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Article

Troy A. McKenzie*

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Abstract: The history of insolvency schemes as mass tort resolution devices is generally said to begin with the asbestos bankruptcies of the 1980s. This Article brings to light a much earlier example of the resolution of mass tort claims through another insolvency scheme—the equity receivership—that was a precursor to Chapter 11 of the Bankruptcy Code. The Article recounts the creation of a receivership after a fire at the Ringling Brothers circus killed and injured hundreds of spectators. It also describes the maneuvers of the key actors in the case and the legal landscape that explained their resort to a receivership instead of traditional civil litigation. The Article presents the Ringling Brothers case as more than a piece of historical trivia. The case raises a number of puzzles, most notably its success. While modern mass tort bankruptcies are criticized for a variety of perceived flaws, the Ringling Brothers receivership was widely praised. The Article considers a model of mass tort insolvency schemes as public law litigation in order to explain the different fates of the Ringling Brothers receivership and the modern mass tort bankruptcy.

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Introduction

The conventional account of the relationship between bankruptcy and aggregate litigation is one of transformation. It is commonly said that mass tort litigation can be transformed when claims are brought together for resolution through the bankruptcy process. In turn, the bankruptcy process itself is transformed when defendants resort to the Bankruptcy Code as an aggregation device for mass tort claims. The conventional account begins the history of this interplay of

1 Indeed, I have said as much in prior work. See Troy A. McKenzie, Toward a Bankruptcy Model for Non-class Aggregate Litigation, 87 N.Y.U. L. Rev. 960, 999–1010 (2012).
bankruptcy and mass torts in 1982, when Johns-Manville sought protection under Chapter 11 of the Bankruptcy Code with the explicit goal of resolving its mounting asbestos liability.3 The Code’s drafters, it is often said, never contemplated that the bankruptcy process might be used for the resolution of mass tort claims. The Johns-Manville case was groundbreaking and troubling for that reason.

I hope to show that this conventional account, although not wrong as far as it goes, is not complete. Mass tort resolution through insolvency schemes was not a novel concept that arrived on the scene with the enactment of the Bankruptcy Code in 1978. Although the Code has provided an off-the-shelf procedure for the aggregate resolution of mass torts, the history of the mass tort bankruptcy stretches back before the Code. One of those pre-Code schemes stands out for its ambitious nature and for its success. This Article recounts the tragedy that produced that scheme and its similarities to Chapter 11.

This Article has two aims. The first is largely “archaeological” and, consequently, descriptive. It seeks to recover as part of the literature on mass tort litigation the development of a pre-Code arrangement for the resolution of enterprise-threatening mass tort claims against a firm. As the Article describes, the firm in question, the Ringling Brothers circus, was almost put out of business by personal injury and wrongful death claims following a deadly fire at a performance in Hartford, Connecticut. To resolve those claims, lawyers for plaintiffs and the circus, working with the Connecticut courts, cobbled together an equity receivership—an insolvency device that, in its basic structure, mimicked a mass tort Chapter 11 reorganization some 30 years before the creation of Chapter 11.4 The second goal of this Article is more explanatory. It attempts to put forward an assessment of why the Ringling Brothers receivership was so successful and why—despite the similar structure of Chapter 11—mass tort bankruptcies have generated suspicion and resistance.

My ultimate conclusion is that both forms of mass resolution schemes—the Ringling Brothers receivership and the later development of Chapter 11—are best judged as public law cases. Their relative successes and failures reflect the ability of the courts supervising them to appreciate and police them as public law cases. In making my argument, I draw on Richard Nagareda’s work and, in particular, his view of what role courts should play in reviewing mass tort settlements.

A fire in Hartford

On July 6, 1944, fire destroyed the Ringling Brothers and Barnum & Bailey circus during an afternoon performance in Hartford, Connecticut. On that afternoon, some 6,000 people crowded under the big top to see the circus, which had arrived in town the day before. What sparked the flames remains unclear, but they spread quickly as they consumed the tent—a highly flammable construction of canvas soaked in a paraffin-gasoline waterproofing mixture. Although the circus had considered keeping pumping equipment staffed and ready in case of a fire, those plans were laid aside by the wartime shortage of manpower. As a result, the fire burned, uncontrolled, while the audience and performers attempted to escape. When the flaming tent collapsed, hundreds of spectators were trapped inside. Within minutes, the disaster had left 169 people dead and more than 500 seriously injured. Fifty-six of the dead were children aged 9 or younger.

Given the scale of the tragedy, a wave of lawsuits against Ringling Brothers soon followed. Within a week of the fire, the circus’s claims agent had received notices of several thousand claims. But because Ringling Brothers, a Delaware corporation, had few tangible assets—other than its seventy-nine-car train, its circus animals, and the smoldering remains of the circus tent—it became clear that only those plaintiffs who could file suit immediately would stand any realistic chance of recovering on a favorable judgment. A classic race to the courthouse ensued. Within 2 days of the fire, an attorney representing a woman killed in the disaster had launched the first suit against the circus by attaching its property in Connecticut. Eventually, plaintiffs sought attachments to the tune of approximately $15 million against assets worth, at best, $500,000. This had the perverse effect of trapping the circus in Connecticut (the circus could not

5 The circus had abandoned an earlier experimental treatment of its tents with a fire-resistant coating because the treatment allowed rain to soak through the tents’ canvas fabric.
6 Although the circus fire dominated newspaper reports in Hartford for months and even years afterward, there are few comprehensive accounts of the disaster and its aftermath. An exception is Henry S. Cohn & David Boller, The Great Hartford Circus Fire: Creative Settlement of Mass Disasters (1991), from which much of this background description of events is drawn. For other detailed descriptions of the fire, see The American National Red Cross, Hartford Circus Fire: July 6, 1944 (1946), and Stewart O’Nan, The Circus Fire: A True Story of an American Tragedy (2000). For a brief but thoughtful exploration of the legal proceedings after the circus fire, see Note, The Equity Receivership in Mass Tort, 60 Yale L.J. 1417 (1951). For an explanation of the internal corporate convulsions within Ringling Brothers associated with the fire, see J. Mark Ramseyer, Ringling Bros.-Barnum & Bailey Combined Shows v. Ringling: Bad Appointments and Empty-Core Cycling at the Circus, in Corporate Law Stories (J. Mark Ramseyer ed., 2009).
7 Cohn & Boller, supra note 6, at 21.
leave the state until the attachments were satisfied or otherwise lifted) and preventing the business from earning money by traveling to shows scheduled for later in the summer in Ohio, Detroit, and Chicago. Apart from its insurance policies, the future ability of the circus to generate earnings was the only realistic assurance of compensation for victims of the fire.  

A Federal Bankruptcy law before the Code

Today, a disaster like the Hartford circus fire would probably lead to Ringling Brothers’ filing a petition for relief under Chapter 11 of the Bankruptcy Code. In 1944, however, federal bankruptcy law presented real barriers to aggregate resolution of mass tort claims. The Bankruptcy Code and Chapter 11 were a generation away (the Code was not enacted until 1978), and the federal bankruptcy law at the time—the Bankruptcy Act of 1898—had recently gone through an extensive overhaul with the enactment of the Chandler Act of 1938. The Chandler Act provided for business reorganizations under Chapter X, which imposed a rigid process for firms in trouble. Although a Chapter X reorganization was a “case” brought in federal court (as would be true today), the entire process occurred under the watchful oversight of the Securities and Exchange Commission. The SEC’s role in a Chapter X case was pervasive. The agency could appear in the case and opine on the merits of any proposed plan of reorganization. Indeed, the court hearing the debtor’s case could not put the plan before creditors for their acceptance (or rejection) until the SEC had rendered an opinion on it. The SEC’s main goal in bankruptcy cases was to guard the public interest—but that interest was conceived as being the protection of the holders of public securities issued by a debtor. In other words, the SEC’s attention in Chapter X cases was trained on whether a restructuring might be detrimental to bondholders, say. The agency had less institutional concern about the fate of general creditors like trade creditors or tort claimants.  

8 See id. at 35 (recounting the assertion of the circus’s attorney that “the single greatest asset that there was in the picture” was “the good name and earning power of the Ringling Brothers–Barnum and Bailey circus”).
9 See McKenzie, supra note 4, at 865–68.
10 For a description of the agency’s extensive role in Chapter X bankruptcy cases, see id. at 869–70.
11 The Chandler Act also contained a very different provision, Chapter XI, intended for firms that had not issued public securities. A Chapter XI “arrangement,” which was significantly more flexible than a Chapter X reorganization, would look much like a Chapter 11 case today. Indeed, in later years, debtors and their attorneys successfully found ways to circumvent the restrictions
1 Bankruptcy law and the resolution of financial distress

There were two key conceptual mismatches between federal bankruptcy law in 1944 and a mass tort like the circus fire. The first concerned the perceived best solution to financial distress. The basic understanding behind the creation of Chapter X was that a business in financial distress needed the steady hand of outside experts to study the firm and chart a course toward recovery. Chapter X embodied a vision of bankruptcy as a problem to be solved by administrative expertise in managerial and financial matters. More generally, Chapter X was animated by the conviction that public bodies—the courts and the SEC—should act to protect private interests (the investments of bondholders and shareholders) harmed by private error (the incompetence of those running the firm). Rather than a process of private ordering among various stakeholders at the bargaining table, the Chandler Act model of bankruptcy was a clinical process calling for public administration. The particular desires of those with claims against or interests in the debtor were of secondary importance, at best.

2 Bankruptcy law and the causes of financial distress

The second source of conceptual mismatch concerned the causes of financial distress. William O. Douglas, the SEC’s chairman when the Chandler Act was drafted, viewed financial distress as a symptom of self-dealing and dishonesty of Chapter X by seeking relief under Chapter XI, in spite of the SEC’s efforts to prevent these maneuvers. Eventually, Chapter X and Chapter XI were merged in the Bankruptcy Code’s Chapter 11, with the key features of Chapter XI forming the backbone of Chapter 11. See Hon. Leif E. Clark, *Chapter 11—Does One Size Fit All?* 4 AM. BANKER INST. L. REV. 167, 170–75 (1996) (discussing the development of a unified business reorganization chapter in the 1978 Code). In 1944, however, it was unlikely that the circus would have succeeded in pursuing a case under Chapter XI instead of Chapter X.

12 Financial distress is distinguishable from economic distress. A business in financial distress can generate enough revenue to operate but cannot pay off its debts. Reorganizing the firm’s capital structure permits the firm to continue in business. A firm in economic distress, on the other hand, has failed in the marketplace—it cannot generate enough revenue to cover its operating costs, even without considering its debt obligations. Reorganization is unlikely to save the firm.


14 See *id.*
by corporate insiders—that is, managers, bankers, and lawyers. Douglas had a faintly Calvinistic impulse about troubled firms. Their troubles were a sign of sin and that sin could only be cleansed by stern, almost punitive measures. The debtor needed to be purged of “incompetent and faithless management” who would be ousted in favor of the appointment of a neutral trustee. The possibility that a firm could be caught in the grip of “financial embarrassment or disaster” without self-dealing by its managers, however, had no place in the Chandler Act. And, in order to prevent insiders from seizing control of the reorganization machinery in the guise of representing a firm’s claimants and interest holders, the Chandler Act gave little room for committees of stakeholders to play a role in negotiating the firm’s recovery.

B A mass tort equity receivership

There was an alternative model of company reorganization—a bargain model—that predated the Chandler Act. Before the Chandler Act, business reorganization law was really an outgrowth of nineteenth century equity procedures. At the heart of those procedures was the receivership, a provisional remedy in which a court would order a debtor’s property placed under the control of a third party pending resolution of litigation. The receiver was an officer of the court, and once the debtor’s property was entrusted to the receiver, that property was immune from further process. In other words, a receivership put a halt to the cascade of attachments by creditors racing to claim a piece of the debtor before it was too late. Placing a debtor into receivership would stop the race to the courthouse that might pull apart a viable, but distressed, firm. The classic equity

15 Douglas had authored a multivolume report on business reorganization practices that paved the way for the Chandler Act’s passage. That report described in detail the perceived flaws in the receivership system—the pre-Chandler Act form of business reorganization. SECURITIES AND EXCHANGE COMMISSION, REPORT ON THE STUDY AND INVESTIGATION OF THE WORK, ACTIVITIES, PERSONNEL, AND FUNCTIONS OF PROTECTIVE AND REORGANIZATION COMMITTEES (1936–1940) [hereinafter SEC REPORT].


17 Robert T. Swaine, “Democratization” of Corporate Reorganizations, 38 Colum. L. Rev. 256, 257–59 (1938) (internal quotation marks omitted). Swaine (of the Cravath law firm) was a successful reorganization lawyer and a prominent critic of the Chandler Act. His criticisms centered on the suspicion of the reorganization professionals that seemed to animate Chapter X.


receivership allowed a railroad to continue operating under protection from creditors on the theory that the entity’s going concern value was greater than its value if sold off, piecemeal, to satisfy individual creditors.20 The effective stay of further process afforded by the equity receivership provided space for creditors’ representatives to negotiate with the debtor over its fate. The equity receivership, much like the Chandler Act, rested on the assumption that a private firm’s financial distress was a matter of public concern. But there was a crucial difference: the resolution of the firm’s distress under an equity receivership was entrusted to those stakeholders with claims or interests in the firm. The public stage of a receivership merely enabled private ordering.21

What the Ringling Brothers circus wanted after the Hartford fire was much closer to the group bargain model of an equity receivership than the administrative expertise model of a Chapter X case. Ideally, the firm needed a way to preserve its value as an enterprise while centralizing and sorting out the thousands of claims against it. True, filing a Chapter X case would have stayed further attempts to attach the circus’s assets, thereby helping it to remain a going concern (at least in the short term). But what good would the SEC’s financial tinkering do for a firm facing crushing tort liability?22

1 The common interests of debtor and creditors

It is useful to pause at this point to explain that what Ringling Brothers wanted was not necessarily at odds with the needs of tort claimants, at least with respect to the procedural mechanism for resolving claims. That is, any debtor wants immunity from liability on claims. But if claims are to be resolved, the debtor would prefer a means of resolution that lowers the aggregate cost of deciding them and does so in a manner that permits the firm to maximize its remaining value. Similarly, any creditor wants to prevail on the substance of its claims. But when a mass of creditors are racing to recover against the same debtor, creditors

21 See McKenzie, supra note 4, at 853–54.
22 To be sure, the fire could be attributed to the firm’s mismanagement, due to the failure to take the necessary precautions against the known and anticipated hazard of fire. That failure, however, did not require any particular agency expertise to detect. Nor was there any suggestion of self-dealing or conflicted transactions on the part of Ringling Brothers’ management. In short, the scenarios against which federal bankruptcy law had been drawn had little relevance to the circus fire.
as a group are better off with a process that stops that race, maximizes the assets available for recovery, provides for equitable treatment among creditors, and does so as quickly as possible.23

In other words, the unattractiveness of Chapter X to Ringling Brothers did not mean that Chapter X was a better option for those pursuing tort claims against the circus. The outsize role of the SEC in the process would give little bargaining room for tort claimants as a group.24 Of even more concern, Chapter X cases could be very slow because of the agency machinery they required. A common criticism of Chapter X—made especially by creditors, who suffered the most from excessive delay—was that firms in distress would die on the operating table before the surgery could conclude successfully.25 Lawyers for victims of the circus fire recognized as much, and they shared Ringling Brothers’ desire to avoid taking the circus into Chapter X.26

2 Structuring the receivership

Although federal bankruptcy law in 1944 had downplayed the bargain model of bankruptcy, Connecticut state law retained the older remedy of an equity receivership. A group of plaintiffs’ lawyers proceeded to apply for a receiver in state court. They duly pleaded that the circus’s assets were threatened with multiple attachments, that the assets were in danger of waste, and that exigent circumstances required appointment of a receiver “in order that its assets may not be wasted and the interests of creditors and stockholders may be protected.”27 A state court receivership presented significant hurdles. The first was that the circus could

23 This is in essence the “creditors’ bargain” theory of bankruptcy law. See generally Thomas H. Jackson, Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors’ Bargain, 91 YALE L.J. 857 (1982). The theory holds that bankruptcy law should preserve the entitlements and obligations of parties under nonbankruptcy substantive law while maximizing the value of a firm by imposing a central, equitable claims resolution process that prevents the firm’s piecemeal destruction. Although championed by law and economics scholars more recently, the theory finds support in long-established bankruptcy caselaw. See Butner v. United States, 440 U.S. 48 (1979) (recognizing that rights created under state law are preserved in bankruptcy, unless a federal interest requires a different result).
24 See supra note 18 and accompanying text.
26 See COHN & BOILLIER, supra note 6, at 24–25.
27 See id. at 29.
oppose it and, if unsuccessful in its opposition, file a voluntary petition under Chapter X that would trump the state court proceedings. Because the circus’s lawyers realized that a Chapter X proceeding would likely be its death knell, however, a consensual receivership could be arranged. The second, and more significant, obstacle was that state law permitted a judgment creditor—and not an injured plaintiff with an unliquidated claim—to seek a receivership. If a receiver could not be appointed until a victim had been able to reduce his claim to a money judgment, the delay would effectively put the circus out of business. But there was caselaw in Connecticut permitting the appointment of a temporary receiver if there was cause to do so before the court could decide the merits of appointing a permanent receiver. That was sufficient to persuade the Superior Court to grant the request and order the receiver “to take all lawful steps within his power to secure and preserve” the circus’s assets.

The appointment of a temporary receiver brought the circus’s property in Connecticut under formal control of the state court and prevented any further attachments. It also avoided prior attachments. Ringling Brothers, although denying liability, stated its intention to compensate the victims of the disaster and “urged that the earning power of the circus be used for this purpose.” The receiver, a committee of plaintiffs’ attorneys, and counsel for Ringling Brothers negotiated an agreement releasing the assets under the receiver’s control in return for the circus’s payment of $380,000 and an assignment of its fire insurance policies. In effect, the receivership centralized all personal injury claims arising from the circus fire while permitting the circus to leave Connecticut and resume its business. Rather than oust the circus’s management, the receiver permitted the officers of the circus to remain in place. After briefly returning to its headquarters in Florida, the circus once again took to the road. By the end of 1944, the circus had made a profit of $100,000.

28 See Cogswell v. Second Nat’l Bank, 56 A. 574 (Conn. 1903). The plaintiffs’ attorneys who made the request for a receiver did not know of this caselaw until the judge hearing the application, John Hamilton King of Hartford Superior Court, brought it to their attention. CORN & BOLLIER, supra note 6, at 30–31.
30 See Note, supra note 6, at 1418 & n.9 (explaining that the receivership acted “as a general moratorium upon creditor rights”).
31 See id. at 1418 n.10 (noting that the appointment of a receiver abated prior attachments in Connecticut).
32 Jacobs, 103 A.2d at 806.
33 See Jacobs, 103 A.2d at 806; CORN & BOLLIER, supra note 6, at 37.
34 CORN & BOLLIER, supra note 6, at 39.
Within months of the fire, counsel for the receiver, plaintiffs’ attorneys, and the circus agreed to a comprehensive claims resolution process. The agreement contemplated a two stage mechanism. Victims would first present their claims to the receiver. The circus then waived its defenses to liability and, in return, each claimant agreed to submit the amount of damages to arbitration by a board of three arbitrators. Ringling Brothers also undertook to pay the expenses related to the receivership as ordered by the court and agreed not to file for bankruptcy. Under the agreement, payments to claimants would be funded by assets (including the circus’s insurance policies) turned over to the receiver and a portion of the circus’s “net available income.” As the Connecticut Supreme Court described the arrangement, “the circus went about its business, turning in its profits for the satisfaction of claims until, after a period of 6 years, the damages determined by the arbitrators were paid in full.” Altogether, the receiver disbursed almost $4,000,000 in payments to claimants.

C Resolving the mass tort

The arbitration panel developed rough guidelines for payments to claimants. The average award came to approximately $7,000, but the amounts could be significantly more or less depending on the nature of the claim. Death of a child between the ages of 3 and 7 typically yielded an award of $6,500. Wrongful death of a working age adult might garner an award of $12,000 (Connecticut’s statute limited wrongful death claims to only $15,000). Personal injury awards

35 One arbitrator was chosen by the Bar Disaster Committee (a group of prominent local lawyers who represented plaintiffs), one was chosen by the circus, and the third was chosen by the state’s Chief Justice. Id. at 42. The only issues for the arbitrators to decide were (1) “the actual receipt of damage to person and/or property” and (2) “the monetary amount of said damage to the person and/or property” of the claimant. Note, supra note 6, at 1419 n. 14. The arbitrators’ award was final, with the only ground for appeal being a defect in the award in the nature of a miscalculation or clerical error, an error as to the identity of the parties or the arbitrators, or a decision by the arbitrators concerning matters not submitted to them. Id.


37 This was defined as yearly income above $750,000. COHN & BOLLER, supra note 6, at 43. Ringling Brothers made additional payments of $60,000, to cover a shortfall in expected insurance proceeds, and approximately $370,000 in tax rebates from the federal government. See Jacobs, 103 A.2d at 807.

38 Jacobs, 103 A.2d at 806.

39 See id. at 807.

for the living, however, could run much higher, including $100,000 for a 19-year old whose face was disfigured in the fire. A professional dancer received a similar award for burns over her body.41

In retrospect, the Ringling Brothers receivership seems to have been a remarkably successful resolution to a tragic event. The Hartford bar continues to remember the receivership process as an example of creative lawyering in the public interest—the local legal community’s “finest hour.”42 For the most part, the circumstances of the tragedy seem to have encouraged lawyers for claimants and the circus to reach an equitable resolution of claims.

Of course, there were less than smooth moments in the story. Some plaintiffs’ attorneys found fault with the entire process and attempted to upset it. Their attempts were quashed informally by the efforts of the receiver, Edward S. Rogin.43 An even thornier dispute arose over Rogin’s fees. Rogin claimed to have devoted 5,000 hours to his duties as receiver and sought $175,000 for his time. Ringling Brothers, which had undertaken to foot the bill for the receiver’s time, refused to pay him anything. The circus’s about face on its private undertaking turned into a very public dispute when the circus applied to the Superior Court to terminate the receivership without any payment to Rogin. The circus argued that Rogin was not a true receiver but had been little more than a disbursing agent whose role warranted no compensation. Some plaintiffs’ lawyers on the Bar Disaster Committee joined forces with Ringling to oppose payment of Rogin’s fee request—an odd coalition likely brought about by professional rivalries and resentment over some of Rogin’s decisions as receiver.44 The Superior Court rejected the arguments against compensating the receiver. It ultimately deemed 2,000 hours to be fair measure of the time reasonably spent on receivership tasks, at an hourly rate of $30, and awarded Rogin $60,000 for his services.45

41 Cohn & Bollier, supra note 6, at 46. Of the claims filed, 112 claims under $200 were summarily resolved by the circus and 35 claims were disallowed. The remaining 551 claims were “major” claims for wrongful death and personal injury. See Note, supra note 6, at 1419 n.13.
43 Cohn & Bollier, supra note 6, at 51.
44 Id. at 70–71, 78–79.
45 See Jacobs, 103 A.2d at 808 (affirming the Superior Court’s award of fees to the receiver).
II Chapter 11 and mass tort bankruptcies

Unlike bankruptcy law circa 1944, the modern Bankruptcy Code has proven more hospitable to the resolution of mass tort claims. And yet the modern Bankruptcy Code has generated complaints about its suitability as a means of resolving mass tort claims.

For those unfamiliar with bankruptcy, the Code can seem mysterious or even terrifying. But the bankruptcy process itself is relatively straightforward in its basic steps. A bankruptcy case commences upon the filing by the debtor of a voluntary petition,46 which itself is an order for relief. That means, in broad strokes, that the initiation or continuation of further actions against the debtor is stayed automatically when the debtor files a petition.47 At that point, the bankruptcy court effectively controls the debtor’s estate—the res of all rights and interests of the debtor in property (both tangible and intangible), wherever located and by whomever held. But, unlike the past requirements of Chapter X, a debtor filing a Chapter 11 petition today does not have to accept the appointment of an independent trustee. Rather, the debtor’s current managers remain in possession of its assets and can exercise the powers otherwise granted to a trustee. The duties of the so-called debtor in possession are to preserve and enhance the estate for the benefit of all stakeholders in the case. In order to maximize the opportunity to resolve the debtor’s affairs, the Bankruptcy Code does not require a Chapter 11 debtor to prove itself insolvent. The maximalist impulse is also reflected in a much broader definition of claims than prior law, so that even contingent and unliquidated assertions of liability can be brought into the case and resolved.48

After claims against the debtor’s estate are filed, the debtor proposes a plan of reorganization that sets out the new obligations and capital structure of the debtor while binding all those with claims against, or interests in, the debtor. After the plan is accepted by creditors (based on voting rules that take account of the consent of groups of creditors divided by class), it is confirmed by the bankruptcy court and can be consummated. A modern Chapter 11 case, in other words, more closely resembles a pre-Chandler Act receivership than it does the cumbersome Chapter X process in place at the time of the Hartford disaster.

46 This discussion does not take into account the possibility of an involuntary petition brought against a debtor by creditors, because such filings are exceedingly rare.
48 See 11 U.S.C. § 101(5). This broad definition of a claim permits the centralization and resolution of those claims, like the Hartford circus fire personal injury claims, that are not yet reduced to judgment.
The mass tort receivership through the lens of modern Chapter 11

Those familiar with mass tort bankruptcies—and, in particular, asbestos bankruptcies—will have found much in the Ringling Brothers receivership story that is familiar. In its key features, the receivership anticipated the process cobbled together by lawyers for asbestos manufacturer Johns-Manville when that company filed a Chapter 11 petition in 1982. At that time, Johns-Manville confronted some 12,500 asbestos suits on behalf of over 16,000 claimants, with approximately 500 new plaintiffs filing suit each month. Its total tort liabilities were estimated at almost $2 billion. But the company was otherwise a profitable entity with a positive going concern value. Johns-Manville’s eventual plan of reorganization created a separate trust that contained cash from Johns-Manville, insurance payments, securities (including common stock and bonds issued by the company), and a claim on 20% of the firm’s profits. Continued operation of the firm, which was otherwise very profitable, offered the only real hope of compensating asbestos claimants. Those claimants could then present their claims to the trust, an entity that would compromise and settle those claims out of court in the manner of any other private civil litigation. The Johns-Manville asbestos trust was soon replicated by other companies facing mounting asbestos liability. In 1994, Congress codified the asbestos trust structure in a new provision, § 524(g) of the Bankruptcy Code.

The Ringling Brothers receivership and the mass tort bankruptcies that came decades later share the same four-part conceptual framework. First, the appointment of the receiver acted to stop the pursuit of further actions against the circus, much as the automatic stay upon a debtor’s filing of a bankruptcy petition now prevents the initiation or continuation of actions against the debtor. Second, the receivership centralized the resolution of wrongful death and personal injury claims against Ringling Brothers, another key feature of a modern mass tort bankruptcy. Third, the resolution process was then conducted largely outside the courtroom through an arbitral process that developed

50 Id. at 640.
51 11 U.S.C. § 524(g).
52 In a mass tort case, the centralized claims resolution process in bankruptcy is further enhanced by a provision of the Judicial Code that gives the district court in which the bankruptcy case is pending the authority to control venue in pending wrongful death or personal injury claims against the debtor. 28 U.S.C. § 157(b)(5). Thus, cases in state and federal courts around the country can be brought within the administrative control of a single forum when the debtor files for bankruptcy.
relatively stable price points for various claims—a process analogous to the compromise and settlement of claims submitted to a Manville-style personal injury trust created in conjunction with a plan of reorganization in a mass tort bankruptcy. Finally, by channeling tort claims toward a separate fund, the receivership permitted the circus to continue as a profitmaking enterprise. Those profits, in turn, provided a source of compensation for claimants harmed by the company’s activities.

The effectiveness of the Ringling Brothers receivership might foreshadow that a Chapter 11 reorganization would later be seen as an elegant approach to mass tort cases. To put the point in blunt terms, if it worked so well then, why shouldn’t it work well now? So stated, the Johns-Manville case can be reconceived as a rediscovery of older forms of the law and not a radical distortion of the bankruptcy process. Rather than an “extraordinary” and “unanticipated” use of the bankruptcy process that betrayed a lack of good faith on the part of a defendant facing mass tort liability, reorganization under Chapter 11 could be seen as a natural solution to the problem of resolving mass tort claims.

B Chapter 11 and its discontents

In the 30 years since Johns-Manville filed its Chapter 11 petition, the bar has come to accept (albeit grudgingly) bankruptcy as one alternative form of aggregate resolution of mass tort claims. But there remain rumblings of discontent about the soundness of the bankruptcy process as a vehicle to resolve mass tort claims. The sources of discontent do not lie in doctrinal limitations of the bankruptcy process. Instead, critics tend to articulate three interrelated complaints about mass tort bankruptcy cases: cost, time, and conflicts of interest.


54 See, e.g., Kane v. Johns-Manville Corp., 843 F.2d 636 (2d Cir. 1988) (rejecting creditor’s argument that Johns-Manville’s plan of reorganization was not proposed in good faith).

55 There are doctrinal gaps in the Bankruptcy Code that can complicate the resolution of mass tort cases. The principal one is the definition of a “claim.” Although the definition is broad, it generally covers only those assertions of liability that arose before the debtor’s bankruptcy (or the confirmation of a plan of reorganization in a Chapter 11 case). That leaves some uncertainty about the treatment of the debtor’s liability for unmanifested personal injuries. See Alan N. Resnick, Bankruptcy as a Vehicle for Resolving Enterprise-Threatening Mass Tort Liability, 148 U. Pa. L. Rev. 2045, 2068–73 (2000) (describing different approaches used by courts to determine whether and when unmanifested personal injuries give rise to “claims” in bankruptcy). In asbestos cases, Congress has largely settled the question by defining a new category of future “demands” that can be resolved through an asbestos trust structure. See 11 U.S.C. § 524(g), (h).
1 Costs

Complaints about the cost of bankruptcy are pervasive. Those complaints reach beyond the context of mass tort cases, but they are particularly pointed in mass tort cases. Reorganization of a firm requires the services of professionals—lawyers, bankers, and financial analysts—whose fees can run very high indeed.\(^56\) Of course, some of those fees would be incurred outside bankruptcy if, for example, a firm restructured itself out of court. And many of the professional expenses that appear on a debtor’s ledger during a bankruptcy are in fact unrelated to the bankruptcy itself.\(^57\) But the costs of bankruptcy in mass tort cases may be higher than in “ordinary” chapter 11 cases.\(^58\) Some of the complaints about cost are really complaints about bankruptcy lawyers—or, more precisely, about the need to bring another group of professionals on board to resolve mass litigation. The specialized precincts of the bankruptcy court are alien to most civil litigators, who must rely on the bankruptcy bar for guidance. A mass tort bankruptcy, in other words, promises a loss of control by those running the show in mass tort litigation. A loss of control comes with a loss of the monopoly on compensation that might otherwise flow to those who control mass tort litigation outside of bankruptcy.

2 Delay

The second pervasive complaint about bankruptcy is that it takes too much time. For example, the most well-developed examples of the mass tort bankruptcy—the asbestos cases—have been criticized for consigning claimants to “endless

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\(^58\) There is a lack of empirical research on the question of costs in mass tort bankruptcy cases. A RAND Corporation study of asbestos bankruptcies suggested that the costs in those cases are higher than in an ordinary Chapter 11 reorganization. See generally Stephen J. Carroll et al., *Asbestos Litigation* (2005). The same study, however, noted that the transaction costs of resolving asbestos personal injury claims through reorganization in bankruptcy followed by a trust structure are “dramatically lower” than in the tort system. *Id* at 97.
waiting” before receiving compensation. Some of the concern about delay is a historical artifact of the early years of Chapter 11, when big cases—mass tort and ordinary reorganizations alike—might drag on for years before confirmation. That kind of delay is much less common today with the rise of fast-paced pre-packaged cases and more streamlined pre-bankruptcy planning. But the bankruptcy process is just that—a process. Much of the Bankruptcy Code imposes procedural requirements to provide notice and an opportunity to be heard to any party in interest—a term that is considerably broader than the understanding of “party” outside of bankruptcy. In a multipolar process, more voices must be heard. By its nature, the process imposes a deliberative pace on the resolution of a debtor’s financial distress.

3 Conflicts of interest

Perhaps, the most explosive charge against the mass tort bankruptcy process, however, concerns the allegedly conflicted relationships among the players. The bankruptcy bar, although far bigger than it was at the dawn of the Bankruptcy Code, is a relatively small and cohesive one. With a few prominent exceptions, bankruptcy lawyers—at least in the world of corporate reorganizations—tend to represent a mix of creditor and debtor interests. And the multipolar nature of a bankruptcy case means that, even among creditors, the interests of one group might clash with those of another. In a very real sense, bankruptcy lawyers recognize that today’s ally may be tomorrow’s adversary. Indeed, the process is built on the expectation that the vast majority of disputes will be resolved without judicial intervention. These dynamics make it easy to paint a picture of excessive chumminess and conflicted interests.

In mass tort cases, the allegations of conflicts of interest are even more pointed. The asbestos bankruptcy cases have generated a good deal of literature

60 Long delays in mass tort bankruptcies have not disappeared entirely. For example, in order to resolve its asbestos liabilities, W.R. Grace & Co. filed a Chapter 11 petition in April 2001. The company’s plan of reorganization was not confirmed until a decade later—January 2011—and did not become effective until the district court affirmed the bankruptcy court’s decision in 2012. Appeals arising out of the case have been percolating to the Third Circuit. See In re W.R. Grace & Co., 729 F.3d 332 (3d Cir. 2013); In re W.R. Grace & Co., 729 F.3d 311 (3d Cir. 2013); In re W.R. Grace & Co., 532 Fed. App’x 264 (3d Cir. 2013).
suggesting (and more than suggesting) that the repeat players in the process are conflicted or appear to be conflicted. The role of the future claims representative in asbestos cases has drawn particular criticism. Under § 524(g), a court-appointed representative for future claimants is charged with protecting the interests of those who may later make demands arising from exposure to asbestos. Indeed, the statute requires the appointment of a future claims representative in order for the debtor to obtain the benefit of an injunction channeling future claims away from the reorganized company and toward an asbestos personal injury trust.61 A future claims representative’s opposition may scuttle a plan of reorganization. Some commentators have alleged that overly pliant future claims representatives have been appointed in asbestos bankruptcy cases to serve the interests of debtors (seeking to speed the confirmation of a plan) and plaintiffs’ lawyers (seeking to maximize payments to their present-claimant clients) to the detriment of future claimants.62 These critics point to the fact that trusts have had to be restructured to assure some payment to future claimants, leading to the adoption of low payment percentages. The result is that future victims are likely to receive less compensation than past victims.63

To some extent, these conflicts spring from features built into the bankruptcy process. The voting rules in Chapter 11 require the assent of claimants, grouped by class, in order to accept a plan of reorganization.64 In an asbestos case, the absence of future claimants65 (other than through their representative) presents a difficult problem for achieving meaningful consent, because they cannot participate in the voting that is central to the plan confirmation process. That problem was explained away in Manville by declining to classify future claimants explicitly and then relying on the present claimants’ overwhelming acceptance of the plan as a rough proxy for the interests of future claimants.66

61 11 U.S.C. § 524(g)(4)(B)(i). The appointment of a future claims representative was an innovation of the John-Manville bankruptcy that Congress later embraced and codified.
64 See 11 U.S.C. § 1126(c) (providing that a class has accepted a plan if it is approved by creditors that hold “at least two-thirds in amount and more than one-half in number of the allowed claims of such class.”).
65 By using the term “future claimants,” I include those with claims and also those with “demands” that may not satisfy the Bankruptcy Code’s definition of a claim. See supra note 55.
That approach found its way into the Code in 1994 when Congress adopted § 524(g), which essentially ratified the maneuvers deployed in Manville.\(^67\) So confirmation of an asbestos bankruptcy plan requires—in addition to the usual voting rules—that the plan be accepted by three-fourths of the participating asbestos claimants.\(^68\) Because plan confirmation cannot occur without the approval of present claimants, whose votes are typically controlled by law firms holding large inventories of asbestos plaintiffs, there is a serious risk of shortchanging future claimants in favor of present claimants.\(^69\)

### III Bankruptcy, private claims, and public law

What explains the smooth operation of the Ringling Brothers receivership, on the one hand, and the more difficult reception of mass tort bankruptcies under the Code, on the other? If the conceptual framework of the Hartford fire case was truly the same as that of a Chapter 11 case today, one would expect the experience of mass tort bankruptcies over the last 30 years to have generated fewer complaints. The apparent puzzle could be the result of the law of numbers—both small and large. In the modern era, hundreds of mass tort bankruptcy cases have been filed and resolved. It is difficult to compare the success or failure of those cases, in bulk, with the outcome of a single, if remarkable, case like the Hartford circus disaster.

There are two important differences between the Ringling Brothers receivership story and the story of modern Chapter 11. The first is the changed nature of the substantive law of torts. At the time of the Hartford fire, Connecticut law imposed strict limitations on tort damages for wrongful death.\(^70\) Those limitations made for a viable (if odd) allocation of compensation to all victims of the Hartford fire. The relatively low payments for individual wrongful death claims no doubt made it more feasible to pay more claims.\(^71\) As a general matter, tort

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67 11 U.S.C. § 524(g); see Nagareda, supra note 2, at 161–62.
68 Id. § 524(g)(2)(B)(ii)(IV)(bb).
69 As Nagareda explained: The real bargaining leverage in a reorganization proceeding lies with plaintiffs’ lawyers who control large inventories of present claims. They, not so much the futures representative, are the people with whom the debtor must negotiate seriously, for they have the power effectively to veto any proposed reorganization plan under the general voting procedures of Chapter 11 and, especially, the 75% vote required by § 524(g) for the asbestos setting. Nagareda, supra note 2, at 175–76.
70 See supra note 40 and accompanying text.
71 Whether or not those claims, as limited by statute, received true “compensation” is, of course, a normative question I leave to scholars of tort law.
law today provides more capacious damages.\textsuperscript{72} The other—and perhaps more important—difference is that the harm suffered by the victims of the Hartford disaster lacked a significant temporal dimension. It was a single-event mass accident with a limited universe of affected parties, rather than a long-latency-period toxic tort with uncertain numbers and identities of victims. The mass tort bankruptcies of the post-Code era have been dominated by long-latency period toxic torts, in which the need to bind future claimants is paramount.\textsuperscript{73} Those types of cases, by their nature, more complicated to resolve successfully than the single-event mass accident cases exemplified by the circus fire.

\textbf{A Mass tort bankruptcies as public law litigation}

Nevertheless, these differences by themselves do not fully explain the success of the Ringling Brothers receivership. Instead, I offer the following observation about the Hartford disaster: The case succeeded because it captured a critical feature of a mass tort bankruptcy—its public law nature. By “public law” I mean the model of litigation put forward by Abram Chayes to explain the regulatory-infused, multipolar form of adjudication that is distinct from traditional, bipolar civil litigation.\textsuperscript{74} Chayes concentrated his attention on what we would now call impact litigation, which seeks structural or institutional reform. His paradigmatic public law case involved substantive law claims sounding in constitutional law or public-regarding statutes. But he recognized that some forms of dispute resolution that might otherwise be thought to center on private claims—such as “bankruptcy and reorganizations”—also “display in varying degrees the features of public law litigation.”\textsuperscript{75} In particular, the multipolar nature of the dispute, the active role of the judge, and the complex nature of the relief to be fashioned in the case all combine to take a mass tort bankruptcy case outside the traditional

\textsuperscript{72} The greater availability of high damages in personal injury and wrongful death claims in modern tort law, however, is counterbalanced by the difficulty of pursuing punitive damages in bankruptcy. See In re A.H. Robins Co., 89 B.R. 555 (E.D. Va. 1988) (subordinating punitive damage claims relating to the Dalkon Shield intrauterine device); In re Johns-Manville Corp., 68 B.R. 618, 627–28 (Bankr. S.D.N.Y. 1986) (disallowing punitive damages claims relating to asbestos exposure).

\textsuperscript{73} See supra Part II.B.3.

\textsuperscript{74} Abram Chayes, \textit{The Role of the Judge in Public Law Litigation}, 89 Harv. L. Rev. 1281 (1976).

\textsuperscript{75} Id. at 1284.
model of litigation and toward the public law model. Like the class action, which shares similar public-law features, bankruptcy cases emphasize the group nature of the aggregated claims brought together for resolution.

There is, of course, a literature on the public law nature of complex litigation. Almost 30 years ago, David Rosenberg proposed that mass-exposure tort litigation should be seen as public law disputes. What “public law” meant in his proposal was, essentially, a collective process with the aim of speedier compensation, decreased transaction costs, equity across claimants, and a group-based (rather than individualized) causation calculus. Some parts of this understanding of public law litigation are already found in procedural and substantive law developments. But there has been a fair amount of unease about whether the public law label fits cases beyond the obvious category of disputes involving government actors and constitutional claims.

76 Chayes distinguished public law litigation from the traditional lawsuit, which he described as “a vehicle for settling disputes between private parties about private rights.” Id. at 1282. He identified the following markers of the traditional conception of litigation:

1. The lawsuit is bipolar. Litigation is organized as a contest between two individuals or at least two unitary interests, diametrically opposed, to be decided on a winner-takes-all basis.
2. Litigation is retrospective. The controversy is about an identified set of completed events: whether they occurred, and if so, with what consequences for the legal relations of the parties.
3. Right and remedy are interdependent. The scope of the relief is derived more or less logically from the substantive violation under the general theory that the plaintiff will get compensation measured by the harm caused by the defendant’s breach of duty—in contract by giving plaintiff the money he would have had absent the breach; in tort by paying the value of the damage caused.
4. The lawsuit is a self-contained episode. The impact of the judgment is confined to the parties. If plaintiff prevails there is a simple compensatory transfer, usually of money, but occasionally the return of a thing or the performance of a definite act. If defendant prevails, a loss lies where it has fallen. In either case, entry of judgment ends the court’s involvement.
5. The process is party-initiated and party-controlled. The case is organized and the issues defined by exchanges between the parties. Responsibility for fact development is theirs. The trial judge is a neutral arbiter of their interactions who decides questions of law only if they are put in issue by an appropriate move of a party.

Id. at 1282–83 (internal citations omitted).


78 See Rosenberg, supra note 77, at 859–60.


One might think that the Ringling Brothers receivership was a rejection of a “public law” model of mass tort litigation in bankruptcy. Recall that the circus and its adversaries decided not to avail themselves of a federal bankruptcy forum, because the Chandler Act would have required a cumbersome reorganization process with heavy-handed oversight by an administrative agency.\textsuperscript{81} Claimants—or their representatives—would have played a minimal role in that process. The theory behind the law of corporate reorganizations at the time was that private disputes relating to the financial distress of a firm were matters of public concern, which in turn called for the intervention of a public agency.\textsuperscript{82} The players in the Hartford disaster resorted to a state law receivership precisely to avoid that kind of control by a public administrative agency. They recognized what the Chandler Act did not—that the SEC’s expertise at cleansing and reconfiguring the debtor’s corporate management would not help to resolve the circus’s financial distress.\textsuperscript{83} What they wanted was room to arrange a bargain and that could be facilitated by pursuing a state court receivership. If anything, it could be said that the case shows how the pervasively private nature of a mass tort bankruptcy trumps any public law traits.

Viewing the Ringling Brothers example in that way, however, misunderstands the meaning of public law in a mass tort bankruptcy. As Richard Nagareda explained, the turn toward resolution of mass torts through private ordering on a grand scale was not a \textit{sui generis} development in the law. He looked to principles drawn from judicial review of administrative decision making to develop a framework for assessing those private arrangements in the form of mass tort settlements.\textsuperscript{84} Courts, he argued, should analyze the creation of what were essentially private administrative regimes to resolve mass torts in a manner similar to that used to scrutinize public regulatory bodies.\textsuperscript{85} His argument reflected an understanding of the regulatory implications of mass tort settlements as well as the continuing need for courts to police systemic defects in the structure of those settlements.\textsuperscript{86} To speak of mass tort bankruptcies as public law litigation is not to diminish the reality—indeed, the inevitability—of private ordering in their resolution. Rather, the “public law” label serves as a

\textsuperscript{81} See \textit{supra} notes 21–22 and accompanying text.

\textsuperscript{82} See \textit{supra} Part I.A.1.

\textsuperscript{83} See \textit{supra} Part I.B.1.


\textsuperscript{85} See \textit{id.} at 945.

\textsuperscript{86} See \textit{id.} at 938–41. Nagareda also understood, of course, that one could accept that administrative law principles are instructive on purely pragmatic grounds without believing in the conceptual relationship to mass tort settlements.
ready shorthand for the conceptual framework courts must adopt when assessing the resolution of a mass tort in bankruptcy.

Nagareda’s framework calls for a two-part review by courts. The first level of inquiry is a substantive one—the range of plausible compensation levels claimants could receive in the traditional tort system. The second is procedural and structural—an assessment of the negotiation process and whether questions of claim projection, risk allocation, and equitable treatment of claimants have been addressed in good faith. The ultimate goal for the court is to encourage the parties to “grapple seriously with the inevitable tradeoffs and uncertainties” of the scheme they have crafted and assure that those choices are reflected in the settlement. Nagareda was especially sensitive to the agency cost problem in mass tort cases, a product of the various incentives that may drive counsel. Judicial awareness of those incentives should follow accordingly.

B The logic and limits of public law

With those principles in mind, the reasons for the success of the Ringling Brothers receivership begin to come into focus. The process was firmly guided by courts hospitable to mass resolution but mindful of crafting an orderly regime for evaluating the vast number of claims. Within the limits of substantive tort law, the compensatory awards received by victims of the fire were reasonable. Outside of the aggregate proceeding, it is unlikely that the victims as a whole—or any sub-group of them—would have received greater compensation for their claims.

The procedural aspects of the receivership, however, could be criticized as too open to conflicts of interest. Lawyers involved in the case sometimes wore multiple hats. Counsel for the receiver, for example, simultaneously represented a number of tort claimants in the case. One of the members of the Bar Disaster Committee, which acted as a plaintiffs’ steering committee in the case, also served as the U.S. Attorney for the District of Connecticut. These kinds of potential conflicts would be impermissible today.

87 See id. at 946–48.
88 See id. at 949.
89 See id. at 933–35.
90 See COHN & BOLLIER, supra note 6, at 28, 35. The simultaneous representation was not considered an unethical conflict at the time.
91 This is not a trivial point, because the circus faced potential criminal prosecution as a result of the fire.
When viewed through a contemporary lens, the process takes on a very different complexion. The Hartford bar at the time was small and close-knit, which explains why multiple representations were not viewed as suspicious. At the same time, the small size of the bar enforced severe discipline on lawyers who contemplated circumventing the receivership. Local lawyers were reminded to protect “the honor of the Connecticut bar” in their dealings in the case.92 Other lawyers, the courts, and their neighbors were all watching their conduct.93 The circus fire was a tragedy that placed the legal community under sharp public scrutiny. That reality greatly reduced the likelihood of self-dealing by counsel.94

This kind of explanation may be “sociological,” but it provides a realistic view of the incentives driving counsel in the case. Money is not the only source of incentives in litigation. Professional reputation, community relations, and strategic concerns (such as the desire to reassure or impress the court) all play a role in the real world of litigation. The courts in the Ringling Brothers case understood that the lawyers involved were driven by something more than a desire to maximize fees. And, not surprisingly, the courts—although playing a significant role in shepherding the settlement scheme—largely deferred to the arrangements crafted by counsel. The courts’ oversight could be curtailed in light of their knowledge of counsel’s incentives.

Do the same principles help to explain the bumpier Chapter 11 experience? The criticisms of Chapter 11 have related largely to process.95

92 COHN & BOLLIER, supra note 6, at 34–35.
93 Claimants themselves felt similar scrutiny. Public sentiment, and the fear that the courts would look with disfavor upon claimants who did not agree to the receivership scheme, “strongly influenced acceptance” of the scheme by most claimants. See Note, supra note 6, at 1419 n.12.
94 The nasty fee dispute that erupted in the case, see supra notes 43–45 and accompanying text, can be explained by two circumstances: the receivership had drawn to a close, and the intervening years had diminished the spotlight on the case.
95 See supra Part II.B. To be sure, the priority of payment given to tort victims in bankruptcy cases often draws criticism. See David W. Leebron, Limited Liability, Tort Victims, and Creditors, 91 COLUM. L. REV. 1565, 1643–50 (1991); see also Lucian Arye Bebchuk & Jesse M. Fried, The Uneasy Case for the Priority of Secured Claims in Bankruptcy: Further Thoughts and a Reply to Critics, 82 CORNELL L. REV. 1279, 1313, 1319–20 (1997). Tort plaintiffs are typically treated as general creditors, who receive payment only after secured creditors and priority unsecured creditors are paid in full. An unsecured claim for breach of contract submitted by an asbestos manufacturer’s vendor, for example, will usually carry the same level of priority as the unliquidated tort claim of an asbestos plaintiff suffering from mesothelioma. This result, however, is not a feature of bankruptcy law. Rather, it flows from the nonbankruptcy law entitlements of tort creditors, which are respected in bankruptcy. Because a tort creditor would stand on equal footing as a general creditor with a contract creditor, the two share the same priority in bankruptcy.
of counsel is more complicated. The chief complaint about the mass tort bankruptcy process is that the lawyers involved are too closely connected.96 In other words, the interconnected nature of the bar, which helped to police potential self-dealing by counsel in the Hartford case, is seen as an enabler of self-dealing in the bankruptcy context.

The incentives of counsel in bankruptcy, however, are not uniform. Or, to be more precise, the incentives of various blocks of lawyers in a mass tort bankruptcy may differ. In the typical asbestos bankruptcy, there are essentially three groups of lawyers: the lawyers who are true bankruptcy specialists (acting for the debtor and various creditors); the plaintiffs’ lawyers who represent tort creditors with presently manifested asbestos personal injury claims; and the lawyers who represent future asbestos personal injury claimants. The bankruptcy lawyers are most concerned with moving the case toward the confirmation of a plan. In order to do so, the plan must gain the support of present claimants and the future claims representative. The bankruptcy lawyers, however, are usually less concerned with the division of compensation between the present and future claimants. So long as the representatives of present and future claimants have approved the plan of reorganization, the debtor may proceed to confirmation and exit bankruptcy shorn of its asbestos liability.

The tension among the groups of lawyers in a mass tort bankruptcy case can lead to the kinds of misaligned incentives that call for close judicial scrutiny. As in the class action context, where a defendant cares more about the total amount paid than about the division of compensation among claimants (or between claimants and class counsel), policing the representation of various groups of claimants takes on heightened importance in a mass tort bankruptcy. Much of the discontent with mass tort bankruptcy cases, I think, reflects a perception that such policing by bankruptcy judges sometimes has been lax or inconsistent.

The Third Circuit’s decision in an asbestos bankruptcy case, In re Combustion Engineering, provides a prime example of these divisions.97 In brief, the debtor, facing mounting asbestos liability, negotiated a prepackaged bankruptcy, in which a plan of reorganization and supporting votes for the plan were arranged before the petition was filed.98 The plan contemplated the creation of two trusts. One trust was initiated before the commencement of the bankruptcy case and was dedicated to paying plaintiffs with pending asbestos cases some, but not all, of

96 See supra Part II.B.3.
97 In re Combustion Eng’g, Inc., 391 F.3d 190 (3d Cir. 2004). For an especially perceptive discussion of the case, see Nagareda, supra note 2, at 167–79.
98 So-called prepacks are common and unremarkable in bankruptcy practice. They are analogous to the settlement-only class in the ordinary civil litigation context.
their claims against the debtor. The second trust was a standard Manville-type trust to which future asbestos personal injury claims would be channeled after plan confirmation. The Third Circuit upended the scheme based on principles drawn from bankruptcy law and due process.99 What makes the decision significant is the careful attention given by the court to the fissures among claimants—both intertemporal conflicts and conflicts regarding the allocation of compensation to those with high-value claims. More strikingly, the court of appeals expressed concern about the “structural inadequacy” of the plan in light of the manner in which it was negotiated.100 The lawyers at the table, in the court’s view, had failed to represent the group of claimants who received less favorable treatment in the resulting plan. And the district court had failed to probe behind the details of the plan to detect the structural defects in its negotiation.

The Combustion Engineering example shows that discontents about mass tort bankruptcies owe more to the nature of underlying disputes themselves and not the nature of the vehicle used to resolve the disputes. Even a conceptual framework that is receptive to mass resolution can be hindered by the reluctance of courts to pay close attention to the players who act within that framework.

There is no doubt that the local courts in Connecticut that helped shape the circus fire receivership were aware of the players and why those players had sought out a receivership. It is also undoubtedly true that the courts would have been skeptical, and rightly so, of the same device if it had carried a hint of self-dealing and gamesmanship. Instead, the receivership was viewed as, in fact, it was—the most promising route for resolving a single public disaster comprising many private tragedies.

Conclusion

The aim of this Article has been a modest one: to explain the story of the Ringling Brothers receivership and to consider how that receivership presaged the later era of mass tort bankruptcies. There is not, of course, a straight line linking the Ringling Brothers case and the Johns-Manville bankruptcy. But the basic architecture of each was strikingly similar. In other words, that an insolvency scheme could be used for purposes of resolving mass tort litigation was not a misbegotten innovation recently grafted onto the bankruptcy laws. Instead, those laws—built as they were on the much earlier foundations of the equity receivership—proved amenable to mass tort cases.

99 See Combustion Eng’g, 391 F.3d at 241–47.
100 Id. at 245.
Oddly, what is more troubling about the Hartford circus fire story is the success of the receivership. In light of the fraught history of post-Code mass tort bankruptcies, the satisfactory achievement of group resolution in the Ringling Brothers receivership case deserves attention. I do not claim to have definitive answers to that question. But I have tried to propose some considerations that might explain the difference in outcomes. Beyond the differences in the underlying tort—a mass accident versus a “long-tail” mass exposure—and the differences in number—a single successful case versus a large number of cases, some successful and some less so—lies the public law nature of mass tort bankruptcies.

Viewed as public law cases, mass tort bankruptcies call for a shift in the role of the court, which has to understand the incentives of the lawyers who assemble and run the resolution scheme. In Hartford, the courts rightly understood the lawyers operating the receivership machinery as more than dollar-seeking mercenaries. To be sure, they were being paid, but they were motivated by professional and personal sentiments that carried beyond their compensation. That is not, alas, necessarily the reality of modern mass tort bankruptcies. Unlike the Hartford example, the lawyers involved in modern mass tort bankruptcy cases are not as severely disciplined by the obligations of bar and community.

Nevertheless, the story of the Hartford case resonates, if only for its promise of duty and perseverance even under tragic circumstances.

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