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Senate Judiciary Committee Holds Hearing on Chapter 11 Bankruptcy Corporate Manipulation

LIST OF PANEL MEMBERS AND WITNESSES

DICK DURBIN:
This hearing of the Senate Judiciary Committee will come to order. Our hearing today is entitled, "Evading Accountability: Corporate Manipulation of Chapter 11 Bankruptcy." In October of 2021, Johnson and Johnson faced lawsuits from nearly 40,000 Americans who had been diagnosed with ovarian cancer or mesothelioma, allegedly caused by the company's talcum powder, talc-based products.

Rather than defend against these claims in district court or settle with victims, Johnson and Johnson used a legal maneuver known as the Texas Two-Step in an attempt to skirt and limit accountability and liability. Under this bankruptcy maneuver, J and J transferred its legal liabilities to a shell company called LTL Management.

Johnson and Johnson then moved that shell company to a friendly jurisdiction, put it into bankruptcy, and asked the court to stay all litigation against the still solvent and highly profitable parent company, Johnson and Johnson. Johnson and Johnson is not the only wealthy corporation to use the bankruptcy system to try to limit exposure and evade accountability.

We now turn to a video to detail some of these abuses.

[begin videotape]

UNKNOWN:
Years and really more intensely over the last two to three years, a lot of very wealthy corporations and individuals have begun finding loopholes in federal bankruptcy law. My name is Kimberly Naranjo and I'm here to ask you for your help. I have been diagnosed with mesothelioma, which is a terminal cancer that's caused by one thing and one thing only, exposure to asbestos.

After spending hours going over every place I've ever lived or work, it was determined that the only way I was exposed to asbestos was from Johnson and Johnson's baby powder. The fabulously wealthy corporation created a subsidiary, push it into bankruptcy, and then try to piggyback on that bankruptcy in order to block tens of thousands of lawsuits.

I am a voice for the thousands of people that Johnson and Johnson have harmed and we have a right to be heard. And 200,000 military servicemembers and veterans suing 3M claiming the company's earplugs were defective. 3M's legal strategy, putting its subsidiaries into bankruptcy protection. They knew that they were issuing a defective product, that they're trying to scheme a way through their bankruptcy or through these arguments to try and avoid responsibility for what they've done.

And you have a lot of legal scholars, a lot of members of Congress saying, wait a minute, wasn't bankruptcy just supposed to be for actual bankrupt insolvent companies.

[end videotape]

DICK DURBIN:
Ms. Naranjo was a witness at our earlier hearing and sadly has passed away. I don't come to this hearing as an expert in bankruptcy. My exposure to the subject is a law school course and the fact that in my regular practice of law in the city of Springfield, Illinois, I was named a trustee in bankruptcy for a gas station.

So I do not -- I never played at the highest levels, but I think what we're addressing here is certainly the jurisdiction of this committee and timely and appropriate for this hearing. We acknowledge corporate bankruptcy plays an important role in our economy. It is meant to allow a company in financial distress to go before a bankruptcy court, agree to certain conditions, in exchange get protection.

This provides space for the company to negotiate with its creditors to reach a compromise on how the company's debts will be addressed, all under the watchful eye of the bankruptcy court. If all goes well, the debtor is given a fresh start, an opportunity to move on without the burden of unmanageable debt.

That's the fundamental principle at the root of the bankruptcy system. The idea that financial calamity shouldn't be a death knell for every business, that innovation and risk can be good and that the law should provide for second chances. But if a company is going to be freed from its debts, there has to be some cost.

The company has to accept oversight of the bankruptcy court. It has to compensate its creditors according to their interest. It has to limit its operation during the course of the proceedings. Recently, certain corporations have decided they'd rather not accept that arrangement. They want all benefits of bankruptcy without the cost.

The video featured testimony from Kimberly Naranjo, a mesothelioma victim who testified last year and as I mentioned, has since passed away. We are joined today by another mesothelioma victim, Justin Bergeron, a young father, still fighting to hold Johnson and Johnson accountable while Johnson and Johnson's potential liability to Ms. Naranjo and Mr. Bergeron and thousands of other Americans is substantial.

It isn't something this company can't handle. At the time it executed the Texas Two-Step, Johnson and Johnson was valued at more than $420 billion. That year, it made nearly $64 billion in profit. When the court rejected their attempt to use this maneuver as a bad faith scheme, Johnson and Johnson sent its shell company LTL Management back into bankruptcy a mere two hours later.

Unbelievable. We've seen a similar playbook used by 3M to try to avoid accountability for allegedly selling defective combat earplugs to our troops for more than 200,000 servicemembers. We'll hear from Lori Knapp, whose father tragically died of mesothelioma allegedly caused by products manufactured by Georgia-Pacific and other corporations.

She still hasn't been able to hold the company accountable due to this bankruptcy scheme. These maneuvers are blatant attempts by wealthy corporations to bypass our tourism tort system to simply decline to be held liable. And we have every reason to expect that corporations, at least those with deep enough pockets will continue to try to manipulate bankruptcy in similar ways.

That's not what the Congress intended when it created bankruptcy. It's not something we should allow to continue. With that, I'll turn to Ranking Member Graham for his opening statement.

LINDSEY GRAHAM:
Thank you, Mr. Chairman. I look forward to hearing from the witnesses. I'm not an expert in bankruptcy either, but the whole goal is to have a global settlement. In the case of Johnson and Johnson, I think millions of dollars were -- were offered and under bankruptcy law, fraudulent transfers are prohibited and you have a litigation model to make these claims.

So we'll sit here and listen to see if that litigation can model the -- the powers of judges need to be changed by statute. But the goal of bankruptcy is to take a company, try the best you can to make claimants whole but allow a reorganization so people can move forward rather than just multidistrict litigation seems not to work.

So I understand the purpose of bankruptcy. I understand the litigation model is claimants can set aside mergers if they think they're fraudulent in the eyes of the court. So we will deal with that. But one thing we're not dealing with is a broken border. I don't know if you saw yesterday, there's 2,000 people on a train coming out of Mexico cheering and yelling because they're coming to our southern border.

Eventually, sometime, somewhere, I hope the Democratic majority will take a little bit of time and everything's important, but I can't think of anything more important than to stop what I think is literally an invasion of the country. People are being released by the thousands because there's no space left and we've got to deal with this.

We got to -- we got as a Senate come up with a solution, the House passed a border security plan, you may not like it, but at least they did it. It's time for us, Mr. Chairman, to take this problem seriously because it is a life and death situation on multiple levels.

DICK DURBIN:
Senator Graham, I share your concern about this challenge and as you know, we're scheduled to sit down tomorrow for the opening conversation about this. I hope it leads to bipartisan response, which we've seen in the past, and need to have again. This issue of bankruptcy is shared not only with the full committee, but certainly the subcommittee on federal courts, which has jurisdiction over the bankruptcy code.

I'm going to recognize Senator Sheldon Whitehouse, chair of that subcommittee for an opening statement.

SHELDON WHITEHOUSE:
Thank you, Chair Durbin, and Ranking Member Graham for holding this hearing on this important topic. Last February, Senator Kennedy and I held a hearing with the chairman's support in my Federal Court subcommittee to highlight a way that corporations have been abusing the bankruptcy system. That was the then-emerging maneuver known as the Texas Two-Step.

This ploy allows large corporations on solid financial footing like Johnson and Johnson and Georgia-Pacific, well-known names, to shirk responsibility for damage their products have caused and delay paying due compensation for Americans they have hurt. During that hearing, I outlined four main reasons the Texas Two-Step is a problem.

First, it violates the fundamental bankruptcy principle that a company must open up all of its assets and liabilities to creditors in exchange for being forgiven its debts and allowed to start anew. Second, it denies individuals their day in court and denies victims a jury of their

peers. Third, it encourages forum shopping by corporations to take advantage of more favorable locations.

Fourth, the Texas Two-Step and Myers victims in protracted bankruptcy proceedings robbing them of precious time. Proponents of the Texas Two-Step argue that this maneuver is better for victims than resolving claims through the tort system because it supposedly delivers compensation faster and more equitably than litigation.

But look at the facts, the earliest Texas Two-Step bankruptcy which started in 2017 with Georgia-Pacific is still unsolved after -- unresolved after six years. As for equity and fairness, take the fact that when Johnson and Johnson attempted to use the Texas Two-Step to resolve tens of thousands of claims against it for cancer caused by its talc products.

The company's initial proposal of a $2 billion settlement fund and its subsequent $8.9 billion settlement offer were both dismissed by courts after they determined that there was no justification for Johnson Johnson's subsidiary to declare bankruptcy in the first place given Johnson and Johnson's financial strength.

Put all this together and it sure looks like a dirty trick where a company flush with cash tries to put its assets out of reach and then bogs down tort claimants in bankruptcy proceedings that drag out for years with only a thin funding agreement as a promise to pay out compensation. In that hearing, last February, we heard from Kimberly Naranjo, whose testimony just appeared in the chairman's video.

She was diagnosed with terminal mesothelioma after using Johnson and Johnson baby powder. She sued Johnson and Johnson, and her claim was halted along with 38,000 others once Johnson and Johnson

undertook the Texas Two-Step and put its talc liabilities into bankruptcy proceedings. During Kimberly's brave and moving testimony, she told us how, when she learned that she could file a lawsuit and have it decided by a jury.

She saw a path forward for her family. She believed that justice would be done and that her loved ones would be taken care of even after she was gone. She was filled with hope. That hope was taken from her when Johnson and Johnson used the Texas Two-Step to avoid giving Ms. Naranjo and others their day in court.

In her concluding remarks that day, she spoke powerfully powerfully about how time is something we too often take for granted. She was scared for her family and the prospect that after she passed, nothing would come to a resolution for years. Ms. Naranjo died in January of this year. People are dying while corporations try out this bankruptcy truck trick to see if they can make it stick.

I continue to hope that we can work in a bipartisan fashion to address this abuse of our bankruptcy process and to make sure that injured victims get the day in court that our Constitution entitles them to. Thank you, Chairman.

DICK DURBIN:
Thank you, Senator Whitehouse. Senator Kennedy is ranking member of the subcommittee. Do you wish to make a statement?

JOHN KENNEDY:
[off-mic]

DICK DURBIN:

Thank you very much. Today we welcome five witnesses. I'll introduce the majority of witnesses and then turn to Ranking Member Graham to introduce the minority witnesses. Our first witness is Erik Haas, worldwide vice president of litigation at Johnson and Johnson, a position he's held since 2020. Previously, a partner at Patterson Belknap Webb and Tyler.

We are also joined by Professor Melissa Jacoby, the Graham Kenan professor of law in the University of California -- University of North Carolina at Chapel Hill School of Law. Professor Jacoby has written extensively on bankruptcy and is an expert on the issue. Our final witness is Lori Knapp. Ms. Knapp's father, Ed Chapman passed away from mesothelioma, a result of asbestos poisoning.

Ed was prevented from pursuing his claim against Georgia-Pacific due to the company's use of the same Texas Two-Step maneuver. Ms. Knapp is here today to help us understand how this maneuver has a direct real-life impact on American families. Ranking Member Graham, would you like to introduce your witnesses?

LINDSEY GRAHAM:
Yes, Mr. Chairman. Mr. Stephen Hessler is a partner at Sidley, Sidley Austin in New York City, leads the firm's global restructuring group. He has more than two decades of experience representing debtors, creditors, investors, and large and complex Chapter 11 cases, restructuring, acquisitions, and related litigation. He received his BA from the University of Michigan, as JD from the University of Michigan Law School.

Mr. Samir Parikh, that pretty close good, is the Robert E. Jones professor of advocacy and ethics at Lewis and Clark Law School in Portland, Oregon. His research and writing focuses on a variety of

business law and bankruptcy issues, including mass tort restructuring, fraudulent transfer law, and form shopping. He received his BA from the University of Miami and his JD from the University of Michigan Law School.

DICK DURBIN:
Thank you, Senator Graham. I'd ask the witnesses to please stand for the administration of the oath. Raise your right hand. Do you swear or affirm the testimony you're about to give before this committee will be the truth, the whole truth and nothing but the truth so help you God? Let the record reflect that all the witnesses have answered in the affirmative.

And Mr. Haas, you'll be the first to testify you have five minutes and then after all the panel has testified, members will each have five minutes for questions. Please proceed.

ERIK HAAS:
Thank you, sir. Chairman Durbin, Ranking Member Graham, and the members of the committee, thank you for the opportunity to participate in today's hearing. Mr. Chairman, you asked that we speak today to LTL's recent bankruptcy filings, which were brought to effectuate an equitable and efficient resolution of mass tort litigation that had forced J and J's standalone consumer products subsidiary into a loss position in 2020. LTL's proposed bankruptcy resolution contemplated the payment of an unprecedented $8.9 billion to resolve all claims alleging that the subsidiaries' talc powder products caused cancer.

That unprecedented offer understandably was supported by the court-appointed mediators and counsel representing the vast majority

of the talc claimants who described it as a significant victory that would provide expeditious substantial and fair compensation. The offer also was supported by Johnson and Johnson, which agreed to provide financial backing for LTL's proposed bankruptcy resolution that as the Third Circuit recognized the company had no obligation to provide.

Thus far from evading accountability as suggested by the title of this hearing, the proposed resolution would have afforded all talc claimants compensation in a timely manner, a result that is not possible in the tort system for at least three important reasons. First, J and J and its subsidiary have won the overwhelming majority of cases tried in court.

The company has prevailed because the talc claims that are contrived by the plaintiff bars are utterly meritless. Those claims have been refuted by decades of research by medical experts around the world that support the safety of consumer talc as well as the findings by the FDA and other health agencies that cosmetic talc does not cause cancer because the science is clear.

Most claimants have received and will receive absolutely nothing from litigating in the court system. And second, regardless of the merits, trying the tens of thousands of existing cases would take thousands of years. This means that most claimants will never ever have their day in court. Third, only bankruptcy provides the tools that allow both current and future claimants the ability to participate in and receive compensation from the resolution process.

Congress legislated those tools into Section 524 of the code, which provides that asbestos mass torts like ours are properly addressed by a bankruptcy trust covering current and future claims. So with the

support of counsel representing the vast majority of claimants, there was a strong likelihood of securing the requisite vote in favor of LTL's bankruptcy plan.

Indeed, our goal, going into bankruptcy was simply to let the claimants to decide for themselves with a vote on the proposed plan, whether it was in their own best interests. Unfortunately, the claimants never had that opportunity to be heard because the case was transferred to the Third Circuit which adopted a novel standard that required the bankruptcy court to dismiss.

The Third Circuit adopted that novel standard at the urging of mass tort lawyers representing a small minority of claimants, mostly mesothelioma lawyers whose business model is predicated on the possibility of winning one-off jackpot verdicts from which they will take up to a 40 percent fee. This mass tort litigation business model is not in the best interest of claimants, should not be dictating bankruptcy policy, and is a scourge facing US companies today.

Although compelled to dismiss the case, the bankruptcy court also stated that LTL had made remarkable progress towards a fair, efficient, and expeditious settlement and the court strongly encouraged LTL to continue to pursue a global resolution through bankruptcy. We intend to follow the bankruptcy court's directive to achieve a resolution that is in the best interest of and is supported by the claimants.

In the end, the claimants' vote should be what matters. We urge this committee to support legislation to clarify that the proposed resolutions like ours should get to a vote, let the people vote.

DICK DURBIN:

Thank you. Mr. Haas. Professor Jacoby, make sure your microphone is turned on. There we go. Thank you.

MELISSA JACOBY:

When I first learned about bankruptcy and its impact on laws and procedures all over the country and indeed the world, it felt like a new set of power tools and like the power tools one might have in a workshop, there's a temptation to use them broadly and try to use them to fix problems, never mind what the instruction manual is telling us about the warnings of doing so. So I'd like to draw a broader frame around what's happening in Chapter 11, the understandable role that some of these extraordinary interventions that bankruptcy offers plays, and why they are a difficult fit for really all mass tort cases, but need special care in certain situations so that they're not misused.

So these power tools, we'll talk about the automatic stay to use the jargon we can talk about the discharge, we can talk about the majority getting to bind dissenters and change their rights forever. These rules work fairly smoothly in the vast majority of big Chapter 11 commercial cases. We're talking about bondholders and lenders and other investors, debts as we typically understand them.

That's why it makes sense to impose an immediate injunction, which is a very big deal for a federal court to do. But Congress says it's automatic in the bankruptcy situation typically to stop debt collection. It's a different story to talk about stopping jury trials to determine liability about wrongdoing in the first place.

And then we get to the permanent alteration of legal obligations. Big companies already get broader permanent legal relief than financially distressed consumers do. And it is a very significant fact that you don't

need unanimous consent. You can't bind dissenters with the majority that overrides a lot of other law.

And it's one thing to do that in cases involving robust debates over interest rates and other terms, it's completely different in a series of cases that are about managing lawsuits, creating an alternative justice system, not to negotiate with banks and hedge funds, and the like. So they're overriding not just normal debt collection, they're overriding how ordinary law determines liability for wrongdoing in the first place.

So guardrails are really essential here. Now, there are a lot of cases we could talk about but Mr. Haas is here and talking about J and J. So I'll turn there. I think that Mr. Haas and I agree on some meaningful things. We agree that bankruptcy has very unique features. Those power tools cannot be found elsewhere and it's understandable why even profitable corporations would want to use them and argue that they're efficient.

I think we aspire for fair outcomes for all. I agree that all people need ethical representation and deserve it from their lawyers, whether they are an injured person or a big corporation. And I think that the bankruptcy system should be used for its intended purpose. As I think Mr. Haas was suggesting, but we have very different conceptions of what that means.

So Congress did not create bankruptcy to be the complaint department about plaintiffs' lawyers in the civil justice system or a forum to hash out the science when it hasn't gone -- one of the other courts have not always seen J and J's position on this and we can talk about the MDL and the FDA and other things if people would like.

Congress did not intend lawsuits to be stripped into a separate subsidiary. I think the history of 524(g) for asbestos, really imagine the entire operating company being in the bankruptcy. That was the design of Johns Manville. That's how it was created. And the third Circuit decision is fully in the mainstream of -- of the bankruptcy system and fully consistent, I think with what Congress had in mind.

The Fourth Circuit standard by contrast is not particularly well respected. Now I understand that J and J has the right to suggest it knows best for all the claimants. In my remaining time, I just want to highlight that J and J has an incentive to find whatever number of claimants, however vetted or not vetted, they are and consider them the majority.

It's very hard to get a handle on the entire universe. At the very least, mesothelioma and ovarian cancer claimants deserve a different voice. They are in different situations and within them have different experiences. So thank you.

DICK DURBIN:
Thank you. Professor Jacoby. Mr. Hessler.

STEPHEN HESSLER:
Chairman Durbin, Ranking Member Graham, members of the committee, thank you for inviting me to testify. The title of today's hearing indicates meaningful criticism or at least skepticism of certain facets of present bankruptcy practice. I believe much of that narrative, even though well-intended rests on an incomplete understanding of the text design in the application of the bankruptcy code.

That said, I do also believe the committee's emphasis on accountability today is entirely appropriate. As with any detailed body of law, Chapter 11 of course always may benefit from continual reform. I will not repeat my written testimony in these opening remarks, though I do want to summarize briefly two key themes, how both Congress in drafting Chapter 11 and bankruptcy court judges in applying Chapter 11, how they do enforce accountability by corporate debtors.

First, the bankruptcy code and bankruptcy rules are replete with provisions through which Congress thoroughly requires Chapter 11 debtors to justify their decisions and actions, all subject to bankruptcy, court approval, and all subject to a vast array of powerful rights granted to stakeholders to protect and pursue their claims against corporate debtors.

My testimony set forth in detail more than a dozen code mechanisms that embody the following principles. Upon filing for Chapter 11 protection, a debtor is immediately, repeatedly AND consistently subject to disclosure requirements that vastly exceed those imposed upon public companies not in bankruptcy.

I believe Congress plainly intended these transparency mechanisms to advance the due process rights of a debtor and every constituency impacted by that debtor's bankruptcy with severe consequences imposed upon the debtor if it fails to satisfy those obligations. Stated Generally filing for Chapter 11 protection means a corporation Affirmatively places itself under federal court supervision.

The bankruptcy court must authorize not only a debtor's entry into and exit from Chapter 11, but it must authorize every action of substantive import to be taken by the company, at all times, subject to

notice and an opportunity to object by all parties and interest before the court. Put simply, if a corporation is seeking to evade accountability by manipulating Chapter 11, it must overcome stakeholder opposition and bankruptcy court oversight every step of the way.

And if that effort is flailing, the debtor can't simply quit Chapter 11 and walk away from bankruptcy court supervision unless the judge expressly grants permission to leave. Next, Congress in the Bankruptcy code also provided stakeholders with multiple procedural and substantive mechanisms to combat potential improper debtor conduct.

These provisions include expansive standing and discovery rights, the ability to seek to lift the automatic stay of litigation against the debtor, the ability to seek the appointment of a trustee or examiner to run or investigate the debtor. Taken together, these provisions are designed to ensure that a Debtor may not misuse Chapter 11 to shield higher hide or transfer away assets from stakeholders that have a legal right to that value.

Finally, from my perspective as a practitioner, what is largely missing from this debate is the centrality of bankruptcy court judges in enforcing accountability. To the extent that critical inquiry is directed at the important question of whether the bankruptcy code is susceptible to abuse, the massive disclosure and compliance obligations that Congress included in the bankruptcy code make it difficult for a corporate debtor to attempt to hide much less successfully advance.

An impermissible purpose. Even assuming otherwise the adversarial tools that Congress provided to stakeholders in Chapter 11 serve as a

deterrent and if needed, a remedy for manipulation. Proving that there is widespread evasion of accountability, therefore, would logically imply that there's a breakdown in the application of Chapter 11, which brings into focus the indispensable role of bankruptcy court judges.

My testimony sought to address a few arguments that are raised, but given my time, I'll just touch briefly on two. One implied criticism is that because bankruptcy court judges are not appointed under Title 3 and bankruptcy, courts do not have jury trials, that it's suboptimal for bankruptcy court judges to resolve issues involving mass tort allegations which might otherwise be entitled to a state or federal court jury trial as a threshold.

But critical clarification, Chapter 11 addresses the resolution of claims against a debtor. It is not the substantive law that governs liability for those alleged claims. Beyond providing for bankruptcy court rulings to be appealed to higher courts, Congress also specified that any party in interest may ask the District court to withdraw the reference of a Chapter 11 case in whole or in part from the bankruptcy court so that one or more issues can be heard by an Article 3 judge as appropriate.

May I make one more quick point? Thank you for the extra time. The last point I would just want to make is just as a practical matter, recent rulings in certain high-profile mass tort Chapter 11 cases I think speak for themselves. And that's perhaps the most straightforward and compelling response to a contention that bankruptcy court judges are somehow failing to enforce the accountability provisions that Congress enshrined in the bankruptcy code.

Thank you. I appreciate the opportunity to answer questions.

DICK DURBIN:
Thanks, Mr. Hessler. Professor Parikh.

SAMIR PARIKH:
I would like to thank the committee for inviting me to testify today. It is a great honor to be here. My name is Samir Parikh. I'm the Robert Jones Professor of Advocacy and Ethics at Lewis and Clark Law School. Recent discussion about mass tort bankruptcies have certainly provided a lot of fire but not a lot of light.

So I'd like to step back for a second and ask a very simple question. What are our process objectives here? What are policymakers trying to accomplish by resolving mass tort cases? I argue that the clear objective should be to provide meritorious claimants, the recovery they deserve on the shortest timeline.

If that is the guiding light, then you can see why bankruptcy may be the optimal venue in many mass tort cases. Well, why do we land here? Well, we can take a step back and just look at it from the perspective of, well what's on the table, what are the resolution options that are available? Mass tort cases oftentimes cannot be resolved through class aggregation under Rule 23 of the federal Rules of Civil Procedure.

Supreme Court jurisprudence at the turn of the century, made it very clear if a case has future claimants or too many individualized issues regarding damages and causation, then that case cannot be resolved through Rule 23. So that's been taken off the table. So what's stepped into the void. Multidistrict litigation stepped into that void.

MDL has had a lot of successes, but it has a mixed reputation. So MDL cannot offer a global settlement. MDL cannot marshal claims in state court or claims held by future claimants. OK, so what does MDL offer? It offers an arena to have a settlement negotiation. OK, but as we all know just because parties are talking doesn't mean that settlement can be reached.

That's why a lot of cases in MDL drag on for years, five years, seven years, 10 years. Keep in mind, this is a captive process, claimants cannot opt out, they can't just say I don't want to be here anymore. I'd like to have my day in court. That is not an option. MDL also lacks transparency and that's why a lot of claimants have voiced their displeasure with it. So this is the reason why a lot of corporate defendants, a lot of stakeholders have started opting into bankruptcy.

So what does bankruptcy offer? Well, bankruptcy offers a global settlement. You can marshal claims in federal court and in state court, you can marshal claims held by current claimants, excuse me, and future claimants. Bankruptcy also offers the settlement model where parties can have that negotiation that they could have in an MDL. If they can reach a resolution, that's great.

That can be confirmed. But if they can't, the bankruptcy court judge is authorized to intervene. At that point, the judge can estimate the aggregate value of all the claims in a particular case. The corporate debtor can take that information and make a settlement offer to victims. If claimants decide that this is a fair offer, they can vote accordingly.

If a supermajority feel that way that settlement can go forward and a plan can be confirmed, That's a very powerful option. Also, bankruptcy offers a lot of transparency, shines a very bright light on

these proceedings, which is very valuable. It's not to say bankruptcy is perfect, bankruptcy is not perfect.

There's lots of things that could be fixed. I just have three things I'd like to note very quickly. First and foremost, the Section 524(g). That only applies to cases that involve asbestos claims. I think 524(g) should be amended to expand and include all mass tort cases. That way you get uniformity in process and outcomes.

Also when we think about future claimants, they have a representative appointed in bankruptcy cases. This is called a future claimants' representative, that person's appointed by the bankruptcy court. The process to appoint this individual is fundamentally broken. It needs to be revisited. The final piece is a non-consensual, non-debtor releases.

These releases play a vital role in finding resolution in many -- excuse me, mass tort cases. Without them, resolution would not be possible. Under this arrangement, a third party makes a significant contribution to a victim settlement trust. In exchange, civil claims against that party related to the case are channeled to that trust.

Once again, it provides in many cases of meaningful recovery and enhanced recovery for claimants in these cases. So it's very valuable. I believe Section 524 or excuse me, I believe the bankruptcy code actually supports these types of releases, but the language could be amended to make it very clear that this form of relief is available.

In concluding, I would just like to note going back to where I started, what's the objective here? I feel like that doesn't get discussed a lot. The objective is once again trying to find meritorious claimants, the recovery they deserve on the shortest timeline. If that is the guiding light, I do believe bankruptcy is oftentimes the optimal venue in many mass tort cases.

I hope we have time to talk about how to improve that platform instead of merely talking about how to tear that platform down. I thank the committee for this time, and I look forward to your questions.

DICK DURBIN:
Thank you, Professor. Ms. Knapp.

LORI KNAPP:
Thank you for inviting me to be here. My dad, Ed Chapman, died from asbestos cancer caused by asbestos found in drywall products that he worked with in the 1970s. He and a small group of other workers. About 10 men in total worked on many projects together using the same products and tools. At least three of those men died from mesothelioma, a cancer so rare that generally only one in 100,000 people get it. These men have been wiped out by asbestos.

The products that killed my dad were manufactured by and sold by Georgia-Pacific and other companies. Georgia-Pacific knew that their product was incredibly dangerous, but continued to sell them. In 1971, Georgia-Pacific's secret internal documents acknowledged workers would get sick from a business and that they would sue Georgia-Pacific.

But Georgia-Pacific didn't care instead they in the same documents, they callously announced a plan to blame these men for their own cancer. My dad taught me that we are all accountable for our own actions. When my dad got sick, he hired lawyers to hold these companies accountable for his -- for his sickening him and for killing his friends.

Dad was able to sue some of the companies like Union Carbide and the Florida court system. Other companies like United States Gypsum, Gypsum were actually bankrupted by their asbestos liabilities years before my dad had claims. So he still claimed against the trust and try to get some of the money that was left.

Georgia-Pacific though is not bankrupt, but they got a free pass. They filed the Texas Two-Step forcing the victims to compromise their right to a jury trial and to accept a reduced settlement in the bankruptcy court. My dad chose to fight. He refused to go along with the blackmail and he died without being able to see justice.

Georgia-Pacific filed its bankruptcy before my dad got sick. The stay that was put into place protecting Georgia-Pacific has remained in place for over six years. Meanwhile, it has been business as usual for Georgia-Pacific, which has paid $5 billion in profits to Koch Industries while the victims have received zero, nothing.

When my dad's case went to trial in March of 2020, all the defendants that had not settled were in the courtroom. My dad was too sick to be able to attend and he was isolated. But the lawyers and I were in court. This was right literally right before COVID shut down the courts, but my dad had very little energy and couldn't really be exposed to a lot of people.

So he stayed in the -- in the hotel. All the other companies negotiated settlements. This was the best he could hope for because there was no magic wand to make the cancer go away. Georgia, Georgia-Pacific has gotten away with letting people die. My dad died an excruciating horrible death that he did not deserve.

In the meantime, Georgia -Pacific's bankruptcy, he never got a chance to see any kind of justice from them. To make matters worse, they --

the delay will likely mean that Georgia-Pacific and Koch Industries escape any accountability for what they did to my father, which is a windfall for Charles Koch who is already the 20th richest person in the world.

Under Florida law, if an individual is harmed but dies before their trial, their claim for pain and suffering dies with them. Even if Georgia-Pacific's fake bankruptcy is thrown out, Georgia-Pacific will argue that my dad's estate has no claim. And make no mistake, my dad was brutalized, had an agonizing suffering and a humiliation from this asbestos cancer.

My husband and I cared for my dad during the last months of his life. I can personally attest to the horrible experience that my dad suffered. It is wrong that Georgia-Pacific continues to try to dodge accountability. When Koch Industries bought Georgia-Pacific, it knew Georgia-Pacific's asbestos products had sickened and killed thousands of Americans.

That didn't stop Koch Industries because Georgia-Pacific is a massively profitable company. Bankruptcy is for people and companies that can't pay their bills. These Texas Two-Step fake bankruptcies have turned the bankruptcy courts into a sham where profitable companies go to avoid responsibilities they are fully capable of paying.

America was founded on the principle that all men are created equal, but the reality of the Texas Two-Step bankruptcy is that they allow huge profitable companies to delay or avoid entirely taking responsibility for their actions. My dad was my hero. He was a devoted husband while my dad was struggling with his, his asbestos cancer, his wife, my stepmother, Ruth developed pancreatic cancer.

It was devastating to my dad. He was struggling for his own life and now he was trying to take care of his wife that was dying. My dad never quit taking care of himself and he never quit trying to take care of Ruth, but slowly the cancer consumed him. Seeing them through to the end was important to my dad.

The fact that Georgia-Pacific with all of its profits was effectively immune from responsibility, frustrated and confused my dad, how could a company that was massively profitable, whose products you see in nearly every bathroom, every office, every building, every restaurant, every school filed for bankruptcy.

And how could the rights be put on indefinite hold due while Georgia-Pacific sends billions of dollars of profits to Koch Industries? It pains me to know that this abuse of this bankruptcy system has been now copied by other massively profitable companies like Johnson and Johnson. This is wrong. Asbestos products have devastated American workers and their families.

When profitable companies filed for bankruptcy for the express purpose of avoiding juries by standing stranding sick Americans in the bankruptcy system while the companies continue business as usual, that's abuse and it needs to stop. My dad was a fighter, he saw things through to the end. My dad was not my biological father.

He married my mother when I was an infant, but he's the only dad I've ever known. And I couldn't have asked for a better dad. Right before he died, my dad drove himself to the Okeechobee County Courthouse and he legally adopted me. While that never mattered to me, he was my dad no matter what it did matter to him.

And he was going to finish the job of being my father and he made sure he finished the job. Dad taught me to speak up against injustice

and abuse and to hold myself and others accountable for their actions. And Dad taught me to see things through to the end. I am here to honor him by continuing his fight by seeing it through to the end and making sure that Georgia-Pacific doesn't get away with this abuse.

I ask you to do the same. Thank you.

DICK DURBIN:
Thank you, Ms. Knapp, for telling us about your dad and reminding us at the heart of this issue that we are debating is not a bankruptcy code, but a real human being who lost their lives because of exposure to asbestos. And simply we're trying to find their day in court. Thank you very much for that. We now go through the rounds of questioning of five minutes by each Senator.

Mr. Haas, I understood bankruptcy in a basic form to say, you are a company and you have more debts, then you have assets and you go into court and say I want to be discharged from this debt, prepared to pay whatever I can. I want a fresh start. So I take a look at Johnson and Johnson and say, does that fit in this situation that they would go to bankruptcy court?

In October 2021, when LTL first filed bankruptcy, Johnson and Johnson had a market capitalization of approximately $420 billion. 2022, you're following LTL's bankruptcy filing. Johnson and Johnson generated $94.9 billion in sales and $63.9 billion in profit. September 2022, Johnson and Johnson announced a $5 billion stock buyback.

Johnson and Johnson paid a dividend every quarter since LTL declared bankruptcy returning even more money to shareholders. You've dismissed the claims against you for possible asbestos in your

product, calling them meritless, junk science, one-off and beyond that, and yet you put a valuation through LTL of $8.9 billion in these claims.

How can you have it both ways? How can you be a profitable corporation worth that much money and say these meritless claims were worth 8.9 billion and you shouldn't be responsible for them? Turn the microphone on please, microphone.

ERIK HAAS:
Thank you. The entity that sold and manufactured the talc was Johnson and Johnson's Consumer, Inc and it was in a lost position in 2020, the year before the LTL entity went into bankruptcy. So JJJCI could have gone itself into bankruptcy. This is not a story about J and J. It's a story about JJJCI, Johnson and Johnson's Consumer, Inc. In the transaction that we undertook in order to put -- create LTL into place, LTL in bankruptcy, we actually provided the claimants, the talc claimants with more recourse, more assets than they would have had had we not done the transaction.

If JJCI as the enterprise had gone into bankruptcy alone? So what we were able to accomplish is two things, which were as the Third Circuit recognized the objective of the bankruptcy code, one is to optimize the recourse available to claimants and the second is to make sure that viable enterprises can go forward to the extent possible.

DICK DURBIN:
There's something missing here. Why would you create LTL, which made no products whatsoever, but simply was there as the repository of some funds for any liability, if in fact the underlying company that

made this product in question, the company was worth so few assets at the time? It doesn't follow. Let me ask you another question.

I think I read somewhere that your company, Johnson and Johnson has changed the formulation of their baby powder over the years. Is that true?

ERIK HAAS:
Johnson and Johnson Consumer, Inc, the subsidiary, changed the formulation to take talc out and use cornstarch instead and they did that in 2020 because the demand for talc had gone down because of the advertising --

DICK DURBIN:
Potential liability and tort suit.

ERIK HAAS:
Excuse me?

DICK DURBIN:
It had nothing to do with your potential liability in a tort suit?

ERIK HAAS:
No. To the contrary, as we stated at the time, it had to do with the demand that had decreased due to false and misleading advertising by the plaintiff's bar and that is at core, what is the issue here. These claims are meritless, but nonetheless even though they were --

DICK DURBIN:
They are less but worth $8.9 billion.

ERIK HAAS:
The $8.9 billion was an amount that we did not come up with. It is a number that the claimants came up with. The vast, counsel, for the vast majority of claimants approached us with an offer and they approached us and they said If you are willing to pay $8.9 billion, we will take that. We claimants will take it and that's why we went back into bankruptcy because we did so with written agreements from counsel for the vast majority of claimants.

DICK DURBIN:
Vast majority of claimants, which of course means that others who wanted their day in court for establishing their own recovery wouldn't have that chance.

ERIK HAAS:
In bankruptcy, in order for a plan to be confirmed, you need for this particular type of plan, you need a supermajority of plaintiffs, not just the vast majority, but a super majority. And that plan needs to be confirmed by the bankruptcy court. So that plan would have been approved only into the extent that the supermajority of claimants and the court determined that it was the right thing to do. Our intent going into bankruptcy was to simply let the claimants and the court decide whether or not this was the appropriate resolution because again, this was a plan that came to us that was proposed to us as a resolution that was in the best interest of claimants.

And the reason for that is twofold. One, we were winning the majority of cases in the tort system. So most claimants get nothing, absolutely nothing for litigating tort system. Secondly --

DICK DURBIN:
You make two arguments here, meritless claimants get nothing, they recover nothing and yet somebody comes up with a figure of $8.9 billion and you jump at it.

ERIK HAAS:
Right, and that --

DICK DURBIN:
You can't have it both ways. You just can't argue both ways. You went into bankruptcy court to limit the liability of Johnson and Johnson CI or Johnson and Johnson. And luckily, at least at one or two different levels, the courts have said, this is a sham. This is a maneuver in the court, which is not anticipated by the bankruptcy code.

Senator Graham?

LINDSEY GRAHAM:
Finish your thought. Mr. Haas.

ERIK HAAS:
Thank you. The bankruptcy court in dismissing the second time actually encouraged and that's the words of the court, quote, "strongly encouraged", end quote, urge us to continue the process to go forward with the bankruptcy negotiations and to go back into bankruptcy to get it done. And why? Because the claimants supported the plan.

So even though the bankruptcy court recognized that under the Third Circuit's novel new standard, which is different than every other

circuit court in the country, the bankruptcy court said nonetheless, you should go forward and do it because it's in the best interests of all claimants. And in the end, that is the key because if you're in the tort system, most of the claimants would receive zero and it would take 3,000 years to have adjudicated the cases that had been filed at the time of the bankruptcy, let alone the additional thousands that it had been added thereafter.

So the only way to get an equitable efficient resolution was through this process and you ask, why would we spend $8.9 billion? Litigation expenses. There are hundreds and millions of dollars being spent litigating meritless claims year after year after year after year. And yes, there was a desire to put a stop to that and the way to put a stop to that, that was in the best interest of all parties to claimants was the proposed resolution they made.

LINDSEY GRAHAM:
Thank you. Mr. Hessler, mass tort litigation, are you familiar with that at all?

STEPHEN HESSLER:
Yes.

LINDSEY GRAHAM:
OK. You need to put your mic on. So if you have a situation where a lot of people have been allegedly hurt, mass tort litigation allows sort of the consolidation of the claims, right?

STEPHEN HESSLER:
Yes, sir.

LINDSEY GRAHAM:
OK, and that's to get things moving quicker. You form a class, people enter into the class, and you can litigate for the entire class. The goal of that is to do what?

STEPHEN HESSLER:
Get to a consensual resolution as quickly as possible.

LINDSEY GRAHAM:
Bankruptcy in terms of selling outstanding litigation has a its own system. Is that correct?

STEPHEN HESSLER:
It does have its own set of federal bankruptcy rules. They're notionally consistent with the federal rules of civil procedure, but they actually move fast.

LINDSEY GRAHAM:
But the goal of this is to have claimants come in, resolve the matter, bring closure in a more expedited fashion.

STEPHEN HESSLER:
Yes.

LINDSEY GRAHAM:
In general litigation. Mr. Professor, in the Johnson and Johnson case, did the system work in your view?

SAMIR PARIKH:
Did the system work in Johnson and Johnson? Well, the case was dismissed. We didn't necessarily get a chance to see that settlement be realized. So that's why I mentioned earlier this idea of going back to this objective, getting meritorious claimants the recovery they deserve on the shortest timeline, the thinking was that would have been possible if the settlement would have been allowed to move forward.

LINDSEY GRAHAM:
OK, so in terms of how to settle these claims, do you think bankruptcy, what changes would you recommend we make to the bankruptcy system?

SAMIR PARIKH:
I outlined some of those in my oral statement, I think making one section of the code applicable to all mass tort cases, that would be very valuable. The idea of improving the integrity of the system when we think about who's representing future claimants, of course, these victims are not in the room, someone has to represent their interests.

The process of appointing that person has to be addressed to address due process concerns and then also this idea of having the tools, as Professor Jacoby mentioned, right. So in bankruptcy we have these power tools, sometimes they are essential to reaching resolution, one of which is the third party releases.

These releases under very limited circumstances can be extremely valuable.

LINDSEY GRAHAM:
Urge people to put money into the system, but what they get in return is finality, right?

SAMIR PARIKH:
Exactly, exactly. And the idea is that that could improve victim recovery.

LINDSEY GRAHAM:
I mean you know, trying to get claimants, a pot of money people can apply for in real time. Well, fascinating discussion, one thing I would say to the committee is that there are different ways to resolve litigation, mass tort litigation, major claims against big companies. In social media, there is no model like this, so we may not agree on how to resolve this issue.

But if you're harmed by social media, you have nothing zero, zip. That's where I hope the committee can come together and create rights of actions to the millions of Americans who are being abused without any opportunity to have their day in any court or any system. Thank you, Senator. Senator Whitehouse.

SHELDON WHITEHOUSE:
Thank you, Chairman. Welcome Professor Jacoby. I see that the lawyer witnesses who support the corporate Two-Step have maneuvered to outnumber you three to one on this panel. So stand your ground, it's good to have you here. Ms. Knapp offered a pretty compelling point, which is that by virtue of stalling her dad's recovery, until after he had died the system, the corporate potentially liable

party here was able to extinguish his pain and suffering claims, make them vanish, whereas if they'd had to address them while he was alive, they would be a part of his recovery.

Is that a legitimate use of delay by corporate defendants? And is it a real problem, is she stating something that is a significant problem we should pay attention to?

MELISSA JACOBY:
Senator Whitehouse, I think your question goes to the very different environment of mass tort cases, especially preceded by divisive mergers where there's not an operating company in bankruptcy. And the great majority of commercial big corporate Chapter 11 is that I believe that Mr. Hessler spends, spends his time on where it's less likely that one would fall into this circumstance.

There should be many tools to keep Chapter 11s moving. If anything, some Chapter 11s may go too quickly, but that is not what's happening here in these divisive merger cases. They are indeed stalled. And and there are real consequences.

SHELDON WHITEHOUSE:
That's what I was trying to get you.

MELISSA JACOBY:
I'm sorry, Senator Whitehouse, life and death. And I think that is very important. It's bankruptcy and the experts in bankruptcy talk a lot about money and of course they do. And in a lot of situations that's all that's at stake. These kind of claims involve accountability, making sure something like this doesn't happen again, honoring and acknowledging misconduct and letting people tell their stories.

And bankruptcy is not designed for all of those things, maybe it could be. So I am very worried about the concerns that you raise, Senator Whitehouse.

SHELDON WHITEHOUSE:
So let's -- let's talk a little bit more about that money. Mr. Haas made the point that the Johnson and Johnson bankruptcy fund measured favorably against the assets of the subsidiary, JJCI. It strikes me that Johnson and Johnson controls what assets are in JJCI. There are innumerable ways within a corporate structure of moving assets between subsidiaries.

Why should the argument that we're doing better than our divided subsidiary would provide be given any credence at all when that measure, when that bar can be driven right to the ground by the very people who are seeking to dodge their responsibilities?

MELISSA JACOBY:
This question again goes to, I think, a division we see between the average commercial case and what's going on especially in the divisive merger cases designed only for personal injury, wrongful death claims and other other mass tort contexts. Typically corporate form is honored in bankruptcy, that the entity that has filed, we look to that.

There are tools, I think Senator Graham mentioned such as fraudulent transfer to consider various corporate transfers. We also do need to look at non-bankruptcy tort law.

SHELDON WHITEHOUSE:

Corruption on fraudulent transfers, are you aware of any fraudulent transfer challenge in a Texas Two-Step type proceeding that has ever succeeded?

MELISSA JACOBY:
It takes a long time to tee them up. I believe they are underway, but it may be years until they were resolved.

SHELDON WHITEHOUSE:
Got it. OK, and then what is the risk of forum shopping here, where a big corporation that's doing business all over the country can pick the jurisdiction in which they love the bankruptcy judge the most because he's the worst judge for plaintiffs and the best judge for the corporation?

MELISSA JACOBY:
These cases involve two layers of forum shopping, one is opting one's problems into the bankruptcy regime in the first place rather than state court, rather than the MDL, other federal courts, or fora. Then we get to the question that bankruptcies, corporate venue choices are unlike any other civil procedure rules I'm aware of in the federal system.

The amount of latitude given to a big enterprise to choose its form does not match how we typically do personal jurisdiction, how we typically do venue rules. And that does give a lot of latitude. I think there are a lot of reasons that a particular court might be selected, but this is a continuing issue really in the full range of corporate bankruptcy cases, but also we can see in mass tort cases.

SHELDON WHITEHOUSE:
Thank you. All right. Time's expired and you're holding up very well, outnumbered.

DICK DURBIN:
Thank you, Senator Whitehouse. Senator Grassley.

CHUCK GRASSLEY:
Professor Parikh, why are large corporations like Johnson and Johnson turning to bankruptcy system to resolve these tort cases? But that leads me to your opinion, should our focus be on the bankruptcy system or more appropriately on a broken mass tort system?

SAMIR PARIKH:
That's a great question, Senator Grassley. I do think probably there's enough problems going around where both deserve some attention. But I do think that the reason why a lot of companies are opting into bankruptcy for the reasons I noted in my oral statement, which is that if you are seeking global settlement on an expedited timeline, bankruptcy offers that.

Also in terms of there's a -- there's a fear that there are a lot of non-meritorious claims entering the system. MDL has not proven adept at addressing that phenomenon and bankruptcy may not be adept at it either, but at least that does represent an option at this point. So that's -- I think that's the reason why a lot of corporate debtors are opting into bankruptcy, hoping to have finality, hoping to have certainty, but also hoping to settle this quickly.

And that can be very good for victims. The idea of getting a recovery on a short timeline. Remember these cases in MDL, If the bankruptcy didn't exist, these cases would be sent back to the MDL process. You don't get your day in court in MDL. You're captive of that system, we should be very clear about that.

You do not get your day in court, there are bellwether trials, but that's it. So you're along for the ride as a -- as a claimant in that process as well. It has a lot of -- it has a lot of benefits for the right type of case. But most modern mass tort cases are not going to thrive in each resolution in an MDL process.

CHUCK GRASSLEY:
OK. Mr. Haas, can you tell us what will happen if Johnson and Johnson's currently pledge of 8 to 9/10 billion runs out? And how will Johnson Johnson ensure that talc claimants achieve a fair measure of justice into the necessary future as long as the talc claims arise?

ERIK HAAS:
Currently, we are in the tort system, so we will be litigating in the court system until such a point in time that we reached another arrangement with the claimants as recommended by the bankruptcy court and in the tort court system, sir, Johnson and Johnson prevails in the vast majority, the overwhelming majority of the cases, 76 percent of the cases that have been tried.

So to the extent that we will be litigating in the tort system, that $8.9 billion will fund litigation for decades and decades to come, in which case we believe, based upon the track record to date, that we will prevail in most of those cases because these claims are meritless. But it will take decades the plaintiffs in the last bankruptcy hearing

affirmatively represented and told the court that you can try no more than 20 cases a year.

At that rate, it won't just be the 3,000 years to try the existing cases, but it would be 20,000 years to try the cases that they say now exist. So ultimately at the end of the day, the $8.9 billion is going to go to one place, lawyers, who are litigating this case. A bankruptcy resolution would provide and is the only way to provide in the short term an equitable resolution, not only for the current claimants, but the future claimants.

That is the only way that these claimants will receive their money.

CHUCK GRASSLEY:
If your settlement is approved, what would be the minimum settlement for each individual plaintiff?

ERIK HAAS:
That ultimately is decided by the plaintiff lawyers through what's called the TDP process which they set up a tort distribution process, effectively what it is. The number that is relevant from the company's perspective is the 8.9 billion that they requested that we provide as a condition of making that resolution.

So ultimately that is in the hands of the plaintiff lawyers.

CHUCK GRASSLEY:
OK, Mr. Hessler, outside of the divisional merger context, how often do you encounter non-consensual third party releases in these tort cases?

STEPHEN HESSLER:
Outside of the banquet? Oh, I'm sorry, is that for me?

CHUCK GRASSLEY:
Yes.

STEPHEN HESSLER:
Outside of the mass tort context, make sure your question how often are the third party, the nonconsensual third party release is litigated. Within a narrow confine of the United States trustee's office frequently brings objections to third party releases in the mass tort context. It's going to be litigated almost every time that it's included in the plan.

CHUCK GRASSLEY:
OK. Thank you very much.

DICK DURBIN:
Thank you. Senator Grassley. Senator Klobuchar.

AMY KLOBUCHAR:
Thank you very much, Mr. Chairman, and thank you for calling this important hearing. After a company filed for Chapter 11, employees risk, as we all know, losing their livelihoods health benefits pensions through no fault of their own. These are things that workers have worked hard for and have earned. I'm going to focus, I think, the nature of my questions on you, Professor Jacoby.

This issue has become relevant in a big way in my state because just last month, Yellow Corp, one of the largest LTL carriers in the country filed for bankruptcy. This bankruptcy jeopardizes the livelihood and health benefits of many hard working Minnesotans, including 480 Minnesota Teamsters. Do you agree that it is important that the bankruptcy process protects workers, including collective bargaining agreements, wage claims, health benefits, and retiree pensions?

MELISSA JACOBY:
Yes, I do Senator. And I certainly think that was an animating force of Chapter 11 to begin with, the idea of allowing companies to restructure to provide worker protections, to save jobs.

AMY KLOBUCHAR:
And how are the interests of a bankrupt company's employees currently treated under the bankruptcy code? And how would you improve bankruptcy protection for workers?

MELISSA JACOBY:
Well, one thing that I worry about is that workers can be used as a justification to ask for things that aren't actually in the bankruptcy code, very quick going concern sales and other kinds of deals. And often that's premised on saving jobs that that that that this quick sale will save jobs, that agreeing to a loan at a very high interest rate will save jobs.

And yet there's often no guarantee, it's often not in the -- if we read the fine print of the sale agreement, there may be no guarantees. So I would like -- I think there should be more examination of what happens to jobs and the quality of those jobs in that -- in that kind of

scenario. And I think we need to look at employment as well as in the union context given so many of the companies that filed for bankruptcy may not be unionized.

AMY KLOBUCHAR:
Right, so are you talking about changing some of the provisions in law then?

MELISSA JACOBY:
I think that could be warranted. I think it also makes sense to continue to look at what kind of protection is given to worker claims. There are certain priority claims in the bankruptcy code that often it's suggested could be updated to give increased protection and sometimes in some cases even admit those administrative priority claims or other priority claims are not honored as they should be. So I think that should be looked at too.

AMY KLOBUCHAR:
So the US trustee component of the Department of Justice, which is tasked, right, with overseeing the administration of these bankruptcy cases. So the trustee plays a really important role in bankruptcy proceedings and represents the interests of the public. This often means ensuring that the interests of a debtor's, unsecured creditors are represented.

How can Congress work with the US trustee a different way to do this to ensure that the interests of employees and pensioners are properly represented and protected during reorg?

MELISSA JACOBY:

So the complicated job that the government watchdog has, which is what essentially the US trustee program in the Department of Justice is, is they're supposed to appoint a committee that speaks for a full range of creditors. And yet we know even within a mass tort case, the creditors are not an equal footing.

They may not have equal strength of claims, so it's hard to have one for another. We expand that when we're talking about about workers, how to make sure a committee is properly representative of those who need protection. If the committee does not incorporate the full range, what other mechanisms can there be to get the constituencies a seat at the negotiating table?

Because bankruptcy is supposed to be about that collaboration, they need a seat at the table.

AMY KLOBUCHAR:
And how could the bankruptcy code be improved, my last question, to better ensure that harm consumers are respected during the restructuring negotiations and you talked about victims as well in your testimony?

MELISSA JACOBY:
Sure, well, that's -- I would love to think about that a longer time and I'm happy to, to follow up with you. I do think that the -- in terms of individuals, real humans, your constituents who find themselves in a bankruptcy and say, what am I doing here, they need more of a voice in the process. The concept of procedural justice that the process has to seem fair independent of what the outcome is and I think maybe many of us -- I won't want to speak for anyone else, could agree on that, that there's more that the individuals can to -- that can be done

to recognize their individual voice because they are not a mass even if there are a lot of them.

They are individuals with very different situations and we need more recognition of that during a bankruptcy. It's not enough in a mass tort case to have that in a trust afterward. Those are private organizations essentially and very hard to see what's happening there. We need more procedural justice during a big Chapter 11 bankruptcy case.

OK, Thank you.

DICK DURBIN:
Thank you, Senator Klobuchar. Senator Kennedy.

JOHN KENNEDY:
Thank you. Mr. Chairman. Mr. Haas, you're with Johnson and Johnson, is that right? Yes, sir, how is that stakeholder capitalism working out for you?

ERIK HAAS:
How is it working for Johnson and Johnson? It's one of the greatest honors of my life.

JOHN KENNEDY:
OK. I see where you, Johnson and Johnson, has joined with a number of other good American companies, JP Morgan. He's not a company, Mr. Colin, Colin Kaepernick. On his issue of police brutality, Procter and Gamble, Facebook, Apple, you all pledged $50 billion to quote, "be a force for social change and fight injustice."

$50 billion is a lot of money. How is that commitment consistent with what you're asking us to do here today?

ERIK HAAS:
Sir, I'm not aware of the particular commitment you're referencing, but I could say dispositive.

JOHN KENNEDY:
It's got to be right.

ERIK HAAS:
I could say just positively that the consistency is in the end to ensure that each and every act that the company takes is consistent with our credo and our credo puts the public and our patients first, right.

JOHN KENNEDY:
Let me ask the professor a few basic questions because I'm still learning about this issue. Johnson and Johnson took it for two -- I forgot to ask you one question. How many talc cases have you tried to verdict?

ERIK HAAS:
There have been 42 cases that have gone to verdict, of those we have prevailed in 32.

JOHN KENNEDY:
OK. So you've lost ten.

ERIK HAAS:

Yes.

JOHN KENNEDY:
OK. And what were the total damages and the 10 that you lost?

ERIK HAAS:
The damages ranged dramatically --

JOHN KENNEDY:
Give me a total.

ERIK HAAS:
I don't know the total. I can give you an approximate, the highest one was in the billions. OK.

JOHN KENNEDY:
All right, Professor, I don't want to just pick on Johnson and Johnson, but they're the one here. Let me pick the Georgia-Pacific, OK. I don't -- I don't want to pick on anybody. I'm learning on this issue, but let's call them corporation A get sued in mass with -- with respect to a mass torts, they spin off the liabilities to a shell corporation and that shell corporation files Chapter 11 bankruptcy, right?

SAMIR PARIKH:
Sure.

JOHN KENNEDY:
Is that legal under the bankruptcy code?

SAMIR PARIKH:
Is that legal? The code does not restrict that necessarily. Courts have found that there are a variety of bases to reject that sort of action. So courts have been pretty active in this space. I should probably --

JOHN KENNEDY:
What's with the census -- I mean, some bankruptcy judges say this is a legitimate use of the bankruptcy code, I presume. Other bankruptcy judges say no, it's not and it's dismissed. Is that a fair statement?

SAMIR PARIKH:
That that is a fair statement. I think that the nuance here, if you don't mind, let's flesh out a little bit.

JOHN KENNEDY:
What's the national consensus on this?

SAMIR PARIKH:
I think the national consensus is that this is a proper action under state law. But to the extent there is some sort of impropriety, bankruptcy court judges are very well positioned to police that as we've seen in the LTL case. So it's not that Senator White House point out that was supporting Texas Two-Step, I'm not supporting Texas' Two-Step.

I'm merely providing that the extent there is malfeasance that can be addressed.

JOHN KENNEDY:

This is an abuse of the code, right? Exactly and courts can address -- and how many have done that?

SAMIR PARIKH:
Well, the most prominent one is LTL. So in the Third Circuit, now there's a very rigorous test.

JOHN KENNEDY:
There's a split among the circuits?

SAMIR PARIKH:
There is -- there is -- so the Fourth Circuit we were talking about forum shopping earlier that would encourage forum shopping, absolutely.

JOHN KENNEDY:
OK, is there a case before the Supreme Court to resolve this?

SAMIR PARIKH:
No.

JOHN KENNEDY:
But there's one coming, I mean and what are you -- what are you asking us to do today? The -- the -- let me start with Mr. Haas again. What are you asking us to do today?

ERIK HAAS:
The ask from our perspective to Congress would be to make uniform that very issue you just identified whether -- what is the standard with

respect to dismissing a case. Now there's a distinction between the propriety of a Texas Two-Step, let's call that, it's a divisional merger statute. And the question of what is a standard that you apply when you dismiss the case?

Our case was not dismissed because of anything to do with the Texas Two-Step. Nobody challenged the Texas Two-Step in our case, in fact.

JOHN KENNEDY:
She just had a golden opportunity to answer my question. Let me ask you Mr. Parikh and you didn't do it, Professor, tell me what you think we should do today? I mean, what do you think Congress would do?

SAMIR PARIKH:
I think there are very large issues here. I think as I mentioned before, 524(g) needs to be amended to capture all mass tort cases. Once that's done, you can have uniformity in process and procedure with all these cases. Some involve asbestos, some don't. The code could be revised to provide clarity on whether third party releases can be part of a plan.

I think that would be very helpful and of course the future claimant's representative. If that could be modified, have some more integrity in that selection process. Those pieces together I think would really improve the process.

JOHN KENNEDY:
Thank you. Thank you, Mr. Chairman.

DICK DURBIN:

Senator Kennedy asked a good question, we tried to follow through on it is to just what were the verdicts. Are the settlements in these cases -- We -- some of it is hard to come by very quickly, but there was one case in Missouri that was 4.6 billion for a group of 20 claimants reduced on appeal to 2 billion to give you a range here, but the -- remember the offer from Johnson and Johnson through LTL was for 8.9 billion for 60,000 claimants.

Put that in perspective. Next up, I believe is Senator Hirono.

MAZIE K. HIRONO:
Thank you. Mr. Chairman. Professor Parikh, you mentioned that the -- what we describe as the Texas Two-Step is a proper action under state law, those two states being Texas and Delaware. Those are the only two states that allow for divisive mergers, is that not so?

SAMIR PARIKH:
It's also Pennsylvania and Arizona.

MAZIE K. HIRONO:
There's a third state, so a question for Professor Jacoby -- sorry, the Texas Two-Step that we're talking about today, which is, as I said, also possible under Delaware and now we're told Pennsylvania law, relies on a quirk of state corporate law. But it is far from clear to me that a state fraudulent transfer law would actually allow these divisive mergers to be treated as anything other than fraudulent transfers in any event.

Shouldn't we establish some sort of federal minimum standard to prevent a race to the bottom among the states, all trying to create innovative ways to attract corporations considering bankruptcy? So

what used to be just Texas and Delaware now Pennsylvania is getting in on the action as far as I can tell, enabling Texas Two-Steps.

So should we be considering some sort of a minimum kind of standard to -- to make it a lot harder for people to avoid this kind of litigation?

MELISSA JACOBY:
So certainly, if a case is properly within the domain of the bankruptcy system, as that's defined in the constitution, which I think of as narrowly, more narrowly than some of my colleagues here, then you certainly have the right when a case is in that domain to set additional rules. And we have an example of that now where federal fraudulent transfer law can apply to divisive merger bankruptcies.

That is being teed up in, I believe, the Western District of North Carolina cases and that's true even if state law seeks to declare in a statute or a court that under state law, it would not qualify for fraudulent transfer. So yes, federal bankruptcy cases and Congress has the authority to set rules in the -- in the bankruptcy regime and that has already -- there already is a law to start that.

It takes a lot of work to make it apply, it can take years.

MAZIE K. HIRONO:
What is the law that starts that process that establish some sort of federal standard for fraudulent transfers?

MELISSA JACOBY:
Section 548 of the bankruptcy code.

MAZIE K. HIRONO:
There just seems to be something wrong with these divisive mergers that enable a corporation to establish another entity which then files for bankruptcy so that they can get out from under the kind of litigation that they would otherwise be subject to. So even under the kind of mass tort situation, isn't there a way for settlements to occur?

MELISSA JACOBY:
The vast majority of mass tort settlements occur outside of bankruptcy. I think it's interesting to look at the opioid cases. There was a lot of attention and of course, one is gone to the Supreme Court, the Purdue Pharma case. There have been several others about the importance of those settlements and I don't take anything away from the opioid abatement money that would come from them, but they are -- they are a small fraction of the total settlement value.

The idea that one cannot settle mass tort actions outside of bankruptcy, I don't think.

MAZIE K. HIRONO:
I think so and also the vast wouldn't you say the vast majority or a majority of tort cases are settled?

MELISSA JACOBY:
The vast majority of nearly all lawsuits are settled.

MAZIE K. HIRONO:
That's right.

MELISSA JACOBY:
So a day in court can mean more than the trial. It means starting the process, having discovery, being able to ask questions, and then deciding to have a resolution and taking the result, win or lose.

MAZIE K. HIRONO:
And the thing about Chapter 11 bankruptcy is it has nothing to do with liability or the having any kind of discovery that leads to concerns about liability. And usually when you enter -- when you do discovery, you can pretty much be able to argue that the strength of liability, which also -- which then encourages parties to settle.

Isn't that so?

MELISSA JACOBY:
So I do want to emphasize that the bankruptcy system does use rules of procedure, does have discovery. The question is what it's used for and how much control claimants may have in that process. I also do, if you'll indulge me, the -- the vetting of these claims, I think corporate defendants have an incentive in the mass tort context to defer that.

And so we don't have that discovery.

MAZIE K. HIRONO:
It seems to me that the discovery in a bankruptcy case has to do with whether X owes Y any money. In the case of a tort, there's -- there is negligence, there are damages, there are all kinds of other issues that arise. And that's why I just don't think that the bankruptcy laws particularly apply in a tort situation even though these cases may take a long time.

Thank you, Mr. Chairman.

DICK DURBIN:
Senator Hawley.

JOSH HAWLEY:
Thank you, Mr. Chairman. Mr. Haas, if I could just come back to you, let me ask you about the Ingham case. I'm sure you remember that case. That was the one litigated in my state, in the state of Missouri. 22 plaintiffs who alleged that your baby powder caused ovarian cancer. By the way, didn't the FDA find that there were traces of asbestos in your baby powder?

ERIK HAAS:
The FDA outsourced to a lab that found asbestos, a trace amount of asbestos in one lot in 150 studies thereafter were done of that batch and found no asbestos and if there was a spill --

JOSH HAWLEY:
OK, OK. OK, that's a lot of -- that's quite the word, but if we just compress, I think the answer is yes, right? Did the FDA find that there were traces of asbestos in your baby powder?

ERIK HAAS:
No. Ultimately, no, no.

JOSH HAWLEY:
The Third Circuit got that wrong, I just read it in their opinion.

ERIK HAAS:
Ultimately if the --

JOSH HAWLEY:
Wait, wait, wait, wait, answer my question. The Third Circuit was wrong about that? I just read it and their -- in their opinion, they said the FDA found traces of asbestos in your baby powder.

ERIK HAAS:
The FDA outsourced to a lab that found a trace amount of asbestos.

JOSH HAWLEY:
OK, the answer is yes. So let's go back to the case then I think it's a relevant question. Do you remember what the verdict was in the Ingham case where the jury found what they awarded?

ERIK HAAS:
As the chair properly stated, it was initially 4.6 billion for a consolidated trial of 22 plaintiffs that was reduced thereafter to 2.2 billion.

JOSH HAWLEY:
2.24 billion finally on appeal, that's a lot of money, that's one case. 22 plaintiffs, 20 at the end of the day because of the appeal you were facing, how many additional cases after that?

ERIK HAAS:
We have thousands of thousands of cases.

JOSH HAWLEY:
Thousands, tens of thousands, right?

ERIK HAAS:
That's correct.

JOSH HAWLEY:
OK, so one set of plaintiffs gets two plus billion dollars. You have the potential for by that, by that math, tens of billions more, right?

ERIK HAAS:
Not necessarily because we call most claimants lose and receive zero.

JOSH HAWLEY:
So what you do is after the Ingham case, your company panics, and what you do is you then decide, oh my gosh, we can't possibly do this. We can't -- we don't want to pay these plaintiffs, this kind of money. So you then create a separate company for the sole purpose of declaring bankruptcy and making sure that the tens of thousands of other plaintiffs get scraps.

ERIK HAAS:
The proposal that we had would never succeed and would not have succeeded, but for the support of the claimants that had made the proposed resolution. We went to --

JOSH HAWLEY:

I have no idea what you're saying. I thought it was plaintiffs who sued you that went all the way to the Third Circuit where they said you couldn't do what you're trying to do. You're saying that they actually -- you're saying the plaintiffs wanted this. They like the Texas Two-Step? The plaintiffs want to be denied their day in court and denied recovery?

ERIK HAAS:
The majority of claimants counsel representing the majority of claimants, yes, do want this resolution because most claimants receive nothing.

JOSH HAWLEY:
Let's talk about what you --

ERIK HAAS:
Aberrant --

JOSH HAWLEY:
Let's talk about what you did, let's -- first of all, I think it's outrageous. The idea that plaintiffs, plaintiffs want to be denied their day in court. That's why they took you to court. That's why the Third Circuit ruled against you. Let's talk about what you did. Here is, and according to the Third Circuit, an abbreviated, abbreviated version of how you tried to avoid actually paying out liability.

Old Consumer which was one of your subsidiaries merged into merged into Chenango Zero, LLC, a Texas limited liability company wholly owned subsidiary of J and J with Chenango Zero surviving the merger. Chenango Zero then affected a divisional transfer divisional

merger rather under the Texas Business Code by which two new Texas Limited liabilities were created, Chenango One and Chenango Two and Chenango Zero ceased to exist.

Then Chenango One converted into a North Carolina limited liability company and changed its name to LTL. Chenango Two then merged into Currahee holding company, the direct parent company of LTL. Currahee survived the merger and then changed its name to Johnson and Johnson Consumer Incorporated. Are you here to tell us that you think that this is a great way to proceed and is fair to the consumers who had asbestos in their baby powder?

ERIK HAAS:
Indeed, the claimants after that transaction had access to more recourse than they did before, which is exactly --

JOSH HAWLEY:
More recourse?

ERIK HAAS:
Which is exactly --

JOSH HAWLEY:
You created in the words of the Third Circuit, you created a company with the sole purpose of sending it into bankruptcy, so you could limit your liability. Here's what I don't understand. Johnson And Johnson is a hugely profitable company, isn't it?

ERIK HAAS:
This is where we're talking about a subsidiary --

JOSH HAWLEY:
Oh, I know, but you own them all. So aren't you hugely profitable? I mean, how much money did you make on the COVID vaccine, for example?

ERIK HAAS:
Nothing, actually we made nothing.

JOSH HAWLEY:
We got billions of dollars in subsidies from the federal government. Taxpayers have paid you. How much did you make on opioids? All those opioids you prescribed, how much did you make on that over the years? I do not have that information.

ERIK HAAS:
Really. I thought it was curious when you said that your company credo was to always put the public first.

JOSH HAWLEY:
It is -- was that what you were doing when you were lying to doctors and patients about the addictive nature of opioids? Is that why your company agreed to billions of dollars in settlements with states and other localities because of what you did to further the opioid crisis?

ERIK HAAS:
We prevailed in the only two cases that were tried.

JOSH HAWLEY:

You said, for billions of dollars and I brought one of those suits and it's the proudest thing I ever did, as attorney general of the state of Missouri. Your company has made billions of dollars on American consumers multiple times lying to them. And the idea that you now are looking actively for ways to limit the liability for further torts you have committed against the American people, I think is outrageous, absolutely outrageous.

And if you want to know why the American people don't trust huge corporations, it's because of companies like yours. And I would just say to my colleagues, if you want to know why private rights of action are so darn important and why we need to use them against the big tech companies, this is the reason why one jury verdict got $4.6 billion.

That's a hammer, companies fear it, they fear it. It's why they're trying to distort the bankruptcy code to avoid it. We need to give more Americans the ability to get that recourse in court and we need to change the bankruptcy code to make sure that companies like J and J can't avoid it. Thank you, Mr. Chairman.

DICK DURBIN:
Thank you, Senator Hawley. Senator Coons.

CHRISTOPHER COONS:
Thank you, Mr. Chairman, and thank you for this hearing and for the opportunity for us to examine some of these issues. I'll transition to a topic I understand hasn't been thoroughly explored, but that also has the potential consequence of plaintiffs being denied the ability to recover. And that's non-consensual non-debtor agreements.

And I'd like to ask if I could both professors to comment on this. Professor Jacoby, should non-debtor agreements include an opt-out provision, so claimants can choose to file legal claims instead of being bound by the liability release? And if they do get an opt-out, if that were to happen, what effect would there be? Would we see fewer non-consensual non-debtor agreements?

And what effect would it have on how much money is available to claimants, as for example, happened in the mass tort case against Purdue Pharma?

MELISSA JACOBY:
Individual claimants should be presented the option of whether they will release consensually by contract like they could do outside of bankruptcy or not. The discharge power in the bankruptcy code does allow the majority to bind dissenters with respect to the liability of the debtor. I do not believe that extends to direct liability of third parties.

So it has to be by contract and we'll see what the Supreme Court says about Purdue Pharma. But the idea that the only way to ever get a deal done is to mandate a broader discharge. And that is really what it is. If we're talking about personal liability for direct for -- for direct claims, not insurance proceeds put into a trust.

Then that is -- that is a huge extension of of the bankruptcy power. But lawyers are problem solvers. These corporations and their very excellent counsel will find a way forward. They do in circuits that can't -- that that don't permit the same binding of third party.

CHRISTOPHER COONS:

As you're implicitly referencing the courts of appeal are currently split and the Supreme Court has agreed to take the issue up this term. This is a split specifically on non-consensual non-debtor agreements. Is there room for Congress to act? And if so, what do you think Congress should do in this particular area?

MELISSA JACOBY:
Well, I -- the way that the district court decision in Purdue Pharma as well as the dissent in the Second Circuit of Purdue Pharma lay it out, the current code does not authorize third-party liability shields without consent. Clearly, not everyone has bought into that. The Supreme Court claims they're going to have this on a fast track.

The question is whether Senate, the Senate acts more quickly to, to clarify that or not, but I do think it is important to distinguish between efforts to channel, say insurance proceeds into a trust and guide claimants to that trust is different from direct personal liability of a third-party, that's really where the issue lies.

CHRISTOPHER COONS:
Professor Parikh, any different views on these two questions? Both whether there should be an opt-out provision and if so what consequence that would have for what's available to claimants? And then what if anything, Congress might take up and consider doing either before or after the Supreme Court acts?

SAMIR PARIKH:
Yes, Senator, I think for non-consensual non-debtor releases, I think the bankruptcy code does provide for them. They play a very large role in these cases in reaching resolution. Keep in mind that the

claims are not extinguished. They're merely channeled to this trust. I think the larger issue that once again almost never gets discussed is making sure these trusts are properly funded.

That does not get discussed at all and that's -- that's probably the much larger issue from my perspective. In terms of opt-out provisions, you can see in recent mass tort cases, there are opt-out provisions, but there are lots of strings attached. You can opt-out as a claimant, but your ultimate recovery is capped at what you otherwise would have received through the plan.

So there's a strong disincentive not to opt-out. So with opt-out provisions, you know we see them of course under Rule 23, when we think about class aggregation, there are always opt-out provisions. Plaintiffs attorneys are very good at making sure that that's a limited option. But nevertheless, in bankruptcy, that option exists.

But with all these strings attached, that's something could be clarified through the code.

CHRISTOPHER COONS:
Survivors of child abuse and advocates have raised concerns about other bankruptcy procedures that have been involved in cases like the Boy Scouts and USA Gymnastics and others. Are there reforms Congress should consider around claim filing deadlines or automatic stays that would specifically improve protection of survivors from harm in the bankruptcy process?

Professor?

MELISSA JACOBY:

Well, thank you for asking about that. One thing I would like to see before I give an answer from my perspective is I would love for this body to get to hear from more of the survivors who have participated in those cases because I'm not sure they feel heard right now in the process. The issue of bar dates and the proofs of claim, which I think you are asking about, which is very different than what we're seeing in the asbestos cases, where we at least some of them where we're not sure who the -- It's hard to measure the majority, if I don't know who all the claimants are.

But there's a lot of variation in mass tort cases generally about whether we have a universe of current claimants or not. I think I'm not sure that has to be uniform, but I think it cuts a lot of different ways, for example, not having a bar date in a state that has a completely open statute of limitations now in response to Child USA and other advocacy groups about letting adults come forward in their time, not having a bar date, and letting someone collect in the future honors the research about the time it takes to come to that decision.

A bar date forces someone to make that decision at a time they might not be ready or forever be foreclosed. And again, to some of the discussion that's happened about releases and others, this is not just about the money. These claims are not being brought as far. Again, it is -- I don't want to speak for everyone because everyone's got their individual story, but there are a lot of other interests at stake about accountability and ensuring this doesn't happen to other people that are in addition to the money or sometimes even more important to the money.

So I think we need that we really need to factor that in this system was not designed for them.

CHRISTOPHER COONS:
Thank you. Thank you very much. Thank you both. Thank you, Mr. Chairman, for your forbearance.

DICK DURBIN:
Thank you, Senator. Senator Blumenthal.

RICHARD BLUMENTHAL:
Thanks very much, Mr. Chairman, and thanks for having this hearing. As you have heard on a bipartisan basis, there's a lot of dissatisfaction and indeed disgust with the bankruptcy system as it currently operates and now impacts the lives of ordinary people. Professor Jacoby, I have talked to many of those survivors of the gymnastics abuse that occurred and they are very much on my mind as we talk about this issue.

As you know, Larry Nassar's crimes came to light and implicated USA Gymnastics, which faced hundreds of lawsuits from gymnasts who alleged that the organization in effect was complicit and failed to protect them. And USA Gymnastics declared bankruptcy, litigation was halted. Depositions, stopped and their attempt to hold the organization to account for those hundreds of cases of sexual abuse was stymied.

And the public was deprived of a lot of the truth about what USA Gymnastics did to make it liable and responsible. So I wonder whether there is a way, Professor Jacoby, to permit this process to go forward, that is the legal process to go forward at least with the discovery, you know we call it discovery.

It really in that case was discovery about what went wrong with USA Gymnastics.

MELISSA JACOBY:
The bankruptcy system absolutely can accommodate that. Indeed, early discussions of mass tort bankruptcy, I think anticipated that way more would be done through other civil processes, that this would not cut everything off the bankruptcy system also has the capacity within it to provide transparency that is sometimes missing way too much in mass tort bankruptcies for a variety of reasons.

But there are ways to use the coordination features of the bankruptcy system that don't shut everything down, that makes sure the accountability mechanisms still work. Now whether that's the right home for all of this, people have different views. But if we're going to use it, that is absolutely essential.

RICHARD BLUMENTHAL:
That's a relatively simple and when I say relatively simple compared to all the complexity of the system as it now operates, it seems relatively simple that we could reform.

MELISSA JACOBY:
Yes, and in addition, I believe some cases do anticipate data repositories. I think the question is when and who has the information. A lot of it is very hard to access not only for the public but individual claimants. There's information that's for lawyers' eyes only. And I think that makes that, that makes people uncomfortable.

People need to see it not a couple of years from now, but they need to be able to have access to it sooner.

RICHARD BLUMENTHAL:
I want to turn to Purdue Pharma. As Attorney General, I sued Purdue Pharma. I haven't been Attorney General for a while for 10 years, so I have no direct involvement in the pending case or the settlement. But what I know for sure is that between 1999 and 2021, Opioid overdoses killed nearly 645,000 people in America.

And Purdue Pharma knew what it was doing because it knew when they settled a case that I brought against it and then continued to fuel the addiction and substance abuse disorder that killed those people. Let me cut right to the question here and you all are aware of this case in exchange for contributing about $6 billion to the proposed settlement, the Sackler Family, the individual Sacklers have requested immunity from all current and future opioid lawsuits.

The family hasn't declared bankruptcy. They're not subject to any of the requirements of transparency that are imposed on other parties. And they are trying to use the process in effect to buy immunity without the consent of their victims. I know that many of the survivors are supportive of the settlement and I know why, because they want some compensation for the heartbreaking and unspeakable suffering that they have endured as a result of the wrongdoing of the Sacklers and the company.

But yesterday, Senators Warren, Welch, and I reintroduced the Sackler Act, which would close the loophole that has permitted the families to try to avoid accountability and responsibility. I'd like to ask any of the panelists who have an opinion on this issue to provide it. Professor Jacoby, it looks like you.

MELISSA JACOBY:

I'd be happy to if you'd like, I just wanted to give my colleagues a chance. So the one question that always comes to mind is modeling legislation on a very specific case. And if I recall, I have not seen your most recent legislation. What I do recall is that it was focused on the claims of government representatives and also making sure that government representatives were not stopped during the bankruptcy from exercising their police and regulatory.

And if that's not where this is, then I'll switch gears, I think the part about making sure that the -- the temporary injunction is not routinely expanded is -- is quite important. It's something that came up in the 3M bankruptcy, but it came up even more in Purdue Pharma because it stopped government regulators, not just not just private claims.

So I have a lot of sympathy for that. I do have concerns about legislating only about government for permanent releases because that does raise the question and possibly a negative implication that it's acceptable for private parties. And I'm concerned about that question. But I understand why members of Congress think that a discharge in bankruptcy goes to a debtor unless a creditor contract agrees to release their claim.

That makes a lot of sense to me.

SAMIR PARIKH:
So I just weigh in on a really quick statement to answer your question. The bankruptcy case does not halt criminal prosecutions, so I want to make sure that's clear.

DICK DURBIN:
Thank you, Senator Blumenthal.

RICHARD BLUMENTHAL:
Thank you.

PETER WELCH:
I want to pick up where Senator Hawley left off. And where Senator Blumenthal left off. I understand, by the way, Senator Hawley

asked you the question, J and J made $27 billion last year. Is that right?

ERIK HAAS:
I believe that's about the right.

PETER WELCH:
All right. Two, the second thing I want to say bankruptcy, as I understand it is very simple. You're broke and you can get discharged from your debts, but you don't get discharged without putting all your assets in the -- in the pot.

Is that right, Professor?

MELISSA JACOBY:
That's right. And when we're talking about a company, Congress anticipated legislated with an operating company.

PETER WELCH:
If I want to declare bankruptcy, all the assets I have, all the debts I have, are in the pot and they get distributed according to the rules of bankruptcy, right? Same for a company.

The tort system, which we've had forever, allows an individual who's been injured to sue ~Marcela Escobari~, to sue a company. And if I'm found liable by a jury, then I pay, right, and isn't that correct? So what's happened here with the going back to Purdue Pharma, It's really mystifying to me and I think it is to a lot of folks, they go into bankruptcy and there's incredible evidence about the Sackler family individually, not only benefiting and becoming multi-billionaires, making contributions to the Sackler Gallery down here, having named buildings at universities that they were part of the board and they knew that the opioids they were selling were addictive.

They hired management consulting firms to actually boost sales. They did this knowing that people were dying and suffering and they are in bankruptcy where the Sackler family has a Sackler rule for how bankruptcy works. They put all their liabilities in their -- and some of their money, but they keep billions.

Is that how bankruptcy is supposed to work? I'm going to ask you, Mr. Haas, is do you -- do you buy that? Do you think the Sacklers who had knowledge of what they did with their company and killed people, biggest drug dealers outside of the Mexican cartel? Do you think that they have the right to use bankruptcy but not put all of their billions into the pot, so the people who they've injured can have their claims adjudicated?

ERIK HAAS:
I'm not personally familiar with the facts of the case --

PETER WELCH:
I'll make it simple.

ERIK HAAS:
-- but I would say it's a stark contrast and it is actually demonstrating the legitimacy of what we did, all right, so because of that distinction. Let ~Marcela Escobari~ --

PETER WELCH:
I get it, you're with Johnson and Johnson, you're different. I mean, everyone's -- but the Sacklers were able to keep their individual billions safe and get the full benefit of discharge in bankruptcy. That's what they're looking to get.

ERIK HAAS:
So Senator, I just simply do not know the facts and circumstances. I believe the standard that is applied or has been applied in that case depends upon the totality of the circumstances. And ultimately, the question, and I'm not familiar with which side it is, whether it's in the best interest of the claimants.

PETER WELCH:
It's in the best interest of the Sacklers. They keep

Billions --

ERIK HAAS:
So I'm not taking a position one way or another.

PETER WELCH:
I just -- the other thing that seems simple, I think to everyday folks, if a company is being sued and it has assets in the case of Johnson and

Johnson, great Company, $27 billion in profits, the mechanism that's being set up is to protect Johnson and Johnson, not the plaintiffs.

ERIK HAAS:
The -- the mechanism that was utilized had nothing to do with Johnson and Johnson, it had to do with Johnson and Johnson Consumer, Inc, a subsidiary that was in a loss position. So the question became at that point in time how best to protect claimants and the divisional merger that was undertaken put claimants in a better position.

They had more.

PETER WELCH:
To all the claimants -- ma'am, you claim it right? Does that put you in the best position, right? And you're representing your dad and my -- my condolences to you.

LORI KNAPP:
I know it wasn't in his best interest. I think that I think that these companies are greedy and they want to make it sound as if the victims are greedy trying to get what should be given to them. But if they wait long enough, all the victims will die, and then what, just keep stalling.

PETER WELCH:
Nobody could say better. Thank you. I yield back.

DICK DURBIN:
Thank you very much to all the witnesses of my colleagues and this is a compelling subject. It is complicated and yet it's very simple. Ms.

Knapp speaks for her father who died waiting for the moment to have his day in court and Georgia-Pacific, in his case, found a way to avoid that reckoning, that confrontation, and justice was not served in his situation.

I still don't believe there is a credible argument that Johnson and Johnson should have been allowed to create this sham corporation and limit their liability. And I think of all the Johnson and Johnson products that our family is used, that white cloud that's in every baby's room in America, and the trust we had in your company, I have to tell you it breaks my heart to think what it's facing today.

And that is the reality that they're trying to avoid responsibility for their own conduct in their own products. And that to me is not right and I don't believe it's American. God knows that anybody even conceived that bankruptcy code would be used for this purpose, just beyond me and the Sackler situation is disgusting.

You know, they're sitting on billions of dollars and say they're not going to put this on the table for distribution to the people who are deserved unless they get get out of jail free card in the process. Is that what our system of justice has turned out to be? I hope not. I thank you for this hearing. There may be some written questions sent your way in the next few days and if you answer them promptly, I would appreciate it very much.

With that, the hearing stands adjourned.

List of Panel Members and Witnesses

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SEN. SHELDON WHITEHOUSE (D-R.I.)

SEN. AMY KLOBUCHAR (D-MINN.)

SEN. CHRISTOPHER COONS (D-DEL.)

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SEN. JOHN KENNEDY (R-LA.)

SEN. THOM TILLIS (R-N.C.)

SEN. MARSHA BLACKBURN (R-TENN.)

WITNESSES:

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SIDLEY AUSTIN LLP PARTNER STEPHEN HESSLER

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