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The Mismatched Goals of Bankruptcy and Mass Tort Litigation

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By the end of this Term, SCOTUS must decide what to do about the mammoth Purdue Pharma bankruptcy settlement. If allowed to go forward, the $10 billion deal will not only resolve claims against the company, it will shield the Sackler family—the company’s former owners—from any further liability for their role in the opioid crisis. The deal has generated a great deal of discussion, much of it focused on the legality and wisdom of that third-party release. The authors of Against Bankruptcy take a broader view, asking a set of critical questions about the proper role of bankruptcy in the resolution of mass torts. “What’s to be gained and what’s to be lost by the turn to bankruptcy?”

The turn to bankruptcy represents a new attempt to solve a decades-old problem. Mass-tort defendants have long sought “global peace,” an end to the flood of litigation arising from their allegedly harm-producing conduct. Absent a procedural mechanism capable of reducing the flood to a trickle, a defendant might reasonably fear that settling one set of cases will merely encourage the filing of others, especially if it appears that many potential claimants have not yet come forward. That fear, in turn, can stand in the way of settlements that would put meaningful relief in claimants’ hands.

For as long as defendants have sought global peace, creative lawyers have deployed unorthodox aggregation maneuvers to try to provide it. To contextualize the recent turn to bankruptcy, the authors tour earlier innovations, explaining how each fell short of its goal. Defendants created “private, corporate forms of dispute resolution [that] dominated throughout the twentieth century,” but those systems depended on the voluntary participation of claimants and their lawyers, who eventually decided that the judicial system could deliver better outcomes. State Attorneys General created the “AG Multistate,” in which AGs filed separate but coordinated lawsuits in their state courts, but dissatisfied cities and counties undermined that approach by filing their own actions in federal court.

Meanwhile, in federal court, litigants attempted to use class action settlements and multidistrict litigation—sometimes separately, sometimes in combination—as vehicles for achieving global peace. Because the lawsuits pulled into an MDL formally retain their individual character, however, settlement without class certification requires the affirmative consent of each litigant, while the Supreme Court’s 1997 decision in Amchem Products, Inc. v. Windsor made settlement classes difficult in mass tort cases. When parties to the In re Opiates MDL attempted to circumvent those barriers, deploying a mechanism they called the “negotiation class,” the Sixth Circuit shut them down. That decision set the stage for the parties’ turn to bankruptcy.

Unlike state or federal courts, bankruptcy courts have the power to stay all pending lawsuits against the debtor, regardless of where the cases were filed. The court overseeing the Purdue Pharma bankruptcy proceedings issued such a stay—embracing “all state AG actions, class actions, and multidistrict litigation”—and it remained in place for several years. The authors posit that the stay not only facilitated settlement, it “created the leverage that made the more controversial aspect of the deal possible.”
The authors contextualize that controversial aspect of the settlement by tracking the evolution, through asbestos cases and onward, of allowing non-bankrupt individuals to take advantage of the finality that bankruptcy offers to the debtor. In the case of Purdue Pharma, this approach involved “third-party releases from all future civil liability for the Sacklers and a channeling injunction that funneled already filed lawsuits against the Sacklers into the Purdue debtor trust instead.” In exchange, the Sacklers—none of whom have declared bankruptcy—agreed to contribute $5.5 to $6 billion of their personal fortunes to the settlement. If global peace defines success, these maneuvers have succeeded—they have “enabl[ed] mandatory settlement of mass-tort victims’ claims against solvent non-debtors across all federal and state courts.”

But the authors persuasively argue that, in the context of mass tort litigation, success should mean something more than the efficient reallocation of assets. It also should account for claimants’ reasons for bringing these types of lawsuits, including accountability and the opportunity to be heard, and it should respect those claimants’ choices about where, when, and whom to sue. On those metrics, the state and federal court systems do not fully succeed, but bankruptcy does much worse. Among other things, because of a bankruptcy court’s power to stay all other litigation, a bankruptcy filing “has become a powerful tool for short-circuiting civil trials and the bad press that can come from pretrial filings, discovery, and trial,” which are “the principal opportunities plaintiffs have to tell their stories.”

Unlike state or federal courts, bankruptcy courts are not designed to adjudicate tort claims, which causes bankruptcy proceedings to fall short along other important dimensions as well. Consider the information-forcing function of litigation, which has value in public-health mass torts. In litigation about guns and tobacco, for example, the discovery process yielded important information about pervasive industry misconduct, “teeing up issues for legislative intervention.” Bankruptcy courts, by contrast, focus on information about the debtor’s financial health rather than the nature and extent of their wrongdoing. Moreover, while bankruptcy courts have the authority to order discovery-like disclosures, they also have the power to seal public records—a power that “seems to get overused.”

Overall, this essay does a masterful job of contextualizing the quest for global peace and explaining why the turn to bankruptcy challenges traditional litigation values. Perhaps most importantly, it urges us to consider more seriously and explicitly “the foundational goals of our public adjudication system” and to evaluate the extent to which mechanisms for resolving mass torts actually satisfy those goals. Without such an evaluation, the quest for global peace will eventually yield another procedural innovation, and “the conversation will begin afresh without ever reaching the core questions about what litigation in public-harms cases is for and how to protect it.”