NOTES

USING CLAIMS RESOLUTION FACILITIES TO RESUSCITATE MASS TORT JUSTICE

CHARLIE DRIVER*

Personal injury mass torts, like litigation over asbestos exposure or opioid addiction, put a unique strain on the judicial system, overwhelming dockets and creating complex, protracted litigation that can create financial uncertainty for defendants and functionally deny claims to litigants who are often suffering from severe health issues. Efforts to resolve the biggest, most complex mass torts through existing judicial aggregation have yet to meaningfully survive appellate review because of due process, fairness concerns, and the strictures of American civil procedure, with the Supreme Court's decision in Harrington v. Purdue Pharma *being the latest potential blow.*

This Note will argue that stakeholders—parties, their attorneys, judges, and policymakers—should prioritize resolving mass torts via Claims Resolution Facilities rather than seeking the distant prospect of global aggregative relief via class actions, multi-district litigation, or bankruptcy. In doing so, it joins an early wave of work incorporating the Supreme Court's recent decision in Harrington v. Purdue Pharma, L.P. *into aggregation doctrine. It also builds on existing scholarship on Claims Resolution Facilities by highlighting a recent success: a Facility used to resolve claims in the Monsanto Roundup multi-district litigation.*

Aggregation has been unable to effectively provide a template for efficient, fair resolution of complex personal injury mass torts. This Note will chart the doctrinal history of aggregation's limitations and contrast it with Claims Resolution Facilities' historical ability to effectively resolve mass torts. It will then conclude by discussing best practices in Claims Resolution Facilities design and uplifting two models for future stakeholders to consider.

INTRODUCTION 1406
I. COMPLEX PERSONAL INJURY MASS TORTS AND AGGREGATION 1408
A. *Defining Complex Personal Injury Mass Torts* 1409
B. *Aggregation Incentives* 1410
C. *Traditional Aggregative Methods* 1412

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II. ASBESTOS TO OPIOIDS: THE FALSE HOPE OF GLOBAL PEACE VIA THE COURTS 1416
A. *The Asbestos Crisis: The Failure of the Class Action* . . . 1417
B. *The Opioid Crisis: Limitations on MDLs and Bankruptcy* 1423
III. MOVING BEYOND AGGREGATION: ACCEPTING AND PROMOTING SETTLEMENT VIA CLAIMS RESOLUTION FACILITIES 1427
A. *An Overview of Claims Resolution Facilities* 1429
1. *Defining Claims Resolution Facilities* 1429
2. *The Benefits (and Potential Harms) of Claims Resolution Facilities* 1432
B. *Implementing Claims Resolution Facilities for Mass Torts* 1435
1. *Possibilities for Public Claims Resolution Facilities* 1435
2. *Augmenting the Status Quo with Private Claims Resolution Facilities* 1440
CONCLUSION 1446

INTRODUCTION

For decades, asbestos litigation has been the model mass tort, impacting the United States at a heretofore unparalleled scale—one estimate predicts that ultimately, between $200 and $265 billion will be spent on claim resolution and legal fees covering 1.1 to 3.3 million claimants.[1] The sweeping scale of the litigation jammed up federal courts,[2] bankrupted at least eighty-five companies and threw insurers into financial distress,[3] and altered the contours of complex litigation.[4] These failures of the judicial system mean that many tort victims have died before receiving compensation for their claims.[5]

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[1] Michelle J. White, *Asbestos and the Future of Mass Torts* 1 (Nat'l Bureau of Econ. Rsch., Working Paper No. 10308, 2004).

[2] *See generally* REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION (1991) [hereinafter ASBESTOS COMMITTEE REPORT] (describing the difficulties facing the judiciary because of asbestos litigation).

[3] White, *supra* note 1, at 1.

[4] *See generally* Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997) (limiting Rule 23 class actions' abilities to achieve global peace in mass tort cases); Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999) (limiting Rule 23 class actions similarly).

[5] *See* Stephen Labaton, *Judges' Panel, Seeing Court Crisis, Combines 26,000 Asbestos Cases*, N.Y. TIMES (July 30, 1991), https://www.nytimes.com/1991/07/30/business/judges-panel-seeing-court-crisis-combines-26000-asbestos-cases.html [https://perma.cc/7T4J-FT8F]

Legal stakeholders facing down the largest mass torts have sought to resolve them by aggregating them, combining claims to achieve a global settlement that resolves them *en masse*. Attempts to aggregate through methods like class actions, multi-district litigation ("MDL"), and bankruptcy during the asbestos litigation and the resulting complex personal injury mass tort crises have led to substantial doctrinal developments. In general, these doctrinal decisions have been formalist in nature, blocking creative problem-solving on the grounds of defending litigants' rights. Recently, the opioid crisis has seen efforts to settle claims through MDL and bankruptcy frustrated by courts on these grounds.[6] The practical effect of these decisions (and lawyers' fruitless quests for global peace out of which the decisions arose) has been to slow the response to crisis, limiting the ability of tortfeasors and claimants alike to resolve claims and subsequently bogging down courts.

By tracing the doctrinal history of the failures to effectively aggregate some of the biggest and most complicated mass torts (a group described within as "complex personal injury mass torts"[7]), this Note will make the argument that continued attempts to problem-solve through aggregation are Sisyphean. Instead, it will advocate for an alternative approach—disaggregation through Claims Resolution Facilities ("CRFs"), quasi-administrative bodies that utilize objective criteria to rapidly resolve claims—that has been a successful basis for flexible resolution of complex personal injury mass torts in the past.[8] CRFs have been an aspect of mass tort litigation for a long time, but as a secondary option to aggregation. This Note will argue that they should replace aggregation as the primary approach to resolving complex personal injury mass torts, and that stakeholders seeking to implement them should utilize one of two specific CRF models—a legislative CRF based on the Vaccine Injury Compensation Program[9] or a judicially administered CRF based on the Monsanto Roundup MDL[10]—to efficiently and fairly clear dockets and compensate claimants.

("Many plaintiffs must spend years in the courts—and may even die—before they or their families receive even a penny of compensation.").

6 *See infra* Section II.B.

7 *See infra* Section I.A.

8 *See infra* Part III.

9 *See generally* notes 208–16 and accompanying text (describing the Vaccine Injury Compensation Program).

10 *See generally* Pretrial Order No. 240: Order Requiring Participation in Special Master Program, *In re* Roundup Prods. Liab. Litig., No. 16-md-02741-VC (N.D. Cal. July 23, 2021) (requiring participation in the MDL judge's CRF). For more on the creation of the Monsanto Roundup MDL itself, see generally *In re* Roundup Prods. Liab. Litig., 214 F. Supp. 3d 1346 (J.P.M.L. 2016) (consolidating claims against Monsanto).

The near conclusion of the opioid litigation crisis[11] makes it a timely moment to reexamine complex personal injury mass tort resolution. The opioid crisis has seen multiple important doctrinal developments that further underline the importance of prioritizing alternatives to aggregation.[12] At the same time, the Roundup MDL's use of a CRF has recently concluded and has not cracked academic discussions of mass tort resolution. And of course, it is always useful to reconsider approaches to mass torts because the next mass tort litigation crisis could emerge at any time. For example, some stakeholders have cautioned that PFAS, the class of "forever chemicals" present in many quotidian goods, could emerge as a litigation crisis that would "dwarf anything related to asbestos."[13] An updated consideration of mass tort resolution, especially one that questions stakeholders' consistent attempts to aggregate, is always useful.

This Note proceeds as follows. Part I will explain the characteristics of complex personal injury mass torts and the dynamics that lead them to heavily strain the legal system. Part II will trace doctrinal developments in mass tort resolution across two prominent complex personal injury mass torts—asbestos and opioids—and explain how courts have consistently blocked parties from obtaining quick, fair justice for victims of mass torts. Part III will argue that CRFs should be the primary tool to resolve complex personal injury mass torts by examining case studies to identify the best models for stakeholders to adopt.

I
Complex Personal Injury Mass Torts and Aggregation

This Part will briefly cover some foundational concepts that underpin both Part II's analysis of aggregation doctrine and Part III's advocacy of CRFs as an alternative to aggregation. Section I.A will briefly define the category of mass torts ("complex personal injury mass torts") that this Note focuses on and provide some examples. Section I.B will describe the incentive structure of complex personal injury mass torts, explaining why parties have historically sought

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11 *See, e.g.*, Geoff Mulvihill, *Judge Says He'll Approve Opioid Settlement with OxyContin Maker Purdue and Sackler Family*, Associated Press (Nov. 18, 2025, at 14:21 ET), https://apnews.com/article/purdue-pharma-bankruptcy-sackler-settlement-a8c9ae5427b3195096aec8d54b17a054 [https://perma.cc/8QNY-GRJC] (noting that most major opioid lawsuits "have already settled for a total of about $50 billion").

12 *See infra* Section II.B.

13 Hiroko Tabuchi, *Lawyers to Plastics Makers: Prepare for 'Astronomical' PFAS Lawsuits*, N.Y. Times (May 28, 2024), https://www.nytimes.com/2024/05/28/climate/pfas-forever-chemicals-industry-lawsuits.html [https://perma.cc/RL6Q-GNQM].

to aggregate claims. Section I.C will introduce the judicial processes through which that aggregation has occurred.

A. Defining Complex Personal Injury Mass Torts

The universe of mass torts is broad and varied, encompassing a wide variety of conduct and accompanying legal problems. Air disasters, chemical spills, product defects, and more can all be mass torts.[14] This Note, and the doctrine and scholarship it draws on, focuses on a specific subset of mass torts, described by Professor Samir D. Parikh as "complex personal injury mass torts."[15]

Complex personal injury mass torts are identifiable by certain features. They occur on a broad scale with a geographic dispersion of victims.[16] They cause "significant physical, psychological, and emotional injuries."[17] And, crucially, these injuries manifest "randomly over an extended period."[18] This creates a "stratification in the victim class" in which one subset of victims wants remedy for present injuries, while others are concerned with the possibility of an injury manifesting in the future.[19] Random manifestation also makes it difficult to demonstrate causation for victims with long latency periods because of the possibility of intervening causes.[20]

The archetypal complex personal injury mass tort is asbestos. Asbestos is a natural substance that gained widespread use as a construction material due to its flexibility, strength, and fire resistance.[21] Beginning in the 1960s—decades after asbestos use became prevalent—research finally became public linking it to a variety of injuries, including various cancers and asbestosis, a chronic breathing impairment, all of which "often appear only many years after initial exposure."[22] Of these,

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[14] *See generally* Thomas Willging, Rebecca Spiro, Carol Witcher, Philip Egelston, Suzanne Hruby & Melissa Deckman Fallon, Fed. Jud. Ctr., Appendix D: Individual Characteristics of Mass Torts Case Congregations (1999) (describing and providing examples of mass torts).

[15] Samir D. Parikh, *The New Mass Torts Bargain*, 91 Fordham L. Rev. 447, 456–57 (2022).

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.* at 458.

[20] *Id.*

[21] *General Information on Asbestos*, N.Y. State Dep't of Health, https://www.health.ny.gov/environmental/indoors/asbestos/general.htm [https://perma.cc/77US-EL36] (last visited May 9, 2026).

[22] Deborah R. Hensler, *Asbestos Litigation in the United States: Triumph and Failure of the Civil Justice System*, 12 Conn. Ins. L.J. 255, 257–59 (2006) (documenting how Dr. Irving Selikoff's research linking asbestos exposure in the workplace and malignant diseases published in the 1960s was "key" to successful litigation in subsequent decades).

only asbestosis and mesothelioma (a type of lung cancer) were unique to asbestos exposure; other common injuries, like non-mesothelioma lung cancer, could have other causes.[23] By the time it emerged as a mass tort in the late 1970s, asbestos met all the requirements to be a complex personal injury mass tort: People had been exposed nationwide because of the substance's ubiquity, injuries were random across the exposed population, and causation was difficult to establish because of the long latency period and possibility of intervening causes. In addition to asbestos, more recent complex personal injury mass torts include opioids and talcum powder.[24]

The impact of complex personal injury mass torts on the legal system starts small before getting very, very big.[25] At the peak of the asbestos crisis, for instance, 6.28% of all civil filings were asbestos related, and that number was growing, with almost two cases being filed for every case resolved by the courts.[26] At that time, there were 30,000 pending asbestos cases, with the number projected to rise to 48,000 within three years.[27]

B. Aggregation Incentives

As multiple scholars have analyzed, the scale of mass torts leads stakeholders to try to aggregate claims to resolve them as efficiently as possible.[28] The reasons for this are multiple. Mass torts feature repeat

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[23] *Id.* at 256–57 ("[S]omebody exposed to asbestos and diagnosed with lung cancer may have the cancer for some other reason.").

[24] *See* Parikh, *supra* note 15, at 449–51, 458–59 (providing both as examples of complex personal injury mass torts); *see also* Ronald V. Miller, Jr., *Most Active Class Action Mass Torts in 2025*, LAWSUIT INFO. CTR. (Sep. 16, 2025), https://www.lawsuit-information-center.com/most-active-class-action-2023.html [https://perma.cc/BW6S-UEDX] (listing major current mass torts and describing them).

[25] This Note focuses on the issues presented by mass torts once they reach this "mature," large-scale stage, at which point their impact on the judicial system is at its peak. For more on the earlier development of complex personal injury mass torts, see RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT 12–18 (2007) (chronicling the development of a mass tort from small, "immature" beginnings to its larger "mature" phase).

[26] ASBESTOS COMMITTEE REPORT, *supra* note 2, at 7–8.

[27] *Id.* at 8.

[28] *See, e.g.*, Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1618–34 (2004) (describing how aggregation has become the norm in mature torts); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1345–49 (1995) (examining the efficiencies and tradeoffs associated with aggregating mass tort claims); Nathaniel Donahue & John Fabian Witt, *Tort as Private Administration*, 105 CORNELL L. REV. 1093, 1101–06 (2020) (describing how aggregation generates efficiencies in mass tort claims processing); NAGAREDA, *supra* note 25, at 57–94 (detailing the shift from individualized adjudication toward aggregate settlement and private administrative compensation systems).

players on both the plaintiff and defense sides, leading to consistency and familiarity in dealings.[29] The repeated fact patterns that arise among cases make it possible to group cases together and for lawyers and third-party services to easily extrapolate claim values.[30] These factors combine to create dramatic economies of scale that generally incentivize plaintiffs and defendants to resolve as many claims as quickly as possible.[31]

Beyond being a naturally incentivized outcome for the parties, aggregation is also a necessity for the judicial system. Judges with a complex personal injury mass tort are confronted with the reality that there are not enough judges or lawyers to be able to try every case.[32] To effectively clear dockets, mass tort claims must be aggregated. And dockets must be cleared: The incentive structure that drives parties toward case resolution requires the possibility of a trial date, because without one, defendants can let cases lie without a fear of crushing liabilities.[33]

The uncertain size and duration of complex personal injury mass torts also create a heavy incentive for parties to push for a "global settlement" that binds all possible claimants and provides finality. Defendants, facing massive potential liability, want to head off existential threats quickly and understand the resources that they will have to provide to resolve all claims.[34] Plaintiffs' attorneys see global settlements as a way of getting compensation for their clients and as a potential pathway for immediate fees from those clients and any bound non-clients.[35] Global settlements can also resolve the collapse of the

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29 *See* Issacharoff & Witt, *supra* note 28, at 1618.

30 *See id.* at 1627–31 (noting that repeat plaintiffs, defendants, and third-party economic consultants gather information from past jury verdicts and use it to standardize claims for future cases, so that "there is now a predictable pattern to the mass workouts that accompany mass harms").

31 *See* Donahue & Witt, *supra* note 28, at 1103.

32 *See* Hensler, *supra* note 22, at 262 (explaining this in the context of the asbestos crisis); *see also* Asbestos Committee Report, *supra* note 2, at 30–35 (recommending congressional aggregation of pending asbestos claims to alleviate judicial burdens).

33 *See, e.g.*, Patrick M. Hanlon, *An Experiment in Law Reform:* AmChem Products v. Windsor, 46 U. Mich. J.L. Reform 1279, 1289 (2013) (noting that in the asbestos crisis, "the single most important driver of settlement was a firm, credible trial date"); Deborah R. Hensler, William L.F. Felstiner, Molly Selvin & Patricia A. Ebener, Asbestos in the Courts: The Challenge of Mass Toxic Torts, at xviii (1985) ("[C]ourts are able to dispose of cases at a rate that maintains control of the asbestos caseload only if they force the settlement of cases by imposing a credible threat of trial."); Samuel Issacharoff, *Administering Damage Awards in Mass-Tort Litigation*, 10 Rev. Litig. 463, 466 (1991) ("Accordingly, the resolution of asbestos litigation in the federal courts requires a functional trial mechanism that can in turn serve as the basis for voluntary settlements.").

34 *See* Parikh, *supra* note 15, at 461–62.

35 *See* Coffee, *supra* note 28, at 1373.

incentive structure when there is no possibility of trial, since a global settlement covers both trial-ready claims as well as those years away from one. And judges may breathe a sigh of relief when their dockets are no longer inundated with manifold tort cases stemming from the same product or harm.

As a result, a complex personal injury mass tort effectively reorganizes traditional litigation dynamics. In lieu of an adversarial process, with each party's representatives trying to obtain the maximum possible benefit for their clients, tort crises create a cooperative system, where each side's representatives (as well as judges) are instead focused on how to resolve cases efficiently,[36] with global settlement as the ultimate goal.

This creates a number of concerns. A natural one is collusion. For example, plaintiffs' attorneys and defendants can use aggregation to benefit themselves at the expense of present or future clients, such as by agreeing to aggregated settlements that sell out non-represented clients at the expense of those a lawyer does represent.[37] Another is a loss of individuality. By resolving large numbers of cases together, stakeholders run the risk of combining cases that are unalike, which can benefit low-value claims at the expense of high-value ones.[38] A final concern is the tension between the interests of present and future claimants. In the context of a global settlement, present claimants must be compensated for existing injuries, but future claimants (who lack representation) must somehow be compensated based on the possibility that they could have serious health issues.[39] Because formulating projections of the value of future claims is complex and costly, plaintiffs' attorneys are likely to rely on defendants' projections, which leads to underfunded settlements that leave less compensation for future claimants.[40] The next Section will highlight how these concerns manifest across the various mechanisms for judicial claim aggregation.

C. Traditional Aggregative Methods

There are three primary ways that these aggregation incentives can be satisfied through the judicial system: class actions, MDLs, and bankruptcy.[41] This Section introduces each in turn and explains how

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[36] *See* Donahue & Witt, *supra* note 28, at 1101 ("As the number of claimants rises, the much heralded adversarialism of the American legal system often gives way under the weight of pragmatic considerations.").

[37] *See* Coffee, *supra* note 28, at 1373–84 (describing this and other kinds of collusion).

[38] *See* Donahue & Witt, *supra* note 28, at 1105.

[39] *See* Parikh, *supra* note 15, at 462.

[40] *See* Coffee, *supra* note 28, at 1377–78.

[41] *See generally* Alexandra D. Lahav, *The Continuum of Aggregation*, 53 GA. L. REV. 1393 (2019) (describing this).

they interact with collusion concerns that accompany aggregation.[42] In doing so, it draws from and builds on a robust body of literature that has debated their relative merits.[43]

Class actions present a powerful way to bind claims together for joint trial or settlement. A certified class action combines similar claims under one representative who is "typical" of the class and determines all claims together to "provide[] global peace through preclusion."[44] To create a class action, a judge first certifies a class that achieves a series of requirements—commonality, numerosity, typicality, and adequacy.[45] If the plaintiffs are seeking money damages, there are additional requirements the class must fulfill.[46] The judge then approves a class representative and class counsel to represent and advise the class members.[47] Judicial oversight in class actions is very strong, rooted in the judge's power to certify the class and try the case or approve any settlement that results from certification.[48] In mass torts, this mandatory centralization of claims under one class counsel (who is likely to have only previously represented some, but not all, class members) centers a great amount of power (and potential attorney's fees) in one party, creating the concerns about collusion and fairness discussed in Section I.B.[49]

In contrast to the centralization of claims in a class action, MDLs are a much weaker aggregation method, albeit one that can still drive claim resolution at scale. MDLs bring cases together at the pretrial stage (based on the decision of the Judicial Panel on Multidistrict Litigation (JPML), comprised of district and circuit court judges) to efficiently determine common questions of fact, with all trials occurring on remand in the courts in which the claims were all individually filed.[50] Despite the inability to retain cases for trial, MDLs nevertheless

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[42] *See supra* notes 37–40 and accompanying text.

[43] *See, e.g.*, Parikh, *supra* note 15, at 469–85; Anthony J. Casey & Joshua C. Macey, *Bankruptcy by Another Name*, 133 YALE L.J. F. 1016, 1019–22 (2024); Daniel J. Bussel, *The Mass Tort Claimants' Bargain*, 97 AM. BANKR. L.J. 684, 685–701 (2023); Troy A. McKenzie, *Toward a Bankruptcy Model for Nonclass Aggregate Litigation*, 87 N.Y.U. L. REV. 960, 961–64 (2012); Lahav, *supra* note 41, at 1404–09; Abbe R. Gluck, Elizabeth Chamblee Burch & Adam S. Zimmerman, *Against Bankruptcy: Public Litigation Values Versus the Endless Quest for Global Peace in Mass Litigation*, 133 YALE L.J. F. 525, 527–34 (2024).

[44] Lahav, *supra* note 41, at 1396; *see also* FED. R. CIV. P. 23 (outlining the requirements to certify a class).

[45] FED. R. CIV. P. 23(a)–(b).

[46] FED. R. CIV. P. 23(b).

[47] FED. R. CIV. P. 23(g).

[48] *See* Lahav, *supra* note 41, at 1396–97.

[49] *See supra* notes 37–40 and accompanying text. *See generally* Coffee, *supra* note 28 (presenting an influential articulation of these concerns).

[50] *See* 28 U.S.C. § 1407(a), (d).

function as opportunities for judges to exert substantial power over cases, including by driving them to settlement.[51] One key way an MDL judge can induce settlement is by strategically trying one or more cases to demonstrate possible damages, something known as a bellwether trial.[52] While remand is ostensibly the goal of an MDL, in practice it is extremely rare: Between 1968 and 2018, MDL courts received over 516,000 cases, but only remanded around 17,000 for trial.[53] This means that ninety-seven percent of cases were either settled or dismissed.[54]

The high rate of settlement in MDLs (and by extension, the low rate of remand) is at least the partial result of consolidation of oversight. The MDL judge manages all cases and issues binding orders on all parties, with the assistance of steering committees of lawyers representing plaintiffs and defendants.[55] This centralization results in a pro-settlement incentive structure. Judges are incentivized to resolve the cases in front of them because they lack control over the outcome at trial, which takes place under other judges in other courtrooms.[56] Lead plaintiffs' counsel, who have client agreements with only a percentage of all claimants, are incentivized to compile broader settlements to obtain additional attorney's fees.[57] Lead defense counsel is incentivized too, since an MDL judge can use their procedural powers to drive parties to settlements that could have a lower claim value compared to holding out and pushing for trial.[58] Any pull toward collusion that this creates goes unchecked; all settlements in MDLs happen privately, without judicial approval or appellate review, unless defendants resort to a class action settlement.[59] The only limit on these non-class private settlement

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51 For example, Judge Charles Weiner used his oversight of the asbestos MDL to push for a global settlement. *See* Hensler, *supra* note 22, at 267.

52 *See* Eldon E. Fallon, Jeremy T. Grabill & Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2325 (2008).

53 Parikh, *supra* note 15, at 475.

54 *Id.*

55 *See* Lahav, *supra* note 41, at 1398–99.

56 *See* Parikh, *supra* note 15, at 477 ("The statute forbids MDL judges from adjudicating cases; compelling a settlement is the only means to effectuate immediate impact."); Donahue & Witt, *supra* note 28, at 1123 ("Federal district judges managing MDLs self-consciously attempt to drive mass tort cases to resolution by settlement and view remanding cases back to the referring courts for trial as a failure.").

57 *See* McKenzie, *supra* note 43, at 985 (describing the ability of judges in MDLs to set plaintiffs' counsel's compensation following successful settlement); Lahav, *supra* note 41, at 1407 (describing how a plaintiff-side lawyer "may be tempted to reach a settlement that is beneficial for themselves and their retained clients . . . at the expense of the other lawsuits before the court").

58 *See* Gluck, Burch & Zimmerman, *supra* note 43, at 543 (describing MDL procedural pressure toward aggregate settlement and various provisions designed to incentivize take-up).

59 *Id.* at 542.

is that parties are unable to bind future claimants.[60] In essence, then, the MDL creates an amped-up version of a pre-consolidation status quo—private parties resolving lawsuits with private settlements (often along an actuarial grid),[61] only now with a judge in place to ramp up settlement incentives.

Bankruptcy is perhaps the most coercive of the three aggregation methods, but its application is limited. It allows a financially distressed entity to bring claims against its assets, with the hope of reaching a negotiated resolution that produces a plan to reorganize the entity to address its debts without having to fully dissolve.[62] While in the bankruptcy process, all claims against the debtor entity are centralized in a bankruptcy court and subject to the requirements of the bankruptcy code.[63] Any settlement must be agreed to by a majority vote of creditors or be found to be fair and equitable by a court.[64] This settlement can globally resolve claims against the debtor entity—it can fully and bindingly resolve all present and future claims,[65] protecting the viability of the debtor entity while ensuring that victim compensation is not limited to the first movers.[66]

The utility of bankruptcy, however, is limited in a few ways. For one, the ability of a bankruptcy court to create a settlement that binds present and future claims means that the dynamics of collusion[67] recur, with negotiations primarily driven by the debtor and a small group of lawyers with large inventories of present cases. There are special statutory protections for future claimants in asbestos-related bankruptcies, but these are not required for other mass torts,[68] and, even when included, have been critiqued as being beholden to the interests of defendants and present claimants.[69] Additionally, bankruptcy can be, and regularly is, manipulated so tortfeasors limit their exposure. Recently, companies have increasingly utilized a maneuver known as the "Texas Two-Step" to enter into bankruptcy without actually being at risk of insolvency

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60 *See* Parikh, *supra* note 15, at 477.

61 *See* Donahue & Witt, *supra* note 28, at 1123.

62 *See* McKenzie, *supra* note 43, at 999–1001.

63 *See id.* at 1002.

64 Parikh, *supra* note 15, at 481 (citing 11 U.S.C. § 1129(b)).

65 Gluck, Burch & Zimmerman, *supra* note 43, at 544.

66 *See* Casey & Macey, *supra* note 43, at 1017.

67 *See supra* Section I.B.

68 This is the product of § 524(g) in the bankruptcy code, created by Congress in response to bankruptcies resulting from the litigation crisis. *See* Parikh, *supra* note 15, at 482–85 (describing the details of § 524(g)'s safeguards).

69 *See id.* at 489–91 (noting that the parties designated to represent future claimants, "Future Claimants Representatives," are effectively selected by debtors, exposed to a high risk of industry capture, and are subject to almost no oversight, limiting their functional independence).

for the purposes of limiting their exposure to tort claims.[70] And, due to bankruptcy's specialized nature and complex processes, a mass tort that moves into bankruptcy can become substantially more expensive and lengthy, increasing transaction costs.[71] So, while bankruptcy represents one of the few true ways to achieve a global settlement (although only on a single debtor basis), it shares many of the collusive concerns that have motivated aggregation's critics.

The doctrine of complex personal injury mass tort aggregation is, in many ways, a history of lawyers attempting to solve litigation crises using each of these litigation methods, beginning with class actions, and moving between them as they get blocked by courts due to formalist and anti-collusion concerns. The next Part will chronicle this history.

II
Asbestos to Opioids: The False Hope of Global Peace via the Courts

At a general level, modern-day complex personal injury mass tort doctrine has been most shaped by two crises: asbestos in the second half of the twentieth century, and opioids in the late 2010s and early 2020s.[72] Each of these was a complex personal injury mass tort on a gargantuan scale, straining the capacity of the legal system and forcing lawyers to aggregate in creative ways, in search of global settlements (or something close to them).

This Part will chronicle these two crises and describe the doctrinal changes that resulted. A discussion of the asbestos crisis will explain how courts' rejection of the use of Rule 23 class actions for aggregate mass tort resolution extended the length of the crisis and effectively foreclosed the use of class actions as a meaningful mechanism for complex personal injury mass tort resolution. Then, a move forward in time to the opioid crisis will assess the ways that the crisis limited the utility of MDLs and bankruptcy. This Part will then assess the results and what problems they present for future complex personal injury mass tort resolutions.

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70 *See* Gluck, Burch & Zimmerman, *supra* note 43, at 548–50.

71 *See* McKenzie, *supra* note 43, at 1010.

72 I readily admit that there are plenty of other mass torts that have had important doctrinal impacts over the past four decades (much of it dealing with the finer details of procedure). That said, I believe that this Section addresses the most important black-letter law for this Note's topic. *See, e.g.*, Parikh, *supra* note 15; Gluck, Burch & Zimmerman, *supra* note 43 (building doctrinal history in large part around the asbestos and opioid crises).

A. The Asbestos Crisis: The Failure of the Class Action

The asbestos crisis fundamentally challenged the judiciary's ability to evaluate claims and provide justice to tort victims. Cases flooded the courts in the years after liability was first established in 1973's *Borel v. Fibreboard Paper Products Corp*.[73] As mentioned, near the peak of the crisis in 1990, 6.28% of all civil filings were asbestos related, with 30,000 pending asbestos cases.[74] In addition to oversized dockets, issues in the asbestos litigation included long case delays, the constant relitigating of established issues, huge legal costs dwarfing plaintiff recovery, and concerns over exhaustion of defendant assets.[75] These circumstances incentivized many defendants to take steps to delay cases, knowing that if they did not settle, trials were not a meaningful possibility.[76] Many, including the Judicial Conference Ad Hoc Committee on Asbestos Litigation, which was appointed by Chief Justice Rehnquist in 1990, saw the natural solution to the crisis as aggregation under a class action model.[77] As this Section will show, that recommendation turned out to be doctrinally fraught and ultimately doomed.

Before stakeholders launched their attempt to take up the Ad Hoc Committee's recommendation and resolve the crisis through a Rule 23 settlement after the committee's report's release in 1991, Judge Robert Parker of the Eastern District of Texas separately attempted to creatively address a glut of stalled cases in his court.[78] His ultimate failure represents an early demonstration of judicial hostility to attempts to adapt the class action model to suit the needs of a litigation crisis.

Judge Parker's approach, chronicled in *Cimino v. Raymark Industries, Inc.*, involved using a Rule 23(b)(3) class to determine damages via statistical sampling.[79] The trial plan effectively sought to recreate private aggregative settlements[80] by substituting a jury to assemble a damage grid that would pay out damages to thousands of

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73 *See* 493 F.2d 1076 (5th Cir. 1973) (affirming liability for asbestos-related injury).

74 Asbestos Committee Report, *supra* note 2, at 7–8.

75 *See id.* at 7–14, 22.

76 *See, e.g.*, Cimino v. Raymark Indus., 751 F. Supp. 649, 651–52 (E.D. Tex. 1990) (noting that asbestos defendants "Pittsburgh–Corning, Fibreboard and Celotex have adopted a 'fortress mentality'" to avoid liability, knowing that without settlement or aggregation, pending cases against them "will never be tried").

77 *See* Asbestos Committee Report, *supra* note 2, at 19, 35.

78 *See generally Cimino*, 751 F. Supp. at 649 (describing Judge Parker's efforts).

79 *See* Arthur R. Miller & Price Ainsworth, *Resolving the Asbestos Personal-Injury Litigation Crisis*, 10 Rev. Litig. 419, 427–28 (1991) (describing the trial plan). *See generally Cimino*, 751 F. Supp. at 653 (summarizing the plan and its outcomes); Jack Ratliff, *Special Master's Report in* Cimino v. Raymark Indus., Inc., 10 Rev. Litig. 521 (1991) (reproducing the special master's report from *Cimino*, which proposed the trial plan).

80 *See* Issacharoff & Witt, *supra* note 28, at 1625–26.

plaintiffs and reduce the strain on the Eastern District's docket.[81] And, importantly, compared to private resolutions, it did so over defendants who sought delay,[82] effectively binding the unwilling.

The Fifth Circuit reversed *Cimino* on due process grounds, finding that it violated both a Texas law requiring individualized causation findings, and, by extension, the Seventh Amendment.[83] This came in spite of Judge Parker's explanation that his method would produce "a result to a 99% confidence level[,] which would be comparable to the average result if all cases were tried,"[84] as well as a pragmatic argument that his trial plan would be the only way for him to clear his docket and provide compensation to claimants who had valid claims.[85] His colleagues on the Fifth Circuit were unmoved, explaining that Judge Parker's "ingenious but, unfortunately, legally deficient trial plan" could not be saved, because their "hands [were] tied by the United States Constitution."[86] Judge Parker had identified a way to use aggregation to address a complex personal injury mass tort litigation crisis but was unable to carry it out because of its failure to fit into established legal processes (in this case, a requirement for individual damage calculations).

As the Fifth Circuit reckoned with Judge Parker's creative approach in *Cimino*, parties would test the Ad Hoc Committee's recommendation by pursuing a global class settlement.

The global settlement emerged out of the 1991 creation of an MDL of almost 27,000 claims (as well as all future claims) under the oversight of Judge Charles Weiner in the Eastern District of Pennsylvania.[87] In consolidating cases, the panel sought to ensure consistent judicial

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81 *See Cimino*, 751 F. Supp. at 653 (describing the jury's role across the phases of the trial plan); NAGAREDA, *supra* note 25, at 67 ("With his trial plan in *Cimino*, Judge Parker sought to generate by way of judicial proceedings the kind of compensation grid that experienced asbestos lawyers might have reached . . . had defendants been willing to negotiate . . . .").

82 *See Cimino*, 751 F. Supp. at 651 (noting defendants' "fortress mentality" and desire to prolong cases to avoid trial).

83 *See* Cimino v. Raymark Indus., Inc., 151 F.3d 297, 319 (5th Cir. 1998) ("In sum . . . under Texas law causation must be determined as to 'individuals, not groups.' And, the Seventh Amendment gives the right to a jury trial to make that determination.").

84 *Cimino*, 751 F. Supp. at 666.

85 *See id.* ("Defendants complain about the 1% likelihood that the result would be significantly different. However, plaintiffs are facing a 100% confidence level of being denied access to the courts.").

86 Cimino v. Raymark Indus., Inc., 151 F.3d 297, 335, 339 (5th Cir. 1998) (Garza, J., concurring).

87 *See In re* Asbestos Prods. Liab. Litig. (No. VI), 771 F. Supp. 415, 417 (J.P.M.L. 1991) (confirming consolidation). Judge Weiner had attracted acclaim for his efforts to settle the asbestos caseload in his court in the 1980s. Hensler, *supra* note 22, at 267.

oversight of all asbestos cases[88] while also approvingly noting the prospect of settlement.[89] After settlement talks between Judge Weiner and the steering committees he appointed to represent the MDL's plaintiffs and defendants were unsuccessful, a subset of all asbestos manufacturers agreed to a global settlement with the plaintiffs' attorneys who led the MDL steering committee.[90]

The settlement was designed to put an end to asbestos litigation by resolving all future claims. Parties filed a Rule 23(b)(3) opt-out class action with Judge Weiner's court,[91] and the judge certified a class that contained two sets of members (although there was no formal subclassing in the settlement)[92]: those who had present injuries, who would receive immediate payouts; and those who had no present injury, who would effectively receive "the functional equivalent of an insurance policy"[93] in the promise of compensation should they manifest an injury under the terms of the settlement.[94]

Notably, the settlement did not include anyone who had a pending asbestos suit, whether or not they had a manifested injury.[95] Allegedly to "avoid complications in defining the class,"[96] those pending suits would be settled separately and privately, much as before. The negotiating plaintiffs' firms, as well as other peer firms, subsequently agreed to private aggregate settlements to clear their inventory of cases (known as inventory settlements).[97] These settlements generally gave plaintiffs

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88 *See In re Asbestos Prods. Liab. Litig.*, 771 F. Supp. at 421–22 (J.P.M.L. 1991) (describing goals of avoiding inconsistency and promoting efficient claim resolution, among others).

89 *See id.* at 424 ("This order does offer a great opportunity to all participants who sincerely wish to resolve these asbestos matters fairly and with as little unnecessary expense as possible.").

90 Hensler, *supra* note 22, at 267; Hanlon, *supra* note 33, at 1299.

91 23(b)(3) class actions are designed for "those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." FED. R. CIV. P. 23(b)(3) advisory committee's note to 1966 amendment. To certify a 23(b)(3) class action, a party must satisfy the 23(a) prerequisites as well as demonstrate that common questions of law or fact predominate over individual ones and that a class action would be a superior method of resolution. FED. R. CIV. P. 23(a)–(b).

92 *See* Georgine v. Amchem Prods., Inc., 157 F.R.D. 246, 318 (E.D. Pa. 1994) (approving the absence of subclasses).

93 NAGAREDA, *supra* note 25, at 79.

94 More precisely, the class comprised "[a]ll persons . . . who have been exposed . . . to asbestos or to asbestos containing products for which one or more of the defendants may bear legal liability and who . . . have not, as of January 15, 1993, filed a lawsuit for asbestos-related personal injury," as well as any legal representatives of then-deceased claimants. *Georgine*, 157 F.R.D. at 257–58.

95 *Id.* (limiting the class definition to those who "have not, as of January 15, 1993, filed a lawsuit for asbestos-related personal injury").

96 Hanlon, *supra* note 33, at 1300.

97 NAGAREDA, *supra* note 25, at 78.

more money for their claims than they would have received under the class settlement because they paid up-front cash to both impaired and unimpaired, exposure-only plaintiffs, rather than creating an "insurance policy" for the unimpaired.[98]

This settlement, along with an analogous settlement the same plaintiffs' attorneys reached with an asbestos producer, Fibreboard[99] (certified as a 23(b)(1)(B) limited-fund class),[100] moved up the court system, gathering public relations problems as it climbed the appellate ladder.[101] Substantial outside criticism focused on issues like the separate settlement of active claims, the lack of compensation for unimpaired but exposed future plaintiffs, and the danger of future claimants not knowing that they had a right to opt out of the settlement.[102] Amidst this air of skepticism, the two settlements would reach the Supreme Court.

In the first Supreme Court decision on the asbestos global settlements, *Amchem Products, Inc. v. Windsor*,[103] the Court firmly rejected the certification of the Pennsylvania settlement class, and in doing so cast doubt on the ability of the class action to address complex personal injury mass tort crises. Justice Ginsburg's majority opinion strictly construed the text of Rule 23, finding that the class action model could not support the Pennsylvania settlement for two primary reasons: First, there was a lack of predominance because the details of each individual class members' exposure, injury manifestation, and possibility of intervening causes were too disparate;[104] and second, there was a lack of commonality and adequacy of representation because settlement did

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98 *Id.* at 78–79.

99 Hensler, *supra* note 22, at 267–68. *See generally* Ahearn v. Fibreboard Corp., 162 F.R.D. 505 (E.D. Tex. 1995) (approving the global settlement).

100 23(b)(1)(B) class actions are designed for "situations where the judgment in a nonclass action by or against an individual member of the class, while not technically concluding the other members, might do so as a practical matter." FED. R. CIV. P. 23(b)(1)(B) advisory committee's note to 1966 amendment. To certify a 23(b)(1)(B) class action, a party must satisfy the 23(a) prerequisites and demonstrate that resolution of actions against some class members "would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests." FED. R. CIV. P. 23(b)(1)(B).

101 For the lower court opinions on the settlement that would reach the Supreme Court as *Amchem*, see generally Georgine v. Amchem Prods., Inc., 157 F.R.D. 246 (E.D. Pa. 1994) (approving); Georgine v. Amchem Prods., Inc., 83 F.3d 610 (3d Cir. 1996) (invalidating for failing to meet 23(a) and 23(b) requirements). For the lower court opinions on the settlement that would reach the Supreme Court as *Ortiz*, see *Ahearn*, 162 F.R.D. at 505 (approving); *In re* Asbestos Litig., 90 F.3d 963 (5th Cir. 1996) (affirming); *In re* Asbestos Litig., 134 F.3d 668 (5th Cir. 1998) (reaffirming initial affirmance in the wake of *Amchem*).

102 *See* Hensler, *supra* note 22, at 268; Hanlon, *supra* note 33, at 1301–05 (describing criticisms to the *Amchem* settlement's treatment of future claimants and inventory claims).

103 *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 622–25 (1997).

104 *See id.* at 622–25.

not feature subclasses to divide the presently impaired and exposure-only class members and their disparate interests.[105] Just as the Fifth Circuit did for Judge Parker in their *Cimino* decision, Justice Ginsburg expressed sympathy for the pleas for pragmatism but explained that the class action "cannot carry the large load [defendants,] class counsel, and the District Court heaped upon it," and wrote that while "[t]he argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure[,] Congress, however, has not adopted such a solution."[106]

One year later, in the second Supreme Court case, Justice Souter would strike down the Fibreboard settlement on similar grounds. In *Ortiz v. Fibreboard Corp.*, Justice Souter relied on *Amchem*, finding that the lack of subclassing in the settlement was insufficient.[107] Of note, the opinion adopted a common criticism of the settlements, with Justice Souter disparagingly highlighting the inventory settlements made separate to the class and finding it grounds for unfairness.[108] Just as in *Amchem*, the majority explained its court's decision in reluctant terms, with Justice Souter writing that "[t]he nub of our position is that we are bound to follow Rule 23,"[109] and Chief Justice Rehnquist—whose Ad Hoc Committee had called for a global class settlement like the one before the Court—noting in his concurrence that despite a recognition of the scale of the asbestos crisis, the Court was "not free to devise an ideal system for adjudicating [asbestos] claims."[110] Once again, a global settlement was found to be incongruous with the class action system.

Beyond their specific review of individual class settlements, *Amchem* and *Ortiz* functionally eliminated the Rule 23 class action as a large-scale aggregative tool for complex personal injury mass torts. There are two key lessons to that end. First, the Court believed that there was no way that a class action alone could effectively replace the

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105 *See id.* at 625–28.

106 *Id.* at 629. Justice Breyer dissented in *Amchem*, arguing in favor of the settlement as the best way out of the crisis crippling the court system. *See id.* at 629–41 (Breyer, J., dissenting).

107 *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 856 (1999). Justice Souter also took issue with the fact that Fibreboard had not placed all its assets into the settlement, rendering the settlement a poor fit for the limited fund model of Rule 23(b)(1)(B). *See id.* at 848–61.

108 *See id.* at 855 ("Might such class exclusions be forgiven if it were shown that the class members with present claims and the outsiders ended up with comparable benefits? The question is academic here.").

109 *Id.* at 861.

110 *Id.* at 865 (Rehnquist, C.J., concurring). Justice Breyer once again dissented along pragmatic lines. *See id.* at 865–84 (arguing that "our special background circumstances . . . explain the reasonableness and consequent lawfulness" of the district court's management scheme).

individual right to a claim with non-individualized claim resolution.[111] Instead, class actions could only function as a preservation of class members' existing rights under the law,[112] and only Congressional action could change that.[113] To satisfy the requirements of class certification, it would essentially be necessary to aggregate a mass tort without aggregating—each claim would have to be able to function as it would have if proceeding alone, an impossibly high bar given the highly varied nature of complex personal injury mass torts. Second, while the Justices did not explicitly foreclose the possibility that a global settlement could be reached in the context of a complex personal injury mass tort,[114] they created such a high bar for class certifications as to be essentially infeasible at any meaningful scale.[115]

Between *Cimino*, *Amchem*, and *Ortiz*, the judicial system found itself unable to meaningfully address the asbestos litigation crisis due to the constraints of the Seventh Amendment and the Federal Rules of Civil Procedure. After *Amchem* and *Ortiz*, the litigation crisis worsened, as a higher volume of claims led all but one asbestos manufacturer into bankruptcy.[116] This ultimately created a situation not unlike what would have happened had the *Amchem* and *Ortiz* settlements been successful—a series of trusts providing compensation to many

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111 *See* NAGAREDA, *supra* note 25, at 79–80 ("Simply put, the conceptual starting point in both cases is that class actions enjoy no general authority to alter the preexisting rights of class members."); *Ortiz*, 527 U.S. at 845 ("[W]e . . . need to recognize the tension between the limited fund class action's pro rata distribution in equity and the rights of individual tort victims at law.").

112 *See Ortiz*, 527 U.S. at 845 ("The Rules Enabling Act underscores the need for caution. As we said in *Amchem*, no reading of the Rule can ignore the Act's mandate that 'rules of procedure shall not abridge, enlarge or modify any substantive right . . . .'") (quoting Amchem v. Windsor, 521 U.S. 591, 613 (1997)).

113 *Amchem*, 521 U.S. at 628–29.

114 *See Amchem*, 521 U.S. at 625 (writing that "the text of the Rule does not categorically exclude mass tort cases from class certification," but also calling for "caution [in certifying a mass tort class] when individual stakes are high and disparities among class members great."). It is worth noting that this skepticism, based on comments from the 1966 advisory committee that amended Rule 23, *see id.* at 615, may not have been fully necessary. Professor Charles A. Wright, who sat on the committee and believed at the time that Rule 23 and mass torts were incompatible, by 1991 said that he was "profoundly convinced now that this [incompatibility] is untrue. Unless we can use the class action and devices built on the class action, our judicial system is not going to be able to cope with the challenges of the mass repetitive wrong." Cimino v. Raymark Indus., 751 F. Supp. 649, 652 (E.D. Tex. 1990) (quoting H. NEWBERG, NEWBERG ON CLASS ACTIONS § 17.06, at 373 (2d ed. 1985)).

115 *See* Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475, 1476 (2005) ("In *Amchem Products Inc. v. Windsor* and *Ortiz v. Fibreboard Corp.*, the Supreme Court transformed Federal Rule of Civil Procedure 23(b)(3)'s 'superiority' requirement into a mandate of perfection, and reformalized the 'limited fund' doctrine beyond practical utility.").

116 Hensler, *supra* note 22, at 272.

claimants, supplemented by individual lawsuits—but decades after the settlements were created, and with huge transaction (and human) costs along the way.[117]

B. The Opioid Crisis: Limitations on MDLs and Bankruptcy

Following *Amchem* and *Ortiz*'s foreclosure of the class action,[118] lawyers seeking to resolve complex personal injury mass torts moved on to the two other principal aggregative options available to them within the judicial system: MDLs and bankruptcy.[119] Each failed to be a silver bullet. The limitations of MDLs and bankruptcy to achieve meaningful, large-scale resolutions of complex personal injury mass torts are laid bare by an examination of the litigation resulting from the opioid epidemic. This Section describes the litigation crisis that arose out of the opioid epidemic and explains how it demonstrates that the remaining aggregative methods available today remain inadequate to efficiently and fairly resolve mass tort crises.

The opioid epidemic and its effects are well-documented in the press and in secondary literature.[120] Between 1999 and 2023, "approximately 806,000 people died from an opioid overdose," across prescription and illegal drugs (such as fentanyl).[121] The colossal scale of harm created by opioid addiction led to lawsuits against Purdue Pharma (the makers of Oxycontin, the most prominent prescription opioid), along with additional suits against pharmaceutical companies, distributors, and business consultants involved in the creation of the crisis.[122] Thousands of cases were filed, primarily by municipalities and

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117 *See* Hanlon, *supra* note 33, at 1305–07 ("Forty-one bankruptcies in six years take their toll on investors, employees, and communities. The bankruptcies are also hugely expensive, generating millions of dollars in consultants' (including lawyers') fees. Surely there had to be a better way.").

118 In the intervening years, the Supreme Court has further limited the utility of the class action to address big, diverse classes of claimants (as occur in mass torts). *See, e.g.*, Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349–55 (2011) (tightening the commonality requirement for class certification); TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2214 (2021) (holding that class members must all demonstrate concrete harm caused by a tort to have Article III standing).

119 *See* Parikh, *supra* note 15, at 473–79 (explaining that "[i]n the last twenty years, MDLs have supplemented class actions for personal injury mass tort cases," and "corporate defendants are drawn to bankruptcy as a means to regain control over the resolution process").

120 For a general description of the crisis and its causes, see *id.* at 449–51.

121 *Understanding the Opioid Overdose Epidemic*, Center for Disease Control (June 9, 2025), https://www.cdc.gov/overdose-prevention/about/understanding-the-opioid-overdose-epidemic.html [https://perma.cc/K9XA-33F6].

122 *See generally* Wen W. Shen, Cong. Rsch. Serv. LSB11270, National Opioid Litigation: Settlement Agreements as of January 2025 (2025), https://www.congress.gov/crs-product/LSB11270 [https://perma.cc/KVE2-NUTW] (listing settlement agreements reached against targets of opioid crisis-related lawsuits).

states seeking to recover the funds that they had to expend combatting opioid addiction and overdoses.[123] In this way, the opioid litigation crisis was fundamentally different (though no less weighty) than asbestos—it was characterized by a mix of large institutional claimants and individuals in a way that asbestos was not.

Ultimately, an MDL was created to centralize more than 2,000 federal claims and placed in the Northern District of Ohio under Judge Dan A. Polster.[124] Judge Polster, in an echo of Judge Parker before him, recognized that the scale of the opioid litigation meant that only settlement could quickly and meaningfully resolve the crisis[125] but faced a set of defendants who were unwilling to settle without a global settlement.[126] In the wake of *Amchem* and *Ortiz*, this created a problem—the judge could not pursue a standard class settlement under Rule 23 because those had been functionally foreclosed, and there was no way to use the MDL on its own for aggregative settlements.

Judge Polster tried to creatively adapt the class action model to address the standstill, creating a new type of aggregative action: the negotiation class.[127] Compared to a pre-negotiated and judicially approved Rule 23(e) settlement class,[128] a negotiation class would be certified *before* settlement negotiation, and claimants would opt out before a settlement structure is in place (but after a formula for allocating any settlement amongst plaintiffs is determined).[129] Class counsel would then negotiate the settlement, knowing the size of the class, and put the final settlement to a binding vote.[130] Judge Polster's approach was designed to reduce the heightened risk of opt-outs

123 *See id.* ("[S]tate and local governments at the forefront of the opioid crisis . . . pursu[ed] a substantial number of civil lawsuits . . . . These lawsuits . . . numbered in the thousands . . . ."); *In re* Nat'l Prescription Opiate Litig., 332 F.R.D. 532, 536 (N.D. Ohio, 2019) ("Most of these constituent cases have been filed by cities and counties throughout the United States seeking, *inter alia*, reimbursement for monies they have expended . . . addressing the opioid crisis.").

124 *In re* Nat'l Prescription Opiate Litig., 332 F.R.D. at 536 ("At present, this multidistrict litigation (MDL) encompasses more than 2,000 individual actions."); *In re* Nat'l Prescription Opiate Litig., 290 F. Supp. 3d 1375, 1379 (J.P.M.L. 2017) (appointing Judge Polster).

125 *See* Transcript of Proceedings at 9, *In re* Nat'l Prescription Opiate Litig., (N.D. Ohio Jan. 9, 2018) (No. 17-CV-2804) ("[W]e don't need a lot of briefs and we don't need trials . . . . [N]one of those are going to solve what we've got.").

126 *In re* Nat'l Prescription Opiate Litig., 332 F.R.D. at 536–37.

127 *Id.*

128 *See* FED. R. CIV. P. 23(e) (outlining the settlement class).

129 *See* Francis E. McGovern & William B. Rubenstein, *The Negotiation Class: A Cooperative Approach to Class Actions Involving Large Stakeholders*, 99 TEX. L. REV. 73, 79 (2020) (explaining a five-stage process that involves creating "an opt-out Rule 23(b)(3) class, with certification limited to the sole purpose of negotiating a lump sum settlement with the defendant").

130 *Id.*

in mass tort litigation with a wide variety of claim values. By giving claimholders a chance to determine what portion of a settlement they would receive before an opt-out, but binding them to the result of a fully negotiated, supermajority-approved settlement, the negotiation class would incentivize defendants to settle because of the possibility of a near-global peace and incentivize high-value claimants to opt in to aggregation because defendants would be willing to pay a premium for the prospect of global peace.[131]

The negotiation class was carefully designed to address the collapsed incentive structure that was paralyzing Judge Polster's MDL. Nevertheless, the Sixth Circuit reversed in a formalist opinion that was reminiscent of *Cimino* and *Amchem*'s skepticism of creative judicial problem-solving in mass tort,[132] demonstrating a continued skepticism of creative uses of aggregative mechanisms to resolve complex personal injury mass torts.

In the wake of the negotiation class's failure, Purdue Pharma and many of the institutional plaintiffs involved in the MDL agreed to a global bankruptcy settlement that would comprehensively resolve claims against both Purdue and the non-debtor Sackler family.[133] The bankruptcy plan granted the Sacklers a permanent, third-party injunction that would prohibit anyone from bringing opioid lawsuits against them (in the same way that the plan would resolve all present and future suits against the bankrupt Purdue Pharma entity)[134] in exchange for contributing $4.325 billion (out of the $11 billion they had siphoned) to go toward a fund for claimants.[135] Despite opposition by some individual claimants over the Sackler injunction and low creditor turnout (less than twenty percent of ballots were returned), the bankruptcy plan passed a vote and was confirmed by a bankruptcy judge in the Southern District of New York.[136]

After a series of appeals, the Supreme Court denied the Sacklers their injunction, returning to the highly formalist rhetoric that had

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131 *Id.* at 104–07.

132 *See In re* Nat'l Prescription Opiate Litig., 976 F.3d 664, 676 (6th Cir. 2020) ("However innovative and effective the addition of negotiation classes would be to the resolution of mass tort claims—particularly those of grave social consequence . . . we 'are not free to amend a rule outside the process Congress ordered.'" (quoting Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620 (1997))).

133 Gluck, Burch & Zimmerman, *supra* note 43, at 545; Harrington v. Purdue Pharma, Ltd. P'ship, 144 S. Ct. 2071, 2079 (2024) ("Between 2008 and 2016, the family's distributions totaled approximately $11 billion, draining Purdue's total assets by 75% and leaving it in 'a significantly weakened financial' state." (citation omitted)).

134 *See supra* notes 66–67 and accompanying text (discussing this feature of bankruptcy).

135 *Harrington*, 144 S. Ct. at 2079.

136 *Id.* at 2079–80.

both characterized *Amchem* and *Ortiz* almost three decades earlier and doomed the settlement class. In *Harrington v. Purdue Pharma, L.P.*, Justice Gorsuch, writing for the majority, found that the text of the bankruptcy code failed to authorize the kind of non-consensual third-party release that the Sacklers had secured in the bankruptcy plan.[137] Once again, the Court rejected appeals to pragmatism: The majority justified its decision to send the parties back to negotiations on the basis that its "only proper task is to interpret and apply the law as we find it; and nothing in present law authorizes the Sackler discharge."[138] While *Harrington* left open some avenues for third-party injunctions to continue as a part of bankruptcy—namely, ones that are "consensual" or "provide[] for the full satisfaction of claims against a third-party nondebtor"[139]—it nevertheless seemed to dramatically limit the flexibility of bankruptcy to achieve global peace for complex personal injury mass torts by prioritizing due process, fairness, and consent in aggregated case resolution.[140] In other words, just as the Court in *Amchem* and *Ortiz* rejected attempts at global settlements of asbestos cases because they were structurally unable to guarantee individual claimants fairness and due process, something that would functionally doom large-scale global settlements in complex personal injury mass tort cases,[141] *Harrington* appears to signal that attempts to globally settle bankruptcy cases beyond the debtor entity may be similarly limited, limiting bankruptcy's utility to more broadly resolve a complex personal injury mass tort.

The parties in *Harrington* would ultimately renegotiate their settlement without the third-party injunction, with the Sacklers paying more money but receiving an $800 million legal fund to defend future lawsuits against them.[142] The total settlement, approved by a bankruptcy judge in November 2025, would be $7.4 billion, with the majority going

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137 *Id.* at 2088. For a succinct summary of Justice Gorsuch's analysis, see William A. Organek, *Purdue's Side Effects: Using Due Process to Realign Mass Tort Bankruptcies*, 50 BYU L. Rev. 1031, 1044–46 (2025).

138 *Harrington*, 144 S. Ct. at 2087. *Harrington*, like *Amchem* and *Ortiz* before it, features a pragmatist *cri de coeur* in dissent, this time from Justice Kavanaugh. *See id.* at 2088–117.

139 *Id.* at 2088.

140 *See* Organek, *supra* note 137, at 1097 ("*Purdue* reaffirms the right[] . . . to take the Sacklers to court for the harm they have done . . . regardless of the machinations in which they might have engaged and regardless of the notion shared by many that the settlement in the case would be more efficient.").

141 *See supra* notes 103–15 and accompanying text (describing the *Amchem* and *Ortiz* decisions).

142 Brian Mann & A Martínez, *Purdue Pharma and Sackler Family Members to Pay $7.4B in National Opioid Settlement*, Nat'l Pub. Radio (Jan. 24, 2025, at 04:19 ET), https://www.npr.org/2025/01/24/nx-s1-5272769/purdue-pharma-and-sackler-family-members-to-pay-7-4b-in-national-opioid-settlement [https://perma.cc/4QT2-PUWX].

to institutional claimants (demonstrating their large negotiating power) and $850 million set aside to compensate direct victims.[143]

Between Judge Polster's attempts to innovate through the negotiation class and the *Harrington* parties' attempts to increase the reach of a global bankruptcy settlement via a non-consensual third-party injunction, the opioid crisis saw creative problem-solving reversed on appeal based on the same formalist-textualist approach that had characterized asbestos cases. The opioid crisis reinforces and expands on the lessons of the asbestos crisis: Outside of highly specific scenarios, global settlements in the most complex personal injury mass torts are off the table as they relate to multiple defendants and limited in scope as they relate to bankruptcy (due to consent, limits to third-party releases, and insolvency requirements). Appellate courts have clearly stated that aggregation cannot coexist with the creative problem-solving that is necessary to resolve the biggest complex personal injury mass tort crises.

III
Moving Beyond Aggregation: Accepting and Promoting Settlement via Claims Resolution Facilities

The asbestos and opioid crises created clear doctrinal limitations on the use of aggregative methods to resolve complex personal injury mass torts, presenting a problem for stakeholders. Today, parties facing a new complex personal injury mass tort have a limited set of options, often resorting to resolving claims individually or via small scale aggregation in an MDL, or, in cases of insolvency, aggregating globally through bankruptcy. Neither of these is perfect on its own—private aggregation can be fraught with collusion concerns and only functions when both parties seek to settle,[144] and public aggregation through bankruptcy is coercive and prone to the same collusive concerns.[145]

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143 Jan Hoffman, *Judge to Approve Purdue Pharma Bankruptcy, Releasing Billions for Opioid Plaintiffs*, N.Y. Times (Nov. 14, 2025), https://www.nytimes.com/2025/11/14/health/purdue-sacklers-settlement.html [https://perma.cc/7CZM-D7AK]. It is worth noting that individual plaintiffs' claims may have taken a backseat in negotiations—NPR spoke to one advocate who was addicted to Oxycontin for more than a decade who said that the settlement "falls short of anything meaningful that victims will receive," pointing to his own expected recovery of only $3,500. Brian Mann & A Martínez, *Purdue Pharma, Sacklers Reach New $7.4 Billion Opioid Settlement*, Nat'l Pub. Radio (June 16, 2025, at 14:45 ET), https://www.npr.org/2025/06/16/nx-s1-5435318/purdue-pharma-sacklers-reach-new-7-4-billion-opioid-settlement [https://perma.cc/4KUM-EN72].

144 *See supra* Sections I.B–C (summarizing these dynamics).

145 *See supra* notes 61–72 and accompanying text (summarizing this). Scholarly work that argues that bankruptcy is the best way to address complex personal injury mass torts generally includes a laundry list of policy proposals that would need to be implemented to

Additionally, each is prone to long timelines and high transaction costs,[146] decreasing the money available to tort victims and, in some cases, functionally denying some access to compensation.[147]

This Part will argue that limits for aggregation justify an increased utilization of claims resolution facilities, quasi-administrative bodies that utilize objective criteria to rapidly resolve claims to sidestep the judicial limitations on mass tort resolution. CRFs have long been a feature of the complex personal injury mass tort landscape[148] but have played second fiddle to aggregative methods in many aspects of practice and in scholarship.[149] This may be a result of a criticism about CRFs, especially purely private versions, being unable to fairly serve claimants' needs.[150] Taking these concerns as valid, this Part will argue that they can be mitigated or eliminated by prioritizing public and quasi-public CRFs, and will present two different models for stakeholders to use in the future: a legislative CRF based on the National Vaccine Injury Compensation Program, and a judicial CRF based on one used in the recent Roundup MDL.

To make this argument, this Section will first introduce CRFs, describing them generally, providing some prominent examples, and highlighting common criticisms. Accepting concerns about purely private CRFs, the next two Sections will explore how implementing CRFs through legislation and through the MDL process can facilitate the efficient settlement necessary to address a complex personal injury mass tort litigation crisis without the fairness and procedural compromises on which concerns about private mass settlement focus.

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meaningfully address these problems. *See, e.g.*, Parikh, *supra* note 15, at 496–502; Casey & Macey, *supra* note 43, at 1048–50; Bussel, *supra* note 43, at 710–40.

146 *See* Hanlon, *supra* note 33, at 1289 (explaining that asbestos claimants could wait more than five years for their claims to be resolved through private aggregation); White, *supra* note 1, at 16 (noting high transaction costs for the asbestos crisis, with $34 billion out of $54 billion spending going to legal fees); McKenzie, *supra* note 43, at 1010 (describing the same phenomenon for bankruptcy).

147 *See* Labaton, *supra* note 5 ("Many plaintiffs must spend years in the courts—and may even die—before they or their families receive even a penny of compensation.").

148 *See, e.g.*, Kenneth R. Feinberg, *Response to Deborah Hensler, A Glass Half Full, a Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1647, 1647 (1995) (defending the use of CRFs during the asbestos litigation crisis); *see* Section III.A, *infra* (providing examples of CRFs).

149 *See supra* Section II.B (describing Judge Polster's decision to pursue aggregation to address the opioid MDL); Jaime Dodge, *Disaggregative Mechanisms: Mass Claims Resolution Without Class Actions*, 63 EMORY L.J. 1253, 1256–57 (2014) (describing this phenomenon in academia).

150 *See infra* Section III.A.2 (discussing harms, as well as benefits, of CRFs).

A. An Overview of Claims Resolution Facilities

The world of CRFs is broad and varied. This Section will provide a basic overview of CRFs, as well as some examples of ways that they have been used in the past. It will then explore the benefits of CRFs, note some common criticisms, and explain why public and quasi-public CRFs are an excellent way to maximize benefits and reduce possible harms.

1. Defining Claims Resolution Facilities

As described by Professor Francis McGovern, CRFs are "entities that process and resolve claims made against a potential funding source" that "function to enable the disaggregation of liability from damages in the determination of legal entitlements either individually or collectively, in a settlement or as a precursor to litigation."[151] In other words, the core focus of a CRF is not broad questions of who did what and why, but rather how to efficiently take claims and award those that are found to be meritorious.

CRFs vary widely in size, scope, origin, and application. They can function as simple allocation mechanisms, solving the problem of how to distribute funds to victims after a liability determination is made by a judge or a settlement is reached.[152] They can also be more complex, making determinations of causation, liability, and damages that would typically be the task of a court.[153] CRFs can arise out of litigation,[154] be created as a purely private means of claim resolution,[155] or be designed by legislation as an arm of the government.[156] Many different public and private entities can be involved in the creation of a CRF.[157]

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151 Francis E. McGovern, *The What and Why of Claims Resolution Facilities*, 57 STAN. L. REV. 1361, 1361–62 (2005). *See generally* Lynn A. Baker & Charles Silver, *In Defense of Private Claims Resolution Facilities*, 84 L. & CONTEMP. PROBS. 45 (2021) (responding to and expanding on McGovern's article).

152 *See* McGovern, *supra* note 151, at 1363–65 (describing the function of CRFs).

153 *See* LISA BLOMGREN AMSLER, JANET K. MARTINEZ & STEPHANIE E. SMITH, DISPUTE SYSTEM DESIGN, 136 (2020) (describing how the Dalkon Shield mass tort CRF would determine causation and responsibility of defendants in addition to determining the appropriate payout to valid claimants).

154 *See, e.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 603–04 (1997) (describing how class settlement would create an administrative CRF).

155 *See, e.g.*, Hanlon, *supra* note 33, at 1291 (describing the voluntary creation of a CRF by asbestos defendants).

156 *See, e.g.*, Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, tit. IV, 115 Stat. 230, 237 (2001) (codified as amended in scattered sections of 2, 26, and 49 U.S.C.) (creating a CRF for victims of the 9/11 terrorist attacks).

157 *See* McGovern, *supra* note 151, at 1366–67.

At their core, CRFs seek to reorganize the dynamics of how a claim gets evaluated and paid out to prioritize efficient claim resolution. Rather than the adversarial system that is the bedrock of American courts, CRFs rely on an "inquisitorial model of decisionmaking," in which claimant participation is centered without sacrificing "a reasoned decision constrained by law and fact."[158] The inquisitorial model allows for claims to be resolved more quickly than they would be through the courts.[159] This speed can be maintained even while providing claimants opportunities to share their stories to a hearing officer or other official, providing them with a facsimile of a "day in court."[160] The claim filing process can also be designed to allow claimants who were clearly harmed but may be barred from recovery in the courts as a result of statutes of limitations or difficulties in demonstrating causation to still obtain a recovery when appropriate.[161]

An examination of some of the most prominent CRFs is instructive in underlining their characteristics. The most famous CRF may be the September 11th Victim Compensation Fund ("9/11 Fund"), which was created by Congress in the wake of the attacks to provide relief to victims and their families outside of the tort system.[162] The architects of the 9/11 Fund designed a CRF focused on achieving the goals of "fairness, transparency, consistency, and one-on-one communications with claimants, their attorneys, and interested parties" with "maximum efficiency and cost-effectiveness."[163] The 9/11 Fund used objective requirements to identify claimant eligibility, determined awards by relying on an actuarial grid-like system, and provided an opportunity for claimants to have their story heard by

158 *Id.* at 1368.

159 *See, e.g.*, 1 U.S. DEP'T OF JUST., FINAL REPORT OF THE SPECIAL MASTER FOR THE SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001, at 113 (2004) [hereinafter 9/11 FINAL REPORT] (noting that on average, a claimant would receive payment of their award 261 days after filing a claims form with the CRF).

160 *Id.* at 1 ("[T]he Fund offered in-person informal meetings along with hearings so that claimants could 'have their day in court' and explain the magnitude of their loss and their views about the way in which the Fund should treat their particular situation.").

161 *See, e.g.*, Exhibit D to Letter to Judge Alison J. Nathan at 2, United States v. Maxwell, No. 20-cr-330 (S.D.N.Y. July 15, 2022), Dkt. No. 734-4 [hereinafter Exhibit D to Letter to Judge] (allowing claims to be filed with the CRF set up for victims of Jeffrey Epstein and his associates regardless of whether they would be outside of a jurisdiction's statute of limitations).

162 Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, tit. IV, 115 Stat (2001). The original 9/11 Fund did not address a complex personal injury mass tort, since injuries were discrete with no latency, but its later extension to injuries developed from ground zero exposure changed that. *Welcome to the VCF*, SEP. 11TH VICTIM'S COMP. FUND, https://www.vcf.gov [https://perma.cc/QP5S-AWLE] (last visited May 13, 2026).

163 9/11 FINAL REPORT, *supra* note 159, at 74.

an official.[164] This process was ultimately successful; despite having the (potentially more lucrative) option to pursue tort claims through the traditional court system, ninety-eight percent of eligible victims and families pursued claims through the 9/11 Fund, with families of deceased victims recovering an average of $2 million and survivors with disabling injuries receiving an average of $400,000.[165] The time from filing a claim to receiving a payment was, on average, a little less than nine months,[166] dramatically shorter than the years-long parallel personal injury litigation.[167]

Another important CRF is the Gulf Coast Claims Facility ("GCCF"), created in the aftermath of the Deepwater Horizon oil spill in 2010. The GCCF was a private creature created by British Petroleum ("BP") in response to pressure from the federal government and seeded with $20 billion in funds.[168] The GCCF provided claimants with immediate emergency payments without requiring a waiver of future litigation rights, as well as options to get a flat, quick settlement or a more comprehensive, individualized payment for present and future losses.[169] This process was successful in providing fast, efficient relief, providing more than $6.2 billion to over 220,000 claimants over eighteen months,[170] but was also hamstrung by criticism from stakeholders over its defense-driven creation, "its questionable valuation mechanisms, and its overall lack of transparency."[171] It would ultimately be brought under partial supervision of an MDL judge[172] and later be replaced by

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164 *See id.* at 10, 18–52 (noting the option of hearings and describing eligibility and compensation determinations).

165 Kenneth R. Feinberg, Who Gets What: Fair Compensation After Tragedy and Financial Upheaval 55 (2012).

166 9/11 Final Report, *supra* note 159, at 113 (noting an average claim lifespan of 261 days).

167 *See In re* Sep. 11 Litig., 236 F.R.D. 164, 167–69 (S.D.N.Y. 2006) (describing slow progress of non-9/11 Fund personal injury litigation and noting that three years into the litigation "no discernable progress" had been made).

168 Amsler, Martinez & Smith, *supra* note 153, at 137–38.

169 Steven Garber, RAND Corp., Designing Compensation Programs for Individuals and Households After Man-Made and Natural Disasters in the United States 19 (2016) (describing the GCCF's design).

170 BDO Consulting, Independent Evaluation of the Gulf Coast Claims Facility: Report of Findings and Observations to the U.S. Department of Justice 59 (2012), https://www.justice.gov/sites/default/files/opa/legacy/2012/06/06/gccf-rpt-find-obs.pdf [https://perma.cc/FJ23-94J3].

171 Amsler, Martinez & Smith, *supra* note 153, at 139; *see also* Feinberg, *supra* note 165, at 140–59 (describing these criticisms); Linda S. Mullenix, *Prometheus Unbound: The Gulf Coast Claims Facility as a Means for Revolving Mass Tort Claims - A Fund Too Far*, 71 La. L. Rev. 819, 825 (2011) (criticizing the GCCF as unaccountable).

172 *See In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex., MDL No. 2179, 2011 WL 323866, at *8 (E.D. La. Feb. 2, 2011) (imposing supervision on GCCF communications).

a court-controlled CRF after a settlement.[173] An audit ordered by the Department of Justice would pin many of these issues on communication failures and a lack of review built into claims processing.[174]

In addition to these two modern CRFs, the asbestos litigation crisis featured an early example. Multiple asbestos defendants created a cooperative CRF known as the Center for Claims Resolution ("CCR") in which defendants negotiated as one with plaintiffs and split expenses and damages based on an agreed-upon formula.[175] CCR was successful in its goal of settling asbestos claims, with one article noting that even though it only represented a minority of asbestos defendants, it "allegedly accounted for about three-quarters of all payments to asbestos plaintiffs" in the 1990s.[176] CCR's disproportionate share of payments indicated that the resolution of the asbestos litigation crisis hinged on defendants' willingness to settle: When defendants wanted, cases would remain in purgatory, denying compensation to claimants—many of whom had life-threatening illnesses.[177]

Additional examples of prominent CRFs include funds arising out of class settlements or bankruptcy (rather than replacing them) to compensate victims of sexual abuse by Boy Scout leaders[178] or Jeffrey Epstein,[179] or to compensate former NFL players whose careers caused degenerative brain injuries.[180]

2. *The Benefits (and Potential Harms) of Claims Resolution Facilities*

When designed effectively and imbued with legitimacy, CRFs can function as a direct response to the problems that confront complex personal injury mass tort litigation crises: oversized dockets, long waits for case resolution, large legal costs, and exhaustion of defendant

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173 Amsler, Martinez & Smith, *supra* note 153, at 139.

174 BDO Consulting, *supra* note 170, at 87.

175 Hensler, *supra* note 22, at 264; Hanlon, *supra* note 33, at 1291–92.

176 Hensler, *supra* note 22, at 264.

177 *See, e.g.*, Cimino v. Raymark Indus., 751 F. Supp. 649, 651–52 (E.D. Tex. 1990) (noting that asbestos defendants "Pittsburgh–Corning, Fibreboard and Celotex have adopted a 'fortress mentality'" to avoid liability, knowing that without settlement or aggregation, pending cases against them "will never be tried"); Labaton, *supra* note 5 ("Many plaintiffs must spend years in the courts—and may even die—before they or their families receive even a penny of compensation."). The *Amchem* and *Ortiz* global settlements would ultimately be driven by CCR defendants and their attorneys, as those who were willing to settle sought to bind those who were not. Hensler, *supra* note 22, at 267–69; Hanlon, *supra* note 33, at 1299.

178 *See, e.g.*, Scouting Settlement Trust, https://www.scoutingsettlementtrust.com [https://perma.cc/2B4Z-A242] (last visited May 13, 2026).

179 *See, e.g.*, Exhibit D to Letter to Judge, *supra* note 161, at 2.

180 *See, e.g.*, *In re* Nat'l Football League Players' Concussion Injury Litig., 307 F.R.D. 351, 367–68 (E.D. Pa. 2015) (describing the claims process).

assets.[181] The 9/11 Fund's swift distribution of money and resolution of claims compared to the years-long delays of the accompanying personal injury litigation exemplifies this;[182] by rapidly clearing claims, the fund was able to avoid actions clogging dockets for years.

Beyond addressing the administrative concerns of complex personal injury mass torts, CRFs can also tackle the fairness concerns that prompted the Supreme Court's limitations on aggregation in *Amchem*, *Ortiz*, and *Harrington*.[183] For one, due process is not compromised by a CRF in the way that doomed settlements in those cases because a CRF can determine claims individually, granting everyone the right to their own damage determinations and litigation waivers. Individual damage determinations also eliminate concerns over present and future claimants being pitted against each other; everyone in a CRF can have a determination on their own claim, so long as the CRF is appropriately funded. Collusive incentives can also be checked; centralized administration and an inquisitorial model can reduce the ability of counsel to compel action by parties they do not represent.

The counterpoint to these potential benefits is that a poorly designed CRF will fall far short of this fairness and efficiency, and claimants will be harmed as a result. These speculative harms resemble those raised by critics of aggregation[184] that the previous paragraph argued that CRFs can prevent. Critics have argued that CRFs can create an "unseemly pressure exerted on disaster victims to quickly seek relief through a fund mechanism, rather than retaining counsel and filing a lawsuit,"[185] incentivize and even reward lawyers and claimants who file frivolous claims,[186] and shield defendants from meaningful liability at claimants' expense.[187]

The GCCF is one example of this. While it was able to rapidly distribute money to claimants, some commentators were critical of its defense-side origins, insufficient transparency, and prioritization of efficiency over other principles,[188] and the Eastern District of Louisiana

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181 *See, e.g.*, *supra* notes 75–76 and accompanying text.

182 *See supra* notes 166–67 and accompanying text.

183 *See supra* notes 103–10, 137–40 and accompanying text.

184 *See supra* Part II.

185 Mullenix, *supra* note 171, at 914.

186 Amanda Bronstad, *A Judge Asks: Is It Time to End Ken Feinberg's Roundup Settlement Program?*, Law.com (Aug. 1, 2024), https://www.law.com/therecorder/2024/08/01/a-judge-asks-is-it-time-to-end-ken-feinbergs-roundup-settlement-program [https://perma.cc/TA9C-BU48].

187 Dodge, *supra* note 149, at 1306–07.

188 *See* Mullenix, *supra* note 171, at 914 (arguing that the GCCF and other CRFs create an "unseemly pressure exerted on disaster victims to quickly seek relief through a fund mechanism, rather than retaining counsel and filing a lawsuit"); BDO Consulting,

would fault it for misleading claimants into thinking that it was independent of BP, rather than an extension of the defendant.[189] The extent of its success is subject to debate.[190] In particular, its troubled rollout may have reduced enrollment and fed a litigation crisis.[191]

One prominent CRF critic, Professor Linda Mullenix, suggests that the potential for harm justifies a rejection of the efficiency goals that have been a hallmark of CRFs, instead centering values like "democratic governance" and "due process."[192] This echoes a broader critique by some academics that centering efficient compensation risks losing some of the benefits of litigation, namely allocation of responsibility and the development of law and policy.[193] Put plainly, the case against CRFs is that, given the possibility of harm to claimants and the lost benefits of public litigation, it is better to keep complex personal mass torts in the traditional litigation spectrum.

In the context of complex personal injury mass torts, this argument fails to fully reckon with the doctrinal realities this Note described in Part II. For crisis-level complex personal injury mass torts, the civil litigation process provides no opportunity to functionally obtain values like democratic governance or due process. When there are so many cases that trial is so delayed as to not be a functional possibility,[194] and when doctrinal developments have foreclosed the ability to meaningfully aggregate claims outside of individual defendant-specific bankruptcies,[195] then disaggregation through CRFs, despite any imperfections, may be the best option for claimants seeking some kind of justice.[196]

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supra note 170, at 71 (outlining criticisms). *See generally* Deborah R. Hensler, *A Glass Half Full, a Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1587, 1623–26 (1995) [hereinafter Hensler, *A Glass Half Full*] (arguing that plaintiffs are short-changed by the rise of CRFs/Alternative Dispute Resolution in mass torts).

189 *In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on Apr. 20, 2010, MDL No. 2179, 2011 WL 323866, at *7 (E.D. La. Feb. 2, 2011).

190 *Compare* Mullenix, *supra* note 171, at 913 (levying an extensive critique), *with* BDO CONSULTING, *supra* note 170, at 89 (concluding that the GCCF successfully responded to the needs of those most harmed by the Deepwater Horizon disaster).

191 BDO CONSULTING, *supra* note 170, at 89 (noting that "many [claimants] have sought an alternative to the GCCF"); *cf.* FEINBERG, *supra* note 164, at 55 (noting that ninety-eight percent of 9/11 victims participated in the 9/11 Fund).

192 Mullenix, *supra* note 171, at 914.

193 Gluck, Burch & Zimmerman, *supra* note 43, at 525.

194 *See* Cimino v. Raymark Indus., Inc., 751 F. Supp. 649, 652 (E.D. Tex. 1990) (noting that without private settlement or aggregation, pending asbestos cases "will never be tried"); Labaton, *supra* note 5 ("Many plaintiffs must spend years in the courts—and may even die—before they or their families receive even a penny of compensation.").

195 *See supra* Part II.

196 *See, e.g.*, Feinberg, *supra* note 148, at 1650–51 (making a similar argument).

Rather, a better approach to mitigate the potential harms of a poorly designed CRF is to minimize CRFs run by private parties. Creating a CRF is an opportunity to design rules to either replace or augment the role of a court at a potentially massive scale, and mistakes (or knowing choices) carry the risk of substantial harm to parties.[197] Additionally, even if a CRF is well-designed, a failure to appear independent can lead to reduced buy-in from claimants or defendants, limiting the process's utility to remedy litigation crises.[198] Adding public voices to CRF design would serve to address both of these problems—the potential for collusion and the unfairness of private design and the lack of legitimacy that accompanies it.[199]

CRFs offer great potential as a tool to fight complex personal injury mass torts—even an asbestos- or opioid-like behemoth—because they treat claims individually, can be designed in ways that respond to the unique demands of each kind of mass tort, and can be deployed at scale. That said, they are far from being a sure thing or panacea. If poorly designed, a risk particularly high if they are primarily creatures of private design, they will resolve claims but fail parties.

B. Implementing Claims Resolution Facilities for Mass Torts

This final Section will analyze two possible methods of integrating public oversight into CRFs. First, it will describe a few examples of CRF-by-legislation in addition to the 9/11 Fund and identify a model based on the National Vaccine Injury Compensation Program for future policymakers to adopt. Second, it will highlight the possibilities for integrating CRFs into MDLs prior to aggregated settlements, identifying the recent Roundup MDL as a model.

1. Possibilities for Public Claims Resolution Facilities

The most comprehensive way to address a mass tort through a CRF is by creating one through statute, removing some or all claims from the judicial system. Passing federal legislation is obviously challenging in the current political landscape, but the potential of a statutory CRF to reduce the influence of self-interested private parties means it remains worthy of consideration. This Subpart will analyze existing designs of public CRFs, highlighting three specific approaches that have been

197 Dodge, *supra* note 149, at 1261.

198 *See supra* notes 185–92 and accompanying text.

199 *See, e.g.*, Hensler, *A Glass Half Full*, *supra* note 188, at 1625 (proposing that CRFs would be more fair if a judge and other experts were involved in the planning, rather than just defendants); Dodge, *supra* note 149, at 1262 (noting that "in many disputes a public disaggregative mechanism would offer a superior option" to a private one).

created or proposed by Congress. Together, these represent the most prominent visions of public CRFs: the extant 9/11 Fund and National Vaccine Injury Compensation Program ("VICP") and the proposed Fairness in Asbestos Injury Resolution ("FAIR") Act.[200] It will then explain why the VICP represents the best extant model for developing a legislative CRF.

The 9/11 Fund, explored in Section III.A, presents one potential model for legislative CRFs: a CRF with uncapped funding that stands alongside existing litigation options and tries to entice claimants into participating through the promise of efficient claims resolution with an ability to be heard reminiscent of a day in court.[201]

Senator Arlen Specter's FAIR Act, considered by Congress in 2005, represents another: a bespoke CRF that removes an entire category of claims from the judicial system. The FAIR Act sought to create a mandatory compensation scheme for asbestos claimants based in the Department of Labor funded through annual contributions by corporations, people, or groups facing prior liability for asbestos-related injuries.[202] Claimants would apply to the fund by providing an affidavit of exposure to asbestos and medical evidence documenting their injuries.[203] Awards would be determined by a matrix within 90 days of filing.[204] Exposure-only claimants would receive medical monitoring, while the most seriously injured could receive up to $1.1 million.[205] In

200 There are two additional public CRFs that are worth noting but are not appropriate for consideration in this Subpart. First is the Black Lung Program, a worker's compensation-like CRF that provides benefits for mine workers suffering from pneumoconiosis, a lung disease caused by the inhalation of coal dust. SCOTT D. SZYMENDERA, MOLLY F. SHERLOCK & ANTHONY A. CILLUFFO, CONG. RSCH. SERV., R45261, THE BLACK LUNG PROGRAM, THE BLACK LUNG DISABILITY TRUST FUND, AND THE EXCISE TAX ON COAL 1–3 (2023). The Black Lung Disability Trust Fund fails to exemplify CRF best practices because it centers a quasi-adversarial claims resolution approach that incentivizes coal companies to delay and dispute miners' claims. David Hasemyer, *It Took This Coal Miner 14 Years to Secure Black Lung Benefits. How Come?*, INSIDE CLIMATE NEWS (Sep. 7, 2017), https://insideclimatenews.org/news/07092017/coal-company-fights-black-lung-medical-benefits-appalachian-miner [https://perma.cc/RUE8-CUKC] (noting that coal companies "often spend tens of thousands of dollars on lawyers and expert medical witnesses to attack a single claim"). The other program is the Camp Lejeune CRF, created by Congress to address injuries from toxic exposure at a North Carolina military base. *Camp Lejeune Justice Act Claims*, U.S. NAVY, https://www.navy.mil/clja [https://perma.cc/9QZL-54H4] (last visited May 13, 2026). The Camp Lejeune CRF is distinct from the CRFs discussed here because it is meant to compensate tort claims against the United States government, rather than against private tortfeasors.

201 *See supra* notes 163–68 and accompanying text.

202 *See* Fairness in Asbestos Injury Resolution Act of 2005, S. 852, 109th Cong. § 202 (2005) (explaining funding for the fund); *see also* 151 CONG. REC. 6865–68 (2005) (Sen. Specter's introductory remarks on the bill).

203 S. 852 § 121(c).

204 *Id.* § 114(b).

205 *Id.* § 131.

contrast with the 9/11 Fund, claimants could not pursue their claims in another forum but could appeal to their local Court of Appeals.[206] The FAIR Act died in the Senate, with policymakers (pushed by a wide variety of interest groups representing both claimants and defendants) unable to reach an agreement on acceptable CRF design.[207] Two scholars argued that the task of creating an entirely new CRF from scratch, with Congress determining all the details at the legislation stage, was borderline impossible.[208]

The VICP[209] provides a final vision of a public CRF: a pre-litigation CRF to filter out low- and medium-value claims. The VICP was created by Congress in 1986 to manage tort claims against vaccine manufacturers to avoid tort liability pushing manufacturers out of the market, imperiling the nation's public health.[210] The program is non-adversarial; claimants submit a petition and evidence of their injury to the Court of Federal Claims, which appoints special masters to oversee claim resolution.[211] Decisions are based on a "vaccine injury table" overseen by the Department of Health and Human Services (DHHS) and an advisory commission comprised of doctors, lawyers, government officials, and members of the general public,[212] and must be issued 240 or fewer days after filing.[213] If a vaccine is covered in the vaccine injury table, a claimant cannot file a claim in court without going through

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206 *Id.* §§ 302, 403.

207 *See, e.g.*, Tory Newmyer, *Odd Bedfellows Try to Stymie Asbestos Draft*, ROLL CALL (Apr. 19, 2005, at 18:34 ET), https://rollcall.com/2005/04/19/odd-bedfellows-try-to-stymie-asbestos-draft [https://perma.cc/BUW6-UEKU] (identifying some sticking points).

208 *See* Patrick M. Hanlon & Anne Smetak, *Asbestos Changes*, 62 N.Y.U. ANN. SURV. AM. L. 525, 588, 591–92 (2007) (noting significant substantive and political challenges).

209 It must be noted that the future of the VICP is currently uncertain, with HHS Secretary Robert F. Kennedy, Jr. making comments that imply a desire to aggressively reform or eliminate the program. *See generally* Anna Kirkland, *RFK Jr.'s Plans to Overhaul 'Vaccine Court' System Would Face Legal and Scientific Challenges*, THE CONVERSATION (Aug. 15, 2025, at 08:39 ET), https://theconversation.com/rfk-jr-s-plans-to-overhaul-vaccine-court-system-would-face-legal-and-scientific-challenges-261451 [https://perma.cc/F3W7-E5LJ] (describing these critiques and more widely discussing potential reforms).

210 National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3756 (1986) (codified as amended at 42 U.S.C. §§ 300aa-1 to -34) (enacting statute); *see* Lainie Rutkow, Brad Maggy, Joanna Zablotsky & Thomas R. Oliver, *Balancing Consumer and Industry Interests in Public Health: The National Vaccine Injury Compensation Program and Its Influence During the Last Two Decades*, 111 PENN. ST. L. REV. 681, 683 (2007) (describing the impetus for the bill).

211 Rutkow et al., *supra* note 210, at 687; *see also* 42 U.S.C. § 300aa-12(d) (detailing the role of special masters).

212 Rutkow et al., *supra* note 210, at 685–87.

213 U.S. CT. OF FED. CLAIMS, APPENDIX B: VACCINE RULES OF THE UNITED STATES COURT OF FEDERAL CLAIMS 127 (2025) [hereinafter VACCINE RULES OF THE UNITED STATES COURT OF FEDERAL CLAIMS].

the VICP.[214] However, they can decide to pursue a claim in court after receiving a special master decision, although the ability to do so is then effectively limited to high-value cases in which manufacturers have been negligent.[215] Since its inception, the VICP has assessed more than 25,000 claims, providing approximately 13,000 claimants with $5.4 billion in compensation (with additional claimants reaching private settlements outside the VICP).[216] Since 1988, benefits for vaccinations have been paid for by a seventy-five cent excise tax on every dose of a VICP-covered vaccine.[217]

Of these models—the 9/11 Fund, the FAIR Act, and the VICP—the VICP is the best-suited for future legislative efforts. The 9/11 Fund and the FAIR Act are similar, both functioning as self-contained, *sui generis* CRFs authorized by statute and run by a centralized administrator contracting out work to third parties.[218] At a large scale, it seems unlikely that this kind of fund could feasibly make it through Congress.[219] The 9/11 Fund was enacted at a uniquely unified political moment and addressed a mass tort crisis in which compensation was seen as a national duty; the FAIR Act, on the other hand, responded to a more standard mass tort (albeit at a massive scale) and was unable to forge a path to law despite moderate, bipartisan support,[220] a victim of a variety of intensely conflicting stakeholder views.[221] The approach of creating a new CRF whole cloth may just be too big and too radical to be able to achieve the legislative consensus necessary to become law.[222]

The VICP, on the other hand, is well-suited for future adaptation because of its relatively neat fit into existing administrative and judicial frameworks. Rather than creating a large CRF wholesale, like the

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214 Rutkow et al., *supra* note 210, at 688.

215 *See id.* ("[T]he injured person can prevail only in certain types of situations, such as when the manufacturer conducted insufficient testing, or produced a 'bad batch' of vaccine." (internal citations omitted)).

216 Health Res. & Servs. Admin., National Vaccine Injury Compensation Program Monthly Statistics Report (2025), https://www.hrsa.gov/sites/default/files/hrsa/vicp/vicp-stats-09-01-25.pdf [https://perma.cc/K6M7-52SA].

217 Rutkow et al., *supra* note 210, at 686.

218 *See* Hanlon & Smetak, *supra* note 208, at 584 ("The Administrator would have broad authority to contract for [claims processing and financial management]."); 9/11 Final Report, *supra* note 159, at 74–75 (noting The Feinberg Group, LLP's central role in administration of the fund, albeit on a pro bono basis).

219 *See* Hanlon & Smetak, *supra* note 208, at 580–92 (making this argument).

220 *See id.* at 580 (noting that the FAIR Act's "political support comes from moderates in both parties").

221 *See* Newmyer, *supra* note 207 (describing some of these views).

222 *Cf.* Hanlon & Smetak, *supra* note 208, at 584 (highlighting Senator Patrick Leahy's quote that the FAIR Act was "one of the most complex legislative undertakings" of his legislative career (internal citations omitted)).

FAIR Act, the VICP model focuses on harnessing existing expertise within the government to determine appropriate claims (DHHS) and to assess and compensate claims (special masters within the Court of Federal Claims). Each part of the VICP can redesign the program iteratively with meaningful oversight and stakeholder involvement through rulemaking and the DHHS advisory commission. Its funding has been stable due to a sensibly designed excise tax on new vaccines.

Functionally, the VICP also succeeds at efficiently resolving claims. Claimants are funneled through the program, ensuring high buy-in, but can still resort to civil courts in particularly egregious, high-value situations or to appeal a decision. Special masters issue their decisions within 240 days.[223] While designed to protect manufacturer-defendants from crushing liability,[224] today the VICP is widely supported by plaintiff-side lawyers as well.[225]

All told, the VICP program model is effective, simple, and replicable. While there are present criticisms of the program,[226] they are minor, and easily addressed by additional congressional action (or, in the case of a new program, simple tweaks to legislation). Future legislators seeking to design a CRF for a mass tort would be smart to adapt this model, placing claim eligibility determination in a relevant administrative agency, identifying a funding source targeted at the actions of potential tortfeasors, and providing for a sufficient number of court-based special masters to address existing claims. Fundamental questions, like a funding stream, can be handled by Congress, while more expert-based determinations can be done at the agency level. While there is of course no guarantee that such a CRF design could go from bill to law, it is likely a stronger proposition than legislation based on any of the other models presented here.

If federal legislation is not forthcoming, states can play a role in addressing future complex personal injury mass tort crises by implementing their own programs and incentivizing claimants to file with them and release other claims. A state could create a CRF using the VICP model as an alternative to litigation in the state's courts. A

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223 *See* VACCINE RULES OF THE UNITED STATES COURT OF FEDERAL CLAIMS, *supra* note 213, at 126 (requiring that decisions be issued within 240 days of filing a claim).

224 Rutkow et al., *supra* note 210, at 682.

225 *See, e.g.*, David Carney, *Reforming the Vaccine Injury Compensation Program: Why Real Progress Starts with H.R. 5142*, GREEN & SCHAFLE TRIAL LAWYERS (July 30, 2025), https://www.greenlegalteam.com/news/2025/07/30/reforming-the-vaccine-injury-compensation-program-why-real-progress-starts-with-hr-5142 [https://perma.cc/YG4A-UWG6] (demonstrating that the President of the Vaccine Injured Petitioners Bar Association believes that the VICP "remains the most effective forum to handle vaccine injury claims").

226 *See* Kirkland, *supra* note 209 (describing these critiques and potential reforms).

successfully designed CRF could provide a compelling alternative to litigation elsewhere, creating a new kind of forum shopping in which claimants could choose the CRF over traditional litigation.[227] The exact details of state CRF implementation are left for future work; I note the possibility to make the point that legislative CRFs need not be federal-or-bust.

2. *Augmenting the Status Quo with Private Claims Resolution Facilities*

In the total absence of legislation creating a CRF on the state or federal levels—the status quo for the vast majority of complex personal injury mass torts today—private CRF implementation represents one way to improve the resolution of claims, although one fraught with legitimacy and independence concerns.[228] I define a private CRF as any facility that is not created by statute and administered by a government agency. A key distinction within the world of private CRFs is the presence (or lack thereof) of judicial oversight: As I define them, a fully private CRF has no touchpoint with the judiciary, and is akin to a private settlement, while a judicially involved CRF has some judicial oversight but is privately administered, and a judicially controlled CRF is fully administered by a judge. Of the three, the judicially controlled CRF model is the most preferable, because it creates the best conditions for a CRF to be viewed as independent and legitimate.[229]

An effective way to avoid complex personal injury mass tort resolution being the domain of fully private CRFs is to integrate CRFs into the MDL process prior to aggregative settlement, thus reducing the number of claims that are resolved privately without judicial oversight.[230] This Subsection will present an approach used in a recent MDL related to Roundup pesticides as a model to be adopted by stakeholders.

For an MDL-integrated CRF to be an effective replacement for a fully private CRF, this integration should take place after aggregation into the MDL but before parties can reach any kind of aggregative settlement or launch independent disaggregative efforts. The BP GCCF CRF once again provides an instructive example to this end. The

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[227] Forum shopping is heavily characteristic of state mass tort litigation, and states have legislated to avoid it. *See* Hanlon & Smetak, *supra* note 209, at 569–73 (describing the problem in the asbestos context and various state efforts to restrict it).

[228] *See supra* notes 185–92, 198–99 and accompanying text.

[229] *See* McGovern, *supra* note 151, at 1367 ("Typically, the more governmental the authority, the more legitimate the facility.").

[230] *See supra* notes 55–61 and accompanying text (describing MDL settlement dynamics and the high number of private settlements).

GCCF's legitimacy and independence issues led to it being replaced by a court-supervised CRF created through a class settlement within an MDL.[231] While this did provide added accountability through judicial involvement, the actual effects were less noticeable: "[T]he class settlement substantially paralleled the GCCF," with key differences being preclusion of future claims and legal costs of up to $600 million.[232] This echoes the way that failures to aggregate settlements in *Amchem* and *Ortiz* ultimately only led to substantially similar outcomes with heavy delays.[233]

A way to avoid these costly and time-consuming failure points—creation of an unpopular, defendant-driven CRF or a futile attempt to aggregate—is to instead use a CRF as a judicial tool to settle individual cases within an MDL at scale. Doing this allows parties and judges to avoid having to negotiate the fraught post-*Amchem* and *Harrington* aggregation doctrine while also taking advantage of the efficiency benefits of CRFs to rapidly (and fairly, as a result of judicial supervision) clear dockets at lower cost. It also avoids the potential pitfalls of a fully private CRF, chief among them the redundancy and wastefulness caused by private CRFs like the GCCF that are followed by additional aggregation or disaggregation[234] or inadequate buy-in from claimants or stakeholders that leads to an inability to meaningfully resolve claims at scale.[235] This should generally interest plaintiffs because it would minimize the time to claim resolution after judicial consolidation (and with it minimize transaction costs, including attorney's fees),[236] and it should interest defendants because deploying a CRF effectively can reduce potential liabilities and resolve claims in a more efficient and cost-effective way.[237]

An excellent recent case study of this approach, and the way that a CRF can succeed where traditional aggregative processes or private CRF deployments fail, is the Monsanto Roundup MDL, which was consolidated in the Northern District of California under Judge Vince Chhabria.[238] The Monsanto Roundup MDL involves tort claims that

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231 Dodge, *supra* note 149, at 1312–15.

232 *Id.* at 1314–16.

233 *See supra* note 117 and accompanying text.

234 *See supra* notes 231–33 and accompanying text.

235 *See supra* note 191 and accompanying text (noting this concern with regard to the GCCF).

236 *See, e.g.*, *supra* notes 166–67 and accompanying text (describing this in the context of the 9/11 Fund).

237 *See, e.g.*, *supra* notes 175–77 and accompanying text (describing how asbestos manufacturers comprising Center for Claims resolution were able to drive efficient claims much more effectively than non-member manufacturers).

238 *In re* Roundup Prods. Liab. Litig., 214 F. Supp. 3d 1346, 1348 (J.P.M.L. 2016).

the use of Monsanto's pesticide can cause non-Hodgkins lymphoma,[239] and features the telltale signs of a complex personal injury mass tort[240]: wide geographic dispersion, different kinds of claimants, and latency creating a stratification between injured and exposure-only claimants.[241]

Judge Chhabria, like many judges before him, sought to address the pileup of claims—in 2020, there were more than 120,000—by encouraging settlement.[242] He resorted to some standard practices, such as encouraging the parties to settle[243] and incentivizing them to do so by holding bellwether trials.[244]

Before long, he ran into the same problem faced by Judge Polster in the opioid litigation: In a post-*Amchem* world, it is near impossible to effectively craft a global class settlement for a complex personal mass injury tort. In 2020, parties reached a $10 billion class settlement agreement, but Judge Chhabria expressed *Amchem*-like concerns about the size of the class and the parties' ability to fairly represent them ahead of a planned fairness hearing.[245] The parties quickly withdrew the settlement and returned to the judge with a revised $2 billion settlement,[246] which was subsequently rejected on effectively the same grounds.[247]

Without aggregation as a possibility, Judge Chhabria instead turned to a CRF. About two months after denying the class settlement, the judge ordered all plaintiffs in the MDL to apply to a CRF run by

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239 *Id.* at 1346.

240 *See supra* notes 16–20 and accompanying text.

241 *See generally* Patricia Cohen, *Roundup Maker to Pay $10 Billion to Settle Cancer Suits*, N.Y. TIMES (June 24, 2020), https://www.nytimes.com/2020/06/24/business/roundup-settlement-lawsuits.html [https://perma.cc/26G7-VWHL] (describing the MDL and its tens of thousands of claims).

242 *Id.*

243 *See id.*

244 *See* Hardeman v. Monsanto Co., 997 F.3d 941, 950 (9th Cir. 2021) (affirming $20 million damage verdict against Monsanto in first bellwether trial).

245 Pretrial Order No. 214: Denying Motions to Alter Schedule on Motion for Preliminary Approval, No. 16-md-02741-VC, slip op. at 3 (N.D. Cal. July 26, 2020). Specifically, Judge Chhabria noted that the size and diversity of the class meant that notification would be impossible and functionally deny opt-out rights to present and future claimants, a clear concern over adequacy of representation. *Id.*

246 Amanda Bronstad, *In Second Attempt to Resolve Roundup Claims, Bayer Announces $2B Class Deal*, LAW.COM (Feb. 3, 2021), https://www.law.com/2021/02/03/in-second-attempt-to-resolve-roundup-claims-bayer-announces-2b-class-deal/?slreturn=20260228201518 [https://perma.cc/HH9A-W2ME].

247 *See* Pretrial Order No. 235: Denying the Motion for Preliminary Approval, No. 16-md-02741-VC, slip op. at 1 (N.D. Cal. May 26, 2021) ("It is unnecessary to evaluate whether the settlement is reasonable for the first group because it is clearly unreasonable for the second group—the Roundup users who have not been diagnosed with NHL. This ruling merely discusses some of the most glaring flaws . . . .").

Ken Feinberg,[248] who had previously been retained as a special master to oversee settlement negotiations.[249] Plaintiffs and Monsanto would both submit information to the CRF, which would then analyze the claim and provide a written settlement offer to the plaintiff.[250] The plaintiff could then accept that settlement offer, which would be binding on Monsanto, or choose to reject it and continue their claim in the MDL.[251] By doing this, the Judge had created a quasi-public CRF—like the VICP, plaintiffs would have to funnel their claims through the facility to access civil remedies, giving them a chance to consider a settlement offer and resolve their claim if it is within their interests.

In terms of take-up, the Monsanto Roundup CRF has been successful, with Feinberg stating that two-thirds of claimants accepted the settlement offer.[252] Where there were once 5,500 active cases in the MDL, by August 2024 there were only a few hundred remaining.[253] Some stakeholders did levy some common anti-CRF criticisms, in particular a concern that plaintiffs were being railroaded into settlement instead of taking potentially lucrative cases to trial,[254] but, assuming proper oversight from Judge Chhabria (and there is no evidence to the contrary), these concerns lack merit.[255]

The Monsanto Roundup MDL's use of an integrated CRF demonstrates the way that a properly designed facility can alleviate the burdens of a complex personal injury mass tort given the general absence of aggregative options. The model's limiting factor is that it requires a defendant who is willing to settle, but, as the case study demonstrates, effective use of the MDL judge's toolkit (including bellwether trials) can incentivize this by fleshing out claim values.[256] Judge Chhabria turned to a CRF after the failure of aggregative efforts, but future stakeholders can instead prioritize a CRF as an initial step once cases are consolidated in an MDL; paring down the docket as an initial step can make a complex personal injury mass tort simpler for a judge and perhaps create a more manageable class for future aggregative efforts.

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248 Pretrial Order No. 240: Order Requiring Participation in Special Master Program, No. 16-md-02741-VC (N.D. Cal. July 23, 2021).

249 Cohen, *supra* note 241.

250 Pretrial Order No. 240, slip op. at 1–2.

251 *Id.* at 2.

252 Bronstad, *supra* note 186.

253 *Id.*

254 *See id.* (noting some criticisms); *supra* notes 192–93 and accompanying text (highlighting these criticisms in an academic context).

255 Judge Chhabria suspected that many of the MDL's remaining cases remained unresolved because of malpractice, rather than CRF failure. *See* Bronstad, *supra* note 186.

256 *See supra* notes 50–53 and accompanying text.

Events subsequent to the Monsanto Roundup MDL's CRF demonstrate the way that effective integrated CRF use can avoid the pitfalls, complications, and costs of aggregation. After unsuccessfully seeking class settlement under Judge Chhabria,[257] Monsanto's parent company, Bayer, and a group of plaintiff-side attorneys put together a new global settlement in February 2026.[258] This $7.25 billion global settlement filed in Missouri state court would aim to resolve all pending state court claims and future claims relating to exposure to Roundup products (without touching the federal claims under the control of Judge Chhabria's MDL).[259] The settlement was drafted in advance (and in anticipation of) a recent Supreme Court decision, *Monsanto Co. v. Durnell*, in which the Supreme Court applied preemption principles to block a subset of tort claims brought against Monsanto over Roundup,[260] with Bayer seeking to use the Supreme Court's impending decision to convince claimants to settle claims that looked likely to be preempted.[261]

This settlement has been preliminarily approved by a Missouri state judge, Timothy J. Boyer,[262] but looks likely to face the extended court fight that many precursor complex mass tort global settlements have previously encountered.[263] Already, objectors have attempted and failed to have the case removed to the federal level, where it would be consolidated under Judge Chhabria.[264] Assuming the case receives

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257 *See supra* notes 245–47 and accompanying text (describing rejected class settlement).

258 *See* Carey Gillam, *Bayer Proposes $7.25 Billion Class Action Settlement in Roundup Litigation*, New Lede (Feb. 17, 2026), https://www.thenewlede.org/2026/02/bayer-proposes-7-25-billion [https://perma.cc/2TS6-6KF7] (introducing the proposed class settlement and noting that Bayer had "learned" from its failed settlement in Judge Chhabria's MDL).

259 Preliminary Approval Order at 3–5, King et al. v. Monsanto Co., No. 2622-CC00325 (Mo. Cir. Ct., City of St. Louis, Mar. 4, 2026), https://www.robertkinglawfirm.com/wp-content/uploads/2026/03/roundup-settlement-preliminary-approval-order-monsanto-missouri.pdf [https://perma.cc/8CRD-KXLN] (outlining the preliminarily approved class and noting that cases in the federal MDL are excluded from the class definition).

260 *See* Monsanto Co. v. Durnell, No. 24-1068, slip op. at 3 (June 25, 2026) (holding that "[b]ecause Durnell's state tort claim would impose a pesticide labeling requirement 'in addition to or different from' the label required by EPA, [federal law] expressly preempts Durnell's [state law failure-to-warn] claim" (quoting 7 U.S.C. § 136v(b))).

261 *See* Gregg Goldfarb, *What Durnell Ruling Means For Mo. Roundup Settlement*, Law360 (July 8, 2026, at 4:43 PM ET), https://www.law360.com/articles/2498192/what-durnell-ruling-means-for-mo-roundup-settlement?copied=1 [https://perma.cc/9LVM-BKGM] ("Bayer's message to wavering claimants was straightforward: Settle now, because an adverse Supreme Court ruling could erase the claim.").

262 *See generally* Preliminary Approval Order, *supra* note 259 (granting the settlement preliminary approval).

263 *See supra* Section II (describing the lengthy, difficult path faced by global settlements in the context of asbestos and opioid mass torts).

264 *See* King v. Monsanto Co., No. 4:26-CV-813 HEA, 2026 WL 1741223 at *1 (E.D. Mo., June 16, 2026) (rejecting objectors' motion to remove on the grounds that only the defendant may remove a case).

final approval from Judge Boyer, appeal is likely—Judge Chhabria, commenting on the proceedings, argued that "there are many" issues with the proposed settlement, and those would be the domain of the Missouri appellate courts and the U.S. Supreme Court to review.[265] The objectors to the suit have raised allegations that the settlement is unfair in the value it gives to class members as well as unfair structurally due to a lack of adversity between the parties.[266] While it is impossible to know at this point how these disagreements will pan out, based on historical examples, full resolution could take years.[267]

Assuming the Missouri settlement is approved,[268] the ultimate result will be the creation of a fully private CRF built on the terms of the settlement agreement.[269] This would happen at least five years after Judge Chhabria first started resolving cases in his court with his CRF, and six years after initial attempts at a global settlement.[270] While a totalizing expansion of Judge Chhabria's CRF was impossible because of the MDL's inability to reach state court claims, there were other opportunities potentially available to the parties to more efficiently resolve claims, such as attempting to replicate the CRF through consolidation in state courts or attempting to do so on a fully private basis. Each of these could have been implemented without a global class settlement's likely yearslong delay.

This Subsection has highlighted ways that parties and judges can effectively work together to consolidate cases and resolve them via

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265 Carey Gillam, *US Judge Calls Proposed Bayer Roundup Settlement a "Filthy" Deal*, NEW LEDE (Apr. 30, 2026), https://www.thenewlede.org/2026/04/us-judge-calls-proposed-bayer-roundup-settlement-a-filthy-deal [https://perma.cc/H54D-CGAS] (describing Judge Chhabria noting that "there are major problems with this settlement agreement[,]" including a possible lack of adversariality between Bayer and plaintiffs' counsel and an unfair opt-out procedure).

266 *See* Goldfarb, *supra* note 261 (noting that the objectors have alleged that the class is overbroad, "pricing every claim as though the litigation risk were uniform" and "that the named plaintiffs and Monsanto are aligned in seeking approval").

267 The rejection of the *Amchem* settlement was a result of at least four years of litigation (not inclusive of prior or subsequent settlement efforts). *See* Amchem Products, Inc. v. Windsor, 521 U.S. 591, 602 (1997) (describing in 1997 how the *Amchem* settlement that was being rejected was initially filed in early 1993). The rejection of the *Harrington* bankruptcy plan was an even longer process; the initial attempt to aggregate opioid cases in the negotiation class was filed in 2019, *see In re* Nat'l Prescription Opiate Litig., 976 F.3d 664, 667 (6th Cir. 2020) (rejecting the negotiation class and noting its filing date), and the *Harrington* decision was issued in 2024. *See generally* Harrington v. Purdue Pharma, Ltd. P'ship, 144 S. Ct. 2071 (2024) (rejecting the bankruptcy plan).

268 The Missouri court's decision on certification was yet to be determined at the time that editing for this Note concluded.

269 Class Action Settlement Agreement at 29–49, King et al. v. Monsanto Co., No. 2622-CC00325 (Mo. Cir. Ct., City of St. Louis, Feb. 17, 2026), https://www.thenewlede.org/wp-content/uploads/2026/02/Exhibit-1-Class-Action-Settlement-Agreement-1.pdf [https://perma.cc/76NS-9HGZ] (outlining the proposed CRF).

270 *See supra* notes 244–49 and accompanying text (describing these events).

judicially supervised CRFs, rather than resorting to lengthy and potentially futile efforts at global settlement. Compared to fully private CRFs, like the original GCCF,[271] judicially centered CRFs have an innate legitimacy and can be overseen in a way that renders them independent, making them more likely to succeed. When integrated as a post-consolidation, pre-aggregation approach to claim resolution in an MDL, a CRF like the one in the Monsanto Roundup MDL can be an extremely useful tool in the MDL toolbox. Specifically, Judge Chhabria's integration of a CRF into his MDL has been able to significantly speed up recovery for claimants and empty his docket, while more traditional efforts to resolve claims via a global class settlement are now in their sixth year and carry substantial uncertainty over when, and if, a settlement may take effect.

MDL judges and lawyers should prioritize CRF design over attempts to pursue futile global settlements, taking advantage of the flexibility that the facilities offer. With aggregation largely limited doctrinally, CRFs offer judges the ability to do what Rule 23 may not let them do—approach the unique problems presented by a complex personal injury tort in a creative way to meaningfully address judicial paralysis and resolve claims at scale.

Conclusion

Since the heyday of the asbestos litigation, much ink has been spilled about how to address complex personal injury mass tort crises by aggregating claims and assessing them as one. These efforts have yet to meaningfully survive appellate review because of due process, fairness concerns, and the strictures of American civil procedure, with the Supreme Court's decision in *Harrington v. Purdue Pharma* being the latest potential blow. This Note has traced the history of these difficulties, highlighted how Claims Resolution Facilities can provide a different way to efficiently resolve mass torts, and presented how they can be effectively implemented by legislative act or in an MDL to achieve claim resolution breakthroughs without compromising fairness. In doing so, it has tried to argue that disaggregation of claims, rather than aggregation, may be the best approach for lawyers dealing with complex personal injury mass torts in the future, outside of circumstances when bankruptcy may be available.

There will be another gargantuan complex personal injury mass tort in the future. It is worth considering now how the law can be better prepared when it arrives.

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271 *See supra* notes 168–73 and accompanying text.