You Can't Buy That: Justice Beyond Compensation in Mass-Tort Bankruptcy

As corporate defendants charged with unspeakable harms increasingly find their way to the bankruptcy courts, bankruptcy scholars and practitioners are debating the merits and misgivings of the mass-tort bankruptcy. This Note contributes to this conversation a crucial advantage of mass-tort bankruptcies: the ability to give tort creditors more meaningful resolution of their injuries through nonmonetary remedies. Bankruptcy proceedings, as contrasted with traditional tort litigation, provide a legal and practical forum for securing justice beyond mere compensation, tailored to the unique needs and preferences of victims. Early examples of nonmonetary provisions in Chapter 11 reorganization plans—including those of Catholic dioceses involved with child sex-abuse allegations, USA Gymnastics, the Boy Scouts of America, and Purdue Pharma—suggest a role for courts and litigants in pursuing nonmonetary remedies, as well as a role for legislators in empowering tort creditors to obtain meaningful relief, monetary and nonmonetary. Although bankruptcy may not be the preferred venue for tort creditors, advocates should be mindful of the bankruptcy court as a court in equity, poised to render solutions through nontraditional means as justice requires.

Introduction

Perhaps the defining trend in bankruptcy today is the increasing use of bankruptcy processes to resolve a variety of claims arising not from a debtor's financial hardship, but from a tortfeasor's debts to those it harms—the rise of mass torts in bankruptcy.[1] This trend has not gone unnoticed by scholars[2] and by mass tortfeasors,[3] who increasingly turn to bankruptcy courts to settle their claims. Supporters of the mass-tort bankruptcy phenomenon argue that while mass tortfeasors do not necessarily call to mind the prototypical debtor, the claims they face are well suited to solution in bankruptcy.[4] Bankruptcy intervenes to resolve a collective-action problem involving many debtors seeking repayment out of a limited pool of assets. Mass torts, so the argument goes, are clearly analogous, with numerous victims and a limited amount of potential recovery.

But the resolution of mass-torts cases in bankruptcy courts also faces many critiques. Some highlight the lack of procedural safeguards for claimants in bankruptcy relative to other fora, such as multidistrict-litigation

1. *See* Douglas G. Smith, *Resolution of Mass Tort Claims in the Bankruptcy System*, 41 U.C. DAVIS L. REV. 1613, 1615 (2008). Bankruptcy scholar Edward Janger has referred to the bankruptcy courts as the "favored forum" of large corporate mass-tort defendants. Edward J. Janger, *Aggregation and Abuse: Mass Torts in Bankruptcy*, 91 FORDHAM L. REV. 361, 362 (2022).

2. *See, e.g.*, Georgene Vairo, *Mass Torts Bankruptcies: The Who, the Why, and the How*, 78 AM. BANKR. L.J. 93, 93 (2004).

3. Several recent bankruptcy filings feature tort claims. *See, e.g.*, Decision on Reorganized Debtors' Second Omnibus Motion to Enforce the Plan Injunction at 4, *In re* Revlon, No. 22-10784-DSJ (Bankr. S.D.N.Y. Aug. 12, 2024), https://www.nysb.uscourts.gov/sites/default/files/opinions/312567_1107_opinion.pdf [https://perma.cc/VV6H-FZH7]. The WESTLAW *Bankruptcy: Mass Torts Tracker* includes 21 active cases. Practical Law Bankruptcy & Restructuring, *Bankruptcy: Mass Tort Tracker*, WESTLAW (July 25, 2025), https://next.westlaw.com/Document/I5f9aa177561d11e9adfea82903531a62/View/FullText.html [https://perma.cc/RR68-8HF4].

4. *See infra* notes 30-33 and accompanying text.

proceedings.[5] Others emphasize the plight of future claimants in mass-tort bankruptcies, whose claims are extinguished in the bankruptcy proceeding and whose recovery is limited by the remnants of the funds set aside for them by their unchosen representatives.[6] At bottom, these critics contend that the bankruptcy process is simply unsatisfying to mass-tort victims. As asserted by Professor Levitin before the House Subcommittee on Antitrust, Commerce, and Administrative Law:

> Bankruptcy law has never dealt well with questions of moral justice—it is fundamentally a financial process that reduces all manner of obligation to cold, hard dollars, which are then allocated according to the Bankruptcy Code's priority structure. This financial logic has an unavoidable mismatch with the dignitary and expressive justice goals of tort law.[7]

Bankruptcy, however, is and always has been about moral judgments. In the early days of bankruptcy, indebtedness was seen as a moral failing, one that could land you in prison.[8] Over time, the Bankruptcy Code evolved to be more debtor friendly,[9] but bankruptcy courts continue to provide moral recourse to tort creditors, though the nature of the remedy may be different than it would be in tort.[10] Indeed, this Note functions as a defense of mass-tort bankruptcies precisely because tort law—through its failure to extract nonmonetary commitments from tortfeasors—provides only limited recourse. Tort law offers victims monetary damages, but what they often truly want is for the perpetrator to make genuine amends for past wrongs and adjust future behavior to prevent further harm.[11]

Bankruptcy, on the other hand, can offer victims exactly what they want. An apology,[12] a promise to do better going forward,[13] an agreement to adopt specific practices while desisting from others[14]—all this is within the purview of the bankruptcy courts' equitable authority in the context of

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5. *See, e.g.*, Abbe R. Gluck, Elizabeth Chamblee Burch & Adam S. Zimmerman, *Against Bankruptcy: Public Litigation Values Versus the Endless Quest for Global Peace in Mass Litigation*, 133 YALE L.J.F. 525, 550-562 (2024).

6. *See generally* Thomas A. Smith, *A Capital Markets Approach to Mass Tort Bankruptcy*, 104 YALE L.J. 367 (1994) (arguing that present mass-tort bankruptcy claimants are able to secure a disproportionate share of the debtor's assets).

7. *Oversight of the Bankruptcy Code, Part I: Confronting Abuses of the Chapter 11 System: Hearing Before the Subcomm. on Antitrust, Com., and Admin. L. of the H. Comm. on the Judiciary*, 117th Cong. 5 (2021) (statement of Adam J. Levitin, Professor of L., Georgetown Univ. L. Ctr.).

8. *See* Fleur Stolker, *The Forgotten History of Bankruptcy, 1543-1624*, 44 J. LEG. HIST. 295, 299-301 (2023).

9. David A. Moss & Gibbs A. Johnson, *The Rise of Consumer Bankruptcy: Evolution, Revolution, or Both?*, 73 AM. BANKR. L.J. 311, 328 (1999).

10. *See infra* Section III.A.

11. *See infra* notes 59-63 and accompanying text.

12. Eighth Amended Joint Chapter 11 Plan of Reorganization for the Diocese of Rochester, Exhibit 5 at 10, *In re* Diocese of Rochester, No. 19-20905 (Bankr. W.D.N.Y. Mar. 14, 2025) (requiring the Diocese to issue letters of apology to victims of sexual abuse).

13. *See, e.g.*, *infra* note 153.

14. *See, e.g.*, *infra* note 121.

a Chapter 11 reorganization plan or settlement agreement. Equity skeptics bristle at legal rules being bent to favor debtors simply because the putative debtor seeks refuge in the bankruptcy courts. But the promise of equity is available to creditors, too. Equity should imply justice for arguably the most sympathetic class of involuntary creditors—those who were tortiously harmed by the debtor. It is black-letter law that equitable remedies to creditors can disappear in bankruptcy through discharge;[15] this Note argues that bankruptcy can create equitable remedies, too, through nonmonetary commitments to tort claimants. The problem with bankruptcy, then, is not its takeover of claims that ought to be litigated in courts of law, but its failure to maximize the use of equitable solutions in situations well suited for them.

Others have suggested a few specific nonmonetary commitments as ways to enhance procedural justice for resolution of mass torts in bankruptcy.[16] This Note unifies those remedies, arguing for their broader and more consistent usage in Chapter 11 reorganization plans. The need for these remedies is demonstrated through weaknesses of tort law, which exhibits a mismatch between what victims can get out of a lawsuit and what they actually want.[17] Bankruptcy law, and its embrace of equitable solutions,[18] may offer a more satisfying recovery to those victims. After discussing the legality of nonmonetary commitments in bankruptcy, this Note describes as a policy matter how such commitments should be optimally designed, looking to nonmonetary commitments in several high-profile mass-tort bankruptcies, including those involving Purdue Pharma, USA Gymnastics, the Boy Scouts of America, and Catholic dioceses charged with allegations of child sex abuse. It also discusses complementary legislative reforms that would make bankruptcy fairer for all involuntary creditors, including those seeking nonmonetary remedies. But to begin, this Note situates itself within the larger debate about mass-tort bankruptcies.

I. The Debate About Mass Torts in Bankruptcy

Bankruptcy is attractive to mass tortfeasors for two reasons. First, courts of law convert claims that sound in tort into money damages. When these judgements overtake a tortfeasor's assets, the tortfeasor becomes indebted, a clearly parallel situation to a corporation overtaken by the claims

15. *See* Maids Int'l, Inc. v. Ward, 194 B.R. 703, 715 (Bankr. D. Mass 1996).

16. *See, e.g.*, Ella Epstein, Note, *The Need for Dignitary Justice for Tort Creditors in Chapter 11 Bankruptcy*, 2022 COLUM. BUS. L. REV. 943, 987 (encouraging victims to demand apologies from the tortious debtor); Pamela Foohey & Christopher K. Odinet, *Silencing Litigation Through Bankruptcy*, 109 VA. L. REV. 1261, 1325 (2023) (proposing that tortious debtors issue an admission of responsibility, including a public statement).

17. *See* infra Section II.A.

18. *See generally* Bruce A. Markell, *Courting Equity in Bankruptcy*, 94 AM. BANKR. L.J. 227 (2020) (examining whether bankruptcy courts are courts of equity and concluding they are courts with equitable powers).

of its creditors in the ordinary course of its business. Bankruptcy offers a way to satisfy tort creditors and protect the tortfeasor's future prospects by equitably dividing up the assets available. Second, bankruptcy is procedurally attractive, offering a channeling mechanism that consolidates numerous claims. Inherent in a mass tort is that many are hurt. Litigating each claim individually presents an enormous burden to tortfeasors; bankruptcy can resolve all of these claims in one fell swoop.[19]

The trend of resolving mass torts in bankruptcy was largely kicked off by the Johns Manville Corporation, a major asbestos manufacturer.[20] Although Manville was not insolvent according to traditional metrics, it faced thousands of claims that the company knowingly exposed workers and the public to harmful asbestos fibers, causing those exposed to develop mesothelioma and lung cancer.[21] One challenge of the Manville case was that as many claims as the company faced when it declared bankruptcy in 1982, it knew that many more would subsequently arise. Mesothelioma has a notoriously long latency period; diagnosis may lag initial asbestos exposure by fifty years.[22] Therefore, it would not suffice for the bankruptcy process to divide Manville's assets among its present claimants; doing so would leave future claimants uncompensated. And failing to deal with future claimants in the bankruptcy case would deprive Manville of the very thing it sought from the bankruptcy court: a single resolution to dispense with all of its asbestos-related claims and allow it to move forward with its enterprise.

The solution devised was the "Manville trust" and channeling injunction.[23] This injunction created a trust, funded with certain assets and a portion of Manville's future profits, to which all future claims would be channeled—freeing Manville from future litigation while providing future claimants recourse. Congress later codified the bankruptcy court's ability to issue such channeling injunctions in asbestos cases.[24]

The problem of future claimants, however, is not limited to the asbestos context, and the *Manville* case opened the floodgates for the use of bankruptcy law to resolve mass torts.[25] Moreover, litigants sought ever

19. A key related feature of bankruptcy law is the discharge. In exchange for being bound by a reorganization plan pursuant to the authority of the bankruptcy court, the bankruptcy discharge generally relieves the debtor of debts not repaid under the plan. 11 U.S.C. § 524(a).

20. *See generally* Robert Jones, Note, *The Manville Bankruptcy: Treating Mass Tort Claims in Chapter 11 Proceedings*, 96 HARV. L. REV. 1121 (1983) (employing the *Manville* case to examine how an otherwise solvent company facing mass-tort liability may utilize the bankruptcy system appropriately).

21. *Id.* at 1122 n.7.

22. *See Mesothelioma Causes, Risk Factors, and Prevention*, AM. CANCER SOC'Y. 3 (Nov. 2018), https://www.cancer.org/content/dam/CRC/PDF/Public/8734.00.pdf [https://perma.cc/SH7V-N3QP].

23. *See* Kane v. Johns-Manville Corp., 843 F.2d 636, 640 (2d Cir. 1988).

24. 11 U.S.C. § 524(g) (2018).

25. *See* Lawrence Ponoroff, *Mass Tort Litigation, Chapter 11, and Good Faith: Let Not Perfect be the Enemy of Pretty, Pretty Good*, 74 DUKE L.J. ONLINE 1, 8 (2024).

more creative applications of bankruptcy law, often inciting controversy. For example, Johnson & Johnson pioneered what has become known as the "Texas Two-Step," which involves spinning a subsidiary off of a fully solvent corporation, allowing the subsidiary to hold all corporate liabilities and the parent corporation to shield assets and evade complete disclosure.[26] Meanwhile, Purdue Pharma famously sought a "third-party release" in its bankruptcy, seeking not just to discharge the liabilities of Purdue Pharma for its illegal marketing practices and role in the opioid crisis but also to protect its owners and directors, the Sackler family, from litigation.[27] Here, the Supreme Court weighed in, holding that the Bankruptcy Code does not authorize the discharge of claims against a nondebtor without the consent of affected claimants.[28] While this restriction stems certain applications of bankruptcy law to mass-tort claims, it is unlikely to reverse the tide.[29]

Amidst these developments, mass-tort bankruptcies have won many defenders. Professors Casey and Macey emphasize the utility of bankruptcy as a solution to a collective-action problem, arguing that bankruptcy more effectively deals with holdouts and future claimants than class-action and multidistrict-litigation proceedings.[30] The U.S. Chamber of Commerce elaborates on the weaknesses of traditional mass-tort litigation, including the judicial limitations of class actions and the slow pace of tort litigation.[31] Professor Resnick details the relative advantages of bankruptcy, including quick resolution through claim consolidation, equal compensation to present and future claimants, and the high likelihood that creditors will get what they are promised by virtue of Chapter 11 plans' feasibility requirement.[32] And Professor Bussel addresses head-on more controversial mass-tort bankruptcies, acknowledging the tenuous legality of such features as

26. *See* J. Maria Glover, *Due Process Discontents in Mass-Tort Bankruptcy*, 72 DEPAUL L. REV. 535, 561-62 (2023).

27. *See* Harrington v. Purdue Pharma L.P., 603 U.S. 204, 225-26 (2024).

28. *Id.* at 216.

29. *See* William Organek, Why Bankruptcy Will Keep Eating Mass Torts 7 (Feb. 3, 2025) (unpublished manuscript), https://ssrn.com/abstract=5553980 [https://perma.cc/LSY7-SQE7].

30. *See* Anthony J. Casey & Joshua C. Macey, *In Defense of Chapter 11 for Mass Torts*, 90 U. CHI. L. REV. 973, 976-77, 981 (2023).

31. *See* C. Anne Malik, *Unlocking the Code: The Value of Bankruptcy to Resolve Mass Torts*, U.S. CHAMBER OF COM. INST. FOR LEGAL REFORM 6-10 (Dec. 7, 2022), https://instituteforlegalreform.com/wp-content/uploads/2022/12/Unlocking-the-Code-the-Value-of-Bankruptcy-to-Resolve-Mass-Torts-final-digital.pdf [https://perma.cc/MF5P-ET4Q]. It is not obvious, however, that bankruptcy offers speedier resolution. *See* Daniel Connolly, *For These Victims, Death Came Before Bankruptcy Resolution*, LAW360 (Feb. 7, 2025), https://www.law360.com/articles/2292619/for-these-victims-death-came-before-bankruptcy-resolution [https://perma.cc/REK7-Y5FW].

32. *See* Alan N. Resnick, *Bankruptcy as a Vehicle for Resolving Enterprise-Threatening Mass Tort Liability*, 148 U. PA. L. REV. 2045, 2066-68 (2000).

the third-party release but arguing they ought to be codified to maximize the potential of reaching a global settlement.[33]

Mass-tort bankruptcies, however, also suffer many critics, who offer three main strands of dissent. Professor Brubaker raises constitutional concerns, highlighting the tension between broad bankruptcy jurisdiction, tort victims' due-process and jury-trial rights, and state sovereignty over state-law claims.[34] Professors Gluck, Burch, and Zimmerman elevate a related set of procedural concerns, noting that while time-consuming, traditional tort-litigation procedures offer significant value, including the opportunity to hear testimony from victims, the ability to generate information through discovery, and the potential to develop tort doctrine.[35] These limitations, they contend, put tort claimants in the bankruptcy court at a distinct disadvantage. Bankruptcy claimants' voices are impaired through voting procedures, lack of jurisdictional choice, and the need to quickly file a claim.[36] Furthermore, victims will be imprecisely compensated, since bankruptcy fails to value claims before admitting them into the bankruptcy process.[37] Professors Foohey and Odinet similarly emphasize the procedural value in allowing victims to confront those that harm them in court, to uncover information through discovery, and to participate in litigation on a timeline initiated by the victim, in accordance with any applicable statutes of limitation.[38] Professor Jacoby suggests that the result of all these procedural imperfections is that tort claimants often decline to exercise what little voice they have at all, failing to vote on plan confirmation.[39]

In her book, *Unjust Debts: How Our Bankruptcy System Makes America More Unequal*, Professor Jacoby articulates a third critique, arguing that there is a poor match between the bankruptcy system and the tort claims that are increasingly pushed into it, given the particular needs of tort claimants, which may far exceed a mere settlement check for pennies on the dollar owed.[40] Encapsulated in this critique are myriad points raised by

33. *See* Daniel J. Bussel, *The Mass Tort Claimants' Bargain*, 97 AM. BANKR. L.J. 684, 691 (2023).

34. *See* Ralph Brubaker, *Mass Torts, the Bankruptcy Power, and Constitutional Limits on Mandatory No-Opt-Outs Settlements*, 23 FLA. ST. U. BUS. REV. 111, 125-127 (2024).

35. Gluck et al., *supra* note 5, at 525-30.

36. *Id.* at 553.

37. *Id.* at 531. Indeed, the tort claimants in the *Manville* case raised this exact concern before the Second Circuit, but the bankruptcy plan was confirmed over their objections. Kane v. Johns-Manville Corp., 843 F.2d 636, 638-39 (2d Cir. 1988).

38. Bankruptcy, instead, forces victims to file a claim soon after the tortfeasor files a petition for bankruptcy. *See* Foohey & Odinet, *supra* note 16, at 1319; *see also* Epstein, *supra* note 16, at 965-79 (arguing that bankruptcy deprives tort victims of voice, provides them with inadequate notice to file a claim, obstructs their opportunity to obtain knowledge and justice through discovery and litigation, and imperfectly represents unsecured creditors when they have divergent goals).

39. *See* Melissa B. Jacoby, *Sorting Bugs and Features of Mass Tort Bankruptcy*, 101 TEX. L. REV. 1745, 1756-1757 (2023).

40. *See* MELISSA B. JACOBY, UNJUST DEBTS: HOW OUR BANKRUPTCY SYSTEM MAKES AMERICA MORE UNEQUAL 10-11 (2024).

bankruptcy scholars, identifying instances in which particular mass-tort claimants failed to receive justice at the hands of the bankruptcy system. As one example, Jason Rosenthal points out how the Fourth Circuit denied emergency medical payments to women injured by the Dalkon Shield.[41] The Dalkon Shield was an intrauterine contraceptive device whose faulty design rendered over 13,000 women infertile.[42] What these women sought from the justice system was a way to restore their fertility before it was too late; in denying emergency medical payments, the bankruptcy system foreclosed this opportunity. Professor Parikh makes a broader argument in defense of future tort claimants, who he argues are inadequately protected in bankruptcy, ill-defended by their representatives, and undercompensated by insolvent victim-settlement trusts.[43] Professor Simon flips the focus onto mass tortfeasors, painting them as "bankruptcy grifters" who reap the benefits of bankruptcy's automatic stay and discharge without paying the costs of full disclosure, or even being entitled to the process at all through status as a debtor.[44] Adi Marcovich Gross argues further that such cooptation of the bankruptcy process perpetuates corporate misconduct by externalizing its costs.[45]

The question of whether mass torts belong in bankruptcy is part of a larger debate over the role of equity in bankruptcy law—equity skepticism versus equity enthusiasm.[46] Indeed, the embrace of equitable solutions runs up against many of the concerns elevated by mass-tort bankruptcies' harshest critics. Equitable solutions, such as nondebtor releases, risk a disruption of due-process norms and the statutory rule of law as expressed in the Bankruptcy Code—all to the benefit of the putative debtor.[47] This Note argues, however, that equity skepticism may not be the answer to the mass-tort bankruptcy critique. A different possibility is to apply the promise and expansiveness of equitable solutions not just to the debtor, but also to mass-tort creditors. The Supreme Court arguably articulated a version of this idea in its ruling in *Purdue*, when the Court disallowed the equitable solution of the nondebtor release as unauthorized by the Bankruptcy Code but nevertheless embraced equitable principles in characterizing the Sacklers as undeserving of release—a far cry from the "honest but unfortunate

41. *See* Jason A. Rosenthal, Note, *Courts of Inequity: The Bankruptcy Laws' Failure to Adequately Protect Dalkon Shield Victims*, 45 FLA. L. REV. 223, 231-32 (1993).

42. Robin Marantz Henig, *The Dalkon Shield Disaster*, WASH. POST (Nov. 16, 1985), https://www.washingtonpost.com/archive/entertainment/books/1985/11/17/the-dalkon-shield-disaster/6c58f354-fa50-46e5-877a-10d96e1de610 [https://perma.cc/D5CD-TF8R].

43. *See* Samir D. Parikh, *Mass Exploitation*, 170 U. PA. L. REV. ONLINE 53, 57, 62-63 (2022).

44. *See* Lindsey D. Simon, *Bankruptcy Grifters*, 131 YALE L.J. 1154, 1202-03 (2022).

45. *See* Adi Marcovich Gross, *Morally Bankrupt: Bankruptcy Law, Corporate Responsibility, and Sexual Misconduct*, 97 AM. BANKR. L.J. 480, 485 (2023).

46. *See, e.g.*, Michelle M. Harner & Emily A. Bryant-Álvarez, *The Equitable Powers of the Bankruptcy Court*, 94 AM. BANKR. L.J. 189, 191 (2020).

47. *See generally* Simon, *supra* note 44 (highlighting a pattern of "bankruptcy grifters" who exploit nondebtor releases).

debtor."[48] Nonmonetary commitments made by the debtor-tortfeasor to the tort creditor are the "paradigmatic example" of equity[49]—a remedy unavailable in tort, but springing to life in bankruptcy.

II. The Promise of Bankruptcy

Implicit in the complaints of mass-tort bankruptcies' detractors described in Part I is that tort law is better suited to resolve mass torts than is bankruptcy. But as scholars—and plaintiffs—have long recognized, the recourse offered by tort law seldom offers true vindication. Part II demonstrates that where tort law falls short in satisfying plaintiffs, bankruptcy may offer a more fulsome set of remedies.

A. Tort Remedies are Unsatisfying to Victims

As a general rule, tort law reduces all harms to money damages. Except in rare cases, courts applying the law of tort lack the authority to compel tortfeasors to cease their tortious behavior (i.e., through an injunction) or to order them to behave in a certain way pursuant to an agreement (i.e., by ordering specific performance). Under the Restatement (Third) of Torts, compensatory damages are presumptively a preferred remedy compared to injunctive relief.[50] Generally speaking, courts only award injunctive relief if the party seeking it can prove irreparable harm and lack of an adequate remedy at law.[51] Under this standard, an injunctive remedy is very rarely granted, given the broad availability of monetary damages for nearly all manner of injury.[52] Following the Supreme Court of Iowa's formulation, such legal-damages remedies are "inadequate" if "the character of the injury is such 'that it cannot be adequately compensated by damages at law, . . . occasion[s] [a] constantly recurring grievance which cannot be removed or [otherwise] corrected,' or would result in a multiplicity of suits or interminable litigation."[53] As a result, a single tortious act, no matter how grievous or injurious, is unlikely to produce nonmonetary relief unless it is part of a pattern of ongoing harm with respect to an individual plaintiff. Courts have historically granted injunctive relief in cases of property

48. Harrington v. Purdue Pharma L.P., 603 U.S. 204, 209 (2024).

49. Woodworth Winmill, *Enforcing the Unenforceable: Monetary Remedies for Breaches of Nonmonetary Provisions in Sex Abuse Chapter 11 Plans*, 96 AM. BANKR. L.J. 653, 677 (2022).

50. RESTATEMENT (THIRD) OF TORTS: REMEDIES § 50-51 (A.L.I. 2024).

51. *See* Brennan v. Brennan Assocs., 977 A.2d 107, 123 (Conn. 2009).

52. The Restatement (Third) of Torts contemplates damages for both physical and emotional harm, as well as in a punitive capacity. RESTATEMENT (THIRD) OF TORTS: REMEDIES § 26, 41 (A.L.I. 2024).

53. Ney v. Ney, 891 N.W.2d 446, 452 (Iowa 2017) (quoting Martin v. Beaver, 19 N.W.2d 555, 558 (Iowa 1947)).

obstruction or domestic violence.[54] But under this legal standard, a court would not grant such relief to a victim of corporate harm seeking to modify the corporation's behavior going forward so as to prevent future would-be plaintiffs' victimization. The best this victim can hope for is that the cost of monetary damages will disincentivize the tortfeasor from perpetuating subsequent harms, consistent with a theory of deterrence.[55]

Whereas injunctions foreclose tortious behavior, specific performance requires parties to act pursuant to an enforceable contract. This nonmonetary remedy is unavailable to many tort victims, who do not contract *ex ante* with their tortfeasors. And even where a contract exists, specific performance is available only when no other remedy is available at law.[56] As with an injunction, this is almost never the case; courts readily assign contracts pecuniary values recoupable through damages, except in rare cases where a contract deals with a particularly unique good, such as a parcel of real estate.[57] In such cases, specific performance may be available, but the scope of resultant nonmonetary relief is cabined precisely by what is prescribed in the contract. Courts are also reluctant to demand specific performance for services.[58]

Money damages, then, are what courts of law are usually left with. And while damages are by no means unimportant, it is a mistake to assume that they are all plaintiffs seek through litigation and all the law should potentially offer. Anecdotal accounts, coupled with empirical evidence, suggest that money is, at best, many plaintiffs' second concern. Whereas traditional law-and-economics theory predicts likelihood of suit on the basis of expected damages, Professor Felstiner and coauthors present an alternate model that emphasizes the degree to which blame for an injury is focused on the would-be defendant.[59] Under this theory, tort victims seek not to maximize a monetary payout, but to maximize the opportunity to hold a perpetrator to account. Testing this theory, a pair of economists surveyed injured individuals to understand the decision-making process of bringing a claim. Their findings suggest that the most important factor is

54. The ability of courts to grant restraining orders in the domestic-violence context is amplified by state statutes explicitly authorizing court orders of protection. *See generally* Kit Kinports & Karla Fischer, *Orders of Protection in Domestic Violence Cases: An Empirical Assessment of the Impact of the Reform Statutes*, 2 TEX. J. WOMEN & L. 163 (1993) (examining the effectiveness of state reform statutes authorizing court orders of protection).

55. The economics of this disincentivizing effect do not always work out in favor of the plaintiff, however. *See, e.g.*, Boomer v. Atl. Cement Co., 257 N.E.2d 870, 873, 875 (N.Y. 1970) (conditioning injunctive relief to prevent air pollution emanating from a cement plant onto plaintiffs' property on payment of permanent damages providing full compensation for total economic loss).

56. Reed v. Triton Servs., Inc., 15 N.E.3d 936, 939 (Ohio Ct. App. 2014).

57. *See* RESTATEMENT (SECOND) OF CONTRACTS § 360 cmt. e (A.L.I. 1981).

58. *See* Fitzgerald v. SMS/800, Inc., 17 N.Y.S.3d 213, 214 (N.Y. App. Div. 2015).

59. *See* William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .* , 15 LAW & SOC'Y REV. 631, 641 (1981).

the victim's perception of fault, contradicting the old assumption that the litigation decision is rational and economic.[60] Similar findings emerge from a different survey of both plaintiffs and their lawyers. Although the lawyers assumed that clients sued primarily, if not solely, to obtain financial compensation, only eighteen percent of plaintiffs listed money as their primary motivation for suing, and a mere six percent cited money as their sole reason.[61] Plaintiffs were instead interested in such things as admissions of fault and prevention of future harm.[62] A third study reveals that people prefer substitution in-kind to monetary compensation; in this vein, an apology may be preferred over additional damages as a better way to assure "restoration."[63] Summing up damages' failure to satisfy the desires of tort plaintiffs, Professor Ingber argues that damages make society as a whole worse off, imposing a cost on defendants without providing commensurate benefit to plaintiffs.[64]

Other research emphasizes the particular importance of a tortfeasor's apology to tort victims. Apologies can serve multiple functions for victims, including attributing responsibility for harm and reducing the anger of those injured.[65] Drawing on psychological research, Professor Robbennolt argues that an apology may convince a victim of a tortfeasor's responsibility while offering reassurance that the harm will not recur.[66] Furthermore, apologies restore equity between parties and temper emotional reactions.[67] Professor Robbennolt's research suggests that tort victims who receive apologies are less likely to pursue litigation.[68]

Given the disparity between the remedies available in tort and what tort victims actually want, it is no surprise that legal scholars have offered various critiques of tort's limited remedies. These critiques correspond to an understanding of tort law that is more expansive than mere compensation of victims. The tort system is commonly understood not simply as a form of public insurance but also as serving functions of corrective justice, civil recourse, loss distribution, and deterrence.[69] Notably, Jules Coleman

60. *See* Frederick C. Dunbar & Faten Sabry, *The Propensity to Sue: Why Do People Seek Legal Actions?*, 42 BUS. ECON. 31, 36-37 (2007).

61. Tamara Relis, *"It's Not About the Money!": A Theory on Misconceptions of Plaintiffs' Litigation Aims*, 68 U. PITT. L. REV. 701, 723 (2007).

62. *Id.* at 706-07.

63. *See* Daphna Lewinsohn-Zamir, *Can't Buy Me Love: Monetary Versus In-Kind Remedies*, 2013 U. ILL. L. REV. 151, 156.

64. *See* Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CALIF. L. REV. 772, 772 (1985).

65. *See* Daniel W. Shuman, *The Role of Apology in Tort Law*, 83 JUDICATURE 180, 183 (2000).

66. *See* Jennifer K. Robbennolt, *Apologies and Reasonableness: Some Implications of Psychology for Torts*, 59 DEPAUL L. REV. 489, 492 (2010).

67. *Id.* at 492.

68. *Id.* at 493.

69. KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW 17-20 (6th ed. 2022).

has significantly advanced the theory of tort law as a system of corrective justice.[70] In Professor Coleman's view, tort law enforces the duty of wrongdoers to "repair" the harms they cause.[71] The problem is that money—and thus tort law itself—can only repair so much.

Professor Abel faults tort law for failing to pass moral judgment, undercompensating victims, and neglecting future safety, arguing that the importance of money damages privileges economic efficiency over other purposes of tort law.[72] Abel insists that a genuine moral response requires the tortfeasor to acknowledge wrongdoing and apologize.[73] Money, on the other hand, "is a poor equivalent for non-pecuniary loss," failing to restore victims to their previous condition.[74] In later work, he further proposes that tortfeasors offer their victims "medical, psychotherapeutic, and other rehabilitative care," consistent with a corrective-justice view of tort law.[75] Professor Murphy explicitly proposes a broad expansion of the use of the injunctive remedy, arguing that claimants likely prefer injunctions to damages and that injunctions helpfully benefit third parties and the general public in addition to those who seek them.[76] Professor Bayefsky is similarly supportive of broad injunctions that respond to harms experienced by individuals as a class, not just by those individuals bringing suit.[77] In her view, civil litigation ought to satisfy litigants' quest for intangible forms of relief, including respect, dignity, and vindication.[78] Most radically, Professor Bender proposes a major paradigm shift in how to conceptualize tort law, consistent with feminist theory and an ethic of responsibility and care. Her suggestions for reform include requiring tortfeasors to personally meet the needs of mass-tort victims through interpersonal caregiving, using community service in the criminal-law context as a potential model.[79]

Critics of tort law's limited remedies are united in their belief that doctrinal limitations on the availability of nonmonetary relief disserve tort victims and society at large. Their arguments resonate with several related strands of legal critique. Advocates championing trauma-informed lawyering urge lawyers to seek "noneconomic" remedies for their clients,

70. *See, e.g.*, Jules L. Coleman, *The Practice of Corrective Justice*, 37 ARIZ. L. REV. 15, 15, 25 (1995) (arguing that the conception of corrective justice is the core of tort law); Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CALIF. L. REV. 555, 603 (1985).

71. Coleman, *supra* note 70, at 15.

72. Richard L. Abel, *A Critique of Torts*, 37 UCLA L. REV. 785, 791, 794 (1990).

73. *Id.* at 819.

74. *Id.* at 802.

75. Richard Abel, *General Damages Are Incoherent, Incalculable, Incommensurable, and Inegalitarian (but Otherwise a Great Idea)*, 55 DEPAUL L. REV. 253, 323, 325 (2006).

76. *See* John Murphy, *Rethinking Injunctions in Tort Law*, 27 OXFORD J. LEGAL STUD. 509, 512-14 (2007).

77. *See* Rachel Bayefsky, *Remedies and Respect: Rethinking the Role of Federal Judicial Relief*, 109 GEO. L.J. 1263, 1266-67, 1331-32 (2021).

78. *See id.* at 1331-34.

79. *See* Leslie Bender, *Feminist (Re)Torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities*, 1990 DUKE L.J. 848, 905, 911.

focusing on those remedies that are responsive to clients' individual needs and capable of averting future harms.[80] And in the criminal-law context, the "restorative justice" movement seeks to extend remedies beyond fines and prison sentences. The movement's proponents point to evidence that victims in large part seek recognition of harms they have experienced, making them better off within a system of restorative justice than one shaped by punitive remedies.[81] These arguments similarly resonate in tort, suggesting that the black-letter law takes too narrow a view of injured parties' due entitlements.

However, doctrine is not the only obstacle; numerous practical reasons prevent courts of law from granting more expansive remedies. For one thing, tort victims do not fashion their own remedies in courts of law—judges and juries do. Second, putting aside for a moment the First Amendment concerns of compelled speech in demanding apologies of tortfeasors, tortfeasors are currently reluctant to make such apologies, fearing that statements of culpability will create litigation risk.[82] Third, a tort claim restricts the availability of injunctive relief to and from the parties on either side of the "v." This is unhelpful where an injunction might most usefully be obtained from a third party—for example, the Sackler family controlling Purdue Pharma. But where tort law falls short, both doctrinally and practically, bankruptcy offers a solution.

B. Equitable Solutions in Bankruptcy Offer Justice to Victims

It is clear that for many tort victims, tort law offers an unsatisfying resolution. But is bankruptcy—a procedural move entirely forced upon tort creditors—any better? As discussed in Part I, mass-tort bankruptcies' critics have raised important concerns with bankruptcy as an alternative to traditional litigation. Some of these concerns may be fairly easily dispensed with. Constitutional critiques, for example, are not an inherent attack on the theory of mass-tort bankruptcies but, rather, express concerns with particular features of their practice, such as when a Texas Two-Step forces all tort claimants into a mandatory no-opt-outs settlement.[83] The Supreme Court may very well declare the Texas Two-Step to be unconstitutional.[84] While this would limit the reach of mass-tort bankruptcies, possibly even

80. *See* Daniel Connolly, *How Trauma-Informed Lawyering Can Help Clients Heal*, LAW360 (Dec. 1, 2023, 9:34 PM), https://www.law360.com/articles/1772006/how-trauma-informed-lawyering-can-help-clients-heal [https://perma.cc/ZJL8-4KCZ].

81. *See* Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 UTAH L. REV. 15, 18, 25.

82. *See* Robbennolt, *supra* note 66, at 495.

83. *See* Brubaker, *supra* note 34, at 127.

84. Although the constitutionality of the Texas Two-Step has not reached the Supreme Court, in a recent ruling the Court defined bankruptcy as a procedure reserved for "individuals and businesses in financial distress." Truck Ins. Exch. v. Kaiser Gypsum Co., 602 U.S. 268, 272 (2024).

stemming the tide, it would not impair the constitutional right of a mass-tort defendant in legitimate financial distress from seeking the Bankruptcy Court's assistance in managing a voluminous set of claims.

But other concerns with mass-tort bankruptcies allege not illegality, but unfairness. Mass-tort bankruptcy is unfair to tort victims, the argument goes, because it deprives them of their day in court and constricts the flow of any financial recovery.[85] These critics are correct that bankruptcy as it is commonly imagined and practiced minimizes tort victims in this way. Similarly, a litany of complaints concerning procedural aspects of bankruptcy illustrates how bankruptcy disadvantages tort creditors.[86] But practiced a different way, bankruptcy, by its very design, can instead empower victims to seek solutions they would never be able to receive in a regular legal proceeding. In offering nonmonetary remedies to tort victims, bankruptcy can satisfy victims' true yearnings for fundamental justice through its wide embrace of equitable solutions. Meanwhile, procedural disparities could be solved not by removing the case from the bankruptcy court, but with targeted reforms that empower tort creditors while allowing them to benefit from flexibly designed nonmonetary remedies.

The magic of bankruptcy law is its potential to convert money damages back into a form of equitable relief. A tort claimant can walk into the bankruptcy court with a tort judgment for damages and walk out with the debtor's promise to cease certain behavior, to commit to others, to furnish particular pieces of information, to voice an apology—in short, to make meaningful amends. Advocates for nonmonetary remedies in tort are transparent that their ideas require radical reconceptualization of the law as it exists today.[87] Not so in bankruptcy. The entire premise underlying the bankruptcy system is to attempt to make whole what can nominally never be made whole again. When bankruptcy is involved, there simply is not enough money to go around. Something else must make up the difference, and the Bankruptcy Code provides few limits as to what this something else can be.[88]

The criminologist John Braithwaite defines restorative justice as "a process where all stakeholders affected by an injustice have an opportunity to discuss how they have been affected by the injustice and to decide what should be done to repair the harm."[89] Restorative justice is, once again, a radical notion in the criminal-law context—and yet, framed in this way, it

85. *See supra* notes 34-35.

86. *See supra* notes 35-39 and accompanying text.

87. *See generally* Bender, *supra* note 79 (proposing a reconstruction of tort law through feminist legal methods).

88. *See infra* notes 104-105 and accompanying text; 11 U.S.C. § 1123(b)(6); *see also In re* Kaiser Gypsum Co., No. 20-00537-GCM, 2021 WL 3215102, at *11-12, *35 (W.D.N.C. July 27, 2021) (confirming a reorganization plan implementing new corporate governance documents).

89. John Braithwaite, *Restorative Justice and De-Professionalization*, 13 GOOD SOC'Y 28, 28 (2004).

sounds an awful lot like bankruptcy. Bankruptcy is a convening of parties with different harms, brought together to reach a collective resolution.

Innovations in bankruptcy represent new ways to repair the positions of tort creditors at bankruptcy's bargaining table. For example, the classic Manville trust envisions ongoing repair, paying victims not just out of the assets the bankrupt debtor currently has on hand, but out of its future profits, too. Future earnings represent one dimension of potential repair, but nonmonetary remedies are a promising vehicle for much more fulsome healing. As an equitable solution, nonmonetary remedies suggest that whereas legal courts may be procedurally better for the dignitary interests of harmed individuals, substantively, they produce far less.

Nonmonetary remedies are well-suited to bankruptcy for several reasons. First, the monetary commitments a debtor is in a position to make are necessarily capped by the debtor's insolvency—unsecured creditors in bankruptcy know they will be repaid less than they are owed. But with nonmonetary remedies, the potential for recovery is potentially limitless. And unlike financial assets, nonmonetary remedies cannot be hidden by the debtor, stashed in offshore bank accounts, or squirreled away in a Texas Two-Step.[90] This offers a distinct advantage to future claimants, who are often disadvantaged in bankruptcy.[91] Second, money is often hard for individual claimants to obtain in bankruptcy because the bankruptcy process involves a multilateral negotiation—not merely a give and take between debtor and creditor, but a squabbling amongst multiple creditors over how to divide a limited pool of assets. For example, in the Purdue Pharma bankruptcy, unsecured creditor Ryan Hampton reported that a major obstacle in securing funds for individuals harmed by Purdue's addictive product, OxyContin, was not Purdue Pharma itself, but the state creditors, who insisted that they deserved the lion's share of funds available to unsecured creditors.[92] But a debtor's refusal to provide a nonmonetary commitment lies squarely on the debtor, making this a relatively easy negotiating target for claimants.

Third, unlike traditional litigation, an admission of responsibility and apology in bankruptcy creates no legal risks for the apologist—indeed, extinguishment of legal claims against them may be exactly what tortfeasors seek from bankruptcy.[93] Fourth, a claim for money damages does not

90. *See* Gross, *supra* note 45, at 504.

91. *See* Smith, *supra* note 6, at 370-72.

92. RYAN HAMPTON, UNSETTLED: HOW THE PURDUE PHARMA BANKRUPTCY FAILED THE VICTIMS OF THE AMERICAN OVERDOSE CRISIS 289 (2021).

93. For example, states accused the Sackler family of using the bankruptcy process to evade individual liability. Christopher Rowland, *The Sackler Family Is Trying to Shield Billions in Opioid Profits Through Purdue Pharma Bankruptcy, States Say*, WASH. POST (Oct. 4, 2019), https://www.washingtonpost.com/business/economy/the-sackler-family-is-trying-to-shield-billions-in-oxycontin-profits-through-purdue-pharma-bankruptcy-states-say/2019/10/04/f0f3f67c-e6ad-11e9-a6e8-8759c5c7f608_story.html [https://perma.cc/63TE-UZFK]. *See generally* Simon,

disappear upon a debtor's promise of a nonmonetary commitment without the consent of those to whom damages are owed. The extent to which creditors are willing to accept nonmonetary commitments in the place of a monetary payout is for the creditors to decide and negotiate. Fifth, by bringing all relevant parties together, bankruptcy provides an opportunity to secure nonmonetary commitments from nondebtors. This is the counterargument to Professor Simon's "bankruptcy grifters" argument—to the extent nondebtors are reaping the benefits of bankruptcy without paying its costs, why not make them pay, demanding their admission of their role in the tort and forcing them to make proper amends to victims?

It is worth noting that nonmonetary remedies may be secured through a settlement in bankruptcy where a bankruptcy is not resolved through a reorganization plan.[94] Within the current tort system, the best opportunities victims have for coming forward and demanding a particular remedy is within the context of a settlement, but there are reasons to think that a bankruptcy settlement is more effective in guaranteeing nonmonetary relief than a tort settlement. Once again, remedies in bankruptcy are more likely to produce relief targeted not just at individual litigants, but at broad classes of affected individuals.[95] Courts also play a much larger role with regards to settlements in bankruptcy. Every settlement in bankruptcy must be approved by the bankruptcy judge as fair and equitable,[96] with particular consideration to the views of creditors.[97] Nonmonetary remedies fit nicely into this standard: what could be more fair than rectifying nonfinancial harms in kind? But in tort, similar considerations do not arise. Furthermore, courts in law decide cases and move on from them, whereas bankruptcy courts play an ongoing role in ensuring the terms of the resolution are met. For courts deciding tort cases, equitable relief poses a burden on the court, weighing against a court's provision of this form of relief.[98]

Finally, there is a way in which incorporating equitable principles into mass-tort litigation just makes sense. Equity spells out fairness for those unwittingly harmed and ill-served by legal remedies. And as Professors Weinstein and Hershenov have pointed out, equity has historically played

supra note 44, at 1164-66 (describing the use of bankruptcy to resolve mass-tort claims and mitigate the costs of accrued liability).

94. *See* Jonathan C. Lipson, *When Churches Fail: The Diocesan Debtor Dilemmas*, 79 S. CAL. L. REV. 363, 453 (2006).

95. *See supra* notes 76-77 and accompanying text.

96. *See* Protective Comm. for Indep. S'holders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424 (1968).

97. In deciding whether or not to approve a settlement, bankruptcy courts consider the probability of success in underlying litigation, complexity and cost of litigation, difficulties to be encountered in collection of payment, and the "paramount interest of the creditors and a proper deference to their reasonable views . . . ." *In re* Justice Oaks II, Ltd., 898 F.2d 1544, 1549 (11th Cir. 1990).

98. *See* Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530, 580 n.262 (2016).

a role in doctrinal developments in tort, suggesting future applications of equity in mass torts:

> Mass torts cases have outstripped the ability of the common law, with its relatively rigid adherence to precedent, to fashion remedies that adequately redress the harms of modern technological society. In circumstances where the rules of the common law prove to be too strict and fail to provide adequate remedies, the courts historically have turned to equity.[99]

And there is reason to think that equity could make a real difference. In a study of Catholic church child sex-abuse cases in the Netherlands, Gijs van Dijck found that the availability of nonmonetary relief depended most critically upon "the mentality and attitudes of those participating in the system."[100] This suggests, even in the U.S. legal context, that an equity mindset within the court provides real potential for claimants seeking nonmonetary remedies.

In addition to providing an alternative to the shortcomings of tort remedies, nonmonetary remedies in bankruptcy can be designed to alleviate procedural critiques of mass-tort bankruptcies by bringing legal procedures into the bankruptcy court. For example, tort victims might demand that the defendant settle its debts by disclosing information that would have otherwise emerged through discovery. They might seek an opportunity to verbally and publicly confront the defendant, offering a nontraditional form of victim testimony. The mismatch between the needs of tort creditors and the remedies of bankruptcy is really a mismatch with bankruptcy's *default* remedy—a monetary payout. But courts in equity are optimally positioned to fashion equitable remedies that are perfectly designed for the harm at the center of the bankruptcy.

Having determined that nonmonetary remedies are well-suited to bankruptcy as a practical policy matter, the question then turns to bankruptcy courts' legal authority to issue and enforce such remedies. First, can a bankruptcy court insert nonmonetary remedies into a reorganization plan? In *Grupo Mexicano*, the Supreme Court clarified that the only equitable solutions bankruptcy courts are authorized to issue are those permitted by the Bankruptcy Code or practiced in chancery before 1789.[101] The most expansive nonmonetary remedies are likely inconsistent with traditional chancery notions of equity.[102] Turning back to the history of bankruptcy, this is unsurprising. The Court of Chancery most commonly dealt

99. Jack B. Weinstein & Eileen B. Hershenov, *The Effect of Equity on Mass Tort Law*, 1991 U. ILL. L. REV. 269, 276.

100. Gijs van Dijck, *Victim-Oriented Tort Law in Action: An Empirical Examination of Catholic Church Sexual Abuse Cases*, 15 J. EMPIRICAL LEGAL STUD. 126, 126 (2018).

101. *See* Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 318-19 (1999).

102. *See* Lipson, *supra* note 94, at 453 (arguing that bankruptcy courts lack equitable authority to order dioceses to apologize in cases involving child sex abuse).

with bankrupt individuals; bankruptcy law and related equitable principles evolved to save them from the legal consequences of debt peonage and prison, not to condemn them to further servitude.[103]

However, there is relatively clear statutory authorization for nonmonetary remedies. The Code provides for the inclusion in a reorganization plan of any appropriate provision not inconsistent with the Bankruptcy Code.[104] No Code provision explicitly prohibits nonmonetary remedies. Instead, courts generally read the Code as embracing such forms of relief.[105] Notably, in *SEC v. United States Realty & Improvement Co.*, the Supreme Court held that courts in equity, including bankruptcy courts, could grant or deny relief based on performance of a condition that will safeguard the public interest.[106] In the context of a reorganization plan, this is consistent with pairing the discharge of debts with affirmative nonmonetary commitments designed to prevent future harms.

More generally, nonmonetary remedies can be understood as furthering an important principle underlying the Bankruptcy Code—furnishing the debtor with a fresh start. The legislative history of the Code is rife with references to this "fresh start."[107] Courts have long recognized the debtor's fresh start as a core purpose of bankruptcy.[108] Where financial distress prevents a bankrupt business from maintaining its current obligations, the traditional reorganization strategy of paying creditors pursuant to a payment plan and discharging outstanding debts enables the debtor company to pursue future business operations. But where a debtor company, through involvement with a mass-tort proceeding, loses not only damages owed under tort judgments but also its good standing in the community, a fresh start requires something more. In particular, nonmonetary remedies can be crafted to salvage a debtor-tortfeasor's tarnished reputation by forcing it to make amends to those harmed, reassure the public that no future harm is impending, and nudge the debtor into less harmful practices going forward.

Reporting on the opioid crisis and on the role of Purdue Pharma in mass marketing its OxyContin pill as nonaddictive plainly portrayed the

103. *See generally* Stolker, *supra* note 8 (discussing how debt settlements awarded in the English courts of chancery sought to financially rehabilitate debtors).

104. 11 U.S.C. § 1123(b)(6) (2024).

105. *See, e.g.*, *In re* Dow Corning Corp., 255 B.R. 445, 478-79 (E.D. Mich. 2000) (authorizing a permanent injunction pursuant to 11 U.S.C. § 1123(b)(6)).

106. *See* SEC v. U.S. Realty & Improvement Co., 310 U.S. 434, 455 (1940).

107. *See, e.g.*, 123 CONG. REC. H35452 (daily ed. Oct. 27, 1977) (statement of Rep. Drinan) ("First we want to give a fresh start to the debtor; in all the writings on bankruptcy, this is the essence of bankruptcy.").

108. *See, e.g.*, Bentley v. Boyajian (*In re* Bentley), 266 B.R. 229, 242 (B.A.P. 1st Cir. 2001) ("Without question, affording debtors a fresh start is one of the fundamental purposes of Chapter 13 and of the Bankruptcy Code in general."); Marrama v. Citizens Bank of Mass., 549 U.S. 365, 367 (2007) ("The principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.'" (quoting Grogan v. Garner, 498 U.S. 279, 286, 287 (1991))).

company and its owners as the villains of the story.[109] It is hard to fathom how Purdue can truly get a fresh start without addressing its public perception. Another example is Johnson & Johnson, a company whose baby powder was found to cause ovarian cancer. As the negative publicity unfurled, customers threatened a boycott.[110] Discharge of Johnson & Johnson's debts would not bring those customers back; only a credible promise of product safety could do that. Indeed, mass-tort bankruptcies lacking this kind of meaningful nonfinancial rehabilitation have not tended to produce success for the debtors. While Johns Manville still exists, it operates as a wholly owned subsidiary of Berkshire Hathaway.[111] A.H. Robins, the manufacturer of the Dalkon Shield, was acquired by American Home Products Corp.[112] Nonmonetary remedies may provide a less drastic route to public rehabilitation than a complete change in ownership. Professor Parikh is similarly skeptical of the ability of what he calls "scarlet-lettered companies" to achieve a fresh start.[113] He therefore recommends a particular form of nonmonetary remedy—conversion of a tortious company into a public-benefit corporation.[114]

Beyond the principle of the fresh start, Jason Rosenthal locates another source of bankruptcy doctrine consistent with preserving the debtor's reputation. He argues that the doctrine of necessity—an embrace of equity to rehabilitate the debtor and maximize value for creditors—supports safeguarding the debtor's goodwill.[115] Furthermore, the critiques of tort remedies as providing unsatisfactory psychic relief suggest that nonmonetary remedies could provide a real public-relations boon. Professors Robbennolt and Shuman find that apologies play a critical role in repairing the relationship between a tortfeasor and an injured party, rectifying

109. *See* Brian Mann, *"Dopesick" Casts the Sacklers as Villains of the Opioid Crisis. Reality is Complex*, NPR (Nov. 12, 2021, 7:00 AM), https://www.npr.org/2021/11/12/1051811415/dopesick-opioids-purdue-pharma-sacklers [https://perma.cc/4W8K-9BNE]; Barry Meier, *Origins of an Epidemic: Purdue Pharma Knew Its Opioids Were Widely Abused*, N.Y. TIMES (May 29, 2018), https://www.nytimes.com/2018/05/29/health/purdue-opioids-oxycontin.html [https://perma.cc/9NQC-YW68].

110. *See Johnson & Johnson to Pay $72m in Case Linking Baby Powder to Ovarian Cancer*, GUARDIAN (Feb. 23, 2016, 7:32 PM), https://www.theguardian.com/world/2016/feb/24/johnson-johnson-72-millon-babuy-talcum-powder-ovarian-cancer [https://perma.cc/VAH2-WR2S].

111. *History & Heritage*, JOHNS MANVILLE (2025), https://www.jm.com/en/our-company/HistoryandHeritage [https://perma.cc/G3PM-R9XZ].

112. Joe Taylor, *Family's Only Link to A.H. Robins is the Name Now*, GREENSBORO NEWS & REC. (Jan. 26, 2015), https://greensboro.com/familys-only-link-to-a-h-robins-is-the-name-now/article_b6cdc5f1-e8b8-5376-8d7a-0ad74024baae.html [https://perma.cc/C2C2-7244].

113. Samir D. Parikh, *Scarlet-Lettered Bankruptcy: A Public Benefit Proposal for Mass Tort Villains*, 177 NW. U. L. REV. 425, 430 (2022).

114. *See id*. at 430-31 ("The public benefit model is preferable to a traditional reorganization because a simple rebranding will not address asset taint or harsh public scrutiny. My proposal helps a business reestablish its reputation among consumers and other disparate constituents whose buy-in is needed to maximize enterprise value.").

115. *See* Rosenthal, *supra* note 41, at 244.

power imbalances and tempering emotional responses.[116] In sum, nonmonetary remedies are not just what tort claimants have been clamoring for, but also in the best interest of tortfeasor-debtors.[117]

Returning again to the statutory language, several Code provisions work together to authorize bankruptcy courts to sanction different nonmonetary remedies designed to rehabilitate the debtor's public image. Under § 1123(b)(6), courts can fashion creative reorganization plans not inconsistent with the Code's other substantive provisions.[118] And under § 1141, a confirmation plan is binding upon all its parties.[119] In theory, bankruptcy courts have unlimited tools at their disposal to enforce reorganization plans. Though their authority is reduced, bankruptcy courts retain jurisdiction over cases after plan confirmation. Bankruptcy's version of the All Writs Act allows its courts to "issue any order, process, or judgement" necessary to carry out the Bankruptcy Code.[120]

The Code thus invites a commendable degree of creativity. For example, Purdue Pharma's reorganization plan included an "operating injunction" that explicitly constrained its future business operations in specifically articulated ways.[121] This feature suggests that reorganization plans can operate as vehicles for legally binding forms of equitable relief, and moreover, that debtors might willingly submit themselves to such constraints. Another option is reorganization as a public-benefit corporation. Professor Parikh argues that this enables bankruptcy courts to enforce "rigorous" governance standards for such corporations as set forth by Delaware state law.[122] Furthermore, bankruptcy courts have inherent authority to impose civil sanctions for civil contempt on parties that fail to comply with their orders.[123] Practically speaking, naturally there are limits to what a court can do to literally force compliance of an intransigent debtor. One worst case scenario is the debtor defaulting on its new "debts" and declaring bankruptcy anew.[124] But the broad authority of the bankruptcy courts and the benefits of compliance for defendant debtors give tort creditors

116. *See* Robbennolt, *supra* note 66, at 492; Shuman, *supra* note 65, at 183. Professor Shuman also notes that an apology can help attribute responsibility for harm, which may be of especial use in cases like *Purdue*, where victims are made to believe that the harm of drug addiction is their own fault.

117. *See* Winmill, *supra* note 49, at 658 (arguing that debtors in sex-abuse cases have an incentive to "come clean" in order to maintain public goodwill).

118. 11 U.S.C. § 1123(b)(6) (2024).

119. *Id.* § 1141(a).

120. *Id.* § 105(a).

121. Eighteenth Amended Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. and its Affiliated Debtors at 30, *In re* Purdue Pharma L.P., No. 19-23649-SHL (Bankr. S.D.N.Y. Nov. 14, 2025).

122. *See* Parikh, *supra* note 113, at 469.

123. *See* Worms v. Vladimirovich Rozhkov (*In re* Markus), 78 F.4th 554, 570 (2d Cir. 2023).

124. JACOBY, *supra* note 40, at 83. As Jacoby notes, the business debtor in this case, unlike an individual debtor in Chapter 13, would still benefit from discharge, which is granted immediately upon plan confirmation.

good reason to hope that any promises they extract in a reorganization plan will be adhered to.

Since tortious debtors have an incentive to comply with nonmonetary commitments insofar as they advance their public image, good faith may be sufficient to ensure compliance, especially where the terms of the debtor's nonmonetary commitments are widely advertised. But where debtors renege on their promises, creditors can turn to contract law, provided that they include a liquidated damages clause in the reorganization plan.[125] Woodworth Winmill presents seven theories, including breach of contract, upon which tort claimants can seek monetary remedies for breach of a nonmonetary provision of a Chapter 11 plan.[126] This provides an admittedly circuitous route for a remedy to take—from a damages claim in tort to an equitable claim in bankruptcy back to a monetary claim in contract. But it provides tort claimants some guarantee of value in the event their first request for a nonmonetary remedy is unexpectedly denied by the debtor.

Tort creditors can also pursue nonmonetary remedies in a bankruptcy settlement.[127] However, enforcement in this context is more precarious, such that tort creditors *can* enforce nonmonetary commitments in a settlement rather than a reorganization plan but have no reason to *prefer* a settlement. When parties settle, the bankruptcy case is dismissed, so the bankruptcy court's jurisdiction over the case is disputed,[128] though arguments have been made for its inherent authority to enforce settlement agreements.[129] Courts view settlement agreements as akin to a contract between debtors and creditors—not an order from the bankruptcy court.[130] This structure provides tort creditors with another opportunity to defend their claims to nonmonetary commitments with arguments that sound in contract.

Importantly, nonmonetary remedies in either a bankruptcy reorganization plan or settlement are unlikely to be rendered ineffective by First Amendment concerns over compelled speech, if, for instance, a debtor commits to making a public apology. Under his theory of monetary remedies for a debtor's breach of nonmonetary commitments, Winmill argues that the state has a compelling interest in ensuring that tort victims receive what they were promised and thus may be able to defeat a First

125. *See* Winmill, *supra* note 49, at 657.

126. *See id.* at 669.

127. *Supra* note 94.

128. *See* Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 378 (1994).

129. *See* Neil P. Olack & Kristina M. Johnson, *Compelling Statement Agreements in Bankruptcy Cases: Holding Their Feet to the Fire*, 18 MISS. COLL. L. REV. 427, 431 (1998).

130. *See, e.g.*, *In re* Griffin, 509 B.R. 864, 887 (Bankr. W.D. Ark. 2014) (holding that bankruptcy settlements are construed according to contract-law principles); *In re* Manuel Mediaville, Inc., 568 B.R. 551, 568 (B.A.P. 1st Cir. 2017) ("Settlement agreements should be interpreted in accordance with the general rules of contract interpretation . . . .").

Amendment defense.[131] Advocates for nonmonetary remedies can also point to cases in the criminal-law context in which judges have compelled apologies from criminals without violating their First Amendment rights. In one such case, the court upheld a criminal sentence requiring an individual found guilty of sexual assault to write an apology letter to his victim, reasoning under Ninth Circuit precedent that the letter would further a compelling state interest of rehabilitating juvenile offenders.[132] A clear analog exists in bankruptcy, where the compelling state interest is successful reorganization, including, to the extent necessary, debtor rehabilitation. Furthermore, First Amendment claims are relatively weak in bankruptcy, which is a voluntary process; mass-tort debtors seeking to avoid the bankruptcy court's equitable demands can always return to class-action suits and multidistrict litigation.[133]

Ultimately, many of these legal questions remain murky, in part because they have not been tested aggressively in the courts. So, while this Note seeks to defend mass-tort bankruptcies, it also critiques their thus far limited application for failing to maximally deliver what only the bankruptcy system can provide to tort creditors: equity. Critics of mass-tort bankruptcies argue that debtor-tortfeasors use bankruptcy to evade the legal and social consequences of their actions,[134] but bankruptcy is perfectly capable of meting out such consequences. This Part has shown how bankruptcy courts, as courts of equity, are uniquely situated to examine the facts and circumstances of a given mass tort and to fashion a just solution accordingly—in the words of Professor Coleman, to ensure that defendants actually repair the harms they wreak.[135] Equity should not simply serve the interests of bankrupt defendants, enabling them to bend the Bankruptcy Code to wriggle out of all kinds of scrapes. It should also even more powerfully protect tort creditors—often unsophisticated parties hurt through no fault of their own and then dragged to the bankruptcy court without their consent. The next Part offers specific recommendations for a more fulsome embrace of nonmonetary provisions in Chapter 11 reorganization plans, drawing on early attempts to pursue nonmonetary remedies in mass-tort bankruptcies.

III. Embracing Equity in Bankruptcy with Nonmonetary Remedies

The current debate over mass-tort bankruptcies overlooks the opportunity for tort creditors to seek remedies in bankruptcy that would be

131. *See* Winmill, *supra* note 49, at 663-66.

132. *See* State v. K H-H, 353 P.3d 661, 665 (Wash. Ct. App. 2015).

133. *See generally* Charles J. Tabb, *The Bankruptcy Clause, the Fifth Amendment, and the Limited Rights of Secured Creditors in Bankruptcy*, 2015 U. ILL. L. REV. 765 (arguing that the Fifth Amendment imposes no limitations on Congress's legislative authority under the Bankruptcy Clause).

134. *See, e.g.*, Foohey & Odient, *supra* note 16, at 1315.

135. *See* Coleman, *supra* note 70, at 18.

unavailable to them in regular tort proceedings. An unavoidable consequence of the bankruptcy forum is that it is the sole choice of the defendant debtors—a tort creditor has virtually no choice but to engage in bankruptcy proceedings. But once the choice of bankruptcy has been made for them, bankruptcy offers creditors wide latitude to seek remedies that practically do not exist within other domains of law.

Bankruptcy, as it exists today, provides courts and those who operate within them the opportunity to pursue nonmonetary remedies. Meanwhile, legislative reforms to the Bankruptcy Code could aid tort creditors seeking nonmonetary remedies by enhancing their bargaining power in bankruptcy proceedings.

A. The Role for Courts and Litigants

Recent high-profile mass-tort bankruptcies have included within their Chapter 11 reorganization plans provisions entitling tort creditors to specific forms of nonmonetary relief.[136] While media coverage of these bankruptcies zeroes in on the headline monetary payout awarded to tort victims,[137] a more comprehensive examination of these bankruptcies reveals a crucial role for nonmonetary remedies. Drawing on cases involving sexual abuse within Catholic dioceses, Section III.A.1 animates the theoretical discussion of Part II, providing evidence that nonmonetary remedies can be more effective in bankruptcy than in tort. This finding suggests that tort creditors should consider seeking such nonmonetary remedies routinely. Section III.A.2, describing the USA Gymnastics case, illustrates the potential importance of nonmonetary remedies for tort creditors and suggests a unique role for these creditors in designing remedies tailored to the harms they suffered. Furthermore, other players in the bankruptcy proceedings, including future-claims representatives, government creditors, and the U.S. Trustee, should play an active role in supporting tort creditors' requests for nonmonetary relief. Section III.A.3 on the Boy Scouts of America bankruptcy focuses in particular on the role of future-claims representatives, while Section III.A.4's discussion of the Purdue Pharma bankruptcy addresses other players. Finally, as also demonstrated in Section III.A.4, nonmonetary remedies are not a panacea, and, consistent with the spirit of the Bankruptcy Code, parties should not pursue them when they are not likely to rehabilitate the debtor.

136. *See infra* Sections III.A.1-4.

137. *See, e.g.*, Juliet Macur, *Nassar Abuse Survivors Reach a $380 Million Settlement*, N.Y. TIMES (Dec. 13, 2021), https://www.nytimes.com/2021/12/13/sports/olympics/nassar-abuse-gymnasts-settlement.html [https://perma.cc/Y3XC-5VAG].

1. Catholic Dioceses

Litigation involving sexual abuse within Catholic dioceses, which took place inside and outside of the bankruptcy courts, illustrates the advantages of bankruptcy in resolving this pernicious harm. Beginning in 2002, reports surfaced of priests in the Catholic Church abusing minors while leaders turned a blind eye.[138] As these claims spread and accelerated, dioceses around the country turned to bankruptcy for relief.[139] The outcomes of these cases, however, widely diverged. In Guam, survivors secured nonmonetary commitments in the form of a new "child protection protocol."[140] Meanwhile, in Portland, Oregon, tort creditors agreed to a reorganization plan lacking nonmonetary commitments.[141] Between 2004 and 2022, Woodworth Winmill counted nineteen Catholic entities that filed for bankruptcy protections following tort claims of sexual abuse, seventeen of which agreed to nonmonetary commitments in their confirmed plans of reorganization.[142] Summarizing the nonmonetary commitments contained therein, he describes promises to support the repeal of statutes of limitations for child sex offenses, disclosure of documents, and commitments to send apology letters to survivors.[143] Though Winmill does not document whether these commitments were honored, he makes a convincing case that, if neglected, they provide the basis of a contractual claim for survivors to seek monetary relief.

One way in which the nonmonetary provisions of diocesan reorganization plans appear meaningful is through comparison with the outcomes secured by plaintiffs suing dioceses who did not seek bankruptcy protection. In these tort cases, plaintiffs often won monetary damages—according to one estimate, the Catholic Church has paid in excess of $3 billion to

138. *See FACTBOX: Five Facts on the Catholic Church's Sex Abuse Scandal*, REUTERS (Aug. 9, 2007, 5:10 PM), https://www.reuters.com/article/world/factbox-five-facts-on-the-catholic-churchs-sex-abuse-scandal-idUSN15269103 [https://perma.cc/3MG6-R44D].

139. *See* Marie Reilly, *Diocesan Bankruptcies*, CATHOLIC PROJECT, https://catholicproject.catholic.edu/catholic-church-finances/bankruptcy-information [https://perma.cc/U397-4Z29] (tracking bankruptcy filings by Catholic dioceses in response to clergy-abuse litigation).

140. *See* Fifth Amended Joint Chapter 11 Plan of Reorganization for the Archbishop of Agaña at 73, *In re* Archbishop of Agaña, No. 19-00010 (D. Guam Sep. 27, 2022).

141. *See* Third Amended and Restated Joint Plan of Reorganization of Debtor, Tort Claimants Committee, Future Claimants Representative, and Parish and Parishioners Committee at 27-29, *In re* Roman Cath. Archbishop of Portland in Or., No. 04-37154-elp11 (Bankr. D. Or. Apr. 9, 2007), 2007 WL 7215577.

142. *See* Winmill, *supra* note 49, at 653-54.

143. *See id.* at 655.

its victims.[144] But they rarely, if ever, received the nonmonetary relief they sought.[145]

For example, a North Carolina state court refused to consider plaintiffs' request to compel an abusive priest to undergo testing for sexually transmitted diseases, arguing that to do so would exceed a civil court's authority under the First Amendment by imposing the court's judgment onto the church's religious practice.[146] Although tort claimants are in general more likely to secure injunctive relief when alleging a public nuisance, plaintiffs against dioceses ran into roadblocks when pursuing this theory. Courts often dismissed, reasoning that a priest's abuse of minor parishioners failed to interfere with a general public right, a necessary component of a public nuisance action.[147] Claims against the Holy See itself similarly failed given the presumptive immunity granted to foreign governments under the Foreign Sovereign Immunities Act.[148] Meanwhile, a case involving the Roman Catholic Diocese of Covington reveals that injunctive relief is difficult to obtain, even in the context of a tort settlement. There, plaintiffs sued for injunctive relief, including public disclosure of records relating to past abuse.[149] But the settlement agreement confirmed by the court included "no injunctive relief of any type."[150] For plaintiffs seeking at the very least a bare promise of nonmonetary relief, bankruptcy may be a much more favorable forum than the traditional courts of law.

2. USA Gymnastics

As bankruptcy proceedings involving Catholic dioceses illustrate, tort creditors have numerous choices when determining which nonmonetary remedies to pursue. Advocates for the tort creditors in the USA Gymnastics bankruptcy demonstrate the power tort creditors can have when they take the lead in demanding nonmonetary remedies responsive to their needs. In 2016, women gymnasts began speaking up about Larry Nassar, a doctor formerly employed by Team USA who abused over a hundred girls

144. *See* Johnathan L. Wiggins & Mary L. Gautier, *Summary of 20 Years of Data Collected Annually for the CARA Survey of Allegations and Costs for U.S. Catholic Dioceses, Eparchies, and Religious Communities of Men*, CTR. FOR APPLIED RSCH. IN THE APOSTOLATE (2025), https://static1.squarespace.com/static/629c7d00b33f845b6435b6ab/t/6787e82e7d337b11e27ac467/1736960046969/CARASummary2024.pdf [https://perma.cc/JEN4-HJZS].

145. However, Professors Gluck, Burch, and Zimmerman argue that the diocesesan cases not handled in bankruptcy produced clarifications in public-nuisance law. Gluck et al., *supra* note 5, at 558.

146. Doe v. Diocese of Raleigh, 776 S.E.2d 29, 41 (N.C. Ct. App. 2015).

147. *See, e.g.*, Golden v. Diocese of Buffalo, 184 A.D.3d 1176, 1176-77 (N.Y. App. Div. 2020); Monaghan v. Roman Cath. Diocese of Rockville Ctr., 165 A.D.3d 650, 653 (N.Y. App. Div. 2018) (holding that failure to disclose did not itself amount to a public nuisance).

148. *See, e.g.*, Keenan v. Holy See, 686 F. Supp. 3d 810, 819 (D. Minn. 2023); O'Bryan v. Holy See, 471 F. Supp. 2d 784, 795 (W.D. Ky. 2007), *aff'd*, 556 F.3d 361 (6th Cir. 2009).

149. Doe v. Roman Cath. Diocese of Covington, No. 03-CI-00181, 2006 WL 250694, at *1 (Ky. Cir. Ct. Jan. 31, 2006).

150. *Id.* at *4.

under the guise of medical treatment.[151] While Nassar was criminally prosecuted, abuse survivors filed suit against entities who failed to protect them from Nassar, including USA Gymnastics, the national governing body for gymnastics in the United States. In 2018, facing mounting claims, USA Gymnastics filed for bankruptcy.[152]

Article XX of USA Gymnastics's confirmed reorganization plan contains a variety of nonmonetary commitments. The plan framed these commitments around "athlete safety," requiring an amended board structure that included survivor representation; updated bylaws and policies; mandatory reporting and other safety requirements for member clubs; safety audits; strengthened educational initiatives; and more.[153] In addition to these forward-looking measures, the plan addressed historic wrongs, committing to "continued discussions about the work and make-up of a Restorative Justice Task Force," to, in part, "provide for historical accountability" and "healing for all stakeholders."[154]

As relayed by Megan Bonanni, who represented the survivors' creditor committee in the bankruptcy proceedings, nonmonetary remedies were dreamt up and championed by survivors but were not a first-order concern early in the bankruptcy.[155] However, in the end stages of negotiations, nonmonetary provisions landed in the plan.[156] According to the public statements of survivors and their attorneys, the nonmonetary provisions of the reorganization plan were crucial to survivors' support of the plan. Rachel Denhollander was the first woman to publicly accuse Nassar of sexual abuse, and she served on the survivors' committee in bankruptcy. She asserted that she was particularly proud of the nonmonetary reform commitments she helped secure.[157] "I will say that survivors deserve help with their medical care, and therapy is not cheap, so I do think they deserve compensation," said Denhollander; "[b]ut it would also be in the best interest of everyone to see actual change and reform to take place in the organization.

151. *See Larry Nassar Case: The 156 Women Who Confronted a Predator*, BBC (Jan. 25, 2018), https://www.bbc.com/news/world-us-canada-42725339 [https://perma.cc/DAY3-HKND].

152. *See* Holly Yan, *USA Gymnastics Files for Bankruptcy After Hefty Lawsuits Over Larry Nassar*, CNN (Dec. 5, 2018, 8:03 PM), https://www.cnn.com/2018/12/05/us/usa-gymnastics-files-for-bankruptcy/index.html [https://perma.cc/24HD-QCQN].

153. Modified Third Amended Joint Chapter 11 Plan of Reorganization Proposed by USA Gymnastics and the Additional Tort Claimants Committee of Sexual Abuse Survivors at 51-56, *In re* USA Gymnastics, No. 18-09108-RLM-11 (Bankr. S.D. Ind. Dec. 13, 2021), 2021 WL 9930460.

154. *Id.* at 55-56.

155. *See* THE LITIGATION WAR ROOM: *Mediation Mastery with Megan Bonanni and Ilan Scharf*, at 33:38 (Feb. 27, 2025), https://www.thelitigationwarroom.com/podcasts/episode-31-7-figure-mediation-strategy [https://perma.cc/PF5S-YU39].

156. *Id.* at 34:03.

157. *See* Holly Yan, *Olympic Gymnast Who Helped Negotiate $380 Million for Larry Nassar Victims Says Settlement Will Pay for Critical Help*, CNN (Dec. 14, 2021, 1:36 PM), https://www.cnn.com/2021/12/14/us/larry-nassar-victim-settlement-mental-health/index.html [https://perma.cc/RVS2-5H4S].

That's what we were hoping for. Change was our goal."[158] Similarly, survivor Tasha Schwikert Moser stated that "[w]hat makes [her] hopeful this will never happen again is the commitment by [USA Gymnastics and the U.S. Olympic and Paralympic Committee] for institutional reform in the bankruptcy plan."[159]

According to Denhollander, only after USA Gymnastics agreed to the nonmonetary provisions did survivors accept the reorganization plan.[160] Indeed, survivors' attorney John Manly reports that survivors were willing to give up additional compensation in favor of nonmonetary commitments: "They fundamentally want to change the culture of money and medals being the only thing that matters, because that way, they can protect other women, girls, boys and men from this happening to them."[161] Accordingly, Manly rejected an earlier settlement plan with weaker commitments regarding athlete safety and public disclosure.[162] Another attorney representing the survivors, Mick Grewal, commented: "The restorative justice process that's part of this plan, you can't buy that. . . . It will be the gold standard for every institution that has a sexual assault problem."[163]

To the survivors, it appears that the nonmonetary provisions of USA Gymnastics's reorganization plan were indispensable, and this alone speaks to their value. True, the survivors did not get everything they wanted. Among the things they sought but were ultimately denied were disclosure of documents clarifying USA Gymnastics's role in covering up the abuse[164] and public acknowledgment of the U.S. Olympic and

158. Juliet Macur, *U.S.A. Gymnastics and Abuse Survivors Propose a $425 Million Payout*, N.Y. TIMES (Aug. 31, 2021), https://www.nytimes.com/2021/09/01/sports/olympics/usa-gymnastics-payout-sexual-abuse.html [https://perma.cc/3YKX-49J4].

159. Zoe Christen Jones, *Larry Nassar Abuse Victims Reach $380 Million Settlement With USA Gymnastics and U.S. Olympic and Paralympic Committee*, CBS NEWS (December 14, 2021, 7:58 AM), https://www.cbsnews.com/news/larry-nassar-victims-settlement-380-million-usa-gymnastics [https://perma.cc/9Z97-65XC].

160. Macur, *supra* note 158.

161. Becky Sullivan, *Tracing USA Gymnastics' Journey from Rock Bottom Back to Olympic Dominance*, NPR (July 16, 2024, 6:00 AM), https://www.nhpr.org/2024-07-16/tracing-usa-gymnastics-journey-from-rock-bottom-back-to-olympic-dominance [https://perma.cc/S3BR-BDTR].

162. *See* Juan Martinez, Comment, *Sexual Abuse and Bankruptcy: How Organizations Abuse Chapter 11 to Avoid Victims' Demands for Answers*, 37 EMORY BANKR. DEV. J. 213, 225 (2020).

163. Dan Murphy & John Barr, *USA Gymnastics and U.S. Olympic & Paralympic Committee Agree to Pay $380 Million to Survivors of Former Olympic Team Doctor and Convicted Sexual Predator Larry Nassar*, ESPN (Dec. 13, 2021, 11:48 AM), https://www.espn.com/olympics/story/_/id/32859504/usa-gymnastics-us-olympic-paralympic-committee-agree-pay-380-million-survivors-former-olympic-team-doctor-convicted-sexual-predator-larry-nassar [https://perma.cc/E7JN-YWPP].

164. *See* Liz Clarke, *Simone Biles Blasts USA Gymnastics' Settlement Proposal; Aly Raisman Assails 'Massive Cover Up'*, WASH. POST (Feb. 29, 2020), https://www.washingtonpost.com/sports/2020/02/29/simone-biles-aly-raisman-blast-usa-gymnastics-settlement-proposal [https://perma.cc/K9SF-HYAB].

Paralympic Committee's role.[165] Survivors' attorney Ilan Scharf argues that such disclosure is important from a research perspective because it could help uncover how Nassar's abusive behavior adapted as suspicions about him arose and how institutions failed to protect his patients.[166]

Still, those commitments that USA Gymnastics did make appear to be producing at least incremental progress. Pursuant to the nonmonetary commitments, survivor Tasha Schwikert Moser serves on the USA Gymnastics Board.[167] At the top of the USA Gymnastics corporate hierarchy, a single director was replaced with three new positions, a move Schwikert Moser sees as enabling greater institutional change.[168] In its 2022 end-of-year message, USA Gymnastics highlighted additional changes undertaken consistent with its nonmonetary commitments in bankruptcy, including expanded mental-health programming, quicker handling of safety concerns, and strengthened resources at the member-club level.[169] The organization hired a Chief of Athlete Wellness, adopted a new athlete-funding model, and set aside sponsorship money for mental-health services.[170] The Restorative Justice Task Force—only vaguely alluded to in the reorganization plan—did indeed materialize, working slowly but surely to manifest additional change.[171] While complaints of abuse within gymnastics did not disappear overnight with the bankruptcy,[172] the sentiment from athletes today is that while USA Gymnastics's transformation is not complete, its culture feels meaningfully different.[173] This response speaks to the value of nonmonetary commitments to debtors hoping to reform their public images.

165. *See* Nancy Armour, *USA Gymnastics, Survivors Reach Agreement on Proposed $425 Million Settlement*, USA TODAY (Aug. 31, 2021, 8:25 PM), https://www.usatoday.com/story/sports/2021/08/31/usa-gymnastics-abuse-survivors-reach-425-million-settlement-agreement/5673248001 [https://perma.cc/D9KE-3FWQ].

166. *See* THE LITIGATION WAR ROOM, *supra* note 155, at 36:15.

167. *See Tasha Schwikert Moser Selected by Survivors' Committee to Serve on USA Gymnastics Board*, USA GYMNASTICS (June 2, 2022), https://usagym.org/tasha-schwikert-moser-selected-by-survivors-committee-to-serve-on-usa-gymnastics-board [https://perma.cc/W4BS-GWVY]; *Board of Directors*, USA GYMNASTICS, https://usagym.org/about/board [https://perma.cc/DT4D-YDF5].

168. *See Olympian, Nassar Survivor Tasha Schwikert Moser on USA Gymnastics' Board of Directors*, ESPN (June 2, 2022, 2:11 PM), https://www.espn.com/olympics/gymnastics/story/_/id/34026100/olympian-nassar-victim-tasha-schwikert-moser-usa-gymnastics-board-directors [https://perma.cc/YV92-Y9S9].

169. *See* Li Li Leung, *Year-End Message from Li Li Leung*, USA GYMNASTICS (2022), https://usagym.org/update/year-end-message-from-li-li-leung [https://perma.cc/2PNM-X2TP].

170. *See How USA Gymnastics Rebounded from a Sexual Abuse Scandal Ahead of the Paris Olympics*, U.S. NEWS (June 26, 2024, 4:15 PM), https://www.usnews.com/news/sports/articles/2024-06-26/no-egos-increased-transparency-and-golden-retrievers-how-usa-gymnastics-came-back-from-the-brink [https://perma.cc/DC5S-48DU].

171. *See* THE LITIGATION WAR ROOM, *supra* note 155, at 34:42.

172. *See* Diana Moskovitz, *What the Hell Is USAG Even Doing?*, DEFECTOR (Mar. 16, 2022, 9:12 AM), https://defector.com/what-the-hell-is-usag-even-doing [https://perma.cc/5MAJ-SK5C] (describing an ongoing SafeSport investigation in response to alleged verbal and psychological abuse).

173. *See* ESPN, *supra* note 170.

The USA Gymnastics case illustrates the range of remedies creative lawyering can secure, but advocates of nonmonetary remedies should be mindful that not all nonmonetary remedies are necessarily created equal. For each generally proposed remedy, there exist proponents and opponents, pros and cons. For example, Professor Parikh highlights the debate over the public-benefit-corporation solution. On the one hand, the promise of a public-benefit corporation may allow a debtor to compensate creditors inadequately and underfund settlement trusts by negotiating for primarily revenue-based—rather than up-front—contributions and overstating initial revenue projections for the new corporation.[174] On the other hand, the radical rebranding associated with a conversion to a public-benefit corporation may maximize asset value through a commitment to accountability and improved public image.[175] Other nonmonetary remedies may exhibit widely variable values. For example, the value of an apology depends on its genuineness.[176] There is a real risk that apologies negotiated and compelled through bankruptcy may fall short in psychic value.

In the end, however, it is impossible to describe any single nonmonetary remedy as categorically worthwhile (or worthless). The nonmonetary remedies worth pursuing depend upon the circumstances of each particular case, and mass-tort victims should be at the forefront of crafting remedies, as they were in the USA Gymnastics bankruptcy. Ultimately, advocates should be creative. They should be comprehensive—there is a clear opportunity to secure nonmonetary commitments from "grifters" who manipulate the bankruptcy process to their advantage.[177] Finally, in addition to the remedies themselves, Woodworth Winmill suggests including liquidated-damages clauses alongside nonmonetary provisions, bolstering a potential claim for contractual relief should the debtor breach its commitments.[178]

3. Boy Scouts of America

Survivor support was similarly crucial in the Boy Scouts of America bankruptcy, but survivors do not show up to bankruptcy proceedings unaccompanied. This mass-tort bankruptcy illustrates the importance of future-claims representatives in advocating for nonmonetary remedies. The Boy Scouts of America (BSA) is yet another American institution upended by charges of child sexual abuse. In recent years, hundreds of men and boys have come forward alleging that they were abused by volunteer

174. *See* Parikh, *supra* note 43, at 67.

175. *See* Parikh, *supra* note 113, at 430-31.

176. Shuman, *supra* note 65, at 186-87. Professor Govern, discussing restorative justice in the context of cleric sexual abuse, similarly notes that victims find voluntary assumptions of responsibility by clergy leadership preferable to court orders. Kevin H. Govern, *Truth, Justice, and Reconciliation in the Wake of Cleric Sexual Abuse in America*, 5 BAKU ST. UNIV. L. REV. 216, 231 (2019).

177. *See* Simon, *supra* note 44, at 1157-58.

178. *See* Winmill, *supra* note 49, at 657.

Scoutmasters, sometimes during sleepovers and camping trips.[179] Following the allegations, BSA filed for bankruptcy.[180] Much like the USA Gymnastics reorganization plan, BSA's plan included an article specifically dedicated to nonmonetary commitments.[181] These commitments essentially consisted of the adoption of a new "Youth Protection Plan," which encompassed hiring a Youth Protection Executive; forming a Youth Protection Committee; changing BSA's policies on volunteer background checks and protective measures; enhancing training and audit requirements; increasing survivor representation in BSA leadership; and more.[182]

BSA's post-bankruptcy progress is much less widely reported on than that of USA Gymnastics. However, the information available suggests that these nonmonetary commitments were instrumental in securing the support of tort claimants for the reorganization plan.[183] BSA also appears to have taken similar steps as USA Gymnastics in meeting its new commitments. Glen Pounder, a founding member of a nonprofit fighting child abuse, serves as BSA's new Youth Protection Executive, working with survivors and the Youth Protection Committee to prioritize scouts' safety.[184] BSA adopted a rule requiring increased registration and vetting of its adult volunteers.[185] The Youth Protection Committee plays a role in developing these reforms, while also acknowledging the harms of the past

179. *See* Eliana Dockterman, *These Men Say the Boy Scouts' Sex Abuse Problem Is Worse Than Anyone Knew*, TIME (June 1, 2019, 7:00 AM), https://time.com/5595606/boy-scouts-sex-abuse [https://perma.cc/32LL-DZLT].

180. *See Boy Scouts of America Changes Name After Bankruptcy and Sexual Abuse Claims*, GUARDIAN (May 7, 2024, 3:21 PM), https://www.theguardian.com/us-news/article/2024/may/07/boy-scouts-name-change-scouting-america [https://perma.cc/4T7Q-JFWZ].

181. Third Modified Fifth Amended Chapter 11 Plan of Reorganization (with Technical Modification) for Boy Scouts of America and Delaware BSA, LLC at 96, *In re* Boy Scouts of Am., No. 20-10343 (Bankr. D. Del. Apr. 22, 2022), 2022 WL 20140844.

182. *Id.* at 316-22.

183. *See* Cara Kelly, *Boy Scouts of America Bankruptcy Update: Key Agreement Reached Ahead of Confirmation Hearing*, USA TODAY (Feb. 10, 2022, 12:37 PM), https://www.usatoday.com/story/news/investigations/2021/12/15/boy-scouts-bankruptcy-update-what-know-settlements-more/6439683001 [https://perma.cc/6KPG-DD3C] ("In a statement, the Tort Claimants Committee said three revisions to the plan resulted in the group's support: enhanced child protection procedures; independent oversight of the settlement trust for survivors; and a path to additional compensation for survivors.").

184. *See* Aaron Derr, *Getting to Know Glen Pounder, the BSA's Youth Protection Executive*, AARON ON SCOUTING (Oct. 18, 2023), https://blog.scoutingmagazine.org/2023/10/18/getting-to-know-glen-pounder-the-bsas-youth-protection-executive [https://perma.cc/BMA2-2YWK].

185. *See id.*

retroactively.[186] But the jury is still out on whether scouting is meaningfully safer.[187]

Furthermore, each of these nonmonetary remedies largely reflected the efforts of sex-abuse survivors, while future-claims representative sat on the sidelines.[188] The role future-claims representatives play in the bankruptcy process is to protect the interests of victims whose identities may not yet be apparent. Nonmonetary commitments are of particular relevance to such victims because those commitments speak to the potential for future change. The advocacy of future-claims representatives is thus incomplete without meaningful consideration of potential nonmonetary remedies.

4. Purdue Pharma

Purdue Pharma has come up in this story several times already. Its bankruptcy illustrates the limitations of nonmonetary remedies in bankruptcy while highlighting areas in which legislative reforms might enable greater success. Purdue Pharma won commercial triumph with its opioid painkiller OxyContin. Despite scientific evidence and credible reports that the drug was being abused, Purdue Pharma, led by its owners, the Sackler family, continued to aggressively market the drug as less addictive than competing opioids.[189] A review of the economic evidence concerning the origins of the opioid crisis found supply-side factors to be a "proximate cause," beginning with the approval of OxyContin and efforts to prescribe it widely.[190] As patients became hooked on OxyContin, they began dying of overdoses or else turning to other addictive and lethal substances to satisfy their addictions.[191] As details of the crisis and its root causes came into focus, Purdue Pharma and the Sacklers entered the spotlight. In 2019,

186. *See* Aaron Derr, *The Chair of Scouting America's Youth Protection Committee Is One of the World's Experts on Child Abuse Prevention*, AARON ON SCOUTING (Sep. 25, 2024), https://blog.scoutingmagazine.org/2024/09/25/the-chair-of-scouting-americas-youth-protection-committee-is-one-of-the-worlds-experts-on-child-abuse-prevention [https://perma.cc/ECK9-S9AL].

187. *See* Anna Menta, *Former Boy Scouts Director Blasts Org as "Still Not Safe for Boys and Girls," in New Netflix Documentary About Sexual Abuse Scandal*, DECIDER (Aug. 30, 2023, 8:00 AM), https://decider.com/2023/08/30/scouts-honor-netflix-documentary-boys-scouts-not-safe-michael-johnson [https://perma.cc/XF7F-BNYF].

188. *See* Jacoby, *supra* note 39, at 1769-70.

189. *See* Meier, *supra* note 109.

190. *See* Johanna Catherine Maclean, Justine Mallatt, Christopher J. Ruhm & Kosali Simon, *Economic Studies on the Opioid Crisis: A Review* 12 (Nat'l Bureau of Econ. Rsch., Working Paper No. 28067, 2021), https://www.nber.org/system/files/working_papers/w28067/w28067.pdf [https://perma.cc/T4RY-4EGY].

191. *See Understanding the Opioid Overdose Epidemic*, CDC (June 9, 2025), https://www.cdc.gov/overdose-prevention/about/understanding-the-opioid-overdose-epidemic.html [https://perma.cc/QLX5-P6EX]; *About Prescription Opioids*, CDC (June 10, 2025), https://www.cdc.gov/overdose-prevention/about/prescription-opioids.html [https://perma.cc/5SUC-UG4X]

facing more than 2,600 separate lawsuits, Purdue Pharma filed a voluntary Chapter 11 petition.[192]

The saga of Purdue Pharma's bankruptcy continued following the Supreme Court's refusal to grant a third-party release to members of the Sackler family facing their own legal claims.[193] The company countered with a new settlement agreement, one containing several nonmonetary provisions. First, the reorganization plan provides for a restructuring of Purdue Pharma. The reorganized entity is to "be operated in a responsible and sustainable manner, balancing (i) the interests of its stakeholders . . . to fund and provide abatement of the opioid crisis, (ii) effective deployment of its assets to address the opioid crisis and (iii) the interests of those materially affected by its conduct."[194] Ownership interests are to be held by a new foundation, not the Sackler family.[195] Second, this new entity is subject to an operating injunction limiting its ability to market and sell opioids.[196] Third, the reorganization plan creates a public document repository, making available "the most significant documents about Purdue, the Sackler family and the opioid crisis."[197] And fourth, separate from payments to creditors, including those harmed by OxyContin, the plan commits the reorganized debtor to "public health initiatives," developing and distributing medicines to treat addiction and reverse overdoses.[198]

This agreement has only just been approved by the bankruptcy judge, so it is too early to tell how successful its nonmonetary provisions will be.[199] Professor Parikh has cited the provision requiring Purdue Pharma to convert to a public-benefit corporation positively, consistent with his argument that conversion to a public-benefit corporation maximizes asset value available to creditors.[200] Meanwhile, the creation of a public document repository is directly responsive to concerns raised by Professors Gluck and

192. *See* Jan Hoffman & Mary Williams Walsh, *Purdue Pharma, Maker of OxyContin, Files for Bankruptcy*, N.Y. TIMES (Nov. 24, 2020), https://www.nytimes.com/2019/09/15/health/purdue-pharma-bankruptcy-opioids-settlement.html [https://perma.cc/TPS2-DH3C].

193. Harrington v. Purdue Pharma L.P., 603 U.S. 204, 216 (2024).

194. Eighteenth Amended Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. and its Affiliated Debtors, *supra* note 121, at 93.

195. *Id.* at 31, 93.

196. *See id.* at 30, 94; *Purdue Pharma L.P. Files New Plan of Reorganization Providing for More than $7.4 Billion in Creditor Distributions*, PURDUE PHARMA (Mar. 18, 2025), https://www.purduepharma.com/news/2025/03/18/purdue-pharma-l-p-files-new-plan-of-reorganization-providing-for-more-than-7-4-billion-in-creditor-distributions [https://perma.cc/7U8P-5MT7].

197. Eighteenth Amended Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. and its Affiliated Debtors, *supra* note 121, at 123.

198. *Id.* at 40, 94.

199. *See* Findings of Fact, Conclusions of Law, and Order Confirming the Eighteenth Amended Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. and Its Affiliated Debtors at 4-5, *In re* Purdue Pharma L.P., No. 19-23649-SHL (Bankr. S.D.N.Y. Nov. 18, 2025).

200. *See* Parikh, *supra* note 114, at 464.

others that bankruptcy stems discovery and disclosure.[201] Historian Antoine Lentacker argues that this information is crucial for the public to understand the opioid epidemic and demand better of the pharmaceutical industry.[202] Public disclosure was also a primary aim of the opioid crisis's survivors, right up there with putting the Sacklers in jail.[203]

However, at least some victims of the opioid crisis have expressed doubts. Ryan Hampton, a recovering OxyContin addict and participant in Purdue Pharma's bankruptcy proceedings as a representative of the unsecured creditors, expresses little confidence that Purdue would succeed or better the world as a public-benefit corporation, calling the proposal "a softball pitch for Purdue."[204] He notes that the plan is "littered with pending business," such as the specific parameters defining the documents that would comprise the public repository.[205] Historian David Herzberg is similarly skeptical, noting that even in selling addiction-treatment medications in furtherance of its public mission, the new Purdue would have a profit objective, limiting the sense in which the company could truly remake itself.[206] Historians might also look cynically upon Purdue Pharma's own past: in earlier litigation, the company committed itself to improving its conduct, but it instead continued to market OxyContin as safe and nonaddictive, paying the fines it incurred without changing its behavior meaningfully.[207]

What explains victims' ambivalence towards nonmonetary remedies in the Purdue Pharma reorganization plan, especially as compared with the effusiveness of USA Gymnastics survivors speaking about the nonmonetary commitments they secured? The principles underlying the Bankruptcy Code provide a clear answer—nonmonetary remedies are appropriate

201. *See* Gluck et al., *supra* note 5, at 525-30.

202. *See* Antoine Lentacker, *How the Purdue Opioid Settlement Could Help the Public Understand the Roots of the Drug Crisis*, U. CAL. (Sep. 2, 2021), https://www.universityofcalifornia.edu/news/how-purdue-opioid-settlement-could-help-public-understand-roots-drug-crisis [https://perma.cc/Q8ZS-F96V].

203. HAMPTON, *supra* note 92, at 223, 227-28; PATRICK RADDEN KEEFE, EMPIRE OF PAIN: THE SECRET HISTORY OF THE SACKLER DYNASTY 433 (2021) ("[Families who had lost loved ones to opioids] often felt a tremendous sense of indignation, but what they wanted . . . was not money but truth.").

204. HAMPTON, *supra* note 92, at 246; *see also id.* at 277 ("Replacing a corporation's entire management team would be an enormous undertaking, one that could take years. And there was no plan—no business plan, no plan for choosing board members, no plan on how to equitably distribute the revenue. What would guarantee that some of the states wouldn't run the company so as to maximize profit? Elected officials could be bought and sold by special interests. The Sacklers' philanthropy had a long reach, and who knew how far that grasp might go. Who oversees the government? Furthermore, there wasn't a whole lot of precedence for this. Turning an evil supercorp into a public utility was unheard of. There was no blueprint. Predictably, the process faltered as lawyers failed to rise to the challenge of their imaginations.").

205. *Id.* at 296.

206. *See* David Herzberg, *Company that Makes OxyContin Could Become 'Public Trust'—What Would that Mean?*, UBNOW (Dec. 5, 2019), https://www.buffalo.edu/ubnow/stories/2019/12/herzberg-purdue-public-trust.html [https://perma.cc/SYP9-8XLF].

207. *See* KEEFE, *supra* note 203, at 294; HAMPTON, *supra* note 92, at 113.

when they further bankruptcy's goal of rehabilitating the debtor and enabling her fresh start. In cases like USA Gymnastics, the tort victims felt real love for the sport, and they wanted to be able to trust its institutions once again. USA Gymnastics was far from blameless. But in a certain sense it embodies the prototypical bankrupt debtor's qualities of "honest but unfortunate." The organization made a terrible mistake, but no one, not even those most hurt by the mistake, wanted to damn the organization forever. Instead, they wanted its mission to advance, unhindered by the abuses they experienced, unmarred by the risks they faced.[208] They wanted justice, and in the words of USA Gymnastics survivors' attorney Megan Bonanni, "justice is not about money . . . . So, as a lawyer, I think we should always be looking for opportunity for nonmonetary reform."[209]

From this vantage point, the case of Purdue Pharma is very different from that of USA Gymnastics. It is nearly impossible to imagine any circumstance in which a recovering OxyContin addict could put her trust in Purdue Pharma again and purchase its products. Purdue Pharma might continue to realize a profit in selling OxyContin, and certain pain patients, like those with terminal cancer, might continue to buy it. But to a certain extent, supporting Purdue Pharma's continued existence entails accepting that current addicts will fuel the reorganization effort. Meanwhile, the Sackler family refused to accept any semblance of fault.[210] They never expressed any intentions of repairing anything or admitting there was anything to be repaired. As a result, Purdue Pharma's nonmonetary commitments ring hollow—not a way for the company to accept responsibility for past mistakes but rather a way to prove that it was innocent and misunderstood all along, that Purdue and its victims were and always had been on the same side. It is also not clear that Purdue's tort victims clamored for nonmonetary relief the way that USA Gymnastics's victims did. Telling the story of his participation on the unsecured creditors' committee, Ryan Hampton's anger and frustration is palpable. His demand is not a reformed

208. Emma Green, *The Gymnast Who Won't Let Her Daughters Do Gymnastics*, ATLANTIC (Aug. 3, 2021), https://www.theatlantic.com/politics/archive/2021/08/rachael-denhollander-olympics-gymnastics-kids/619635/ [https://perma.cc/42KG-HE8J] ("Green: 'It seems like you're in an impossible place where you love gymnastics and it's a big part of who you are and you want to share it with your daughters, but you just don't feel like the world of gymnastics makes it possible for your girls to experience your love of the sport.' Denhollander: 'Yeah, I think that's accurate. It's really disappointing. And it's not fair to them.'").

209. Connolly, *supra* note 80.

210. *See* KEEFE, *supra* note 203, at 6-7 ("One might suppose, given the dark legacy of OxyContin, that [Kathe Sackler] would distance herself from the drug. As [plaintiff's lawyer Paul Hanly] questioned her, however, she refused to accept the very premise of his inquiry. The Sacklers have nothing to be ashamed of or to apologize for, she maintained—because there's nothing wrong with OxyContin. 'It's a very good medicine, and it's a very effective and safe medicine,' she said. Some measure of defensiveness was to be expected from a corporate official being deposed in a multibillion-dollar lawsuit. But this was something else. This was *pride*. The truth is, she said, that she, Kathe, deserved credit for coming up with 'the idea' for OxyContin. Her accusers were suggesting that OxyContin was the taproot of one of the most deadly public health crises in modern history, and Kathe Sackler was outing herself, proudly, as the taproot of OxyContin.").

Purdue Pharma but a liquidated one.[211] When that turns out to be a non-starter, he advocates for monetary relief: an emergency relief fund to pay for recovery resources, a larger payout for victims and their families.[212]

One way to determine a debtor's potential for rehabilitation through nonmonetary remedies, then, is simply to gauge victims' appetite for them. After all, victims are the ones whose trust must be regained, and they are the ones who are best equipped to identify the particular reforms that are likely to rebuild that trust. Where uncertainty remains, the bankruptcy court may have a role to play, exercising discretion as to whether a debtor, despite injuring some segment of the population grievously, is capable of reformation and reintegration into the business landscape. This, of course, is a highly fact-dependent inquiry with no clear answers. While it is relatively clear that an organization like USA Gymnastics has a much greater rehabilitative potential than one like Purdue Pharma, there are likely to be many less-clear cases. However, bankruptcy courts, as courts of equity, are well-equipped to make such case-by-case determinations.

Another failure of the Purdue Pharma bankruptcy is state governments' unwillingness to rally behind tort creditors. States opposed to Purdue's proposed settlement balked at Purdue's refusal to turn over documents and admit responsibility.[213] This is a tremendously different stance from that of the states seeking to limit the dollars tort victims received in the Purdue bankruptcy.[214] Naturally, these states wanted more money for themselves. But it makes perfect sense for states to support victims in obtaining nonmonetary remedies—remedies that will not cut into the states' potential recovery and that may even protect their residents from future harm. The federal government as a creditor can do the same. In *Purdue*, the U.S. government (as a creditor) similarly failed to advocate effectively on behalf of tort creditors. There may even be a role for the U.S. government beyond that of creditor, through support for nonmonetary remedies by the U.S. Trustee.[215]

Other creditors and their representatives can be useful too. Once victims decide they want nonmonetary remedies, the major obstacle in

211. *See* HAMPTON, *supra* note 92, at 10.

212. *Id.* at 152, 271.

213. *See* Colin Dwyer, *Your Guide to the Massive (And Massively Complex) Opioid Litigation*, NPR (Oct. 15, 2019, 9:05 AM), https://www.npr.org/sections/health-shots/2019/10/15/761537367/your-guide-to-the-massive-and-massively-complex-opioid-litigation [https://perma.cc/D8YX-DUDZ].

214. *See supra* note 92 and accompanying text; *see also* Aneri Pattani, *For Opioid Victims, Payouts Fall Short While Governments Reap Millions*, KFF HEALTH NEWS (Apr. 8, 2025), https://kffhealthnews.org/news/article/opioid-settlements-payouts-overdoses-addiction-database [https://perma.cc/GS46-UY8A] (noting that state and county governments received vast settlement payouts after arguing the opioid epidemic harmed their public safety and health systems).

215. The U.S. Trustee has broad authority to intervene in a bankruptcy, of course, but in *Purdue*, it only did so to challenge the third-party release. *See* Clarissa Valenciano, Comment, *Trust Issues: Narrowing the U.S. Trustee's Power in Mass Tort Bankruptcies Post-*Purdue Pharma, 57 TEX. TECH L. REV. 659, 675 (2024).

securing them is the negotiating power of the debtor. It is in the best interests of the reorganization for other creditors to rally behind tort claimants and their particular nonmonetary asks. After all, nonmonetary remedies for tort creditors do not diminish the monetary relief available to other creditors. With nonmonetary remedies in the mix, distribution in bankruptcy is no longer a zero-sum game, and equity and efficiency are no longer at odds.[216] In fact, to the extent that tort creditors are willing to accept nonmonetary remedies in lieu of monetary payment, nonmonetary remedies may increase the payout available to other creditors.

B. The Role for Legislators

This Note argues that nonmonetary remedies can be a powerful tool in bankruptcy, serving the interests of tort creditors and tortfeasor-debtors alike. The at least partial successes of the nonmonetary remedies in the mass-tort bankruptcies described in Section III.A above prove their potential and demonstrate that advocates need not wait for bankruptcy reform to begin pursuing nonmonetary remedies in earnest. At the same time, nonmonetary remedies do not assuage every concern, nor are they always readily available. As bankruptcy law currently stands, tort creditors are disadvantaged in a number of ways: aggregation into a single class; reliance on future-claims representatives; the limited reach of § 524(g)'s procedural protections; the first-mover advantage granted to debtors; and a lack of control over the forum.

Reforms addressing these issues would do much to both improve the bankruptcy system overall and to facilitate the adoption of nonmonetary provisions in Chapter 11 plans. In addition to improving outcomes for tort creditors when nonmonetary remedies are ill-suited or undesired, these reforms would make the pursuit of nonmonetary remedies easier by bolstering tort creditors' bargaining power in negotiations over monetary and nonmonetary remedies alike.[217]

First is the problem of aggregation. Bankruptcy separates creditors into classes based on the nature of their claims, seeking to assign creditors with similar claims to the same class. Committees formally represent classes or groups of creditors in bankruptcy proceedings. A class is deemed to approve a reorganization plan if more than half of creditors in the class,

216. This elevates nonmonetary remedies above punitive damages, which dilute the recovery available to other claimants without punishing the debtor meaningfully. *See* Bussel, *supra* note 33, at 735.

217. As Professor Lipson notes, the importance of bargaining within bankruptcy is on the rise. So-called "bankruptcy bargains"—negotiated agreements between debtors and small groups of stakeholders that limit the options available on the bankruptcy table—may lead to creative solutions, but at the expense of rule of law and special public interests held by creditors who were cut out of the bargain. Nonmonetary remedies only expand the space for bargaining, heightening this dynamic. *See* Jonathan C. Lipson, *"Special": Remedial Schemes in Mass Tort Bankruptcies*, 101 TEX. L. REV. 1773, 1798-99 (2023).

holding at least two-thirds of the amount of claims, vote in its favor.[218] The default rule often lumps different unsecured creditors together. For example, in the Purdue Pharma bankruptcy, opioid victims constituted a minority of the unsecured-creditors class, alongside all of Purdue's other unsecured creditors—governmental entities, tribes, hospitals, pharmacies.[219] But the interests of each of these different types of unsecured creditors may diverge sharply, as became evident in the Purdue bankruptcy when states sought a larger recovery than opioid victims did.[220] In the USA Gymnastics bankruptcy, abuse survivors got their own committee.[221] Even then, however, victims may have differing views and priorities.[222]

Other scholars have highlighted over-aggregation's vices. Professor Jacoby argues that aggregating all tort victims into a single class perpetuates a version of bankruptcy in which tort claimants lack agency and that, as a result, those claimants fail to vote.[223] She points to Supreme Court jurisprudence suggesting that claims might be better grouped according to the severity of personal injury asserted or other distinguishing factors.[224] Professor Rave also critiques the bargaining dynamics within bankruptcy.[225] He argues that multidistrict litigation is better for tort victims than bankruptcy because debtors control the aggregation of claims in bankruptcy.[226] That debtors are in control in bankruptcy is undoubtedly true, suggesting possibilities for bankruptcy reform, perhaps by requiring creditors with certain claims, such as tort creditors, to affirmatively assent to their class assignments.

Currently, creditors can object to their class assignments, but the court may overrule these objections if it determines that the class assignment is

218. 11 U.S.C. § 1126(c) (2024).

219. *See* HAMPTON, *supra* note 92, at 87-89.

220. *See id.* at 289.

221. *See* Mick S. Grewal, Sr., *USA Gymnastics & USOPC Agree to $425 Million Settlement for Survivors of Larry Nassar's Abuse*, LANSING INJURY L. NEWS (Sep. 3, 2021), https://lansing.legalexaminer.com/legal/usa-gymnastics-usopc-agree-to-425-million-settlement-for-survivors-of-larry-nassars-abuse [https://perma.cc/46NB-WGJ9]. Ella Epstein recommends making this common practice. *See* Epstein, *supra* note 16, at 988.

222. Professor Parikh articulates this point clearly with regards to present and future claimants: "This Essay explores how the victim collective is not a monolith, and balkanization may be corporate defendants' true objective; pitting current victims against future victims by arguing that any attempt to fully compensate both groups will lead to significant recovery delays for victims currently suffering." Parikh, *supra* note 43, at 57; *see also* Martinez, *supra* note 162, at 241 (discussing conflicts within the USA Gymnastics survivors' committee).

223. *See* Jacoby, *supra* note 39, at 1756-57, 1763; *see also* Gluck et al., *supra* note 5, at 555 (elaborating on the gerrymandering risks of placing all mass-tort claimants in a single class); Gross, *supra* note 45, at 502 (discussing the consequences of grouping victims in a single class in the Boy Scouts of America case).

224. *See* Jacoby, *supra* note 39, at 1757.

225. *See* D. Theodore Rave, *Bankruptcy v. Multidistrict Litigation for Mass Torts*, 114 CALIF. L. REV. (forthcoming 2025) (manuscript at 35), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5140220 [https://perma.cc/Q9DL-7DQ5].

226. *See id.* (manuscript at 49).

consistent with the Code's permissible classification scheme.[227] As the critiques above demonstrate, the limited range of permissible objections fails to protect creditors' interests adequately. While unsecured creditors hold a veto power ostensibly, they may not be grouped however they wish. Expanding the situations in which creditors may object to class assignments and departing more readily from a default unsecured-creditor class would allow for creditors to group themselves naturally according to the unique harms they have experienced. They could then, as an aligned block, pursue the remedies that address those harms. Congress could amend the Bankruptcy Code to make this change, but it would likely want to also instill safeguards to prevent each tort creditor from operating on her own island. Aggregation is a feature of bankruptcy, not a bug, and modifications to the aggregation procedure should focus on optimizing the aggregation of claims, not curtailing it.

Second, tort creditors whose injuries have not manifested at the time of the bankruptcy filing must rely on the future-claims representative to negotiate on their behalf, but future-claims representatives are not well positioned to advocate powerfully for future claimants. It is impossible for a future-claims representative to be held accountable by a claimant that does not yet exist.[228] Future-claims representatives' feebleness might undermine nonmonetary remedies—and the claimants who would benefit from them—in particular. Nonmonetary remedies are often meant to address the structural problems causing harm in the first place.[229] By averting future harms, effective nonmonetary remedies secured by a future-claims representative may reduce the number of future claimants. There is no better "remedy" for a harm than preventing it. So, effective future-claims representatives are vital for nonmonetary remedies' full use.

However, the Bankruptcy Code does not even require appointment of a future-claims representative.[230] While § 524(g)(4)(B) requires such appointment, it applies only to cases involving liability over asbestos exposure. Additionally, even when a future-claims representative is appointed, they may be an ineffective agent for their not-yet-ascertained principals.[231] Professor Parikh contends the potential for exploitation is exacerbated by the Code's lack of guardrails around future-claims-representative appointment.[232] He offers a variety of suggestions to rectify the situation, including appointment of a committee of future-claims representatives and oversight

227. *See, e.g.*, *In re* City of Detroit, 524 B.R. 147, 246 (Bankr. E.D. Mich. 2014) (overruling creditors' objections to classification).

228. *See* Parikh, *supra* note 43, at 62.

229. *See supra* Section III.A (providing examples of organizations that nonmonetary remedies helped reform structurally).

230. *See* Resnick, *supra* note 32, at 2063.

231. *See* Parikh, *supra* note 43, at 62-63; Samir D. Parikh, *The New Mass Torts Bargain*, 91 FORDHAM L. REV. 447, 489 (2022).

232. *See* Parikh, *supra* note 231, at 489.

in their selection by the U.S. Trustee.[233] Congress could implement similar protections within the Code. And while it is impossible to guarantee effective advocacy by a future-claims representative, increased accountability is likely to improve outcomes for future claimants while creating another opportunity to check for potential nonmonetary remedies.

Third, tort creditors lack special protections elsewhere provided in the Code ensuring that a confirmed reorganization plan enjoys their support. The Code provides a number of additional procedural protections to creditors in the context of asbestos cases under § 524(g), and other tort creditors would greatly benefit from these same protections in negotiating with debtors for nonmonetary remedies. Indeed, there is no shortage of simple, broadly appealing legislative proposals for extending § 524(g)'s innovations beyond the asbestos context.[234] Most importantly, § 524(g) requires victim classes to approve of reorganization plans.[235] This gives victim classes the unilateral power to reject plans if, for example, they are dissatisfied with the nonmonetary provisions contained therein. And § 524(g) sets a high bar for what constitutes a victim class's approval, requiring more than seventy-five percent of the votes of those in the victim class.[236] This helps empower minority interests within the victim class, ensuring nonmonetary provisions are not tailored to exclude their demands.

Fourth, debtors possess a first-movers advantage in proposing the first draft of the reorganization plan. This forms the starting point from which all subsequent negotiations depart. Since the nonmonetary remedies are likely a higher priority for tort creditors than tortfeasor-debtors, the likely effect of this is that nonmonetary remedies are relegated to the last phases of the negotiation, as was the case in the USA Gymnastics bankruptcy. Professors Casey and Macey suggest allowing tort creditors to propose the first draft of the plan instead of debtors.[237] This would allow tort creditors to prioritize nonmonetary remedies according to their own preferences. Although this is a significant shift in longstanding bankruptcy practice and would be resisted by corporate debtors, it is another relatively simple legislative adjustment with broad, populist appeal.

Finally, debtors exercise an advantage in the bankruptcy process through the initial filing itself. Not only can debtors unilaterally choose to move the case into bankruptcy, but they also control where the case will be filed and which judge will decide their—and their creditors'—fate. Forum

233. *See id.* at 496, 498; Parikh, *supra* note 43, at 70. Professors Foohey and Odinet also advocate for multiple claims representatives. *See* Foohey & Odinet, *supra* note 16, at 1327.

234. *See, e.g.*, Parikh, *supra* note 43, at 70; Parikh, *supra* note 231, at 500; Olivia Maier, Note, *Show Me the Money: How Bankruptcy Courts Could Become the Most Equitable Mass Tort Forum*, 30 WASH. & LEE J. CIV. RTS. & SOC. JUST. 195, 199 (2023); Sarah Melanson, Note, *Evaluating Nondebtor Releases: How Purdue Pharma Emphasizes the Need for Congress to Resolve the Decades-Long Debate*, 55 CONN. L. REV. 1, 6 (2023); Bussel, *supra* note 33, at 697.

235. 11 U.S.C. § 524(g)(2)(B)(ii)(IV)(bb) (2024).

236. *Id.*

237. Casey & Macey, *supra* note 30, at 1018.

shopping is a pervasive concern in bankruptcy.[238] Professor Parikh estimates that a majority of cases in bankruptcy are forum shopped.[239] Increased bargaining for nonmonetary remedies may increase the consequences of judicial discretion in the bankruptcy courts, to the extent that judges are determining whether a debtor can be adequately rehabilitated such that nonmonetary remedies are appropriate. Thus, combatting forum shopping is an important way to ensure fairness as tort creditors pursue nonmonetary commitments. Professor Parikh offers a range of suggestions for curbing forum shopping, including through changes to the bankruptcy-venue statute, bankruptcy procedure, and the bankruptcy-court structure.[240] Forum shopping is undoubtedly a difficult problem to solve—and one outside the scope of this Note. But limitations on forum shopping are very likely to empower tort creditors, including in their pursuit of nonmonetary remedies.

Other potentially useful reforms seek to elevate the status of tort creditors even beyond their current disadvantages relative to tortfeasor-debtors. Some scholars argue that tort creditors, as a particularly vulnerable group of involuntary creditors, should receive higher priority under the Bankruptcy Code.[241] This would place tort creditors in a stronger bargaining position to receive nonmonetary commitments. Moreover, this point underscores the fact that nonmonetary remedies are not intended to replace money damages (except to the extent victims prefer nonmonetary remedies to cash) but rather to recognize other ways a court in equity can compensate tort creditors, especially when a defendant-debtor cannot afford full monetary compensation. Whereas all tort creditors may deserve higher priority status by virtue of their role as tort creditors, certain tort creditors may require additional, special protections, based on the relevant equities and circumstances. For example, Juan Martinez suggests protections tailored to the unique vulnerabilities of sex-abuse survivors, including the ability to file bankruptcy claims anonymously and to pursue investigations alongside the bankruptcy case.[242] He offers a mix of statutory and judicial means of achieving these reforms—emphasizing how tort creditors may ultimately benefit from a system of equity.

Some advocates for tort creditors in mass-tort bankruptcies argue that bankruptcy proceedings interfere with the pursuit of nonmonetary forms

238. *See generally* LYNN M. LOPUCKI, HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS (2005) (arguing that states have liberalized their charter laws to situate themselves competitively as attractive forums for corporations).

239. *See* Samir D. Parikh, *Modern Forum Shopping in Bankruptcy*, 46 CONN. L. REV. 159, 159 (2013).

240. *See id.* at 199-205.

241. *See, e.g.*, Casey & Macey, *supra* note 30, at 1011; Gross, *supra* note 45, at 521-30; Christopher M.E. Painter, Note, *Tort Creditor Priority in the Secured Credit System: Asbestos Times, the Worst of Times*, 36 STAN. L. REV. 1045, 1084 (1984) (investigating three levels of tort-creditor priority and finding superpriority to be optimal).

242. *See* Martinez, *supra* note 162, at 231, 239.

of justice.[243] But there is no reason why nonmonetary commitments cannot be accommodated within the bankruptcy forum. Reforming bankruptcy proceedings in ways that empower tort victims will help ensure that debtors and creditors alike in mass-tort bankruptcies get what they want out of the process.

Conclusion

Mass-tort defendants can be very stubborn about admitting fault. What a tragedy it is, then, that an admission of fault, an apology, "is all some victims want."[244] Bankruptcy proceedings that accommodate nonmonetary remedies provide a way for everyone to win: injured parties with claims in bankruptcy can receive an apology, admission of fault by the perpetrators of damage, and commitments to harm mitigation and prevention; defendant-debtors can salvage their reputations without incurring additional legal liability thanks to the hallmark discharge feature of the bankruptcy process, allowing them a true fresh start.

A cynical view of these assertions is that nonmonetary remedies merely continue the trend of corporations getting better treatment than individuals in bankruptcy—full payment on secured debts and full forgiveness on tort claims—while tort creditors get at best an insincere thank you.[245] This is a fair critique, but the reality is that mass-tort bankruptcies are not going anywhere, and those unconvinced that bankruptcy is good for mass torts must nonetheless seek the best outcomes for injured parties within the bankruptcy system. Save for the most egregious applications, courts have embraced the application of bankruptcy law to mass torts.[246] Proposals to get mass torts out of bankruptcy at this stage are mere academic exercises. An expansion of nonmonetary remedies offers instead a viable, practical solution for making the best of a situation tort claimants did not ask for, both as involuntary creditors and as reluctant parties to a bankruptcy proceeding.

But for tort claimants to get a fair shake out of the bankruptcy process, advocates must be bold and creative in securing nonmonetary commitments. Critics of mass-tort bankruptcies acknowledge that money is not the only goal of litigation and that objectives such as information-gathering are lost when a tortfeasor files for bankruptcy.[247] It is the job of advocates

243. *See* Connolly, *supra* note 31.

244. Abel, *supra* note 75, at 264.

245. *See* JACOBY, *supra* note 40, at 63-89.

246. Recently, for example, medical implant maker Exactech filed for bankruptcy, suspending thousands of lawsuits over its allegedly defective products. Dietrich Knauth, *Medical Implant Maker Exactech Files for Bankruptcy After Recall Litigation*, REUTERS (Oct. 29, 2024, 4:22 PM), https://www.reuters.com/legal/litigation/medical-implant-maker-exactech-files-bankruptcy-after-recall-litigation-2024-10-29 [https://perma.cc/FRA9-Y9Z8].

247. Gluck et al., *supra* note 5, at 532.

and bankruptcy courts to prove that these goals and more can be achieved within bankruptcy.

Tort creditors' experiences in bankruptcy reveal how seriously they take nonmonetary commitments. It is time for the bankruptcy bar to catch up. Despite previous skepticism,[248] lawyers ought to take nonmonetary remedies seriously, too. "I know that sounds bananas," said USA Gymnastics survivors' attorney Megan Bonanni of sexual-abuse survivors' preference for institutional change over a bigger check, "but it's true."[249]

248. *See* Lipson, *supra* note 102, at 452-53 (lamenting bankruptcy courts' inability to address the noneconomic problems presented in mass-tort bankruptcies); Winmill, *supra* note 49, at 657 (citing some advocates' views of nonmonetary provisions in reorganization plans as largely unenforceable).

249. THE LITIGATION WAR ROOM, *supra* note 155, at 39:15.