

No. 26-394

IN THE
Supreme Court of the United States

MICHAEL HERLIHY, ET AL.,
Petitioners,

v.

DBMP, LLC,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

**BRIEF OF PROFESSOR D. THEODORE RAVE
AS AMICUS CURIAE IN SUPPORT OF THE
PETITION FOR WRIT OF CERTIORARI**

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INTEREST OF AMICUS CURIAE¹

Professor D. Theodore Rave is the Bernard J. Ward Centennial Professor of Law at the University of Texas School of Law. As a scholar of complex litigation and mass torts, Professor Rave has an established interest in the issues presented in this case and relevant expertise that can assist the Court. Several of his recent articles have focused on mass tort bankruptcies, including *Dissonance and Distress in Bankruptcy and Mass Torts*, 91 FORDHAM L. REV. 309 (2022) (with Andrew D. Bradt & Zachary D. Clopton) and *MDL Strikes Back*, 110 CORNELL L. REV. 1855 (2026) (with Andrew D. Bradt & Zachary D. Clopton). Most recently, he has written *Bankruptcy v. Multidistrict Litigation for Mass Torts*, 114 CALIF. L. REV. 839 (2026), which analyzes many of the questions at issue in this proceeding and shows that bankruptcy is not an appropriate forum for resolving mass torts when the defendant is not in financial distress.

Professor Rave was retained by the Official Committee of Talc Claimants as an expert witness in *In re LTL Management, LLC*, Case No. 23-12825

¹ Pursuant to Supreme Court Rule 37(6), counsel for *amicus* represent that they authored this brief in its entirety, that no counsel for a party authored this brief in whole or in part, and that none of the parties or their counsel, nor any other person or entity other than *amicus* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37(2), counsel for *amicus* also represent that all parties were provided notice of his intention to file this brief at least 10 days before it was due.

(Bankr. D.N.J.). The outcome of that proceeding was dismissal by the Bankruptcy Court based on the debtor’s failure to satisfy the “gateway” issue of financial distress, which dismissal was affirmed by the Third Circuit. *In re LTL Mgmt., LLC*, 652 B.R. 433, 436 (Bankr. D.N.J. 2023), *aff’d*, Nos. 23-2971 and 23-2972, 2024 WL 3540467 (3d Cir. July 25, 2024).

SUMMARY OF ARGUMENT

Certiorari is warranted to decide whether a debtor’s pursuit of bankruptcy as part of a Texas Two-Step lacks good faith, such that “cause” exists to lift the automatic stay under 11 U.S.C. § 362(d). The Fourth Circuit acknowledged that good faith is an “implied requirement for obtaining an automatic stay” and that bad faith can “justify lifting the stay.” *Herlihy v. DBMP, LLC*, 167 F.4th 142, 151 (4th Cir. 2026). Yet it held that whether DBMP was a “profitable, non-distressed” company was “irrelevant” to the bad-faith inquiry. *Id.* at 152.

Petitioners explain why that holding cannot be squared with 11 U.S.C. § 362(d) or with the decisions of other circuits. But the ramifications of the Fourth Circuit’s approach on Americans’ ability to pursue relief against profitable companies that cause widespread harm are just as profound—and more disturbing.

Bankruptcy’s powerful tools—to stay all litigation, to cut off future claims for recovery, and to bind nonconsenting claimants to a resolution—may be justifiable as an attempt to preserve value and ensure an equitable distribution when a mass tort

defendant lacks enough money to make all creditors whole. The decision below instead authorizes *distress-free bankruptcy*: the use of Chapter 11 by solvent entities to obtain bankruptcy's procedural leverage without the predicate of financial distress. That is an invitation for abuse.

The financial distress requirement plays a critical gatekeeping role, preventing healthy mass tort defendants from using bankruptcy as an escape hatch from tort litigation that is not going their way—whether that litigation is centralized in multidistrict litigation (MDL) or, as for petitioners here, in the courts where victims would otherwise bring their claims. Allowing healthy companies to flee to bankruptcy to escape tort litigation systematically shifts leverage from mass tort claimants to defendants, disempowers individuals with the strongest claims while inviting the mass filing of weaker claims, and provides a windfall for shareholders at the expense of the very parties bankruptcy was designed to protect—the creditors, including tort creditors.

Distress-free bankruptcy undercuts tort claimants in three crucial ways. First, it enables the tortfeasor to stay all litigation, depriving claimants of their day in court and ability to threaten trial. Second, the tortfeasor may impose a resolution of all claims even over the objection of claimants with the strongest claims and most severe injuries. And third, the tortfeasor may engage in forum-shopping for the most favorable set of rules (despite its position as the would-be defendant).

Gimmicks like the so-called “Texas Two-Step” further compound this disparity by allowing a debtor and its corporate affiliates to engage in a divisional merger and then to isolate tort liability in bankruptcy while continuing ordinary operations outside of it. This move minimizes the pain of bankruptcy for corporate managers and shareholders while circumventing fundamental safeguards of the Bankruptcy Code. This case is emblematic. CertainTeed, a profitable company with ample assets to satisfy all its liabilities, is seeking to use bankruptcy to wholly displace the tort liability system without filing for bankruptcy itself. The decision below lets it do so, indefinitely suspending tort claimants’ right to a jury trial and the leverage that right confers.

And because corporate debtors may easily rearrange their corporate structure or move their assets to file bankruptcy virtually anywhere in the country, the Fourth Circuit’s holding has effects far beyond its geographic boundaries. This Court should bring the Fourth Circuit into line with the other circuits and prevent healthy companies from using bankruptcy tactically to undercut mass tort victims’ ability to seek recovery for their injuries in court.

ARGUMENT

The record shows what the Fourth Circuit’s ruling permits. The bankruptcy court found that CertainTeed was “[s]eeking a less expensive way of dealing with these tort liabilities” and “never entertained a bankruptcy filing for itself.” *In re*

DBMP LLC, No. 20-30080, 2021 WL 3552350, at *6, *8 (Bankr. W.D.N.C. Aug. 11, 2021); *see Herlihy*, 167 F.4th at 159 (King, J., dissenting). And DBMP itself told the court of appeals that the restructuring “enabled Old CertainTeed to pursue § 524(g) relief for asbestos liabilities without the entire company having to file for bankruptcy.” DBMP C.A. Br. 10. In short, a fully solvent corporation consolidated its asbestos liabilities into a subsidiary “for the sole purpose of” pursuing a bankruptcy “aimed at denying thousands of victims of their right to a jury trial, and also to coerce favorable settlements from those victims in its preferred bankruptcy forum.” *Herlihy*, 167 F.4th at 170 (King, J., dissenting). That is not a reorganization. It is a litigation-evasion strategy, and it is viable only because the decision below opens bankruptcy to a defendant that is not in financial distress.

That opening hands financially healthy defendants three advantages they could never obtain in the tort system: it halts every case, it imposes a resolution even on the strongest claims, and it lets the defendant choose its forum. The Texas Two-Step compounds the imbalance by keeping the enterprise's assets, operations, and other creditors beyond the bankruptcy court's reach.

I. Distress-Free Bankruptcy Allows Defendants To Stay All Litigation

Filing under Chapter 11 automatically stays all litigation against the debtor, pursuant to 11 U.S.C. § 362(a), and bankruptcy courts are often willing to enter preliminary injunctions effectively extending

the reach of that stay to the debtor’s affiliated companies.² Stays and injunctions remove plaintiffs’ biggest source of leverage in mass tort litigation—the threat of jury trials and verdicts. Although mass tort litigation nearly always ends in settlement,³ bargaining over the terms of those settlements takes place in the shadow of litigation. And plaintiffs’ ability to push their cases forward toward trial is their biggest stick. The automatic stay takes that stick away and places total control over the pace of the litigation in the hands of the bankruptcy judge.⁴

² See, e.g., *Herlihy*, 167 F.4th at 147 (“As the result of the Chapter 11 bankruptcy filing, all asbestos-related state law tort claims against DBMP were automatically stayed pursuant to 11 U.S.C. § 362(a), and the bankruptcy court, in addition, entered a preliminary injunction that prohibited claimants from bringing asbestos claims against New CertainTeed, affiliated entities, and Old CertainTeed’s distributors.”); *In re Bestwall LLC*, 606 B.R. 243, 254–58 (Bankr. W.D.N.C. 2019); *In re Aldrich Pump LLC*, No. 20-30608, 2021 WL 3729335, at *33, *38 (Bankr. W.D.N.C. Aug. 20, 2021); see also Melissa B. Jacoby, *Sorting Bugs and Features of Mass Tort Bankruptcy*, 101 TEX. L. REV. 1745, 1762 (2023) (noting that large corporate debtors “have obtained nationwide injunctions going well beyond the automatic stay’s protection,” which “sometimes are extended for years”).

³ More than 99% of cases in federal court are resolved before trial. Admin. Off. U.S. Cts., *Table C-4—U.S. District Courts—Civil Cases Terminated, by Nature of Suit and Action Taken—During the 12-Month Period Ending June 30, 2022*, U.S. Courts: Statistical Tables for the Federal Judiciary (June 30, 2022), <https://www.uscourts.gov/statistics/table/c-4/statistical-tables-federal-judiciary/2022/06/30>.

⁴ See, e.g., Daniel J. Bussel, *The Mass Tort Claimants’ Bargain*, 97 AM. BANKR. L.J. 684, 713–14 (2023).

That is precisely the benefit CertainTeed’s corporate family set out to obtain. Its ultimate parent, Compagnie de Saint-Gobain, told investors that it expected the bankruptcy to “take up to approximately five to eight years,” to give DBMP “the time and protection to negotiate an agreement,” and to ensure that “all asbestos litigations [would be] stayed and all related costs suspended.” *Herlihy*, 167 F.4th at 159 (King, J., dissenting) (quoting C.A. J.A. 437). The bankruptcy court then extended that protection to CertainTeed, even though CertainTeed itself never filed for bankruptcy. *Id.* at 147–48; *id.* at 159 (King, J., dissenting).

The consequences fall entirely on the other side of the ledger. Thousands of tort plaintiffs who have already waited years for their day in court must now wait indefinitely. With every case paused and no trial on the horizon, defendants lose any incentive to resolve claims promptly. But the stay does nothing to relieve the urgency on the plaintiffs’ side, and it does not halt the progression of their injuries. Petitioners themselves illustrate the point: Mr. Bergrud’s estate filed suit in April 2019, after he died of mesothelioma, and Mr. Herlihy, “who is yet living and suffering,” filed suit in August 2023. *Id.* at 166 (King, J., dissenting); *see id.* at 148. Where the defendant is solvent, a litigation stay does not merely give the parties breathing room to work out an equitable distribution of limited assets. It prevents injured claimants from pursuing recovery from defendants that could otherwise pay legitimate claims. In so doing, it systematically shifts bargaining leverage from mass tort plaintiffs to defendants. Petitioners

asked only to pursue their claims before juries in Washington and California, *id.* at 160 (King, J., dissenting)—that is, to recover the leverage the stay took away. They were refused.

II. Distress-Free Bankruptcy Allows Defendants To Impose Resolution On Even Plaintiffs With the Strongest Claims

Another significant source of mass tort defendant leverage in bankruptcy is the power to impose resolution over the objection of even plaintiffs with the strongest claims and most severe injuries—those that have the highest value in the tort system. Debtors in Chapter 11 bankruptcy enjoy the exclusive right to propose a reorganization plan⁵ and—if the plan is confirmed after a vote by the tort creditors and meets other statutory requirements—the ability to bind nonconsenting claimants to that plan.⁶

In theory, voting is tort claimants’ main protection in a mass tort bankruptcy,⁷ but in practice mass tort defendants can skew bankruptcy voting

⁵ Debtors have the exclusive right to propose a plan of reorganization for four months after filing a petition, which can be extended to eighteen months. 11 U.S.C. § 1121(b); *see also id.* § 1121(d)(2)(A).

⁶ *See* Troy A. McKenzie, *Toward A Bankruptcy Model for Nonclass Aggregate Litigation*, 87 N.Y.U. L. REV. 960, 1002–08 (2012).

⁷ *In re LTL Mgmt., LLC*, 637 B.R. 396, 416 (Bankr. D.N.J. 2022), *rev’d and remanded*, 58 F.4th 738 (3d Cir. 2023), *amended and superseded by*, 64 F.4th 84 (3d Cir. 2023).

procedures sharply in their favor. The resolution of the plaintiffs' claims will be negotiated in the shadow of those voting rules, not the threat of trial by the strongest claims.

One way that mass tort defendants can skew bankruptcy voting procedures is by allocating voting rights to give the weakest claims the same voting power as the strongest. In a mass tort, the value of victims' claims can vary widely along many dimensions (e.g., degree of injury, evidence of causation, applicable state law). But determining the valuation of each tort claim can be difficult and costly. As a result, bankruptcy courts tend to lump all tort claimants into a single creditor class⁸ and estimate the value of their claims uniformly at \$1 for voting purposes.⁹ The "one dollar, one vote" method of estimation creates a serious risk of undervaluing the strongest claims.¹⁰

Even worse, uniform valuation of claims for voting purposes invites the filing of weak claims in bankruptcy by claimants who would never have recovered in the tort system, but who will be content

⁸ In theory, the bankruptcy rules allow judges to separate tort claimants into different voting classes based on the relative value of their claims. Fed. R. Bankr. P. 3013. But, as Bussel has explained, this classification approach "is virtually never used." Bussel, *supra* note 4, at 726.

⁹ See, e.g., *Menard-Sanford v. Mabey (In re A.H. Robins Co.)*, 880 F.2d 694, 697–98 (4th Cir. 1989); Jacoby, *supra* note 2, at 1756–57 (noting ubiquity of this practice).

¹⁰ See, e.g., *In re Quigley Co.*, 346 B.R. 647, 659 (Bankr. S.D.N.Y. 2006).

to accept a lowball bankruptcy plan that pays them something. Those votes count the same as the votes of claimants with serious injuries, giving the holders of the weakest claims outsized influence over a plan that systematically undercompensates the strongest ones.

Unlike in the tort system, where the defendant has every incentive to screen out as many claims as possible, a debtor in bankruptcy that favors a low-value plan may welcome the deluge of weak claims, which can effectively stuff the ballot box in favor of a plan opposed by stronger claims.¹¹ And the debtor may attempt to design voting procedures that minimize screening of predictably friendly votes.¹²

In addition, bankruptcy shifts control over the terms of aggregation to mass tort defendants. Aggregate resolution of claims is the typical endgame for mass torts in whatever system they are brought. And outside of bankruptcy—whether in an MDL or in state court—tort claimants and their lawyers decide whether and on what terms to aggregate. However, bankruptcy empowers the defendant to impose

¹¹ See, e.g., Adam Levitin, *Stuffing the Chapter 11 Ballot Box with “Junk” Claims*, CREDIT SLIPS (Apr. 26, 2024), <https://www.creditslips.org/creditslips/2024/04/stuffing-the-chapter-11-ballot-box-with-junk-claims>.

¹² Cf. *In re Red River Talc LLC*, 670 B.R. 251, 278–94 (Bankr. S.D. Tex. 2025) (finding “there were significant voting and solicitation irregularities,” including that certain “firms collectively purported to vote on behalf of more than 25,000 claimants” without the requisite power of attorney).

aggregate resolution unilaterally.¹³ Bankruptcy allows the defendant to force all claimants to vote on a plan that it proposes and to bind dissenters to the results of that vote.

Claimants face the risk that the debtor will be permitted to delay payments until it establishes a bankruptcy trust, which could then pay claimants less than they would be awarded in the tort system. And if individual claimants do not like the terms of the deal, they typically cannot opt out of the plan of reorganization; they can only pursue their claims against the trust, where their recoveries are likely to be capped.¹⁴ The majority below emphasized that, in invoking § 524(g), *CertainTeed* “did not protect one single dollar from asbestos-related liability.” *Herlihy*, 167 F.4th at 153. But the harm of distress-free bankruptcy is not hidden dollars. It is the debtor’s control over when claimants are paid, on what terms, and whether a jury ever values their claims. These features make bankruptcy particularly attractive to mass tort defendants.¹⁵

¹³ See D. Theodore Rave, *Bankruptcy v. Multidistrict Litigation for Mass Torts*, 114 CALIF. L. REV. 839, 891–93 (2026).

¹⁴ See, e.g., Ralph Brubaker, *Mass Torts, the Bankruptcy Power, and Constitutional Limits on Mandatory No-Opt-Out Settlements*, 23 FLA. ST. U. BUS. REV. 111, 119–20 (2024).

¹⁵ See Andrew D. Bradt, Zachary D. Clopton & D. Theodore Rave, *MDL Strikes Back*, 110 CORNELL L. REV. 1855, 1855–56 (2026).

III. Distress-Free Bankruptcy Allows Mass Tort Defendants To Forum Shop

Outside bankruptcy, no mass tort defendant gets to pick its forum. Since the Multidistrict Litigation Act was adopted in 1968, mass tort cases in the federal courts have been centralized in MDL, and MDL judges—often working cooperatively with state judges handling parallel litigation—have successfully managed the vast majority of those controversies to comprehensive resolution.¹⁶ A neutral body, the Judicial Panel on Multidistrict Litigation (JPML), decides where to create the MDL and chooses the district judge best suited to handle the particular litigation. Studies have shown that when the parties agree on a preferred transferee district, the JPML usually picks that one, and when they disagree, the JPML sides with plaintiffs and defendants roughly equally.¹⁷

Many states have adopted their own MDL procedures, under which a neutral body or a judge in a court where a plaintiff has filed suit—not the defendant—decides whether and where to consolidate the litigation.¹⁸ And when, as here, victims sue in the state courts where they live, ordinary rules of jurisdiction and venue tie the litigation to the parties and the injury—not to the defendant’s preference.

¹⁶ See Rave, *supra* note 13, at 856–73.

¹⁷ See Zachary D. Clopton & Andrew D. Bradt, *Party Preferences in Multidistrict Litigation*, 107 CALIF. L. REV. 1713, 1714 (2019).

¹⁸ See Zachary D. Clopton & D. Theodore Rave, *MDL in the States*, 115 NW. U. L. REV. 1649, 1654 (2021).

Bankruptcy upends that arrangement and hands mass-tort defendants unilateral control over the forum. A defendant filing for Chapter 11 enjoys a virtually unlimited choice of venue under 28 U.S.C. § 1408 because a corporate debtor can reincorporate in its preferred jurisdiction shortly before filing.¹⁹

In this case, for example, CertainTeed and DBMP existed as Texas entities “for less than four hours” before DBMP converted to a North Carolina limited liability company. *In re DBMP*, 2021 WL 3552350, at *10. Indeed, a North Carolina manufacturing plant had been “earmarked” as part of CertainTeed’s plan, which “would establish venue for a chapter 11 filing in the Western District of North Carolina.” *Id.* at *9.

IV. The Texas Two-Step Further Allows A Debtor And Its Corporate Affiliates To Circumvent The Fundamental Safeguards Of The Bankruptcy Code

The so-called “Texas Two-Step” further exacerbates the imbalance between mass tort defendants and plaintiffs. In a Two-Step bankruptcy, the mass tort defendant divides itself into two new companies: a “GoodCo” with all of the assets, and a “BadCo” with all of the tort liability plus a funding

¹⁹ See, e.g., Adam J. Levitin, *Judge Shopping in Chapter 11 Bankruptcy*, 2023 U. ILL. L. REV. 351 (2023); cf. Steve Vladeck, “The Growing Abuse of Single-Judge Districts,” One First (Mar. 13, 2023), <https://www.stevevladeck.com/p/18-shopping-for-judges>.

guarantee from the GoodCo. The BadCo then files for bankruptcy while the GoodCo continues business as usual outside of bankruptcy.²⁰ That is what happened here. CertainTeed assigned DBMP all of its asbestos liabilities, \$25 million in cash, and a siding and trim business, while CertainTeed itself kept 97% of the enterprise's viable assets, all of its employees, and all of its non-asbestos creditors. *Herlihy*, 167 F.4th at 147; *id.* at 158 n.5 (King, J., dissenting); Pet. App. 5a, 30a, 63a; *In re DBMP*, 2021 WL 3552350, at *1, *9. The asbestos victims left behind make up 97% of DBMP's creditors. *Herlihy*, 167 F.4th at 167 (King, J., dissenting). This Two-Step maneuver allows a debtor and its corporate affiliates to circumvent fundamental safeguards of the Bankruptcy Code.

The Code vests bankruptcy courts with the power to control the debtor's business and assets through appointment of a trustee and review of transactions. *See, e.g.*, 11 U.S.C. §§ 363, 1104(a). However, under the Two-Step, a corporate parent can keep its operating assets outside the bankruptcy court's supervision by allocating them to a sibling entity instead of the debtor. The Two-Step thus hinders the bankruptcy system's ability to control the assets that gave rise to the tort liabilities in the first place—and the assets available to satisfy those liabilities. The Two-Step also allows a debtor to ensure that tort victims are the only creditors subject to bankruptcy, while providing that trade creditors

²⁰ *See* Michael A. Francus, *Texas Two-Stepping Out of Bankruptcy*, 120 MICH. L. REV. Online 38 (2022).

remain outside bankruptcy and have their claims satisfied in full as they become due.

From the debtor’s perspective, the Two-Step eliminates many of the disincentives to filing for bankruptcy. Bankruptcy can be a painful process for the debtor, which must endure disclosure requirements, judicial oversight, and the inevitable reputational hit of a Chapter 11 filing. Ordinarily, a solvent debtor whose managers still have a duty of loyalty to the shareholders will have an incentive to put enough money on the table to secure the tort claimants’ votes and end the bankruptcy ordeal quickly. But because the BadCo debtor in a Two-Step bankruptcy can have no operations (other than seeking to cap liability for the tort claims), there is no pain to prolong. Professional fees in bankruptcy can be high, but they are easily dwarfed by the money the defendant is *not* spending on litigation costs and judgments in the tort system.²¹

The bankruptcy court reasoned that, “if there was good faith and cooperation,” the parties “might actually be faster in bankruptcy,” *Herlihy*, 167 F.4th at 161 (King, J., dissenting) (citation omitted); *see* Pet. App. 76a, 78a (denying stay relief for the reasons

²¹ *See In re Aldrich Pump LLC*, No. 20-30608, 2023 WL 9016506, at *10 & n.13 (Bankr. W.D.N.C. Dec. 28, 2023) (noting that “for the past three years, both the Debtors and the Affiliates have enjoyed . . . a ‘payment holiday’ from the \$100 million-a-year costs they were previously incurring”). Before its Two-Step, CertainTeed spent an average of \$80 million per year resolving asbestos claims, plus \$20 to \$30 million per year in legal defense costs. *Herlihy*, 167 F.4th at 146.

stated on the record), and the majority below apparently embraced that premise, *Herlihy*, 167 F.4th at 150, 153. But the Two-Step is built to remove the debtor’s incentive to cooperate. A debtor with no pain to prolong has no reason to hurry—and every reason to wait. Tort claimants, by contrast, need to bring the bankruptcy to a close before they see any money. This combination further shifts significant leverage from mass tort plaintiffs to defendants and can result in an extended period in which the debtor can effectively tranquilize tort claims. Here, asbestos claims against DBMP and CertainTeed have been stayed since DBMP filed for bankruptcy in January 2020—nearly seven years.

CONCLUSION

The Fourth Circuit’s decision runs counter to the principle at the heart of bankruptcy theory: that bankruptcy exists for the benefit of creditors, not just the debtor.²² Bankruptcy makes sense when the defendant cannot afford to pay all of its creditors—even if it necessarily curtails plaintiffs’ procedural abilities, rights, and leverage.

However, when a defendant is *not* bankrupt (neither insolvent nor even financially distressed), there is no reason to allow a defendant to unilaterally avail itself of bankruptcy protections to torpedo tort victims’ ability to try or resolve their claims in the courts where they filed them. For all these reasons,

²² See *Conner v. Long*, 104 U.S. 228, 232 (1881); see also Thomas H. Jackson, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* (1986).

enforcing the financial distress requirement is imperative.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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