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Rethinking Chapter 11 For Mass Child Sexual Abuse Claims: Shifting The Focus From Debtor Institutions To The Victims

Introduction

In enacting the United States Bankruptcy Code, Congress intended to assist honest debtors who had incurred overwhelming business debts. The Code contains provisions designed to "give debtors 'a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.'" [1] Its goal is to enable organizations to remain operational through debt restructuring and repayment plans guided by a neutral arbiter. [2] That notion has changed as Catholic dioceses, USA Gymnastics, and the Boy Scouts of America have turned to Chapter 11 to limit their exposure to victims suing for the negligent and reckless policies that put kids at risk of child sexual abuse. [3] The advantages to those institutions have included: avoiding in-depth discovery regarding their bad acts; [4] forcing their victims to come forward (regardless of their legal rights to choose the time of suit or whether they are psychologically prepared to do so); [5] and a stay against victims' claims. As it currently stands, Chapter 11 allows these organizations to avoid dissolution and shift attention away from the harm they inflicted on the child victims and to the institution's own needs. The focus is on the "debtor" even though it permitted extensive child sexual abuse; victims become mere creditors, like roofers.

Part I summarizes the history of how mass tort claims came to be administered under Chapter 11 of the federal Bankruptcy Code. Part II discusses how Chapter 11 became an avenue for institutions facing a myriad of tort claims to escape liability. Part III examines the failures of the Chapter 11 process when sexual abuse tort claims are involved. Finally, Part IV recommends legislative and other reforms including amending the Bankruptcy Code to turn the focus away from "bad actor" institutions that the assistance of the courts to restructure and continue their operations, and towards the victims of these child sexual abuse cases who are further negatively affected by the current bankruptcy system.

I. A Brief History of Mass Tort Claims in Bankruptcy

Tort claims were not considered under the original Bankruptcy Act enacted in 1898. [6] The Act only focused on contractual obligations and providing relief to "traders," individuals, and small businesses from overwhelming contractual debts. [7] Unproven tort claims came under purview of bankruptcy law with the Chandler Act of 1938, which "gave the court the authority to consider tort claims in reorganizations, regardless of their provability." [8] Congress expanded bankruptcy purview to include tort claims "to facilitate rehabilitation of embarrassed corporations by a scaling or rearrangement of their obligations and shareholders' interests, thus avoiding a winding up, a sale of assets, and a distribution of the proceeds." [9]

The Bankruptcy Reform Act of 1978 overhauled bankruptcy laws, and continued to include pending tort claims under Chapter 11. [10] The 1978 Code also removed the requirement that organizations must be insolvent to file a petition under Chapter 11. [11] A debtor's having assets in value greater than its liabilities, or the ability to repay current debts, is not a cause for dismissal of

a voluntary case. [12] This means that organizations are allowed to file for Chapter 11 reorganization to address their potential future liability.

Chapter 11 is designed to provide a debtor reprieve from debilitating debt, enabling organizations to remain operational and restructure. It is a way to help a financially distressed business return to a viable state. The goal is "to restructure a business's finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders." [13] The intent of reorganization is to put together a plan that determines "the amounts creditors will be paid, the form of payment, the amount of interest to be retained by shareholders, and the methods in which the business will remain operational." [14] Until the Hare Krishna filing in 2002, [15] it was not the go-to legal track for institutions facing multiple sexual abuse and assault lawsuits.

Chapter 11 evolved into an exit strategy for organizations facing mass tort claims, including those institutions with pending child sexual abuse lawsuits. The system has since become a cruel pathway for traumatized victims to find justice.

A. The Chapter 11 Process

The reorganization process under Chapter 11 for large institutions is governed by 11 U.S.C.A. sections 1101 to 1129. A debtor files a petition which constitutes an automatic order for relief. [16] The filing of the petition institutes an automatic stay of most legal actions, both pending or previously initiated against the debtor. [17] For tort-related claims, "cases pending against the debtor are postponed, new actions cannot be taken, and judgments cannot be recovered." [18] The automatic stay immediately improves the financial state of the debtor because it postpones litigation obligations, freeing all liquid assets to support the continuation of regular business. It also suspends discovery in actions brought by tort claimants, by which they might obtain information about an organization and its alleged wrongdoing. [19]

A committee of unsecured creditors is then formed. [20] The committee is comprised of individuals who represent the unsecured creditors' interests in the bankruptcy process. [21] The court may order the appointment of additional committees. [22] Committees provide a structure for considering the debtor's estate and help develop a reorganization plan. [23] Most child sexual abuse bankruptcies have had one such committee, but the Boy Scout proceedings have two different victim committees.

To organize the proceedings, creditors are labeled as secured or unsecured. [24] Secured creditors typically have a lien on the debtor's property to ensure their claim will be repaid and are entitled to receive payment on their claims up to the value of their collateral. [25] Some unsecured creditors have claims articulated in the Bankruptcy Code as receiving priority over other unsecured claims. [26] Child sexual abuse claims are classified as non-priority, general, unsecured claims. Thus, *victims of child sexual abuse will only have their claims satisfied after all other secured and prioritized unsecured claims have been paid* as summarized above.

Claims and interests that are "substantially similar" to each other are put into the same class for purposes of the Chapter 11 plan of reorganization. [27] All claims within a class must be treated equally under that plan. [28] Tort claimants may be, and often are, place in a separate class in a reorganization plan.

The majority of funds representing the value of the estate can be distributed to secured creditors and priority unsecured creditors before the court even considers child sexual abuse claims. Thus, victims of child sexual abuse may receive far less payment through bankruptcy proceedings than they otherwise would in regular civil court proceedings.

II. How Bankruptcy Became an Avenue for Organizations Facing Mass Tort Claims to Avoid Liability

As previously stated, Chapter 11 was not originally designed to relieve a debtor facing massive tort liability. [29] Rather, its serves to "mitigate the effects of financial failure and allows for reorganization for businesses that permit debt and equity interests to be restructured." [30] Chapter 11 enables debtors to reorganize their financial affairs while continuing to operate.

For a debtor facing massive tort claims, a reorganization "imposes mass tort solutions" over large groups of claims.[31] This means that claims are considered not individually, but as a part of a broader group. Chapter 11 has been characterized as a collective debtor proceeding that ends the race to the courthouse, meaning that each individual creditor has far less control over the outcome of its claim in bankruptcy.[32] This "mass solution" approach, although efficient for businesses, can have disparate negative outcomes for individual tort claimants, whose needs are often individualized, which is particularly true for child sexual abuse victims. The failures of this approach are highlighted in the bankruptcies that grew out of asbestos-related claims, and those of the opioid crisis.

A. Toxic Tort Bankruptcies

In 1982, the Manville Corporation, the largest producer of asbestos in the United States, was the first organization to file for reorganization under Chapter 11 while facing over 12,500 tort claims for causing asbestos exposure.[33] Manville had a $1.1 billion net worth and total assets exceeding $2.2 billion when it filed, but it asserted that the Chapter 11 filing was largely due to the impact of potential future tort claimants.[34] The affidavit estimated that, over the next twenty years, the "cost of the future suits could range anywhere between $2 billion and many times that amount," which could "potentially force the sale, liquidation or other disposition of Manville's assets and the dismemberment of its business."[35]

The victims of the asbestos exposure objected to the bankruptcy filing, claiming that Manville filed for reorganization in bad faith to "escape liability."[36] The Bankruptcy Court concluded that Manville's liquidation "would be economically inefficient in not only leaving many asbestos claimants uncompensated, but also in eliminating needed jobs and the productivity emanating from an ongoing concern."[37] As such, the court determined that Manville required a Chapter 11 reorganization to "avoid liquidation at all costs."[38] A representative was appointed to oversee any asbestos-related claims arising after the bankruptcy as well. Over the next few years, multiple companies would follow Manville's example and use Chapter 11 to reorganize in the face of "massive personal injury liability in the future."[39]

The companies targeted with mass, toxic tort litigation did, indeed, escape liability for many of these claims. The Bankruptcy Code states that "confirmation of a [reorganization] plan … discharges the debtor from any debt that arose before the date of such confirmation."[40] This means that companies may not be liable for toxic tort claims that occurred before a bankruptcy, *even if* the claimant's injuries manifested years later.[41]

B. Opioid Epidemic Bankruptcies

Between 1999 and 2017, the opioid epidemic claimed over 400,000 U.S. lives.[42] In 2017, the Attorney General for the State of Oklahoma sued Purdue Pharma[43] L.P. for its role in the opioid crisis. The State of Oklahoma claimed that Purdue used "deceptive and fraudulent marketing schemes" that "misrepresented the risk of opioid addiction."[44] Shortly thereafter, Purdue was named in the federal opioid multidistrict litigation ("MDL").[45] Facing over 2,600 civil actions filed by over sixty cities and counties across the country, Purdue was spending approximately $2 million per week in litigation costs.[46]

As a result of these expenses, Purdue filed for bankruptcy relief in 2019 as part of a "tentative deal struck with thousands of local governments, twenty-four states, U.S. territories, hospitals, and other parties."[47] The deal stipulated that Purdue's business operations would continue, but its assets would be placed under a public-beneficiary trust "for the benefit of claimants and the U.S. public."[48] Additionally, Purdue's owners, the Sackler family, would step down from management and would contribute $4.5 billion of their personal funds into the trust.[49] Although some attorneys general, like Pennsylvania Attorney General Josh Shapiro, helped lead negotiations toward a settlement agreement,[50] this agreement initially was opposed by the majority of state Attorneys General, as well as some local governments, who preferred to seek recovery through their own civil court cases.[51] In response to this opposition, Purdue "filed a motion asking the bankruptcy court to use its vast powers under the Bankruptcy Code to stay all pending litigation."[52] Purdue argued that "[p]rotection from uncontrolled litigation is the singular feature of bankruptcy that makes it an effective tool for the successful resolution of mass tort matters."[53] The bankruptcy court granted the stay, concluding that the pending litigation would "severely disrupt" the "constructive" ongoing settlement negotiations.[54]

Chapter 11 proceedings steered the outcome to one that in many ways shortchanged the victims. Those negotiations concluded in September 2021 with the bankruptcy court's approval of a settlement plan that will "end thousands of lawsuits brought by state and local governments, tribes, hospitals, and individuals" [55] While Purdue Pharma was dissolved and the Sackler family was ordered to pay $4.5 billion towards addiction treatment and prevention programs, the bankruptcy court settlement "means that a full accounting of Purdue's role in the epidemic will never unfold in open court." [56] Additionally, the settlement amount will not adequately compensate individual plaintiffs harmed by Purdue's production and manufacturing of OxyContin. [57] The 130,485 "individuals and families of those who suffered from addiction or died from an overdose" will only receive "amounts ranging from $3,500 to $48,000." [58] The "guardians of about 6,550 children with a history of neonatal abstinence syndrome" will receive even less on average; an estimated $7,000. [59] Because the bankruptcy court approved this settlement, *all* parties are bound by its terms. In fact, "it doesn't matter if you were a settlement party or a non-settling party, it doesn't matter if you knew nothing about it, its binding on your client … That's the power of bankruptcy. It impacts everything." [60]

Several other companies embroiled in the MDL have similarly filed for bankruptcy, showing a growing trend to resolve mass opioid-related claims in bankruptcy court. Insys Therapeutics, an opioid manufacturer, filed for Chapter 11 bankruptcy protection in June 2019. [61] Insys's bankruptcy court-approved $1 billion reorganization plan will afford most victims "pennies on the dollar." [62] Mallinckrodt Pharmaceuticals, another opioid manufacturer, filed for bankruptcy in October 2020 and seeks a reorganization plan "that would set up a $1.6 billion trust to resolve opioid-related claims." [63] Mallinckrodt's bankruptcy proceedings are ongoing as of the publication of this article, but appear to be headed toward a similarly inequitable conclusion.

C. The Advent of Organizations Using Chapter 11 to Force Victims to Come Forward and Accept Pennies on the Dollar

The predicaments of the Manville Corporation and Purdue Pharma that led to their subsequent actions in filing for bankruptcy mirror the actions of other institutions when faced with a myriad of child sex abuse claims. Large organizations, such as Catholic dioceses, the Boy Scouts of America, and USA Gymnastics have been faced with numerous civil suits based on a course of past conduct and attempts to avoid responsibility, as well as a number of huge tort judgments, which led them to seek refuge in the bankruptcy system. Child sexual abuse victims are also different from other creditors as they enter the system traumatized and are frequently re-traumatized by the way Chapter 11 transforms them from a victim to a creditor with no full access to justice. [64]

In July 2004, the Archdiocese of Portland, Oregon became the first Roman Catholic diocese in the United States to file for bankruptcy amidst pending lawsuits of victims alleging sexual abuse by members of the clergy. [65] It announced its intention to file on the eve of two civil trials in suits alleging that it failed to remove a priest accused of having abused more than 50 boys from the 1950s to 1980s. [66] The plaintiff in one case, James Devereaux, was seeking $130 million in damages and said he was "determined to have a public hearing of his case against the church." [67] Devereaux, who was 51 years-old at the time of the civil suit, said he was an altar boy from ages 11–13 for Reverend Maurice Grammond. [68] Grammond, who died in 2002, was accused of molesting dozens of boys in the rectory, in his car, and on camping trips. [69] According to David Slader, Devereaux's attorney, there were two witnesses to the priest's abuse as well as documentation proving that the archdiocese purposefully sent the priest to a remote parish where the parishioners were not told about his abuse of children. [70] The bankruptcy petition immediately stayed the pending cases.

According to the diocese, there were more than 60 additional claims pending at the time of filing for bankruptcy with more than $21 million in settlements having been paid the prior year by the diocese and insurers. [71] Despite an estimated half-billion dollars in assets, Archbishop John G. Vlazny urged that the estimate included parishes, schools, charities, and trusts which the diocese has no authority over "under canon law" (an argument the court ultimately rejected), [72] and that "the pot of gold is pretty much empty right now." [73] He insisted that filing for bankruptcy was "not an effort to avoid responsibility" but to "assure that other claimants can be offered fair compensation." [74] After two and a half years pending in bankruptcy court, the case ended with a settlement plan of $75 million for the victim claimants. [75]

The Dioceses of Tucson, Arizona, and Spokane, Washington soon followed Portland in filing for bankruptcy under Chapter 11. [76] According to BishopAccountability.org, 29 Catholic dioceses and religious orders in the United States have filed for bankruptcy since 2004. [77] On the day that the Archdiocese of Portland filed, Deveraux, whose attorney indicated that he wanted his day in court over any financial settlement, said, "The archdiocese filed for bankruptcy today, but they have been morally bankrupt my entire life." [78]

USA Gymnastics (USAG) filed for bankruptcy in the U.S. District Court for the Southern District of Indiana in December 2018 following a wave of lawsuits filed by gymnasts who claimed that the organization failed to adequately protect them from sexual abuse by Dr. Larry Nassar. [79] Over the course of three decades, Nassar sexually assaulted hundreds of gymnasts in his capacity as a team physician. [80] He was ultimately convicted of numerous crimes and sentenced to between 140 and 360 years in federal and state prisons. [81] Nassar's victims were grateful for his criminal convictions, but advocate that liability also extends to USOPC, USAG, and the Karolyi Camps and gyms. [82] They have filed lawsuits to make all responsible for the systematic failures that traumatized them. As of the publishing of this article, a proposed settlement agreement of $425 million, with the approval of abuse victims, was submitted on August 31, 2021 and is pending court approval. [83] The USAG bankruptcy has shone a spotlight on how cruel even the Chapter 11 bar date can be, with Olympian Terin Humphrey shut out after filing only a few months late, as discussed in Part III.C.1, below.

The Boy Scouts of America filed for reorganization under Chapter 11 on February 18, 2020, after facing thousands of allegations of child sexual abuse perpetrated by scoutmasters and others by more than 88,000 claimants. [84] In its most recent tax filing, the organization reported annual revenue of $285 million and assets of $1.4 billion, mostly coming from merchandise sales, membership fees, and profits from investments and facilities. [85] The number of claims exceeds those of the Catholic dioceses in the United States. [86] As of the publishing of this article, the bankruptcy case remains pending with a proposed reorganization plan still in the works, as two tort claimants' committees and other constituencies struggle to agree. [87] The plan includes a matrix to display the range of how much financial compensation a victim could receive that's based on the type of sexual abuse and where it happened, and denoting whether the state's statute of limitations had passed or not. [88]

Chapter 11 is currently an ill-fitting solution for victims of child sexual abuse who have claims against institutions. If institutions like the Catholic Church, USA Gymnastics, and the Boy Scouts of America continue filing for bankruptcy when faced with mass tort claims from victims of child sex abuse, reforms are desperately needed within the Bankruptcy Code to hold those responsible accountable, provide the victims with a fair outcome, and prevent future abuse from happening within these youth-serving organizations.

III. The Failures of the Current Bankruptcy System in Child Sexual Abuse Cases

The Bankruptcy Code is riddled with procedural features that make sense for the "honest but unfortunate" debtor, but that result in vast injustice to victims of child sexual abuse with institutional claims. Non-debtors in many jurisdictions can be released from liability, the bar date set by the bankruptcy court often forces victims to come forward (or lose their claims) before they are ready, pending civil litigation is stayed upon filing a bankruptcy petition so victims are unable to continue conducting discovery, institutions often get away with being dishonest about the value of their assets, and they typically avoid having to disclose any information that shows the extent of their involvement or coverup in the abuse. The current system allows organizations to emerge from bankruptcy without giving any insight—to the public or their victims—into the systemic failures and bad actors facilitating abuse. It also excludes victims who may miss the bar date for filing claims, re-traumatizes victims, and often silences those who want to confront responsible parties in a public forum. The public loses because the truth is not made known. In short, Chapter 11 is a strategy and solution for organizations that failed to protect children from heinous crimes that is cruel to the victims and fails to address the regulatory failure that contributed to the abuse in the first place.

A. The Trauma Associated with Child Sexual Abuse Differentiates Victims from Other Creditors

Victims of child sexual abuse approach the Chapter 11 process with different needs, goals, and expectations than those of an average creditor. There is an extensive body of scientific evidence establishing that childhood sexual abuse victims are traumatized and harmed in a way that makes it difficult or impossible to process and cope with the abuse, or to self-report it. [89] Victims often need decades to do so, and roughly one third of victims never disclose their abuse. [90] This means that there are

likely many unrepresented victims of child sexual abuse who are not ready to come forward, or who cannot file a Chapter 11 claim against a debtor institution when it declares bankruptcy.

Trauma affects childhood victims of sexual abuse or assault in a way that is wholly distinguishable from victims of other crimes. As explained by the Center for Disease Control, Adverse Childhood Experiences, like child sexual abuse, "have a tremendous impact on future violence victimization and perpetration, and lifelong health and opportunity." [91] The ACE Study is one of the largest investigations of the effects of childhood abuse, and definitively shows a strong correlation between ACEs and negative effects across the lifespan, including, disrupted neurodevelopment; impaired social, emotional, and cognitive development; psychiatric and physical disease; and disability. [92] The negative effects of abuse generate significant costs for a victim over the course of their life. [93] Financial recovery can be instrumental for victims to cover costs associated with healthcare and healing, but for many, it is not the only reason they came forward.

Victims of child sexual abuse and sexual assault often find healing and empowerment in knowing they are safe, knowing they are heard, and receiving very clear communication about the ongoing process of their claims and cases. [94] Instilling a sense of control helps empower victims who may have had that power taken from them. [95] Conversely, elements of the Chapter 11 process, like forcing victims to come forward before they are ready, lumping claims into larger groups, and refusing to hear individual stories, may actually retraumatize a victim, forcing them to relive their trauma. [96]

Many victims are motivated by a burning conviction that no child ever be harmed by a debtor's employees again. Those victims "seek to investigate [a debtor institution because] … exposing the organization's negligence could reveal other potential defendants." [97] For victims of Dr. Larry Nassar, "the main point of suing USA Gymnastics is not monetary, but rather to 'get to the truth' of how the abuse continued for as long as it did and who within USA Gymnastics knew about it." [98] Therefore, having the ability to conduct discovery and share findings of how abusive environments flourished is often central to victims' interests. Unlike these victims, halting discovery processes are not crucial to creditors who have historically made claims through Chapter 11, because they have been more concerned about the payment of their debt. Chapter 11 in its current form takes little notice of and fails to adequately address the individualized needs of traumatized victims of child sexual abuse.

B. Chapter 11 Can Release Non-Debtor Third Parties from Liability in Sexual Abuse Claims Despite Their Involvement in the Claims

Many Chapter 11 plans also include non-debtor release provisions, both consensual and non-consensual, though no section of the Bankruptcy Code specifically allows for them. A non-debtor release provision in a reorganization plan under Chapter 11 "shields third parties who share an identity of interest with the debtor, usually corporate officers and directors of the organization, from any claim, cause of action, or liability from any party who has filed a claim under the bankruptcy proceeding." [99] Consensual releases require the consent of the claimants, while non-consensual releases can be approved by the court regardless of whether the claimants consent. [100]

High-profile bankruptcy cases, including USA Gymnastics and the Boy Scouts of America, have catapulted this issue into the public square. Proposed reorganization plans from both institutions sought to release numerous non-debtor parties from any liability related to their relevant business activities. The Boy Scouts included provisions that sponsors of local troops, like churches, civic groups, and others, could be released from liability in exchange for assigning their insurance rights and making a substantial contribution to the settlement fund. [101] They could opt out of participating but would not receive protection in future litigation. [102] The Official Committee of Tort Claimants called the proposal a "get out of jail free card" in a motion requesting that the court terminate the organization's exclusive period to file a plan and solicit acceptances in order to file its own proposed plan. [103]

USA Gymnastics initially proposed a $215 million settlement plan in January 2020 that was similarly rejected by the Additional Tort Claimants Committee of Sexual Abuse Survivors (the "Survivors' Committee"). [104] The proposed plan would have released the U.S. Olympic & Paralympic Committee (USOPC); USAG chief executive, Steve Penny; the former national team directors, Bela and Martha Karolyi; the former U.S. Olympic team coach, Don Peters; and others from all claims. [105] Further, it would not have provided for public disclosure of the non-debtors' knowledge of Nassar's abuse or their involvement in concealing

the abuse. John Manly, an attorney representing hundreds of victims, called the plan a "blatant disregard" for the victims. [106] Specifically related to the releases, Manly stated: "Most disturbingly, this proposed plan attempts to absolve USOPC of any responsibility for these crimes which were committed under its watch. This plan from USAG is not just unworkable, it is unconscionable." [107] The judge took note of the proposal to release USOPC from liability, stressing the "distinct possibility of liability on the part of USOPC" which would be released without paying anything to victims. [108]

In August 2021, USAG and the Survivors' Committee jointly proposed a settlement plan of nearly double USAG's initial proposal, $425 million, to the bankruptcy court. [109] Under the new plan, the USOPC would significantly contribute to the victims' compensation. [110] In exchange for accepting the settlement, the victims would end the claims against USAG, USOPC, and certain individuals within those organizations. [111] USAG would also take numerous steps, including establishing reporting rules within the organization, to prevent future abuse. [112] Still, the plan is missing an important element in holding the responsible actors accountable and preventing future abuse: information and insight, if any, into who knew about the abuse and what was done to cover it up. The USOPC, USAG, and individuals tied to the organizations continue to avoid taking any responsibility related to these cases.

Circuit courts are split regarding whether non-consensual third-party releases are permissible in a Chapter 11 bankruptcy proceeding. The Second, Third, Fourth, Sixth, Seventh, and Eleventh Circuits [113] permit such releases under certain circumstances while the Fifth, Ninth, and Tenth Circuits do not. [114] In the circuits that permit these releases, the courts consider the factors initially detailed in *In re Master Mortgage Investment Fund, Inc.* [115] and adopted in *In re Zenith Electronics Corp.*, [116] which require:

> (1) an identity of interest between the debtor and the released party; (2) a "substantial contribution" to the reorganization made by the released party; (3) the essential nature of the injunction to the reorganization to the extent that, without the injunction, there is little likelihood of success; (4) an agreement by a substantial majority of creditors to support the injunction, specifically if the impacted class or classes "overwhelmingly" votes to accept the plan; and (5) provision in the plan for all or substantially all of the claims of the class affected by the injunction. [117]

Despite the split in the courts, the release of non-debtors from liability creates an incentive for organizations to file for bankruptcy when they are inundated with child sexual abuse claims against both it and its insiders, including owners, managers and employees who have not filed for bankruptcy. As the Second Circuit Court of Appeals explained,

> "[A] nondebtor release is a device that lends itself to abuse. By it, a nondebtor can shield itself from liability to third parties. In form, it is a release; in effect, it may operate as a bankruptcy discharge arranged without a filing and without the safeguards of the Code. The potential for abuse is heightened when releases afford blanket immunity." [118]

The "blanket immunity" through child sexual abuse bankruptcies, provided to non-debtor organizations and the individuals who owned, managed or worked within it, fails to result in any actual accountability or incentive for third parties to prevent future abuse. It also does not encourage the creation and development of better child protection programs. The victims and the public lose; the immunized institutions bask in the ongoing secrecy.

C. Bankruptcy Bar Dates Conflict with and Override State Statutes of Limitations (SOL)

"[B]ankruptcy courts maintain broad discretion to set claims bar dates irrespective of state statutes of limitations." [119] This feature alone undermines many victims. When institutions file for bankruptcy amidst pending tort claims, the Bankruptcy Court sets a date at which all claims must be filed by claimants in order to be considered and subsequently recovered within the reorganization plan. A problem often arises when the bar date set in the bankruptcy proceeding does not align with the state's SOL, thereby forcing victims to come forward before their claims expire pursuant to state law.

1. Bankruptcy Bar Dates Cut Off Child Sexual Abuse Claims Even When the State SOL is Open

Historically, 90% of child victims never go to the authorities, and the vast majority of claims have expired under the applicable statute of limitations before the victims could get into court. [120] According to medical and social science, victims of child sexual abuse come forward later in life, if at all, due to the impact of trauma. [121] One study of over 1,000 victims found that age 52 is the average age of disclosure for victims of child sex abuse who do come forward. [122] In response to this growing body of research, certain states are leading the way to turn back this scourge of concealed abuse. There is a nationwide trend to lengthen, eliminate, and revive civil statute of limitations for child sex abuse claims to hold institutions and perpetrators. [123] The bar dates set in bankruptcy courts, however, are prematurely foreshortening victims' SOLs, leading to a re-traumatization of victims and deterring the public from learning the information it needs to understand the prevalence and dangers of child sexual abuse within youth-serving organizations.

In August 2020, the federal bankruptcy court denied Terin Humphrey, a former U.S. gymnast and two-time Olympic medalist, from being included in part of a potential settlement with USA Gymnastics after she narrowly missed the bar date as established by the court. [124] Humphrey alleged that Nassar sexually abused her in 2002 when she was 15 years old. [125] The applicable state law for civil action, Virginia, allows victims to bring a claim for sexual assault if that action is filed within prescribed limitations. [126] Virginia limits a victim's ability to seek redress under a SOL that begins to run when "the fact of the injury and its causal connection to the sexual abuse is first communicated to the person by a licensed physician, psychologist, or clinical psychologist." [127] For Humphrey, this communication from her doctor occurred in June of 2020. [128] In Virginia, victims of child sex abuse are given until they are 38 years old, or 20 years after they discover their abuse, to file lawsuits. [129]

Thus, under Virginia law, Humphrey had until 2040 to bring a claim. However, the federal bankruptcy court entered an order on February 25, 2019 that set April 29, 2019 as the bar date for general claims and claims asserting sexual abuse. [130] Humphrey brought her claim in bankruptcy court on July 30, 2020 and filed a Motion to Allow Late Filed Claim to Be Treated as Timely Filed. [131] The bankruptcy court denied her motion, with the U.S. District Court for the Southern District of Indiana affirming the decision that her claim was untimely. [132] She did, however, bring her claim within Virginia's set time frame. Robert Allard, an attorney for Humphrey, emphasized that the Survivor's Committee objected to the acceptance of Humphrey's claim, a decision which Allard contends was "petty and political in nature," and that the late filing the only reason the claim was rejected. [133] The outcome was a "step backwards from the great advancements we have made over the past decade to ensure that all victims of abuse in the Olympic movement are treated with fairness and integrity." [134]

a. Is A Bar Date That Trumps a State SOL for a Claim Against a Non-Debtor Constitutional?

This conflict between state SOL laws and bankruptcy bar dates also raises concerns related to both the power of the federal government vis-a-vis the states, federalism, and due process. The federal government is a government of enumerated, not plenary power. [135] The Framers intentionally reserved power to the States. Congress has authority under the Bankruptcy Clause of the United States Constitution to enact uniform laws governing bankruptcy procedures. [136] However, Congress' authority is not without limit.

The Tenth Amendment states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." [137] States retain a "residuary and inviolable sovereignty" in all matters where Congress has not been given authority to legislate. [138] Further, states have more autonomy in areas of historical, traditional authority, including family law [139] and "state regulations of health and safety." [140] Many states, including Virginia "ha[ve] a compelling interest, one central to its right to survive, in protecting its children from treatment it determines is physically or psychologically injurious to youth." [141] Therefore, states have the inherent authority to determine the statutes of limitations for child sexual abuse crimes and torts occurring in those states. While the federal government can supplement the SOL or provide a better alternative, it cannot cut short a state's SOL for victims.

The Fifth and Fourteenth Amendments to the U.S. Constitution "impose[] constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests." [142] Many states' statutes of limitations for child sex abuse are supported by the state's compelling interest in identifying perpetrators, making institutions accountable by shifting the cost of the abuse to those responsible, and educating the public. [143] This interest gives victims a right to redress that should not be denied by a bankruptcy court's interest in efficient reorganization, especially when it involves claims against and the release of a non-debtor. A denial of a non-debtor's claims against another non-debtor based on a short bar date—which was fixed only because of the happenstance of a bankruptcy case in both non-debtors were involved—poses potential due process violations as guaranteed by the Fifth and Fourteenth Amendments.

2. Bankruptcy Bar Dates Often Force Victims to Come Forward Before They Are Ready

When the Bankruptcy Court sets the date for claims to be filed, many victims are forced to come forward to reveal their abuse before they are ready. As previously discussed, settled research has established that most victims experience traumatic effects that delay disclosure for decades and, for many, permanently.

In Humphrey's case, she maintained that she did not experience any physical or emotional effects of Nassar's abuse until she became pregnant with her first child in May 2019, past the bar date. [144] Throughout her pregnancy, she recounted severe anxiety when being examined, which was heightened if the examination was being conducted by a male doctor. [145] During childbirth and thereafter, she suffered from distressing memories and flashbacks of Nassar's sexual abuse and submitted that the recognition of the abuse started at the beginning of her pregnancy. [146] Dr. Steven A. Elig, who performed a psychiatric evaluation of Humphrey, also indicated that Humphrey's experience is not unusual and concluded the following:

> "Delayed symptoms and disclosure of sexual abuse are not uncommon … Ms. Humphrey clearly recalled the incident of child sexual abuse during adolescence and early adulthood, but she did not experience significant psychological symptoms until genital examination during pregnancy and childbirth served as a powerful reminder and precipitated a feeling of recurrence of sexual abuse. She was then flooded with feelings of vulnerability, helplessness, guilt, defectiveness, and lack of trust. Prior to that time, she had also been in the child sexual abuse, creating a potent loyalty bind. These factors credibly explain Ms. Humphrey's pattern of delayed symptoms and disclosure from a psychiatric viewpoint." [147]

Humphrey was diagnosed with Child Sexual Abuse, PTSD with delayed expression, and Major Depressive Disorder. [148] Her story is not uncommon.

D. The Automatic Stay Under the Bankruptcy Code Halts the Discovery Process in Child Sexual Abuse Cases

Filing a bankruptcy petition under Chapter 11 operates as an automatic stay of the commencement or continuation of any judicial, administrative, or other proceeding against the debtor that commenced before the bankruptcy case. [149] In some unusual cases, third parties that have not filed for reorganization may also seek and obtain stays on pending litigation. [150] The automatic stay remains in effect until the case is closed, the case is dismissed, or a discharge is granted or denied. [151] Therefore, when institutions are faced with tort claims filed by sexual abuse victims, the automatic stay will both prolong the time before victims receive compensation as well as the discovery in those pending cases. Victims are unable to gather information and conduct interviews with witnesses through the discovery process to determine the institution's role in the abuse and the actors responsible for concealing it. Through exposing the organizations' negligence, victims could also uncover other actors responsible and seek damages from another responsible party. While child custody, domestic violence, and other types of legal actions are exempt from this rule pursuant to Section 362(b) of Chapter 11, sexual abuse claims do not fall within the statutory exemption. [152]

a. Institutions Avoid Disclosing Details of Abuse Under Chapter 11 Reorganization Plans

The history of Catholic dioceses in voluntary Chapter 11 bankruptcy proceedings show how the automatic stay does not just deny a victim his day in court, but also shields the diocese from disclosing any evidence of knowledge or coverup. [153] The San Diego Catholic Diocese filed for bankruptcy under Chapter 11 in February 2007 while facing more than 140 civil lawsuits related to sexual abuse by priests. [154] Irwin Zalkin, a lawyer for several plaintiffs, said the most important part of the cases

was having the church agree to release personnel documents that were expected to chronicle the history and pattern of abuse. Paul Livingston, director of the San Diego chapter of the Survivors Network of those Abused by Priests, said the disclosures would "show lay Catholics that these victims are not about collecting money … They are about truth, justice and the future protection of children." [155]

The Harrisburg, Pennsylvania diocese filed for Chapter 11 bankruptcy on February 19, 2020. [156] Benjamin D. Andreozzi, an attorney in Harrisburg, told the New York Times that three of his clients' lawsuits filed in New Jersey would be stayed just as the diocese was beginning to disclose an estimated 100,000 pages of internal documents related to clergy sexual abuse from 1970 to 2002. [157] He said, "my clients are incredibly frustrated. They wanted full transparency and they will inevitably be denied the opportunity to confront witnesses that have the answers to the questions that have haunted them for many years." [158]

b. "A Well-Dressed Cover-Up": USA Gymnasts Fight for Answers

In the case of USA Gymnastics, the bankruptcy filing halted all lawsuits by the victims against USA Gymnastics and the USPOC's decertification process of USA Gymnastics. [159] The victims were seeking more than financial compensation when they filed suits; they wanted to expose the organizations and actors responsible for allowing Nassar's abuse to prevail for decades. [160] In January 2020, the institution proposed a settlement offer of $215 million to those victims seeking justice. [161] The settlement did not address the disclosure of documents or other information that would show the extent the institution knew of Nassar's abuse and the lengths it (and other organizations) went to conceal it. [162] The proposal was immediately dismissed by victims' attorneys, with Manly calling it a "well-dressed cover-up." [163] He noted that the plan lacked "critical, structural" plans to ensure the safety of future gymnasts and ignored requests for the disclosure of documents related to Nassar's years of abuse. [164]

Victims of Nassar fought the court for answers related to the extent that USA Gymnastics and the USOPC knew about Nassar's abuse and what steps, if any, were taken to conceal the abuse and prevent it from happening to future athletes. [165] The claimants issued eight subpoenas for eight current and former USOPC directors, officers, and employees in an effort to seek information related to the USOPC's liability in connection with the bankruptcy proceeding. [166] The USOPC then filed a motion for a protective order to limit the Survivor Committee's request, indicating that it was "vastly overbroad and duplicative," and that the request failed to make a connection to the underlying Chapter 11 case. [167] The bankruptcy judge issued a split decision, agreeing with the USOPC that the claimants "stray[ed] significantly from the narrowly tailored and relevant discovery parameters" but that the claimants could depose three current and former directors and officers, and seek information on a narrow range of topics addressing the committee's response to sexual abuse claims. [168]

E. Some Institutions Try to Use Chapter 11 to Hide Assets from Victims

Unless ordered otherwise by the court, an organization filing for Chapter 11 reorganization must file schedules of assets and liabilities; a schedule of current income and expenditures; a schedule of executory contracts and unexpired leases; and a statement of financial affairs. [169] Generally, a written disclosure statement must also be filed with the court and served on interested parties if the debtor is to propose confirmation of a plan of reorganization. [170] The disclosure statement is a document that must contain information concerning the assets, liabilities, and business affairs of the debtor sufficient to enable a creditor to make an informed judgment about the debtor's plan of reorganization. [171] History shows, however, that institutions faced with pending child sexual abuse cases, such as Catholic dioceses, have attempted to hide the value of their estate to limit the amount paid into a settlement fund in connection with their "reorganization".

The San Diego Catholic Diocese bankruptcy case in 2007 was fraught with issues related to the diocese's financial disclosures. While leading up to the eventual settlement, the victims' attorneys accused the diocese of submitting misleading financial reports, and Judge Louise DeCarl Adler scheduled a hearing on an Order to Show Cause Re: Contempt or Other Sanctions due to apparent financial irregularities. [172] In response, she appointed an independent investigator "to examine the financial structure of the [diocese], its cash flow, including uses and sources of income, and such other issues pertinent to the Cash Management Motion of [the diocese], all to be more fully defined by the Court in a separate order …" [173]

The expert ultimately found that the diocese's financial statements were inaccurate, and some parishes engaged in "openly questionable activities" in some accounts. [174] For example, the expert uncovered that, just prior to the bankruptcy filing, Our Lady of Guadalupe parish engaged in a series of transactions that "deliberately concealed" almost $50,000 from the bankruptcy court. [175] The court scheduled another hearing to show cause why the diocese's case should not be dismissed in light of the expert's findings. [176] The bankruptcy case was ultimately dismissed in November 2017 after a settlement agreement where the diocese agreed to pay $198 million to 144 abuse victims. [177] However, when granting the request to close the bankruptcy proceedings in light of the settlement, Adler condemned the diocese, stating that it could have settled the claims without seeking bankruptcy. [178] Further, she noted that Chapter 11 "is not supposed to be a vehicle, a method, to hammer down the claims of those abused." [179] The diocese still maintained that it was honest in its disclosures. [180]

Similarly, when the Archdiocese of St. Paul and Minneapolis filed for bankruptcy in 2015, the diocese was accused by victims' attorneys of hiding more than $1 billion in assets. [181] The diocese reported $45 million in assets and indicated that it did not own the parishes, schools, or numerous cemeteries in the area. [182] The victims argued that the number was closer to $1.7 billion when considering those other entities and alleged the diocese had taken steps to shield various assets, including painting over signs at cemeteries to conceal ownership. [183] The archbishop insisted it had disclosed all assets and was fully cooperative with the bankruptcy process. [184]

In May 2016, the committee of claimants filed a motion asking the court under Code Section 105(a) to substantively consolidate the archdiocese with over 200 non-debtor affiliated non-profit entities, including 187 parishes, arguing that the archdiocese had "direct control and supervision in all material aspects" over those affiliated entities. [185] The bankruptcy court denied the motion, and the U.S. District Court for the District of Minnesota and Eighth Circuit affirmed the decision, agreeing with the bankruptcy court that Section 303(a) of Chapter 11, which addresses when involuntary cases may be brought, "prevents the use of Section 105(a) to force truly independent non-profit entities into involuntary bankruptcy." [186]

The Eighth Circuit further concluded that "global consolidation of all entities in the Archdiocese is not authorized by the Bankruptcy Code. There are remedies available in the Bankruptcy Code to address specific abuses by Debtor or other entities, if they exist. Substantive consolidation of all related entities, however, is not one of those remedies." [187] After nearly four years, the archdiocese reached a $210 million settlement agreement with the 450 abuse victims. If organizations facing mass tort liability misrepresent the value of their available assets to a court, or ring-fence assets with non-debtor affiliates, then the victims' prospects for recovery are undermined from the very beginning of the bankruptcy case.

IV. Reforming Chapter 11 to Adequately and Justly Reorganize in the Face of Mass Child Sexual Abuse

As detailed in Part III, the application of Chapter 11 has re-traumatized child sexual abuse victims while sheltering the institutions that have endangered children. It also derails the public search for the truth about widespread child sex abuse by short-circuiting discovery and shifting the attention from the victims and systematic failures to the financial needs of the institution. Therefore, reform is needed within the federal bankruptcy system to shift the focus away from those responsible institutions, hold them accountable, and ensure a fair and just process for the victims.

A. Needed Legislative Amendments to the Bankruptcy Code in Child Sexual Abuse Cases

Numerous legislative amendments to Chapter 11 must be considered to combat the failures within the current system, including a ban on non-debtor releases, prohibiting a state statute of limitations from barring recovery in a bankruptcy case on an abuse claim, expanding the bar date for claims, exempting child sexual abuse cases from the automatic stay, employing forensic accountants to assess the debtor's estate, disclosing the number of valid claims in connection with any proposed reorganization plan, and excluding any payments resulting from child abuse cases from discharge.

1. Limiting Non-Debtor Releases, Stays and Ring-Fencing

Youth-serving institutions should not be permitted to use Chapter 11 of the Bankruptcy Code to inappropriately shield themselves and other responsible, related organizations from accountability for their part in child sex abuse, over the protests of victims. Therefore, non-consensual, non-debtor third-party releases should be prohibited.

In July 2021, the House Committee on the Judiciary Subcommittee on Antitrust, Commercial, and Administrative Law proposed the Nondebtor Release Prohibition Act of 2021 (NRPA) to prohibit the use of non-consensual, non-debtor releases that have helped entities and individuals escape accountability for wrongdoing through bankruptcy proceedings. [188] The Act would essentially eliminate the use of non-consensual, non-debtor releases in private claims and those brought by the government. [189] Specifically, "it would prevent individuals who have not filed for bankruptcy from obtaining releases from lawsuits brought by private parties, states, Tribes, municipalities, or the U.S. government in bankruptcy by prohibiting the court from discharging, releasing, terminating or modifying the liability of and claim or cause of action against any entity other than the debtor or estate; and prohibiting the court from permanently enjoining the commencement or continuation of any action with respect to an entity other than the debtor or estate." [190]

The NRPA proposes to add a new section 113 to the Bankruptcy Code, stating that the court would not be permitted to discharge, release, terminate, or modify a claim or cause of action against a non-debtor, regardless of whether it was approved in a reorganization plan. [191] The Act also limits a debtor's ability to stay or enjoin lawsuits against non-debtors to 90 days, and an extension beyond the 90-day timeframe may be permitted with the "express consent of the entity whose claim or cause of action is stayed or enjoined." [192] Additionally, the NRPA proposes to amend section 1112 of the Code related to divisional mergers. The proposed section 1112(f) would, upon a request of a party in interest, require the court to dismiss a Chapter 11 case if the debtor or a predecessor of the debtor was formed in connection with a divisional merger or equivalent transaction within the past 10 years before the bankruptcy petition was filed. [193]

Critics of the NRPA argue that non-consensual third-party releases and the automatic stay are effective methods for resolving complex cases and avoiding liquidation and costly litigation. [194] Additionally, they urge that courts have set a high bar to debtors' using these tools, emphasizing the factors previously mentioned that the courts consider. [195] Therefore, they argue that the NRPA may ultimately harm tort claimants by discouraging settlements, and insist that the bankruptcy courts are best suited to determine whether lawsuits against non-debtors should be enjoined and if a third-party release in a debtor's plan is appropriate. [196]

Despite these criticisms of the NRPA, legislative reform related to non-debtor releases is undoubtedly needed. The plans for reorganization in these bankruptcy cases that release non-debtors from liability significantly impact tort claimants who are victims of sexual abuse. Thus, legislation like the NRPA is critical to both protecting victims and exposing the predators within these institutions who are responsible for the abuse.

2. Prohibiting the State Statute of Limitations from Barring Recovery in Bankruptcy for a Claim or from Impacting Classification of Claims

The fate of a victim's recovery in bankruptcy court should not be determined by where they were abused as a child. Trauma does not restrict itself to the states where victims have appropriately generous statutes of limitations. A growing number of states have heeded the science surrounding the impact of trauma and delayed disclosure, improving their statute of limitations for victims. [197] However, victims who were unable to come forward before their state statute of limitations expired should not be penalized for their delay. Each victim of child sex abuse experiences some form of trauma and deserves access to justice. Additionally, the classification of claims should not be based on a state's arbitrary determination of a statute of limitations, especially where such consideration would subjugate one victim's claim under another.

Thus, Section 1111 under Chapter 11 should be amended to add an additional subsection that allows claims relating to the sexual assault of a child to be deemed filed regardless of and notwithstanding the state statute of limitation otherwise applicable to the claim. Further, Section 1122(a), which indicates that a plan may place a claim or interest in a class if such claim or interest is "substantially similar" to the others in the class, should be amended as to specify that, when designating a class of creditors whose claims are related to the sexual assault of a child, a plan may not consider the state statute of limitations, and must use a trauma analysis in its determination of whether a claim is "substantially similar" to other claims.

3. Expanding the Bankruptcy Bar Date for Child Sexual Abuse Cases

Setting an arbitrary bar date on child sex abuse claims will disenfranchise victims who are not ready or able to come forward. The bar date for filing claims should be expanded to account for the research of delayed disclosure as numerous states have accomplished through statute of limitations reform.

Thus, Section 1111 of the Code should be amended by adding that a claim deriving from the sexual abuse of a child is considered timely filed if the claim is filed on or before the latest of (1) the date that is five (5) years after the date of the filing of the bankruptcy petition; (2) the date that is 10 years after the date on which the victim is the sexual abuse of a child reaches 18 years if age; and (3) the termination of a reasonable period of time following the establishment of the sexual abuse of the victim that that the abuse occurred. Although some claimants will still inevitably be barred from filing, these time conditions prevent the courts from setting a restrictive and arbitrary bar date while ensuring an expanded opportunity for claimants based on the research related to delayed disclosure.

4. Exempting Child Sexual Abuse Cases from the Automatic Stay

Section 362(b) of Chapter 11, which provides exemptions to the automatic stay, should be amended to add an additional subsection exempting sexual assault of a child or related claims from the automatic stay when a debtor files a petition under Chapter 11. Instead of halting all active civil litigation related to child sex abuse when an institution files for bankruptcy under Chapter 11, victims should be permitted to continue conducting discovery. This amendment will improve the accuracy and quality of bankruptcy claims and reorganization plans, as well as identify unknown predators, provide victims better access to justice, and more effectively educate the public on how institutions enable abuse.

5. Publicizing the Number of Valid Claims, Proposed Reorganization Plan, and Future Claims Plan

Increasing the public disclosure of the number of claims, as well as proposed plan for reorganization and future claims serves the public policy of educating the public about the prevalence of child sex abuse and empowers the public to understand the Chapter 11 process. These institutions should also be exempted from the protection afforded to institutions related to scandalous or defamatory matters.

Thus, Section 107(a) of Chapter 11, which provides that the dockets of bankruptcy court are public records and open to examination by an entity at reasonable times, should be expanded to include that, for all cases regarding debts or other financial liability arising from allegations of sexual assault of a child, the court shall release, or cause to be released, records at least 90 days prior to approving a settlement or reorganization plan including, but not limited to: (1) the number of valid claims against the individual or institution; (2) a copy of the proposed reorganization plan including, but not limited to, any provisions to implement policy changes to prevent or respond to child abuse risks; and (3) details of any applicable proposed future claims fund, including contact information for any future claims representatives and instructions for submitting claims.

Additionally, the bankruptcy court's authority under Code Section 107(b), to protect persons from the publication of scandalous or defamatory matters, should be amended to exempt information relating to allegations of sexual assault of a child from this section.

6. Excluding Payments Resulting from Child Sex Abuse Cases from Discharge

Section 1141 of Chapter 11 outlines the effects that a reorganization plan has on the debtor. Specifically, under subsection (d), the confirmation of a plan "discharges the debtor from any debt that arose before the date of the order for relief unless the plan or the order confirming the plan provides otherwise." [198] However, the plan itself may indicate otherwise and, under paragraphs (2) and (3), certain debts are excluded from the discharge following a reorganization plan. [199] Court orders or settlement agreements pertaining to child sexual abuse cases are not included in the exclusions and it therefore might be asserted that they are discharged under Section 1141 as it is currently written when a reorganization plan is confirmed.

Therefore, a bankruptcy court should expressly exclude such claims from its confirmation order. In addition, Section 1141(d) should be amended by adding a new paragraph (7) that states that a discharge under this chapter does not discharge the debtor from: (1) any judgment, order, consent order, or decree relating to the role of the debtor in the sexual abuse of a child entered in any Federal or State judicial or administrative proceeding before, on, or after the date on which the petition is filed; (2) any settlement agreement relating to the role of the debtor in the sexual abuse of a child entered into by the debtor before, on, or after the date on which the petition is filed; or (3) any court or administrative order issued before, on, or after the date on which

the petition is filed for any damages, fine, penalty, citation, restitution payment, disgorgement payment, attorney fee, cost, or other payment owed by the debtor relating to role of the debtor in the sexual abuse of a child.

7. Employing Forensic Accountants to Assess the Debtor's Estate

In cases involving a debtor that is registered as a 501(c)(3) organization under the Internal Revenue Code, bankruptcy courts should be required to employ forensic accountants to review all assets and interests of the debtor and require the accountants to submit reports on the assets and interests of the organization prior to the determination of the scope of the estate, as the court did in the San Diego Diocese bankruptcy case. This ensures that debtor organizations are fairly submitting their assets for consideration in a reorganization plan, while bestowing courts with further confidence to efficiently assess the debtor's assets.

Code Section 541, which defines what a debtor's estate entails, should be amended to state that, in all cases regarding debts or other financial liability arising from allegations of sexual assault of a child, involving debtors that are organizations described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code, the Court is required to engage the services of an independent forensic accountant to review the assets and interests of such debtor, and require preparation of a report to assist the Court with ensuring that such assets and interests are properly included or excluded from estate as defined in this section.

B. Changes within the Judicial Conference

In addition to legislative amendments to Chapter 11, changes are needed within the Bankruptcy Courts themselves, particularly related to judicial officers and staff, in order for the proceedings to become empowering, rather than traumatizing, spaces for victims. If the Judicial Conference does not take up these issues, Congress should use its authority to mandate these changes.

1. Trauma-Informed Training for Judges and Court Personnel

Bankruptcy court judges are not currently mandated to undergo any judicial training pertaining to trauma of child sexual abuse and the myriad of effects abuse has on victims that could impact the cases before them. Yet, these judges are making crucial decisions, not just in confirming a reorganization plan, but also related to how the proceedings unfold, such as setting bar dates for claims. If institutions are going to keep filing for bankruptcy under Chapter 11, thereby forcing the bankruptcy courts to handle cases related to child sexual abuse, it is critical for judges to understand the life-long, individualized trauma that victims experience. The system should therefore require judges to undergo trauma-informed training regarding the presentation and impact of child sex abuse, as well as trauma-informed administrative practices. [200]

Section 105 of Chapter 11, which denotes the power of the bankruptcy court, should therefore be amended to add an additional subsection which would state that, prior to assignment of a case regarding potential debts or other financial liability arising from allegations of sexual abuse or assault of a child, judges and court personnel shall be required to complete a trauma-informed training regarding the impact and presentation of childhood sexual assault, as well as trauma-informed administration practices. The Court should also be required to maintain a list of such approved trainings and implement a trauma-informed practice in cases involving financial liability incurred as a result of a finding of civil liability arising from facts of sexual abuse or assault.

2. Require Courts to Permit Victim-Impact Statements

In Chapter 11 cases involving child sexual abuse claims, judges should be required to give victims the right to read a victim-impact statement before a reorganization plan is confirmed. When organizations file for bankruptcy, some right before a civil trial is scheduled to begin as described above, victims lose their day in court in publicly confronting these institutions and sharing with the court the effects the abuse has had on their lives. This mandate would allow victims who are ready to share their story to have a voice in the proceeding and speak directly to the judge regarding the proposed outcome of the case, as would be the case in a civil litigation process.

Section 1109(b) of Chapter 11, which states that a party in interest may appear and be heard on any issue in a case, should therefore be amended to add that, in cases for claims related to alleged sexual assault of a child, victims of the alleged sexual assault may appear and have their victim-impact statements heard before the confirmation of the reorganization plan. Further, Section 1101, which lists definitions pertaining to Chapter 11, should be amended to add the definition of “victim impact

statement" as a written or oral statement describing the emotional, physical, and financial impact suffered as a result of the sexual abuse of the child.

Conclusion

There is no one quick fix to make Chapter 11 a proceeding that is a safe space for victims and a process to educate the public on the prevalence and long-lasting effects of child sexual abuse. Bankruptcy law was designed to provide an honest debtor reprieve from debilitating debt, and Chapter 11 to enable an organization to remain operational until it can restructure its debts through a reorganization plan. Instead, Chapter 11 has been used as an avenue for institutions facing mass tort claims to avoid being financially crushed from the outcomes of those claims while also evading their responsibility for the lifelong harms caused to their victims. Specifically, youth-serving organizations that are alleged and proven to have played a role in child sexual abuse cases continue to seek refuge in the bankruptcy system, creating significant problems for the victims seeking, not just financial compensation, but answers related to the failures of the institutions to protect them. Legislative reform to Chapter 11 is required to shift the role of bankruptcy law from merely assisting the responsible organizations in improving their financial state and escaping liability, to ensuring that these institutions are held accountable and victims of child sexual abuse secure fair outcomes.

Footnotes

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24 11 U.S.C.A. § 1123(a)(1).

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68 Oregon Archdiocese.

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had failed to properly account for all of its property (land held in the name of the diocese or a parish was not accounted for, bank accounts had not been fully disclosed on the diocese's scheduled or amended schedules); (3) the diocese had "persisted in reporting its assets at assessed valuation, rather than fair market value as required by all debtors in bankruptcy proceedings"; (4) the diocese "failed to disclose material facts to the Court with respect to the operation of its cash management system when it sought expedited approval to continue use of this system in its First Day Motion."

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186 In re Archdiocese of Saint Paul & Minneapolis, 888 F.3d at 953.

187 In re Archdiocese of Saint Paul & Minneapolis, 888 F.3d at 954.

188 The Nondebtor Release Prohibition Act of 2021, S.B. 2497, 117th Cong. (2021). See also Press Release, Warren, Nadler, Durbin, Blumenthal, Maloney Announce Legislation to Eliminate Non-Debtor Releases, Prevent Corporations and Private Entities From Escaping Accountability In Bankruptcy Proceedings (July 28, 2021), available at https://www.warren.senate.gov/newsroom/press-releases/warren-nadler-durbin-blumenthal-maloney-announce-legislation-to-eliminate-non-debtor-releases-prevent-corporations-and-private-entities-from-escaping-accountability-in-bankruptcy-proceedings.

189 The Nondebtor Release Prohibition Act of 2021.

190 The Nondebtor Release Prohibition Act of 2021.

191 The Nondebtor Release Prohibition Act of 2021.

192 The Nondebtor Release Prohibition Act of 2021.

193 The Nondebtor Release Prohibition Act of 2021.

194 Arendsen, K. & Morrison, P., Congress Proposes Significant Bankruptcy Code Changes to Protect Tort Claimants and Creditors, But What are the Real Consequences?, THE NATIONAL L. REV. (Aug. 11, 2021) https://www.natlawreview.com/article/congress-proposes-significant-bankruptcy-code-changes-to-protect-tort-claimants-and.

195 Congress Proposes Significant Bankruptcy Code Changes. In the circuits that permit these releases, the courts consider the factors initially detailed in In re Master Mortgage Investment Fund, Inc. and adopted in In re Zenith Electronics Corp., which require:
"(1) an identity of interest between the debtor and the released party; (2) a "substantial contribution" to the reorganization made by the released party; (3) the essential nature of the injunction to the reorganization to the extent that, without the injunction, there is little likelihood of success; (4) an agreement by a

substantial majority of creditors to support the injunction, specifically if the impacted class or classes "overwhelmingly" votes to accept the plan; and (5) provision in the plan for all or substantially all of the claims of the class affected by the injunction."

196 Congress Proposes Significant Bankruptcy Code Changes.

197 See generally History of US SOL Reform: 2002-2020, CHILDUSA.ORG (Feb. 26, 2021), https://childusa.org/2020-sol-report/.

198 11 U.S.C.A. § 1141(d)(1). Senate Report No. 95-989

199 11 U.S.C.A. § 1141(d)(2), (3).

200 See CHILD USA, Letter to the Advisory Committee on Bankruptcy Rules, Committee on Rules of Practice and Procedure, Judicial Conference of the United States Re: Reform Needed to Protect Victims of Child Sex Abuse in Federal Bankruptcy Courts, CHILDUSA.ORG (Aug. 21, 2021), available at https://childusa.org/wp-content/uploads/2021/10/2021-08-24-SCOTUS-Bankruptcy-Letter.pdf.

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