, by Year in Which the MDL Was Terminated, Excluding 3M Combat Arms Earplugs and Asbestos



SOURCES: Features data from Office of the Clerk, 1992; Office of the Clerk, 1993; Office of the Clerk, 1994; Office of the Clerk, 1995; Office of the Clerk, 1996; Office of the Clerk, 1997; Office of the Clerk, 1998; Office of the Clerk, 1999; Office of the Clerk, 2000; Office of the Clerk, 2001; Office of the Clerk, 2002; Office of the Clerk, 2003; Office of the Clerk, 2004; Office of the Clerk, 2005; Office of the Clerk, 2006; Office of the Clerk, 2007; Office of the Clerk, 2008; Office of the Clerk, 2009; Office of the Clerk, 2010; Office of the Clerk, 2011; Office of the Clerk, 2012; JPML, 2012; JPML, 2013; JPML, 2014; JPML, 2015; JPML, 2016; JPML, 2017; JPML, 2018; JPML, 2019; JPML, 2020; JPML, 2021.

NOTE: J&J = Johnson and Johnson. These cases were settled, dropped, dismissed, or remanded to the transferor court. Not all cases in an MDL need to be resolved at once. In an agreed-upon global settlement, there is a fair amount of clustering as plaintiffs opt in. In an inventory settlement, the clustering is often less pronounced because law firms settle with the defendant at different times. Some might be resolved while others remain open. This chart includes cases resolved by motions for summary judgment, which counted as dismissed in the JPML data. MDLs that had not terminated by 2022 are included in the rightmost column of the figure. An MDL is terminated when all cases have been settled, dismissed, or remanded to the transferor court. The size of the circle indicates the number of cases in the MDL.

amount of control over the case that an individual plaintiff actually possesses.[23] Although this lack of control might facilitate global settlement and increase a defendant's willingness to settle for a higher amount, it might also suggest that the settlement is coercive.

This highlights a tension between individualized adjudication and addressing collective-action problems. Provisions that strongly encourage participation in a settlement (e.g., by requiring a lawyer to withdraw from representing the client in the absence of agreement) make the MDL more like a class action or bankruptcy in its ability to resolve all or nearly all cases by explicitly or implicitly binding plaintiffs. This addresses concerns about piecemeal adjudication and the race to the courthouse in the same way that the binding nature of bankruptcy or a class action does. But it does so at a cost of coercion and loss of individualized adjudication. Is it better to have an explicitly binding system (class action or bankruptcy) or an MDL system that ostensibly promises plaintiff autonomy but, in practice, does not deliver it? An MDL system without any coercive

who does not wish to settle without representation while court deadlines to comply with *Lone Pine* orders tick away. Engstrom, 2019, n. 143.

[23] Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. Rev. 1, 67, 72 (2021) (calling the notion that an individual plaintiff controls their case a "fiction" and insisting that, in an MDL, a litigant "does not control her own lawsuit in any meaningful way").

features might protect due-process interests but faces collective-action problems that we discuss in the next section.

Disadvantages of MDL

Although the MDL system has some strengths in dealing with mass litigation, there are concerns about its ability to resolve rather than simply aggregate mass claims. Broadly, these weaknesses can be grouped into six categories: problems of scale, scope, time, judicial authority and management, equity, and finality.

- **Problems of scale:** According to some SMEs, the problem of scale emerges when mass litigation becomes too large for the MDL system to manage efficiently. Several notable cases, including the Roundup Products Liability Litigation (MDL No. 2741), 3M Combat Arms Earplug Products Liability Litigation (MDL No. 2885), and the BP oil spill (MDL No. 2179), demonstrate the challenges (see the box titled "MDLs with Problems of Scale").[24] MDLs with large numbers of potentially injured parties pose difficulties, such as managing the inventory of filed cases, in which the filed cases might represent only a small portion of the total injured parties with potential claims. Additionally, as MDLs increase in volume,

MDLs with Problems of Scale

Roundup Products Liability Litigation

The Roundup Products Liability Litigation (MDL No. 2741) involves numerous lawsuits alleging that exposure to Roundup, a glyphosate-based herbicide originally produced by Monsanto (acquired by Bayer AG in 2018), causes non-Hodgkin lymphoma and other cancers. In October 2016, the JPML centralized these federal cases in the Northern District of California. In addition to the MDL, a large number of cases were pending in state courts. In June 2020, Bayer announced settlements totaling more than $10 billion to resolve a significant portion of existing claims, but litigation is ongoing.

3M Combat Arms Earplug Litigation

The 3M Combat Arms Earplug Products Liability Litigation (MDL No. 2885) involves claims by U.S. military service members and veterans alleging that defective Combat Arms Earplugs Version 2, supplied by 3M and its subsidiary Aearo Technologies between 2003 and 2015, led to hearing loss and tinnitus. In August 2023, 3M agreed to a $6.01 billion settlement to resolve these claims, marking one of the largest mass-tort settlements in U.S. history. The settlement process is ongoing, with more than 99 percent of claimants participating as of March 2024. Several of our SMEs noted that this level of participation in such a large MDL is rare. Prior to the 3M litigation, 95 percent would have been extraordinary.

BP Oil Spill Litigation

The Oil Spill by the Oil Rig "Deepwater Horizon" litigation (MDL No. 2179) encompasses extensive civil proceedings following the Deepwater Horizon oil rig explosion on April 20, 2010, which resulted in a massive oil spill in the Gulf of Mexico. These cases were consolidated into an MDL in the Eastern District of Louisiana. In parallel, BP established the Gulf Coast Claims Facility, a $20 billion fund to compensate individuals and businesses affected by the spill. Administered by Kenneth Feinberg, the facility processed more than 1 million claims between 2010 and 2012, distributing approximately $6.2 billion to more than 220,000 claimants.

[24] *See* Press Release, 3M, *3M Announces Combat Arms Settlement* (Aug. 29, 2023); 60 Minutes, *BP's Victims Fund: Kenneth Feinberg's Tough Task* (Sep. 30, 2010).

settlement negotiations become more complex, and other issues (e.g., holdouts) can prolong resolution. Many of the SMEs we interviewed suggested that the MDL system struggles when cases reach a particular scale.

- **Problem of scope of legal issues:** Another issue our SMEs mentioned involves the scope of legal issues in cases in which litigation becomes very broad and complex. National Prescription Opiate Litigation (MDL No. 2804) and the Juul Labs, Inc. Marketing, Sales Practices and Products Liability Litigation (MDL No. 2913) highlight this issue (see the box titled "MDLs with Problems of Scope").[25] These cases involve a wide variety of legal theories, including consumer protection violations, public nuisance, and Racketeer Influenced and Corrupt Organizations claims.[26] They also involve an array of plaintiffs, including government entities at various levels. This complexity can make liability assessments and resolution difficult. For instance, according to one SME, in the Juul litigation, the broad scope made estimating liability difficult, ultimately leading to settlements in the millions before a bellwether trial concluded.[27]
- **Problems of time:** Latency in the manifestation of injury also creates complexities. SMEs cited a variety of cases, including the National Football League [NFL] Players' Concussion Injury Litigation (MDL No. 2323), in which some injuries, such as chronic traumatic encephalopathy, might not manifest for

MDLs with Problems of Scope

National Prescription Opiate Litigation

The National Prescription Opiate Litigation (MDL No. 2804) was initiated in December 2017 in the Northern District of Ohio, overseen by Judge Dan Polster. The MDL centralizes thousands of lawsuits filed by various governmental entities, including states, cities, and counties, against opioid manufacturers, distributors, and pharmacies. The plaintiffs allege that the defendants' practices contributed significantly to the opioid epidemic by misrepresenting the addictive risks of opioid medications and failing to monitor and report suspicious orders. The litigation has led to substantial settlements, with some defendants agreeing to pay billions of dollars to support addiction treatment and prevention efforts. The Purdue bankruptcy and subsequent litigation that is the focus of this report arose out of this litigation.

Juul Labs Litigation

The Juul Labs, Inc. Marketing, Sales Practices and Products Liability Litigation (MDL No. 2913) encompasses numerous lawsuits alleging that Juul Labs engaged in deceptive marketing practices by targeting young people and downplaying the addictiveness of its e-cigarette products. In October 2019, the JPML consolidated these cases in the Northern District of California. As of January 2025, Juul had settled with 48 states and territories for more than $1 billion in vape lawsuits. In September 2023, Judge William H. Orrick granted final approval of a nationwide class-action settlement for $255 million in the litigation against Juul Labs. These settlements are intended to address the public health concerns associated with youth vaping and hold Juul accountable for its marketing strategies.

[25] *See* Michelle Llamas, *Juul Lawsuits & Settlements*, Consumer Notice (last modified Sep. 2, 2025).

[26] Organized Crime Control Act of 1970, Pub. L. No. 91-452 (Oct. 15, 1970).

[27] A bellwether trial involves selecting representative cases for trial to provide insights into the broader pool of claims in an MDL. These trials are intended to inform settlement negotiations by offering reliable data on claim values and potential outcomes.

years or even decades (see the box titled "MDL with Problems of Time").[28] The delays in compensation for these plaintiffs become problematic because settlements might need to be adjusted long after they are first agreed upon. The NFL litigation illustrates how the settlement process evolved into a VCF, in which special masters play a crucial role in disqualifying claims or doctors for potential misrepresentation. This reflects the complexity and lengthy time frames involved when such cases are litigated in the MDL process.

- **Problems of judicial authority and management:** Judges in MDLs have less formal authority over settlements than class-action judges do because MDL judges are not explicitly required to review or approve settlements. MDLs involve individually filed cases in which claimants retain their own lawyers, and MDL settlements cannot bind parties not involved in the litigation. However, some SMEs said that judges can influence global settlements not only by facilitating the exchange of information and offering nonbinding opinions on the fairness of a proposed resolution but also through active case management, including the issuance of case management orders, control over discovery procedures, *Daubert* hearings to evaluate expert testimony, and the scheduling of bellwether trials—all of which help shape

MDL with Problems of Time

NFL Players' Concussion Injury Litigation

The National Football League Players' Concussion Injury Litigation (MDL No. 2323) is a collection of lawsuits filed by former professional football players against the NFL, alleging that the league failed to protect them from the long-term health risks associated with repeated head injuries. In 2011, the JPML consolidated them into an MDL in the U.S. District Court for the Eastern District of Pennsylvania, overseen by Judge Anita B. Brody. The litigation culminated in a settlement agreement, effective January 2017, which established an uncapped compensation fund to provide monetary awards to retired players diagnosed with specific neurocognitive conditions. Several of the experts with whom we spoke noted that an uncapped settlement fund, such as the one in the NFL concussion litigation, is extremely rare and typically is created only when the scope of liability can be estimated with a high degree of certainty. In this case, an uncapped agreement was possible because the number of eligible NFL players was finite and the likelihood of developing traumatic brain injuries from playing football could be reasonably projected. However, as one of our defense-side experts put it, uncapped settlements are "a tough sell to defendants, to put it mildly."

As of July 7, 2025, approximately 4,321 claim packages had been submitted to the NFL concussion settlement fund out of approximately 20,585 registered class members, and 1,998 payable monetary awards had been issued, totaling around $1.54 billion. That means that fewer than 2,000 players have had their claims accepted and paid, with many others either denied, appealed, or pending review. Claim denials have been especially common among early-stage cognitive diagnoses (e.g., level 1.5 or level 2 neurocognitive impairment); roughly half of such initial claims have been rejected.

[28] The NFL Players' Concussion Injury Litigation is unusual because, after the cases were consolidated into an MDL, a class certification was issued for

> all retired players of the NFL, American Football League ("AFL"), World League of American Football, NFL Europe League and NFL Europa League, as well as authorized representatives of deceased, legally incapacitated or incompetent retired players and family members of retired players who meet certain criteria.

See NFL Concussion Settlement, homepage (last visited Jan. 8, 2025).

the parties' expectations and incentives to settle, as seen in such cases as the Vioxx and ZYPREXA litigations (see the box titled "MDLs with Problems of Judicial Authority and Management").[29]

- **Problems of equity:** Unlike class actions, many MDLs result in inventory settlements, meaning that defendants negotiate and settle with individual plaintiffs' law firms rather than with all plaintiffs at once. The result is that similarly situated plaintiffs might be treated quite differently depending on which law firm they have engaged, and compensation can vary widely for identical or very similar injuries.[30]
- **Problems of finality:** Several SMEs noted that it is challenging to provide defendants with complete resolution of the litigation other than in the rare global settlement. This can reduce amounts available for compensation because, even if they settle with certain plaintiffs' firms, they are still potentially exposed to liability from plaintiffs not represented by those firms and from future claimants, particularly if there is a latent harm or another means of tolling statutes of limitations. In addition, because MDLs are federal court mechanisms, MDL settlements might not address parallel state court claims. On the other hand, there are examples of transferee judges concluding MDLs through summary judgment.[31] And some lawyers have developed mechanisms that strongly incentivize participation in the settlement

MDLs with Problems of Judicial Authority and Management

Vioxx Litigation

The Vioxx Products Liability Litigation (MDL No. 1657) involved numerous lawsuits against Merck and Company concerning its anti-inflammatory drug, Vioxx, which was withdrawn from the market in 2004 for increased risks of heart attack and stroke. In 2007, Merck agreed to a $4.85 billion settlement to resolve approximately 27,000 product liability lawsuits.

ZYPREXA Litigation

The Zyprexa Products Liability Litigation (MDL No. 1596) centered on claims against Eli Lilly and Company regarding its antipsychotic medication, ZYPREXA. Plaintiffs alleged that the company promoted the drug for off-label uses and downplayed risks, such as weight gain and diabetes. In 2007, Eli Lilly agreed to pay $1.2 billion to settle more than 28,000 personal injury claims. Additionally, in 2009, Eli Lilly agreed to a $1.415 billion settlement to resolve allegations of off-label promotion of ZYPREXA, including a $515 million criminal fine.

[29] *See* Seeger Weiss, *Vioxx Heart Attack & Stroke Lawsuit* (last updated May 30, 2025); Seeger Weiss, *Zyprexa Products Liability Litigation* (last updated May 7, 2025); Press Release, U.S. Department of Justice, *Eli Lilly & Company Agrees to Pay $1.415 Billion to Resolve Allegations of Off-Label Promotion of Zyprexa* (Jan. 15, 2009).

[30] Although some critics view inventory settlements as lacking the uniformity of global resolutions, others note that this reflects the inherent nature of the tort system, in which outcomes often vary by jurisdiction, jury pool, and the quality of legal representation. Just as a case tried in New York might yield a different result from one in New Mexico, settlements negotiated by different firms can differ in structure and value, mirroring tort litigation's decentralized and individualized nature outside the MDL context.

[31] *E.g.*, *Lipitor (Atorvastatin Calcium) Mktg. v. Pfizer, Inc.*, 892 F.3d 624, 647 (4th Cir. 2018) (affirming the transferee court's grant of summary judgment, thus terminating the Lipitor litigation); *In re Zoloft (Sertraline Hydrochloride) Prods. Liab. Litig.*, 858 F.3d 787 (3d Cir. 2017) (affirming the transferee court's grant of summary judgment, thus terminating the Zoloft litigation); *Meridia Prods. Liab. Litig. v. Abbott Lab'ys*, 447 F.3d 861 (6th Cir. 2006) (affirming the transferee court's grant of summary judgment, thus terminating the Meridia litigation).

(discussed above). Although these raise due-process concerns, they can also partly assure defendants that the settlement will conclude the litigation.[32]

Mass-Tort Bankruptcy Before Harrington

To understand the importance of the *Harrington* decision, it is important to recognize how bankruptcy became a mass-tort resolution mechanism and what objectives it was designed to achieve. A basic understanding of bankruptcy law's core provisions is also essential to putting the *Harrington* decision in context. We therefore provide in this section a brief history of how bankruptcy became an important tool in mass torts, highlighting some of the more relevant aspects of the bankruptcy process, and summarize the advantages and disadvantages of bankruptcy in the mass-tort context.[33]

The Evolution of Bankruptcy in Mass Torts

Between the 1970s and early 1990s, asbestos claims grew rapidly as thousands of people exposed to asbestos began to experience severe health problems, including mesothelioma, lung cancer, and asbestosis.[34] The litigation landscape during this period was chaotic, and courts were clogged with personal injury claims. Courts were overwhelmed, struggling to manage the influx of cases, because asbestos litigation spanned multiple jurisdictions with inconsistent outcomes. Many companies facing asbestos liability, including manufacturers and distributors, resorted to bankruptcy because of the volume of claims and the substantial payouts required.

The absence of a structured, coordinated system to handle the claims led to a fragmented and inefficient process, with earlier claimants often receiving substantial settlements, leaving fewer resources available for future victims or exhausting the defendants' resources altogether. Settlement negotiations were typically ad hoc and disjointed, lacking the broad, global agreements that later became more common in mass-tort settlements. To address some of these issues, asbestos claims were pulled into a class action to work out a global settlement between plaintiffs and defendants. However, as discussed earlier, the SCOTUS decisions in *Amchem* and *Ortiz* limited parties' ability to reach a global settlement that bound all current and future asbestos claimants through a single class action.

Meanwhile, a different approach was developed by the parties in the bankruptcy court, albeit without any statutory basis. The Johns-Manville case, filed in 1982, was the first.[35] Manville was a profitable com-

[32] A judge's facilitation of a settlement by signing off on provisions that incentivize participation could also raise judicial ethical issues. *See* Model Rules of Pro. Conduct r 2.6(B) (Amer. Bar Ass'n 2020) ("A judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement").

[33] *See also* Andrew D. Bradt, Zachary D. Clopton, & D. Theodore Rave, *Dissonance & Distress in Bankruptcy & Mass Torts*, 91 Fordham L. Rev. 309 (2022); Ralph Brubaker, *Mandatory Aggregation of Mass Tort Litigation in Bankruptcy*, 131 Yale L.J. Forum 960 (2022); Anthony J. Casey & Joshua C. Macey, *In Defense of Chapter 11 for Mass Torts*, 90 U. Chi. L. Rev. 973 (2023).

[34] *See* Stephen J. Carroll, Deborah R. Hensler, Jennifer Gross, Elizabeth M. Sloss, Matthias Schonlau, Allan Abrahamse, & J. Scott Ashwood, *Asbestos Litigation* (RAND Corp., MG-162-ICJ 2005).

[35] *In re Johns-Manville Corp.*, 36 B.R. 743 (Bankr. S.D.N.Y. 1984). In the Manville bankruptcy, the court approved the creation of a trust fund under Chapter 11 to compensate asbestos victims over time, ensuring that both present and future claimants could receive payments, despite being general unsecured creditors. This then-innovative use of bankruptcy law acknowledged the extraordinary scale of asbestos liability and laid the groundwork for future mass-tort bankruptcies by allowing flexibility in compensating victims through long-term trust structures. (*See* Sander L. Esserman & David J. Parsons, *The Case for Broad Access to 11 U.S.C. § 524[g] in Light of the Third Circuit's Ongoing Business Requirement Dicta in* Combustion Engineering, 62 N.Y.U. Ann. Surv. Am. L. 187 [2006]; Manville Personal Injury Settlement Trust, *History* [last visited Sep. 23, 2025].)

pany that produced asbestos products that were widely used in a variety of industries and products. Asbestos fibers, however, harm the lungs and can cause terrible lung injuries, including various cancers, such as mesothelioma. Manville initially concealed evidence that it was aware that asbestos caused lung injuries.[36] As users developed these illnesses, they sued, and in increasing numbers. Manville projected that, as such lawsuits were filed into the future, the costs of resolving them would increase and that it would exhaust its insurance coverage. The company also recognized that the Bankruptcy Code does not require a company to be currently insolvent to seek relief. Manville filed for Chapter 11 relief in 1982 as a solvent company and argued that it was an appropriate candidate for Chapter 11 relief because, in the future, it would consume all its insurance, and then it would become unable to pay its judgment debts. Manville argued that it made sense to seek immediate Chapter 11 relief and to devise a plan to ensure that all its tort claimants could be treated equally in the future. Chief Bankruptcy Judge Burton R. Lifland of the Southern District of New York agreed, and the parties fashioned a plan that the bankruptcy court confirmed.

Using the Manville case as its reference, the Bankruptcy Reform Act of 1994 added § 524(g) to the Bankruptcy Code to specifically address the resolution of mass-tort *asbestos* claims, allowing for the creation of asbestos trusts, which companies could fund with their insurance and third-party contributions to handle current and future asbestos-related liability.[37] The innovation that allowed future claims to be included was the requirement that they be separately represented in the bankruptcy.[38]

Bankruptcy provided a more direct path to global resolution than was available in the post–*Amchem-Ortiz* world by treating claimants as unsecured creditors and distributing available assets among them on a pro rata basis. And the bankruptcy strategy was, at least in terms of the number of cases resolved, successful. Many asbestos cases have been resolved through the bankruptcy process.[39] Because of those successes, bankruptcy has been increasingly used in nonasbestos mass torts (see Appendix B for examples of mass-tort bankruptcies).

Automatic Stay

In the context of mass-tort bankruptcy claims, the automatic-stay provision plays a crucial role in managing the complexities of numerous claims against a debtor. The automatic stay, which is triggered when a debtor/defendant files for bankruptcy under Chapter 11, immediately halts creditors' and claimants' legal actions and collection efforts, including those of mass-tort plaintiffs. In mass-tort bankruptcies, in which there can be thousands of claimant/plaintiffs who can be consolidated into a single proceeding in the bankruptcy court, the bankruptcy court streamlines and facilitates the process of determining liability and distributing available assets to claimants.

[36] Paul Brodeur, *Outrageous Misconduct: The Asbestos Industry on Trial* (Pantheon Books 1985).

[37] Bankruptcy Reform Act of 1994, Pub. L. No. 103-394 (Oct. 22, 1994).

[38] Although asbestos litigation drove much of the development of mass-tort bankruptcies, third-party releases predate many asbestos cases. A notable early example is the bankruptcy of A. H. Robins, the Dalkon Shield intrauterine device manufacturer, which filed for Chapter 11 in 1985 and involved third-party releases for shareholders and affiliates. *See A.H. Robins Co., Inc. v Piccinin*, 788 F.2d 994 (4th Cir. 1986) (recounting history).

[39] *See* Lloyd Dixon, Geoffrey McGovern, & Amy Coombe, *Asbestos Bankruptcy Trusts: An Overview of Trust Structure & Activity with Detailed Reports on the Largest Trusts* (RAND Corp., TR-872-ICJ 2010).

Priority Rules in Bankruptcy and Their Impact on Mass Torts

Although bankruptcy does not require that a debtor's liability exceed its assets, it does require some level of financial distress.[40] Consequently, even currently solvent companies facing mass litigation in which the future claims exceed their assets might have an avenue into bankruptcy court.

In bankruptcy, the distribution of assets is governed by a hierarchy that affects the recovery prospects of different types of creditors, including mass-tort claimants. Secured claims come first and are collateralized by property or other assets. Creditors without collateral are unsecured, often referred to as *general unsecured creditors*.

Next in line are administrative expenses, which are unsecured claims that are afforded a priority in payment over other unsecured claims. They are primarily the costs of administering the case, including professional fees and the operating expenses of the Chapter 11 debtor. Administrative expenses take precedence over claims that arose before the petition date, including those by mass-tort victims. In most cases in which a company is facing mass litigation and seeking bankruptcy, the tort claims significantly dwarf the rest of the unsecured claims.

After administrative expenses are more-junior priority unsecured claims. These claims are unsecured but are given priority under the Bankruptcy Code. Examples include certain tax obligations and unpaid employee wages. These claims must be paid in full before there can be any distribution to general unsecured claims, which can have significant implications in mass-tort cases. If a debtor has high-dollar, high-priority unsecured claims, mass-tort claimants might receive only a small share of the assets.

General unsecured claims, which include mass-tort claims, come next in the bankruptcy hierarchy. These claimants lack collateral and do not qualify for priority status under the Bankruptcy Code. In mass-tort bankruptcies, general unsecured claims can include both **liquidated claims**, such as those based on contracts with fixed amounts due, and **unliquidated tort claims**, such as personal injury lawsuits, in which the value must be determined through individualized assessments of harm, causation, and damages. Because unliquidated tort claims are more complex and harder to value, they often face steeper reductions in bankruptcy. As general unsecured creditors, mass-tort claimants might ultimately receive only a fraction of the compensation they would have sought in traditional litigation—or nothing at all if higher-priority claims exhaust the estate's assets.

Last are equity holders, who are shareholders or owners of the debtor. In Chapter 11 cases, it is rare for equity holders to receive any compensation: The debtor's assets are typically exhausted by higher-priority claims. Equity holders are entitled to recovery only if all other claims are fully satisfied—a scenario that is highly unlikely in large-scale bankruptcies, particularly those involving mass-tort liability. However, in some reorganizations, especially those negotiated consensually or involving significant shareholder contributions, equity holders may retain or receive new shares or debt in the reorganized company. These outcomes are case-specific and depend on the structure of the reorganization plan and the value of the enterprise relative to its liabilities.

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[40] Bankruptcy law recognizes two distinct concepts of financial distress: balance-sheet insolvency (also referred to as *technical insolvency* or *negative net worth*) and equitable insolvency (also referred to as *cash flow insolvency*). Balance-sheet insolvency occurs when a debtor's liabilities exceed the fair value of its assets. Equitable insolvency, by contrast, arises when a debtor cannot pay debts as they come due, even if its assets technically exceed liabilities. Under the Bankruptcy Code, a debtor need not be balance-sheet insolvent to seek Chapter 11 protection. It is sufficient for a firm to demonstrate financial distress, including the risk of being overwhelmed by litigation or unable to meet contingent obligations when due. *See In re Gen. Growth Props.*, 409 B.R. 43 (Bankr. S.D.N.Y. 2009), in which the district court affirmed that even solvent companies may file for bankruptcy if they face real and immediate financial pressure, particularly from litigation or refinancing needs. But see *LTL Mgmt., LLC v. Those Parties Listed on Appendix A to Complaint* (*In re LTL Mgmt., LLC*), 64 F.4th 84 (3d Cir. 2023) (finding that good faith in bankruptcy requires "immediate" financial distress and rejecting J&J's divisional merger bankruptcy). There appears to be some legal uncertainty about the extent to which future tort claims can justify the use of bankruptcy.

As general unsecured creditors, mass-tort claimants typically recover only a portion of their claimed damages.[41] In many mass-tort bankruptcies, a trust fund is established as part of the reorganization plan to provide compensation over time. These trusts, funded by the debtor and sometimes third parties, such as insurers, distribute payments based on the severity and type of injuries. In asbestos bankruptcies, for example, § 524(g) trusts were created to ensure ongoing compensation for both current and future claimants. However, although these trusts are intended to distribute funds equitably, payout amounts may change over time because of claim volume and fund availability. As a result, future claimants are not always guaranteed the same level of compensation as those paid earlier, unless safeguards are in place. For example, asbestos bankruptcy trusts established under § 524(g) employ a payment-percentage mechanism to ensure that current and future claimants receive equitable compensation.[42] The payment percentage is set based on actuarial estimates of the number and value of future claims, and it is adjusted periodically to reflect changes in the trust's assets and liabilities.

Some non–§ 524(g) trusts or PCFs might not use this mechanism, which leads to variation in how funds are distributed over time. In some cases, such as the Johns-Manville (asbestos) and Purdue Pharma (opioid) bankruptcies, courts have approved reorganization plans that allow mass-tort claimants to receive distributions ahead of other creditors, even if they are technically lower in the priority order. But for this to occur, the creditors must agree to the Chapter 11 plan.[43] This flexibility helps ensure that victims receive some form of compensation even when the debtor's assets are limited. Additionally, the use of third-party releases can shield certain parties from future litigation in exchange for their contributions to the VCF, as in *Harrington*.

Prohibitions on Fraudulent Transfers

The ability to claw back fraudulent transfers is designed to ensure that the debtor's estate can recover debtor's assets that were improperly conveyed before the bankruptcy filing.[44] Specifically, these provisions are designed to remedy asset stripping—that is, to prevent a debtor from deliberately moving assets out of the reach of creditors, such as by transferring them to related parties.

Bankruptcy courts have several methods for recovering fraudulently transferred assets, the most common of which is a clawback action, in which the debtor, bankruptcy trustees, or other authorized parties can recover the transferred assets. These recovered assets are then brought back into the bankruptcy estate,

[41] In bankruptcy, a claim is considered fully satisfied when the claimant receives the full value of their assessed damages, a feature we discuss further below. When a claimant recovers only a portion of their claimed damages, the claim is referred to as *impaired* under 11 U.S.C. § 1124 because they are not paid in full or are otherwise modified by the reorganization plan. Compensation is often distributed on a pro rata basis, meaning each claimant receives a percentage of their assessed claim value based on available funds.

[42] *Payment percentage* refers to the portion of a claim's full value that a trust pays out, on the basis of financial projections of how many total claims the trust expects to receive and how much money it has. Section 524(g) requires these percentages to be set equitably and updated regularly to preserve assets for future claimants.

[43] In the Purdue Pharma bankruptcy, which involved thousands of claims related to the opioid crisis, the court approved a reorganization plan that included a large settlement fund specifically for opioid victims. Despite objections from some creditors, the court allowed the mass-tort claimants—opioid victims—to receive distributions from the settlement fund, placing their recoveries effectively ahead of other unsecured creditors. The reasoning was that these victims had suffered significant harm and that therefore prioritizing their claims was seen as equitable under the circumstances (Casey & Macey, 2023).

[44] The term *fraudulent transfer* in bankruptcy law does not necessarily imply intentional deceit or traditional fraud. Rather, it refers to certain transfers of assets made by a debtor prior to bankruptcy that are deemed legally improper because they diminish the estate available to creditors. This includes transfers made with actual intent to hinder, delay, or defraud creditors, as well as constructive fraudulent transfers, such as preferential payments to insiders, shareholders, or select creditors, made while the debtor was insolvent or nearing insolvency. In the *Harrington* case, for example, the Sackler family withdrew billions of dollars from Purdue Pharma at a time when the company faced mounting litigation risk, leading to allegations that these withdrawals constituted fraudulent conveyances that harmed future claimants.

increasing the total amount available for distribution to creditors and restoring the estate to what it should have been before the fraudulent transfer.

These provisions provide some leverage for tort claimants because debtor/defendants might be willing to settle for higher values if they know that attempts to shield assets could be challenged and reversed.

The Future-Claim Representative

In an asbestos mass-tort bankruptcy proceeding, the court-appointed FCR represents the interests of people who have been exposed to asbestos prior to the bankruptcy filing but whose injuries do not manifest until after the bankruptcy plan is approved. These people often cannot be aware of their injuries or legal claims—and might not yet be represented—at the time of the bankruptcy. The FCR is charged with protecting these future claimants and ensuring that they are not unfairly disadvantaged in the bankruptcy process compared with current claimants. Specifically, the FCR advocates for those whose injuries from past asbestos exposure might arise years or decades later. Although § 524(g) focuses on prepetition exposure, courts have sometimes debated whether and how future exposures might be addressed. In practice, however, the trust structure typically applies only to those with prebankruptcy exposure, regardless of when symptoms arise. The FCR helps ensure that future claimants receive treatment equitable to that afforded to current claimants and creditors in the bankruptcy plan.

The FCR is a party of interest and actively participates in the development of the bankruptcy reorganization plan, particularly in negotiating its terms. The FCR's approval is required for any settlement or reorganization and is contingent on the plan having provisions to cover future claims. After the bankruptcy plan is confirmed, the FCR will have ongoing duties related to the oversight of the trust, ensuring that it operates in accordance with the plan and continues to meet the needs of future claimants. The FCR has a say in payment percentages, investments, and the like. Finally, the FCR has a role in evaluating and addressing potential changes in the value of future claims, such as shifts in medical costs or treatment protocols. This is distinct from class actions, in which plaintiffs' attorneys represent the certified class as a whole, without separately accounting for the unique interests of future claimants.[45]

Creditor Approval Required for Settlement

In Chapter 11 bankruptcy, creditors vote on the proposed reorganization plan, and approval requirements differ depending on the type of creditor and the structure of the bankruptcy. Creditors are divided into classes based on the nature of their claims, such as secured creditors, unsecured creditors, and equity holders. For a class of general unsecured creditors to approve a plan, those holding at least two-thirds (66.7 percent) of the dollar amount of claims in that class and more than 50 percent by number of claimants who actually

[45] More precisely, in a class action, plaintiffs' attorneys represent only people who fall within the certified class. Future claimants—people who have not yet developed an injury or are unaware of their injury—are generally not considered part of the class unless explicitly defined as such. However, courts have been skeptical of class settlements that attempt to bind future claimants because there could be conflicts of interest between current and future plaintiffs. In *Amchem*, SCOTUS rejected the use of a single class action to settle all current and future asbestos claims, emphasizing that future claimants could not be adequately represented within a single class. Similarly, in *Ortiz*, the Court held that class counsel could not fairly represent future claimants if their interests conflicted with those of currently injured plaintiffs.

By contrast, in asbestos-related bankruptcies, § 524(g) of the Bankruptcy Code explicitly provides for future claimants by requiring the appointment of an FCR to advocate on their behalf. This structure is intended to ensure, at least in theory, that adequate funds remain available to compensate future victims. (*See* Esserman & Parson, 2006; Manville Personal Injury Settlement Trust, 2025.)

vote must support the plan. This dual threshold helps ensure that both large creditors and a majority of participating claimants within the class consent to the proposed reorganization.[46]

The rules are different in asbestos mass-tort bankruptcies, which are designed to ensure broad consensus, especially where future claimants are concerned. Under § 524(g) of the Bankruptcy Code, which governs asbestos-related bankruptcies, at least 75 percent of affected tort claimants who choose to vote must approve the plan. Unlike standard creditor voting, in which the size of the claim weights votes, the 75-percent threshold in mass-tort cases is based on the total number of tort claimants to ensure that larger tort claims do not overshadow smaller ones.[47]

In the Purdue bankruptcy, like almost all mass-tort bankruptcies, the approval process mirrored the rules applied in asbestos cases. The bankruptcy plan required 75-percent approval from opioid victims and municipalities that had filed claims. Ultimately, more than 96 percent of voting creditors supported the settlement, easily surpassing the threshold necessary for approval.

Third-Party Releases and Divisional Mergers

Although bankruptcy has some controversial aspects pertaining to its use as a resolution mechanism in mass torts, we highlight here two specific provisions of the bankruptcy process: nonconsensual third-party liability releases and divisional mergers, also referred to by some litigants as the *Texas two-step*.[48] Both strategies aim to facilitate global resolutions while minimizing the impact on the ongoing business operations of the

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[46] Under 11 U.S.C. § 1126(c),

> a class of claims has accepted a plan if such plan has been accepted by creditors, other than any entity designated under subsection (e), that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors that have accepted or rejected the plan.

In asbestos-related bankruptcies seeking a channeling injunction—a court order that diverts all claims from the debtor and its insurer to a settlement trust—under 11 U.S.C. § 524(g), a higher threshold applies: Seventy-five percent of voting asbestos personal injury claimants whose claims will be channeled must approve the plan. *See* 11 U.S.C. § 524(g)(2)(B)(ii)(IV)(bb).

[47] This can create problems, however, when claim values vary widely. For example, in the Imerys Talc America bankruptcy proceedings, U.S. Bankruptcy Judge Laurie Selber Silverstein specifically addressed issues related to the valuation and voting rights of claims based on their severity. In October 2021, Judge Silverstein excluded more than 15,000 votes from claimants after determining that many of diseases alleged in these claims were not compensable under the proposed plan (*In re Imerys Talc Am*., 2021 Bankr. LEXIS 2852 [Bankr. D. Del. 2021]). This decision effectively suspended the confirmation hearing and required Imerys to reassess its bankruptcy strategy. More recently, in January 2025, Imerys announced that more than 90 percent of voting claimants had accepted the plan of reorganization, designed to address varying claim severities and ensure equitable treatment for all claimants. (*See* Maria Chutchian, "Ex-J&J Talc Supplier Considering New Path as Judge Nixes Bankruptcy Plan Votes," Reuters, Oct. 31, 2021; Press Release, Imerys, *Imerys Provides an Update on the Ongoing Chapter 11 Process of the North American Talc Entities* [Jan. 6, 2025].) *See* Nora Freeman Engstrom & Todd Venook, *Harnessing Common Benefit Fees to Promote MDL Integrity*, 101 Tex. 1623 (2023) (discussing the problem of nonmeritorious claims in mass torts and MDLs).

Although the FCR does not have a formal vote on the bankruptcy plan, their support is typically critical. Bankruptcy courts rely on the FCR to determine whether the plan is fair and equitable to future claimants. Courts have, in some cases, declined to confirm a § 524(g) plan when the FCR objects, treating the FCR's opposition as a strong signal that future claimants' interests are not adequately protected. Thus, although the FCR lacks a statutory veto, their effective influence can approach that level in practice.

[48] The term *divisional merger* originates from Texas law—specifically, the Texas Business Organizations Code, which provides the legal framework for a process that allows a company to divide into two or more entities. Although the statute refers to this process as a *merger*, the outcome often diverges significantly from the conventional understanding of the term. Rather than combining businesses or assets, a divisional merger frequently results in the partitioning of assets and liabilities, with one entity retaining valuable assets while another assumes significant liabilities. Although the term *merger* reflects the statutory language, it can be misleading because it implies consolidation rather than the division that typically characterizes the process (*see* Michael A. Francus, *Texas Two-Stepping Out of Bankruptcy*, 120 Mich. L. Rev. Online 38 [2023]). Note that other states, including Delaware, Pennsylvania, and North Carolina, also have divisional merger statutes that allow similar restructuring. However, the scope and application of these statutes vary by state and entity type.

companies involved. They can also limit payouts to injured individuals and avoid the revelation of information that may be embarrassing or damaging to the companies. We focus on the nonconsensual third-party liability release because it was restricted by *Harrington* and on the divisional merger because it is a strategy that could be affected.

Nonconsensual Third-Party Releases

Although third-party releases in bankruptcy have been used for decades, they have recently garnered more attention for their prominent role in mass-tort bankruptcies.[49] As described previously, a third-party release occurs when a court issues an order preventing parties with claims against the debtor from pursuing related claims against other, nonbankrupt parties, such as the debtor's parent, managers, owners, insurers, and other co-liable unrelated parties (e.g., codefendants). Even though most claimants involved might vote in favor of the plan, it is still considered nonconsensual for the claimants who object to or vote against it. In many cases, courts have also treated nonvoting claimants as bound by the release, which further complicates the question of valid consent. A release is deemed consensual only if it receives approval from all affected claimants. Although consensual releases can still face criticism, our focus in this report is on releases that do not receive full support and are therefore classified as nonconsensual. Nonconsensual third-party releases in bankruptcy allow entities not themselves in bankruptcy, such as parent companies, insurers, executives, or codefendants, to be shielded from future liability as part of a debtor's reorganization plan. These third parties might not necessarily bear independent legal responsibility for the underlying torts but are often included because of their ties to the debtor, whether financial (e.g., insurers and funders), managerial (e.g., owners and directors), or operational (e.g., affiliates, distributors, and chartered organizations, such as in the Boy Scouts of America [BSA] litigation[50]). In many cases, these entities agree to make substantial financial contributions to the bankruptcy estate in exchange for the protection of a release, which permanently enjoins future lawsuits against them related to the debtor's conduct.

To provide a sense of how frequently nonconsensual third-party releases are used in mass-tort bankruptcies, we provide a list of bankruptcies in which they have been used (see Table 2.1). To develop this list, we surveyed the existing literature on mass-tort bankruptcies and the amicus briefs filed in the *Harrington* case and compiled a list of all instances of nonconsensual third-party releases mentioned in these sources. The SMEs we consulted for this project also contributed to the list based on their experience. The list is not necessarily complete, but it suggests that nonconsensual third-party releases have been used regularly in recent years. This finding is consistent with those of Casey and Macey, who documented that some large businesses have initiated Chapter 11 bankruptcy proceedings to resolve mass torts and that these proceedings have typically involved nonconsensual third-party releases.[51]

Divisional Merger

The divisional merger is a recent innovation in mass-tort bankruptcies, initially used in asbestos cases and later extended to other types of liability. This strategy involves a two-step process: First, a company splits

The Texas divisional merger law was not originally designed for mass-tort litigation. The rule allows companies to engage in divisional mergers as part of standard corporate restructuring. The law was created to provide flexibility for businesses to reorganize, streamline operations, or manage assets and liabilities by dividing into multiple entities. Its primary intent was to facilitate corporate efficiency, succession planning, tax strategies, and general asset management.

[49] *See* Dorothy Coco, *Third-Party Bankruptcy Releases: An Analysis of Consent Through the Lenses of Due Process & Contract Law*, 88 Fordham L. Rev. 231 (2019).

[50] *In re BSA*, 2024 Bank. LEXIS 635 (Bankr. D. Del. 2024); *In re BSA*, 137 F.4th 126 (3d Cir. 2025)

[51] Casey & Macey, 2023; *see also* Adam J. Levitin, Purdue*'s Poison Pill: The Breakdown of Chapter 11's Checks & Balances*, 100 Tex. L. Rev. (2022).

TABLE 2.1

Examples of Third-Party Releases in Mass-Tort Bankruptcies

Defendant	Description	Year[a]	Harm at Issue
A. H. Robins Co.	A. H. Robins Co. used nonconsensual third-party releases in mass-tort litigation related to the Dalkon Shield IUD, protecting nondebtor parties. *Ackles v. A.H. Robins Co. (In re A.H. Robins Co.)*, 59 B.R. 99 (Bankr. E.D. Va. 1986).	1988	Dalkon Shield IUD design causing infection
Dow Corning	Dow Corning used nonconsensual third-party releases for insurers and guarantors in a bankruptcy related to breast implant litigation. To obtain the release, the shareholders (Corning and Dow Chemical) provided insurance assets and a credit facility to back up Dow Corning. *Class Five Nev. Claimants*.	1999	Breast implants causing systemic health problems
Combustion Engineering	Combustion Engineering's bankruptcy involved nonconsensual third-party releases in asbestos-related claims. *In re Combustion Eng'g, Inc.,* 391 F.3d 190 (3d Cir. 2004).	2005	Asbestosis
Roman Catholic Diocese of Gallup	The Roman Catholic Diocese of Gallup used nonconsensual third-party releases in its bankruptcy plan to address sexual abuse claims. *In re Roman Cath. Church of the Diocese of Gallup*, 513 B.R. 761 (Bankr. D.N.M. 2014).	2014	Sexual abuse insufficiently addressed
Takata Airbag	Takata filed for Chapter 11 bankruptcy in 2017 because of liability related to defective airbag inflators. Several automakers that installed Takata airbags sought nonconsensual third-party releases to shield themselves from future personal injury lawsuits. The court approved these releases as part of the confirmed bankruptcy plan.	2018	Airbags rupturing and releasing dangerous debris
Insys Therapeutics	Insys Therapeutics used nonconsensual third-party releases in its bankruptcy related to opioid litigation. *Henrich v. XL Specialty Ins. Co. (In re Insys Therapeutics, Inc.)*, 2024 Bankr. LEXIS 1261 (Bankr. D. Del. 2024).	2020	Illegal marketing of opioids
Weinstein Company	The Weinstein Company used nonconsensual third-party releases to create a settlement fund for sexual abuse claims, protecting nondebtor third parties. *Cooper v. Lantern Entm't LLC (In re Weinstein Co. Holdings, LLC)*, 2020 U.S. Dist. LEXIS 48464 (D. Del. 2020).	2020	Sexual abuse by a principal
Roman Catholic Diocese of Harrisburg	The Roman Catholic Diocese of Harrisburg used nonconsensual third-party releases to manage future claims related to revived statutes of limitations. *In re Roman Cath. Diocese of Harrisburg*, 640 B.R. 59 (Bankr. M.D. Pa. 2022).	2020	Failure to adequately address sexual abuse
PG&E	PG&E used nonconsensual third-party releases in a Chapter 11 bankruptcy plan to address wildfire-related liability. *In re PG&E Corp.*, 2020 Bankr. LEXIS 1754 (N.D. Cal. 2020).	2020	Sparking wildfire
Purdue Pharma	Purdue Pharma's bankruptcy plan included nonconsensual third-party releases for the Sackler family in exchange for contributions to the settlement resolving opioid litigation. *Purdue Pharma, L.P. v. City of Grande Prairie (In re Purdue Pharma L.P.)*, 69 F.4th 45 (2d Cir. 2023).	2021	Known overuse and risk of opioids
USA Gymnastics	USA Gymnastics utilized nonconsensual third-party releases in its bankruptcy related to sexual abuse claims. Press Release, USA Gymnastics, *Settlement with Survivors Approved by Court; USA Gymnastics to Exit Bankruptcy* (Dec. 13, 2021).	2021	Failure to adequately address sexual abuse
BSA	The BSA's bankruptcy involved nonconsensual third-party releases for nondebtor parties, addressing sexual abuse claims. *In re BSA*, 137 F.4th 126 (3d Cir. 2025).	2022	Failure to adequately address sexual abuse
Mallinckrodt Pharmaceuticals	Mallinckrodt Pharmaceuticals used nonconsensual third-party releases as part of its opioid litigation bankruptcy plan. *In re Mallinckrodt PLC*, 639 B.R. 837, 871 (Bankr. D. Del. 2022).	2022	Failure to adequately address excessive sales of opioids

Table 2.1—Continued

Defendant	Description	Year[a]	Harm at Issue
Tehum Care Service	Tehum Care Services (formerly Corizon) reached a $75 million settlement in its Chapter 11 bankruptcy. Although it initially sought third-party releases for affiliated entities, such as YesCare, the final plan included a compromise that allowed prisoners and their families to walk away from the deal and instead pursue lawsuits alleging that the company provided poor medical care. *In re: Tehum Care Services, Inc.*, Case No. 23-90086 (CML) (Bankr. S.D. Tex.).	2025	Medical negligence causing death and preventable injuries and pain
J&J	J&J used a divisional merger to manage talc-related liability through a bankruptcy filing by its subsidiary, LTL Management. However, in 2024, the U.S. Court of Appeals for the Third Circuit found that the filing lacked good faith and dismissed the case. The company is seeking third-party releases, but the litigation remains ongoing.[b] *In re LTL Mgmt., LLC*, 637 B.R. 396 (Bankr. D.N.J. 2022).	Rejected 2023, ongoing	Asbestos contamination in talc products[c]
3M	3M is seeking third-party releases in its bankruptcy related to defective earplugs.	Ongoing	Defects in earplugs damaged hearing
Georgia-Pacific	Georgia-Pacific used a divisional merger (Bestwall LLC) to shift asbestos liability and subsequently filed for bankruptcy. It is seeking third-party releases. *Bestwall LLC v. Off. Comm. of Asbestos Claimants (In re Bestwall LLC)*, 71 F.4th 168 (4th Cir. 2023).	Ongoing	Asbestos in products causing cancer
CertainTeed	CertainTeed used a divisional merger (DBMP LLC) to shift asbestos liability and subsequently filed for bankruptcy. It is seeking third-party releases. *DBMP LLC v. Those Parties Listed on Appendix A to Complaint (In re DBMP LLC)*, 2021 Bankr. LEXIS 2194 (Bankr. W.D.N.C. 2021).	Ongoing	Asbestos in products causing disease
Trane Technologies	Trane Technologies employed a divisional merger to address asbestos liability by creating new entities—Aldrich Pump and Murray Boiler—which later filed for bankruptcy. It is seeking third-party releases for these entities. *In re Aldrich Pump LLC*, 2023 Bankr. LEXIS 3043 (W.D.N.C. 2023).	Ongoing	Asbestos in products causing disease
Highland Capital Management Fund Advisors	Highland Capital Management sought third-party releases to limit liability for nondebtor third parties in its Chapter 11 plan. *Highland Cap. Mgmt. Fund Advisors, L.P. v. Highland Cap. Mgmt., L.P. (In re Highland Cap. Mgmt., L.P.)*, 132 F.4th 353 (5th Cir. 2025) (limiting use of plan's provisions against nondebtors).	Rejected	Failure to pay creditors

SOURCES: This table lists all uses of third-party releases in mass litigation referenced in the articles in the reference list at the end of this report or cited in the amicus briefs filed in *Harrington*.

NOTE: IUD = intrauterine device; PG&E = Pacific Gas and Electric Company. The table does not list all bankruptcies in which third-party releases have been approved or are being considered. This table includes examples in which third-party releases were sought in mass-tort bankruptcies. In some cases, the bankruptcy court approved the releases; in others, they were denied, modified, or later invalidated on appeal. A case's inclusion in this table does not imply ultimate success or final legal resolution of the third-party release issue.

[a] This column contains the year in which the bankruptcy court agreed to the third-party release. Jeffrey E. Bjork & Nicholas J. Messana, *Mass Tort Bankruptcies and Third-Party Releases: Observations from the Frontlines* (Southeastern Bankr. L. Inst. Seminar May 5, 2021).

[b] In *In re LTL Mgmt. LLC*, 2024 U.S. App. LEXIS 18437 (3d Cir. 2024), the Third Circuit held that the bankruptcy filing was not made in good faith under 11 U.S.C. § 1112(b), concluding that J&J's affiliate was not in sufficient financial distress to justify Chapter 11. This decision significantly limited the use of divisional mergers to manage mass-tort liability through bankruptcy.

[c] This is true even though many of the claims in the J&J talc litigation have involved allegations of asbestos contamination, such as claims linking talc use to mesothelioma, which would make § 524(g) provisions on third-party releases applicable. Despite this, the company did not seek to resolve this liability through § 524(g) of the Bankruptcy Code, which applies only to debtors "directly or indirectly liable for the payment of damages arising from exposure to asbestos or asbestos-containing products." Instead, J&J employed a divisional merger strategy (the aforementioned Texas two-step) to create a new entity, LTL Management LLC, which filed for Chapter 11 protection under the general provisions of the Bankruptcy Code. The Third Circuit dismissed the first LTL bankruptcy filing for lack of good faith. *See LTL Mgmt., LLC* (2024). J&J subsequently pursued additional bankruptcy filings through both LTL and a later-created subsidiary, Red River Talc LLC. These efforts were also met with legal challenges and dismissals, which just underscores the company's protracted and evolving effort to manage the talc litigation through bankruptcy, outside the asbestos-specific framework of § 524(g). *See In re LTL Mgmt. LLC* (2024).

into two entities under state law, typically using Texas divisional merger statutes, creating one entity (say, LiabilityCo) that assumes the company's tort liability and another (GoodCo) that retains the operating business and assets. Second, LiabilityCo files for Chapter 11 bankruptcy. This has been described as a "bankruptcy quarantine" that shields GoodCo from the financial consequences of mass-tort claims.[52]

One of our experts suggested that this characterization oversimplifies the arrangement. In practice, GoodCo would typically enter into a funding agreement to finance the bankruptcy trust or pay claims, ensuring that it remains financially responsible for the tort liability, even if it avoids the procedural burdens of bankruptcy itself. This separation allows GoodCo to continue operations unimpeded by the constraints of Chapter 11, such as the need for court approval of actions outside the ordinary course of business, while LiabilityCo resolves the claims in bankruptcy. As several of our experts noted, this structure can benefit plaintiffs as well: Because it isolates the tort liability in a single entity backed by a committed funding agreement, tort claimants become the sole class of creditors with a claim to those funds, potentially improving their position relative to a full-company bankruptcy, in which they would compete with other, unsecured creditors. Moreover, without such a funding arrangement, the divisional merger could fail under fraudulent transfer scrutiny because shifting liabilities without sufficient assets or consideration would violate bankruptcy principles.

Table 2.2 provides some indication of the frequency of Texas divisional mergers. As we did for nonconsensual third-party releases, we surveyed existing literature on mass-tort bankruptcies and reviewed the amicus briefs filed in *Harrington* to compile this list. The results suggest that divisional mergers are far less common than third-party releases.[53]

TABLE 2.2
Examples of Divisional Mergers in Mass-Tort Bankruptcies

Defendant	Description	Year of Divisional Merger	Product at Issue
J&J	J&J tried to use a divisional merger to address talc-related liability, but these attempts have been rejected.	2021[a]	Talc
Georgia-Pacific (Bestwall)	Georgia-Pacific employed the divisional merger to offload asbestos liability into Bestwall, which sought bankruptcy protection.	2017	Asbestos
CertainTeed (DBMP)	CertainTeed used a divisional merger (DBMP) to shift asbestos liability and subsequently filed for bankruptcy.	2019	Asbestos
Trane Technologies	Trane Technologies used a divisional merger to transfer asbestos-related liability to two new entities (Aldrich Pump and Murray Boiler), which later filed for bankruptcy.	2020	Asbestos
Paddock Enterprises[b]	Owens-Illinois used the diversional merger strategy to move its asbestos liability to Paddock Enterprises, which filed for bankruptcy.	2020	Asbestos
Corizon Health	Corizon Health utilized a divisional merger to separate its liability into Tehum Care Services Inc., which subsequently filed for bankruptcy, and YesCare, which received its operational assets.	2022	Prison health care services

SOURCE: This table contains all attempted uses of divisional mergers referenced in the articles cited in the reference section or cited in the amicus briefs filed in *Harrington*.

NOTE: The table does not provide a complete list of all divisional mergers motivated by mass-tort exposure. With the exception of Corizon Health, none of the bankruptcies filed after these divisional mergers has been resolved.

[a] *See* Charlie Hu, *Court Rejects Johnson & Johnson's Use of the "Texas Two-Step" to Tackle Baby Powder Liability*, U. Chi. Business L. Rev. (online ed. 2023); Francus, 2023.

[b] *In re Paddock Enterprises LLC*, No. 20-10028 (LSS) (Bankr. D. Del. 2022).

[52] *See* Casey & Macey, 2023.

[53] *See also* Francus, 2023.

Recent court decisions have cast doubt on the viability of the divisional merger strategy. In the J&J talc litigation, J&J faced more than 40,000 claims alleging that its talc-based baby powder caused cancer, prompting the company to adopt this strategy. To manage its talc-related liability, J&J's subsidiary, J&J Consumer Inc. (JJCI), executed a divisional merger in 2021 under Texas law. This resulted in the creation of LTL Management, which was assigned the talc litigation liability, while JJCI retained the valuable assets and continued business operations. A funding agreement between LTL and J&J/JJCI obligated the solvent entities to provide the funds necessary to satisfy LTL's liability. LTL then filed for Chapter 11 bankruptcy, aiming to resolve talc claims through a settlement trust while shielding the operating business from direct litigation exposure.[54] The U.S. Court of Appeals for the Third Circuit ultimately dismissed J&J's bankruptcy efforts, reasoning that LTL was not in sufficient current financial distress and therefore did not qualify for bankruptcy protections.[55] The court's decision was based on the fact that J&J gave LTL a guarantee that would enable LTL to pay all of its creditors, including tort claimants, in full. Thus, the court found insufficient financial distress to justify the use of bankruptcy.[56]

[54] The restructuring did not involve a divisional merger by J&J itself but rather by its wholly owned subsidiary, JJCI, under Texas Business Organizations Code § 10.001 *et seq.* The merger created a new entity, LTL, which was allocated the company's talc-related liability, while JJCI retained the operating assets. Shortly thereafter, JJCI merged with another J&J affiliate, effectively consolidating its ongoing operations. A key feature of the transaction was a funding agreement obligating J&J and JJCI to provide LTL with financial resources sufficient to pay its talc-related liability, up to the value of JJCI at the time of the restructuring. This funding agreement was central to LTL's argument that it was not filing for bankruptcy in bad faith, though the courts ultimately rejected this claim. *See LTL Mgmt., LLC*; *In re LTL Mgmt. LLC* (2024).

[55] See *LTL Mgmt., LLC*. There are other recent cases in which the courts have rejected bankruptcy protection as part of an effort to manage mass-tort liability. Aearo Technologies LLC, a subsidiary of 3M, filed for Chapter 11 bankruptcy in July 2022 to manage extensive litigation over allegedly defective earplugs supplied to the U.S. military. The filing was intended to consolidate and resolve the claims within the bankruptcy framework, potentially limiting 3M's liability (Alex Wolf, *3M Unit Bankruptcy Toss Is Second Blow to Mass Tort Defense Play*, Bloomberg Law [June 13, 2023]). However, in June 2023, U.S. Bankruptcy Judge Jeffrey J. Graham dismissed Aearo's bankruptcy case, ruling that the filing did not serve a valid reorganization purpose. The court determined that Aearo, with substantial financial backing from its parent company, 3M, was not in financial distress warranting bankruptcy protection (Press Release, Bailey Glasser, *Bailey Glasser Team Led by Brian Glasser Helps Dismiss Improperly Filed Mass Tort Bankruptcy by 3M Subsidiary Aearo Technologies* [June 12, 2023]). The dismissal of Aearo's bankruptcy underscores judicial scrutiny of solvent companies' attempted use of bankruptcy to address mass-tort liability, particularly when such filings are perceived as strategic moves to limit liability rather than genuine efforts for financial reorganization.

The *Red River* decision marked J&J's third attempt to manage its talc-related liability through a divisional merger and subsequent bankruptcy. The court dismissed the Chapter 11 petition that Red River Talc LLC filed, holding that the filing lacked a legitimate reorganization purpose and was not made in good faith. The debtor had no meaningful operations or financial distress and existed solely as a vehicle to obtain bankruptcy protections without bearing the ordinary burdens of Chapter 11. The ruling echoed and reinforced the Third Circuit's earlier decision in *LTL Mgmt., LLC*, further signaling a growing judicial reluctance to allow solvent parent companies to use divisional mergers to isolate tort liability. *See In re Red River Talc LLC*, 670 B.R. 251 (Bankr. S.D. Tex. Mar. 31, 2025) (Lopez, J.) (denying confirmation of prepack Chapter 11 plan and dismissing the case for cause, as well as rejecting the full-pay argument and proposed nondebtor releases).

In the wake of these decisions, there is some uncertainty about the circumstances under which efforts to reduce future tort liability are a good-faith use of bankruptcy protection. On the one hand, they can appear to be a manipulative litigation strategy that looks like an effort to evade much-deserved liability for wrongdoing. On the other hand, they might simultaneously be genuine efforts to ensure a company's ongoing viability by reducing future financial liability.

[56] One of our SMEs speculated that, because many plaintiffs in the talc MDL alleged asbestos contamination as a central basis for liability, the talc litigation might fit within § 524(g) (which is applicable only in asbestos cases).

Advantages and Disadvantages of Bankruptcy in the Mass-Tort Context, Pre-*Harrington*

Bankruptcy as a mass-tort resolution mechanism has been subject to both praise and criticism. In this section, we outline some of the advantages and disadvantages bankruptcy offered, prior to the *Harrington* decision, because these will be relevant to our later analysis of *Harrington*'s implications.

Advantages of Mass-Tort Bankruptcy

From a financial perspective, bankruptcy law would seem to be an ideal mechanism for resolving mass torts when a defendant's resources are less than the value of the claims against it. Generally, bankruptcy law includes core provisions that are fundamental in addressing financial distress, both in general contexts and in cases involving mass torts, and are based on equal treatment of creditors. These provisions are designed to provide fairness in resolving financial obligations by protecting the interests of creditors and claimants.[57]

Mass-tort cases often present significant challenges to achieving a global resolution because the claims are so large in scale and so complex. A core issue that hinders global settlements in mass torts is the collective-action problem. Casey and Macey argued that both the tort system in general and the MDL system in particular create a collective-action problem by encouraging a race among claimants to secure compensation before a company's assets are depleted.[58] In the absence of coordination, early claimants who win large judgments can exhaust the company's resources, leaving later claimants with little or no compensation. This race-to-the-courthouse dynamic is exacerbated by the fact that different claimants might receive significantly different payouts depending on when and where they file, resulting in inequities and inefficiencies. MDLs, though designed to consolidate cases and streamline litigation, still face challenges in fully resolving mass-tort claims, particularly when holdouts or future claimants are involved. As a result, individual litigation and MDL proceedings can lead to disorganized, lengthy, and value-destructive resolutions—precisely the type of problem that bankruptcy proceedings, such as Chapter 11, are designed to mitigate by providing a single forum in which all claims can be addressed efficiently.

Some of our SMEs suggested that bankruptcy law, particularly Chapter 11, has features that are well-suited to resolving mass-tort claims because it is designed specifically to address the collective-action problems that arise when a defendant does not have enough assets to satisfy multiple creditors or claimants who are pursuing separate proceedings. As Casey and Macey argued, the bankruptcy system provides a centralized forum in which claims can be aggregated and resolved in an organized manner.[59] In the context of mass torts, this system ensures that claimants, rather than competing for limited resources, are subject to a single process in which the firm's assets are distributed in a more equitable and structured way. The automatic-stay provisions in bankruptcy, for instance, prevent plaintiffs, absent their obtaining relief from the automatic stay under § 362(d), from filing lawsuits outside the bankruptcy court, which ensures that all recoveries are processed collectively. This not only preserves the value of the firm but also minimizes the risk of individual claimants draining the defendant's resources at the expense of other claimants.

[57] The primary goal of Chapter 11 in corporate bankruptcies is to allow financially distressed companies to reorganize their debts and business operations while continuing to operate, rather than forcing them into liquidation. Chapter 11 is designed to provide a company with temporary "breathing space" by imposing an automatic stay on creditor actions, which halts all collection efforts, lawsuits, and other legal actions against the company. This allows the business to develop a reorganization plan that outlines how it will restructure its debts, which could involve renegotiating terms with creditors, selling off nonessential assets, or altering its operations to return to profitability.

[58] Casey & Macey, 2023.

[59] Casey & Macey, 2023.

As several of our experts noted, one of the most significant advantages of bankruptcy in mass-tort cases is its ability to deal with situations in which the total claims exceed the defendant's resources. In such instances, bankruptcy enables a comprehensive resolution by encouraging third parties to contribute significant monies to the estate that can be many times greater than what the debtor is able to do on its own and by consolidating all claims into a single proceeding and distributing the available assets in a fair and proportional manner. Several of our experts pointed out that this contrasts with traditional litigation, in which individual lawsuits may proceed independently, which usually leads to inconsistent outcomes and occasionally the depletion of resources before all claimants can be compensated. Bankruptcy also allows for such mechanisms as structured settlements or the creation of settlement trusts, which can ensure that future claimants, whose injuries have not yet manifested, are also compensated.

By consolidating all claims into the bankruptcy process, the Bankruptcy Code ensures that claims are handled in an orderly and equitable manner. Having a single forum for claims also reduces legal costs and allows for a more predictable and transparent distribution of compensation to victims.

We earlier described some disadvantages of utilizing MDLs to resolve mass torts. We reflect now on how bankruptcy compares in the face of those challenges.

- **Scale.** The bankruptcy system allows a defendant seeking a global resolution to address the overwhelming scale of the largest MDLs. As mass-tort cases grow, companies face an immense number of claims that can threaten their financial viability. For example, in the opioid litigation, some companies, such as Purdue Pharma, filed for Chapter 11 to escape thousands of lawsuits consolidated in MDLs. By entering bankruptcy, a defendant can create a centralized process to limit its liability exposure and avoid the financial pressures that come with managing mass claims in the MDL system.[60] This effectively reduces the scale of litigation by consolidating claims into a single forum, as opposed to dealing with thousands of individual cases in various courts. From the plaintiff's perspective, this could be viewed as a positive or negative.
- **Scope of legal issues.** Mass-tort cases in MDLs often involve a broad array of legal issues. Earles pointed out that bankruptcy allows defendants to address the wide-ranging scope of claims in a more structured environment. For instance, in the opioid and Juul litigations, claims ranged from individual personal injuries to public health costs incurred by government entities. Several of our SMEs argued that the MDL system struggles to handle such varied legal and factual issues. In contrast, Chapter 11 enables defendants to propose global settlements that can encompass all claimants, including future claims, under a single, binding agreement. This allows defendants to handle the broad scope of legal liability in a more organized and final manner than MDLs do.[61]

[60] *See* Natalie R. Earles, *The Great Escape: Exploring Chapter 11's Allure to Mass Tort Defendants*, 82 La. L. Rev. (2022); Casey & Macey, 2023.

[61] One of our experts pointed to the BSA bankruptcy and the Takata airbag litigation as examples of how the challenges of achieving a global resolution through MDL are often driven by issues of scope. The expert noted that the MDL process was not a viable option in the BSA case because of the highly individualized nature of the sexual abuse claims, which varied significantly by location, time frame, and circumstances. Instead, the BSA filed for Chapter 11 bankruptcy in 2020, consolidating all claims into a single forum and establishing a settlement trust to compensate survivors. *See In re BSA*, 2024 Bank. LEXIS 635 (Bankr. D. Del. 2024). Although the bankruptcy offered a centralized mechanism for resolution, some advocates argued that survivors were forced to accept less favorable outcomes than they might have received through jury trials. The expert also highlighted the limitations of the Takata airbag litigation, which used an MDL but was limited to economic loss claims from vehicle owners seeking compensation for diminished vehicle value. Personal injury claims were excluded from the MDL because of the unique circumstances of each accident, including vehicle type, location, contributory negligence, and injury severity. Instead, personal injury claimants pursued individual lawsuits or sought compensation through a trust created during Takata's bankruptcy (MDL No. 2599). Again, although bankruptcy facilitated centralized resolution, some personal injury claimants raised concerns about opaque procedures and limited individual participation.

- **Time.** One of the significant advantages of the bankruptcy system for defendants is its ability to halt ongoing litigation and control the timeline for resolution. Defendants use Chapter 11 to impose an automatic stay on all pending lawsuits, as seen in such cases as Mallinckrodt and Purdue Pharma.[62] This suspends MDL proceedings and allows the company to negotiate reorganization plans without the pressure of mounting litigation costs. Although MDLs are already criticized for their prolonged time frames and the bankruptcy stays can further extend the timeline, bankruptcy can provide more predictability and control over when and how settlements will occur.[63] In cases in which there is wide variation in when claimants make their claim, perhaps because of latency in the injury or very different exposure times, the appointment of an FCR helps ensure that claims that have not yet been filed are represented in the process.
- **Management.** The bankruptcy system also offers defendants a way to manage mass-tort litigation more effectively. In MDLs, management issues arise from the variation in how judges handle complex cases, which can lead to inconsistent rulings and outcomes. Several of our defense-side experts argued that bankruptcy offers a standardized and predictable process, allowing defendants to exert control over the litigation. For example, the Chapter 11 process centralizes all claims in one court, eliminating the unpredictability of multiple judges, such as when state complex litigation courts and a federal MDL handle different aspects of the same case. However, this centralization can come at a cost to plaintiffs.
- **Equity and finality.** An MDL, although it consolidates cases for pretrial proceedings, does not necessarily lead to a global settlement and can face challenges with holdouts and future claimants. Furthermore, MDL lacks the ability to provide the same level of finality and comprehensive resolution as bankruptcy because the MDL is made up of many individual cases and state court claims exist outside the MDL. By contrast, several of our SMEs argued that bankruptcy allows a more direct path to global resolution by centralizing claims and treating claimant/plaintiffs as equal to unsecured creditors, distributing available assets among them. Bankruptcy allows the resolution of both present and future claims, including establishing future claim trusts to ensure that victims who have yet to file a lawsuit or learn of their injuries or harm are accounted for.[64]

Casey and Macey highlighted how legal innovations, such as third-party releases and divisional mergers, can further enhance the bankruptcy process by promoting efficient resolutions and reducing holdout problems, albeit while potentially incurring due process for the holdout plaintiffs.[65] They argued that nonconsensual third-party releases, for example, can provide a global resolution by releasing not only the debtor from liability but also affiliated parties, such as the defendant's parent, managers, or insurers, as part of a settlement. This mechanism ensures that all relevant parties are part of the resolution, preventing future litigation and promoting finality. They further contended that divisional mergers enable companies to quarantine their

[62] Press Release, Mallinckrodt, *Mallinckrodt Secures Broad Consensus with Key Stakeholders on Comprehensive Chapter 11 Restructuring* (Oct. 12, 2020); Press Release, Purdue Pharma, *Plan of Reorganization of Purdue Pharma L.P. Receives Bankruptcy Court Approval* (Sep. 1, 2021).

[63] *See* Casey & Macey, 2023.

[64] For example, the Roundup litigation against Monsanto illustrates the limits of achieving finality and equitable resolution through inventory settlements. Bayer, Monsanto's parent company, sought to implement a global settlement, including a proposed class settlement to resolve future claims. However, federal courts rejected these efforts, citing inadequate representation for future claimants and insufficient procedural protections. Unlike in bankruptcy, in which an FCR and court-supervised trust might have been used, these tools were unavailable outside Chapter 11. *See In re Roundup Prods. Liab. Litig.*, 544 F. Supp. 3d 950 (N.D. Cal. 2021). For the cases that have gone to trial, there is wide variation in the verdicts and, as one of our SME with experience in litigation argued, wide variation in settlement amounts even for similarly situated plaintiffs.

[65] Casey & Macey, 2023.

mass-tort liability into a separate entity that can then file for bankruptcy, allowing the rest of the company to continue operating without disruption. Casey and Macey, like several of our mass-tort bankruptcy experts, viewed these innovations as powerful tools for achieving global resolution in mass-tort cases, provided that they are used with proper judicial oversight to prevent abuse. These strategies can streamline litigation and provide a centralized forum for resolving claims. Importantly, to make such arrangements viable and to ensure that creditors are meaningfully compensated, parent companies often commit substantial financial contributions through funding agreements or trust financing as part of the bankruptcy plan. But although these mechanisms might facilitate global settlements, they do so at the risk of reducing the bargaining power of plaintiffs, who might have had greater leverage in traditional litigation settings.

Disadvantages of Mass-Tort Bankruptcy

A key difference between bankruptcy and other approaches is that outside bankruptcy claimants have an opportunity to opt out of a settlement or before a trial, preserving some level of individual choice. By contrast, bankruptcy does not allow claimants to opt out; all creditors, including tort claimants, are bound by the confirmed reorganization plan, even if they strenuously object. Although this makes achieving global resolution easier, it raises obvious concerns about due process and fairness for the claimants.

Critics generally characterize bankruptcy as denying victims due process and their "day in court" (i.e., a trial of their claims on the merits). More broadly, our plaintiff-side experts argued that the process, designed primarily to offer a fresh start for financially distressed businesses, is ill-equipped to handle the complexities and moral considerations involved in resolving mass-tort claims and that there are insufficient safeguards for claimant/plaintiffs in bankruptcy proceedings.[66] The overarching criticism is that bankruptcy, in this context, operates as a draconian, procrustean resolution mechanism, disproportionately benefiting defendants while minimizing their financial and reputational costs. Nonconsensual third-party releases and divisional mergers, in particular, are viewed as exacerbating these issues, creating unfair and constitutionally dubious protections for defendants at the expense of plaintiffs.

Moreover, although bankruptcy law provides a structured framework for resolving mass torts, its critics among our experts point to significant problems in its application, arguing that these problems undermine bankruptcy as a tool for equitable resolution. One major issue lies in how claims are treated in mass-tort bankruptcies. Bradt, Clopton, and Rave highlighted that tort creditors are typically given equal voting rights on reorganization plans, often without a thorough evaluation of the merits of the creditors' claims.[67] Jacoby further noted that it is common to group mass-tort claimants into a single voting class and value their claims uniformly at $1, regardless of their actual severity.[68] Because the real power in mass-tort bankruptcy lies in voting on the reorganization plan rather than in the threat of trial, this system incentivizes the filing of meritless claims to manipulate voting outcomes.

Plaintiffs' attorneys often view bankruptcy as a suboptimal venue for resolving claims because of the methods used to calculate and distribute compensation. The lack of individual trials in bankruptcy limits claimants' ability to pursue the full range of damages in the manner available in traditional litigation—particularly, punitive damages and noneconomic compensation, such as for pain and suffering. Although

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[66] *See also* Sergio Campos & Samir D. Parikh, *Due Process Alignment in Mass Restructurings*, 91 Fordham L. Rev. 325 (2022); Samir D. Parikh, *Scarlet-Lettered Bankruptcy: A Public Benefit Proposal for Mass Tort Villains*, 117 Nw. U. L. Rev. 425 (2022); Lindsey D. Simon, *The Settlement Trap*, 96 Ind. L.J. 1 (2021); Lindsey D. Simon, *Bankruptcy Grifters*, 131 Yale L.J. 1154 (2022).

[67] Bradt, Clopton, & Rave, 2022. For example, in *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 646–47 (2d Cir. 1988), the court found it a harmless error to treat all claims equally, a practice that remains prevalent. One of our SMEs argued that, in many asbestos cases, votes are valued based on alleged injury, which itself creates an issue because there is not always proof of injury. Although, as our discussion of *Imerys* shows, there is some flexibility in how alleged injury is handled in bankruptcy voting.

[68] Melissa B. Jacoby, *Shocking Business Bankruptcy Law*, 131 Yale L.J. 409 (2021).

such damages can be accounted for in bankruptcy settlements, often through estimation procedures or tiered settlement matrices, they are typically based on expert analysis and historical data rather than on individualized assessments by juries reacting to corporate misconduct.[69] Although this process may incorporate verdicts from prior trials or bellwether proceedings, it does not typically involve new trials, and individual damages are not adjudicated in the same way as in civil litigation. Critics argue that this approach disproportionately benefits defendants by shielding them from the risk of high-value jury verdicts, which could otherwise serve as a deterrent against corporate wrongdoing. Moreover, unlike traditional litigation, in which attorneys can pursue large jury verdicts when they feel that the settlement offers are too low and in which noneconomic and punitive damages are possible, claim value in bankruptcy is an estimate made by experts, with the court making the final determination.[70] Bankruptcy also limits recoveries to a fixed pool of assets, reducing the potential for high-value settlements or awards.[71]

Although expert valuations in bankruptcy can be grounded in tort system experience and data, the process is inherently subjective and depends heavily on the assumptions each expert applies to available evidence. Several plaintiff-side experts we interviewed expressed skepticism about these valuations, describing them as ad hoc and insufficiently reflective of what they considered reasonable tort-based claim values.[72] Although bankruptcy estimations often include a markup for punitive damages, plaintiff-side experts we interviewed argue that this practice is fraught with inconsistencies. Economists involved in aggregate liability valuations frequently exclude the highest and lowest awards to reach a more representative figure. For instance, according to one SME familiar with the litigation, the valuation in the BSA bankruptcy case discarded several settlements, including some exceeding $5 million, as well as some as low as $30,000. This approach prevents distortion caused by outliers, but our SME noted that the practice of trimming in estimating damages can raise concerns about fairness and accuracy, particularly for claims from underrepresented or economically disadvantaged regions.[73]

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[69] As one of our SMEs noted, in asbestos bankruptcies, estimation of aggregate liability is typically informed by extensive historical data on prior settlements and jury verdicts, often across multiple jurisdictions and over decades. In contrast, bankruptcy courts often lack historical data for newer or less developed mass torts. In those cases, estimates rely more heavily on expert opinion, analogies to related torts, and evidentiary hearings.

[70] In contrast, class actions typically use standardized compensation formulas agreed to by the litigants.

[71] The J&J talc litigation provides a clear illustration of these dynamics. When a company enters bankruptcy, it effectively cuts off claimants' ability to pursue punitive damages, which are often critical to incentivizing plaintiffs' attorneys and making the high risk of mass litigation economically viable for them. According to one of the plaintiff-side experts we interviewed, broadly speaking, the plaintiffs' bar consists of two main business models: those who focus on securing settlements and those who aim for high-risk, high-reward jury trials. Settlement-oriented attorneys might adapt more easily to bankruptcy constraints, while trial-focused attorneys, who depend on the possibility of larger recoveries, often find the bankruptcy process unprofitable. According to this expert, the introduction of third-party litigation funding into mass-tort litigation has further complicated this landscape, potentially encouraging some plaintiffs' lawyers to adopt more risk-loving strategies that are ill suited to the predictability and caps inherent in bankruptcy settlements.

[72] Valuations can be, and often are, challenged in bankruptcy.

[73] Another SME raised similar concerns about how disparities in claims resulting from geography are handled. They cited differences in the BSA valuation. According to the SME, in Guam, where multiple BSA abuse claims were filed, the average compensation in litigation was significantly lower than in cases litigated in the 50 states and the District of Columbia, despite evidence of severe abuse being comparable. According to the SME, one reason for the lower compensation is that incomes are far lower in Gaum than in the states and the district, so awards will be lower, absent punitive or noneconomic damages. On the other end of the distribution, according to an SME, some litigated claims in the BSA case received upward of $2 million. To ensure equitable outcomes within bankruptcy frameworks, the court's bankruptcy valuation removed the low-value cases from the data used to produce the claim valuation in the bankruptcy process. Our SME suggested that, in their experience, the end result is that the median payouts in both bankruptcy and traditional litigation were strikingly similar but that the variance in the bankruptcy valuations was far smaller.

More broadly, among SMEs, critics of bankruptcy as a mass-tort resolution system pointed to fundamental procedural deficiencies in mass-tort bankruptcies that disadvantage claimants relative to the traditional tort system. At the highest level, the argument is that the bankruptcy process does not provide the same individualized claim verification level as traditional litigation. In the tort system, each claim is subject to scrutiny through discovery, evidentiary hearings, and, if necessary, a trial on the merits. By contrast, bankruptcy proceedings often involve aggregate liability estimation, which relies on statistical modeling rather than case-by-case evaluation. Although a bankruptcy trustee is put in place to review each claim before it is paid, several of our SMEs suggested that this review still allows disproportionately more-fraudulent or weaker claims to be compensated while stronger claims receive less than they would through individual adjudication. Our plaintiff SMEs argued that the limit on very high awards is a key reason certain defendants prefer bankruptcy.[74]

Another important objection raised by plaintiff-side attorneys is that bankruptcy deprives them of the ability to recover **common benefit fees**, which represent a major proportion of compensation for lawyers who take on leadership roles in MDL. In the MDL system, courts often establish common benefit funds, which allocate a percentage of global settlements to compensate lead counsel for work that benefits all plaintiffs, such as conducting discovery, retaining experts, and coordinating legal strategy. These fees can be substantial, especially in large-scale MDLs. However, these structures generally do not apply when litigation is diverted into bankruptcy. Instead, attorney compensation is governed by the bankruptcy process, which may impose different standards or significantly limit fee recovery. One SME noted that, beyond the personal financial incentive, moving more mass torts to bankruptcy is a threat to the incentives and financial viability of mass-tort leadership. More generally, the very efficiency of bankruptcy in resolving all claims could result in less work for plaintiffs' attorneys and a systemic reduction in the number of skilled plaintiffs' attorneys able to bring other cases. This, in turn, could reduce the deterrent function of civil litigation.[75]

Insurers are also critical of some aspects of the bankruptcy process. Several SMEs with a background in insurance criticized mass-tort bankruptcies for failing to incorporate provisions ensuring insurance neutrality in settlements. Insurance neutrality requires that bankruptcy neither expand nor contract a debtor/defendant's property rights and, therefore, that claims under insurance policies will be treated the same post-bankruptcy as they would have been treated prebankruptcy. Insurance coverage proceeds are often the most valuable asset available to the defendant/debtor. Insurer rights, including the right to assert coverage defenses and to litigate those coverage issues, can be limited in bankruptcy. Failure of bankruptcy plans to adequately protect insurance neutrality prejudices insurer rights under subject policies and can result in avoidable disputes and litigation between insurers, bankruptcy trustees, and claimants' counsel over the obligations and rights of the interested parties with regard to available insurance coverage (e.g., coverage defenses, ability

[74] For example, one plaintiff-side expert noted the absence of *Daubert* rulings and pretrial motions in bankruptcy, which, in traditional litigation, serve to exclude unreliable expert testimony and narrow the issues before trial. In the tort system, defendants routinely challenge plaintiffs' expert evidence under the *Daubert* standard, requiring courts to determine whether the methodology used to establish causation and damages is scientifically valid. Without this procedural safeguard in bankruptcy, claims may be assessed based on methodologies that would not necessarily survive rigorous scrutiny in court. This absence of judicial gatekeeping raises concerns about the fairness and reliability of claim valuations in bankruptcy. This can benefit claimants with weak claims at the expense of those with strong ones.

More generally, the accuracy and fairness of aggregate liability estimation in bankruptcy proceedings depend heavily on the availability and quality of historical claim data. In asbestos bankruptcies, for example, many debtors and insurers have decades of detailed settlement and trial information, which can provide a robust estimation of the value of claims. However, in other mass-tort contexts, such as emerging product liability, such comprehensive data might not exist. In these situations, experts could be forced to rely on limited analogies, incomplete claim samples, or assumptions that increase the risk of under- or overvaluing claims.

[75] *See* Marc Galanter & David Luban, *Poetic Justice: Punitive Damages & Legal Pluralism*, 42 Am. U. L. Rev. 1393 (1993).

to defend against underlying claims, claim valuation, settlement, allocation, and payment of self-insured retentions).

The academic discourse about nonconsensual third-party releases and divisional mergers has been overwhelmingly negative, with numerous scholars challenging both their fairness and constitutionality.[76] Specifically, nonconsensual third-party releases have been called illegitimate and unconstitutional, an argument that SCOTUS vindicated in *Harrington*.[77] The concern is that victims could be denied their day in court against all responsible parties, especially when a release is granted without their consent.

Divisional mergers have drawn sharp criticism for being a form of legal maneuvering that unfairly advantages defendants at the expense of claimants. Critics among our SMEs argued that divisional mergers allow solvent companies to sidestep the full financial impact of their liability, transferring the burden to victims through a process that lacks transparency and accountability. These critiques underscore the tension between bankruptcy's protective framework and its potential for misuse in resolving mass-tort claims.

Similarly, SME critics also noted that bankruptcy does a poor job of facilitating the noncompensatory goals of tort law, including producing information about a defendant's actions for the public and other governmental actors or providing corrective justice or civil recourse.[78] A nonconsensual resolution of a grievous personal injury justified by specious appeals to theoretical defendant resource limitations can seem unjust.

Casey and Macey stand out as rare defenders of using bankruptcy for mass-tort resolution, including a case for divisional mergers and third-party releases.[79] In their work, they acknowledge the breadth of opposition in the academic sphere, citing recent articles from Campos and Parikh, Brubaker, Simon, Francus, Levitin, and Jacoby, all of which challenge the legitimacy of these mechanisms.[80]

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[76] *See* Gluck, Burch, & Zimmerman, 2024; Foohey & Odinet, 2023; D. Theodore Rave, *Bankruptcy v. Multidistrict Litigation for Mass Torts*, Calif. L. Rev. (forthcoming).

[77] *See* Brubaker, 2022.

[78] *See* Engstrom et al., 2024 (discussing information revelation function of civil justice system); Owen M. Fiss, *The Supreme Court 1978 Term*, 93 Harv. L. Rev. 1, 29 (1979) ("[C]ourts exist to give meaning to our public values, not to resolve disputes"); Owen M. Fiss, *Against Settlement*, 93 Yale L.J. 1073 (1984) (arguing that resource disparity and power relations can affect "voluntary" settlements and that public adjudication is an important independent value that courts should vindicate).

[79] Casey & Macey, 2023.

[80] Campos & Parikh, 2022; Brubaker, 2022; Simon, 2021; Simon, 2022; Francus, 2023; Levitin, 2022; Jacoby, 2021.

CHAPTER 3

Harrington: What Did It Change?

The Purdue bankruptcy highlighted the controversial practice of using of nonconsensual third-party releases to resolve mass-tort claims. In the case at the center of *Harrington*, Purdue sought to discharge the Sackler family—its owners and managers—from opioid-related claims through bankruptcy, even though the Sacklers themselves had not filed for bankruptcy. The bankruptcy court confirmed a plan that released all claims against the Sackler family in exchange for the family's financial contributions to a settlement trust designed to benefit those with claims against the company. Initially, the Sacklers agreed to contribute $4.325 billion, which they later increased to $6 billion.[1] More than 96 percent of the tort claimants voted in favor of the settlement.[2]

In *Harrington*, SCOTUS addressed a contentious issue in bankruptcy law: whether a bankruptcy court can approve a nonconsensual third-party release as part of a reorganization plan. The Court's majority and dissenting opinions offered sharply contrasting views on the legality of these releases and the broader implications for bankruptcy law.

Majority Opinion

The majority opinion, delivered by Justice Neil Gorsuch, held that the Bankruptcy Code does not authorize a release and injunction that discharges nonasbestos claims against a nondebtor (a third party) without the consent of affected claimants. The Court emphasized that the core principle of bankruptcy law is that a debtor can discharge its debts only by placing virtually all its assets on the table for distribution to creditors. In this case, the Sacklers were nondebtors who sought a release, effectively a discharge for a nondebtor who had not filed for bankruptcy and had not committed all its assets to Purdue's estate. Thus, the Court ruled that Purdue's plan effectively allowed the Sacklers to gain the benefits of a bankruptcy discharge without meeting the fundamental requirement of full transparency and asset surrender.

The Court focused on the statutory language of § 1123(b)(6), which allows the inclusion of "appropriate" provisions in a reorganization plan. The majority rejected the Second Circuit Court of Appeals' broad interpretation of this provision, holding that it did not authorize a discharge for nondebtors, such as the Sacklers.

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[1] According to Casey & Macey, 2023, the Sacklers' willingness to increase their financial commitment underscores the efficiency of third-party releases in the bankruptcy process. These releases offered the Sacklers greater legal certainty than the traditional tort system, enabling them to resolve liability more predictably and comprehensively within the bankruptcy framework.

[2] Following SCOTUS's decision in *Harrington*, Purdue's bankruptcy settlement was renegotiated to comply with the ruling. In early 2025, a revised plan was approved, eliminating mandatory releases for the Sackler family and allowing individual claimants to choose whether to opt into the settlement in exchange for compensation or retain their right to sue. The Sacklers agreed to contribute up to $6.5 billion, with payments front-loaded over 15 years, ensuring substantial early funding for opioid abatement and victim-compensation efforts. In Chapter 4, we discuss the revised settlement and what it signals about mass-tort bankruptcies as a global resolution mechanism.

The majority reasoned that the Bankruptcy Code's provisions are designed to govern the debtor's obligations and that nondebtor releases without consent would contravene the purpose of the bankruptcy system. Additionally, the majority noted that the code explicitly provided for nondebtor releases in asbestos cases under § 524(g) but that no such provision existed for opioid-related claims. This distinction, the Court reasoned, indicated that Congress did not intend to allow nondebtor releases outside the asbestos context, even if the third party's contribution is substantial.

The majority also rejected policy arguments in favor of the releases. Although plan proponents argued that the releases were necessary to secure the Sacklers' $6 billion contribution to Purdue's estate, the majority viewed this as an attempt to evade the fundamental structure of the bankruptcy system. The majority argued that allowing nondebtor releases would open the door to abuse, in which wealthy individuals could shield their assets from creditors without fully subjecting themselves to the bankruptcy process. The majority left open the possibility of consensual third-party releases in bankruptcy but drew a firm line against nonconsensual releases like the ones at issue in this case.[3] It also left intact nonconsensual releases in asbestos mass-tort cases.

Dissenting Opinion

Justice Brett Kavanaugh, joined by Chief Justice John Roberts and Justices Sonia Sotomayor and Elena Kagan, dissented, criticizing the majority for disrupting a well-established tool in bankruptcy law—nondebtor releases—that have been used for decades to facilitate settlements in mass-tort cases. The dissent emphasized that nondebtor releases are essential in complex bankruptcy cases, particularly in mass-tort bankruptcies like Purdue's, in which thousands of claims are at stake.

The dissent argued that the Bankruptcy Code's broad language in § 1123(b)(6), which allows "appropriate" provisions, should be interpreted to permit nondebtor releases. According to the dissent, the term *appropriate* grants bankruptcy courts discretion to approve nondebtor releases when necessary to resolve complex disputes, as long as those provisions are consistent with the code's broader objectives. In this case, the dissent contended that the releases were crucial to securing a multibillion-dollar settlement from the Sacklers, which would provide compensation to thousands of opioid victims and fund abatement efforts to address the opioid crisis.

Moreover, the dissent pointed to historical precedent, noting that nondebtor releases have been used in other mass-tort bankruptcies, such as asbestos, breast implant, and sexual abuse cases. The dissent argued that these cases show that bankruptcy courts have long had the authority to approve nondebtor releases in situations in which they are necessary to ensure a fair and equitable distribution of a debtor's assets. The dissent also argued that the Sacklers' contribution to Purdue's estate would ultimately benefit the opioid victims and that, without the releases, there would be no settlement, leaving victims with little to no compensation.

Regarding the asbestos-specific provisions of the Bankruptcy Code, the dissent in *Harrington* argued that Congress's creation of § 524(g) was not meant to limit nondebtor releases to asbestos cases. Instead, the dissent maintained that Congress, when enacting § 524(g), explicitly included a rule of construction making clear that the provision did not alter the existing equitable authority of bankruptcy courts to grant nondebtor releases in other contexts. As Justice Kavanaugh explained, Congress responded to the urgent need for an asbestos-specific mechanism but simultaneously affirmed that similar tools, such as nondebtor releases and

[3] The Court did not opine on the definition of *consensual*. This omission has led to ongoing discussions in lower courts about the criteria for a release to be deemed consensual, including whether opt-in or opt-out mechanisms are necessary. (*See* Squire Patton Boggs, *Judge Goldblatt Reconsiders What Constitutes "Consent" Post Purdue Pharma [US]*, Restructuring GlobalView [Oct. 29, 2024].)

channeling injunctions, could still be used in nonasbestos mass-tort bankruptcies, as had occurred in earlier cases, such as *Menard-Sanford* against A. H. Robins, which was decided in 1989.[4] Thus, the dissent viewed § 524(g) as a targeted expansion of bankruptcy court powers, not a restrictive codification. The dissent also took issue with the majority's narrow reading of the Bankruptcy Code, arguing that it failed to account for the practical realities of mass-tort bankruptcies. By disallowing nondebtor releases, the majority, according to the dissent, undermined bankruptcy courts' ability to facilitate global settlements that provide fair compensation to victims. The dissent noted that the vast majority of creditors, including opioid victims, supported the plan because it would provide billions of dollars in compensation not available from the debtor. The dissent accused the majority of prioritizing formalistic legal reasoning over victims' and creditors' practical needs in complex bankruptcies.

The dissent also emphasized the importance of nondebtor releases in avoiding a race-to-the-courthouse scenario, in which individual claimants might deplete the assets on a nondebtor estate before other claimants could recover anything. By enabling a global resolution of claims, nondebtor releases prevent this outcome and ensure that all claimants receive equitable treatment.

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4 *Menard-Sanford v. Mabey (In re A.H. Robins Co.)*, 880 F.2d 694 (4th Cir. 1989).

CHAPTER 4

Consequences of *Harrington*

The *Harrington* decision marks a potentially significant shift in whether and how bankruptcy will be used to achieve global resolution in mass torts. Although the ruling does not directly affect consensual third-party releases or address the potential unwinding of already confirmed plans, it challenges long-established practices in mass-tort bankruptcies, in which third-party waivers have allowed nonbankrupt parties to contribute to settlements to avoid future liability.[1]

This decision highlights an ongoing tension in the courts about the balance between due-process concerns and the need to achieve equitable global resolutions to mass torts. Following the *Amchem* and *Ortiz* cases, which effectively eliminated the class-action device as a method of achieving global resolution in personal injury mass torts, most mass torts have been aggregated—if not resolved—using the MDL system. However, bankruptcy, particularly through the use of nonconsensual third-party releases, had been growing in popularity.

According to some SMEs we consulted, the *Harrington* ruling raises significant uncertainty about whether bankruptcy will remain a viable pathway to global resolution. Other SMEs suggested that, although the absence of nonconsensual third-party releases would change the dynamics of negotiations in both MDLs and bankruptcy, something close to global resolution might still be achievable.

In this section, we explore the implications of the decision for mass torts by addressing the following research questions:

1. How has *Harrington* changed the efficiency or efficacy of bankruptcy in achieving global resolution of mass torts?
2. How might *Harrington* affect the strategies that parties use in bankruptcy?
3. What are *Harrington*'s consequences for the future mass-tort resolution?
4. What legislative and administrative responses might be considered to address the limitations imposed by *Harrington*?

There are many trade-offs between bankruptcy and other mechanisms for resolving mass torts, such as class actions and MDL. Although the *Harrington* decision does not alter these trade-offs, it likely affects bankruptcy's ability to achieve global resolution. We raise some of these trade-offs in our analysis, but we focus on decision's effect on bankruptcy's ability to achieve global resolution and the potential stakeholder response to the decision.

[1] Although *Harrington* does not directly invalidate previously confirmed bankruptcy plans, its reasoning could encourage parties to challenge such plans, particularly those that rely heavily on nonconsensual third-party releases. Under current bankruptcy law, modification of a confirmed plan is generally permissible only before the plan is substantially consummated (11 U.S.C. § 1127[b]), and revocation is limited to cases involving fraud in the procurement of the plan (11 U.S.C. § 1144). However, given *Harrington*'s strong language rejecting nonconsensual releases, some of our SMEs have suggested that parties might try to revisit these provisions in already-approved plans. To date, no confirmed plan has been successfully unwound on these grounds.

Before we address each of these research questions, we summarize the settlement of the Purdue bankruptcy following *Harrington*. Even though it is only one case with features that might limit its relevance to other settings, it provides additional information on the consequences of the SCOTUS decision for mass-tort litigation.

Settlement of the Purdue Bankruptcy Following *Harrington*

Following SCOTUS's ruling in *Harrington*, the Purdue bankruptcy plan was significantly revised to comply with the opinion, in which the Court held that nonconsensual third-party releases were not authorized under the Bankruptcy Code. In some ways, the new Purdue bankruptcy reorganization plan provides some of the first evidence on what the new mass-tort bankruptcy environment looks like. Most obviously, the new settlement eliminates nonconsensual releases for the Sackler family and provides creditors a choice between receiving higher payments in exchange for releasing their claims or taking a lower payment but retaining their right to sue. In this section, we outline the key changes in the Purdue bankruptcy reorganization plan, compare it with the prior (rejected) plan, and discuss broader implications for mass-tort bankruptcies.

One of the most obvious changes in the revised settlement is the removal of nonconsensual third-party releases. The previously approved plan required all creditors to release their claims against the Sackler family, effectively shielding the family from future litigation (see Table 4.1). In contrast, the new settlement allows claimants to choose whether to release their claims. If they sign the waiver, they forfeit their right to pursue litigation against the Sacklers.

In addition to the changes pertaining to third-party releases, the new settlement includes a two-tiered structure that differentiates between estate claims and direct claims. The estate claim settlement involves Purdue Pharma's bankruptcy estate, resolving claims against Purdue Pharma and distributing proceeds to creditors. The direct claim settlement provides cash distributions to creditors who voluntarily opt into the settlement by releasing their claims against the Sacklers. Those who choose not to release the Sacklers do not receive payments from this settlement, but they retain the option to pursue litigation.[2] Thus, under the revised settlement, claimants who agree to release the Sacklers receive a higher payment. Those who do not opt in retain their litigation rights but receive lower payments. This approach provides claimants a clear choice between guaranteed financial compensation and the opportunity to seek additional redress through litigation.

TABLE 4.1
Features of Revised Purdue Bankruptcy Reorganization Plan

Feature	Rejected Plan (Pre-*Harrington*)	Revised Plan (Post-*Harrington*)
Third-party releases	Would-be claimants must sign mandatory, nonconsensual releases for the Sacklers.	Would-be claimants may opt into a settlement that includes releases for the Sacklers, or they can retain their right to sue.
Creditor choice	All claimants are bound by the agreed bankruptcy plan terms.	Claimants choose between release (higher payout) and possible litigation (lower payout).
Sackler contribution	$6 billion over 18 years	Up to $6.5 billion over 15 years, front-loaded payments
Litigation reserves	Not applicable	Reserves are established to defend against nonsettling claimants' lawsuits.

[2] As of this writing, specific data on how many plaintiffs or claimants have opted in or out have not been publicly disclosed. The decisionmaking process for claimants is ongoing, and detailed statistics are expected to be released upon the plan's finalization and approval by the bankruptcy court.

The Sackler family's financial contribution for direct claims has been increased, which is consistent with our SMEs' prediction that *Harrington* would alter the plaintiffs' bargaining position. The revised plan increases the total amount the Sacklers will pay to up to $6.5 billion over 15 years, compared with the $6 billion over 18 years in the rejected plan. This contribution is structured to be front-loaded, with approximately 44 percent of the payments occurring within the first three years. Additionally, an extra $500 million may be contributed, depending on the proceeds from the sale of the Sacklers' foreign pharmaceutical businesses.

The revised Purdue reorganization plan establishes litigation reserves to address opioid-related civil litigation against the Sackler family. These reserves are funded from amounts that would have been received by claimants who did not opt into the release had they opted in. The reserves are intended to cover the Sackler family's legal defense costs in litigation brought by those claimants, assuming that not all claimants agree to release the Sacklers from liability. This structure ensures that the Sacklers have dedicated funds for legal expenses related to ongoing lawsuits while preserving the overall settlement framework. Any unused litigation reserves may ultimately be redirected toward opioid abatement or victim-compensation efforts.

A key lesson of the Purdue bankruptcy reorganization plan, consistent with what our SMEs predicted prior to the settlement, is the strategic use of structured financial incentives. The plan encourages voluntary participation by offering higher payouts to claimants who agree to release the Sackler family from liability while preserving legal avenues for those who opt out and wish to pursue litigation. Notably, the Purdue case also demonstrates that defendants may choose to continue in bankruptcy even when the possibility of achieving a comprehensive, nonconsensual global settlement has been foreclosed. However, the fact that the Sacklers supported continuation of the process under an opt-in structure does not necessarily imply that they—or similarly situated defendants—would have entered bankruptcy in the first place had that been the only available option.

Several of our SMEs commented that the Sackler family has engaged in extensive asset protection planning, including transferring funds to offshore trusts and entities, making it challenging for other plaintiffs or the U.S. courts to access these assets. These moves complicate claimants' efforts to pursue litigation and recover damages directly from the family. Thus, plaintiffs who wish to sue might well recover less than they would receive from the trust by opting in. In fact, 96 percent of plaintiffs voted to approve the bankruptcy plan before the Court's decision.

This strategy to increase claimant support for the bankruptcy plan might not work in other contexts. For example, unlike the Sacklers, J&J and the BSA have assets that are more accessible to litigants. As a result, claimants in these cases might have a stronger incentive to pursue litigation, particularly if they believe that they can recover more through the tort system, either because punitive damages are available or because J&J and the BSA are less likely to face insolvency in the future from ongoing litigation.

How Has *Harrington* Changed the Efficacy of Bankruptcy in Achieving Global Resolution for Mass Torts?

Harrington Challenges a Heavily Relied-Upon Strategy

Before the *Harrington* decision, nonconsensual third-party releases had become a recurring strategy in mass-tort bankruptcies, allowing companies and related entities to resolve current and future liability even without complete consensus from creditors. The SCOTUS ruling against nonconsensual third-party releases challenges a key mechanism used in bankruptcy to aggregate claims and shield nondebtor parties. Introducing such a significant change to the traditional way of conducting mass-tort bankruptcies is likely to have a disruptive effect.

We asked our SMEs for examples of resolutions through the bankruptcy system that relied heavily on third-party releases. The Takata airbag litigation was one case identified (see the box titled "The Takata Airbag Litigation" for an overview of the litigation).[3] Others included the A. H. Robins and BSA cases (see Table 2.1 in Chapter 2).[4]

The Takata Airbag Litigation

Takata's airbags were installed in vehicles produced by major automakers, such as Honda, Ford, Toyota, Volkswagen, and BMW. Investigations revealed that the ammonium nitrate propellant used in the airbag inflators was unstable under certain conditions. When these inflators deployed, they could explode with excessive force, sending dangerous shrapnel into vehicle cabins. This defect, which worsened with heat and humidity, led to one of the largest recalls in automotive history, affecting millions of vehicles worldwide.

The defective airbags were linked to numerous injuries and fatalities, prompting lawsuits from victims and their families seeking compensation for physical harm, wrongful death, and related harm. Facing massive liability from litigation and recall costs, Takata filed for Chapter 11 bankruptcy in 2017. Creditors in the bankruptcy included injured individuals, automakers responsible for recalls and replacements, and other affected entities.

The automakers—who had already borne substantial recall expenses—also faced lawsuits from consumers and sought to shield themselves from additional liability. In the bankruptcy proceedings, they requested nonconsensual third-party releases that would protect them from future personal injury suits related to Takata airbags. In exchange for these releases, the automakers agreed to contribute hundreds of millions of dollars to the reorganization plan and the settlement trust. The releases were intended to consolidate litigation exposure and provide finality, streamlining the resolution of claims and avoiding protracted court battles.

However, the releases also limited individual claimants' ability to pursue full tort damages—particularly noneconomic or punitive damages—against solvent automakers. Under the *Harrington* ruling, such nonconsensual third-party releases would likely be impermissible in future nonasbestos mass-tort bankruptcies. Automakers seeking comparable protections would need to either negotiate settlements with individual claimants or offer additional compensation to secure broad, affirmative consent.

SOURCES: Authors' interpretation of documents from *In re Takata Airbag Prods. Liab. Litig.*; JPML (2015); Takata Airbag Products Liability Litigation (MDL No. 2599).

[3] Order Granting in Part and Denying in Part Motions to Dismiss by Defendants FCA, General Motors, Mercedes, Audi, and Volkswagen, *In re Takata Airbag Prods. Liab. Litig.*, 396 F. Supp. 3d 1101 (S.D. Fla. 2019). *See also* National Highway Traffic Safety Administration, U.S. Department of Transportation, *Takata Recall Spotlight* (last visited Sep. 27, 2025); *In re: Takata Airbag Products Liability Litigation: Volkswagen Settlement* (last visited Nov. 25, 2025).

[4] The A. H. Robins Company bankruptcy serves as an important example of an early nonasbestos case in mass-tort litigation and bankruptcy law. Confronted with more than 327,000 claims tied to the Dalkon Shield IUD—a product linked to severe injuries and fatalities—the company filed for Chapter 11 bankruptcy in 1985. A pivotal element of the reorganization plan was the inclusion of nonconsensual third-party releases, which shielded the company's shareholders, officers, and insurers from further liability. These releases were critical to securing contributions from insurers and facilitating a merger with American Home Products, which provided additional funds for the $2.5 billion settlement trust established to compensate claimants. Without these releases, it would have been difficult to achieve a global resolution because lingering liability risks for third parties could have discouraged their participation in the settlement process.

The BSA litigation represents one of the most significant mass-tort bankruptcies in recent years, addressing more than 80,000 claims of sexual abuse spanning decades. To resolve these claims, the BSA filed for Chapter 11 bankruptcy in 2020 and proposed a reorganization plan involving a $2.46 billion settlement fund to compensate survivors. A critical aspect of the plan was the inclusion of nonconsensual third-party releases for the organization's local councils, charter organizations, and other affiliated entities, which were codefendants in many of the lawsuits. These releases were designed to shield third parties

Not all SMEs, however, said that *Harrington* will make much of an impact on the use of bankruptcy to resolve mass torts. One pointed out that Chapter 11 bankruptcy already requires a majority of claimants to approve a settlement and that mass-tort cases need a supermajority of 75 percent. The debtor could thus settle a large majority of cases through bankruptcy and then subsequently deal with the limited number of cases that claimants might pursue postbankruptcy. Another reason is that, in some cases, creditors fare better in a Chapter 11 case than in a pure liquidation of the debtor's assets—whether through an out-of-court sale or a Chapter 7 liquidation—because third parties seeking injunctive protection often contribute substantial funds to the settlement. These third-party contributions can result in greater recoveries for creditors than if the debtor's assets were simply sold off to satisfy claims. This seems to have been the logic in the post-*Harrington* Purdue bankruptcy reorganization plan.

Harrington Improves the Bargaining Position of Mass-Tort Claimant/Plaintiffs

Almost all our experts said that the *Harrington* decision significantly improved the negotiating position of individual claimants and plaintiffs. Before *Harrington*, a nonconsensual third-party release in a mass-tort bankruptcy required supermajority approval (75 percent) from creditors. This meant that a single holdout could not block a settlement for all other creditors. The *Harrington* decision has essentially increased the necessary approval rate to 100 percent, requiring complete consensus among creditors.[5]

In nonbankruptcy mass torts, settlement designers in MDL cases have employed various strategies to encourage the acceptance of settlements.[6] The *Harrington* ruling could lead to more-favorable outcomes for mass-tort plaintiffs by preserving their right to pursue full remedies in the tort system, including noneconomic and punitive damages, which are often more limited in bankruptcy proceedings. By restricting the use of nonconsensual third-party releases, the Court reaffirmed the principle that plaintiffs should have the opportunity to seek direct redress from all responsible parties, rather than accept reduced payouts through bankruptcy. Some of our SMEs suggested that this shift could result in larger settlements or judgments that more accurately reflect what plaintiffs might have received in the traditional tort system.

However, the majority of our SMEs expressed concerns about the ruling's implications for effective global resolution in complex mass-tort cases, especially when the primary defendant is insolvent or near insolvent while certain third-party entities—that might otherwise contribute to a settlement trust—remain outside the bankruptcy system.[7] Historically, bankruptcy has provided a structured mechanism to ensure some level of compensation for all claimants, even if the amounts are lower than some plaintiffs would have recovered in court. Without this option, prolonged litigation could lead to scenarios in which some plaintiffs receive little or nothing if companies liquidate or lack sufficient assets to pay judgments.

This change also increases the leverage of holdouts, potentially incentivizing more creditors to seek holdout advantages, which could lengthen the resolution process. Debtors and third parties will now have to negotiate with dissenters they could previously bypass when the required approval threshold was lower.

from future litigation, incentivizing them to contribute to the settlement fund. Without such releases, these entities might have faced continued exposure to claims, potentially undermining the collective resolution and the financial stability of the BSA's broader network.

[5] Although *Harrington* significantly raises the bar for approving nonconsensual third-party releases, important questions remain about how the decision applies to claimants who do not vote on a reorganization plan and to future claimants who are not yet identifiable or able to participate in the process.

[6] *See* Rave, 2017 (discussing and cataloging terms designed to encourage claimants to opt into a settlement used in recent mass torts).

[7] So long as all defendants in a mass litigation are insolvent or near insolvent and file for bankruptcy, defendants can still get relief. It is the nondebtor defendants that, post-*Harrington*, cannot use bankruptcy to gain a global resolution.

Although this shift might enhance individual claimants' negotiating power, it could also encourage strategic behavior from claimants with weak or unverified claims who realize they can extract concessions by threatening to block plan confirmation. This dynamic could delay recoveries for more–seriously injured or more-meritorious claimants and create inefficiencies in the bankruptcy process. However, as previously noted, mass-tort settlement structures have addressed this issue in other contexts by creating incentives for plaintiffs to forgo litigation and agree to settlements.

We do not evaluate whether these changes are positive or negative; instead, we recognize that the *Harrington* decision could lead to lengthier resolution times, upward pressure on costs to debtors and third parties, and improved due-process protections for claimants who would otherwise lack a meaningful opportunity to object to a bankruptcy plan.[8] More broadly, the *Harrington* ruling underscores the ever-present tension in mass-tort litigation: the pursuit of individualized compensation in the tort system versus the pragmatic desire for collective, albeit limited, recovery at some cost to traditional civil justice values.[9] Although the decision might enhance plaintiffs' leverage in negotiations and encourage higher settlements, it also risks creating barriers to swift and equitable resolutions, potentially leaving victims in limbo for years.[10] This dual perspective highlights the broader debate over the role of bankruptcy in mass-tort cases and the ongoing search for legal frameworks that balance efficiency, fairness, and the traditional values of civil justice, including due process and public transparency.[11]

Harrington Reduces the Efficacy of Bankruptcy in Coming to a Global Resolution

Traditionally, third parties have been willing to contribute to bankruptcy plans in exchange for the certainty of a global resolution, which has been facilitated by nonconsensual third-party releases. The benefits of bankruptcy and the finality it offers diminish if related entities remain vulnerable to future claims for similar harms. Without the assurance of these releases, companies might be less inclined to use the bankruptcy system for resolving mass torts because they and related entities could still face exposure to future claims. Additionally, as discussed previously, claimants' improved bargaining position could lead to longer resolution times because debtors must negotiate with all holdouts. Consequently, the *Harrington* decision arguably reduces bankruptcy's effectiveness as a resolution mechanism and its appeal to defendants.

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[8] *See* Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 Cornell L. Rev. 265 (2011) (criticizing strategies or plans that minimize the need for individual consent in the interest of promoting settlement).

[9] In one sense, this issue arises in all structured or grid settlements, whether implemented through bankruptcy trusts or MDL frameworks. These systems aim to promote administrative efficiency by offering standardized compensation based on injury categories and exposure profiles rather than on facts specific to each case. As one of our SMEs noted, this structure could result in claimants with weaker or even nonmeritorious claims receiving compensation they would be unlikely to secure through traditional litigation, while stronger claims might be undervalued because of preset caps or formulaic payouts. This creates a tension between fairness and expedience, especially when the goal is swift, uniform resolution of mass claims.

A key difference, however, is that an MDL claimant generally retains the option to reject the grid and continue pursuing their claims in court if they believe that their individual circumstances warrant a higher recovery. In bankruptcy, in which a debtor's assets are fixed and limited, allowing some claimants to litigate outside the plan would reduce the recovery available to others, undermining the principle of equitable distribution. Viewed in this light, *Harrington* could preserve that individual litigation pathway by requiring genuine consent to third-party releases, thereby allowing some claimants to opt into the grid and others to test the value of their claim in the tort system.

[10] The bankruptcy system can also significantly delay plaintiffs' recoveries.

[11] This debate echoes debates over class actions a generation ago. *See* Deborah R. Hensler, Nicholas M. Pace, Bonnie Dombey-Moore, Elizabeth Giddens, Jennifer Gross, & Erik Moller, *Class Action Dilemmas: Pursuing Public Goals for Private Gain* (RAND Corp., MR-969-ICJ 2000).

Although it is still too early to assess *Harrington*'s long-term impact, some of our SMEs noted a perceptible decline in defendants' interest in mass tort–related bankruptcies in the immediate aftermath of the decision. Although the ruling was less than a year old at the time of our interviews and legal strategies continue to evolve, these experts predicted that *Harrington* could significantly diminish bankruptcy's attractiveness as a tool for resolving mass torts, at least in the near term.[12] They also observed that companies believe that they will now face increased scrutiny when attempting to resolve mass-tort claims through bankruptcy. According to some SMEs, many defendants—depending on the strength of the claims against them—are exploring alternative strategies, such as direct settlements or the establishment of compensation funds outside bankruptcy proceedings.

The emerging litigation surrounding PFASs serves as a relevant example. Pre-*Harrington*, bankruptcy was viewed as a viable strategy for consolidating and resolving mass-tort claims while shielding corporate affiliates and executives from liability.[13] However, some interviewees indicated that defendants in PFAS litigation are now concerned that nondebtor parties will not be able to gain legal protections, exposing them to ongoing litigation even if the primary entity files for bankruptcy. This concern has reduced the attractiveness of pursuing bankruptcy in this context.

Harrington Has an Indirect Impact on the Divisional Merger Strategy

Although SCOTUS's decision in *Harrington* did not address or invalidate divisional mergers, its implications pose significant legal and practical risks for the strategy. Some SMEs observed that, prior to *Harrington*, companies pursuing divisional mergers typically sought third-party releases after separating from the company that assumed the liability.[14] If the company holding the assets cannot secure a release of liability through these mechanisms, it might be less inclined to pursue a divisional merger in the first place.

The decision in *In re Red River Talc* exemplifies the increasing judicial scrutiny of divisional merger bankruptcies used to manage mass-tort liability. Red River Talc, a shell entity created through a Texas divisional merger to assume J&J's talc liability, filed for Chapter 11 shortly after its formation. The court dismissed the petition for cause under § 1112(b), citing voting irregularities, plan structure issues, and the absence of financial distress or a legitimate reorganization purpose. Although the court explicitly refrained from stating that any party had acted in bad faith, the ruling highlights the limitations of using bankruptcy to shield solvent parent companies from mass-tort liability, especially when the debtor lacks ongoing operations or financial hardship.[15]

More broadly, the *Harrington* decision could indicate a trend toward stricter scrutiny of expansive bankruptcy practices, potentially limiting the use of some strategies, such as divisional mergers. Courts might become less willing to approve corporate restructuring tactics that prioritize financial maneuvering over

[12] One SME also cautioned that it might be premature to draw firm conclusions about the decision's long-term effects, noting that lawyers are resourceful and likely to develop new strategies in response to changing doctrine.

[13] Hiroko Tabuchi, *Lawyers to Plastics Makers: Prepare for "Astronomical" PFAS Lawsuits*, N.Y. Times (May 28, 2024).

[14] It could be argued that the divisional merger eliminates the need for the company that did not retain the liability to receive a release, provided that LiabilityCo is adequately capitalized with a funding agreement or similar commitment. But SMEs indicated that such companies typically desire a release anyway.

[15] *Red River Talc* represented J&J's third attempt to address talc-related liability through a divisional merger and bankruptcy. It followed the earlier dismissals of bankruptcy petitions by LTL Management, another J&J subsidiary created using the Texas divisional merger statute. Unlike the Third Circuit's ruling in *LTL Mgmt., LLC*, which explicitly discussed bad faith, the court in *Red River* dismissed the case without ascribing bad faith to individual actors. Instead, the court focused on procedural and structural problems, including irregularities in plan voting and the debtor's lack of meaningful operations or financial distress. The ruling further signals judicial skepticism toward divisional merger strategies that separate liabilities from assets without a compelling reorganization purpose.

the equitable resolution of tort claims. Additionally, fraudulent transfer laws present a significant challenge, particularly when liability claimants argue that separating assets and liabilities is intended to shield the company from legitimate creditor claims. Courts could subject corporate finances to extra scrutiny if they determine that the entity assuming the liability is underfunded or unable to satisfy claims, as seen in similar cases involving fraudulent conveyance theories. Increased scrutiny of actions, such as the Sackler family's prebankruptcy asset transfers in the Purdue bankruptcy, could further diminish defendants' interest in pursuing divisional mergers.

How Might *Harrington* Affect the Strategies That Parties Use in Bankruptcy?

For companies that still seek bankruptcy protection after the *Harrington* decision, what strategies can they use to mitigate any negative effects on the efficiency of the bankruptcy process or the chances of achieving a successful resolution? In this section, we examine four potential work-arounds.

Offer Additional Compensation to Holdouts

It is possible that *Harrington* did not fundamentally change anything except the relative bargaining positions of mass-tort defendants and their plaintiff creditors. Although negotiations can break down, most economic models of bargaining suggest that a reallocation of bargaining power will not decrease the number of deals but that rather it will result in different payment amounts for the parties involved.[16] Thus, one prediction is that *Harrington* did not affect the viability of bankruptcy as a mass-tort settlement mechanism but simply increased the price that holdouts could demand.

One potential strategy post-*Harrington* would be to secure unanimous agreement by offering additional compensation to holdout creditors, thereby eliminating opposition and facilitating the reorganization process. Another approach, as illustrated by the postdecision reorganization plan in the Purdue bankruptcy, is to offer a tiered payment system that differentiates between those who do and do not sign liability waivers.[17]

Some SMEs suggested that offering higher payments to holdouts could be an effective strategy for securing agreement for a reorganization plan. However, they noted that this approach has significant drawbacks. Other creditors might perceive such payments as inequitable, potentially leading to additional disputes. Moreover, such a strategy risks encouraging holdout behavior in future cases, which would complicate negotiations. It might also attract regulatory and judicial scrutiny, particularly if seen as undermining the principles of fairness and equity that are central to bankruptcy proceedings. For instance, the USTP has expressed

[16] *See* Kathryn E. Spier, *Litigation*, 1 Handbook of Law & Economics (A. M. Polinsky & S. Shavell eds. North Holland 2007), for a comprehensive review.

[17] In practice, debtors do negotiate separate agreements with these holdouts, offering higher payments to secure their consent. In fact, this tactic was evident in the Purdue Pharma case, in which certain states initially opposed the settlement plan. To address their objections, the Sackler family increased its financial contribution, reaching side agreements with these holdout states. This additional funding was intended to resolve dissent and gain broader support for the reorganization plan.

Tiered compensation structures have been used in previous mass-tort bankruptcies to account for claimants' varying levels of legal strength or factual circumstances rather than to incentivize plan support. For example, in the Dow Corning breast implant bankruptcy, claimants could choose between different compensation tracks: one based on a fixed, expedited payment and another allowing for a more detailed, individualized review that might result in higher compensation. Similarly, in asbestos bankruptcies, claimants with certain diseases (e.g., mesothelioma as opposed to asbestosis) often receive higher payouts based on the severity and proven link to exposure. What is novel in *Purdue* is that the tiered structure is directly tied to claimant consent to third-party releases. *See Class Five Nev. Claimants*, 655–56.

concerns about practices that could compromise equitable treatment among creditors, which we argue is one of the principal advantages of bankruptcy over inventory settlements in MDLs.[18] An overview of the USTP is provided in Appendix A.

Although offering additional compensation to holdouts might be effective, it requires careful management to ensure transparency and maintain the integrity of the process. The reduced interest in bankruptcy post-*Harrington*, as discussed earlier in this chapter, provides initial evidence that simply increasing compensation to holdouts is not a straightforward solution to the limitations imposed by *Harrington*.

Pursue Payment in Full as a Potential Exception to Harrington

In U.S. civil law, a person typically cannot recover in tort for the same injury more than once. This principle, known as *the rule against double recovery* or *unjust enrichment*, ensures that plaintiffs do not receive compensation from multiple defendants that would exceed the value of the actual harm they suffered.[19] This rule plays a significant role in mass-tort litigation and bankruptcy cases, in which claimants may seek damages from multiple defendants. Once a claimant has received full compensation for their injury from one source—such as a bankruptcy trust or settlement—courts generally bar further recovery for the same injury through additional lawsuits.

In the context of mass-tort bankruptcies, a bankruptcy court's determination that the debtor's estate or trust—often bolstered by third-party contributions—fully compensates claimants can effectively prevent additional litigation against third parties. In this manner, bankruptcy can resolve claims, making further lawsuits for the same injury unnecessary or subject to dismissal by the courts. For example, if claimants receive complete payments from a victim-compensation fund, third parties could argue that any future damages should be offset by the amount already received, preventing claimants from pursuing duplicative litigation. This process aligns with the principle that there is no legal basis for further compensation from other parties once the harms have been fully compensated.

Despite the potential for fully satisfied bankruptcies to limit third-party litigation through double-recovery rules, defendants and their affiliates still sought nonconsensual third-party releases because they offer broader protection by explicitly barring future lawsuits against nondebtor parties. Double-recovery rules might not eliminate the risk of future claims, particularly from individuals whose injuries have not yet manifested. In contrast, nonconsensual third-party releases provide comprehensive legal certainty by ensuring that all claims, both present and future, are resolved through the bankruptcy process, thereby preventing lingering legal exposure.

The ongoing litigation surrounding the BSA bankruptcy case has brought attention to double recovery and unjust enrichment as a possible work-around for *Harrington*'s restriction on nondebtor releases. The BSA filed for Chapter 11 bankruptcy in 2020 to address thousands of sexual abuse claims, proposing a reorganization plan that included third-party releases for its local councils and affiliated entities. These releases shielded these entities from future litigation related to sexual abuse claims and were integral to a $2.46 billion settlement aimed at compensating survivors.[20]

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[18] *See In re Purdue Pharma L.P.*, 633 B.R. 53 (Bankr. S.D.N.Y. Sep. 17, 2021).

[19] *See* Restatement (Second) of Torts § 885(3) ("A person is not entitled to recover damages for the same harm from more than one person"). This principle, sometimes referred to as *the rule against double recovery*, ensures that a plaintiff may obtain only one satisfaction for a single injury, even if multiple tortfeasors are involved.

[20] A similar principle was articulated in the *Dow Corning* bankruptcy. The confirmed plan allowed each claimant to elect between settling their claims for a scheduled amount and pursuing litigation. The bankruptcy court found that those who opted for litigation would be paid in full on any awarded claims, while those who elected to settle were bound by their choice

One of our SMEs argued that the third-party releases in BSA's reorganization plan differ fundamentally from those invalidated by *Harrington*. This SME emphasized that, if claims under the BSA's settlement agreement are fully satisfied and receive overwhelming support from a significant majority of claimants, the releases effectively become consensual. This argument centers on the notion that fully satisfied settlements—in which settlement trusts are adequately financed—ensure fair and equitable outcomes for claimants while incentivizing contributions from third parties in exchange for liability protection.[21] Several SMEs argued that these releases provide a practical pathway to resolution, avoiding protracted litigation that could deplete the resources available for victims.

Critics among our SMEs contended that nonconsensual third-party releases are impermissible under the Bankruptcy Code, even in fully satisfied settlements. In the BSA case, the U.S. trustee argued that releasing claims without the explicit consent of all affected parties would exceed a bankruptcy court's statutory authority and would violate fundamental due-process protections. This view aligns with SCOTUS's reasoning in *Harrington*, in which it held that nonconsensual third-party releases lack authorization under the Bankruptcy Code. Ultimately, according to one of our SMEs, although the U.S. trustee objected to the inclusion of nonconsensual third-party releases in the BSA plan, the USTP did not pursue an appeal after the plan's confirmation. As one SME noted, the trustee's objections raised significant legal questions but did not prevent the confirmation of the settlement.

In some ways, the objections to fully satisfied releases in the BSA case highlight ongoing debates about the valuation and payment structures in mass-tort bankruptcy plans. As one SME asked, "What is fully satisfied?" Critics among our SMEs, particularly plaintiffs' attorneys, argued that proclamations of fully satisfied settlements can be misleading because valuation methods often exclude noneconomic damages, punitive damages, individual circumstances, differences in law, and the full range of potential awards. Proponents among our SMEs, however, argued that these valuation methods are necessary compromises to ensure the feasibility of settlements and are not fundamentally different from what would result from settlement negotiations in a global settlement in an MDL, in which negotiators would also discount outlier values. Moreover, supporters of the current valuation process in bankruptcy argue that these methods provide a practical and consistent framework for addressing a large number of claims with finite resources.

Redefine *Consensual* When Considering Third-Party Releases

An alternative response to *Harrington* is to reconfigure potential opt-in or opt-out mechanisms to navigate consent requirements for third-party releases in bankruptcy while maintaining their functionality.[22] Bankruptcy law establishes clear rules for voting on reorganization plans, with calculations based on the votes of participating claimants. To vote, a claimant must have a claim that is at least temporarily allowed for voting purposes; however, participation in the voting process is not mandatory. Those who abstain from voting are still entitled to share in any distributions if their claims are ultimately allowed.[23]

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and deemed to have accepted that the scheduled compensation was sufficient. This approach limited the potential for further recovery. *See Class Five Nev. Claimants*, 658–59.

[21] Alex Wolf, *Boy Scouts Beat Bankruptcy Plan Appeal over Liability Shield (3)*, Bloomberg Law (May 13, 2025).

[22] Specifically, opt-in mechanisms require claimants to affirmatively agree to the release, while opt-out mechanisms automatically include claimants unless they actively choose to withdraw.

[23] Bankruptcy courts may allow claims for voting purposes under Fed. R. Bankr. P. 3018(a), even if those claims are disputed or contingent. This temporary allowance enables claimants to participate in plan confirmation but does not guarantee that their claims will be allowed in the same amount, or at all, for purposes of receiving distributions. A claim must still be resolved through the plan's claim allowance procedures before payment is made. *See In re FRG, Inc.*, 121 B.R. 451, 456 (Bankr. E.D. Pa. 1990).

Importantly, bankruptcy law generally does not allow a court to assume that nonvoters automatically opt in or out of specific provisions, including third-party releases.[24] Consequently, one of the central legal issues in post-*Harrington* mass-tort bankruptcies is whether an opt-out system—in which a creditor is deemed to consent to third-party releases unless they explicitly object—remains a viable option. This approach shifts the burden onto creditors, requiring them to actively opt out if they oppose a release, rather than opt in by taking a specific action to indicate consent.

In other words, the question is under what conditions an opt-out system could effectively address some of the challenges posed by SCOTUS's *Harrington* decision on nonconsensual third-party releases.

In *In re Smallhold*, Judge Craig T. Goldblatt evaluated the validity of third-party releases in bankruptcy plans, focusing on how creditor consent is determined.[25] He concluded that creditors who actively voted on the plan and did not opt out were deemed to have consented to the third-party releases. However, he held that neither creditors who failed to return a ballot nor unimpaired creditors who were not solicited had not provided affirmative consent to the plan's third-party releases. Emphasizing SCOTUS's reasoning in *Harrington*, he determined that a third-party release can no longer be treated as an ordinary plan provision that can be entered by default in the absence of an objection.

Although this ruling rejected the practice of imposing third-party releases through an opt-out mechanism, Judge Goldblatt left open the possibility of a different approach—one that incorporates procedural protections similar to those in Fed. R. Civ. P. 23(b)(3). He reasoned that bankruptcy courts lack the authority to impose third-party releases on claimants without their affirmative consent and that mere failure to opt out does not constitute valid consent under contract law. He likened this to civil litigation, in which courts do not impose obligations on parties simply because they fail to respond to a legal notice.

However, he acknowledged that class-action litigation provides structured mechanisms that allow a named representative to act on behalf of absent class members, provided that claimants receive notice and have an opportunity to opt out. Although he did not formally propose treating a bankruptcy estate fiduciary (such as a trustee or a debtor in possession) as a class representative, he suggested that, if a bankruptcy plan were structured to incorporate Fed. R. Civ. P. 23(b)(3) protections, including a court determination that common legal and factual issues predominate and a finding that the fiduciary adequately represents all affected claimants, then an opt-out structure might be more defensible. This approach could bridge the gap between bankruptcy and class-action litigation, offering a potential alternative to nonconsensual third-party releases while ensuring due-process protections for claimants. His suggestion that structured procedural protections could make opt-out releases more viable introduces a new legal avenue for future bankruptcy cases to explore.

However, there are still significant limitations to opt-out systems. First, even with an opt-out mechanism, a small number of creditors might explicitly opt out, potentially blocking the settlement. Additionally, opt-out systems will likely face higher scrutiny in mass-tort cases, in which large numbers of unrepresented plaintiffs are often involved. For instance, one of the experts we interviewed noted that, in the Purdue bankruptcy, approximately 100,000 plaintiffs were eligible to vote: 30,000 who were unrepresented and 70,000 represented by attorneys. An opt-out system would seem viable for those represented by attorneys because the attorneys should be engaged with the process. However, similar assumptions cannot be made about unrepresented plaintiffs not voting, which places a significant burden on the court to ensure that these claimants were handled with care.

[24] As discussed in Chapter 3, the *Purdue* court objected to nonconsensual releases, but the opinion does not specifically define what *consensual* means.

[25] *In re Smallhold, Inc.*, 2024 WL 4296938 (Bankr. D. Del. Sep. 25, 2024).

In most cases, it should be possible to differentiate between more and less sophisticated creditors.[26] In the bankruptcy proceedings of Endo International, the issue of third-party releases became a focal point after SCOTUS's ruling in *Harrington*.[27] Although our SME suggested that discussions had occurred about potential mechanisms to differentiate between sophisticated and nonsophisticated creditors—such as a hybrid system in which sophisticated creditors would be subject to an opt-out mechanism while nonsophisticated creditors would need to affirmatively opt in—in the end, no such system was formally proposed or adopted. Instead, Endo's confirmed plan implemented a uniform opt-out mechanism for all creditors, presuming their consent to third-party releases unless they explicitly opted out. The U.S. trustee raised concerns about the broader implications of opt-out provisions, arguing that they could effectively impose nonconsensual releases, especially given recent legal scrutiny. To address these concerns and incentivize creditor participation in the releases, the final plan included a two-tiered payout structure: Creditors who signed the third-party releases received higher payments, while those who opted out retained their right to pursue litigation but received lower compensation.[28]

Following SCOTUS's *Harrington* decision, a similar structure was ultimately adopted in the Purdue bankruptcy reorganization plan. As discussed earlier, the revised *Harrington* plan eliminated mandatory third-party releases for the Sackler family, instead allowing individual claimants to choose whether to release their claims in exchange for a higher settlement payment or opt out and retain their right to sue.[29]

In light of these issues, Judge Goldblatt's suggestion that a bankruptcy estate fiduciary—such as a trustee or a debtor in possession—could function as a class representative, akin to the role defined in Fed. R. Civ. P. 23(b)(3), might provide better protection than an opt-in system. This would empower the fiduciary to bind absent claimants, provided that they receive individual notice and the opportunity to opt out. To implement this, the bankruptcy court would need to make factual determinations similar to those required for class-action certification, ensuring that common legal and factual issues predominate over individual ones. Theoretically, a fiduciary for nonsophisticated creditors would streamline the process for reaching a consensual release.

Attempt Prepackaged Bankruptcies with Enhanced Asset Contributions

Prepackaged bankruptcy, often called a *prepack*, has emerged as an efficient approach for companies managing mass-tort liability, providing a more streamlined and collaborative resolution process than traditional Chapter 11 filings. In a prepack bankruptcy, companies negotiate settlements or agreements with major groups of tort claimants and creditors before filing. These prenegotiated agreements typically include

[26] Sophisticated creditors typically include institutions and individuals represented by attorneys. Nonsophisticated claimants typically include individuals who are not represented by attorneys.

[27] Endo International, a pharmaceutical company, was a defendant in the National Prescription Opiate Litigation (MDL No. 2804) because of its production and marketing of opioid medications, including Opana ER. The company faced numerous lawsuits alleging deceptive marketing practices and failure to mitigate the risks of opioid addiction. In August 2022, Endo filed for Chapter 11 bankruptcy, citing the financial burden of opioid litigation. Endo Public Opioid Trust, homepage (last visited Dec. 21, 2025).

[28] Creditors with legal claims will receive four times the compensation if they agree to third-party releases (*see* Soma Biswas, *Endo's Chapter 11 Plan Has Unusual Provision Leaving Door Open to Litigation*, Wall St. J. [Mar. 8, 2024]; Christine Minhee, *Global Settlement Tracker* [last visited Sep. 29, 2025]). The bankruptcy court approved this differential, finding it permissible under § 1129. Although this type of incentive is legally acceptable, the question of whether such a payout disparity could become coercive has not been fully tested in court.

[29] One SME asked, "How meaningful is the choice that uncounseled, unsophisticated pro se litigants are making? It is possible that, because of their lack of meaningful understanding, they have retained litigation rights that are of less value than the higher payout they would have received from the bankruptcy trust."

the establishment of a settlement trust to address current and future claims. By completing much of the negotiation in advance, companies can navigate the bankruptcy process quickly, sometimes within a few months. This expedited process minimizes operational disruptions, avoids prolonged litigation, and reduces the uncertainty and extensive costs associated with mass-tort cases, in which liability and damages can be unpredictable.

A key feature of prepackaged bankruptcies is their reliance on creditor approval of the restructuring plan before filing. Once the requisite number of creditors consents, the company files for Chapter 11, and the court oversees the implementation of the prearranged plan.

In the context of interest here, *all* potentially exposed parties (including those who might have expected nonconsensual third-party releases before *Harrington*) enter bankruptcy. Presumably, such a prepack would gain approval from the creditors because of the enhanced asset contributions from previously third-party companies entering bankruptcy. Ideally, a prepack would include all potentially exposed parties; however, it does not need to capture every potentially exposed entity. For example, an insurance company might refuse to settle and decline to participate in the bankruptcy. In such cases, tort claimants could pursue litigation directly against those nonparticipating insurers, assuming that the claimants have independent rights to do so.[30]

An illustrative example of this approach can be found in the bankruptcy proceedings of the Roman Catholic Diocese of Rockville Centre, which employed the prepack strategy to address the liability of its parishes and affiliated entities. According to one of our SMEs, instead of granting third-party releases to these entities—which would have shielded them from liability without their direct involvement in the bankruptcy process—the diocese required each parish to file for an "abbreviated Chapter 11" bankruptcy. This strategy was intended to resolve these filings within 48 hours, ensuring that each parish secured a release from liability through its own bankruptcy proceedings. By mandating direct participation in the bankruptcy process, this approach aligned with SCOTUS's ruling in *Harrington*.

Applying this strategy in other cases seeking a global resolution, such as the J&J talc litigation, presents significant challenges. The J&J talc cases involve a vast number of claimants and a complex corporate structure, making individual bankruptcy filings for each entity impractical. Furthermore, the divisional merger strategy previously employed by J&J was rejected by the courts, which found that the subsidiary was not in financial distress and that the strategy was an improper attempt to shield the parent company from liability. Even though the Diocese of Rockville Centre's approach proved effective in its specific context, it might not be feasible or legally permissible in other cases, such as the J&J talc litigation.

Post-*Harrington* Uncertainty

Although the four strategies identified in response to our second research question could be considered by parties remaining in the bankruptcy system, their ultimate effectiveness and attractiveness to the various stakeholders remain uncertain. There was no consensus among our SMEs about an obvious work-around to the *Harrington* decision. Unfortunately, it seems that there is no straightforward path to restoring the efficacy of bankruptcy to its status prior to *Harrington*.

[30] In some prepackaged bankruptcy scenarios, an insurer can resolve its liability by contributing up to its policy limits into a settlement trust established through the plan, thus extinguishing its exposure for covered claims. However, this approach becomes more complicated when insurers contest coverage or decline to participate. In the BSA bankruptcy, for instance, claimants alleged that some older insurance policies, especially those issued in the pre-1980s era, did not contain aggregate limits, potentially exposing insurers to unlimited liability. Moreover, some state laws grant direct-action rights, allowing tort claimants to sue insurers directly without first obtaining a judgment against the insured. For example, Louisiana permits direct actions against insurers under La. R.S. § 22:1269. Additionally, multiple BSA-affiliated entities asserted competing property interests in the same insurance policies, further complicating negotiations. As one of our SMEs explained, these factors made a streamlined prepackaged resolution extremely difficult or practically unworkable in that case.

What Are the Potential Consequences of *Harrington* for the Future of Mass-Tort Resolution?

Having addressed how *Harrington* might affect strategic decisionmaking within the bankruptcy forum, we now turn to *Harrington*'s implications for the broader mass-tort landscape.

- **Defendants might be less likely to seek bankruptcy to resolve mass torts.** Although the recent shift toward using the bankruptcy process as a global resolution mechanism in mass-tort litigation has been motivated largely by a desire to avoid the tort system, the *Harrington* decision could shift the focus back to the MDL process, which presents its own challenges in achieving global resolution. If the bankruptcy system can no longer provide a global resolution for related third parties contributing to a bankruptcy trust, these parties might have no choice but to continue litigating some or all claims within the tort system.
- **Parties might continue to pursue bankruptcy without the expectation that all claims will be extinguished.** Although bankruptcy would still eliminate claims against the debtors, it would not necessarily do the same for claims against all other parties. Most claims could still be resolved within the bankruptcy framework, leaving third parties at risk of litigation from a small percentage of claimants who opt out of the settlement. Additionally, bankruptcy plans could allocate funds for third parties to defend against such claims, similar to the approach taken during the renegotiation of the Purdue bankruptcy following the *Harrington* decision.
- **Defendants might be less likely to use divisional mergers.** Although the decision does not specifically address the use of divisional mergers, it might have reduced their appeal if the company spinning off its liability cannot secure a third-party release to protect against future claims. Experts we interviewed expressed conflicting opinions on whether defendant companies would require third-party releases when using divisional mergers.

What Legislative and Administrative Responses Might Be Considered to Address the Limitations Imposed by *Harrington*?

The SMEs we consulted identified several strategies that might be considered to mitigate the limitations imposed by *Harrington* on bankruptcy's ability to achieve global resolution. In this section, we describe four potential strategies identified.

Modify § 524(g) of the Bankruptcy Code to Apply to All Mass Torts and Not Just Asbestos

In 1994, Congress enacted § 524(g) of the Bankruptcy Code, which codifies procedures for dealing with personal injury asbestos claims against bankrupt companies. Since the legislation was passed, however, bankruptcy and tort bar practice have evolved to encompass a broader variety of tort types and possible solutions that are quite frankly beyond the language of § 524(g). Considering this evolution, one obvious solution is for Congress to modify the language of § 524(g) to encompass current practices.[31]

[31] According to one of our SMEs, a prominent view among some bankruptcy attorneys, particularly those representing mass-tort defendants, is that Congress did not intend § 524(g) to preclude the use of nonconsensual third-party releases in other types of mass-tort bankruptcies. These attorneys argue that asbestos was the most pressing and visible example at the time of the statute's enactment in 1994 and that therefore the legislation tailored the channeling injunction mechanism specifi-

SMEs expressed differing opinions on whether replacing the word *asbestos* with *mass tort* in § 524(g) of the Bankruptcy Code would be sufficient to restore pre-*Harrington* practices in bankruptcy courts for resolving mass-tort claims. This difference of opinion stems from the specific requirements embedded within 524(g), which are narrowly tailored to asbestos cases and do not easily translate to the broader scope of mass torts. Key issues identified include the following:

- **The specific-relationship requirement.** Section 524(g) mandates a specific relationship between the debtor and the third party, such as that of a parent company or insurer, for a third-party release to qualify. Additionally, liability must arise directly from this relationship, often referred to as the *by reason of* standard. These constraints, outlined in § 524(g)(4)(A), limit the applicability of this requirement. Simply replacing *asbestos* with *mass tort* does not address these inherent limitations. For example, directors and officers of a debtor company might lack the requisite relationship, as might affiliated entities with independent liability.
- **Challenges for nonprofits.** Section 524(g) poses significant obstacles for cases involving nonprofits, such as the BSA or Catholic dioceses. The provision currently applies only to for-profit corporations and includes such requirements as granting stock to a trust. Because nonprofits do not issue stock and often lack traditional corporate affiliations, the framework of § 524(g) is poorly suited to their circumstances. As nonprofits increasingly face mass-tort liability, this limitation will become even more problematic.
- **Ambiguity in mass-tort definition.** Unlike asbestos cases, which typically involve long-term exposure to a single harmful substance, mass torts encompass a wide variety of claim types, including product liability, environmental disasters, pharmaceutical harms, and consumer safety issues. Creating a definition that adequately captures the diversity of mass torts without being overly broad or vague is challenging and risks excluding some claims or inviting misuse.[32]
- **Variability in timelines.** A key challenge lies in the variation of timelines across different types of mass torts. Although asbestos liability often spans decades, requiring trust mechanisms to address future claims, other mass torts—such as those arising from defective products or environmental incidents—can involve more-immediate or shorter-term harms. A one-size-fits-all framework, such as the trust-based structure currently in § 524(g), might not adapt well to these differences. Ensuring that revised legislation accommodates these temporal dynamics would require careful and flexible drafting.
- **Complex questions of liability attribution.** Even in asbestos litigation, commonly considered the archetype for mass-tort bankruptcies, liability is rarely clear-cut. These cases typically involve multiple defendants, and the allocation of liability depends on such factors as the type of asbestos-containing product, the degree and duration of exposure, and the evidence linking a specific product to a particular site or plaintiff. Modern mass torts, such as opioid litigation and environmental disasters, present similar—if not greater—complexities, often involving manufacturers, distributors, retailers, and other intermediaries with varying degrees of involvement. These layered and diffuse liability structures pose a challenge for defining *mass tort* under existing provisions, such as § 524(g), which currently require a direct relationship between the debtor and the liability.

cally to asbestos claims. This view is echoed in the dissenting opinion in *Harrington*, in which Justice Kavanaugh emphasized that § 524(g) was not intended to prohibit courts from granting nondebtor releases in other contexts, noting that Congress "expressly authorized nondebtor releases in one specific context," but also made clear that it was not "altering the authority" of courts to use similar mechanisms in other cases (*Harrington*, Kavanaugh, J., dissenting, 44–45).

[32] More specifically, a vague or overly inclusive definition of *mass tort* could enable entities to misuse mass-tort bankruptcy protections to escape liability for claims that do not fit the legislative intent. Conversely, a narrow definition could inadvertently exclude certain legitimate mass-tort claims, limiting the statute's effectiveness. Balancing inclusivity and specificity in the definition is essential to ensure that the revised legislation serves its intended purpose.

Reform the MDL Process to Facilitate Global Resolution

It might be possible to mirror some of the attractive features of resolutions achieved in bankruptcy court through the MDL system by utilizing certain case management techniques that MDL judges have found facilitate resolution. One example cited by several SMEs is the 3M Combat Arms Earplug litigation (see the box titled "Examples of the Innovative Use of MDL Procedures to Secure Resolution").

Many of these effective procedures share a common feature: providing a comprehensive inventory of claims. For instance, the lack of a complete inventory of claims in the Roundup and 3M Combat Arms Earplug litigation significantly hindered settlement efforts and delayed the final resolution of litigation, according to several of our SMEs. In mass-tort cases, a clear inventory of claims is critical for both plaintiffs and defendants to assess the scope of liability and allocate settlement funds. Without it, defendants face uncertainty about the total number of claims, the severity of injuries, and the potential for future litigation. One SME noted that, in the Roundup litigation, for example, Bayer struggled to achieve finality despite settling claims for approximately $11 billion because the absence of a clear inventory enabled ongoing and future claims to be brought, undermining the defendant's goal of global resolution. Similarly, in the 3M Combat Arms Earplug litigation, the vast volume of more than 230,000 claims—many of which were incomplete or duplicative—overwhelmed the system, delaying resolution and complicating negotiations.

Several experts argued that the lack of an inventory also creates barriers to structuring global settlements, which rely on the participation of a critical mass of claimants to ensure finality. Without a clear understanding of the pool of claims, a defendant cannot effectively distribute settlement funds or address weaker claims

Examples of the Innovative Use of MDL Procedures to Secure Resolution

Judge M. Casey Rodgers's efforts to secure a resolution in the 3M Combat Arms Earplug litigation (MDL No. 2885) exemplify the potential of MDL proceedings to achieve a level of finality typically associated with bankruptcy. Judge Rodgers employed various case management strategies, including direct engagement with holdout claimants by summoning them to Pensacola, Florida, to address their concerns personally. By explaining the benefits of settlement and emphasizing the collective interest in resolving the litigation efficiently, she secured an extraordinarily high participation rate. The Vioxx litigation serves as another example of mass litigation with high participation rates, likely facilitated by the opt-in incentives included in the settlement.[a]

The MDL system presents a viable alternative to bankruptcy for resolving mass-tort claims, particularly when judges actively engage with claimants and facilitate settlements. However, its limitations are evident, given that it relies heavily on claimant cooperation. This includes the absence of binding authority over holdouts and the inability to stay related litigation or manage future claims effectively.[b]

[a] The Vioxx settlement, finalized in 2007, was cited by several of our SMEs as having achieved an unusually high participation rate, estimated between 93 and 99 percent. Unique structural features helped facilitate this outcome. Notably, the settlement required each participating attorney to enroll all of their clients or none at all, limiting selective opt-outs and reinforcing collective participation. Claimants who opted out faced the prospect of individualized litigation, often with uncertain outcomes and long delays. Although the Vioxx settlement demonstrates that MDLs can, under certain conditions, yield near-global resolution, several SMEs emphasized that its success was likely an anomaly. Other factors, such as Merck's financial resources, the relatively mature stage of the litigation, and strong coordination among attorneys, contributed to the unusually high participation rate. In contrast, more-recent MDLs—such as those involving opioids or PFASs—often involve more-diffuse claimant pools, third-party litigation funding, and more-fragmented representation. See Rave, 2017 (discussing mechanisms used to incentivize settlement participation in mass-tort MDLs).

[b] In fact, one of our SMEs has suggested that Judge Rodgers's case management efforts went far beyond what is easily identifiable in the docket and would, in fact, be worthy of a study in their own right.

while resolving stronger ones.[33] This was evident in 3M's difficulty in distinguishing meritorious claims from weaker ones, which, according to our interviews, prolonged the litigation and undermined incentives for settlement. Additionally, the absence of an inventory exacerbates the risk of future claims, as illustrated in *Roundup*, in which courts blocked Bayer's attempt to establish a class settlement for future claims because of concerns about fairness and uncertainty.[34]

Several other case management techniques can facilitate more-complete resolutions. Although a comprehensive list of possible procedural tools is beyond the scope of this report, we focus on three: *Lone Pine* orders, bellwether trials, and show-cause orders.[35]

- ***Lone Pine* orders** require plaintiffs to submit early documentation supporting their claims, such as evidence of exposure, harm, and causation. Proponents among our SMEs argued that these orders help eliminate meritless claims early, conserving time and resources for all parties involved. Other SMEs, however, contended that *Lone Pine* orders impose undue burdens on plaintiffs, potentially dismissing valid claims because of procedural hurdles.[36] Research suggests that their impact depends on timing:

[33] *See* Engstrom & Venook, 2023 (noting the problem of fraudulent claims and suggesting a mechanism to deter them).

[34] Although some of our experts pointed to the absence of a complete claimant inventory as a barrier to global settlement in the Roundup litigation, other SMEs argued that the primary obstacles lay elsewhere. One SME noted that Bayer's proposed class settlement for future claims was "dead on arrival," in part because it sought to resolve claims of a vague and indeterminate group of future claimants, including seasonal farmworkers, many of whom might not have been U.S. citizens. The proposal, the SME argued, raised serious due-process concerns and was ultimately rejected by the court. Moreover, the SME argued that Bayer's lack of finality resulted less from the absence of an inventory than from state court proceedings and plaintiffs' widespread rejection of settlement offers. In this SME's view, screening out unmeritorious claims was not especially difficult, but the challenges lay in achieving broad-enough participation and judicial approval of settlement structures designed to cover future unknown claimants. *See In re Roundup Prods. Liab. Litig.*

[35] Notably absent from this list are two commonly suggested procedural reforms: requiring plaintiffs to pay filing fees and mandating disclosure of third-party litigation financing (TPLF). The argument for imposing filing fees in mass-tort litigation is that it might discourage meritless claims by ensuring that plaintiffs have some financial stake in the case. However, some of our SMEs who were critical of this argument said that filing fees could have an unintended chilling effect, disproportionately burdening claimants who have limited resources while having little impact on well-funded litigants or those with contingency-fee representation. Additionally, most mass-tort claims are typically consolidated in MDL, in which plaintiffs typically file short-form complaints after centralization, making the imposition of individualized filing fees a more complex procedural question. Unlike *Lone Pine* orders, which require evidentiary submissions that can directly affect the strength of settlement negotiations, filing fees function primarily as a financial barrier rather than as a mechanism for clarifying claim validity.

A second proposed reform—requiring disclosure of TPLF—is intended to increase transparency in mass-tort proceedings. Some of our SMEs who were proponents of this proposal argued that disclosure allows courts and defendants to assess whether plaintiffs' attorneys have financial incentives that could prolong litigation rather than facilitate settlements. However, the causal link between TPLF disclosure and encouraging settlements remains uncertain. Although some claimed that disclosure could create pressure on funders to resolve cases more quickly, others argued that transparency requirements might have little practical effect on case resolution because financiers already conduct rigorous assessments of claim viability before investing. Unlike bellwether trials or *Lone Pine* orders, which introduce direct procedural incentives for resolving cases, litigation finance disclosure affects primarily litigation economics rather than the procedural dynamics of case resolution.

Although these two reforms could influence litigation dynamics, their link to nudging plaintiffs toward global settlement is less direct than the procedural innovations discussed in the main text are. *Lone Pine* orders, bellwether trials, and show-cause orders actively shape the evidentiary and strategic posture of cases, directly influencing both plaintiffs' and defendants' incentives in settlement negotiations. Filing fees and TPLF disclosure, by contrast, operate more as systemic constraints than as targeted tools for facilitating resolution. Although such reforms merit discussion in broader debates on mass-tort litigation, their role in promoting settlement outcomes remains more speculative.

Engstrom & Venook, 2023, *supra* n. 132, proposes another procedural mechanism to address this issue: common benefit fees.

[36] *See, e.g.,* Engstrom, 2019 (criticizing *Lone Pine* orders for inconsistent application, incompatibility with key procedural protections, and oversimplification of complex questions).

When issued later in MDL, *Lone Pine* orders can facilitate resolution by encouraging settlements and aligning with broader negotiation efforts.[37]

- A **bellwether trial** involves selecting representative cases for trial to provide insights into the broader pool of claims in an MDL. Bellwether trials are intended to inform settlement negotiations by offering reliable data on claim values and potential outcomes. The success of these trials depends largely on the selection process. Theoretically, bellwether cases should be chosen randomly to ensure representativeness, but more-common approaches involve both parties nominating cases, which can introduce biases.[38] Nonetheless, bellwether trials often serve as a signal from the judge to the parties about the judge's seriousness about resolving the MDL.[39]
- **Show-cause orders** are an informal but long-standing procedural tool that courts use under their inherent authority to manage litigation, particularly to address inactive or meritless claims.[40] Although not explicitly authorized in the FRCP or most state procedural codes, they are routinely issued to compel plaintiffs to further the litigation. In the MDL context, their utility in streamlining large dockets is evident, although the lack of formal standards can create inconsistency in their application.

Although these case management techniques have shown promise in MDLs and could theoretically enhance their attractiveness as a venue for resolution, replicating some of the advantages of third-party releases in bankruptcy, no specific rules govern their use. One proposal highlighted by several of our SMEs would be for the Judicial Conference of the United States' Advisory Committee on Civil Rules to consider targeted amendments to the FRCP that could institutionalize these tools, creating greater consistency and uniformity in their application. For example, amending Fed. R. Civ. P. 42 to incorporate provisions for bellwether trials would establish a standardized framework, including criteria for case selection.[41]

A possible new rule could also allow an MDL judge to conduct trials of cases not originally filed in their district, which currently requires a waiver from both parties. Some courts hesitate to issue *Lone Pine* orders because of a lack of statutory authority and tension with the principles of the federal rules. Some SMEs suggested amending Fed. R. Civ. P. 16 to explicitly authorize *Lone Pine* orders while protecting plaintiffs to address these concerns.[42] This change could also provide guidance on procedural safeguards to ensure fairness, such as limiting the use of these safeguards to cases with voluminous claims and requiring courts to balance the burden on plaintiffs with the need for efficient case management. Amendments to Fed. R. Civ. P. 41 or the creation of an MDL-specific rule could clarify procedures and timelines for issuing show-cause

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[37] Eric Helland & Minjae Yun, *Estimating the Impact of Case Management in MDLs* (arXiv, arXiv:2512.08997 2025).

[38] *See* Deborah L. Rhode Center on the Legal Profession, Stanford Law School, *Bellwether Trials* (last visited Sep. 30, 2025) (cataloging approaches to choosing bellwether trials in mass torts).

[39] Helland & Yun (2025).

[40] A show-cause order is a court directive requiring a party to explain why a specific action should not be taken against it. Although it can be used in many contexts, it is typically used in MDLs to address a failure to prosecute a case or deficiencies in filings. It is considered less burdensome than a *Lone Pine* order but can be used to identify nonmeritorious cases. The party receiving the order must demonstrate why the court should not dismiss its case.

[41] Fed. R. Civ. P. 42 grants courts discretion to consolidate cases involving common questions of law or fact and to order separate trials to promote efficiency. In the context of MDL, consolidation under Fed. R. Civ. P. 42(a) allows joint handling of pretrial matters, while Fed. R. Civ. P. 42(b) permits the separation of issues or claims for trial. However, under 28 U.S.C. § 1407, MDL judges generally cannot conduct trials for transferred cases without the parties' consent because such cases must instead be remanded to their original courts for trial after pretrial proceedings.

[42] Fed. R. Civ. P. 16 governs pretrial conferences, scheduling orders, and case management, empowering courts to streamline litigation and reduce delays. *Lone Pine* orders are controversial *supra* n. 137. For an empirical analysis of *Lone Pine* orders' effect on settlement, *see* Helland & Yun, 2025 (arguing that *Lone Pine* orders significantly increase the likelihood of settlement and resolution in MDL).

orders, ensuring both efficiency and fairness. Such codification would preserve judicial flexibility while offering greater transparency and predictability for litigants.

This process is already underway to some extent. For instance, the proposed Fed. R. Civ. P. 16.1 aims to improve the management of MDLs. If adopted, it would be the first addition to the FRCP focused specifically on MDLs. Developed by the Advisory Committee on Civil Rules, the proposal introduces a formal framework for case management conferences, scheduling, and other aspects of MDLs that have historically relied on judicial discretion. The proposal emphasizes early case management conferences to develop tailored plans for discovery, scheduling, and bellwether trials while formalizing the appointment of lead counsel or steering committees. It also encourages early disclosures of key issues to focus proceedings on substantive matters. The stated motivation for Fed. R. Civ. P. 16.1 is to standardize best practices across MDLs to reduce delays and lower litigation costs while preserving judicial flexibility to adapt to the specific needs of each case.[43] Although this rule does not address *Lone Pine* orders, show-cause orders, or the selection mechanism for bellwether trials, future rule changes could be made in light of the *Harrington* decision.

Revitalize Class Actions

As previously discussed, amendments to the Bankruptcy Code addressing asbestos liability mirror what the courts attempted to achieve in *Ortiz*: a limited class-action settlement designed to resolve future mass-tort liability. It is important to note that, although SCOTUS ultimately struck down both the nationwide and limited settlements in *Amchem* and *Ortiz*, these decisions were based primarily on the application of Fed. R. Civ. P. 23, not on constitutional due-process grounds.

This distinction is critical. Although Congress cannot override constitutional protections, it can amend procedural rules. Because the Court's rulings in *Amchem* and *Ortiz* focused on Fed. R. Civ. P. 23's requirements, not constitutional violations, either Congress or SCOTUS, through its rulemaking authority, could, in theory, amend the rule to address the procedural deficiencies those cases identified.

However, such reforms would not be without risk. As several of our SMEs noted, amending Fed. R. Civ. P. 23 to allow broader certification of mass-tort classes could invite new constitutional challenges, particularly over due-process protections for absent or future claimants. SCOTUS has made clear that absent plaintiffs are entitled to adequate representation, notice, and an opportunity to opt out. If class actions involving future claims limit those rights, especially for people who are still unaware that they have been harmed, then due-process concerns could resurface, regardless of changes to Fed. R. Civ. P. 23.

In both *Amchem* and *Ortiz*, the Court emphasized the lack of commonality and typicality among class members and questioned whether future claimants were adequately represented. In response, such scholars as Elizabeth Cabraser and Samuel Issacharoff have proposed what they call a "participatory class action" model.[44] This approach is intended to improve fairness by enhancing transparency and communication between class counsel, courts, and claimants. With the rise of the MDL as a flexible aggregation mechanism and new communication technologies, there is now greater potential for meaningful engagement with class members. Cabraser and Issacharoff argued that these tools could make class actions more responsive to individual needs, potentially satisfying the rigorous requirements of Fed. R. Civ. P. 23 while respecting the rights of future claimants.

[43] Proposed Fed. R. Civ. P. 16.1 was unanimously approved by the Advisory Committee on Civil Rules in April 2024 and is undergoing the federal rulemaking process under the Rules Enabling Act (28 U.S.C. §§ 2071–2077). This process includes review by the Administrative Office of the U.S. Courts' standing Committee on Rules of Practice and Procedure, approval by the Judicial Conference of the United States, and subsequent review by SCOTUS. If adopted, Congress has seven months to review the rule before it takes effect, with an anticipated implementation date of December 1 following approval.

[44] Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. Rev. 846 (2017).

Another proposal that has garnered significant attention is the use of FCRs, court-appointed fiduciaries similar to those used in bankruptcy under § 524(g) of the Bankruptcy Code. Unlike class counsel, who must represent the interests of the entire class, representatives would be responsible solely for protecting the interests of future claimants. Their role would include evaluating proposed settlement terms, objecting to provisions that inadequately compensate unknown or late-emerging injuries, and helping define subclass or allocation structures that better reflect the risk profile of future claims. Although judges already have a duty to assess fairness, this added layer of representation could offer stronger protection in cases involving long latency periods or complex medical harms.

Despite growing interest in these innovations, Fed. R. Civ. P. 23 remains unchanged, in part because of ongoing skepticism about whether class actions are a viable tool for resolving mass torts. SMEs critical of class actions argued that individualized questions of causation, exposure, and damages are ill suited to collective adjudication. However, other SMEs contended that, with targeted reforms, such as separate subclass counsel, robust judicial oversight, and tailored roles for FCRs, class actions could be restructured to meet both the practical demands of mass-tort resolution and the constitutional rights of claimants, without requiring formal rule changes.

Whether these reforms can withstand judicial scrutiny remains an open question that might require further empirical testing and doctrinal development. But they offer a potential middle path: preserving the efficiency and finality of class-action resolutions while strengthening procedural protections for future claimants.

Expand Use of Innovative Financial Strategies, Such as Divestiture Transactions

Several of our SMEs noted the emergence of a small but growing trend of nonbankruptcy liability divestiture transactions, in which companies with long-tail tort liability, most often related to asbestos exposure, transfer those obligations to third-party firms, typically without court oversight.

These transactions are most viable when the value of underlying damages is actuarially stable and expected to decline over time, usually because of an aging claimant population and the absence of new exposures. For example, a company might expect to pay $10 million to $20 million annually in asbestos claims, with predictable downward trends. For many firms, these legacy liabilities can distract from core operations and require specialized expertise they lack.

To address this limitation, some firms sell the subsidiaries housing the liability to specialist liability management firms, typically backed by private equity, hedge funds, or insurance-linked investors. These acquiring entities assume full responsibility for resolving claims, offering sellers operational relief and the ability to cap their financial exposure through a one-time capital contribution while avoiding bankruptcy's reputational and financial risks.

This approach has drawn particular interest in the wake of the *Harrington* decision because it allows companies to offload liabilities without seeking bankruptcy protection, invoking nonconsensual third-party releases, or utilizing divisional merger strategies.

According to our SMEs, the asbestos liability divestiture model builds on the concept of insurance runoff, in which a closed portfolio of long-tail claims, such as those arising from asbestos exposure, environmental harm, or toxic torts, is managed over time without underwriting new policies. Rather than continuing as a fully operating insurer, a runoff entity focuses solely on resolving outstanding obligations through settlement, litigation, or recovery from reinsurance.

Liability management firms generate returns for themselves and their investors through a three-pronged strategy:

- **Reducing litigation costs.** These specialized liability management firms often streamline legal operations, selecting counsel with specialized mass-tort litigation experience and employing tiered settlement strategies to reduce total payouts. Unlike traditional corporate defendants, they avoid overlitigation and aim to settle efficiently. As one SME put it, "It's easy to blow yourself up with litigation."
- **Maximizing insurance recoveries.** Legacy tort liability is often backed by substantial insurance coverage. However, one SME argued that many corporate sellers are reluctant to aggressively pursue these claims or engage in protracted disputes with insurers. Liability management firms, by contrast, employ legal teams with specialized knowledge of insurance coverage and recovery, extracting significantly more value from these assets.
- **Managing capital.** The funds contributed at closing—often hundreds of millions of dollars—are typically managed through tiered vehicles or investment accounts, with oversight, solvency tests, and payout schedules extending over a decade or more. Returns are realized only after meeting strict solvency thresholds, with independent reviews to safeguard claimant recovery.[45] These arrangements attract patient-money investors—such as private equity, hedge funds, alternative asset managers, insurers, and reinsurers—that view the liability pool as a long-duration, yield-generating asset.

Divestiture allows companies to offload the legal and administrative burdens of mass-tort litigation while avoiding the complexities and uncertainties of bankruptcy court, such as judicial discretion, stay litigation, and the risk of newly surfaced claims. However, these deals do not offer the purportedly ironclad protections of Chapter 11, such as automatic stays, channeling injunctions, or court-approved discharges, making them potentially vulnerable to legal challenges.

Although, as of this writing in late 2025, none of the divested entities involved in these transactions has exhausted its reserves or been the subject of litigation seeking to unwind the divestiture, the risk remains: If a liability-bearing entity becomes insolvent, plaintiffs may attempt to hold the parent company accountable by invoking such legal doctrines as fraudulent conveyance, which targets asset transfers made without adequate consideration, or veil piercing, which is intended to disregard corporate separateness where entities are insufficiently independent or undercapitalized.

These deals remain relatively uncommon because they require mature, actuarially predictable liability profiles. Asbestos claims, with decades of litigation history and actuarial modeling, are well suited. In contrast, emerging torts—such as PFASs—present far greater uncertainty in exposure pathways, latency, and claimant populations, making them less attractive or too risky to price.

Although these transactions remain rare, one of our SMEs identified four such deals that occurred in 2024 alone, and more could follow, especially given the limitations on third-party releases in bankruptcy post-*Harrington* (see the box titled "Recent Asbestos-Related Divestitures" for further examples). These transactions could prove particularly attractive for a company with legacy claims that no longer align with its core business strategy. However, growth is likely to remain modest, given the need for predictable liability and deal customization.[46] It is also important to recognize that companies must have adequate resources to fund these types of transactions.

[45] Regulatory oversight can also come into play, particularly when insurance assets or reinsurance arrangements are involved. In such cases, corporate or insurance regulators might scrutinize the transaction to ensure that claimants' recovery prospects are preserved and that the transaction does not compromise ongoing coverage rights.

[46] *See* Jack Willard, *Crane Holdings to Divest Legacy Asbestos Liabilities*, Reinsurance News (Aug. 16, 2022).

Recent Asbestos-Related Divestitures

MSA Safety (2023)

In 2023, MSA Safety, a manufacturer of industrial protective equipment, announced the sale of a wholly owned subsidiary that held legacy product liability claims related to coal dust, asbestos, silica, and other exposures. The buyer was a joint venture between R&Q Insurance Holdings and Obra Capital. MSA contributed $341 million in cash and cash equivalents, while the joint venture contributed an additional $35 million.[a] As a result of the transaction, MSA removed all legacy cumulative trauma product liability reserves, related insurance assets, and associated deferred tax assets from its balance sheet. R&Q and Obra assumed full responsibility for managing the claims. As with all of these transactions, litigation associated with the legacy liability continues in the tort system under the management of the divested subsidiary. This allowed MSA to preserve claimants' rights to litigate while achieving a clean financial separation from its historical liability.

Ingersoll Rand (2024)

Ingersoll Rand divested its wholly owned subsidiaries holding asbestos liability and related insurance assets to Delticus Group, a liability management platform. The June 10, 2024, transaction included total capitalization of $188.5 million: $143.5 million from insurance settlement proceeds, $35 million from Delticus affiliates, and $10 million from Ingersoll Rand.[b] A key feature of the deal was an independent solvency opinion confirming that the divested entities were adequately capitalized at closing. As with the MSA deal, the Ingersoll Rand transaction did not involve bankruptcy. Existing and future asbestos claims continue through the tort system but are now managed by Delticus. By removing liability and related insurance assets from its consolidated balance sheet, Ingersoll Rand reduced financial risk and improved clarity for investors.

SPX Technologies and Canvas Holdco (2022)

In November 2022, SPX Technologies divested three wholly owned subsidiaries containing asbestos liability and related insurance assets to Canvas Holdco, a joint venture between Global Risk Capital and an affiliate of Premia Holdings. SPX contributed $138.8 million in cash, while Canvas contributed $8 million.[c]

Other Notable Transactions

Other deals have followed a similar pattern. For instance, in July 2021, ITT sold its asbestos liability subsidiary, InTelCo Management, to Delticus. ITT contributed approximately $398 million in cash, and Delticus assumed responsibility for managing the claims and indemnifying ITT for any successor liability.[d] In another example, Crane Holdings divested its asbestos liability to Spruce Lake Liability Management (a joint venture between Global Risk Capital and Fortress) in August 2022. Crane contributed roughly $550 million, Spruce Lake added $83 million, and the subsidiary retained formal indemnification protection for Crane.[e] Interestingly, both ITT and Delticus had evaluated bankruptcy under § 524(g) but determined that the nonbankruptcy divestiture route was more operationally efficient and provided a faster resolution.

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[a] *See* Press Release, MSA, *MSA Safety Announces Divestiture of Its Subsidiary Holding Legacy Liabilities* (Jan. 5, 2023).

[b] *See* Press Release, Ingersoll Rand Inc., *Ingersoll Rand Divests Legacy Asbestos Liabilities* (June 10, 2025); TipRanks, *Ingersoll Rand Divests Asbestos Liabilities to Delticus*, NASDAQ (June 10, 2024).

[c] *See* Press Release, Premia, *Premia Invests in a Joint Venture That Has Acquired Three Subsidiaries from SPX Technologies* (Nov. 2, 2022).

[d] *See* ITT Inc., Current Report (Form 8-K) (July 1, 2021).

[e] Press Release, Crane Co., *Crane Holdings, Co. Announces Transaction to Divest Legacy Asbestos Liabilities* (Aug. 15, 2022).

CHAPTER 5

Conclusions

The SCOTUS decision in *Harrington v. Purdue Pharma L.P.* has had significant implications for the use of bankruptcy as a mass-tort resolution mechanism. Although the Purdue bankruptcy ultimately reached a successful settlement following the *Harrington* decision, the extent to which third parties can still achieve—or approximate—a global resolution in bankruptcy remains uncertain under the new legal framework. We analyzed *Harrington*'s potential impact by addressing several research questions. In this chapter, we present our findings related to each question.

Harrington's Impact on the Efficacy of Bankruptcy in Achieving Global Resolution of Mass Torts

SCOTUS's decision to curtail the use of nonconsensual third-party releases sent a clear message to Congress that only legislative action, not judicial discretion, can authorize a mechanism that has long underpinned global settlements in asbestos bankruptcies. For decades, the possibility of securing a full release incentivized defendant/debtors and related third parties to contribute significant funds to bankruptcy plans in exchange for finality. That leverage has now shifted.

The Court's decision strengthens the bargaining position of mass-tort claimants and increases the leverage of holdouts, who may now demand more-favorable terms or decline to settle altogether. Although, as noted in Chapter 2, asbestos bankruptcies have a 75-percent consensus threshold, post-*Harrington*, near-unanimity might become a practical necessity to achieve comprehensive resolution—making settlement negotiations longer, more complex, and more prone to failure.

Moreover, without the protection of future liability shields, third parties might now be less inclined to contribute to bankruptcy settlements, preferring to preserve resources for ongoing or future litigation related to the same issue and harm. This shift could undermine one of bankruptcy's core benefits: providing a centralized forum for final resolution. As a result, creditor recoveries could decline, and the utility of bankruptcy for mass-tort resolution could diminish significantly. At a minimum, the post-*Harrington* environment will require new strategies to secure third-party contributions, as was ultimately achieved in *Harrington* after the ruling.

Although the decision did not directly address the use of divisional mergers, the inability to obtain third-party releases could make the strategy less attractive to companies seeking to spin off their liability. On this point, expert opinion remains divided. Some SMEs said that third-party releases are essential to making divisional mergers viable; others suggested that companies may proceed without them, albeit with increased litigation risk.

Bankruptcy Strategies for Parties in a Post-*Harrington* World

Should they continue to pursue bankruptcy, mass-tort defendants could have several potential work-arounds to the limitations imposed by *Harrington*:

- Third parties could offer additional compensation to holdouts to secure unanimous support of the settlement or higher payments to those who agree to release third parties.
- Third parties in a fully satisfied bankruptcy might argue that their liability is extinguished under the principle of preventing double recovery by plaintiffs.
- Judges could clarify what constitutes a *consensual* third-party release, potentially implementing opt-out systems or hybrid voting mechanisms.
- Parties could try to arrange prepackaged bankruptcies (or *prepacks*), in which all potentially exposed parties enter bankruptcy and agree to settlement terms before filing, which, in principle, would enable faster court approval.

Although these strategies might be explored by parties remaining in the bankruptcy system, their ultimate effectiveness and attractiveness to the various stakeholders remain uncertain. The SMEs we consulted indicated no consensus about an obvious work-around to the *Harrington* decision. Unfortunately, it seems there is no straightforward path to restoring the efficacy of bankruptcy to its status pre-*Harrington*.

Harrington's Consequences for the Future of Mass-Tort Resolution

As we have discussed, the *Harrington* decision has likely diminished the efficacy of bankruptcy in resolving mass torts. Without the ability to secure global resolution, including liability releases for related third parties, such as insurers, the use of bankruptcy as a resolution mechanism is likely to decline.

If bankruptcy becomes less attractive, the MDL system could emerge as the default forum for resolving mass torts—particularly for third parties (e.g., the Sacklers) seeking finality without filing for bankruptcy. However, this shift presents trade-offs. For example, MDLs might provide plaintiffs increased bargaining power and offer the procedural advantages of litigation. However, settlement values for plaintiffs could decline if defendants anticipate prolonged, unresolved litigation and increased exposure.

The decision could also discourage the use of divisional mergers. Parties might be less inclined to employ this strategy if the company that divests the liability is unlikely to receive a third-party release.

As parties increasingly utilize the MDL system, greater reliance on experienced MDL judges could follow. These judges may use their discretion to facilitate resolutions that resemble bankruptcy outcomes. However, MDLs rarely achieve true global settlements. More often, they result in inventory settlements, in which law firms negotiate block settlements for groups of clients rather than resolving all claims comprehensively. Without the bankruptcy system's tools—such as injunctions and discharge provisions—defendants could remain exposed to ongoing litigation, including future claims that MDLs cannot easily extinguish.

In the future, companies and claimants alike might increasingly explore alternative resolution mechanisms outside the bankruptcy and MDL systems altogether. In the post-*Harrington* world, creativity and flexibility will likely define the next generation of mass-tort resolution strategies.

Legislative and Administrative Responses That Might Be Considered Post-*Harrington*

There are several strategies that could be used to mitigate *Harrington*'s impact on bankruptcy's ability to achieve global resolution:

- Congressional modification of § 524(g) of the Bankruptcy Code could allow nonconsensual third-party releases in all mass torts, not just asbestos.
- Changes to the FRCP could institutionalize effective case management techniques, thus mirroring some of the attractive features of bankruptcy.
- Revising the FRCP to address past deficiencies that SCOTUS identified in its 1990s *Amchem* and *Ortiz* decisions could revitalize the class action.
- Increased exploration of innovative financial strategies, such as liability divestiture transactions, could reveal alternatives to bankruptcy and divisional mergers.

Concluding Thoughts

As we noted at the outset, mass torts are inherently complex. How does the system balance public adjudication, the individual right to seek justice, and fairness while tackling collective-action problems and the need for efficiency? Given these challenges, it is unsurprising that judges and litigants have turned to bankruptcy to resolve these difficult cases. However, these innovations have often compromised some of the key values of the civil justice system.[1]

It seems clear that, in the wake of *Harrington*, bankruptcy has become a less effective mechanism for achieving global resolution in mass torts. This decreased efficacy will likely reduce interest in bankruptcy and divisional mergers as strategies for resolving mass torts while also prompting a reassessment of other resolution mechanisms. Although we have identified several trade-offs in the pursuit of global resolution, a more comprehensive analysis of these trade-offs is necessary to determine the optimal path forward.

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[1] *Cf.* Judith Resnik, *Managerial Judges*, 96 Harv. L. Rev. 374 (Dec. 1982) (calling attention to erosion of traditional due-process values occasioned by more-active managerial judging justified by efficiency).

APPENDIX A

The U.S. Trustee Program and Its Role in Mass-Tort Bankruptcies

Because the USTP is a recurring character in our study of bankruptcy and mass torts, we provide a bit of background on the trustee's role in mass-tort bankruptcies. The USTP, a division of the U.S. Department of Justice, is tasked with overseeing the administration of bankruptcy cases and trustees in federal bankruptcy courts. Its core purpose is to maintain the integrity of the bankruptcy system and promote fairness for all parties involved. Although the U.S. trustee is not a judicial officer, they play a critical supervisory and administrative role in ensuring compliance with bankruptcy law.[1]

In mass-tort litigation proceedings through bankruptcy courts, the USTP is tasked with ensuring lawful and equitable outcomes. The program monitors the administration of mass-tort cases to ensure compliance with bankruptcy laws and procedures. This oversight includes more-quotidian aspects of case monitoring, such as adherence to deadlines, filings, and reporting requirements, as well as broader goals, such as promoting transparency to provide claimants and stakeholders with access to critical information.

The USTP also facilitates the appointment and supervision of essential parties in mass-tort cases. This includes appointing creditors' committees—such as unsecured creditors' or mass-tort victims' committees—to represent claimants' interests and negotiate bankruptcy plans. Additionally, in cases involving latent or future claims, the program weighs in on the appointment of FCRs to advocate for claimants who might not yet have materialized injuries.

The USTP scrutinizes proposed bankruptcy plans to ensure that they comply with the law and prioritize fairness. In the case of *Harrington*, this scrutiny included opposing third-party releases. More generally, because it is thought that mass-tort bankruptcies often present unique opportunities for abuse, the USTP is tasked with investigating suspect practices and may challenge them in court or, in rare cases, refer them for criminal prosecution.

The USTP's role arises from the unusual position of bankruptcy judges as Article I judges. As such, they differ from Article III judges in their appointment, tenure, and jurisdiction, and these differences have potentially significant implications for mass-tort bankruptcies. A bankruptcy judge's limited tenure and narrower jurisdiction can influence the handling of these complex cases, raising questions about the allocation of authority and the potential need for further appellate oversight in significant legal disputes. For example,

[1] The USTP's duties span several key areas other than mass-tort bankruptcies. It supervises case administration by appointing and overseeing private trustees, such as those in Chapter 7 and Chapter 13 cases, and monitors case progress to ensure compliance with applicable laws. It also reviews fee applications from attorneys, trustees, and other professionals involved in bankruptcy cases to ensure reasonableness. Additionally, the USTP enforces bankruptcy laws by identifying and referring cases involving fraud or abuse to the Department of Justice and may object to a debtor's discharge or the confirmation of a bankruptcy plan in cases of noncompliance. Importantly, the USTP ensures that creditors' and debtors' interests are fairly represented, sometimes intervening in cases in which procedural fairness is at risk. Finally, it provides input to cases by filing briefs or motions to guide courts on legal interpretations, including eligibility for specific bankruptcy relief.

the USTP can review settlement terms, scrutinizing administrative costs and challenging excessive fees requested by attorneys or financial advisers to ensure that more funds remain available for victims.

In some ways, the *Harrington* case is an example of the USTP's unique role in the U.S. legal system. The program objected to the Sackler family's nonconsensual third-party releases, arguing that these provisions violated bankruptcy law. This challenge escalated to SCOTUS. In the BSA bankruptcy, the USTP intervened to ensure equitable treatment of abuse survivors and scrutinized plan provisions for fairness and transparency. In long-standing asbestos bankruptcies, the USTP has overseen the establishment of settlement trusts, ensuring accountability and proper governance.

APPENDIX B

Examples of Mass-Tort Bankruptcies

In Table B.1, we provide some examples of mass-tort bankruptcies referenced in our research for this study, in ascending chronological order.

TABLE B.1
Examples of Mass-Tort Bankruptcies

Defendant Company	Bankruptcy Filing Year	Reason for Filing for Bankruptcy
Johns-Manville	1982	Asbestos-related litigation; created the first asbestos trust
A. H. Robins	1985	Liability from Dalkon Shield IUD litigation
Dow Corning	1995	Breast implant litigation; created a settlement trust
Amchem Products	1997	Asbestos claims; SCOTUS addressed the issue of future claimants
Fibreboard Corporation	1999	Asbestos liability; addressed settlement fairness
Combustion Engineering	2003	Asbestos-related claims
Met-Coil Systems	2004	Asbestos-related litigation
Garlock Sealing Technologies	2010	Asbestos litigation and disputes over claim valuation
Archdiocese of St. Paul and Minneapolis	2015	Clergy sexual abuse claims
Millennium Lab Holdings	2015	Fraud and illegal kickback litigation in the health care sector
Seaside Engineering and Surveying	2015	Financial distress and third-party releases
Deepwater Horizon (BP)	2016	Multibillion-dollar settlement to resolve oil spill claims
Kaiser Gypsum	2016	Asbestos-related litigation
Bestwall (Georgia-Pacific)	2017	Asbestos claims
Bikram Yoga	2017	Sexual harassment claims against its founder
Takata	2017	Defective airbags
Weinstein Company	2018	Sexual abuse and harassment claims against Harvey Weinstein
USA Gymnastics	2018	Sexual abuse claims against Larry Nassar
Highland Capital Management	2019	Creditor disputes and restructuring issues in investment firm litigation
Imerys Talc America	2019	Talc litigation
Insys Therapeutics	2019	Litigation related to fentanyl marketing practices
PG&E	2019	Liability from California wildfires
Purdue Pharma	2019	Opioid crisis litigation

Table B.1—Continued

Defendant Company	Bankruptcy Filing Year	Reason for Filing for Bankruptcy
Aldrich Pump and Murray Boiler	2020	Asbestos-related liability (Texas two-step maneuver)
BSA	2020	Sexual abuse claims
DBMP	2020	Asbestos claims through trust formation
J&J and LTL Management	2021	Talc litigation through bankruptcy (Texas two-step)
3M (Aearo Technologies)	2022	Litigation over defective military earplugs
Infowars	2022	Defamation lawsuits against Jones for statements made about the Sandy Hook shooting
Endo International	2022	Opioid-related liability
Kidde-Fenwal	2023	PFAS contamination claims
Mallinckrodt	2020, 2023	Opioid litigation and mass-tort liability
Diocesan bankruptcies	Various	Sexual abuse claims
Avon Products	2024	Lawsuits alleging asbestos contamination in talc-based products
Exactech	2024	Lawsuits over defective knee and hip implants
Red River Talc (J&J)	2024	Talc-related cancer claims

NOTE: This list is not exhaustive.

Abbreviations

BSA	Boy Scouts of America
FCR	future claim representative
FRCP	Federal Rules of Civil Procedure
IUD	intrauterine device
J&J	Johnson and Johnson
JJCI	Johnson and Johnson Consumer Inc.
JPML	U.S. Judicial Panel on Multidistrict Litigation
MDL	multidistrict litigation
NFL	National Football League
PCF	private compensation fund
PFAS	per- and polyfluoroalkyl substances
PG&E	Pacific Gas and Electric Company
SCOTUS	U.S. Supreme Court
SME	subject-matter expert
TPLF	third-party litigation financing
USTP	U.S. Trustee Program
VCF	victim-compensation fund

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In recent years, bankruptcy has been used with increasing frequency as a strategy for resolving mass-tort litigation. Its appeal for defendants lies in the potential for global resolution—the ability to address all current and future claims in a single, centralized process. A key feature facilitating this capability has been the availability of nonconsensual third-party releases. These releases allow affiliated parties that have not declared bankruptcy themselves to be released from liability without requiring the unanimous approval of all mass-tort claimants and creditors. Often, these third parties contribute substantial sums to the bankruptcy estate in return for these releases. The U.S. Supreme Court decision in *Harrington v. Purdue Pharma L.P.* has had significant implications for the use of bankruptcy as a mass-tort resolution mechanism. Although the Purdue bankruptcy ultimately reached a successful settlement following the *Harrington* decision, the extent to which parties can still achieve—or approximate—a global resolution in bankruptcy remains uncertain under the new legal framework. Researchers analyzed *Harrington*'s potential impact; in this report, they present their findings.

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