HOW DO "BANKRUPTCY GRIFTERS" DESTROY VALUE IN MASS TORT SETTLEMENTS? *IN RE PURDUE PHARMA* AS A BARGAINING FAILURE

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Bankruptcy has become the endgame of mass tort litigation. Increasingly, corporate tortfeasors have resorted to bankruptcy to halt pending mass tort lawsuits and force parties to renegotiate. This creates bargaining leverage for corporate tortfeasors in settling mass tort liabilities while providing efficient means for tort victims to aggregate their claims. However, one recent development has disrupted this balance: solvent entities, such as the controlling shareholders and parent companies of insolvent firms seeking bankruptcy protection, have abused the bankruptcy process. These "bankruptcy grifters"—to borrow Professor Lindsey Simon's terminology—haul their subsidiaries into bankruptcy while staying outside of bankruptcy themselves. Free of restrictions imposed by the Bankruptcy Code, the "bankruptcy grifters" exploit tort victims and creditors with impunity.

While there has been ample scholarly interest in corporate abuses of the bankruptcy system in mass torts, studies on how such abuses impact the negotiation process are virtually absent. This Article fills the scholarly gap. It examines how "bankruptcy grifters" alter the bargaining dynamics, incentives, and strategies undertaken by each party in the settlement negotiation. Focusing on the Sackler family's role in the high-profile bankruptcy of opioid producer Purdue Pharma, this Article argues that the looming presence of "grifters" generates pervasive principal-agent conflicts that motivate parties to pursue non-cooperative strategies that destroy value. Using Purdue Pharma as a case study, this Article further contends that these negotiation tactics can backfire by creating inefficiencies along structural, behavioral, and cognitive dimensions. This discovery both challenges and enriches established law-and-economics understandings of inefficient bargaining.

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INTRODUCTION

Corporate bankruptcies are the quintessential examples of "bargaining in the shadow of the law."[1] In fact, the norm of business reorganization is to resolve debtor-creditor conflicts through negotiation rather than adjudication.[2] In the United States, the vast majority of business insolvencies[3] are resolved contractually via out-of-court restructurings.[4] Firms that file for bankruptcy typically do so through prepackaged bankruptcies[5]—whereby parties negotiate reorganization plans on the eve of bankruptcy and present them to the bankruptcy judge for rubber-stamp approval.[6] These practices serve the Bankruptcy Code's ("Bankruptcy Code" or "Code") purpose to facilitate "rapid and orderly" debtor rehabilitation, which is manifested in chapter 11's streamlined corporate bankruptcy process.[7] Integral to this process is the Code's recognition that most corporations tend to use bankruptcy as a last resort under regular circumstances,[8] since corporate managers are generally reluctant to let bankruptcy judges intervene in their regular commercial relations.[9]

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[1] *See generally* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (examining the role of contemporary divorce law in providing a framework for bargaining and negotiations outside the courtroom); Robert H. Mnookin & Robert B. Wilson, *Rational Bargaining and Market Efficiency: Understanding* Pennzoil v. Texaco, 75 VA. L. REV. 295 (1989).

[2] *See generally* MARK J. ROE & FREDERICK TUNG, BANKRUPTCY AND CORPORATE REORGANIZATION (4th ed. 2020) (explaining that modern reorganization processes evolved from the equitable receiverships used to reorganize bankrupt railroad companies in the nineteenth century, which relied heavily on negotiations between parties to rework the companies' capital structure).

[3] There is no formal requirement of insolvency to file for bankruptcy. The Bankruptcy Code only requires good faith as a prerequisite for filing. *See* 11 U.S.C. § 109 (2018).

[4] *See* Sarah Borders & Stephen M. Blank, *1-Day Prepackaged Bankruptcy*, BL (Aug. 2021), https://www.bloomberglaw.com/external/document/X36CBBNO000000/bankruptcy-professional-perspective-1-day-prepackaged-bankruptcy.

[5] *See* DENNIS F. DUNNE, DENNIS C. O'DONNELL & NELLY ALMEIDA, *Prepackaged Chapter 11 in the United States: An Overview*, *in* THE ART OF THE PRE-PACK 29, 29–30 (Jacqueline Ingram & Ryan Cattle eds., Global Restructuring Review 2d ed. 2022) ("Prepackaged Chapter 11 cases have been widely used in the United States since the late 1980s and have become ever more prevalent in the last 10 years.").

[6] The quickest chapter 11 corporate reorganization proceeding was completed within 24 hours—it was done through a pre-packaged reorganization deal. *See* Order Approving the Debtors' Disclosure Statement for, and Confirming, the Debtors' Joint Prepackaged Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code, *In re* Mood Media Corp., No. 20-33768 (Bankr. S.D. Tex. Jul. 31, 2020), ECF No. 72; Order Approving Debtors' Disclosure Statement for, and Confirming, the Debtors' Joint Prepackaged Chapter 11 Plan, *In re* Belk, Inc., No. 21-30630 (Bankr. S.D. Tex. Feb. 24, 2021).

[7] *See* Mark J. Roe, *Bankruptcy and Mass Tort*, 84 COLUM. L. REV. 846, 855 (1984) (stating debtor rehabilitation is a basic bankruptcy goal); *see also* 12 U.S.C. § 5365(d) (2018).

[8] *See* Barry E. Adler, *The Law of Last Resort*, 55 VAND. L. REV. 1661 (2002).

[9] *See generally* Anthony J. Casey, *The Creditors' Bargain and Option-Preservation Priority in Chapter 11*, 78 U. CHI. L. REV. 759 (2011) (pointing out the structure of chapter 11 is informed by the law-and-economics understanding that "the optimal system of reorganization must respect nonbankruptcy contract rights while maximizing the expected value of assets in bankruptcy"); Ethan D. Dunn, *Faster, Cost-Effective, and Streamlined Reorganization Under Subchapter V*, MICH. BAR J. (June 2020), http://www.michbar.org/file/barjournal/article/documents/pdf4article3930.pdf (indicating the "traditional Chapter 11 process was often not an option [to most U.S. small businesses] given the length of time, expense, and complexity of the process").

In contrast, corporate tortfeasors anticipating litigation or encumbered with large judgment debt[10] actively seek for what regular debtor-corporations in commercial bankruptcies generally avoid: the bankruptcy court's intervention. Increasingly, such corporate tortfeasors file for bankruptcy as a first resort. Especially for corporate tortfeasors in mass torts, the expansive protections afforded by the automatic stay make chapter 11 an attractive alternative to litigating their cases in class actions or multidistrict lawsuits.[11] Upon filing for a chapter 11 bankruptcy, the company is protected by an automatic stay.[12] The stay will (1) halt law enforcement from collecting on *past* judgments; (2) enjoin all *present* lawsuits against the company; and (3) free the company from *future* responsibility arising from prebankruptcy claims—including claims of the mass tort victims.[13]

However, unlike regular commercial restructurings, mass tort bankruptcies are far from streamlined—they are rife with conflicts and tend to drag on for years.[14] Debtors expend substantial costs, time, and energy to litigate the merits at trial.[15] Even then, there is still a high likelihood that the debtor will be subjected to multimillion-dollar damage awards which may exceed the debtor's value.[16] Once a monetary judgment is entered, the mass tort victims are then added to a long queue of creditors holding debt claims against the debtor.[17] Moreover, mass tort victims may find themselves struggling to get what they are rightfully owed after the tortfeasors file for bankruptcy, even though the victims have already won their cases in state and federal courts.[18] Whereas commercial creditors are typically sophisticated parties who investigate their debtors and assume the costs of lending,[19] mass tort creditors are often unsophisticated. They have few opportunities to investigate the debtors,

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10 *See Judgment Debt*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/judgment_debt (June 2020) ("When a person against whom a monetary judgment has been entered, the person owes a judgment debt.").

11 *See generally* C. Anne Malik, *Unlocking the Code: The Value of Bankruptcy to Resolve Mass Torts*, U.S. CHAMBER OF COM. INST. FOR LEGAL REFORM (Dec. 2022), https://instituteforlegalreform.com/research/unlocking-the-code-the-value-of-bankruptcy-to-resolve-mass-torts/ (arguing the bankruptcy system provides a simpler and more effective means for providing relief to current and future tort claimants than the mass tort litigation system).

12 *See* 11 U.S.C. § 362(a)(1) (2018).

13 *See* S. ELIZABETH GIBSON, JUDICIAL MANAGEMENT OF MASS TORT BANKRUPTCY CASES 1 (2005).

14 According to a recent RAND report, the average duration of an asbestos bankruptcy case is 6 years. *See* Stephen J. Carroll et al., *Asbestos Litigation*, RAND INST. FOR CIV. JUST. 1, 118–19 (2005).

15 *See generally* RAND CORP. RSCH. BRIEF (1995), https://www.rand.org/pubs/research_briefs/RB9021.html (explaining the expansion of mass tort litigation starting in the 1980s and how parties have attempted to reduce litigation costs through alternative tools such as consolidation and creation of compensation funds).

16 *See generally* Mass Tort Case Updates 2023, CASE WORKS, https://yourcaseworks.com/mass-tort-updates/ (Jan. 31, 2024) (containing a broad list of various mass tort filings and their subsequent updates).

17 *See Judgment Debt*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/judgment_debt (June 2020) ("When a person against whom a monetary judgment has been entered, the person owes a judgment debt.").

18 *See* Anthony J. Casey & Joshua C. Macey, *In Defense of Chapter 11 for Mass Torts*, 90 U. CHI. L. REV. 973, 977 (2023).

19 *See* Casey, *supra* note 10, at 762 n.12.

suffer unanticipated losses, and own little stake in the debtor's business relationship.[20] Thus, commercial and tort creditors have opposite goals in a bankruptcy: while the former tend to prioritize corporate rehabilitation and sometimes voluntarily write off debts to enable debtors to resume their businesses, the latter desire to be "made whole" by getting every penny they are owed for the compensation of their sufferings.[21] The adverse interests between tort creditors and commercial creditors often turn the debtor's bankruptcy process into a protracted warfare.

As such, chapter 11 creates opportunities for abuse.[22] Some solvent third-parties to the bankruptcy, such as the controlling shareholders and parent holding entities of the debtor-company, have used chapter 11 to extract substantial benefits from creditors and tort victims.[23] These "bankruptcy grifters"—to borrow Professor Lindsey Simon's terminology in her seminal *Yale Law Journal* article—have hauled their subsidiaries into bankruptcy while staying outside of bankruptcy themselves.[24] Some have even shifted all debt liabilities to an empty-shell subsidiary, leaving the tort victims with nothing to claim in a reorganization.[25] Experts and practitioners have generally labeled such entities as "parasites" of the bankruptcy system.[26]

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[20] *See* Casey & Macey, *supra* note 18, at 977–79, 997, 999, 1008 (arguing that, without the option of chapter 11, tort victims in several high-profile cases would have received a larger payout than other victims because of collective action problems resulting in unequal distribution due to their lack of sophistication, and that the bankruptcy procedural rights are designed to protect creditors from opportunistic maneuvers by debtors or other parties with more sophistication).

[21] *See* Vincent S.J. Buccola & Joshua C. Macey, *Claim Durability and Bankruptcy's Tort Problem*, 38 YALE J. REGUL. 766, 809 (2021).

[22] In addition to the advent of "bankruptcy grifters," chapter 11 has given rise to a number of abuses. *See, e.g.*, *Abusing Chapter 11: Corporate Efforts to Side-Step Accountability Through Bankruptcy: Hearing before U.S. Senate Committee on the Judiciary*, 117th Cong. (2022) (testimony of Hon. Judith K. Fitzgerald (Ret.)). In this case, Purdue Pharma represents the confluence of three types of abuse in bankruptcy: "(1) increasingly aggressive and coercive restructuring techniques like the poison pill that lock in the determination of subsequent decisions in the bankruptcy; (2) the lack of [meaningful] appellate review for many key bankruptcy issues; and (3) the rise of [forum-shopping and] 'judge-shopping,' facilitated by bankruptcy courts' local rules that enable debtors to handpick their judge." *See* Adam J. Levitin, Purdue*'s Poison Pill: The Breakdown of Chapter 11's Checks and Balances*, 100 TEX. L. REV. 1079, 1104–05 (2022).

[23] *See* Lindsey D. Simon, *Bankruptcy Grifters*, 131 YALE L.J. 1154, 1154 (2022) (noting grifters exploit the bankruptcy system by receiving the benefits of bankruptcy without incurring any of the costs).

[24] *See id.* at 1154, 1158 (highlighting the Sacklers, Honda, Wal-Mart, and USOPC as mass-tort defendants who got the relief they were looking for without filing for chapter 11).

[25] For example, Johnson & Johnson ("J&J") engaged in a maneuver called the "Texas Two-Step." *See* Mark Roe & William Organek, *The Texas Two-Step: The Code Says It's a Transfer*, HARV. L. SCH. BANKR. ROUNDTABLE (Jul. 19, 2022), https://blogs.harvard.edu/bankruptcyroundtable/2022/07/19/texas-two-step-and-the-future-of-mass-tort-bankruptcy-series-the-texas-two-step-the-code-says-its-a-transfer/. In anticipation of bankruptcy, J&J moved assets and liabilities from one corporate entity to another via a divisive merger that split the assets and liabilities. *See id.* (explaining how J&J separated its talc liabilities from its extensive assets). The entity (usually a subsidiary) with all the liabilities files for bankruptcy, while the other (usually the parent company) continues the operation as usual. *See id.*

[26] *See* Simon, *supra* note 23, at 1154 (comparing grifters to parasites because they derive benefits from the host bankruptcy); *see also* Samir D. Parikh, *Mass Exploitation*, 170 U. PA. L. REV. ONLINE 53, 57 (2022) (observing grifters seize the Bankruptcy Code's benefits while leaving future victims without recovery).

Despite ample scholarly interest in the doctrinal and policy implications of "bankruptcy grifters" in mass torts,[27] studies on how these "grifters" impact chapter 11 negotiation are virtually absent.[28] This Article seeks to fill the scholarly gap. It argues that the looming presence of "grifters" generated pervasive principal-agent conflicts that motivated parties to pursue non-cooperative, value-destroying strategies. Because "grifters" often have different interests than their debtor-subsidiaries[29] and are insulated from insolvency risks themselves,[30] they are incentivized to pursue strategies that enrich themselves at the expense of everyone whom the Bankruptcy Code intends to protect.

In re Purdue Pharma is one of these cases.[31] Arguably the highest-profile mass tort bankruptcy—and the greatest bargaining fiasco—of this decade, *In re Purdue Pharma* illustrates how "grifters" like the Sackler family (owners of Purdue Pharma) abused the bankruptcy process in a way that the bankruptcy court is powerless to stop. Instead of filing for bankruptcy themselves, the Sacklers transferred assets away from Purdue Pharma, pulled it into bankruptcy, and used the bankruptcy as a bargaining chip to demand exploitative liability releases from the tort victims.[32] Yet, the outcome of *In re Purdue Pharma* is perhaps best described as a "lose-lose" negotiation: the Sacklers got what they bargained for but lost everything else.[33] Purdue Pharma paid a large fine, bled its treasury dry, gave up its most valuable assets, and even conceded away its autonomy.[34] The tort victims received a meager settlement and signed a "nonconsensual non-debtor release" that forced them to abandon all present and future claims against the tortfeasors.[35] Even the bankruptcy judge who approved the final plan called it a "bitter result."[36] To make matters worse, the issue of

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[27] *See, e.g.*, Ralph Brubaker, *Mandatory Aggregation of Mass Tort Litigation in Bankruptcy*, 131 YALE L.J. F. 960, 960 (2022); Natalie R. Earles, *The Great Escape: Exploring Chapter 11's Allure to Mass Tort Defendants*, 82 LA. L. REV. 519, 523 (2022); Andrew D. Bradt, Zachary D. Clopton & D. Theodore Rave, *Dissonance and Distress in Bankruptcy and Mass Torts*, 91 FORDHAM L. REV. 309, 309 (2022).

[28] The few scholars who were attentive to bargaining in chapter 11 tend to approach it from a macroeconomic theoretical level. *See generally* Anthony J. Casey, *Chapter 11's Renegotiation Framework and the Purpose of Corporate Bankruptcy*, 120 COLUM. L. REV. 1709 (2020) (focusing the chapter 11 bargaining discussion on costs and information, and not grifters).

[29] *See infra* Parts II.B and III.B.

[30] *See infra* Parts I.A and III.A.

[31] *See* William Organek, *"A Bitter Result": Purdue Pharma, a Sackler Bankruptcy Filing, and Improving Monetary and Nonmonetary Recoveries in Mass Tort Bankruptcies*, 96 AM. BANKR. L.J. 361, 363 (2022) (explaining how the Sacklers never filed for bankruptcy themselves and were released from all civil liability).

[32] *See id.* at 367–68 (noting hundreds of millions in noncash transfers were made to members of the Sackler family to shield these assets from creditors).

[33] *See* Mediator's Report, *In re* Purdue Pharma L.P., No. 19-23649 (Bankr. S.D.N.Y. July 7, 2021), ECF No. 3119 [hereinafter Mediator's Report] (stating the Sacklers paid millions in incremental cash payments, but many private documents became public).

[34] *See* Mediator's Fourth Interim Report, *In re* Purdue Pharma L.P., No. 19-23649 (Bankr. S.D.N.Y. Mar. 3, 2022), ECF No. 4409.

[35] *See* Twelfth Amended Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. and Its Affiliated Debtors, *In re* Purdue Pharma L.P., No. 19-23649 (Bankr. S.D.N.Y. Sept. 2, 2021), ECF No. 3726.

[36] *In re* Purdue Pharma, 633 B.R 53, 93 (Bankr. S.D.N.Y. 2021).

nonconsensual non-debtor liability release has invited nationwide criticism[37] and the reorganization plan was subsequently found to be illegal by the district court.[38] Despite the appellate court's subsequent reversal the district court's decision,[39] this issue has generated a deep circuit split garnered widespread congressional attention, only to be reversed again by the Supreme Court.[40] After exhausting millions of dollars, three years of bitter re-negotiations, and igniting nationwide turmoil, the parties remain in deadlock.

How did the negotiating parties reach a "lose-lose" outcome after investing significant time, energy, and resources? From a classical law-and-economics standpoint, the Sacklers should have extracted substantial benefits from the other negotiating parties due to the bargaining leverages they gained from abusing the bankruptcy process.[41] Even if the bargain was a net inefficiency in the aggregate, the Sacklers should have won by a large margin. Conventional theories predict negotiators with the greatest bargaining leverage—*i.e.*, resource availability and informational advantage—would achieve the best outcome.[42] Yet, in this case, the prediction cannot be further from reality. Not only did Purdue Pharma reach an inefficient outcome, but the grifters themselves—the Sacklers—have also fared

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37 *See, e.g.*, Phil Helsel, *States Vow to Fight Purdue Pharma Bankruptcy Plan That Shields Sacklers From Opioid Lawsuits*, NBC NEWS (Sept. 1, 2021), https://www.nbcnews.com/news/us-news/judge-will-approve-purdue-pharma-bankruptcy-shields-sacklers-opioid-lawsuits-n1278319; Conn. Office of Att'y's Gen., *Attorney General Tong Responds to Purdue Bankruptcy* (Sept. 1, 2021), https://portal.ct.gov/AG/Press-Releases/2021-Press-Releases/Attorney-General-Tong-Responds-to-Purdue-Bankruptcy-Decision ("This decision is a slap in the face to the millions of suffering and grieving Americans who have lost their lives and loved ones due to the Sacklers calculated and craven pursuit of opioid profits."). In addition to garnering media and public attention, *In re* Purdue Pharma also prompted Congress to act by proposing legislation that directly addressed bankruptcy abuses, such as the "SACKLER Act" (shorthand for "Stop shielding Assets from Corporate Known Liability by Eliminating non-debtor Releases Act"). *See* SACKLER Act, H.R. 2096, 117th Cong. (2021).

38 *See, e.g.*, Stephen Lerner & Jihyun Park, *District Court Rejects Purdue Pharma's Chapter 11 Plan Over Non-Consensual Releases Provided to Sackler Family*, 11 NAT'L L. REV. 355 (2021); Decision and Order on Appeal, *In re* Purdue Pharma L.P., No. 7:21-cv-08566 (S.D.N.Y. Dec. 16, 2021), ECF No. 100.

39 *See, e.g.*, Marc S. Casarino, Katie Barksdale & Andrea Vega Travieso, *Second Circuit Confirms Use of Third-Party Releases in Chapter 11 Bankruptcy Plans—Circuit Split Remains*, KENNEDYS (June 21, 2023), https://kennedyslaw.com/en/thought-leadership/article/2023/second-circuit-confirms-use-of-third-party-releases-in-chapter-11-bankruptcy-plans-circuit-split-remains/.

40 Circuit Judge Richard Wesley, writing for the majority, has invited the Supreme Court or Congress to step in and provide clarification. *See In re* Purdue Pharma, 69 F.4th 45, 90–91 (2d Cir. 2023) ("Regardless of the right answer, the majority's answer pins this Circuit firmly on one side of a weighty issue that, for too long, has split the courts of appeals . . . . [A] non-debtor's ability to be released through bankruptcy turns on where a debtor files . . . . Absent direction from Congress . . . or the High Court, the answer is a function of geography."); *see also* Christopher Graham, *Third-Party Releases Possibility Headed to Scotus Following Purdue Pharma Plan Confirmation*, JDSUPRA (Jun. 6, 2023), https://www.jdsupra.com/legalnews/third-party-releases-possibly-headed-to-9317339/. On December 4, 2023, the Supreme Court heard oral arguments on the narrow issue of whether the Bankruptcy Code authorizes the bankruptcy judge to authorize a nonconsensual non-debtor release as part of the Chapter 11 reorganization plan. Then, on June 27, 2024, the Supreme Court reversed the Second Circuit's decision, holding the reorganization plan illegal. *See* Harrington v. Purdue Pharma L.P., 144 S. Ct. 2071, 2071-73 (2024).

41 *See infra* Part III.A.1.

42 *See infra* Part III.A.2.

worse than others despite possessing greater bargaining power.[43] Moreover, the Sacklers' struggle to close the floodgates to unlimited and uncertain tort liability through the nonconsensual non-debtor release has only stirred further lawsuits and public animosity.[44]

The fatal omission of conventional law-and-economics, this Article argues, is that it ignores the dynamic and reactive nature of bargaining. A negotiation is not a one-time satisfaction of preferences. Rather, it is an interactive process where parties constantly redefine what their interests are via mutual signaling, information-sharing, strategizing, re-evaluation, and adaptation.[45] Consequently, negotiators that have enormous bargaining power can mistakenly play a purely distributive game instead of a value-creating one.[46] This is evident in what occurred in *In re Purdue Pharma*: the Sacklers' myopic pursuit for enhancing their bargaining power caused them to lose sight of value-creating opportunities.[47] This resulted in pushback from other parties that cost any victories they would have gotten from exploiting the power imbalance. Consequently, in reacting to the Sacklers' abusive practices, all other parties wrapped themselves in a value-destroying spiral.[48]

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[43] Although the bankruptcy judge had confirmed a reorganization plan that contained the nonconsensual non-debtor liability release, the Sacklers agreed to contribute $4.325 billion to a settlement trust to pay out tort claims against both Purdue Pharma and the Sacklers. *See* Twelfth Amended Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. and its Affiliated Debtors, *In re* Purdue Pharma L.P., No. 19-23649 (Bankr. S.D.N.Y. Sept. 2, 2021), ECF No. 3726. During subsequent appeals, the Sacklers increased their personal contribution to approximately $6 billion in further attempts to reach settlement. *See* Notice of Hearing Regarding Motion of Debtors Pursuant to 11 U.S.C. § 105(a) and 363(b) for Entry of an Order Authorizing and Approving Settlement Term Sheet, *In re* Purdue Pharma L.P., No. 19-23649 (Bankr. S.D.N.Y. Mar. 3, 2022), ECF No. 4410 ("[A]ggregate payments by the Sackler Mediation Parties would total $5.5 to $6.0 billion.").

[44] *See, e.g.*, Jan Hoffman & Katie Benner, *Purdue Pharma Pleads Guilty to Criminal Charges for Opioid Sales*, N.Y. TIMES (Sept. 1, 2021), https://www.nytimes.com/2020/10/21/health/purdue-opioids-criminal-charges.html ("The Justice Department announced an $8 billion settlement with the company. Members of the Sackler family will pay $225 million in civil penalties but criminal investigations continue."); Ed Markey, *Senators Urge DOJ to Investigate Sackler Family Members for Role in Fueling Opioid Epidemic* (Feb. 16, 2022), https://www.markey.senate.gov/news/press-releases/senators-urge-doj-to-investigate-sackler-family-members-for-role-in-fueling-opioid-epidemic (highlighting multiple senators' criticisms of the nonconsensual non-debtor release).

[45] Drawing inspiration from game-theory, modern law-and-economics models have started to pay more attention to the dynamic nature of bargaining. *See, e.g.*, Akira Okada, *Dynamic Bargaining with Voluntary Participation and Externalities*, 75 ECON. THEORY 427, 442 (2023); Renee Bowen, Ilwoo Hwang & Stefan Krasa, *Personal Power Dynamics in Bargaining* 23 (Nat'l Bureau of Econ. Rsch., Working Paper No. 27981, 2022).

[46] A distributive game is one where negotiation is characterized as zero-sum. *See generally* Pon Staff, *Expanding the Pie: Interactive Versus Distributive Bargaining Negotiation Strategies*, HARV. L. SCH.: PROGRAM ON NEGOT. BLOG (Oct. 4, 2022), https://www.pon.harvard.edu/daily/negotiation-skills-daily/negotiation-skills-expanding-the-pie-integrative-bargaining-versus-distributive-bargaining/.

[47] *See infra* Part III.A.2.

[48] One of the central purposes of the federal bankruptcy system is to provide efficient means for debt resolution by overcoming race-to-the-courthouse dynamics and collective action problems between the insolvent firm's creditors. *See* Casey & Macey, *supra* note 18, at 995–97 (2023). But, as this Article aims to show, the value-destroying outcome of *In re Purdue Pharma* casts doubt on whether this statutory purpose can be adequately fulfilled in mass tort bankruptcies that involve abuses by bankruptcy grifters.

The remainder of this Article is as follows. Part I paves the factual foundations of *In re Purdue Pharma* and examines how negotiations for Purdue Pharma's chapter 11 reorganization unfolded. Part II focuses on what interests, considerations, and alternatives underlie the negotiation strategies undertaken by each party. Part III, which is the centerpiece of this Article, offers a new theory of bargaining failure that both challenges and enriches the existing law-and-economics consensus. It arrives at the rather unsettling conclusion that having bargaining power does not necessarily lead to better negotiation outcomes. Part IV illuminates new fields of inquiry by illustrating how new bargaining paradigms can help end the bankruptcy grift. The final Part also explores legislative options to radically reform the federal bankruptcy system by drawing lessons from the negotiations literature.

I. BACKGROUND: WHAT HAPPENED IN *IN RE PURDUE PHARMA*?

A. Shifting the Battlefront: From Opioid Litigation to Chapter 11

On September 15, 2019, Purdue Pharma ("Purdue"), the manufacturer of opioid pain medication OxyContin®, shocked the nation by filing for chapter 11 in the Southern District of New York.[49] By the time of Purdue's bankruptcy, the company and its owner, the Sackler family, were inundated by an influx of products liability

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[49] *In re* Purdue Pharma involves the reorganization of multiple debtors in a corporate group headed by the parent holding entity, Purdue Pharma L.P. Other debtors in this case include:

> (1) Purdue Pharma Inc.; (2) Purdue Transdermal Technologies L.P.; (3) Purdue Pharma Manufacturing L.P.; (4) Purdue Pharmaceuticals L.P.; (5) Imbrium Therapeutics L.P.; (6) Adlon Therapeutics L.P.; (7) Greenfield BioVentures L.P.; (8) Purdue Pharmaceutical Products L.P.; (9) Purdue Neuroscience Company; (10) Seven Seas Hill Corp.; (11) Ophir Green Corp.; (12) Purdue Pharma of Puerto Rico; (13) Avrio Health L.P.; (14) Nayatt Cove Lifescience Inc.; (15) Button Land L.P.; (16) Rhodes Associates L.P.; (17) Paul Land Inc.; (18) Quidnick Land L.P.; (19) Rhodes Pharmaceuticals L.P.; (20) Rhodes Technologies; (21) UDF LP; (22) SVC Pharma LP; and (23) SVC Pharma Inc.

The official committee of unsecured creditors (*i.e*., "Creditors' Committee"), appointed by the U.S. Trustee for the Southern District of New York, consists of the following entities and persons:

> (1) Blue Cross and Blue Shield Association; (2) CVS Caremark Part D Services, L.L.C. and CaremarkPCS Health, L.L.C.; (3) Ryan Hampton; (4) Cheryl Juaire; (5) LTS Lohmann Therapy Systems, Corp.; (6) Pension Benefit Guaranty Corporation; (7) Walter Lee Salmons; (8) Kara Trainor; and (9) West Boca Medical Center.

See Disclosure Statement for Chapter 11 Plan for Purdue Pharma L.P. and Its Affiliated Debtors, *In re* Purdue Pharma L.P., No. 19-23649 (Bankr. S.D.N.Y. Mar. 15, 2021), ECF No. 2488 at 1, 36. For the purposes of this Article, I have simplified the parties in this case into three camps: (1) the *tort claimants*; (2) the *debtors* (Purdue and its business affiliates); and (3) the *Sackler family*. I excluded the Creditors' Committee from the analysis because it did not play a material role in the negotiation dynamic I identified in this Article.

lawsuits—both class actions and Multi-District Litigations ("MDL")[50]—from twenty-three states and two thousand local governments.[51] Purdue's bankruptcy sought to resolve more than 2,600 OxyContin®-related lawsuits brought against the company.[52] In addition to resolving Purdue's own tort liabilities, Purdue's bankruptcy aimed to protect the company's puppet masters—members of the Sackler family who owned and controlled Purdue—from exposure to direct and derivative liability stemming from the Sacklers' misconduct in the opioid crisis.[53] The automatic stay, which puts a stop on the mass tort lawsuits seeking recovery against Purdue and the Sacklers, provided the co-tortfeasors breathing room from the looming MDL trial pressure.[54]

OxyContin® was one of the principal culprits of the opioid overdose epidemic, a nationwide crisis which claimed more than 564,000 lives from 1999 to 2020.[55] In the years leading up to Purdue's bankruptcy, more than seventy-five percent overdose deaths involved the usage of an opioid.[56] About two million people are living with varying forms of opioid-related substance use disorder.[57] To make matters worse, the epidemic carried devastating effects beyond the immediate victims of overdose.[58]

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[50] Multidistrict litigation consolidates pretrial proceedings in individual cases. Most mass torts are handled in MDL today, and MDL makes up more than a third of all cases in federal court. But mass tort defendants see bankruptcy as an attractive alternative to MDL because the jurisdiction of bankruptcy court is broader. MDLs cannot consolidate state-law-based cases that lie outside of federal jurisdiction. Bankruptcy, in principle, can. *See, e.g.*, Nora Freeman Engstrom, *The Lessons of* Lone Pine, 129 YALE L.J. 2, 7 (2019); Margaret S. Williams, *The Effect of Multidistrict Litigation on the Federal Judiciary Over the Past 50 Years*, 53 GA. L. REV. 1245, 1270–76 (2019).

[51] *Opioid Lawsuits Generate Payouts, Controversy*, AM. BAR ASS'N NEWS (Sept. 15, 2019), https://www.americanbar.org/news/abanews/aba-news-archives/2019/09/opioid-lawsuits-generate-payouts-controversy/.

[52] *See* Voluntary Petition for Non-Individuals Filing for Bankruptcy, *In re* Purdue Pharma L.P., No. 19-23649 (Bankr. S.D.N.Y. 2019), ECF No. 1 at 19.

[53] *See id.*

[54] *See* Renae Merle, *Judge in Purdue Pharma Bankruptcy Case Extends Lawsuit Protection to Sacklers*, WASH. POST (Nov. 6, 2019), https://www.washingtonpost.com/business/2019/11/06/judge-purdue-pharma-bankruptcy-extends-lawsuit-protection-sacklers/; The States' Coordinated Opposition to the Debtors' Motion for Preliminary Injunction of States' Law Enforcement Actions Against the Sacklers, *In re* Purdue Pharma L.P., No. 19-08289 (Bankr. S.D.N.Y. Oct. 4, 2019), ECF No. 41 at 23–24 [hereinafter States' Coordinated Opposition].

[55] In addition to OxyContin overdose, other substances responsible for the opioid crisis include the widespread unregulated usage of illicitly manufactured synthetic opioid fentanyl. *See Fentanyl*, CTRS. FOR DISEASE CONTROL AND PREVENTION (CDC) (June 1, 2022), https://www.cdc.gov/opioids/basics/fentanyl.html.

[56] *See Opioids: Understanding the Epidemic*, CTRS FOR DISEASE CONTROL AND PREVENTION (June 1, 2022), https://www.cdc.gov/opioids/basics/epidemic.html.

[57] *See* Alexander M. Dydyk, Nitesh K. Jain & Mohit Gupta, *Opioid Use Disorder*, NAT'L LIBR. MED., https://www.ncbi.nlm.nih.gov/books/NBK553166/ (July 21, 2023) ("Opioid use disorders affect over 16 million people worldwide, over 2.1 million in the United States . . . .").

[58] *See, e.g.*, William S. Shaw, Cora Roelofs & Laura Punnett, *Work Environment Factors and Prevention of Opioid-Related Deaths*, 110 AM. J. PUB. HEALTH 1235, 1238 (2020) ("Perhaps the most compelling case to engage employers in opioid prevention is a financial one, as employer costs for opioid use, OUD treatment, and related health care and disability insurance are substantial.").

Nearly 80 infants a day are born with opioid withdrawal symptoms.[59] Families with members suffering opioid addiction exhaust their savings to treat and rehabilitate their loved ones.[60] The annual aggregate burden of opioid abuse on the U.S. economy is estimated to be $78.5 billion.[61]

Purdue accelerated the crisis and monetized it better than any other drug company. Instead of promoting OxyContin® to physicians who exclusively treated the terminally ill, Purdue "moved the drug to the mainstream by soliciting general practitioners, dentists, gynecologists, and physical therapists."[62] To maximize profits, Purdue "provided kickbacks to each cog in the distribution chain."[63] "[W]holesalers received rebates in exchange for keeping OxyContin off prior-authorization lists, pharmacists received kickbacks on their initial orders, patients received coupons for thirty-day starter kits, medical academics received grants for research on the benefits of pain management, and politicians received donations from the company and its founding family."[64] Purdue's aggressive advertising tactic directly contributed to the epidemic. The opioid victims sought to hold Purdue liable on defective design, failure to warn, and misrepresentation grounds.[65]

The Sacklers were among the "architects and the principal beneficiaries of the opioid crisis."[66] For one, OxyContin® was extremely profitable: during the ten years preceding Purdue's bankruptcy, the Sackler family received $13 billion in dividends solely from Purdue's sale of OxyContin®.[67] From 2008 to 2017, the Sacklers pulled more than $10 billion OxyContin® profits out of the company and into spendthrift trusts designed to shield assets away from the reach of creditors.[68] These spendthrift trusts, domiciled both domestically and abroad, were established principally for the benefit of Mortimer and Raymond Sackler—Purdue's co-owners.[69] Other

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[59] *See Data and Statistics About Opioid Use During Pregnancy*, CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/pregnancy/opioids/data.html (March 21, 2023). *See generally Neonatal Abstinence Syndrome*, STAN. CHILD.'S HEALTH, https://www.stanfordchildrens.org/en/topic/default?id=neonatal-abstinence-syndrome-90-P02387 (last visited Feb. 16, 2023).

[60] *See, e.g.*, Geoff Mulvihill, *Opioid Victims Can Begin Filing Claims Against Purdue Pharma*, PBS NEWS HOUR (Jan. 24, 2020, 5:34 PM), https://www.pbs.org/newshour/health/opioid-victims-can-begin-filing-claims-against-purdue-pharma.

[61] *See* Curtis S. Florence, Chao Zhou, Feijun Luo & Likang Xu, *The Economic Burden of Prescription Opioid Overdose*, *Abuse, and Dependence in the United States, 2013*, 54 MED. CARE, 901, 901 (2016).

[62] Samir D. Parikh, *The New Mass Torts Bargain*, 91 FORDHAM L. REV. 447, 451 (2022).

[63] *Id.*

[64] *Id.*

[65] *See generally* Rebecca L. Haffajee & Michelle M. Mello, *Drug Companies' Liability for the Opioid Epidemic*, 377 N. ENGL. J. MED. 2301, 2301 (2017).

[66] The Multi-State Governmental Entities Group's Opposition to Debtors' Motion for a Preliminary Injunction, at 6, Purdue Pharma L.P v. Commonwealth of Massachusetts (*In re* Purdue Pharma L.P.), Adv. Pro. No. 19-08289, (Bankr. S.D.N.Y. Mar. 3, 2019), ECF No. 37.

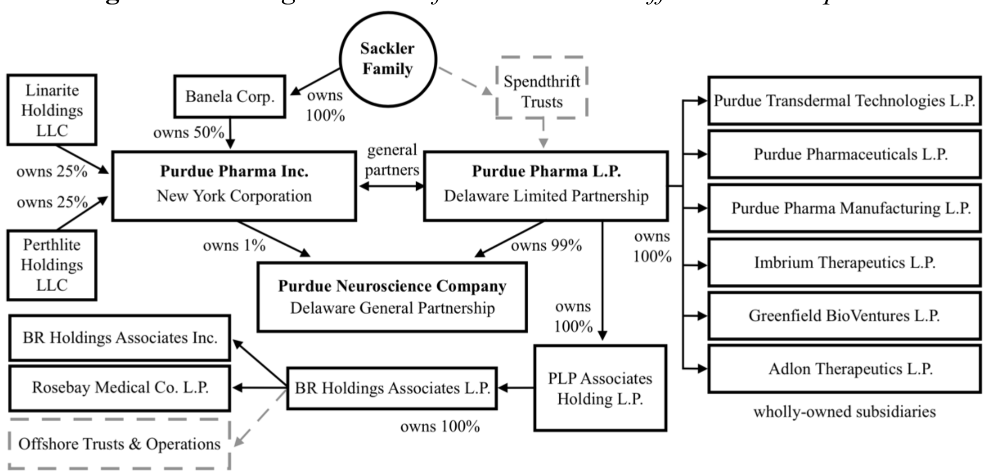
[67] *See* Rachel Sandler, *The Sacklers Made More Than $12 Billion in Profit From OxyContin Maker Purdue Pharma, New Report Says*, FORBES (Oct. 4, 2019), https://www.forbes.com/sites/rachelsandler/2019/10/04/the-sacklers-made-12-to-13-billion-in-profit-from-oxycontin-maker-purdue-pharma-new-report-says/?sh=a808de4477da.

[68] *See* Organek, *supra* note 31, at 367–68.

[69] *See id.* at 368.

beneficiaries of the spendthrift trusts included members of the Sackler family who held various positions as officers and directors of Purdue Pharma as well as the company's affiliates or subsidiaries.[70] Assets shielded by these trusts were immune from lien enforcements and levies to satisfy judgments against beneficiaries.[71] These trusts can even shield assets from the bankruptcy court.[72] The following figure illustrates the Sacklers' ties with Purdue and its debtor-affiliates.[73]

Figure 1: *Holding Structure of Purdue and Its Affiliates in Chapter 11*



Note: Figure 1 presents a simplified version of the organizational structure of Purdue Pharma corporate group, based on the chapter 11 disclosure statements provided by the debtor and its affiliates.

Despite the enormity of Purdue's bankruptcy, it was not entirely unforeseeable. Many businesses that anticipate insolvency and litigation risks have prepared for chapter 11 even years before any lawsuit arises. Companies involved in the oil, gas, and mineral extraction business have routinely used bankruptcy-remote entities to

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70 *In re* Purdue Pharma, 635 B.R. 26, 40–41 (Bankr. S.D.N.Y. 2021) (the Sackler family became "one of the top twenty wealthiest families in America in 2015, with a reported net worth of $14 billion dollars").

71 *See* RESTATEMENT (SECOND) OF TRUSTS §§ 152, 153 (AM. L. INST. 1959); *see also Scheffel v. Krueger*, 782 A.2d 410 (N.H. 2001).

72 *See* 11 U.S.C. § 541(c)(2) (2018) ("A restriction on the transfer of a beneficial interest in the debtor in a trust that is enforceable under applicable non-bankruptcy law is enforceable in a case under this title.").

73 *See, e.g.*, Disclosure Statement for Chapter 11 Plan for Purdue Pharma L.P. and Its Affiliated Debtors, *In re* Purdue Pharma L.P., No. 19-23649 (Bankr. S.D.N.Y., Mar. 15, 2021), ECF No. 2488, at app. E; Notice of Suggestion of Bankruptcy and Automatic Stay of Proceedings, *Massachusetts v. Purdue Pharma*, No. 1884-CV-01808 (Sup. Ct. Mass., Sep. 16, 2019),ECF No. 1, at 2, exhibit A; Adam Geller, *Where Did the Sacklers Move Cash From Their Opioid Maker?* CITY NEWS (Sep. 5, 2019), https://calgary.citynews.ca/2019/09/05/where-did-the-sacklers-move-cash-from-their-opioid-maker/.

hedge and shift insolvency risks in anticipation of chapter 11.[74] Leading asbestos manufacturers such as Johns-Manville Corp.,[75] Celotex Corp.,[76] Eagle-Picher Industries, Inc.,[77] and Keene Corp.[78] had all utilized trusts limiting the liabilities of key business affiliates while settling mass tort claims in the reorganization process. Johnson & Johnson's notorious maneuver—the "Texas Two-Step" divisive merger—worked to deplete the aggregate pool of assets available for debt satisfaction (and thereby sabotaging the tort claimants) by transferring assets to bankruptcy-remote entities on the eve of bankruptcy.[79] Purdue's resort to chapter 11 was certainly not unexpected in light of the long history of corporate tortfeasors settling mass product liability in connection with bankruptcy. But Purdue's chapter 11 was unique in the degree to which "bankruptcy grifters" like the Sackler family impacted the negotiation.[80]

B. Mixing Mass Tort Settlement with Chapter 11: New Complications

Contrary to popular belief, chapter 11 does offer a potential benefit for the mass tort victims: the opportunity to reach for deeper pockets by restarting the mass tort settlement process.[81] By halting pending litigation and barring future ones, chapter 11 forces all litigants—whether in individual lawsuits, class actions, or MDLs—to aggregate their claims[82] and convene at the negotiation table.[83] Since tort victims are

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[74] *See generally* Steven L. Schwarcz, *Bankruptcy-Remote Structuring: Reallocating Risk Through Law*, 97 AM. BANKR. L.J. 30, 30 (2023).

[75] *In re* Johns-Manville Corp., 36 B.R. 743, 744 (Bankr. S.D.N.Y. 1984).

[76] Owens-Illinois, Inc. v. Rapid Am. Corp. (*In re* Celotex Corp.), 124 F.3d 619, 622 (4th Cir. 1997).

[77] *In re* Eagle-Picher Indus., 197 B.R. 260, 263–64 (Bankr. S.D. Ohio 1996).

[78] *In re* Keene Corp., 208 B.R. 112, 113 (Bankr. S.D.N.Y. 1997).

[79] *See, e.g.*, Kevin Dunleavy, *Court Rejects Johnson & Johnson's Texas Two-Step Bankruptcy Ploy for Talc Claims*, FIERCE PHARMA (Jan. 30, 2023), https://www.fiercepharma.com/pharma/court-says-no-johnson-johnsons-bankruptcy-ploy-talc-claims; Paige Sutherland & Kimberly Atkins Stohr, *The "Texas Two-Step": A Controversial Legal Strategy to Avoid Corporate Liability*, WBUR (Oct. 20, 2022), https://www.wbur.org/onpoint/2022/10/20/the-texas-two-step-a-new-bankruptcy-strategy-to-avoid-corporate-liability; Jeffrey R. Gleit & Matthew R. Bentley, *The Texas Two-Step: A Problematic Reframing of the Bankruptcy Code Toolkit or an Equitable Solution for Productive Conglomerates and their Mass Tort Claimants?*, 31 NORT. J. BANKR. L. & PRAC. 148, 150 (2022). Recently, the Third Circuit Court of Appeals dismissed the bankruptcy filing by J&J subsidiary LTL management, holding that LTL did not file the bankruptcy case in good faith and therefore was ineligible to petition for bankruptcy relief. *See* LTL Mgmt. v. Those Parties Listed on Appendix A to Complaint (*In re* LTL Mgmt.), 58 F.4th 738, 764 (3d Cir. 2023), *amended and superseded by* LTL Mgmt. v. Those Parties Listed on Appendix A to Complaint (*In re* LTL Mgmt.), 64 F.4th 84, 111 (3d Cir. 2023) (amending decision to include that the lower bankruptcy court abused its discretion by denying claimant's motion to dismiss).

[80] *See infra* Parts III.B, III.C, and III.D.

[81] *See* Organek, *supra* note 31, at 390.

[82] *See* Edward J. Janger, *Aggregation and Abuse: Mass Torts in Bankruptcy*, 91 FORDHAM L. REV. 361, 366 (2022) Mandatory aggregation provides both benefits and disadvantages to the individual tort claimant. When the plaintiff has small claims, the plaintiff gets the benefit from increasing access to the courts. But when the plaintiff has significant damages against the corporation to make hiring a lawyer economical, the benefit shifts to the defendant because the defendant can obtain a global settlement of all tort claims. *Id.*

[83] *See* Brubaker, *supra* note 27, at 988.

often dispersed and lack any established relationship with the debtor-companies, chapter 11 provides a convenient central forum for these dispersed victims to recover from their tortfeasors.[84] Thus, for both the tort victims and the creditors, aggregating claims against the debtor in chapter 11 is a more cost-effective alternative to separately pursuing claims in MDL.[85] In the case of *In re Purdue Pharma*, chapter 11 opened a window for tort victims to recover more than they could have had they pursued their claims individually in MDL.[86] They could also try to persuade the Sacklers to lift the shields protecting assets beyond the reach of bankruptcy court.[87] Once there was a possibility to enlarge the aggregate pool of funds, new value-creation opportunities became viable.[88]

However, restarting settlements in chapter 11 created new complications: the need to adequately compensate *all* opioid victims conflicted with the established bankruptcy principle that only holders of pre-bankruptcy claims could participate in chapter 11's redistribution process.[89] Here, the core problem is that future victims were not represented in the negotiation. In mass torts, many injuries would not manifest until years later.[90] The degree of injuries varies from individual to individual.[91] The costs of medical treatment differ vastly.[92] People's uneven exposure to the tortious substance caused an inherent uncertainty about the exact scope,

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[84] *See* Casey & Macey, *supra* note 18, at 997 (asserting the difficulty for tort claimants to contract with other creditors and protect their interests).

[85] *See id.* at 1005 ("Outside of bankruptcy, tort claimants would still face the significant administrative costs of MDL, which has limited coordination mechanisms and no tools for binding future claimants. Neither can MDL solve the collective action problem because dissenting claimants can opt out of settlements even when super majorities favor them.").

[86] *See id.* at 981 ("MDL is failing to provide an acceptable venue in which to resolve mass tort claims, recent high-profile bankruptcy filings suggest the growing attractiveness of bankruptcy as an alternative to MDL.").

[87] *See* Organek, *supra* note 31, at 390–91.

[88] Bankruptcy law generally focuses on entities that file for bankruptcy, rather than those that do not, as an extension of general corporate law principles of limited liability and entity separateness. *See generally* Henry Hansmann, Reinier Kraakman & Richard Squire, *Law and the Rise of the Firm*, 119 HARV. L. REV. 1335, 1347–48, 1401–02 (2005). To haul non-debtor entities into bankruptcy, judges need to invoke the principle of substantive consolidation. *See generally* 2 COLLIER ON BANKRUPTCY ¶ 105.09(1)(a) (Richard Levin & Henry J. Sommer eds., 16th ed. 2019). Typically, a substantive consolidation is approved only under extraordinary circumstances—such as clear indication of asset commingling, lack of respect for corporate formalities, or bad faith on part of the bankrupt firm—which justify the judge's invocation of equitable powers. Some scholars argue that, in *In re* Purdue Pharma, the mass tort victims got the benefit of "de facto substantive consolidation" by reopening negotiations for mass tort settlement in connection with chapter 11, even though the Sacklers were not formally hauled into the bankruptcy process. *See* Organek, *supra* note 31, at 391–92.

[89] *See, e.g.*, 11 U.S.C. § 362 (2018); *id.* § 101(5); *id.* § 503.

[90] *See generally* Frederick Tung, *The Future Claims Representative in Mass Tort Bankruptcy: A Preliminary Inquiry*, 3 CHAP. L. REV. 43 (2000) (describing the likelihood of future claims in mass tort cases and the issues arising with protecting such claimants' interests in the bankruptcy proceeding).

[91] *See id.* at 51.

[92] *See id.*

duration, and intensity of injury.[93] Yet, there was no clear method to ascertain their damages.[94]

Moreover, victims with dormant injuries did not join the class action. "[T]hose without current afflictions may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out."[95] A similar problem exists for MDL due to issue preclusion.[96] In the case of Purdue, the overwhelming majority of opioid claims conjoined by Purdue's chapter 11 were from an MDL pending before the Northern District of Ohio, which have dragged on for years without final resolution.[97] But claims of opioid victims who were not already represented in a class action or MDL were excluded from the negotiation table.

Adding to the problem is that the *fixed* remedies for *all* victims are distributed on a first-come-first-serve basis—*i.e.*, the present and future victims' interests are not aligned in bankruptcy.[98] If tort claims were negotiated outside of bankruptcy, parties would have complete freedom to determine what is enough to satisfy their claims without regard to who comes first. But, once the settlement is negotiated in connection with chapter 11, bankruptcy rules apply.[99] Under the absolute priority rule of asset redistribution mandated by the Bankruptcy Code,[100] compensations for opioid victims would be paid on a lump-sum, pro-rata basis.[101] However, a large, immediate lump-sum cash payout exceeding the value of the bankrupt firm would necessarily create a distributive conflict between existing and future tort claimants.[102] Since the aggregate pie is fixed, the first victim to lay claim on the pie will recover their damages in full. The second victim will get what they were owed from the remaining share. The third victim, who arrives late to the game, will get undercompensated. Other victims whose injuries have not yet manifested at the time

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[93] *See* Mark J. Roe, *Bankruptcy and Mass Tort*, 84 COLUM. L. REV. 846, 846–47 (1984).

[94] Nevertheless, bankruptcy may be the only equitable option to compensate all of the debtor-company's tort victims. Without a bankruptcy proceeding, individuals who are the first to litigate their actions may be the only parties who can recover from the company. Tort victims whose injuries are latent or dormant for a long period may be unable to recover anything after the company has paid off all its other victims. *See* Jason A. Rosenthal, Note, *Courts of Inequity: The Bankruptcy Laws' Failure to Adequately Protect the Dalkon Shield Victims*, 45 FLA. L. REV. 223, 226–27 (1993).

[95] Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 628 (1997); *see also* RICHARD B. SOBOL, BENDING THE LAW: THE STORY OF THE DALKON SHIELD BANKRUPTCY 107–15 (1991).

[96] *See* Brubaker, *supra* note 27, at 997; *see also* GIBSON, *supra* note 13, at 84, 96.

[97] *See In re* Nat'l Prescription Opiate Litig., 477 F. Supp. 3d 613, 617 (N.D. Ohio 2020) ("This Opinion addresses the viability of the public nuisance claims as they arise out of Pharmacy Defendants' activity *dispensing* prescription opioids to customers."); *see also* ELIZABETH CHAMBLEE BURCH, MASS TORT DEALS: BACKROOM BARGAINING IN MULTIDISTRICT LITIGATION 35–63 (2019).

[98] *See* Janger, *supra* note 82, at 368; *see also* Roe, *supra* note 8, at 846.

[99] A bankruptcy judge can approve the reorganization plan only if it satisfies the requirements of 11 U.S.C. § 1129(a)(8) of the Bankruptcy Code.

[100] The absolute priority rule determines the order in which creditors and shareholders of the debtor are paid in a corporate reorganization scheme. *See* 11 U.S.C. §§ 1129(a)(8), 1129(b) (2018). *See also* Douglas G. Baird & Donald S. Bernstein, *Absolute Priority, Valuation Uncertainty, and the Reorganization Bargain*, 115 YALE L.J. 1930, 1937–38 (2006).

[101] *See* Roe, *supra* note 8, at 867.

[102] *See id.* at 846.

of the tortfeasor's bankruptcy will be entirely uncompensated.[103] This dynamic created both a pie-distribution problem and a serious question as to whether the existing opioid victims at the negotiation table could adequately represent the interests of all opioid victims.

II. ANALYSIS: HOW DID THE PARTIES SETTLE OPIOID LIABILITIES IN CHAPTER 11?

A. The Tort Victims' Considerations

For lawyers representing the opioid victims, the problems of inadequate representation[104] and pie-distribution[105] constrained the range of options they could realistically pursue in the settlement negotiation. First, the victims' lawyers needed to create unity among *all* tort victims. Potentially divisive issues, such as limiting the scope of tort liability to a precise range or ascertaining exact schedule for payment, could amplify adverse interests between the tort claimants. Second, the problem of inadequate representation could be solved by having the government represent all OxyContin® victims. This problem was resolved when the State Attorneys General (AGs) took over representation of the victims at the beginning of chapter 11.[106] They also needed to create a pie large enough to encompass *all* tort claims. The common interests of all victims are as follows:

1. *Monetary Interests*. — Understandably, all opioid victims wanted to maximize the value of their compensation. For them, this was not only a money issue. Many victims had already invested significant time and energy to fight for their compensations in the MDLs and class actions before Purdue filed for chapter 11.[107] The very idea that they would get a discount on what they were rightfully owed just because the tortfeasors filed for bankruptcy was offensive.

As expected, the state AGs prioritized the victims' monetary interests.[108] To maximize financial recovery, the state AGs had two options: either demand a larger settlement (value-distribution) or ask the tortfeasors to set aside assets that can appreciate in value for future compensation (value-creation). One value-creation strategy that the AGs considered was to negotiate for a legal claim on Purdue's future

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[103] *See id.* (inquiring whether a large, immediate cash payout should be allowed if it would destroy the responsible firm and leave later plaintiffs uncompensated).

[104] *See supra* Part I.B (discussing the inability to assess the full scope of compensation needed for future tort victims).

[105] *See supra* Part I.B (discussing the pie-distribution problem caused by the absolute priority rule).

[106] *See* Mediator's Report, *supra* note 33, at 5–7.

[107] *See* Amy Howe, *Court Conflicted over Purdue Pharma bankruptcy plan that shields Sacklers from liability*, SCOTUSBLOG (Dec. 4, 2023, 4:42 PM), https://www.scotusblog.com/2023/12/purdue-bankruptcy-sacklers/ (explaining how thousands of lawsuits were filed against Purdue Pharma before Purdue Pharma filed for bankruptcy).

[108] *See id.*

earnings.[109] Another strategy was to establish a settlement trust solely to satisfy the claims of opioid victims and ask the tortfeasors to pledge the company's equity to finance the trust.[110] They wanted to know "the full story of how their injuries were caused and what can be done to stop similar injuries in the future."[111] In short, what the victims really wanted were answers: how the system broke down to permit such corporate malfeasance;[112] what contributed to the suffering and death of their loved ones;[113] how to prevent the Sackler family from continuing to profit from the sale of opioids;[114] what was the full picture of the Sacklers' involvement in the opioid crisis and how deep their pockets were;[115] and what corporate governance mechanisms can be installed to prevent similar abuses in the future.[116] Regardless of the nature and size of the claim, all opioid victims shared the common interest in demanding truth and transparency from the tortfeasors.

The victims' nonmonetary interests could be satisfied by a full-scale financial and factual disclosure by Purdue and the Sackler family.[117] Disclosure by Purdue would not be a difficult issue since Purdue already filed for chapter 11.[118] It was required by the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure to maintain complete transparency regarding its past dealings, asset transfers, and financial health.[119]

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[109] *See id.* (explaining that Purdue Pharma accepted to contribute $6 billion to the bankruptcy plan in exchange to being shielded from future civil liability for opioid-related claims).

[110] For instance, the lawyers for Purdue could establish a trust for future mass tort victims like what Johns-Manville Corp. did in its chapter 11 reorganization. *See In re* Johns-Manville Corp., 97 B.R. 174, 177 (Bankr. S.D.N.Y. 1989). For an in-depth analysis of the *Johns-Manville* reorganization plan, *see* Joshua M. Silverstein, *Overlooking Tort Claimants' Best Interests: Non-Debtor Releases in Asbestos Bankruptcies*, 78 UMKC L. REV. 1, 10–18 (2009). The *Johns-Manville* plan, which was often deemed by bankruptcy scholars as a successful case of value-creation, solved the pie-distribution problem with regards to future tort victims having the company set aside assets to satisfy future tort claims through a trust. *See* Simon, *supra* note 23, at 1172 ("[T]he [*Johns-Manville*] created litigation trusts to fund both property-damage claims and health-related claims. These trusts would pay all asbestos-related claims. Additionally, to effectuate the trusts as the place for liquidation and payment for all asbestos claims, the plan provided for the court to issue an injunction. Specifically, the plan provided that the court issue a channeling injunction requiring all claims to be settled against the corporation through the trust and prohibited all parties with asbestos-related personal injury or property damage claims from suing certain protected entities—namely, the corporation and its insurance carries. The channeling injunction allowed all injured parties to recover from the various trusts, but prevent them from going after the company, its subsidiaries, or insurance carriers.") (internal quotations omitted).

[111] Organek, *supra* note 31, at 394.

[112] *See* States' Coordinated Opposition, *supra* note 54, at 6–7 (describing victims who died of overdoses that relied on Purdue's deceptive representations).

[113] *See id*.

[114] *See* States' Coordinated Opposition, *supra* note 54, at 12, 22.

[115] *See* Opposition by the Consortium of Some Massachusetts and Other Municipalities to the Motion for a Preliminary Injunction in Favor of the Sackler Family Non-Debtors, *In re* Purdue Pharma, L.P., Adv. Pro. No. 19-08289 (Bankr. S.D.N.Y. Oct. 2, 2019), ECF No. 31, at 3–4.

[116] *See* Organek, *supra* note 32, at 394–95.

[117] *See id*.

[118] *See generally* 11 U.S.C. §§ 1121, 1125 (2018).

[119] *See id.*

But the victims were confronted with an obstacle: how to obtain disclosure from the Sackler family? The Sackler family fortune was dispersed in a vast global web of spendthrift trusts, companies, and LLCs that are owned by private individuals.[120] Many of them were established in tax havens and foreign jurisdictions with powerful bank secrecy laws and consequently exempt from the bankruptcy court's jurisdiction.[121] Thus, pressing the Sacklers for complete financial and factual transparency could be an uphill battle.[122]

2. *Corporate Governance Change*. — The opioid victims also wanted to see meaningful change in Purdue's corporate governance so that similar abuses in the future may be prevented. This interest could be served by altering the ownership and management of Purdue. One of the victims' core demands was to transform Purdue into a "public benefit company" after it emerges from chapter 11.[123] This would require the Sacklers to step down from Purdue's board and to have government representatives (of the opioid victims) take their seats on the board instead.

3. *The Victims' BATNA*.[124] — All parties involved understood that the tort victims had a terrible BATNA. The tort victims had weak bargaining power because their claims were enjoined by the automatic stay.[125] Nevertheless, the victims could try to challenge the tortfeasors' proposals on the grounds of procedural abuse and sue the Sacklers in bankruptcy court.[126]

If there's no agreement, the state AGs could pursue two equally ineffective and onerous alternatives. First, the state AGs could petition the bankruptcy judge to "substantively consolidate" Purdue's and the Sacklers' assets to enlarge the funds in the bankruptcy estate.[127] This challenge, if successful, would effectively force the Sacklers into an involuntary bankruptcy. However, substantive consolidation is rarely invoked because it imposes onerous evidentiary burdens on the challenger.[128]

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[120] *See* Organek, *supra* note 31, at 367–68.
[121] *See* PATRICK RADDEN KEEFE, EMPIRE OF PAIN: THE SECRET HISTORY OF THE SACKLER DYNASTY 403 (1st ed. 2021).
[122] *See id.* at 403.
[123] *See* Samir D. Parikh, *Scarlet-Lettered Bankruptcy: A Public Benefit Proposal for Mass Tort Villains*, 117 NW. U. L. REV. 425, 464–65 (2022).
[124] "BATNA" is the acronym for "Best Alternative To Negotiated Agreement." *See* Guhan Subramanian, *What is BATNA? How to Find Your Best Alternative to a Negotiated Agreement*, HARV. L. SCH.: PROGRAM ON NEGOT. BLOG (Dec. 28, 2023), https://www.pon.harvard.edu/daily/batna/translate-your-batna-to-the-current-deal/.
[125] *See supra* Part I.B.
[126] *See* 11 U.S.C. § 1109(b) (2018) (granting creditors the right to raise a challenge in bankruptcy court without being subject to the automatic stay).
[127] *See* J. Stephen Gilbert, *Substantive Consolidation in Bankruptcy: A Primer*, 43 VAND. L. REV. 207, 208 (1990) ("Substantive consolidation is a powerful vehicle in bankruptcy by which the assets and liabilities of one or more entities are combined and treated for bankruptcy purposes as belonging to a single enterprise.").
[128] To substantively consolidate the two, the victims would need to show the following: (1) the Sacklers were fraudulent or completely dominated Purdue; (2) the Sacklers did not respect corporate formalities; (3) Purdue was inadequately capitalized; (4) the purpose for the Sacklers' transfer of funds out of Purdue; (5) overlap in ownership and management between Purdue and the Sacklers; (6) their dealings were not at arm's length; (7) the Sacklers had Purdue pay Sacklers' debts; (8) the two commingled their assets; (9) and it was impossible to

Second, the state AGs could petition the court to have the bankruptcy trustee[129] or the debtor-in-possession to avoid the Sacklers' transfer of assets from Purdue and include funneled assets into the bankruptcy estate under the theory of "fraudulent conveyance."[130] Section 548 allows the trustee to avoid and recover assets that were transferred away from the debtor with the actual or implied intent to hinder, delay, or defraud the creditors.[131] The action could proceed against the Sacklers because the Sackler family was not protected by the automatic stay.[132] But the fraudulent conveyance action would be unlikely to succeed because it has a two-year statute of limitations.[133] Purdue filed for bankruptcy in September 2019, and the transfers reportedly started in 2008, with most value being transferred by 2013.[134] Even if the AGs pursue claims under state fraudulent conveyance laws, which typically have a statute of limitations of four to six years, the AGs could only recover very few assets from the Sacklers' prior transfers.[135] The state AGs had few options that they could realistically pursue by unilateral action.

B. Two Dreams in One Bed[136]*: Purdue and Sackler's Considerations*

The co-tortfeasors' interests were at odds. If Purdue were engaged in a regular corporate restructuring, its board of directors would have wanted a speedy resolution of its debt and a reversion to the status quo.[137] The Sacklers, however, preferred to prolong Purdue's bankruptcy so that they could extract concessions from the opioid

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separate the assets and liabilities. *See* Union Savs. Bank v. Augie/Restivo Baking Co. (*In re* Augie/Restivo Banking Co.), 860 F.2d 515, 518 (2d Cir. 1988). These are extremely demanding standards. *See id.*

[129] A bankruptcy trustee is an entity appointed by the U.S. trustee, an officer of the Department of Justice, to represent the debtor's estate in bankruptcy proceeding. *See* Maya Dollarhide, *Bankruptcy Trustee: Meaning, Overview, Example*, INVESTOPEDIA (last updated Apr. 9, 2023), https://www.investopedia.com/terms/b/bankruptcy-trustee.asp; *See also U.S. Trustee Program*, THE U.S. DEPARTMENT OF JUSTICE (accessed Mar. 1, 2023).

[130] *See* KEEFE, *supra* note 121, at 403.

[131] *See* 11 U.S.C. § 548.

[132] Several state AGs, including New York AG Letitia James and North Carolina AG Josh Stein, have been pushing for a "fraudulent conveyance" action. *See* KEEFE, *supra* note 121, at 404–05. But they eventually gave up the action after concluding that it was too difficult to trace all the past asset transfers given the extent of asset commingling and intertwining between Purdue and the Sacklers. *Id.*

[133] *See* 11 U.S.C. § 548(a)(1).

[134] *See* ROE & TUNG, *supra* note 3, at 96.

[135] *See id.*

[136] The popular expression "two dreams in one bed," or "sleeping in the same bed and dreaming different dreams," is an old Chinese saying that originally describes intimate partnerships that do not have the communication necessary to sustain them (whether in business or marriage). In business, this idiom is often used to describe situations where two partners of the same partnership do not share the same goal—or worse, have conflicting objectives—but are stuck in the same camp. *See generally* CHRIS VOSS & TAHL RAZ, NEVER SPLIT THE DIFFERENCE: NEGOTIATING AS IF YOUR LIFE DEPENDED ON IT 73 (2016).

[137] *See* Disclosure Statement for Fifth Amended Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. and its Affiliated Debtors, *In re* Purdue Pharma L.P., No. 19-23649 (Bankr. S.D.N.Y. June 3, 2021), ECF No. 2983, at 60.

victims and reap benefits they would not get in ordinary circumstances.[138] This relationship between Purdue and the Sacklers is perhaps best described as having "two dreams in one bed"—*i.e.*, that the two not only had conflicting objectives but also had something to gain from the other's loss, even though both were on the same side of the negotiation table.[139]

1. *Purdue's Interests*. — Had Purdue been independent from the Sacklers, its top priority would be to successfully emerge from chapter 11 free of liens and debt so the company could restart its business in pharmaceutical manufacturing.[140] Since Purdue had no materially significant debt other than the amount they owed to the opioid victims, its primary concern was whether the terms of Purdue's reorganization plan would allow the company to operate its business the way it did before.[141] A successful reorganization would enable Purdue to continue in existence.

The most important question for Purdue was what to do with OxyContin®. OxyContin® was by far one of Purdue's strongest patents and most profitable investments.[142] Discontinuing the development and manufacture of OxyContin® would not only hamper Purdue's ability to compete with other pharmaceutical companies, but it would also make the company less attractive to future investors.[143] Moreover, Purdue held the position that OxyContin® could be a valuable drug for society.[144] If used properly, OxyContin® could increase the access of pain management and reduce the suffering of patients who are afflicted with rare and complex diseases.[145] OxyContin® became the subject of mass torts only because its access became unregulated due to Purdue's aggressive marketing and lobbying.[146] In negotiating against the state AGs, Purdue's lawyers were prepared to give up control over how OxyContin® was going to be marketed.[147]

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[138] *See* KEEFE, *supra* note 121, at 618–19.
[139] To fully illustrate the bargaining dynamics, this section analyzes Purdue's bankruptcy as if Purdue is an independent company. The following paragraphs demonstrate what Purdue's interests and BATNA would have looked like had Purdue negotiated on its own behalf without the undue influence of bankruptcy grifters like the Sackler family. *See* discussion *infra* Section II.C.1.
[140] *See* Disclosure Statement for Fifth Amended Joint Chapter 11 Plan, *supra* note 137, at 60.
[141] *See* Levitin, *supra* note 22, at 1104.
[142] *See* KEEFE, *supra* note 121, at 454.
[143] *See id.* at 481–82.
[144] *See id.* at 426–27.
[145] *See* Art Van Zee, *The Promotion and Marketing of OxyContin: Commercial Triumph, Public Health Tragedy*, 99 AM. J. PUB. HEALTH 221, 223 (2009).
[146] *See id.* at 221–27.
[147] *See* KEEFE, *supra* note 121, at 395.

But Purdue's minority shareholders[148] were concerned that the looming presence of the Sacklers would weaken their bargaining position vis-à-vis the state AGs.[149] They knew very well that the Sacklers' interests were not aligned with theirs. As a result of the Sacklers' maneuvers, Purdue's minority shareholders might have a potential claim against the Sacklers: as controlling shareholders of Purdue and de facto management of the company, the Sacklers owed fiduciary duties of loyalty and care to the minority shareholders.[150] By funneling Purdue's corporate assets into the Sacklers' personal trusts and corporation into bankruptcy at the expense of Purdue's shareholders, there is a reasonable suspicion that the Sacklers' conduct violates the duty of loyalty.[151]

2. *Purdue's BATNA*. — If the negotiation turns sour, Purdue could try to find new investors to arrange a buyout of the company. It could do so by (1) unilaterally soliciting buyers to purchase Purdue's assets at a distressed price (via section 363 sales),[152] or by (2) obtaining "debtor-in-possession" (DIP) financing from new creditors.[153] If Purdue were to pursue either option, it would need to get rid of the Sacklers from its board of directors. If necessary, Purdue could sue the Sacklers for a breach of fiduciary duty in a shareholder derivative action as a last resort.[154]

3. *Sacklers' Interests in OxyContin®*. — The Sacklers could not care less about the profits from OxyContin®. By the time Purdue filed for bankruptcy, the Sacklers had already transferred much of the sales proceeds of OxyContin® from the company to their spendthrift trusts.[155] "[The Sacklers] had known as early as 2014 that the company could one day face the prospect of damaging judgments. To protect themselves on this day of reckoning, the Sacklers assiduously siphoned money out of Purdue and transferred it offshore, beyond the reach of U.S. authorities."[156]

As a result, the Sackler family had little to lose from Purdue's insolvency, operational capacity, or future financial prospects—except future profits from OxyContin®. Even if Purdue fails to reorganize under chapter 11 and must liquidate

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148 Minority shareholders of Purdue Pharma Inc. include Linarite Holdings LLC (owning 25% of Purdue's outstanding shares) and Perthlite Holdings LLC (owning 25% of Purdue's outstanding shares). Purdue Pharma Inc. is also a general partner of Purdue Pharma L.P., retaining duties and powers to manage the partnership in the ordinary course of business and is liable to the partnership's debts. Purdue Pharma L.P. is indirectly owned by members of the Sackler family through various trusts. *See supra* Part I.A, Figure 1; *see also* Disclosure Statement for Chapter 11 Plan for Purdue Pharma L.P. and Its Affiliated Debtors, *In re* Purdue Pharma, No. 19-23649 (Bankr. S.D.N.Y. Mar. 15, 2021), ECF No. 2488, at 103.

149 *See* Betsy L. Feldman, *Bankruptcy Can Establish True Peace: The Importance of Non-Consensual Third-Party Releases in Purdue Pharma's Chapter 11 Case*, 30 NORT. J. BANKR. L. & PRAC. 1, 7 (2021).

150 *See, e.g.*, Sinclair Oil Corp. v. Levien, 280 A.2d 717, 723 (Del. 1971); *In re* Southern Peru Copper Corp. S'holder Derivative Litig., 30 A.3d 60, 89 (Del. Ch. 2011); *see also* Note, *Controller Confusion: Realigning Controlling Stockholders and Controlled Boards*, 133 HARV. L. REV. 1706, 1706 (2020).

151 *See* Levitin, *supra* note 22, at 1105–06.

152 *See* 11 U.S.C. § 363(f) (2018).

153 *See id.* § 364(b).

154 *See id.* § 1109(b).

155 *See* Organek, *supra* note 31, at 367–68.

156 Patrick Radden Keefe, *The Sackler Family's Plan to Keep Its Billions*, THE NEW YORKER (Oct. 4, 2020), https://www.newyorker.com/news/news-desk/the-sackler-familys-plan-to-keep-its-billions.

the company, the Sacklers would be well protected from Purdue's failure.[157] The Sacklers are a family of billionaires who own multiple lines of business other than Purdue.[158] Although the Sacklers would prefer a lower settlement for the opioid victims, profits from OxyContin® were of secondary concern.

4. *Sacklers' Interests in Limiting Liability Exposure*. — The Sacklers' largest interest was to close the floodgates to unlimited, uncertain tort liability arising from their management of Purdue and their involvement in the opioid crisis. Even though the Sacklers did not file for bankruptcy themselves, they hoped to acquire substantially the same bankruptcy protections that Purdue had in chapter 11—most principally, the benefits of the automatic stay.[159] In the short term, obtaining a preliminary injunction for pending lawsuits against the Sacklers would be the most ideal.[160] With regards to long-term liabilities, the Sacklers hoped to obtain a permanent release (from the opioid victims) of all civil liabilities arising from the Sacklers' involvement in the opioid crisis.[161]

5. *Sacklers' Reputational Interest*. — The Sacklers were concerned about the impacts of chapter 11 on their reputation.[162] For decades, the Sacklers had been active in philanthropy and imprinted their name on hundreds of museums and educational institutions.[163] "[T]heir philanthropic largesse had given them an almost saintly status in the art world."[164] Beyond the arts, the Sacklers had also invested heavily in cultivating their image in the medical profession.[165] Since their involvement in the opioid crisis had already tarnished the family name, they were open to opportunities to rectify their wrongs as long as they could retain their naming rights for charitable donations.[166] However, as the later sections of this Article will demonstrate, the

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[157] *See id.*
[158] *See* David Crow, *Billionaire Sackler Family Owns Second Opioid Drugmaker*, FIN. TIMES (Sep. 9, 2018), https://www.ft.com/content/2d21cf1a-b2bc-11e8-99ca-68cf89602132; *see also* Manuel Baigorri, *Sackler-Owned Mundipharma Taps Deutsche Bank for Sale*, BLOOMBERG (Jan. 13, 2020), https://www.bloomberg.com/news/articles/2020-01-13/sackler-owned-mundipharma-is-said-to-tap-deutsche-bank-for-sale.
[159] *See* 11 U.S.C. § 362.
[160] *See* Amended and Restated Case Stipulation Among the Debtors, the Official Committee of Unsecured Creditors and Certain Related Parties, *In re* Purdue Pharma L.P., No. 19-23649 (Bankr. S.D.N.Y. Nov. 20, 2019), ECF No. 518.
[161] *See* Fifth Amended Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. and Its Affiliated Debtors, *In re* Purdue Pharma L.P., No. 19-23649 (Bankr. S.D.N.Y. June 3, 2021), ECF No. 2982, at 133.
[162] *See generally* KEEFE, *supra* note 121.
[163] *See id.* at 118–21 (explaining how Sackler's Wing at the Metropolitan Museum came to be).
[164] Sean O'Hagan, *Patrick Radden Keefe on Exposing the Sackler Family's Link to the Opioid Crisis*, THE GUARDIAN (Feb. 27, 2022), https://www.theguardian.com/us-news/2022/feb/27/empire-of-pain-patrick-radden-keefe-sackler-opioid-crisis-oxycontin.
[165] *See* Brian Mann, *In the Rise and Fall of the Sacklers' Opioid Empire, An American Dream Turns Toxic*, NPR (Apr. 8, 2021, 6:20 PM), https://www.npr.org/2021/04/08/984870694/in-the-rise-and-fall-of-the-sacklers-opioid-empire-an-american-dream-turns-toxic.
[166] *See id.*

Sacklers' abuse of the bankruptcy process had tarnished their reputation in both the arts and the medical profession beyond repair.[167]

6. *Sacklers' BATNA*. — If the Sacklers could not agree on a settlement outcome they could live with, the Sacklers could file for bankruptcy and surrender their assets to the bankruptcy court's jurisdiction. This would give them the same protections afforded to Purdue and open up new opportunities for mass tort settlement. However, filing for bankruptcy meant that the Sacklers would be subject to the Bankruptcy Code's restrictions on how the Sacklers could use their assets. Moreover, if the Sacklers file for bankruptcy, some of their asset transfers from Purdue could be avoided by the bankruptcy judge as "fraudulent transfers"—*i.e.*, transfers taken "to hinder, delay, or defraud creditors or transfers undertaken while Purdue was insolvent for which Purdue did not receive reasonably equivalent value."[168] As unattractive as this BATNA was, the Sacklers' BATNA was better than those of the victims and Purdue. If the negotiation turns sour, the Sacklers could just file bankruptcy themselves and subject their assets to the bankruptcy court's jurisdiction.

C. The Negotiation Process: Trench Warfare

1. *The Preliminary Injunction*. — The first round of negotiation centered on whether Purdue and the Sacklers should be afforded similar protections in chapter 11.[169] Since the Sacklers did not file for bankruptcy, "absent court intervention, lawsuits could proceed against the Sacklers" even though lawsuits targeting Purdue had been stayed.[170] As such, obtaining a preliminary injunction was of paramount importance to the Sacklers.[171] Understandably, the victims were unhappy about this. The state AGs, who represented the victims, claimed that the Sacklers do not deserve bankruptcy-like protection since they had not filed for bankruptcy.[172] They were

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[167] *See id.*; *see also* Nadeem Badshah & Joanna Walters, *National Portrait Gallery Drops $1M Grant from Sackler Family*, THE GUARDIAN (Mar. 19, 2019, 2:54 PM EST), https://www.theguardian.com/artanddesign/2019/mar/19/national-portrait-gallery-turns-down-grant-from-sackler-family-oxycontin; Joanna Walters, *Opioid Crisis Protestors Target New York's Guggenheim over Sackler Family Link*, THE GUARDIAN (Feb. 10, 2019, 00:49 EST), https://www.theguardian.com/us-news/2019/feb/10/anti-opioid-protesters-target-new-yorks-guggenheim-over-sackler-family-link.

[168] Levitin, *supra* note 22, at 1105–06; *see also* 11 U.S.C. § 548(a)(1)(A) (2018); UNIF. VOIDABLE TRANSACTIONS ACT §§ 4–5, at 2–3 (UNIF. L. COMM'N 2014).

[169] *See* Organek, *supra* note 31, at 383.

[170] *See id.* at 368.

[171] To prove an entitlement to a preliminary injunction, Purdue bears the burden of showing the following: (1) a probability of success on the merits; (2) that Purdue would suffer irreparable harm if the injunction were not granted; (3) the States would not suffer irreparable harm if the injunction is issued; and (4) the public interest would not be harmed if the injunction issued. *See* eBay, Inc. v. MercExchange, LLC, 547 U.S. 388, 391–92 (2006); *see also In re* Go West Ent., Inc., 387 B.R. 435, 440 (Bankr. S.D.N.Y. 2008) (setting forth the first two factors only).

[172] *See* States' Coordinated Opposition, *supra* note 54.

(rightly) concerned that the judge's granting of preliminary injunction could "further Sackler[s'] chicanery."[173]

In response to the AGs' skepticisms, the Sacklers agreed to refrain from "tak[ing] any action with respect to any material amount of [their] property that is located inside or outside the United States with the intent or material effect of frustrating enforcement of any potential judgement . . . ."[174] The Sacklers' agreement to freeze their family assets (shielded by the spendthrift trusts) allayed concerns by the state AGs that the Sacklers would take additional underhanded maneuvers to sabotage the victims' interests.[175] Despite sporadic oppositions by some states, eventually a majority of state AGs agreed to the Sacklers' terms.[176] Thus, by tying their own hands, the Sacklers got what they yearned for—a preliminary injunction which afforded the Sacklers substantially the same protections as Purdue without completely submitting to the bankruptcy court's jurisdiction.[177] In return, the victims also got the Sackler's assurance that "there would be no further chicaneries," and this mutual agreement opened up space for subsequent negotiations.[178]

In retrospect, the preliminary injunction had been the catalyst for future conflict. Although injunctions of claims against the debtor were fairly common in chapter 11, injunctions protecting non-debtors were unprecedented.[179] From the tort victims' perspective, the injunction barred actions against the true culprits and limited their recovery to a depleted pool of funds managed by a defunct company. Its effect was to temporarily extinguish the tort victims' rights of action at a time when their need for recovery intensified each day. Yet, from the Sackler's point of view, the preliminary injunction was not enough. The injunction could only hold the floodgates to tort liability for as long as the case was pending.[180] Its validity was also contingent

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[173] Organek, *supra* note 31, at 369.
[174] Amended and Restated Case Stipulation Among the Debtors, the Official Committee of Unsecured Creditors and Certain Related Parties, *In re* Purdue Pharma, L.P., No. 19-23649 (Bankr. S.D.N.Y. Nov. 20, 2019), ECF No. 518, at 10.
[175] *See* Organek, *supra* note 31, at 369.
[176] *See id.*
[177] *See id.*
[178] *See id.*
[179] *See* Simon, *supra* note 23, at 1159. In most mass tort bankruptcies, including *In re* Johns-Manville Corp., *In re* A.H. Robins, *In re* Babcock & Wilcox, and *In re* Dow Corning, the debtors had successfully petitioned the bankruptcy court to issue preliminary injunctions. Moreover, it is standard practice for the bankruptcy court to issue channeling injunctions as a part of the chapter 11 reorganization plan. The channeling injunction usually funnels claims against debtors into a settlement trust created and administered by the debtor. Claims channeled into the trust do not have the usual procedural protections that accompany bankruptcy procedure or MDL proceedings in an Article III court. Even though these injunctions limit the debtors' exposure to liability and force tort victims to recover from a limited pool of funds, they do not pose serious grifting risks because they require approval by the bankruptcy judge, who has the power and discretion to curb potential abuses.
[180] *See* Disclosure Statement for Fifth Amended Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. and its Affiliated Debtors, *In re* Purdue Pharma, L.P., No. 19-23649 (Bankr. S.D.N.Y. June 3, 2021), ECF No. 2983, at 60.

on the bankruptcy judge's discretion and review.[181] The Sacklers needed a more permanent solution that would be binding against future claimants.[182]

2. *The Initial Reorganization Plan*. — Despite the seemingly smooth victory scored by the Sacklers in the first round of negotiations concerning the preliminary injunction, negotiations for the actual chapter 11 reorganization plan were ridden with conflicts. The main reason was that Purdue and the Sacklers had different goals for what the chapter 11 reorganization plan should achieve. For Purdue, the plan should have been about *its own* financial rehabilitation and efficient debt resolution.[183] Purdue's minority shareholders may have assumed this to be the primary purpose of going through the hassle of chapter 11. After all, it was Purdue, not the Sacklers, who filed for bankruptcy.[184] Yet, this was not what the Sacklers envisioned. For the Sacklers, Purdue's bankruptcy was merely a tactic to pressure the victims to release the Sacklers from tort liability.[185] If achieving this goal required dragging Purdue further into financial distress, even if it results in a liquidation, the Sacklers would gladly do so.

Since the Sacklers were the controlling shareholders and founding family of Purdue, the company's management was in a terrible bind: on the one hand, the Purdue management had little choice but to prioritize the Sacklers' personal interests over the company's. The resulting product was the Sacklers' proposal to include a "nonconsensual non-debtor release" provision into the reorganization package.[186] Under the terms of the "release," the victims were required to release all tort claims—both present and future claims—against the Sacklers for their involvement in the sale and marketing of OxyContin®.[187] Minority shareholders of Purdue would abandon all derivative claims against the Sacklers for their "illegal transfer" of corporate assets into spendthrift trusts.[188] The state governments would release the Sacklers from all civil liability.[189] Notably, these liability releases were "nonconsensual"—*i.e.*, they bind not only the present victims (and other creditors) who accept the plan of

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[181] *See* Simon, *supra* note 23, at 1159.
[182] *See infra* Part II.C. The permanent solution that the Sacklers sought was the "nonconsensual non-debtor release," which will be discussed further in the following sections. *Id.* Unlike either a preliminary or a channeling injunction, the "nonconsensual non-debtor release" is a contractual provision of the chapter 11 plan of reorganization. *Id.* Once a bankruptcy judge confirms a chapter 11 plan including such provision, it becomes immediately binding against all future claimants who may or may not be adequately represented by existing tort claimants at the negotiation table. *Id.* Given its legal status as private agreement, the "nonconsensual non-debtor release" is largely immune from modification or invalidation by the bankruptcy court. *Id.*
[183] *See* Disclosure Statement, *supra* note 133, at 60.
[184] *See id.*
[185] *See* KEEFE, *supra* note 121, at 451.
[186] *See* Fifth Amended Joint Chapter 11 Plan for Reorganization of Purdue Pharma L.P. and Its Affiliated Debtor, *In re* Purdue Pharma, L.P., No. 19-23649 (Bankr. S.D.N.Y. June 3, 2021), ECF No. 2982, at 107–08.
[187] *See* Objection of United States Trustee to Sixth Amended Joint Chapter 11 Plan of Purdue Pharma L.P. and its Affiliated Debtors, *In re* Purdue Pharma, L.P., No. 19-23649 (Bankr. S.D.N.Y. July 19, 2021), ECF No. 3256, at 10–11.
[188] *See* Organek, *supra* note 32, at 370.
[189] *See id.*

reorganization, but also all future creditors and possible claimants.[190] This means that victims who were not at the negotiation table would be bound to release their tort claims against the Sacklers even though there were not parties of the agreement.[191] The release was deemed by the Sacklers as the most essential component of the plan.[192] However, neither Purdue's minority shareholders nor the opioid victims shared the Sacklers' view.

The victims found the Sacklers' demand for a global release of tort liabilities both offensive and reprehensible. The Attorneys General ("AGs") of Massachusetts and New York, for instance, mounted fierce opposition to the non-debtor release and threatened to walk away from settlement.[193] The controversial release also garnered nationwide attention from the legislators. Calling the Sacklers' conduct "exploitative," Senator Elizabeth Warren pushed for congressional action to prohibit business owners who have not filed for bankruptcy from getting nonconsensual liability releases.[194]

Following three rounds of mediation conducted over eighteen months,[195] the victims and the tortfeasors finally agreed on a reorganization plan which involved the following terms: (1) The Sacklers agreed to contribute $4.55 billion in cash over a period of 9-10 years towards compensation of the opioid victims.[196] (2) The Sacklers would transfer all Purdue insurance claims (with a face value of more than $4 billion) to the victims.[197] (3) Upon exiting bankruptcy, Purdue would be dissolved and turned into a "public benefit company" owned by state governments representing the opioid

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[190] For a more detailed description of the historical origin and current development of nonconsensual non-debtor releases in bankruptcy, *see* Simon, *supra* note 23, at 1171–76. *See also* Fouad Kurdi, *A Question of Power: Non-Consensual Third-Party Releases in Chapter 11 Plans*, 25 NORT. J. BANKR. L. & PRAC. 331 (2016); Jason W. Harbour & Tara L. Elgie, *The 20-Year Split: Nonconsensual Nondebtor Releases*, 21 NORT. J. BANKR. L. & PRAC. 4 (2012); Kate Inman, Note, *All Debts Are Off?—Can the Bankruptcy Process Be Used to Release the Debts of Nondebtor Parties*, 49 FLA. L. REV. 631, 648–49 (1997); Peter E. Meltzer, *Getting Out of Jail Free: Can the Bankruptcy Plan Process Be Used to Release Nondebtor Parties?* 71 AM. BANKR. L.J. 1, 41 (1997).

[191] *See* Organek, *supra* note 32, at 370.

[192] *See id.*; *see also* The Mortimer D. Sackler Family's Response to Plan Objections and Statement in Support of Confirmation of the Sixth Amended Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. and its Affiliated Debtors, *In re* Purdue Pharma, L.P., No. 19-23649 (Bankr. S.D.N.Y. Aug. 5, 2021), ECF No. 3442, at 17.

[193] *See* Brian Mann, *15 States Drop Opposition to Controversial Purdue Pharma OxyContin Bankruptcy*, NPR (July 8, 2021), https://www.npr.org/2021/07/08/1014043094/fifteen-states-drop-opposition-to-controversial-purdue-pharma-oxycontin-bankrupt.

[194] *See* Jonathan Randles, *Elizabeth Warren Targets Sacklers' Legal Protection in Purdue Bankruptcy*, WALL ST. J. (July 23, 2021), https://www.wsj.com/articles/elizabeth-warren-targets-sacklers-lawsuit-exemptions-in-purdue-bankruptcy-11627041600 ("'If the Sacklers want to stop those lawsuits, they can file for bankruptcy just like normal people do . . . .'").

[195] *See* Organek, *supra* note 32, at 369. All rounds of mediation were led by Judge Shelly Chapman, a bankruptcy judge on the Bankruptcy Court for the Southern District of New York. *See also* Mediator's Report, *supra* note 33.

[196] *See* Disclosure Statement, *supra* note 133, at 31.

[197] *See* Declaration of Jessica B. Horewitz, Ph.D. in Support of the Ad Hoc Committee's Reply to Plan Objections and in Support of Plan Confirmation, *In re* Purdue Pharma, L.P., No. 19-23649 (Bankr. S.D.N.Y. Aug. 5, 2021), ECF No. 3450, at 6, 16; *see also* Organek, *supra* note 32, at 370.

victims and would continue to produce opioids but be subject to new marketing restrictions.[198] (4) State governments representing the victims would become the controlling members of two philanthropic trusts currently controlled by the Sacklers, with a collective value of around $175 million, and the funds from the trusts would be exclusively directed towards abatement of the opioid crisis.[199] (5) Finally, the Sacklers would be prohibited from engaging in any opioid business and could not obtain naming rights from charitable donations until all mass tort settlement payments were completed.[200] In exchange, all other parties would agree to the "nonconsensual non-debtor release."[201]

The Sacklers got what they bargained for, but at what cost? The Sacklers were forced to step down from Purdue's management. Purdue lost control of its own board and had to capitulate to the government's will. The opioid victims, though they received a $4.55 billion compensation, signed an agreement that would impair their future rights to sue. While this seemed to be a pyrrhic victory for the Sacklers, the fruits of their victory were far from secured. As the next section will show, what was originally believed to be the cornerstone of Purdue's reorganization plan—the "nonconsensual non-debtor release"—would be subjected to new rounds of contestation.

D. The Outcome: A Pyrrhic Victory?

1. *Approval of the Reorganization Plan*. — On September 17, 2021, Judge Drain of the bankruptcy court finally entered an order confirming Purdue's chapter 11 reorganization plan, including the "nonconsensual non-debtor releases" that generated national controversy.[202] At the confirmation hearing, Judge Drain expressed his disappointment with the final outcome, calling it a "bitter result."[203] Judge Drain was dissatisfied that the rounds of mediation did not result in a larger settlement for the victims; but he was "unwilling to deny confirmation merely for that reason."[204]

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[198] *See* Disclosure Statement, *supra* note 133, at 136. The concept of "public benefit company" has been supported by some bankruptcy law scholars. *See* Parikh, *supra* note 122, at 425; *see also* Organek, *supra* note 32, at 370.
[199] *See* Mediator's Report, *supra* note 33, at 4.
[200] *See id.* at 3.
[201] *See* Findings of Fact, Conclusions of Law, and Order Confirming the Twelfth Amended Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. and its Affiliated Debtors, *In re* Purdue Pharma L.P., No. 19-23649 (Bankr. S.D.N.Y. Sept. 17, 2021), ECF No. 3787, at 27–30.
[202] *See id.* In the Confirmation Order, Judge Drain cited to Second Circuit precedent for approving nonconsensual non-debtor releases, which held that such releases should not be approved absent findings that there exist truly unusual circumstances to render the releases important to the success of the plan. *See, e.g.*, Deutsch Bank AG v. Metromedia Fiber Network, Inc. (*In re* Metromedia Fiber Network, Inc.), 416 F.3d 136, 142 (2d Cir. 2005) (indicating non-debtor releases cannot be granted using a list of factors, there must be unique circumstances).
[203] *See In re* Purdue Pharma, 633 B.R 53, 93 (Bankr. S.D.N.Y. 2021).
[204] *See* Organek, *supra* note 32, at 371.

The confirmation met immediate pushback. Initially, the state AGs expressed unanimous opposition to the confirmation, but fifteen states eventually dropped their opposition.[205] Nine states—including Connecticut, California, Delaware, Maryland, New Hampshire, Oregon, Rhode Island, Vermont, and Washington—persisted and immediately appealed the bankruptcy judge's decision to confirm the plan.[206] On December 16, 2021, the district court, sitting as an appellate court, reviewed the decision and vacated Judge Drain's confirmation of the plan.[207] Judge McMahon of the Southern District of New York held that the Bankruptcy Code—specifically, section 524(g)—did not authorize "nonconsensual non-debtor release" beyond the narrow context of asbestos injury.[208]

2. *Appeal and Further Mediation*. — Following the district court's decision, the Sacklers immediately appealed the decision to the Second Circuit.[209] The Sacklers then engaged in further mediation with the nine uncooperative state AGs over the next three months.[210] Eventually, the nine AGs agreed to the "nonconsensual non-debtor liability release" demanded by the Sacklers.[211] In exchange, the reorganization plan was modified in three ways:

First, the Sacklers would need to make an additional $1.675 billion contribution towards compensation of the opioid victims, making the total amount $6.225 billion (around $6 billion if discounted to present value).[212] The Sacklers agreed to allocate (1) $175 million for immediate cash payout to the states, (2) $1 billion over a period of 18 years towards opioid abatement, and (3) up to $500 million supplemental funds from Sacklers' sale of assets shielded by the spendthrift trusts.[213] Under the revised settlement, all states—including the fifteen states that dropped opposition to the prior reorganization plan—would be entitled to the additional funds.[214]

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205 *See* Mann, *supra* note 193.

206 *See id.* The District of Columbia also objected to the reorganization plan, joining the nine states in their appeal. *See id.*

207 *See In re* Purdue Pharma L.P., 635 B.R. 26, 27 (S.D.N.Y. 2021); *see also* Jonathan Randles, *Judge Throws Out Purdue Pharma's Deal To Shield Sacklers From Opioid Lawsuits*, WALL ST. J. (Dec. 16, 2021, 8:18 PM), https://www.wsj.com/articles/judge-overturns-4-5-billion-settlement-between-purdue-pharma-sacklers-11639698359.

208 *See* 11 U.S.C. § 524(g) (2018). *See also* Wendy W. Smith, *In re Purdue Pharma (S.D.N.Y.)*, CAL. LAW ASS'N (Apr. 20, 2022) (explaining the sections of the Bankruptcy Code that refer to third party releases were enacted in response to asbestos cases).

209 *See* Daniel Gill, *Purdue Pharma Bankruptcy Plan Appeal Goes to Second Circuit*, BL (Jan. 28, 2022, 10:32 AM), https://news.bloomberglaw.com/bankruptcy-law/purdue-pharma-bankruptcy-plan-appeal-goes-to-second-circuit.

210 *See In re* Purdue Pharma, 69 F.4th 45, 57 (2d Cir. 2023).

211 *See generally* Mediator's Fourth Interim Report, *supra* note 34.

212 *See id.*; *see also* Rob Bonta, *Attorney General Bonta Announces Details of $6 Billion Settlement with Purdue Pharma and Sackler Family*, State of California Department of Justice Office of the Attorney General (Mar. 3, 2022), https://oag.ca.gov/news/press-releases/attorney-general-bonta-announces-details-6-billion-settlement-purdue-pharma-and.

213 *See* Mediator's Fourth Interim Report, *supra* note 34, at 5–6.

214 *See id.* at 11–15.

Second, the Sacklers must allow any institution in the U.S. to "remove their family name from buildings, scholarships, and fellowships."[215] This includes the museums, universities, and charitable organizations that the Sacklers had donated to even before the opioid crisis.[216] But, the Sacklers retained their naming rights for future charitable contributions and donations.[217] Additionally, the Sacklers were no longer obligated to relinquish their ownership of the philanthropic trusts.[218]

Third, both Purdue and the Sacklers must publicly disclose documents that were previously withheld as privileged information.[219] This includes written documents and legal communications regarding "advocacy before Congress, the promotion, sale, and distribution of opioids, structure of Purdue's Compliance Department and its monitoring and abuse deterrence systems."[220] In addition, Purdue must disclose the recommendations it received from consulting firms (*e.g.*, McKinsey & Co., Razorfish, and Publicis) related to the sale and marketing of OxyContin®.[221] Finally, the Sackler family would renounce all control and ownership of Purdue.[222] The company and its business affiliates (both subsidiaries and parent holding entities) would be dissolved upon the completion of the reorganization.[223]

3. *Second Circuit's Decision*. — On April 29, 2022, the Second Circuit heard oral arguments on the specific issue of whether the Bankruptcy Code permits the bankruptcy judge to grant "nonconsensual non-debtor releases" affecting parties who are not parties of a reorganization.[224] While the case was pending, several state AGs have expressed willingness to restart negotiations on the mass tort settlement in case the Second Circuit decides that the Code permits the use of "nonconsensual non-debtor releases."[225] Then, on May 30, 2023, the Second Circuit reversed the district court's decision and upheld Judge Drain's original order confirming Purdue's chapter

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[215] Bonta, *supra* note 212.
[216] *See id.*
[217] *See* Christopher Rowland, *Members of Sackler family move closer to OxyContin settlements as key states drop opposition*, WASH POST, (Jul. 8, 2021, 12:36 PM), https://www.washingtonpost.com/business/2021/07/08/purdue-sackler-bankruptcy-settlement/.
[218] *See* Mediator's Fourth Interim Report, *supra* note 34, at 5–6; *see also* Organek, *supra* note 32, at 372.
[219] *See* Mediator's Fourth Interim Report, *supra* note 34, at 6.
[220] Bonta, *supra* note 212.
[221] *See id.*
[222] *Sackler Family Agrees to Pay $6 Billion in New Opioid Settlement Between Purdue Pharma and States*, CNBC NEWS (Mar. 3, 2022), https://www.cnbc.com/2022/03/03/purdue-pharma-us-states-agree-to-new-opioid-settlement.html.
[223] *See* Dietrich Knauth, Jonathan Stempel & Tom Hals, *Sacklers to Pay $6 Billion to Settle Purdue Opioid Lawsuits*, REUTERS (Mar. 4, 2022), https://www.reuters.com/business/healthcare-pharmaceuticals/sacklers-will-pay-up-6-bln-resolve-purdue-opioid-lawsuits-mediator-2022-03-03/ ("When the bankruptcy plan takes effect, Purdue Pharma will cease to exist. It will emerge as a new company, Knoa Pharma LLC, owned by the National Opioid Abatement Trust, an entity controlled by creditors of Purdue.").
[224] *See* Kim Lavin, *Opioid Bankruptcy Litigation Updates*, VERUS LLC (Jun. 2, 2022), https://verusllc.com/opioid-bankruptcy-litigation-updates/.
[225] *See, e.g.*, Press Release, Conn. Office of Atty. General, Attorney General Tong Compels Purdue Pharma and Sackler Family to Pay $6 Billion to Victims, Survivors and States (Mar. 3, 2022), https://portal.ct.gov/ag/press-releases/2022-press-releases/ag-tong-compels-purdue-and-sacklers-to-pay-six-billion-to-victims-survivors-and-states.

11 reorganization plan.[226] In upholding the non-debtor release, the Second Circuit laid out a nebulous seven-factor test that turned on the nature, identity, essentiality, and circumstances of the non-debtor in the reorganization.[227]

Despite public expectations of closure, the Second Circuit's decision has raised more questions than answers. Writing for the majority, Circuit Judge Richard Wesley opined that the enforceability of non-debtor releases in bankruptcy "is a function of geography" and invited both Congress and the Supreme Court to give a definitive answer.[228] Moreover, the issue has generated a steep circuit split—with the Fifth, Ninth, and Tenth Circuits explicating taking the opposite position.[229] Immediately after the Second Circuit ruled, the U.S. Trustee filed an emergency application with the Supreme Court to stay the Second Circuit's decision.[230]

4. *Supreme Court's Reversal*. — Finally, on August 10, 2023, the Supreme Court granted the U.S. Trustee's emergency application for a stay—and in doing so, granted certiorari in the case *Harrington v. Purdue Pharma* to resolve the issue.[231] On June 27, 2024, the Supreme Court reversed the Second Circuit's decision, holding that the text of the Bankruptcy Code does not authorize the bankruptcy judge to enforce a nonconsensual non-debtor release as part of a chapter 11 reorganization plan.[232] In deciding that the bankruptcy judge's confirmation order exceeded his judicial powers, the Court threw out the entire reorganization plan that the parties have negotiated for years.[233]

Now, with the plan gone and non-debtor releases categorically prohibited, the parties are forced to restart settlement negotiations as Purdue continues to be submerged in chapter 11. The result? The victims lost their $6 billion settlement, Purdue continues to bleed, and the Sacklers may now need to file for bankruptcy themselves. After five years of protracted legal battles, the parties are back to ground zero.

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[226] *See In re* Purdue Pharma, 69 F.4th 45, 85 (2d Cir. 2023).

[227] *See id.* at 77–79. The seven factors are: (1) identity of interests between the debtors and released third parties; (2) factual and legal overlap of claims against the debtors and released parties; (3) the scope of the releases; (4) how essential the releases are to the reorganization; (5) substantial contribution of assets by the non-debtor; (6) overwhelming approval by creditors; and (7) fair payment of enjoined claims. The court did not specify which factor is dispositive. *Id.*

[228] *See id.* at 91; *see also* Kristine Manoukian, Douglas S. Mintz, Michael L. Cook, Peter J. Amend & Reuben E. Dizengoff, *Second Circuit's Purdue Pharma Ruling: Third Party Releases Remain a Question of Geography*, SCHULTE ROTH & ZABEL CLIENT ALERT (Jun. 20, 2023), https://www.srz.com/resources/second-circuit-s-purdue-pharma-ruling-third-party-releases.html.

[229] *See* Derek Baker & Matthew Lane, *Second Circuit Joins Circuits Allowing Nonconsensual Third-Party Releases In Chapter 11 Plan*, REED SMITH VIEWPOINTS (Jul. 6, 2023), https://viewpoints.reedsmith.com/post/102iii0/second-circuit-joins-circuits-allowing-nonconsensual-third-party-releases-in-chap.

[230] *See Harrington*, at 2080.

[231] *See In re* Purdue Pharma L.P., 69 F.4th 45 (2d Cir. 2023), *cert. granted*, Harrington v. Purdue Pharma L.P., 144 S. Ct. 44, 44 (2023).

[232] *See Harrington*, at 2071-73.

[233] *See id*. at 2088 (Kavanaugh, J., dissenting).

III. REFLECTION: ANATOMY OF A BARGAINING FAILURE

A. A Theory of Inefficient Bargaining

In re Purdue Pharma presents a puzzle. How did one of the bankruptcy world's most resourceful and high-profile mass tort settlement end up becoming a "lose-lose" bargain? Conventional law-and-economics—*i.e.*, the Creditor's Bargain Theory[234] —would tell us that inefficient negotiations are typically the results of *imperfect* information and *high* bargaining costs.[235] Thus, if parties employ negotiation tactics that *exchanges* information and *lowers* bargaining costs, they will more likely identify a zone of possible agreement where any deal within that zone is Pareto efficient.[236] What this means is that, when the parties are trustful of each other and their interests aligned, they are more likely to exchange information and reach an efficient deal. Even if their interests are not initially aligned, repeated and symmetrical information-sharing would generate a tendency towards equilibrium. This theory certainly explains why commercial restructurings typically take far less time and reach better outcomes than mass tort bankruptcies. In mass torts, negotiations are often imbued with distrust and antagonism.

But conventional law-and-economics fails to explain why Purdue Pharma fared far worse than other mass tort bankruptcies. All mass tort bankruptcies are conflict-ridden and distrust-prone. Yet, Purdue's predecessors—*e.g.*, Johns-Manville,[237] A.H. Robins,[238] Dow Corning,[239] and Babcock & Wilcox[240]—all emerged from chapter 11 with deals satisfactory to all parties within reasonable timeframes. Even more perplexing is why the Sacklers failed to secure their victories despite gaining significant bargaining leverage against the tort victims via underhanded maneuvers. The following figure compares Purdue to other mass tort bankruptcies.[241]

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[234] *See, e.g.*, Douglas G. Baird & Thomas H. Jackson, *Fraudulent Conveyance Law and Its Proper Domain*, 38 VAND. L. REV. 829, 836–43 (1985); Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditor's Bargain*, 91 YALE L.J. 857 (1982); Douglas G. Baird & Robert K. Rasmussen, *The End of Bankruptcy*, 55 STAN. L. REV. 751 (2002). Recently, Professor Anthony J. Casey criticized the Creditor's Bargain Theory. *See* Casey, *supra* note 28, at 1709 ("This Article challenges the Creditor's Bargain Theory and presents an alternative: The sole purpose of corporate bankruptcy law is to solve the incomplete contracting problem that accompanies financial distress.").

[235] *See generally* Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON, 1, 15 (1960).

[236] *See generally* ROGER FISHER, WILLIAM URY & BRUCE PATTON, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (2d ed. 1991); *see also* ROBERT MNOOKIN, SCOTT R. PEPPET & ANDREW S. TULUMELLO, BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES (2000).

[237] *See* generally *In re* Johns-Manville Corp., 36 B.R. 743 (Bankr. S.D.N.Y. 1984).

[238] *See generally In re* A.H. Robins Co., 862 F.2d 694 (4th Cir. 1988).

[239] *See generally In re* Dow Corning Corp., 211 B.R. 545 (Bankr. E.D. Mich. 1997).

[240] *See generally In re* The Babcock & Wilcox Co., No. 00-0558, 2000 WL 422372 (E.D. La. Apr. 17, 2000).

[241] For information on J&J's bankruptcy, *see, e.g.*, Tiffany Hsu, *Johnson & Johnson Reaches Deal for $8.9 Billion Talc Settlement*, N.Y. TIMES (Apr. 4, 2023), https://www.nytimes.com/2023/04/04/business/media/johnson-johnson-talc-settlement.html; Joseph Orbach, *Put Down Your Fiddle: Third Circuit Halts Johnson & Johnson's Texas Two-Step Bankruptcy Tactic to Limit Impact of Talc Claims*, AM. BAR ASS'N JOURNAL (Mar. 6, 2023), https://www.americanbar.org/groups/litigation/committees/commercial-

Figure 2: *Comparison of High-Profile Mass Tort Bankruptcies*

	WITH GRIFTERS		WITHOUT GRIFTERS			
	Purdue Pharma	**Johnson & Johnson**	**Johns-Manville**	**A.H. Robins**	**Dow Corning**	**Babcock & Wilcox**
Type of Mass Tort	Opioid liability	Talc liability	Asbestos liability	Defective IUDs	Defective silicone implants	Asbestos liability
Number of Claims Settled	~138,000	~70,000	~1,000,000	~200,000	~245,000	~385,000
Total Cost of Settling Claims	$6 billion (9 years)	$8.9 billion (25 years)	$2.5 billion (30+ years)	$2.7-$2.5 billion	$2.35 billion (16 years)	$1.6 billion
Number of Years to Exit Ch.11	Ongoing	Ongoing	4 years	3 years	9 years	6 years
Grifting Risk Features	CI NNDR	CI DM	CI	CI	CI	CI
Ch.11 Outcome	Dissolved Denied Appealed (Ongoing)	Denied Appealed (Ongoing)	Emerged	Acquired (363 sale)	Emerged	Emerged

CI = Channeling Injunction (*i.e.*, court order enjoining claims against debtor and redirecting them against a trust)
DM = Divisive Merger (*i.e.*, company splits itself and allocates assets/liabilities in any way it sees fit)
NNDR = Nonconsensual Non-Debtor Release (*i.e.*, global release of liability against non-debtor)

To investigate this puzzle, this section highlights what conventional law-and-economics tends to omit: abuse of power. At the core of *In re Purdue Pharma*'s failure is a combination of structural, behavioral, and cognitive flaws in bargaining caused by the Sacklers' undue influence over the bankruptcy process. Even though the Sacklers were not formal parties to the bankruptcy, they imposed their own

business/practice/2023/johnson-and-johnson-texas-two-step-bankruptcy/. For information on Johns-Manville bankruptcy, *see, e.g.*, *Johns-Manville Asbestos Trust*, MESOTHELIOMA FUND, https://www.mesotheliomafund.com/asbestos-trusts/johns-manville/ (last visited Aug. 1, 2023); Jacqueline Marcus, *Manville Channeling Order Still Effective After More Than 30 Years*, WEIL RESTRUCTURING (Mar. 5, 2021), https://restructuring.weil.com/claims/manville-channeling-order-still-effective-after-more-than-30-years/. For information on A.H. Robins' bankruptcy, *see, e.g.*, James Flanigan, *In Robins Case, the Bankruptcy Laws Worked*, L.A. TIMES (Jan. 6, 1988), https://www.latimes.com/archives/la-xpm-1988-01-06-fi-22685-story.html; Jeb Gerth, Ed Meade & Ryan Russel, *The A.H. Robins Bankruptcy*, 15 CHAPTER 11 CASE STUDIES 1, 35 (2004). For information on Dow Corning's bankruptcy, *see Dow Corning Emerges from Bankruptcy*, NBC NEWS (June 1, 2004). For information on Babcock & Wilcox's bankruptcy, *see Asbestos Claims Drive Babcock & Wilcox Into Chapter 11*, ELECTRIC NET (2000), https://www.electricnet.com/doc/asbestos-claims-drive-babcock-wilcox-into-cha-0001; *The Babcock & Wilcox Company Exits Chapter 11 Bankruptcy; A Transformational Event for McDermott and B&W*, MCDERMOTT (Feb. 22, 2006), https://www.mcdermott-investors.com/news/historical-mcdermott-news/historical-mcdermott-news-details/2006/The-Babcock--Wilcox-Company-Exits-Chapter-11-Bankruptcy-A-Transformational-Event-for-McDermott-and-BW/default.aspx.

priorities over those of Purdue and the opioid victims. The Sacklers were also well insulated from insolvency risks and had little to lose from Purdue's financial distress. As a result of this power imbalance, the parties became distracted, started to ignore useful information, and acted unilaterally without considering impact—creating a feedback loop of closemindedness that escalated tension. This vicious cycle explains why the presence of "bankruptcy grifters" in mass tort settlements can motivate parties to pursue value-destroying, rather than value-creating outcomes.

1. The limits of conventional law and economics

The predominant law-and-economics model—*i.e.*, the Creditor's Bargain Theory—posits that interested parties in a bankruptcy should prefer arrangements that produce the most efficient outcome.[242] In an ideal market with *perfect* information and *no* bargaining costs, rational creditors will agree to reorganization plans that largely mirror the loan agreements they negotiated before bankruptcy.[243] This is because pre-bankruptcy contractual commitments reflect the cost of lending that creditors have already agreed to.[244] Thus, if information is sufficiently *transparent* and the costs of reaching agreement is *low*, creditors will seek to maintain their *ex ante* positions rather than to disrupt them in bankruptcy.[245] Because initiating formal bankruptcy is costly, the rational course of action that a creditor should undertake is to minimize exposure to the formal bankruptcy system and, if possible, resolve their debt claims outside of the courts.[246] By negative implication, therefore, long-winded bankruptcy cases are products of *imperfect* information and *high* bargaining costs—*i.e.*, circumstantial constraints that prevent creditors from exercising the most cost-efficient option.

Simply put, the Creditor's Bargain Theory is a restatement of the well-established Coasian principle in the context of bankruptcy.[247] At the heart of the theory lies two assumptions: (1) deal-making is costless and (2) creditors' claims are bargained-for.[248] The theory presumes that creditors are well-informed, sophisticated commercial actors who are fully aware of the debtors' insolvency risks.[249] It also presumes that, before the debtor goes into bankruptcy, creditors have already baked

[242] *See* Casey, *supra* note 28, at 1711–12.
[243] *See id.* at 1721–22. *See also* Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements and the Creditors' Bargain*, 91 YALE L.J. 857, 860 (1982).
[244] *See* Douglas G. Baird, *Priority Matters: Absolute Priority, Relative Priority, and the Costs of Bankruptcy*, 165 U. PA. L. REV. 785, 792 n.21 (2017) ("Framing the question as one about the hypothetical *ex ante* bargain among investors has been the standard trope in reorganization scholarship ever since Jackson introduced the creditor's bargain model in the early 1980s.").
[245] *See id.* at 789, 792.
[246] *See* Borders & Blank, *supra* note 5.
[247] *See* Coase, *supra* note 235, at 15.
[248] *See id.*
[249] *See* Alan Schwartz, *A Contract Theory Approach to Bankruptcy*, 107 YALE L.J. 1807, 1808–09 (1998).

terms into their credit agreements that reflect their risk tolerance and preferences.[250] This explains why commercial creditors typically prefer pre-packaged bankruptcies or out-of-court restructurings to a full chapter 11 proceeding.[251] In commercial contexts, creditors have the incentives to maintain long-term business relations with the debtor (*i.e*., low costs of deal-making) and are typically advised by a sophisticated cohort of financial analysts, business consultants, and lawyers (*i.e*., informed bargaining) when contracting with the debtors.[252]

However, the Creditor's Bargain Theory lacks explanatory power in the context of mass tort bankruptcies. Most importantly, the claims of mass tort victims are not bargained-for.[253] The vast majority of tort victims are ordinary, unsophisticated consumers of the debtors' products who have no knowledge of the company's financial conditions; they do not expect injury when using the debtors' products.[254] After mass tort victims suffer injuries due to exposure to tortious substance, they do not anticipate the tortfeasors to go into bankruptcy when they sue them for compensation.[255] Tort victims become creditors only because the tortfeasors owe them a judgment debt.[256] These victims-turned-creditors are involuntarily hauled into the bankruptcy process because of debtors' unilateral actions. At no point prior to debtors' bankruptcy do the victims have any chance to negotiate their debt claims.

In this regard, the existence of tort claims against a debtor-company necessarily disrupts the pre-bankruptcy status quo arranged among the informed, sophisticated parties. The reason is that tort claims are unexpected by all parties. Neither the tortfeasors, victims, nor commercial creditors could reasonably ascertain the exact scope of liability a tortious action can create from an *ex ante* perspective.[257] No matter how sophisticated or informed a commercial creditor is, the creditor has limited ability to contract around the risks of insolvency caused by tort liabilities unknown at the time the creditor signs the loan agreement with the debtor.[258] As a result, these creditors' financial calculations of risk and return will be disrupted. For instance, creditors who agreed to subordinate their claims in exchange for higher interest rates can be surprised to find out that tort victims have the same or more senior priority than the creditors in the event of a bankruptcy waterfall.[259] Had the creditors known

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[250] *See generally* RIZWAAN JAMEEL MOKAL, CORPORATE INSOLVENCY LAW: THEORY AND APPLICATION 38–39, 53 (2005).
[251] *See* Borders & Blank, *supra* note 5 ("Practically, the primary benefits of a Prepack are speed, cost, and value.").
[252] *See* MOKAL, *supra* note 247, at 38–39.
[253] *See* Thomas H. Jackson & Robert E. Scott, *On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditors' Bargain*, 75 VA. L. REV. 155, 177–78 (1989).
[254] *See id.* (explaining the predicament mass tort victims find themselves in as unsophisticated unsecured creditors dealing with bankruptcy proceedings).
[255] *See id.*
[256] *See id.* at 178 n.45.
[257] *See* MOKAL, *supra* note 247, at 38.
[258] *See id.* at 38–39.
[259] A "waterfall" is the payment sequence by which creditors' claims will be satisfied in the event of a bankruptcy. Any reorganization plan must be either "consensual" under section 1129(a)(8) or, if

about the possible insolvency risks attributable to mass tort claims, they would have been more risk-averse; they would have negotiated for a different loan agreement to reflect the true cost of lending.[260] Consequently, commercial creditors will realize that adhering to the pre-bankruptcy contractual commitments might not generate the most optimal returns. This motivates creditors to deviate from their pre-bankruptcy commitments and renegotiate their claims in a formal bankruptcy proceeding.

Of course, ardent students of law-and-economics can try to explain mass tort bankruptcies through the lens of *imperfect* information and *high* bargaining costs. Since mass tort claims are unexpected at the time of contracting, its presence creates asymmetrical information among different classes of creditors.[261] Similarly, the notion of high bargaining costs can roughly describe the conflictual nature of mass torts. Many tort victims have already litigated their cases in federal and state courts before their claims are aggregated in bankruptcy.[262] Some are in the process of litigating but are pulled into bankruptcy involuntarily.[263] Others may have future claims but are prevented from seeking recovery due to the automatic stay.[264] Tort victims already harbor immense distrust and resentment towards their tortfeasors whose actions have caused victims to suffer physical pain and emotional agony.[265] Imagine how victims would react when they find out the tortfeasors try to reduce the amount that victims are rightfully owed by filing for bankruptcy. Antagonistic parties are more suspicious of the others' intentions, more likely to spend resources to defend themselves, and less likely to make productive concessions.[266] Such distrust and conflict increase the costs of deal-making.

While the law-and-economics framework of information and bargaining costs can explain differences between commercial and mass tort bankruptcies, it fails to explain the variations within mass tort bankruptcies. All mass tort bankruptcies are similarly plagued by conflict, distrust, and antagonism.[267] Yet, these mass tort

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nonconsensual, both "non-discriminatory" and "fair and equitable" to all creditors under a section 1129(b) cramdown. *See* 11 U.S.C. § 1129(a)(8) (2018) (stating the class must have "accepted the plan" to be confirmed by the court); *see also* 11 U.S.C. § 1129(b) (stating the plan may not "discriminate unfairly, and is fair and equitable"). Creditors can agree to a pre-arranged order of asset distribution by including a "waterfall provision" in the loan agreement. Hon. Jennifer H. Henderson & Hon. Clifton R. Jessup, Jr., 11 U.S.C. § 1129(a): Satisfying the Requirements for "Consensual" Confirmation (2019) (available at https://www.bradley.com/-/media/files/insights/events/2019/06/batb-2019--judges-henderson-and-jessup.pdf?la=en).

[260] *See* MOKAL, *supra* note 247, at 38.

[261] *See* Thomas H. Jackson & Robert E. Scott, *On the Nature of Bankruptcy, an Essay on Bankruptcy Sharing and the Creditors' Bargain*, 75 VA. L. REV. 155, 177–78 (1989).

[262] *See* Anne Hardiman, *Toxic Torts and Chapter 11 Reorganization: The Problem of Future Claims*, 38 VAND. L. REV. 1369, 1371–72 (1985).

[263] *See id.* at 1371.

[264] *See id.*

[265] *See generally* RYAN HAMPTON, UNSETTLED: HOW THE PURDUE PHARMA BANKRUPTCY FAILED THE VICTIMS OF THE AMERICAN OVERDOSE CRISIS (1st ed. 2021).

[266] *See generally* Alison Wood Brooks, *Emotion and the Art of Negotiation: How to Use Your Feelings to Your Advantage*, HARV. BUS. REV. (Dec. 2015), https://hbr.org/2015/12/emotion-and-the-art-of-negotiation.

[267] *See* Troy A. McKenzie, *The Mass Tort Bankruptcy: A Pre-History*, 5 J. TORT L. 59, 72–76 (2012).

bankruptcies reach vastly divergent outcomes in terms of how much time, cost, or other resources were spent to reach a final chapter 11 reorganization package.[268] Even if we focus only on cases which reached any deal resolving mass tort liabilities in bankruptcy, they differ in scope and impact—ranging from immediate corporate liquidation to successful reorganization.[269] Some debtor-companies even return to the bankruptcy courts for "chapter 22" within a year of exiting chapter 11.[270] Thus, there must be factors other than *high* bargaining costs and *imperfect* information that can explain these differences.

This Article proposes a possible explanation: the presence of "bankruptcy grifters" skews bargaining incentives and motivates value-destroying behavior. Notably, bankruptcies where "grifters" exerted control over the negotiation process reached far worse outcomes than those without "grifters." Similar to what the Sackler family has done in *In re Purdue Pharma*, J&J tried to extract unfair terms from tort victims by pulling its subsidiary into bankruptcy while staying aloof from bankruptcy itself.[271] J&J's notorious "Texas Two-Step" gave it substantial bargaining leverage over the victims and pushed them into extremely precarious conditions.[272] Yet, not only did J&J fail to use the leverage to its economic advantage, its "Texas Two-Step" also generated nationwide backlash and was recently invalidated by the Third Circuit.[273] In contrast, bankruptcies without "grifters"—such as the bankruptcy of asbestos manufacturer Johns-Manville—resulted in far smoother transitions out of chapter 11.[274] Such difference raises the possibility that the presence of "grifters" increases the likelihood of inefficient bargaining in a mass tort bankruptcy.

Certainly, other factors such as sectorial difference, industry, financial health, or nature of the tort claims might also explain variations within mass tort bankruptcies. By underscoring the degree to which "bankruptcy grifters" influence negotiation outcomes, this Article does not crowd out other possibilities. Nor is this Article trying to posit that "bankruptcy grifters" are the *causal* explanation for such variation. Rather, this Article simply points out a *correlation* which deserves further scholarly attention. The next section offers an alternative theory of how "bankruptcy grifters" may lead to inefficient bargaining.

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[268] *See id.*
[269] *See id.*
[270] *See generally* Edward I. Altman, Tushar Kant & Thongchai Rattanaruengyot, *Post-Chapter 11 Bankruptcy Performance: Avoiding Chapter 22*, 21 J. APPLIED CORP. FIN. 53, 53 (2009).
[271] *See* David Dayen, *Johnson & Johnson's Texas Two-Step Dies*, AM. PROSPECT (Jan. 31, 2023), https://prospect.org/blogs-and-newsletters/tap/2023-01-31-johnson-texas-two-step-bankruptcy/.
[272] *See id.*
[273] *In re* LTL Mgmt., LLC, 58 F.4th 738, 764 (3d Cir. 2023).
[274] *See In re* Johns-Manville Corp., 36 B.R. 743, 744 (Bankr. S.D.N.Y. 1984).

2. The role of power in bankruptcy negotiations

To sketch a new theory of bargaining, this section underscores what conventional law-and-economics tends to overlook: power. By using the word "overlook," this Article does not mean to suggest that mainstream law-and-economics models completely ignore the role of bargaining power in shaping negotiation outcomes.[275] Rather, it means that bargaining power is undertheorized within the current literature.[276] Existing scholarship often treats bargaining power simply as leverage—a reflection of resourcefulness or informational asymmetry that one party possesses relative to another.[277] Under this framework, what is generally referred to as "bargaining power" is nothing more than a positional advantage that negotiators have prior to arriving at the negotiation table.[278] Having power imbalance only means that one party has access to more alternatives or resources than another party. By implication, traditional law-and-economics predicts that negotiators with greater bargaining power are more likely to obtain better outcomes.[279]

In re Purdue Pharma challenges this prediction. If conventional law-and-economics is correct, how come the Sacklers—the most informed and resourceful party—fared worse than others? Why do "bankruptcy grifters" consistently reach inefficient negotiation outcomes despite having the greatest bargaining leverage?

The core problem of the conventional proposition is that it ignores *how* bargaining power is shaped and *what* impact it has on the structure, process, and dynamics of negotiation. Specifically, the conventional proposition suffers from three flawed assumptions. First, it presumes that bargaining power is a fixed

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[275] In fact, there has been ample law-and-economics scholarship highlighting bargaining power as a central component of negotiation analysis. But most theories are heavily influenced by the Coase Theorem, which conceptualizes bargaining power in simple transactional terms. *See* S. Todd Lowry, *Bargain and Contract Theory in Law and Economics*, 10 J. ECON. ISSUES 1, 9–10 (1976).

[276] Over the past 50 years, the dominant proposition in law-and-economics has been "bargaining power irrelevance"—that bargaining power should affect only price and not non-price terms of a contract. More recent law-and-economics scholarship have started to revise the "irrelevance proposition" by suggesting variations between the impact of "strong" and "weak" forms of bargaining power. However, almost no law-and-economics scholar ever theorized what specific factors create, shape, and maintain bargaining power. They tend to treat bargaining power as fixed and monolithic. *See generally* Albert Choi & George Triantis, *The Effect of Bargaining Power on Contract Design*, 98 VA. L. REV. 1665 (2012).

[277] Under traditional bargaining models, power in negotiation may simply be understood as the ability to affect favorably someone else's decisions. *See* Roger Fisher, *Negotiating Power: Getting and Using Influence*, 27 AM. BEHAV. SCI. 149, 150 (1983). Within this framework, leverage is best understood as a subset of power that is rooted in one's ability to influence another party through the threat of or the imposition of consequences on another party. *See* Paul F. Kirgis, *Bargaining with Consequences: Leverage and Coercion in Negotiation*, 19 HARV. NEGOT. L. REV. 69, 73 (2014).

[278] *See generally* Hamid Sabourian, *Bargaining and Markets: Complexity and the Competitive Outcome*, 116 J. ECON. THEORY, 189 (2004) (formally analyzing the relationship between competitive outcomes and complexity inputs in bargaining games).

[279] Most law-and-economics theories embrace the notion that inequalities in bargaining leverage tend to create asymmetrical distribution outcomes, where the party possessing positional advantage has claimed a greater portion of the pie being distributed. *See generally* Omri Ben-Shahar, *A Bargaining Power Theory of Default Rules*, 109 COLUM. L. REV. 396 (2009).

positional advantage rather than a malleable form of influence that changes according to the circumstances. Second, it assumes that negotiation is a one-time satisfaction of pre-arranged preferences instead of an interactive process where parties constantly find out what their interests are via mutual signaling, information-sharing, strategizing, re-evaluation, and adaptation. Third, it presupposes all negotiating parties to be rational and economical actors.

However, all three assumptions can be disproved if we scrutinize the behavioral, cognitive, and structural aspects of bargaining. From a behavioral standpoint, negotiator choices are "socialized," rather than "economical";[280] their decisions are "reasonable," not "rational."[281] Cognitively, strategies that negotiators undertake are more often reflections of how they *perceive* their relationship with other parties and what they *expect* from the negotiation, instead of the direct result of resource allocation.[282] For any incentive to have meaningful effect, one must follow through a series of coordinated steps—*e.g.*, receiving signals, interpreting information, eliminating distractions, formulating strategies, and deploying a course of action to effectuate the strategy.[283] Structurally, whether or not negotiators can exercise their best interests depends on a host of circumstantial factors influencing how they prioritizes certain interests.[284] Agents who prioritize their own interests over the interests of their principals may brush off useful information as distractive, causing parties to obscure value-creation opportunities.[285] A skilled negotiator must pay attention to each moving part to obtain an efficient result.

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280 *See, e.g.*, Deepak Malhotra & Max H. Bazerman, *Bounded Rationality, Negotiation Perception, and Attitudinal Structuring*, 31 NEGOT. J. 363 (2015); Elisabeth Gsottbauer & Jeroen C.J.M. van den Bergh, *Bounded Rationality and Social Interaction in Negotiating a Climate Agreement*, 13 INT'L ENVIRON. AGRMTS: POL. L. & ECON. 225 (2013).

281 *See, e.g.*, Igor Grossman & Richard P. Eibach, *When "Reasonable" Trumps "Rational,"* THE SCIENTIFIC AMERICAN (Jan. 30, 2020), https://blogs.scientificamerican.com/observations/when-reasonable-trumps-rational/; Dan Ariely, *The End of Rational Economics*, HARV. BUS. REV. (July 2009), https://hbr.org/2009/07/the-end-of-rational-economics.

282 *See, e.g.*, Bertram I. Spector, *Negotiation as a Psychological Process*, 21 J. CONFL. RESOLUT. 607 (1977) (discussing the outcome negotiators achieve can be decided by their efforts in mutual persuasion); *Dear Negotiation Coach: Managing Perceptions*, HARV. L. SCH. PROGRAM ON NEGOT. BLOG (Oct. 4, 2022), https://www.pon.harvard.edu/daily/batna/dear-negotiation-coach-manage-their-perceptions-nb/.

283 *See, e.g.*, Peter Kesting & Rasmus Kjærsgaard Nielsen, *The Meaning of Intuition for the Negotiation Process and Outcome*, 36 NEGOT. J. 309 (2020) ("[N]egotiations are often highly complex endeavors in which people make holistic judgements with incomplete information and no time for deliberation."); Deepak Malhotra & Max Bazerman, *Psychological Influence in Negotiation: An Introduction Long Overdue*, 34 J. MANAG. 509, 531 (2008).

284 *See generally* Rudolf Vetschera, *Preference Structures of Negotiators and Negotiation Outcomes*, 15 GROUP DECIS. & NEGOT. 111 (2006).

285 *See, e.g.*, Tomasz Wachowicz, Gregory E. Kersten & Ewa Roszkowska, *How Do I Tell You What I Want? Agent's Interpretation of Principal's Preferences and its Impact on Understanding the Negotiation Process and Outcomes*, 19 OPER. RES. 993, 1032 (2019); Sujin Lee & Leigh Thompson, *Do Agents Negotiate for the Best (or Worst) Interest of Principals? Secure, Anxious, and Avoidant Principal-Agent Attachment*, 47 J. EXP. SOC. PSYCH. 681, 684 (2011).

Thus, stronger bargaining power does not necessarily lead to better outcomes. In fact, the opposite is more likely to be true.[286] When negotiators myopically seek to strengthen bargaining leverage and pay scant attention to the dynamics on and behind the negotiation table, they are more likely to develop entrenched thinking.[287] Such entrenched mindset causes negotiators to limit informational intake, act unilaterally, and escalate tension.[288] As a result, leverages that originally allow negotiators to score small victories might cause them to lose the big picture.[289]

As such, any law-and-economics framework that ignores the shaping and exercise of power in negotiation is bound to be incomplete at best—or even outright misleading at worst. Reductionist models lead negotiators to believe that efficient outcomes can be attained solely by strengthening informational advantage and resource availability.[290] Those who are guided by such principles will approach bargaining as a simple exchange of pre-committed interests—without regard to the development, dynamics, process, and impact of negotiations.[291] They look for opportunities that give them the greatest bargaining leverage, instead of opportunities that create the greatest value.[292] The following sections, which revisit the details of *In re Purdue Pharma*, apply lessons from structural, behavioral, and cognitive studies of bargaining to understand why "bankruptcy grifters" like the Sackler family can cause lose-lose negotiations.

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[286] Paradoxically, some studies indicate that weak bargaining leverage (such as lack of information regarding the opponents' BATNA) can lead to efficient bargaining while strong bargaining leverage may lead to one party "winning" an impoverished prize at the expense of aggregate efficiency. *See* Ricky Siu Wong, *Knowledge of Opponents' Power in Power-Asymmetric Negotiations: Whose Knowledge Shapes the Structure of Outcomes?* 11 CONTEMP. MANAG. RES. 117, 142 (2015) (observing that, in job negotiations, "strong negotiators' knowledge of opponents' BATNA increases their bargaining strength but hinders efficiency; weak negotiators' knowledge alone reduces their bargaining strength but increases efficiency; and the detrimental impact of strong negotiators' knowledge on efficiency outweighs the benefit of weak negotiators' knowledge . . . .").

[287] *See generally* Dacher Keltner, *The Power Paradox*, GREATER GOOD MAG. (Dec. 1, 2007), https://greatergood.berkeley.edu/article/item/power_paradox.

[288] *See id.*

[289] *See id*.

[290] A new wave of legal scholarship informed by behavioral economics has challenged neoclassical assumptions of rationality and pre-market commitments that are embedded in conventional law-and-economics models. *See generally* Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998).

[291] *See id.* at 1501–03.

[292] *See id.*

B. Structural Flaws: The Principal-Agent Problem

Structural deficiencies take many forms.[293] A negotiation can be doomed from the beginning because there is no zone of possible agreement.[294] A far more common structural deficiency, caused by misplaced negotiators' incentives that appear during the process of negotiation, is principal-agent conflict.[295] Most principal-agent conflicts describe tensions between the lawyers' and their clients' interests.[296] But, in *In re Purdue Pharma*, the conflict comes from a blurring of principal-agent relationships caused by the exertion of undue influence over the bankruptcy negotiation by a powerful nonparty of the bankruptcy.

The failures of *In re Purdue Pharma* stem from the anti-synergies between Purdue and the Sacklers due to conflicts of interest. Under regular circumstances, Purdue would be the Sackler's agent in any business dealings by virtue of the Sacklers owning a controlling share in the corporation. Purdue's board owed fiduciary duties of loyalty and care to the Sacklers.[297] But, when mass tort negotiations became mixed with bankruptcy, that principal-agent distinction was blurred. Since members of the Sackler family simultaneously held managerial positions in Purdue and seats on the board,[298] the Sacklers collectively wielded controlling influence over the business decision-making of Purdue.[299] According to a top Purdue executive, the Sacklers were functionally Purdue's "de-facto CEO," in addition to being the largest beneficiaries and owners.[300] As a result, the Sacklers owed a fiduciary duty to Purdue's shareholders as their de facto management.[301] Thus, when the Sacklers and Purdue negotiated vis-à-vis the opioid victims in the subsequent settlement negotiations, they had a duty to represent each other's best interests and not prioritize their own.

However, this mutual obligation did not seem to hold any actual weight when the parties proceeded into the negotiation—at least not for the Sacklers. When Purdue

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[293] *See, e.g.*, TANYA ALFREDSON & AZETA CUNGU, FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, NEGOTIATION THEORY AND PRACTICE: A REVIEW OF THE LITERATURE, 9–17 (2008); Edward J. Lawler & Jeongkoo Yoon, *Structural Power and Emotional Processes in Negotiation: A Social Exchange Approach*, *in* NEGOTIATION AS A SOCIAL PROCESS 143, 143–61 (Roderick M. Kramer & David M. Messick eds., 1995).

[294] *See* Marcela Merino, *Understanding ZOPA: The Zone of Possible Agreement*, HARV. BUS. SCH. ONLINE: BUSINESS INSIGHTS (Sep. 14, 2017), https://online.hbs.edu/blog/post/understanding-zopa.

[295] *See* MNOOKIN, PEPPET & TULUMELLO, *supra* note 233, at 74–76.

[296] *See id.* at 82–86.

[297] *See* KEEFE, *supra* note 121, at 4.

[298] *See id.* at 373 ("Richard [Sackler]'s mother, Beverly, had stepped down from the board, at the age of ninety-three . . . . She had never been particularly involved in the business, even when she was on the board.").

[299] *See id.* at 372. Maria Barton, Purdue Pharma's general counsel, said the following: "Unless the *family* starts saying something, whatever the company does will get drowned out by the family's silence." *Id.*

[300] Brian Mann, *Critics Want Sacklers To Face Criminal Charges For Role In Opioid Crisis*, NPR (Nov. 25, 2020, 7:20 PM), https://www.npr.org/2020/11/25/938801514/critics-want-sacklers-to-face-criminal-charges-for-role-in-opioid-crisis (describing the roles members of the Sackler family played as owners of Purdue Pharma).

[301] *See* Sinclair Oil Corp. v. Levien, 280 A.2d 717, 723 (Del. 1971).

played its part representing the Sacklers' interests, the Sacklers exploited the relationship. They pulled Purdue further into financial distress just to gain a bargaining leverage. They used Purdue's bankruptcy to hold the opioid victims at their neck—*i.e.*, to weaken their BATNAs, eliminate their options, and increase bargaining costs—in hopes that the victims capitulate to their power. This was accomplished at the expense of Purdue's welfare and chances for financial rehabilitation.

Why wouldn't the Sacklers do so when there was no realistic check on their power within the corporation? For decades, the Sacklers treated Purdue as entirely their own. They declared unusually large dividends—$13 billion, to be precise—to finance their family expenses and purchases.[302] They staffed Purdue's central management with their kin and family friends, while paying Purdue's scientists and employees meager salaries.[303] When the company was in trouble, the Sacklers liquidated corporate assets and shielded their proceeds in their personal spendthrift trusts.[304] Why wouldn't they go one step further? Thus, given the habitual commingling of assets by the Sacklers and the trepidation of Purdue's minority shareholders, the only natural outcome of this relationship is one of where Sackler plays the puppeteer (and Purdue the puppet). This necessarily skews bargaining incentives.

C. Behavioral Flaws: How Power-Moves Destroy Value

The existence of a power imbalance, by itself, does not create a failed negotiation. The abuse of power does.[305] In negotiations, abuses of power often involve the use coordinated tactics aimed at entrenching one's power imbalance to extract concessions from the other side, whether through intimidation or exploiting positional advantages in certain relationships.[306] Such behaviors commonly include *hardballs* (to prevent opponents from asserting their interests) *deception* (to create

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302 *See* Rachel Sandler, *The Sacklers Made More Than $12 Billion in Profit From OxyContin Maker Purdue Pharma, New Report Says*, FORBES (Oct. 4, 2019), https://www.forbes.com/sites/rachelsandler/2019/10/04/the-sacklers-made-12-to-13-billion-in-profit-from-oxycontin-maker-purdue-pharma-new-report-says/.

303 *See* KEEFE, *supra* note 121, at 199, 333.

304 *See* Organek, *supra* note 32, at 367–68.

305 Having power in a negotiation—whether generated by a strong BATNA, a powerful role, or sense of confidence—does not by itself make parties worse-off in a negotiation. Some research shows that power leads negotiators to behave more proactively throughout the negotiation process. For example, powerful negotiators are more inclined than less powerful negotiators to make the first offer. *Power in Negotiation: The Impact on Negotiators and the Negotiation Process*, HARV. L. SCH. PROGRAM ON NEGOT. BLOG (Jan. 26, 2024), https://www.pon.harvard.edu/daily/negotiation-skills-daily/how-power-affects-negotiators/. The focus of this article is the abuse of power, rather than the existence of power in negotiation.

306 *See* Robert S. Alder & Elliot M. Silverstein, *When David Meets Goliath: Dealing with Power Differentials in Negotiations*, 5 HARV. NEGOT. L. REV. 1, 29 (2000) ("In negotiations involving power imbalances, most abuses arise from the stronger party, either through threats or other over displays of power, intimidates the other into entering an agreement so one-side that it offends reasonable sensibilities …. Some [abuses] arise from shifting the balance of power by exploiting trust or employing deceit.")

informational asymmetries), and *manipulation* (to stymie opponent's pursuit of their best interests).[307] The problem with these power-moves is that they lock parties into impasses, distract them from common interests, and prevent discoveries of value-creation opportunities.[308]

The Sacklers were so invested in power-seeking that they forgot what was important: reaching a durable settlement of their tort liabilities. Throughout the negotiation, the Sacklers were myopically focused on entrenching their bargaining leverage. To break the victims' coalition, the Sacklers directed Purdue to create impasses while the Sacklers tried to "divide-and-conquer" their opponents by negotiating with the state AGs separately.[309] To extract concessions, the Sacklers appealed to the Second Circuit and used the pending case as a bargaining chip to restart negotiations with the uncooperative AGs.[310] To widen the informational asymmetry, the Sacklers refused to disclose the size of their wealth and did everything they could to prevent a filing bankruptcy themselves (which would require a financial disclosure statement).[311] To eliminate the victims' alternatives, the Sacklers funneled funds out of Purdue so that the victims were compelled to negotiate with the Sacklers on favorable terms if they hoped to recover anything for their injuries.[312] Together, these abusive tactics solidified the Sacklers' power imbalance vis-à-vis the victims.

But the Sacklers ignored the most important lesson: for any agreement to be enforceable and lasting, all parties to the agreement must feel they got a "fair bargain."[313] This is especially true for chapter 11 cases, where the durability of reorganization plans is often contingent on the creditors' approval or willing acceptance of arrangements providing them substantial recovery of their claims.[314] Even if a court were to cramdown a reorganization plan against the creditors' consent, a cramdown under section 1129(b) of the Bankruptcy Code requires the plan to be "[non]discriminatory" and "fair and equitable."[315] When the disadvantaged parties

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307 *See generally* MNOOKIN, PEPPET & TULUMELLO, *supra* note 236.

308 *See supra* Part II.C.

309 *See supra* Part II.D.

310 *See id.*

311 *See* discussion *supra* Part II.C.

312 *See id.*

313 However, there is always room for disagreement about what is "fair" (or, equivalently, what is the appropriate benchmark or reference transaction). Thus, there will be opportunity for manipulation by self-interested parties. While people care about fairness, self-interested parties may have distorted assessments of fairness that are geared towards self-interest. *See* Jolls, Sunstein & Thaler, *supra* note 287, at 1501.

314 *Id.*

315 *See* 11 U.S.C. § 1129(b)(1) (2018). While a "fair and equitable" reorganization plan must adhere to the absolute priority scheme, the Supreme Court did not address the issue whether settlements must adhere to the priority scheme. *See In re* TMT Trailer Ferry, Inc., 390 U.S. 414 (1968). The only guidance the Supreme Court has provided is that judges should weigh all relevant factors in determining this. *See id*. at 424. While it is widely agreed upon that the priority scheme is relevant to the analysis of "fair and equitable," there is a circuit split as to how the priority scheme should be applied. *See, e.g.*, *In re* Iridium Operating, 478 F.3d 452 (2d Cir. 2007), *In re* AWECO, Inc., 725 F.2d 293 (5th Cir. 1984), *In re* Anderson, 377 B.R. 865 (6th Cir. BAP 2007). Some factors considered by a bankruptcy court when approving a settlement as "fair and

feel unfairly treated, disrespected, undignified, or offended, they either challenge the validity of the agreement or sabotage its enforcement.[316] A bargain that initially yielded net-benefits to the advantaged party in the short-term might become a net-cost in the long-term since that party will need to install compliance mechanisms and additional contractual guardrails to enforce the agreement.

This is exactly what happened in *In re Purdue Pharma.* Even though the Sacklers scored an initial victory by having the victims agree to their "nonconsensual non-debtor release," the victims contested its validity on the grounds of unfairness and unconscionability.[317] The result was a bitter attrition: before Purdue's reorganization plan was approved by the bankruptcy court, it went through four rounds of negotiations[318] and was amended for a total of twelve times.[319] After the court's confirmation, the plan was immediately appealed by the nine dissatisfied AGs and was appealed to the Second Circuit.[320] The Sacklers had to increase their initial contribution by $1.675 billion and made further concessions to quell the victims' anger.[321] Purdue, which had exhausted its corporate treasury to satisfy the Sacklers' demands, lost its autonomy to the government.[322] What had initially given the Sacklers an advantage became their undoing.

D. Cognitive Flaws: Creating a Feeback Loop of Closemindedness

At its core, seeking power is about gaining control of the risks, uncertainties, and consequences. It is not about creating opportunities for maximizing value. When one myopically seeks power at the expense of others, it creates a feedback loop of closemindedness that clouds one's judgement.[323] In a negotiation, if one party

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equitable" based on the movant's business judgement include: (1) the probability of success in the litigation; (2) the difficulties, if any, to be encountered in the matter of collection; (3) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; (4) the paramount interest of the creditors and a proper deference to their reasonable views in the premises. *See, e.g.*, *In re* Ortiz, 619 B.R. 273 (Bankr. M.D. Fla. 2020); *Ritchie Cap. Mgmt., LLC v. Kelley*, 785 F.3d 273, 278-79 (8th Cir. 2015) (quoting *Tri-State Fin., LLC v. Lovald*, 525 F.3d 649, 654 (8th Cir. 2008)).

316 *See* Jolls, Sunstein & Thaler, *supra* note 287, at 1479 ("In many market and bargaining settings (as opposed to nonmarket settings such as bequest decisions), people care about being treated fairly and want to treat others fairly if those others are themselves behaving fairly.").

317 *See* discussion *supra* Part II.C.

318 *See* Mediator's Fourth Interim Report, *supra* note 34.

319 *See* Findings of Fact, Conclusions of Law, and Order Confirming the Twelfth Amended Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. and its Affiliated Debtors, *supra* note 201.

320 *See 15 States Drop Opposition to Controversial Purdue Pharma OxyContin Bankruptcy*, NPR.ORG (Jul. 8, 2021), https://www.npr.org/2021/07/08/1014043094/fifteen-states-drop-opposition-to-controversial-purdue-pharma-oxycontin-bankrupt.

321 Bonta, *supra* note 212.

322 *See* Disclosure Statement for Fifth Amended Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. and its Affiliated Debtors, *supra* note 137, at 145.

323 Power does not always lead to entrenched ways of thinking. When someone holds powerful positions for a long time or due to structural reasons, power can create entrenched thinking and consequently lead to less creative outcomes. However, in certain dynamic bargaining contexts where power can be shifted, psychological power can lead individuals to be more creative. This occurs because negotiators who are

becomes powerful enough to insulate itself from the risks and consequences, it becomes inattentive to input from others. Consequently, that party ignores useful information that is helpful for solving common problems. It becomes more likely to act unilaterally without considering how it may impact others. Inattentiveness to the other parties' interests invites hostility, escalates tensions, and creates impasses. In turn, this chain of causation generates a vicious cycle where parties pursue value-destruction strategies.

The Sacklers were trapped in an echo-chamber because they myopically sought power above all else. This pursuit hampered their ability to identify opportunities that could satisfy their other interests. Although the Sacklers cared about their reputation—as demonstrated by their insistence on preserving their naming rights for charitable organizations—they forgot about the impact of their conduct.[324] One after another, museums and universities disassociated with the Sacklers because the Sackler name had become associated with greed and abuse.[325] Purdue experienced a wave of resignation and a loss of its top scientific talent. Although Purdue retained the right to develop and manufacture OxyContin®, it became unmarketable—which means that Purdue could not use it to turn around its financial conditions.[326] The state AGs, who felt insulted, went on to pursue value-destroying strategies.[327] They filed procedural objections incessantly to delay and obstruct the negotiation in hopes of gaining their leverage back.[328] The outcome? A bargaining disaster.

What the Sacklers did was actually common among powerful "grifters" in mass tort bankruptcies. On the eve of bankruptcy, J&J shifted its tort liabilities to its subsidiary LTL Management LLC as part of a ploy to delay, hinder, and defraud the

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relatively insulated from risks of bargaining failure have better opportunities to explore options outside the box and the costs of failed exploration is lower. *See Power in Negotiation: The Impact on Negotiators and the Negotiation Process*, HARV. L. SCH. PROGRAM ON NEGOT. BLOG (Jan. 2, 2023). The problem here is myopically
"seeking power," rather than using power to one's advantage to explore value-creation opportunities.

324 *See supra* Part II.C.

325 *See, e.g.*, Zachary Small, *Guggenheim Removes Sackler Name Over Ties to Opioid Crisis*, N.Y. TIMES (May 10, 2022), https://www.nytimes.com/2022/05/10/arts/design/guggenheim-sackler-name-opioids.html; Sarah Cascone, *The British Museum Drops the Sackler Name from its Galleries, Joining a Growing Flood of Institutions Cutting Ties with the Family*, ARTNET (Mar. 25, 2022), https://news.artnet.com/art-world/british-museum-ditches-the-sackler-name-2090153; Ed Cunningham, *Museums All Over the World are Finally Ditching the Damaging Sackler Name*, TIMEOUT (May 12, 2022), https://www.timeout.com/news/museums-all-over-the-world-are-finally-ditching-the-damaging-sackler-name-051222; Angela Davic, *The End of the Sackler Name on Art Buildings and Museums*, THE COLLECTOR (Oct. 9, 2022), https://www.thecollector.com/end-sackler-name-art-buildings-museums/.

326 *See generally* Patrick Radden Keefe, *An Insider From the Purdue Pharma Bankruptcy Speaks Out*, THE NEW YORKER (Sep. 20, 2021), https://www.newyorker.com/news/news-desk/an-insider-from-the-purdue-pharma-bankruptcy-speaks-out.

327 *See generally* Ryan Hampton, *What Americans Don't Know About the Purdue Pharma Bankruptcy Hurts All of Us*, TIME (Oct. 6, 2021), https://time.com/6104495/purdue-pharma-bankruptcy-victims/.

328 *See, e.g.*, Objection of United States Trustee to Sixth Amended Joint Chapter 11 Plan of Purdue Pharma L.P. and its Affiliated Debtors, *supra* note 187, at 3.

tort claimants.[329] The plan, internally dubbed as "Project Plato," was kept in the strictest confidence.[330] J&J's lawyers deployed a series of contractual arrangements to protect the plan in secrecy and threatened its employees about the consequences of leakage.[331] Once the plan came into light as LTL filed for bankruptcy, J&J again resorted to hostile tactics and held-up the negotiation in hopes that the victims capitulate.[332] As a result, J&J ended at a place similar to where the Sacklers ended: the tort victims resisted and challenged J&J's actions in court, and the court ruled that J&J's maneuver was illegal.[333]

IIII. LESSONS: ENDING THE GRIFT THROUGH NEGOTIATIONS?

A. Rethinking Bankruptcy Reform from the Lens of Negotiation

Professor Lindsey Simon's timely article, *Bankruptcy Grifters*,[334] debuted amidst a collective reckoning to grapple with some of the most disturbing corporate abuses in the wake of a nationwide opioid crisis.[335] Simon's article, which coined the term "bankruptcy grifters," brought to light both past and ongoing grifts of the Sackler family which largely escaped the radar of most bankruptcy scholarship.[336] Since her article, debates concerning how to end the bankruptcy grift have filled the academy, the bench, and the bar.[337]

Simon's discoveries reanimated calls for mass tort reforms through changing the Bankruptcy Code.[338] With some variations, most proposals fall along these lines: (1)

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329 *See* Kevin Dunleavy, *Judge Backs Johnson & Johnson in Bankruptcy Ploy for Talc Litigation, Clears Way for Settlement*, FIERCE PHARMA (Feb. 25, 2022), https://www.fiercepharma.com/pharma/judge-backs-johnson-johnson-bankruptcy-ploy-talc-litigation-clears-way-settlement.

330 *See* Mike Spector & Dan Levine, *Special Report: Inside J&J's Secret Plan to Cap Litigation Payouts to Cancer Victims*, REUTERS (Feb. 4, 2022), https://www.reuters.com/business/healthcare-pharmaceuticals/inside-jjs-secret-plan-cap-litigation-payouts-cancer-victims-2022-02-04/.

331 *See id.*

332 *See id.*

333 *See In re* LTL Mgmt. LLC, 58 F.4th 738, 764 (3d Cir. 2023).

334 *See* Simon, *supra* note 23, at 1154.

335 *See* Brubaker, *supra* note 27, at 960.

336 *See* Simon, *supra* note 23, at 1160.

337 *See* Robin J. Effron, *Fighting the Grift: The Stubborn Creep of Bankruptcy as a Forum for Aggregate Litigation*, JOTWELL (Nov. 7, 2022), https://courtslaw.jotwell.com/fighting-the-grift-the-stubborn-creep-of-bankruptcy-as-a-forum-for-aggregate-litigation/ (reviewing Lindsey D. Simon, *Bankruptcy Grifters*, 131 YALE L.J. 1154 (2022)); Alexandra D. Lahav, *Mass Tort Endgames*, JOTWELL (Jul. 14, 2022), https://torts.jotwell.com/mass-tort-endgames/; Adam Levitin, *The Texas Two-Step: The New Fad in Fraudulent Transfers*, CREDIT SLIPS (Jul. 19, 2021), https://www.creditslips.org/creditslips/2021/07/the-texas-two-step.html.

338 *See, e.g.*, Marshall S. Huebner & Marc J. Tobak, *Please Don't Forget the Victims: Mass Torts, Third Party Releases and the U.S. Bankruptcy Code*, HARV. L. SCH. BANKR. ROUNDTABLE (Dec. 13, 2022); David Skeel, Is the Texas Two-Step a Proper Chapter 11 Dance? HARV. L. SCH. BANK. ROUNDTABLE (Jul. 5, 2022), http://blogs.harvard.edu/bankruptcyroundtable/tag/david-skeel/; Jamie M. Scherbeh, Note, *The Texas Two-Step: How Divisive Merger Turn Plaintiffs'*

outright prohibition of *all* "nonconsensual non-debtor releases" and federal preemption of state contract law;[339] (2) mandatory disclosures for materially important non-debtor parties to the bankruptcy;[340] (3) discovery mechanisms giving creditors information regarding the debtor's affairs;[341] (4) procedural protections for the tort victims' claims in bankruptcy;[342] (5) gatekeeping via adopting new judicial tests for recovering channeled non-debtor assets or confirming reorganization plans.[343] Most of these proposals, grounded on traditional arguments of bankruptcy policy, are directed towards Congress or the Supreme Court. Despite their obvious differences, these proposals push for more or less the same outcomes: higher informational transparency, more robust procedural safeguards for creditor consent, and stronger remedies for procedural abuse.[344] All of these proposals center on reforming the text of the Bankruptcy Code by drawing lessons directly from the classic law-and-economics handbook.[345] As expected, the success of these reform proposals largely depends on whether judges and lawmakers will accept the scholars' new interpretations of "best interest" standards[346] and "equitable powers"[347] that already exist in the Bankruptcy Code.

This Article presents an alternative: focus on the practice, not just the text. Without discounting the value of the above proposals, we should not forget that bankruptcy outcomes are largely determined by negotiation practice.[348] Existing

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Litigation Into a Nationwide Honkytonk, 41 REV. LITIG. 275, 296-98 (2022); *See also* Parikh, *supra* note 123, at 450–51.

339 *See* Michael J. Cohen, Michael A. Rosenthal & Matthew J. Williams, *Congressional Committees Propose Changes to Bankruptcy Code Prohibiting Non-Consensual Releases of Third Parties and Limiting Other Important Bankruptcy Tools*, HARV. L. SCH. BANKR. ROUNDTABLE (Jan. 26, 2022); *see also* NONDEBTOR RELEASE PROHIBITION ACT, S.2497, 117th Cong. § 2(a) (2021).

340 *See* Simon, *supra* note 23, at 1207–08.

341 *See id.* at 1209–10.

342 *See id.* at 1210–11.

343 *See id.* at 1212–15.

344 *See id.* at 1216.

345 *See id.* at 1214.

346 *See* 11 U.S.C. § 1129(a)(7) (2018) Historical and Revision Note (Legislative Statements) (emphasis added) ("Section 1129(a)(7) adopts the position taken in the House bill in order to insure that the dissenting members of an accepting class will receive at least what they would otherwise receive under the *best interest of creditors test*; it also requires that even the members of a class that has rejected the plan be protected by the *best interest of creditors test* for those rare cramdown cases where a class of creditors would receive more on liquidation than under reorganization of the debtor.").

347 *See id.* § 105(a) (2018) ("The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.")

348 *See* Kenneth Ayotte & Jared A. Ellias, *Bankruptcy Process for Sale*, 39 YALE J. REGUL. 1, 1 (2022) (examining the role of DIP financing transactions in dictating the outcome the restructuring process); *see also* Michelle M. Harner & Jamie Marincic, *The Potential Value of Dynamic Tension in Restructuring Negotiations*, 30 AM. BANKR. INST. J. 61 (2011) (discussing the potential value of dynamic tensions in relationships among debtors and their various stakeholders for reaching a productive restructuring negotiation outcome).

proposals primarily seek to address the consequences of bankruptcy grifts by tweaking and re-interpreting existing provisions in the Bankruptcy Code. While these efforts are both admirable and necessary, they do not go far enough. At best, they create clear signals that incentivize cost-efficient and fair conduct. At worst, they are just ignored or contracted around by sophisticated parties so that the legal texts are deprived of meaning and effect. Thus, as we continue to look for the legal solutions to curb corporate abuses of bankruptcy, we should be mindful of what negotiation toolkits we can use by drawing from the practitioner's arsenal.

Perhaps rethinking negotiations as a fluid process can offer a dose of optimism. Since power-seeking does not lead to the most efficient outcomes, this implies that abusing the bankruptcy system might not be instrumentally desirable—or even utilitarian—for negotiators contemplating a bankruptcy. Despite Simon's enlightening contribution for starting the study on "bankruptcy grifters," she herself seems resigned to the inevitability of bankruptcy grifts.[349] Informed by conventional law-and-economics, Simon casts these abuses as either efficient or advantageous to the "bankruptcy grifter."[350] But grifts do not have to be inevitable. If we can convince prospective bankruptcy filers that abusing the system to gain bargaining leverage is a suboptimal strategy that creates a lose-lose negotiation, we can reduce their incentives to abuse the bankruptcy system. Hopefully, we will see fewer "bankruptcy grifters" in the long run.

Instead of characterizing *In re Purdue Pharma* solely as a legal failure of the Bankruptcy Code, seeing *In re Purdue Pharma* as a practical bargaining failure can illuminate new fields of inquiry. First, focusing on the structural, behavioral, and cognitive dimensions of bargaining help us bridge the gaps between theory and praxis. Power-blind theories such as the bargaining power irrelevance proposition have long dominated law-and-economics discourse.[351] Although practitioners have long recognized the importance of bargaining power in bankruptcy negotiations, their approaches to bargaining power are largely ad hoc and undertheorized.[352] Second, rethinking negotiations as dynamic and interactive processes help re-center the often-neglected conceptions of power that have been sidelined by the law-and-economics

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349 *See* Brubaker, *supra* note 27, at 962 (reviewing and criticizing Lindsey D. Simon's arguments).
350 *See id.*
351 *See* Choi & Triantis, *supra* note 276, at 1665. More recent law-and-economics scholarship are starting to pay attention to the distributive inequalities of the bargaining power irrelevance proposition, which were previously sidelined by mainstream theories due to the economists' obsessions with Pareto efficiency. *See* Fabio Galeotti, Maria Montero & Anders Poulsen, *Efficiency Versus Equality in Bargaining*, 17 J. EUR. ECON. ASSOC. 1941, 1968 (2018); *see also* Aaron Nicholas & Birendra Rai, *Are Efficient Bargaining Power Disparities Unfair? An Experimental Test*, MONASH UNIV. DEPT. OF ECON. DISCUSSION PAPER 02/19 (Feb. 2019), https://www.monash.edu/business/economics/research/publications/publications2/0219AreEfficientRai.pdf
352 *See, e.g.*, Carolyn O'Hara, *How to Negotiate with Someone More Powerful than You*, HARV. BUS. REV. (June 6, 2014), https://hbr.org/2014/06/how-to-negotiate-with-someone-more-powerful-than-you; Deborah M. Kolb & Judith Williams, *Breakthrough Bargaining*, HARV. BUS. REV. (Feb. 2001), https://hbr.org/2001/02/breakthrough-bargaining

orthodoxy.[353] Once we understand that bargaining power is not a monolithic positional advantage and learn to scrutinize how power is exercised, we become freed from the intellectual constraints that confine our solutions to informational exchange and bargaining costs.[354]

This includes imposing new corporate governance duties for controlling non-debtor entities of the bankrupt firm.[355] Similarly, focusing on the behavioral and cognitive aspects of negotiations can help reformers identify possible process abuses that could be addressed through implementing good faith bargaining obligations.[356] These dimensions of negotiation practice help reformers expand the regulatory arsenal to consider solutions beyond the traditional toolkits of disclosure or procedural safeguards.

B. Actionable Steps for Substantive Bankruptcy Reform

While there are reasons to be optimistic about the prospects of ending the bankruptcy grift through changing our negotiation paradigms, we should not passively wait for a paradigm shift to occur. After all, recognizing the centrality of negotiation in bankruptcy is merely the first step to reform the federal bankruptcy system. The next step is to undertake concrete steps to mitigate grifting risks that are conducive to inefficient bargaining and value-destruction. What this means is we must install more radical institutional guardrails to prevent abuses, penalize harmful bargaining strategies, and incentivize productive negotiation dialogue specific to the mass tort context. Towards this end, this section explores three possibilities to reform existing bankruptcy law and procedure, corresponding to the three flaws identified earlier in this Article.

1. *Granting Tort Claimants a Right to Propose Plan.* — One method to mitigate grifting risks by non-debtor affiliates in chapter 11 is to allow tort victims as a class

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353 *See* Peter H. Kim, Robin L. Pinkley & Alison R. Fragale, *Power Dynamics in Negotiation*, 30 ACAD. MANAG. REV. 799, 820 (2005) (noting that there have been few scholarly efforts to integrate the most prominent theory of power into a cohesive framework of negotiation, despite the fact that power is widely acknowledged to affect negotiator performance).

354 *See supra* Part III.A.1.

355 There has been ample scholarship highlighting the possibility of using corporate governance systems design to curb principal-agent problems. *See, e.g.*, Livia Bonazzi & Sardar M.N. Islam, *Agency Theory and Corporate Governance: A Study of the Effectiveness of Board in their Monitoring of the CEO*, 2 J. MODEL. MANAG. 7, 17–18 (2007); Thomas Waschenfelder, *The Principal-Agent Problem: Solving it with Incentives*, WEALEST (last accessed Mar. 19, 2023), https://www.wealest.com/articles/principal-agent-problem. Yet there has been scant discussion of how to solve principal-agent problems in the context of corporate bankruptcy.

356 The Bankruptcy Code already takes certain measures to protect creditors from unfair treatment. 11 U.S.C. § 1129(a)(7) requires the creditor to be entitled to at least what they would retain if the debtor were liquidated under chapter 11. The Code requires the debtor to show that the proposed reorganization plan is in the best interest of the creditors, under which the debtor conducts a liquidation analysis to show that the treatment is better than a hypothetical chapter 11 case. The court could adopt a similar "best interest" requirement for non-debtors seeking an injunction or a release of nonconsensual liability claims. *See* Simon, *supra* note 23, at 1212. Alternatively, the court can impose a good faith bargaining obligation for mass tort bankruptcies that is similar to the one mandated in the context of collective bargaining (union) agreements.

to propose a reorganization plan.[357] Currently, the Bankruptcy Code gives debtors an exclusive right to propose a reorganization plan for a period of 120 days after filing chapter 11.[358] This period can be extended up to 18 months by the debtor's request.[359] Although the purpose of this exclusive right is to reduce administrative and transactional costs of resolving complex corporate reorganizations,[360] cases like *In re Purdue Pharma* show that the debtor's 120-day period of exclusivity is susceptible to abuse by controlling non-debtor affiliates. Powerful third parties like the Sackler family can piggyback on the debtor's exclusive right while directing the debtor to propose a reorganization plan that benefits third parties to the detriment of the debtor and its creditors.[361] Even without "bankruptcy grifters," this right incentivizes the debtor-in-possession to delay plan proposal and pursue risky business operations that may squander the bankruptcy estate before the 120-day window expires. These risks encourage holdouts and value-destructive tactics that often spoil subsequent bankruptcy negotiations.

The structural problems of bankruptcy negotiation can be resolved by creating an exception to the debtor's 120-day period of exclusivity specifically for mass tort bankruptcies. This will enhance the tort victims' voice in the reorganization while preserving the same efficiency benefits that the 120-day period of exclusivity was originally designed to give debtors. Without completely eliminating the debtor's right to propose a plan, tort victims should be allowed to propose a competing reorganization plan of their own within the same 120-day period. All claimants of the debtor should be able to vote on both plans, express their preferences on either plan, or deny both plans in favor of a conciliatory plan that incorporates elements of both. The bankruptcy judge should set up the voting rules. Since the tort victims themselves will be responsible for proposing a plan that leads to their optimal financial recovery, this reform can legitimize chapter 11 as a viable, equitable, and efficient method to resolve dispersed mass tort claims with minimal grifting risks.

2. *Stakeholder Governance of Debtor-Company by Tort Victims*. — In addition to reforms augmenting the tort victims' voice in the plan proposal stage, reforms granting tort victims a stake in the restructured debtor-company can incentivize parties to reach more durable and equitable negotiation results. For instance, one way to prevent grifters from abusing the bankruptcy system for leverage gains is to allow tort victims to appoint fiduciary representatives to the restructured debtor's board of

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[357] Only "substantially similar" claims may be classified together into the same creditor class. Tort victims satisfy this requirement. *See* 11 U.S.C. § 1122 (2018).

[358] *See id.* § 1121(b) (2018).

[359] *See id.* § 1121(d)(2)(A) (2018).

[360] *See* Eric W. Lam, *Of Exclusivity and For Cause: 11 U.S.C. Section 1121(d) Re-Examined,* 36 DRAKE L. REV. 533, 534 (1987) ("The major goals of such reorganizational proceedings are the formulation, filing, and consummation of a plan to restructure debts. In an effort to provide debtors with sufficient time and flexibility to formulate plans, 'Congress confers on the debtor an exclusive right to file a plan . . . .'").

[361] Even with no information asymmetries between the managers of the debtor-in-possession and the tort claimants, the 120-day period of exclusivity creates a "take-it-or-leave-it" dynamic that significantly reduces recovery by the tort claimants. *See* Casey & Macey, *supra* note 18, at 1018.

directors. Ideally, the victims' representative should be someone who has a long-term commitment and obligation to act for the victim's best interests—such as the trustee of a settlement trust.[362] Even without a majority of board directors, the victims' representative will be able to advocate for the victims' interests, get involved in corporate decision-making, and demand access to business information from the debtor's managers and officers for the benefit of the tort victims. The idea is to reform the debtor's corporate governance so that the victims are able to check and curb the influence that powerful non-debtor affiliates exercises over the debtor (as well as the bankruptcy estate).

By rebalancing the power between tort victims, the debtors, and non-debtor affiliates through stakeholder governance, this reform will increase the likelihood that the debtor successfully emerges from chapter 11 while ensuring the tort victims are adequately compensated after the debtor exits bankruptcy. This reform is similar to what some have referred to as the "public benefit company" solution to mass torts.[363] Under the "public benefit company" proposal, debtors that emerge from chapter 11 will be owned by the tort victims for the public good.[364] As shareholders of the newly emerged company, the tort victims will be entitled to equity distribution and may even participate in a shareholder windfall if there is strong post-bankruptcy performance.[365] However, the "public benefit company" solution has two drawbacks. First, whether or not the debtor declares a dividend or distribution is up to the discretion of the board. This solution neither limits the board's discretion nor imposes obligations for mandatory distribution. Second, the tort victim's ability to recover will be entirely dependent on strong post-bankruptcy performance. If the company becomes distressed or insolvent again, the tort victims will be in a precarious situation because their claims (as shareholders) will be subordinate to those of all other creditors under bankruptcy's absolute priority rule. Unlike the "public benefit company" solution, my stakeholder governance proposal will guarantee tort victims' recovery without regard to equity distribution or post-bankruptcy firm performance.

3. *Imposing a Duty to Bargain in Good Faith*. — A complementary reform is to require debtors and their affiliate holding entities to bargain with tort victims in good faith. Currently, the Bankruptcy Code only requires the reorganization plan to be

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[362] A settlement trust is created for the purpose of growing assets set aside for the tort victims' recovery and paying them incrementally as new victims develop actionable claims against the debtor. Usually, a settlement trust is accompanied by a channeling injunction that funnels all new tort claims against the debtor into the trust. Although the future victims' right to sue the debtors will be extinguished, the settlement trust and channeling injunction ensures that all tort victims will recover in full. However, some scholars worry that the settlement trust arrangement will not give tort victims the same procedural protections that would have been provided to them had they litigated their tort cases in an Article III court. *See* Simon, *supra* note 23, at 1159.

[363] *See* Parikh, *supra* note 123, at 425 ("Instead of accepting fire-sale prices and an underfunded settlement trust, the scarlet-lettered company emerges from bankruptcy as a corporation for the public benefit. This modified reorganization offers victims the greatest recovery.").

[364] The idea is that the debtor-company has forfeited its right to pursue shareholder value maximization once it commits a mass tort or public nuisance and files bankruptcy afterwards. When the company exits bankruptcy as a new entity, it will be transformed to remediate the evil that it has done prior to bankruptcy. *See id.* at 465.

[365] *See id.* at 425.

proposed in good faith.[366] My proposal will give the bankruptcy judge an oversight role over the entire reorganization process to ensure good faith in bargaining. Under this proposal, if either the debtor or the non-debtor affiliate walks away without bargaining, rejects the tort victim's proposed reorganization plan without explanation, or refuses to bargain, the good faith duty will be deemed to be violated. As a remedy, the bankruptcy judge may refuse to confirm the reorganization plan or modify it in the tort victims' favor. The judge may also sanction repeat offenders. Here, the idea is to import the duty to bargain in good faith from the labor union (*i.e.*, collective bargaining agreement) context to the mass tort bankruptcy context.[367] By imposing such duty, debtors and non-debtor affiliates will be penalized for deploying harmful bargaining tactics to the detriment of the tort victims. This will foster more productive negotiation dialogues that can lead to better outcomes for both debtors and the tort victims.

CONCLUSION

In re Purdue Pharma is a story about victimhood, conflict, and abuse. The story begins with how corporate malfeasance set the stage for a nationwide public health crisis; it ends with how "bankruptcy grifters" exploit the federal bankruptcy system to evade the consequences (unsuccessfully). It is also a cautionary tale for *what* power abuses are capable of and *how* they further escalate disasters—through the microcosm of a failed negotiation.

By rearticulating the story of *In re Purdue Pharma* through the rarely-explored lens of bargaining failure, this Article hopes to re-center the study of negotiations in the legal scholarship on mass tort bankruptcies. A central puzzle of *In re Purdue Pharma* is why the parties reached a lose-lose outcome after investing significant time, energy, and resources. Rationally, "bankruptcy grifters" like the Sacklers should have extracted substantial benefits from the other negotiating parties due to the bargaining leverages and informational asymmetries they gained from abusing the bankruptcy process. Even if the bargain was a net inefficiency in the aggregate, the Sacklers should have won by a large margin. In practice, however, the Sacklers' excessive focus on entrenching power imbalances not only caused them to lose sight of value-creating opportunities but also resulted in pushbacks from other parties that cost any victories they would have gotten from exploiting the power imbalance. Consequently, all parties resorted to value-destroying strategies.

As such, this Article carries implications for the study of law-and-economics as well. Conventional law-and-economics often leads scholars to focus exclusively on laws without regard to how they impact legal practice. But, as *In re Purdue Pharma*

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366 *See* 11 U.S.C. § 1129(a)(3).

367 *See* NAT'L LABOR RELATIONS ACT §§ 8(a)(5), 8(d); *see also* National Labor Relations Board, *Bargaining in Good Faith with Employees' Union Representative*, NLRB, https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/bargaining-in-good-faith-with-employees-union-representative (last accessed Mar. 19, 2023).

shows, whether a company successfully emerges from bankruptcy depends on a host of factors beyond rules that dictate resource allocation. More often, the structural, behavioral, and cognitive dimensions of bargaining determine how the parties use resources to their (dis)advantage, not the other way around.

Focusing on the bargaining dynamics of *In re Purdue Pharma* therefore illuminates new fields of academic inquiry. Recent debates on "bankruptcy grifters" in mass torts have resulted in a proliferation of proposals centering on reforms of specific Bankruptcy Code provisions. They call for the installment or removal of certain rights and legal entitlements from the Code yet pays scant attention on how affected parties react to incentives created by these changes. But the real problem for mass tort bankruptcies is *how* value is created or destroyed through negotiations, not *what* is being supplied by the Code provisions. Any attempt to understand the structural, behavioral, and cognitive aspects of negotiations in bankruptcy is bound to be incomplete.