TRUST ISSUES: NARROWING THE U.S. TRUSTEE'S POWER IN MASS TORT BANKRUPTCIES POST-*PURDUE PHARMA*

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ABSTRACT

For years, mass-tort bankruptcies have allowed tortious debtors to reorganize their debts and maintain operations while still reasonably compensating their creditors. Because mass-torts can create thousands of victims with claims across various jurisdictions, bankruptcy offers unique aggregate litigation benefits that help the debtor manage its liability and secure equitable recovery for creditors. For these benefits to occur, however, a bankruptcy court must approve a debtor's proposed reorganization plan. The United States Trustee helps oversee this process.

In Chapter 11 reorganizations, a type of bankruptcy, the Trustee has the power to object and appeal for "any issue" at any time—a wide-reaching power derived from 11 U.S.C. § 307. Because of this statute, the Trustee can object to plans that parties with actual money on the line have already agreed to and depend on to receive creditor repayment or compensation. In the mass-tort setting, this can lead not only to delays in victim recovery but also to the possibility that victims may never recover anything at all due to competing claims and a lack of assets in the estate. This exact situation happened in the Supreme Court's recent decision in Harrington v. Purdue Pharma. Because the next mass-tort bankruptcy is a "when," not an "if," Congress has a chance to amend this statute so the Trustee does not have as much power to strike down plans that can benefit mass-tort victims.

This Comment analyzes the U.S. Trustee's role within Chapter 11 mass-tort bankruptcies following the Court's decision in Purdue Pharma. The proceeding text illustrates why reorganization is a desirable choice for mass tortfeasors and how it uniformly benefits creditors while exploring the Trustee's broad power. This Comment illustrates the Trustee's particular ability to disrupt any bankruptcy proceeding through objections and appeals

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even for matters that do not expressly violate the Bankruptcy Code. This Comment argues that Congress should amend 11 U.S.C. § 307 to limit the Trustee's authority to raise issues in the mass tort context because of the recovery limits such objections can place on creditors who may hold a claim against a debtor with a limited estate. Specifically, this Comment explains why the Trustee should only be allowed to raise an issue if a plan contains an improper application of the Bankruptcy Code. That is, an express violation of another Code requirement. This Comment hopes to demonstrate why this amendment would increase victim recovery while upholding the principles of our judicial system, honoring the interests of debtors and creditors, and maintaining integrity through judicial review.

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I. INTRODUCTION

The mass tort setting can pose difficult paths to recovery for individual victims.[1] Imagine your employer is a customer of Iron Grove Manufacturers (Iron Grove), a large corporation specializing in iron machinery. Recently, Iron Grove has been producing industrial presses with significant manufacturing defects. Your employer bought an Iron Grove press, and you use it almost every day. At a nearby factory, Sam, a worker at an automobile assembly line, uses the same industrial press from Iron Grove. One day, the machine crushes Sam's entire right arm. Given the extent of his injuries, the doctors have to amputate his arm, leaving him permanently disabled. Three days later, unaware of who Sam is and the injury he sustained, you use the press at work and end up crushing your left hand. All the bones in your hand are shattered, but the doctors say you can make a full recovery after invasive surgery and extensive physical therapy.

You and Sam each sue Iron Grove, but Sam sues first. Sam's jury awards him $15 million in damages. Iron Grove, however, only has $15 million in assets. Accordingly, Sam's claim wiped out everything Iron Grove had. You eventually make it to trial and receive a judgment in your favor, but Iron Grove does not have any money left to compensate you. Even though you fall in the same category of injured claimants, you will not recover anything because Sam made it to court first.

This demonstrates the "race to the courthouse" effect that mass tort victims often face.[2] While individual victims may have similar claims stemming from the conduct of the same tortfeasor, one may be precluded from recovering if another sues first and takes everything.[3] Such is the case for the individual tort victims in the Purdue Pharma opioid bankruptcy—except they must compete against thousands of victims.[4] When the U.S. Trustee objects to a reorganization plan, it creates the possibility of stripping creditors of the protection bankruptcy affords them and leaves individual creditors fighting to establish their claim and see who can recover first.[5] Instead of receiving a guaranteed and organized settlement through bankruptcy, these victims must individually take their claims to court if they wish to recover anything, and now must race one another to do so.[6]

This Comment recommends that Congress amend 11 U.S.C. § 307 to limit when the U.S. Trustee can raise issues in the mass tort context: only for improper applications of the Bankruptcy Code.[7] This Comment hopes to

1. *See* Lindsey D. Simon, *The Guardian Trustee in Bankruptcy Courts and Beyond*, 98 N.C. L. REV. 1297, 1305–06 (2020).
2. *See id.*
3. *See id.*
4. Harrington v. Purdue Pharma L.P., 603 U.S. 204, 209–10 (2024).
5. *See id.* at 231–32 (Kavanagh, J., dissenting); Simon, *supra* note 1, at 1305–06.
6. *See Purdue Pharma*, 603 U.S. at 209–10.
7. *See infra* Part III (describing what an improper application of the Bankruptcy Code is).

provide a limited but effective way to modify the Trustee's role while advocating for widespread tort victim recovery.[8]

Part II discusses Chapter 11 reorganizations as well as three unique benefits of the process: automatic stays, discharges, and creditor distributions.[9] Part II further examines why bankruptcy is a beneficial mass-tort litigation tool that can spread out creditors' claims while still holding a debtor accountable.[10] Part II then explains the creation and role of the Trustee.[11] Part II then describes another advocate within court systems, the amicus curiae,[12] and concludes by summarizing the United States Supreme Court's opinion on the Purdue Pharma bankruptcy.[13]

Part III begins with the proposed amendment to § 307 and describes how amending the statute will improve the quality of the Trustee's objections and ensure courts are only hearing thorough and insightful issues.[14] Part III then discusses how amending the statute will lead to increased tort victim recovery.[15] Part III further argues that the Trustee should not have the same ability to influence the outcome of a particular bankruptcy or the future implications of the Bankruptcy Code because it does not have personal stakes in the outcome.[16] Finally, Part III explains that the system will not lose integrity because of the roles courts and attorneys play in bankruptcy.[17]

II. OVERVIEW OF THE BANKRUPTCY SYSTEM AND ITS FUNCTIONS

Bankruptcy is a unique process that helps parties recover from financial stress or insolvency.[18] While bankruptcy can take on many forms and span various sections of the United States Code, this Comment focuses on Chapter 11 reorganizations.[19] This Part includes a brief overview of how bankruptcy works as well as the Trustee's role in the system.[20] Lastly, this Part discusses

8. *See infra* Part III (discussing how amending 11 U.S.C. § 307 will improve the Trustee's role in mass-tort bankruptcy cases which will enhance victim recovery and make the proceedings more efficient).

9. *See infra* Section II.A (noting three ways bankruptcy benefits a debtor and its creditors).

10. *See infra* Section II.B (explaining how bankruptcy is a strategic form of aggregate litigation).

11. *See infra* Section II.C (illustrating the Trustee's role throughout history).

12. *See infra* Section II.D (discussing the role an amicus curiae plays in resolving litigation).

13. *See infra* Section II.E (introducing the competing viewpoints of Purdue's proposed reorganization plan).

14. *See infra* Section III.A–B (noting the amendment would limit spurious objections).

15. *See infra* Section III.C (considering future tort victims whose tortfeasors undergo bankruptcy).

16. *See infra* Section III.D (comparing the debtor's and creditors' interests in the outcome of a bankruptcy to the Trustee's lack of any personal interest in the matter).

17. *See infra* Section III.E (emphasizing that the Trustee is not the only safeguard of bankruptcy).

18. *Chapter 11 – Bankruptcy Basics*, U.S. CTS., https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics (last visited Feb. 20, 2025).

19. *Id.*

20. *See infra* Section II.A–C (providing details on how the Trustee functions within bankruptcy).

how the Trustee's objections leading up to the Supreme Court's decision in *Purdue Pharma* have reshaped tort victim recovery within bankruptcy.[21]

A. Basics of the Bankruptcy System

Article I of the United States Constitution vests Congress with the exclusive authority to create "uniform [l]aws on the subject of [b]ankruptcies."[22] For years, the bankruptcy process has allowed both individuals and entities the opportunity to respond to economic hardship.[23] At its core, the process allows debt-ridden parties, or "debtors," to either discharge or create "a plan to repay [their] debts" and financially "restart."[24] Parties with claims against the debtor, either for repayment of a security interest or for legal liability that arose at or before the time the debtor declared bankruptcy, are deemed "creditors" and receive the opportunity to participate in the debtor's restructuring.[25] To benefit from the bankruptcy process, a debtor must offer up its remaining assets and craft a reorganization plan describing how it intends to compensate its creditors.[26]

Originally, bankruptcy predominantly favored creditors and subjected debtors to harsher, involuntary proceedings.[27] But over time, the law shifted from the shameful, punitive process to one that focused on debtor rehabilitation and reorganization—all under one uniform Code.[28] As such, the current system has key elements that make bankruptcy an attractive option for debtors wanting to maintain operations rather than cease operations entirely.[29] To fully appreciate the practical effects of most modern Chapter 11 bankruptcies, three of their prominent features require special attention: automatic stays, discharges, and distributions to creditors.[30]

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21. *See infra* Section II.E (explaining the Court's reasoning in striking down nonconsensual third-party releases).

22. U.S. CONST. art. I, § 8, cl. 4.

23. *See generally Bankruptcy*, U.S. CTS., https://www.uscourts.gov/services-forms/bankruptcy (last visited Feb. 20, 2025) (stating individuals, municipalities, businesses, and others may participate in bankruptcy under various provisions in the United States Code).

24. *Id.* Chapter 11 debtors typically draft reorganization plans to keep their business operating while simultaneously repaying creditors. *Chapter 11 – Bankruptcy Basics*, *supra* note 18.

25. *See* 11 U.S.C. § 101(10)(A); *Chapter 11 – Bankruptcy Basics*, *supra* note 18.

26. 1 CHAD L. SCHEXNAYDER ET AL., NEW APPLEMAN ON INSURANCE LAW LIBRARY EDITION § 145.02 (2024).

27. *A Brief History of Bankruptcy*, BANKRUPTCYDATA, https://www.bankruptcydata.com/free/history/ (last visited Feb. 20, 2025).

28. *Id.*

29. *See Chapter 11 – Bankruptcy Basics*, *supra* note 18.

30. *See generally* 11 U.S.C. §§ 362(a), 1141, 507 (describing the ways the bankruptcy system supports debtors while they attempt to reorganize).

1. Automatic Stays

Debtors cannot effectively reorganize—that is, put all of their assets on the table—if they must simultaneously endure ongoing litigation or a repayment of their debts.[31] The automatic stay halts "virtually all [creditor] actions against the debtor . . . ."[32] The stay takes effect immediately upon filing one's bankruptcy petition.[33] It encompasses all claims that arose before the debtor filed for bankruptcy.[34] For example, if a debtor files for bankruptcy, a creditor cannot successfully foreclose on the debtor in a last-minute attempt to recover.[35] Their claim is suspended.[36] Not only does this give the debtor a "breathing spell" to address its current financial status and draft a mindful reorganization plan, but it also ensures that creditors will not surreptitiously deplete the debtor's estate and prevent other creditors from receiving adequate compensation.[37]

2. Discharges

Bankruptcy exists to "give debtors a financial 'fresh start' from burdensome debts."[38] The Supreme Court acknowledged that this purpose offers debtors "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt."[39] As such, the United States Bankruptcy Code (the Code)—through the issuance of what is known as a "discharge"—releases debtors from liabilities that arose before plan confirmation[40] and prohibits creditors from attempting to collect on any debts.[41] A discharge effectively refreshes the debtor's economic status, allowing them to focus on successfully carrying out their reorganization plan without fear that a creditor's pre-existing claim will wipe out their estate assets and restart the process.[42] While it may seem odd to release a party from liability, bankruptcy is a *quid pro quo* system.[43] Chapter

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31. *See In re* Ripley, 412 B.R. 690, 697 (Bankr. E.D. Pa. 2008).
32. SCHEXNAYDER, *supra* note 26.
33. *Chapter 11 – Bankruptcy Basics*, *supra* note 18.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*; *see generally* 11 U.S.C. §§ 362(a)(3)–(4) (the automatic stay pauses "any act to obtain possession of property of [or from] the estate . . . or to exercise control over property of the estate," and "any act to create, perfect, or enforce any lien against property of the estate.").
38. *Process – Bankruptcy Basics*, U.S. CRTS. https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/process-bankruptcy-basics (last visited Feb. 20, 2025).
39. Loc. Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).
40. 11 U.S.C. § 1141(c)–(d).
41. SCHEXNAYDER, *supra* note 26.
42. *See id.*
43. *See* Harrington v. Purdue Pharma L.P., 603 U.S. 204, 209–10 (2024) ("[a] debtor can win a discharge of its debts if it proceeds with honesty and places virtually all [of] its assets on the table for its creditors.").

11 debtors automatically receive a discharge when the bankruptcy court confirms their proposed reorganization plan.[44] However, a court's approval of the debtor's plan depends on whether it meets all of the numerous requirements outlined in the Code.[45] Moreover, the Code does not discharge *all* debts.[46] Debtors are still liable for valid liens that the court has not nullified, such as those related to fraud, certain taxes, and child support.[47] Thus, a discharge is not necessarily a complete erasure of the debtor's economic past.[48]

3. Distributions to Creditors

One of the benefits associated with Chapter 11 reorganizations is that they facilitate repayment to creditors.[49] A secured creditor has a claim backed by collateral or a valid lien on the debtor's property, whereas an unsecured creditor does not have any property backing its claim.[50] While secured creditors can choose between revoking collateral or receiving its value, unsecured creditors participate in "pro rata distribution."[51] Under this distribution scheme, unsecured creditors are eligible to collect a proportionate share of their claim "as compared to the amount of all unsecured creditors' claims."[52] This process ensures that creditors with more capital at stake will recover an equitable amount once the debtor reorganizes.[53] However, the amount of a creditor's claim is not the only factor the Code accounts for, as some unsecured creditors take payment priority over others.[54] Ultimately, the repayment structure of Chapter 11 helps debtors honor the claims of their creditors while also realistically dispersing their limited assets.[55]

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44. 11 U.S.C. § 1141.

45. *See generally id.* § 1129 (illustrating that courts consider several other aspects of a plan aside from whether the debtor acted in good faith and presented all of their assets for reorganization).

46. *See Discharge in Bankruptcy – Bankruptcy Basics*, U.S. CTS., https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/discharge-bankruptcy-bankruptcy-basics (last visited Feb. 20, 2025).

47. 11 U.S.C. § 523.

48. *See id.*

49. SCHEXNAYDER, *supra* note 26.

50. *See* 11 U.S.C. § 506.

51. SCHEXNAYDER, *supra* note 26.

52. *Id.*

53. *Id.*

54. *See generally* 11 U.S.C. § 507 (outlining the payment priority for various unsecured creditors).

55. *See id.*

B. Resolving Mass Tort Liability Through Bankruptcy

Because of the unique opportunities reorganization presents to debtors, bankruptcy can be an attractive option for entities facing mass tort liability.[56] Mass torts are distinct from other legal causes of action because of the numerous claims—often in the thousands—from claimants across multiple jurisdictions.[57] As a result, mass tort litigation can pose practical issues for both the countless plaintiffs who want to effectively litigate their claims and the defendants who wish to swiftly and permanently resolve the disputes against them.[58]

1. Aggregate Litigation

One way to tackle the challenges of mass tort liability is through aggregate litigation.[59] Aggregate litigation consists of "any procedural mechanism to consolidate multiple actions into one forum for efficiency purposes."[60] This process can help parties in mass tort litigation manage the procedural load that comes with extensive claimants and ultimately help end the dispute.[61] Three common methods of aggregate litigation include class actions, multidistrict litigation, and bankruptcy.[62]

Class actions, most people's first thought when they think of mass torts, group claimants together and benefit parties through preclusion.[63] Preclusion helps introduce finality into litigation because parties may not relitigate those issues that a court has previously adjudicated.[64] But a class action and its preclusive effect can also create issues for claimants who fall outside of the class.[65]

Relatedly, multidistrict litigation facilitates the pretrial process by consolidating similar lawsuits from multiple federal districts into one district court.[66] While multidistrict litigation can reduce litigation costs, the process only covers pretrial matters.[67] Thus, once a managing district court settles all

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56. *See generally* William Organek, *Mass Tort Bankruptcy Goes Public*, 77 VAND. L. REV. 723, 732–33 (2024) (illustrating why alternate forms of litigation are less feasible for managing the intricacies of mass torts).

57. THOMAS E. WILLGING, FED. JUD. CTR., MASS TORT PROBLEMS & PROPOSALS 1–2 (1999).

58. *See* Organek, *supra* note 56, at 733, 735–37.

59. *See id.* at 726 n.8.

60. *Id.*

61. Alexandra D. Lahav, *The Continuum of Aggregation*, 53 GA. L. REV. 1393, 1394 (2019).

62. *Id.*

63. *Id.* at 1396.

64. *See id.*; Legal Information Institute, *res judicata*, CORNELL L. SCH., https://www.law.cornell.edu/wex/res_judicata (last updated Mar. 2024).

65. *See generally* Lahav, *supra* note 61, at 1397 (noting that lawyers may obtain deals on behalf of absent class members at the expense of the class itself).

66. 1 CLASS ACTION PLAYBOOK § 1.03 (2024).

67. *Id.*

pretrial matters, it must then send each individual dispute back to its original district court.[68]

2. Bankruptcy as a Litigation Tool

Bankruptcy, however, is distinct. Because the bankruptcy system offers parties efficiency and finality through aggregation, guidance through the Code, and increased hope for creditor recovery, several mass tortfeasors have used bankruptcy as a litigation tool.[69] Notable mass-tort bankruptcies include Purdue Pharma for the deceptive marketing of opioids,[70] Boy Scouts of America and the Catholic Church for sexual abuse,[71] Johns-Manville for asbestos exposure,[72] A.H. Robins for IUD products liability,[73] and Dow Corning for personal injury related to silicone breast implants.[74]

As an aggregate technique, its jurisdictional scope is broad, allowing courts to handle controversies "arising in or related to" Chapter 11 bankruptcies.[75] So when businesses reorganize because of economic hardship related to mass tort liability, bankruptcy under Chapter 11 allows debtors to resolve these pending claims under a single reorganization plan.[76]

Moreover, in addition to both discharges and automatic stays, the Bankruptcy Code brings a greater sense of control to the litigation process.[77] The Code sets out specific deadlines for each party to ensure uniformity and timeliness.[78] It also establishes the content-related compliance requirements for reorganization plans.[79] So while bankruptcy may appear overly favorable to debtors at times—especially those who file for Chapter 11 because of their tortious conduct—courts cannot approve a proposed reorganization plan unless it adheres to the Code's requirements.[80] Not only does this enforce the quid pro quo nature of the system, but it also helps debtors and creditors better

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68. *Id.*

69. *See generally* Georgene Vairo, *Mass Torts Bankruptcies: The Who, the Why and the How*, 78 AM. BANKR. L.J. 93, 100–22 (2004) (describing how three mass tortfeasors used the bankruptcy system to manage liability).

70. Harrington v. Purdue Pharma L.P., 603 U.S. 204, 209–10 (2024).

71. *In re* Boy Scouts of Am. & Del. BSA, LLC, 642 B.R. 504, 518 (Bankr. D. Del. 2022); Marie Reilly, *Diocesan Bankruptcies*, CATHOLIC PROJECT, https://catholicproject.catholic.edu/catholic-church-finances/bankruptcy-information/ (last visited Feb. 20, 2025).

72. Vairo, *supra* note 69, at 100.

73. *Id.* at 111–12.

74. *Id.* at 121.

75. 28 U.S.C. § 1334(b).

76. *See supra* Section II.A.2 (discussing how discharges release debtors from ongoing claims).

77. *See* Organek, *supra* note 56, at 733, 737–38.

78. *See* 11 U.S.C. § 1121(b) (debtors must file their reorganization plan within 120 days of the initial filing).

79. *See id.* § 1129.

80. *Id.*

understand what the reorganization process should look like and subsequently helps them enforce compliance with it.[81]

Lastly, bankruptcy creates the unconventional hope that creditors, including mass tort victims, can receive guaranteed—although limited—recovery under a reorganization plan.[82] Aggressive creditors may "race to the courthouse," establish their claim before other similarly-situated creditors, and wipe out the debtor's assets through traditional litigation.[83] With an automatic stay in place, the "loudest, quickest, or most well-connected creditors" cannot collect a disproportionate amount of the debtor's assets and leave other creditors without an opportunity to equitably recover.[84]

C. The United States Trustee in Chapter 11 Proceedings

Another key and unique feature of the bankruptcy process is the role of the United States Trustee.[85] In 1986, Congress passed the "Bankruptcy, Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986 (the Act),"[86] which officially launched the United States Trustee Program nationwide.[87] This program empowered the Office of the United States Trustee (UST) to supervise bankruptcy administration across federal courts.[88] The UST is a part of the Department of Justice and exists in twenty-one different regions across the nation.[89] Each region may encompass multiple field offices.[90] The U.S. Attorney General appoints individual trustees (the Trustee) for each judicial district.[91] The Trustee serves for five years and is subject to removal at the Attorney General's discretion.[92]

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81. *See id.*

82. *See generally id.* § 1123 (listing the various contents a reorganization plan may contain including modifications of unsecured creditors' claims of interest). This conclusion stems from the assumptions that the creditor has a claim filed against the debtor and that the debtor has enough assets in its estate to pay creditors according to the payment priority scheme. *See id.* § 507.

83. *See* Simon, *supra* note 1 (explaining how the "race to the courthouse" method contributes to a more difficult recovery process).

84. *See id.* at 1306.

85. *See* 28 U.S.C. § 586.

86. *See generally* Peter C. Alexander, *A Proposal to Abolish the Office of United States Trustee*, 30 U. MICH. J.L. REFORM 1, 1–3 (1996) (explaining how the Trustee Program used to be an experimental program in only a few districts).

87. *Id.* at 2 (clarifying that the Act did not implement the program in Alabama or North Carolina).

88. *Id.*

89. *U.S. Trustee Program*, U.S. DEP'T OF JUST., https://www.justice.gov/ust (last visited Feb. 20, 2025).

90. *See id.* (stating that there are eighty-nine field offices across the country).

91. 28 U.S.C. § 581.

92. *Id.*

1. The Purpose of the U.S. Trustee

Congress created the Trustee to implement an independent "watchdog of the bankruptcy system."[93] The Trustee aims to "[protect] the integrity and efficiency of the bankruptcy system for the benefit of all stakeholders . . . ."[94] Because bankruptcy offers debtors the opportunity to discharge claims and reorganize their debts instead of shutting down, the Trustee serves, in part, as a guardian for the court.[95] The Trustee helps protect the system by ensuring that reorganization plans adhere to the various requirements set out in the Code and ensuring that debtors do not abuse the system that provides them with a financial fresh start.[96] The Trustee, however, does not have ultimate decision-making power; therefore, bankruptcy judges retain the final say on whether a reorganization plan is Code compliant.[97] Not every Chapter 11 reorganization has a Trustee.[98] Many Chapter 11 reorganizations allow a "debtor in possession" to carry out the same functions of a Trustee.[99] A debtor in possession is a debtor who retains control of its assets during the reorganization process instead of giving them to the Trustee so they can generate value for creditors.[100] This effectively places the debtor in possession in the Trustee's role.[101] Additionally, some bankruptcy courts may appoint a Trustee if the creditor committee lacks confidence in the debtor in possession's ability to adequately reorganize.[102]

Trustees also work closely with creditors to ensure all claims are addressed through the debtor's proposed reorganization plan.[103] For instance, at the start of a bankruptcy, the Trustee presides over a § 341 meeting with creditors.[104] This meeting gives creditors and the Trustee an opportunity to meet with the debtor before the reorganization process begins and ask the debtor any questions they may have, particularly about the reorganization process.[105] The Trustee also works closely with creditor committees.[106] These

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93. U.S. Trustee Program, *About the United States Trustee Program*, U.S. DEP'T OF JUST., https://www.justice.gov/ust/about-program#FT1 (last updated Nov. 6, 2024) (internal quotations omitted).

94. *Id.*

95. Simon, *supra* note 1, at 1307 (explaining that the Trustee safeguards the integrity of bankruptcy).

96. *See id.* at 1308.

97. *See id.*

98. *Chapter 11 – Bankruptcy Basics*, *supra* note 18.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*; Legal Information Institute, *Debtor in Possession*, CORNELL L. SCH., https://www.law.cornell.edu/wex/debtor_in_possession (last updated Sept. 2022).

103. *See* 11 U.S.C. § 341.

104. *Id.*

105. Simon, *supra* note 1, at 1308.

106. *See In re* First Cap. Holdings Corp., 146 B.R. 7, 11 (Bankr. C.D. Cal. 1992).

committees confer with the Trustee over the administration of the bankruptcy proceedings and work together to represent the creditors' best interests.[107]

Through its independent watchdog role, the Trustee also attempts to alleviate the administrative burden courts face so they can better serve as neutral adjudicators in bankruptcy disputes.[108] This workload includes ensuring the debtor pays any fees for bankruptcy professionals, monitoring the status of disclosure statements, and meeting with the debtor to discuss their obligations throughout the process.[109] Accordingly, the Trustee has specific powers under the Code to fulfill these responsibilities.[110] These provisions not only allow the Trustee to carry out administrative functions to alleviate a court's judicial burden but also empower the Trustee to act in more substantial ways.[111]

2. The Trustee's Powers in Chapter 11

While one of the Trustee's main roles is overseeing the administration of bankruptcies under various chapters of the Code, the Trustee has additional powers once the bankruptcy transitions out of its preliminary, administrative stages.[112] For Chapter 11 reorganizations, two prominent powers include raising objections to plans and conducting judicial review through appealing—generally, "rais[ing] . . . issue[s]" before the court.[113] Objections in Chapter 11 proceedings usually refer to a party opposing a proposed reorganization plan rather than protesting a procedural act.[114] However, appealing has the same general meaning within bankruptcy as it does outside of it and refers to a party requesting a higher court to review the ruling of a lower court.[115]

Section 307 of the U.S. Code gives the Trustee the ability to "raise and . . . appear and be heard on any issue in any case or proceeding" under Title 11.[116] This statute empowers the Trustee to object and appeal before the court in Chapter 11 reorganizations.[117] Because this provision is so broad, it grants the Trustee the same standing as a party to the case and allows them to disrupt the bankruptcy proceeding if they believe a plan does not comply with the

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107. *See id.*; 11 U.S.C. § 1103.
108. *In re* Tomlinson Ints., Inc., 128 B.R. 181, 187 (Bankr. S.D. Tex. 1991).
109. *See* 28 U.S.C. § 586.
110. *See* 11 U.S.C. § 704.
111. *See id.*
112. *About the United States Trustee Program*, *supra* note 93.
113. *See* 11 U.S.C. § 307.
114. *Compare Chapter 11 – Bankruptcy Basics*, *supra* note 18, *with* Legal Information Institute, *Objection*, CORNELL L. SCH., https://www.law.cornell.edu/wex/objection (last updated Sept. 2023) [hereinafter LII, *Objection*] (distinguishing objections within bankruptcy from objections outside of bankruptcy).
115. *See* FED. R. APP. P. 6(a).
116. 11 U.S.C. § 307.
117. *See id.*

Code.[118] This includes disrupting reorganizations that parties have already spent countless hours negotiating over.[119]

D. The Amicus Curiae

Another way courts become aware of legal or policy arguments regarding noncompliance with the Code is through amicus curiae.[120] Amicus curiae is Latin for "friend of the court."[121] Amici, the plural form of amicus, generally consist of individuals or groups who are "not [parties] to an action, but [nevertheless have] a strong interest in the matter."[122] One prominent example of an amicus is the American Civil Liberties Union (ACLU), an organization dedicated to protecting individual freedoms.[123] The ACLU dedicates resources to crafting amicus briefs to support individuals whose rights may be at stake.[124] A court uses its discretion to determine whether it will allow amici to argue.[125] If the court gives an amicus permission to participate in the proceeding, the amicus must submit its arguments in an "amicus brief[]."[126] They thus do not present their initial arguments in the same format (orally) as parties to a case.[127]

The amicus brief is the primary, and often sole, method for courts to hear an amicus's arguments.[128] While courts may vary on what they require a brief to contain, bankruptcy courts generally require the amicus to explain their interest in the matter and why their "brief is desirable and . . . relevant to the disposition of the appeal."[129] Bankruptcy courts also impose formatting and timeline requirements for briefs, including how long they may be, when they must contain a table of contents or authorities, and how long each party has to file them with the court.[130] Amici have seven days after the appellant

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118. *See id.*

119. *See infra* Section II.E (explaining a case in which the Trustee's objections derailed a reorganization plan that the parties had already negotiated over).

120. *See* Harrington v. Purdue Pharma L.P., SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/harrington-v-purdue-pharma-l-p/ (last visited Feb. 20, 2025) [hereinafter SCOTUSBLOG].

121. Legal Information Institute, *Amicus Curiae*, CORNELL L. SCH., https://www.law.cornell.edu/wex/amicus_curiae (last updated June 2022) [hereinafter LII, *Amicus Curiae*].

122. *Id.*

123. *ACLU History*, ACLU, https://www.aclu.org/about/aclu-history#how-we-do-it (last visited Feb. 20, 2025).

124. *See Spring 2024 Impact Report*, ACLU (Mar. 25, 2024), https://www.aclu.org/publications/spring-2024-impact-report (informing the public that the ACLU is currently developing amicus briefs for a reproductive rights case).

125. *See* LII, *Amicus Curiae*, *supra* note 121.

126. *See id.*

127. *See id.* Some appellate courts may allow an amicus to speak in oral arguments, but it is less common. *See id.*

128. *See id.*

129. FED. R. BANKR. P. 8017. The brief writer must state these requirements in their motion for leave to file an amicus brief which must accompany the proposed brief itself. *Id.*

130. *Id.*

files its brief to file their briefs. [131] Generally, anyone with an interest in the outcome of a bankruptcy proceeding can serve as an amicus curiae.[132] Amici normally must obtain permission from all of the other parties to file an amicus brief, but "[t]he United States [or] its officer or agency . . . may file an amicus brief without the [consent of the parties] or leave of court."[133] Thus, the Trustee—as an officer of the United States—would not need to obtain consent from the parties before filing an amicus brief, only from the judge.[134]

E. The Purdue Pharma Bankruptcy

In June 2024, the Supreme Court issued its ruling on the Purdue Pharma bankruptcy.[135] The case concerned Purdue Pharma (Purdue), a privately held pharmaceutical company that filed for bankruptcy after facing extensive liability related to "its role in the opioid epidemic."[136] Purdue had been manufacturing OxyContin and advertising the painkiller as "a less addictive and safer alternative to other contemporary opiates prescribed for pain management" since the 1990s.[137] Years after production began, in 2007, Purdue executives faced federal charges related to drug misbranding, and the company itself faced numerous lawsuits for its role in spreading the opioid crisis.[138] Subsequently, the Sackler family, the owners of Purdue, began withdrawing money from the company's assets—roughly $11 billion—to protect themselves against anticipated personal lawsuits.[139] Because of the extensive litigation and the family's gradual withdrawals, Purdue fell into insolvency and filed for reorganization under Chapter 11.[140]

Purdue had numerous creditors across the country.[141] Both state and local governments held claims, as well as over 100,000 individual opioid abuse victims.[142] Because of the extensive number of creditors and their payment priority, Purdue's estate did not have enough money to compensate each creditor.[143] The United States held the highest priority claim at around $2 billion—a claim that would have immediately wiped out Purdue's $1.8

131. *Id.*
132. *See* LII, *Amicus Curiae*, *supra* note 121.
133. FED. R. BANKR. P. 8017.
134. *See id.*
135. SCOTUSBLOG, *supra* note 120.
136. Harrington v. Purdue Pharma L.P., 603 U.S. 204, 209 (2024).
137. Nicole Ezeh, *Supreme Court Overrules Purdue Pharma Opioid Settlement, Rejects Immunity for Sacklers*, NCSL (July 5, 2024), https://www.ncsl.org/state-legislatures-news/details/supreme-court-overrules-purdue-pharma-opioid-settlement-rejects-immunity-for-sacklers.
138. *Id.*
139. *Id.*
140. *Id.*
141. *See Purdue Pharma*, 603 U.S. at 226.
142. *See id.*
143. *See id.* at 228 (Kavanaugh, J., dissenting).

billion estate.[144] The United States would not even receive the entire $2 billion.[145] Consequently, without an adjustment to Purdue's estate, most of its creditors, including numerous victims across America, would receive nothing.[146]

While preparing for reorganization approval, Purdue incorporated a deal with the Sacklers into its proposed reorganization plan: the family would "return $4.3 billion to [Purdue's] bankruptcy estate in exchange for a judicial order that would shield the family from all opioid-related claims against them."[147] This deal, referred to as a non-consensual third-party release, would individually release the Sacklers from liability arising out of any existing and future opioid-related claims against them.[148] The bankruptcy court confirmed the plan despite objections from eight creditor states, the District of Columbia, Canadian creditors, and the U.S. Trustee.[149] A district court subsequently vacated the bankruptcy court's decision on the grounds that the Code, specifically 11 U.S.C. § 1123(b)(6), did not allow for nonconsensual third-party releases.[150]

After the district court's decision and after supporters of the plan appealed, the Sacklers renegotiated.[151] In exchange for the eight creditor states and the District of Columbia withdrawing their objections, the Sacklers would "contribute an additional $1.175 to $1.675 billion to Purdue's estate . . . . ."[152] The states and D.C. withdrew their objections, but the Canadian creditors and Trustee did not.[153] This meant the modified plan had the approval of all fifty states' attorneys general.[154] It also had widespread victim support.[155] Roughly 95% of the polled victims and other creditors approved the plan—despite their simultaneous disdain for the Sackler family and their role in the matter.[156] The Second Circuit ultimately reversed the district court's decision and approved Purdue's now-amended plan.[157] This decision caused the Trustee to appeal to the Supreme Court, which then granted certiorari.[158] The Court ultimately struck down Purdue's reorganization plan in a 5–4 decision.[159]

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144. *Id.* at 254.
145. *See id.*
146. *See id.*
147. Ezeh, *supra* note 137.
148. *Id.*
149. *See Purdue Pharma*, 603 U.S. at 210–11.
150. *See id.* at 213.
151. *See id.*
152. *Id.*
153. *Id.* The Court did not discuss why the Canadian creditors objected to the plan. *See id.*
154. *Id.* at 226.
155. *Id.*
156. *See id.*
157. *Id.* at 212–13.
158. *Id.*
159. *Id.* at 226.

The majority focused on nonconsensual third-party releases in general.[160] It emphasized that the Code has long focused on the relationship between debtors and their estate as opposed to the relationship between non-debtors and the debtor's estate.[161] In writing the majority opinion, Justice Gorsuch explained that Congress did not intend to release non-debtors from present and future claims, regardless of the circumstances surrounding a particular bankruptcy.[162] The majority also suggested that Purdue's thousands of creditors could still individually sue the Sackler family if they so desired.[163]

In contrast, the dissent focused on the equitable side of bankruptcy.[164] It described how bankruptcy courts have traditionally worked with debtors to fashion equitable relief for victims and other creditors who otherwise may be unable to recover.[165] The dissent emphasized the struggles victims often face in mass tort bankruptcies, such as collective-action problems, payment priority, and the effects of the complex relationships between large debtor organizations and their closely intertwined, non-debtor directors who may also face liability.[166]

First, it explained that by not affording § 1123(b)(6) the flexibility bankruptcy courts have traditionally granted it, the majority forced Purdue's victims to race to the courthouse so that they might recover from the Sacklers.[167] Moreover, even if these victims win on their individual claims, they could not receive any damages because the Sacklers have an indemnification agreement with Purdue.[168] Next, because of payment priority, the Purdue estate will be wiped clean after the company honors the United States's super priority claim.[169] Finally, these victims will have to navigate the intricate relationships between the Sacklers and Purdue.[170] The dissent noted that mass torts often involve large organizations whose directors and officers simultaneously carry both company assets and liability.[171] So now, victims must determine how to receive compensation for their claims when a non-debtor's assets are difficult to reach because of agreements with the debtor organization or other "legal hurdles."[172] Ultimately, the dissent stressed the harmful impact the majority decision will have on the ability of future mass tort victim creditors to recover against the

160. *See id.* at 212–13.
161. *See id.* at 214–19.
162. *See id.*
163. *See id.* at 219–20.
164. *Id.* at 226.
165. *Id.*
166. *Id.* at 234–39, 250 (Kavanaugh, J., dissenting).
167. *Id.* at 234.
168. *Id.* at 228.
169. *Id.*
170. *See id.*
171. *Id.* at 234.
172. *Id.*

next inevitably large, complex, and tortious debtor.[173] Justice Kavanaugh reiterated that these impacts are especially harsh when creditor support for Purdue's reorganization plan was high, and the case only made it to the docket because of the Trustee's objections.[174]

III. CONGRESS SHOULD AMEND 11 U.S.C. § 307 TO LIMIT A TRUSTEE'S ABILITY TO CHALLENGE "IMPROPER" APPLICATIONS OF THE CODE IN MASS-TORT CASES

The United States Code currently grants the Trustee the ability to "raise and . . . appear and be heard on any issue in any case or proceeding under [Title 11]."[175] As currently written, § 307 grants the Trustee an almost unlimited power to disrupt bankruptcy proceedings for "any" reason it sees fit.[176] To limit the Trustee's ability to disrupt mass tort bankruptcies and potentially harm victim recovery, this Comment proposes that Congress amend § 307 as follows, with text inside of the brackets indicating the proposed changes:[177]

> [(a)] The United States trustee may raise and may appear and be heard on any issue in any case[, except cases falling under subsection (b) of this section,] or proceeding under this title but may not file a plan pursuant to section 1121(c) of this title.
> [(b) Mass Tort Bankruptcies
> (1) A mass tort bankruptcy is one in which a party files for reorganization under Chapter 11 in response to financial hardship, insolvency, or liability stemming from numerous interrelated torts claims in which the claimants allege the filing party is a common issue or actor.
> (2) If the court has appointed a United States trustee to oversee a Chapter 11 reorganization under subsection (b)(1) of this section, the trustee may not raise and appear and be heard on an issue unless the trustee is raising an issue related to an improper application of § 1123(b)(6) of this title.
> (i) An improper application of § 1123(b)(6) occurs when a plan includes language that is expressly forbidden by the other provisions of this title.

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173. *Id.* at 275–77.
174. *See id.* at 253.
175. 11 U.S.C. § 307.
176. *Id.*
177. This amendment modifies the current text of 11 U.S.C. § 307. It also incorporates language from *In re* Dow Corning Corp., 211 B.R. 545, 574 (Bankr. E.D. Mich. 1997), to describe what a mass tort is and how it relates to bankruptcy. Brackets indicate the proposed changes.

> (3) The trustee must raise these issues by filing a brief with the applicable bankruptcy court. All trustee briefs under this section, notwithstanding those under subsection (b)(3)(i) of this section, must comport with the same requirements outlined in Rule 8017 of the Federal Rules of Bankruptcy Procedure. If no other party has filed an appeal, the trustee has 30 days from when the record of the lower court becomes available to file its brief.
> (i) If the trustee is submitting a brief to the Supreme Court of the United States, the brief must comport with Supreme Court Rule 37 for amicus briefs.][178]

This amendment narrows the Trustee's ability to raise issues in the mass tort bankruptcy setting. Instead of granting the Trustee free reign, the amendment imposes restrictions on the Trustee and pushes its role closer to that of an amicus curiae.[179] Support for these propositions is detailed below.[180]

A. Amending § 307 Increases a Trustee's Procedural Burden Which Helps Prevent Frivolous Objections

Raising issues before a court as an amicus curiae involves more than simply making an oral objection before a judge.[181] Typically, when a party[182] wishes to serve as an amicus curiae, it must start by receiving permission from the court.[183] If the court grants such permission, the party may file an amicus brief.[184] This brief outlines the party's "arguments and recommendations for how the [court should decide the case.]"[185]

By amending § 307, Congress would immediately modify a Trustee's ability to raise issues in a mass-tort context.[186] With this change, the Trustee would no longer be able to rely on a quick, oral objection.[187] Instead, courts would require that the Trustee file and prepare a brief in the same manner as an amicus.[188] The brief writing process slows down the impact of an

178. SUP. CT. R. 37.

179. *See generally Supreme Court Procedures*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1 (last visited Feb. 20, 2025) (describing how amici file briefs to raise arguments before the court).

180. *See infra* Section III.A–E (discussing the advantages created by amending § 307).

181. *See Supreme Court Procedures*, *supra* note 179.

182. "Party" in this context does not refer to a party in a lawsuit or other court proceeding, but rather to an individual or group in the general sense.

183. Supreme Court Procedures, *supra* note 179.

184. *Id.*

185. *Id.*

186. *See id.*

187. *See id.*

188. *See* SUP. CT. R. 37.

otherwise oral objection.[189] Thus, the Trustee would have to provide a detailed, written document to the court.[190] In submitting such a thorough document, the Trustee would inherently be discouraged from raising any frivolous arguments simply because it has the power to.[191] Adjusting this process pushes the Trustee to further reflect on the issue they intend to raise and decide if it is worth the court's time.[192]

B. Changing § 307 Makes Courts Consider Whether the Trustee Is Adding New and Useful Insight to the Proceeding

Under Supreme Court Rule 37, a party should not file an amicus brief if the issue is irrelevant or if a party has already brought the issue to the Court's attention.[193] This rule helps protect the Court's time and ensures that it hears issues necessary for the administration of justice.[194] Amending § 307 to account for "improper" applications of § 1123(b)(6) furthers this principle.[195]

Section 1123(b)(6) states that reorganization plans may contain "any other appropriate provision not inconsistent with the applicable provisions of this title."[196] In *Purdue*, the Trustee argued that the nonconsensual third-party release for the Sackler family violated § 1123(b)(6).[197] But § 1123(b)(6) does not expressly forbid nonconsensual third-party releases.[198] Instead, there was an ongoing circuit split as to whether these releases aligned with § 1123(b)(6).[199] With the amended § 307, the Trustee would only be able to raise issues that relate to express violations of Title 11, not issues pertaining to debatable aspects of a plan.[200]

By amending the statute, Congress would prevent the Trustee from raising issues that are either (1) irrelevant because they do not expressly violate the Code, or (2) a waste of the court's time because another party—such as the attorney of the debtor or creditor—has already done so.[201]

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189. *See id.*
190. *See id.*
191. *See id.*
192. *See id.*
193. SUP. CT. R. 37.
194. *See id.*
195. *See supra* Section II.A (proposing an amendment to 11 U.S.C. § 307).
196. 11 U.S.C. § 1123(b)(6).
197. *See* Harrington v. Purdue Pharma L.P., 603 U.S. 204, 212–13, 216 (2024).
198. *See* 11 U.S.C. § 1123(b)(6).
199. *Purdue Pharma*, 603 U.S. at 212–13.
200. *See supra* Section II.A (explaining how to change the Code to prevent Trustee disruption).
201. *See infra* Section III.D (discussing how courts should give more deference to the objections of parties to the bankruptcy because they have a pecuniary or reputational interest in the outcome).

C. Limiting a Trustee's Ability to Raise Issues Related to "Improper" Applications Will Lead to Increased Victim Recovery

The Trustee's objection in *Purdue* led to the Court rejecting the debtor's proposed reorganization plan and remanding the case.[202] Under Purdue's original proposal, the Sackler family was going to contribute roughly $5.5–6 billion to Purdue's bankruptcy estate in exchange for a release of all Purdue-related claims against the family.[203] With the additional money from the Sacklers, Purdue would have been able to compensate all of its creditors, including the numerous individual tort victims across the country.[204] However, because the Court struck down this plan, the future of Purdue's victims is still unknown.[205] Instead of receiving the guaranteed, although limited, payout—amounts ranging from $3,500 to as much as $48,000—these victims must now pursue their claims against the Sacklers in court, thus disposing of the race-to-the-courthouse security the discharge and automatic stay offer in bankruptcy.[206]

1. Striking Down Reorganization Plans with Widespread Creditor Support Forces Victims to Race to the Courthouse to Recover

The mass-tort bankruptcy setting is special because of the large number of creditors.[207] Without bankruptcy courts employing tools like automatic stays and discharges, creditors must navigate the complicated, untimely, and competitive litigation process if they wish to recover from those who harmed them.[208] Although Purdue's creditors may, in theory, individually sue the Sackler family, they no longer have the guarantee that they will see any form of recovery.[209] Instead, these claimants not only must take on the heavy procedural burdens of a traditional lawsuit, but they also must win in order to see a penny from the Sacklers.[210] Accordingly, traditional litigation presents various risks to mass tort victims that they would not face in bankruptcy court.[211]

First, mass tort victims often face a great power imbalance between themselves and their tortfeasor.[212] Because mass torts often, if not always,

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202. *Purdue Pharma*, 603 U.S. at 227–28 (Kavanaugh, J., dissenting).
203. *Id.* at 250–51.
204. *Id.* at 267–68.
205. *See id.*
206. *See id.* at 245–46.
207. *See In re* Dow Corning Corp., 211 B.R. 545, 574 (Bankr. E.D. Mich. 1997).
208. *See supra* Section III.A (describing why the automatic stay and discharges can reduce competitive litigation).
209. *See Purdue Pharma*, 603 U.S. at 227–30 (Kavanaugh, J., dissenting).
210. *See id.*
211. *See id.*
212. *See id.* at 227–28.

involve large, powerful establishments and corporations, individual victims generally do not have the resources to compete with such well-equipped entities.[213] Indeed, these mass tortfeasors often have the resources to hire the best lawyers—lawyers that likely have more experience litigating such tremendous claims.[214] These lawyers undoubtedly know how to unduly extend the process, such as through excessive motions or appeals, and exhaust individual victims—either financially or emotionally.[215]

Additionally, not only are victims giving up the time they would not have had to give up under the bankruptcy system, but they are also spending significant money on various aspects of litigation.[216] The discovery process alone could cost a plaintiff thousands of dollars in attorney's fees, which could discourage the plaintiff from pursuing their claim altogether.[217] Even on a contingency arrangement, the plaintiff could still lose—potentially *years* into the litigation process and after paying for court and discovery fees—and never receive any compensation from their tortfeasor.[218] And although a plaintiff may win, it will likely be after years of expensive and mentally taxing litigation.[219]

Second, a victim's initial win may prevent other victims from later recovering against the same tortfeasor.[220] When victims have to pursue their claims individually, as opposed to receiving the guaranteed recovery through a reorganization plan like the one in *Purdue*, one victim's win could deplete most, if not all, of the tortfeasor's assets.[221] Thus, even if subsequent plaintiffs win on the merits, their efforts could be in vain because there is no asset pool left to compensate them even when they have spent months, if not years, in court while expending excessive litigation costs.[222] This race to the courthouse effect essentially pits creditors against one another, inflicts a class-action problem similar to those described in Section I.A.3 of this Comment, and disrupts the organized creditor payment priority system that the Code imposes through bankruptcy.[223]

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213. *See supra* Section II.A.2 (illustrating how several infamous mass tortfeasors were large organizations).

214. *See Purdue Pharma*, 603 U.S. at 234–35 (Kavanaugh, J., dissenting).

215. *See id.*

216. *See* Practical Law Intellectual Property & Technology, *Trademark Litigation: Pre-Suit Considerations*, Practical Law Practice Note 8-520-4922, https://us.practicallaw.thomsonreuters.com/8-520-4922 (last visited Feb. 20, 2025).

217. *See id.*

218. *See Fees and Expenses,* AM. BAR ASS'N (Dec. 3, 2020), https://www.americanbar.org/groups/legal_services/milvets/aba_home_front/information_center/working_with_lawyer/fees_and_expenses/.

219. *See Purdue Pharma*, 603 U.S. at 250–51 (Kavanaugh, J., dissenting).

220. *See id.* at 253.

221. *Id.*

222. *See generally id.* (explaining how individual victims will struggle to receive compensation without bankruptcy).

223. *See supra* Section I.A.3 (explaining what the creditor payment order is and why it is important).

2. Limiting the Trustee's Ability to Raise Issues Will Prevent Future Debtors from Avoiding Creditor Repayment Through Reorganization

There is a very real chance that all of the *Purdue* victims will recover nothing—either individually from the Sacklers or through Purdue's bankruptcy.[224] The Sacklers' contribution to Purdue's bankruptcy estate was the only way victims would receive a guaranteed recovery.[225] Without their contribution, Purdue would not have enough money to "reach" individual claimants, given the payment priority scheme bankruptcy mandates.[226] In *Purdue*, the United States had the highest priority claim: $2 billion.[227] Without the Sacklers' contribution, Purdue's estate—a mere $1.2 billion—would not even fully compensate its top claimant, much less reach the individual victim-creditors whose claims fall below the government's.[228]

By amending § 307 and limiting the Trustee's ability to raise issues, future mass tort debtors will not be able to avoid compensating their victims in situations like *Purdue*.[229] That is, situations with a negotiated plan that did not expressly violate another provision of the Code.[230] One of the reasons Purdue's reorganization plan appeared unconventional and unpopular had to do with why the Sackler family contributed money to Purdue's bankruptcy estate.[231] Although their contribution made it possible for the tort victims to realistically recover, the Sacklers are the reason Purdue's estate lacked sufficient funds to compensate creditors.[232] Over time, the Sacklers transferred roughly $11 billion from Purdue to various family trusts and holding companies so that the family would be better equipped to face individual litigation linked to Purdue's opioid-related liability.[233] When Purdue finally filed for bankruptcy, the Sacklers possessed most of the organization's assets.[234] Thus, as a non-debtor, the Sacklers' assets were not available to compensate creditors.[235]

While the Sacklers' actions are reprehensible, they are nevertheless set the current reality that their victims now face.[236] So, while critics of the original reorganization plan are quick to claim that the Supreme Court's decision was "correct" because it did not let the Sackler family discharge its liability, these critics ignore the negative impacts that striking down this deal

224. *See Purdue Pharma*, 603 U.S. at 251–52 (Kavanaugh, J., dissenting).
225. *See id.* at 252–53.
226. *See id.*
227. *Id.* at 253–54.
228. *See id.*
229. *See id.* at 212 (majority opinion).
230. *Id.*
231. *See id.* at 211–12.
232. *Id.* at 209–11.
233. *See id.*
234. *See id.* at 210–11.
235. *See id.*
236. *See id.*

will have on creditors with lower-priority claims.[237] This illustrates a question that future creditors may face in mass tort bankruptcy: What if the best way for tort victims to recover is through a non-traditional reorganization plan?

Proposed reorganization plans do not just appear.[238] Parties negotiate and work together to ensure that creditors receive compensation and debtors can reorganize, all while considering their current circumstances.[239] It is a thoughtful process. Moreover, bankruptcy allows parties to be "creative" with how they reorganize.[240] As such, parties may draft plans that take on atypical solutions so that a debtor may reorganize and its creditors are able to benefit from a relatively favorable outcome.[241] Sometimes, this leads to reorganization plans that people are not expecting or that they do not expect creditors to support, such as the plan in *Purdue*.[242] Still, these plans cannot violate the Code.[243] As such, parties work diligently to ensure that plans—despite their potentially unorthodox or unexpected methods—are Code-compliant.[244] It would be one thing for the Trustee to raise an issue over a plan that expressly violates the Code, but it is another for the Trustee to voice concern over a plan that parties heavily negotiated and drafted to certify Code compliance.[245]

The next mass-tort bankruptcy may have similar circumstances. Creditors may reach a deal that, in the public eye, appears overly favorable to evil, mass tort debtors.[246] But in reality, that plan may be the best way for victims to receive compensation despite their unfortunate situation.[247] Amending § 307 would ensure that the Trustee is raising an issue because of a blatant Code violation—not because the parties have agreed to an unexpected reorganization route.[248]

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237. *See supra* Section I.A.3 (explaining how debtors repay creditors in a particular order based on the priority of their claim).

238. *See generally* 11 U.S.C. §§ 1121–29 (providing guidelines for plan creation, modification, and confirmation).

239. *See generally id.* § 1121 (providing the various parties that can participate in the plan proposal process).

240. *See, e.g.*, Jason Fernando, *Texas Two-Step Bankruptcy: Meaning, Criticism, Example* (Jan. 4, 2023), https://www.investopedia.com/texas-two-step-bankruptcy-definition-5225888 (describing how debtors will transfer their assets to a subsidiary, so the original company is not responsible for the liability).

241. *See id.*

242. *See* Harrington v. Purdue Pharma L.P., 603 U.S. 204, 211–12 (2024).

243. *See generally* 11 U.S.C. § 1129 (clarifying that a court cannot approve a plan that does not comply with all required aspects of the Code).

244. *See id.*

245. *See id.*

246. *See id.*

247. *See id.*

248. *See id.*

D. Courts Should Not Give the Trustee the Same Deference That an Objecting Debtor or Creditor Would Get Because the Trustee Lacks a Pecuniary or Reputational Interest in the Bankruptcy

The Trustee is meant to act as a neutral third-party watchdog to the bankruptcy process.[249] Accordingly, the Trustee cannot have a personal stake in the bankruptcy's outcome because such a stake would tarnish its impartiality.[250] Accordingly, the Trustee lacks both a pecuniary and reputational interest in the proceeding.[251] While the current status of § 307 grants the Trustee the ability to raise any issue it wants, amending the statute better supports the idea that debtors and creditors should lead the reorganization process because they are the true stakeholders—not the Trustee.[252]

Parties have a pecuniary interest when the outcome of a particular matter will lead to a gain or loss in the party's financial status.[253] When debtors participate in Chapter 11 reorganizations, they must disclose all of their assets and liabilities to the court.[254] Their ability to reorganize and thus continue operations depends on the court approving their reorganization plan.[255] Once the court approves the plan, the debtor must begin repaying creditors under the approved terms.[256] Accordingly, debtors have a pecuniary interest not only because they must distribute their assets to creditors but also because a successful reorganization can improve their future financial status.[257] Creditors also maintain a pecuniary interest because their ability to receive compensation depends on the terms of the reorganization plan.[258] The Trustee, however, does not receive any money from the debtor or give up any of its assets.[259]

While the idea of a reputational interest is more prominent in the employment context, debtors nevertheless have an interest in maintaining their reputation in society.[260] While debtors may undergo bankruptcy because

249. *See* Simon, *supra* note 1, at 1300.
250. *See id.*
251. *See id.*
252. *See id.*
253. *See Interest*, BLACK'S LAW DICTIONARY (12th ed. 2024).
254. *Chapter 11 – Bankruptcy Basics*, *supra* note 18.
255. 11 U.S.C. § 1129.
256. *See id.*
257. *See Chapter 11 – Bankruptcy Basics*, *supra* note 18.
258. *See id.*
259. *See* Simon, *supra* note 1, at 1300.
260. *See generally* Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 573 (1972) (explaining that government employers may infringe on a plaintiff's liberty interest in their reputation if they fire them without notice). The reputational interest here refers to a party caring about their reputation in society, not the term of art referring to a liberty interest that someone infringes on in relation to substantive due process. *Id.*

of illegal conduct, bankruptcy itself is not an inherently shameful process.[261] Debtors receive a financial fresh start because bankruptcy is a quid pro quo system.[262] After reorganizing, however, debtors may wish to refocus on their mission both to improve their public image and better contribute to society.[263] For example, Boy Scouts of America (BSA) filed for bankruptcy after facing extensive liability related to sexual abuse.[264] The court emphasized the difficulty of drafting a reorganization plan given the victims' feelings about BSA staying open and BSA's desire to continue operating and fulfill its mission of developing strong leaders.[265] While the circumstances of BSA's bankruptcy are abhorrent, they nevertheless demonstrate that debtors care about maintaining their reputation throughout and after the reorganization process.[266] If the debtor can make it through reorganization, they have another chance to rebuild their image.[267] The Trustee does not have a similar reputational interest.[268]

In *Purdue*, the Trustee objected to a provision that appellate courts were divided on rather than an express Code violation.[269] Thus, the objection concerned a debatable principle rather than an express Code violation.[270] If the amended version of § 307 was in place, the Trustee would not have been able to raise an issue over the proposed plan because the Purdue plan did not explicitly violate the Code.[271] Allowing the Trustee to raise an issue about a matter not rooted in an improper application of law allows the Trustee to impose interpretations of the Code without facing any of the consequences of those interpretations.[272] The Trustee will not lose or receive any money, and it will not face the same reputational impact as a debtor.[273] The wide discretion under the current version of § 307 allows the Trustee to carry the same influence as the debtor and creditor who have true interests on the line.[274]

Moreover, as zealous advocates, attorneys—not the Trustee—should be the ones advocating for or against circuit splits pertaining to the Code because

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261. *See generally A Brief History of Bankruptcy*, *supra* note 27 (noting that bankruptcy was a historically punitive process but now focuses on rehabilitation).

262. *See supra* Section II.A.1–2 (describing the benefits of the automatic stay and discharge for debtors); Harrington v. Purdue Pharma L.P., 603 U.S. 204, 209 (2024) ("[a] debtor can win a discharge of its debts if it proceeds with honesty and places virtually all its assets on the table for its creditors.").

263. *In re* Boy Scouts of Am. & Del. BSA, LLC, 642 B.R. 504, 518 (Bankr. D. Del. 2022).

264. *Id.*

265. *Id.*

266. *See id.*

267. *See id.*

268. *See id.*

269. Harrington v. Purdue Pharma L.P., 603 U.S. 204, 212–14 (2024).

270. *Id.*

271. *See supra* Section II.A (proposing a new amendment to the Code).

272. *See also* Simon, *supra* note 1, at 1300 (explaining that the Trustee is a neutral figure that does not have a stake in the outcome of a bankruptcy).

273. *See id.*

274. *See id.* at 1294.

it is their client who will face the outcome.[275] Under the amendment, Trustees would only be able to raise issues about clear and express areas of the law instead of arguing for the creation of a new law at the hands of a bankruptcy court.[276] Because of the Trustee's objection in *Purdue*, there is now a new standard for Chapter 11 reorganizations that will never directly impact the Trustee—only future debtors and creditors.[277]

E. Trustee Objections Are Not the Only Safeguard to Ensure That a Plan Is "Code-Compliant"

In theory, the Trustee exists to limit abuse of the bankruptcy system and promote public trust in the process as a whole.[278] While advocates for the Trustee's broad power believe the Trustee must maintain its current status to prevent abuse in the bankruptcy system, they ignore the inherent powers and responsibilities that both judges and attorneys possess.[279]

1. The Bankruptcy Court Maintains the Final Say on Reorganization Plan Compliance

Before a debtor can reorganize, it must present its reorganization plan to the court.[280] The court then has the sole power to approve or deny a debtor's plan.[281] A common concern about modifying the Trustee's role is that doing so will lead to abuse of the bankruptcy process—especially for debtors whose evil conduct put them there in the first place.[282] However, this concern is minor when analyzing the bankruptcy system as a whole. First, the federal judge presiding over the bankruptcy court is bound by the Code of Conduct for United States Judges (the Code of Conduct) and their inherent obligations to the court.[283] The Code of Conduct helps the public maintain faith in the court system and allows judges to make independent and impartial decisions that further the administration of justice.[284]

Additionally, under the Code of Conduct, judges' decisions must align with other areas of the law such as "constitutional requirements, statutes, [and] other court rules and decisional law . . . ."[285] Thus, judges will not

275. *See generally* 11 U.S.C. § 1123 (explaining that reorganization plans must account for both the debtor's future conduct and for the treatment of creditors).

276. *See id.*

277. *See* Harrington v. Purdue Pharma L.P., 603 U.S. 204, 226 (2024).

278. Simon, *supra* note 1, at 1308.

279. *See id.*

280. 11 U.S.C. § 1129.

281. *See id.*

282. Simon, *supra* note 1, at 1300–01.

283. *See* U.S. CTS., 2 GUIDE TO JUDICIARY POLICY 1–2 (Mar. 12, 2019), https://www.uscourts.gov/sites/default/files/Code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf.

284. *See id.* at 2–3.

285. *Id.* at 3.

approve plans that flagrantly violate the Bankruptcy Code because doing so would fundamentally violate the principles that uphold our justice system.[286] Moreover, bankruptcy judges do not want to risk an appeal, especially because appellants can appeal to either an appellate bankruptcy panel or a district court.[287] This option doubles the appellate avenues for bankruptcy parties and allows them to choose the more favorable court for their appeal.[288] Even at the appellate level, judicial review is always a possibility because a party can petition the Supreme Court on a writ of certiorari.[289] As such, the bankruptcy judge acts as an inherent safeguard to the system's integrity.[290]

2. Bankruptcy Attorneys Will Not Propose Plans That Blatantly Violate the Code Because Doing So May Adversely Impact Their Client

Similar to federal judges, attorneys have their own professional code of conduct.[291] Although attorneys do not have the same purview as bankruptcy judges, they are still members of the court and must act ethically and in furtherance of the law.[292] Accordingly, attorneys within the bankruptcy system, such as those for debtors, are obligated not to propose plans or negotiate deals that deliberately violate the code.[293]

Not only would knowingly proposing a plan that does not adhere to the code's requirements be an ethical violation and a waste of judicial resources, but it would also put one of the attorney's clients—the debtor—in a risky position.[294] If a debtor's plan does not comply with the code, the court will not allow the debtor to reorganize with it.[295] Thus, if an attorney knowingly submits one of these plans on behalf of the debtor, they risk the court rejecting their client's plan and restarting the whole process.[296] This harms both the debtor, who now must restart the undoubtedly expensive process, and the attorney, who could face malpractice claims or court sanctions.[297] So, while changing the Trustee's power may cause concern about abusive or unethical

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286. *See id.*

287. *See Appeals*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/types-cases/appeals (last visited Feb. 20, 2025).

288. *See id.*

289. *See id.*

290. *See* 11 U.S.C. § 1129.

291. MODEL RULES OF PROF'L CONDUCT Preamble & Scope (AM. BAR ASS'N 2018).

292. *See id.*

293. *See* Sup. Ct. of N.H. v. Piper, 470 U.S. 274, 286 (1985) (emphasizing that lawyers maintain an interest in their ethics and reputation because of the inherent nature of the legal profession).

294. *See generally* 11 U.S.C. § 1129 (explaining the multiple requirements for proposing a reorganization plan).

295. *See id.*

296. *See id.*

297. *See* FED. R. OF BANKR. P. 9011.

behavior in bankruptcy courts, other parties are working to ensure that the process runs smoothly and in accordance with the code.[298]

3. The Trustee Will Not Lose Its Watchdog Powers Because Amending § 307 Would Only Limit the Trustee in Specific Contexts

The Trustee has played a significant role in the evolution of bankruptcy.[299] Accordingly, modifying the Trustee's role in every context would be too drastic of a change for Congress to make, especially because the Trustee has numerous offices across the country.[300] As such, a complete reformation of the Trustee's role would impact almost every federal court in the country.[301] Narrowing the Trustee's role only in the mass tort context, however, allows the Trustee to continue executing the duties both courts and parties to a bankruptcy have always known the Trustee to perform, such as overseeing fees, monitoring disclosure statements, and conducting regular meetings with debtors, while still limiting its ability to disrupt reorganization plans.[302]

Additionally, the Trustee would retain its power to interact with creditors through creditor committees.[303] This interaction with creditors allows the Trustee to continue overseeing the bankruptcy proceeding, especially in its earlier stages.[304] Because creditor committees can participate in plan creation, the Trustee can still oversee the proceedings and watch for potential instances of abuse or wrongdoing.[305] While the Trustee would still be limited in raising such issues before the court, nothing in the amendment prevents the Trustee from pointing out wrongful conduct to both creditors and debtors during a plan's formidable stages.[306] Therefore, if creditors or debtors still proceed with a plan that incorporates the conduct the Trustee warned against, the court will act as a subsequent check on the plan.[307] Finally, if the conduct expressly violates the Code, the Trustee may raise that matter before the court, even under the proposed amendment.[308]

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298. *See* MODEL RULES OF PROF'L CONDUCT, *supra* note 291.

299. *See About the United States Trustee Program*, *supra* note 93.

300. *See supra* Section II.C (explaining that the Trustee has a presence in twenty-one regions in the country).

301. *See supra* Section II.C.1 (noting that the Trustee does not have an office in Alabama or North Carolina).

302. *See supra* Section II.C.1 (describing the different roles the Trustee has within the bankruptcy system aside from acting as a watchdog).

303. 11 U.S.C. § 1103(c).

304. *See id.*

305. *See id.*

306. *See supra* Section III.A (noting that the amendment does not impact the Trustee's relationship with creditor committees).

307. *See* 11 U.S.C. § 1129 (clarifying that the court can only approve a debtor's proposed plan for reorganization if it complies with all aspects of the Code).

308. *Id.*

IV. CONCLUSION

Overall, bankruptcy is a tool that parties can use to escape liability and restart after suffering great financial loss.[309] Bankruptcy offers mass tort debtors the unique opportunity to resolve multiple claims while providing creditors with a guaranteed route to recovery.[310] While Congress created the U.S. Trustee to improve the system and instill a greater sense of integrity, the current state of 11 U.S.C. § 307 grants the Trustee too much power to disrupt reorganizations, specifically in the mass tort setting where thousands of victims hold claims.[311] The circumstances in *Purdue* demonstrate how the Trustee can derail an entire, well-negotiated plan and leave thousands of victims' futures unclear.[312] Accordingly, Congress should amend § 307 to narrow the Trustee's ability to raise issues in the mass tort setting because doing so would increase victim recovery.[313] First, the Trustee would have a higher procedural burden that would decrease frivolous objections.[314] Second, limiting objections to improper applications of the Code ensures that debtors and creditors are the parties with primary control over the terms of a debtor's reorganization—an outcome that would respect our judiciary's adversarial system.[315] Third, limiting the Trustee's role will not impact the system's integrity because judges and attorneys act as a check on the process.[316] Overall, amending the statute prevents future mass tort victims from racing to the courthouse to recover from their tortfeasor without erasing the integrity of the bankruptcy system.[317]

309. *See supra* Section II.A (describing some of the beneficial aspects of bankruptcy).

310. *See supra* Section II.A.3 (describing the creditor repayment process within bankruptcy).

311. *See* 11 U.S.C. § 307.

312. *See generally* Harrington v. Purdue Pharma L.P., 603 U.S. 204, 209 (2024) (denying the debtor's proposed reorganization plan and leaving victims without recovery because the Trustee claimed that the plan violated the Code).

313. *See supra* Part III (amending 11 U.S.C. § 307 to limit the Trustee's power in mass-tort settings).

314. *See supra* Section III.A (explaining the benefits of increasing the Trustee's procedural burden regarding objections).

315. *See supra* Section III.D (illustrating how debtors and creditors have financial and reputational interests in the outcome of a bankruptcy).

316. *See supra* Section III.E (describing the other parties that must ensure that plans do not violate the Code).

317. *See supra* Section III.C (noting the harm victim creditors can experience if they must sue a mass tortfeasor).