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Creditors' Committees: Giving Tort Claimants a Voice in Chapter 11 Bankruptcy Cases

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CREDITORS' COMMITTEES: GIVING TORT CLAIMANTS A VOICE IN CHAPTER 11 BANKRUPTCY CASES

ABSTRACT

Over the years, tort claimants have increasingly appeared in the bankruptcies of corporate debtors. More so than other participants in bankruptcy proceedings, tort claimants are brought into this forum involuntarily. Unlike shareholders, lenders, or even the corporate debtor's employees, tort claimants often do not choose to engage in commercial transactions with corporate debtors. Rather, their claims arise because the debtor has harmed them without their consent. To protect their interests, tort claimants often request that courts order the United States Trustee to appoint a creditors' committee to represent them. Courts have been authorized to do so under 11 U.S.C. § 1102(a)(2). While courts have the authority to form creditors' committees for tort claimants, courts do not uniformly grant tort claimants' requests.

Through the lens of the Montreal, Maine and Atlantic Railway, Ltd. bankruptcy case, this Comment argues that courts should form creditors' committees for tort claimants when corporate debtors with tort liability file for bankruptcy. Four arguments support this proposition. First, there are strong policy reasons for forming creditors' committees for tort claimants. Second, courts need to form creditors' committees for tort claimants to ensure that tort claimants are guaranteed due process of the law. Third, forming creditors' committees for tort claimants is consistent with the case law interpreting 11 U.S.C. § 1102(a)(2), the Bankruptcy Code section authorizing the formation of creditors' committees. Finally, forming creditors' committees for tort claimants can have practical significance.

INTRODUCTION

This Comment argues that courts should form a creditors' committee of tort claimants when a corporation with tort liability files for relief under chapter 11 of the Bankruptcy Code (the "Code").[1] The Code currently authorizes courts to form one or more creditors' committees to represent unsecured creditors.[2] The Code gives these committees significant powers, including the ability to negotiate a plan of reorganization with the debtor[3] and the ability to hire lawyers, accountants, and other professionals to represent the committee's interests.[4]

Although forming a creditors' committee of tort victims is currently not commonplace, such committees need to be the norm, not the exception, in chapter 11 bankruptcy cases. The reasons why tort claimants need their own creditors' committee can be shown through the use of the following hypothetical. Imagine losing a relative or suffering a serious injury at the hands of a corporate tortfeasor. You desire compensation for your loss, but the corporation that has harmed you has filed for bankruptcy. To make matters worse, you find out that the corporation owes significant amounts of money to several other parties. These parties include sophisticated individuals and various companies that have voluntarily engaged in business with the corporate debtor, including the corporation's employees, lending institutions, and suppliers. Some of these parties have secured claims so they will get paid in full before you are paid, even if the debtor cannot pay you after it has satisfied these debts. Others have positions on the unsecured creditors' committee, which will be able to hire professionals on the debtor's dime. Such professionals have the expertise and know-how to negotiate for better repayment options and other advantageous treatment on behalf of their clients. You have requested that the court appoint a creditors' committee to represent you. However, there is the chance that the court may instead give you only a seat on the existing creditors' committee, or may deny your request outright. This possibility is a problem because the existing committee is stacked with

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[1] Chapter 11 is used primarily for business debtors to reorganize and continue operations or sell the business as a going concern. *See* 7 COLLIER ON BANKRUPTCY ¶ 1101.01 (Alan Resnick & Henry J. Sommer eds., 16th ed. 2010) ("Chapter 11 of the Bankruptcy Code provides an opportunity for a debtor to reorganize its business or financial affairs or to engage in an orderly liquidation of its property either as a going concern or otherwise.").

[2] 11 U.S.C. § 1102(a)(1)–(2) (2012).

[3] *Id.* § 1103(c)(3).

[4] *Id.* § 1103(a) (giving creditors' committees the ability to employ "one or more attorneys, accountants, or other agents, to represent or perform services for such committee").

individuals whose interests and even possible avenues for repayment are completely dissimilar from your own interests.

This hypothetical reflects the real-life plight of tort claimants in the Montreal, Maine and Atlantic Railway, Ltd. ("MMA") bankruptcy case. On July 6, 2013, a train owned by MMA broke free from a rail yard in Nantes, Quebec.[5] At the time, the unmanned train was carrying about seventy-three tank cars filled with crude oil.[6] Soon after breaking free, the train derailed and plowed into buildings in the nearby town of Lac-Megantic, Quebec.[7] The ensuing fires burned for thirty-six hours and wreaked havoc in the town center, causing an estimated forty-seven deaths, countless other injuries, and leveling forty buildings.[8] Given the extent of the devastation experienced by accident victims, news commentators have labeled the train crash the worst in North America in twenty years.[9]

One month after the crash, MMA filed a voluntary petition for relief under chapter 11 of the Code in the United States Bankruptcy Court for the District of Maine.[10] Later the same month, the estates of some of the people killed in the train crash filed a motion to appoint a committee of creditors to represent the interests of the wrongful death and personal injury claimants.[11] A few days later, the Quebec government, the town of Lac-Megantic, and the tort-victim's class-action representatives filed a similar motion with the bankruptcy court.[12] The Chapter 11 Trustee[13] opposed both of these motions.[14] In his opinion,

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[5] *Runaway Train Devastates Canadian Town*, CNN (July 12, 2013, 5:45 PM), http://www.cnn.com/interactive/2013/07/world/canada-train-explosion/.

[6] *Id.*

[7] *Id.*

[8] David McLaughlin, Frederic Tomesco & Tiffany Kary, *Montreal Maine Railway Files for Bankruptcy After Crash*, BLOOMBERG NEWS (Aug. 8, 2013, 3:31 PM), http://www.bloomberg.com/news/2013-08-07/montreal-maine-railway-files-for-bankruptcy-after-crash.html (estimating $200 million in cleanup costs for the accident); *Runaway Train Devastates Canadian Town*, *supra* note 5.

[9] Louise Egan & Tom Hals, *Railway in Deadly Quebec Explosion Files for Bankruptcy*, REUTERS (Aug. 7, 2013, 6:23 PM), http://www.reuters.com/article/2013/08/07/us-train-montrealmaineatlantic-idUSBRE97614E20130807.

[10] Bankruptcy Petition, *In re* Montreal Me. & Atl. Ry., Ltd., No. 13-10670 (Bankr. D. Me. Aug. 7, 2013), ECF No. 1.

[11] Wrongful Death Claimants' Motion for Formation of Creditors' Committee, at 1, *In re* Montreal Me. & Atl. Ry., Ltd., No. 13-10670 (Bankr. D. Me. Aug. 22, 2013), ECF No. 76.

[12] Motion of Informal Committee of Quebec Claimants for Appointment of Creditors' Committee Pursuant to Bankruptcy Code Section 1102(a)(2) at 1, 5–6, *In re* Montreal Me. & Atl. Ry., Ltd., No. 13-10670 (Bankr. D. Me. Aug. 30, 2013), ECF No. 127 [hereinafter *Montreal Me. & Atl. Ry.* Motion for Appointment].

[13] In a railroad reorganization, a trustee is always appointed with input from the U.S. Department of Transportation. 11 U.S.C. § 1163 (2012). In a typical chapter 11 case, however, a chapter 11 trustee is not appointed, and the debtor serves as the debtor in possession, having the powers and duties of the chapter 11

appointing a creditors' committee in the case would be wholly unnecessary.[15] However, the experience of tort claimants in other chapter 11 bankruptcy cases strongly contradicts the Chapter 11 Trustee's skepticism.

Tort claimants have faced harsh outcomes in chapter 11 bankruptcy cases when they do not have their own creditors' committee. In *In re Chrysler, LLC*, more than 150 personal injury victims requested the bankruptcy court to appoint an official creditors' committee of tort claimants.[16] Instead of appointing a separate committee to represent the personal injury victims, the United States Trustee[17] appointed one tort claimant and one asbestos claimant to an existing creditors' committee.[18] This creditors' committee consisted primarily of parties who were interested in selling Chrysler's property "free and clear" of tort liability.[19] These creditors had negotiated a deal in which they would receive an ownership interest in the newly formed Chrysler entity.[20] Eventually, these creditors prevailed over the tort claimants because Chrysler's assets were sold free and clear of the existing tort claims against Chrysler.[21] Chrysler provided virtually nothing to tort claimants who had

trustee. *Id.* § 1107(a). In chapter 11 cases, a trustee may be appointed to administer the bankruptcy estate and operate the debtor's business either for cause or if it is in the interest of creditors. *Id.* § 1104.

[14] Trustee's Consolidated Response to Motions for Appointment of Creditors' Committee Filed by Certain Wrongful Death Claimants & the Informal Committee of Quebec Claimants at 1, *In re* Montreal Me. & Atl. Ry., Ltd., No. 13-10670 (Bankr. D. Me. Sept. 11, 2013), ECF No. 212.

[15] *Id.*

[16] Motion of Ad Hoc Committee of Consumer-Victims of Chrysler LLC for Appointment of Official Committee of Tort Claimants Pursuant to 11 U.S.C. § 1102(a)(2) at 2–3, *In re* Chrysler LLC, No. 09-50002 (Bankr. S.D.N.Y. May 4, 2009), ECF No. 273 [hereinafter *Chrysler* Motion for Appointment].

[17] The United States Trustee serves as part of the U.S. Department of Justice and is charged with overseeing the administration of bankruptcy cases and private trustees, including those appointed in chapter 11 cases. *See* 28 U.S.C. § 586 (2012). In the context of chapter 11 cases, the United States Trustee is responsible for appointing all members of creditors' and equity security holders' committees. 11 U.S.C. § 1102(a)(1); *see also In re* Dow Corning Corp., 194 B.R. 121, 164 (E.D. Mich. 1997).

[18] Motion of Ad Hoc Committee of Consumer Victims of General Motors for Appointment of Official Committee of Tort Claimants Pursuant to 11 U.S.C. § 1102(a)(2) at 5, *In re* Gen. Motors, Inc., No. 09-50026 (Bankr. S.D.N.Y. June 2, 2009), ECF No. 287 [hereinafter *Gen. Motors* Motion for Appointment].

[19] *Id.*

[20] Under the terms of the deal, the U.S. Treasury would provide some of the funds to orchestrate the sale of Chrysler to Fiat, and in return, the U.S. Treasury, Fiat, a Canadian entity, and the United Auto Workers Union would receive ownership interests in the new Chrysler entity. Ind. State Police Pension Trust v. Chrysler LLC (*In re* Chrysler LLC), 576 F.3d 108, 111–12 (2d Cir. 2009), *vacated as moot sub nom.*, Ind. State Police Pension Trust v. Chrysler LLC, 558 U.S. 1087 (2009).

[21] *See* Order (I) Authorizing the Sale of Substantially All of the Debtors' Assets Free & Clear of All Liens, Claims, Interests and Encumbrances, (II) Authorizing the Assumption & Assignment of Certain Executory Contracts & Unexpired Leases in Connection Therewith & Related Procedures, & (III) Granting Related Relief, *In re* Chrysler, LLC, No. 09-50002 (Bankr. S.D.N.Y. 2009), ECF No. 3232 [hereinafter *Chrysler* Order Authorizing Sale]; *see also* Master Transaction Agreement Among Fiat S.p.A., New Carco

prepetition claims against it.[22] Similarly, in *In re General Motors, Inc.*, when the court did not form a creditors' committee to represent tort claimants, General Motors' assets were sold free and clear of more than 300 tort claims.[23]

In light of these problems, this Comment examines how and why creditors' committees should be formed for tort claimants in chapter 11 bankruptcies. This Comment proceeds in five parts. Part I provides an overview of creditors' committees for the purpose of showing that these committees have certain rights and powers which can be used to protect tort claimants' interests. Part II.A argues that forming creditors' committees for tort claimants is supported by public policy. Part II.B shows that such creditors' committees are needed to guarantee tort claimants due process of the law. Part II.C demonstrates that forming committees of tort claimants is consistent with the case law addressing the statutory requirements for creditors' committees. Finally, Part II.D contends that forming creditors' committees for tort claimants is likely to have important practical significance. Thus, this Comment will show that courts should uniformly form creditors' committees for tort claimants when a corporation with tort liability files for bankruptcy.

I. INTRODUCTION TO CREDITORS' COMMITTEES

This part of the Comment will describe why forming a creditors' committee will protect tort claimants' interests and how such committees can be formed.

Acquisition LLC, Chrysler LLC and the Other Sellers Identified Herein (Apr. 30, 2009) [hereinafter Master Transaction Agreement], http://www.treasury.gov/initiatives/financial-stability/TARP-Programs/automotive-programs/Documents/mta.pdf.

[22] Under Chrysler's plan of reorganization, the sole recovery for unsecured creditors was proceeds from litigation instituted against Daimler. Disclosure Statement with Respect to Second Amended Joint Plan of Liquidation of Debtors and Debtors in Possession, *In re* Old Carco LLC, No. 09-50002 (Bankr. S.D.N.Y. Jan. 22, 2010), ECF No. 6273; *see also* Order Confirming Second Amended Joint Plan of Liquidation of Debtors and Debtors in Possession, as Modified, *In re* Old Carco LLC, No. 09-50002 (Bankr. S.D.N.Y. Apr. 23, 2010), ECF No. 6875. The case against Daimler was subsequently dismissed, Liquidation Trust v. Daimler AG (*In re* Old Carco LLC), 435 B.R. 169 (Bankr. S.D.N.Y. 2010), and the unsecured creditors of Chrysler received nothing under the plan of reorganization. Notice of Conclusion of Daimler Litigation & Treatment of the Daimler Fund Balance, *In re* Old Carco LLC, No. 09-50002 (Bankr. S.D.N.Y. July 11, 2013), ECF No. 8198.

[23] *'New' GM Agrees to Assume Future Liability Claims of 'Old' GM Products*, CLAIMS JOURNAL (June 29, 2009), http://www.claimsjournal.com/news/national/2009/06/29/101794.htm (noting that the "New GM," the entity which purchased General Motors' assets, will not assume liability for pending claims against the automaker and those claimants will still be forced to seek compensation from the "Old GM"); *see also Gen. Motors* Motion for Appointment, *supra* note 18, at 2 (stating that just the ad hoc committee of tort claimants consisted of more than 300 tort claimants).

A. Advantages Afforded Debtors in Chapter 11 Bankruptcies

Chapter 11 provides debtors significant powers, which can be used at the expense of a debtor's creditors.[24] Most importantly, the chapter 11 process allows the debtor to modify its obligations to creditors while allowing the debtor to continue operating its business or to sell its assets as a going concern.[25] In a traditional chapter 11 bankruptcy, a debtor specifies how it plans to repay its debts by drafting a plan of reorganization.[26] This plan is supposed to be drafted based on input from a debtor's creditors.[27] A debtor should take into account creditors' input because a debtor's reorganization plan is similar to a contract between a debtor and its creditors—the debtor's obligations to pay its creditors are extinguished in exchange for what the creditors receive under the plan.[28]

More recently, many corporate debtors have opted not to draft a reorganization plan. Instead, they use the chapter 11 process to marshal their assets in anticipation of selling all or a portion of the business as a going concern in a § 363 sale.[29] This process is known as a § 363 sale because § 363 of the Code gives a debtor the authority to sell assets outside the normal course of business and without a reorganization plan.

Section 363 sales can impact tort claimants' interests. The issue is that 11 U.S.C. § 363(f) gives debtors the ability to sell their property to a buyer free and clear of "any interest in such property" under certain circumstances.[30] While the Code does not define the phrase "any interest in such property," courts have interpreted this term broadly to include tort claims.[31] When a

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[24] For example, in chapter 11 the debtor can modify the rights of creditors, obtain financing, recover transferred property, and avoid obligations incurred prior to the commencement of the case. 7 COLLIER ON BANKRUPTCY, *supra* note 1, ¶ 1100.01.

[25] *Id.*

[26] *Id.* ¶ 1100.09.

[27] *Id.*

[28] WILLIAM L. NORTON III & ROGER G. JONES, NORTON CREDITORS' RIGHTS HANDBOOK § 18:1 (2014).

[29] 3 COLLIER ON BANKRUPTCY, *supra* note 1, ¶ 363.02[3]. While the chapter 11 plan process allows the debtor to sell all or a portion of the business as a going concern, the debtor may prefer to use § 363 to sell all or part of the business outside of the plan process if, for example, the delays inherent to the plan process could result in squandering the value of the estate. *Id.* Section 363 can be used even if there is "no emergency requiring immediate action." *Id.*

[30] *See* 11 U.S.C. § 363(f) (2012). *See generally* Alla Raykin, Comment, *Section 363 Sales: Mooting Due Process?*, 29 EMORY BANKR. DEV. J. 91 (2012) (discussing the use of § 363 sales to expedite the bankruptcy process and some troubling implications for creditors' due process rights).

[31] *See, e.g.*, Myers v. United States, 297 B.R. 774, 780–81 (S.D. Cal. 2003) (holding that plaintiffs' personal injury claims are "interest(s) in such property" that debtor sold free and clear to defendant); Am.

purchaser acquires the debtor's property free and clear of tort claims or any other interests, it gets a court order stating that it acquired the property free and clear of these interests.[32] Purchasers want to obtain such a court order because they could use the court order in later disputes to show that they are not responsible for paying any of the debtor's debts even though they acquired the debtor's property.[33]

Thus, § 363 sales can have important implications for tort claimants for at least two reasons. First, tort victims may not be able to recover anything from a purchaser if the purchaser acquires the debtor's assets free and clear of tort claims. Second, if the debtor's assets are sold free and clear of preexisting tort liability, tort claimants may only receive adequate compensation if the sales price is high enough to cover the debtor's tort liability, since the purchaser may not be responsible for satisfying the debtor's tort liability. As such, as in drafting a reorganization plan, tort claimants' input is needed in § 363 sales because such sales affect how much tort claimants will recover for their claims against the debtor.

B. Role of Creditors' Committees

Regardless of whether the debtor proceeds through the traditional plan process or sells a substantial portion of its assets through a § 363 sale, the main action for creditors is negotiating with the debtor. The creditors may have varying interests such as seeing the debtor emerge from bankruptcy as a going concern, maximizing the repayment of their debts, or gaining an equity stake in the reorganized company. The Code provides a voice for creditors in this process through the mandatory creation of at least one creditors' committee.[34]

Living Sys. v. Bonapfel (*In re* All Am. of Ashburn, Inc.), 56 B.R. 186, 189–90 (Bankr. N.D. Ga. 1986) (holding 11 U.S.C. § 363(f) precludes tort claimants from asserting their claims against the purchaser who bought the debtor's assets free and clear of any interest in the debtor's property).

[32] *See* Felton E. Parrish et al., *Sales of Assets Under Section 363*, *in* 1-3 COLLIER GUIDE TO CHAPTER 11: KEY TOPICS AND SELECTED INDUSTRIES ¶ 3.02 (Alan Resnick & Henry J. Sommer eds., 2014).

[33] *See id.* The court order differentiates the § 363 sale from a sale under Article 9 of the U.C.C., which requires the purchaser to defend against successor liability using arguments based in state law. *Id.*; *see* Morgan Olson L.L.C. v. Frederico (*In re* Grumman Olson Indus., Inc.), 467 B.R. 694, 703 (S.D.N.Y. 2012) ("Section 363(f) 'can be used to sell property free and clear of claims that could otherwise be assertable against the buyer of the assets under the common law doctrine of successor liability.'" (quoting George W. Kuney, *Misinterpreting Bankruptcy Code Section 363(f) and Undermining the Chapter 11 Process*, 76 AM. BANKR. L.J. 235, 267 (2002)).

[34] 11 U.S.C. § 1102(a)(1)–(2).

Creditors' committees represent the interests of the unsecured creditors and, if necessary, the equity security holders.[35] The creditors' committee generally consists of the holders of the seven largest unsecured claimholders, although the committee may be larger in large corporate bankruptcies.[36] The committee members are appointed by the United States Trustee.[37] The United States Trustee must appoint at least one creditors' committee and has the authority to appoint additional committees.[38] The court can also order that the United States Trustee appoint additional committees, if requested by a "party in interest."[39]

The purpose of a creditors' committee is to act as a watchdog on behalf of the larger body of creditors which it represents, either unsecured creditors or equity security holders.[40] In chapter 11 bankruptcies, a watchdog is needed because, unlike in chapters 7 and 13, the debtor is permitted to act as its own trustee when it files for bankruptcy.[41] Because a disinterested trustee will not be appointed in a typical chapter 11 bankruptcy case, the creditors' committee is specifically responsible for monitoring the debtor's operations and activities, and monitoring the debtor's compliance with the requirements of the Code.[42]

As part of its monitoring responsibilities, creditors' committees have several duties and powers. These powers and duties are described in § 1103 of the Code.[43] Section 1103(a) gives creditors' committees the ability to employ "one or more attorneys, accountants, or other agents, to represent or perform services for [the] committee."[44]

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[35] *Id.* § 1102(a)(1); 7 COLLIER ON BANKRUPTCY, *supra* note 1, ¶ 1102.03 (discussing the requirements for appointing a committee of equity security holders).

[36] 11 U.S.C. § 1102(b)(1); 7 COLLIER ON BANKRUPTCY, *supra* note 1, ¶ 1102.02[2]. The Enron committee had thirteen members; and the Chrysler committee had eleven members. *In re* Enron, 279 B.R. 671 (Bankr. S.D.N.Y. 2002); Appointment of Official Committee of Unsecured Creditors, *In re* Chrysler LLC, No. 09-50002 (Bankr. S.D.N.Y. May 6, 2009), ECF No. 366.

[37] 11 U.S.C. § 1102(a)(1).

[38] *Id.*

[39] *Id.* § 1102(a)(2).

[40] Advisory Comm. of Major Funding Corp. v. Sommers (*In re* Advisory Comm. of Major Funding Corp.), 109 F.3d 219, 224 (5th Cir. 1997) ("Creditor Committees have the responsibility to protect the interest of the creditors; in essence, 'the function of a creditors' committee is to act as a watchdog on behalf of the larger body of creditors which it represents.'" (quoting AKF Foods, Inc., 36 B.R. 288, 289 (Bankr. E.D.N.Y. 1984))).

[41] *Compare* 11 U.S.C. §§ 1107(a), 1108 (describing the powers and duties of the debtor in possession in chapter 11), *with id.* §§ 701–702, 1302 (describing the powers of the trustee in chapters 7 and 13).

[42] 9 AM. JUR. 2D *Bankruptcy* § 648 (2015).

[43] 11 U.S.C. § 1103; 7 COLLIER ON BANKRUPTCY, *supra* note 1, ¶ 1103.01.

[44] 11 U.S.C. § 1103(a).

Section 1103(c) lists other powers that creditors' committees possess.[45] These powers are tools to protect their constituency's financial interests. Of the powers in 11 U.S.C. § 1103(c), the committee's ability to participate in the formulation of a reorganization plan is probably the most important.[46] Having the ability to participate in the drafting of a reorganization plan is critical because committee members may be able to consult and negotiate with the debtor before the debtor submits its plan to the court.[47] However, if specific requirements are met, the Code does permit the court to confirm reorganization plans even if some creditors do not approve of the plan.[48] Similarly, the ability to investigate the debtor's business, another power imbedded in § 1103(c), is important because a creditors' committee may be able to better analyze how the debtor should reorganize its business and repay creditors after reviewing the debtors' business records.[49] Finally, because creditors' committees may "perform such other services as are in the interest of those represented," creditors' committees can object to the allowance of other creditors' claims.[50] If these claims are not allowed, the return of all other creditors will be increased because the debtor will have fewer claims to repay.[51]

While 11 U.S.C. § 1103(c) states that a committee "may" use those powers, the members of a committee have a duty to act in the best interests of their constituents so they will be required to exercise such powers if doing so is necessary to protect their constituents' interests.[52] Creditors' committees are supposed to use their significant powers to act in the best interests of the creditors which they represent.[53] For example, committee members cannot use their powers to advance the interests of any individual member of the committee over other members.[54] Committee members are also required to

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45 *See id.* § 1103(c).

46 *Id.*; 7 COLLIER ON BANKRUPTCY, *supra* note 1, ¶ 1103.05.

47 *But see* 7 COLLIER ON BANKRUPTCY, *supra* note 1, ¶ 1103.05[1][d] ("Nothing precludes the debtor from filing a plan without committee support, but a debtor should always negotiate with the committees and attempt to obtain their support.").

48 This process is known as cramdown, and it allows a court to approve a reorganization plan as long as all classes of creditors that vote against the plan receive at least as much as they would have in a chapter 7 liquidation and they are either paid in full or any junior claimholders will receive nothing under the plan. *See* 11 U.S.C. § 1129(a)(7), (b).

49 *See id.* ¶ 1103.05[1][c].

50 11 U.S.C. § 1103(c)(5); *see* 7 COLLIER ON BANKRUPTCY, *supra* note 1, ¶ 1103.05.

51 *See* 7 COLLIER ON BANKRUPTCY, *supra* note 1, ¶ 1103.05[1][f].

52 *Id.* ¶ 1103.05.

53 Westmoreland Human Opportunities, Inc. v. Walsh, 246 F.3d 233, 256 (3d Cir. 2001); *see* 7 COLLIER ON BANKRUPTCY, *supra* note 1, ¶ 1103.05.

54 9 AM. JUR. 2D *Bankruptcy*, *supra* note 42, § 648.

deal fairly with creditors of the class that they represent.[55] However, in practice, committee members may be incapable of fulfilling their fiduciary duties because their interests may be opposed to other committee members' interests.

Consider the interests of the various creditors in the MMA bankruptcy case. By far, the largest number of creditors in the MMA bankruptcy case were trade creditors.[56] Trade creditors may have different interests than tort claimants.[57] Trade creditors may be willing to forgo full repayment of their claims to help ensure that the debtor survives bankruptcy.[58] Trade creditors may want the debtor to be operating after the bankruptcy proceedings are concluded so that the trade creditors can continue to sell goods and services to the debtor.[59] However, tort creditors will likely have no interest in continued interactions with the debtor and they are more likely to have an immediate need for funds than trade creditors since the debtor has already injured them by causing damage to their physical health or personal property.[60] Thus, trade creditors and tort claimants may be unable to serve as fiduciaries for each other. A potential solution to this problem is to appoint an additional creditors' committee to represent only tort claimants.

C. Forming Creditors' Committees

11 U.S.C. § 1102(a) provides that creditors' committees can be formed for unsecured creditors and equity security holders.[61] Tort claimants may be appointed to such committees because tort claimants are unsecured creditors in

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[55] *Id.*

[56] Bankruptcy Petition, *supra* note 10.

[57] *In re* Dow Corning Corp., 194 B.R. 121, 144 (Bankr. E.D. Mich. 1996) (holding that persons with contingent claims are eligible to serve on creditors' committees), *rev'd on other grounds*, 212 B.R. 258 (E.D. Mich. 1997) (reversing the bankruptcy court to the extent it exceeded its authority by removing members of the creditors' committee).

[58] *Id.*

[59] *Id.*

[60] Kenneth Ayotte & Yair Listokin, *Optimal Trust Design in Mass Tort Bankruptcy*, 7 AM. L. & ECON. REV. 403, 403–04 (2005). In the situation of mass tort liability that may manifest in the future, such as asbestos exposure, potential claimants may be interested in having funds set aside to cover future claims. *Id.* These types of tort claims may more closely resemble those of trade creditors, in that they have an interest in the future availability of funds and the long-term wellbeing of the debtor.

[61] *See* 11 U.S.C. § 1102(a) (2012) (providing for the formation of a "committee of creditors holding unsecured claims . . . or equity security holders"); *In re* Barneys, Inc., 197 B.R. 431, 440 (Bankr. S.D.N.Y. 1996) ("All creditors holding unsecured claims are eligible for committee membership."); *In re* First RepublicBank Corp., 95 B.R. 58, 60 (Bankr. N.D. Tex. 1986) (stating to be eligible for membership on a statutory committee, an entity must hold an unsecured prepetition claim).

bankruptcy proceedings.[62] A creditor is an individual or business that has "a claim against the debtor that arose at the time of or before the order for relief."[63] A claim covers all legal or equitable rights to payment even if they are unliquidated, unmatured, contingent, or disputed.[64] Therefore, even though a tort claim may be disputed and unliquidated, it still meets the definition for a claim under the Code. Furthermore, as *unsecured* claimants, tort creditors are eligible to serve on the creditors' committee. The difference between unsecured and secured creditors is that secured creditors have an interest that is backed not only by a debtor's promise or obligation to pay but also by a second contract in which the debtor has committed specific assets to the creditor as collateral, which the creditor can seize if the debtor fails to honor its promise to pay.[65] A tort claimant satisfies all the conditions for serving on the creditors' committee because she has a claim against the debtor for the injuries that it inflicted upon her prior to bankruptcy and which is not secured by any collateral.[66] Thus, tort claimants may be appointed to a creditors' committee.

Section 1102(a) of the Code gives the United States Trustee[67] and the courts the responsibility for forming creditors' committees.[68] 11 U.S.C. § 1102(a)(1) requires the United States Trustee to appoint at least one creditors' committee.[69] The Code states that "the United States trustee *shall* appoint a committee of creditors holding unsecured claims" as soon as practical after the beginning of a chapter 11 case.[70] In contrast, the Code gives the United States Trustee the discretion to appoint additional creditors' committees if he deems them appropriate.[71] The Code states that the United States Trustee "*may* appoint additional committees of creditors . . . as the

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62 *See In re* A.H. Robins Co., 65 B.R. 160, 161 (E.D. Va. 1986); *In re* Farm Bureau Servs. Inc., 32 B.R. 69, 69 (Bankr. E.D. Mich. 1982).

63 11 U.S.C. § 101(10).

64 *Id.* § 101(5).

65 PAUL BARRON & MARK B. WESSMAN, SECURED TRANSACTIONS: PROBLEMS AND MATERIALS 4 (2d ed. 2011).

66 *But see* Margaret I. Lyle, Note, *Mass Tort Claims and the Corporate Tortfeasor: Bankruptcy Reorganization and Legislative Compensation Versus the Common-Law Tort System*, 61 TEX. L. REV. 1297, 1305–06 (1983) (explaining that a tort victim could make himself a secured creditor if, before the debtor filed for bankruptcy, the tort victim got a final judgment against the debtor and levied immediately upon the debtor's assets that were not subject to any prior security interests).

67 *See supra* note 17.

68 *See* 11 U.S.C. § 1102(a)(1)–(2).

69 *Id.* § 1102(a)(1), (3) (requiring the United States Trustee to form a creditors' committee in a chapter 11 bankruptcy case except in a small business case in which there is cause not to form a creditors' committee).

70 *Id.* § 1102(a)(1) (emphasis added).

71 *Id.*

United States trustee deems appropriate."[72] Thus, the United States Trustee is not obligated to appoint multiple creditors' committees even if creditors request that a committee be formed.

Section 1102(b)(1) of the Code describes which unsecured creditors the United States Trustee can appoint to the creditors' committees.[73] Section 1102(b)(1) states,

> A committee of creditors . . . shall *ordinarily* consist of the persons, willing to serve, that hold the seven largest claims against the debtor of the kinds represented by the committee, or of the members of a committee organized by creditors before the commencement of the case under this chapter, if such committee was fairly chosen and is representative of the different kinds of claims to be represented.[74]

Because of the Code's use of the term "ordinarily," courts have held that the requirement that creditors on the committee hold the seven largest claims is permissive rather than mandatory.[75] The legislative history of 11 U.S.C. § 1102(b)(1) also suggests that the language of this provision is not intended to be binding on the United States Trustee.[76] Specifically, the legislative history of 11 U.S.C. § 1102(b)(1) indicates that the language of this provision is aspirational rather than mandatory, immutable, or binding.[77] Thus, in some cases, the United States Trustee has appointed creditors other than the seven largest claimholders to creditors' committees.[78] Such considerations are relevant in evaluating tort claimants' ability to form creditors' committees because bankruptcy cases usually involve several unsecured creditors and many of these creditors could have claims that greatly exceed the claims of tort claimants.[79]

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[72] *Id.* (emphasis added).

[73] *Id.* § 1102(b)(1).

[74] *Id.* (emphasis added).

[75] *See* Kenneth N. Klee and K. John Shaffer, *Creditors' Committee Under Chapter 11 of the Bankruptcy Code*, 44 S.C. L. REV. 995, 1005 & n.34 (1993).

[76] *See* H.R. REP. NO. 95-595, at 401 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6357.

[77] *Id.* (describing the statute's text as "precatory").

[78] *See, e.g.*, *In re* McLean Indus., Inc., 70 B.R. 852, 855 (Bankr. S.D.N.Y. 1987) (stating creditors' committee in the case consisted of nineteen members). *See generally* SALLY S. NEELY, *Official Committees in Chapter 11*, *in* ALI-ABA COURSE OF STUDY: CHAPTER 11 BUSINESS REORGANIZATIONS 33, 58 (2011).

[79] *See* Carlos J. Cuevas, *Due Process and Adequate Representation in a Chapter 11 Case: The Appointment and Removal of Members of a Creditors' Committee in a Reorganization*, 24 NEW ENG. L. REV. 333, 334 (1989) ("The claims of unsecured creditors may range from ten dollars to millions of dollars.").

Section 1102(a)(2) grants bankruptcy courts the authority to review whether the United States Trustee has appointed enough creditors' committees to represent the various creditors' interests in the case.[80] The touchstone in the statute for evaluating whether to form an additional creditors' committee is whether creditors are adequately represented.[81] 11 U.S.C. § 1102(a)(2) states that the court can "order the appointment of additional committees of creditors . . . if necessary to assure *adequate representation of creditors*."[82] The creditor making the request has the burden of proving inadequate representation.[83]

Proving inadequate representation is a high standard. Courts view the appointment of an additional creditors' committee to be an extraordinary remedy.[84] In fact, the mere presence of conflict among committee members does not show a lack of adequate representation unless the committee is also unable to function or if its members have breached their fiduciary duties to each other.[85] Even if a party can show a lack of adequate representation, courts have discretion to choose whether to appoint an additional creditors' committee, and that finding will be binding unless clearly erroneous.[86] Courts interpret 11 U.S.C. § 1102(a)(2) as giving them discretion because the language of § 1102(a)(2) is not mandatory.[87] 11 U.S.C. § 1102(a)(2) states that courts "*may* order the appointment of additional committees of creditors" rather than courts "must," "shall," or "are required to" order the appointment of additional creditors' committees.[88]

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[80] *See* 11 U.S.C. § 1102(a)(2) (2012) (stating the court may order the United States Trustee to appoint additional creditors committees).

[81] *See id.*

[82] *Id.* (emphasis added).

[83] Albero v. Johns-Manville Corp. (*In re* Johns-Manville Corp.), 68 B.R. 155, 158 (S.D.N.Y. 1986).

[84] *In re* Dana Corp., 344 B.R. 35, 38 (Bankr. S.D.N.Y. 2006) ("The appointment of an additional committee under section 1102(a)(2) is 'extraordinary relief'"); *In re* Sharon Steel Corp., 100 B.R. 767, 778 (Bankr. W.D. Pa. 1989) (stating courts have been reluctant to appoint an additional creditors' committee because it is an extraordinary remedy).

[85] *See, e.g.*, *Dana Corp.*, 344 B.R. at 38–39; *In re* McLean Indus., Inc., 70 B.R. 852, 861 (Bankr. S.D.N.Y. 1987).

[86] *Albero*, 68 B.R. at 157.

[87] *See In re* Dow Corning Corp., 194 B.R. 121, 142–43 (Bankr. E.D. Mich. 1996), *rev'd on other grounds*, 212 B.R. 258 (E.D. Mich. 1997).

[88] 11 U.S.C. § 1102(a)(2) (2012) (emphasis added); *see* BLACK'S LAW DICTIONARY 1127, 1585 (10th ed. 2014) (defining "may" as "to be a possibility" and "shall" as "has a duty to").

Nevertheless, courts have appointed multiple creditors' committees when such committees are needed in a particular case.[89] Courts have appointed additional creditors' committees to represent employees, property holders, priority creditors, subordinated note holders, retirees, and industry competitors.[90] This Comment will now move on to show why tort creditors need their own creditors' committee.

II. FORMING CREDITORS' COMMITTEES FOR TORT CLAIMANTS

The remainder of this Comment will show that forming creditors' committees is (1) needed for public policy reasons; (2) necessary to guarantee tort claimants' due process rights; (3) possible given the standards that courts have adopted in evaluating whether to form a creditors' committee; and (4) practically important.

A. Policy Reasons

Public policy dictates why courts should order the creation of creditors' committees for tort claimants in chapter 11 bankruptcy cases. More so than any other creditors in a bankruptcy proceeding, tort claimants have been brought into this forum involuntarily. Tort claimants do "not elect to work for, do business with, or purchase the securities of," a corporate debtor.[91] In fact, tort claimants do not choose to be injured at all.[92]

Tort claimants are also dissimilar from other creditors because tort claimants do not have the ability to protect their interests in the same ways that other creditors do.[93] Prior to entering into a transaction with a corporation, trade creditors can bargain with a corporation to protect themselves.[94] These

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[89] *E.g.*, Van Arsdale v. Clemo (*In re* A.H. Robins Co.), 65 B.R. 160 (E.D. Va. 1986), *aff'd sub nom.* Van Arsdale v. Clemo, 825 F.2d 794 (4th Cir. 1987).

[90] *E.g.*, *In re* Patrick Cudahy, Inc., 88 B.R. 895 (E.D. Wis. 1988) (retirees); *In re* Texaco, Inc., 73 B.R. 960 (S.D.N.Y. 1987) (industry competitors); *Van Arsdale*, 65 B.R. 160 (tort claimants); *In re* Mesta Mach. Co., 67 B.R. 151, 156 (W.D. Pa. 1986) (employees); *In re* Nat'l Equip. & Mold Corp., 60 B.R. 133 (N.D. Ohio 1986) (priority creditors); *In re* Nova Real Estate Inv. Trust, 10 B.R 90 (S.D. Fla. 1981) (subordinated note holders); *In re* Cloud Nine, Ltd., 3 B.R. 202 (D.N.M. 1980) (property holders); Peter C. Blain & Diane Harrison O'Gawa, *Creditors' Committees Under Chapter 11 of the United States Bankruptcy Code: Creation, Composition, Powers, and Duties*, 73 MARQ. L. REV. 581, 592 & n.73–83 (1990).

[91] *See* 8 COLLIER ON BANKRUPTCY, *supra* note 1, ¶ 1171.01 (describing tort claimants as "involuntary creditors").

[92] *See* Lyle, *supra* note 66, at 1304.

[93] *See id.* at 1305.

[94] *See id.*

creditors can demand a high interest rate or may ask for a security interest in the debtor's assets.[95] However, tort claimants cannot anticipate that they will have claims against the corporation so they cannot make such arrangements to protect their interests.[96] Moreover, after they are injured and before they have received a judgment in their favor, tort claimants often have nothing to offer the corporation in exchange for more favorable terms of repayment.[97]

The tort claimants in the MMA, General Motors, and Chrysler bankruptcy cases illustrate these problems. In the MMA bankruptcy case, some of the tort claimants included individuals "who happened to be in a small town café when it, and they, were incinerated by the Debtor's runaway train."[98] Other tort claimants in the MMA bankruptcy case include property owners who helplessly watched while their homes and businesses were engulfed by fires nearly twelve stories high.[99] Other tort claimants suffered severe property damage when the train crashed into the town spilling 1.5 million gallons of oil.[100] Similarly, in the General Motors and Chrysler bankruptcy cases, the tort claimants were individuals who involuntarily experienced devastating injuries as a result of unknown defects in vehicles that Chrysler and General Motors manufactured.[101] Yet, all of these tort claimants were automatically lumped into the class of unsecured creditors under the authority of the Code.[102]

To make matters worse, unlike commercial creditors, tort claimants may not make up a sophisticated or economically stable group.[103] In fact, tort claimants may not be familiar with the Bankruptcy Code or with how to protect themselves in a bankruptcy proceeding.[104] For example, in the General Motors and Chrysler bankruptcy cases, the tort claimants included individuals

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95 *See id.* (citing U.C.C. §§ 9-201, 9-203 (1978)).

96 *See id.*

97 *See id.*

98 Wrongful Death Claimants' Motion for Formation of Creditors' Committee, *supra* note 11, at 3.

99 *See Montreal Me. & Atl. Ry.* Motion for Appointment, *supra* note 12, at 12–13; McLaughlin, Tomesco & Kary, *supra* note 8.

100 *See Montreal Me. & Atl. Ry.* Motion for Appointment, *supra* note 12, at 1, 12–13; McLaughlin, Tomesco & Kary, *supra* note 8.

101 *See Gen. Motors* Motion for Appointment, *supra* note 18, at 5; *Chrysler* Motion for Appointment, *supra* note 16, at 5.

102 *See Montreal Me. & Atl. Ry.* Motion for Appointment, *supra* note 12, at 1, 3; *Gen. Motors* Motion for Appointment, *supra* note 18, at 4; *Chrysler* Motion for Appointment, *supra* note 16, at 4.

103 *See, e.g.*, Wrongful Death Claimants' Motion for Formation of Creditors' Committee, *supra* note 11, at 3 (stating tort claimants are unsophisticated); *Gen. Motors* Motion for Appointment, *supra* note 18, at 5 (stating tort claimants are economically fragile).

104 *See, e.g.*, Wrongful Death Claimants' Motion for Formation of Creditors' Committee, *supra* note 11, at 3 (stating tort claimants are not familiar with American bankruptcy law).

who resided throughout the country and who struggled to find individual representation to assert their claims.[105] Similarly, in the MMA bankruptcy case, the tort claimants include injured victims or family members representing the estates of individuals killed in the crash.[106] Moreover, these individuals reside in Canada, are not familiar with American bankruptcy law, and may not even speak English.[107] Nevertheless, tort claimants like the MMA accident victims will be treated like other unsecured creditors in bankruptcy proceedings.

Some commentators have suggested that the Code's drafters did not anticipate that tort claims would frequently appear in the bankruptcy forum or that debtors' would use bankruptcy as a means to dealing with mass tort liability.[108] The thrust of this argument is that the Code was designed primarily to operate in the context of commercial contractual relationships.[109] According to this argument, we can see evidence of this limited design in the fact that the Code refers to the parties in a bankruptcy proceeding exclusively as creditors and debtors and can be used to advance business interests over equitable goals.[110] However, since 1982 with the bankruptcies of several asbestos manufacturers, companies facing mass tort liability have increasingly filed for bankruptcy.[111]

To overcome the shortsightedness of the Code and to more generally protect tort claimants, creditors' committees of tort claimants need to be formed.

B. Due Process Considerations

Due process considerations also suggest that creditors' committees of tort claimants are needed in chapter 11 bankruptcy cases of corporate debtors. Due process provides that the government cannot deprive an individual of life,

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105 *See Gen. Motors* Motion for Appointment, *supra* note 18, at 2, 5; *Chrysler* Motion for Appointment, *supra* note 16, at 5.

106 Wrongful Death Claimants' Withdrawal of their Motion for Formation of Creditors' Committees at 1, 4–5, *In re* Montreal Me. & Atl. Ry., Ltd., No. 13-10670 (Bankr. D. Me. Sept. 27, 2013), ECF No. 291.

107 Wrongful Death Claimants' Motion for Formation of Creditors' Committee, *supra* note 11, at 3.

108 *See* Lyle, *supra* note 66, at 1304.

109 *See id.*

110 *See id.*

111 S. ELIZABETH GIBSON, FED. JUDICIAL CTR., JUDICIAL MANAGEMENT OF MASS TORT BANKRUPTCY CASES 1 (2005), *available at* http://www2.fjc.gov/content/judicial-management-mass-tort-bankruptcy-cases-0.

liberty, or property without notice and the opportunity to be heard.[112] By comparing class action suits and chapter 11 bankruptcy cases, this Comment will show that tort claimants may be deprived of due process when courts fail to order the United States Trustee to form creditors' committees for tort claimants.

1. Comparison of Class Action Suits and Chapter 11 Bankruptcies

Chapter 11 bankruptcies are similar to class action suits in a variety of ways.[113] A chapter 11 bankruptcy involves a group of unsecured creditors whom the debtor has harmed by failing to repay its debts or, as in the case of tort claimants, by physically injuring them.[114] Similarly, a class action suit involves several injured parties.[115] In a class action suit, the court authorizes a representative to litigate on behalf of a class of absent persons; whereas, in a chapter 11 bankruptcy case, the court or the United States Trustee form a creditors' committee to represent the interests of the debtor's unsecured creditors.[116] Like the actions of a creditors' committee, the actions of a class representative can significantly impact the members that she represents—potentially affecting their ability to recover against the defendant.[117]

2. Adequate Representation Standard in Class Action Suits

Since class members will be bound by the outcome of a class action law suit, due process requires that the class representative adequately represent their interests. Rule 23(a) of the Federal Rules of Civil Procedure embodies this requirement, listing the requirements that must be met before a court may certify a class action suit.[118] Like the bankruptcy standard for forming a

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[112] U.S. CONST. amend. V; *see* W. Auto Supply Co. v. Savage Arms, Inc. (*In re* Savage Indus., Inc.), 43 F.3d 714, 720 (1st Cir. 1994); *see also* Jeffrey Davis, *Cramming Down Future Claims in Bankruptcy: Fairness, Bankruptcy Policy, Due Process, and the Lessons of the Piper Reorganization*, 70 AM. BANKR. L.J. 329, 335 (1996).

[113] *See* Cuevas, *supra* note 79, at 336.

[114] *See id.*

[115] *See id.*

[116] *Compare* 11 U.S.C. § 1102(b)(1), (3) (2012) (describing the responsibilities of committee members in bankruptcy), *with* FED. R. CIV. P. 23(a) (describing the requirements of class representatives in class actions).

[117] *See* 7A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1765 (3d ed. 2014) ("If the absent members are to be conclusively bound by the result of an action prosecuted or defended by a party alleged to represent their interests, basic notions of fairness and justice demand that the representation they receive be adequate.").

[118] FED. R. CIV. P. 23(a); *see also* FED. R. CIV. P. 23(b) (providing additional requirements that must be met before a court can certify a class action suit).

creditors' committee, Rule 23(a) establishes that any class representative needs to "fairly and adequately" represent the needs of the class.[119] Rule 23(a) requires adequate representation to ensure that class members receive due process in class action suits.[120] Due process is a concern in class action suits because judgments in class action suits can bind the members of the class regardless of whether the judgments are favorable or whether the class members are present during the proceedings.[121]

The requirement of adequate representation imposes two limitations.[122] Adequate representation necessitates: (1) that the interests of the class representative not impermissibly conflict with those of the class he or she seeks to represent and (2) that the class counsel be competent.[123] In applying the requirement of adequate representation, courts focus on whether the proposed class representative's interests are antagonistic to the interests of the class that he or she seeks to represent.[124]

Courts have consistently found a lack of adequate representation when the economic interests of the proposed class representative conflict with the members of the class that she seeks to represent.[125] *Bieneman v. City of Chicago* is illustrative of how class members' conflicting interests can destroy class certification.[126] In that case, a homeowner sought to bring a class action suit on behalf of all landowners in the vicinity of an airport.[127] The homeowner claimed that the airport owner had harmed the class members by expanding the airport facilities in an area close to their properties.[128] Although the airport expansion might cause the value of residential homes to decrease, the court pointed out that other property owners would "undoubtedly derive great benefit" from the expansion.[129] Specifically, the court proposed that business

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119 *Compare* FED. R. CIV. P. 23(a) ("fairly and adequately protect the interests of the class"), *with* 11 U.S.C. § 1102(a)(2) (2012) ("assure adequate representation of creditors").

120 *See* 7A WRIGHT & MILLER, *supra* note 117, at § 1768.

121 *See id.* at § 1765.

122 Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 157 n.13 (1982).

123 *Id.*

124 *See generally* 7A WRIGHT & MILLER, *supra* note 117, at § 1768.

125 *See, e.g.*, Valley Drug Co. v. Geneva Pharms., Inc., 350 F.3d 1181, 1190 (11th Cir. 2003) ("Rule 23(a)(4) . . . preclude[s] class certification where the economic interests and objectives of the named representatives differ significantly from the economic interests and objectives of unnamed class members.").

126 864 F.2d 463, 464 (7th Cir. 1988).

127 *Id.*

128 *Id.*

129 *Id.* at 465.

owners would enjoy more business from increased airport operations.[130] Because of their different economic interests, the court declined to certify the class.[131] This case demonstrates that a court cannot certify a class action suit if the representative's interests conflict with those of some of the proposed class members.

3. Applying the Rules from Class Action Suits

The rules for class action suits provide strong support for the appointment of committees of tort claimants because tort claimants' financial interest often conflict with other creditors' financial interests.[132] In bankruptcy cases, tort claimants generally have the same priority as other unsecured creditors, meaning that the debtor is not required to satisfy tort claims before it pays other unsecured creditors.[133] Tort creditors and other unsecured creditors would typically be paid the same pro rata share of their claims in a chapter 7 liquidation, and therefore they would be eligible for the same baseline repayment in a chapter 11 reorganization.[134] Although their claims are of equal priority, tort claimants' interests may be at odds with other creditors' interests because tort claimants may prefer immediate relief. Faced with high medical bills or other expenses, tort claimants and their families may prefer liquidation of the debtor's assets rather than reorganization of the debtor so that they can obtain prompt payment of their claims. This preference may conflict with trade creditors' interests because a debtor's trade creditors are often interested in "having a reorganized company around to sell goods and services to at a later date."[135]

Even if trade creditors also want the debtor to sell its assets, trade creditors' interests may not be well-aligned with tort claimants' interests. A purchaser may be incentivized to satisfy the debts that a debtor owes to trade creditors because a purchaser may need to do business with those trade creditors once it

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130 *Id.*

131 *Id.*

132 *See* Wrongful Death Claimants' Motion for Formation of Creditors' Committee, *supra* note 11, at 6.

133 The one counter-example is the priority treatment of personal injury and wrongful death claims against railroads. 11 U.S.C. § 1171 (2012) (granting that these claims will be paid as an administrative expense of the estate).

134 *Compare* 11 U.S.C. § 726(a)(2), (b) (requiring a chapter 7 debtor to repay unsecured creditors on the same pro rata basis), *with id.* § 1129(a)(7)(A) (requiring chapter 11 debtors repay holders of unsecured claims at least what they would have received in a chapter 7 liquidation if the class votes against the plan of reorganization).

135 *In re* Dow Corning Corp., 194 B.R. 121, 144 (Bankr. E.D. Mich. 1996) (citing *In re* Altair Airlines, 727 F.2d 88, 90 (3d Cir. 1984)), *rev'd on other grounds*, 212 B.R. 258 (E.D. Mich. 1997).

has assumed the debtor's property. However, a purchaser will not need to work with tort claimants so it will not have a similar incentive to assume a debtor's tort liability.

Moreover, unlike most creditors, tort victims' claims may in part be covered by insurance.[136] However, the availability of such insurance funds is often not sufficient to fully compensate tort claimants for their injuries. Consider the MMA bankruptcy case. MMA had an insurance policy of $25 million, which covered costs related to bodily injury, property damage, and pollution.[137] Yet, the costs to clean up the oil spilled are estimated to be $193 million alone.[138] Although insurance proceeds are often insufficient to cover tort victims' claims, the availability of such funds could be used to justify paying tort victims less on a pro rata basis than other unsecured creditors. 11 U.S.C. § 1129(b) provides that a court can confirm the terms of a debtor's reorganization plan as long as the plan does not unfairly discriminate against some creditors. Arguably, a court may think that a plan providing for a smaller payout to tort claimants does not unfairly discriminate against them because they have access to funds outside of the plan.

Tort claimants may also be entitled to additional post-confirmation relief.[139] 28 U.S.C. § 1411(a) provides that the Code "do[es] not affect any right to trial by jury that an individual has under applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim."[140] Because tort claimants have the ability to sue debtors after bankruptcy proceedings are concluded, tort claimants may be interested in setting up a trust or other device that will be used to pay any judgments that they receive in post-confirmation litigation. Other creditors will not be interested in providing for these mechanisms unless they also have the ability to sue the debtor post-confirmation. Setting up a trust

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136 *See* Houston v. Edgeworth (*In re* Edgeworth), 993 F.2d 51, 55–56 (5th Cir. 1993). Many states allow a tort creditor of a bankrupt estate to substitute itself as the beneficiary of a plan of insurance held by the debtor to cover their claims under direct action statutes. Giroux v. Purington Bldg. Sys., Inc., 670 A.2d 1227, 1229 (R.I. 1996) (discussing a Rhode Island statute that allowed a wrongful death plaintiff to substitute for the insured on the insurance policy when the insured had filed for bankruptcy, and allowing the plaintiff to recover from the insurer to the policy limits). However, insurance policies are typically property of the estate, and if insurance proceeds become part of the estate, they are eligible for pro rata distribution to all unsecured creditors. *In re* Caribbean Petroleum Corp., 580 F. App'x 82, 84–87 (2014).

137 Richard Summerfield, *Montreal, Maine and Atlantic Railway Files for Bankruptcy Protection*, FINANCIER WORLDWIDE, Oct. 2013, *available at* http://www.financierworldwide.com/montreal-maine-and-atlantic-railway-files-for-bankruptcy-protection/#.VSWt9_nF_IY.

138 *Id.*

139 *See* 28 U.S.C. § 1141(a) (2012).

140 *See id.*

will also be against their interests because doing so will decrease the amount of money that can be paid to all other creditors. Thus, tort claimants need a means to voice their individual interests.

If a court does not appoint a committee for tort claimants, tort claimants do not have meaningful ways to participate in the proceedings. Consider tort claimants' ability to vote on a debtor's reorganization plan. Like all other creditors, tort claimants have the right to vote on a debtor's reorganization plan.[141] If the creditors reject the plan, the court may not be able to confirm the debtor's reorganization plan.[142] Creditors vote on the plan in classes or groups.[143] However, as part of the plan process, the debtor is responsible for arranging creditors into these classes. The debtor could use this power to put tort claimants in a class dominated by other creditors who favor the plan.[144] If tort claimants are outnumbered, they might not be able to effectively oppose a plan that goes against their best interests. Furthermore, it is possible that such a plan could be confirmed because a plan can be confirmed over the opposition of some creditors if the plan meets other requirements.[145]

The Code protects creditors' rights by giving them the right to appear and raise any concern in a bankruptcy case.[146] Because tort claimants are often economically fragile and unfamiliar with the Code, tort claimants may not be able to take advantage of this opportunity.[147] Additionally, the Code provides that the debtor must provide notice to those parties "who are likely to have the most interest in a particular type of proceeding in the typical case, and who are most likely to care about participation."[148] However, merely providing notice to tort claimants does not guarantee due process because the right to notice has little value if tort claimants do not have a meaningful opportunity to be heard. Thus, the existing avenues for participating in a bankruptcy case do not provide a robust form of due process for tort claimants. However, because

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141 *See* 11 U.S.C. §§ 501–502, 1126(a) (2012).

142 *See id.* § 1129(a)(7)–(8).

143 *See id.* §§ 1123(a)(1)–(4), 1126.

144 *See id.* § 1123(a)(1)–(4).

145 *See id.* § 1129(b) (describing the requirements of cramdown, which permits confirmation of a reorganization plan despite creditor opposition).

146 *Id.* § 1109(b).

147 *See, e.g.*, Wrongful Death Claimants' Motion for Formation of Creditors' Committee, *supra* note 11, at 3 (stating tort claimants are not familiar with American bankruptcy law); *Gen. Motors* Motion for Appointment, *supra* note 18, at 5 (stating tort claimants are economically fragile).

148 *See* 7 COLLIER ON BANKRUPTCY, *supra* note 1, ¶ 1109.06 ("[T]he rules balance the importance of notice against the costs of notice, recognizing that notice of every proceeding to every party in interest in every case would often be a waste of time and resources.").

"bankruptcy relief is powerful medicine, often resulting in the profound alteration . . . of a host of otherwise valid legal obligations,"[149] the Code should provide tort claimants a robust form of due process.

Thus, courts should form creditors' committees to ensure that tort claimants enjoy due process.

C. Consistent with Case Law Interpreting 11 U.S.C. § 1102(a)(2)

In addition to the public policy and due process reasons for appointing an additional creditors' committee to represent tort claimants, case law interpreting 11 U.S.C. § 1102(a)(2) also supports this proposal. Although § 1102(a)(2) does not provide a framework for evaluating whether an additional creditors' committee is warranted, courts have identified certain factors to consider in evaluating whether creditors are adequately represented by existing committees.[150] Courts most commonly cite the following factors: (1) the nature of the case; (2) the ability of the committee to function; (3) the potential for added cost and the timeliness of the motion; and (4) the desires of the constituencies.[151] These factors weigh strongly in favor of forming a creditors' committee of tort claimants when a corporate debtor files for relief under chapter 11 of the Code.

1. Nature of the Case

In enacting 11 U.S.C. § 1102(a)(2), Congress recognized that in bankruptcy cases involving several types of creditors or equity holders a single creditors' committee could not adequately represent the interests of all the creditors in the case.[152] Congress stated that courts are authorized to use § 1102(a)(2) to create additional creditors' committees when "the debtor proposes to affect several classes of debt or equity holders."[153] Therefore, some courts have found the size of the proceeding, whether it includes several classes of debt or

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149 *Id.* ¶ 1109.02[3b].

150 *See In re* Dow Corning Corp., 194 B.R. 121, 141 (Bankr. E.D. Mich. 1996), *rev'd on other grounds*, 212 B.R. 258 (E.D. Mich. 1997); *In re* Hill Stores Co., 137 B.R. 4, 5–6 (Bankr. S.D.N.Y. 1992); *In re* McLean Indus., Inc., 70 B.R. 852, 860–61 (Bankr. S.D.N.Y. 1987); Albero v. Johns-Manville Corp. (*In re* Johns-Manville Corp.), 68 B.R. 155, 159 (Bankr. S.D.N.Y. 1986).

151 *See Dow Corning Corp.*, 194 B.R. at 141; *Hill Stores Co.*, 137 B.R. at 5–6; *McLean Indus., Inc.*, 70 B.R. at 860-61; *Albero*, 68 B.R. at 159.

152 *See Dow Corning Corp.*, 194 B.R. at 142; *see also* H.R. REP. NO. 95-595, at 401 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6357.

153 H.R. REP. NO. 95-595, at 401, *reprinted in* 1978 U.S.C.C.A.N. at 6357.

equity holders, to be particularly significant in determining whether additional creditors' committees are warranted.[154]

For example, in *In re Beker Industries Corp.*, the court ordered the United States Trustee to appoint an additional creditors' committee of stock and debenture holders in part because the case was large and complex.[155] The case involved several creditor groups, including numerous public utility entities and debenture holders, as well as equity holders, namely common and preferred stockholders.[156] The court explained that additional creditors' committees are warranted in a large bankruptcy case, in which there are several groups of debt and equity holders, because "committees should be composed of creditors . . . representative of classes as a whole as opposed to dissident factions of particular classes."[157]

Additionally, the court explained that multiple creditors' committees are warranted in large bankruptcy proceedings because creditors have to take an active role in such cases to protect their interests.[158] The court stated that creditors will have to take an active role in large bankruptcy proceedings to protect their interests because "[a] large case brings with it . . . a complex business requiring significant post-petition financing and a heavily negotiated plan."[159]

In the bankruptcies of corporate debtors, the case will often be large and complex affecting several types of creditors. For example, the MMA bankruptcy case is exceedingly large and complex because it has affected hundreds of different unsecured creditors.[160] These unsecured creditors include railroad equipment vendors, a public utility company, insurance companies, and financial institutions in addition to the tort claimants.[161] Given the law on

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154 *See Dow Corning Corp.*, 194 B.R. at 144 ("The Court finds that the case is large and complex and is the type that can justify additional committees."); *In re* Mansfield Ferrous Castings, Inc., 96 B.R. 779, 781 (Bankr. N.D. Ohio 1988) ("[T]he size and complexity of debtor's bankruptcy's proceedings weigh in favor of the appointment of an additional committee."); *In re* Beker Indus. Corp., 55 B.R. 945, 948–49 (Bankr. S.D.N.Y. 1985) ("The complex nature of this large case requires representation . . . ."). *But see In re* Dana Corp., 344 B.R. 35, 39 (Bankr. S.D.N.Y. 2006) (stating size of the bankruptcy case is not determinative of whether additional creditors' committees are warranted).

155 *See* 55 B.R. at 949.

156 *Id.* at 947.

157 *Id.* at 948–49 (quoting 7 COLLIER ON BANKRUPTCY ¶ 1102.2 (Lawrence P. King ed., 15th ed. 1984)).

158 *See id.* at 949.

159 *Id.*

160 *See* Bankruptcy Petition, *supra* note 10.

161 *See id.*

point, which suggests that additional creditors' committees are needed when a case affects several types of debt or equity holders, courts should order the United States Trustee to appoint additional committees for tort claimants in the bankruptcies of corporate debtors such as MMA.

2. Ability of the Committee to Function

In addition to the nature of the bankruptcy case, courts commonly consider the ability of the committee to function to determine if an additional committee is appropriate.[162] In evaluating a committee's ability to function, courts examine whether the existing committee is able to reach a consensus on the issues that require the committee's approval and whether creditors have a meaningful voice on the committee.[163] If an existing committee is "hopelessly divided, unable to take a position on important matters and ineffective," then a court is more likely to hold that an additional committee is needed.[164] However, as the court in *In re Dow Corning Corp.* explained, the analysis should not end there.[165]

In evaluating whether creditors are adequately represented on the creditors' committee, courts should assess whether a creditor group has a meaningful voice on the committee.[166] In *In re Dow Corning Corp.,* the court looked beyond the committee's ability to function in evaluating whether an additional creditors' committee is warranted.[167] The court explained that creditors may not be adequately represented even if the existing committee is able to function and to reach a consensus on all the important issues before it.[168] The problem is that a creditors' committee may be "so dominated by one group of creditors that a separate group has virtually no say in the decision-making process."[169] Instead, the court stated that courts need to evaluate whether the creditors in

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162 *See, e.g.*, *In re* Enron Corp., 279 B.R. 671, 686 (Bankr. S.D.N.Y. 2002); *In re* Hills Stores Co., 137 B.R. 4, 5–6 (Bankr. S.D.N.Y. 1992); *In re* Sharon Steel Corp., 100 B.R. 767, 779 (W.D. Pa. 1989) (finding that the conflict among committee members did not prevent adequate representation).

163 *See Enron Corp.*, 279 B.R. at 686; *In re* Dow Corning Corp., 194 B.R. 121, 141 (Bankr. E.D. Mich. 1996), *rev'd on other grounds*, 212 B.R. 258 (E.D. Mich. 1997).

164 *Enron Corp.*, 279 B.R. at 686.

165 *See* 194 B.R. at 142.

166 *See id.* at 141–42; *see also Enron Corp.*, 279 B.R. at 693 (denying to form an additional creditors' committee when the creditors' concerns had been heard through the existing creditors' committee).

167 *See* 194 B.R. at 142.

168 *See id.*

169 *See id.*

the case have "a meaningful voice" on the existing committee or whether particular creditors are "effectively disenfranchised."[170]

When courts fail to form creditors' committees exclusively for tort claimants, tort claimants can become effectively disenfranchised. Two bankruptcies in particular, *In re Chrysler* and *In re General Motors*, illustrate this problem. In *In re Chrysler*, tort claimants were appointed to an official creditors' committee.[171] However, other unsecured creditors made up most of the creditors' committee.[172] These other unsecured creditors were interested in selling Chrysler's assets free and clear of tort claims to Chrysler's successor because their own claims would be satisfied through the sale transaction.[173] Because these other unsecured creditors dominated the creditors' committee and supported the sale, tort claimants were unable to oppose the sale and received nothing because the sales price was insufficient to repay all of the creditors.[174]

Similarly, in *In re General Motors*, the court did not form a creditors' committee to represent tort claimants and the debtor sold its assets free and clear of tort claims.[175] Like in *In re Chrysler*, the other unsecured creditors supported a sale free and clear of General Motors' tort claims[176]—their own interests being satisfied through the sale.[177] General Motors' successor offered unsecured bondholders an ownership in the new General Motors company.[178] For other unsecured creditors, General Motors' successor offered to assume the contracts that the creditors had made with the old General Motors for supplies and dealerships.[179] However, if the court had appointed a separate committee of tort claimants, tort claimants' voices would not have been drowned out by

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170 *See id.* at 141–42.

171 *Gen. Motors* Motion for Appointment, *supra* note 18, at 5.

172 *Id.*

173 *See Chrysler* Order Authorizing Sale, *supra* note 21; *see also* Master Transaction Agreement, *supra* note 21.

174 *See supra* note 22.

175 *See 'New' GM Agrees to Assume Future Liability Claims of 'Old' GM Products, supra* note 23.

176 *In re* Gen. Motors Corp., 407 B.R. 463, 473–74 (Bankr. S.D.N.Y. 2009).

177 *Gen. Motors* Motion for Appointment, *supra* note 18, at 4.

178 *See* Kendra Marr, *GM Bondholders Vote on Sweetened Deal*, WASH. POST, May 31, 2009, at A14 (describing the deal between the U.S. Treasury and GM's bondholders to grant them an ownership stake in "New GM" in return for their support of GM's § 363 sale); David Welch, *Old GM Bondholders Getting Shares in New GM May Depress Price*, BLOOMBERG BUSINESS (Apr. 7, 2011 12:01AM), http://www.bloomberg.com/news/articles/2011-04-06/old-gm-bondholders-getting-shares-in-new-general-motors-may-depress-price (discussing the release of New GM stock to former bondholders of Old GM).

179 *Gen. Motors Corp.*, 407 B.R. at 483 ("Substantially all of old GM's executory contracts with direct suppliers are likely to be assumed and assigned to New GM.").

other creditors on the committee with dissimilar interests. With their own voice, tort claimants may be more successful in negotiating with the debtor and purchaser for a higher sales price or for a sale in which the purchaser assumes the debtor's tort liability.

3. Timing and Added Cost

In deciding whether to order the United States Trustee to appoint additional creditors' committees, courts also consider the added cost associated with forming the committees and the timing of a party's motion.[180] These factors are balanced against whether the creditors' committee adequately represents the creditors in the proceeding.[181] These discretionary factors should not prevent the appointment of a separate committee if it is otherwise justified by a concern for adequate representation.[182]

a. Timing of 11 U.S.C. § 1102(a)(2) Motion

Parties need to promptly file a motion under 11 U.S.C. § 1102(a)(2) to form a creditors' committee.[183] In *In re Public Service Co. of New Hampshire*, the court denied the creditor group's motion to form an additional creditors' committee because the motion was not timely filed.[184] The creditor group filed their motion for formation of an additional creditors' committee four months after the United States Trustee had appointed a single creditors' committee.[185]

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[180] *See generally Enron Corp.*, 279 B.R. 671 ("Discretionary considerations include: 1. The cost associated with the appointment; 2. The time of the application; 3. The potential for added complexity; and 4. The presence of other avenues for creditor participation.").

[181] *See generally id.* ("[T]he court must determine whether the appointment of an additional committee is necessary to assure the movants are adequately represented. . . . [I]f the answer to the first question is yes, then the court must decide whether it should exercise its discretion and order the appointment.").

[182] *See, e.g.*, *In re* Hills Stores Co., 137 B.R. 4, 6 (Bankr. S.D.N.Y. 1992) (citing *In re* McLean Indus., Inc., 70 B.R. 852, 860 (Bankr. S.D.N.Y. 1987)) (stating the potential added cost is not sufficient in itself to deprive the creditors of the formation of an additional committee if one is otherwise appropriate); *In re* Texaco, Inc., 79 B.R. 560, 566 (Bankr. S.D.N.Y. 1987) ("[A] price tag should not be placed on adequate representation.") (holding that a separate committee for unsecured oil and gas creditors was no longer required to adequately represent their interests).

[183] *See* Ad Hoc Bondholders Grp. v. Interco Inc. (*In re* Interco Inc.), 141 B.R. 422, 424–25 (Bankr. E.D. Mo. 1992); *Hills Stores Co.*, 137 B.R. at 7–8; *In re* Drexel Burnham Lambert Grp., Inc., 118 B.R. 209, 211 (Bankr. S.D.N.Y. 1990); *In re* Pub. Serv. Co. of N.H., 89 B.R. 1014, 1020 (Bankr. D.N.H. 1988); Albero v. Johns-Manville Corp. (*In re* Johns-Manville Corp.), 68 B.R. 155, 161 (S.D.N.Y. 1986); Van Arsdale v. Clemo (*In re* A.H. Robins Co.), 65 B.R. 160, 162 (E.D. Va. 1986), *aff'd sub nom.* Van Arsdale v. Clemo, 825 F.2d 794 (4th Cir. 1987) (explaining that a party's motion was not promptly filed when it filed a motion to dissolve the committee of tort claimants seven weeks after the United States Trustee selected the committee).

[184] 89 B.R. at 1020.

[185] *Id.* at 1016–17.

The court found it significant that the case was far along in the proceeding and that the formation of an additional creditors' committee would delay and disrupt the conclusion of the proceeding.[186]

Similarly, in *In re Johns-Manville*, the court affirmed the lower court's denial of a motion to form an additional creditors' committee.[187] The court explained that the creditors had waited too long because the debtor was in its final stages of reorganization.[188] At this point, the court believed that it would be "too late for a committee to exercise its most important function—negotiating a reorganization plan—as a reorganization plan ha[d] already been submitted to the bankruptcy court."[189]

While these examples demonstrate the consequences of submitting an untimely motion for an additional creditors' committee, tort claimants have typically filed timely motions.[190] Therefore, timing concerns generally should not come into play in a court's deliberation about whether to order the United States Trustee to appoint a creditors' committee for tort claimants.

b. Added Cost

Opponents of forming additional creditors' committees often focus on the fact that additional creditors' committees entail additional expenses for the bankruptcy estate.[191] 11 U.S.C. § 1103(a) authorizes creditors' committees to hire professionals, such as lawyers and accountants, at the expense of the bankruptcy estate.[192] Moreover, pursuant to 11 U.S.C. § 503(b)(3)(F), the

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186 *Id.* at 1020.

187 68 B.R. at 165.

188 *Id.* at 163.

189 *Id.*

190 For example, in *In re General Motors* and *In re Chrysler*, tort claimants filed their motions to form additional creditors' committees within a few days of the debtors' bankruptcy filings. Chrysler LLC filed a voluntary petition for relief under chapter 11 of the Code on April 30, 2009. The tort claimants in this case filed a motion requesting the court to form an additional creditors' committee on May 4, 2009. *Chrysler* Motion for Appointment, *supra* note 16, at 1, 7. Likewise, General Motors filed a voluntary petition for relief under chapter 11 on June 1, 2009. On June 2, 2009, its tort claimants filed a motion requesting the court to form an additional creditors' committee of tort claimants. *Gen. Motors* Motion for Appointment, *supra* note 18, at 1, 6.

191 *See In re* Dow Corning Corp., 194 B.R. 121, 143 (Bankr. E.D. Mich. 1996), *rev'd on other grounds*, 212 B.R. 258 (E.D. Mich. 1997); *In re* Beker Indus. Corp., 55 B.R. 945, 949 (Bankr. S.D.N.Y. 1985).

192 *See* 11 U.S.C. § 1103(a) (2012). The provision states,

> At a scheduled meeting of a committee appointed under section 1102 of this title, at which a majority of the members of such committee are present, and with the court's approval, such

bankruptcy estate may be required to compensate members of creditors' committees for out-of-pocket expenses.[193] These expenses and fees are in part what cause the bankruptcy estate to incur additional costs when the court or the United States Trustee appoint an additional creditors' committee.[194]

While courts should review added costs, courts can minimize these costs so as to provide for additional creditors' committees.[195] Courts can minimize professional expenses because a committee's employment of professionals is ultimately subject to court approval.[196] The Bankruptcy Rules, which govern procedures for bankruptcy proceedings, provide the application that creditors' committees should use in requesting the court's approval to hire professionals.[197] This application requires creditors to state the specific need for hiring a professional, the professional's name, the reasons for selecting the particular professional, the professional services to be rendered, any proposed arrangements for compensation, and any connections that the professional might have with the debtor.[198] Even if a court allows a creditors' committee to hire professionals, a court does not have to compensate these professionals if the professionals' fees are unreasonable or duplicative.[199]

Courts have exercised their power to restrict the hiring of lawyers, accountants, and other professionals by creditors' committees.[200] In *In re Cumberland Farms, Inc.*, the court held that a separately appointed creditors'

> committee may select and authorize the employment by such committee of one or more attorneys, accountants, or other agents, to represent or perform services for such committee.

Id.

193 *See id.* § 503(b) ("After notice and a hearing, there shall be allowed administrative expenses . . . (3) [for] the actual, necessary expenses . . . incurred by . . . (F) a member of a committee appointed under section 1102 of this title, if such expenses are incurred in the performance of the duties of such committee . . . .").

194 *See Dow Corning Corp.*, 194 B.R. at 143; *Beker Indus. Corp.*, 55 B.R. at 949.

195 *See Dow Corning Corp.*, 194 B.R. at 143; *In re* Cumberland Farms, Inc. 142 B.R. 593, 594–96 (Bankr. D. Mass. 1992) (denying the committee's request to hire counsel at the expense of the estate); *In re* Drexel Burnham Lambert Group, Inc. 118 B.R. 209, 211 (Bankr. S.D.N.Y. 1990) (stating in dicta that the court could control the costs of creating separate committees by ordering the committees to share accountants); Blain & O'Gawa, *supra* note 98, at 596.

196 *See* 11 U.S.C. § 1103(a) ("[W]ith the court's approval, . . . committee[s] may select and authorize the employment by such committee of one or more attorneys, accountants, or other agents, to represent or perform services for such committee[s]."); Blain & O'Gawa, *supra* note 90, at 596.

197 FED. R. BANKR. P. 2014(a).

198 *Id.*

199 *See* 11 U.S.C. § 330(a)(1)(A), (a)(2) (stating the court may award "reasonable" compensation and that the court may award less than the amount of compensation requested by the professional).

200 *See Cumberland Farms, Inc.*, 142 B.R. at 595–96; *Drexel Burnham Lambert Grp., Inc.*, 118 B.R. at 211.

committee of lenders was not allowed to employ legal counsel at the bankruptcy estate's expense because that legal counsel's efforts would merely duplicate services provided by the unsecured creditors' committee.[201] Similarly, in *In re Drexel Burnham Lambert Group, Inc.*, the court noted that in previous cases, courts have "required separate committees to share accountants" out of concern for costs.[202] In addition to limiting the hiring of professionals, the court in *In re Beker Industries* suggested that courts can require the various creditors' committees to "determine their joint interests and address them jointly[, take] steps to minimize duplication," and monitor costly fees and other expenses.[203]

Given these considerations, concerns about additional costs should not prevent a court from ordering the United States Trustee to appoint a creditors' committee for tort claimants.

4. Desires of the Constituencies

In chapter 11 bankruptcy cases of corporate debtors, tort claimants have widely supported the formation of additional creditors' committees to represent them. For example, in the MMA bankruptcy case, the train crash killed forty-seven people.[204] Of the decedents, thirty-three of their estates supported the motion requesting the court to form an additional creditors' committee.[205] Moreover, the Canadian government representatives and the pending class-action claimants also wanted the court to form a creditors' committee to represent tort claimants.[206]

Thus, the case law supports forming creditors' committees of tort claimants in bankruptcies of corporate debtors.

D. Practical Significance

This Comment does not claim that forming creditors' committees for tort claimants will guarantee tort claimants will always be successful in achieving all of their objectives. However, as the MMA bankruptcy case illustrates, tort claimants may be better off if such committees are formed.

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201 142 B.R. at 595–96.
202 118 B.R. at 211.
203 55 B.R. 945, 951 (Bankr. S.D.N.Y. 1985).
204 Wrongful Death Claimants' Motion for Formation of Creditors' Committee, *supra* note 11, at 5.
205 *Id.*
206 *See Montreal Me. & Atl. Ry.* Motion for Appointment, *supra* note 12, at 1.

In the MMA bankruptcy case, the court reached the right result. On October 18, 2013, the court ordered the United States Trustee to appoint a creditors' committee for victims of the accident.[207] In doing so, the court explained that a creditors' committee of victims was needed "[to] give official standing and [a] voice to victims who may be without one in these proceedings" and to "give the trustee and other parties a point of contact and [a] negotiating partner on a plan and any other issue in the case."[208]

Once formed, the committee of tort claimants embraced the powers that the Code affords creditors' committees.[209] On January 8, 2014, the committee filed a motion requesting the court's approval to let the committee hire legal counsel to represent the committee's interests in the case.[210] After the court granted the committee's request,[211] the committee's hired counsel filed a motion requesting that the court require the debtor and other parties to sit down and discuss specific issues surrounding the case.[212]

Despite the successes, there have been some setbacks in the case from the tort claimants' perspective. The court issued an order approving the sale of MMA's assets free and clear of liens, claims, and interests to Railroad Acquisitions Holdings, LLC.[213] The order states that the term "liens, claims, and interests," includes any claims arising from tort claims and specifies that the purchaser will only be responsible for certain "Assumed Liabilities."[214] Tort claims were not part of the Assumed Liabilities so Railroad Acquisitions Holdings, LLC will not assume responsibility for paying the tort claimants.[215]

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[207] Order Authorizing the Appointment of a Victims' Committee at 4, *In re* Montreal Me. & Atl. Ry., Ltd., No. 13-10670 (Bankr. D. Me. Oct. 18, 2013) ECF No. 391.

[208] *Id.* at 3.

[209] *See, e.g.*, Application for Order, Pursuant to Sections 328, 330, & 1103 of Bankruptcy Code, Authorizing Employment and Retention of Paul Hastings LLP as Counsel to Official Committee of Victims, *In re* Montreal Me. & Atl. Ry., Ltd., No. 13-10670 (Bankr. D. Me. Jan. 8, 2014), ECF No. 559.

[210] *Id.* at 1.

[211] Order Authorizing Employment and Retention of Paul Hastings LLP as Counsel to Official Committee of Victims Pursuant to Sections 328, 330, & 1103 of Bankruptcy Code, *In re* Montreal Me. & Atl. Ry., Ltd., No. 13-10670 (Bankr. D. Me. Feb. 11, 2014), ECF No. 647.

[212] Motion of Official Committee of Victims Pursuant to Cross-Border Insolvency Protocol Requesting Joint Status Conference Before U.S. & Canadian Court at 1, *In re* Montreal Me. & Atl. Ry., Ltd., No. 13-10670 (Bankr. D. Me. Feb. 7, 2014), ECF No. 620.

[213] Order (I) Approving (A) Sale of Assets Pursuant to Asset Purchase Agreement with Railroad Acquisition Holdings LLC, (B) Sale of Assets Free & Clear of Liens, Claims, & Interests, & (C) Assumption & Assignment of Certain Executory Contracts & Unexpired Leases Thereto & (II) Granting Related Relief, *In re* Montreal Me. & Atl. Ry. Ltd., No. 13-10670 (Bankr. D. Me. Jan, 24, 2014), ECF No. 594.

[214] *Id.* at 15.

[215] *Id.* at 9, 12.

The other problem is that the total purchase price is far less than the estimated value of the tort claims so tort claimants will receive only a portion of the value of their claims.[216]

Although tort claimants suffered this setback, as of the writing of this Comment, several news outlets reported that a settlement fund had been drafted to repay tort claimants. According to these news outlets, MMA, its insurers, its founder, Edward Burkhardt, and several other entities linked to the derailment will contribute to a settlement fund that will then be used to repay tort claimants.[217] The exact amount of this settlement fund has yet to be determined, but the Chapter 11 Trustee has indicated that he hopes to obtain as much as $500 million for the tort claimants.[218] Importantly, there is reason to believe that the committee of tort claimants helped to achieve this settlement. Prior to the settlement, the committee of tort claimants had said that it "worked tirelessly with the Trustee in hopes of achieving a global settlement that would result in adequate compensation for the victims."[219] Thus, it is likely that the efforts of the committee of tort claimants in the MMA bankruptcy case contributed to better repayment terms for tort victims.

CONCLUSION

Tort claimants, like the accident victims in the MMA bankruptcy case, are not going to stop appearing in chapter 11 bankruptcies. In fact, scholars predict that tort claimants are going to appear more frequently in chapter 11 corporate bankruptcies given the advantages of dealing with tort claims in bankruptcy.[220] This trend is unfortunate because tort claimants are involuntary creditors. Their

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216 *See* Darren Fishell, *Assets of Bankrupt Montreal, Maine and Atlantic Railway Sold in Canada After Clearing Regulatory Approval*, BANGOR DAILY NEWS (June 30, 2014, 5:25 PM), http://bangordailynews.com/2014/06/30/business/assets-of-bankrupt-montreal-maine-and-atlantic-railway-sold-in-canada-after-clearing-regulatory-approval/ (stating MMA's assets were sold for $15.85 million but the Quebec government has claims against MMA in excess of $409 million for cleanup and other costs).

217 *See* Julie Gordon, *Update 1-Victims of Quebec Oil-by-Rail Disaster Agree to $200 Mln Settlement*, REUTERS (Jan. 9, 2015, 7:51 PM), http://www.reuters.com/article/2015/01/10/canada-train-settlement-idUSL1N0UO2KM20150110.

218 *See Lac-Mégantic Rail Disaster: $200M Proposed Settlement Reached*, CBC NEWS (Jan. 9, 2015 7:29 PM), http://www.cbc.ca/news/canada/montreal/lac-mégantic-rail-disaster-200m-proposed-settlement-reached-1.2896250.

219 Motion of Official Committee of Victims Seeking Modification of Committee Appointment Order to Authorize Committee to Fully Participate in Wrongful Death Proceedings Pending Before Maine District Court at 1, *In re* Montreal Me. & Atl. Ry. Ltd., No. 13-10670 (Bankr. D. Me. Aug, 15, 2014), ECF No. 1077.

220 *See* Barbara J. Houser, *Chapter 11 as a Mass Tort Solution*, 31 LOY. L.A. L. REV. 451, 451–52 (1998) (describing chapter 11 as a tool "to assist companies in bringing closure" to mass tort claims in bankruptcy).

relationship with the debtor stems entirely from the fact that they are owed money because the debtor has harmed them without their consent.

Luckily, the Code grants courts the power to form additional creditors' committees for tort claimants. In determining whether additional creditors' committees are needed in a case, courts balance the following factors: (1) the nature of the case; (2) the ability of the existing creditors' committee to function; (3) the added cost of forming an additional creditors' committee and the timing of a creditor group's motion requesting the court to form an additional creditors' committee; and (4) the desires of the constituencies.[221] Balancing these factors strongly weighs in favor of forming a committee for tort claimants.

Tort claimants will greatly benefit from having their own committee. The committee of tort claimants will be able to work directly with the debtor to formulate a reorganization plan or consult with the debtor about the terms of the sale or other matters regarding the administration of the case.[222] During this process, tort claimants can voice their concerns about proposals that might not be in their best interest. Moreover, because creditors' committees can hire legal counsel and other professionals,[223] tort claimants will be informed about their legal interests, and hence, better equipped to assert their legal interests in a bankruptcy case. Finally, tort claimants will actually be able to voice their concerns if they get their own committee because their voices will not be drowned out by creditors who have dissimilar interests. Thus, while forming creditors' committees for tort claimants will not guarantee that tort claimants will prevail on each of their objectives or will receive full repayment of their claims, forming creditors' committees for tort claimants is important because it provides these victims a meaningful voice to advocate for their interests. Moreover, we have seen that the failure to form creditors' committees for tort claimants can have disastrous results.[224] Such a failure could enable corporate debtors to sell their property free and clear of tort claims for such a low price that tort claimants receive virtually nothing as evidenced in the General Motors

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221 *See, e.g.*, *In re* Dow Corning Corp., 194 B.R. 121, 141 (Bankr. E.D. Mich. 1996) (*citing In re* Hill Stores Co., 137 B.R. 4, 5–6 (Bankr. S.D.N.Y. 1992); *In re* McLean Indus., Inc., 70 B.R. 852, 860–61 (Bankr. S.D.N.Y. 1987)), *rev'd on other grounds*, 212 B.R. 258 (E.D. Mich. 1997); Albero v. Johns-Manville Corp. (*In re* Johns-Manville Corp.), 68 B.R. 155, 159 (Bankr. S.D.N.Y. 1986).

222 *See* 11 U.S.C. § 1103(c)(3) (2012).

223 *Id.* § 1103(a).

224 *See, e.g.*, Gen. Motors Motion for Appointment, *supra* note 18, at 5 (describing tort victims as an "economically fragile constituency").

and in the Chrysler bankruptcy cases.[225] Thus, courts should always order the United States Trustee to form creditors' committees for tort claimants in chapter 11 bankruptcies of corporate debtors.

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[225] *See In re* General Motors, Inc., 407 B.R. 463, 473–74, 505 (Bankr. S.D.N.Y. 2009); *'New' GM Agrees to Assume Future Liability Claims of 'Old' GM Products, supra* note 23. While the law is clear in this area, it is not very sympathetic to tort claimants. The court in *In re General Motors* made this clear, stating,

> This Court fully understands the circumstances of tort victims, and the fact that if they prevail in litigation and cannot look to [the purchaser] as an additional source of recovery, they may recover only modest amounts on any allowed claims . . . . But the law in this Circuit and District is clear; the Court will permit [the debtor's] assets to pass to the purchaser free and clear of successor liability claims.

General Motors, Inc., 407 B.R. at 505.

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