

# Methods to Resolve Mass Tort Claims

The U.S. legal system provides a variety of paths to address civil claims brought by large numbers of people. This document provides an overview of the main approaches. **For talc-related mass tort liabilities, the Chapter 11 process provides the only path to fair, efficient, and equitable resolution for all current and future talc-related claims.**

*The core provisions of Chapter 11... allow the **quick, efficient, and fair resolution of claims and preserve value for the claimants** and the other stakeholders of the business. **Professor Anthony Casey, University of Chicago Law School. Written Statement to the US Senate. 2/8/22***

## CHAPTER 11 RESTRUCTURING

Chapter 11 restructuring allows for people who have already made legal claims against a company (claimants), as well as people who may make a legal claim against a company in the future (future claimants), to participate in an orderly process to resolve claims. The Chapter 11 process brings together all parties involved to negotiate an agreement and provides for the quickest and most efficient resolution—that treats claimants equitably. This results in a comprehensive settlement that cannot be achieved through other methods.

## MULTI-DISTRICT LITIGATION (“MDLS”)

MDLs are a method to coordinate pre-trial proceedings in related federal cases before a single judge but are often unable to fully resolve mass torts, especially cases involving claimants who are not yet known but may allege an injury in the future (“future claimants”). In an MDL, hundreds, thousands, or sometimes tens of thousands of separate lawsuits are transferred to a single judge responsible only for *pre-trial* proceedings.<sup>1</sup> Although an MDL judge may hold a limited number of test trials known as “bellwether trials,” once pre-trial proceedings are concluded, the cases must be transferred back to the judges across the country who were originally assigned the cases.

Importantly, only cases in *federal* court can be part of the MDL process, which means cases in state courts are addressed in an ad hoc manner, causing significant variation in how cases of even similar claimants are addressed—especially when all cases in the country are reviewed on the whole.

An MDL also cannot resolve the claims of future claimants. Individuals who may later develop or discover a potential claim will need to file their own lawsuit and are not covered by an MDL that happened before their case was filed. As a result, MDLs cannot provide a framework to address mass torts where new claims may be filed for years or decades into the future.

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<sup>1</sup> See 28 U.S.C. § 1407; *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 36 (1998).

MDL has two big limitations. First, unlike bankruptcy, MDLs cannot offer a global settlement for many mass tort cases... Further, MDLs can be extremely protracted, needing 7-10 years to reach resolution.

**Bankruptcy avoids the lottery effects** we see when mass tort cases are resolved through jury trials; some plaintiffs receive a windfall and others receive nothing. **Bankruptcy resolution is more equitable** to the victims collective. Further, without class aggregation, litigating tens of thousands of mass tort cases would take decades and ultimately disadvantage all stakeholders. Funds meant for victims would go to attorneys. **Professor Samir Parikh, Lewis & Clark Law School. Law.com: Judge Says Bankruptcy Is Best for Talc Lawsuits. Opioid Companies Move Forward With \$26B Deal. 3/2/2022**

## COMPARISON OF EACH APPROACH AS APPLIED TO J&J TALC LITIGATION

	Chapter 11 Restructuring	Multi-District Litigation
<b>Provides a global resolution?</b>	✓ Yes, resolves all current and future claims equitably.	✗ No, cannot resolve future claims.
<b>How long to address pending claims?</b>	✓ All pending claims addressed quickly and simultaneously.	✗ Of 38,000 pending claims, about 10 cases have been tried per year. It would take thousands of years to address all pending cases.
<b>Are claimants guaranteed resolution?</b>	✓ Yes. After submitting the required proof and claim documents, claimants are treated equitably and receive a guaranteed resolution based upon agreed criteria.	✗ No. Trials provide unpredictable lottery-like results.
<b>Possible to be overturned on appeal?</b>	✓ No. Once approved by the courts, claimants receive guaranteed compensation.	✗ Yes. Most jury awards to date have been overturned or the compensation reduced on appeal.
<b>Can this process address future claims?</b>	✓ Yes. Future claimants are represented by a court-appointed future claims representative during the Chapter 11 process. In the future when they develop a claim, they can file for compensation from the trust.	✗ No.
<b>Is there a cap on how much claimants might be able to collect?</b>	✓ J&J has agreed to provide funding to LTL for the payment of amounts the Bankruptcy Court determines are owed by LTL.	✗ Total compensation determination is based on jury findings and subsequent appeals.

### A NOTE ABOUT CLASS ACTIONS

The U.S. Supreme Court has repeatedly held that class actions cannot be used to resolve mass torts where each plaintiff's claims have unique features—such as individual medical histories, genetics, exposure history, or other personalized issues—that can only be assessed on an individual basis. Because class action rules require all claims to be similar, this is not a viable method to address talc-related mass tort claims.