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Enterprise, Liability, and Insolvency: An Essay in Honor of Aaron Twerski

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ENTERPRISE, LIABILITY, AND INSOLVENCY: AN ESSAY IN HONOR OF AARON TWERSKI

Edward J. Janger[*]

ABSTRACT

Modern tort law links concepts of duty, duty of care, causation, and compensatory damages in a manner that, it is hoped, simultaneously communicates moral suasion, redresses wrongs, and incentivizes "reasonable" socially appropriate behavior. Deterrence and corrective justice theorists of tort law differ fiercely about the scope of and rationale for liability, but both assume that tortfeasors are good for their debts. Sometimes, however, debtors are insolvent. Bankruptcy law provides individuals with a route to a fresh start, and this paper considers the relationship between modern tort law and the discharge of debt in bankruptcy.

The concept of a bankruptcy discharge—the "fresh start"—has deep historical roots in the idea of the "honest but unfortunate debtor." However, recent high-profile bankruptcy cases involving mass torts have signaled to the world that something is amiss. A short list of liabilities discharged in bankruptcy includes harms from opioid addiction, allegedly carcinogenic baby powder, and sex abuse (in churches, gymnastics, and the Boy Scouts). Chapter 11's goal of value maximization through continuation of the business enterprise is always in tension with tort law's goals of internalization and redress, but the scope of the harms and the level of culpability involved in some of these cases have drawn particular scrutiny.

This Article first links the bankruptcy power to discharge mass tort liabilities to the existence of good faith financial distress. It then fleshes out the concept of "good faith" and what it means to "deserve" a bankruptcy discharge. The discussion proceeds in four steps. First, it explains the utility of and common justification for granting a mandatory discharge in mass tort cases in both bankruptcy and limited fund class actions under Rule 23 of the Federal Rules of Civil Procedure. Second, it evaluates the first and second J&J talc filings in light of that standard and finds that neither filing passes the straight-face test. Third, it takes a dystopic look beyond the bankruptcy law silo to consider the relationship between insolvency and recourse in tort law. Lastly, this Article seeks to posit the proper relationship between bankruptcy law and recourse in tort by describing what it means to be an "honest but unfortunate enterprise" entitled to "global peace."

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INTRODUCTION

Modern tort law links concepts of duty, duty of care, causation, and compensatory damages in a manner that, it is hoped, simultaneously communicates moral suasion, redresses wrongs, and incentivizes "reasonable" socially appropriate behavior. The followers of Coase and Calabresi, as well as the theorists of corrective justice, coexist in a world where they differ fiercely about the scope of and rationale for liability.[1] In both cases, however, they assume that tortfeasors are good for their debts (or at least insured).

While I teach and write about torts, my longtime scholarly home is commercial law, particularly bankruptcy. This paper considers the relationship between modern tort law and solvency. The judgment-proof problem—the idea that insolvency creates moral hazard—is not a new idea.[2] But modern corporate law situates the fiduciary duty of officers and directors firmly with the shareholders, and modern bankruptcy laws permit the continuation of a business enterprise notwithstanding a general default.[3] These twin trends poke a huge conceptual hole in tort law's unspoken assumption that recourse will tie right to remedy. While I do not anticipate the death of liability, neither the Coasean concept of internalization nor the principle of civil recourse serves its function if the defendant is judgment-proof.[4]

1. Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960); GUIDO CALABRESI, THE COST OF ACCIDENTS (1970); ERNEST WEINREB, CORRECTIVE JUSTICE (2016).

2. Lynn M. LoPucki, *The Death of Liability*, 106 YALE L.J. 1 (1996).

3. The goal of continuing the enterprise is no longer a phenomenon peculiar to the United States. Preserving going concern value of financially troubled businesses is an express goal of the EU Directive on Preventive Restructuring Frameworks and the more recent directive on Restructuring and Insolvency. Directive (EU) 2019/1023, of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132, 2019 O.J. (L 172) [hereinafter, EU Directive on Preventive Restructuring Frameworks]. The recent creation of a "superscheme" arrangement in the United Kingdom has the same goal. Part 26A of the Companies Act 2006 (U.K.).

4. This Article focuses on how insolvency affects the ability of the tort system to serve its dual goals of incentivizing reasonable behavior through internalization and compensating victims with monetary damages. It assumes that liability and damages can be accurately determined, either prior to filing for bankruptcy, through the results of individual cases, or through aggregate litigation in a multidistrict litigation (MDL) or class action. For an articulation of concerns about the accuracy of this assumption, see Abbe Gluck, Elizabeth Burch & Adam Zimmerman, *Against Bankruptcy: Public Litigation Values versus the Endless Quest for Global Peace in Mass Litigation*, 134 YALE L.J. F. (forthcoming, 2024). As a practical matter, debtors generally do not file for bankruptcy because of mass tort liability until they have lost multiple cases. Moreover, adhering to the requirement that bankruptcy petitions be filed in good faith financial distress means relief generally should not be available until the facts relating to liability are established. *In re* LTL Mgmt., LLC, 64 F.4th 84, 100–01 (3d Cir. 2023). If the debtor cannot show that the tort liability threatens the company, it will not have access to bankruptcy. While stranger things have happened, it seems unlikely that a debtor would take this route in the absence of an adjudicated or impending defeat and a conclusion that such a defeat is not an isolated event.

As Jay Westbrook recently noted, the concept of a bankruptcy discharge has deep historical roots in the idea that an "honest but unfortunate debtor" should receive a "fresh start."[5] Its extension to include juridic people (corporations) is comparatively recent, codified in the Chandler Act of 1937, which established the basic structure of a business reorganization under which an insolvent firm might reorganize its capital structure to allow the business enterprise to continue.[6] The current Bankruptcy Code adopted in 1978 further streamlines the process, and the result is a double discharge: (1) the shareholders enjoy the benefits of corporate limited liability; and (2) the enterprise continues through recapitalization or a going concern sale.[7]

By almost all accounts, modern Chapter 11 benefits both society and the creditors by preserving the going concern value of business enterprises that fall into financial distress. This ability to preserve (and hopefully maximize) value should, at least in theory, benefit all claimants regardless of the basis of their claim, be it public (capital market investors), private (banks or other financial creditors), trade credit, employment contracts, or tort liability. However, recent high-profile bankruptcy cases involving mass torts have signaled to the world that something is amiss. A short list of liabilities discharged in bankruptcy includes harms from opioid addiction,[8] allegedly carcinogenic baby powder,[9] and sex abuse (in churches,[10] gymnastics,[11] and the Boy Scouts[12]). In these cases, the bankruptcy courts have forgiven some

5. Jay Westbrook, The Law of Financial Distress: The Resolution Revolution, A Lecture in Honor of Ian Fletcher and Gabriel Moss, (June 7, 2023) (unpublished manuscript) (on file with author); BRUCE H. MANN, REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE (2009). In 1800, when John Adams signed into law a bankruptcy bill abolishing debtor's prison, one commentator stated, "Mercy now covers the judgment seat of our land—it is the dawn of a brighter day to many honest but unfortunate citizens." *Id.* at 219.

6. Stephen J. Lubben, *Railroad Receiverships and Modern Bankruptcy Theory*, 89 CORNELL L. REV. 1420 (2004); *see also* Douglas G. Baird & Robert K. Rasmussen, *Boyd's Legacy and Blackstone's Ghost*, 1999 SUP. CT. REV. 393, 397–401 [hereinafter Baird & Rasmussen, *Boyd's Legacy*]; Douglas G. Baird & Robert K. Rasmussen*, Control Rights, Priority Rights, and the Conceptual Foundations of Corporate Reorganizations*, 87 VA. L. REV. 921, 925–33 (2001) [hereinafter Baird & Rasmussen, *Control Rights*]; David A. Skeel, Jr., *An Evolutionary Theory of Corporate Law and Corporate Bankruptcy*, 51 VAND. L. REV. 1325, 1353–58 (1998) [hereinafter Skeel, *Evolutionary Theory*].

7. 11 U.S.C. §§ 363(f), 1141.

8. *In re* Purdue Pharma L.P., 69 F.4th 45 (2d Cir.)*, cert. granted sub nom.* Harrington v. Purdue Pharma L.P., 144 S. Ct. 44, 216 L. Ed. 2d 1300 (2023).

9. *In re* LTL Mgmt., LLC, 64 F.4th 84 (3d Cir. 2023).

10. *See, e.g.*, Priscilla DeGregrory, *Albany Diocese Files for Bankruptcy as Hundreds of Sex Abuse Suits Pile Up*, N.Y. POST (Mar. 16, 2023), https://nypost.com/2023/03/16/albany-diocese-files-for-bankruptcy-as-hundreds-of-sex-abuse-suits-pile-up/.

11. For a timeline of the USA Gymnastics Case, see, e.g., *USA Gymnastics Outlines Plans to Emerge from Bankruptcy, Settle with Survivors*, OLYMPICS (Jan. 30, 2020), https://olympics.com/en/news/usa-gymnastics-bankruptcy-settlement-plan-with-survivors-larry-nassar.

12. Randall Chase, *Boy Scouts' $2.4 Billion Bankruptcy Plan Upheld by Judge*, ASSOCIATED PRESS (Mar. 28, 2023), https://apnews.com/article/boy-scouts-bankruptcy-child-sexual-abuse-f6359f826b98d471c290598573ebc5da.

very bad behavior. The goals of continuation and value maximization, thus, appear to be in tension with the goals of internalization and redress. This is a concern, both because of the scale and type of harms being discharged, and because the dynamics and exigencies of seeking to maximize value may deprive individual claimants of their day in court.[13]

There has been an outpouring of scholarship, including some by me, raising concerns about this phenomenon.[14] Authors have focused on the peculiar power claimed by some bankruptcy courts to provide defendants with global peace through the combined effect of bankruptcy discharge (which can extend to future claims) and so-called third-party releases.[15] Their concern is rooted in the Bankruptcy Code and the United States Constitution, but when viewed from a tort law perspective, *both* Justices Cardozo and Andrews would be appalled as well.[16] This Article explores whether the statutory requirement that a plan be proposed in "good faith" imposes a dual threshold requirement of "honesty" and "ill fortune," before a court can grant a discharge of business liabilities.[17]

In a previous article, I argued that the legal basis for the power to "discharge" both present and future claims through a plan of reorganization derives from the assumption that the debtor is in "good faith" financial distress.[18] One of the cases I criticized was Judge Kaplan's decision in the Johnson and Johnson (J&J) talcum powder litigation.[19] In that case, J&J took advantage of a peculiarity of Texas corporate law to engage in a so-called "Texas Two-Step" transaction. The process was byzantine, but stripped to its

13. *See infra* text accompanying note 107; *see also* Edward Helmore, *US Court Move to Reassess Sackler Deal 'Opens Window' for Victims' Families*, GUARDIAN (Aug. 12, 2023, 6:00 AM), https://www.theguardian.com/us-news/2023/aug/12/supreme-court-purdue-pharma-sacklers-bankruptcy-opioid-settlement? (third-party release deprives plaintiffs of their day in court).

14. Edward J. Janger, *Aggregation and Abuse: Mass Torts in Bankruptcy*, 91 FORDHAM L. REV. 361 (2022); Lindsey D. Simon, *Bankruptcy Grifters*, 131 YALE L.J. 1154 (2022) [hereinafter Simon, *Bankruptcy Grifters*]; Melissa B. Jacoby, *Shocking Business Bankruptcy Law*, 131 YALE L.J. F. 409 (2021) (emphasizing the linkage of crisis leverage and value maximization in bankruptcy cases); Melissa B. Jacoby, *Sorting Bugs and Features of Mass Tort Bankruptcy*, 101 TEX. L. REV. 1745 (2023) [hereinafter Jacoby, *Sorting Bugs and Features of Mass Tort Bankruptcy*]; Adam J. Levitin, Purdue*'s Poison Pill: The Breakdown of Chapter 11's Checks and Balances*, 100 TEX. L. REV. 1079 (2022); Ralph Brubaker, *Mandatory Aggregation of Mass Tort Litigation in Bankruptcy*, 131 YALE L.J.F. 960 (2022).

15. 11 U.S.C. § 1141. *See also In re* Grossman's Inc., 607 F.3d 114 (3d Cir. 2010) (future claims). The power to grant third-party releases is deeply controversial. There is no specific Code section that authorizes it. Circuits are divided, and the Supreme Court will consider the question in December 2023. *See* Amy Howe, *Justices Put Purdue Pharma Bankruptcy Plan on Hold*, SCOTUSBLOG (Aug. 10, 2023, 4:41 PM), https://www.scotusblog.com/2023/08/justices-put-purdue-pharma-bankruptcy-plan-on-hold/.

16. Palsgraf v. Long Island Railroad Co., 162 N.E. 99 (N.Y. 1928).

17. 11 U.S.C. § 1129(a)(3) (plan of reorganization may only be confirmed if it is "proposed in good faith").

18. Janger, *supra* note 14.

19. *In re* LTL Mgmt., LLC, 637 B.R. 396, 409 (Bankr. D.N.J. 2022), *rev'd and remanded*, 58 F.4th 738 (3d Cir. 2023), *rev'd and remanded*, 64 F.4th 84 (3d Cir. 2023).

essentials, J&J reincorporated its cosmetics subsidiary in Texas and then took advantage of Texas's divisional merger statute to split "Old Cosmetics" into two entities: "New Cosmetics," an operating company, and "LTL," a liquidating trust for the talc liabilities.[20] Forty-eight hours later, LTL reincorporated in North Carolina and filed a bankruptcy petition. The North Carolina court demurred, finding that the proper venue for the case was the District of New Jersey, where J&J's corporate headquarters were located.[21] Notwithstanding the procedural shenanigans and the fairly blatant attempt to forum shop the case into both North Carolina and bankruptcy court, the Trenton court welcomed the case with open arms, declaring that the filing was in "good faith" because bankruptcy courts have proven effective forums for addressing mass-tort liabilities.[22]

Since writing that article, the Third Circuit has dismissed the bankruptcy filing of LTL. The Third Circuit's decision confirmed the core intuition of my earlier essay—that "good faith" requires the debtor entity be in "financial distress" to access the bankruptcy discharge.[23] The court found that, through a funding agreement, LTL had access to the robust balance sheet of J&J Cosmetics. As such, it had the wherewithal to satisfy its tort liabilities.[24] The Third Circuit's opinion focused solely on the distress of the filing entity, avoiding any need to consider whether the corporate contrivances leading to the filing might themselves have constituted "bad faith."

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20. *Id.* at 402.

21. *Id.*

22. *In re* LTL Mgmt., LLC, 637 B.R. 396, 409 (Bankr. D.N.J. 2022), *rev'd and remanded*, 58 F.4th 738 (3d Cir. 2023), *rev'd and remanded*, 64 F.4th 84 (3d Cir. 2023). There, the court said:

> What the Court regards as folly is the contention that the tort system offers the only fair and just pathway of redress and that other alternatives should simply fall by the wayside. It is manifestly evident that Congress did not share this narrow view in developing the structure of asbestos trusts under § 524(g). There is nothing to fear in the migration of tort litigation out of the tort system and into the bankruptcy system. Rather, this Court regards the chapter 11 process as a meaningful opportunity for justice, which can produce comprehensive, equitable, and timely recoveries for injured parties. The bankruptcy courts offer a unique opportunity to compel the participation of all parties in interest (insurers, retailers, distributors, claimants, as well as Debtor and its affiliates) in a single forum with an aim of reaching a viable and fair settlement.

Id. at 414 (emphasis and footnote omitted).

23. *In re* LTL Mgmt., LLC, 64 F.4th 84, 101 (3d Cir. 2023) ("[A]bsent financial distress, there is no reason for Chapter 11 and no valid bankruptcy purpose.").

24. *Id.* at 106–07. My thoughts on the Third Circuit's opinion can be found here: *The Bankruptcy Roundtable*, HARVARD LAW SCHOOL BANKRUPTCY ROUND TABLE, http://blogs.harvard.edu/bankruptcyroundtable/2023/02/14/texas-two-step-and-the-future-of-mass-tort-bankruptcy-series-postscript-and-analysis-of-third-circuit-dismissal-of-ltl-managements-bankruptcy/ (last visited Jan. 17, 2024), and even more specifically, here: Edward J. Janger & John Pottow, *Waltz Across Texas: The Texas Three-Step*, HARVARD LAW SCHOOL BANKRUPTCY ROUND TABLE (Feb. 2023), https://hlsbankruptcyr.wpengine.com/wp-content/uploads/2023/02/Janger-and-Pottow-Waltz-Across-Texas.pdf.

Conveniently for this Symposium, on April 4, 2023, the day after the Third Circuit's dismissal became effective, LTL refiled its bankruptcy case with a revised funding arrangement.[25] By removing pre-bankruptcy recourse against J&J Cosmetic's "robust" balance sheet, the debtor engaged in a double contrivance—first, by repositioning its talc liabilities in LTL, and then by ensuring that the entity it created would be undercapitalized (at least outside of bankruptcy).[26] This time, the Bankruptcy Court was not as receptive, dismissing the refiled case as filed in bad faith.[27]

The transparency of this (series of) tactical maneuver(s)—and the fact that it (they) very nearly succeeded—provides an opportunity to consider the question of "good faith" more broadly and argues for the need to consider the nature of the behavior that led to the financial distress. At the very least, J&J demonstrates that this inquiry must include the entire business enterprise (in this case, the corporate group) when judging whether a bankruptcy filing is in good faith or merely a litigation tactic, but it also may include the nature of the tortious behavior.[28] I will argue that the "good faith" requirement carries with it the need to consider more broadly what it means to be an "honest but unfortunate" business enterprise.

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25. The Symposium was held on April 20–21, 2023, shortly after the refiling occurred. *See* Chapter 11 Voluntary Petition, *In re* LTL Mgmt., LLC, No. 23-12825 (MBK), 2023 WL 3136666 (Bankr. D.N.J. Apr. 27, 2023) ECF No. 1.

26. *In re* LTL Mgmt., LLC, 652 B.R. 433, 437 (Bankr. D.N.J. 2023).

27. *Id.* at 456.

28. In a short essay published on the Harvard Bankruptcy Roundtable Blog, John Pottow and I explain that the court's single-party focus may have been an act of judicial diplomacy and that parties should not assume the pre-bankruptcy maneuvers would pass muster should the court have to look at them. Janger & Pottow, *supra* note 24. In dismissing the refiled case, the court was forced to consider the financial viability of the group as a whole—though it declined to pass judgment on the procedural shenanigans—in this somewhat remarkable passage:

> At a point early in the first chapter 11 filing of LTL Management, LLC ("Debtor" or "LTL") . . . the Court queried of Debtor's counsel the origin of the name given the 2021 Corporate Restructuring Project—Project Plato—which gave rise to the initial bankruptcy filing. . . . While Debtor's counsel suggested that the project name was selected randomly, this Court harbors some doubts and imputes far greater significance to the denomination, "Plato." . . .
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> In his influential work, the *Republic*, Plato suggests that a right or just action can be defined as one which flows naturally from a just disposition. In other words, whether an action is "good" or "bad" depends on the outcome. . . . For consequentialists, the ends necessarily justify the means.
>
> So, the ultimate inquiry for this Court would be whether the aptly named Project Plato, with its corporate restructuring in 2021, as modified in 2023, and resulting two chapter 11 filings, could, in fact, produce a just and right result, notwithstanding the highly debatable means undertaken. For the reasons discussed below, [however,] and based on the evidence at trial, this Court is constrained to bypass this challenging inquiry and dismiss this chapter 11 proceeding, as the evidentiary record . . . does not establish sufficient "imminent" or "immediate" financial distress to satisfy the criteria enunciated by the Third Circuit . . . .

In re LTL Mgmt., LLC, 652 B.R. at 435–36 (footnotes omitted).

The goal of this Article is, thus, twofold: (1) to link the power to grant global peace to the existence of financial distress of the debtor; and (2) to flesh out the concept of "good faith" and what it means to "deserve" a discharge. This Article proceeds in four steps. First, it explains the utility of and common justification for granting a mandatory discharge in mass tort cases in both bankruptcy and limited fund class actions under Rule 23 of the Federal Rules of Civil Procedure. Second, it evaluates the first and second LTL filings in light of that standard and finds that neither passes the straight-face test. Third, it takes a dystopic look beyond the bankruptcy silo to consider the relationship between insolvency and recourse in tort law and considers the dangers of granting global peace at too low a cost. Lastly, this Article considers the proper relationship between bankruptcy law and recourse in tort by describing what it means to be an "honest but unfortunate enterprise" entitled to "global peace" and explores the concept of bankruptcy's forgivable and unforgivable sins.

I. MASS TORTS IN BANKRUPTCY: THE SEARCH FOR GLOBAL PEACE

A peculiar development in United States tort law is the emergence of bankruptcy courts as the venue of choice for resolving mass tort liability. In recent years, bankruptcy courts have supplanted class actions and multidistrict litigation (MDL) in federal court as the forum for coordinating global settlements of environmental, personal injury, and financial harms.[29] The reasons for this shift are, in part, procedural and, in part, substantive. Bankruptcy courts can procedurally centralize the process of dispute resolution and facilitate negotiation. They also have the power to discharge liability without consent. These powers are useful, but they also hold the potential for abuse. This section describes these powers and considers their source to determine their proper purposes and limits.

A. BANKRUPTCY'S SUPERPOWERS: COORDINATION & GLOBAL NON-CONSENSUAL RELEASE

Bankruptcy courts are, by their nature, fora for aggregate litigation. Multiple claimants against an insolvent debtor must resolve their claims when there is not enough money to go around.[30] Under state law, that scarcity is handled on a first-in-time basis, often characterized as a "race to the courthouse."[31] Bankruptcy courts, by contrast, are tasked with realizing the value of the enterprise and distributing it equitably amongst the competing

29. *See* Samir D. Parikh, *The New Mass Torts Bargain*, 91 FORDHAM L. REV. 447 (2022).

30. Melissa B. Jacoby & Edward J. Janger, *Tracing Equity: Realizing and Allocating Value in Chapter 11*, 96 TEX. L. REV. 673 (2018) [hereinafter Jacoby & Janger, *Tracing Equity*].

31. The automatic stay stops the race to the courthouse. 11 U.S.C. § 362. Preference avoidance unwinds transfers of property on the eve of bankruptcy that undercut equality of distribution. 11 U.S.C. § 547.

claimants.[32] This gives bankruptcy courts procedural advantages over traditional courts accustomed principally to bipolar disputes.[33] First and foremost, bankruptcy provides a single centralized forum by staying all unilateral efforts to collect.[34] Second, the Chapter 11 plan confirmation process contains a disclosure, solicitation, and voting process that, so long as the required majorities vote to accept the plan and certain basic entitlements are satisfied, holds the power to bind dissenting creditors.[35] Third, bankruptcy courts have the substantive power to discharge both present and future claims (subject to the constraints of due process).[36] Finally, and somewhat controversially, bankruptcy courts have asserted the power to extend that discharge beyond the filing entity itself to cover claims against affiliates.[37] Collectively, these powers allow bankruptcy courts to offer tort defendants a form of "global peace" that cannot be achieved in ordinary litigation or even through more modern non-bankruptcy mechanisms, such as multi-district litigation (MDL) and class actions.[38]

The source of these bankruptcy superpowers is not always well understood. They derive from the confluence of two practical aspects of bankruptcy: (1) the traditional resolution of an insolvent firm's affairs through liquidation; and (2) the relatively recent, at least in historical terms, extension of the concept of a "fresh start" for an "honest but unfortunate" debtor beyond natural persons to include business enterprises reorganizing in bankruptcy. Thus, the power to grant global peace—the "fresh start"—rests jointly in insolvency and desert. Therefore, in cases where there is neither honesty *nor* financial distress, the justification for relief may evaporate.

The conceptual link between financial distress, honesty, and the discharge is obvious where an individual debtor is concerned. When the debtor is a corporation or consolidated business enterprise, a prerequisite of

32. Jacoby & Janger, *Tracing Equity*, *supra* note 30, at 676–709.

33. Edward J. Janger, *Towards A Jurisprudence of Public Law Bankruptcy Judging*, 12 BROOK. J. CORP. FIN & COM. L. (2017).

34. 11 U.S.C. § 362.

35. 11 U.S.C. §§ 1122 (contents of a plan), 1125 (solicitation and disclosure), 1126 (voting), 1129 (confirmation). In particular, individual claimants may object on the grounds that the plan does not give them as much as they would receive in liquidation (11 U.S.C. § 1129(a)(7)), that the plan is not feasible (11 U.S.C. § 1129(a)(11)), or as discussed later, that the plan is not proposed in good faith. (11 U.S.C. § 1129(a)(3)).

36. *In re* Grossman's Inc., 607 F.3d 114, 125 (3d Cir. 2010) (future claims); Epstein v. Official Comm. Of Unsecured Creditors (*In re* Piper Aircraft, Corp.), 58 F.3d 1573 (11th Cir. 1995) (due process).

37. Most recently, the Second Circuit approved the discharge of direct claims against the Sackler family in the bankruptcy of opioid manufacturer, Purdue Pharma. The Supreme Court has granted certiorari. See *In re* Purdue Pharma L.P., 69 F.4th 45 (2d Cir.), *cert. granted, sub nom*. Harrington v. Purdue Pharma L.P., 144 S. Ct. 44, 216 L. Ed. 2d 1300 (2023).

38. Ortiz v. Fibreboard Corp., 527 U.S. 815, 838 (1999). Neither MDL nor Federal Rule of Civil Procedure 23 offer the possibility of a mandatory discharge that binds future claims. *See* Janger, *supra* note 14, at 365–68.

financial distress retains its vitality.[39] Requiring "honesty" from an artificial business entity is more problematic. How does one determine the culpability of a fake person? Corporate scholars have wrestled with this question in the context of corporate crime.[40] As this Article will discuss below, when mass torts are involved, the harms caused may be financial, but they can also be physical, emotional, and dignitary. For J&J, the harms alleged were debilitating injury and death. In other recent cases, the torts alleged have involved sexual abuse, encouraging addiction, and environmental pollution.[41] Similarly, the behaviors involved have ranged from negligence to recklessness to intent, at least on the part of the debtors' agents. It is well beyond the scope of this essay to answer the metaphysical question of whether a juridic person or business enterprise can have the scienter necessary for criminal liability. That said, the extraordinary power of discharging the debt of an operating business enterprise does allow one to ask whether it can be considered "good faith" to use bankruptcy to free a business enterprise from liability for the intentional torts of its agents. This is especially true when those torts are committed to increase the profitability of the enterprise—as, allegedly, were many of the challenged marketing practices used by the pharmaceutical company Purdue Pharma.[42]

B. LIQUIDATION: REST IN PEACE

The special power of bankruptcy courts to discharge both present and future claims derives from bankruptcy law's origin as a procedure for winding up a business—liquidation. When an insolvent enterprise liquidates, the existing tort claims share in the distribution, but any claims that arise after the winding-up is complete are left out in the cold.[43] In a world without reorganization, a company that is unable to pay its debts because of a crushing tort liability will liquidate. Outside of bankruptcy, any purchaser of the business as a going concern might find itself subject to successor

39. It should be noted that the Bankruptcy Code does not require "insolvency" as a precondition to opening a proceeding. 11 U.S.C. § 109. Instead, however, the Chapter 11 discharge requires a good faith submission of a plan of reorganization, 11 U.S.C. § 1129(a)(3), and courts have required a good faith bankruptcy purpose as a prerequisite to filing. *See, e.g.*, *In re* SGL Carbon Corp., 200 F.3d 154, 160–62 (3d Cir. 1999).

40. Miriam Hechler Baer, *Forecasting the How and Why of Corporate Crime's Demise*, 47 J. CORP. L. 887 (2022) [hereinafter Baer, *Forecasting Corporate Crime's Demise*]; Miriam Hechler Baer, *Insuring Corporate Crime*, 83 IND. L.J. 1035 (2008) [hereinafter Baer, *Insuring Corporate Crime*].

41. See Simon, *Bankruptcy Grifters*, *supra* note 14, for a description of these cases.

42. *In re* Purdue Pharma L.P., 69 F.4th 45, 70 (2d Cir. 2023), *cert. granted sub nom*. Harrington v. Purdue Pharma L.P., No. 23-124 (23A87), 2023 WL 5116031 (U.S. Aug. 10, 2023).

43. Historically, to participate in a bankruptcy distribution, the "claim" had to be provable. The 1978 Bankruptcy Code expanded the definition of "claim" to include any "right to payment," even if it was "reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, [or] disputed . . . ." 11 U.S.C. § 101(4) (1978).

liability.[44] In such a world, insolvency is a death penalty for both the enterprise and any claims of liability against it. This "death penalty," historically, served an important role in ensuring that tort liability would discipline business behavior.

Per Coase and Calabresi, tort liability seeks to encourage appropriate behavior by requiring tortfeasors to pay for the harms they cause by engaging in (choose one: culpable, unreasonable, blameworthy, accountable) activity.[45] Liability for intentional torts, negligent acts, and acts subject to strict liability encourage appropriate behavior by requiring defendants to make their victims whole. Defendants internalize the costs of their tortious conduct by paying compensatory damages. However, this incentive structure only works if the natural and juridic persons it regulates are solvent.

Judgment-proof tortfeasors are a hazard. It is well understood, to quote Janis Joplin, that "freedom's just another word for nothing left to lose." Judgment-proof people (humans and legal entities) can commit torts (intentional or negligent), cause harm, and pay only as much as their limited resources allow. For individuals, the debt might follow them until death. For corporations, however, the business might wind up and disappear. For this reason, the discharge of debt has always been controversial for individuals. While now firmly entrenched in the United States, the bankruptcy discharge is not universally available in other countries. Indeed, it did not become a permanent feature of U.S. bankruptcy law until the Bankruptcy Act of 1898. And a fresh start was only available to an "honest but unfortunate" debtor.[46] There was no such requirement for corporate debtors, but that was because there was no discharge for corporations. Business failure was accompanied by liquidation.

To deal with this risk of undercapitalized enterprises, many jurisdictions outside the United States threaten the owners, officers, and directors of a business with personal liability. In England, for example, "trading" (continuing to operate a business) while insolvent is a tort.[47] In Germany, failing to open a bankruptcy proceeding within three weeks of insolvency can give rise to criminal liability.[48] Further, in most jurisdictions, at least until recently, the opening of a bankruptcy proceeding signaled the death of the business enterprise.[49] The investors lost their investment; the secured

44. *See, e.g.*, Andrews v. John E. Smith's Sons Co., 369 So. 2d 781, 785 (Ala. 1979) (business continuation); LaFountain v. Webb Indus. Corp., 951 F.2d 544, 547 (3d Cir. 1991) (continuation of a product line).

45. Coase, *supra* note 1; CALABRESI, *supra* note 1.

46. 11 U.S.C. §§ 523(a), 727.

47. *See* Insolvency Act of 1986 §§ 214, 246ZB (U.K.).

48. Insolvenzordnung [InsO] [Insolvency Code], § 19, https://www.gesetze-im-internet.de/englisch_inso/englisch_inso.html (Ger.).

49. Globally, the Chapter 11 rescue-based approach to insolvency has been catching on, with many jurisdictions seeking to adopt statutory regimes that facilitate restructuring. *See, e.g.*, EU Directive on Preventive Restructuring Frameworks, *supra* note 3.

creditors recovered their collateral, and then the unsecured creditors (including any secured creditor deficiency) shared ratably in the proceeds of liquidation of unencumbered assets. The combination of liability for any harm caused by wrongful trading, and the zeroing out of equity made insolvency quite unattractive. While the investors got a fresh start due to limited liability, the enterprise did not. The United States is an outlier in this regard. It does not impose a duty to creditors on officers and directors, nor does it treat continuing to operate while insolvent as a tort.[50] Instead, it offers the possibility of a fresh start by restructuring in Chapter 11.

This focus on rescue or reorganization, once idiosyncratic, is catching on globally.[51] Modern bankruptcy regimes seek to continue the business enterprise where to do so would benefit creditors. This, however, fundamentally changes the calculus. Where the enterprise continues to operate post-insolvency, one must ask whether moral delicts, to the extent that they can be attributed to the entity, may be forgiven along with debts?

C. Reorganization: Global Peace & Financial Distress

Chapter 11 of the United States Bankruptcy Code significantly changed the landscape. Extrapolating the fresh start from personal bankruptcy, U.S. law, starting in the 1930s, recognized that preserving the enterprise as a going concern might be more valuable to the creditors than forcing it to liquidate.[52] There are two ways of realizing on the value of a firm for the benefit of creditors. The assets of the enterprise can be sold piecemeal, or the value can be realized by continuing to operate the firm either through recapitalization or a going-concern sale.[53] The insight that drives Chapter 11 is that giving the enterprise a fresh start might be better for everyone involved, at least where recapitalizing the firm can be done in "good faith."[54]

The *sine qua non* of "rescue" is the elimination of debt overhang. Pre-petition obligations must be finally addressed, either by being paid out of the

50. As will be discussed *infra* notes 108–110 and accompanying text, officers and directors of a firm in the vicinity of insolvency owe no duty to creditors. *See, e.g.*, N. Am. Cath. Educ. Programming Found. v. Gheewalla, 930 A.2d 92 (Del. 2007). Further, continuing to operate while insolvency deepens is not an independent tort. *See, e.g.*, Trenwick Am. Litig. Tr. v. Ernst & Young, L.L.P., 906 A.2d 168 (Del. Ch. 2006).

51. U.N. Comm'n on Int'l Trade L., UNCITRAL Legislative Guide on Insolvency Law: Part One: Designing the Key Objectives and Structure of an Effective and Efficient Insolvency Law, U.N. Sales No. E.05.V.10 (2004), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/leg-guide-insol-part3-ebook-e.pdf.

52. The Chandler Act of 1938, Pub. L. 75-696, 52 Stat. 840 (1938).

53. *Compare* 11 U.S.C. § 1129 (plan of reorganization), *with* 11 U.S.C. § 363(b) (sale). Note that a debtor may be recapitalized, sold as a going concern, or liquidated piecemeal pursuant to a plan of reorganization. A debtor can also be liquidated piecemeal or sold as a going concern under § 363(b). Melissa B. Jacoby & Edward J. Janger, *Ice Cube Bonds: Allocating the Price of Process in Chapter 11 Bankruptcy Cases*, 123 Yale L.J. 862 (2014).

54. 11 U.S.C. § 1129(a)(3).

proceeds of a sale or over time from the business's operating income.[55] The logic behind discharging the debts of a continuing enterprise is: (1) the debtor is in financial distress and will likely liquidate if it cannot shed debt; (2) in liquidation, the only funds available for distribution are proceeds from a sale of the assets; and (3) if, instead, a larger fund can be created by continuing to operate the business, that value should be preserved and distributed amongst the creditors. The benefit of Chapter 11 is that the claimants receive a greater recovery. The price, however, is the double discharge mentioned above: investors get a fresh start as a result of limited liability, while the enterprise (the juridic entity) gets a fresh start from the bankruptcy discharge.[56]

Where the debt overhang is caused by open-ended tort liability, this promise of enterprise discharge is particularly attractive. Beginning with the adoption of the Bankruptcy Code in 1978, companies plagued by environmental or mass tort claims increasingly turned to Chapter 11 to address these liabilities. Manufacturers of asbestos, medical devices such as IUDs and breast implants, and non-profits faced with charges of sexual abuse, like the Boy Scouts of America, USA Gymnastics, and Catholic dioceses, have turned to bankruptcy to address these liabilities.[57] In all these cases, however, a prerequisite to bankruptcy relief has been that the debtor is in a state of financial distress that endangers the continuation of the enterprise. Where the debtor has the wherewithal to pay all the claims against it, the justification for a bankruptcy discharge evaporates; the business can continue to operate while satisfying its tort liability. Granted, the market value of the corporate stock will decline, but that is a feature, not a bug—an indication that tort recourse has caused the firm and its owners to internalize the costs of the harm the firm caused.

Judge Ambro discussed this aspect of the reorganization bargain at length in the Third Circuit's decision in *LTL Management*.[58] But the refiling of the *LTL* case and its subsequent dismissal by the Bankruptcy Court raise a further set of issues.[59] Is it possible to limit the inquiry to a single debtor entity within a corporate group, and does culpability matter for corporate debtors, either at the threshold of the case or when seeking a discharge?

D. REORGANIZATION: GLOBAL PEACE & GOOD FAITH

For real people, the Bankruptcy Code takes desert seriously. There is significant statutory attention given to what it means to be an "honest but

55. Jay Westbrook, The Law of Financial Distress: The Resolution Revolution, A Lecture in Honor of Ian Fletcher and Gabriel Moss, (June 7, 2023) (unpublished manuscript) (on file with author).

56. 11 U.S.C. § 1141.

57. See Simon, *Bankruptcy Grifters*, *supra* note 14, for a description of these cases; *see also* sources cited *supra* notes 10–12.

58. *In re* LTL Mgmt., LLC, 64 F.4th 84, 101 (3d Cir. 2023).

59. *In re* LTL Mgmt., LLC, 652 B.R. 433 (Bankr. D.N.J. 2023).

unfortunate" individual debtor entitled to a "fresh start." The Bankruptcy Code lists a variety of reasons why prepetition behavior might lead to an inability to discharge certain debts or denial of a discharge entirely.[60] For example, debts incurred through fraud or that arise out of intentional torts are denied discharge.[61] Additionally, a debtor who secrets assets in advance of bankruptcy may be denied its discharge entirely.[62]

In the corporate context, however, beyond financial distress, there has been little discussion about when a corporate debtor, continuing in business, is entitled to access bankruptcy relief. While the global discharge may be denied for hiding assets or destruction of documents,[63] there is no section that excuses particular debts from discharge based on the nature of the liability. To the extent the nature of the debtor's prepetition conduct might matter, the entire question is subsumed into the concept of "good faith" and mostly ignored in favor of the goal of financial value maximization. Melissa Jacoby has pointed out that bankruptcy requires "honesty" and good faith of "real people," but juridic people are not judged as a price of discharge.[64] Cases like *LTL*, along with several others involving opioids and sexual abuse in particular, place this omission in high relief.[65] In the next section, I will discuss how the refiling of J&J's talc subsidiary—LTL—and the recent Second Circuit opinion in the *Purdue Pharma* (opioid) bankruptcy raise similar issues in connection with the non-voluntary release of direct claims against third parties.

II. GOOD FAITH: STRATEGY, TACTICS, & THE HONEST BUT UNFORTUNATE ENTERPRISE

This section tells the cautionary tale of the Johnson & Johnson talc bankruptcy and the now-celebrated "Texas Two-Step." It demonstrates that, without a more robust conception of good faith, pre-bankruptcy shenanigans can turn bankruptcy courts into a forum for instrumentally avoiding accountability for torts of both the accidental and the intentional variety.

A. TALC & THE TEXAS TWO-STEP

J&J is a corporate healthcare behemoth. It produces everything from vaccines and prescription drugs to over-the-counter cosmetics. The market capitalization of the entire J&J enterprise (as of March 19, 2024) was $376

60. 11 U.S.C. § 523 (non-dischargeability of certain debts); 11 U.S.C. § 727 (denial of global discharge).

61. 11 U.S.C. § 523(a)(1).

62. 11 U.S.C. § 727(a)(2)(A).

63. 11 U.S.C. § 727(a)(3).

64. Melissa B. Jacoby, *Fake and Real People in Bankruptcy*, 39 EMORY BANKR. DEVS. J. 497 (2023).

65. For a discussion of recent cases, see the articles cited *supra* note 14.

billion.[66] It is no stranger to large-scale tort litigation. It has litigated and settled cases involving the anti-psychotic drug Risperdal,[67] vaginal mesh,[68] and opioids.[69] However, none of these cases threatened the overall solvency of the enterprise, and they were handled through ordinary tort litigation processes.

A problem of a different scale arose with regard to one of J&J's flagship consumer products—J&J baby powder. It turns out that talc mines are frequently adjacent to asbestos mines, and, as a result, the talc in J&J baby powder was found to be contaminated with asbestos.[70] It is alleged that this contamination can increase the risk of ovarian cancer or mesothelioma in people who use the product.[71] At present, J&J faces such claims from as many as 58,000 lawsuits.[72] However, J&J contests the validity of these claims, and, to date, nobody has seriously suggested that the talc liability threatens the solvency of the J&J enterprise. Indeed, the shareholder equity of J&J's cosmetics subsidiary alone, which produced the talcum powder products, is reportedly worth $61 billion (exclusive of the talc liabilities).[73]

To address this liability, J&J tried a novel tactic—the now (in)famous Texas Two-Step—to recruit a federal bankruptcy court and federal bankruptcy law to help them resolve their talc liability. The strategy, stripped to its bones, was intended to work as follows:

1. Old Cosmetics would divide into two entities, an asset-rich operating entity and an asset-poor liquidating trust containing the talc liabilities;

66. *Market Summary > Johnson & Johnson*, GOOGLE, https://www.google.com/search?q=johnson+and+johnson+market+capitalization&oq=&gs_lcrp=EgZjaHJvbWUqBggBEEUYOzIGCAAQRRg5MgYIARBFGDsyBwgCEAAYgAQyBwgDEAAYgAQyBwgEEAAYgAQyBwgFEAAYgAQyBwgGEAAYgAQyBwgHEAAYgAQyBwgIEAAYgAQyBwgJEAAYgATSAQg1MjYwajBqNKgCALACAA&sourceid=chrome&ie=UTF-8 (last visited Mar. 19, 2024).

67. *J&J Settles Most Risperdal Lawsuits, with $800 Million in Expenses*, REUTERS (Nov. 1, 2021, 5:24 AM), https://www.reuters.com/business/healthcare-pharmaceuticals/jj-settles-most-risperdal-lawsuits-with-800-million-expenses-2021-10-30/.

68. Melissa Davey, *Johnson & Johnson Reaches $300m Settlement Over Pelvic Mesh Implants*, THE GUARDIAN (Sept. 11, 2022, 11:50 PM), https://www.theguardian.com/business/2022/sep/12/johnson-johnson-reaches-300m-settlement-over-pelvic-mesh-implants.

69. *Johnson & Johnson Reaches Opioid Settlement Agreement with New York State Consistent with Terms of Previously Announced Broader Settlement Agreement in Principle*, JOHNSON & JOHNSON (June 26, 2021), https://www.jnj.com/johnson-johnson-reaches-opioid-settlement-agreement-with-new-york-state-consistent-with-terms-of-previously-announced-broader-settlement-agreement-in-principle.

70. Ronald E Gordon, Sean Fitzgerald & James Millette, *Asbestos in Commercial Cosmetic Talcum Powder as a Cause of Mesothelioma in Women*, 20 INT'L J. OCCUPATIONAL & ENV'T. HEALTH 318, 330 (2014).

71. *Id.*

72. *In re* LTL Mgmt., LLC, 652 B.R. 433, 439 (Bankr. D.N.J. 2023).

73. *In re* LTL Mgmt., LLC, 64 F.4th 84 (3d Cir. 2023). When it dismissed the case, the bankruptcy court stated that the outside worst case liability was $21 billion. *In re LTL Mgmt.*, 652 B.R. at 447.

2. LTL (the talc entity) would then file for bankruptcy;
3. The filing would then stay any talc lawsuits against LTL, and LTL would further seek a supplemental stay on actions against the operating entity and the corporate parent;
4. LTL would then confirm a Chapter 11 plan of reorganization; and
5. The Chapter 11 plan would discharge past and future talc liability of LTL and extend a third-party release to similarly discharge all past, present, and future claims against LTL's affiliates—the operating company and the corporate parent.[74]

Thus, depending on how one counts, the "Two-Step" could more properly be characterized as a waltz (divide, file, discharge); a jive-step (divide, file, stay, discharge); or, as I have characterized it above, a full-blown five-step "Texas Tango."[75] The key point is that it is not the division of the company that matters, but the use of bankruptcy to then discharge the claims, not just against the filing entities, but against the non-filing affiliates as well, through the use of a third-party release.

Things did not go exactly as planned. They started out well enough: Old Cosmetics reincorporated in Texas to take advantage of the so-called "divisional merger" statute;[76] Old Cosmetics then split into two pieces—New Cosmetics, the operating company, and LTL Management, a new subsidiary to house the talc liabilities; LTL Management was capitalized with approximately $2 billion in assets, principally in the form of an insurance policy; then finally, [77] LTL Management reincorporated in North Carolina and filed for bankruptcy. Once the "two-step" was accomplished, things started to go sideways. While the Bankruptcy Court for the Western District of North Carolina had previously recognized cases using the Two-Step as filed in good faith,[78] when it looked at LTL Management, it observed that the J&J corporate group, all its assets, operations, and creditors resided in New Jersey. The case was, therefore, transferred to the bankruptcy court in Trenton, New Jersey. Once in New Jersey, the talc claimants raised an objection, seeking to have the case dismissed as not filed in "good faith."[79]

Initially, the case appeared to get back on track in February of 2022 when Judge Kaplan in Trenton issued his decision on "good faith." He concluded that the bankruptcy superpowers—the ability to discharge present and future claims and grant third-party releases—made bankruptcy courts a superior

74. The first three steps were implemented in the first filing, prior to its reversal by the Third Circuit. When LTL Management refiled the bankruptcy court noted that many claimants had signed on to a plan support agreement that detailed the remaining steps. *In re LTL Mgmt.*, 652 B.R. at 439.

75. *See* Janger & Pottow, *supra* note 24.

76. TEX. BUS. ORGS. CODE ANN. §§ 10.001 *et seq*.

77. *In re LTL Mgmt.*, 64 F.4th at 95–97.

78. *Id.* at 97.

79. *Id.* at 95–97.

forum for addressing mass tort liability.[80] For that reason alone, independent of any financial distress or consideration of the naked forum shop, Judge Kaplan approved the filing as in good faith.[81]

When the case was appealed to the Third Circuit, the wheels came off. While the Third Circuit took a very careful and diplomatic approach, it dismissed the case as filed in bad faith. It focused on one aspect of the transaction—the funding agreement between the debtor and its affiliates. Notwithstanding the relatively small ($2 billion) capitalization of the debtor, J&J (the corporate parent) and New Cosmetics entered into an agreement to fund the full expenses of the talc litigation.[82] Taking the affiliates at their word, Judge Ambro concluded that LTL Management was not in financial distress and dismissed the case as filed in bad faith.[83] This single-entity focus allowed the court to ignore the corporate shenanigans that led to the filing and instead look only at the finances of the filing entity.

Unwilling to take no for an answer, on April 4, 2023, the day the mandate was issued on the appeal, LTL Management refiled its bankruptcy case in Trenton. The refiled case looked a lot like the previously dismissed one, except for one salient difference. In the first case, the funding agreement was in place prior to the bankruptcy proceedings, and it would have funded talc-related liabilities in the absence of a bankruptcy filing—hence, no financial distress.[84] In the refiled case, the original funding agreement was canceled and replaced by a new one.[85] The twist lay in the fact that, under the new agreement, the affiliate's funding commitment was contingent on the confirmation of a plan of reorganization funded by a trust.[86] Put differently, this meant that if the talc claimants wanted access to any significant settlement offer, they would have to go along with the global settlement proposed in the bankruptcy proceedings. To the extent there was now financial distress, however, it only existed because of further pre-petition (actually, pre-refiling) shenanigans within the corporate group.

As noted above, this behavior places in high relief the question of what it means to file a Chapter 11 bankruptcy petition in "good faith" and further what "good faith" means in the context of a plan of reorganization, as required by Section 1129(a)(3) of the Bankruptcy Code.[87] Broadly speaking, there are three possible approaches to the term "good faith":

80. *In re* LTL Mgmt., LLC, 637 B.R. 396, 409 (Bankr. D.N.J. 2022), *rev'd and remanded*, 58 F.4th 738 (3d Cir. 2023), *rev'd and remanded*, 64 F.4th 84 (3d Cir. 2023).
81. *Id.*
82. *In re LTL Mgmt.*, 64 F.4th at 93 (3d Cir. 2023).
83. *Id.* at 84.
84. *Id.* at 106.
85. *In re* LTL Mgmt., LLC, 652 B.R. 433, 440 (Bankr. D.N.J. 2023).
86. *Id.*
87. *See* 11 U.S.C. § 1129(a)(3).

1. It requires that the filing be used to maximize the value of the firm, regardless of financial distress.
2. It requires that the filing be used to maximize recovery to creditors in the face of financial distress.
3. It requires that the filing be used to maximize recovery to creditors in the face of financial distress and in the absence of prepetition behavior that would preclude discharge.

The Third Circuit's ruling in *LTL* precluded the first approach. On refiling, the bankruptcy court considered the second possibility. It concluded that in considering financial distress, it was necessary to look not just at the LTL entity but also at the corporate group and its ability to support the funding agreement. This time, the bankruptcy court somewhat reluctantly concluded that in light of the Third Circuit's ruling, the debtor was not in financial distress, and the filing was in bad faith.[88] In the next subparts, I consider how these questions would have been resolved if LTL Management had been an individual debtor rather than a corporate repository of liabilities housed within a larger corporate group.

B. REAL PEOPLE: THE HONEST BUT UNFORTUNATE DEBTOR

A frequently ignored aspect of the bankruptcy discharge of corporations in Chapter 11 is that it is derivative from the fresh start available to real people. The starting point of the bankruptcy discharge is Section 727.[89] An individual who liquidates gets a discharge unless there is a reason to deny it. A corporation that liquidates does not. Corporations only receive a discharge if they confirm a Chapter 11 plan of reorganization that provides for the continuation of the business and is proposed in good faith.

For a real person to obtain a discharge, they must meet the requirement of being an "honest but unfortunate debtor." The reasons for denying a debtor's discharge focus on the dissipation of assets, but individual debts are excepted from discharge for a variety of reasons that, collectively, "reflect that the fresh start inherently must give way to deterring and remedying serious fraud, defalcation, or willful and malicious injury."[90] Intentional torts can be discharged in a Chapter 13 case, but again, only upon a showing of both good faith and that substantially all of the debtor's disposable income has been committed to plan payments.[91] Financial frauds cannot be discharged even in Chapter 13.[92]

88. *In re LTL Mgmt.*, 652 B.R. at 449.
89. 11 U.S.C. § 727.
90. Jacoby, *supra* note 64, at 502; 11 U.S.C. § 523(a)(2), (4), and (6).
91. 11 U.S.C. § 1325.
92. Intentional torts of an individual are non-dischargeable in a liquidation case. 11 U.S.C. §§ 523(a)(6), 727. They are dischargeable in a Chapter 13 case for debtors of modest means. 11 U.S.C. § 1328. But they are not dischargeable in an individual Chapter 11 case. 11 U.S.C. § 1141.

C. CORPORATIONS: GOOD FAITH REORGANIZATION

Section 523 applies only to individuals, not corporations, but that is likely a function of the fact that, in liquidation, a corporation does not receive a discharge in Chapter 7 or Chapter 11.[93] The bases for denial of global discharge apply in Chapter 11.[94] The question left open by the statute is whether claims of a particular creditor that would have been non-dischargeable in Chapter 7 against an individual can be discharged in Chapter 11 by a "good faith" plan of reorganization.

To review: Individuals and corporations can be denied a discharge if they secret assets, though preferences and fraudulent transfers can be remedied after the fact through avoidance actions. Individuals can be denied a discharge of particular debts, including debts incurred by fraud and debts arising from intentional torts against person or property. Individuals who file for Chapter 13 cannot discharge damages for intentional torts that cause personal injury, but intentional torts against property may be discharged.[95] Corporations can discharge debts incurred by fraud and intentional torts against person and property so long as the plan is in "good faith."[96]

But what is the scope of the good faith inquiry? It appears to require insolvency, but can this insolvency have been artificially induced through prepetition transfers? Should the court's inquiry consider the culpability associated with the underlying behavior? This is the question posed by the talc litigation, but even more so for bankruptcies involving claims of sexual abuse, as in the Boy Scouts of America, USA Gymnastics, and various churches,[97] as well as for the principals in the opioid-related bankruptcies of Purdue Pharma and Mallinckrodt.

D. DISCHARGE ARBITRAGE: LEVERAGING THE PERSON/ENTERPRISE DISTINCTION IN *LTL* & *PURDUE PHARMA*

The principles that emerge from the discussion above is that for real people, the debtor must be honest but unfortunate to receive a discharge. The need for a discharge is occasioned by financial distress, but the precondition is desert. When looking at corporations seeking to reorganize, the justification for discharge derives from financial distress, a surplus from

93. 11 U.S.C. § 727(a)(1), 1141(d)(3).

94. 11 U.S.C. § 1141(d)(3).

95. 11 U.S.C. § 1328(a)(4). The text of § 1328(a)(4) limits the non-dischargeability to damages awarded in a civil action. This reflects the fact that under 28 U.S.C. § 157(b)(5) personal injury claims for tort and wrongful death must be heard by the district court.

96. 11 U.S.C. §§ 1129(a)(3), 1141(d)(3), (4). Indeed, some courts have held that even without confirming a plan of reorganization, a debtor can engage in an all-asset going concern sale of the debtor that continues the business free and clear of any claims of successor liability.11 U.S.C. § 363(b); *see, e.g.*, *In re* Leckie Smokeless Coal Co., 99 F.3d 573, 585 (4th Cir. 1996) ("[T]he Bankruptcy Court may extinguish Coal Act successor liability pursuant to 11 U.S.C. § 363(f)(5)").

97. *See* Simon, *Bankruptcy Grifters*, *supra* note 14, for a description of these cases; *see also* sources cited *supra* notes 10–12.

continued operations, and good faith. Some courts would combine surplus and good faith into a more general concept of bankruptcy purpose, but the basic point is that there has to be a good reason for the discharge. In two of the most prominent recent mass tort cases, the debtors have used the corporate form and confusion about the justification for the discharge to generate a discharge for an entity that would not otherwise be able to establish entitlement for relief.

1. LTL*: Liquidating an Entity to Discharge the Enterprise*

When LTL filed for bankruptcy, the goal was not to get a bankruptcy discharge for the LTL entity but to obtain bankruptcy relief for the J&J entities that were continuing to operate—New Cosmetics and its corporate parent, J&J. The strategy entailed putting LTL into bankruptcy, obtaining a supplemental stay of proceedings against the other J&J entities, and then, as a condition of funding any plan or settlement, a third-party release of the claimants' direct claims against the operating entities. There is something deeply troubling about this approach. The prerequisite to a supplemental stay is that it is necessary to the reorganization of the filing debtor.[98] The prerequisite to a third-party release, where it is available, is, again, that it be essential to a successful reorganization.[99]

An irony in *LTL* is that the filing debtor was a liquidating trust. By its very nature, it had no operations to continue, had never had any operations, and never would. It was created only for the purposes of being liquidated. It was liquidating in Chapter 11 and would not be entitled to a discharge.[100] It is hard to imagine how third-party releases can be supported in a case where the debtor itself would not be entitled to a discharge and was not seeking to reorganize.[101] The only entities that were reorganizing were the non-filing entities that were not in financial distress.

2. Purdue*: Leveraging the Business Enterprise to Discharge Non-Dischargeable Claims*

The bankruptcy of opioid manufacturer *Purdue Pharma* presents a similar paradox. The case is currently pending before the United States Supreme Court on the issue of whether the debtor's plan of reorganization can include non-consensual third-party releases of certain members of the Sackler family. The debtor, Purdue Pharma, is a pharmaceutical company

98. Celotex Corp. v. Edwards, 514 U.S. 300 (1995).

99. *In re* Purdue Pharma L.P., 69 F.4th 45, 78 (2d Cir. 2023), *cert. granted sub nom*. Harrington v. Purdue Pharma L.P., No. 23-124 (23A87), 2023 WL 5116031 (U.S. Aug. 10, 2023) ("[I]t must be the case that, without the releases, 'there is little likelihood of [a plan's] success.'" (alterations in original) (citing Master Mortg. Inv. Fund, 168 B.R. 930, 935 (Bankr. W.D. MO 1994)).

100. 11 U.S.C. § 1141(d)(3)(A).

101. 11 U.S.C. §§ 523, 727, 1325(a)(3), 1328 (discharge); 11 U.S.C. §§ 727, 1129(a)(3), 1141(d) (no discharge).

that manufactured and distributed opioids. Its marketing strategies have been linked to exacerbating, if not causing, the opioid epidemic. This gave rise to tort claims against the company but also against its principal officers—members of the Sackler family. Certain members of the Sackler family are alleged to have engaged in conduct that would give rise to direct intentional tort claims that might very well have been non-dischargeable had the family members filed their own bankruptcy.[102] If the Supreme Court affirms the Second Circuit and approves these third-party releases, the Sacklers will have managed to use the social interest in preserving a viable business enterprise to override the requirement that individual debtors be "honest but unfortunate."

In both *LTL* and *Purdue*, the desire to save a business enterprise was used to override any concerns about whether the recipients of the discharge were entitled to "global peace."

III. RECOURSE & PRECAUTION: GLOBAL PEACE & DYSTOPIA

This discussion of the *LTL* and *Purdue* bankruptcies illustrates the poor fit between the value realization and maximization goals of bankruptcy and the incentivization and recourse goals of tort law. The forum shopping shenanigans of *LTL* offer just one example of how the tools of bankruptcy law, designed to preserve value for the benefit of creditors, can be abused. The attempt to use third-party releases to discharge debts that would have been non-dischargeable in the releasee's own bankruptcy is another.

Reorganization of a business may require the resolution of debt overhang. But the remedy is extraordinary and should not exacerbate the moral hazard that derives from doing business while insolvent. In this section, I place bankruptcy law in a broader context of a wide variety of legal institutions that may encourage business enterprises to overborrow and thereby limit the incentives created by tort law to behave reasonably, as well as the extent to which these enterprises will internalize the costs of the harms they cause. Taken together, this incentive to overborrow may suggest a need to recalibrate a number of legal doctrines.

A. ADEQUATE CAPITAL AND & INCENTIVE TO OVERBORROW

The first on the list of legal doctrines that encourage excessive borrowing is limited liability. There is a reason that debt financing of a business is often referred to as leverage. Debt claims against an enterprise are fixed; they do not share in a business enterprise's success. The creditor is entitled to the return of its principal with interest, but no more. As a result, when a leveraged investment succeeds, the equity investor's return is multiplied. But when it fails, there is less room for error because debt claims take priority. For

102. 11 U.S.C. § 523(a)(6) (non-dischargeability of claims for property damage or personal injury arising out of intentional torts).

example, if a firm without debt is valued at $100, which then increases by 10 percent to $110, equity investors can gain $10—a 10 percent return. However, if the same firm is financed with $50 of debt and $50 of equity, the same $10 increase represents a 20 percent return on the equity investment. This leverage is a double-edged sword, as the same multiplier effect applies to losses: A $10 decline in value would result in a 20 percent loss in the value of equity. Nothing about this is troubling, so long as the business is adequately capitalized. However, limited liability also offers a way to capture the upside of the enterprise while escaping the full downside risk.

By doing business through the corporate form, both debt and equity investors limit their potential liability to the capital they invest.[103] The *LTL* case discussed above shows how corporate structure can be used to influence recourse. While *LTL* is an extreme case due to the manipulation occurring on the eve of filing, the problem is more general. For example, the recent *3M Earplug* case is an example of how the bankruptcy of an existing subsidiary can be used to seek global peace for the larger corporate group.[104] There, the bankruptcy judge denied the extension of the automatic stay sought by the debtor.[105] The case is currently on appeal to the Seventh Circuit.[106]

Property law can also be used to enhance the effect of limited liability. Mechanisms such as secured credit, securitization, and corporate structuring can collectively render operating entities practically immune to judgments.[107] A substantial body of literature delves into how secured credit can incentivize excessive risk-taking by owners and financial creditors at the expense of operating creditors and tort claimants.[108]

Yet another place where corporate law in the United States diverges from the rest of the world is the law of fiduciary duty.[109] Outside the United States, both in the commonwealth countries and under civil law, the fiduciary duty of loyalty switches from the shareholders to the creditors in some manner upon insolvency and expands in the vicinity of insolvency.[110] This is not the

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103. Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L.J. 1879 (1991).

104. *In re* Aearo Techs. LLC, 642 B.R. 891 (Bankr. S.D. Ind. 2022).

105. *Id.* at 912.

106. Brendan Pierson & Dietrich Knauth, *3M's Bid to Shield Itself from Earplug Lawsuits Faces Skeptical Judges*, REUTERS (Apr. 4, 2023), https://www.reuters.com/legal/3ms-bid-shield-itself-earplug-lawsuits-faces-skeptical-judges-2023-04-04/.

107. Lopucki, *supra* note 2, at 14–30.

108. *See, e.g.*, Thomas Jackson & Anthony T. Kronman, *Secured Financing and Priorities Among Creditors*, 88 YALE L.J. 1143 (1979); Paul M. Shupack, *Solving the Puzzle of Secured Transactions*, 41 RUTGERS L. REV. 1067, 1074–75 (1989); Lynn M. LoPucki, *The Unsecured Creditor's Bargain*, 80 VA. L. REV. 1887, 1908–09 (1994); Lucian Arye Bebchuck & Jesse Fried, *The Uneasy Case for the Priority of Secured Claims in Bankruptcy*, 105 YALE L.J. 857, 904 (1996).

109. *See supra* notes 47–49 and accompanying text.

110. U.N. COMM'N ON INT'L TRADE L., UNCITRAL LEGISLATIVE GUIDE ON INSOLVENCY LAW: PART THREE: TREATMENT OF ENTERPRISE GROUPS IN INSOLVENCY, U.N. Sales No. E.12.V.16 (2012), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/leg-guide-insol-part3-ebook-e.pdf.

case in the United States, at least not in Delaware, where the Chancery Court has rejected any notion of duty shift or an independent tort of deepening insolvency.[111] Collectively, these doctrines can be seen as subsidizing businesses that run at high leverage and reducing the penalties faced by officers and directors who continue to operate the firm. This incentive jeopardizes the interests of creditors, such as employees, tort claimants, and trade creditors, who cannot adjust the interest rates they charge.

An important aspect common to all these prepetition behaviors is that although they may involve culpable behavior by owners or officers and directors, they invariably require the complicity of a claimant who stands to benefit from priority (for example, a secured creditor, asset-backed security holder, or guaranteed creditor). These harms can therefore be remedied using existing legal theories of avoidance,[112] veil piercing,[113] subordination,[114] and even through affirmative litigation against officers and directors for breaches of fiduciary duty. To the extent these claims have vitality, they can be addressed as part of the plan negotiation process.

But this presupposes that the plan confirmation process is adhered to. Frequently, the proponents of a restructuring will, in the interest of value maximization, seek to run a case through bankruptcy very quickly. Sometimes, this is done through prepackaged bankruptcies, lock-up agreements, restrictive financing arrangements, and all-asset going concern sales outside the plan process.[115] Melissa Jacoby and I have written before about the way "melting ice cube" leverage is used in these cases to force an early compromise of claims, often without a full airing.[116] Here, judges must proactively intervene to ensure that this leverage is not used to short-circuit the process of equitable value allocation and, where necessary, veil piercing and avoidance.

B. NON-FINANCIAL HARMS

Financial judgment proofing and value reallocation are not the only concerns. For some harms, financial compensation is not remotely a solution.

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111. Officers and directors of a firm in the vicinity of insolvency owe no duty to creditors. *See, e.g.*, N. Am. Cath. Educ. Programming Found. v. Gheewalla, 930 A.2d 92, 92 (Del. 2007). Furthermore, continuing to operate while insolvency deepens is not an independent tort. *See, e.g.*, Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P., 906 A.2d 168, 168 (Del. Ch. 2006). *See also* Jared A. Ellias & Robert J. Stark, *Bankruptcy Hardball*, 108 CAL. L. REV. 3 (2020); EDWARD J. JANGER, EQUITABLE DUTY: REGULATING CORPORATE TRANSACTIONS IN THE VICINITY OF INSOLVENCY FROM A COMPARATIVE PERSPECTIVE, (Arthur B. Laby & Jacob Hale Russell eds., Cambridge Univ. Press 2021).

112. 11 U.S.C. § 544.

113. *In re* Augie/Restivo Baking Co., 860 F.2d 515, 518 (2d Cir. 1988).

114. 11 U.S.C. § 510(c).

115. Edward J. Janger & Adam J. Levitin, *Badges of Opportunism: Principles for Policing Restructuring Support Agreements*, 13 BROOK. J. CORP. FIN. & COM. L. 169 (2018).

116. Melissa B. Jacoby & Edward J. Janger, *Ice Cube Bonds: Allocating the Price of Process in Chapter 11 Bankruptcy Cases*, 123 YALE L.J. 862 (2014).

Many claimants in the opioid litigations care more about having their day in court than perhaps about financial compensation. Some may even prefer punishment to compensation.[117] This feature—anger—is also present in cases involving the Boy Scouts of America, USA Gymnastics, and the Catholic Church.[118]

Here, one is forced to view some of the "features" of the bankruptcy process as bugs.[119] Many of the tools bankruptcy uses to obtain global peace operate to deprive individual claimants of particularized process—their day in court. While equitable treatment may suffice in disputes over money, the objectives of the system become considerably more complex in cases involving mass tort claims. For example, plaintiffs in the opioid litigation and the Boy Scouts have often expressed concerns that their complaints about the process were not monetary. There are some things that judges can do to enhance the perceived procedural fairness of bankruptcy cases, and while these processes are not free, judges should consider being proactive in this regard. These include investing time in allowing claimants to tell their stories, appointing an examiner to serve as an independent investigator, or even appointing a trustee to supervise the case.[120]

C. Precaution

Finally, the combined effect of the doctrines described above, especially when combined with enterprise rescue, is that businesses are free to gamble about "unknown unknowns" and long-tail risks. For example, it may not be obvious whether a particular chemical is a carcinogen or whether a particular storage method will cause leaching into groundwater, or if a new form of AI will destroy humanity as we know it. If those risks later materialize, the ability to discharge liability may lead to the preservation of the business enterprise, even after it has caused irreparable harm. This may be the efficient outcome *ex-post*, but we might choose a different incentive structure *ex-ante*.

This illustrates an important reality about insolvency, the tort system, and bankruptcy. Bankruptcy law cannot solve the judgment-proof problem. By the time a debtor is in bankruptcy, it is too late. Whatever risks they took, whatever harms they caused, have materialized. The assets and value available for recourse are established. Bankruptcy law cannot fix that. That is the job of doctrines like fiduciary duty, fraudulent conveyance law, and

117. Editorial Board, *The Purdue Pharma Opioid Settlement is a Retrospective Punishment that Can't Possibly Fit the Crime*, WASHINGTON POST (Sept. 3, 2021), https://www.washingtonpost.com/opinions/2021/09/03/purdue-pharma-opioid-settlement-is-retrospective-punishment-that-cant-possibly-fit-crime/.

118. See Simon, *Bankruptcy Grifters*, *supra* note 14, for a description of these cases; *see also* sources cited *supra* notes 10–12.

119 *See* Jacoby, *Sorting Bugs and Features of Mass Tort Bankruptcy*, *supra* note 14.

120. Adam Levitin, Purdue*'s Poison Pill: The Breakdown of Chapter 11's Checks and Balances* 100 TEX. L. REV. 101 (Mar. 23, 2022); Jonathan C. Lipson, *Understanding Failure: Examiners and the Bankruptcy Reorganization of Large Public Companies*, 84 AM. BANK. L. J. 1 (2010).

others. But bankruptcy law should not make these things worse. It should not provide a fresh start to those who do not deserve it or who contrive to obtain it.

IV. THE PRICE OF PEACE: THE HONEST BUT UNFORTUNATE ENTERPRISE

While bankruptcy law has the power to confer global peace, mass-tort cases raise a number of concerns about how the process might be abused. These concerns go beyond whether the debtor is in financial distress. The question posed is whether the concept of "good faith" should carry with it additional dimensions. The discussion above does not undercut the rationale for the bankruptcy discharge. However, it may cast doubt on the power of bankruptcy courts to discharge certain intentional torts. It should also prompt further consideration of whether bankruptcy courts ought to be more demanding of debtors when using coercive techniques aimed at conferring global peace. On the one hand, it is crucial to recognize the link between financial distress and discharge. But it might also be necessary to flesh out the concept of good faith to include consideration of the reason for financial distress. Most of the time, insolvency will be a product of honest business reversals visited on the enterprise, but not always. Where culpable behavior of the debtor or its agents is involved, some sins may be forgivable, while others may not.

A. LACK OF BANKRUPTCY PURPOSE: NO CHANCE OF SUCCESS OR NO NEED FOR RELIEF

The first category of "bad faith" cases is discussed by the Third Circuit opinion in *LTL*.[121] Cases where there is no reorganization purpose, such as single-asset real estate cases, are often dismissed at the outset because they are simply two-party disputes where the value of the principal asset is readily ascertainable. In these cases, no reorganization is possible, and liquidation is the most appropriate recourse. Similarly, where the debtor is not in financial distress, bankruptcy is not necessary. Judge Ambro's decision in *LTL* underscores this point, highlighting that without the Two-Step maneuver, the enterprise would have remained solvent and adequately equipped to address the liabilities in question.[122]

B. FORGIVABLE SHENANIGANS

The second category of cases where good faith comes into play is those in which the business has been intentionally undercapitalized—either through the use of the corporate structure, secreting of assets, or encumbering

121. *In re* LTL Mgmt., LLC, 64 F.4th 84, 101 (3d Cir. 2023).
122. *Id.* at 106.

or partitioning of assets—to the harm of foreseeable creditors. These cases are proper cases for Chapter 11, as preserving value for the creditors is precisely the purpose of reorganization. Indeed, these cases should not be dismissed as filed in bad faith. Rather, the question of good faith should be considered fully and carefully at the plan confirmation stage. The focus here is not on value maximization but instead on value allocation.

Several established legal doctrines can be used to combat harm caused by intentional efforts to reallocate risk. These include substantive consolidation,[123] veil piercing,[124] and fraudulent conveyance law.[125] These remedies are extraordinary and costly, but they can serve as important correctives in cases where recourse has been manipulated. Where these forms of harm are addressed within the confirmation process, the good faith standard can be satisfied. Furthermore, many seeming "shenanigans" can be justified where consensual creditors are involved. Investors who invested with notice of the company's capital structure have not been adversely affected. However, non-consensual claimants harmed by tortious behavior should arguably stand in a privileged position.[126]

C. UNFORGIVABLE SHENANIGANS

The challenging question arises when one asks whether there are types of harms for which the global peace provided by bankruptcy should not be available. At what juncture does the wrongdoing of a business enterprise reach a threshold where it is no longer entitled to redemption, even for the benefit of its creditors? This question is harder than it might seem. The fight here is between creditors who wish to maximize financial recovery and those who would prefer to see the enterprise die—to be punished for its culpable behavior. How is one to choose, assuming the culpable behavior has stopped? What does good faith mean in this context?

There are a number of conceptual problems here. First is the issue of "corporate" culpability. Some would argue that corporations cannot behave culpably because they lack individual agency and are not real people. There is extensive literature in this regard questioning the justification for and feasibility of corporate criminal liability.[127] Second, what does it even mean to "punish" a business enterprise?

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123. *In re* Augie Restivo Baking Co., 860 F.2d 515 (2d Cir. 1988) (granting substantive consolidation)**;** *In re.* Owens Corning, 419 F.3d 195, 211 (3d Cir. 2005) ("[S]ubstantive consolidation . . . should be rare and, in any event, one of last resort after considering and rejecting other remedies").

124. Agai v. Diontech Consulting, Inc., 29 N.Y.S.3d 441 (App. Div. 2016)

125. 11 U.S.C. § 548.

126. Lucien Bebchuck & Jesse M. Fried, *The Uneasy Case for the Priority of Secured Claims in Bankruptcy*, 105 YALE L.J. 857 (1996); Lynn M. LoPucki, *The Unsecured Creditors' Bargain*, 80 VA. L. REV. 1887 (1994).

127. Baer, *Forecasting Corporate Crime's Demise*, *supra* note 40; Baer, *Insuring Corporate Crime*, *supra* note 40.

The focus here, however is not discussing criminal liability, but instead the internalization and redressive functions of tort law. The enterprises were run by people and invested in by people, and it would be a mistake to disregard the acts of agency that together may have contributed to some very bad behavior. So, we must ask, should there be a class of corporate behaviors for which bankruptcy cannot atone? Here, the category that leaps out is the type of claim that could not be discharged if the debtor was an individual—an intentional tort against person or property.[128] Here, the claim does not arise out of a consensual business relationship. It would likely be subject to successor liability outside of bankruptcy, so it could not be avoided through an asset sale and, as such, perhaps should, contrary to current case law, be dischargeable in a Chapter 11 plan.[129]

The choice may not, however, be as stark as it seems. The price may not be an inability to reorganize. The price will be the inability to use the bankruptcy superpowers to get there. The principal superpower of bankruptcy is the ability to coerce consent by binding minority creditors to the will of the class. Where harms are not financial or where they do not translate easily into dollar amounts, it may not be appropriate to gather the claimants together into a class. The price of peace may instead be individual consent—allowing claimants to opt out of the class. This will not necessarily mean that the organization will fail. Indeed, in the absence of financial distress, this would be the environment faced by the firm in a multidistrict litigation, where consent is required, or class action litigation, where only an opt-out class may be available.

V. CONCLUSION: INSOLVENCY & TORT LAW

Bankruptcy law, and Chapter 11 in particular, have the potential to increase the recourse available to the victims of mass torts. Chapter 11 can increase the value available to pay tort claimants and preserve recourse for future claimants. The bankruptcy superpowers are an important part of this, but it is crucial to recognize that they all find their justification in the financial distress of an honest but unfortunate debtor. This means that, at the front end, the powers should only be available to those who truly need them, and, at the back end, the double discharge should not be available unless the victims of forgivable shenanigans are made whole by the unwinding of detrimental transactions, and where intentional torts are involved, it may be necessary to consider whether this behavior is forgivable at all. Are there unforgivable shenanigans where bankruptcy cannot deny the plaintiff of their day in court?

128. *See* 11 U.S.C. § 523(a)(6).

129. *In re* Leckie Smokeless Coal Co., 99 F.3d 573, 585 (4th Cir. 1996) ("[T]he Bankruptcy Court may extinguish Coal Act successor liability pursuant to 11 U.S.C. § 363(f)(5)").