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CHANNELING ABUSE: SURVIVOR CLAIMS, BANKRUPTCY, AND A PATH FORWARD

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ABSTRACT

Since 2002, numerous state legislatures have passed revival statutes renewing the statute of limitations for sexual abuse claims. Faced with an influx of claims, indemnitors of alleged abusers, including the Boy Scouts of America and the Archdiocese of Saint Paul and Minneapolis, have filed for bankruptcy and sought injunctive relief that included releases for local organizations or individuals. Due to a circuit split on whether such orders are permissible under § 105(a) of the Bankruptcy Code, abuse survivors obtain different outcomes in different districts. While some circuits view § 105(a) as a broad grant of equitable powers, others hesitate to apply such expansive authority from a relatively vague provision. This note argues that Congress should follow the precedent it set in the Johns-Manville Corporation asbestos bankruptcy proceeding and amend the Code to lay out the factors a bankruptcy court should consider before entering an order in a mass-tort bankruptcy that limits future claimants. Congress drew from the Johns-Manville bankruptcy proceeding to draft § 524(g), the portion of the Code dealing with asbestos-related bankruptcies, and Congress can now draw from the factors used by the courts in the majority to resolve the circuit split. This change will empower bankruptcy courts to manage future mass tort bankruptcies.

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INTRODUCTION

States have reformed their sexual abuse statutes at an accelerating rate since 2002, when the *Boston Globe* published a groundbreaking article exposing widespread sexual abuse throughout Catholic parishes in the Greater Boston area and a corresponding coverup by the archdiocese.[1] The Spotlight article drove a national conversation about how statutes of limitation negatively impact survivors of sexual abuse[2] because a majority of sexual abuse survivors do not disclose their abuse until adulthood.[3]

Many complex factors contribute to the phenomenon of delayed disclosure, ranging from a child's intrinsic lack of understanding that abuse has occurred to an imbalanced power dynamic.[4] Moreover, only a small percentage, between six and fifteen percent, of disclosures are made to persons with legal authority.[5] This delay impedes prevention and enforcement efforts because the child's own disclosure of his or her history has been found more efficacious for abuse diagnosis purposes than medical examinations, which often fail to uncover anything

1. Michael Rezendes, *Church Allowed Abuse by Priests for Years*, BOS. GLOBE (Jan. 6, 2002, 5:50 PM), https://www.bostonglobe.com/news/special-reports/2002/01/06/church-allowed-abuse-priest-for-years/cSHfGkTIrAT25qKGvBuDNM/story.html [hereinafter referred to as the "Spotlight" article].

2. MARCI A. HAMILTON ET AL., CHILD USA, 2019 ANNUAL REPORT: A NATIONAL OVERVIEW OF THE MOVEMENT TO PREVENT CHILD SEX ABUSE AND EMPOWER VICTIMS THROUGH STATUTES OF LIMITATION REFORM SINCE 2002 5–7 (2020).

3. *Delayed Disclosure: A Factsheet Based on Cutting-Edge Research on Child Sex Abuse*, CHILD USA (Mar. 2020), https://childusa.org/wp-content/uploads/2020/04/Delayed-Disclosure-Factsheet-2020.pdf (finding the average age of disclosure to be roughly fifty-two years old).

4. *Id.* at 2.

5. *Id.*

"abnormal."[6] For survivors, delayed disclosure caused by the trauma of their abuse inhibits their pursuit of justice, as many survivors find the doors of the courthouse closed to them because the applicable statute of limitations has expired.[7]

Recognizing that sexual abuse may prevent survivors from coming forward until the relevant statute of limitation had expired, seventeen states and the District of Columbia have passed laws reviving expired claims.[8] Faced with a potential influx of claims, insurance companies and employers with a contractual duty to indemnify potential abusers preemptively filed for bankruptcy.[9] Would-be claimants were forced to pursue their civil damages through the labyrinthine bankruptcy system because a bankruptcy order can supersede the state revival statute under which survivors make their claim.[10] In addition, a bankruptcy court can enjoin lawsuits against the abuser personally where his former employer has sought protection.[11] Moreover, as noted above, survivors also encounter radically different outcomes depending on the judicial district in which the indemnitor filed for bankruptcy.[12]

This note argues for revision of the Bankruptcy Code (the "Code") to grant bankruptcy courts the power to issue channeling injunctions in mass tort litigations like the indemnitor bankruptcies that resulted from the passage of sexual abuse revival statutes nationwide.[13] Part I analyzes recent bankruptcy cases involving sexual abuse claims revived through state statute, including *In re Archdiocese of Saint Paul & Minneapolis* and *In re Boy Scouts of America & Delaware BSA, LLC*. Part II addresses the split between the circuits on whether § 105(a) of the Code allows bankruptcy courts to grant the injunctions necessary for equitable management of mass tort litigations.[14] Notably, the broad language of § 105(a), which permits bankruptcy courts to issue "any order, process,

6. *See, e.g.*, Astrid Heger et al., *Children Referred for Possible Sexual Abuse: Medical Findings in 2384 Children*, 26 CHILD ABUSE NEGL. 645, 652 (2002) (finding that even children with a history of severe abuse including vaginal or anal penetration only exhibited "abnormal medical findings" at a rate of 5.5%).

7. *See Delayed Disclosure: A Factsheet Based on Cutting-Edge Research on Child Sex Abuse*, *supra* note 3, at 3.

8. *See* HAMILTON ET AL., *supra* note 2, at 46.

9. *See, e.g.*, Samantha Schmidt, *Boy Scouts Must Settle 95,000 Abuse Claims by Next Summer – or Risk Running Out of Cash*, WASH. POST (Nov. 19, 2020, 5:05 PM), https://www.washingtonpost.com/dc-md-va/2020/11/19/boy-scouts-bankruptcy-abuse/.

10. *See infra* Part I.

11. *See infra* Part I (discussing the *Boy Scouts of America & Delaware BSA, LLC* bankruptcy and its impact on claims revived by the New Jersey Legislature).

12. *See infra* Part II.

13. *See infra* Part I; *see generally* HAMILTON ET AL., *supra* note 2.

14. *See infra* Part II (discussing relevant portions of the Code and differing interpretations of § 105(a)).

or judgment that is necessary or appropriate" has led some circuits to conclude that bankruptcy courts' equitable powers can expand to meet the needs of a given case, while others have found the language too vague to justify such a broad grant of authority.[15] Part III examines Congress's amendment of the Code that allows bankruptcy courts to issue channeling injunctions, which compel claims against the debtor to be filed through a judicially-established trust, for asbestos cases pursuant to § 524(g) as a model for legislative action.[16] Finally, Part IV suggests a framework for a further legislative amendment of the Code by defining requirements to obtain a channeling injunction through the cases analyzed in Parts I and II, using the asbestos amendment addressed in Part III as a model. This note will demonstrate that legislative action could resolve the current circuit split and build a foundation for equitable resolution of future mass tort claims created by statute, including sexual abuse or environmental claims.

I. INDEMNITORS SEEK BANKRUPTCY PROTECTION

Bankruptcy courts are increasingly forced to determine whether to issue a broad injunction against future claims revived by state statute because indemnitors seek the protection of Chapter 11 reorganization as a shield against mass claims.[17] Chapter 11 reorganization allows a company to continue conducting business while it seeks to rehabilitate itself and reorganize its debts.[18] Generally, reorganization under Chapter 11 limits existing creditors' claims to the amounts set forth in the debtor's plan of reorganization.[19] Typically, the claims covered by a reorganization plan are claims against the debtor. However, recent actions in the Districts of Minnesota and Delaware demonstrate that some bankruptcy courts allow debtors to go a step further and limit the claims that may be brought against non-debtor third parties.[20] Along

15. *See id.*; 11 U.S.C. § 105(a).

16. *See* 11 U.S.C. § 524(g); *see also infra* Part III (discussing the connection between asbestos-related bankruptcies, the language of 524(g), and the impact of channeling injunctions).

17. *See generally In re* Archdiocese of Saint Paul & Minneapolis, 578 B.R. 823 (Bankr. D. Minn. 2017); *In re* Boy Scouts of Am. & Del. BSA, LLC, No. 20-10343 (Bankr. D. Del.).

18. Jason J. Jardine, *The Power of the Bankruptcy Court to Enjoin Creditor Claims Against Non-Debtor Parties in Light of 11 U.S.C. 524(e)*: In re Down Corning Corp., 2004 B.Y.U. L. REV. 283, 284 (2004).

19. *Id.* at 284 n.7 (citing JOHN H. WILLIAMSON, THE ATTORNEY'S HANDBOOK ON SMALL BUSINESS REORGANIZATION UNDER CHAPTER 11 1:2 (3d ed. 1992)).

20. *See generally In re* Archdiocese of Saint Paul & Minneapolis, 578 B.R. 823 (Bankr. D. Minn. 2017); *In re* Boy Scouts of Am. & Del. BSA, LLC, No. 20-10343 (Bankr. D. Del.).

with channeling injunctions, these non-debtor third-party releases limit the claims that can be brought by abuse survivors with revived claims.

A. Channeling Injunctions and Third Party Releases

Bankruptcy courts use both non-debtor third-party releases and channeling injunctions as tools to efficiently and equitably resolve complex bankruptcies involving future claims against the debtor. A bankruptcy court may issue a third-party release where potential claims against a non-debtor could impact the reorganization of the debtor company due to an indemnification or similar relationship between the debtor and the third party.[21] For example, a court could enjoin future claims against board members of a corporation where the corporation seeks a discharge but has an ongoing duty to indemnify its board members. These releases can bind both existing and future creditors. In some cases, a bankruptcy court will treat all future claims as waived once the plan is approved.[22] A claimant subject to such a release in a mass tort bankruptcy might lose their claim, even if the applicable revival statute gave them more time to file.[23]

Bankruptcy courts also use channeling injunctions to limit future claims against the debtor. First employed by a bankruptcy court in the asbestos-related Johns-Manville bankruptcy, channeling injunctions direct all future claims against a debtor company to a trust established for the purpose of equitably distributing payment between present and future claims.[24] Channeling injunctions also preclude the filing of those claims against the debtor company or related parties who might be

21. A "debtor might seek to extend third party releases to co-debtors, officers, directors, lenders, parents, guarantors, sureties, or insurance carriers where those parties could assert post-confirmation [of the reorganization plan] indemnification claims against the debtor, or where the non-debtor party is a potential source of funding for the plan of reorganization." Dorothy Coco, *Third Party Bankruptcy Releases: An Analysis of Consent Through the Lenses of Due Process and Contract Law*, 88 FORDHAM L. REV. 231, 232 n.3 (2019) (quoting Michael S. Etkin & Nicole M. Brown, *Third Party Releases?—Not So Fast! Changing Trends and Heightened Scrutiny*, 29 AIRA J. 22, 22 (2015)).

22. *E.g.*, *In re* Dow Corning Corp., 244 B.R. 721 (Bankr. E.D. Mich. 1999), *aff'd*, 280 F.3d 648 (6th Cir. 2002). In *Dow Corning*, the plan stated that "all Persons who have held, hold, or may hold Products Liability Claims, whether known or unknown, shall be deemed to have forever waived and released all such rights or Claims" against "the Debtor and its shareholders, The Dow Chemical Company and Corning, Inc." *Id.* at 735–36 (footnote omitted). The reorganization plan also stipulated that "all Persons who have held, hold, or may hold Released Claims, whether known or unknown, shall be permanently enjoined" from bringing their claims against the released parties. *Id.*

23. *See id.*

24. *See* Eric D. Green et al., *Future Claimant Trusts and "Channeling Injunctions" to Resolve Mass Tort Environmental Liability in Bankruptcy: The* Met-Coil *Model*, 22 EMORY BANK. DEVS. J. 157, 161–63 (2005).

personally sued.[25] These injunctions attempt to resolve the conflict between the debtor's need to obtain a complete resolution of potential claims and future claimants' right to pursue lawful claims against the debtor.[26] Just as they have done in asbestos and product liability bankruptcies, bankruptcy courts presiding over mass tort bankruptcies involving sexual abuse claims use channeling injunctions to direct all claims to an established trust.[27]

Both channeling injunctions and non-debtor third party releases limit survivors' claims as indemnitors seek the protection of Chapter 11.[28] Non-debtor third-party releases prevent claimants from filing claims against their abusers or the institution(s) that employed them, while channeling injunctions force claimants through a predetermined process to obtain a fixed amount of relief.[29] One recent case highlights how a bankruptcy court may confirm both measures in a plan for reorganization.

B. In re Archdiocese of Saint Paul and Minneapolis

On September 25, 2018, a bankruptcy court confirmed a plan for reorganization approved by both the Saint Paul Minneapolis Archdiocese and over 400 sexual abuse survivors who had come forward prior to the plan's approval.[30] Previously, in December 2017, the United States

25. *See id.*

26. *See id.*

27. *See* Gary Svirsky et al., *A Field Guide to Channeling Injunctions and Litigation Trusts*, 260 N.Y. L. J. 1–3 (2018), https://www.omm.com/resources/alerts-and-publications/publications/a-field-guide-to-channeling-injunctions-and-litigation-trusts/; *see also* 11 U.S.C. §§ 105, 524(g).

28. For example, the Syracuse Catholic Diocese filed for Chapter 11 bankruptcy a few days after thirty-eight people filed claims against it pursuant to the New York Child Victims Act. Julie McMahon, *Syracuse Catholic Diocese Files for Bankruptcy*, SYRACUSE.COM (June 19, 2020, 11:38 AM), https://www.syracuse.com/crime/2020/06/syracuse-catholic-diocese-files-for-bankruptcy.html. These new claimants joined a group of over 100 victims making claims against the Diocese, but the bankruptcy filing supplanted the deadlines set by the Child Victims Act with deadlines imposed by the bankruptcy court. Marnie Eisenstadt, *Syracuse Catholic Diocese's Move Shifts Abuse Claims Against Priests to Bankruptcy Court*, SYRACUSE.COM (June 19, 2020, 6:03 PM), https://www.syracuse.com/news/2020/06/syracuse-catholic-dioceses-move-shifts-sex-abuse-claims-against-priests-to-bankruptcy-court.html. The Diocese of Syracuse followed the example of the Dioceses of Rochester and Buffalo, which had already filed for bankruptcy. *Id.*

29. *See infra* Part II (discussing third party releases); *infra* Part III (discussing channeling injunctions as used in asbestos bankruptcies).

30. Brian Roewe, *Twin Cities Archdiocese's $210 Million Bankruptcy Settlement Approved*, NAT'L CATH. REP. (Sept. 27, 2018),

Bankruptcy Court for the District of Minnesota had issued a ruling on an earlier plan that sought a third party release and/or a channeling injunction that would bind future claimants from bringing suit against their alleged abusers, former employees of the archdiocese.[31] The bankruptcy court recognized that the circuit courts of appeal were split on whether to allow releases for non-debtor third parties, and it held that such releases would be permissible in certain circumstances where the bankruptcy court exercised its broad equitable powers.[32]

The court suggested a set of considerations for a debtor to obtain a channeling injunction and/or third party release: (1) a significant number of claims against the debtor and the third parties for whom the release is sought; (2) a "substantial contribution" from the third parties to the plan; (3) the importance that obtaining the releases has to the ultimate success of the plan; and (4) "significant acceptance of the plan" by the claimants.[33] Thus, the court did not approve the initial plan because the majority of sexual abuse claimants rejected it.[34]

The court ultimately approved the third amended plan, which released all claims against the Archdiocese, its constituent parishes, its insurers, and any employees or agents of the diocese who did not actually commit abuse.[35] This plan left claimants without the ability to file claims against the insurers or indemnitors of their abusers except through the channeling injunction.[36] In many instances, these indemnifying entities were the claimant's only path to relief because the clergymen who perpetrated the abuse earned between $30,000 and $45,000 a year and were thus unable to pay significant civil damages.[37] Despite acceptance by the majority of claimants, this plan necessarily limits future claimants.

https://www.ncronline.org/news/accountability/twin-cities-archdioceses-210-million-bankruptcy-settlement-approved.

31. *In re* Archdiocese of Saint Paul & Minneapolis, 578 B.R. 823, 832–33 (Bankr. D. Minn. 2017).

32. *Id*. at 832–34.

33. *Id*. at 833 (noting that a "significant" number of claimants approving the plan would mean more than half of the existing claimants consenting).

34. *Id*.

35. *See generally* Third Amended Joint Chapter 11 Plan of Reorganization of the Archdiocese of Saint Paul and Minneapolis, *In re* Archdiocese of Saint Paul & Minneapolis, 578 B.R. 823 (Bankr. D. Minn. 2017) (No. 1262).

36. *See id*.

37. The median national salary of a Catholic priest was approximately $45,000 a year in 2017, and the average starting salary for a Catholic priest in the Midwest was $29,856. Michael J. O'Loughlin, *How Much do Catholic Priests and Their Lay Colleagues Make? A New Report Gives Answers*, AMERICA: JESUIT REV. (Aug. 11, 2017), https://www.americamagazine.org/faith/2017/08/11/how-much-do-catholic-priests-and-their-lay-colleagues-make-new-report-gives.

C. In re Boy Scouts of America & Delaware BSA, LLC

A bankruptcy court can also shorten the time period set by state legislature with respect to a debtor. In New Jersey, the legislature enacted Senate Bill 477 on December 1, 2019.[38] The New Jersey Senate bill revived expired claims for childhood sexual abuse for a two-year period from December 1, 2019 to December 1, 2021.[39] Notably, "46 new cases were filed in the first *minute* of the revival period . . . ."[40]

The Boy Scouts of America and Delaware BSA, LLC ("BSA") subsequently filed for bankruptcy, citing the claims brought by survivors of sexual abuse as the catalyst.[41] Upon BSA's motion, the bankruptcy court issued an order that established a deadline for filing sexual abuse survivor claims against the BSA or any local scout counsel before November 16, 2020.[42] This deadline was over a year shorter than the

38. S. 477, 218th Leg., Reg. Sess. (N.J. 2019); Press Release, Philip D. Murphy, Governor, New Jersey, Governor's Statement Upon Signing Senate Committee Substitute for Senate Bill No. 477 (May 13, 2019), http://d31hzlhk6di2h5.cloudfront.net/20190513/53/cf/95/53/c9bc8166d33a2ed7ab41766a/S477.pdf. *See also* Melissa L. Jampol & Yael Spiewak, *New Jersey's New Child Victims Act Expands Opportunity for Filing Abuse Claims and Removes Former Immunity for Non-Profit Organizations and Public Entities*, NAT'L L. REV. (Jan. 2, 2020), https://www.natlawreview.com/article/new-jersey-s-new-child-victims-act-expands-opportunity-filing-abuse-claims-and#:~:text=This%20new%20law%20opens%20a,because%20they%20were%20filed%20late.

39. *See* S. 477, 218th Leg., Reg. Sess. (N.J. 2019); *see also* S. 477, 218th Leg., Reg. Sess. (N.J. 2018) ("The bill would revive any action that was previously dismissed on grounds that the applicable statute of limitations had expired for a period of two years following the effective date.") (Prefatory phrase was removed from the final version of the bill before enactment).

40. *See* Jampol & Spiewak, *supra* note 38.

41. Laurel Wamsley and Wade Goodwyn, *Boy Scouts of America Files for Bankruptcy as It Faces Hundreds of Sex Abuse Claims*, NPR (Feb. 18, 2020, 1:08 AM), https://www.npr.org/2020/02/18/806721827/boy-scouts-of-america-files-for-bankruptcy-as-it-faces-hundreds-of-sex-abuse-cla.

42. Order, Pursuant to 11 U.S.C. § 502(b)(9), Bankruptcy Rules 2002 and 3003(c)(3), and Local Rules 2002-1€, 3001-1, and 3003-1, (I) Establishing Deadlines for Filing Proofs of Claim, (II) Establishing the Form and Manner of Notice Thereof, (III) Approving Procedures for Providing Notice of Bar Date and Other Important Information to Abuse Survivors, and (IV) Approving Confidentiality Procedures for Abuse Survivors at 3, *In re* Boy Scouts of Am. & Del. BSA, LCC, No. 20-10343 (Bankr. D. Del. May 26, 2020) [hereinafter Order, Pursuant to 11 U.S.C. § 502(b)(9)]. The Order specifically notified survivors of the following:

> For the avoidance of doubt, even if the Sexual Abuse Claim is time-barred under an applicable statute of limitations, each Sexual Abuse Survivor is required to file a Sexual Abuse Survivor Proof of Claim in order to preserve the right to pursue a Sexual Abuse Claim, or such Sexual Abuse Survivor who fails to timely file a

period stated in New Jersey Senate Bill 477.[43] Moreover, the order also bound claimants from other states whose legislatures had not yet revived their claims because it required the filing of notice even where claims were time-barred.[44] Therefore, at least in the District of Delaware, bankruptcy courts can effectively prevent state legislatures from reviving expired sexual abuse claims by issuing broad releases to indemnitors.[45] Again, just as with the clergy abusers in the *In re Saint Paul* bankruptcy, the individual scoutmasters may lack the ability to pay claimants.[46]

Moreover, this court's order restrains suits against the local Boy Scout councils, which held more than $3 billion in assets in 2018.[47] In an amended reorganization plan, the BSA proposed that a channeling injunction be issued to draw all claims against the national organization or local councils into a trust; however, the BSA proposal only includes a contribution of $300 million from the local councils.[48] Ultimately, the District of Delaware Bankruptcy Court approved the BSA's reorganization plan, with its channeling injunction and non-debtor third party releases, in a 281-page opinion addressing the proper use of channeling injunctions and found that "these nonconsensual releases are

> Sexual Abuse Survivor Proof of Claim shall not be treated as a creditor with respect to such claim for the purposes of voting and distribution. Any Sexual Abuse Survivor must file the applicable Sexual Abuse Survivor Proof of Claim even if such claimant may be included in, or represented by, another action filed against the Debtors with respect to such claimant's Sexual Abuse Claim.

Id. at 7.

43. *Compare id.*, *with* S. 477, 218th Leg., Reg. Sess. (N.J. 2019).

44. *See* Order, Pursuant to 11 U.S.C. § 502(b)(9), *supra* note 42, at 3.

45. Notably, the bankruptcy court's order in *In re Boy Scouts of America* also applies to abuse claims that might be brought by survivors who live in states that have not revived the applicable statute of limitations for those claims. *See id.* at 7 ("[E]ven if the Sexual Abuse Claim is time-barred under an applicable statute of limitations, each Sexual Abuse Survivor is required to file a Sexual Abuse Survivor Proof of Claim in order to preserve the right to pursue a Sexual Abuse Claim . . . .").

46. While some claims are made against scoutmasters, many are also made against adult volunteers. *See* Corky Siezmaszko, *Boy Scouts of America Have A 'Pedophile Epidemic' and are Hiding Hundreds in its Ranks, Lawyers Claim*, NBC NEWS (Aug. 6, 2019, 4:05 PM), https://www.nbcnews.com/news/us-news/boy-scouts-america- have-pedophile-epidemic-are-hiding-hundreds-its-n1039661. Since its founding in 1910, the BSA has employed approximately 960,000 adult volunteers. *Id.*

47. *See* Cara Kelly, *Boy Scouts of America Plan to Exit Bankruptcy Would Pay Abuse Survivors an Average of $6,000 Each*, USA TODAY (Mar. 7, 2021, 10:29 AM), https://www.usatoday.com/story/news/investigations/2021/03/01/boy-scouts- bankruptcy-reorganization-plan-woefully-inadequate/6872981002/.

48. *BSA Takes Critical Step Toward Emergence By Filing An Amended Plan of Reorganization*, BOY SCOUTS OF AM., https://www.bsarestructuring.org/event/bsa-takes-critical-step-toward-emergence-by-filing-an-amended-plan-of-reorganization/ (last visited July 5, 2022).

necessary to the reorganization both to confirm this Plan and to ensure that BSA's Scouting program continues."[49] Thus, BSA's injunction and its insurers and local councils' third party releases control and limit the future recovery of all claimants who suffered abuse while participating in Boy Scouts.

Both *In re Archdiocese of Saint Paul & Minneapolis* and *In re Boy Scouts of America & Delaware BSA, LLC* present compelling arguments for revision of the Bankruptcy Code. The District of Minnesota used its equitable powers to issue non-debtor third party releases, while the District of Delaware effectively rewrote New Jersey Senate Bill 477 less than a year after its passage. In both cases, sexual abuse claimants found their claims subject to these broad equitable powers the courts themselves have struggled to define. As state legislatures around the nation are recognizing the importance of reviving sexual abuse claims,[50] future claimants may be similarly impacted by bankruptcy court rulings.

II. CIRCUIT SPLIT WITH RESPECT TO BANKRUPTCY COURTS' POWER TO ISSUE THIRD-PARTY RELEASES

Circuit courts are split as to whether bankruptcy courts have the power to enjoin suits against third parties; this split creates geographic and legal discrepancies in outcomes for entities seeking Chapter 11 reorganization in the face of mass tort claims. As a result, claimants face varying outcomes in different districts.

The issue stems from the drafting of the Bankruptcy Code. Congress granted courts of bankruptcy broad equitable powers through § 105(a):

> 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

49. *In re* BSA, No. 20-10343, 642 B.R. 504, 2022 Bankr. LEXIS 2095 at *225–34 (Bankr. D. Del. July 29, 2022) ("This is an extraordinary case crying out for extraordinary solutions. Two years of mediation by capable lawyers has yielded a Plan supported by Debtors, JPM, the UCC, the TCC, the FCR, the Coalition, the Settling Insurers and 85.72% of Direct Abuse Claimants. The combination of the monetary and non-monetary aspects of the Plan are fair to the holders of Abuse Claims.").

50. *See* HAMILTON ET AL., *supra* note 2, at 46.

> necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.[51]

Courts derive their power to issue third party releases from this provision.[52] Some courts, however, have found that these broad equitable powers are limited by § 524(e), which provides that a bankruptcy court cannot affect non-debtor liabilities through a debtor's discharge.[53]

51. 11 U.S.C. § 105(a). However, this broad grant of power has been limited by Article III courts reviewing bankruptcy orders or judgments. *E.g.*, *In re* Combustion Eng'g, Inc., 391 F.3d 190, 236 (3d Cir. 2004). The Third Circuit reasoned that § 105(a) did not "give the court the power to create substantive rights that would otherwise be unavailable under the Code." *Id.* (quoting *In re* Morristown & Erie R.R. Co., 885 F.2d 98, 100 (3d Cir. 1989)). Faced with an injunction barring third-party suits against two non-debtor companies that planned to contribute funds to the reorganization plan, the court found that § 105(a) did not permit a bankruptcy court to issue an injunction binding third-party suits in an asbestos bankruptcy that did not meet the explicit requirements for such injunctions set forth in § 524(g). *Id.* at 236–37. Similarly, in *Law v. Siegel*, the Supreme Court reversed a bankruptcy order permitting the debtor's administrative expenses to be paid from the debtor's homestead exemption, reasoning that § 105(a) "does not allow the bankruptcy court to override explicit mandates of other sections of the Bankruptcy Code." Law v. Siegel, 571 U.S. 415, 421–23 (2014) (quoting 2 COLLIER ON BANKRUPTCY 105.01[2], 105–06 (16th ed. 2013)).

52. "[S]everal courts have concluded that trusts and channeling injunctions may be authorized under § 105(a) and § 1123(b)(6) of the Bankruptcy Code to address other mass tort liabilities where a trust and channeling injunction would play 'an important part in the debtor's reorganization plan.'" *In re* Glob. Indus. Techs., 645 F.3d 201, 205 n.10 (3d Cir. 2011) (quoting SEC v. Drexel Burnham Lambert Grp., Inc. (*In re* Drexel Burnham Lambert Grp., Inc.), 960 F.2d 285, 293 (2d Cir. 1992)). The Third Circuit identified cases from the Second, Fourth, and Sixth Circuits where channeling injunctions were found within this broad grant of power. *See id.* (citing *In re* Drexel Burnham Lambert Grp., Inc., 960 F.2d at 293) (upholding a channeling injunction covering class action securities claims); Class Five Nev. Claimants (00-2516) v. Dow Corning Corp. (*In re* Dow Corning Corp.), 280 F.3d 648, 663 (6th Cir. 2002) (affirming a channeling injunction covering mass tort claims for damages related to silicone breast implants); Menard-Sanford v. Mabey (*In re* A.H. Robins Co.), 880 F.2d 694, 702 (4th Cir. 1989) (permitting a channeling injunction covering mass tort claims for damages related to Dalkon Shield birth control devices).

53. *See* Coco, *supra* note 21, at 236.

A. The Majority Finds Non-Debtor Releases Permissible

The Second,[54] Third,[55] Fourth,[56] Sixth,[57] Seventh,[58] and Eleventh[59] Circuits found that bankruptcy courts can issue third-party releases if circumstances justify their use.[60] Lower courts in the Eighth and First Circuits agreed with this view.[61] The majority of courts read § 105 as granting bankruptcy courts the power to confirm plans containing non-debtor releases where such releases are necessary; the basis of this reasoning is that the grant of equitable power in § 105 encompasses any process that is "necessary" to reorganize under Chapter 11.[62] The majority circuits determine (1) if necessity exists, (2) if the majority of claimants have consented to the plan, and (3) if the debtor and the non-debtor third parties have made significant contributions to the plan such that the present and future claimants will not be disadvantaged by its confirmation.[63]

For example, in *In re Millennium Lab Holdings II, LLC*, the District of Delaware held that a bankruptcy judge has "constitutional adjudicatory authority" to issue nonconsensual third party releases in a confirmation order.[64] One of the creditors in that case had challenged a

54. *E.g.*, Deutsche Bank AG, London Branch v. Metromedia Fiber Network, Inc. (*In re* Metromedia Fiber Network, Inc.), 416 F.3d 136, 143 (2d Cir. 2005).

55. *E.g.*, Gillman v. Cont'l Airlines (*In re* Cont'l Airlines), 203 F.3d 203, 212–14 (3d Cir. 2000).

56. *E.g.*, *In re* A.H. Robins Co., 880 F.2d at 702.

57. *E.g.*, *In re* Dow Corning Corp., 280 F.3d at 656–57.

58. *E.g.*, *In re* Specialty Equip. Cos., Inc., 3 F.3d 1043, 1047 (7th Cir. 1993).

59. *E.g.*, SE Prop. Holdings, LLC v. Seaside Eng'g & Surveying, Inc. (*In re* Seaside Eng'g & Surveying, Inc.), 780 F.3d 1070, 1078–79 (11th Cir. 2015).

60. *See* Coco, *supra* note 21, at 241. Coco also notes that while the First and Eighth Circuits have not yet addressed the validity of non-debtor releases, lower courts there have signaled agreement with the majority view that non-debtor releases are a permissible exercise of the equitable power granted to courts of bankruptcy under the Code. *See id.* at 241, nn.62–63 (citing *In re* Charles Saint Afr. Methodist Episcopal Church of Bos., 499 B.R. 66, 100–02 (Bankr. D. Mass. 2013); *In re* U.S. Fidelis, Inc., 481 B.R. 503, 519 (Bankr. E.D. Mo. 2012)).

61. Coco, *supra* note 21, at 241.

62. *See, e.g.*, *In re* Metromedia Fiber Network, Inc., 416 F.3d 136, 143 (2d Cir. 2005); *see also In re* Airadigm Commc'ns, Inc., 519 F.3d 640, 656–57 (7th Cir. 2008) (echoing the majority view in the Seventh Circuit: "Section 105(a) codifies this understanding of the bankruptcy court's powers by giving it the authority to effect any 'necessary or appropriate' order to carry out the provisions of the bankruptcy code.").

63. Though courts in the majority do not limit their analysis to just the three factors identified here, the various tests adopted can be distilled into these essential elements. For a discussion of two examples of the fact-based tests adopted by the majority courts, see *infra* notes 64–74 and accompanying text.

64. *In re* Millennium Lab Holdings II, LLC, 575 B.R. 252, 262 (Bankr. D. Del. 2017), *aff'd*, 945 F.3d 126 (3d Cir. 2019).

provision of the reorganization plan that precluded claims against equity holders in the debtor company.[65] The basis of this challenge was that the bankruptcy court did not have jurisdiction to include such a release in the plan.[66] The court noted that those circuits that allowed non-debtor releases predicated that authority on §§ 105, 1123(b)(6),[67] and 1129(a)(1)[68] of the Code.[69] The court then highlighted two fact-based tests to determine whether the non-debtor release could be included in the reorganization plan: (1) whether the plan had the "hallmarks" set forth in *Gillman v. Continental Airlines*;[70] and (2) whether the plan met the factors used in *In re Master Mortgage Investment Fund*.[71] The "hallmarks" test revolves around fairness to those affected and necessity for the proposed reorganization; similarly, the *Master Mortgage* factors require a court to examine the treatment of those whose claims will be affected as well as the necessity of the injunction to the reorganization plan.[72]

While the court recognized that these "hallmarks" and "factors" did not require the bankruptcy court to examine the sufficiency or basis for the released claims, it found that these factors required a bankruptcy judge to undertake a factual analysis of (1) the language of the proposed reorganization plan, (2) the ultimate necessity of the release, and (3) the

65. *See id.* at 255.

66. *Id.* at 255–56.

67. Providing that a reorganization plan may "include any other appropriate provision not inconsistent with the applicable provisions of this title." 11 U.S.C. § 1123(b)(6).

68. Providing that a bankruptcy court shall only confirm a plan that "complies with the applicable provisions of this title." 11 U.S.C. § 1129(a)(1).

69. *In re* Millennium Lab Holdings, II, LLC, 575 B.R. at 271–72.

70. *In re* Cont'l Airlines, 203 F.3d 203, 214 (3d Cir. 2000). Although the Third Circuit did not uphold the non-debtor releases in *Continental Airlines*, it noted that "permissible non-consensual releases" would exhibits certain "hallmarks," including "fairness, necessity to the reorganization, and specific factual findings to support these conclusions." *Id.*

71. In *In re Master Mortgage Investment Fund*, the court enumerated five factors for allowance of non-debtor releases: (1) "identity of interest" whereby the suits against the non-debtor are "in essence, [suits] against the debtor" that would affect the bankruptcy estate; (2) a substantial contribution to the plan by the non-debtor; (3) the necessity of the release for the reorganization plan to succeed; (4) consent from "a substantial majority of the creditors"; and (5) the plan provides for payment of "substantially all, of the claims of the class . . . affected by the injunction." *In re* Master Mortg. Inv. Fund, 168 B.R. 930, 935 (Bankr. W.D. Mo. 1994).

72. *See id.*; *In re Cont'l Airlines*, 203 F.3d at 214. Both tests require a bankruptcy court to scrutinize the debtor's plan for its impact on potential claimants, a requirement that both demonstrates and encourages restraint on the part of the court. Though the injunctive power granted by § 105(a) can be broadly construed, these fact-intensive tests imposed by the majority limit the invocation of this power to only the most extreme circumstances, like the mass tort litigations discussed herein.

plan's likelihood of success with the release in place.[73] This ruling comports with the majority's general approach toward non-debtor releases in that it identified a few key factors to consider and a subsequent case-specific factual analysis by the bankruptcy courts presented with plans containing such releases. The majority courts recognize that in the context of mass tort bankruptcies, non-debtor releases are often essential to a debtor's plan of reorganization where the debtor has a duty to indemnify the non-debtor.[74]

This bears emphasizing. The majority circuits upheld exercise of injunctive power by bankruptcy courts where the case before them necessitated that power.[75] Mass tort litigations present unique challenges to courts of bankruptcy because the debtor faces both present claims that have not been adjudicated as well as innumerable future claims.[76] The courts in the majority take care to emphasize that the facts drive their analysis, which suggests that even the majority agrees that the broad grant of equitable powers in § 105 of the Code should only be exercised sparingly.[77]

The courts in the majority are cognizant of the consequences of their failure to approve a successful plan for a debtor. For any debtor, failure to obtain a plan of reorganization will result in liquidation instead of the desired reorganization.[78] Normally, this would mean that the debtor

73. *Id.* at 272–73.

74. *See, e.g.*, *In re* Master Mortg. Inv. Fund, 168 B.R. at 937–38 (finding an injunction restraining future claims against non-debtor settling creditor was necessary to the plan where the settlement itself was crucial to the reorganization, and the "injunction [was] the cornerstone of the settlement").

75. *See id.*

76. Asbestos bankruptcies serve as the quintessential example of this type of bankruptcy filing, where the debtor cannot ascertain how many future claims will be filed because mesothelioma may not appear for years. *See* U.S. DEP'T OF HEALTH & HUM. SERVS., TOXICOLOGICAL PROFILE FOR ASBESTOS 6 (Sept. 2001), https://www.atsdr.cdc.gov/toxprofiles/tp61.pdf ("These diseases do not develop immediately following exposure to asbestos, but appear only after a number of years."). For a discussion of asbestos bankruptcies and the treatment of unknown future claims, see *infra* Part III. However, other mass tort bankruptcies force bankruptcy courts to consider how to treat unknown future claimants, with mixed results. *See* Joseph F. Rice & Nancy Worth Davis, *The Future of Mass Tort Claims: Comparison of Settlement Class Action to Bankruptcy Treatment of Mass Tort Claims*, 50 S.C. L. REV. 405, 428–34 (1999).

77. For a discussion of factors used by the majority, see *supra* notes 62–63 and accompanying text. The adherence to a long list of requirements demonstrates that even the majority hesitates to issue non-debtor third party releases.

78. *See* Michelle M. Arnopol, *Why Have Chapter 11 Bankruptcies Failed So Miserably: A Reappraisal of Congressional Attempts to Protect a Corporation's New Operating Losses After Bankruptcy*, 68 N.D. L. REV. 133, 134–35 (2014).

closes its doors, sells off its assets, and dissolves.[79] This process is far more complicated in the context of a mass-tort bankruptcy. When a mass tort bankruptcy does not result in a successful reorganization or approval of a plan, only those claimants who have secured judgments will recover a portion of their claim.[80] Courts of bankruptcy abhor such an inequitable result,[81] and the majority's use of § 105 can best be understood in that context: an attempt to treat *all* claimants equitably.

B. The Minority Treat § 524(e) as a Prohibition

On the other hand, the Fifth,[82] Ninth,[83] and Tenth[84] Circuits have held that that § 524(e) prohibits third-party releases. In sum, "[c]ourts that follow the minority view find that the discharge of the debtor's pre-confirmation debts via the Code should not affect another entity's liability."[85] The minority jurisdictions equate a third-party release to a

79. One commentator, examining R. H. Macy & Company's Chapter 11 bankruptcy filing, explained the repercussions of a failure to obtain or maintain a reorganization plan: "If Macy's is unsuccessful in its reorganization attempt, the assets of the corporation will have to be liquidated. As a result, it is likely that 69,000 people will lose their jobs, and 20,000 suppliers will lose a major, if not primary, purchaser of their goods." *Id.* at 135.

80. Mass tort claimants must file their proof of claim like any other creditor in bankruptcy. *See* 11 U.S.C. § 501. Thus, if a potential claimant has not filed a claim before the failure of the Chapter 11 reorganization, the claimant will not be able to take part in the liquidation and disbursement of the debtor's remaining assets.

81. When granting injunctions restraining suits against non-debtors, bankruptcy courts consistently refer to the injunction's necessity to bring assets into the bankruptcy estate for payments to mass tort claimants. *E.g.*, *In re* Dow Corning Corp., 255 B.R. 445, 479 (E.D. Mich. 2000), *aff'd*, 280 F.3d 648 (6th Cir. 2002). In *In re Down Corning Corp.*, the Eastern District of Michigan reasoned through what it called the "unusual circumstances test" to determine that an injunction was necessary because the case presented "unusual" equitable circumstances justifying restraining suits against non-debtors who would contribute to the plan and therefore to the mass tort claimants. *Id.* at 479, 494. The court noted that "[b]y permanently enjoining suits against these third party non-debtors, the courts created a legal environment that enabled the non-debtor to take the necessary steps which would lead to the creation of assets for the debtor's estate." *Id.* at 479 (quoting Greenblatt v. Richard Potasky Jeweler, Inc. (*In re* Potasky Jeweler, Inc.), 222 B.R. 816, 826–27 (S.D. Ohio 1998)).

82. *E.g.*, Bank of N.Y. Tr. Co. v. Off. Unsecured Creditor's Comm. (*In re* Pac. Lumber Co.), 584 F.3d 229, 252 (5th Cir. 2009).

83. *E.g.*, Am. Hardwoods Inc. v. Deutsche Credit Corp. (*In re* Am. Hardwoods, Inc.), 885 F.2d 621, 626 (9th Cir. 1989).

84. *E.g.*, Landsing Diversified Props.–II v. First Nat'l Bank & Tr. Co. Tulsa (*In re* W. Real Est. Fund, Inc.), 922 F.2d 592, 600 (10th Cir. 1990), *modified sub nom.* Abel v. West, 932 F.2d 898 (10th Cir. 1991).

85. Coco, *supra* note 21, at 238 n.45 (quoting Kathrine A. McLendon & Lily Picon, *The Changing Landscape of Consensual Third Party Releases in Chapter 11 Plans: Does Silence = Consent?*, HARV. L. SCH.: BANKR. ROUNDTABLE (May 7, 2018),

debtor-discharge. This analysis subjects such releases to the requirement in § 524(e) that a "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt."[86] By contrast, the majority jurisdictions do not view third-party releases as a form of debtor discharge and, therefore, they are not subject to § 524(e).[87]

For example, in *In re American Hardwoods*, the Ninth Circuit found that § 524(e) limits the equitable powers granted to the bankruptcy court in § 105.[88] In a case where a debtor sought an injunction restraining enforcement of a state judgment against the debtor's contractual guarantors for its debt, the court found that the bankruptcy court did not have the "equitable power . . . to order the discharge."[89] Moreover, the court did not draw a distinction between a discharge and a permanent injunction.[90] However, the Ninth Circuit did note that none of the factors the Fourth Circuit had considered in *In re A.H. Robins Co.* to grant a permanent injunction, from the existence of hundreds of thousands of tort claimants to the necessity of an injunction for the reorganization plan to succeed, were present in the case before it.[91] This acknowledgement may have left the door to a permanent injunction open if a case presented a similar set of circumstances to those at issue in *In re A.H. Robins Co.* Moreover, this dictum from *In re American Hardwoods* shows that bankruptcy courts may only read the equitable powers necessary to grant a non-debtor release into the Code when faced with those outlier cases where resolution would be otherwise impossible, like in a mass-tort litigation where hundreds of thousands of claimants may be adversely affected by a plan's failure.[92]

http://blogs.harvard.edu/bankruptcyroundtable/files/2018/05/The-Changing-Landscape-of-Consensual-Third-Party-Releases-in-Chapter-11-Plans.pdf).

86. *See id.* at 238 (quoting 11 U.S.C. § 524(e)).

87. *See, e.g.*, Behrmann v. Nat'l Heritage Found., 663 F.3d 704, 710 (4th Cir. 2011).

88. *In re* Am. Hardwoods, Inc., 885 F.2d at 625–26.

89. *Id.* at 626.

90. *Id.*

91. *Id.* at 626–27 (The debtor "does not argue, nor did the district court find, that the permanent injunction is 'essential to the plan' or that the entire reorganization 'hinged' on it." (quoting Menard-Sanford v. Mabey (*In re* A.H. Robins Co.), 880 F.2d 694, 702 (4th Cir. 1989))).

92. In *In re A.H. Robins Co.*, the Fourth Circuit considered arguments from a class of claimant-creditors under the reorganization plan that, *inter alia*, § 524(e) prohibited the issuance of an injunction restraining suits against the medical providers who had contributed to an insurance settlement incorporated into the plan. *In re A.H. Robins Co.*, 880 F.2d at 701–02. The Fourth Circuit found that the other mass-tort claimants would be adversely affected because they would lose the benefit of the insurance settlement arrangement and resulting funds, which depended on the issuance of an injunction. *Id.*

C. The Seventh Circuit Joins the Majority

The Seventh Circuit comports with the majority view that bankruptcy courts are authorized to issue non-debtor third-party releases.[93] The Seventh Circuit has included § 1123(b) in its analysis, which authorizes bankruptcy courts to "include any other appropriate provision not inconsistent [with the remainder of the Code]."[94] Accordingly, the Seventh Circuit has found that a bankruptcy court's powers are limited only where Congress explicitly wrote such limitation into the Bankruptcy Code.[95] Although the Seventh Circuit took a different route through the Code, the result comports with the majority's views that non-debtor third party releases are permissible where necessary, and courts can determine necessity on a case-by-case basis.

D. The Prevailing Factors for Non-Debtor Releases

The majority courts, including the Seventh Circuit, recognize certain common factors that must be present in a case before issuing a non-debtor third-party release as part of an approved reorganization plan. First, courts consistently require a demonstration of necessity.[96] That is, the courts require the debtor to show that, without the release, reorganization cannot be successful.[97] *In re A.H. Robins Co.*[98] provides a good example. The court in that case found releases were necessary where they were a critical component of a settlement agreement with the insurer that was responsible for paying a large portion of the underlying claims.[99] Second, the courts often require a super-majority of affected claimants (those that exist) to consent to the plan, including to the use of

93. *In re* Airadigm Commc'ns, Inc., 519 F.3d 640, 656 (7th Cir. 2008).

94. *Id.* at 657 (quoting 11 U.S.C. § 1123(b)(6)).

95. Coco, *supra* note 21, at 242.

96. *See In re* Zenith Elecs. Corp., 241 B.R. 92, 110 (Bankr. D. Del. 1999); *In re* Millennium Lab Holdings II, LLC, 575 B.R. 252, 262 (Bankr. D. Del. 2017), *aff'd*, 945 F.3d 126 (3d Cir. 2019). For further analysis of the "hallmarks," *Master Mortgage* factors, or the "unusual circumstances" test, see *supra* notes 62–74 and accompanying text.

97. *See, e.g.*, *In re* Master Mortg. Inv. Fund, 168 B.R. 930, 937–38 (Bankr. W.D. Mo. 1994) (finding an injunction necessary because it was the "cornerstone of the settlement").

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

99. *See id.* at 701–02 ("It is essential to the reorganization that [even the claimants who did not consent to the plan] either resort to the source of funds provided for them in the Plan and . . . settlement or not be permitted to interfere with the reorganization and thus with all the other [claimants]."); *see also, e.g.*, *In re* Master Mortg. Inv. Fund, 168 B.R. at 937–38 (finding an injunction restraining future claims against non-debtor settling creditor was necessary to the plan where the settlement itself was crucial to the reorganization and the "injunction [was] the cornerstone of the settlement").

the non-debtor release.[100] Even in *In re Archdiocese of Saint Paul & Minneapolis*, the court viewed the consent of the mass-tort claimants as a critical factor in determining whether to approve the plan at issue.[101] Third, the courts require significant non-debtor contribution to the plan.[102] That is, the courts are unwilling to grant broad releases to third parties if the non-debtor third party does not intend to fund the plan itself.[103] Finally, and crucially for this discussion of sexual abuse claims, the plan must provide some avenue to relief for future claimants before a court will approve a plan that would limit their ability to file claims.[104] Only when a debtor meets all these requirements (and others that may be imposed on a circuit-by-circuit basis) will the bankruptcy court approve the plan put before it.[105]

Because the equitable powers granted by Congress revolve around what is "necessary" for the bankruptcy court to carry out its function, the majority circuits have crafted a set of factors to determine that necessity.[106] As already suggested, even those circuits that have not yet permitted non-debtor releases as part of a reorganization plan may allow them if faced with a mass tort bankruptcy wherein the debtor presents a

100. In *In re A.H. Robins Co.*, the Fourth Circuit relied on acceptance of the proposed reorganization plan and its concomitant injunction by 95.8% of the claimants. *In re* A.H. Robins Co., 880 F.2d at 698. *But see* Airadigm Commc'ns., Inc. v. FCC, 519 F.3d 640, 656 (7th Cir. 2008) (finding that "§ 524(e) does not bar a non-consensual third-party release from liability").

101. *See* Order Confirming Plan at 3, *In re* Archdiocese of Saint Paul & Minneapolis, 578 B.R. 823 (Bankr. D. Minn. 2017) (No. 1278) ("The creditors most affected by the releases and injunctions—the Tort Claimants—have indicated by an overwhelming majority that they accept such provisions; indeed, the committee is a proponent of the joint plan.").

102. *See, e.g.*, *In re* Zenith Elecs. Corp., 241 B.R. 92, 110 (Bankr. D. Del. 1999).

103. *See, e.g.*, Order Confirming Plan, *supra* note 101 at 2 ("[T]he Protected Parties and Settling Insurers will make substantial contributions . . . to provide for payment to the Tort Claimants . . . .").

104. Indeed, bankruptcy courts often require that legal representatives be appointed to represent potential future claimants. *See* Yair Listokin & Kenneth Ayote, *Protecting Future Claimants in Mass Tort Bankruptcies*, 98 NW. U. L. REV. 1435, 1443 (2004) ("Bankruptcy courts have frequently appointed legal representatives to represent classes of future claimants in mass tort cases."); *see also* Douglas G. Smith, *Resolution of Mass Tort Claims in the Bankruptcy System*, 41 U.C. DAVIS L. REV. 1613, 1640 (2008) ("It is typical for the bankruptcy court to appoint a representative for future claimants to protect their interests throughout the bankruptcy proceedings.").

105. *See, e.g.*, Order Confirming Plan, *supra* note 101, at 1–4 (noting that each of these factors, necessity, non-debtor contribution, and consent by a majority of claimants, were met before confirming the plan).

106. "Section 105(a) codifies this understanding of the bankruptcy court's powers by giving it the authority to effect any '*necessary* or appropriate' order to carry out the provisions of the bankruptcy code." Airadigm Commc'ns, Inc. v. FCC (*In re* Airadigm Commc'ns, Inc.), 519 F.3d 640, 657 (7th Cir. 2008) (citing United States v. Energy Res. Co., 495 U.S. 545, 549 (1990)) (emphasis added); *see also* 11 U.S.C. § 105(a).

plan in compliance with the factors set forth above.[107] The unique and challenging circumstances of a mass tort bankruptcy demand that bankruptcy courts exercise powers that may be dusty from lack of use.

III. MASS ASBESTOS LITIGATION AND CONGRESSIONAL REFORM

Congress's enactment of § 524(g), which codified a solution to mass asbestos litigation developed through bankruptcy practice, demonstrates that legislation can effectively tailor the broad equitable powers of a bankruptcy court to meet pressing social and/or economic needs.[108] Thus, Congress has already dealt with problems posed by bankruptcy courts exercising their broad equitable powers on their own initiative.

A. The Johns-Manville Corporation Bankruptcy

From the 1920s to 1970s, the Johns-Manville Corporation ("Manville") manufactured and supplied more asbestos than any other American company.[109] Asbestos was linked to a set of deadly diseases in the 1970s, and the courts found Manville liable as a manufacturer of the material.[110] Faced with an ever-growing number of claimants, Manville filed a Chapter 11 bankruptcy petition in 1982.[111] The court recognized that if Manville had not filed for Chapter 11 but had instead simply liquidated its assets, thousands of future claimants would have been left without recourse for civil damages.[112] Ultimately, the court upheld a plan providing for an injunction that restrained actions against Manville, its insurers, or its subsidiaries.[113] The injunction "channel[ed]" the mass asbestos claims toward two trusts established as part of the plan and

107. *See supra* Section II.B.

108. 11 U.S.C. § 524(g).

109. Peta Spender, *Evaluating Bankruptcy and Class Actions as Just Responses to Mass Tort Liability*, 25 SYDNEY L. REV. 223, 226 (2003) (citing *In re* Joint E. & S. Dist. Asbestos Litig., 129 B.R. 710, 742 (Bankr. E. & S.D.N.Y. 1991)).

110. Manville Corp. v. Equity Sec. Holders Comm. (*In re* Johns-Manville Corp.), 66 B.R. 517, 521–22 (Bankr. S.D.N.Y. 1986).

111. *Id.* at 521.

112. *Id.* at 522 (failure to seek Chapter 11 reorganization "would have left thousands of present and future victims without compensation or any recourse, save to a mere corporate charter").

113. *In re* Johns-Manville Corp., 68 B.R. 618, 624–26 (Bankr. S.D.N.Y. 1986) (upholding the provision, which stated: "The actions prohibited by this Injunction include: commencing, enforcing, perfecting, or setting-off any proceeding, judgment or interest against the Debtor or its subsidiaries or any settling insurance company, or any of their transferees, or against the Trust."), *aff'd sub nom.* Kane v. Johns-Manville Corp., 843 F.2d 636 (2d Cir. 1988).

precluded any claimant from asserting claims for punitive damages against the protected parties, which included non-debtors.[114]

The court recognized that the Manville bankruptcy presented an entirely new set of problems for bankruptcy courts.[115] Like the courts in the majority described above in Part II, the court found that these unique circumstances implicated its equitable powers under § 105(a), which included the power to issue a channeling injunction.[116] Crucially, the court relied on two factors from the facts of the case: (1) the mass tort claimants would "certainly suffer" without the channeling injunction; and (2) the failure to uphold the injunction would frustrate the purpose of Chapter 11 because it would lead to "inequitable, piece-meal dismemberment" of the estate.[117] Furthermore, the court allowed for preclusion of claims for punitive damages where those claims would deplete the estate and preference present claimants over future claimants whose diseases had not manifested.[118] As a final factual consideration, the court noted that the claimants were guaranteed at least as much as they would have received under a Chapter 7 liquidation.[119] Thus, the court adopted many of the factors still used by the majority of courts to determine whether a non-debtor release and/or channeling injunction is appropriate.[120]

The resulting Manville trust was, at the time, the largest claims resolution vehicle in the United States.[121] At its inception, it contained over $3 billion, and more than $1.1 billion has already been paid to settle tens of thousands of claims.[122] Claimants are currently paid at a rate of 6.25% of the amount requested to ensure that the trust is not depleted

114. *Id.* at 624.

115. *Id.* at 624–25. The court stated that the various filings presented "societal, legal and economic issues on a scale heretofore unknown to Title 11 proceedings." *Id.*

116. *See id.* at 625. The court also noted that the equitable power to maintain channeling injunctions extended beyond the date the reorganization plan is confirmed and compared its § 105(a) power to the authority granted to courts to channel prosecutions of third-party interests toward the proceeds of a sale, an authority upheld by the Supreme Court in *Ray v. Norseworthy*. *Id.* (citing Ray v. Norseworthy, 90 U.S. 128, 134 (1874)); *see also supra* Part II.

117. *In re Johns-Manville Corp.*, 68 B.R. at 626.

118. *Id.* at 626–27.

119. *Id.* at 633.

120. For a detailed discussion of the relevant factors used by the majority, see *supra* notes 51–72 and accompanying text.

121. *A History of Asbestos and the Manville Trust Fund*, WASH. POST, https://www.washingtonpost.com/archive/business/1990/11/20/a-history-of-asbestos-and-the-manville-trust-fund/fb60ed34-2a94-4570-9648-9e2efb8167f0/ (last visited July 4, 2022) [hereinafter *History of Asbestos*].

122. *Id.*

for future claimants.[123] Though claimants are now paid a fraction of what past claimants received, the establishment of the trust and concomitant channeling injunction ensured that even those claimants filing as late as the 1990s still received civil damages payments.[124]

B. Congress Enacts § 524(g)

The Johns-Manville Corporation's use of bankruptcy relief to resolve asbestos claims established a model for resolution of mass tort claims.[125] Recognizing that the Johns-Manville bankruptcy plan could be applied methodologically to other mass tort claims, Congress amended the Bankruptcy Code in 1994 to incorporate a model for handling the massive asbestos claims litigations cropping up around the country.[126] Congress recognized the need for legislation permitting affected companies to reorganize while providing a path to relief for claimants, so it adopted the approach used by the Johns-Manville Corporation in drafting Section 524 of the Code.[127]

To qualify under § 524(g), a debtor must show: (1) it is subject to existing asbestos claims; (2) a likelihood of future claims related to the same conduct; (3) damages remain uncertain for the future claims; (4) future claims would impact equitable distribution between present and future claimants; and (5) the proposed trust would treat present and future claimants in the same manner.[128] Once a debtor has qualified, § 524(g) authorizes bankruptcy courts to issue channeling injunctions protecting both the debtor and other parties in interest to the bankruptcy from future claims.[129] § 524(g) also grants bankruptcy courts the power to bar actions against third parties who, *inter alia*, had a financial interest in the debtor or worked as managers for the debtor company.[130]

These powers are comparable to the broad equitable authority exercised by the courts in *In re Saint Paul* and *In re Delaware BSA*.

123. *Johns-Manville Corporation*, MESOTHELIOMA FUND (Apr. 6, 2022), https://www.mesotheliomafund.com/asbestos-trusts/johns-manville/#:~:text=homes%20and%20businesses.-,Johns%20Manville%20Trust%20Distribution,a%20share%20of%20the%20funds.

124. *See History of Asbestos*, *supra* note 121.

125. *See generally In re* Johns-Manville Corp., 68 B.R. 618 (Bankr. S.D.N.Y. 1986), *aff'd sub nom.* Kane v. Johns-Manville Corp., 843 F.2d 636 (2d Cir. 1988); Susan Power Johnston & Katherine Porter, *Extension of Section 524(g) of the Bankruptcy Code to Non-Debtor Parents, Affiliates and Transaction Parties*, 59 BUS. LAW. 503, 510–11 (2004).

126. 11 U.S.C. § 524(g).

127. Johnston & Porter, *supra* note 125, at 510–11.

128. *Id.* at 511; 11 U.S.C. § 524(g)(2)(B).

129. § 524(g)(4)(A)(i); *see also* Johnston & Porter, *supra* note 125, at 512.

130. § 524(g)(4)(A).

However, § 524(g) limits the use of channeling injunctions and any concomitant non-debtor releases to asbestos-related bankruptcies.[131] The courts could not apply § 524(g) to either the Archdiocese of Saint Paul and Minneapolis or the Boy Scouts of America and Delaware BSA, LLC's plan because neither involved asbestos claims.[132] Thus, rather than relying on an explicit framework providing for coverage under a channeling injunction, the courts in those cases were forced to extrapolate the injunctions they ultimately issued from a single sentence buried in § 105.[133]

Yet, the Johns-Manville bankruptcy and its use of channeling injunctions parallels the majority circuits' use of non-debtor third party releases.[134] On the one hand, the asbestos bankruptcy of Johns-Manville demanded that the bankruptcy court find some method to address how future claims would be handled and provide for their payment.[135] On the other hand, the mass-tort litigations like *In re A.H. Robins Co.* required the use of non-debtor releases to reach settlements where the insurer agreed to fund a large portion of the mass tort claims and provision was made even for those claimants who did not consent to the plan.[136] These exercises of equitable power can be viewed as two sides of the same coin: one side enjoys Congressional approval through the enactment of a specific provision in the Code, while the other must be painstakingly established with each new case.[137]

C. § 524(g) in Practice

§ 524(g) has proven remarkably effective in aiding the resolution and administration of asbestos bankruptcies. The Manville Personal Injury Settlement Trust still contains almost roughly $2.5 billion in funds for

131. *See* 11 U.S.C. § 524(g)(2)(B) (setting forth the prerequisites for the imposition of any injunction).

132. *See id.*

133. *See supra* Part I.

134. *See supra* Part II (discussing the majority circuit's use of injunctions in mass tort bankruptcies outside the asbestos context).

135. *See* Kane v. Johns-Manville Corp., 843 F.2d 636, 640–41 (2d Cir. 1988). Indeed, the court noted that the reorganization plan provided an avenue for payment to future claimants and had been approved by 95.8% of the claimants who voted on the plan's confirmation. *Id.*

136. *See* Menard-Sanford v. Mabey (*In re* A.H. Robins Co.), 880 F.2d 694, 701–02 (4th Cir. 1989) ("And, in all events, provision for payment in full of all [claimants] has been made.").

137. For a discussion of the fact-based analysis used by courts to determine if non-debtor releases should issue outside of the asbestos context, see *supra* Part II.

future claims.[138] It has fielded almost a million individual claims.[139] Since the Manville bankruptcy, fifty-four separate asbestos bankruptcy trusts have been established in the United States.[140] In 2008, the asbestos trusts paid 575,000 claims for a total value of $3.3 billion.[141] At the end of 2008, the assets of the more active asbestos trusts totaled $18.2 billion.[142]

Thus, Congress' enactment of § 524(g) and its adoption of the *Johns-Manville* court's analysis has opened the doors for millions of claimants to recover for the injuries they sustained from exposure to asbestos.[143] Trusts were created using the § 524(g) mechanisms of non-debtor releases and channeling injunctions, and they have remained an important tool in providing equitable relief to those suffering from mesothelioma or other asbestos-related injuries.[144] Those suffering from mesothelioma have been informed of the trusts' existence through the actions of the bankruptcy courts, as well as through coordinated advertising campaigns.[145]

IV. A PATH FORWARD: ADOPTING THE CONGRESSIONAL REFORM MODEL

Through enacting § 524(g), Congress already demonstrated that it could resolve the circuit split over non-debtor releases outside the asbestos context. Just as Congress relied on the court's reasoning in *Johns-Manville* to draft § 524(g),[146] it can look to the factors set forth by the majority courts to establish the requirements for issuing injunctive relief to non-debtors in mass tort litigations.[147]

138. *Johns-Manville Corporation*, *supra* note 123.

139. *Id.*

140. LLOYD DIXON ET AL., RAND INSTITUTE FOR CIVIL JUSTICE, ASBESTOS BANKRUPTCY TRUSTS: AN OVERVIEW OF TRUST STRUCTURE AND ACTIVITY WITH DETAILED REPORTS ON THE LARGEST TRUSTS xii (2010), https://www.rand.org/pubs/technical_reports/TR872.html. The number of trusts was calculated up until June 2010. *Id.* However, the rate at which asbestos bankruptcy trusts have been created has accelerated since the year 2000. *Id.*

141. *Id.* at xiii.

142. *Id.*

143. *See generally* LLOYD DIXON ET AL., *supra* note 140.

144. *See id.*

145. For an example of the commercials that have permeated the airwaves in the United States, see, *e.g.*, injurylawassociates, *Mesothelioma*, YOUTUBE (Aug. 29, 2008), https://www.youtube.com/watch?v=zIJErVlVOY8.

146. *See* Johnston & Porter, *supra* note 125, at 510–11 ("Section 524(g) codifies the approach that Johns-Manville Corporation . . . used in its bankruptcy in the mid-1980s to deal with the asbestos claims against it.").

147. Those factors include, at a minimum, (1) necessity; (2) consent by a majority of claimants; and (3) significant contributions to the plan by both the debtor and the non-debtors seeking release. *See* Part II; *see also supra* notes 62–63 and accompanying text.

Congress should amend § 524 to include a provision parallel to § 524(g) that establishes a similar set of requirements that, if met, allow a bankruptcy court to issue a broad injunction both precluding future claims against third parties to whom the debtor owes a duty to indemnify and channeling those claims toward a trust. This hypothetical provision will be referred to as § 524(n) here.[148]

First, § 524(n) would need to limit the availability of a channeling injunction to bankruptcies caused by mass tort litigations.[149] Unlike § 524(g), § 524(n) would not limit injunctive power to asbestos bankruptcies.[150] Instead, § 524(n) should extend to all bankruptcies in which the debtor seeks an injunction to restrain future filings of claims because it already faces a "mass" of parallel claims, like the sexual abuse claim bankruptcies discussed in Part I.[151] While the definition of "mass" can be left to Congressional discretion, § 524(n) should set a high enough threshold to reflect the "unusual circumstances" test used by the majority and prevent overuse of the injunctive power.[152] Thus, § 524(n) will only be invoked where a debtor faces thousands of claims pursuant to the same statute or category of damages.

Second, § 524(n) must require, like § 524(g), that the proposed trust be funded both by the debtor as well as any non-debtors seeking release through the proposed injunction.[153] To comport with the analysis of the majority courts already permitting these releases, the non-debtors' contribution must be "substantial."[154] Therefore, Congress should define "substantial" to have some relation to the underlying claims against the non-debtors.[155] Yet, "substantial" should also be weighed against the

148. § 524 currently ends at subchapter (m). 11 U.S.C. § 524.

149. As discussed in Part II, the vast majority of bankruptcies in which these injunctions are sought are mass-tort bankruptcies. *See supra* Part II.

150. *See* 11 U.S.C. § 524(g)(2)(B)(i)(I) (providing that the injunction must be connected to a trust that will "assume the liabilities of a debtor which at the time of entry of the order for relief has been named as a defendant in personal injury, wrongful death, or property-damage actions seeking recovery for damages allegedly caused by the presence of, or exposure to, asbestos").

151. *See generally In re* Archdiocese of Saint Paul & Minneapolis, 578 B.R. 823 (Bankr. D. Minn. 2017); *In re* Boy Scouts of Am. & Del. BSA, LLC, No. 20-10343 (Bankr. D. Del.).

152. *See In re* Dow Corning Corp., 255 B.R. 445, 479 (E.D. Mich. 2000), *aff'd*, 280 F.3d 648 (6th Cir. 2002); *In re* Potasky Jeweler, 222 B.R. 816, 826–27 (S.D. Ohio 1998).

153. *See* 11 U.S.C. § 524(g)(2)(B)(i)(II) (providing that the trust "is to be funded in whole or in part by the securities of 1 or more debtors involved in such plan"); 11 U.S.C. § 524(g)(4)(A)(ii).

154. *See, e.g.*, *In re* Archdiocese of Saint Paul & Minneapolis, 578 B.R. at 833.

155. While majority courts do not explicitly weigh the non-debtor contribution against the potential claims, they consistently take note of the "substantial" nature of the non-debtor's contribution *in connection with* the provision for payment of the existing and future

assets of the non-debtors who, in the case of abuse claims, may be relatively impoverished individuals who lack the funds to make an objectively "substantial" contribution.[156]

Third, § 524(n) must limit the availability of the injunction to those non- debtors with whom the debtor has an indemnification or similar relationship.[157] Similarly, § 524(n) must also require certainty that the non-debtors will be subject to mass tort claims without the injunction, which can be established through the presence of existing claims against the non-debtors.[158] This echoes a requirement found in § 524(g) that "the debtor is likely to be subject to substantial future demands for payment arising out of the same or similar conduct or events . . . ."[159] This provision will ensure that the injunction does not protect non-debtors who lack the necessary identity of interest with the debtor.[160] Furthermore, such a requirement will limit issuance of the injunction to only those cases where it is "necessary" for the debtor's reorganization plan.[161]

Fourth, § 524(n) must require consent from a "substantial majority" of the affected claimants.[162] Congress should enshrine the majority circuits' consent concerns in a separate provision requiring a certain percentage, at least seventy-five percent of claimants, to consent before an injunction is issued.[163] Moreover, any consent requirement must

claims with the existing claimants' consent. *See, e.g.*, Gillman v.Cont'l Airlines (*In re* Cont'l Airlines), 203 F.3d 203, 217 n.17 (3d Cir. 2000).

156. *See* O'Loughlin, *supra* note 37 (finding that the average starting salary for a Catholic priest in the Midwest was $29,856 in 2017).

157. Part I of this note discusses bankruptcies where the debtor might have a duty to indemnify the non-debtors accused of abuse, while Part II addresses other cases where non-debtors seeking such releases were the indemnitors of the debtor, such as *In re A.H. Robins Co.*

158. § 524(g) requires that the debtor demonstrate it has been "named as a defendant in personal injury, wrongful death, or property-damage actions." 11 U.S.C. § 524(g)(2)(B)(i)(I).

159. *Id.* at § 524(g)(2)(B)(ii)(I).

160. *See, e.g.*, *In re* Master Mortg. Inv. Fund, 168 B.R. 930, 934–35 (Bankr. W.D. Mo. 1994) (identifying "identity of interest" as the first factor to be considered when determining whether an injunction should issue protecting a non-debtor).

161. *See id.* (requiring that the "injunction [be] essential to reorganization . . .[because] [w]ithout [sic] [it], there [would be] little likelihood of success.").

162. *Id.* For a detailed analysis of consent and non-debtor releases in the bankruptcy context, see Coco, *supra* note 21, at 244.

163. *See* Menard-Sanford v. Mabey (*In re* A.H. Robins Co.), 880 F.2d 694, 698 (4th Cir. 1989) (where ninety-four percent of claimants voted to approve the plan); *In re* AOV Indus., Inc., 792 F.2d 1140, 1143 (D.C. Cir. 1986) (where over ninety percent of creditors voted to approve the plan).

further mandate that a legal representative be appointed on behalf of all future claimants to take part in the confirmation process.[164]

Finally, § 524(n) must require that the reorganization plan provide sufficient funds to pay the claims of all present and future claimants.[165] Sufficiency requires a factual analysis of the underlying claims for both their likelihood of success as well as their possible recovery.[166] While this requirement may be limited by the assets available to fund the proposed trust, the consent of a supermajority of the claimants will likely ensure sufficiency as well because the claimants would have presumably refused to approve a plan that inadequately compensated them for their injuries. However, Congress will need to include language requiring equal treatment of present and future claimants, as that remains a crucial factor for majority courts' approval of an injunction restraining actions against non-debtors.[167] Congress may need to include language prohibiting a court from enjoining claims before the date set by a state legislature where those claims are created or revived by statute.[168]

This proposed amendment would resolve the current circuit split over the permissibility of non-debtor releases and channeling injunctions outside the context of asbestos bankruptcies.[169] The requirements set forth above mirror the factors the majority courts use in their analysis of whether to issue an injunction, so § 524(n) would simply codify existing majority jurisprudence.[170] § 524(n) will ensure that a bankruptcy court only issues non-debtor releases for those debtors that demonstrate (1) necessity, (2) consent by a supermajority of claimants, and (3) significant contributions from the non-debtors seeking the release.[171] Instead of cobbling various tests together when presented with the "unusual

164. *See* Smith, *supra* note 104, at 1640 ("It is typical for the bankruptcy court to appoint a representative for future claimants to protect their interests throughout the bankruptcy proceedings.").

165. *See In re* Master Mortg. Inv. Fund, 168 B.R. at 934–35 (identifying sufficient payment of present and future claimants as a factor to be considered when issuing an injunction) (citing *In re* A.H. Robins Co., 880 F.2d at 697).

166. For example, the BSA's proposal to fund a trust with roughly $520 million in its Delaware bankruptcy proceeding would result in roughly $6,000 for each of the 95,000 claims. *See* Kelly, *supra* note 47. That will likely not be viewed as sufficient to pay claims that have results in jury verdicts of up to $19.9 million as recently as 2010. *See id.*

167. *E.g.*, *In re* Master Mortg. Inv. Fund, 168 B.R. at 934–35.

168. For an example of how a bankruptcy court's order can set a deadline for filing claims well in advance of a competing deadline set by state legislature, see *supra* Part I, at notes 38–43 and accompanying text.

169. *See supra* Part II.

170. For a detailed discussion of the relevant factors used by the majority, see *supra* notes 51–74 and accompanying text.

171. *See supra* notes 51–74 and accompanying text.

circumstance" of a mass tort bankruptcy,[172] bankruptcy courts will instead use an unchanging set of requirements to guide Chapter 11 debtors toward reorganization more efficiently.[173]

Moreover, § 524(n) would address the federalism problems posed by the current circuit split, which caused both disparate treatment of debtors[174] and conflicts with state statutes.[175] This amendment would ensure that bankruptcy courts treat mass tort claimants similarly throughout the United States.[176] As is already the case with those suffering from asbestos-related illnesses,[177] mass tort claimants from all federal circuits will enjoy equal treatment under the Code. Such legislation would also limit the scope of the injunctions issued and might prevent issuance of orders that directly contradict the timelines for filing set forth by various state legislatures.[178]

However, this is not simply a matter of judicial economy and uniform jurisprudence, though those principles will both be furthered by this proposed amendment. § 524(n) will set the parameters for all channeling injunctions outside asbestos bankruptcies. This will be a boon for abuse survivors, who will enjoy the same clear path to relief the Code currently affords asbestos claimants.

CONCLUSION

Asbestos bankruptcies marked the beginning of what has become a modern trend. Though the Johns-Manville bankruptcy took years of deliberation and negotiation to resolve,[179] the asbestos bankruptcy filings that followed benefitted from a process explicitly set forth by statute. *In re Archdiocese of Saint Paul & Minneapolis* and *In re Boy Scouts of America & Delaware BSA, LLC* demonstrate that courts continue to

172. *See In re* Millennium Lab Holdings II, LLC, 575 B.R. 252, 272 (Bankr. D. Del. 2017) (analyzing the tests from both *In re Master Mortgage Investment Fund* and *Gillman v. Continental Airlines*), *aff'd*, 945 F.3d 126 (3d Cir. 2019).

173. *See id.*

174. *See supra* Part II (discussing how some circuits approve plans containing non-debtor releases while others do not).

175. *Compare* Order, Pursuant to 11 U.S.C. § 502(b)(9), *supra* note 42, *with* S. 477, 218th Leg., Reg. Sess. (N.J. 2019).

176. *See* Order, Pursuant to 11 U.S.C. § 502(b)(9), *supra* note 42 (discussing how non-debtor releases are permitted in some federal circuits but not others).

177. *See* 11 U.S.C. § 524(g) (permitting non-debtor releases in any federal circuit through explicit statutory language).

178. *See supra* Part I, at notes 38–43 and accompanying text.

179. *See supra* Section III.A.

grant channeling injunctions outside the asbestos bankruptcy context.[180] These channeling injunctions have immediate and long-lasting effects on abuse survivors, who already faced extreme difficulty disclosing their abuse in the first place. Therefore, it is incumbent upon Congress to enshrine the majority courts' reasoning in a separate subsection of the Code. In so doing, Congress will protect abuse survivors and other vulnerable mass tort claimants from the vagaries of individualized court opinions while providing them a clear path to relief.

The modern industrialized marketplace manufactures mass torts at an accelerating rate, and our own changing society has also birthed other statutory claims that may require the use of trusts for plaintiffs to recover damages. Future legislatures may allow individual citizens or municipalities to pursue claims for environmental damages or may revive other claims subject to expired statutes of limitations. Thus, Congress should address the problem posed by sexual abuse claimants now before future claimants are subjected to the same conflicts between court rulings and state statutes.

180. *See generally In re* Archdiocese of Saint Paul & Minneapolis, 578 B.R. 823 (Bank. D. Minn. 2017); *In re* Boy Scouts of Am. & Del. BSA, LLC, No. 20-10343 (Bankr. D. Del.).