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Comment

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Models of Closure in Mass Torts: A Comment on "The Mass Tort Bankruptcy: A Pre-History"

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The deadly Hartford Circus Fire of 1944 resulted in a pathbreaking settlement that has largely been ignored in the mass tort literature. I am grateful to Troy McKenzie for bringing the fire and its legal aftermath to our collective attention. The tragedy provides a unique window into the many changes since 1944 in the legal representation of mass tort victims and the resolution of their claims. As McKenzie notes, the matter also is a noteworthy example of a pre-Bankruptcy Code resolution of a mass tort through an insolvency scheme.

McKenzie compares the *Ringling Brothers* receivership to modern Chapter 11 bankruptcies and asks why the 1944 receivership proceeded so relatively smoothly. He is particularly intrigued by, and seeks to explain, the success of the Ringling Brothers receivership relative to the Chapter 11 mass tort bankruptcies, which "despite the similar structure of Chapter 11 … have generated suspicion and resistance."[1] McKenzie offers two explanations. First, he contends that the *Ringling Brothers* receivership succeeded because of "its public law nature."[2] Second, he argues that the lawyers representing the plaintiffs in *Ringling Brothers* were "driven by something more than a desire to maximize fees" and therefore "although playing a significant role in shepherding the settlement scheme … [t]he courts' oversight could be curtailed in light of their knowledge of counsel's incentives."[3]

1 Troy A. McKenzie, *The Mass Tort Bankruptcy: A Pre-History*, 5 J. Tort Law 59, 60 (2012).
2 *Id.* at 77 ("The case succeeded because it captured a critical feature of a mass tort bankruptcy—its public law nature.").
3 *Id.* at 81.

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I agree with McKenzie that the resolution of hundreds of fire-related personal injury and wrongful death claims against Ringling Brothers was successful (and innovative), but I disagree with both of the explanations he offers for that success.

With regard to McKenzie's first claim: I believe that the *Ringling Brothers* receivership succeeded not because of its "public law" component but rather because it lacked—and did not need—many of the public law components of Chapter 11 mass tort bankruptcies. To be sure, the court in *Ringling Brothers* played a critical role in preserving the defendant circus as a going concern, just as courts do under Chapter 11. In all other critical respects, however, the *Ringling Brothers* settlement looked like a modern private inventory settlement rather than a Chapter 11 bankruptcy.

As reflected in Table 1 below, two of the major areas in which modern mass tort bankruptcies "have generated suspicion and resistance"[4] have involved future claimants. Mass tort bankruptcies under Chapter 11, such as those involving asbestos, have struggled with the issue of how to achieve closure for the defendant given the need to provide compensation for unknown numbers of future claimants as well as present claimants.[5] This in turn has raised difficult

Table 1: Models of Closure in Mass Torts

	Inventory settlement	**Hartford fire settlement**	**Modern Chapter 11**
Covered claimants	Current clients	Current clients	Current & future
Closure/finality	D Walk-away right	D Walk-away right	Reorg. plan approval
Allocation conflicts resolved	Disclosure & consent	Arbitration panel & guidelines	Reorg. plan sets out claim values
Funding	D assets no issue, lump sum	Future earnings critical, over time	Future earnings critical, over time
Community sentiment	Not relevant	Significant force, local tragedy	Not relevant
Attorneys' fees	Contractual	Modified contractual	Problematic–bifurcated
Role of courts	None	Receivership (to protect funds, enable private ordering)	Receivership (to protect funds, ensure future claims have rep)

4 *Id.* at 60.
5 *Id.* at 75–76.

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questions about how those unknown future claimants can sensibly be represented in the negotiations surrounding the plan of reorganization.[6]

In the *Ringling Brothers* litigation, in contrast, there were no future claimants. The identities and injuries of all those seeking compensation as a result of the fire were known.[7] Therefore, the only significant issue for the court and the parties was how to preserve the circus as a going concern in order to ensure that it could provide compensation for the claimants. But this financial goal was—and typically is—broadly shared by the parties rather than a source of disagreement. Thus, I believe that the success of the *Ringling Brothers* bankruptcy relative to mass tort bankruptcies under Chapter 11 was largely due to the absence of future claimants and, therefore, due to a relatively limited and less complex role for the court. That is, the absence, rather than the presence, of "public law" elements in the proceedings was central to the smooth resolution of the claims against Ringling Brothers.

The second explanation that McKenzie offers for the relative success of the *Ringling Brothers* bankruptcy is similarly flawed in its under-appreciation of the extent to which that bankruptcy resembles modern, private, mass tort inventory settlements. McKenzie contends that the lawyers representing the plaintiffs in *Ringling Brothers* were "driven by something more than a desire to maximize fees" and that helped smooth the settlement road.[8]

What were the incentives of the plaintiffs' lawyers in *Ringling Brothers*? And how do they compare to the incentives of the plaintiffs' lawyers in private, mass tort inventory settlements and in Chapter 11 mass tort bankruptcies?

As can be seen from Table 2 below, the plaintiffs' lawyers in *Ringling Brothers* were working under a contingent fee. Their fee arrangement differed from the modern contingent fee (see Table 3) in several respects, however. First, their fee structure was set by the local bar and was not a matter of private contract with individual clients.[9] Second, as Table 2 shows, the fee structure provided attorneys no financial incentive to seek recoveries for their clients in excess of $20,000. This fee cap had little practical effect, however. The Connecticut statute at the time, however, limited compensation for wrongful death claims to $15,000, and only a handful of the more than 400 personal

6 *Id.* at 76.

7 *Id.* at 61.

8 *Id.* at 81.

9 Henry S. Cohn & David Bollier, The Great Hartford Circus Fire: Creative Settlement of Mass Disasters 47–48 (1991) Cohn and Bollier note that "At a time when minimum fee schedules for attorneys were routine and respectable (indeed, fixed fees were considered an ethical protection against 'ambulance chasers') the bar in this case took the unusual tack of limiting its fees." *Id.* at 47.

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Table 2: Attorneys' Fees: Ringling Brothers Settlement

Ringling Brothers settlement
• Contingent percentage fee • Fee structure set by Bar – 10% of death cases ($6k–13k) – 15% of first $5,000 – 10% of next $15,000 – 0$ of rest of award – Average award was $7,162 • Incentive to maximize total number of settling claims • Total $$ was determined by arbitration panel

Table 3: Attorneys' Fees: Inventory vs. Chapter 11 Settlements

Inventory settlement	**Chapter 11 settlement**
• Contingent percentage fee • Individual client contracts • Incentive to maximize total $$ recovery for the group	• **Present claims** – Contingent Percentage fee – Individual client contracts – Incentive to maximize total $$ recovery for present claims • **Future claims** – Rep is paid by the hour – Repeat player status if "goes along" – No clients, so no leverage

injury claims were determined by the arbitration panel to have values in excess of $20,000.[10] In the end, the arbitration hearings resulted in an average award of $7,162.16 to 551 claimants.[11]

Thus, the incentives for the plaintiffs' lawyers in *Ringling Brothers* were very similar to those for plaintiffs' lawyers in modern mass tort inventory settlements (see Table 3). In the modern Chapter 11 settlement, in contrast, the fee structure

10 *Id*. at 46 (noting two arbitration awards of $100,000, one of $90,000 "to a young girl who spent more time in the hospital than any other victim" and "a few awards in the $40,000 range").

11 *Id*. at 47–48. The total awarded was $3,946.355.70. Id. at 47.

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reflects and exacerbates the "suspicion and resistance" that McKenzie discusses.[12] Here too the source of the problem is the fact that the Chapter 11 mass tort claimant group typically includes both present and future claimants. Attorneys representing present claimants have contingent fee contracts that provide them the usual financial incentives to maximize a client's recovery. The representative for the future claimants, however, is typically paid by the hour and has no flesh-and-blood clients to provide leverage or constraint within the larger bankruptcy negotiations.[13] The result of these divergent incentives for the two groups of plaintiffs' attorneys under Chapter 11 is persistent controversy and concern that future claimants are being sold out to the benefit of present claimants.[14]

McKenzie may well be correct that the plaintiffs' lawyers in *Ringling Brothers* were motivated by concerns other than—or in addition to—money. The nature of the tragedy may well have generated a special sense of "community" within the local bar, similar to the feelings generated by the 9/11 tragedy which caused many plaintiffs' attorneys to work for free.[15] But the plaintiffs' lawyers in *Ringling Brothers* were still being compensated for their services, and the fee structure did not significantly alter the usual incentives a contingent fee provides. Thus, I would again argue that the reason for the smooth resolution in *Ringling Brothers* relative to Chapter 11 mass tort bankruptcies was not any significant change in the plaintiffs' lawyers' incentives but rather the absence of future claimants and their representatives.

The *Ringling Brothers* receivership was able to succeed because the "pathologies of peacemaking" about which Richard Nagareda taught us so much were not present[16]: there were no future claimants and the plaintiff group was therefore not bifurcated; and all of the plaintiffs' attorneys were paid on a contingent fee basis, with their incentives substantially aligned with the best interests of their clients.

12 McKenzie, *supra* note 1, at 5 J. Tort Law 60, 75–76 (2012).

13 See Richard A. Nagareda, Mass Torts in a World of Settlement 174–179 (2007).

14 McKenzie, *supra* note 1, at 5 J. Tort Law 75–76 (2012). See also Nagareda, *supra* note 13, at 161–182.

15 See, e.g., Diana B. Henriques, A Nation Challenged: Compensation; Lawyers Offer Free Advice In Tapping Federal Fund, NY Times, October 15, 2001 (more than 1,000 members of the Association of Trial Lawyers of America volunteered to help the families of victims of 9/11 obtain awards from the federal victims' compensation fund in "what lawyers say is the largest pro bono effort their profession has ever undertaken"); but see David W. Chen, Saying No to Free 9/11 Aid, Many Families Hire Lawyers, NY Times, July 29, 2002 (noting that "more than a quarter of all the families who have sought legal advice … have hired paid lawyers who could collect fees of up to 25% of the awards paid by the federal Victim Compensation Fund").

16 Nagareda, *supra* note 13, at 221–236.

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In the end, McKenzie's analysis of the legal proceedings following 1944 Hartford circus fire is as relevant to our understanding of the evolution of mass tort settlements outside of bankruptcy as within it. (Indeed, the article might more accurately be titled "Mass Tort Settlements: A Pre-History.") The article usefully underscores the complexities of obtaining closure when future claimants as well as present claimants are involved and should prod us to continue the work on leveraging conflicts of interest that Richard Nagareda so creatively began.[17]

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17 *Id*. at 219–268.

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