

**TO:** Mr. David Cicilline, Chair, Ms. Pramila Jayapal, Vice Chair, and Honorable Members of the Committee on the Judiciary, Subcommittee on Antitrust, Commercial, and Administrative Law

**FROM:** Professor Marci A. Hamilton

**RE:** Federal Bankruptcy Reform to Protect Victims of Child Sex Abuse

**DATE:** July 28, 2021

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Thank you for allowing me to submit testimony on the negative impact of chapter 11 bankruptcy law, 11 U.S.C. §§ 1101-1195, on the well-being of child sex abuse victims when the institution that endangered them files for reorganization to protect its assets in federal court.

By way of introduction, my name is Marci Hamilton, and I am the Founder & CEO of CHILD USA, the nation's leading interdisciplinary think tank dedicated to the prevention of child abuse and neglect, and the Fels Institute of Government Professor of Practice and Senior Resident Fellow in the Program for Research on Religion at the University of Pennsylvania. Before joining the faculty at the University of Pennsylvania, I clerked for Justice Sandra Day O'Connor at the United States Supreme Court and held the Paul R. Verkuil Chair in Public Law at Benjamin N. Cardozo School, Yeshiva University. I am the author of *Justice Denied: What America Must Do to Protect Its Children* (Cambridge University Press 2008, 2012), which makes the case for statute of limitations (SOL) reform, or access to justice, for child sex abuse victims, and the textbook, *Children and the Law* (Carolina Academic Press). I am also the author of numerous scholarly articles and merits and amicus briefs in the country's highest courts addressing different aspects of child protection.

The following provides the most pressing reforms needed to make federal bankruptcy cases less re-traumatizing to the victims and to serve the public's interest in learning how institutions endanger our children. The foundational principle that should drive federal bankruptcy law in these cases is that child sex abuse victims suffer individualized trauma and damage. **The bankruptcy system, as it is now situated, is ill-suited for child sex abuse victims to obtain justice.**

### **I. Child Sex Abuse Results in Life-long, Individualized Trauma**

Child sex abuse is a widespread public policy crisis. While the prevalence of child sex abuse is difficult to determine because so many victims never report, the best science holds that 1 in 5 girls and 1 in 13 boys are sexually abused before the age of 18.<sup>1</sup> The trauma stemming from child sexual abuse is complex and individualized, and it typically affects victims throughout their lifetimes. There is an overwhelming body of science exposing the ways in which the trauma of sexual abuse during childhood impacts the individual. It is settled that PTSD, memory deficits, and complete



disassociation are common results<sup>II</sup>, and that such victims suffer disproportionately from depression, addiction, and suicidal ideation and suicide.<sup>III</sup> These trauma effects typically delay disclosure. In fact, the **average age of disclosure of child sexual abuse in a study of 1,000 victims was 52 years-old.**<sup>IV</sup>

Trauma is only one of the barriers preventing the victims from disclosing abuse during childhood and well into adulthood. “Among other barriers, children often lack the knowledge needed to recognize sexual abuse, lack the ability to articulate that they have been abused, don’t have an adult they can disclose their abuse to, don’t have opportunities to disclose abuse, and aren’t believed when they try to disclose.”<sup>V</sup> Studies suggest that roughly one-third never disclose their abuse to anyone.<sup>VI</sup> The disclosure of child sexual abuse is a process and not a discrete event in which a victim comes to terms with their abuse. Often this happens in the context of therapy; sometimes it is triggered many years after the abuse by an event the victim associates with the abuse; other times it happens gradually and over time as a victim recovers their specific memories.<sup>VII</sup>

The legal system can be a difficult venue for the victims to enter, but it is much more difficult than it should be in the currently configured chapter 11 system. Federal bankruptcy law is being deployed against survivors in a way that foreshortens their access to justice and trivializes their suffering.

## **II. Changes Are Needed Through the Judicial Conference of the United States**

The application of chapter 11 law, 11 U.S.C. §§ 1101-1195, has re-traumatized child sexual abuse victims while it shelters the institutions that have endangered children. It also derails the public search for the truth about widespread child sex abuse by short-circuiting discovery and shifting the attention from the victims and systemic failures to the financial needs of the institution. Federal bankruptcy law was never intended to be the clearinghouse for the coverup of child sex abuse. This playing field needs to be leveled for the sake of the victims, their families, and the public.

### **A. Reforms the Federal Courts Can and Should Embrace**

- 1) **Trauma-Informed Training for Judges and Court Personnel:** Require federal judges to undergo trauma-informed training regarding the presentation and impact of child sex abuse, as well as trauma-informed administrative practices.
- 2) **Allow Victim-Impact Statements:** In chapter 11 cases involving child sex abuse claims, judges should be required to give victims the right to read a victim-impact statement before a reorganization plan is confirmed.

Implementing trauma-informed training and allowing victim-impact statements are both changes that may be adopted by the Supreme Court when it next amends the Federal Rules of Bankruptcy Procedure. The Judicial Conference may also implement these improvements in guidelines it promulgates for bankruptcy judges.

**If the Judicial Conference does not take up these issues, it is imperative that Congress use its authority to mandate these changes so bankruptcy proceedings become empowering—rather than traumatizing—spaces for victims.**

### **III. Legislative Reforms to Protect Child Sex Abuse Victims from Being Re-traumatized by Federal Bankruptcy Proceedings**

Congress should also implement the following improvements to chapter 11 so child sex abuse victims are not re-traumatized or further marginalized by the federal bankruptcy process:

- 1) **Ban Non-Debtor Releases:** Ensure that no institutions or organizations use chapter 11 to inappropriately shield themselves from accountability for their part in child sex abuse by requiring that courts only be allowed to release liability of debtor entities in a reorganization plan.
- 2) **Give Survivors the Right to Obtain Discovery:** Instead of halting all active civil litigation related to child sex abuse when an institution files for bankruptcy under chapter 11, Congress may allow victims to continue conducting discovery. This will improve the accuracy and quality of bankruptcy claims and reorganization plans, as well as identify previously unknown predators, provide survivors better access to justice, and more effectively educate the public on how institutions enable abuse.
- 3) **Prohibit the State Statute of Limitations from Barring Recovery for a Claim or from Impacting Classification of Claims:** The fate of a victim's recovery in bankruptcy court should not be determined by where they happened to be abused as a child. Trauma does not restrict itself to the states where victims have appropriately generous statutes of limitations. Some states have heeded the science surrounding the impact of trauma and delayed disclosure, improving their SOLs for victims of abuse. However, victims who were unable to come forward before their state statute of limitations expired should not be penalized for their delay. Each victim of child sex abuse experiences some form of trauma and deserves access to justice. The classification of claims should not be based on a state's arbitrary determination of a statute of limitations, especially where such consideration would subjugate one victim's claim under another.
- 4) **Employ Forensic Accountants to Assess the Debtor's Estate:** In cases involving debtor organizations that are registered as 501(c)(3) organizations under the Internal Revenue Code, employ forensic accountants to review all assets and interests of the debtor, and require the accountants to submit reports on the assets and interests of the organization prior to the determination of the scope of an organization's estate. This addition ensures that debtor organizations are fairly submitting their assets for consideration in a reorganization plan, while bestowing courts with further confidence to efficiently assess the debtor's assets.
- 5) **Publicize the Number of Valid Claims, Proposed Reorganization Plan, and Future Claims Plan:** Increasing public disclosure of the number of claims, as well as a proposed plan for reorganization and future claims serves the public policy of educating the public about the prevalence of child sex abuse, as well as empowering the public to understand the chapter 11 process.

## **Alternatively, Exempt Child Sex Abuse Civil Claims from Bankruptcy**

If Congress finds itself unable to implement changes in chapter 11 that are necessary to protect victims from re-traumatization and to educate the public about institutional abuse, child sex abuse claims should be exempted from chapter 11 bankruptcy altogether.

### **IV. Conclusion**

Chapter 11 is unintentionally sheltering institutions and affiliated non-debtors from being held accountable for pervasive child sexual abuse, sparing them from discovery that would inform the public about the truth while ensuring the institution emerges intact. Moreover, the process subordinates the legitimate needs of victims to the financial demands of a debtor institution. Congress needs to enact reform to battle the institution-based child sex abuse that is plaguing this country.

Please do not hesitate to contact me if you have questions regarding these proposed changes or if I can be of assistance in any other way.

Sincerely,



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<sup>1</sup> G. Moody, et. al., *Establishing the international prevalence of self-reported child maltreatment: a systematic review by maltreatment type and gender*, 18(1164) BMC PUBLIC HEALTH (2018) (finding a 20.4% prevalence rate of child sexual abuse among North American girls); M. Stoltenborgh, et. al., *A Global Perspective on Child Sexual Abuse: Meta-Analysis of Prevalence Around the World*, 16(2) CHILD MALTREATMENT 79 (2011) (finding a 20.1% prevalence rate of child sexual abuse among North American girls); N. Pereda, et. al., *The prevalence of child sexual abuse in community and student samples: A meta-analysis*, 29 CLINICAL PSYCH. REV. 328, 334 (2009) (finding a 7.5% and 25.3% prevalence rate of child sexual abuse among North American boys and girls respectively).

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<sup>ii</sup> Jacobs-Kayam.A. and Lev-Weisel, R., *In Limbo: Time Perspective and Memory Deficit Among Female Survivors of Sexual Abuse*, FRONTIERS IN PSYCHOL. (April 24, 2019) available at <https://www.frontiersin.org/articles/10.3389/fpsyg.2019.00912/full>.

<sup>iii</sup> van der Kolk, B., *The Body Keeps the Score: Memory & the Evolving Psychobiology of Posttraumatic Stress*. HARVARD REV. OF PSYCHIATRY (1994) 1(5), 253-65; Jim Hopper, *Why Can't Christine Blasey Ford Remember How She Got Home?*, SCIENTIFIC AMER. (Oct. 5, 2018), available at <https://blogs.scientificamerican.com/observations/why-cant-christine-blasey-ford-remember-how-she-got-home/>; see also Hoskell, L. & Randall, M., *The Impact of Trauma on Adult Sexual Assault Victims*, JUSTICE CANADA 30 (2019), available at [https://www.justice.gc.ca/eng/rp-pr/jr/trauma/trauma\\_eng.pdf](https://www.justice.gc.ca/eng/rp-pr/jr/trauma/trauma_eng.pdf) (hereinafter "Hoskell").

<sup>iv</sup> See *supra* n. iv.

<sup>v</sup> CHILD USA, *Delayed Disclosure: A Factsheet Based on Cutting-Edge Research on Child Sex Abuse*, CHILDUSA.ORG, 3 (Mar. 2020) available at <https://childusa.org/wpcontent/uploads/2020/04/Delayed-Disclosure-Factsheet-2020.pdf>. (citing N. Spröber et. al., *Child sexual abuse in religiously affiliated and secular institutions*, 14 BMC PUB. HEALTH 282, 282 (2014).

<sup>vi</sup> *Id.*

<sup>vii</sup> Hoskell, at 24.