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Amending §524(g) to Service Sexual Abuse Mass Torts in Bankruptcy

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AMENDING §524(G) TO SERVICE SEXUAL ABUSE MASS TORTS IN BANKRUPTCY

I. Introduction

The Bankruptcy Code is designed to fairly resolve financial disputes.[1] The Code typically non-financial interests to another area of resolution.[2] Asbestos cases are a rare scenario where the Code accommodates special interests.[3] Asbestos is a mineral used in common construction materials.[4] It can cause inflammation, scaring, genetic damage, and cancer.[5] Asbestos was used in millions of construction projects across the country; thus, millions of people risk exposure.[6] Asbestos manufacturers faced litigating thousands of claims for an immeasurable amount of time.[7] Exposure cases were inevitable and expected to continue for over thirty years.[8] Asbestos manufacturers were financially incapable of paying judgments and continuing business.[9] Eventually, litigation would force manufacturer insolvency.

Bankruptcy courts responded by administering a trust-injunction mechanism as part of the restructuring plan.[10] The trust-injunction mechanism consists of two main parts: a trust dispersing recovery to claimants; and an injunction barring personal injury claims brought against the company.[11] The mechanism benefited all parties. Manufacturers enjoyed reduced

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[1] Stephen J. Lubben, *Fairness And Flexibility: Understanding Corporate Bankruptcy's Arc*, 23 U. Pa. J. of Bus. Aff. 132, 134 (2020)
[2] Leaving it up to negotiation amongst the parties, discretion of the court, or resolution in another court.
[3] 11 U.S.C. §524(g)
[4] Daniel King, *What is asbestos and how does it cause cancer?,* Asbestos.com (last visited April 19, 2021), https://www.asbestos.com/asbestos/
[5] Id.
[6] Id.
[7] Mark D. Plevin, Leslie A. Epley, Clifton S. Elgarten, *The Future Claims Representative in Prepackaged Asbestos Bankruptcies: Conflicts of Interest, Strange Alliances, and Unfamiliar Duties for Burdened Bankruptcy Courts*, 62 N.Y.U. Ann. Surv. Am. L. 271, 271 (2006)
[8] Id.
[9] Id.
[10] Kane v. Johns-Manville Corp., 843 F.2d 636, 650 (2d Cir. 1988)
[11] Id.

liability and continued operation. Present claimants settled uniformly. Future claimants maintained an opportunity to recover. But, since the mechanism was only court-administered, litigants questioned its validity.[12] Congress and added a new subsection to the code that provided greater certitude.[13] The new subsection only validated the trust-injunction as applied to asbestos cases.[14]

Like parties in asbestos cases, parties in sexual abuse bankruptcies have special interests deserving of concrete authority. Sexual abuse claimants have interests in closure, accountability, lessening personal anguish, preventative reform, and adequate damages. Sexual abuse debtor-corporations have interests in of mitigating claims and distinctive obstacles in post-bankruptcy survival.[15] Unfortunately, the Code does not sufficiently serve the parties' interests.

Bankruptcy is an efficient way for corporations to avoid insolvency due to mass tort litigation.[16] Tort claimants benefit from tortfeasor debt restructuring because it often preserves some form of recovery for damages that otherwise go unsatisfied. The Code can provide special protections when needed. Sexual abuse claimants need the same protection of a codified resolution as enjoyed by asbestos claimants. Section 524(g) of the Code should include sexual assault bankruptcies and add specific clauses protecting parties' unique interests.

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[12] The power to create injunctive relief is typically provided through legislation. Critics questioned the court's power to shift liability.

[13] Subsection (g) was added to 11 U.S.C. § 524

[14] "The injunction is to be implemented in connection with a trust that, pursuant to the plan of reorganization -- (I) is to assume the liabilities of a debtor which at the time of entry of the order for relief has been named as a defendant in personal injury, wrongful death, or property-damage actions seeking recovery for damages allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products;" 11 U.S.C. §524(g)(B)(i)

[15] Primarily, the obstacles include conserving their reputation, funding, and licenses.

[16] Alan N. Resnick, Bankruptcy as a Vehicle for Resolving Enterprise-Threatening Mass Tort Liability, 148 U. Pa. L. Rev. 2045, 2048 (2000)

Part I provides background necessary to understand the argument's totality. It introduces tools used in Chapter 11 mass tort bankruptcies that are important to understand when discussing sexual abuse cases. Next, it discusses the trust-injunction's legislative history and considerations by the court used to justify special treatment of asbestos claimants. Third, part I summarizes the phenomenon of sexual abuse mass torts and the recent bankruptcies of USA Gymnastics, Boy Scouts of America, and several Catholic Dioceses.

Part II highlights specific issues sexual abuse mass torts present and argues they are not properly regarded within the Code's current framework.[17] Currently, courts must resolve complex conflicts of interest issues while providing a "fresh start" for the debtor. Proof of claim procedures sometimes burden sexual assault claimants' non-financial interests. Bar dates, discovery limitations, and recovery distribution criteria adopted by the uncodified trusts may impose stricter standards on claimant-survivors than non-bankruptcy procedure.[18] Un-codified channeling injunctions lack concrete authority and consistency. Sexual assault mass tort resolution needs the formal protection of certainty, recognized as a leading factor in codifying § 524(g).

Part III shows how § 524(g) can potentially solve most issues stifling the claimant while fulfilling some debtor interests. The injunction element is vital to the corporation's continued operation. However, it should not apply to individual direct tortfeasors[19], only the corporate entity. The injunction should be conditioned upon: removal of individual direct tortfeasors from the corporation; and preventative policies imposed by the board of directors and monitored by a third party. Non-corporate third-party releases should not apply to individual direct tortfeasors. A

[17] Juan Martinez, *Sexual Abuse and Bankruptcy: How Organizations Abuse Chapter 11 to Avoid Victims' Demands for Answers*, 37 Emory Bankr. Dev. J. 213, 224 (2020)
[18] Id. at 233
[19] This term is used to describe those who personally sexually assaulted the survivors.

specialized creditor committee should be appointed to represent the survivors' interests. The committee should enjoy discovery powers the current limits of bankruptcy. Claimants defending their proof of claim should also enjoy broadened discovery powers. Part IV provides recommendations.

II. Part I: Background

A. Relevant tools of bankruptcy mass tort law

Mass torts are lawsuits involving numerous claimants who suffered similar acts of harm from the same defendant. Corporations involved in mass tort litigation may be forced into bankruptcy due to the inability to satisfy all claims. Once in a bankruptcy proceeding, tort claims are consolidated and resolved via Chapter 11 reorganization plan. There is debate concerning whether mass torts are best handled through the bankruptcy process.[20] Several scholars argue that bankruptcy is an efficient means for mass tort litigation.[21] Others believe the process lacks proper tools to handle this level of complex litigation.[22] Some tools provided by the Bankruptcy Code to resolve mass torts are the automatic stay, creditor committees, future claims, discovery rules, and the trust-injunction.

[20] Id.
[21] Smith, *supra* at 1640
[22] Id.

1. The Automatic Stay

The automatic stay is one of the most important tools of bankruptcy.[23] The automatic stay is an immediate temporary injunction staying all debt collection efforts against the debtor.[24] Debtors effectuate the stay by filing a petition in bankruptcy court. The stay includes ongoing litigation of sexual assault tort claims, regardless of their stage.[25]

Interpreted broadly, the automatic stay provides an opportunity to effectively resolve competing economic interests.[26] Interpreted narrowly, the automatic stay affords the debtor a "breathing spell from the pressures that precipitated its bankruptcy filing and protecting creditors by promoting the bankruptcy goal of equal treatment."[27]

2. Creditor Committees

Creditor committees are groups of people, appointed by the bankruptcy trustee, who represent classes of creditors in bankruptcy proceedings. Committees owe a fiduciary duty to the creditors under its representation.[28] Representatives participate in plan negotiation, advise creditors, and collect and file plan acceptances or rejections.[29] Committees have broad power to investigate the debtor's acts, business operations, assets and liabilities.[30]

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[23] Id. at 1640
[24] 11 U.S.C. §362(a) "Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of-- (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title."
[25] Id.
[26] Smith, *supra* at 1639
[27] Id.
[28] *In re* Residential Capital LLC, 480 B.R. 550, 559 (Bankr. S.D.N.Y. 2012)
[29] 11 U.S.C. §1103
[30] 11 U.S.C. §1103(c)

3. Future Claims

Generally, bankruptcy courts do not adjudicate post-petition causes of action. In every Chapter 11 proceeding, courts establish a bar date. A bar date is a window of fixed time when creditors may file a claim for consideration of payment from the debtor.[31] Courts may only extend the bar date for good cause.[32] Any claims filed after the bar date are prevented from recovery unless the claimant presents a valid excuse for their tardiness. If the claimant can not show cause or present a valid excuse, the claim is categorized as a "latent claim." Latent claimants' interests are only considered after all timely claims are satisfied.[33] Post-petition claimants who suffered harm from the debtor's pre-petition conduct may be categorized as future claimants and appointed a future claims representative (FCR) to advocate for their interests. [34]

4. Discovery Procedures

Discovery in bankruptcy proceedings are limited to the financial conduct of the debtor's estate.[35] In a corporate restructuring, the estate typically includes the company's officers and managers.[36] Discovery procedures are referred to as examinations in bankruptcy and normally performed by creditor committees.[37] Discovery may not delve into matters unrelated to discovering

[31] FRBP 3003(c)(3) "The court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed. Notwithstanding the expiration of such time, a proof of claim may be filed to the extent and under the conditions stated in Rule 3002(c)(2), (c)(3), (c)(4), and (c)(6)."
[32] FRBP 3002(c)(1)
[33] Plevin, *supra* at 275
[34] Plevin, *supra* at 278
[35] FBRP 2004 (a) on motion of any party in interest, the court may order the examination of any entity. (b) The examination of an entity under this rule or of the debtor under § 343 of the Code may relate only to the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate, or to the debtor's right to a discharge. . . an individual's debt adjustment case under chapter 13, or a reorganization case under chapter 11 of the Code, other than for the reorganization of a railroad, the examination may also relate to the operation of any business and the desirability of its continuance, the source of any money or property acquired or to be acquired by the debtor for purposes of consummating a plan and the consideration given or offered therefore, and any other matter relevant to the case or to the formulation of a plan."
[36] Martinez, *supra* at 240
[37] Id.

assets or revealing fraud; but, courts often extend great latitude.[38] Examinations may not be used for the purposes of abuse or harassment.[39]

5. Trust-Injunctions

Courts commonly approve trust-injunctions when cases involve future claimants. Trust-injunctions are a dual-system involving a trust and an injunction. A court-created trust disburses recovery to claimants and assumes future liability. The injunction bars future claims against the debtor and channels them to the trust. Trusts are funded by the debtors and their insurers. It distributes payouts per claimants' applicability to predetermined criteria.[40]

Courts have different opinions on whether they possess the authority to administer trust-injunctions. Those who do, rely on their broad equitable powers under 11 U.S.C. § 105(a) and a finding of unusual circumstances.[41] There is no bright line test to determine what constitutes "unusual circumstances" warranting a trust-injunction. However, each court applies some variation of the considerations expressed in *In re Dowing*[42]:

> (1) a relationship between the debtor and the third party such that a suit against the non-debtor is, in essence, a suit against the debtor or capable of depleting the assets of the estate;
>
> (2) the non-debtor contributed substantial assets to the reorganization;
>
> (3) the injunction is essential to the reorganization;
>
> (4) the majority of the impacted classes has voted to accept the plan;
>
> (5) the plan provides for full or nearly full compensation to all or substantially all of the impacted classes;
>
> (6) the plan provides an opportunity for non-settling claimants to recover in full; and

[38] Id.
[39] Id.
[40] Smith, *supra* at 1648
[41] Silverstein, *supra* at 14
[42] Id. at 15

(7) the court made factual findings in support of these considerations.

6. Non-debtor release

Often proposed in a trust-injunction negotiation is a non-debtor third-party release. Third-party releases bar creditor claims against non-debtor third parties over the creditor's objection.[43] Third-party releases enjoin creditors from bringing a certain type of claim or absolve the third party from all liability.[44] Authority for third-party releases is not expressly provided in the code and remains widely disputed, but jurisdictions allowing releases typically justify it because "the benefiting non-debtor is making a financial contribution to the debtor's estate--a contribution that is necessary for the success of the debtor's reorganization."[45]

B. The Evolution of §524(g)

The trust-injunction mechanism of 11 U.S.C. § 524(g) is modeled after the Chapter 11 plan of *Johns-Manville v. Kane* (*Manville*).[46] Johns-Manville Corp. (Manville) was the world's largest asbestos producer. Studies done in the 1960s showed asbestos exposure causes respiratory diseases and cancer. Subsequently, the company became flooded with personal injury and wrongful death claims. Preliminary estimates of present and future claims reported liabilities of approximately $2 billion.

The court established a creditor committee to represent personal injury claimants, and appointed counsel to represent future claimants. Per Judge Lifland, future claimants deserved representation based on their large quantity and statistical surety of their existence.[47] Future

[43] Id. at 21
[44] Id. at 22
[45] Macchiarola, *supra* at 596
[46] *Kane*, 843 F.2d at 650
[47] *Id.* at 646

claimants technically did not have "claims" cognizable under 11 U.S.C. § 101(4), but were still parties in interest under § 1109(b). Therefore, future claimants were entitled to a voice in the proceedings.[48]

Judge Lifland also lifted the bar date requirement. He reasoned that since asbestos related disease may be undisclosed for up to 30 years or more, a procedure for dealing with future claims must be addressed.[49] Negotiations resulted in a trust consisting of the proceeds from Manville's settlements, cash, receivables, insurance, and stock of the reorganized company.[50] To receive compensation, "victims would submit their claims to a medical screening panel and receive a predetermined amount for the injury specified with subsequent reevaluation not precluded."[51] To ensure asbestos claims would only be asserted against the debtors, the court issued an injunction.

Manville's trust retained the right to collect twenty percent of the company's income. Recovery under the trust required claimants to attempt settlement. If a settlement is not reached the claimant could elect mediation, arbitration, or traditional[52] tort litigation and the trust would pay the full amount of compensatory damages.[53] Unfortunately, the *Manville* debtors grossly underestimated the number of future claimants. They crafted the plan expecting between 83,000 and 100,000 claims, but within a few years over 240,000 claims were filed. Ultimately the trust itself became insolvent.

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[48] *Id.* at 639
[49] *Id.* at 640
[50] *Id.* at 649
[51] Id.
[52] In this artcile, "traditional" means "outside of bankruptcy court." i.e., traditionally, tort claims are not originally heard in bankruptcy court.
[53] Macchiarola, *supra* at 608

As asbestos-induced bankruptcies exponentially increased, so did the debtors mimicking the trust-injunction mechanism. However, legal uncertainty around the scheme created doubt regarding its authoritative validity.[54] Congress sought to strengthen the trust-injunction mechanism and offer certitude to other asbestos trust-injunction schemes that meet similar standards pertaining to the rights of future claimants.[55] Subsequently, they enacted the Bankruptcy Reform Act of 1994, adding subsection (g) to 11 U.S.C. § 524, the law governing effect of discharge. Their stated reason was: to "preserve the going concern value" of the debtor and provide a source of payment to future claimants.[56]

The Act provided statutory authority upholding the validity of the trust-injunction mechanism as applied to asbestos-induced bankruptcy proceedings and included specific requirements for confirmation and structure. The newfound authority legitimizes the scheme, allows it to withstand all challenges, and increases the company's stock value. Congress believed the company's value and stock and stock increase would allow continued contribution the fund. Continued contributions by the company allows continued recovery for claimants.

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[54] H.R.Rep. No. 103–835, at 40 (1994), 1994 U.S.C.C.A.N. 3340, 3349 ". . . lingering uncertainty in the financial community as to whether the injunction can withstand all challenges has apparently made it more difficult for the company to meet its needs for capital and has depressed the value of its stock. This has undermined the 'fresh start' objectives of bankruptcy and the goals of the trust arrangement."

[55] Id. "[Section 524(g) was adopted "in order to strengthen the Manville and UNR trust/injunction mechanisms and to offer similar certitude to other asbestos trust/injunction mechanisms that meet the same kind of high standards with respect to regard for the rights of claimants, present and future, as displayed in the two pioneering cases. The Committee believes Johns-Manville and UNR were aided in meeting these high standards, in part at least, by the perceived legal uncertainty surrounding this mechanism, which created strong incentives to take exceptional precautions at every stage of the proceeding. The Committee has concluded, therefore, that creating greater certitude regarding the validity of the trust/injunction mechanism must be accompanied by explicit requirements simulating those met in the Manville case."

[56] Id.

C. The Phenomenon of Sexual Abuse Mass Torts in Bankruptcy.

Sexual abuse mass torts are becoming a significant occurrence in bankruptcy law. Recent major sexual-abuse bankruptcies involve the corporations of USA Gymnastics, Boy Scouts of America., and several Catholic Dioceses. This section will begin with a brief summary of each.

USA Gymnastics (USAG) filed for bankruptcy in December, 2018 due to threats of liability in sexual abuse disputes against Larry Nassar, a now former national team doctor. Nassar was accused by over three hundred women and named in over one hundred lawsuits spanning over his entire career with USAG. Nasar was convicted in 2017 and sentenced to forty to one hundred twenty-five years in prison by multiple state and federal courts.[57] Subsequently, Nassar's victims brought claims against USAG for failing to adequately protect them.[58] The case is currently tied up in litigation pertaining to insurer liability.[59]

Boy Scouts of America (BSA) filed for Bankruptcy in 2018 amidst a wave of two hundred and seventy-five pending state and federal sexual abuse related claims.[60] BSA projected approximately one thousand seven hundred future claims, initiating their Chapter 11 petition.[61] BSA filed a reorganization plan using a trust-injunction to satisfy claims. The plan creates a trust named the

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[57] *Who is Larry Nassar? A timeline of his decades-long career, sexual assault convictions and prison sentences,* USA Today (last updated Aug. 22, 2018), https://www.usatoday.com/pages/interactives/larry-nassar-timeline/.
[58] *Sexual Assault Civil Statutes of Limitations by State,* FindLaw.com (last updated Dec. 3, 2018) https://www.findlaw.com/injury/torts-and-personal-injuries/sexual-assault-civil-statutes-of-limitations-by-state.html
[59] *Timeline for Key Motions and Actions Regarding USA Gymnastics' bankruptcy case,* USA Gymnastics, (Aug. 26, 2020), https://usagym.org/pages/aboutus/pages/bankruptcy.html
[60]Corky Siemasko, *Lawyer Demands Boy Scouts Open Up the 'perversion files',* NBC News (Apr. 24, 2019 11:25 AM), https://www.nbcnews.com/news/us-news/lawyer-demands-boy-scouts-open-perversion-files-n997786. This wave stems from the public release of the "ineligible volunteer files" (also known as the "perversion files"), containing details of over 5,000 cases of sexual abuse allegations against scout masters that were never investigated or charged criminally. The documents were publicized in *Lewis vs. Boy Scouts of America*, Case No. 0710-11294.
[61] Id.

"Victim Compensation Trust" funded by local councils, charter organizations, and insurance proceeds. The injunction prong releases BSA and all affiliate organizations.[62]

Since over twenty-five Catholic Dioceses filed for sexual abuse induced bankruptcy, this paper will briefly highlight specific considerations from some. The case involving the Diocese of Portland addressed a disclosure issue of documents produced in discovery. The documents were initially protected by a District court order. The documents contained names and addresses of Priests accused of sexual assault. The Bankruptcy court directed release of the documents and the Ninth Circuit Court of appeals affirmed. The court held: "disclosure of an abuser's identity was only permissible where the public safety interest of protecting children from potential abuse demonstrably outweighed the alleged abuser's privacy interest, for example, when the abuser remained active as a priest or otherwise posed a threat to children. Otherwise, the abuser's identity would not be disclosed where there had been no showing of risk to the community."[63]

The Diocese of Harrisburg bankruptcy is a pioneer case filed in February 2020. It is the first diocese to file for bankruptcy resulting from the Grand Jury investigation published in 2018. The investigation revealed sexual abuse allegations against over three hundred priests from six dioceses, and over one thousand identifiable child victims.[64] Per the report, the dioceses knew the abuse was occurring and actively contained the scandal. [65]

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[62] The "affiliate organizations" include local councils, boards committees, related entities, and charter organizations.
[63] *In re Roman Catholic Archbishop of Portland in Oregon*, 661 F.3d 417, 408 (9th Cir. 2011), cert. denied, 132 S. Ct. 1867, 182 L. Ed. 2d 645 (2012).
[64] Report I of the 40th Statewide Grand Jury, July 27, 2018, available at www.attorneygeneral.gov/wp-content/uploads/2018/08/A-Report-of-the-Fortieth-Statewide-Investigating-Grand-Jury_Cleland-Redactions-8-12-08_Redacted.pdf ("There have been other reports about child sex abuse within the Catholic Church. But never on this scale. For many of us, those earlier stories happened someplace else, someplace away. Now we know the truth: it happened everywhere .... We subpoenaed, and reviewed, half a million pages of internal diocesan documents. They contained credible allegations against over three hundred predator priests. Over one thousand child victims were identifiable, from the church's own records.").
[65] Id.

The Oregon Province of the Society of Jesus also required public disclosure of names of priests identified as abusers. In 2015, a bankruptcy court in Wisconsin confirmed a plan of reorganization submitted by the Archdiocese of Milwaukee. The bankruptcy settled three hundred thirty sexual abuse claims. There were five hundred seventy-nine sexual abuse claims filed against the church in total. The trust only serviced present substantiated claimants. It provided eight million dollars towards the settlement and established a five hundred thousand dollar therapy fund for victims.[66]

The Christian Brothers Institute (CBI) filed for Chapter 11 Bankruptcy in the Southern District of NY. CBI settled after a court-supervised mediation on a trust-injunction. CBI and its insurers funded the trust with sixteen-million-dollars. The injunction barred CBI from further liability. The settlement did not bar claimants from actions against insurers, schools, or dioceses. The bar date for "future claimants" was set for five to eight months after confirmation of the plan depending on the type of harm suffered. The Catholic Diocese of Rochester, Archbishop of Agana, and Diocese of Santa Fe, are all currently in mediation pertaining to insurance disputes, despite petitions filed in 2018 and prior.[67]

[66] *In re* Archdiocese of Milwaukee, 523 B.R. 655 (Bankr. E.D.N.Y. 2014)
[67] George R. Calhoun, *Mediation and A Lack of Transparency in Mass Tort Cases,* 39 Am. Bankr. Inst. J. 26,64 (2020)

III. Part II - Sexual Abuse Survivors, Like Asbestos Victims, Should Be Afforded Special Protections In Bankruptcy Proceedings.

Corporate reorganization law tries to balance fairness and flexibility. [68] When flexible application of the code shows signs of undue unfairness, the bankruptcy code will adopt amendments and strictly apply its rules.[69] The code adopted Section 524(g) to fairly resolve some of the prejudices parties face in asbestos-related bankruptcies. Claimants harmed by asbestos exposure faced life threatening illnesses.[70]There is no feasible way to trace asbestos exposure to prevent it. New harm will continue decades after manufacturers stop producing asbestos products.

At the time the court resolved pioneer asbestos cases, the Code only dealt with present claims and acts committed prior to filing for bankruptcy. Asbestos cases were unique because acts were committed prior to filing, but a significant amount of harm would manifest after the bankruptcy ended. Thus, the corporation would be forced to litigate thousands of claims pushing the company into insolvency. Consequently, individuals with legitimate personal injury or wrongful death claims would be left with no recovery.

Due to the magnitude of the harm and unfairness in the current resolution process, courts recognized that future personal injury claims should have access to recovery and a voice in the proceedings Debtor-manufacturers deserved the ability to reorganize. Congress believed these special interests warranted firm protection by the code and enacted an amendment providing concrete authority for new protective procedures.

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[68] Stephen J. Lubben, *Fairness And Flexibility: Understanding Corporate Bankruptcy's Arc*, 23 U. Pa. J. of Bus. Aff. 132, 134 (2020)

[69] Id.

[70] Daniel King, *What is asbestos and how does it cause cancer?,* Asbestos.com (last visited April 19, 2021), https://www.asbestos.com/asbestos/

Parties to sexual abuse mass tort bankruptcies have special interests similar to those in asbestos bankruptcies. Some special interests in sexual abuse mass tort bankruptcies are more complex than those considered by Congress designing § 524(g) and safeguarded in other areas of law. Therefore, special protections in sexual abuse mass tort bankruptcies are warranted and should be afforded in the same manner as asbestos-related bankruptcies. This section argues that sexual abuse claimants deserve their own codified section in the bankruptcy code by outlining prejudices faced due to conflicts of interests, proof of claims procedure, discovery limitations, and lack of authority.

A. Conflicts of Financial and Non-financial Interests.

Sexual abuse claimants have important non-financial interests that conflict with their own financial interests and those of the debtor. Claimants seek public accountability and the power of telling their story uncontested.[71]

In *USA Gymnastics*, the survivors, many of whom were financially stable professional gymnasts, explained the main point of suing USAG was to get to the truth. Monetary compensation was insufficient to make them "whole again," for many of them will endure lifelong therapy and mental anguish. Claimant's interest in accountability conflicts with the debtor's ability to achieve a "fresh start," one of the core principles of corporate reorganization. Debtors in recent sexual abuse mass torts are nonprofit, charitable or religious organizations; meaning, they are financially dependent on donations or other public funding. Increasing revelations of sexual abuse occurrences

[71] Martinez, *supra* at 221. Even plaintiffs in *Purdue,* a case involving corporate liability for drug addiction which is arguably less invasive than sexual assault, objected to a settlement proposal because it did not include any admission of wrongdoing or liability and they believed the "story of what happened here really needs to be told."

will discourage donors from contributing to the organization, substantially impacting the organization's main source of income.[72]

In fact, the USAG bankruptcy put the organization's Olympic eligibility at risk.[73] Olympic eligibility was the organization's most competitive asset. Gymnasts aspiring to attend the Olympics will turn to an Olympic eligible organization. The organization risks a significant drop in both funding and business. This would cause another bankruptcy, and the organization would liquidate. If claimants' interest in public accountability is met, and the corporation's funds are substantially depleted, no money is left to disburse damages. damages pay for medical expenses, therapy, attorney's fees, and other costs related to abuse. This presents a direct conflict of interests between the claimants' own financial and non-financial interests.

Consequently, recovery funding will rely heavily on contributions from insurers. Insurers present a significant obstacle in the bankruptcy process because they frequently have legitimate coverage defenses relieving them of liability for sexual abuse torts.[74] They often tie up resolution efforts with adversary proceedings that exhaust claimants within and outside of the bankruptcy. Survivors within the bankruptcy experience postponed recovery. Survivors outside the bankruptcy experience prolonged discovery proceedings. Lengthy discovery is detrimental to sexual abuse plaintiffs because certain discovery findings lose emphasis and reliability with time.[75] In asbestos cases, there was only one layer of conflicting interests: future claimants' compensation, and the corporation's ability to compensate claims and continue operating. The Code provides for those

[72] i.e., loss of sponsorships, decrease in donations, decrease in participation, etc.
[73] Juliet Macur, *Olympic Committee Moves to Revoke U.S.A. Gymnastics' Governing Rights*, The New York Times (Nov. 5, 2018), https://www.nytimes.com/2018/11/05/sports/usa-gymnastics-usoc.html
[74] Id. at 65
[75] Martinez, *supra* at 250. For example, witnesses become less credible over time because the memory is further away, injuries that are visible at one point may heal and be less convincing overtime, etc.

interests by requiring the trust to provide reasonable assurance that they can pay present and future claims in the same manner.[76] If the Code identifies the interests in protecting recovery for future claimants in asbestos cases important enough to codify, then the complicated interests of sexual abuse claimants should be regarded and protected in the same manner.

B. Proof of claims

Proof of claim procedures may impose burden on the claimant by enforcing strict standards of proof and timing. Bar dates set time limits to file claims. But, numerous legitimate circumstances may prevent timely filing. Trends in other areas of law create exceptions for sexual assault survivors that expand time for claims filing. The only exception provided in the bankruptcy process does not effectively protect survivors from prejudice.

Once a Chapter 11 petition is filed, creditors must file a proof of claim within a time period set by the court, This period is commonly referred to as the "bar date."[77] The claimant bears the burden of establishing a valid claim and must assert facts sufficient for a legal basis.[78] If the debtor objects they may submit a motion for summary judgment to litigate threshold issues that apply to all or some of the asserted claims.[79]

[76] 11 U.S.C. §524(g)(2)(B)(ii)(V), in order for the court to confirm a plan resolving asbestos mass torts, the trust must provide reasonable assurance that they will be able to pay present and future claims in the same manner.
[77] FRBP Rule 3003(c)(3) The court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed. Notwithstanding the expiration of such time, a proof of claim may be filed to the extent and under the conditions stated in Rule 3002(c)(2), (c)(3), (c)(4), and (c)(6).
[78] Id. §502(b)
[79] 11 U.S.C. §502(a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.

Bar dates for sexual abuse bankruptcy cases typically range from three to nine months after petition filing.[80] The generosity of these extended filing periods show Bankruptcy Courts generally use their Rule 3003(c)(3) discretion in favor of sexual abuse claimants. Still, bar dates may prejudice claimants whose resolution is best sought through the bankruptcy system.[81]

Bar dates affect claimants differently depending on the claimant and resolution process. Pre-petition claimants well within the state-imposed statute of limitations period may be rushed to filing a proof of claim within the bar date. If a pre-petition claimant misses the bar date, they must either petition the court to allow their claim "for cause," or commence action in state court.[82] If the claimant goes forward with the "for cause" defense they must provide a good reason for their lateness.

Claims may even become subject to the automatic stay if they file in state court after failing to provide a "for cause" showing. If the bankruptcy results in pre-petition discharge of unscheduled claims the late claimant risks recovery entirely. If the bankruptcy results in an uncodified trust-injunction mechanism, the late claimant loses the ability to equally negotiate on their own behalf. If the claimant is still allowed to bring suit in state court, access to fresh discovery will be diluted, along. The recovery pool is also diluted since most of the corporation's assets and funds were distributed within the bankruptcy.

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[80] Dana Quick, *Boy Scouts Receive Permission to Set Bar Date for Nov. 2020 on Abuse Claims in Ch. 11,* BastAmron Insolvency Litigators (June 17, 2020), https://www.bastamron.com/boy-scouts-receive-permission-to-set-bar-date-for-nov-on-abuse-claims-in-ch-11/ (court allows 9 month long claims filing limit for Boy Scouts survivors); *Timeline for Key Motions and Actions Regarding USA Gymnastics' bankruptcy case,* USA Gymnastics, (Aug. 26, 2020), https://usagym.org/pages/aboutus/pages/bankruptcy.html (court allows 5 month long claims filing limit for USGA)

[81] Whether by way of reducing litigation costs, trauma, access to recovery, or bar of independent suit.

[82] FRBP Rule 3003(c)(3) The court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed.

Sexual abuse survivors suffer varying psychological effects that may account for late filing. Survivors who dealt with trauma by burying the memory, were too young to remember vividly, or become shocked upon notice of the ability to recover, may need time to mentally prepare.[83] If so, their ability to file a claim is at the discretion of a judge. Claimants with limited evidence are also prejudiced by proof of claims procedures. Once a proof of claim is filed and executed, the debtor has the right to object by producing evidence to rebut the claimant's *prima facie* claim.[84] If rebuttal is successful, the burden of proof shifts to the claimant to produce additional evidence of the claim's validity based on a preponderance of the evidence.[85] Ultimately, the claimant has the burden of proof to support their claim.

In sexual assault cases, proof is not always readily available, and its discovery may even occur during the bankruptcy, after the bar date. Prior to BSA filing for bankruptcy, a lone negligence case prompted the release of the "perversion files," a record kept by the organization of alleged sexual abuse allegations and details that were never investigated or turned over to the court.[86] A two-year grand jury investigation uncovered evidence of sexual assault of over one thousand survivors, implicating over three hundred priests.[87] Evidence of sexual assault was also uncovered during an investigation into an organization's claims valuation procedure.[88] The survivors in these cases may have been precluded from filing proof of claims before the evidence was uncovered due to lack of proof rendering them unable to support their claims. The evidence uncovered during the

[83] Martinez, *supra* at 248
[84] *In re* Allegheny Intern., Inc., 954 F.2d 167, 173 (3d. Cir. 1992)
[85] Id.
[86] Lewis vs. Boy Scouts of America, Case No. 0710-11294 (Or. 2012)
[87] Michelle Boorstein, *More than 300 accused priests listed in Pennsylvania report on Catholic Church sex abuse,* The Washington Post, (Aug. 14, 2018), https://www.washingtonpost.com/news/acts-of-faith/wp/2018/08/14/pennsylvania-grand-jury-report-on-sex-abuse-in-catholic-church-will-list-hundreds-of-accused-predator-priests/
[88] 17 No. 2 Cal. Ins. L. & Reg. Rep. 35

bankruptcy may provide enough support for their claim, but, the bar date prevents them from filing. Though the new evidence would provide a "for cause" reason to allow for late filing, a plethora of procedure must be administered prior.[89]

In a civil sexual abuse case, most states' statutes of limitations are one to seven years from the act.[90] However, numerous states allow statutes of limitations periods to begin at the time of discovery rather than the date of the incident.[91] Most states with fixed statute of limitations periods contain exceptions that also allow for flexible filing times depending on the type of harm or victim.[92] Bar dates act contrarily to the trend of other courts. Bar dates significantly limit filing times for sexual abuse claimants. Other courts allow at least twice as long to file actions for the same offense.

The Code allows for asbestos claims to continue indefinitely. It recognizes the injustices bar dates pose on their special claimants but makes no official considerations for sexual abuse claimants. Asbestos claimants are afforded indefinite filing times due to the nature of asbestos-related diseases. Specifically, since the harm caused by asbestos exposure can affect individuals after the bankruptcy for an unquantifiable period of time, it would be unfair to bar recovery based on timing. In sexual abuse cases, like asbestos cases, the effects of pre-petition harm can manifest

[89] For example, a hearing would have to be held on whether or not those survivors must be notified of the evidence, how they must be notified (whether it will be made public or not), who is responsible for notifying them (it poses a burden on whoever is responsible for the task that is unfair to place on other claimants but may pose a conflict of interest issue for the corporation), issues of privacy (what information must be redacted), etc.
[90] *Sexual Assault Civil Statutes of Limitations by State,* FindLaw.com (last updated Dec. 3, 2018) https://www.findlaw.com/injury/torts-and-personal-injuries/sexual-assault-civil-statutes-of-limitations-by-state.html
[91] Id.
[92] Id. (Though courts have placed statutes of limitations on sexual abuse claims, those statutes may extend up to 6 years sometimes beginning at the time of maturity or even the time the victim knew or had reason to know that the injury was caused by sexual abuse.)

itself at any time. Factors like trauma induced memory loss, dissociative amnesia, or discovery of sexually transmitted diseases are impossible to control or predict.[93]

C. Discovery limitations on proof of claims

Proof of claims procedure also presents obstacles to evidence. If the debtor in a sexual abuse bankruptcy successfully challenges a proof of claim, the burden of proof ultimately falls on the claimant.[94] The issue is disputed and resolved by the bankruptcy court, therefore it is subject to the Federal Rules of Bankruptcy Procedure (FRBP). Discovery in bankruptcy proceedings are limited to the financial affairs of the debtor pursuant to FRBP 2004(3).[95]

Creditor committees are given the power to investigate debtors, but may only examine conduct relating to their property, liabilities and financial conditions for the purpose of "unearthing fraud."[96] Committees are often granted latitude in their discovery powers, but the examinations must always relate back to unearthing fraud or discovering assets.[97]

Some creditor committees have been able to uncover sufficient evidence of sexual misconduct despite discovery limitations. For example, survivors in the Archbishop of Portland's bankruptcy, were able to uncover confidential documented accounts of sexual abuse, kept and intentionally hidden by the diocese, through examination of their projected liability process. Survivors in the Diocese of Harrisburg's bankruptcy uncovered evidence of decades of abuse after a two-year grand jury investigation conducted prior to the bankruptcy filing. Survivors in the USAG bankruptcy

[93] James T. O'Reilly & Joann M. Strasser, *Clergy Sexual Misconduct: Confronting the Difficult Constitutional and Institutional Liability Issues,* 7 St. Thomas L. Rev. 31, 36 (1994)
[94] Id.
[95] FRBP 2004(3)
[96] Martinez, *supra* at 216
[97] Id.

obtained evidence through Larry Nassar's criminal proceedings conducted prior to the bankruptcy. Still, discovery limitations present significant obstacles in the claimants' ability to substantiate their claims.

This issues poses a significant concern because there is conflicting law on whether sexual abuse judgments are sufficient as proofs of claim in a bankruptcy proceeding where the confirmation plan includes an uncodified trust-injunction mechanism.[98] There are jurisdictions where, upon the debtor's objection and successful rebut of a prima facie claim, a civil judgment is not enough to support a survivor's proof of claim; and discovery to obtain the requisite evidence is limited to financially related conduct. This proof of claims issue poses two substantial obstacles: a higher burden of proof than traditional procedures, and restricted opportunity to obtain proof. Though satisfactory proof was obtained in other cases, proof of claims procedure often places considerable burdens on sexual abuse claimants.

Asbestos claimants do not share the same issue. Asbestos claimants prove their asbestos related injuries with medical records and manufacturer advertising. Sexual assault allegations are not as cut and dry. They require inquiry and investigation into the actors' conduct, personal lives, and experiences.

[98] Cathy Ta, *Sexual Harassment Civil Judgments in Bankruptcy*, Best Best & Krieger Attorneys at Law (May 23, 2018), https://www.bbklaw.com/news-events/insights/2018/authored-articles/05/sexual-harassment-civil-judgments-in-bankruptcy

D. Discovery limitations on negotiations.

Creditor committees must contribute to the plan and negotiate on behalf of the unsecured creditors. Part of that negotiation is usually conditions the plan on reformative and preventative measures for the company. Effective measures must be tailored to the root of the problem.

Bankruptcy discovery limitations prevent committees from uncovering the root of the problem by requiring investigations only into the financial aspect of the company–a surface level inquiry. Effective preventative measures are important in sexual abuse bankruptcies because it is the only way to achieve an effective reorganization, true "fresh start." Obviously, these corporations can not aptly provide these measures themselves or else they would not succumb to a mass tort bankruptcy. Still, the debtor has a significant interest in providing for, preventing, and limiting liability to future claims.

Crafting specially tailored reformative measures for companies plagued by sexual abuse culture is in the best interest of all parties: it effectively limits the debtor's chance of recurrence and liability; serves the claimants' interest in creating a safe environment; provides a bargaining chip for present claimants; and may prevent harm to others**.** The same discovery rules that limit claimants' ability to support challenged proof of claims also restricts the creditor committee's ability to condition settlement on reformative measures. Though committees are afforded wide latitude in their discovery powers, the Code's restrictions block inquiry into the actual conduct of sexual abuse. It is nearly impossible to track down how the abuse continued without a full investigation into the company.

If the committee is unable to trace the enabling measures of the organization, they cannot craft preventative safeguards for a meaningful reorganization plan that cure all areas of the company contributing to the ongoing abuse.[99]

Sexual abuse survivors are provided special protections in other areas of law and policy, These measures speak to survivors' unique need for safeguards in discovery dating back decades. "Rape shield laws" were a collection of legislation aimed to protect the identify of rape accusers from the media.[100] Though the original laws were later held unconstitutional under the First amendment, state legislators have adopted a constitutional version of rape shield laws in every state.[101] Remnants of rape shield laws are even found in the Federal Rules of Evidence(FRE). The FRE prevents evidence of past sexual behavior or sexual predisposition in criminal proceedings involving sexual misconduct.[102] The continuance of rape shield laws shows a universal understanding in law that sexual abuse victims must be handled with care. The appearance of privacy protections in rules that govern discovery issues like confidentiality and evidence admissibility show that special protections for sexual abuse survivors in discovery practices are common.[103]

Discovery limited to financially-related aspects of the company is an appropriate safeguard for mass tort debtors whose torts are more facially realizable, like asbestos manufacturers advertising asbestos products.

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[99] Meredith C. Doyle, *Circles of Trust: Using Restorative Justice to Repair Organizations Marred by Sex Abuse*, 14 Pepp. Dis. Res. L.J. 175, 186 (2014)
[100] Martinez*, supra* at 237
[101] Id. at 238; *Rape Shield Laws: Protecting Sex-Crime Victims,* NOLO (last updated 2013), https://www.nolo.com/legal-encyclopedia/rape-shield-laws-protecting-sex-crime-victims.html
[102] Id; FRE 412
[103] Id. (In fact, sexual abuse is one of the *only* exceptions in the FRE.)

Financially restricted discovery is inadequate when the act is as embedded into the company as the sexual abuse mass torts discussed in this article. These organizations do not have simple processes and systems that can be corrected and monitored with a simple layer of security. They have turned sexual abuse into a norm and created a "culture of silence" through shame, conflicts of interests, and a lack of transparency.[104] Even in the aforementioned examples[105] of proof of sexual misconduct unveiled during the bankruptcy process, the bankruptcy code does not directly provide for further inquiry into the circumstances surrounding those incidents. Those circumstances are the key to preventative reform for organizations where the issue is not in a system seen through the lens of financial processes, but a culture of subtle actions and silent policies. This poses another setback that sexual abuse claimants face and asbestos claimants do not.

The actions of manufacturers that created asbestos-related harm is clear and simple. Preventative measures are consequently clear and simple–stop using asbestos.[106] To comply, manufacturers must only find alternative means of supplying their products and conduct routine quality checks. Corporations in sexual abuse bankruptcies have a much higher hurdle to overcome sexual abuse enabling. Especially if the organization has been battling with sexual abuse practices for decades like the Boy Scouts or the dioceses. Unlike asbestos manufacturers who were openly and legally manufacturing asbestos. Corporations in sexual abuse cases operate for an unrelated purpose and the sexual abuse occurred "under the radar." Therefore, a deeper level of discovery is

[104] Doyle, *supra* at 182
[105] *See* section I.C. The Phenomenon of Sexual Abuse Mass Torts in Bankruptcy
[106] In all fairness, the *correct* phrase would be "stop using a deadly amount of asbestos" as asbestos is still legally used in consumer products and is not banned in the United States.

necessary to uncover the corporation's enabling qualities and condition reorganization on their cure.

E. Lack of Authority

Courts have not officially recognized any form of governance that provides the authority to create a trust-injunction. The legality of the plan is vulnerable to differing interpretations of authority breeding varying outcomes that go against the courts' policy of uniformity, transparency, and equity. Courts in early asbestos cases and current sexual abuse bankruptcies rely on the "equitable injunctive powers of bankruptcy courts under § 105 of the Bankruptcy Code" to enforce the channeling injunction mechanism.

After the *Manville* decision, litigants challenged the authority of the court to issue the injunction[107]. In fact, Congress expressly stated that § 524(g) was enacted to quiet those challenges.[108] Courts using uncodified channeling injunctions face a similar issue today.[109] By expressly establishing the courts' authority in a new provision to the code that only applies to one specific type of case, Congress opened the door for doubt in the court's authority to establish a trust-injunction in other cases. Congress may have retroactively worsened the strength of non-asbestos related trust-injunctions, increasing skepticism of its application in sexual abuse cases.

Validity of a recovery scheme is particularly meaningful in sexual assault bankruptcies inherently involving victims of heinous crimes and limited alternative means of recovery. Lack of

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[107] Silversetin, *supra* at 22
[108] Id at 23
[109] Georgene Vairo, *Mass Tort Bankruptcies: the Who, The Why, and the How*, 78 AM. Bankr. L.J. 93, 126 (2008). "The Grupo Mexicano Court distinguished that holding on the grounds that the First National case "involved not the Court's general equitable powers under the Judiciary Act of 1789, but its powers under the statute authorizing tax injunctions." Grupo Mexicano, 527 U.S. at 326, 119 S.Ct. 1961. Thus, because the district court had a statutory basis for issuing such an injunction, it was not confined to traditional equity jurisprudence available at the enactment of the Judiciary Act of 1789."

authority creates a lack of guidance. Not only are parties left uncertain of the validity of a creative reorganization plan, but they are also unclear of the standards to support it. Prior to enactment of 524(g), asbestos cases fiddled with trust-injunction requirements. For example, debtors were unclear of the level of compensation a trust must prove its capable of providing claimants post-confirmation.

In *Manville*, the court found (mistakenly, as it turned out) that the trusts established for the payment of asbestos-related personal injury claims would be adequate to pay those claims. In *Robins*, the court estimated the aggregate of Dalkon Shield claims at $2.45 billion and required that any plan adequately provide for the payment of claims in that amount. In *Finley Kumble's* bankruptcy, although the full payment of claims ultimately proved infeasible in confirming the plan, the court found that creditors were receiving distributions in excess of what they would receive in a Chapter 7 liquidation of the debtor and its partners.[110]

In sexual assault cases, the trust-injunction mechanism faces similar issues. Courts differ on the standard required to issue a trust-injunction.[111] Most courts use the five factor test expressed in *Master Mortgage Inv. Fund, Inc*.,[112] but, like early mass tort cases, there remains no definitive standard governing which cases warrant a trust-injunction. Meaning, no existing authority solidifies the right of future sexual assault claimants to recovery. Lack of authority governing

[110] *In re* Myerson & Kuhn, 121 B.R. 145, 157 (Bankr. S.D.N.Y. 1990)
[111] Also largely due to the lack of authority prong.
[112] Master Mortgage Inv. Fund, Inc., 168 B.R. 930, 935 (Bankr. W.D. Mo. 1994
Five factor test:(a) Whether there is an identity of interest between the debtor and the non-debtor beneficiaries of the injunction, such as an indemnity relationship, such that suit against the non-debtor either is, in essence, a suit against the debtor or will otherwise deplete the assetsof the estate; (b) Whether the plan provides for the non-debtor beneficiary to contribute substantial assets to the reorganization; (c) Whether the injunction is essential to the debtor's reorganization;(d) Whether a substantial majority of the creditors (especially those negatively impacted by it) have consented to the injunction; and (e) Whether the plan provides for the payment of all, or substantially all, of the claims of the class or classes affected by the injunction.

whether the uncodified trust-injunction mechanism is valid also created conflicting authority of what satisfies a sexual abuse proof of claim. Traditionally, corporations may not receive discharges in bankruptcy. However, the injunction prong of the trust-injunction mechanism creates the "effect of discharge." This opens the door for arguments on whether sexual abuse judgments are sufficient as proofs of claim in a bankruptcy proceeding per discharge rules. If the court refuses to substantiate the claim based on their litigated civil judgment, a survivor with a legally valid claim will walk away meritless.

Non-debtor releases also threaten survivors due to lack of guidance stemming from lack of authority. Since third party releases are based on broad interpretation of a statute, there is no concrete authority governing who qualifies. This flexibility is capable of exculpating a major tortfeasor responsible for facilitating the conduct inducing the bankruptcy. Congress established specific guidelines in § 524(g) for non-debtor releases, recognizing the need to regulate benefitting parties.[113] Sexual abuse cases need structure for regulating third-party releases.

The companies involved in recent sexual-abuse related bankruptcies allowed the conduct to continue for decades. Common sense supports the assumption that long-term, widespread sexual abuse does not normally go unnoticed by related parties.[114] Parties whose relationship to the tortfeasor is close enough to absolve them of liability in a third-party release are not normally

[113] It has five elements. First, there must be "an identity of interest between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete assets of the estate."201 Second, the third party must contribute substantial assets to the reorganization.202 Third, the release must be "essential to reorganization. Without the [release], there is little likelihood of success."203 For example, in the absence of a release, non-debtors may refuse to contribute assets that are "necessary" for the debtor's *25 reorganization.204 Fourth, a "substantial majority of the creditors agree to [the release], specifically, the impacted class, or classes has 'overwhelmingly' voted to accept the proposed plan treatment."205 Fifth, the plan provides for "payment of all, or substantially all, of the claims of the class or classes affected by the [non-debtor release]."206 In In re Dow Corning Corp., the Sixth Circuit added a sixth factor: all dissenting creditors whose claims are extinguished by the release must be paid in full under the plan.207 Pro-release authorities have generally approved of this addition

[114] Strasser, *supra* at 36

innocent of some form of negligence.[115] For example, the BSA's confirmation plan raised suspicions about third-party liability. The plan releases BSA and substantially every BSA-affiliated organization, including the reorganized BSA, the "Future Claimants' Representative," the Local Councils and their board committees, related non-debtor BSA entities and contributing chartered organizations. In addition, the plan includes an exculpation provision in favor of the debtors and the reorganized debtors.[116]

In a case concerning asbestos liability, there is only one clear reason why a company requests non-debtor release from liability – to protect their monetary assets from exposure to future claims. But, in sexual abuse cases, third-parties risk civil judgment, federal investigations, criminal prosecution of directors and officers, and even public shaming. Allowing those parties to escape liability without even a proper standard for who or how, worsens the risk to the victims of deprivation of justice and other non-financial interests. In the worst-case scenario, it may allow the abuse culture to continue by protecting its enablers or participants.

[115] Doyle, *supra* at 181
[116] Id. at 182

IV. Recommendations

Section 524(g) of the bankruptcy code should be amended to include sexual abuse claims and include added subsections in furtherance of those protections. The new amendments will maintain the trust-injunction mechanism and its existing terms and requirements, impose additional conditions on the surviving company,[117]

New amendments will protect the debtors' interest of maintaining the organization. Some of the corporations involved in recent sexual abuse mass tort bankruptcy are coveted institutions with decades of history. Though acts of sexual abuse should never be tolerated, and the organizations failed their duty to protect survivors, it may be in the best interests of all parties to navigate the restructuring based on the individuals at fault rather than the entire entity. Some scholars argue the "prolonged nature of the abuse can only realistically occur where is widespread negligence, lack of adequate protections, and a refusal to seriously investigate claims of abuse." [118] Instead of destroying institutions (presumably) built on good intentions, the bankruptcy code should mandate safeguards to facilitate better practices and preventative measures moving forward. The code provides a laundry list of requirements a debtor must satisfy to assume the benefits of §524(g), imposing conditions on the plan itself, terms for the trust, classification of future claimants[119], and acceptable third-party relationships qualifying for non-debtor release.

[117] The term "surviving company" is used here to describe the corporation relieved from liability out of the trust-injunction structure. The trust-injunction structure either enjoins new law suits brought against the existing company and funnels them to a new company representing the trust; or allows claims against the old company and creates a new corporation able to operate free of the old corporation's liability. Both forms essentially end in one corporation that "survives" the bankruptcy. Hence the term "surviving company."
[118] Martinez, *supra* at 224
[119] Claims of future claimants are referred to in the statute as "demands," recognizing that future claimants do not technically have claims yet under the code.

Congress should amend §524(g)(2)(B), to include a third section that imposes conditions on the surviving organization. The conditions should require: (1) the individuals responsible be removed or replaced through a transparent process; (2) preventative policies put in place and monitored by a third party approved by the court; (3) the corporation cooperates in litigation against the tortfeasors upon court order; (4) removal of individual tortfeasors and parties directly involved in actions of sexual misconduct by participation, encouragement, willful blindness, or gross negligence from the organization indefinitely, and findings of such conduct be turned over to the third party in charge of supervising the preventative policies.[120]

Maintaining the organizations in the interest of preserving the integrity of long-standing institutions, allowing operations to fund recovery, and providing a fresh start, must also be realized by upholding the third-party release and adding clarifying conditions that protect victims. Non-debtor releases may exculpate potentially guilty parties without a fair investigation into culpability due to restricted discovery. Section §524(g)(4)(A)(ii)(IV), interpreted broadly, may allow a debtor to include an unobvious tortfeasor within the terms of the injunction.[121] On the other hand, non-debtor releases may be vital to reviving the corporation and offer a strong bargaining chip for the claimants.[122]

The issue lies in the lack of authority and conflicting judicial implementation of third-party releases. Courts have cited both §524(g) and §105(a) as authority for allowing third-party releases because neither provides clear and concrete authority to do so. Lack of concrete authority reduces

[120] The third section would be §524(g)(2)(B)(iii)
[121] It could even include a known tortfeasor whose victims were unable to substantiate their claims.
[122] For example, an insurer may require injunctive relief of certain entities or officers.

stock value in the company – a vital characteristic of non-profit organizations tied up in sexual abuse mass torts.

For example, the US Olympic Committee (USOC) threatened to revoke recognition of USGA as the sport's national governing body amidst the sexual abuse claims. USOC voluntarily stayed the revocation process upon completion of the bankruptcy proceedings. Though their motives probably include high moral values, they likely seek to avoid future liability. If USGA loses its Olympic status, hundreds of hopeful gymnasts may be deprived of the ability to compete or subjected to assimilating to the norms of an entirely different organization. Obtaining a non-debtor third party release for USOC quiets their liability concerns and allows USGA to maintain its status for the sake of existing Olympic gymnasts and rebuild its legacy.

In *Purdue Pharma*, the issue of non-debtor release was challenged when the court administered a preliminary injunction to enjoin creditor's lawsuits against the Sackler family, the company's owners.[123] The creditors challenged the court's authority to enjoin non-debtors, arguing they abused their §105(a) discretions in doing so. [124] The court held they did not abuse discretion because the second circuit previously upheld third-party releases where the injunction plays an important part in the debtor's estate and satisfies a four-factor test.[125] Recently, the parties' dispute over non-debtor releases turns to their appearance in the plan itself. The Judge stated in the opinion that the injunction provides a crucial incentive that "could seriously threaten the global settlement,

[123] *In re* Purdue Pharm. L.P., 619 B.R. 38, 58 (S.D.N.Y. 2020)
[124] Id.
[125] The four-factor test is: (1) whether there is a likelihood of successful reorganization, id.; (2), whether there is an imminent irreparable harm to the estate in the absence of an injunction, although a limited exception permits an injunction to issue "whether the action to be enjoined is one that threatens the reorganization process," if the threat is not imminent, Alert Holdings, Inc. v. Interstate Protective Servs., Inc., 148 B.R. 194, 200 (Bankr. S.D.N.Y. 1992); (3) the balance of "the comparative harm[s] to the debtor, and to [the] debtor's reorganization, against that to the would-be-enjoined party should an injunction be issued," Hawaii Structural Ironworkers Pension Tr. Fund v. Calpine Corp., No. 06-cv-5358 (PKC), 2006 WL 3755175, at *4 (S.D.N.Y. Dec. 20, 2006); and (4) whether the public interest weighs in favor of an injunction, see, e.g., Lyondell, 402 B.R. at 588.

an essential ingredient to any confirmable reorganization plan," if taken off the table.[126] But, some creditors representing government entities reject use of the injunction to protect the Sacklers because it relieves them of accountability and a substantial portion of their personal fortune in tact.[127] If states and cities don't sign off on the settlement, they risk losing any potential payout in the bankruptcy because their claims would be diluted by the Justice Department, according to the objection.[128] Risk of losing the injunction prompted the Sacklers to voluntarily contribute their personal finances to the asset pool, but their settlement agreement still received negative criticisms by public officials for lack of accountability.[129]

The circumstances surrounding *Purdue* and *USAG* are perfect examples of the necessity of the release – it provides debtor-tortfeasors with an incentive to negotiate and the opportunity to reorganize on better terms. As the court in *Purdue* expressed, third parties can seriously threaten the reorganization.[130] Especially in sexual abuse cases where the debtor is usually a non-profit organization whose ability to fund the plan would solely rest on insurers and donative funding.[131] Litigation between debtors and insurers are tying up sexual assault bankruptcy claims with liability related adversary proceedings.[132] Half of the issues addressed can be avoided or handled swiftly by additions to 524(g)(4).

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[126] Purdue, 619 B.R. at 47
[127] For perspective, the Sacklers pledged $4 billion of their personal finances and $6 billion from Purdue in the settlement agreement – Forbes last reported their personal net worth at $13 billion but they allege it is only $1.1 billion. 45&46 They allege the $4.3 billion will be paid over the course of a decade, with $500 million upfront, $1 billion from year end sales, and the rest from insurance claims.
[128] Bloomberg*, Purdue's massive opioid settlement is tangled in a bankruptcy court fight*, Los Angeles Times (Nov. 11, 2020), https://www.latimes.com/business/story/2020-11-11/purdues-opioid-settlement-bankruptcy
[129] Purdue, 619 B.R. 42 (A crucially important factor considering this case includes municipalities recovering from both the Opiod Crisis and the Coronavirus pandemic.)
[130] Purdue, 619 B.R. at 47
[131] Calhoun, *supra* at 64 "Because nonprofit enterprises frequently depend on donations for revenue, their finances are often highly irregular and depend on the enterprise's reputation. An abuse scandal or an economic downturn can significantly stifle a nonprofit's income and strain existing assets."
[132] Id.

Parties should be given a conduct-based opportunity of liability release. Section 524(g)(4) explain who may be released but not when. Non-debtor parties should only be prevented from receiving a third-party release if the conduct act risk of tying them to the claim amounts to liability of negligence or less. Tortfeasors whose conduct amounts to more than negligence do not deserve a permanent injunction, and parties who were merely negligent or de jure liable should be able to qualify for non-debtor release. The code should state that eligibility for third-party release does not mandate it, only allows for parties to consider it in the plan. These provisions provide both the authority to enact third-party releases, and clarity to what qualifies.

The code should also include a discovery exception for broader investigation into sexual abuse claims by the creditor committee based on the principles illustrated by FRE 412 and rape shield laws[133]. The committee already retains the power to investigate and rule 2004 is flexible if interpreted broadly.[134] Instead of relying on individual interpretation of discovery procedures, the court should apply those in the federal rules of civil procedure and federal rules of evidence when considering sexual assault cases. They provide a great framework with reasonable restrictions and will not prejudice ongoing litigation.

Lastly, the court must expressly state that section 524(g) is the sole means for providing for asbestos or sexual abuse mass tort claims. Codification only achieves its intended purpose of concrete authority if the terms are unambiguous. Congress should amend 524(g) to include sexual assault claims, and express that it is the sole means of recovery, in order to best regulate the debtors and rid pending uncertainties regarding its application. The court in In re Energy Future Holdings Co., recognized that establishing a litigation trust under §524(g) of the code was not the only means

[133] FRE 412
[134] John G. Stevenson, Jr., *Discovery Under the Federal Rules of Bankruptcy Procedure,* 9 Bankr. Devs. J. 643, 644 (1993)

for providing due process for unknown claimants in a bankruptcy case.[135] According to the court, a plan like the one in Energy Future does not offend the Fourteenth Amendment of the U.S. Constitution by discharging latent asbestos claims if, for example, there is a fundamentally fair process for reinstating those claims post-confirmation.[136] Here, the debtors argued that future claimants may meaningfully appeal their claims under rule 3003(3) allowing latent claims to be instated for cause.[137] However, that undermines the purpose of structuring 524(g). Leaving the statute without precise language establishing its required use dilutes the court's ability to meaningfully provide for future claimants.

V. Conclusion

Sexual assault victims deserve the protections of a codified trust-injunction recovery model. The scheme presented in section 524(g) creates the perfect framework if it can be amended to expand its application to sexual assault cases, broaden discovery rules, and place use of the injunction and third-party release on conditional behavior that safeguards the claimants.

[135] *In re* Energy Future Holdings Corp, 949 F.3d 806, 821 (3d Cir. 2020)
[136] Id.
[137] FRBP 3003(c)(3)