



EMORY  
LAW

Emory Bankruptcy Developments Journal

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Volume 37  
Issue 1 *A Tribute to Jay Alix*

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2020

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### Recommended Citation

Juan Martinez, *Sexual Abuse and Bankruptcy: How Organizations Abuse Chapter 11 to Avoid Victims' Demands for Answers*, 37 Emory Bankr. Dev. J. 213 (2020).

Available at: <https://scholarlycommons.law.emory.edu/ebdj/vol37/iss1/9>

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# **SEXUAL ABUSE AND BANKRUPTCY: HOW ORGANIZATIONS ABUSE CHAPTER 11 TO AVOID VICTIMS' DEMANDS FOR ANSWERS**

## **ABSTRACT**

*USA Gymnastics has been embroiled in highly contested bankruptcy proceedings since December 5, 2018, and the organization has been unable to confirm a reorganization plan. Prior to filing for bankruptcy, these victims filed over 100 suits against USA Gymnastics claiming that the organization failed to properly investigate claims of abuse and placed the gymnasts in an unsafe environment. Now, the victims claim USA Gymnastics is unwilling to negotiate a settlement agreement in good faith.*

*The bankruptcy filing activated the automatic stay, putting the victims' litigation on hold. The automatic stay is a powerful tool that is necessary to ensure the bankruptcy court's success. However, in situations involving organizations accused of sexual abuse, the automatic stay prevents victims from delving into the organization's role in their abuse.*

*Bankruptcy courts are courts of equity, but they are bound by statute in their ability to remedy a wrong. Organizations like USA Gymnastics abuse the Bankruptcy Code to gain unintended benefits at the expense of abuse victims. They place victims in a difficult position; if the survivors receive compensation through bankruptcy, they lose their chance to conduct discovery proceedings otherwise available through litigation. This outcome prevents the victims from receiving answers regarding their own abuse and from guaranteeing that the abuse will not continue in the future. Further, the discovery process may uncover other sources of damages like USA Gymnastics' officers or the U.S. Olympic and Paralympic Committee, but the victims are forced to wait until the organization is out of bankruptcy to pursue litigation. This lengthy delay could prevent victims from timely discovering evidence vital to successfully litigating their claims. Due to the statute of limitations and failure to timely uncover evidence, the delay may also prevent victims from bringing suit against any nondebtor that could be liable for their injuries.*

*The bankruptcy process is currently inadequate to properly protect the interests of sexual abuse victims. Bankruptcy focuses on financial issues, so victims of sexual abuse will have non-financial interests negatively impacted by the bankruptcy process. This Comment argues that bankruptcy courts should borrow from other areas of law and provide special protections for victims of*

*sexual abuse. This protection would prioritize the victims' claims and ensure that the victims can pursue an investigation into the organization's involvement in their abuse. This plan would allow adequate protection for sexual abuse victims and deter misuse of the bankruptcy courts by organizations.*

## INTRODUCTION

On January 24, 2018, USA Gymnastics team physician Larry Nassar was found guilty of multiple sex crimes committed against gymnasts under the guise of medical treatment over several decades.<sup>1</sup> Nassar committed these crimes as a gymnast physician at USA Gymnastics and as a doctor at Michigan State University.<sup>2</sup> More than 350 girls and young women accused Nassar of abusing them.<sup>3</sup>

USA Gymnastics filed for bankruptcy<sup>4</sup> (“USA Gymnastics case”; “USA Gymnastics”) after a wave of lawsuits by gymnasts who claimed that the organization failed to adequately protect them from Nassar.<sup>5</sup> In the two years following the commencement of the bankruptcy case, the victims have been trapped in a tangled web of disputes involving USA Gymnastics, its insurers, and the United States Olympic and Paralympic Committee (“USOPC”).<sup>6</sup> This long and fruitless process has led victims to seek dismissal of USA Gymnastics’ bankruptcy petition on the grounds that the organization has not been negotiating in good faith.<sup>7</sup> The gymnasts argue that USA Gymnastics and the U.S. Olympic Committee strung both the court and the survivors along in hopes of buying enough time to enjoy the financial windfalls they expected from the upcoming Summer Olympics in Tokyo, Japan, then scheduled for 2020.<sup>8</sup> If successful in

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<sup>1</sup> Rebecca Schuman, *USA Gymnastics Has Fallen. Now It’s Using Bankruptcy to Avoid Justice.*, WASH. POST (Dec. 11, 2018, 6:00 AM), <https://www.washingtonpost.com/outlook/2018/12/11/usa-gymnastics-has-fallen-now-its-using-bankruptcy-get-out-trouble/>.

<sup>2</sup> Eric Levenson, *Larry Nassar Apologizes, Gets 40 to 125 Years for Decades of Sexual Abuse*, CNN (Feb. 5, 2018, 2:17 PM), <https://www.cnn.com/2018/02/05/us/larry-nassar-sentence-eaton/index.html#:~:text=At%20his%20sentencing%20hearing%20in,me%20to%20my%20innermost%20core.%22&text=But%20Judge%20Janice%20Cunningham%2C%20citing,he%20was%20in%20%22denial.%22>.

<sup>3</sup> Nancy Armour & Rachel Axon, *USA Gymnastics Won’t Give Up Governing Body Status, So USOPC is Starting Revocation Process*, USA TODAY (Nov. 21, 2018, 1:50 PM), <https://www.usatoday.com/story/sports/olympics/2018/11/21/us-olympic-committee-starts-process-revoke-usa-gymnastics-status/2079315002/>.

<sup>4</sup> See *In re USA Gymnastics*, No. 1:18-bk-09108 (Bankr. S.D. Ind. Dec. 5, 2018). All discussion of the USA Gymnastics case will refer to this case. Motions have been filed in this case since the debtor’s petition. See, e.g., First Day Motion for Order (I) Authorizing the Debtor to Pay Pre-Petition Taxes; and (II) Authorizing the Debtor’s Bank to Honor and Process Checks and Electronic Transfer Requests Related Thereto Pursuant to Sections 105(a), 363(b), 507(a)(8), and 541 of the Bankruptcy Code, *In re USA Gymnastics* (Bankr. S.D. Ind. Dec. 5, 2018) (No. 18-09108-RLM-11).

<sup>5</sup> See Louise Radnofsky, *Nassar Victims Move to Throw out USA Gymnastics’ Bankruptcy Bid*, WALL ST. J. (Jan. 22, 2020, 8:00 AM), <https://www.wsj.com/articles/nassar-victims-move-to-throw-out-usa-gymnastics-bankruptcy-bid-11579698001> (discussing the treatment experienced from USA Gymnastics).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> See Ryan Boysen, *Nassar Accusers Want USA Gymnastics Bankruptcy Canned*, LAW360 (January 22, 2020, 5:33 PM), <https://www.law360.com/articles/1236606>. The Summer Olympics of 2020 were postponed:

dismissing the bankruptcy petition, the victims may resume their lawsuits. However, given the time they spent trapped in bankruptcy, the victims might have a difficult time in discovery because evidence and witnesses may not be as readily accessible as they were two years ago. This Comment will argue that the current bankruptcy system is ill-equipped to protect the interests of victims of sexual abuse and that public policy warrants special bankruptcy protection for this unique class.

The Nassar criminal trials were an emotional ordeal for the survivors and their families; the victims read statements detailing how Nassar's abuse changed their lives.<sup>9</sup> The overwhelming nature of the trial was best exemplified when a father of three victims attempted to attack Nassar in open court.<sup>10</sup> On December 7, 2017 in the first of three separate trials, U.S. District Judge Janet Neff sentenced Nassar to twenty years, for three counts of receiving child pornography, possessing child pornography, and destroying and concealing evidence.<sup>11</sup> On January 24, 2018, Nassar received a 40 to 175 year sentence in Ingham County, Michigan after pleading guilty to seven counts of criminal sexual conduct.<sup>12</sup> Additionally, Nassar received a sentence for 40 to 125 years in prison for crimes committed in Eaton County, Michigan.<sup>13</sup>

Over the course of 2018, USA Gymnastics found itself the target of multiple lawsuits filed by Nassar's victims.<sup>14</sup> These suits argued that USA Gymnastics failed to protect gymnasts from Nassar's abuse despite being informed of Nassar's actions for years.<sup>15</sup> As the allegations against Nassar began to mount,

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In the present circumstances [the COVID-19 pandemic] and based on the information provided by the WHO today, the IOC President and the Prime Minister of Japan have concluded that the Games of the XXXII Olympiad in Tokyo must be rescheduled to a date beyond 2020 but not later than summer 2021, to safeguard the health of the athletes, everybody involved in the Olympic Games and the international community.

*Joint Statement from the International Olympic Committee and the Tokyo 2020 Organising Committee*, OLYMPIC (Mar. 24, 2020), <https://www.olympic.org/news/joint-statement-from-the-international-olympic-committee-and-the-tokyo-2020-organising-committee>.

<sup>9</sup> Levenson, *supra* note 2.

<sup>10</sup> Levenson, *supra* note 2.

<sup>11</sup> Elizabeth Joseph, Ray Sanchez & Eric Levenson, *Ex-USA Gymnastics Doctor Sentenced to 60 Years on Child Porn Charges*, CNN (Dec. 7, 2017, 3:50 PM), [https://www.cnn.com/2017/12/07/us/larry-nassar-usa-gymnastics-sentence/index.html#:~:text=\(CNN\)%20Larry%20Nassar%2C%20the,a%20court%20official%20said%20Thursday.&text=He%20will%20be%20sentenced%20on%20those%20state%20charges%20in%20January](https://www.cnn.com/2017/12/07/us/larry-nassar-usa-gymnastics-sentence/index.html#:~:text=(CNN)%20Larry%20Nassar%2C%20the,a%20court%20official%20said%20Thursday.&text=He%20will%20be%20sentenced%20on%20those%20state%20charges%20in%20January).

<sup>12</sup> Levenson, *supra* note 2.

<sup>13</sup> Levenson, *supra* note 2.

<sup>14</sup> Schuman, *supra* note 1.

<sup>15</sup> Schuman, *supra* note 1.

USA Gymnastics lost sponsorships because sponsors chose to let their contracts expire instead of renewing them with the organization.<sup>16</sup> The sponsors have not closed the door on USA Gymnastics completely, with some leaving open the possibility of reassessing the organization's sponsorship potential for the 2020 Summer Olympics.<sup>17</sup>

In November 2018, the USOPC began proceedings to strip USA Gymnastics of its National Governing Body ("NGB") status.<sup>18</sup> NGBs are organizations that govern and manage all aspects of their respective sport within the United States.<sup>19</sup> NGBs are responsible for training, competition, and development for their sport, as well as nominating athletes to the USOPC teams.<sup>20</sup> As an NGB, USA Gymnastics receives funding from the USOPC to support teams representing the United States at international events, including the Olympics.<sup>21</sup>

On December 5, 2018, USA Gymnastics filed for chapter 11 bankruptcy, automatically staying the lawsuits filed by Nassar's victims.<sup>22</sup> Initially, the USOPC stated that the bankruptcy's automatic stay would not affect its plan to decertify USA Gymnastics,<sup>23</sup> but the USOPC has since decided not to proceed with decertification, choosing instead to give USA Gymnastics time to reach a settlement with Nassar's victims.<sup>24</sup> Unfortunately, USA Gymnastics' bankruptcy is not the first of its kind. Several organizations have filed for bankruptcy following lawsuits claiming that they failed to protect plaintiffs from abuse.

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<sup>16</sup> See Des Bieler, *Amid Sexual Assault Scandal, USA Gymnastics Loses Major Corporate Sponsors*, WASH. POST (Dec. 14, 2017, 9:12 PM), <https://www.washingtonpost.com/news/early-lead/wp/2017/12/14/amid-sexual-assault-scandal-usa-gymnastics-loses-major-corporate-sponsors/> (stating the loss of two major corporate sponsors of USA gymnastics).

<sup>17</sup> *Id.* ("The contract for Kellogg's most recent sponsorship of USAG ended at the close of 2016 . . . at this point, we have not renewed but will assess the USAG for the 2020 Summer Games").

<sup>18</sup> Armour & Axon, *supra* note 3.

<sup>19</sup> USOPC, *About the U.S. Olympic & Paralympic Committee*, TEAMUSA.ORG, <https://www.teamusa.org/About-the-USOPC/Structure> (Under "National Governing Body").

<sup>20</sup> *Id.*

<sup>21</sup> Alice Park, *'Enough Is Enough.' It's Time to Decertify USA Gymnastics or Start All Over Again, Gymnasts Say*, TIME (Oct. 29, 2018, 4:42), <https://time.com/5431333/usa-gymnastics-decertify-aly-raisman/#:~:text=Again%2C%20Gymnasts%20Say-,%20Enough%20Enough%20Michigan%2C%20on%20Jan.>

<sup>22</sup> See *In re USA Gymnastics*, No. 1:18-bk-09108 (Bankr. S.D. Ind. Dec. 5, 2018); Schuman, *supra* note 1.

<sup>23</sup> Laurel Wamsley, *USA Gymnastics Files for Chapter 11 Bankruptcy*, NPR (Dec. 5, 2018, 4:50 PM), <https://www.npr.org/2018/12/05/673861714/usa-gymnastics-files-for-chapter-11-bankruptcy>.

<sup>24</sup> Nancy Armour, *USA Gymnastics Signals Confidence for Its Future with Announcement of 2020 Olympic Trials*, USA TODAY (Apr. 24, 2019, 2:55 PM), <https://www.usatoday.com/story/sports/olympics/2019/04/23/usa-gymnastics-expects-avoid-desertification-plans-olympic-trials/3549806002/>.

For example, over the last decade, the Boy Scouts of America organization has experienced backlash similar to that faced by USA Gymnastics, as allegations of sexual abuse reaching as far back as 1946 have come to light.<sup>25</sup> These allegations resulted in several states retroactively modifying their statutes of limitations to allow survivors of sexual abuse a year-long window to file claims against Boy Scouts of America.<sup>26</sup> The rise in lawsuits against the organization, coupled with its tarnished reputation, has led Boy Scouts of America to file for bankruptcy.<sup>27</sup> Other similar cases include the bankruptcies of the Catholic Church and, more recently, the Weinstein Company.<sup>28</sup> The Weinstein Company bankruptcy is eerily similar to the USA Gymnastic bankruptcy in several respects. First, both bankruptcies arose from mass lawsuits by victims of sexual abuse that occurred at each organization over the span of several decades.<sup>29</sup> Second, both bankruptcies were filed in 2018, and the debtors are still in the process of negotiating a chapter 11 plan.

Although there are, sadly, quite a few examples of this growing trend of bankruptcies arising out of discovery of long-standing sexual abuse, this Comment will primarily focus on USA Gymnastics as the test case. USA Gymnastics exemplifies the problems presented in bankruptcy cases involving sexual abuse by employees of the debtor organization. While the Weinstein bankruptcy is similar, several differences make USA Gymnastics a better test case. The Weinstein Company bankruptcy differs from USA Gymnastics in the nature of abuse and level of corruption. In the Weinstein Company case, the abuse was committed by Harvey Weinstein, the company's president and founder, whereas the abuse in USA Gymnastics was committed by Larry Nassar and other doctors and coaches. Because this Comment focuses on how bankruptcy limits the victims' ability to investigate the organization's role in their abuse and the necessary protections that should be implemented, the USA Gymnastics case presents a better starting point for discussion. In the Weinstein

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<sup>25</sup> Samantha Schmidt & Kayla Epstein, *Lawsuits. Possible Bankruptcy. Declining Numbers. Is There a Future for the Boy Scouts?*, WASH. POST (Sept. 11, 2019, 7:04 PM), [https://www.washingtonpost.com/local/social-issues/lawsuits-possible-bankruptcy-declining-members-is-there-a-future-for-the-boy-scouts/2019/09/11/54699d6a-ce53-11e9-8c1c-7c8ee785b855\\_story.html](https://www.washingtonpost.com/local/social-issues/lawsuits-possible-bankruptcy-declining-members-is-there-a-future-for-the-boy-scouts/2019/09/11/54699d6a-ce53-11e9-8c1c-7c8ee785b855_story.html).

<sup>26</sup> *Id.*

<sup>27</sup> Mark Baker, *Boy Scouts Seek Bankruptcy to Survive a Deluge of Sex-Abuse Claims*, N.Y. TIMES (June 17, 2020), <https://www.nytimes.com/2020/02/18/us/boy-scouts-bankruptcy-sex-abuse.html>.

<sup>28</sup> See Corina Knoll, *He Sued Over a Priest's Abuse. Then the Diocese Filed for Bankruptcy*, N.Y. TIMES (Sep. 26, 2019), <https://www.nytimes.com/2019/09/26/nyregion/sexual-abuse-rochester-diocese-catholic.html>; Michael Corkery, *Harvey Weinstein's Former Studio Seeks Liquidation in Bankruptcy Court*, N.Y. TIMES (May 15, 2019), <https://www.nytimes.com/2019/05/15/business/harvey-weinstein-company-liquidation.html>.

<sup>29</sup> See *Harvey Weinstein Timeline: How the Scandal Unfolded*, BBC NEWS (May 9, 2020), <https://www.bbc.com/news/entertainment-arts-41594672> (outlining the timeline of the Harvey Weinstein scandal).

case, the corruption and involvement of the Weinstein Company in the sexual abuse is well-explored and detailed. The involvement or negligence of USA Gymnastics is not as clear and allows for a discussion on the associated issues.

By filing for bankruptcy, the debtor organization forces survivors to play by the rules of bankruptcy. Bankruptcy provides the best forum to deal with the financial issues, but USA Gymnastics also reaps unintended benefits through the Code. The survivors' chances for conducting discovery and locating other sources of damages are harmed by bankruptcy. Preventing discovery may also allow corporate leaders of USA Gymnastics to escape personal liability or criminal charges. In this respect, the bankruptcy court is being abused by debtor organizations to prevent victims from fully investigating the organization and limiting the compensation that victims of sexual abuse receive.

### I. BACKGROUND OF USA GYMNASTICS' BANKRUPTCY

Bankruptcy serves to mitigate the effects of financial failure.<sup>30</sup> For businesses, bankruptcy allows for reorganization. In reorganization, businesses can take advantage of the Code's provisions that permit debt, as well as equity interests, to be restructured.<sup>31</sup> Specifically, in the case of chapter 11 bankruptcy, reorganization 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.<sup>32</sup> Chapter 11 embodies a policy that it is generally preferable to enable a debtor to continue to operate and to reorganize or sell its business as a going concern, rather than simply liquidate a troubled business.<sup>33</sup> Continued operation of chapter 11 debtors can save the jobs of their employees and the tax base of their communities, and it generally reduces the upheaval that results from termination of a business.<sup>34</sup>

Here, USA Gymnastics seeks to reorganize and keep its USOPC certification to continue serving as the NGB for gymnastics in the United States. As part of the chapter 11 filing, USA Gymnastics estimated its assets and liabilities in the range of \$50 million to \$100 million.<sup>35</sup> According to the organization's documents, USA Gymnastics has \$75 million in insurance available and listed

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<sup>30</sup> 1 COLLIER ON BANKRUPTCY ¶ 1.01 (16th ed. 2020).

<sup>31</sup> *Id.*

<sup>32</sup> 7 COLLIER ON BANKRUPTCY ¶ 1100.01 (16th ed. 2020).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> Allison McNeely, Josh Saul & Eben Novy-Williams, *USA Gymnastics Bankruptcy May Leave Sex-Abuse Victims Unpaid*, BLOOMBERG (Dec. 5, 2018, 6:47 PM), <https://www.bloomberg.com/news/articles/2018-12-05/usa-gymnastics-files-for-bankruptcy-to-settle-sex-abuse-claims-jpbvnmq0>.



assets of \$107.8 million in its most recent financial report.<sup>36</sup> The potential impact of the lawsuits by Nassar's victims could range between \$75 million and \$150 million.<sup>37</sup>

In total, USA Gymnastics listed between 1,000 and 5,000 creditors in the initial chapter 11 bankruptcy filing.<sup>38</sup> The survivors' claims make up a significant portion of the claims against USA Gymnastics, and such lawsuits were the primary reason the gymnastics organization decided to file for chapter 11.<sup>39</sup> The survivors' claims are similar to those of other usual creditors in that they seek financial compensation from the debtor organization, claiming that USA Gymnastics knew of the widespread abuse but failed to act and protect the gymnasts. The survivors' claims in bankruptcy proceedings are unsecured, meaning that they are not tied to any collateral. They are also unliquidated because they have not been reduced to a fixed dollar amount. The survivors' claims would be considered noncontingent, as the abuse which gave rise to USA Gymnastics' liability occurred prior to the filing of the bankruptcy petition, even though the truth of these allegations and the extent of USA Gymnastics' liability has not been proven.<sup>40</sup>

Unlike typical creditors in bankruptcy proceedings, the survivors of Larry Nassar's abuse base their claims on the negligence of USA Gymnastics in handling initial allegations of assault. They seek to investigate USA Gymnastics' involvement in their abuse,<sup>41</sup> whereas a typical creditor in bankruptcy would primarily be concerned with getting paid.<sup>42</sup> As discussed

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<sup>36</sup> Scott M. Reid, *Survivors Overwhelmingly Reject USA Gymnastics Settlement Offer*, ORANGE CNTY. REG. (Dec. 4, 2020, 8:28 PM), <https://www.oregister.com/2020/03/04/survivors-overwhelmingly-reject-usa-gymnasticssettlementoffer/#:~:text=USA%20Gymnastics'%20%24217%20million%20proposal,the%20South%20California%20News%20Group>.

<sup>37</sup> McNeely, Saul & Novy-Williams, *supra* note 35.

<sup>38</sup> McNeely, Saul & Novy-Williams, *supra* note 35.

<sup>39</sup> Joseph Ax, *USA Gymnastics, Reeling from Abuse Claims, Files for Bankruptcy*, REUTERS (Dec. 5, 2018, 3:58 PM), <https://br.reuters.com/article/us-gymnastics-usa/usa-gymnastics-reeling-from-abuse-claims-files-for-bankruptcy-idUSKBN1O42NK>.

<sup>40</sup> See *In re Smith*, 365 B.R. 770, 771 (Bankr. S.D. Ohio 2007) (stating "while the term 'noncontingent debt' is not statutorily defined, case law uniformly holds that 'a debt is contingent if it does not become an obligation until the occurrence of a future event, but is noncontingent when all of the events giving rise to liability for the debt occurred prior to the debtor's filing for bankruptcy.'").

<sup>41</sup> See Alice Park, *Why USA Gymnastics' Bankruptcy Will Delay Abuse Survivors' Search for the Truth*, TIME (Dec. 6, 2018, 3:01 PM), <https://time.com/5473063/usa-gymnastics-bankruptcy-survivors/> (describing the investigative step in survivor's law suit against USA Gymnastics).

<sup>42</sup> See 1 COLLIER ON BANKRUPTCY ¶ 1.01 (stating "[i]n this process, through orderly and centralized liquidation or through reorganization or rehabilitation, creditors of equal priority receive ratable and equitable distributions designed to serve 'the prime bankruptcy policy of equality of distribution among creditors of the debtor.'").

below, exposing the organization's negligence could reveal other potential defendants, such as the USOPC or USA Gymnastics officials. When USA Gymnastics filed for bankruptcy, the survivors' attorney had already begun the process of taking depositions and requesting discovery as part of the lawsuits against the organization, which numbered over one hundred.<sup>43</sup> For the survivors, the main point of suing USA Gymnastics is not monetary, but rather to "get to the truth" of how the abuse continued for as long as it did and who within USA Gymnastics knew about it.<sup>44</sup>

The USOPC has found itself in hot water, as victims of Nassar brought suit against the USOPC arguing that it knew about the abuse taking place at USA Gymnastics and should have done more to stop it.<sup>45</sup> In fact, a Congressional investigation conducted by Senator Richard Blumenthal resulted in a scathing report that described USOPC's conduct as a "cover-up in spirit."<sup>46</sup> The report concluded that, between summer 2015 and September 2016, USA Gymnastics and the USOPC "knowingly concealed abuse by Nassar" more than a year before anything was done.<sup>47</sup> During defendant depositions, USOPC officials were uncooperative, often at the instruction of their attorneys.<sup>48</sup> Interestingly, a settlement proposed by USA Gymnastics in the bankruptcy proceedings would release the USOPC from legal liability, even though there was a "distinct possibility of liability on the part of the USOPC" should civil lawsuits proceed.<sup>49</sup>

While investigation of USA Gymnastics' negligence may be better handled by law enforcement and criminal prosecutors, some of the survivors find themselves unable to trust police to conduct a fair and thorough investigation, given their past failures to expose Nassar's criminal conduct.<sup>50</sup> USA Gymnastics victims are similar to creditors in the ongoing Purdue Pharma bankruptcy and

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<sup>43</sup> Park, *supra* note 41.

<sup>44</sup> Park, *supra* note 41.

<sup>45</sup> Phila. Indem. Ins. Co. v. U.S. Olympic Comm., 418 F. Supp. 3d 673, 677 (D. Colo. 2019).

<sup>46</sup> Sarah Fitzpatrick, Tom Costello & Adiel Kaplan, *Congress: U.S. Olympic Committee, FBI Failed to Protect Athletes from Larry Nassar's Abuse*, NBC NEWS (July 30, 2019, 4:25 PM), <https://www.nbcnews.com/politics/congress/congress-u-s-olympic-committee-fbi-failed-protect-athletes-larry-n1035751> ("Whether it was a criminal cover-up remains to be proven, but it was a cover-up in spirit.").

<sup>47</sup> *Id.*

<sup>48</sup> *USA Gymnastics: Judge Says Nassar Settlement Is Beneficial*, TROUBLED CO. REP. (Aug. 17, 2020).

<sup>49</sup> *Id.*

<sup>50</sup> Richard Gonzales, *Michigan Officer Says He Botched Investigation, Believed Larry Nassar's 'Lies'*, NPR (Mar. 26, 2019, 10:03 PM), <https://www.npr.org/2019/03/26/707048511/michigan-officer-says-he-botched-investigation-believed-larry-nassars-lies>; see *USA Gymnastics: Judge Says Nassar Settlement Is Beneficial*, TROUBLED CO. REP. (Aug. 17, 2020) ("The depositions would also shine new light on why Michigan State was not contacted by USOPC officials, along with USA Gymnastics and FBI officials, after they were presented with allegations of sexual abuse against Nassar by multiple gymnasts in the summer of 2015.").

PG&E bankruptcy in that creditors are primarily made up of clients-turned-victims that have suffered irreversibly because of the organization's negligence. In the former case, Purdue Pharma, the maker of OxyContin, filed for bankruptcy after more than 2,600 federal and state lawsuits accused the company of misleading doctors and the public by promoting opioids and ultimately creating the opioid epidemic.<sup>51</sup> The bankruptcy filing was part of a deal to settle thousands of lawsuits, but has been met with mixed emotions from various states.<sup>52</sup> Some state attorneys general argue the bankruptcy deal will not provide enough in damages for their communities, while others have finalized deals with Purdue Pharma to ensure their communities receive opioid recovery resources.<sup>53</sup>

Similar to those in the USA Gymnastics case, the plaintiffs in the Purdue Pharma lawsuits are not simply seeking financial compensation. Massachusetts Attorney General Maura Healey objected to Purdue Pharma's bankruptcy deal because the settlement did not include any admission of wrongdoing or liability.<sup>54</sup> Healey also demanded to see all the documents in Purdue Pharma's possession "because the story of what happened here really needs to be told."<sup>55</sup>

PG&E, an investor-owned utility company, filed for bankruptcy after the company was blamed for wildfires in California in 2017 and 2018 that killed eighty-five people and destroyed the town of Paradise, California.<sup>56</sup> The victims here were the company's customers who relied on PG&E for electricity. But PG&E's failure to maintain equipment and make necessary upgrades, resulted in widespread blackouts and wildfires in the very same areas PG&E was supposed to service.<sup>57</sup>

In these cases, filing suit against the organization can be therapeutic for victims, giving them the opportunity to be heard and have their day in court.<sup>58</sup>

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<sup>51</sup> Andrew Joseph, *Purdue Pharma Filed for Bankruptcy. What Does It Mean for Lawsuits Against the Opioid Manufacturer?*, STAT NEWS (Sept. 16, 2019), <https://www.statnews.com/2019/09/16/if-purdue-pharma-declares-bankruptcy-what-would-it-mean-for-lawsuits-against-the-opioid-manufacturer/>.

<sup>52</sup> *See id.* (stating the responses from various state attorneys general).

<sup>53</sup> *Id.*

<sup>54</sup> Colin Dwyer, *Your Guide to the Massive (And Massively Complex) Opioid Litigation*, NPR (Oct. 15, 2019, 9:05 AM), <https://www.npr.org/sections/health-shots/2019/10/15/761537367/your-guide-to-the-massive-and-massively-complex-opioid-litigation>.

<sup>55</sup> *Id.*

<sup>56</sup> *California Governor Rejects PG&E Bankruptcy Reorganization Plan*, CNBC (Dec. 14, 2019, 2:59 AM), <https://www.cnbc.com/2019/12/14/california-governor-rejects-pge-bankruptcy-reorganization-plan.html>.

<sup>57</sup> *Id.*

<sup>58</sup> *See* Mara Silvers, *Adult Victims of Childhood Sex Abuse in New York Can Sue Alleged Abusers*, NPR (Aug. 14, 2019, 5:00 AM), <https://www.npr.org/2019/08/14/750881986/adult-victims-of-childhood-sex-abuse-in-new-york-can-sue-alleged-abusers>.

The idea that victims want to uncover the truth of what happened is commonplace. In addition to the therapeutic effects of bringing suit, discovery can reveal other potential defendants who are liable to the survivors.

USA Gymnastics differs from the Purdue Pharma and PG&E cases in that the damages suffered by the victims are less quantifiable. With Purdue Pharma, the damage can be more easily calculated by tallying medical expenses, drug treatment costs, lost wages, pain and suffering, and funeral expenses. Similarly, PG&E damages would reasonably consist of property damage, medical expenses, pain and suffering, and funeral expenses.

As a side note, organizations typically have insurance that will serve as the means through which victims receive the bulk of their compensation, but the insurance companies may contest the claims.<sup>59</sup> This will also lead to unexpected litigation, as the organization will most likely have to compel the unwilling insurance company to perform on the contract. USA Gymnastics filed suit against seven insurance carriers arguing that the carriers have either not provided a full defense or not fully reimbursed USA Gymnastics for legal costs.<sup>60</sup> The gymnastics organization argues that the insurance companies wrongfully denied coverage and refused to confirm that they will indemnify USA Gymnastics for all of the organization's costs relating to the survivors' suits.<sup>61</sup> In such cases, insurance companies typically refuse to cover the organization because, as the insurance companies claim, the organization acted negligently.<sup>62</sup> Here, at least one carrier refused to provide coverage because USA Gymnastics knew, or should have known, about Nassar's abuse but neglected to protect athletes.<sup>63</sup>

In the USOPC case, Philadelphia Indemnity Insurance Company ("PIIC") asked the District Court of Colorado to rescind its insurance contract with the USOPC claiming that the USOPC concealed material facts with the intent to coerce PIIC to act.<sup>64</sup> Specifically, PIIC's insurance application contained a question asking, "[h]as your organization ever had as [sic] incident which

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<sup>59</sup> Ryan Boysen, *USA Gymnastics Asks for 60 More Days to File Ch. 11 Plan*, LAW360 (Sept. 13, 2019, 2:07 PM), <https://www.law360.com/articles/1198631/usa-gymnastics-asks-for-60-more-days-to-file-ch-11-plan>.

<sup>60</sup> Marisa Kwiatkowski, Tim Evans & Ryan Martin, *USA Gymnastics Sues Insurance Carriers to Compel Coverage in Larry Nassar Lawsuits*, USA TODAY (Apr. 10, 2018, 9:36 PM), <https://www.usatoday.com/story/sports/olympics/2018/04/10/usa-gymnastics-sues-insurance-carriers-compel-coverage-larry-nassar-lawsuits/505519002/>.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Phila. Indem. Ins. Co. v. U.S. Olympic Comm.*, 418 F. Supp. 3d 673, 677 (D. Colo. 2019).

resulted in an allegation of sexual abuse?”<sup>65</sup> USOPC answered by responding, “No. Based on USOPC’s understanding of appropriate definitions of sexual abuse, there have been no incidents.”<sup>66</sup> PIIC claimed that the USOPC controls the NGBs, including USA Gymnastics, to the point of being legally indistinguishable from the NGBs, and therefore knew, or should have known, of the abuse occurring within the gymnastics organization.<sup>67</sup> PIIC argued that if the USOPC had not concealed the abuse occurring at USA Gymnastics, PIIC would not have provided the USOPC with liability insurance to cover “sexual or physical abuse or molestation.”<sup>68</sup>

Similar to the insurance companies in the USOPC case, the insurance companies contracted by USA Gymnastics are unwilling to provide compensation, but it is unlikely that USA Gymnastics’ insurance carriers will refuse to provide coverage on similar grounds.<sup>69</sup> In summary, USA Gymnastics benefits from bankruptcy, not only through its intended uses, but also as a means of preventing investigation and limiting compensation for the victims.

## II. IS BANKRUPTCY BEING ABUSED BY DEBTOR ORGANIZATIONS?

One of the twins aims of bankruptcy is to allow debtors to get a fresh start, but, in these particular cases, is a fresh start the appropriate solution? In cases like USA Gymnastics, the prolonged nature of the abuse can only realistically occur where there is widespread negligence, lack of adequate protections, and a refusal to seriously investigate claims of abuse. While bankruptcy is a viable and often necessary option for organizations faced with financial devastation, in these cases, bankruptcy has the effect of limiting the victims’ compensation and preventing them from obtaining answers as to the organizations’ role in their abuse. Whether filing for bankruptcy was purposefully done by the organization’s leadership as a tactic to deny the victims’ an investigation is irrelevant and would be difficult to determine. Regardless of intent, in these cases, bankruptcy produces unintended negative effects.

During bankruptcy, USA Gymnastics offered to pay \$215 million to settle the survivors’ claim against the gymnastic organization.<sup>70</sup> Under this settlement

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *See id.*

<sup>70</sup> Liz Clark, *USA Gymnastics Offers \$215 Million in Settlement to Larry Nassar Victims*, WASH. POST (Jan. 30, 2020, 7:12 PM), <https://www.washingtonpost.com/sports/2020/01/30/usa-gymnastics-offers-215-million-settlement-larry-nassar-victims/>.

plan, the survivors would vote on whether to accept the settlement or to instead pursue their lawsuits and collect whatever compensation was available from USA Gymnastics' insurers.<sup>71</sup> The settlement offer was squarely rejected by John Manly, an attorney representing some of the gymnasts against USA Gymnastics, who faulted the plan for lacking "critical, structural plans" to ensure the safety of future gymnasts and for ignoring the survivors' requests for the disclosure of the documents related to Nassar's abuse.<sup>72</sup> Compared to the Michigan State settlement agreement, which paid victims of Nassar during his time as an employee of the university, the USA Gymnastics' settlement was much more restrictive.<sup>73</sup>

Manly's critiques make clear that the survivors are not here solely for the money. They seek answers about their abuse to prevent sexual abuse for future gymnasts. Even then, the monetary compensation is insufficient to make the victims whole again, as many of them will deal with lifetime therapy, loss of earnings, and mental anguish.<sup>74</sup> Manly called the settlement offer "unconscionable," which, given the history of USA Gymnastics' bankruptcy, may indicate that the organization is not taking the survivors seriously and is avoiding responsibility through bankruptcy.<sup>75</sup>

The settlement also came under fire by the judge overseeing the bankruptcy proceedings for releasing the USOPC from legal liability despite the "distinct possibility of liability on the part of the USOPC" should civil lawsuits related to the sexual abuse of young gymnasts by Larry Nassar and others proceed.<sup>76</sup> The judge took issue with the settlement agreement's request that the survivors release the USOPC from liability without the USOPC paying anything to survivors.<sup>77</sup> The settlement also ignored questions regarding the extent USA

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

<sup>72</sup> *See id.*

<sup>73</sup> According to the New York Times, the Michigan State settlement had a more serious tone than the USA Gymnastics settlement:

Manly said that the \$500 million settlement that Michigan State paid victims of Nassar, who was an employee of the university, was much different in that it spurred investigations that led to the firing or resignation of university officials, including Lou Anna Simon, the university's president, who now faces criminal charges of lying to the police in the Nassar investigation. Kathie Klages, the university's former gymnastics coach, last month was found guilty of lying to investigators and could face up to four years in prison.

Juliet Macur, *As Gymnasts Who Were Abused Seek Answers, They Are Offered Only Money*, N.Y. TIMES (Mar. 3, 2020), <https://www.nytimes.com/2020/03/03/sports/olympics/biles-gymnastics-settlement-nassar.html>.

<sup>74</sup> *See Clark, supra* note 70.

<sup>75</sup> *See Clark, supra* note 70.

<sup>76</sup> *USA Gymnastics: Judge Says Nassar Settlement is Beneficial*, TROUBLED CO. REP. (Aug. 17, 2020).

<sup>77</sup> The Chief Judge for the U.S. Bankruptcy Court for the Southern District of Indiana, Robert L. Moberly,

Gymnastics, the USOPC, and FBI officials were aware of the predatory behavior of Nassar and others and what steps, if any, they took to conceal that sexual abuse from unknowing potential victims.<sup>78</sup>

In situations like the USA Gymnastics case, organizations can easily abuse the bankruptcy process because the Code allows for anyone to file for chapter 11 and does not require proof of insolvency.<sup>79</sup> While this provides for easier filing, it also becomes a source for abuse by organizations seeking to use bankruptcy for reasons other than those intended by Congress.<sup>80</sup> The inherent nature of bankruptcy and the focus on the financial health of the debtor and reorganization of debts may ultimately be incompatible with the goals of the survivors. Bankruptcy may indeed be necessary for USA Gymnastics and similar organizations to deal with financial distress, but the bankruptcy process clearly results in non-financial effects on sexual abuse survivors that should be avoided as a matter of public policy.

#### A. *Adversarial Nature of the Judicial System*

The adversarial system is a deeply engrained hallmark of American adjudication.<sup>81</sup> The two main justifications for the adversarial system are its focus on uncovering the truth and its preservation of individual dignity.<sup>82</sup> With regard to the first justification, the adversarial system operates under the idea that when each side presents its best case, the decision maker will reach a just result.<sup>83</sup> One prominent criticism of the adversarial system is its potential to

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was cited in the Troubled Company Report as saying:

As I've stated before, I have some attention to the fact that the USOPC is reaping the full benefits of gathering all of these tort suits in this forum, in the bankruptcy of USAG and not having to go through it themselves, not having to pay for it and what little did I know which is not everything is that there certainly is a distinct possibility of liability on the part of USOPC themselves so they are getting an enormous benefit. . . .

*Id.*

<sup>78</sup> *Id.*

<sup>79</sup> See Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L.J. 301, 301 (1989) ("The hallmark of American adjudication is the adversary system. The virtues of the adversary system are so deeply engrained in the American legal psyche that most lawyers do not question it.").

<sup>80</sup> See Greg M. Zipes, *After Amchem and Ahearn: The Rise of Bankruptcy over the Class Action Option for Resolving Mass Torts on a Nationwide Basis, and the Fall of Finality?*, 1998 DET. C.L. REV. 7, 50 (1998) ("Interestingly, the bankruptcy cases that have spawned the most mass tort case law were filed by corporations that arguably are not insolvent. Attorneys saw the use of bankruptcy as an opportunity to resolve specific problems.").

<sup>81</sup> Sward, *supra* note 79, at 307.

<sup>82</sup> Sward, *supra* note 79, at 316–17.

<sup>83</sup> Sward, *supra* note 79, at 316–17.

obscure the truth by encouraging people to actively conceal relevant facts that could lead to a more accurate portrayal of the case.<sup>84</sup>

The second justification for the adversarial system is the system's preservation of individual dignity by allowing each side to have free rein in presenting its case before the court.<sup>85</sup> However, laypeople also criticize the legal system because of the system of ethics that attorneys operate under when representing clients, causing the clients to "lose control of their attorney."<sup>86</sup> In the context of mass tort claims with large numbers of injured parties, the adversarial system's focus on individualized justice is not practical, especially when attempting to deal with claims quickly and efficiently.<sup>87</sup>

The adversarial system is arguably unsuitable for resolving disputes involving many parties with many possible outcomes.<sup>88</sup> For example, a dispute over the distribution of one painting between several competing claimants will necessarily affect each party because the final distribution will alter the painting's availability for distribution to all the claimants.<sup>89</sup> Furthermore, the adversarial process may force the decisionmaker to put a monetary value on the painting and attempt to distribute money between the claimants.<sup>90</sup> In this approach, the arbitrary monetary value does not consider each claimant's individual value of the painting and ultimately acts as a surrogate for a true remedy because the court is incapable of deciding the central question: who deserves to keep the painting.<sup>91</sup> The adversarial system within the context of bankruptcy becomes even more problematic.

Here, the USA Gymnastics bankruptcy presents similar issues. For one, USA Gymnastics survivors' claims against the organization are mostly grouped together, meaning that the final decision regarding a settlement will affect each of the survivors and require the approval of the members. Some members may opt out of class membership to pursue their claim individually, but they run the risk of receiving a smaller payout than the class members. The victims also differ from other usual creditors in chapter 11 bankruptcies, as these claimants are made up of victims of sexual abuse by a USA Gymnastics employee, whereas other creditors of chapter 11 bankruptcies will typically include institutions

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<sup>84</sup> Sward, *supra* note 79, at 317.

<sup>85</sup> Sward, *supra* note 79, at 317–18.

<sup>86</sup> Sward, *supra* note 79, at 318–19.

<sup>87</sup> Zipes, *supra* note 80, at 14.

<sup>88</sup> Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 20 (1982).

<sup>89</sup> *Id.*

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

<sup>91</sup> *Id.*



providing business loans, companies providing business equipment, or other businesses the debtor has yet to pay for services rendered. It is important to consider not only how the goals of the victims will conflict with other creditors and the debtor organization, but also how the goals of the individual victims might conflict with one another. After all, it is unlikely that the organization will be able to fully compensate all its creditors, including the victims of sexual abuse.<sup>92</sup>

Furthermore, one important distinction involves the nature of the bankruptcy court, which focuses on debt and financial failure. Unlike other creditors, the survivors will have goals other than simply ensuring they receive a substantial distribution of the estate. The survivors want to hold the organization accountable for its negligence, and as discussed further below, the discovery process of bankruptcy and the automatic stay make improbable the possibility that the victims will receive the answers they seek.

This presents a dilemma for the survivors. If they decide to receive a settlement through bankruptcy, then they will be able to close this traumatic chapter of their lives sooner, but they may never be able to hold the organization accountable, and there remains the potential that future victims may suffer abuse. The survivors may also agree to a settlement in bankruptcy, only to discover down the line that the compensation is insufficient to cover their injuries and mental anguish.

On the other hand, the survivors can choose to wait until bankruptcy proceedings are completed to continue with litigation. This will require them to spend much more time dealing with their trauma, and they may still not receive the answers they seek, given that bankruptcy proceedings can take several months or even years before a plan is confirmed. During this time, evidence may be lost, witnesses' memories may fade, and the survivors may want to move on with their lives, further diminishing the chances that they will get answers from the organization. Regardless of their decision, it appears that the survivors may not find the justice they seek.<sup>93</sup>

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<sup>92</sup> McNeely, Saul & Novy-Williams, *supra* note 35 (“[I]n court filings, USAG said there may not be enough to go around. It estimated the potential impact of these lawsuits at \$75 million and \$150 million, while the organization has assets of just \$6.5 million in cash and investments, and said that the insurance policy might prove insufficient”).

<sup>93</sup> See Zachary Zagger, *Nassar Accusers Seek Answers Amid USA Gymnastics Ch. 11*, LAW360 (Feb. 7, 2019, 8:27 PM), <https://www.law360.com/articles/1126933/nassar-accusers-seek-answers-amid-usa-gymnastics-ch-11> (“USAG ‘provided no answers . . . I think the survivors came away with a sense that they are trying to go through the motions and that they think they can fool the court and get away with this and pay the survivors close to nothing.’”).

### B. *Mass Tort Claims are Difficult to Settle Even in Bankruptcy*

While bankruptcy courts are accustomed to handling a large number of claims, mass tort claims have presented complicated problems that bankruptcy courts are not fully equipped to handle.<sup>94</sup> The focus on speed and finality proves even more problematic for mass tort claims where the victims' injuries might not fully manifest for years.<sup>95</sup> Some features of the bankruptcy process are better suited for resolving mass torts compared to class action lawsuits. But bankruptcy's focus on finality and speed coupled with the large number of claims by creditors create conflict when courts attempt to be fair to future claimants while also affording finality to the debtor-organization and the creditors.<sup>96</sup> The Code provides for the appointment of a future claims representative to protect their interests under section 524(g)(4)(B)(i). A collective process that commences well before the damages or injuries develop might be the only opportunity for future claimants to receive any compensation, both because early claimants may take all the assets or the company's extraordinary liability may dry up access to all capital.<sup>97</sup>

Some aspects of bankruptcy procedure—the ability to handle a large number of claims, judicial activism, and expansive definition of a claim—make bankruptcy a more suitable venue for handling mass tort claims. First, the very nature of bankruptcy involves multiple creditors collectively pursuing assets of the debtor; in this sense, bankruptcy focuses more on the rights of groups rather than those of individuals.<sup>98</sup> Conflicts of interest arise in bankruptcy cases when the interests of the individual creditors do not perfectly align with one another.<sup>99</sup> Second, because of bankruptcy's focus on promptly administering the estate, bankruptcy judges often proactively intervene at all stages of the proceeding in a way that is unheard of in the greater civil adversary system.<sup>100</sup> Third, under the

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<sup>94</sup> Zipes, *supra* note 80, at 10.

<sup>95</sup> Zipes, *supra* note 80, at 11–12.

<sup>96</sup> Zipes, *supra* note 80, at 11–12.

<sup>97</sup> G COLLIER ON BANKRUPTCY ¶ 1 (16th ed. 2020).

<sup>98</sup> See Zipes, *supra* note 80, at 43–44.

<sup>99</sup> On the conflicts of interest that arise in a bankruptcy case, Zipes notes:

[A]lliances shift in the middle of the case, depending on the issues. Creditors may be allied against the debtor in, say, trying to bring the debtor to heel. But creditors and the debtor may be allied with each other in trying to maximize the return from the estate. As if this weren't complicated enough, the Bankruptcy Code goes even further. That is, at one point the Bankruptcy Code permits one person to occupy a dual role.

Zipes, *supra* note 80, at 51.

<sup>100</sup> See Zipes, *supra* note 80, at 53–54.

Code, almost any claim can be reduced to a dollar amount, even if the claim is unliquidated, contingent, unmatured, or disputed.<sup>101</sup>

On the other hand, the bankruptcy process makes it difficult to estimate future claims, and bankruptcy judges may misjudge the number and types of future claims.<sup>102</sup> Asbestos provides a classic example. In *In re Johns-Manville Corporation*, the entity filed for chapter 11 bankruptcy following an increased number of current and future tort claims against it for causing exposure to asbestos.<sup>103</sup> As part of its chapter 11 plan, Johns-Manville created the Asbestos Health Trust as the sole fund through which present and future asbestos victims could satisfy their claims.<sup>104</sup> Even though the trust ran afoul of the bankruptcy priority scheme, the trust was deemed to be the only practical solution at the time and was therefore recognized as valid by Congress.<sup>105</sup> The trust was proposed despite the parties' knowledge that the fund would be insufficient to pay all the claimants, but there were no other alternatives.<sup>106</sup> Inevitably the trust ran out of money, and the parties struggled to find a solution to this dilemma, with many claimants not receiving compensation.<sup>107</sup> While the plan was not technically modified, the presiding judge approved a class action settlement that revised rights to the trust that would increase trust assets, thereby modifying the claim in effect.<sup>108</sup>

Prior to the Bankruptcy Reform Act of 1994, courts reached vastly different determinations about the ability to treat and discharge future claims in bankruptcy.<sup>109</sup> Since the early 1980s, a large handful of courts have presided over cases dealing with uncertain future liabilities, and some have confirmed plans using channeling injunctions to protect the reorganized entity against individual collection attempts while providing a pool of resources for the claimants' treatment.<sup>110</sup> But because the Bankruptcy Code did not contain express authorization for these procedures, the resulting uncertainty over the legality of the resolutions restricted access to capital and depressed public stock

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<sup>101</sup> See Zipes, *supra* note 80, at 47 (citing 11 U.S.C. § 101(5) (2019)).

<sup>102</sup> See Zipes, *supra* note 80, at 57.

<sup>103</sup> Zipes, *supra* note 80, at 57–58 (citing *In re Johns-Manville Corp.*, 68 B.R. 618, 621 (Bankr. S.D.N.Y. 1986)).

<sup>104</sup> Zipes, *supra* note 80, at 58.

<sup>105</sup> Zipes, *supra* note 80, at 58.

<sup>106</sup> Zipes, *supra* note 80, at 59.

<sup>107</sup> Zipes, *supra* note 80, at 58.

<sup>108</sup> Zipes, *supra* note 80, at 58.

<sup>109</sup> G COLLIER ON BANKRUPTCY ¶ 1 (16th ed. 2020).

<sup>110</sup> *Id.*

value.<sup>111</sup> In response, Congress enacted amendments in the Bankruptcy Reform Act of 1994 to provide explicit legislative guidance to ensure equitable treatment of mass future asbestos claimants in bankruptcy.<sup>112</sup> The “asbestos amendments” led to the realization that products other than asbestos could give rise to massive liability issues.<sup>113</sup> The USA Gymnastics case presents a similar future claimants problem. A large number of survivors of sexual abuse have filed proofs of claim. It is likely that a number of other survivors have not filed a proof of claim either because they are not prepared to expose themselves as survivors of sexual abuse or because they do not know that the bankruptcy is happening. One method for USA Gymnastics to handle the potential claims of sexual abuse is to establish a fund similar to the Asbestos Health Fund created in the Johns-Manville bankruptcy. This might not fully compensate the victims and could potentially result in issues similar to those that arose after the John-Manville plan was confirmed, but it would be a good faith effort to adequately compensate the victims for their injuries.

An additional solution would be to allow the survivors to file a claim anonymously, similar to an individual who files a lawsuit as a “Jane Doe.” By borrowing from other areas of law that provide special protections to victims of sexual abuse, the bankruptcy process can better accommodate the unique concerns of victims.

A further issue with bankruptcy is the amount of time a mass tort case may remain in bankruptcy proceedings.<sup>114</sup> In *In re Dow Corning Corporation*, testimony revealed that mass tort bankruptcy cases involving public companies with greater than \$100 million in assets tended to linger in chapter 11 bankruptcy for many years before confirmation.<sup>115</sup> As long as bankruptcy proceedings may take, it is important to note that class action lawsuits are no quicker.<sup>116</sup>

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<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* (Similar mass liability issues have already arisen in the context of intrauterine devices, polybutylene pipe, lead-related injuries, and silicone implants.)

<sup>114</sup> Zipes, *supra* note 80, at 57–58 n. 213.

<sup>115</sup> Zipes, *supra* note 80, at 57–58 n. 213.

<sup>116</sup> Zipes, *supra* note 80, at 57–58 n. 213 (“UNR Industries, Inc., for example, stayed in bankruptcy for 80 months prior to confirmation . . . Of course, class action cases are no better. The *Ahearn* settlement is now approaching its sixth year of uncertainty.”) (citing *Does Exclusivity Foster Chaos or Cooperation?*, BANKR. CT. DECISIONS WKLY. NEWS & COMMENT, June 16, 1998, at A11) (discussing *In re Dow Corning Corp.*, 211 B.R. 545 (Bankr. E.D. Mich. 1997)).

### C. *The Automatic Stay*

The filing of a bankruptcy petition operates as an automatic stay of the commencement or continuation of any judicial, administrative, or other action or proceeding against the debtor that was, or could have been, commenced before the commencement of the case.<sup>117</sup> The automatic stay remains in effect until either: (1) the case is closed; (2) the case is dismissed; or (3) a discharge is granted or denied.<sup>118</sup>

The automatic stay is an important feature of bankruptcy because it prevents the diminution or dissipation of the debtor's estate and enables the debtor to avoid the multiplicity of claims against the estate arising in different forums.<sup>119</sup> Here, USA Gymnastics' bankruptcy filing on December 5, 2018 automatically halted the lawsuits by Nassar's victims against USA Gymnastics and the USOPC's decertification process of USA Gymnastics.<sup>120</sup>

With regards to the lawsuits by the survivors, the automatic stay will not only prolong the time that victims will have to wait in order to receive compensation, but it will also prolong discovery of the role USA Gymnastics and others played in the plaintiffs' abuse by Nassar. Because the filing of the bankruptcy petition automatically stayed the victims' litigation, the survivors will be unable to gather information or interview witnesses about USA Gymnastics through discovery. This is significant because the victims filed their suits with a goal greater than financial compensation; namely, they sought to expose the organization responsible for allowing Nassar to abuse gymnasts for decades.<sup>121</sup> By exposing the organization for its alleged negligence, victims could potentially uncover other sources from which to seek damages and would simultaneously gain peace of mind.

The more obscure effect of the automatic stay presented itself when the USOPC temporarily halted its decertification process of USA Gymnastics. Initially, the USOPC claimed that its decertification process would not be affected by the bankruptcy filing because the automatic stay did not apply.

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<sup>117</sup> 11 U.S.C. § 362(a)(1) (2019).

<sup>118</sup> *Id.* § 362(c)(2).

<sup>119</sup> *In re Planned Sys., Inc.*, 78 B.R. 852, 857 (Bankr. S.D. Ohio 1987).

<sup>120</sup> See *In re USA Gymnastics*, No. 1:18-bk-09108 (Bankr. S.D. Ind. Dec. 5, 2018); see also Nancy Armour & Rachel Axon, *USA Gymnastics Finds A Solution for Its Worst Problems, But It Might Create New Ones*, USA TODAY (Dec. 5, 2018 7:11 PM), <https://www.usatoday.com/story/sports/olympics/2018/12/05/usa-gymnastics-bankruptcy-filing-solution-problems/2221078002/>.

<sup>121</sup> Michael McCain, *How USA Gymnastics' Bankruptcy Petition Impacts Larry Nassar Survivors*, SPORTS ILLUSTRATED (Dec. 6, 2018) <https://www.si.com/olympics/2018/12/07/usa-gymnastics-files-for-backruptcy-larry-nassar>.

Nevertheless, the USOPC decided not to move forward with its decertification process, instead waiting until the end of USA Gymnastics' bankruptcy to make any further decision. USA Gymnastics has taken this failure to act as indication that it will be allowed to keep its NGB status, allowing USA Gymnastics to continue with its plan to hold the 2020 Olympic trials in St. Louis.<sup>122</sup> A later settlement proposed by USA Gymnastics to address the victims' claims would release the USOPC from any liability related to the sexual abuse of gymnasts, but the settlement did not require Olympic or gymnastic officials to disclose any more information that would explain how the abuse at USA Gymnastics continued for so long.<sup>123</sup>

In sum, bankruptcy has provided USA Gymnastics more than just the opportunity for financial restructuring; their bankruptcy filing prevented the survivors from engaging in discovery that could potentially tarnish the reputation of the once prestigious organization even further. Additionally, the filing allowed USA Gymnastics to retain its NGB status, ensuring that USA Gymnastics will continue to receive funding from the USOPC and remain the international representative for the United States. While continued funding for USA Gymnastics *might* result in more money for the survivors, there is no guarantee that the organization will be willing to give up its windfall to the survivors.

#### *D. Filing Period Places Undue Burden on Survivors*

On February 25, 2019, the bankruptcy court entered a Bar Date Order establishing certain claims bar dates in the USA Gymnastics chapter 11 bankruptcy.<sup>124</sup> This notice established April 29, 2019 at 4:00 P.M. EST as the date by which sexual abuse claims must be filed.<sup>125</sup> The notice, in relevant part, states “[t]he Bar Date Order requires that Survivors holding prepetition claims arising from sexual abuse for which they believe the Debtor may be liable must file proofs of claim. . . .”<sup>126</sup> The debtor sent notice to all known counsel for sexual abuse claimants, emailed notice to more than 360,000 email addresses for former and current USA Gymnastic members, and placed the notice on its website, Facebook, Twitter, and Instagram.<sup>127</sup> While over 350 women came

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<sup>122</sup> Armour, *supra* note 24.

<sup>123</sup> See Macur, *supra* note 73.

<sup>124</sup> *In re* USA Gymnastics, No. 18-09108-RLM-11, 2020 Bankr. LEXIS 1090, at \*2 (Bankr. S.D. Ind. Apr. 20, 2020).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at \*4.

forward accusing Nassar of sexual abuse, it is possible that some victims will miss the deadline and never receive justice. This scenario has, in fact, already happened.<sup>128</sup>

The bankruptcy court rejected a bid to be included in the civil claims against USA Gymnastics filed by Terin Humphrey, a two-time Olympic medalist.<sup>129</sup> Humphrey's filing was opposed by attorneys for the Committee of Sexual Abuse Survivors because she filed after the bar date.<sup>130</sup> The attorneys for the Committee of Sexual Abuse Survivors also asked the court to reject a similar motion by an unnamed survivor.<sup>131</sup> Humphrey stated that she missed the filing deadline because "[she] did not come to terms with her sexual assault until memories of the abuse were triggered by treatment for her pregnancy in 2019 and [she] was unable to even tell her husband about the abuse until June 2020."<sup>132</sup>

It is important to note that the order does not simply bar claims by survivors of sexual abuse committed by Larry Nassar; rather, the order will bar any sexual abuse claims by any survivor that has a prepetition claim for which USA Gymnastics may be liable.<sup>133</sup> While Nassar's case has become the most publicized case of sexual abuse involving USA Gymnastics, it is certainly not the only case.

As early as 1998, USA Gymnastics received complaints about William McCabe, a gymnastics coach who pleaded guilty in 2006 to federal charges of sexual exploitation of children and making false statements.<sup>134</sup> An investigation

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<sup>128</sup> See Scott Reid, *Court Rejects Terin Humphrey Bid to Join Nassar Case, Citing Missed Filing Deadline*, ORANGE CNTY. REP. (Aug. 26, 2020, 5:32 PM), <https://www.pe.com/2020/08/26/court-rejects-terin-humphrey-bid-to-join-nassar-case-citing-missed-filing-deadline/>.

<sup>129</sup> See *id.*

<sup>130</sup> See *id.* ("The only reason why this late claim was not accepted is because the survivor committee objected," Robert Allard, an attorney for Humphrey, said in an email. "No one else had the audacity to make such a move, including, tellingly, USAG").

<sup>131</sup> Reid describes the motion and the reasoning of the USA Gymnastics attorneys as thus:

In asking the court to reject the motions by Humphrey and the unnamed gymnast, Stang and Theisen [attorneys for the Committee of Sexual Abuse Survivors] wrote "There is also a risk of opening the floodgates to additional claims if any late claims are treated as timely at this late stage of the case, there is risk that additional survivors may come forward at this time. Based on negotiations, the Survivors' Committee believes that allowing additional claims will reduce amounts available to pay survivors who filed timely claims prior to the start of mediation."

*Id.*

<sup>132</sup> *Id.*

<sup>133</sup> See Notice of Bar Date for Filing Sexual Abuse Claims at 2, *In re USA Gymnastics* (S.D. Ind. filed Dec. 5, 2018) (No. 18-09108-RLM-11) (the bar date does not limit claims only against Nassar, instead against USA Gymnastics itself).

<sup>134</sup> Marisa Kwiatkowski, Mark Alesia & Tim Evans, *A Blind Eye to Sex Abuse: How USA Gymnastics*

into William McCabe ultimately resulted in Nassar's decades-long abuse coming to light.<sup>135</sup> Several other coaches had been reported to USA Gymnastics for their inappropriate conduct, and USA Gymnastics—even after these reports—failed to take steps to prevent further abuse.<sup>136</sup> It is unclear how engrained the abuse of gymnasts became within USA Gymnastics, but the bar order makes clear that after April 29, 2019, any prepetition survivor who has not filed a claim will be “forever barred, estopped, and enjoined from asserting such sexual abuse claim against [USA Gymnastics], and [USA Gymnastics] and its property will be forever discharged from any and all indebtedness or liability with respect to or arising from that sexual abuse claim.”<sup>137</sup>

This notice, as part of the bankruptcy proceedings, forces survivors to make an important decision in a small window of time. The claim form allows for the survivors to have their claim kept confidential, but the filing will require the victim to make known to the people in her life that she was a victim of sexual abuse, a confession that some survivors might not be prepared to make.<sup>138</sup> While the filing period in a typical chapter 11 bankruptcy ensures a timely reorganization, here the filing period has the unintended effect of requiring victims, often children, to come to terms with and disclose their abuse in spite of the physical and psychological torment they have been subjected to.

While USA Gymnastics entered into bankruptcy because of the lawsuits against the organization arising out of the criminal conduct of Nassar, the organization gets the benefit of washing its hands of all claims of sexual abuse that occurred prior to the filing of the bankruptcy petition. Any claim that is filed will receive compensation through the bankruptcy proceedings. On the other hand, USA Gymnastics has an opportunity to limit its liability by forcing survivors of sexual abuse to confront their abuse quickly or forfeit the right to bring a sexual abuse claim against the organization. Again, USA Gymnastics uses the bankruptcy system to limit its liability for negligence by preventing future survivors from filing claims for their negligence.

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*Failed to Report Cases*, INDYSTAR (June 24, 2020, 9:46 AM), <https://www.indystar.com/story/news/investigations/2016/08/04/usa-gymnastics-sex-abuse-protected-coaches/85829732/>.

<sup>135</sup> See Marisa Kwiatkowski & Tim Evans, *USA Gymnastics Settles Lawsuit That Started IndyStar Investigation into Sex Abuse*, INDYSTAR (Apr. 20, 2018, 11:55 AM), <https://www.indystar.com/story/news/2018/04/20/usa-gymnastics-settles-lawsuit-started-indystar-investigation-into-sex-abuse/419972002/>.

<sup>136</sup> See Kwiatkowski, Alesia & Evans, *supra* note 134.

<sup>137</sup> Notice of Bar Date for Filing Sexual Abuse Claims at 2, *In re USA Gymnastics* (S.D. Ind. filed Dec. 5, 2018) (No. 18-09108-RLM-11).

<sup>138</sup> See *id.* (providing an option for confidentiality on the form).



The filing notice sparked a lawsuit in Indianapolis state court where plaintiffs claimed that USA Gymnastics knows or should know the identities of many abuse survivors who had not filed claims by the deadline.<sup>139</sup> The suit specifically alleged that USA Gymnastics kept records on coaches accused of abusing athletes and that these records would reveal the identities of individuals who experienced sexual abuse at USA Gymnastics by someone other than Larry Nassar.<sup>140</sup>

### III. SEXUAL ABUSE SURVIVORS ARE A UNIQUE CLASS WARRANTING SPECIAL PROTECTIONS IN BANKRUPTCY PROCEEDINGS

It would be irresponsible to delve into the need for special protection for sexual abuse victims in bankruptcy without a detailed discussion of sexual abuse laws in the United States. Survivors of sexual abuse are a unique class of individuals that have historically received distinct protection through courts and by statute. These protections are especially strong when the survivors are young children. Bankruptcy processes should similarly recognize the need for special procedures for sexual abuse victims, especially where a significant portion of the creditors' claims are based on the creditors' sexual abuse.

It is important to recognize the emotional, mental, and physical anguish suffered by victims of sexual abuse. Justice White characterized rape as the "ultimate violation of self . . . There is no other crime in which the victim risks being blamed and in so insidious a way."<sup>141</sup> Victims of rape often suffer for the rest of their lives from the trauma of the experience and are more likely to become depressed, abuse drugs and alcohol, and commit suicide.<sup>142</sup> Testifying in court may also further traumatize victims by forcing them to relive the details of their abuse, which can be especially traumatic for younger victims.<sup>143</sup> On top of this mental toll, victims worry about the public attention that they might receive should their identity be disclosed through the media.<sup>144</sup> Victims who

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<sup>139</sup> Associated Press, *Suit Against USA Gymnastics Seeks Help for Abused Gymnasts*, INDIANAPOLIS BUS. J. (May 1, 2019), <https://www.ijb.com/articles/73565-suit-against-usa-gymnastics-seeks-help-for-abused-gymnasts>.

<sup>140</sup> *See id.*

<sup>141</sup> Daniel M. Murdock, Comment, *A Compelling State Interest: Constructing a Statutory Framework for Protecting the Identity of Rape Victims*, 58 ALA. L. REV. 1177, 1179 (2007) (quoting *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (White, J. writing for the Court)).

<sup>142</sup> Hannah R. Norman, Note, *Adult Rape Victims Need Protection Too: The Application of Closed Circuit Television and the Exception from Maryland v. Craig to Adult Rape Victim Testimony*, 55 WASHBURN L.J. 701, 701 (2016).

<sup>143</sup> *See id.*

<sup>144</sup> *See* Murdock, *supra* note 141, at 1177 ("86% of the surveyed group thought that rape victims would

report their abuse may also face retaliation from their abuser.<sup>145</sup> In one case, a victim received several death threats after reporting her rape, and an investigation revealed a credible plan to kill the accuser for financial gain.<sup>146</sup> This troubling reality may explain why rape continues to be the most underreported crime within the criminal justice system.<sup>147</sup>

Rape laws have a long and complicated history. English common law, the foundation of our current rape laws, used rape laws to keep women as the sexual objects of men and regulate the sexuality of women.<sup>148</sup> Early English male-dominated society perceived women as “untrustworthy and seductive[.]” and the laws reflected skepticism toward the seriousness of rape.<sup>149</sup>

Beginning in the 1970s, feminists and scholars worked to increase rape reporting, create equal treatment of rape under the law in comparison to other crimes, improve treatment of victims within the justice system, and expand the range of victims covered under rape laws.<sup>150</sup> Addressing the growing public concern, many states and courts implemented protective measures for rape victims.

The legislative process has been used to protect the survivors of sexual abuse. Over the years, Rape Shield law tried various methods to protect rape accusers. Initially, Rape Shield laws aimed to limit the media’s ability to disseminate information identifying a rape accuser, but these laws were ultimately held unconstitutional under the First Amendment and were repealed.<sup>151</sup> A second form of Rape Shield laws have been adopted by every state to bar the admission of the complainant’s sexual history as evidence at trial.<sup>152</sup> This has been codified into the Federal Rules of Evidence as Rule 412, which declares inadmissible any evidence of the alleged victim’s past sexual behavior or sexual predisposition in criminal proceedings involving alleged sexual misconduct.<sup>153</sup> These laws recognize how rape trials can devolve into inquisitions into the victim’s morality and deviate from a pure determination of

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be less likely to report rapes if those victims believed that the news media would disclose their names.”) (internal quotations omitted).

<sup>145</sup> See Murdock, *supra* note 141, at 1179.

<sup>146</sup> See Murdock, *supra* note 141, at 1179 (citing *People v. Bryant*, 94 P.3d 624, 636 n. 12 (Colo. 2004)).

<sup>147</sup> See Murdock, *supra* note 141, at 1198.

<sup>148</sup> Emily Pedersen, Comment, *The New Rape: Proposal of a Comprehensive Rape Law Reform to Increase Rape Convictions in Cases of Acquaintance Rape*, 84 U.M.K.C. L. REV. 1111, 1115 (2016).

<sup>149</sup> See *id.*

<sup>150</sup> *Id.* at 1116–17.

<sup>151</sup> See Murdock, *supra* note 141, at 1180–81.

<sup>152</sup> See Bennett Capers, *Rape, Truth, and Hearsay*, 40 HARV. WOMEN’S L.J. 183, 185 (2017).

<sup>153</sup> See *id.* at 203.

the defendant's guilt or innocence.<sup>154</sup> But these Rape Shield laws have not provided the protection advocates envisioned, as jurors may still impute their assumptions and stereotypes of the victims and invent the victims' sexual histories for themselves.<sup>155</sup>

Despite constitutional challenges, courts have attempted and, in some cases, succeeded in providing rape victims with additional protection. In *Ohio v. Clark*, a three-year-old reported to his daycare teacher that he was being abused by his mother's boyfriend.<sup>156</sup> The child was deemed too young to testify, and the defendant argued that the statements by the victim to his teacher should not be admissible because it would violate his constitutional right to due process. The Supreme Court disagreed; "statements by very young children will rarely, if ever, implicate the Confrontation Clause."<sup>157</sup>

In another case involving rape victims and the Confrontation Clause, the Supreme Court carved out an exception that would allow child victims of sexual abuse to testify behind a one-way closed-circuit television.<sup>158</sup> In *Maryland v. Craig*, a Maryland statute allowed for a child victim to testify in this manner if the trial judge determined that the testimony by the child victim in the courtroom would result in the child suffering serious emotional distress such that the child could not reasonably communicate.<sup>159</sup> The Supreme Court noted that the state had an interest in protecting child abuse victims from the emotional stress of testifying, and therefore the use of a one-way closed-circuit television for child witnesses was constitutional.<sup>160</sup>

The Victims of Crime Act of 1984 created the Crime Victims Fund to provide assistance to victims and victim service providers and would be paid through fines that perpetrators would pay as part of their sentence.<sup>161</sup> To ensure

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<sup>154</sup> *Id.*

<sup>155</sup> Stereotypes in the rape context tend to fall on ethnic and racial lines:

While white women who presented as demure may fit the script of a "good girl" and thus benefit from rape shield's protections, women who do not fit this script, and men, may not. Jurors may assume an Asian woman is "exotically sexual and willingly submissive" or a Hispanic woman is hotblooded, "wanton and promiscuous" . . . rape shields are likely particularly ineffective in cases involving black women, given the long history associating black women with sexual accessibility and with being "unrapeable."

*Id.* at 209–10.

<sup>156</sup> *See Ohio v. Clark*, 135 U.S. 2173, 2175–76 (2015).

<sup>157</sup> *Id.* at 2182.

<sup>158</sup> Norman, *supra* note 142, at 707.

<sup>159</sup> Norman, *supra* note 142, at 707.

<sup>160</sup> *See Norman, supra* note 142, at 708.

<sup>161</sup> 34 U.S.C. § 20101(b) (2018).

that defendants do not purposefully deplete their wealth, the court will typically freeze the alleged perpetrator's assets.<sup>162</sup> In one case, the defendant challenged the court's power to freeze defendants' assets as unconstitutional.<sup>163</sup> The Supreme Court upheld this asset-freezing power of the court, citing the strong governmental interest in obtaining full recovery of forfeitable assets.<sup>164</sup>

The Code was not created with situations like USA Gymnastics in mind, and revision to the Code may be necessary to properly protect the victims as creditors. The bankruptcy courts are courts of equity and are guided by equitable doctrines and principles unless they are inconsistent with the Bankruptcy Act.<sup>165</sup> Courts of equity may grant or deny relief upon performance of a condition that will safeguard the public interest.<sup>166</sup>

This is not to suggest that bankruptcy courts have not attempted to protect victims of sexual abuse, but their efforts have not sufficiently provided the vulnerable claimants with adequate support. For this reason, the Code should be amended to provide a special exception to allow sexual abuse claimants to conduct a full investigation into the debtor organization.

#### IV. THE BANKRUPTCY CODE'S ATTEMPTS TO REPRESENT VICTIMS' INTEREST

Creditor committees have specific powers that allow them to represent the creditors' interests as a conglomerate in bankruptcy cases.<sup>167</sup> "A creditors committee can act as a foil to the debtor, sometimes bringing claims against a debtor's insiders that the debtor may not be motivated to pursue."<sup>168</sup> Creditor

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<sup>162</sup> Kaley v. U.S., 571 U.S. 320, 322 (2014) (citing 21 U.S.C. § 852(e)(1) (2018)).

<sup>163</sup> See *id.*

<sup>164</sup> *Id.* at 323.

<sup>165</sup> SEC v. U.S. Realty & Improvement Co., 310 U.S. 434, 455 (1940).

<sup>166</sup> *Id.*

<sup>167</sup> Committees have the power to:

- (1) consult with the trustee or debtor in possession concerning the administration of the case; (2) investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan; (3) participate in the formulation of a plan, advise those represented by such committee of such committee's determinations as to any plan formulated, and collect and file with the court acceptances or rejections of a plan; (4) request the appointment of a trustee or examiner under section 1104 of this title; and (5) perform such other services as are in the interest of those represented.

11 U.S.C. § 1103(c) (2019).

<sup>168</sup> Daniel Gill, *Aly Raisman Named to Abuse Survivor Panel in USA Gymnastics Case*, BLOOMBERG LAW (Dec. 20, 2018, 5:26 PM), <https://news.bloomberglaw.com/bankruptcy-law/aly-raisman-named-to-abuse-survivor-panel-in-usa-gymnastics-case>.

committees are also “important for negotiating or litigating over a proposed plan of reorganization, sometimes even writing a plan of their own.”<sup>169</sup>

Attorneys for the creditor’s committee are paid directly from the bankruptcy estate, making it easier for the survivors to get representation in the bankruptcy proceedings.<sup>170</sup> The main issue with creditor committees is that they are bound by the rules of the bankruptcy court, and therefore their power focuses on the financial aspects of the debtor. Creditor committees hold the power to conduct investigations into the financial affairs of the debtor and into the officers and management of the debtor.<sup>171</sup> Under Federal Rule of Bankruptcy Procedure 2004, on motion of any party in interest, the court may order examination of any entity so long as such examination relates only to the acts, conduct, or property or to the liabilities and financial condition of the debtor.<sup>172</sup> While the inquiry under Rule 2004 is generally permitted great latitude, Rule 2004 examinations are conducted for the purpose of discovering assets and unearthing fraud; these examinations, however, cannot delve into matters not tethered to discovering assets or unearthing fraud.<sup>173</sup> The Rule 2004 examination also may not be used for the purposes of abuse or harassment.<sup>174</sup> As discussed below, a broad interpretation of Rule 2004 may provide victims with the investigation they desire.

In the USA Gymnastics case, the U.S. Trustee created the Additional Tort Claimants Committee of Sexual Abuse Survivors (“the Survivors Committee”) to represent the interests of the 350 athletes pursuing substantially similar claims against USA Gymnastics.<sup>175</sup> The Survivors Committee is made up of nine former gymnasts charged to represent the interests of the survivors of sexual abuse committed by Nassar.<sup>176</sup>

At the initial creditors meeting, the Survivors Committee was able to confront USA Gymnastics by directly questioning the organization’s chief

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<sup>169</sup> *Id.*

<sup>170</sup> *Id.*; see FED. R. BANKR. P. 2016(a). This is particularly important because unsecured creditors, individually, typically are subject to the treatment of the bankruptcy estate with no recourse. Creditor’s committees, in this way, provide unsecured creditors a seat at the bargaining table.

<sup>171</sup> 11 U.S.C. § 1103(c)(2) (2020).

<sup>172</sup> FED. R. BANKR. P. 2004(a)–(b).

<sup>173</sup> 9 COLLIER ON BANKRUPTCY ¶ 2004.01(1) (16th ed. 2020).

<sup>174</sup> *Id.*

<sup>175</sup> See Gill, *supra* note 168; see also 11 U.S.C. § 1102(a)(1) (2019) (“the United States trustee shall appoint a committee of creditors holding unsecured claims and may appoint additional committees of creditors or of equity security holders as the United States trustee deems appropriate.”).

<sup>176</sup> *Id.*; see 7 COLLIER ON BANKRUPTCY ¶ 1103.05 (16th ed. 2020) (“Section 1103(c) sets forth some of the powers and duties of an official committee in a chapter 11 case”).

financial officer and challenging certain financial disclosure.<sup>177</sup> But even with the power vested in the Survivors Committee, there is no guarantee that USA Gymnastics will provide answers as to how the survivors' abuse continued for as long as it did and who else should be held responsible.

Some of the Survivors Committee members expressed dissatisfaction with the creditors' meeting after the chief financial officer was unable to answer many of their questions.<sup>178</sup> He could not answer many of their questions relating to the organization's knowledge of the historical abuse that occurred because, according to him, he had only been appointed USA Gymnastics' financial chief in July 2018.<sup>179</sup> This points to an issue with bankruptcy proceedings that prevents the victims from investigating a debtor organization: Had the survivors been able to proceed with discovery prior to the bankruptcy filing, they would have been able to question representatives that had a better understanding of USA Gymnastics throughout the years of abuse. But without discovery prior to the bankruptcy filing, the survivors were left to question an agent hired after the abuse had occurred.

Another issue with the Survivors Committee's representation of all survivors lies in the fact that not all survivors have the same goals in mind. While some might weigh the discovery of USA Gymnastics' negligence as more important than financial compensation, others might see bankruptcy as a means through which they may quickly end their ordeal, receive compensation, and resume their lives. Furthermore, the Survivors Committee's interest has the potential to clash with the interests of survivors in general. Following the April 29 deadline to file proof of claim for a Sexual Abuse Claim, one gymnast submitted her claim asserting that Nassar abused her over twenty times since she was nine years old.<sup>180</sup> The unnamed gymnast stated that she did not learn of the bankruptcy until June 10, 2019, well past the bar date of April 29, 2019.<sup>181</sup>

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<sup>177</sup> Michelle Simpson Tuegel, *#MeToo Defendant Bankruptcies Can Delay, Not Deny, Justice*, LAW360 (July 30, 2019, 3:08 PM), <https://www.law360.com/articles/1183415/-metoo-defendant-bankruptcies-can-delay-not-deny-justice>.

<sup>178</sup> Associated Press, *Larry Nassar Accusers Frustrated by USAG Exec's Lack of Answers*, ESPN (Feb. 7, 2019), [https://www.espn.com/olympics/gymnastics/story/\\_/id/25948177/larry-nassar-accusers-frustrated-usag-exec-lack-answers](https://www.espn.com/olympics/gymnastics/story/_/id/25948177/larry-nassar-accusers-frustrated-usag-exec-lack-answers).

<sup>179</sup> *Id.*

<sup>180</sup> David Woods, *Judge Lets Ex-Gymnast Press a Late Larry Nassar Claim. Here's Why It May Be Harder for Others*, INDYSTAR (Sept. 17, 2019, 6:41 PM), <https://www.indystar.com/story/sports/2019/09/17/usa-gymnastics-bankruptcy-ex-gymnast-ok-press-late-larry-nassar-claim/2350513001/>.

<sup>181</sup> *Id.* ("When USA Gymnastics filed for bankruptcy in December, the gymnast was recovering from surgery and subsequently stayed with her parents for two months during recovery. She did not learn of the bankruptcy until seeing a news story [on] June 10. She reached out to law firms, completed a claim June 13 and mailed it June 19.").

Attorneys for the Survivors' Committee argued that allowing late claims would "open the floodgates" for other survivors to do the same.<sup>182</sup> As discussed earlier, Terin Humphrey also attempted to be included in part of a potential settlement with USA Gymnastics but received opposition from the attorneys for the Survivors Committee. While it is clear the Survivors Committee's attorneys are attempting to secure fair compensation for the survivors within the class, the result can be that the Survivors Committee is working against the interests of survivors outside of the class.

#### V. VARIOUS PROCESSES CURRENTLY IN PLACE ARE INADEQUATE TO PROTECT THE INTERESTS OF SEXUAL ABUSE VICTIMS

The current bankruptcy court system was not created with mass torts claims brought by sexual abuse victims in mind. While the Code provides mechanisms designed to protect creditors' financial interests, the protections fail to adequately satisfy the goals sexual abuse victims have when conducting investigations into the organization's misconduct and uncovering other sources for damages.

##### A. *Dismissal is a Difficult Hurdle for Sexual Abuse Claimants to Overcome and May Not Be Desirable*

The Code provides a mechanism through which improper petitions can be dismissed from bankruptcy. Section 1112(b) provides that "on request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under Chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause. . . ."<sup>183</sup> The cause requirement of Section 1112(b) applies at various stages during the case to test whether the benefits of reorganization are likely to be achieved within a reasonable amount of time and in a manner consistent with the Code.<sup>184</sup> While the Code outlines what constitutes "cause" in section 1112(b)(4), the list is non-exhaustive, and courts consider what is in the best interest of the creditors and the estate.<sup>185</sup>

Similar to section 1112(b)(4) of the Code, all bankruptcy courts have read a "good faith" requirement as an implicit condition to filing a bankruptcy petition,

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<sup>182</sup> *Id.*

<sup>183</sup> 11 U.S.C. § 1112(b)(1) (2019).

<sup>184</sup> 7 COLLIER ON BANKRUPTCY ¶ 1112.07 (16th ed. 2020).

<sup>185</sup> *In re Turboff*, 120 B.R. 849, 850 (Bankr. S.D. Tex. 1990).

even though the Code does not expressly contain such a standard.<sup>186</sup> The purpose of the good faith standard is to prevent abuse of the bankruptcy process, and therefore, courts will dismiss cases for “cause” where the filing is not in good faith filing.<sup>187</sup> In contrast to testing the debtor’s prospects of reorganization, the good faith standard focuses directly on the subjective intentions of the debtor and his proper use of the bankruptcy system as a court of equity.<sup>188</sup> The good faith standard is designed to prevent conduct only peripherally related to the economic interplay between the debtor and the creditor community that would result in abuse of the bankruptcy process, or harm the rights of others.<sup>189</sup> The terms “good faith” and “bad faith” are misleading, as the question is really whether the debtor has presented a legitimate reorganizational objective within the scope of the Code or has instead presented “tactical reasons unrelated to reorganization.”<sup>190</sup> Determination of a lack of good faith requires the court to examine the “totality of the circumstances.”<sup>191</sup> While there is no particular test for determining a lack of good faith, courts may consider evidence that a debtor intended to abuse the judicial process and the purposes of reorganization.<sup>192</sup>

Courts have wide discretion in determining whether there is sufficient bad faith to dismiss a case, but courts are hesitant to apply such power.<sup>193</sup> Courts are more likely to address the bad faith conduct of the debtor without dismissing the bankruptcy petition if it appears that reorganization is in the best interest of the creditors, notwithstanding the debtor’s bad faith conduct.<sup>194</sup>

Further minimizing the chances that a case will be dismissed for cause is the split among courts as to whether a finding of bad faith by itself is sufficient to warrant dismissal. Some courts find that bad faith alone will not constitute grounds for dismissal unless the court finds that reorganization is objectively futile.<sup>195</sup>

Although application of the standard necessarily turns on the totality of the circumstances of each individual case, courts have generally found a lack of

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<sup>186</sup> 7 COLLIER ON BANKRUPTCY ¶ 1112.07 (16th ed. 2020).

<sup>187</sup> See *In re Marsch*, 36 F.3d 825, 828 (9th Cir. 1994).

<sup>188</sup> See 7 COLLIER ON BANKRUPTCY ¶ 1112.07 (16th ed. 2020).

<sup>189</sup> *Id.*

<sup>190</sup> *In re Original IFPC S’holders, Inc.*, 317 B.R. 738, 750 (Bankr. N.D. Ill. 2004).

<sup>191</sup> *Dunes Hotel Assocs. v. Hyatt Corp.*, 245 B.R. 492, 511 (D.S.C. 2000).

<sup>192</sup> *In re Phoenix Piccadilly, Ltd.*, 849 F.2d 1393, 1394 (11th Cir. 1988).

<sup>193</sup> *Carolin Corp. v. Miller*, 886 F.2d 693, 700 (4th Cir. 1989) (noting that the power to dismiss for lack of good faith “while essential to proper administration of Code policies and implicit in the statute itself, is obviously one to be exercised with great care and caution.”).

<sup>194</sup> See 7 COLLIER ON BANKRUPTCY ¶ 1112.07 (16th ed. 2020).

<sup>195</sup> *Carolin Corp.*, 886 F.2d at 701.



good faith where the debtor: (1) used the bankruptcy system simply to avoid the consequences of prior misconduct<sup>196</sup>; (2) used bankruptcy proceedings merely to frustrate the rights of creditors<sup>197</sup>; or (3) was not in need of reorganization but filed simply to avoid an obligation.<sup>198</sup>

Apart from the authority to dismiss a case for lack of good faith, courts also have broad discretion to dismiss a case where there is sufficient evidence of bad faith conduct. In many situations, the court might address the bad faith conduct of the debtor through an action other than dismissal.<sup>199</sup> Even where the debtor may be guilty of bad faith conduct, it might be an abuse of discretion for the court to order dismissal if reorganization would still be in the best interest of all concerned.<sup>200</sup>

Other courts have found that upon a finding of bad faith, dismissal is warranted even if there is the possibility for a successful reorganization.<sup>201</sup> In one case, the court found a bankruptcy filing to be in bad faith where the filing constituted merely a litigation tactic to frustrate prosecution of antitrust claims.<sup>202</sup> Proving that an organization is using the bankruptcy court for an improper purpose is difficult where the debtor organization has a substantial amount of real debt and real creditors attempting to enforce the debt.<sup>203</sup> Indeed, the purpose of a chapter 11 bankruptcy is to assist financially distressed businesses by providing them with breathing room to return to a viable state.<sup>204</sup> This “lack of good faith” or “bad faith” requirement for dismissal is problematic for sexual abuse claimants trying to pursue an investigation into the debtor organization.

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<sup>196</sup> See *In re Cook*, 104 F.2d 981, 985 (7th Cir. 1939) (“[I]t appears plainly that the instant proceeding was instituted not for the purpose of obtaining benefits afforded by the [former Bankruptcy] Act to a corporation in financial distress, but to enable appellees to escape the jurisdiction of another court where the day of reckoning of their alleged acts of misconduct was at hand.”); *Furness v. Lillienfield*, 35 B.R. 1006, 1013 (D. Md. 1983) (bankruptcy case dismissed for lack of good faith where debtor filed petition solely to delay litigation)

<sup>197</sup> See *In re SGL Carbon Corp.*, 200 F.3d 154, 162–64 (3d Cir. 1999) (filing found to be a litigation tactic); *Argus Group 1700 v. Steinman*, 206 B.R. 757, 763 (E.D. Pa. 1997) (dismissal warranted where debtor was solvent and simply sought a better forum for ongoing litigation)

<sup>198</sup> See *In re Marsch*, 36 F.3d 825, 828–29 (9th Cir. 1994) (where debtor had sufficient assets to satisfy judgment, it was improper for debtor to file chapter 11 petition simply to delay collection of judgment and avoid posting appeal bond); *Dunes Hotel Assocs. v. Hyatt Corp.*, 245 B.R. 492, 511–12 (D.S.C. 2000) (dismissal warranted on grounds of bad faith where solvent debtor was found to have filed case simply as a litigation tactic to avoid the obligations of an unfavorable lease)

<sup>199</sup> 7 COLLIER ON BANKRUPTCY ¶ 1112.07 (16th ed. 2020).

<sup>200</sup> See *id.*

<sup>201</sup> *In re Phoenix Piccadilly, Ltd.*, 849 F.2d 1393, 1395 (11th Cir. 1988).

<sup>202</sup> 7 COLLIER ON BANKRUPTCY ¶ 111.07 (16th ed. 2019).

<sup>203</sup> *In re Johns-Manville Corp.*, 36 B.R. 727, 734 (Bankr. S.D.N.Y. 1984).

<sup>204</sup> *In re Original IFPC S’holders, Inc.*, 317 B.R. 738, 750 (Bankr. N.D. Ill. 2004).

Due to the high number of lawsuits, negative media attention, and mounting legal fees, USA Gymnastics could reasonably benefit from restructuring. For that reason, sexual abuse victims would not be able to dismiss the bankruptcy petition on bad faith, “for cause” grounds. But even if the survivors could meet that standard for dismissal, that might not be the most favorable result. Even though survivors would be able to conduct discovery and potentially uncover other sources for damages, the survivors would compete against one another to receive a judgment against the organization. This is the paradigmatic “race to the courthouse” issue: those who take longer to secure a judgment may end up receiving an unfairly small compensation, if they recover at all.

### *B. Relief from the Automatic Stay Only Solves Half of the Issue*

As previously mentioned, the filing of a bankruptcy petition triggers an automatic stay of all pending litigation against the debtor, with some exceptions under section 362(b). The Code also provides for relief from the automatic stay:

On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—(1) for cause, including the lack of adequate protection of an interest in property of such party in interest. . . .<sup>205</sup>

Creditors may obtain relief from the automatic stay where “cause” exists to grant relief.<sup>206</sup> “Allowing a matter to proceed in another forum can constitute ‘cause’ for lifting the automatic stay.”<sup>207</sup> The stay is automatically lifted if, after thirty days after a party files a motion to lift the stay, there is not a notice and hearing ordering the continued effect of the stay.<sup>208</sup> At the hearing to determine whether to lift the automatic stay, the moving party bears the initial burden of showing cause as to why continuance of the stay would cause irreparable damage.<sup>209</sup> After meeting this burden, the debtor has the additional burden of

<sup>205</sup> 11 U.S.C. § 362(d)(1) (2019).

<sup>206</sup> *See id.*

<sup>207</sup> 14 COLLIER ON BANKRUPTCY § 4.27(III)(B)(1) (16th ed. 2019).

<sup>208</sup> 11 U.S.C. § 362(e)(1).

<sup>209</sup> The factors considered for lifting the automatic stay for cause are:

- (1) the Debtor’s filing of its chapter 11 petition on the eve of the scheduled trial of the Action and its immediate removal of the Action to the bankruptcy court; (2) the interests of judicial economy; (3) the policy favoring the determination of state law claims in state court; (4) the lack of prejudice to the bankruptcy estate as a result of granting relief from the automatic stay; and (5) the “bad faith” filing of the Debtor’s chapter 11 petition and its misuse of bankruptcy jurisdiction.

14 COLLIER ON BANKRUPTCY § 4.27(III)(A) (16th ed. 2019).

proving that modification of the stay would result in prejudice to the administration of the debtor's estate.<sup>210</sup>

If the debtor succeeds in obtaining a continuance of the automatic stay, participation in the bankruptcy proceedings will be the best route for the survivors to secure financial compensation. But the survivors are prevented from conducting a full investigation into the debtor organization. One solution might be to allow the survivors to pursue their claims outside of bankruptcy by lifting the automatic stay, despite the failure to meet the requirements for relief. By allowing the victims to pursue their claims out of bankruptcy, USA Gymnastics can still reorganize all its debts except for the survivors' claims and the victims would be able to participate in discovery and expose the organization's role in the survivors' abuse but the debtor would be unable to aggregate all current liabilities and obligations in one forum. Lifting the automatic stay would not be in the best interest of the survivors.

A solution to this issue would be to allow the survivors to pursue discovery outside of bankruptcy, while still allowing them to reach a settlement through bankruptcy. This investigation is necessary not only to allow for a proper calculation of the damages that the survivors are owed, but also because the investigation may reveal additional sources for damages. Additionally, the public has a legitimate interest in understanding how such widespread abuse continued for so long. Bankruptcy's automatic stay, while a necessary tool to allow a debtor to successfully complete the bankruptcy process, prevents the complete understanding of the organization's wrongful conduct in instances like the USA Gymnastics sexual abuse scandal.

## VI. CHANGING THE BANKRUPTCY PROCESS TO PROVIDE EQUITABLE TREATMENT TO SEXUAL ABUSE SURVIVORS

Sexual abuse victims in the USA Gymnastics case and similar bankruptcies are inherently different from typical chapter 11 creditors because full financial compensation is not their only goal. Victims of sexual abuse also want to bring to light the organization's negligence in allowing their abuse to continue and want to ensure that the same kind of abuse does not continue in the future. Sexual abuse victims are in a unique and vulnerable position as creditors in bankruptcy. This section will discuss how the bankruptcy system currently places sexual abuse victims in a "catch-22" situation where they must either forgo either uncovering answers as to why their abuse occurred or financial compensation.

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<sup>210</sup> *Id.*

This section will then present a possible solution where the Code is amended to allow sexual assault survivors the power to conduct a full discovery into the debtor during bankruptcy.

*A. Pursuing Bankruptcy May Provide Financial Compensation But Fails to Provide Answers*

By participating in the bankruptcy proceedings, the USA Gymnastics survivors will receive financial compensation sooner. Additionally, through the Survivors Committee, the survivors might be able to condition the settlement of their claims on the organization implementing safety precautions for the gymnasts and stricter background checks for coaches, physicians, and other team management personnel. With this option, the survivors will be able to move on with their lives quicker, but there is no guarantee of a formal investigation into USA Gymnastics. By foregoing litigation in favor of a speedy resolution, the survivors may never know the true extent of the organization's role in their abuse. Not only are questions important to the survivors on a personal level, but it may allow the survivors to pursue additional action against others who may have played a role in their abuse, such as the USOPC.

Broadly, debtor organizations may be encouraged to ignore or actively cover up its negligence to avoid public backlash, and their corporate officers may encourage the decision to file for bankruptcy to prevent discovery of their own personal negligence. If and when claims of negligence come to light, an organization can file for bankruptcy and use the time provided by the automatic stay to attempt to settle the survivors' claims outside of litigation, in a seemingly forced arbitration. In the case of USA Gymnastics, the filing of the bankruptcy petition also halted the USOPC from decertifying the gymnastic organization as the NGB for United States gymnastics. And the USOPC may also benefit from the USA Gymnastics bankruptcy: any proposed settlement agreement from USA Gymnastics' would release the USOPC from all liability related to the sexual abuse of the gymnasts.

Finally, the interests of the survivors as creditors conflict with the interests of the organization as a debtor. A typical creditor in a chapter 11 proceeding benefits from allowing the debtor to remain operational because this will ensure that the creditor will eventually receive a financial payoff, even if such compensation takes longer than expected or if the amount is not the full amount to which the creditor was originally entitled. Survivors of sexual abuse desire to be financially compensated, to hold the organization publicly accountable for its negligence, and not allow the abuse to continue. The second and third goal have

the effect of devastating the organization's reputation, which could result in a loss of sponsorships, partners, and clients, and endanger the organization's ability to effectively reorganize and remain in business. In this way, the survivors' goals as survivors of sexual abuse conflict with their goals as creditors and conflict with the organization's desire to remain open.

*B. Investigation Outside of Bankruptcy May Fail to Provide Answers and Financial Compensation*

The other option for the survivors would involve foregoing the bankruptcy proceedings by moving for relief from the automatic stay or opting out of the bankruptcy proceedings. This would provide the survivors with the opportunity to investigate the organization through the discovery process. As previously mentioned, the survivors and the public may not trust government officials to properly investigate and prosecute the organization for their involvement in the abuse. The congressional report by Senator Blumenthal found that the FBI opened an investigation into Larry Nassar in July 2015 after receiving credible reports concerning three gymnasts.<sup>211</sup> The report goes on to condemn the government agency for failing to act as the investigation dragged on for more than a year while Nassar continued to abuse his patients under the guise of medical treatment.<sup>212</sup> Without conducting a full investigation into USA Gymnastics, the truth of what happened may never come to light, and procedures to prevent further abuse may fail to adequately protect gymnasts. Gymnasts may be better situated than the police to investigate the organization, as they have a better understanding of how their sport and its organizers operate.

Uncovering this information will play an integral role in understanding the kinds of regulations supervising organizations like the USOPC can implement to self-regulate. But it is insufficient to allow the USOPC to self-regulate given the possible role it played in the victims' abuse. Legislators and the public will question whether self-regulation can provide adequate protection. Even with regulations and legislation, it would be difficult to know what to change without knowing what went wrong.

While this option may allow the survivors to uncover the organization's role, the survivors will also be burdened with confronting their trauma for a longer period of time. Even if the survivors can litigate outside of bankruptcy and begin the discovery process, there is no guarantee they will be able to find evidence of

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<sup>211</sup> Fitzpatrick, Costello & Kaplan, *supra* note 46.

<sup>212</sup> Fitzpatrick, Costello & Kaplan, *supra* note 46.

negligence given the amount of time between the filing of a bankruptcy petition and the time when the survivors will be able to resume their lawsuits. By the time the survivors can continue with their lawsuits, the statute of limitations may have run out against non-debtor entities or evidence as to the nondebtors' liability may decay, and the survivors will not be able to secure recovery from these sources either. The survivors may be able to bring their case against nondebtor entities under the doctrines of equitable estoppel or fraudulent concealment.<sup>213</sup> But given the lengthy wait to conduct discovery the survivors may be unable to find evidence of the nondebtors' improper conduct. Failing to find this evidence would prevent them from being able to rely on the doctrines of equitable estoppel or fraudulent concealment.

Furthermore, if the survivors wait until the organization has completed its bankruptcy, there may not be sufficient remaining assets in the organization's estate to properly compensate the survivors for their trauma. The survivors risk walking away with neither answers nor financial compensation.

*C. Vesting Special Power in Sexual Abuse Survivors as Creditors Would Ensure Financial Compensation and Proper Investigation into the Organization's Abuse*

Given that bankruptcy serves only to resolve financial issues, it is inefficient to resolve the issues of the survivors but provides seemingly unfair benefits for the debtor organization. The unfairness of the situation is even more evident considering that the organization filing for bankruptcy did so largely due to the number of lawsuits filed by the victims claiming negligence on the part of the organization.

In the case of USA Gymnastics, the survivors are faced with a difficult dilemma: either choose financial compensation through settlement and forgo an investigation of the organization or demand answers and risk losing out on

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<sup>213</sup> See *Stallcop v. Kaiser Foundation Hospitals*, 820 F.2d 1044, 1050 (9th Cir. 1987) (“Equitable estoppel focuses on the defendant’s actions. There must be evidence of an improper purpose by the defendant, or of the defendant’s actual or constructive knowledge that its conduct was deceptive.”). The Fourth Circuit largely follows the same reasoning:

The purpose of the fraudulent concealment tolling doctrine is to prevent a defendant from concealing a fraud, or . . . committing a fraud in a manner that it concealed itself until” the defendant “could plead the statute of limitations to protect it. Thus . . . when the fraud has been concealed or is of such a character as to conceal itself, and the plaintiff is not negligent or guilty of laches, the limitations period does not begin to run until the plaintiff discovers the fraud.

*Supermarket of Marlinton v. Meadow Gold Dairies*, 71 F.3d 119, 122 (4th Cir. 1995) (internal citation omitted).

financial compensation. My solution to this conflict would be to provide the survivors with special power to conduct a full investigation of the debtor. Furthermore, to preserve important evidence and testimony, the investigation should be conducted during bankruptcy, not after plan confirmation. This would also be in the organization's best interest because uncovering other sources of financing for victim compensation would help alleviate the financial burden of the debtor.

My plan would allow the victims to receive their just compensation while ensuring that others are not harmed in the same manner and would achieve the public interest goal of protecting victims of rape and sexual abuse. While it is easier to simply present my plan as an informal option parties can pursue in bankruptcy, it may not necessarily provide adequate protection for the victims. The best way to implement such a solution would be through modification of the Code. Codification of this special protection for survivors of sexual abuse would ensure that victims receive the same treatment across circuits, similar to the asbestos legislation. Finally, codifying this protection for victims of sexual abuse in the Code would prevent more vulnerable victims from receiving less than equal protection, regardless of economic class, race, or gender.

One of the main benefits of providing sexual abuse with the power to investigate the debtor during bankruptcy is that the victims would not have to decide between receiving just compensation or the investigation into their abuse. As previously discussed, deciding between just compensation or investigation presents significant pitfalls. My proposed plan, through codification, will do away with this catch-22 situation and allow proper compensation to the victims and a proper investigation into the organization, both of which serve the public's interest.

Another important aspect of this plan is that evidence critical to an investigation of the organization's negligence would be timely discovered and preserved. Bankruptcy proceedings can take several years, and the implementation of a bankruptcy plan can last for up to five years. During that time, physical evidence may be lost or destroyed (either intentionally or accidentally) or witnesses may lose their memory, pass away, or move out of the court's jurisdiction. This plan will discourage improper use of the bankruptcy court's automatic stay power, which currently incentivizes organizations to file for bankruptcy—if only for the brief reprieve from pending lawsuits and the opportunity to hide evidence.

For example, the USA Gymnastics case has been ongoing for two years and is not close to finding a resolution between the survivors and the debtor

organizations. The survivors have attempted to dismiss the case from bankruptcy court, claiming that the organization is not interested in expeditiously resolving the parties' disputes.<sup>214</sup> The survivors are convinced that USA Gymnastics has no real interest in attempting to work with them to settle their claims.<sup>215</sup> The debtor organization may end up litigating the survivors' claims outside of bankruptcy, but the organization has still enjoyed the benefit of holding off litigation for two years.

Such benefits, as previously mentioned, include the degradation of key evidence and testimony and delaying the USOPC's decertification process. USA Gymnastics also benefited from the decline in media attention, while repairing its reputation without the discovery of evidence that might point to its involvement in Nassar's abuse. Given the current trajectory of the bankruptcy proceedings, one could argue that the entire filing was used by USA Gymnastics to achieve these listed goals instead of using bankruptcy for its intended purposes. In fact, John Manly, an attorney representing some of the gymnasts against USA Gymnastics, stated that "[USA Gymnastics] and the U.S. Olympic Committee have used this bankruptcy proceeding as yet another tool to inflict pain upon these sexual abuse survivors and deny justice. . . ."<sup>216</sup> As mentioned in the beginning of this Comment, the failure of USA Gymnastics to meet with the survivors points to its true reason for filing for bankruptcy: the organization made hollow promises about safety and properly compensating the survivors, allowing it to avoid decertification and take part in the 2021 Summer Olympics, which will undoubtedly provide USA Gymnastics with an enormous influx of money. There is no guarantee that the survivors will see any of that windfall.

This revelation also points to another benefit of my solution. If survivors of sexual abuse are able to conduct an investigation, even in bankruptcy, then it is less likely that an organization will file for bankruptcy to prevent such an investigation. This will disincentivize organizations from filing simply to gain the protection of the automatic stay, and court resources will be properly preserved for good faith bankruptcy petitions.

One issue with my solution is that investigating the organization's role in the survivors' abuse will likely result in public backlash, diminishing public support for the organization and ultimately reducing the chances that the organization

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<sup>214</sup> Radnofsky, *supra* note 5.

<sup>215</sup> Boysen, *supra* note 8 ("the gymnasts said they've been trying to [reach a deal] for months, but have barely heard from USAG since a mediation session in November came and went without any progress being made.").

<sup>216</sup> Boysen, *supra* note 8.



will be able to adhere to a payment schedule. It is equally important to consider the evidence that would be discovered and the public interest in discovering this information. If the investigation reveals that USA Gymnastics or a similar organization grossly failed to protect athletes from sexual abuse and turned a blind eye to Nassar's criminal conduct, the failure of the organization should receive public admonishment.

USA Gymnastics failed to protect its vulnerable population. This failure may indicate that the organization is not prepared to carry out its mission moving forward, and, naturally, would make anyone hesitant to trust the organization with their safety or the safety of their children. The dissolution of a large organization like USA Gymnastics will likely produce negative economic effects, but this should not stand in the way of ensuring that these organizations do not continue to endanger children. On the other hand, if the evidence reveals the organization had little or no involvement in the survivors' abuse, then the organization's ability to adhere to the court's payment plan will not be severely affected.

By providing survivors with the ability to investigate, the bankruptcy process would give survivors the confidence and power to confront the organization and demand answers. It is important to mention that this exception to the automatic stay must be narrowly tailored for cases involving widespread sexual abuse similar to that of USA Gymnastics, the Boy Scouts of America, and the Catholic Church. While this revision to the Code would not affect a majority of proceedings, it will provide much-needed relief for victims who continue to be abused through bankruptcy by the very organizations that failed to protect them.

## CONCLUSION

In recent years, a growing trend of ongoing sexual abuse within established organizations has received public attention. These sexual abuse scandals have resulted in bankruptcy filings by the organizations that negligently allowed the abuse to continue. In these proceedings, the victims make up a significant number of creditors, making it important for the courts to ensure that their voices are being heard and that the bankruptcy system recognizes their unique position as both creditors and victims of abuse. It is also important to ensure that bankruptcy is not being abused by negligent organizations for the purpose of staying litigation and investigations into the role the organization played in the victims' abuse. One purpose of bankruptcy is to allow debtors the opportunity to manage their financial situation and receive a fresh start. That aim is in

conflict with the goals of the survivors as creditors who seek not only financial compensation but also want to investigate into the debtor organization's role in their abuse.

One solution to this unfair situation that survivors of sexual abuse find themselves in would be to alter the rules of bankruptcy to provide victims of sexual abuse with additional protections. This special consideration for victims of sexual abuse and rape is not new, as protections for victims of rape and sexual abuse have been implemented in criminal law and even codified in the Federal Rules of Evidence. The proposed plan would allow the survivors to conduct discovery into the organization separate from that conducted by the chapter 11 trustee. A full investigation will not only provide a clear picture of how the abuse occurred but may also uncover other liable actors that the gymnasts can then sue. This will also discourage organizations from filing for bankruptcy simply to avoid investigation into any negligence or involvement in alleged abuse.

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