

# ESSAY

## MDL STRIKES BACK

Andrew D. Bradt, Zachary D. Clopton & D. Theodore Rave<sup>†</sup>

INTRODUCTION.....	1855
I. GALACTIC WARFARE .....	1858
A. Existing Tools for MDL Judges to Fight Back ...	1858
1. <i>Bankruptcy and MDL in the Same District</i> ....	1858
2. <i>Bankruptcy and MDL in Different Districts</i> ....	1861
B. Escalation and Mutually Assured Destruction ...	1866
II. A NEW HOPE: THE JPML ASSERTS CONTROL.....	1871
A. Transfer the Bankruptcy into the MDL District...	1872
B. Transfer the MDL to the Bankruptcy District...	1880
III. COOPERATION OR RIVALRY? RESTORING BALANCE THROUGH CLEAR LINES OF AUTHORITY .....	1881
CONCLUSION.....	1885

### INTRODUCTION

One of the crucial insights of the judges responsible for the Multidistrict Litigation Act was that no one could opt out. Indeed, the whole idea of MDL is that everyone is stuck there, required to participate in pretrial proceedings until the litigation is resolved or the Judicial Panel on Multidistrict Litigation (JPML) decides it's time for remand.<sup>1</sup> MDL has, one might say, an imperial quality. But what if there's an escape hatch to exit

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<sup>†</sup> Bradt is the Shannon Cecil Turner Professor of Jurisprudence at University of California Berkeley School of Law, Clopton is the Daniel Hale Williams Professor of Law at Northwestern University School of Law, and Rave is the Bernard J. Ward Centennial Professor of Law at the University of Texas School of Law. Thanks to Bruce Markel, Troy McKenzie, and David Molton for helpful conversations. Madeline Love and Jackson Roberg provided excellent research assistance.

<sup>1</sup> Indeed, when the judges primarily responsible for drafting the MDL statute met with the Reporters of the Civil Rules committee as they were developing new Rule 23(b)(3), the Reporters noted: "The judges with whom we discussed opting out were clear that it should not be allowed simply on the say-so of the individual member of the class." Andrew D. Bradt, *Something Less and Something More: MDL's Roots as a Class Action Alternative*, 165 U. PA. L. REV. 1711, 1729 (2017).

an MDL that's not going your way? Well, some defendants in high-profile mass-tort MDLs seem to think they have found one: bankruptcy court. Even if the liability threatened in the MDL would not render the defendant corporation insolvent, some creative lawyers believe they have devised an escape pod to get their cases out of MDL and into the supposedly friendlier confines of bankruptcy.

And bankruptcy may well be friendlier.<sup>2</sup> It gives defendants lots of weapons they don't have in typical litigation: the automatic stay, a virtually unlimited choice of venue, and the ability to bind nonconsenting claimants to a plan of reorganization. One might think that such brazen procedure shopping would be a source of embarrassment, particularly given the potential public relations hit of declaring bankruptcy. But, as ever, the best defense is a good offense, and these defendants are not trudging into bankruptcy court with their tails between their legs. To the contrary, they are heading in guns blazing, with their ire pointed at the MDL process itself.<sup>3</sup> These defendants contend that MDL is too slow (or too fast), too unpredictable (or too rote), too expensive (or too focused on speedy resolution), and too biased in favor of plaintiffs (or judges trying to earn prestige through successfully relieving the federal courts of loads of cases). They claim they need bankruptcy court, not only to protect them from their creditors, but to protect them from MDL judges. And they present their criticisms of MDL in much harsher terms than one might expect from litigants who are still defendants in cases consolidated before the same MDL judge they are pillorying.

Overheated rhetoric aside, there is, at present, a robust debate playing out in the bankruptcy system about whether otherwise healthy corporate defendants can seek Chapter 11 protection without showing financial distress through controversial maneuvers like the so-called Texas Two-Step.<sup>4</sup> But in

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<sup>2</sup> See D. Theodore Rave, *Bankruptcy v. Multidistrict Litigation for Mass Torts*, 114 CALIF. L. REV. (forthcoming 2026).

<sup>3</sup> See, e.g., Informational Brief of Aeero Techs. at 42, *In re Aeero Techs. LLC* (Bankr. S.D. Ind. 2023) (No. 22-02890-JJG-11), Docket Entry 12 [<https://perma.cc/M8A-46SW>].

<sup>4</sup> Compare *In re LTL Mgmt., LLC*, 64 F.4th 84 (3d Cir. 2023), with *In re Bestwall LLC*, 71 F.4th 168 (4th Cir. 2023) and *Bestwall LLC v. Off. Comm. Asbestos Claimants of Bestwall LLC*, 148 F.4th 233 (4th Cir. 2025). For just a small slice of the academic commentary, see, for example, Anthony J. Casey & Joshua C. Macey, *In Defense of Chapter 11 for Mass Torts*, 90 U. CHI. L. REV. 973 (2023); Ralph Brubaker, *Assessing the Legitimacy of the "Texas Two-Step" Mass-Tort Bankruptcy*, BANKR. L. LETTER, Aug. 2022; Jonathan C. Lipson, "Special": Remedial Schemes in Mass Tort Bankruptcies, 101 TEX. L. REV. 1773 (2023); Edward J. Janger, *Aggregation and Abuse: Mass Torts in Bankruptcy*, 91 FORDHAM L. REV.

the meantime, MDL judges are not taking this rebellion lying down. They are, in fact, striking back, both rhetorically and by using the tools at their disposal to protect their jurisdiction. After years as a punching bag—perhaps the price of the dominance MDL has achieved in aggregate litigation—those invested in the process are punching back. For instance, when defendants in the national opioids MDL sought writs of mandamus against Judge Polster, he wrote impassioned defenses of his exercise of power.<sup>5</sup> When Uber sought to dissolve an MDL created to consolidate cases alleging sexual assaults by its drivers via a writ of mandamus in the Ninth Circuit, the JPML pushed back vigorously in a supplemental order.<sup>6</sup> And when 3M defendants took aim at transferee Judge Casey Rodgers in its attempt to flee to bankruptcy court, Judge Rodgers fired right back in her own defense.<sup>7</sup>

Beyond impassioned self-defense, when a defendant attempts to exit an MDL in favor of bankruptcy court, MDL judges also have procedural tools to protect their jurisdiction. Part I of this Essay catalogs and evaluates the tools that MDL judges have used to reassert control over the litigation when a defendant seeks to flee to bankruptcy court. When the bankruptcy is filed in (or transferred under 28 U.S.C. § 1412 to) the same district where the MDL is pending, the process is straightforward: The MDL judge can simply withdraw the bankruptcy reference. Even if the defendant files in a different district, the MDL judge is not without weapons to fight back, as Judge Rodgers demonstrated in the *3M Combat Arms Earplugs Litigation*. Matters may escalate further if the MDL judge issues an anti-suit injunction attempting to shut down a competing out-of-district bankruptcy. But bankruptcy judges could return fire,

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361, 370 (2022); Samir D. Parikh, *The New Mass Tort Bargain*, 91 *FORDHAM L. REV.* 447, 478 (2022); Sergio Campos & Samir D. Parikh, *Due Process Alignment in Mass Restructurings*, 91 *FORDHAM L. REV.* 325, 355 (2022); Lindsey D. Simon, *Bankruptcy Grifters*, 131 *YALE L.J.* 1154 (2022); Melissa B. Jacoby, *Shocking Business Bankruptcy Law*, 131 *YALE L.J.F.* 409 (2021).

<sup>5</sup> Response from Hon. Dan A. Polster, *In re CVS Pharmacy, Inc., Nat'l Prescription Opiate Litig.*, No. 20-3075 (6th Cir. Feb. 25, 2020) [<https://perma.cc/PK8Q-Y8SD>]; see also Andrew Bradt & Calen Bennett, *Adult Supervision? Appellate Review, Mandamus, and the Federal Rules in Multidistrict Litigation*, 50 *FLA. ST. U. L. REV.* 187 (2022).

<sup>6</sup> *In re Uber Techs., Inc., Passenger Sexual Assault Litig.*, 712 F. Supp. 3d 1394 (J.P.M.L. 2024).

<sup>7</sup> See, e.g., *In re 3M Combat Arms Earplug Prods. Liab. Litig.*, No. 19-md-2885, 2022 WL 17853203, at \*3 (N.D. Fla. Dec. 22, 2022).

leading to mutually assured destruction, or at least an impasse with no apparent way out.

But we see another, more productive option. In Part II of this essay, we explain how, when a defendant/debtor files for bankruptcy in a new district beyond the MDL judge's reach and ability to withdraw the reference, the JPML could step in. The Panel could transfer the bankruptcy to the MDL district or the MDL to the bankruptcy district. Either option would allow the MDL judge to reassert control over the litigation and facilitate cooperation with the bankruptcy judge—a far better outcome than an arms race between the two systems.

Part III of this essay zooms out and looks at the interactions between the bankruptcy and MDL systems. MDL and bankruptcy don't have to be rivalrous systems—they can cooperate, either formally or informally. There are many potential benefits to cooperation. Each system has comparative advantages over the other in various circumstances that cooperation could unlock. But there is no guarantee that the bankruptcy judge and MDL judge will be willing to work together—especially when the defendant views bankruptcy as an escape hatch from MDL and files in front of a bankruptcy judge disinclined to go along. This is where we think the JPML—the congressionally designated institution to decide where mass torts should be litigated—can help restore balance. By getting the bankruptcy and MDL into the same judicial district, the JPML can reduce friction, delineate clear lines of authority, and enable cooperation. This is the way.

## I

### GALACTIC WARFARE

With mass tort defendants openly excoriating MDL as they run to bankruptcy, rivalry between the two systems has escalated to something resembling open warfare. Bankruptcy may appear to have the upper hand, as a Chapter 11 filing triggers an automatic stay of all litigation in federal and state courts against the debtor and consolidates control in the hands of an Article I bankruptcy judge. But MDL judges have tools to fight back.

#### A. Existing Tools for MDL Judges to Fight Back

##### 1. *Bankruptcy and MDL in the Same District*

If the defendant files for bankruptcy in the MDL district, the MDL judge has a straightforward means to reassert control. The MDL judge may simply withdraw the bankruptcy reference.

Ever since Congress restructured the bankruptcy system in 1984, bankruptcy judges have operated as Article I “adjuncts” to their Article III counterparts, the federal district judges.<sup>8</sup> Technically, Chapter 11 proceedings are filed in the Article III district courts and “referred” to a bankruptcy judge pursuant to standing referral orders.<sup>9</sup> The decisions of a bankruptcy judge are subject to appellate review by the district court, much like the decisions of a magistrate judge.<sup>10</sup> At any time, at the parties’ request or *sua sponte*, the district court may withdraw the reference and assert primary control over the bankruptcy.<sup>11</sup>

An MDL judge can thus take control over a bankruptcy pending in the same judicial district by withdrawing the reference. Judge Rakoff did exactly that in the *Ephedra Products Liability Litigation*. The JPML transferred a slew of actions alleging personal injury or wrongful death caused by dietary supplements containing ephedra to the Southern District of New York, where one supplement manufacturer, Twin Laboratories, had filed for bankruptcy.<sup>12</sup> Judge Rakoff, the MDL judge, withdrew the reference in Twin Laboratories’ bankruptcy in order to take unified control over the entire litigation.<sup>13</sup> Doing so allowed him to jointly manage the MDL cases against other defendants, which had been transferred to him for pretrial purposes, and the claims against Twin Laboratories in bankruptcy, which withdrawal placed before him for all purposes.

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<sup>8</sup> See Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 STAN. L. REV. 747, 765–66 (2010).

<sup>9</sup> 28 U.S.C. §§ 151, 157(b)(1).

<sup>10</sup> 28 U.S.C. § 158.

<sup>11</sup> 28 U.S.C. § 157(d) (“The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown.”); FED. R. BANKR. P. 5011.

<sup>12</sup> *In re Ephedra Prods. Liab. Litig.*, 314 F. Supp. 2d 1373, 1374–75 (J.P.M.L. 2004).

<sup>13</sup> Order, *In re Ephedra Prods. Liab. Litig.*, No. 04-MD-1598 (JSR) (Mar. 22, 2004), Docket Entry 1379. [<https://perma.cc/V4YY-T2WZ>]. It is worth noting that Judge Rakoff was not engaged in a hostile takeover of the bankruptcy. To the contrary, the Ephedra litigation was an excellent example of how the MDL and bankruptcy systems can work together. The JPML chose the Southern District of New York as the MDL district in part because the Twin Laboratories bankruptcy was already pending there. And Judge Rakoff had been working cooperatively with the bankruptcy judge for months after the transfer. His ultimate decision to withdraw the reference was precipitated by the bankruptcy judge’s planned retirement. And Judge Rakoff consulted with the outgoing bankruptcy judge, his replacement, and the district’s chief bankruptcy judge, as well as the parties, before withdrawing the reference. See *id.* Nevertheless, an MDL judge who finds it difficult to cooperate with a bankruptcy judge in the same district could employ the same method to take control of the litigation.

While the MDL judge's power to withdraw the bankruptcy reference is unquestioned, the opportunities to use that power over a defendant fleeing an MDL for the friendlier confines of bankruptcy may be limited. Corporate defendants have extraordinary flexibility in *where* they file for bankruptcy. The forum-shopping problem in bankruptcy is well-documented.<sup>14</sup> The venue rules give corporate debtors many options, and they can expand those options through maneuvers like reincorporating in their preferred forum. In many instances, debtors can be fairly certain which bankruptcy judge will get the case.<sup>15</sup> A mass tort defendant trying to escape an MDL that is not going its way will almost certainly not file in the MDL district. Instead it will petition for bankruptcy in a district with a receptive bankruptcy judge outside the MDL judge's reach.

If the defendant files for bankruptcy outside the MDL district, tort claimants might ask the bankruptcy judge to transfer the proceeding back to the MDL district under § 1412.<sup>16</sup> This would hardly be unprecedented. In Johnson & Johnson's (J&J) first attempt to resolve its talc liability through a Texas Two-Step bankruptcy, the debtor filed in the Western District of North Carolina, presumably to take advantage of favorable Fourth Circuit precedent. But the assigned bankruptcy judge, Judge Whitley, transferred the proceeding to the District of New Jersey, where J&J is headquartered and where the talc MDL was underway.<sup>17</sup> In his order transferring the bankruptcy, Judge Whitley specifically noted the potential for cooperation between the bankruptcy court in New Jersey and the MDL.<sup>18</sup>

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<sup>14</sup> See, e.g., Lynn M. LoPucki & William C. Whitford, *Venue Choice and Forum Shopping in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 1991 WIS. L. REV. 11, 12; Adam J. Levitin, *Purdue's Poison Pill: The Breakdown of Chapter 11's Checks and Balances*, 100 TEX. L. REV. 1079, 1084 (2022); Anthony J. Casey & Joshua C. Macey, *Bankruptcy Shopping: Domestic Venue Races and Global Forum Wars*, 37 EMORY BANKR. DEVS. J. 463, 478–79 (2021).

<sup>15</sup> See, e.g., Adam J. Levitin, *Judge Shopping in Chapter 11 Bankruptcy*, 2023 U. ILL. L. REV. 351, 354; cf. Steve Vladeck, *The Growing Abuse of Single-Judge Divisions*, ONE FIRST (Mar. 13, 2023), <https://www.stevavladeck.com/p/18-shopping-for-judges> [<https://perma.cc/L4A4-G4SM>].

<sup>16</sup> 28 U.S.C. § 1412 (“A district court may transfer a case or proceeding under title 11 to a district court for another district, in the interests of justice or for the convenience of the parties.”).

<sup>17</sup> *In re LTL Mgmt., LLC*, No. 21-30589, 2021 WL 5343945, at \*1, \*3 (W.D.N.C. Nov. 16, 2021).

<sup>18</sup> *Id.* at \*3 (“Furthermore, the MDL presents a unique opportunity to help work towards an estimation of present and future claims that could take place in any future bankruptcy proceeding . . . Although presently stayed, the MDL should be accounted for during the bankruptcy case and, it could even be joined with the

But the MDL judge did not withdraw the reference, and Bankruptcy Judge Michael Kaplan largely took the lead until the Third Circuit held that the bankruptcy had to be dismissed.<sup>19</sup>

A savvy defendant, however, will try to avoid this risk by shopping for a bankruptcy judge who would not be inclined to transfer. Indeed, J&J did not make the same mistake again. In its third Texas Two-Step bankruptcy, the debtor reincorporated in Texas and filed in the Southern District of Texas, knowing the proceeding would be assigned to one of the two bankruptcy judges who handle complex cases in that district. When a group of tort claimants sought a § 1412 transfer to the District of New Jersey, where the MDL was back underway, the bankruptcy judge denied the motion.<sup>20</sup> In denying transfer, Bankruptcy Judge Lopez noted that the fact that 57,000 talc claims were pending in the MDL was “not determinative,” and, in fact, did not even cut in favor of a transfer because “Texas is the home to . . . the second-largest percentage of claimants in the MDL.”<sup>21</sup> Judge Lopez acknowledged that “forum shopping concerns may be real here,” but he was confident in his own ability to sort that out on a motion to dismiss or in the context of plan confirmation.<sup>22</sup>

## 2. Bankruptcy and MDL in Different Districts

Even when the bankruptcy and MDL are proceeding in different districts, the MDL judge is not without tools to fight back. In the *3M Combat Earplugs Litigation*, the largest MDL in history by number of cases, the defendant, 3M, took its subsidiary Aearo into bankruptcy in an open attempt to short-circuit

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bankruptcy case to help efficiently resolve thousands of talc related claims and aid in any future estimation proceeding.”).

<sup>19</sup> See *In re LTL Mgmt., LLC*, 64 F.4th 84, 93, 110 (3d Cir. 2023) (holding that the bankruptcy had been filed in bad faith because the debtor was not in financial distress); *In re LTL Mgmt., LLC*, 652 B.R. 433, 436 (Bankr. D.N.J. 2023) (dismissing LTL’s second bankruptcy filing because the debtor was still not in financial distress).

<sup>20</sup> Order Denying Motions to Transfer Venue, *In re Red River Talc*, No. 24-90505 (Bankr. S.D. Tex. Oct. 10, 2024), Docket Entry 245.

<sup>21</sup> Transcript of Motion to Transfer Case to Another District at 205, *In re Red River Talc*, No. 24-90505 (Bankr. S.D. Tex. Oct. 10, 2024).

<sup>22</sup> *Id.* at 212. Judge Lopez eventually dismissed the prepackaged bankruptcy as not in the best interests of the creditors after finding irregularities in the claimant voting process and determining that the plan could not be confirmed without impermissible third-party releases. *In re Red River Talc LLC*, 670 B.R. 251, 304–07 (Bankr. S.D. Tex. 2025).

the MDL.<sup>23</sup> Judge Rodgers of the Northern District of Florida, the MDL judge, fired back vigorously using the All Writs Act, her inherent authority over the debtors' affiliates whose claims remained pending before her, and her considerable powers of persuasion.

Claiming that the earplug MDL proceeding was "broken beyond repair," on July 26, 2022, 3M's subsidiary Aearo filed for bankruptcy in the Southern District of Indiana, where the case was assigned to Bankruptcy Judge Jeffrey Graham.<sup>24</sup> Shortly before the bankruptcy filing, Aearo and its parent, 3M, had entered into a funding agreement under which Aearo assumed full liability for the allegedly defective earplugs in exchange for 3M's guarantee that it would fund that liability.<sup>25</sup> (In economic substance this arrangement resembles the Texas Two-Step that J&J and other companies have used in their mass tort bankruptcies.<sup>26</sup>) Upon filing, the debtor, Aearo, sought to extend bankruptcy's automatic stay to cover litigation against its parent, 3M.

But Judge Rodgers was having none of it. As soon as the parties notified her of the bankruptcy filing, Judge Rodgers noted that 3M was not a debtor in the bankruptcy case and ordered a hearing the next morning for the company to "show cause why" it had unilaterally cancelled scheduled depositions in the MDL and "to discuss the bankruptcy filing[]." <sup>27</sup> She considered entering a brief, temporary restraining order preventing 3M from seeking to extend the bankruptcy stay, but ultimately declined because the bankruptcy court was not

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<sup>23</sup> In brief, the litigation involves allegations that 3M earplugs made for and distributed to servicemembers were defective, causing hearing loss and other injuries of varying severity. See generally Informational Brief of Aearo Techs. at 2, *In re Aearo Techs. LLC* (Bankr. S.D. Ind. 2023) (No. 22-02890-JJG-11), Docket Entry 12 [<https://perma.cc/MA8A-46SW>].

<sup>24</sup> *Id.* at 42.

<sup>25</sup> *In re Aearo Techs. LLC*, 642 B.R. 891, 898–900 (Bankr. S.D. Ind. 2022).

<sup>26</sup> The Aearo bankruptcy was not technically a Texas Two-Step because the subsidiary taken into bankruptcy already existed and no divisional merger was necessary. But the move resembled a Texas Two-Step in substance, as 3M disclaimed any direct liability but financially backstopped Aearo's liability, and the two companies entered agreements to indemnify each other. For an excellent explanation of the Texas Two-Step, see Michael A. Francus, *Texas Two-Stepping Out of Bankruptcy*, 120 MICH. L. REV. 38, 40–41 (2022).

<sup>27</sup> Order at 1–3, *In re 3M Combat Arms Earplug Prods. Liab. Litig.*, No. 19-md-2885 (N.D. Fla. July 26, 2022), Docket Entry 3329 [<https://perma.cc/G485-MUJE>].

scheduled to decide the issue for several weeks.<sup>28</sup> Judge Rodgers then stayed litigation in the MDL against Aearo, but *not* against 3M.<sup>29</sup> And she set an expedited briefing schedule for a preliminary injunction hearing before the bankruptcy court would decide the issue.

Judge Rodgers ultimately declined to enjoin 3M from asking the bankruptcy court to extend the stay. But, in her order denying the preliminary injunction, she made it clear that she had the authority to enjoin 3M under the All Writs Act because extending the bankruptcy stay to 3M would prevent the MDL court “from guiding this litigation ‘to its natural conclusion.’”<sup>30</sup> Her decision not to do so was an exercise of discretion. Judge Rodgers explained:

Under these circumstances, the Court readily concludes that it has jurisdiction to determine whether Aearo’s automatic stay applies to the claims against 3M in this MDL, and the authority under the All Writs Act to enjoin actions by 3M in other forums which threaten the Court’s jurisdiction.<sup>31</sup>

And she was not shy about expressing her views on 3M’s bankruptcy “scheme”:

If successful, hundreds of thousands of individual plaintiffs will be deprived of their constitutional right to a jury trial while 3M—a fully solvent and highly profitable Fortune 500 Company that will never actually file a bankruptcy petition itself—will reap all of the benefits of the bankruptcy system without the attendant burdens. The unabashed justification for dismantling this MDL is 3M/Aearo’s dissatisfaction with the MDL system, this Court’s legal rulings, and the multiple jury verdicts against it in this litigation.<sup>32</sup>

Nevertheless, Judge Rodgers decided to defer to the bankruptcy court, which was concurrently holding an evidentiary hearing on whether to extend the stay to 3M. She noted that “[t]he bankruptcy court is well-qualified and aptly suited to

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<sup>28</sup> Order at 1–2, *In re* 3M Combat Arms Earplug Prods. Liab. Litig., No. 19-md-2885, (N.D. Fla. July 28, 2022), Docket Entry 3343 [https://perma.cc/FXF2-HXDJ].

<sup>29</sup> Order at 1–2, 1 n.1, *In re* 3M Combat Arms Earplug Prods. Liab. Litig., No. 19-md-2885, (N.D. Fla. Aug. 2, 2022), Docket Entry 3356 [https://perma.cc/DMG7-7TWF].

<sup>30</sup> *In re* 3M Combat Arms Earplug Prods. Liab. Litig., No. 19-md-2885, 2022 WL 3370146, at \*1–3 (N.D. Fla. 2022) (quoting *Klay v. United HealthGroup, Inc.*, 376 F.3d 1092, 1102 (11th Cir. 2004)).

<sup>31</sup> *Id.* at \*2 (citation omitted).

<sup>32</sup> *Id.* at \*2 (footnote omitted) (citation omitted).

determine whether 3M is lawfully using the Bankruptcy Code for a proper restructuring purpose or, instead, using its subsidiaries' bankruptcy petition as bad-faith subterfuge to defeat this Court's jurisdiction and relitigate this Court's rulings."<sup>33</sup> And, for good measure, she threw in a couple of helpful citations to cases where bankruptcy courts had dismissed for bad faith.<sup>34</sup> While she declined to rule on the scope of the stay, Judge Rodgers did enjoin 3M from attempting to relitigate in bankruptcy court issues that she had already decided in the MDL or otherwise collaterally attacking her orders.<sup>35</sup>

Perhaps taking the hint, ten days later, Bankruptcy Judge Graham denied Aearo and 3M's request for a preliminary injunction extending the bankruptcy stay to cover 3M.<sup>36</sup> But neither 3M nor Judge Rodgers was done. Judge Rodgers ordered the parties to mediation, and 3M took the position that, after its funding agreement, Aearo was *solely* liable for injuries caused by the Combat Arms Earplugs.<sup>37</sup> The plaintiffs moved for summary judgment on the issue of whether 3M could, at this late stage, deny independent liability and mount a successor liability defense when it had, from the start of the MDL, comported itself as the sole entity potentially liable for the claims.<sup>38</sup> And Judge Rodgers notified 3M that she was considering imposing sanctions.<sup>39</sup>

In a blistering order on December 22, 2022, Judge Rodgers invoked her inherent power to sanction 3M. She accused 3M of "devis[ing] a scheme to oust the Congressionally-established system for resolving mass tort disputes in Article III courts and install its new favored forum (for the moment anyway), an Article I court, at the helm."<sup>40</sup> She said that no "*bona fide*

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<sup>33</sup> *Id.* at \*2.

<sup>34</sup> *Id.* at \*2 n.4.

<sup>35</sup> *Id.* at 2–3. Judge Rodgers subsequently clarified that this injunction applied only to 3M and was not intended to interfere with Aearo's ability to act in bankruptcy court. Order at 2, *In re* 3M Combat Arms Earplug Prods. Liab. Litig., No. 19-md-2885 (N.D. Fla. Aug. 25, 2022), Docket Entry 3407.

<sup>36</sup> *In re* Aearo Tech. LLC, 642 B.R. 891, 896 (Bankr. S.D. Ind. 2022).

<sup>37</sup> Mediation Order, *In re* 3M Combat Arms Earplug Prod. Liab. Litig., No. 19-md-2885 (N.D. Fla. Aug. 30, 2022), Docket Entry 3416.

<sup>38</sup> Order with Background on 3M's Litigation Position and Plaintiffs Motion for Summary Judgment at 2–3, *In re* 3M Combat Arms Earplug Prod. Liab. Litig., No. 19-md-2885 (N.D. Fla. Oct. 27, 2022), Docket Entry 3568.

<sup>39</sup> Notice of Sanctions, *In re* 3M Combat Arms Earplug Prod. Liab. Litig., No. 19-md-2885 (N.D. Fla. Nov. 1, 2022), Docket Entry 3571.

<sup>40</sup> *In re* 3M Combat Arms Earplug Prods. Liab. Litig., No. 19-md-2885, 2022 WL 17853203, at \*3 (N.D. Fla. Dec. 22, 2022).

threat of financial distress” motivated the turn to bankruptcy.<sup>41</sup> “No, this was good old-fashioned litigation forum shopping, solely—and admittedly—designed to evade dissatisfactory legal rulings and verdicts in the MDL, and to avoid potential future liability for a *non-debtor*, 3M, in the tort system.”<sup>42</sup>

To pull this off, Aearo would have to “be recast as the ‘real-party defendant’” for earplug claims in order to justify a stay of litigation against 3M.<sup>43</sup> The bankruptcy court’s denial of the stay, Judge Rodgers said, “should have ended the sophistry.”<sup>44</sup> But instead, 3M “sought to rewrite history” in the MDL by “asserting *for the first time* that it has neither independent nor successor liability” for the earplug claims.<sup>45</sup> She described 3M’s “attempt to renege on those positions now, and its duplicitous motives and modes of doing so” as “beyond the pale of acceptable litigation conduct” and “the epitome of bad faith.”<sup>46</sup> As a sanction for “explicit statements and conduct establishing itself as the sole responsible party for nearly four years in the MDL and its bad-faith reversal of that position solely to serve its strategic objectives in bankruptcy,” Judge Rodgers barred 3M from “attempting to avoid any portion of its alleged liability” for the earplug claims “by shifting blame to the Aearo defendants.”<sup>47</sup>

On June 9, 2023, Judge Graham dismissed the bankruptcy as a bad-faith filing.<sup>48</sup> Judge Graham based his ruling on Aearo’s lack of financial distress, given 3M’s ample assets and agreement to fund all of its liability, meaning that Aearo lacked a “valid reorganization purpose” to invoke the protections of Chapter 11.<sup>49</sup> While he did not need to conclude that 3M’s machinations were primarily “litigation tactics” in order to

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at \*4.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at \*6.

<sup>47</sup> *Id.* at \*7. Recognizing the gravity of this move, Judge Rodgers also *sua sponte* certified her grant of summary judgment and imposition of sanctions for interlocutory appeal to the Eleventh Circuit. *Id.* Judge Rodgers’ sanctions may spark memories of the court’s actions in the venerable casebook classic, *Zielinski v. Phila. Piers, Inc.*, 139 F. Supp. 408, 411, 413 (E.D. Pa. 1956) (estopping defendant that had concealed that a different entity was legally liable from avoiding liability on that ground).

<sup>48</sup> *In re Aearo Techs. LLC*, Nos. 22-2890-JJG-11 to No. 22-2896-JJG-11, 2023 WL 3938436, at \*1, \*17–20 (Bankr. S.D. Ind. June 9, 2023).

<sup>49</sup> *Id.* at \*17–20.

find bad faith, he was surely aware of Judge Rodgers's running commentary.

While she never asserted authority over the debtor itself, by moving rapidly once the bankruptcy was filed, Judge Rodgers was able to assert the MDL court's jurisdiction over the debtor's affiliated companies—here the debtor's parent company and primary MDL defendant, 3M—and stake out her authority to rule on the scope of the bankruptcy stay. Although Judge Rodgers elected not to exercise that authority, instead allowing Bankruptcy Judge Graham to make the call on whether to extend the stay, she took the opportunity to make her view of the defendant's machinations abundantly clear for the bankruptcy court. And once the bankruptcy judge declined to extend the stay to 3M, Judge Rodgers took aggressive steps under her inherent authority to protect and effectuate the rulings she had already made in the MDL. While these rulings did not reach the debtor itself, they allowed the MDL judge to weigh in on the circumstances of the bankruptcy in a way that would be hard for the bankruptcy judge to miss. In this case, the bankruptcy judge was well attuned to the litigation dynamic and inclined to defer. But that may not always be the case.

## B. Escalation and Mutually Assured Destruction

The previous section described the existing battlelines between MDL and bankruptcy. But as with most battles, there is the possibility—the risk—of escalation. And this escalation could spiral into mutually assured destruction (MAD).<sup>50</sup>

What would happen if an MDL judge got MAD? One possibility is that the judge might enter an order stopping parties over whom it had jurisdiction from filing for bankruptcy or participating in any bankruptcy proceeding. This type of order may remind readers of the antisuit injunction.<sup>51</sup> An antisuit

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<sup>50</sup> See Robert Jervis, *The Dustbin of History: Mutual Assured Destruction*, FOREIGN POL'Y (Nov. 9, 2009) <https://foreignpolicy.com/2009/11/09/the-dustbin-of-history-mutual-assured-destruction/> [<https://perma.cc/Q5V6-B2PN>] (referring to mutually assured destruction theory as “the idea that in a nuclear war, or even a large conventional conflict, each side should be prepared to destroy the other's cities and society”).

<sup>51</sup> See, e.g., *Cole v. Cunningham*, 133 U.S. 107, 119 (1890) (“It is now held that whenever the parties are resident within a country the courts of that country have full authority to act upon them personally with respect to the subject of suits in a foreign country, as the ends of justice may require, and with that view to order them to take or to omit to take any steps and proceedings in any other court of justice, whether in the same country or in any foreign country.”) (quoting JOSEPH STORY, COMMENTS. EQUITY JURIS., § 900); *Laker Airways Ltd. v. Sabena, Belgian*

injunction is an order that bars litigants from filing or participating in other litigation that might interfere with an ongoing proceeding.

Antisuit injunctions have a long history. In 1793, Congress adopted what is known as the Anti-Injunction Act, limiting the authority of federal courts to issue injunctions against state proceedings.<sup>52</sup> The existence of that act makes sense only in light of the possibility that without it a court might enjoin the proceedings of another court. And, indeed, there have long been examples of federal or state courts issuing injunctions against proceedings in other federal, state, or foreign tribunals.<sup>53</sup>

Authority to issue antisuit injunctions in federal court derives from the All Writs Act.<sup>54</sup> The Act provides that “[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”<sup>55</sup> The Act supports the issuance of antisuit injunctions against parties and even against nonparties in appropriate cases.<sup>56</sup>

The All Writs Act plausibly supports the issuance of antisuit injunctions by MDL judges against bankruptcy proceedings. Because bankruptcy proceedings are federal, the Anti-Injunction Act and its limitations are of no moment.<sup>57</sup> Indeed, federal courts have enjoined parties from filing for bankruptcy in particular courts. In *Hunt v. Bankers Trust Company*, for example, the Fifth Circuit upheld an injunction issued by the

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World Airlines, 731 F.2d 909, 926 (D.C. Cir. 1984) (“It is well settled that English and American courts have power to control the conduct of persons subject to their jurisdiction to the extent of forbidding them from suing in foreign jurisdictions.”).

<sup>52</sup> Act of Mar. 2, 1793, c. 22, § 5, 1 Stat. 334 (codified at 28 U.S.C. § 2283); see generally *Toucey v. N.Y. Life Ins. Co.*, 314 U.S. 118 (1941); *Cole*, 133 U.S. 107.

<sup>53</sup> See, e.g., *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921) (federal-state); *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183–84 (1952) (federal-federal); *Ganpat v. E. Pac. Shipping PTE, Ltd.*, 66 F.4th 578 (5th Cir. 2023) (federal-foreign); *James v. Grand Trunk W. R.R. Co.*, 152 N.E.2d 858 (Ill. 1958) (state-state).

<sup>54</sup> 28 U.S.C. § 1651(a). The Supreme Court has suggested that the power to issue antisuit injunctions against foreign proceedings may exist independent of the Act. *Cole*, 133 U.S. at 124.

<sup>55</sup> 28 U.S.C. § 1651(a).

<sup>56</sup> See, e.g., Tobias Barrington Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 U. PA. L. REV. 2035, 2114 (2008).

<sup>57</sup> 28 U.S.C. § 2283. Even if the Anti-Injunction Act were to provide an interpretive guide to federal equity practice, the statute includes an exception that allows federal courts to enjoin state court proceedings “in aid of” their own jurisdiction—essentially what an MDL judge would be doing by enjoining parties from fleeing to bankruptcy. *Id.*

Northern District of Texas enjoining the parties from initiating bankruptcy proceedings anywhere other than in Dallas.<sup>58</sup> Bankruptcy courts also have been known to issue injunctions barring parties from filing other bankruptcy petitions under the equivalent of the All Writs Act available to bankruptcy courts.<sup>59</sup>

Similar maneuvers have been contemplated in MDL. In 1985, the district judge in the *Baldwin-United* MDL issued an injunction prohibiting a debtor from applying to the bankruptcy court for any relief against any defendant.<sup>60</sup> The Second Circuit later vacated the injunction—its decision appeared to turn on a difference of opinion on the balance of the equities, though some language of the opinion could be read to imply that the district court lacked the power to issue the injunction.<sup>61</sup> Fast forwarding a few decades, in the J&J talc MDL, plaintiffs requested an order barring LLT (J&J's newly created subsidiary holding the liability for injury claims) from filing for bankruptcy in any court other than the District of New Jersey where the MDL was being heard.<sup>62</sup> And in 3M, of course, Judge Rodgers explained that, under the All Writs Act, the district court could issue an injunction barring 3M's participation in the Aearo bankruptcy because it would "threaten the Court's jurisdiction."<sup>63</sup>

While the MDL judges in J&J and 3M declined to escalate this far, we think the best reading of the All Writs Act is that

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<sup>58</sup> 799 F.2d 1060 (5th Cir. 1986).

<sup>59</sup> *In re Robertson*, 206 B.R. 826, 830 (Bankr. E.D. Va. 1996); *Norwalk Sav. Soc'y v. Peia* (*In re Peia*), 204 B.R. 310, 311, 315 (Bankr. D. Conn. 1996) (holding that any further bankruptcy filings will not interfere with creditor's eviction proceeding); *In re Robinson*, 198 B.R. 1017, 1022–23 (Bankr. N.D. Ga. 1996) (holding that a bankruptcy court may enjoin a debtor from filing another case for the length of time necessary to prevent an abuse of process).

<sup>60</sup> *In re Baldwin-United Corp. Litigation*, 765 F.2d 343 (2d Cir. 1985).

<sup>61</sup> *Id.* In a later decision with the same author, the Second Circuit described the prior decision in a way that suggested it was not a decision about power: "[W]e ruled that the equities weighed substantially against preventing the bankruptcy court from determining the applicability of the stay and from exercising its 'broader' authority under section 105(a) of the Bankruptcy Code." *Covanta Onondaga Ltd. v. Onondaga County Res. Recovery Agency*, 318 F.3d 392 (2d Cir. 2003) (quoting *In re Baldwin*, 765 F.2d at 348) (internal citation omitted). See also *Mun. of San Juan v. Puerto Rico*, 919 F.3d 565, 575 (1st Cir. 2019) (characterizing the Second Circuit's holding as fact-specific).

<sup>62</sup> Memorandum of Law in Support of Temporary Restraining Order & Preliminary Injunction / Order to Show Cause Why Preliminary Injunction Should Not Be Granted, *Love v. LLT Mgmt., LLC*, No. 3:24-cv-06320 (D.N.J. June 11, 2024), Docket Entry 6-1 [<https://perma.cc/K8XM-UP5A>].

<sup>63</sup> *In re 3M Combat Arms Earplug Products Liab. Litig.*, 2022 WL 3370146, at \*2 (N.D. Fla. Aug. 16, 2022).

it would permit an injunction against participating in a bankruptcy proceeding that would interfere with the jurisdiction of the MDL court. Even if our reading (and Judge Rodgers's) is incorrect, we think it is quite possible that an MDL judge might press the button anyway. Although the MDL statute was passed before the significant revision of the bankruptcy code, there are strong reasons to believe that an MDL transferee judge should have this authority. Bankruptcy courts are, ultimately, lower in the judicial hierarchy than district courts, whose judges have the protections of Article III and the power to review bankruptcy courts' decisions. Moreover, there is much to recommend Judge Rodgers's view that MDL is the "Congressionally-established system for resolving mass tort disputes."<sup>64</sup> Although mass-tort bankruptcies are not new, and bankruptcy courts have been creative when it comes to handling them, sometimes extending the statutory provisions intended for asbestos-manufacturer bankruptcies to other areas, the limitation of that provision to asbestos cases suggests a Congressional understanding that such situations were unusual.<sup>65</sup> There is certainly no evidence that Congress intended a mass-tort bankruptcy of a solvent defendant to disrupt an MDL.

For an MDL judge to enjoin a bankruptcy filing, though, the district court must be able to hear the request for the anti-bankruptcy injunction. Before a bankruptcy is filed, the court should have such an opportunity, perhaps.<sup>66</sup> (Federal courts even may enjoin participation in not-yet-filed state court proceedings that otherwise would be protected by the Anti-Injunction Act.<sup>67</sup>) But once a bankruptcy is filed, an automatic stay of claims against the debtor kicks in.<sup>68</sup> The automatic stay

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<sup>64</sup> *In re 3M Combat Arms Earplug Prods. Liab. Litig.*, No. 19-md-2885, 2022 WL 17853202, at \*3 (N.D. Fla. Dec. 22, 2022).

<sup>65</sup> *See, e.g.*, Lindsey D. Simon, *Bankruptcy Grifters*, 131 YALE L.J. 1154, 1171-76 (2022) (discussing 11 U.S.C. § 524(g) and extension of its tools to contexts beyond asbestos).

<sup>66</sup> Proposed Federal Rule of Civil Procedure 16.1 requires an initial management conference, before which the parties must report their views on "whether related actions have been—or are expected to be—filed in other courts, and whether to adopt methods for coordinating with them." FED. R. CIV. P. 16.1(b)(2)(E)) (to be codified Dec. 2025).

<sup>67</sup> 28 U.S.C. § 2283; *Dombrowski v. Pfister*, 380 U.S. 479, 484 n.2 (1965); *Barancik v. Invs. Funding Corp. of N.Y.*, 489 F.2d 933, 936-38, 935 n.5 (7th Cir. 1973) (extending the logic to permit a federal injunction against a pending state proceeding if there was no state action when the federal injunction was sought).

<sup>68</sup> 11 U.S.C. § 362.

“addresses all actions within the judicial power,”<sup>69</sup> and as the First Circuit explained, “there is no indication that the automatic stay in Section 362 does not apply to injunctions.”<sup>70</sup> So presumably, once a debtor files for bankruptcy, an MDL judge will be barred by the automatic stay from issuing an injunction against the debtor.

Not so fast, my friend. Bankruptcy’s automatic stay is not the ultimate power in the litigation universe. A transferee judge interested in escalating—a MAD one—might exercise her discretion to interpret the automatic stay, and she might interpret the stay narrowly, not to reach the anti-bankruptcy injunction proceeding.<sup>71</sup> That would permit the MDL judge to issue an anti-bankruptcy injunction even after the filing of a bankruptcy, for example when the MDL defendant is a different entity from the debtor declaring bankruptcy (which is increasingly common in the age of the Texas Two-Step).<sup>72</sup>

So perhaps the MDL judge can maneuver around even an automatic stay, either by moving first or by narrowly construing the stay. But the bankruptcy court also has other tools in its toolkit. Bankruptcy judges may enjoin litigation not covered by the automatic stay pursuant to 11 U.S.C. § 105(a), including litigation by nonparties.<sup>73</sup> Judge Easterbrook, sitting by designation in a patent MDL, thought it would be “unheard of” for a bankruptcy judge to issue an injunction barring

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<sup>69</sup> *Mun. of San Juan v. Puerto Rico*, 919 F.3d 565, 577 (1st Cir. 2019) (quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley*, 756 F.2d 1048, 1052 & n.3 (4th Cir.1985)).

<sup>70</sup> *Id.* at 576 (holding that the automatic stay also stays a district court injunction). The court also cited 3 COLLIER ON BANKRUPTCY ¶ 362.03 (16th ed. 2018), *Nat’l Tax Credit Partners, L.P. v. Havlik*, 20 F.3d 705, 707–08 (7th Cir. 1994), and *In re Mahurkar Double Lumen Hemodialysis Catheter Patent Litig.*, 140 B.R. 969, 977 (N.D. Ill. 1992) (Easterbrook, J., sitting by designation). *Id.* at 576–577.

<sup>71</sup> *See, e.g., In re Baldwin-United Corp. Litig.*, 765 F.2d 343, 346–47 (2d Cir. 1985).

<sup>72</sup> *Id.* (concluding that the district court had the authority to interpret the scope of the automatic stay though vacating the anti-bankruptcy injunction issued in this case on these facts).

<sup>73</sup> *In re Johns-Manville Corp.*, 801 F.2d 60, 63 (2d Cir.1986) (“Injunctions are authorized under 11 U.S.C. § 105(a) (1982), which empowers the bankruptcy court to issue any order necessary or appropriate to carry out the provisions of the Code, including orders restraining actions pending elsewhere.” (citation omitted) (citing *In re Davis*, 730 F.2d 176, 183–84 (5th Cir.1984) (“[A] bankruptcy court is authorized, once jurisdiction is established, to ‘issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.’ This provision includes the authority to enjoin litigants from pursuing actions pending in other courts that threaten the integrity of a bankrupt’s estate.” (quoting 11 U.S.C. § 105(a))))).

resolution of a pending motion in a related civil case—though that is what happened in his case, and in another case he cited.<sup>74</sup>

The Easterbrook example is instructive in two respects. First, it is an example of a bankruptcy court reaching out to enjoin district court litigation.<sup>75</sup> Second, it is an example of a district court fighting back, in that case ignoring the injunction and moving ahead with its proceeding.<sup>76</sup> Were this to continue, mutual destruction would be assured.

Finally, though we have not identified any direct examples in the galactic struggle between bankruptcy and MDL, we want to draw attention to a disturbing phenomenon in international litigation. In response to the issuance of an antisuit injunction, some courts (including U.S. courts<sup>77</sup>) have issued anti-antisuit injunctions, enjoining the enforcement of antisuit injunction. In other courts, there have been examples of anti-anti-antisuit injunctions and even anti-anti-anti-antisuit injunctions<sup>78</sup>—enough to drive you MAD.

## II

### A NEW HOPE: THE JPML ASSERTS CONTROL

We see a more promising option than escalating competition between the MDL and bankruptcy judge. When a defendant/debtor files for bankruptcy in a new district beyond the MDL judge's reach and ability to withdraw the reference, the JPML can—and should—step in to get the bankruptcy and MDL into the same district. The JPML can do this in two ways: It can transfer the bankruptcy (or pieces of it) to the MDL district. Or it can retransfer the MDL (along with the MDL judge,

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<sup>74</sup> *In re Mahurkar Double Lumen Hemodialysis Catheter Patent Litig.*, 140 B.R. at 974 (citing *Lower Brule Constr. Co. v. Sheesley's Plumbing & Heating Co.*, 84 B.R. 638, 644 (D.S.D. 1988)).

<sup>75</sup> *Id.*; see also *In re L & S Indus., Inc.*, 989 F.2d 929, 932 (7th Cir.1993) (“[A] bankruptcy court can enjoin proceedings in other courts when it is satisfied that such proceedings would defeat or impair its jurisdiction over the case before it. In other words, the court does not need to demonstrate an inadequate remedy at law or irreparable harm.”).

<sup>76</sup> See *In re Mahurkar Double Lumen Hemodialysis Catheter Patent Litig.*, 140 B.R. 969, 974 (N.D. Ill. 1992).

<sup>77</sup> *Ericsson Inc. v. Samsung Elecs. Co.*, No. 2:20-CV-00380-JRG, 2021 WL 89980, at \*3 (E.D. Tex. Jan. 11, 2021).

<sup>78</sup> King Fung Tsang & Jyh-An Lee, *The Ping-Pong Olympics of Antisuit Injunction in FRAND Litigation*, 28 MICH. TECH. L. REV. 305, 308 (2022) (providing examples from China and Germany); See Jorge L. Contreras, *It's Anti-Suit Injunctions All the Way Down—The Strange New Realities of International Litigation over Standards-Essential Patents*, 26 IP LITIGATOR, July/Aug. 2020, at 7.

sitting by designation) to the bankruptcy district. Either option should facilitate cooperation between the MDL and bankruptcy judges. And if that cooperation fails, the transfer will delineate clear lines of authority for the MDL judge to reassert control by withdrawing the reference.

#### A. Transfer the Bankruptcy into the MDL District

The simplest approach would be for the JPML to transfer the entire bankruptcy proceeding into the MDL district under § 1407 and assign it to the MDL judge.<sup>79</sup> Such a move has been contemplated, but never seriously attempted. In the *3M Earplug Litigation*, for example, one law firm attempted to designate the Aearo bankruptcy as a potential “tag-along” action that should be automatically transferred into the MDL, just like any other later-filed related cases.<sup>80</sup> But the clerk of the JPML declined to enter a conditional transfer order, and the firm never followed up with a formal motion to transfer the bankruptcy under § 1407.<sup>81</sup>

In the early 1990s, when the asbestos MDL was created, some parties asked the JPML to transfer several asbestos manufacturer bankruptcies into the MDL as well. The Panel demurred, finding that the unbriefed question was not ripe for decision, and it suggested that it would be reluctant to transfer the bankruptcies unless and until the MDL transferee judge determined that other alternatives like informal coordination with the bankruptcy courts were insufficient.<sup>82</sup> The following

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<sup>79</sup> The JPML may choose “any district for coordinated or consolidated pretrial proceedings,” 28 U.S.C. § 1407(a), without regard for any otherwise applicable limitations on venue or personal jurisdiction. *In re FMC Corp. Pat. Litig.*, 422 F. Supp. 1163, 1165 (J.P.M.L. 1976) (“Transfers under Section 1407 are simply not encumbered by considerations of in personam jurisdiction and venue.”).

<sup>80</sup> Notice of Potential Tagalong Action, *In re 3M Combat Arms Earplug Prod. Liab. Litig.*, No. 19-md-2885m (J.P.M.L. Aug. 2, 2022), Docket Entries 1778, 1779.

<sup>81</sup> Notice to Counsel, *In re 3M Combat Arms Earplug Prod. Liab. Litig.*, No. 19-md-2885m (J.P.M.L. Aug. 15, 2022) (Docket Entry 1789). JPML Rule 7.1 allows parties or counsel to notify the JPML of potential “tag-along” actions that share common questions of fact with actions previously transferred into the MDL. The clerk of the JPML can then issue an order conditionally transferring the action to the MDL subject to other parties’ opportunity to object and convince the JPML to vacate the conditional transfer order. If the clerk determines that the potential tag-along action is not appropriate for inclusion in the MDL and does not enter a conditional transfer order, Rule 6.1 allows the party to make a formal transfer motion, which the JPML will consider. See ROBERT H. KLONOFF, FEDERAL MULTIDISTRICT LITIGATION IN A NUTSHELL §§ 6.1-6.2, pp. 157-64 (2020).

<sup>82</sup> *In re Asbestos Prods. Liab. Litig.* (No. VI), 771 F. Supp. 415, 421 n.6 (J.P.M.L. 1991).

year, Judge Weiner, the MDL judge, did just that and asked the JPML to centralize thirteen pending asbestos bankruptcies in the MDL district. Again, the JPML declined, noting “serious concerns that transfer would adversely impact the constituent bankruptcy cases” and its “confidence” that problems “could be resolved through consultation, exchange of information and coordination between Judge Weiner and the concerned bankruptcy courts.”<sup>83</sup> The Panel did not, however, reach the question of its authority to transfer a bankruptcy proceeding under § 1407. And it expressly left open the possibility that it “could reconsider 1407 transfer should the bankruptcy courts and the parties fail in their voluntary efforts to coordinate with Judge Weiner.”<sup>84</sup>

Judge John Nangle, who was chair of the JPML at the time, elaborated on the Panel’s reasoning in a 1997 law review article.<sup>85</sup> He offered several prudential reasons why the Panel stayed its hand. Some were specific to the asbestos context, namely the complications of transferring multiple bankruptcies.<sup>86</sup> Others were more generalizable, like disrupting “organizational and logistic arrangements in the bankruptcy district,” interrupting “efforts to achieve a consensual plan of reorganization,” affecting “the debtor’s going concern value,” injecting bankruptcy issues “that ha[ve] nothing to do with the tort claims” into the MDL, and causing other creditors “to believe that the § 1407 tort claimants were being preferred in the bankruptcy reorganization.”<sup>87</sup> Many of these concerns, however, loom less large when the defendant/debtor uses bankruptcy as an escape hatch from an MDL. Organizational and logistical arrangements, for example, will have to be set up from scratch in the bankruptcy district, and if large contingents of tort claimants seek to have the bankruptcy dismissed, then a consensual plan of reorganization may be far off. Similarly, if the defendant’s path into bankruptcy follows the divisional merger or Texas Two-Step model, then the debtor has no operations to preserve as a going concern, and resolving the tort

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<sup>83</sup> *In re Asbestos Bankr. Litig.*, No. 91-md-950, 1992 WL 423943, at \*1 (J.P.M.L. Dec. 9, 1992).

<sup>84</sup> *Id.*

<sup>85</sup> John F. Nangle, *Bankruptcy’s Impact on Multidistrict Litigation: Legislative Reform as an Alternative to Existing Mechanisms*, 31 GA. L. REV. 1093 (1997).

<sup>86</sup> *Id.* at 1108.

<sup>87</sup> *Id.*

claims will be the *only* issues in the bankruptcy.<sup>88</sup> So, in a case like 3M earplugs or J&J talc, prudential considerations may not cut against transferring the bankruptcy.

But Judge Nangle identified another threshold question that would have to be resolved before the Panel could transfer an entire bankruptcy proceeding into an MDL: The JPML's statutory authority under § 1407.<sup>89</sup> The MDL statute authorizes the JPML to transfer "civil actions," and there is uncertainty over whether a bankruptcy case qualifies as a "civil action." As Judge Nangle put it: "Essentially, the matter to be determined is whether the litigation world is divided into two parts (civil and criminal, with a bankruptcy case being a subset of the civil category) or three parts (civil, criminal, and bankruptcy)."<sup>90</sup> Neither the JPML nor any federal appellate court has ever ruled on the Panel's authority to transfer an entire bankruptcy proceeding under § 1407.

Case law on whether bankruptcy cases are "civil actions" is sparse and not uniform. Some courts have suggested that they are.<sup>91</sup> Other courts have suggested that they are not.<sup>92</sup> In *In re Teter*, for example, the Sixth Circuit held that a debtor who prevailed against the U.S. Trustee's motion to dismiss her Chapter 7 bankruptcy was not entitled to attorneys' fees under the Equal Access to Justice Act (EAJA) because the motion was not "a civil action" within the meaning of the EAJA.<sup>93</sup> The court

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<sup>88</sup> See Casey & Macey, *supra* note 4, at 1007; Michael A. Francus, *Designing Designer Bankruptcy*, 102 TEX. L. REV. 1205, 1227 (2024).

<sup>89</sup> Nangle, *supra* note 85, at 1105 n.41.

<sup>90</sup> *Id.*

<sup>91</sup> See, e.g., *Brimmage v. Quantum3 Group LLC (In re Brimmage)*, 523 B.R. 134, 141 (Bankr. N.D. Ill. 2015); *In re Fairchild*, 969 F.2d 866, 868 (10th Cir. 1992); *O'Connor v. U.S. Dep't of Energy*, 942 F.2d 771, 773 (10th Cir. 1991); *In re Terrill*, No. 05-87180-BJH-7, 2006 WL 2385236, at \*1 (Bankr. N.D. Tex. July 27, 2006); *In re Mendez*, No. 7-07-11092 SA, 2008 WL 5157922, at \*2 (Bankr. D.N.M. Sept. 26, 2008); *In re Graves*, 279 B.R. 266, 273 (B.A.P. 9th Cir. 2002).

<sup>92</sup> See, e.g., *In re Teter*, 90 F.4th 493, 498–500 (6th Cir. 2024), *cert. denied sub nom.* *Teter v. United States Tr.*, 144 S. Ct. 2527(2024); *In re Sisk*, 973 F.3d 945, 947 (9th Cir. 2020) ("[U]ncontested bankruptcy cases do not clearly constitute 'civil action[s]' brought by or against the United States' within the meaning of the EAJA.") (quoting 28 U.S.C. § 2412(a)(1)); *In re U.S. Lines, Inc.*, 216 F.3d 228, 235–36 (2d Cir. 2000); *In re Jordan*, 313 B.R. 242, 250 n.10 (Bankr. W.D. Tenn. 2004) ("A 'case' under title 11 is unique to the bankruptcy court; there is nothing comparable to it in the United States district court or State court."), *rev'd sub nom.* on other grounds by *In re MacDonald*, 356 B.R. 416 (W.D. Tenn. 2006); *In re Perry*, No. 02-13366, 2002 WL 31160132, at \*3 (Bankr. W.D. Tenn. Sept. 26, 2002) ("Even by analogy, a bankruptcy case is not a civil action against a single defendant.").

<sup>93</sup> *In re Teter*, 90 F.4th at 498–500.

reasoned that according to Rule 3 of the Federal Rules of Civil Procedure, a “civil action is commenced by the filing of a complaint with the court,” and neither the debtor nor the Trustee filed a complaint.<sup>94</sup> By this logic, because a bankruptcy proceeding is commenced by filing a “petition,” not a “complaint,” it cannot be a civil action.<sup>95</sup> The court also looked to the edition of Black’s Law Dictionary in print when the EAJA was enacted, which it said “share[s] the understanding that the invocation of a civil action turns on the filing of a complaint.”<sup>96</sup>

We think the reasoning of cases like *Teter* is rather thin, and the better view is that § 1407 encompasses bankruptcy cases in their entirety. Rule 3 does not purport to define a “civil action”; it merely specifies how one may be commenced.<sup>97</sup> And Rule 2 makes clear that there is only “one form of action—a civil action,” merging common law actions with the equity practice from which bankruptcy is derived.<sup>98</sup> Indeed, *Teter* itself acknowledges that according to the same edition of Black’s Law Dictionary, a civil action “includes ‘all types of actions other than criminal proceedings.’”<sup>99</sup> In § 1407, Congress empowered the JPML to decide where related civil litigation should proceed. There is little reason not to include bankruptcy proceedings in an MDL if doing so would be for the “convenience of parties and witnesses” and would “promote the just and efficient conduct” of the litigation.<sup>100</sup> Moreover, allowing the JPML to transfer bankruptcies when related litigation is pending in other federal

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<sup>94</sup> *Id.* at 499–500 (quoting FED. R. CIV. P. 3).

<sup>95</sup> *Id.* at 499. However, it is worth noting that *Teter* leaves this question open. *See id.* at 498 (“Our inquiry here is limited . . . Whether, for example a bankruptcy case itself constitutes a civil action for purposes of the EAJA is not a point pressed by *Teter*.”). And because the EAJA amounts to a partial waiver of sovereign immunity, in interpreting the term “civil action,” the court applied the presumption that textual ambiguities should be read in favor of preserving immunity. *Id.* at 498–99. No similar presumption would apply in interpreting § 1407.

<sup>96</sup> *Id.* at 499.

<sup>97</sup> FED. R. CIV. P. 3; *see also In re Brimpage*, 523 B.R. 134, 141 (Bankr. N.D. Ill. 2015) (“Defendants argue that a bankruptcy case is not a civil action because a civil action is commenced by filing a complaint, while a bankruptcy case is commenced by filing a petition. This, however, is not entirely persuasive. The similarity of the language of the two sections provides a strong indication that Congress intended for a bankruptcy petition to commence a civil form of action.”) (citations omitted).

<sup>98</sup> FED. R. CIV. P. 2. *See generally* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

<sup>99</sup> *In re Teter*, 90 F.4th at 499 (quoting *Civil Action*, BLACK’S LAW DICTIONARY (5th ed. 1979)).

<sup>100</sup> 28 U.S.C. § 1407.

courts would go a long way towards solving the forum-shopping problem in bankruptcy.<sup>101</sup> Indeed, some mass tort bankruptcy proponents have suggested that Congress should create a national body akin to the JPML to decide in which venue mass tort bankruptcies should proceed.<sup>102</sup> There is no need for new legislation when the JPML already has that power.

Such an interpretation of § 1407 would also be consistent with the intentions of those who drafted the MDL statute as expressed in the legislative history. Speaking about the JPML and the “factors [that] should be weighed in the selection of a transferee district . . . [which] do not lend themselves to precise measurement,” the Senate Report emphasizes that “the informed discretion of the judiciary is the best method for resolving questions as to when and where cases should be transferred for pretrial.”<sup>103</sup> In other words, the statute intentionally assigns the decision of *where* coordinated pretrial proceedings will proceed to the JPML, not the defendant. The drafters of the statute intended to vest control of pretrial proceedings in the hands of the JPML, which was substantially insulated from appellate review, by design.<sup>104</sup> It would be odd to allow a defendant to unilaterally seize that control by filing for bankruptcy in a district of its choosing, particularly a defendant whose justification for bankruptcy is a product of corporate machinations and not the necessity of insolvency.

Moreover, the main purpose of the MDL statute is to achieve efficiency by centralizing actions in a single federal forum *without having to rely on cooperation* of federal judges beyond the MDL district. The informal consolidation achieved in the electrical-equipment cases was entirely voluntary and began to fray as proceedings progressed.<sup>105</sup> Congress correctly believed that mass-tort proceedings would become more common and passed the MDL statute so future coordination could be achieved by centralization in a single proceeding before one judge without needing to rely on the voluntary participation of multiple judges.<sup>106</sup>

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<sup>101</sup> See sources cited *supra* note 14.

<sup>102</sup> See Daniel J. Bussel, *The Mass Tort Claimants' Bargain*, 97 AM. BANKR. L.J. 685, 708–09 (2023) (proposing new JPML-like body for mass tort bankruptcies); cf. Nangle, *supra* note 85, at 1117–18 (arguing that Congress should amend § 1407(b)).

<sup>103</sup> S. REP. NO. 90-454, at 5 (1967); see also H.R. REP. NO. 90-1130, at 4 (1967).

<sup>104</sup> See Andrew D. Bradt, *The Looming Battle for Control of Multidistrict Litigation in Historical Perspective*, 87 FORDHAM L. REV. 87, 90–91, 106 (2018).

<sup>105</sup> See *id.* at 92–95.

<sup>106</sup> See S. REP. NO. 90-454, at 7–8 (1967).

We must, however, acknowledge that core bankruptcy proceedings may be a different animal from ordinary civil litigation.<sup>107</sup> In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, the Supreme Court struck down the whole bankruptcy system because it empowered a non-Article III judge to adjudicate a debtor's state law claim against a third party.<sup>108</sup> But while it held that adjudication of such adversary proceedings by an Article I judge would violate the Constitution, the Court did not question a bankruptcy judge's power to discharge debts in a core bankruptcy proceeding.<sup>109</sup> The Court in *Stern v. Marshall* seemed to follow the same logic, treating the "restructuring of debtor-creditor relations" as different in kind from a debtor's state law counterclaim against a creditor.<sup>110</sup> Again, we think the better reading of § 1407 is that core bankruptcy proceedings count as civil actions. And, of course, transfer of such proceedings would not raise the kinds of constitutional concerns at issue in *Marathon Pipe* and *Stern*. But the argument that core bankruptcy proceedings are *sui generis* cannot be dismissed out of hand, and uncertainty over that question may be part of the reason why, to date, the JPML has not transferred an entire bankruptcy case.

Whether or not a core bankruptcy proceeding counts as a transferrable civil action, it is abundantly clear that "adversary proceedings" within the bankruptcy *are* civil actions.<sup>111</sup> Indeed, the JPML has transferred adversary proceedings under § 1407 many times in the past.<sup>112</sup> Adversary proceedings are essentially

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<sup>107</sup> See, e.g., *In re Jordan*, 313 B.R. 242, 250 n.10 (Bankr. W.D. Tenn. 2004) ("A 'case' under title 11 is unique to the bankruptcy court; there is nothing comparable to it in the United States district court or State court.").

<sup>108</sup> 458 U.S. 50, 87 (1982) (plurality opinion).

<sup>109</sup> *Id.* at 71.

<sup>110</sup> 564 U.S. 462, 477, 502–03 (2011) (suggesting that the former could be placed within the authority of the Article I bankruptcy judges (with appeal to the district court under a clear error standard) even though the latter had to be within the de novo control of an Article III judge).

<sup>111</sup> See, e.g., *Bullard v. Blue Hills Bank*, 575 U.S. 496, 505 (2015) ("[A]dversary proceedings[]" [are] essentially full civil lawsuits carried out under the umbrella of the bankruptcy case."). Per Bankruptcy Rules 7003 and 7004, adversary proceedings are initiated by filing a complaint, satisfying the logic of cases like *Teter*. F. R. BANKR. P. 7003, 7004.

<sup>112</sup> See, e.g., *In re Nat'l Arbitration Forum Trade Practices Litig.*, 729 F. Supp. 2d 1353, 1353–54, 1353 n.1 (J.P.M.L. 2010) (transferring bankruptcy adversary proceeding to MDL and noting that the "Panel has previously transferred multiple adversary proceedings under Section 1407"); *In re Ephedra Products Liab. Litig.*, 416 F. Supp. 2d 1358, 1359 (J.P.M.L. 2006) (transferring adversary proceedings in bankruptcy cases to MDL); *Phar-Mor, Inc. v. Gen. Elec. Cap. Corp.*

lawsuits that are tried under the umbrella of a bankruptcy case because they relate to the core bankruptcy proceeding. Importantly, a request for a temporary restraining order or preliminary injunction extending the bankruptcy stay to a nondebtor defendant is an adversary proceeding. Defendants who use bankruptcy to escape an MDL routinely seek to extend the bankruptcy stay to nondebtor defendants. Indeed, obtaining such a stay is a central component of the Texas Two-Step strategy. And doing so requires initiating an adversary proceeding that the JPML could unquestionably transfer to the MDL district.<sup>113</sup>

The JPML may also be able to transfer other pieces of the bankruptcy case to the MDL, even if it cannot transfer the core bankruptcy proceedings under § 1407. There is a plausible argument that “contested matters” in the bankruptcy are civil actions transferable under § 1407.<sup>114</sup> Bankruptcy Rule 9002(1) says that “[a]ction’ or ‘civil action’ means an adversary proceeding or, when appropriate, a contested petition, or proceedings to vacate an order for relief or to determine any other contested matter.” A contested matter is a catch-all term for issues in the bankruptcy that the parties dispute. Contested matters include motions to dismiss the bankruptcy, to lift the automatic stay, and to object to confirmation of a plan, as well as many other issues.<sup>115</sup> If, for example, the JPML were to

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(*In re Phar-Mor, Inc.*), No. 959, 1994 WL 41830, at \*1 n.2 (J.P.M.L. Jan. 31, 1994) (“Because federal bankruptcy jurisdiction is vested in district courts, the Panel has never found any jurisdictional impediment to transfer of adversary proceedings as tag-along actions in multidistrict dockets.”) (collecting cases).

<sup>113</sup> The JPML’s clerk may have been wrong to summarily reject Keller Postman’s request to tag Aearo and 3M’s motion to extend the stay into the MDL. Though the clerk’s reluctance to issue a conditional transfer order without briefing is understandable, and Keller Postman never followed up with a motion to transfer. In the future, the JPML could write its initial transfer orders to expressly contemplate using the tag-along process for subsequently filed bankruptcies or their component adversary proceedings. See *supra* notes 80–81. Entering a conditional transfer order for an action seeking to extend the stay would put the ball in the JPML’s court to decide in the first instance which court should rule on the scope of the stay, heading off escalating antisuit injunctions or race to judgment between MAD bankruptcy and MDL judges.

<sup>114</sup> Cf. *In re Fairchild*, 969 F.2d 866, 868 (10th Cir. 1992) (holding that a contested matter was an “action” within the meaning of Federal Rule of Civil Procedure 41(a)(2), such that the debtor could not unilaterally withdraw an objection); *In re Graves*, 279 B.R. 266, 273 (B.A.P. 9th Cir. 2002) (“[T]he term ‘civil action’ is ambiguous within the construct of the Federal Rules of Bankruptcy Procedure because it subsumes both bankruptcy ‘adversary proceedings’ and bankruptcy ‘contested matters.’”) (quoting FED. R. BANKR. P. 9002).

<sup>115</sup> See, e.g., Christopher M. Klein, *Bankruptcy Rules Made Easy (2001): A Guide to the Federal Rules of Civil Procedure That Apply in Bankruptcy*, 75 AM. BANKR. L.J. 35, 39–41 (2001).

transfer a motion to dismiss the bankruptcy as filed in bad faith to the MDL, the MDL judge could effectively reassert control over the entire dispute.

To be sure, the argument that contested matters count as civil actions is hardly bulletproof. Contrary authority exists. *In re Teter*, for example, held that a motion to dismiss the bankruptcy was not a civil action for purposes of the EAJA, reasoning that motions to dismiss are merely “tools to resolve, in whole or in part, the civil actions of which they are a part,” not civil actions themselves.<sup>116</sup> Though, we are not aware of any court considering the question in the context of § 1407. And should the JPML conclude that an aspect of a bankruptcy was erroneously transferred to an MDL, the statute provides for easy severance and remand.<sup>117</sup>

But uncertainty may not be a bad thing. The more pieces of the bankruptcy the JPML transfers into the MDL, the more incentive the bankruptcy judge will have to work cooperatively with the MDL judge. Indeed, if key issues are going to be decided by the MDL judge, the bankruptcy judge might even decide to transfer the rest of the bankruptcy on her own under § 1412 to avoid being left with the bankruptcy equivalent of a “rump state.”

The JPML might even take advantage of some strategic ambiguity to facilitate cooperation. There is no question that the entire bankruptcy can be transferred under § 1412. The problem (assuming the defendant did a good job forum shopping) is that the bankruptcy judge may be the least likely actor to want to authorize a transfer. But the JPML could act incrementally. It could for example, transfer an adversary proceeding in which the debtor seeks to extend the bankruptcy stay to its parent corporation and, in the transfer order, say something along the lines of, “we are not, at this time, considering whether to transfer the contested motion to lift the stay against debtor—or the entire bankruptcy—but we will revisit those questions in the future if the MDL transferee judge thinks it wise.” Such signaling by the JPML may prompt some degree of cooperation, while leaving open the possibility for future escalation.

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<sup>116</sup> *In re Teter*, 90 F.4th 493, 500 (6th Cir. 2024).

<sup>117</sup> 28 U.S.C. § 1407(a) (“[T]he panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded”).

## B. Transfer the MDL to the Bankruptcy District

A conclusion that a bankruptcy cannot be transferred into an existing MDL does not mean that the JPML is necessarily frozen in carbonite. The JPML could decide to retransfer the MDL to the bankruptcy district and assign the transferee judge to that district for purposes of the MDL.<sup>118</sup> First, recall that the JPML may choose *any* district for pretrial proceedings, regardless of whether that district would be a proper venue or have personal jurisdiction.<sup>119</sup> Second, the drafters of the MDL statute were attuned to the possibility that the MDL judge might need to be transferred to another district to sit by designation and oversee the MDL. Hence the specific language in § 1407(b), establishing that “upon request of the panel, a circuit judge or a district judge may be designated and assigned temporarily for service in the transferee district . . . as may be required . . . .”<sup>120</sup> The goal of this provision is clear. As the Senate Report notes, “[the] judges may be assigned as necessary from district to district to expedite processing of the litigation. This provision makes possible the efficient allocation of available judicial manpower.”<sup>121</sup>

The drafters of the statute envisioned situations when either a transferee judge would have to travel (or the JPML would have to designate a second judge) to perform some functions in an MDL. One example would be presiding over what we might call today an “apex” deposition of an important witness, whose testimony will be relevant to all cases. This provision of the statute made clear that any limitations on the subpoena power would not be an obstacle to coordination. Importantly for our purposes, the statute places the power in the hands of the JPML to decide when such assignments are necessary.

It might be logistically challenging to accomplish the transfer of an entire MDL to a new district where the transferee judge

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<sup>118</sup> The JPML has undoubted power to retransfer an MDL even though it is typically “extremely reluctant” to do so. *In re Helicopter Crash in Ger.* on Sept. 26, 1975, 443 F. Supp. 447, 450 (J.P.M.L. 1978). As Judge Nangle noted, however, “[a] bankruptcy filing by a major defendant in a § 1407 litigation might well be another instance in which the Panel’s reluctance to order retransfer could be overcome.” Nangle, *supra* note 85, at 1115–16.

<sup>119</sup> See Andrew D. Bradt, *The Long Arm of Multidistrict Litigation*, 59 WM. & MARY L. REV. 1165, 1169–70 (2018); Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendants’ Terms: Bristol-Myers Squibb and the Federalization of Mass Tort Litigation*, 59 B.C. L. REV. 1251, 1296 (2018).

<sup>120</sup> 28 U.S.C. § 1407(b).

<sup>121</sup> S. REP. NO. 90-454, at 5 (1967).

does not regularly sit. But much of the inconvenience would be for the clerk's office that has to transfer the dockets to a new district, and the clerk's office there that has to receive them. In an era of electronic filing and growing uniformity across MDL case websites, such a transfer should hopefully not be an insuperable barrier. There is nothing in the statute that requires the judge to actually move, though it might be desirable in order to achieve not only coordination with the bankruptcy judge, but also the district court where the MDL will proceed.

Once the MDL is retransferred to the bankruptcy district, the MDL judge can coordinate with the bankruptcy judge to jointly manage the litigation or withdraw the reference and reassert control.

### III

#### COOPERATION OR RIVALRY? RESTORING BALANCE THROUGH CLEAR LINES OF AUTHORITY

Part I of this paper showed how MDL and bankruptcy judges can battle, potentially leading to mutually assured destruction. Part II offered a new hope, the possibility of collaboration between MDL and bankruptcy judges. In this Part, we explore why that cooperation might be possible, what benefits it entails, and how it might be achieved.

To begin with, there is no legal or functional impediment to district and bankruptcy judges working together. Judges regularly coordinate and collaborate across courts. District and bankruptcy judges sat together in the Dalkon Shield and asbestos cases.<sup>122</sup> In the breast implant litigation, Judge Pointer “worked closely” with state courts to resolve aspects of the wider litigation,<sup>123</sup> and he secured permission from the Chief Justice to sit by designation in the bankruptcy district so that he could work cooperatively with the bankruptcy judge handling the Dow Corning bankruptcy.<sup>124</sup> The JPML seems to

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<sup>122</sup> See *In re* A.H. Robins Co., 158 B.R. 640, 641 (Bankr. E.D. Va. 1993); *In re* Joint E. & S. Dist. Asbestos Litig., No. CV90-3973, 1993 WL 207565 (E.D.N.Y. & Bankr. S.D.N.Y. June 10, 1993).

<sup>123</sup> See D. Theodore Rave & Francis E. McGovern, *A Hub-and-Spoke Model of Multidistrict Litigation*, 84 LAW & CONTEMP. PROBS. 21, 29 (2021); see also Sam C. Pointer, Jr., Comment, *Reflections by a Federal Judge: A Comment on Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute*, 73 TEX. L. REV. 1569, 1571 (1995) (describing experience firsthand).

<sup>124</sup> See S. ELIZABETH GIBSON, JUDICIAL MANAGEMENT OF MASS TORT BANKRUPTCY CASES 14, 15 (2005). The parties even contemplated asking Judge Pointer to withdraw the reference to conduct bellwether trials to help estimate the debtor's aggregate liability, but the plan never came to fruition. S. ELIZABETH GIBSON, CASE STUDIES OF

endorse these collaborations.<sup>125</sup> Meanwhile, the Bankruptcy Code itself encourages cooperation between bankruptcy courts and foreign courts hearing overlapping cases.<sup>126</sup>

And there are good reasons to cooperate. There are, of course, the classic justifications for cooperation. Two people working together can bring different perspectives to a problem and perhaps can counteract biases that may exist in a single decisionmaker.<sup>127</sup> There also are more specific advantages for MDL-bankruptcy cooperation because of the specific capacities and competencies of the two systems. On the one hand, MDL judges can supplement bankruptcy court jurisdiction with the capacity to organize bellwether jury trials around the country.<sup>128</sup> Bellwethers combine with other aspects of “information forcing”—a core competence of MDL judges<sup>129</sup>—in the critical process of valuing claims. Proper valuation of claims is necessary for a bankruptcy court to allocate voting rights fairly, to police out fraudulent transfers, and to ensure that sufficient funds are available to claimants.<sup>130</sup> Critics of mass tort bankruptcies have identified claim valuation as a central shortcoming;<sup>131</sup> MDL judges could contribute their skills and resources to this enterprise.

On the other hand, bankruptcy judges have powers that help respond to some of the potential shortcomings in MDL. Bankruptcy judges have at their disposal tools that are designed to deal with the collective action problems inherent in mass

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MASS TORT LIMITED FUND CLASS ACTION SETTLEMENTS & BANKRUPTCY REORGANIZATIONS, 221–23 (2000); see *In re Dow Corning Corp.*, 211 B.R. 545, 554–60 (Bankr. E.D. Mich. 1997) (describing debtor’s and tort claimants’ competing bellwether trial plans).

<sup>125</sup> For example, when declining to decide whether asbestos bankruptcy proceedings could be consolidated in an MDL, the Panel observed that “to the extent that state court actions and bankruptcy proceedings are excluded from the ambit of the Panel’s transfer decision, transfer will nonetheless have the salutary effect of creating one federal court with which such proceedings can be coordinated.” *In re Asbestos Prods. Liab. Litig.* (No. VI), 771 F. Supp. 415, 421 n.6 (J.P.M.L. 1991).

<sup>126</sup> See 11 U.S.C. § 1525.

<sup>127</sup> See, e.g., JAMES SUROWIECKI, *THE WISDOM OF CROWDS: WHY THE MANY ARE SMARTER THAN THE FEW AND HOW COLLECTIVE WISDOM SHAPES BUSINESS, ECONOMIES, SOCIETIES AND NATIONS* 3–22 (2004); Brian T. Fitzpatrick, *Many Minds, Many MDL Judges*, 84 L. & CONTEMP. PROBS. 107, 111–15 (2021).

<sup>128</sup> See generally Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576 (2008) (surveying bellwether practices).

<sup>129</sup> See generally Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 CALIF. L. REV. 1259 (2017).

<sup>130</sup> Rave, *supra* note 2, at 55.

<sup>131</sup> *Id.*

adjudication,<sup>132</sup> such as the automatic stay,<sup>133</sup> the appointment of a futures representative,<sup>134</sup> priority rules,<sup>135</sup> prohibitions on fraudulent transfers,<sup>136</sup> and the ability to approve global plans of reorganization without unanimous support.<sup>137</sup> Also, while MDL judges cannot directly manage or resolve cases filed in state courts,<sup>138</sup> bankruptcy courts can stay *all* proceedings and then resolve all of them at once.<sup>139</sup>

MDL and bankruptcy judges could combine their powers, making a whole that is greater than the sum of its parts. But cooperation is not a given, especially when parties (and scholars and judges) have pushed narratives about rivalrous systems.<sup>140</sup> Strategic choices of defendants exacerbate the issue. Defendants will choose where to file bankruptcy strategically, and the odds are low that their preferred forum is in the same district as the MDL. Indeed, if defendants seek bankruptcy to escape the MDL, then they are likely to choose judges in different districts and with, shall we say, less cooperative attitudes.

<sup>132</sup> See Casey & Macey, *supra* note 4, at 977 (“Chapter 11 provides tools for dealing with holdouts and future claimants that are unavailable in conventional class action or multidistrict litigation proceedings.”); Troy A. McKenzie, *Toward a Bankruptcy Model for Nonclass Aggregate Litigation*, 87 N.Y.U. L. REV. 960, 963 (2012) (“Bankruptcy, by contrast [to class actions], starts with an assumption that collective resolution is necessary, but then tempers the emphasis on the collective with group and individual consent and with institutional structures that prevent the excessive accretion of power by lawyers or particular subgroups of claimants.”); cf. D. Theodore Rave, *Governing the Anticommons in Aggregate Litigation*, 66 VAND. L. REV. 1183, 1198-1201 (2013) (explaining collective action problem inherent in aggregate litigation).

<sup>133</sup> 11 U.S.C. § 362.

<sup>134</sup> See *Wright v. Owens Corning*, 679 F.3d 101, 108 n.7 (3d Cir. 2012) (explaining that a future claims representative can be “appointed to represent and protect the interests of persons with future unknown claims”); see generally Frederick Tung, *The Future Claims Representative in Mass Tort Bankruptcy: A Preliminary Inquiry*, 3 CHAP. L. REV. 43 (2000).

<sup>135</sup> 11 U.S.C. § 1129(b)(2)(B)(iii); see Douglas G. Baird, *Priority Matters: Absolute Priority, Relative Priority, and the Costs of Bankruptcy*, 165 U. PA. L. REV. 785, 786 (2017).

<sup>136</sup> 11 U.S.C. § 548.

<sup>137</sup> 11 U.S.C. § 1129.

<sup>138</sup> 28 U.S.C. § 1407(a); see generally Zachary D. Clopton & D. Theodore Rave, *MDL in the States*, 115 Nw. U. L. REV. 1649 (2021).

<sup>139</sup> See, e.g., Anthony J. Casey & Aziz Z. Huq, *The Article III Problem in Bankruptcy*, 82 U. CHI. L. REV. 1155, 1198 (2015) (“[A] critical benefit of bankruptcy derives from the procedural aggregation of claims into a single forum as a way to mitigate perverse and destructive collective action problems.”).

<sup>140</sup> See *supra* Part I.

The choices matter not only because collaboration might be easier between judges collocated in a district, but also because once the MDL and bankruptcy are separated, there are not clear lines of authority between the MDL and bankruptcy judges. The automatic stay, in some sense, gives the bankruptcy judge the upper hand.<sup>141</sup> But we showed how MDL judges can strike back.<sup>142</sup> Many of the examples of escalation we described above, however, simply would not occur if the MDL and bankruptcy judges were in the same district, where the MDL judge can withdraw the reference to end any stand-off. It is our experience that both MDL and bankruptcy judges are committed to fair and efficient resolution. Their interests are aligned. And once clear lines of authority are established, those clear lines can facilitate cooperation by eliminating any ambiguity.

So the solution, we think, is to get the MDL and the bankruptcy into the same district. This result could be mandated by statute, but we are more than dubious that such legislation would be forthcoming. As we explained above, the same result can be achieved under current law. The JPML arguably has the power to transfer an entire bankruptcy and unquestionably has the power to transfer important pieces of it. The JPML also unquestionably has the power to retransfer the MDL to collocate it with the bankruptcy proceeding.<sup>143</sup>

Indeed, entrusting the decision to the JPML may be preferable to an automatic transfer rule because of the JPML's unique powers and competences. The JPML is the congressionally designated institution to decide where mass torts (and other mass cases) are litigated in the federal courts.<sup>144</sup> The Panel is not handling the case itself, so it lacks any vested interest that a district or bankruptcy judge might have in a proceeding they are overseeing.<sup>145</sup>

The JPML also can exercise its sound discretion to choose among options that might best facilitate cooperation and resolution. We think the most likely approach should be that the

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<sup>141</sup> 11 U.S.C. § 362.

<sup>142</sup> See *supra* Part I.

<sup>143</sup> See *supra* Part II.

<sup>144</sup> 28 U.S.C. § 1407(a); see generally Andrew D. Bradt, "A Radical Proposal": *The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831 (2017).

<sup>145</sup> See, e.g., Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337, 361-62 (1986) (arguing that judges who invest heavily in making settlement happen are unlikely to remain indifferent to its consummation).

JPML maintains the traditional district-bankruptcy hierarchy by putting the bankruptcy judge “under” the MDL judge. This outcome is possible because of the special authority of the Panel to request that the MDL judge be assigned temporarily to the transferee district. So, for example, the Panel could have requested that Judge Shipp, who is handling the J&J talc MDL in the District of New Jersey, be temporarily assigned to the Southern District of Texas, where the third talc bankruptcy was filed. In that situation, the MDL judge would remain in the driver’s seat but could collaborate with a bankruptcy judge in the same district who might have more expertise in exercising bankruptcy’s special powers.

This structure, though, is not the only option for the Panel. The Panel might consider and decline to request reassignment of the MDL judge. This choice might indicate that the Panel concluded that the bankruptcy judge, operating with the protection of the automatic stay, should take the lead. Or the Panel could transfer the MDL to a new judge in the district in which the bankruptcy was pending, empowering an Article III judge but perhaps signaling that a fresh start to the collaboration would be prudent. The Panel, like the judges, has an interest in resolution, but without the sense of attachment or “ownership” that a judge might develop through the course of managing a massive litigation. We expect the Panel would exercise its clear-eyed discretion toward that end.

#### CONCLUSION

The resolution of mass torts is an evolving process.<sup>146</sup> As class actions fell away as tool for resolving mass torts, MDLs filled the void. Recently, bankruptcy courts have rebelled against MDL’s imperial reach. As we have shown, MDL and bankruptcy judges have clashed over the proper venue for resolving these cases. Judges have escalated their tactics, and we see a real risk that the escalation will continue until mutually assured destruction. But MAD is not, in fact, assured. The reason is that Congress has designated an impartial arbiter to decide where mass torts should be adjudicated. The Judicial Panel on Multidistrict Litigation need not remain frozen in carbonite as district and bankruptcy judges draw their light-sabers. The Panel can bring balance to the force by identifying

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<sup>146</sup> See generally Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571 (2004).

and capitalizing on the special capacities of MDL and bankruptcy. Whether that resolution happens in the courthouse where the bankruptcy is filed or somewhere else, the key contributions of the Panel are eliminating the battle lines between judges and replacing them with clear lines of authority, which will facilitate the cooperation that is critical to global, if not galactic, peace.