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The U.S. corporate reorganization process is, at its core, about restructuring in a manner that maximizes corporate value and then redistributes that value efficiently to creditors of all types (employees, bondholders, etc.), thus staving off liquidation. The corporate bankruptcy system does this reasonably well. Insurance companies, the debtor, creditors and sometimes principals of the debtor come together to chart a course forward and keep the company as a going concern. But a new threat has emerged—mass tort trial lawyers swing into the middle of this exercise and, with some tricks, walk away with cash that might otherwise go to employees, vendors, and other creditors. The scheme relies on a flurry of marketing to create a massive pile of potential tort liability—none of which is able to be fully verified, challenged, or adjudicated within the confines of bankruptcy proceedings—and is designed to threaten every other stakeholder and net the lawyers a big payday. This sketchy shakedown playbook imposes huge costs and takes massive value away from other creditors who get crushed in the trial lawyer gold rush. The best response, short of a major legislative change, would be (1) action through the Judicial Conference to require added up-front disclosure and heightened certification requirements for the lawyers (and others, as the case may be) who help file claims on behalf of tort claimants, and (2) increased judicial oversight through more frequent appointment of claims examiners to review the process by which claims were solicited, evaluated, and submitted, and in doing so help tamp down on abuses.

Bankruptcy in America

The framers recognized that bankruptcy is a natural part of commerce and thus a federal government with the power to regulate commerce would naturally have the power to establish uniform bankruptcy laws. The power for Congress to establish uniform bankruptcy laws is found in Article 1, Section 8, Clause 4 of the Constitution. And James Madison, in Federalist 42, explained that "The power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different States, that the expediency of it seems not likely to be drawn into question."

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The overall goals of the system haven't changed much since the Founding, although the design has evolved from the early 1800's to the modern framework that is embodied in the Bankruptcy Code of 1978. While early bankruptcy laws, reflecting society at the time, were creditor-centric, the laws in more recent times have more delicately balanced the rights of creditors with those of debtors. In the consumer context, creditors' rights are balanced against the debtor's right to a fresh start through Chapter 7 or 13. In the corporate context, the creditors' rights are balanced against the corporation's ability to restructure and thus avoid liquidation via Chapter 11 and newly minted Chapter 5, which streamlines the reorganization process for small businesses.

Consumer Bankruptcy Fraud and Systemic Reforms

While the bankruptcy system is known for functioning well, there have been historic episodes where the system ran into trouble or abuse and fraud were too prevalent. For example, twenty-some years ago, there used to be a serious fraud and abuse problem with consumer bankruptcies. Between 1989 and 2001, credit card debt almost tripled, from $238 billion to $692 billion, and the savings rate steadily declined.[2] The bankruptcy rate jumped 125%. And this happened during an unprecedented time of prosperity in the United States. During this period, it was not uncommon for a debtor to have $50,000, $75,000, or even $100,000 of credit-card debt while claiming household goods and furnishings of less than $1,500. As a Chapter 7 trustee administering these cases, trying to figure out where all this borrowed money had gone, I began randomly exercising my statutory authority under 11 U.S.C. § 704 to take inventory of debtors' assets and compare them to their bankruptcy schedules. It turned out all too often that the assets I was inventorying in this process were grossly understated. Further investigation revealed that it was often attorneys for the debtors who understated the debtors' assets, playing on the fact that there was really no one auditing or policing the system at that time.

I documented a large portion of this work, and eventually testified several times before the United States Senate regarding my findings, giving evidence of the actual fraud that I had found. I then became the Director of the Executive Office for United States Trustees in 2002. We restructured the Office, creating both civil and criminal enforcement divisions to address the fraud that was documented in the consumer segment of the bankruptcy process. We also created a Significant Accomplishments Reporting System and published annual reports regarding the office's activities during each fiscal year. This structural change to the Office had a profound effect on the fraud problem. During Fiscal Year 2003, the program's enforcement efforts prevented the discharge of approximately $600 million in unsecured debt. The program also obtained hundreds of injunctions against bankruptcy petition preparers who had violated the bankruptcy code. And we refocused the efforts of Chapter 7 Trustees, who ended up closing more than 40,000 cases and distributing more than $1.5 billion in funds to creditors.

Congress then passed the Bankruptcy Abuse Prevention and Consumer Protection Act in 2005. The Act, which is still in effect, contained provisions that created a means test to ensure that debtors were placed in the proper Chapter of the Code. Pursuant to the Act, attorneys are now

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[2] Tamara Draut & Javier Silva, *Borrowing to Make Ends Meet*, DEMOS (Sept. 2003), https://www.demos.org/sites/default/files/publications/borrowing_to_make_ends_meet.pdf [https://perma.cc/HPC2-XBL5].

required to certify that they have made a reasonable inquiry into the information they place in the schedules of debtors. And there are limitations on who can prepare petitions for debtors, with limits on fees for non-attorney petition preparers.

The structural reforms we made leveled the playing field for both debtors and creditors while ensuring that everyone played by the rules. I left my role as the head of the United States Trustee Program in 2005 knowing that the consumer segment of the bankruptcy system was more transparent and thus more trustworthy.

Mass Tort Claims as a Threat to Corporate Bankruptcy Reorganization

The newest fraud problem, and impending peril, comes on the corporate side of the bankruptcy system and involves mass tort trial lawyers bringing their playbook into the bankruptcy courts. The scheme is simple: mass tort trial lawyers set out to generate a crushing number of previously unknown and unaccounted-for claims against the company that is in bankruptcy.

The mass tort trial lawyers engage a full-scale sales operation to further their goal, employing sophisticated "lead generation" teams that find new potential claimants and "lead conversion" specialists that turn the leads into claims with maximum value. The "lead generation" companies invest in all advertising channels, from social media advertising, to online search and mobile maps, to television and radio. These are the types of firms that market "mass tort cases ready to litigate" and offer "zero risk" client acquisition arrangements to help law firms "convert more leads," retain more clients, enhance those clients' claims for maximum potential value, and otherwise provide a conveyer belt of clients and claims.

The plan is to bring a deal-crushing stack of potential claims to the bargaining table. If a case has $8 billion in assets and $10 billion in traditional liabilities, the lawyers might look to bring billions more in unexpected tort claims, none of which are able to be fully verified, challenged, or adjudicated within the confines of bankruptcy proceedings that are designed for other purposes. This throws a wrench into the traditional restructuring. It shifts the balance of power in the final deal negotiations by creating a new, burgeoning class of unsecured creditors with claims in the bankruptcy that the debtor and every other creditor have to deal with but which are hard to value with precision within the usual course of bankruptcy proceedings. The scale of the operation and the new class of unsecured creditors forces insurance companies, the debtor, creditors, and sometimes principals of the debtor back to the drawing board, with the mass tort trial lawyers holding a substantial amount of power.

But fear not, the trial lawyers typically offer an easy solution: create a separate fund of cash to be held in trust as the sole source for resolution of the mass tort claims (including mountains of fees for the lawyers). The details can get complicated depending on insurance arrangements and the like. But a typical arrangement entails the debtor offering up a substantial sum certain that is nonetheless a material discount to the total nominal value of the new, burgeoning, hard-to-value class of unsecured mass tort claims. In exchange for getting guaranteed access to this money, the mass tort trial lawyers agree, as a provision in the bankruptcy plan, to look only to this sum certain amount for satisfaction of their clients' claims (and the concomitant fee commitments to the lawyers) and to provide the debtor, again as part of the bankruptcy plan, with a bar on

additional claims and release for all pertinent future tort claims known and unknown. The creation of this fund (and payday) for the lawyers dislodges the wrench thrown by the trial lawyers, essentially clears the mass tort trial lawyers and the class of unsecured creditors from the playing field, and allows the restructuring to proceed in the traditional fashion with the existing players.

In a lot of ways, the trial lawyer sketchy shakedown playbook in these cases feels a bit like a case of greenmail, the Wall Street tactic that was popular in the 1980s, where a corporate raider buys up shares in a company, threatens a hostile takeover, and then agrees to walk away, sell the shares, and drop the takeover threat when management agrees to purchase the raider's shares at a special, premium price. Like with greenmail, the mass tort trial lawyers initiate aggressive maneuvers that threaten existing participants and then accept a targeted payday in exchange for ceasing the aggressive maneuvers and letting the existing participants continue as before. More specifically, the mass tort trial lawyers use their marketing operations to introduce a threat to every other stakeholder in the process who had predictable expectations of how the bankruptcy would proceed—the "nice bankruptcy process you have here, would be terrible for something to happen to it" moment—and the lawyers then accept a guaranteed pay day from existing creditors who have strong incentive to go along with an offer that can buy peace at a discount to the new stack of unsecured claims with the value-add of the mass tort lawyers giving what amounts to a sweeping injunction against future claims and any future effort to try the same maneuver.[3] Put simply, the mass tort trial lawyers obtain a pay day in exchange for (1) undoing a threat to existing stakeholders that the lawyers themselves helped generate and (2) providing an effective bar on any similar threat coming forward in the future.

Tragic Vignette: The Boy Scouts of America Bankruptcy

While resolution of mass tort claims within the bankruptcy process has its roots in asbestos litigation, silicone breast implants, and (more recently) the Purdue Pharma opioids bankruptcy, the current Boy Scouts of America Bankruptcy in Delaware is a searing vignette of how these issues play out in a dramatic case with compelling victims and vast sums of money at stake.[4]

At the center of the Boy Scouts bankruptcy are sexual abuse claims. Abuse allegations had dogged the Boy Scouts of America for years, with allegations and litigation growing after a landmark case in 2010 that resulted in $19.9 million in damages and a court-ordered release in 2012 of internal files on reports of abuse by Boy Scouts of America volunteers.[5] The bankruptcy

[3] The bar on future claims combined with the releases for all future claims known and unknown that are the norm in this type of arrangement are not without controversy. There are also constitutional questions, as demonstrated by the current litigation in the United States Court of Appeals for the Second Circuit related to Purdue Pharma and the Sackler Family getting releases from claimants who do not yet even know they have a claim. *See In Re: PURDUE PHARMA, L.P.*, No. 22-85 (2d Cir. 2022).

[4] *In re: Boy Scouts of America and Delaware BSA LLC*, No. 20-bk-10343 (U.S. Bankruptcy Court for the District Court of Delaware).

[5] *See, e.g.*, Becky Yerak & Soma Biswas, *Boy Scouts Draw Plan to Settle With Sex-Abuse Victims, Exit Bankruptcy. Here's What We Know*, THE WALL STREET JOURNAL (Sept. 15, 2021), https://www.wsj.com/articles/the-boy-scouts-bankruptcy-case-what-to-know-11630062000 [https://perma.cc/6N79-MDJ9]; Cara Kelly, Nathan Bomey, & Lindsay Schnell, *Boy Scouts Files Chapter*

in 2020 was explicitly designed to reach a resolution of the ongoing abuse claims and compensate victims.[6]

At the time of the initial bankruptcy filings, the number of actual lawsuits filed by abuse claimants was less than 300, with the number expected to grow to about 2,000.[7] The mass tort trial lawyers then walked in and flipped the proceedings upside down with upwards of 80,000 new sexual abuse claims.[8] More than 55,000 came from a group of 10 law firms that branded itself as the Coalition of Abused Scouts for Justice, entering the case in a concerted push that has generated tension with the official Torts Claimant Committee that the Court originally assigned to speak on behalf of victims.[9]

The scale of the number of new claims has produced a to-be-expected series of allegations from all corners of the case regarding questionable behavior and the tactics involved. There have been repeated clashes between the Tort Claimant Committee and the Coalition of Abused Scouts for Justice. There have been skirmishes over the content of the advertising the mass tort lawyers are deploying, with the Boy Scouts alleging that mass tort lawyers are disseminating false and misleading information about the eventual payout and the claim-filing process in order to sign up victims who might otherwise file a claim without a lawyer or prefer to remain anonymous and out of the case.[10] And there have been allegations from certain insurance carriers that mass tort

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11 Bankruptcy In The Face Of Thousands Of Child Abuse Allegations, USA TODAY (Feb. 18, 2020), https://www.usatoday.com/in-depth/news/investigations/2020/02/18/boy-scouts-bsa-chapter-11-bankruptcy-sexual-abuse-cases/1301187001/ [https://perma.cc/8Z4B-LSTS].

[6] *See, e.g.*, Randall Chase, *EXPLAINER: What's At Stake In Boys Scouts Bankruptcy Case*, ASSOCIATED PRESS (Aug. 11, 2021).

[7] Cara Kelly, Nathan Bomey, & Lindsay Schnell, *Boy Scouts Files Chapter 11 Bankruptcy In The Face Of Thousands Of Child Abuse Allegations*, USA Today (Feb. 18, 2020), https://www.usatoday.com/in-depth/news/investigations/2020/02/18/boy-scouts-bsa-chapter-11-bankruptcy-sexual-abuse-cases/1301187001/ [https://perma.cc/8Z4B-LSTS].

[8] Cara Kelly, *Boy Scouts of America Bankruptcy Update: Key Agreement Reached Ahead Of Confirmation Hearing*, USA TODAY (Dec. 15, 2021), https://www.usatoday.com/story/news/investigations/2021/12/15/boy-scouts-bankruptcy-update-what-know-settlements-more/6439683001/ [https://perma.cc/858J-CF3D].

[9] Rachel Axon, *Nearly 90,000 File Sexual Abuse Claims Against The Boy Scouts in Unprecedented Case*, USA TODAY (Nov. 16, 2020), https://www.usatoday.com/story/news/investigations/2020/11/16/boy-scouts-face-nearly-90-000-sex-abuse-claims-bankruptcy-case/6284153002/ [https://perma.cc/3PZX-Z9Z6]; Rachel Axon & Cara Kelly, *Boy Scouts Abuse Claims May Become Largest Case Against A Single National Organization*, USA TODAY (Oct. 23, 2020), https://www.usatoday.com/story/news/investigations/2020/10/23/boy-scouts-sex-abuse-claims-may-grow-tens-thousands/3718751001/ [https://perma.cc/NAF5-WFRC].

[10] *See, e.g.*, Elise Hansen, *Boy Scouts Seek To Curtail 'Misleading' Abuse Claim Notices*, LAW360 (Aug. 25, 2020), https://www.law360.com/articles/1304420/boy-scouts-seek-to-curtail-misleading-abuse-claim-notices [https://perma.cc/AGF4-GKZT]; Eric T. Chaffin, *Amid Increasing Lawsuits, Boy Scouts Complain About Legal Ads*, NEW YORK LEGAL EXAMINER(Oct. 1, 2020), https://newyork.legalexaminer.com/legal/amid-increasing-lawsuits-boy-scouts-complain-about-legal-ads/ [https://perma.cc/HF5G-RTJ7]; Andrew Karpan, *Firms Told To Stop Running 'Misleading' Ads In Scouts' Ch. 11*, LAW360 (Sept. 17, 2020), https://www.law360.com/articles/1311173/firms-told-to-stop-running-misleading-ads-in-scouts-ch-11 [https://perma.cc/4H2A-6LVU].

lawyers in the case cut corners in filing thousands of unvetted, potentially fraudulent claims.[11] The judge in the case, Chief Judge Laurie Selber Silverstein, has stepped in more than once to police the tactics and maneuvering, including on the question of the misleading advertisements, where she made clear that, at least as to some of the allegations, "the statements are false and misleading and shall be removed."[12]

With these contours, it is no surprise that the mass tort trial lawyers are now in position—consistent with their sketchy shakedown playbook—to hold up the proceedings in exchange for a massive payday, that the costs of the proceedings themselves are skyrocketing, and that there is now a real risk that all of this will dilute the money available for the original victims whose claims were the impetus for the bankruptcy filing in the first place.[13] For example, recent reports are that the bill for the Boy Scouts's professionals and those hired by the official creditors' committees will be more than $205 million, which is approaching the size of the trust for survivors that has been part of ongoing settlement discussions. Experts have noted with alarm that the bills for lawyers and others in connection with the fraught proceedings are on a path to being more than 40% of the Boy Scouts of America's self-reported assets, whereas in past mega-bankruptcies the fees are more like 2-3%, and certainly less than 10%.[14]

Stopping the Abuses and Helping Victims

Make no mistake, there is a real problem here. Corporate bankruptcy reorganization is about dividing the limited assets of a distressed company. The mass tort trial lawyer gambit here nets the lawyers and their marketing teams a big payday, but it imposes huge costs and takes massive value away from other creditors, including employees, vendors, and—as in the case of the Boy Scouts bankruptcy—real victims who are getting crushed in the trial lawyer gold rush.

One systematic way to respond to the problem here is legislation from Congress. Congress could pass legislation to try and force disclosure of how claims are generated and otherwise more aggressively regulate the full-scale sales operations that the mass tort trial lawyers use to run their gambit in these bankruptcy cases, for example. But, even setting aside other concerns such legislation might raise, relying on Congressional action doesn't often produce high hopes for solving real world problems in a timely fashion. As recent events in Congress have demonstrated, the path forward for any substantive, non-mandatory legislation, particularly judicial reform legislation, is questionable. Passing the Bankruptcy Abuse Prevention and

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[11] Max Mitchell, *Plaintiffs Firms Flooded Boy Scouts Bankruptcy With Unvetted, Potentially Fraudulent Civil Claims, Insurers Allege*, LAW.COM (Feb. 4, 2021), https://www.law.com/thelegalintelligencer/2021/02/04/plaintiffs-firms-flooded-boy-scout-bankruptcy-with-unvetted-potentially-fraudulent-civil-claims-insurers-allege/ [https://perma.cc/6ABZ-AQEL].

[12] Andrew Karpan, *Firms Told To Stop Running 'Misleading' Ads In Scouts' Ch. 11*, LAW360 (Sept. 17, 2020), https://www.law360.com/articles/1311173/firms-told-to-stop-running-misleading-ads-in-scouts-ch-11 [https://perma.cc/2QRH-KJHU].

[13] Cara Kelly, *Big winners in the Boy Scouts bankruptcy? Attorneys, who could walk away with $1 billion*, *USA Today* (Dec. 10, 2021), https://www.usatoday.com/story/news/investigations/2021/12/10/boy-scout-bankruptcy-sexual-abuse-settlement-attorney-fees/8887578002/ [https://perma.cc/P5BK-UDCJ].

[14] *Id.*

Consumer Protection Act in 2005 took nearly 10 years during a different time in terms of Congressional cooperation and ability to forge bipartisan consensus around reforms to courts.

Another potential avenue for structural reform in this area, short of legislative action, would be action through the Judicial Conference's Committee on Rules of Practice and Procedure to require more up-front disclosure and heightened certification requirements for the lawyers (and others, as the case may be) who help file claims in the bankruptcy process on behalf of tort claimants. The Rules Enabling Act, 28 U.S.C. §§ 2071-2077, authorizes the Supreme Court of the United States to prescribe general rules of practice and procedure for the federal courts, including the bankruptcy courts. Related to this authority is the power that Bankruptcy Rule 9009 gives to the Judicial Conference to prescribe the official forms that, pursuant to the Rule, shall be used in federal bankruptcy proceedings without alteration (except as otherwise provided in the bankruptcy rules, in a particular Official Form, or in the national instructions for a particular Official Form).[15]

Changing the pertinent Bankruptcy Rules themselves to heighten oversight of the claim-generation process—for example, by requiring that third-party providers employed by mass tort trial lawyers be retained subject to an order of the bankruptcy court (like any other professional employed in furtherance of the bankruptcy), with the estate as the locus for payment and therefore greater transparency—would be a two- to three-year process (likely as a complement to updates to the Official Forms, as discussed below).[16] The Advisory Committee on Bankruptcy would evaluate the proposal in the first instance, seek permission from the full Judicial Conference's Committee on Rules of Practice and Procedure, better known as the Federal Rules Committee, to publish a draft of any contemplated amendment that the Advisory Committee thought worth pursuing, and then choose ultimately to transmit the amendment as contemplated to the full Federal Rules Committee (or not) based on comments from the bench, bar, and general public. The Federal Rules Committee would then independently review the findings of the Advisory Committee and, if satisfied, recommend changes to the Judicial Conference itself, which in turn would recommend the changes to the Supreme Court of the United States (or not), at which point the Supreme Court would consider the proposal and ultimately be the entity to promulgate any change to the pertinent rules.

There is also a complementary path that the Federal Rules Committee could follow while full-scale rule changes were in process: changing the Official Forms for the federal bankruptcy proceedings. This is how the Federal Rules Committee tackled some meaningful reform efforts when I was an ex officio member during my tenure as Director of the Executive Office for United States Trustees. In the aftermath of the high-profile National Mortgage Settlement, the Federal Rules Committee revamped the official proof of claim form for mortgage debts, changing how the official form addressed deficiencies and how claims that might change based on contractual language are treated in the filing process—for example, mortgage claim holders

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[15] *Permitted Changes to Official Bankruptcy Forms*, UNITED STATES COURTS, https://www.uscourts.gov/rules-policies/about-rulemaking-process/permitted-changes-official-bankruptcy-forms [https://perma.cc/A5PS-UBUC].

[16] *About the Rulemaking Process*, UNITED STATES COURTS, https://www.uscourts.gov/rules-policies/about-rulemaking-process [https://perma.cc/N42G-94EJ].

must now give notice in the bankruptcy case in advance of any change in the amount of the monthly claim amount.[17] Similarly, after the Supreme Court held that the Fair Debt Collection Practices Act did not apply to the filing of a proof of claim form in bankruptcy in *Midland Funding, LLC v. Johnson*,[18] the Federal Rules Committee revamped the official proof of claim form to require a prominently placed clear statement disclosing that the debt may be subject to legal defenses. In both these instances, the changes to the Official Forms added additional requirements, disclosures, and detail in the initial claim-filing process to serve an information-forcing function and add transparency and trust to the system where it might have been lacking before. This same approach could be deployed in a matter of months in response to the current mass tort problems, with real systematic benefits.

Yet another expedient and meaningful option for addressing the real concerns here would be for bankruptcy judges to increase transparency through proactive appointment of claims examiners. Bankruptcy judges are in a position to do this right away. They have the power to appoint claims examiners pursuant to 11 U.S.C. § 1104. And this would not be a wholly novel approach. The use of examiners has grown dramatically since the United States Trustee Program sought the use of them in Enron, WorldCom, and Adelphia, and the appointment of examiners for particular matters within an ongoing bankruptcy proceeding (such as examiners to shed light on fees sought by all professionals in a case) is not uncommon. Examiners can serve many purposes, but the common theme is that they do not work to fully adjudicate questions in their topic area, but instead perform an investigative function and file detailed reports regarding the matters they were tasked with investigating. These reports serve many beneficial purposes. For example, they help consolidate key information, aiding with eventual discovery and other related reviews, including any involvement by other departments within agencies like the Department of Justice and the Securities and Exchange Commission. And, perhaps most importantly, the examiner reports, which can often be multi-volume affairs, pull back the curtain to shine light on what is actually happening in the bankruptcy proceedings or what precipitated the debtor's insolvency.

The appointment of claims examiners in cases where large numbers of tort claims are brought into the bankruptcy proceedings would shed light on who is submitting the unsecured mass tort claims, how the claims were solicited, sourced, and evaluated prior to submission (if at all), what representations have been made to claimants, and whether victims are being subjected to abuse or mistreatment in connection with the sourcing and submission process. This would help reveal questionable behavior and help courts take corrective action in response. A claims examiner is the best way to decipher how a few hundred actual and expected claims suddenly balloons to become over 80,000 claims, what fees are reasonable in such scenarios, and whether judicial intervention is needed to protect victims from their own lawyers. In addition to serving a responsive function in these cases, the increased transparency that systematic use of claims examiners would drive is exactly what is needed to help tamp down and dissuade future abuses.

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[17] *See, e.g.*, Bankruptcy Rule 3002.1, Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence, and 2011 Committee Notes on Rules.
[18] 137 S.Ct 1407 (2017).

The problems creeping into corporate bankruptcy because of mass tort trial lawyers are serious. The damage to victims and other creditors is real. As the Boy Scouts of America bankruptcy is illustrating in stark fashion, real victims are getting crushed in a mass tort trial lawyer gold rush that imposes huge costs and takes massive value out of a system that is meant to divide the limited assets of a distressed company. We can and should respond. Courts, judges, and other public officials should take action now to increase transparency, expose the forces behind the problems, and respond in an appropriate fashion in order to protect the system and victims.