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## Constitutional Limitations on the Discharge of Future Claims in Bankruptcy

Ralph R. Mabey

*LeBoeuf, Lamb, Greene & MacRae (Salt Lake City, UT)*

Jamie A. Gavrin

*Jacob, Medinger & Finnegan (New York, NY)*

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## CONSTITUTIONAL LIMITATIONS ON THE DISCHARGE OF FUTURE CLAIMS IN BANKRUPTCY

RALPH R. MABEY\*  
JAMIE ANDRA GAVRIN\*\*

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\* Partner, LeBoeuf, Lamb, Greene & MacRae, Salt Lake City, Utah. Adjunct Professor of Law, J. Reuben Clark Law School, Brigham Young Law University. B.A. 1968, University of Utah; J.D. 1972, Columbia University Law School; U.S. Bankruptcy Judge for the District of Utah, 1979-83. Mr. Mabey served as examiner in the *A.H. Robins Co.* case, and LeBoeuf served as his counsel. Mr. Mabey has acted as special counsel to the Dalkon Shield Claimants' Trust. LeBoeuf has also advised insurance companies and one asbestos mining company concerning mass tort bankruptcy-related issues. The views expressed in this Article are solely those of the authors.

\*\* Associate, Jacob, Medinger & Finnegan, New York, New York. (Formerly associated with LeBoeuf, Lamb, Leiby & MacRae, New York, New York). B.A. 1985, Barnard College; J.D. 1989, Columbia University Law School.

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*The movement of mass tort litigation into the bankruptcy courts has opened a new arena whereby a Chapter 11 reorganization not only discharges mass tort claims, but it also serves as a vehicle to organize consensual settlement and administer compensation to tort claimants. The Johns-Manville and the A.H. Robins cases represent two instances where the bankruptcy courts undertook this new role. The successes and failure of these efforts bear careful study as we focus on varying means for handling mass torts.<sup>1</sup>*

## I. INTRODUCTION

Today's technology supplies new and convenient consumer products, but experience may reveal that use of or exposure to these products causes latent injury or disease.<sup>2</sup> Inevitably, as injuries and diseases become manifest, the news is widely published, and manufacturers of these products may find themselves overwhelmed with lawsuits for personal injury. Other persons not yet ill or injured stand vigilant and frightened on the sidelines.

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1. William H. Rehnquist, Remarks to the Annual Spring Meeting of the American Bankruptcy Institute (May 18, 1992).

2. It may take years for medical science to discover the risks associated with technological advances, *see* Steven J. Parent, Note, *Judicial Creativity in Dealing With Mass Torts in Bankruptcy*, GEO. MASON U. L. REV. 381, 381-82 (1990), or for government agencies to review the possible health effects of chemicals used in the marketplace. *See* Jim Morris et al., *The Cancer on Our Coast: We Can't Continue to Ignore it*, HOUS. CHRON., Nov. 24, 1991, at 1. Thus, the next so-called mass tort could arise from any one of many sources. *See, e.g.*, Charlotte Sutton, *Silicone Breast Implants/A Lingered Ordeal*, ST. PETERSBURG TIMES, Sept. 20, 1992, at 1F (noting that substantial litigation has already been initiated in connection with breast implants); *Breast Implants Found to Cause a Variety of Ills*, BOSTON GLOBE, Dec. 19, 1990, at 57 (discussing health risks related to silicone breast implants); Leslie Berkman, *The Silicone Controversy*, L.A. TIMES, Dec. 4, 1990, at E1 (same); Julie Hanna, *Electric Dangers Cause Worry*, CHI. TRIB., Oct. 18, 1992, at D3 (discussing health risks associated with electromagnetic fields emanating from high tension wires).

Still others remain unaware that their use of or exposure to these products has placed them in danger. The resulting crescendo of personal injury claims and lawsuits, magnified greatly by awards for punitive damages if the manufacturer is found culpable, threatens an inexorable slide into insolvency.<sup>3</sup>

Since 1982, the A.H. Robins Company, Inc., a pharmaceutical company,<sup>4</sup> the Johns-Manville Corporation,<sup>5</sup> and at least fourteen other former asbestos manufacturers have filed for bankruptcy protection.<sup>6</sup> The

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3. For a detailed discussion of potential operational problems faced by companies besieged with massive future claims, see Mark J. Roe, *Bankruptcy and Mass Tort*, 84 COLUM. L. REV. 846, 856-62 (1984). As Mr. Roe recognizes, a company faced with overwhelming unresolved claims is likely to suffer an operational collapse as a result of: (1) blocked or diminished access to capital markets and foregone long-term projects or other business opportunities; (2) slow liquidation due to rapid maturing of claims (*i.e.*, a reduction in operations and asset sales in order for current stockholders to receive dividends before an inevitable reorganization); (3) stockholder inducement to follow high-risk strategies in an effort to acquire higher present return; (4) an uncertainty in financial health that undermines or destroys supplier-customer relations; (5) barriers to worthwhile mergers; and (6) the diversion or misdirection of managerial energy. *Id.*

Mr. Roe persuasively argues that the early reorganization of a company faced with future claims greatly in excess of its assets benefits all interested parties, including future claimants. *Id.* at 862-63. Further, he argues that the compensation of future claimants can best be accomplished through the establishment of a variable annuity fund. *Id.* at 862-92. Although his article was published more than nine years ago, before many mass tort-related bankruptcy decisions, much of Mr. Roe's analysis still holds true.

4. The A.H. Robins Company filed for Chapter 11 bankruptcy relief in August 1985 as a result of an "avalanche" of personal injury suits related to the Dalkon Shield. See *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 996 (4th Cir.), *cert. denied*, 479 U.S. 876 (1986).

5. Similarly, the Johns-Manville Corporation filed for bankruptcy relief on August 26, 1982 as a result of a "litigation explosion" of cases filed by persons claiming they were injured by asbestos. See *Johns-Manville Corp. v. Asbestos Litig. Group (In re Johns-Manville Corp.)*, 40 B.R. 219, 221 (Bankr. S.D.N.Y. 1984).

6. A summary of the status of all recent or current asbestos-related bankruptcy proceedings as of mid-August 1992, as well as a survey of relevant law as of that date can be found in *Celotex Corp. & Carey Canada, Inc., Report Concerning Claims Resolution Procedures* (Aug. 14, 1992) (hereinafter *Celotex Report*). This report, prepared by the debtors' counsel, provided background information and source material for this Article with respect to the experience with mass torts of the following companies: UNR Industries, Inc. et al. (UNR); Johns-Manville Corporation (Manville); Amatex Corporation (Amatex); Forty-Eight Insulations, Inc. (Forty-Eight Insulations); Pacor, Inc. (Pacor); Standard Insulations, Inc. (Standard Insulations); Nicolet, Inc. (Nicolet); Raymark Industries Inc. (Raymark); Raytech Corporation (Raytech); Hillsborough Holding Corp. (Hillsborough); The Celotex Corporation (Celotex); Carey Canada (Carey Canada); National Gypsum Company (National Gypsum); Eagle-Picher Industries, Inc. (Eagle-Picher); and H.K. Porter Company, Inc. (H.K. Porter). The terms "A.H. Robins"

A.H. Robins Company manufactured an intrauterine device known as the Dalkon Shield, which was found to cause a variety of serious injuries, including sterility, in many of the approximately 3.6 million women throughout the world who used it.<sup>7</sup> Asbestos fibers, originally used for years as fire-proof insulation material, and the asbestos dust released during production were found to cause asbestosis, mesothelioma, cancer, and other diseases. Moreover, as found by a number of juries, these companies were not forthright about the dangers associated with their products.<sup>8</sup>

It is apparent that the manner in which the *A.H. Robins* and *Manville* cases were, or ultimately will be, resolved will greatly affect incipient mass tort cases. It is also apparent that concerned litigants inquire with particular interest into the successes and failures of these most prominent of mass tort bankruptcies. This inquiry reveals that the *A.H. Robins* court faced the more manageable task, and that the *Manville* plan suffers presently from the greater turmoil and from, at least partial, failure.<sup>9</sup>

Of more relevance to this Article, however, this inquiry reveals that the *A.H. Robins* and *Manville* cases represent divergent methods of addressing the problems raised by mass torts in the bankruptcy context. In *A.H. Robins*, so-called future claims<sup>10</sup> were discharged except insofar as they were to be

and “*Manville*” are italicized in the text when they refer to their bankruptcy cases.

Medical problems allegedly caused by silicone breast implants have also precipitated recent Chapter 11 bankruptcy filings. *See, e.g.*, Petition of Bio-Manufacturing, Inc., No. 93-42603 (Bankr. D. Minn. filed Apr. 29, 1993); Petition of Bioplasty Inc., Bio-Manufacturing Inc., and Uroplasty Inc., No. 93-42600 (Bankr. D. Minn. filed Apr. 29, 1993); *cf. In re Silicone Gel Breast Implants Prods. Liability Litig.*, 793 F. Supp. 1098 (J.P.M.L. 1992).

7. *See* Georgene M. Vairo, Essay, *The Dalkon Shield Claimants Trust: Paradigm Lost (or Found)?*, 61 *FORDHAM L. REV.* 617, 625 (1992) (listing the following injuries linked to the Dalkon Shield: unwanted pregnancies, ectopic pregnancies, septic abortions, miscarriages, birth defects caused by presence of Dalkon Shield in women’s uteruses during conception, excessive bleeding and cramping, Pelvic Inflammatory Disease (PID), and the complications of PID, such as sterilization and infertility).

8. *See generally* John D. Ayer, *Down Bankruptcy Lane*, 90 *MICH. L. REV.* 1584, 1597 (1992) (book review) (noting culpability of A.H. Robins, Johns-Manville, and other asbestos companies); Vairo, *supra* note 7, at 626-27 (noting that A.H. Robins and its insurers had been accused of misrepresentations and nondisclosures about the dangers of the Dalkon Shield); Edmund J. Ferdinand, III, Comment, *Asbestos Revisited: Lead-Based Paint Toxic Tort Litigation in the 1990s*, 5 *TUL. ENVTL. L.J.* 581, 582 (1992) (discussing asbestos manufacturers’ general “policy of silence,” as well as their manipulation of workers’ compensation system, in an effort to conceal information about asbestos dangers from workers and the public and to avoid tort liability).

9. *See* Findley v. Blinken (*In re Joint E.& S. Dist. Asbestos Litig.*, 129 B.R. 710 (E.& S.D.N.Y. 1991), *vacated*, 982 F.2d 721 (2d Cir. 1992), *modified on reh’g*, 993 F.2d 7 (2d Cir. 1993).

10. The term “future claim” as used in this Article is defined *infra* note 13 and

paid by the personal injury trusts established under the plan of reorganization. In *Manville*, future claims were channeled by injunction to the established personal injury trusts for payment.

The practical result intended by both methods, however, was the same: Both sought to provide for the payment of all future claims from a trust corpus while depriving all claimants of any remedy against the debtors or their successors, thereby maximizing the going concern value of the estate and its resulting value to claimants. The *Manville* method in particular reflects a profound judicial reluctance to decide the constitutional limitations on the treatment of future claims.<sup>11</sup> The future claims are channeled because it is the pragmatic solution to an intractable problem. Notably, years after the *Manville* reorganization, the courts generally follow the cautious *Manville* approach: Although recognizing the statutory and due process issues raised by the discharge of future claims, the courts often leave these issues for another day by issuing a channeling injunction.

It is evident that a channeling injunction, like a discharge, is intended to circumscribe the rights of future claimants; therefore, a court obliquely decides the constitutional issues and effects a discharge when it issues such an injunction. It is worthwhile to examine head-on the constitutional underpinnings for the discharge of future claims. The topical debate over present and proposed statutory authority for the channeling and discharge of future claims begs an analysis of the constitutional authority for such an approach.<sup>12</sup>

## II. THE IMPETUS TO DISCHARGE FUTURE CLAIMS

Future personal injury claims arise when a latency period exists between the use of, or exposure to, a faulty product or toxic substance and the manifestation of an injury or disease. Thus, for purposes of this Article,

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accompanying text.

11. The *Manville* channeling injunction also reflects an ambivalence about whether there is statutory authority to discharge future claims. This Article focuses, however, on the constitutional issues.

12. See, e.g., *Bankruptcy Reform Circa 1993: A Presentation of the National Bankruptcy Conference's Code Review Project*, June 11-12, 1993, Chapter 11, ¶¶ T.1.-T.7. The National Bankruptcy Conference is a voluntary organization composed of persons interested in the improvement of the Bankruptcy Code and its administration. Conferees include bankruptcy attorneys, law professors, and judges. The American Bankruptcy Institute, also a voluntary organization of persons interested in bankruptcy issues, has proposed its own solution to the asbestos mass tort problem, in particular in the form of an amendment to the Bankruptcy Code to be known as "Chapter 14." Although Mr. Mabey is a member of both organizations, the views expressed in this Article are solely those of the authors.

a “future claim” means a claim against a debtor for an injury or disease that has not yet become manifest at the time the debtor has filed for bankruptcy, but is based upon the occurrence, prior to the bankruptcy, of one or more material events, acts, or failures to act.<sup>13</sup> The holder of a future claim will be referred to as a “future claimant.”

On the surface, the dischargeability of future claims through regular bankruptcy procedures depends only upon their definitional classification under the Bankruptcy Code.<sup>14</sup> Under Chapter 11 of the Code, a debtor is discharged from liability on claims upon confirmation of its plan of reorganization.<sup>15</sup> Notwithstanding the Code’s broad definition of “claim” to include any “right to payment, whether or not . . . liquidated, . . . contingent . . . [or] matured,”<sup>16</sup> and a legislative history that reflects

13. As one commentator has recognized:

Generally, . . . future claims arise[] from liabilities which possess a common fact pattern or have as their nexus a common act or omission of the debtor such as the manufacture of a defective product. . . . The damage caused by these acts or omissions is unknown generally at the time of commission but causes injury to the public on a massive scale with the harm manifesting itself over a period of years.

Richard L. Epling, *Separate Classification of Future Contingent and Unliquidated Claims in Chapter 11*, 6 BANKR. DEV. J. 173 (1989).

Epling distinguishes future claims arising in the ordinary mass tort situation from those arising from what he labels “toxic torts.” Toxic torts “arise from the acts of an industrial or environmental polluter . . . [and may result in] cleanup costs or penalty fines.” *Id.* Although the term “toxic tort” could be more broadly defined to encompass personal injury claims in the ordinary mass tort context, Epling makes an apt distinction between ordinary mass torts and those that also cause environmental damage. Issues of cleanup and continuing violations that are well beyond the scope of ordinary mass torts complicate the treatment of future claims in the environmental context. *See generally* Thomas G. Gruenert, *Environmental Claims in Bankruptcy: Policy Conflicts, Procedural Pitfalls and Problematic Precedent*, 32 S. TEX. L. REV. 399 (1991). A discussion of these issues is beyond the scope of this Article.

14. In this Article, the terms “Bankruptcy Code” and “Code” refer to the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C. §§101-1330 (1988 & Supp. IV 1992)).

15. 11 U.S.C. § 1141 (1988). Section 1141 uses the term “debt,” which means liability on a claim. *See id.* § 101(12) (Supp. IV 1992).

16. In full, § 101(5) of the Bankruptcy Code defines “claim” to mean:

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured.

*Id.* 101(5) (Supp. IV 1992). The term “creditor” is defined, in relevant part, as an

Congress's intention to give the term as expansive a meaning as possible,<sup>17</sup> controversy has followed this definition. Courts and commentators have debated whether a future claimant's "right to payment" (or "claim") can already exist under the Code when, under state tort laws, the claim may not arise until an injury becomes manifest.<sup>18</sup>

Neither the *A.H. Robins* court nor the *Manville* court specifically ruled whether future claims qualify as claims complete with the concomitant discharge.<sup>19</sup> Moreover, recent case law in the mass tort area generally

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"entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor." *See id.* § 101(10)(A).

17. "By this broadest possible definition [of a claim, the Code] contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case. It permits the *broadest possible relief* in the bankruptcy court." H.R. REP. NO. 595, 95th Cong. 2d Sess. 309 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6266 (emphasis added); *see also* S. REP. NO. 989, 95th Cong., 2d Sess. 21-22 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5807-08.

18. *See, e.g.,* Harvey J. Kesner, *Future Asbestos Related Litigants as Holders of Statutory Claims Under Chapter 11 of the Bankruptcy Code and Their Place in the Johns-Manville Reorganization*, 62 AM. BANKR. L.J. 69 (1988) (arguing that future asbestos litigants should be treated as statutory claimants under the Bankruptcy Code); Gregory A. Bibler, *The Status of Unaccrued Tort Claims in Chapter 11 Bankruptcy Proceedings*, 61 AM. BANKR. L.J. 145 (1987) (arguing that future claims cannot be treated as "claims" under the Bankruptcy Code); Roe, *supra* note 3, at 893-98 (arguing that Bankruptcy Code, as drafted, could be interpreted to permit the pooling and resolution of future claims in an early reorganization); *see also* Anne Hardiman, Note, *Toxic Torts and Chapter 11 Reorganization: The Problem of Future Claims*, 38 VAND. L. REV. 1369, 1377 (1985) (suggesting that bankruptcy courts should use their equitable powers "to recognize the existence of claims for bankruptcy purposes regardless of the status of the claims under state law").

It is not the purpose of this Article to rejoin the debate. *See* Ralph R. Mabey & Annette W. Jarvis, In re Frenville: *A Critique by the National Bankruptcy Conference's Committee on Claims and Distributions*, 42 BUS. LAW. 697 (1987). Rather, we will presume that the Code definition of "claim" includes future claims, and we will discuss the constitutional implications of that presumption. We note, however, that commentators have often suggested the need for a clarifying statutory change. *See, e.g.,* Epling, *supra* note 13, at 190; *see also* Roe, *supra* note 3, at 917-20.

19. In *A.H. Robins*, the Fourth Circuit Court of Appeals determined that a Dalkon Shield injury that manifested itself postpetition as a result of a prepetition insertion qualified as a claim under the Bankruptcy Code for purposes of being subject to the Code's automatic stay provision. *Grady v. A.H. Robins Co.*, 839 F.2d 198, 203 (4th Cir.), *cert. dismissed*, 487 U.S. 1260 (1988). The court expressly avoided deciding whether the relevant future claims were dischargeable, but the statutory implication of dischargeability from that decision seems unavoidable. *See id.*

In *Manville*, the bankruptcy court concluded that it need not answer the question of whether future claimants held cognizable (and thus, dischargeable) claims in order to confirm the plan of reorganization. *See In re Johns-Manville Corp.*, 68 B.R. 618, 629



confirms that whether future claims are cognizable as dischargeable claims under the Code remains unresolved.<sup>20</sup> More important, after over ten years of debate, the case law reveals that the problem of future claims is more than definitional. It reflects the tension between constitutionally mandated due process and a court's constitutionally granted authority under the Bankruptcy Code to award a fresh start.<sup>21</sup>

When mass tort-related litigation, characterized by overwhelming future claims, impels a company to file for reorganization, the company clearly wants future claims to be cognizable as dischargeable claims under the Code. Discharge stems the onslaught of debilitating tort litigation against the reorganized company and thus preserves the going concern value of the business.<sup>22</sup> The preservation of going concern value may, in turn, give

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(Bankr. S.D.N.Y. 1986), *aff'd in part, rev'd in part*, 78 B.R. 407 (S.D.N.Y. 1987), *aff'd sub nom.* Kane v. Johns-Manville Corp., 843 F.2d 636 (2d Cir. 1988).

20. Compare *In re Eagle-Picher Indus.*, 144 B.R. 69, 71 (Bankr. S.D. Ohio 1992) (defining "future claimant" in asbestos case as person who does not have a claim under § 101(5) of the Code) with *Waterman S.S. Corp. v. Aguiar (In re Waterman S.S. Corp.)*, 141 B.R. 552, 556 (Bankr. S.D.N.Y. 1992) (determining that asbestos-related disease resulting from prepetition exposure but manifesting itself postpetition gave rise to cognizable prepetition claim under § 101(5) of Code), *vacated*, 157 B.R. 220 (S.D.N.Y. 1993); see also *Pettibone v. Ramirez (In re Pettibone Corp.)*, 90 B.R. 918, 928 (Bankr. N.D. Ill. 1988) (noting that major cases have not reached a decision on status of future claims).

21. See U.S. CONST. art. I, § 8, cl. 4. According to the Supreme Court:

[A] central purpose of the Code is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy "a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt."

*Grogan v. Garner*, 498 U.S. 279, 286 (1991) (quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934)); see also H.R. REP. NO. 595, *supra* note 17, at 180, *reprinted in* 1978 U.S.C.C.A.N. at 6141 ("The proposed law will permit a complete settlement of the affairs of a bankrupt debtor, and a complete discharge and fresh start."); *Kesner*, *supra* note 18, at 86 (stating that fresh start theory is the "cornerstone of the Code in support of the broad jurisdiction vested in the bankruptcy proceeding").

22. In the *Amatex* case, however, the bankruptcy and district courts rejected the debtor's argument that its ability to reorganize and survive was dependent on its ability to discharge future claims through its plan of reorganization. See *In re Amatex Corp.*, 37 B.R. 613, 614 (E.D. Pa. 1983), *rev'd*, 755 F.2d 1034 (3d Cir. 1985) (denying appointment of guardian *ad litem*). But cf. *In re UNR Indus.*, 725 F.2d 1111, 1120 (7th Cir. 1984) (noting, in dictum, that dischargeability of future claims might affect debtor's ability to emerge from bankruptcy with reasonable prospects for continued existence). While the Third Circuit Court of Appeals in the *Amatex* case eventually reversed the lower courts' decision to deny appointment of a legal representative, it left open the question of whether future claims qualify as dischargeable claims under the Bankruptcy Code. See *Amatex*, 755 F.2d at 1043.

present creditors the incentive to allow a debtor's reorganization in the first place.<sup>23</sup> Without the possibility of preserving going concern value, the present creditors may do better to force a liquidation and divide the current value of the company among themselves before future claims become cognizable. Under a liquidation, if future claims do not qualify as dischargeable claims, future claimants are likely to receive nothing in the bankruptcy.<sup>24</sup>

In the *H.K. Porter* Chapter 11 liquidation case, for example, the number of future asbestos claimants probably exceeds the number of present claimants.<sup>25</sup> Nevertheless, a liquidation plan proposed by the unsecured creditors' committee, which established a trust to provide for pro rata payment to all unsecured creditors including present asbestos claimants, originally made no provision for future asbestos claimants because the committee argued that future claims are not claims under the Bankruptcy Code.<sup>26</sup> This result appears to defeat both the principle of injury compensa-

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23. For an analysis of the underlying economic considerations, see Roe, *supra* note 3, at 850-62.

24. See Hardiman, *supra* note 18, at 1391 (noting that liquidation can prevent a debtor corporation from compensating all tort victims); Roe, *supra* note 3, at 848 (stating that "failure to reorganize early could cripple the firm and leave later tort victims with empty claims against a corporate charter").

25. See CELOTEX REPORT, *supra* note 6, at 21 n.48, 87 n.270 (discussing Telephone Interview with Philip E. Beard, II, Esq., counsel for H.K. Porter (July 27, 1992)).

26. See *id.* (citing H.K. Porter Disclosure Statement, at 21). The District Court for the Western District of Pennsylvania adopted this argument in dicta when it upheld the *H.K. Porter* bankruptcy court's decision to deny a motion (made by a member of the unsecured creditors' committee) for the appointment of a future claims representative. See *Locks v. United States Trustee*, 157 B.R. 89, 97 (W.D. Pa. 1993). Moreover, in concluding that the bankruptcy court had discretion to deny such appointment on conflict of interest grounds, the district court apparently accepted the argument made by both the committee and the debtor that the costliness of providing for future claimants through representation and fund administration would inequitably diminish the value of the liquidating estate for present creditors and tort claimants. See *id.* at 99. But cf. *In re Forty-Eight Insulations, Inc.*, 58 B.R. 476, 477 (Bankr. N.D. Ill. 1986) (appointing legal representative for future asbestos-related claimants in Chapter 11 liquidation and stating, in dictum that "it would be highly inequitable to distribute the liquidated assets of the debtor to the currently known plaintiffs to the detriment of the potential claimants merely because the potential claimants have not yet manifested an injury").

The *H.K. Porter* case did not end with the district court's decision. Subsequent to the bankruptcy court's original decision to deny the motion for appointment of a claims representative on conflict of interest grounds, and prior to the district court's affirmance of that decision, the bankruptcy court ruled, in contrast to the district court's dicta, that the liquidation plan could not be confirmed without making provision for future claimants. See *In re H.K. Porter Co.*, 156 B.R. 16 (Bankr. W.D. Pa. 1993). In this July 7 decision, the bankruptcy court further ruled that the appointment of a representative

tion underlying tort law and the fresh start principle of bankruptcy law.<sup>27</sup> The preservation of going concern value ordinarily enlarges distributable value and thus helps to ensure that future claimants can be paid.<sup>28</sup>

Affording a company a fresh start assists future claimants, however, only if they are made aware of the case, provided with an opportunity to participate in it, and allocated their fair share of the estate value. A bankruptcy court will normally set a bar date for the filing of claims against a debtor's estate and require a debtor to notify all potential claimants of the bar date through reasonable notice procedures.<sup>29</sup> The court can then receive the input of any claimant into the reorganization process, allow or disallow any claim, and estimate any contingent or unliquidated claims for purposes of voting, distribution, and ultimate discharge pursuant to Code procedures.<sup>30</sup> Fitting future claims resulting from a mass tort within these regular procedures raises significant questions of due process: Is it possible to devise a notice procedure reasonably calculated to reach all future claimants? If not, is there some other way to assure future claimants their due process rights to participate in the reorganization? *A.H. Robins and Manville*

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was necessary to protect the interests of future claimants and ordered the representative's appointment. *See id.* In order to obtain a final and binding determination on the future claims issue, the Committee moved for, and obtained, the appointment of a future claims representative, and the debtor filed a declaratory judgment action against the representative seeking a holding that future claimants are not "creditors" within the meaning of § 101(10) of the Bankruptcy Code. The Committee's Second Amended Disclosure Statement describes a plan that treats the issue of future claimants in the alternative, depending upon the outcome of the declaratory judgment action. At this writing, the bankruptcy court has not resolved this issue. Telephone Interview with Philip E. Beard, II, Esq., counsel for H.K. Porter (Mar. 8, 1994).

27. As one commentator has noted:

To the extent that tort law is concerned with the injured party, and the injured party is concerned with an injurer's financial viability, bankruptcy law and tort law may operate harmoniously. Both bodies of law are, then, inherently concerned with social costs and benefits. This suggests a strong economic compatibility between the underlying values of bankruptcy and tort law.

Parent, *supra* note 2, at 390; *see also* Hardiman, *supra* note 18, at 1391-92 (suggesting that bankruptcy reorganization that incorporates interests of future claimants via representation serves the tort law goals of compensation and risk allocation); Epling, *supra* note 13, at 173-74 (noting that Chapter 11 reorganization stops the "'race to the courthouse' where the early victims whose injuries have manifested themselves are paid in full while later claimants receive nothing after all the debtor's assets have been exhausted").

28. *See generally* Roe, *supra* note 3; *see also* Epling, *supra* note 13, at 173-74.

29. *See* 11 U.S.C. § 502(a) (1988); FED. R. BANKR. P. 3002, 3003. In Chapter 11, certain liquidated claims are deemed filed without action by the claimant, *see* 11 U.S.C. § 1111(a), but future claims are unliquidated.

30. *See* 11 U.S.C. § 502(c).

provide the most prominent, although problematic, answers to these questions.

### III. BELTS AND SUSPENDERS: *A.H. ROBINS* VS. *JOHNS-MANVILLE*

The *A.H. Robins* and *Manville* courts created different models for the treatment of future claims. In *A.H. Robins*, the court used both a belt and suspenders to discharge future claims. It entered an order approximately three months after the debtor's bankruptcy filing ("Robins Bar Date Order"),<sup>31</sup> which set a claims bar date ("Robins Bar Date"), established the form of notice to be given to potential Dalkon Shield claimants (among others), and created a procedure by which Robins would disseminate the information world-wide.<sup>32</sup> The court also established an uncomplicated procedure by which a Dalkon Shield claimant was to file a claim.<sup>33</sup> The Robins Bar Date Order, in conjunction with a plan of reorganization under which all Dalkon Shield claims "heretofore, now or hereafter asserted"<sup>34</sup> were said to be discharged,<sup>35</sup> prevented Dalkon Shield claimants from bringing suits against anyone other than the established personal injury

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31. Upon motion by Robins's counsel and after a hearing, the *A.H. Robins* court, on November 21, 1985, vacated its earlier bar date order of November 13 in order to incorporate requested claims objection procedures, among other things, in its later order. In this Article, we discuss the November 21, 1985, Robins Bar Date Order.

32. See *Vancouver Women's Health Collective Soc'y v. A.H. Robins Co.*, 820 F.2d 1359, 1360-61 (4th Cir. 1987) (discussing Robins Bar Date Order and notice procedure in context of upholding foreign notice procedure); *In re A.H. Robins Co.*, 88 B.R. 742, 745 (E.D. Va. 1988) (discussing Robins Bar Date Order and authorizing Robins to undertake international campaign to notify all unknown claimants of Robins Bar Date in context of confirming plan of reorganization), *aff'd sub nom. Menard-Sanford v. Mabey* (*In re A.H. Robins Co.*), 880 F.2d 694 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989).

33. *A.H. Robins*, 8 B.R. at 745. For a description of the two-step filing procedure, see *In re A.H. Robins Co.*, 862 F.2d 1092, 1093 (4th Cir. 1988), *rev'd in part on reh'g on other grounds*, 871 F.2d 465 (4th Cir. 1989).

34. See *Debtor's Sixth Amended and Restated Plan of Reorganization 3* [hereinafter *Robins Plan*]. So-called late claims can be filed with and considered by the Claims Resolution Facility established in the *Robins Plan* to administer the trust for personal injury claimants. See *Dalkon Shield Trust Claims Resolution Facility* 6-7. Claims filed late because of "excusable neglect" are entitled to treatment on par with timely claims with respect to trust monies. *Id.* at 6. If a later claimant first manifests an injury subsequent to the Robins Bar Date and can demonstrate either lack of actual knowledge of the bar date or lack of knowledge of Dalkon Shield use, her claim may fit within the excusable neglect category. *Id.* at 7.

35. Section 8.01 of the *Robins Plan* provides for the discharge of, among other debts, all those arising out of Dalkon Shield claims. *Robins Plan*, *supra* note 34, § 8.01, at 16.

trust.<sup>36</sup> To ensure the practical dischargeability of future claims, the bankruptcy court also issued a “channeling injunction,” which enjoined claimants from pursuing Dalkon Shield claims against the debtor’s successor and channeled all such Dalkon Shield claims against an established claimants’ trust.<sup>37</sup>

With respect to future claimants, the *A.H. Robins* court took additional steps to ensure that those who “[t]hough not aware of any injury, . . . may have been injured by [their] use or another’s use of the Dalkon Shield”<sup>38</sup> received notice. In addition, the Court appointed a legal representative to represent the interests of future claimants.<sup>39</sup> Further, the Court considered the estimated value of future claims when determining the amount of money necessary to fund the claimants’ trust.<sup>40</sup>

The *Manville* court addressed the problem of future claims with suspenders alone. Although it similarly appointed a legal representative to represent the interests of future claimants,<sup>41</sup> estimated future claims for purposes of determining the plan’s feasibility,<sup>42</sup> and established a personal injury trust through which these claims were to be addressed, the court did not set a bar date. The court avoided deciding whether future claims qualify as dischargeable claims under the Code<sup>43</sup> and instead issued only a

36. *Id.* §§ 8.01, 8.03, 8.04, at 16-17.

37. *Id.* § 8.04(c), at 17. The *Robins Plan* also includes a controversial provision enjoining claimants from bringing suits against the Robins family and company officials as well as doctors or other healthcare providers who might otherwise have been sued for malpractice in connection with the Dalkon Shield insertion or removal. *Id.* § 8.03, at 16; see also Vairo, *supra* note 7, at 629-30 (briefly discussing controversy over enjoining suits against nondebtor third parties).

38. *Grady v. A.H. Robins Co.*, 839 F.2d 198, 202 (4th Cir.), *cert. denied*, 487 U.S. 1260 (1988).

39. *In re A.H. Robins Co.*, 88 B.R. 742, 744 (E.D. Va. 1988), *aff’d sub nom. Menard-Sanford v. Mabey (In re A.H. Robins Co.)*, 880 F.2d 694 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989).

40. *Id.* A great deal of work on the part of all parties preceded the court’s aggregate estimation of all Dalkon Shield claims. The court estimated the claims only after the parties were unable, after extensive data collection, to agree on their value. See generally Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 675-88 (1989).

41. See *In re Johns-Manville Corp.*, 36 B.R. 727, 741-42 (Bankr. S.D.N.Y.), *appeal denied*, 39 B.R. 234 (S.D.N.Y. 1984).

42. See *Findley v. Blinken (In re Joint E. & S. Dist. Asbestos Litig.)*, 122 B.R. 6, 6-7 (E. & S.D.N.Y. 1990) (discussing appointment of neutral experts to determine value and nature of claims against settlement trust).

43. Nor did the *Manville* court set a bar date for present asbestos claims. All asbestos claims were directed against the established trusts. See *In re Johns-Manville Corp.*, 68 B.R. 618, 628 (Bankr. S.D.N.Y. 1986), *aff’d in part and rev’d in part*, 78 B.R. 407

channeling injunction that directed all asbestos-related personal injury claims solely against the established personal injury trust.<sup>44</sup> Although this approach acknowledged in principle the perplexing statutory and due process concerns surrounding the discharge of future claims, its intended practical effect was to discharge all present and future claims.

The *Manville* solution greatly influenced later courts handling asbestos-related bankruptcies. Some earlier decisions had determined that the prospect of the unknown prevented the treatment of future claims entirely. As a result, these courts concluded that future claims did not qualify as dischargeable claims and that future claimants did not require legal representation.<sup>45</sup> Against the *Manville* backdrop, a few courts continued to hedge about the status of future claims, but nevertheless recognized the need to appoint representation for future claimants.<sup>46</sup> Most courts, following the *Manville* model, appointed legal representatives and chose to use channeling injunctions that restrict future claims to an established trust.<sup>47</sup>

A channeling injunction employed to effect a discharge, however, is fraught with analytical and practical difficulties. Even when joined with the appointment of a future claims representative, the use of a channeling injunction does not ensure that future claimants will be able to participate in a reorganization with the same rights held by other creditors. A channeling injunction without designation of future claims as cognizable claims under the Code leaves voting and other statutory rights unavailable, or at least ill-defined, for future claimants. Also, such a channeling injunction could be said to operate as an illegal tax on present claimants' return: Why, after all, should a true creditor holding a cognizable claim share an insolvent company's value with an unidentifiable group of nonclaimants holding no claims? Moreover, the use of a channeling

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(S.D.N.Y. 1987), *aff'd sub nom.* Kane v. Johns-Manville Corp., 843 F.2d 636 (2d Cir. 1988).

44. See *id.* at 624. A property damage trust was also established. *Id.* at 621.

45. See *In re Amatex Corp.*, 30 B.R. 309, 315-16 (Bankr. E.D. Pa.), *opinion adopted*, 37 B.R. 613 (E.D. Pa. 1983), *rev'd*, 755 F.2d 1034 (3d Cir. 1985); *In re UNR Indus.*, 29 B.R. 741, 745 (N.D. Ill. 1983), *appeal dismissed*, 725 F.2d 1111 (7th Cir. 1984).

46. See *Amatex*, 755 F.2d at 1042, 1044 (remanding to lower court with instruction to appoint legal representative because future claimants are "sufficiently affected by the reorganization proceedings to require some voice in them"); *In re UNR Indus.*, 46 B.R. 671, 675 (Bankr. N.D. Ill. 1985) (holding that future claimants qualify as parties in interest entitled to legal representation); see also *In re Forty-Eight Insulations, Inc.*, 58 B.R. 476, 477-78 (Bankr. N.D. Ill. 1986) (appointing legal representative in Chapter 11 liquidation case although aware that future claimants did not have claims against the debtor).

47. See CELOTEX REPORT, *supra* note 6, at 124-126.

injunction may exacerbate the statutory and constitutional problems faced by the court.<sup>48</sup> Finally, the channeling injunction is perhaps more susceptible of being vacated by a court if deemed necessary.<sup>49</sup> In the teeth of these difficulties with channeling injunctions, bankruptcy courts in asbestos cases have nevertheless relied exclusively upon it while rejecting statutory discharge, presumably in part, out of a healthy concern for the constitutional rights of the future claimants.

The *A.H. Robins* and *Manville* courts were confronted with future claims problems that differed in a few significant respects. The *Manville* problems presented more difficult constitutional concerns. Although the number of possible Dalkon Shield claims in the *A.H. Robins* case may have been large, it was clearly limited; a limited number of Dalkon Shields had been produced and used. Furthermore, while a future claimant in *A.H. Robins* would not necessarily have known of the nature or extent of any possible Dalkon Shield-related injury by the Robins Bar Date, she was at least likely to have known of her use of the Dalkon Shield. To the extent that claimants knew that they had used some company's intrauterine device,

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48. In the *National Gypsum* case, for example, the court-appointed representative for future claimants opposed the use of a channeling injunction by arguing, among other things, that the bankruptcy court lacked authority to enjoin future claims against the reorganized companies because such action would be tantamount to the discharge of nonclaims. Operating under the assumption that the debtors would remain well capitalized upon reorganization, the claims representative requested that future claimants retain the right to pursue their future claims against the reorganized companies. (Notably, since the commencement of their cases, the debtors had been claiming that asbestos-related liabilities would have no material adverse effect on their ongoing financial condition). See DAILY BANKR. REV., Jan. 6, 1993, at 6. The future claims representative further objected to the channeling injunction based upon the following: (1) the court's alleged lack of authority to approve it at all; (2) the alleged procedural impropriety of the debtors' seeking it via plan approval rather than a separate proceeding; and (3) the injunction's alleged improper scope to the extent that it would protect nondebtor third parties. *Id.* at 5. Ultimately, while confirming the National Gypsum plan of reorganization, the Bankruptcy Court for the Northern District of Texas declined to issue a permanent injunction barring future claims against the reorganized debtor. See *In re National Gypsum*, No. 390-37213-SAF-11, slip op. at 33 (Bankr. N.D. Tex. Jan. 29, 1993) (stating that "[n]on-Bankruptcy Code claimants must be able to pursue their remedies in the future after the exhaustion of the . . . trust [established through the reorganization plan]").

49. It appears that the threat of vacating the injunction prompted *Manville* to place more money in the already established *Manville* trust. Nevertheless, a recent decision in the case appears to support the constitutionality of channeling injunctions, suggesting that the *Manville* injunction set forth in the confirmed plan of reorganization can best be altered by filing a second bankruptcy. See Findley v. Blinken (*In re Joint E. & S. Dist. Asbestos Litig.*), 982 F.2d 721, 751 (2d Cir. 1992), *modified on reh'g other grounds*, 993 F.2d 7 (2d Cir. 1993).

the notice procedures could also be tailored to reflect this fact.<sup>50</sup> Arguably then, a notice procedure in the *A.H. Robins* case, though expensive, could be reasonably calculated to reach users of the Dalkon Shield to apprise them of their future claims.

In contrast, the number and identity of future claimants in *Manville* and the other asbestos cases is more problematic. Future claims in these cases could be held by future claimants who have yet to develop an asbestos-related disease but know of their prebankruptcy exposure to asbestos. On the other hand, many future claimants have neither symptoms of an asbestos-related disease nor knowledge of their prebankruptcy exposure. It is, of course, the unforeseen and unascertainable nature of this second type of future claim that appears to generate the most difficult constitutional problems.<sup>51</sup>

A healthy concern for due process may prompt courts to elect a channeling injunction, instead of a discharge, in order to preserve going concern value and provide for future claimants, but the effect on claimants' rights is virtually the same. Either the discharge and the injunction are constitutionally impermissible, or both are permissible.

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50. In this regard, the notice procedures in the *A.H. Robins* case suggested that women who knew they had used an intrauterine device see their doctors and check their medical records. Moreover, the Claims Resolution Facility established by the *Robins Plan* included provisions that permitted certain categories of women to file late claims against the trust, which claims would nevertheless be treated as timely filed when late filing was due to excusable neglect. See *Dalkon Shield Trust Claims Resolution Facility* 6-7.

51. As one book reviewer explained when comparing the future claims estimation problem faced by Judge Lifland (the *Manville* judge) to that of Judges Merhige and Shelley (the *A.H. Robins* judges):

Lifland's job was harder in the respect that the dimensions of "unknown" were greater. In *Robins*, one could get at least some fix on who the claimants were; the real issue was how badly they had suffered, or would suffer. In *Manville* the participants had to cope not only with the problem of unknown claims, but also of unknown claimants—the statistical certainty that persons in a defined group would someday show symptoms of asbestosis, even though no one knew which ones yet.

Ayer, *supra* note 8, at 1596 n.51 (citing *In re Johns-Manville Corp.*, 68 B.R. 618, 628-29 (Bankr. S.D.N.Y. 1986), *aff'd in part and rev'd in part*, 78 B.R. 407 (S.D.N.Y. 1987), *aff'd sub nom.* Kane v. Johns-Manville Corp., 843 F.2d 636 (2d Cir. 1988)); see *In re Amatek Corp.*, 37 B.R. 613, 614 (E.D. Pa. 1983) (stating, in dictum, that "genuine or meaningful notice" could never be given to future asbestosis claimants), *rev'd*, 755 F.2d 1034 (3d Cir. 1985); *In re UNR Indus.*, 29 B.R. 741 748 (N.D. Ill. 1983) (holding that practical and legal problems of notifying future asbestosis claimants would be insurmountable), *appeal denied*, 725 F.2d 1111 (7th Cir. 1984).



#### IV. FIFTH AMENDMENT LIMITATIONS ON CONGRESS'S POWER TO DISCHARGE FUTURE CLAIMS

The Bankruptcy Clause of the United States Constitution vests Congress with the power “to establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.”<sup>52</sup> This power, the Bankruptcy Power, construed by courts to be both broad<sup>53</sup> and flexible,<sup>54</sup> affords Congress far-reaching discretion to modify the rights of parties in interest in a bankruptcy.<sup>55</sup> In fact, the Supreme Court has stated that “Congress may prescribe any regulations concerning discharge in bankruptcy that are not so grossly unreasonable as to be incompatible with fundamental law.”<sup>56</sup>

52. U.S. CONST. art. I, § 8, cl. 4.

53. See, e.g., *Edward Pirsig Farms, Inc. v. John Deere Co.* (*In re Pirsig Farms, Inc.*), 46 B.R. 237, 244 (D. Minn. 1985) (stating that the Bankruptcy Power gives Congress “broad authority to establish bankruptcy laws”); *In re Bullington*, 80 B.R. 590, 593 (Bankr. M.D. Ga. 1987) (stating that the Bankruptcy Power is “broad enough to permit modification of contractual rights”), *aff’d sub nom.* *Travelers Ins. Co. v. Bullington*, 89 B.R. 1010 (M.D. Ga. 1988), *aff’d*, 878 F.2d 354 (11th Cir. 1989); *Security Pac. Fin. Corp. v. Barto* (*In re Barto*), 8 B.R. 145, 148 (Bankr. E.D. Va. 1981) (“[I]t is clear that Congress has extremely broad power in the realm of bankruptcy legislation.”), *aff’d sub nom.* *United States v. Security Pac. Fin. Co.*, 704 F.2d 142 (4th Cir. 1983); *In re Sapolin Paints, Inc.*, 5 B.R. 412, 423 (Bankr. E.D.N.Y. 1980) (stating that the Bankruptcy Power gives Congress “broad latitude to effect both contract and property rights”); *Hoops v. Freedom Fin.* (*In re Hoops*), 3 B.R. 635, 640 (Bankr. D. Colo. 1980) (stating that the Bankruptcy Power is “broad and evolving”), *aff’d sub nom.* *Rodrock v. Security Indus. Bank*, 642 F.2d 1193 (10th Cir. 1981), *aff’d sub nom.* *United States v. Security Indus. Bank*, 459 U.S. 70 (1982); see also *In re Gifford*, 688 F.2d 447, 462 (7th Cir. 1982) (noting courts’ “highly expansive conception of the bankruptcy power”).

54. See, e.g., *Acacia Mut. Life Ins. Co. v. Perimeter Park Inv. Assocs.* (*In re Perimeter Park Inv. Assocs.*), 697 F.2d 945, 950 n.4 (11th Cir. 1983) (stating that the Bankruptcy Power is “not static,” but rather “a flexible power on which Congress [can] expand with statutes appropriate to the change of conditions of the times”); *In re Barto*, 8 B.R. at 148 (“The Congressional power relative to bankruptcies is a flexible tool which can be utilized to meet the exigencies of the contemporary economic environment.”).

55. One court summarizes the scope of the Bankruptcy Power as follows:

“[I]t extends to all cases where the law causes to be distributed the property of the debtor among his creditors; this is its least limit. Its greatest is the discharge of a debtor from his contracts. And all intermediate legislation, affecting substance and form, but tending to further the great end of the subject—distribution and discharge—are in the competency and discretion of Congress.”

*In re Bullington*, 80 B.R. at 592 (quoting *In re Klein*, 14 F. Cas. 716, 718 (C.C.D. Mo. 1843) (No. 7865)).

56. *Hanover Nat’l Bank v. Moyses*, 186 U.S. 181, 192 (1902) (upholding Bankruptcy Act of 1898 against constitutional challenges); see *SEC v. Albert & Maguire Sec. Co.*,

According to one commentator, “[e]xercise of the Bankruptcy Power requires little more than a fair and reasonable treatment of liabilities and assets,”<sup>57</sup> be it through the equitable distribution of a debtor’s property, the discharge of its debts, or other related means.<sup>58</sup>

Nevertheless, the Bankruptcy Power is not absolute. As the Supreme Court recognized in *Louisville Joint Stock Land Bank v. Radford*,<sup>59</sup> the Bankruptcy Power, “like the other great substantive powers of Congress, is subject to the Fifth Amendment.”<sup>60</sup> Resolving the proper treatment of future claims in the mass tort context thus requires an examination of the substantive and procedural Fifth Amendment limits placed upon Congress’s authority to discharge debt pursuant to its Bankruptcy Power.<sup>61</sup> Courts

378 F. Supp. 906, 912 (E.D. Pa. 1974) (“[U]nder its bankruptcy power, Congress may so legislate as to affect, modify or perhaps destroy vested rights. The test is whether the Congressional solution is so ‘grossly arbitrary and unreasonable as to be incompatible with fundamental law.’”) (quoting *Campbell v. Allegheny Corp.*, 75 F.2d 947, 953 (4th Cir.), *cert. denied*, 296 U.S. 581 (1935)).

57. MARTIN J. BIENENSTOCK, *BANKRUPTCY REORGANIZATION* 692 (1987) (citing *Kuehner v. Irving Trust Co.*, 299 U.S. 445 (1937)).

58. *Id.* at 718.

59. 295 U.S. 555 (1935).

60. *Id.* at 589 (footnote omitted); *accord* *Blanchette v. Connecticut Gen. Ins. Corps.*, 419 U.S. 102, 162 (1974) (Douglas, J., dissenting); *see also* *Community Nat’l Bank & Trust Co. v. Persky (In re Persky)*, 134 B.R. 81, 95 (Bankr. E.D.N.Y. 1991); *Security Pac. Fin. Corp. v. Barto (In re Barto)*, 8 B.R. 145, 148 (Bankr. E.D. Va. 1981), *aff’d sub nom.* *United States v. Security Pac. Fin. Co.*, 704 F.2d 142 (4th Cir. 1983).

61. A few commentators have argued, contrary to most case law, that the Fifth Amendment does not provide an independent source of limitation on the substantive scope of Congress’s Bankruptcy Power—i.e., that such power is limited only by the scope of the Bankruptcy Clause itself. *See* James S. Rogers, *The Impairment of Secured Creditors’ Rights in Reorganization: A Study of the Relationship Between the Fifth Amendment and the Bankruptcy Clause*, 96 HARV. L. REV. 973 (1983); *accord* Thomas H. Jackson, *Avoiding Powers in Bankruptcy*, 36 STAN. L. REV. 725, 736 n.29 (1984); Douglas G. Baird & Thomas H. Jackson, *Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy*, 51 U. CHI. L. REV. 97, 100 n.14 (1984). According to Rogers:

[T]he famous statement [in *Radford*] that the bankruptcy power is subject to the fifth amendment must be taken to mean nothing more than that the fifth amendment, through either the due process or the takings clause, is the constitutional foundation for the proposition that statutes that *retroactively* disrupt settled expectations may be subject to particularly attentive judicial scrutiny.

Rogers, *supra*, at 985 (emphasis added). Rogers further states that substantive limits on the discharge provided by Congress in § 1141 of the Bankruptcy Code exist only insofar as that section attempts to discharge legitimate expectations that became settled before enactment of the Bankruptcy Code in 1978. A further discussion of possible substantive due process limits follows *infra* part IV.C.

have only occasionally, and then only briefly, analyzed the Fifth Amendment limits upon the discharge of future claims<sup>62</sup> or the issuance of channeling injunctions.<sup>63</sup> It is to these constitutional concerns that we now turn.

### A. *The Takings Clause*

The Takings Clause of the Fifth Amendment provides that “private property [shall not] be taken for public use, without just compensation.”<sup>64</sup> The purpose of this clause is “to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>65</sup> In *United States v. Security Industrial Bank*,<sup>66</sup> the Supreme Court acknowledged that Congress’s Bankruptcy Power is subject to this Fifth Amendment prohibition.<sup>67</sup> As then-Associate Justice Rehnquist explained, “however ‘rational’ the exercise of the bankruptcy power may be, that inquiry is quite separate from the question whether the enactment [of bankruptcy legislation] takes property within the prohibition of the Fifth Amendment.”<sup>68</sup> Nevertheless, the convergence of modern takings jurisprudence and bankruptcy law suggests that the discharge in bankruptcy of unsecured claims—much less future unsecured

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62. See, e.g., *In re Amatex Corp.*, 37 B.R. 613, 614 (E.D. Pa. 1983) (stating, in dictum, that there can be “[n]o genuine or meaningful notice” given to future claimants suffering from asbestos-related diseases in order to satisfy due process), *rev’d on other grounds*, 755 F.2d 1034 (3d Cir. 1985); *In re UNR Indus.*, 29 B.R. 741, 747 (N.D. Ill. 1983) (noting alleged insurmountability of notice problem with respect to future claimants), *appeal dismissed*, 725 F.2d 1111 (7th Cir. 1984); see also *Waterman S.S. Corp. v. Aguiar (In re Waterman S.S. Corp.)*, 141 B.R. 552, 558-59 (Bankr. S.D.N.Y. 1992) (discussing limitations of publication notice with respect to future asbestos claimants), *vacated*, 157 B.R. 220 (S.D.N.Y. 1993).

63. See, e.g., *In re A.H. Robins Co.*, 88 B.R. 742, 744-45 (E.D. Va. 1988) (noting in confirmation ruling that method of notice to unknown Dalkon Shield users satisfied due process), *aff’d sub nom. Menard-Sanford v. Mabey (In re A.H. Robins Co.)*, 880 F.2d 694 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989); *In re Johns-Manville Corp.*, 68 B.R. 618, 626 (Bankr. S.D.N.Y. 1986), *aff’d in part, rev’d in part*, 78 B.R. 406 (S.D.N.Y. 1987), *aff’d sub nom. Kane v. Johns-Manville Corp.*, 843 F.2d 636 (2d Cir. 1988).

64. U.S. CONST. amend. V, cl. 4.

65. *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 227 (1986) (citations omitted); see *Metropolitan Property & Cas. Ins. Co. v. Rhode Island Insurer’s Insolvency Fund*, 811 F. Supp. 54, 59 (D.R.I. 1993).

66. 459 U.S. 70 (1982).

67. *Id.* at 75 (citing *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935)).

68. *Id.*

claims—does not effect a taking without compensation in violation of the Constitution.

In constitutional terms, a regulatory taking occurs when three elements are met: (1) a property interest protected by the takings clause exists; (2) it is taken via legislative enactment; and (3) the taking is for public use.<sup>69</sup> In the early days, courts may have required a stronger showing of government justification for property regulation; however, modern takings jurisprudence begins with the presumption that the government has broad authority to regulate private property.<sup>70</sup> The Supreme Court has recently concluded that statutory actions which adjust “the benefits and burdens of economic life to promote the common good” do not constitute compensable takings.<sup>71</sup> In this context, the Court has recognized only two categories of regulatory action in which compensable takings can be established *prima facie*: the so-called “physical invasion” of property and the destruction of all economically beneficial or productive use of land.<sup>72</sup> Significantly, both categories involve the regulation of traditional, real property interests,<sup>73</sup> thus strongly suggesting that courts are still most likely to find a taking where traditional property interests are affected. The emphasis on real property interests further suggests that the first of the three takings elements—the existence of a property interest—may be the most important with respect to an analysis of the discharge of future claims.

### 1. *The Takings Clause: Private Property*

In order to establish that a taking has occurred, a party must first prove that the government regulation at issue “interfere[s] with interests that [are] sufficiently bound up with . . . reasonable expectations . . . to constitute

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69. See *Connolly*, 475 U.S. at 225; *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003-04, 1014-16 (1984).

70. See Glynn S. Lunney, Jr., *A Critical Reexamination of the Takings Jurisprudence*, 90 MICH. L. REV. 1892, 1924 (1992). According to Professor Lunney, Supreme Court decisions formerly required the government to justify the use of its police power for the community good in order to overcome the property owner’s presumed right to be free from regulation. Modern case law reverses this perspective by articulating a limited set of circumstances that justify the property owner’s individual control of property.

71. *Connolly*, 475 U.S. at 225 (citations omitted); see *Metropolitan Property & Cas. Ins. Co.*, 811 F. Supp. at 57.

72. See *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2893 (1992).

73. According to Professor Lunney, the Supreme Court has required compensation in only two situations: (1) when government action affects the right of exclusive occupancy, or (2) when government action that is unnecessary to achieve a substantial government purpose “impinge[s] on a right essential to our conception of real property ownership.” Lunney, *supra* note 70, at 1927.

‘property’ for Fifth Amendment purposes.”<sup>74</sup> For purposes of a takings analysis,<sup>75</sup> protectable property interests “are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.”<sup>76</sup> Theoretically, such property interests extend beyond real property interests to any ownership interests,<sup>77</sup> as long as these interests prove to be more than “abstract needs” or “unilateral expectations.”<sup>78</sup> Nonetheless, the Supreme Court seldom recognizes intangible property interests as cognizable property rights in the takings context.<sup>79</sup>

Under a Takings Clause analysis, purported property interests that are found to be contingent, revocable, or speculative will not support a constitutional claim for compensation.<sup>80</sup> Significant in this regard, several

74. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 125 (1978); see *Lucas*, 112 S. Ct. at 2895, 2902-04; *Kaiser Aetna v. United States*, 444 U.S. 164, 174 (1979); *Preseault v. United States*, 27 Cl. Ct. 69, 84 (1992).

75. As discussed more fully *infra* parts IV.C & E., the term “property” is defined differently for purposes of a Takings Clause analysis, a substantive due process analysis and a procedural due process analysis. See *Burns Harbor Fish Co. v. Ralston*, 800 F. Supp. 722, 727, 729 (S.D. Ind. 1992); *National R.R. Passenger Corp. v. Nevada*, 776 F. Supp. 528, 532 (D. Nev. 1991) (stating that a cause of action may be species of property for some constitutional purposes but not others); *In re Consolidated United States Atmospheric Testing Litig.*, 616 F. Supp. 759, 770 (N.D. Cal. 1985) (same), *aff’d sub nom. Konizeski v. Livermore Labs (In re Consolidated United States Atmospheric Testing Litig.)*, 820 F.2d 982 (9th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988).

76. *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1001 (1984); see *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980); *Board of Regents v. Roth*, 408 U.S. 564 (1972). As the Bankruptcy Court for the Eastern District of New York recently stated: “[S]ince . . . it is state law that both creates property rights and defines their scope, it is not within the province of federal courts to question the purpose or policies underlying such well-settled state law or the nature of the property rights established thereby.” *Community Nat’l Bank & Trust Co. v. Persky (In re Persky)*, 134 B.R. 81, 87 (Bankr. E.D.N.Y. 1991) (citing *Butner v. United States*, 440 U.S. 48, 55 (1979)).

77. The United States Court of Claims has recently stated that property for purposes of a Takings Clause analysis “includes every interest any individual may have in any and everything which is the subject of ownership, together with the right to possess, use, enjoy and dispose of the same.” *Board of County Supervisors v. United States*, 23 Cl. Ct. 205, 208 (1991).

78. See *Lovell v. The One Bancorp*, 818 F. Supp. 412, 420 (D. Me. 1993) (citing *Board of Regents v. Roth*, 408 U.S. at 577; *Lowe v. Scott*, 959 F.2d 323, 334 (1st Cir. 1992)).

79. Arguably, the Supreme Court has extended its protection to intangible property interests unrelated to real property insofar as it has determined that trade secrets qualified as protectable property interests improperly taken by a federal statute. See *Monsanto*, 467 U.S. at 1011.

80. See *Dames & Moore v. Regan*, 453 U.S. 654, 674 n.6 (1981); *Lovell*, 818 F.

courts have determined that causes of action do not vest and become protectable property interests until they have proceeded to final judgment.<sup>81</sup> Other courts have determined that, for purposes of a takings analysis, causes of action become protectable property only when the claim accrues under state law.<sup>82</sup> Perhaps in recognition that, under most state laws, a cause of action in tort will not accrue until an injury or disease has become manifest,<sup>83</sup> at least two courts have implied that tort causes of action will

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Supp. at 420; *FDIC v. Cobblestone Corp.*, Nos. 91-12741-Z, 91-13215-Z, 1992 WL 333961, \*\*3-4 (D. Mass. Oct. 28, 1992); *see also* *First Nat'l Bank v. Hamilton (In re Hamilton)*, 18 B.R. 868, 870 (Bankr. D. Colo. 1982) (finding that Code § 522(f) did not effect an unconstitutional taking of property by avoiding liens in after-acquired property and that alleged property interest was not vested "because, by definition, after acquired property is a mere contingency"); *cf.* *Preseault v. United States*, 27 Cl. Ct. 69, 87 (1992) (suggesting that protectable property right must stem from an "historically rooted expectancy").

81. *See* *Grimesy v. Huff*, 876 F.2d 738, 744 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 1620 (1991) (upholding constitutionality of California statute that reduced aid to families with dependent children provided to eighteen-year-old mothers who reside with their parents); *Hammond v. United States*, 786 F.2d 8, 12 (1st Cir. 1986) (upholding application of statute that operated to bar plaintiffs' recovery by substituting United States as defendant to nuclear testing litigation); *National R.R. Passenger Corp. v. Nevada*, 776 F. Supp. 528, 532 (D. Nev. 1991); *cf.* *Eddings v. Volkswagenwerk, A.G.*, 835 F.2d 1369, 1374 n.9 (11th Cir.) (holding no violation of Fourteenth Amendment in retroactive application of 12-year statute of repose that barred plaintiffs' relief; questioning whether even accrued cause of action translates into "vested property right" protected by Due Process Clause), *cert. denied*, 488 U.S. 822 (1988).

82. *See* *Alpine Ridge Group v. Kemp*, 955 F.2d 1382, 1386 (9th Cir. 1992) (suggesting that accrued claims may constitute property rights for purposes of takings analysis) (citing *Konizeski v. Livermore Labs (In re Consolidated United States Atmospheric Testing Litig.)*, 820 F.2d 982, 989 (9th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988)), *rev'd on other grounds sub nom.* *Cisneros v. Alpine Ridge Group*, 113 S. Ct. 1898 (1993); *Opdyke Inv. Co. v. City of Detroit*, 883 F.2d 1265, 1274-75 (6th Cir. 1989) (stating that *accrued* cause of action is species of property for purposes of takings analysis) (citing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982)); *De Rodulfa v. United States*, 461 F.2d 1240, 1257 (D.C. Cir.) ("[V]ested cause of action, whether emanating from contract or common law principles, may constitute property beyond the power of the legislature to take away . . .") (emphasis added), *cert. denied*, 409 U.S. 949 (1972).

83. *See In re Chicago, M., St. P. & Pac. R.R.*, 974 F.2d 775, 781 (7th Cir. 1992). It should be noted in this regard, however, that some states do recognize a right to bring a cause of action in tort for "medical monitoring," "fear of injury," or "enhanced risk" prior to the manifestation of actual injury. *See Ayers v. Township of Jackson*, 525 A.2d 287 (N.J. 1987). Arguably, the existence of state statutes in this vein provides a basis for finding a property right deserving of constitutional protection. Whether property rights stemming from "medical monitoring" or "risk of injury" cases will be judicially recognized has yet to be determined. *See Ellen Joan Pollock, Claims Increase for No-*

not rise to the level of protectable property, at least until such time.<sup>84</sup> Finally, although the Supreme Court has recognized that a present cause of action based on tort law might be considered protectable property for purposes of procedural due process,<sup>85</sup> the Court has never gone so far in a takings analysis. Taken together, these facts suggest that future claims, which are inherently speculative and contingent, generally do not qualify as protectable property interests in the takings context.

In the bankruptcy context, it is even more unlikely that tort claims (much less future claims) will qualify as protectable property interests for purposes of a takings analysis. When drafting the adequate protection provision of the Bankruptcy Code,<sup>86</sup> in an effort to avoid the unconstitutional impairment of property rights,<sup>87</sup> Congress assumed that secured creditors are the only parties with property interests at risk of being taken in bankruptcy.<sup>88</sup> By concluding that the secured creditor's adequate protection extends only to the value of the secured property,<sup>89</sup> thus leaving

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*Injury Medical Testing*, WALL ST. J., May 12, 1993, at B1; Edward Felsenthal, *Risk-of-Illness Cases Are Getting Unsympathetic Ear from Courts*, WALL ST. J., July 7, 1993, at B8.

84. See *In re Aircrash in Bali, Indonesia* on April 22, 1974, 684 F.2d 1301, 1312-13 (9th Cir. 1982) (determining that accrued claims for wrongful death of relatives qualify under California law as protectable property interests for takings purposes); *Greyhound Food Mgmt., Inc. v. City of Dayton*, 653 F. Supp. 1207, 1219 (S.D. Ohio 1986) (finding that tort cause of action, which arises under Ohio law once injury manifests, constitutes property within meaning of Takings Clause), *aff'd and remanded*, 852 F.2d 866 (6th Cir. 1988).

85. See *infra* note 136 and accompanying text.

86. See 11 U.S.C. § 362(d)(1) (1988).

87. See *Lend Lease v. Briggs Transp. Co. (In re Briggs Transp. Co.)*, 780 F.2d 1339, 1342 (8th Cir. 1985); *First Bank v. Wieseler*, 45 B.R. 871, 874 n.1 (D.S.D. 1985); *Southerton Corp. v. United Penn Bank (In re Southerton Corp.)*, 46 B.R. 391, 397 (M.D. Pa. 1982); *In re Lippy*, 56 B.R. 524, 526 (Bankr. N.D. Ind. 1986); *In re Magnus*, 50 B.R. 241, 243 (Bankr. D.N.D. 1985); *First Agric. Bank v. Jug End in the Berkshires, Inc. (In re Jug End in the Berkshires, Inc.)*, 46 B.R. 892, 898-99 (Bankr. D. Mass. 1985).

88. See Francis F. Gecker, Comment, *The Recovery of Opportunity Costs as Just Compensation: A Takings Analysis of Adequate Protection*, 81 NW. U. L. REV. 953, 953-54 (1987) (arguing that, because Congress derived the concept of adequate protection of secured creditors from the limitations placed on the Bankruptcy Power by the Takings Clause of the Fifth Amendment as recognized in *Radford*, courts should use a takings analysis in deciding secured creditors' motions for adequate protection).

89. See, e.g., *United Savs. Assoc. v. Timbers of Inwood Forest Assocs. (In re Timbers of Inwood Forest Assocs.)*, 793 F.2d 1380, 1390 n.14 (5th Cir. 1986), *aff'd*, 808 F.2d 363 (5th Cir. 1987) (*en banc*), *aff'd*, 484 U.S. 365 (1988); *In re Briggs Transp. Co.*, 780 F.2d at 1342 ("By providing a creditor with a means of protecting its interest through section 362(d)'s adequate protection requirement, the competing interests

the creditor with an unsecured claim for the difference between the full claim and the property value, courts have tacitly confirmed Congress's assumption. At least one court has all but stated that unsecured claims may be destroyed in bankruptcy proceedings without constitutional problems.<sup>90</sup> Thus, to the extent that a tort cause of action is unsecured, decisional authority that it does not constitute property for purposes of a takings analysis already exists in the bankruptcy context.<sup>91</sup>

The most recent Supreme Court bankruptcy precedent in the takings area underscores the notion that only secured creditors possess the sort of traditional property right afforded constitutional protection in a takings context. While the Court in *United States v. Security Industrial Bank* stated that the retroactive application of a lien-avoidance provision of the Bankruptcy Code would effect a taking without just compensation of the

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of the debtor's need to reorganize and the secured creditor's entitlement to constitutional protection of its bargained-for property interests are reconciled."); *In re Kerwin-White*, 129 B.R. 375, 384 (Bankr. D. Vt. 1991) (noting that bankruptcy court may, based on fair market value, "determine and limit the value of an over-secured or under-secured creditor's interest in collateral without violating the Fifth Amendment"), *aff'd sub nom.* First Brandon Nat'l Bank v. Kerwin (*In re Kerwin*), 996 F.2d 552 (2d Cir. 1993); *In re Bullington*, 80 B.R. 590, 593 (Bankr. M.D. Ga. 1987) (stating that adequate protection concept protected plaintiff's Fifth Amendment property rights to its security; "There is no constitutional right to more than the value of the security."), *aff'd sub nom.* Travelers Ins. Co. v. Bullington, 89 B.R. 1010 (M.D. Ga. 1988), *aff'd*, 878 F.2d 354 (11th Cir. 1989).

90. See *Dahlke v. Doering*, 94 B.R. 569, 573 n.6 (D. Minn. 1989) ("An unsecured creditor is subject to considerable impairment of his claim, the most severe being a complete discharge of the debt. . . . The Supreme Court has upheld the validity of the reduction or destruction of unsecured creditors' claims.") (citing *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181, 188 (1902); *Rogers*, *supra* note 61, at 989).

91. Even where a cause of action proceeds to judgment and arguably becomes secured by virtue of a judicial lien, courts have determined that such claims do not constitute property for purposes of a bankruptcy/takings analysis. See *Commonwealth Nat'l Bank v. United States (In re Ashe)*, 712 F.2d 864, 869 (3d Cir. 1983), *cert. denied*, 465 U.S. 1024 (1984); *Hinson v. Lexington State Bank (In re Hinson)*, 20 B.R. 753, 758-59 (Bankr. D.S.C. 1982); *Flege v. Akron City Hospital (In re Flege)*, 17 B.R. 690, 696-97 (Bankr. N.D. Ohio 1982); *In re Habeeb-Ullah*, 16 B.R. 831, 832-33 (Bankr. W.D.N.Y. 1982). Largely, the courts reason that, under state law, judicial liens do not give the party an interest in a specific piece of the debtor's property, as do mortgages or other security interests. See *id.*; cf. *Taylor v. King (In re King)*, 18 B.R. 181, 183 (Bankr. D.R.I. 1982) (finding that consent judgment did not constitute protectable property because, under Rhode Island law, judgment is perfected only after execution and by levy on property of the debtor); *Golden v. City Nat'l Bank (In re Golden)*, 16 B.R. 580, 582 (Bankr. S.D. Fla. 1981) (suggesting that, although judicial lien placed cloud on title of property, under Florida law such lien did not qualify as protectable property interest for takings analysis because state law also prohibited execution of lien against homestead).



secured creditor's property, it also recognized that the Bankruptcy Power authorizes impairment of contractual obligations.<sup>92</sup> Implicit in this holding is the idea that the exercise of the Bankruptcy Power in a manner that radically affects or eliminates nontraditional property (*i.e.*, contractual rights or tort claims) does not rise to the level of a taking.<sup>93</sup> Viewed in this light, tort claims are less likely than contract claims to rise to the level of protectable property interests.<sup>94</sup> By virtue of being at least one step further removed from traditionally recognized property interests, contingent future claims are even less likely to qualify as protectable property for purposes of a bankruptcy/takings analysis. Even if they did by some extraordinary measure qualify as a protectable interest, however, the discharge of future claims probably would not satisfy the second element necessary to establish a compensable taking.

## 2. *The Takings Clause: Taken*

If a property interest is established, courts determine whether a taking has occurred by resorting to an *ad hoc*, factual inquiry.<sup>95</sup> While “es-chew[ing]” the development of any “set formula” in making this determina-

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92. 459 U.S. 70, 74-75 (1982) (citing *Hanover Nat'l Bank*, 186 U.S. at 188).

93. It has been suggested that “takings” do not occur in the bankruptcy context in part because of the special protective procedures available under the Code. As Alexander Cohen and Joseph Ravitch have stated in passing:

The availability of alternative protections has been an important element in cases considering takings claims. For example, despite *dicta* to the contrary . . . , it is now clear that the Just Compensation Clause does not extend to creditors in domestic bankruptcy proceedings. Such creditors are not, however, completely unprotected. Although they may not receive Fifth Amendment compensation for their destroyed expectations, all bankruptcy proceedings are carefully monitored through a number of unique procedural due process safeguards. Thus, the lack of just compensation in the bankruptcy context is balanced by significant protections in the legal process against arbitrary governmental action.

Alexander F. Cohen & Joseph Ravitch, *Economic Sanctions, Domestic Deprivations, and the Just Compensation Clause: Enforcing the Fifth Amendment in the Foreign Affairs Context*, 13 YALE J. INT'L L. 146, 160-61 (1988) (citations omitted).

94. See *In re Chicago, M., St. P. & Pac. R.R.*, 974 F.2d 775, 781 (7th Cir. 1992); *United States v. LTV Corp. (In re Chateaugay Corp.)*, 944 F.2d 997, 1003-05 (2d Cir. 1991); *Schweitzer v. Consolidated Rail Corp. (Conrail)*, 758 F.2d 936, 943 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985).

95. See *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 225 (1986); *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1005 (1984); *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979); *North Ark. Med. Ctr. v. Barrett*, 962 F.2d 780, 790 (8th Cir. 1992); *United States Trustee v. Prines (In re Prines)*, 867 F.2d 478, 485 (8th Cir. 1989).

tion,<sup>96</sup> courts will consider three primary factors: (1) the character of the governmental action (*i.e.*, a complete destruction, extinction, or invasion of a property right versus a mere diminution in its value); (2) the economic impact of the act; and (3) whether there will be an interference with "reasonable investment-backed expectations."<sup>97</sup>

With respect to the character of the governmental action—sometimes considered to be the determinative factor<sup>98</sup>—the discharge of future claims passes muster. To the extent that a discharge is made in conjunction with the establishment of a trust fund for future claimants, one can well argue that the discharge actually serves to augment any otherwise nearly worthless property rights held by future claimants. In other words, discharge in conjunction with the establishment of a fund saves some of the debtor's assets from present creditors in order to protect future claimants. Moreover, if no fund is established to satisfy future claims because they are wholly unknown and unanticipated, then their present value is nil, and no present expectation is extinguished.<sup>99</sup>

With regard to the economic impact of the discharge and its interference with investment-backed expectation, the foregoing analysis seems equally telling. A future claimant's expectation of compensation arguably is not "investment-backed." Nor may it be "reasonable" for future claimants to expect that Congress cannot or will not pass legislation—particularly bankruptcy legislation—that places limitations on the rights of tort victims.<sup>100</sup> At the very least, a "creditor who contends that . . . application

96. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2893 (1992) (citing *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)); *see McAndrews v. Fleet Bank*, 989 F.2d 13, 18 (1st Cir. 1993).

97. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 83 (1980); *Penn Central*, 438 U.S. at 130-31; *McAndrews*, 989 F.2d at 18; *Prines*, 867 F.2d at 485.

98. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-37 (1982); *Penn Central*, 438 U.S. at 130-31; *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415-16 (1922).

99. Arguably, the distinction between extinction of a property right and mere diminution of that right is artificial because it depends upon how broadly the property right in question is defined. In *Security Indus. Bank*, for example, the Supreme Court determined that the retrospective application of Bankruptcy Code § 522(f)(2) to avoid a secured creditor's lien completely destroyed that creditor's "bundle of rights." *See United States v. Security Industrial Bank*, 459 U.S. 70, 75 (1982). One can nevertheless argue that the application of the statute to the secured creditor would merely diminish rather than destroy that secured creditor's rights: The destruction of the lien would still leave the formerly secured creditor with an unsecured claim. *See Rogers, supra* note 61, at 1019-20.

100. State legislatures, as well as Congress, have passed various types of tort reform statutes that have withstood constitutional scrutiny. *See, e.g., Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 84 (1978) (upholding constitutionality

of a . . . bankruptcy law would disrupt his legitimate expectations in a manner that would violate the Constitution should bear a very heavy burden of persuasion.”<sup>101</sup>

### 3. *The Takings Clause: Public Use*

Outside of the bankruptcy context, the third element necessary to find a compensable taking—that the government action be for public rather than purely private use—is easily established since the Supreme Court’s rulings on the issue in 1984.<sup>102</sup> If the government has rationally determined that a conceivable public purpose will be served by the legislation that causes an alleged taking to occur, no further scrutiny of its public or private character is necessary.<sup>103</sup> The Supreme Court has “rejected the notion that a use is a public use only if the property taken is put to use for the general public.”<sup>104</sup> Thus, the scope of the public purpose requirement is “cotermin-

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of federal statute that limited damage recovery for nuclear accidents regardless of liability; deferring to Congress’s judgment in balancing the interests of affected groups); *Olsen v. J.A. Freeman Co.*, 791 P.2d 1285, 1293-94 (Idaho 1990) (upholding constitutionality of statute of repose, which barred product liability actions upon expiration of limitation period based on useful life of product, as valid exercise of legislative power to abolish or modify common-law rights and remedies); *Fein v. Permanente Med. Group*, 695 P.2d 665, 682 (Cal. 1985) (upholding constitutionality of statute limiting damages in medical malpractice actions), *appeal dismissed*, 474 U.S. 892 (1985); *see also* *Silver v. Silver*, 280 U.S. 117, 122 (1929) (deferring to state legislature’s enactment of an automobile guest statute that withdrew a previously recognized common-law right; noting that the Constitution does not forbid the abolition of common-law rights if, in doing so, legislature is seeking to attain a permissible objective); *Hammond v. United States*, 786 F.2d 8, 11-12 (1st Cir. 1986) (citing numerous cases upholding retroactive application of statutes that abridge economic and real property rights created under a prior statute); *Pitts v. Unarco Indus.*, 712 F.2d 276, 279 (7th Cir.) (upholding constitutionality of Indiana statute of repose which barred plaintiff’s wrongful death action against manufacturer of asbestos products brought ten years after last delivery of asbestos product to decedent’s employer), *cert. denied*, 464 U.S. 1003 (1983).

101. Rogers, *supra* note 61, at 1027.

102. *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 240-41 (1984); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 1014-15 (1984).

103. *National R.R. Passenger Corp. v. Boston & Me. Corp.*, 112 S. Ct. 1394, 1404 (1992); *see also* *Monsanto*, 467 U.S. at 1014 (“The role of courts in second-guessing legislatures’ judgment of what constitutes a ‘public use’ is extremely narrow.”). *But cf.* *Community Nat’l Bank & Trust Co. v. Persky (In re Persky)*, 134 B.R. 81, 102-04 (Bankr. E.D.N.Y. 1991) (suggesting that, in order to satisfy “public use” requirement, Congress must specifically consider “constraints of the Takings Clause” when enacting legislation).

104. *Monsanto*, 467 U.S. at 1014.

nous” with the governmental police power<sup>105</sup> and apparently with the Bankruptcy Power.<sup>106</sup>

### B. *The Takings Clause: Summary*

While Congressional action against property under the Bankruptcy Power may be for public use, under present case law future claims are not property within the meaning of the Takings Clause. Therefore, the discharge of future claims does not constitute a taking.

### C. *Substantive Due Process*

The Due Process Clause of the Fifth Amendment provides that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.”<sup>107</sup> Arguably, the due process afforded by this clause is both substantive and procedural,<sup>108</sup> although its specific substantive limiting effect on Congress’s Bankruptcy Power is subject to debate.<sup>109</sup> Assuming that the Fifth Amendment does place substantive limits on Congress’s Bankruptcy Power, however, discharge of future claims under the Bankruptcy Code survives substantive review. In the post-*Lochner*<sup>110</sup>

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105. *National R.R. Passenger Corp.*, 112 S. Ct. at 1404; *Midkiff*, 467 U.S. at 240. *But cf. In re Persky*, 134 B.R. at 104.

106. *See* *General Motors Acceptance Corp. v. Johnson (In re Johnson)*, 145 B.R. 108, 113 (Bankr. S.D. Ga. 1992) (“[T]he bankruptcy system is a ‘public use’ within the ambit of the Fifth Amendment . . . .”); *Hill v. Spencer Savs. & Loan Ass’n (In re Beville, Bresler & Schulman, Inc.)*, 83 B.R. 880, 896 (D.N.J. 1988) (to same effect). *But see* *Morel v. Morel (In re Morel)*, 983 F.2d 104, 105 (8th Cir. 1992) (finding no public use through application of particular Code section because: “The government does not get the property. It simply disappears, as a result of long standing policy, expressly authorized by the [Bankruptcy Power]. The existence of this power has been long accepted and widely known. It can rightly be regarded as a condition that inheres in every contract creating a debt.”), *cert. denied*, 113 S. Ct. 2423 (1993). For a different twist with respect to the public use requirement, *see In re Persky*, 134 B.R. at 103-04 (voiding application of Code § 363(h) “to property rights which had matured and vested prior to its effective date, for a benefit limited only to this estate’s creditors,” because such application did not constitute a public use). The *Persky* court, rather than treating public use as a taking element, suggested that a taking occurs where a court finds a public use to be lacking. *See id.* at 103.

107. U.S. CONST. amend. V, cl. 3.

108. The Fifth Amendment’s procedural due process limitations are discussed *infra* part IV.D.

109. *See supra* note 61 and accompanying text.

110. *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating, on substantive due process grounds, a New York law that limited the number of hours that bakery

era, in which substantive due process review is applied with caution,<sup>111</sup> and economic substantive due process is weak, if not completely dead,<sup>112</sup> any vestige of support for the proposition that substantive due process protects creditors' rights<sup>113</sup> does not extend to the protection of unsecured creditors' property rights.<sup>114</sup>

Under the substantive aspect of the Due Process Clause, legislation affecting heightened interests—so-called “fundamental rights”<sup>115</sup>—is

employees could work).

111. See *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 229 (1985) (“The history of substantive due process counsels caution and restraint. The determination that a substantive due process right exists is a judgment that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.”) (Powell, J., concurring) (citations and internal quotation marks omitted).

112. See, e.g., Michael J. Phillips, *Another Look at Economic Substantive Due Process*, 1987 WISC. L. REV. 265, 283-88 (stating that, although “not completely defunct,” economic substantive due process boils down to little more than a rational basis, means-end test); Herman Schwartz, *Property Rights and the Constitution: Will the Ugly Duckling Become a Swan?*, 37 AM. U. L. REV. 9, 39 (1987) (stating that attempts to revive economic substantive due process create constitutionally protected property rights where they do not properly exist; “Property rights . . . are not and were not intended to be the swan of constitutional law—they really are just ducks, after all, despite all the quacking.”).

113. According to Rogers, “The contention . . . reduces to the claim that rather freewheeling *Lochner*-style economic substantive due process should be revived. In light of the glee with which the Supreme Court seizes every available opportunity to repudiate *Lochner* yet again, few are likely to pursue that route.” Rogers, *supra* note 61, at 986 (citing, *inter alia*, *Dean v. Gadsden Times Publishing Corp.*, 412 U.S. 543, 545 (1973)).

114. See *Dahlke v. Doering*, 94 B.R. 569, 573 (D. Minn. 1989) (noting that the Supreme Court has “routinely allowed impairment of unsecured creditors’ rights”); *Credit Alliance Corp. v. Dunning-Ray Ins. Agency, Inc. (In re Blumer)*, 66 B.R. 109, 114 (Bankr. 9th Cir. 1986) (“Unsecured creditors have no rights to substantive due process since an unsecured claim confers no rights in specific property of the obligor.”) (citing *Louisville Joint State Land Bank v. Radford*, 295 U.S. 555, 588 (1935)), *aff’d mem.*, 826 F.2d 1069 (9th Cir. 1987); *cf. Travelers Ins. Co. v. Bullington*, 878 F.2d 354, 359 (11th Cir. 1989) (“It is undisputed that the takings clause of the fifth amendment protects certain of the rights of secured creditors. . . . However . . . [these] safeguards were provided to protect the rights of secured creditors . . . to the extent of the value of the property. There is no constitutional claim of the creditor to more than that.”) (citations omitted). *But cf. Thorp Credit & Thrift Co. v. Pommerer (In re Pommerer)*, 10 B.R. 935, 948 (Bankr. D. Minn. 1981) (questioning whether unsecured creditor should be treated differently from secured creditor for purposes of substantive due process).

115. Fundamental rights are those that are “explicitly or implicitly guaranteed by the Constitution.” *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33-34 (1973); see *Regents of Univ. of Mich. v. Ewing*, 474 U.S. at 229 (Powell, J., concurring)

subject to a heightened level of judicial scrutiny.<sup>116</sup> The discharge provisions of the Bankruptcy Code, as they pertain to future claims, should not be subject to this heightened scrutiny because future tort claimants do not possess rights that qualify as fundamental.<sup>117</sup> Purely economic rights do not qualify for heightened constitutional protection.<sup>118</sup> Rather, statutes impairing mere economic and other nonfundamental rights pass constitutional scrutiny if they are rationally related to a legitimate governmental interest;

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("[S]ubstantive due process rights are created only by the Constitution . . ."); *Mansfield Apartment Owners Ass'n. v. City of Mansfield*, 988 F.2d 1469, 1477 (6th Cir. 1993) (to same effect). According to constitutional scholar John Ely, the Court is likely to find fundamental rights in "the 'area' (at least the Court sees it as an area) of sex-marriage-childbearing." John H. Ely, *The Supreme Court, 1977 Term—Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 11 & n.40 (1978); see, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (right to choose abortion); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (right to use contraceptives); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (right to marry). Among the other rights that the Supreme Court has held to be fundamental are: freedom of expression and association, see *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); the right to vote and participate in the electoral process, see *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966); the right to interstate travel, *Shapiro v. Thompson*, 394 U.S. 618 (1969); and the right to privacy, see, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965); cf. *Bowers v. Hardwick*, 478 U.S. 186 (1986), *rev'd* 760 F.2d 1202 (11th Cir. 1985).

116. Legislation that impinges upon fundamental rights is subject to strict scrutiny and, therefore, must be necessary to promote a compelling or overriding governmental interest. See *Griswold*, 381 U.S. at 503-04 (1965); *Bates v. Little Rock*, 361 U.S. 516, 524 (1960); *Felice v. Rhode Island Bd. of Elections*, 781 F. Supp. 100, 104 (D.R.I. 1991).

117. See *Boyd v. Bulala*, 647 F. Supp. 781, 787 (W.D. Va. 1986) ("Absent from the list [of fundamental rights] is the right to a full recovery in tort, which is not a right guaranteed by the federal Constitution."), *aff'd in part, rev'd in part on other grounds*, 877 F.2d 1191 (4th Cir. 1989); *Walters v. Webre (In re Webre)*, 88 B.R. 242, 245-46 (Bankr. 9th Cir. 1988) (determining that, in Chapter 13 case, right to be paid in full on judgment obtained for willful and malicious injury is not a fundamental right); *Watters v. Watters*, No. 89-F-229, 1990 WL 97830, \*3 (D. Colo. June 12, 1989) ("The Constitution does not create a fundamental right to pursue specific tort actions. . . . The Open Access Clause of the First Amendment . . . focuses on procedural impediments to the exercise of existing rights and does not prevent a court from holding that a plaintiff has no remedy at law for the injuries he may allege.").

118. See *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973); *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955); *United States v. Carolee Products Co.*, 304 U.S. 144 (1938); see also *United States v. Kras*, 409 U.S. 434, 446 (1973) (stating that "bankruptcy legislation is in the area of economics and social welfare" which is "hardly akin to free speech" or other fundamental rights); cf. *Otasco, Inc. v. United States (In re South)*, 689 F.2d 162, 165 (10th Cir. 1982) (distinguishing contractual rights and economic interests from fundamental interests), *cert. denied*, 460 U.S. 1069 (1983).

*i.e.*, they must not be arbitrary and capricious in affecting such rights.<sup>119</sup> These statutes “enjoy a presumption of constitutionality that casts a heavy burden on the part[ies] challenging them.”<sup>120</sup> Legislation passed pursuant to Congress’s plenary Bankruptcy Power is arguably deserving of an even greater presumption of constitutionality.<sup>121</sup>

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119. See *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 83-86 (1978) (upholding liability-limitation provision in legislation promoting development of nuclear power); *Thompson v. Tulchin (In re Cartridge Television, Inc.)*, 535 F.2d 1388, 1392 (2d Cir. 1976) (upholding constitutionality of former Bankruptcy Act provision that disallowed contingent, unprovable claims); *Ackles v. A.H. Robins Co. (In re A.H. Robins Co.)*, 59 B.R. 99, 103 (Bankr. E.D. Va. 1986), *aff’d sub nom. Beard v. A.H. Robins*, 828 F.2d 1029 (4th Cir. 1987); *Lucas v. Beneficial Fin. Co. (In re Lucas)*, 18 B.R. 179, 180 (Bankr. S.D. Ohio 1982); *Tanner v. FinanceAmerica Consumer Discount Co. (In re Tanner)*, 14 B.R. 933, 938-39 (Bankr. W.D. Pa. 1981) (noting that Due Process Clause is “not a significant restraint” on Congress’s right to act prospectively in matters of economic or social welfare).

120. *Metropolitan Property & Cas. Ins. Co. v. Rhode Island Insurers’ Insolvency Fund*, 811 F. Supp. 54, 57 (D.R.I. 1993); see *Richardson v. Honolulu*, 802 F. Supp. 326, 342 (D. Hawaii 1992) (noting in context of substantive due process analysis that “courts should give substantial deference to a legislature’s determination of a public use or purpose as well as the legislative means for carrying out the purpose”); *In re Bullington*, 80 B.R. 590, 592 (Bankr. M.D. Ga. 1987) (“It is by now well established that legislative acts adjusting the burdens and benefits of economic life [such as the Bankruptcy Code] come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.”) (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976)), *aff’d sub nom. Travelers Ins. Co. v. Bullington*, 89 B.R. 1010 (M.D. Ga. 1988), *aff’d*, 878 F.2d 11th Cir. 1989); cf. *FCC v. Beach Communications, Inc.*, 113 S. Ct. 2096, 2101 (1993) (“In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.”).

121. See *In re Gifford*, 688 F.2d at 453 (“[U]nder the bankruptcy clause of the Constitution, ‘Congress may prescribe any regulations concerning discharge in bankruptcy that are not so grossly unreasonable as to be incompatible with fundamental law.’”) (quoting *Hanover Nat’l Bank v. Moyses*, 186 U.S. 181, 192 (1902)); *In re Bullington*, 80 B.R. at 593 (to same effect); *Paden v. G.E.C.C. Consumer Discount Co. (In re Paden)*, 10 B.R. 206, 207 (Bankr. E.D. Pa. 1981) (recognizing presumption of constitutionality with respect to legislation passed pursuant to Bankruptcy Power).

As the *Pommerer* court concluded in 1981:

It appears . . . that we must sit back and recognize that the congressional power to establish uniform laws on the subject of bankruptcies is virtually supreme, and that this power permeates a broad area which includes more than simply discharging debts and establishing exemptions. If the financial, commercial and economic structure of the nation is to be preserved, disruption of debtor-creditor relationships, within constitutional bounds, must be

If Congress intends the discharge provisions of the Bankruptcy Code<sup>122</sup> to reach the outer most permissible limits of discharge authorized by the Bankruptcy Clause, it is clear that the provisions, as applied to future claims, should survive the rational basis test.<sup>123</sup> As a general matter, the bankruptcy policies of permitting reorganization, giving debtors a fresh start, and paying present creditors qualify as legitimate government objectives.<sup>124</sup> The discharge of future claims upon plan confirmation rationally relates to these legitimate goals. Moreover, the discharge of future claims, to the extent that it is coupled with fair representation of future claimants, rationally relates to the additional, rational goal of providing monetarily for such claimants. Such discharge preserves going concern value while affording future claimants the means to participate in the reorganization and to share in the debtor's estate. Therefore, the discharge of future claims survives substantive due process scrutiny.

#### D. Procedural Due Process

Whether or not the Fifth Amendment substantively limits Congress's power to allow discharge, courts have presumed—primarily in the context of discussing the rights of known creditors<sup>125</sup>—that the exercise of the

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accepted. . . . Today, an Act of Congress designed for relief of debtors, in this debt burdened economy, should not be held to violate the Fifth Amendment, sans a clear and convincing demonstration that the adverse effect upon substantial private rights greatly outweighs the social benefit.

Thorp Credit & Thrift Co. v. Pommerer (*In re Pommerer*), 10 B.R. 935, 948-49 (Bankr. D. Minn. 1981).

122. See 11 U.S.C. §§ 727, 1141(d)(1)(A), 1228(b)-(c), 1328(b) (1988).

123. Whether Congress in fact intended the discharge provisions of the Bankruptcy Code to employ the full scope of the Bankruptcy Power is a question in need of an answer. Our concern, however, is with Congress's constitutional power to exercise the full scope of the Bankruptcy Power. See *supra* note 18 and accompanying text. The fact that Congress has the power to discharge all future claims does not mean that it exercised that power in the Code as currently drafted. The statutory provisions and legislative history of Code § 101(5) (definition of "claim") and § 1141 (Chapter 11 discharge), however, strongly suggest that Congress intended a very broad discharge.

124. Cf. *Walters v. Webre* (*In re Webre*), 88 B.R. 242, 246 (Bankr 9th Cir. 1988) (permitting Chapter 13 debtor to discharge debt for willful and malicious injury; and noting that doing so provides incentive for debtor to propose Chapter 13 plan rather than to liquidate).

125. Most courts considering the interrelation between Fifth Amendment due process and the discharge of debt have done so in the context of deciding whether, and under what circumstances, a known creditor receives adequate notice in a bankruptcy proceeding in order for its claim to be discharged. For a discussion of some of these cases, see generally Nicholas A. Franke, *The Code and the Constitution: Fifth*



Bankruptcy Power is conditioned upon affording creditors procedural due process in the form of reasonable notice and an opportunity to be heard.<sup>126</sup> Some courts and commentators have also presumed that unknown, but presumably foreseeable, future claimants are equally entitled to such procedural due process protections.<sup>127</sup> These presumptions, however, are not obvious ones. Whether future claimants are constitutionally entitled to notice and an opportunity to be heard before their claims can be discharged depends upon: (1) whether a future claim is the kind of property right or interest that is protected by procedural due process; and if so, (2) the nature and extent of the procedural protections that are due a claimant before she may be deprived of her property.<sup>128</sup>

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*Amendment Limits on the Debtor's Discharge in Bankruptcy*, 17 PEPP. L. REV. 853, 865 (1990) (discussing application of Fifth Amendment due process standard to bankruptcy proceedings).

126. *See, e.g.*, *City of New York v. New York, N.H. & H.R. Co.*, 344 U.S. 293, 297 (1953) (finding that the due process protections of Fifth Amendment entitle creditors to adequate notice before their claims can be discharged); *Waterman S.S. Corp. v. Aguir* (*In re Waterman S.S. Corp.*), 141 B.R. 552, 557 (Bankr. S.D.N.Y. 1992) ("The due process considerations of the Fifth Amendment . . . are given great weight and take precedence over the discharge provisions of § 1141, in cases where a debtor has knowledge of claims against it, and fails to inform claimants of the pendency of the proceedings."), *vacated*, 157 B.R. 220 (S.D.N.Y. 1993); *see also* *Spring Valley Farms, Inc. v. Crow* (*In re Spring Valley Farms, Inc.*), 863 F.2d 832, 834 (11th Cir. 1989); *Broomall Indus. v. Data Design Logic Sys., Inc.*, 786 F.2d 401, 403 (Fed. Cir. 1986); *Schweitzer v. Consolidated Rail Corp. (Conrail)*, 758 F.2d 936, 944 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985); *Reliable Elec. Co. v. Olson Constr. Co.*, 726 F.2d 620, 623 (10th Cir. 1984); *Acevedo v. Van Dorn Plastic Mach. Co.*, 68 B.R. 495, 499 (Bankr. E.D.N.Y. 1986) (finding that due process requires that debtor notify creditor of a claim when creditor is unlikely to otherwise know of its existence); *Roach v. Edge* (*In re Edge*), 60 B.R. 690, 691-92 n.1 (Bankr. M.D. Tenn. 1986) (stating that procedural due process rights may impose limits on discharge in bankruptcy).

127. *See, e.g.*, cases cited *supra* notes 46-48; *see also* Franke, *supra* note 125, at 868-70 (assuming potential due process problems with respect to unknown claimants); Bibler, *supra* note 18, at 170-01 (arguing that future claimants can never receive constitutionally adequate notice and thus, can never receive due process in Chapter 11 bankruptcy case that results in discharge of their claims); Roe, *supra* note 3, at 900-04 (discussing economic issues raised by due process/notice analysis with respect to future unknown claimants; determining that such future claimants can receive procedural due process).

128. Arguably, a future tort claimant's entitlement to notice and an opportunity to be heard may also depend upon a third, related consideration: whether discharge necessarily qualifies as a deprivation of the future claim. To the extent that this consideration implicates a takings analysis, see discussion *supra* part IV.A. Perhaps a more important question, however, is whether any alleged deprivation is effected by the bankruptcy court (*i.e.*, through adjudication) or by the Bankruptcy Code (*i.e.*, through legislation).

Procedural due process requires notice and hearing only in adjudicatory settings and not with respect to the adoption of general legislation. *See Atkins v. Parker*, 472 U.S.

*E. Procedural Due Process: "Property" of a Different Sort*

If future claims qualify as dischargeable claims under the Bankruptcy Code,<sup>129</sup> does it follow that these claims qualify as property deserving of procedural due process protection? In answering this question, one again faces the mutable definition of property: The question "What is property?" receives a comparative answer depending upon whether the focus of Fifth Amendment analysis is upon substance, takings, or procedure. As demonstrated above, in the area of substantive due process, there may be no such thing as constitutional protection for economic property, at least since the end of the *Lochner* era.<sup>130</sup> In the area of unconstitutional takings, property is generally limited to a subset of traditional common-law property interests established under state law, which probably does not include future claims dealt with under the Bankruptcy Power.<sup>131</sup> Property in the procedural due process context takes on a third meaning.

While also derived substantially from state law, the concept of property in the procedural due process context is relatively flexible and expansive. For purposes of procedural due process, the term "property" "denotes a broad range of interests secured by 'existing rules or understandings.'"<sup>132</sup> And, according to the Supreme Court, procedurally protected property interests "may take many forms"<sup>133</sup> or be "intangible."<sup>134</sup> Thus, proce-

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115, 129-31 (1985) ("The procedural component of the Due Process Clause does not 'impose a constitutional limitation on the power of Congress to make substantive changes in the law . . . .'" (quoting *Richardson v. Belcher*, 404 U.S. 78-81 (1971)); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (stating that due process requires that deprivation of property by adjudication "be preceded by notice and opportunity for hearing appropriate to the nature of the case"); *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915) ("General statutes . . . are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule."); see also *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432-33 (1982) (noting that neither state grant of tort immunity to government officials nor state legislative adjustment of welfare benefits to recipients deprives affected parties of property without due process); *Texaco, Inc. v. Short*, 454 U.S. 516, 534-36 (1982) (distinguishing adjudication from legislation and noting "it has never been suggested that each citizen must in some way be given specific notice of the impact of a new statute on his property before that law may affect his property rights").

129. See *supra* note 18 and accompanying text.

130. See discussion *supra* part IV.C.

131. See discussion *supra* part IV.A.1.

132. *Perry v. Sindermann*, 408 U.S. 593, 601 (1972) (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)); see *Jackson v. Department of Public Safety*, 675 F. Supp. 1025, 1029 (M.D. La. 1985).

133. *Board of Regents v. Roth*, 408 U.S. 564, 576 (1972).

dural due process protects interests not otherwise protectable by substantive due process or takings analyses.<sup>135</sup> At the most basic level, this heightened procedural protection makes sense: Extra care with respect to procedural protection arguably ensures that an interest which may or may not qualify as property for other purposes is not destroyed before it has been examined.

The language of some decisions suggests that the present right to bring a cause of action in tort, although perhaps not property for other purposes, nevertheless qualifies for procedural due process protection.<sup>136</sup> As in a takings analysis, however, in order for procedural due process to be constitutionally mandated, the interest at issue must be one derived from a source independent of the Constitution, such as state or federal law,<sup>137</sup> and one in which the claimant “has already acquired . . . specific benefits.”<sup>138</sup> A mere subjective expectancy is not protected.<sup>139</sup>

134. *See* *Tulsa Professional Collection Servs., Inc. v. Pope*, 485 U.S. 478, 485 (1988) (determining for procedural due process purposes that cause of action against an estate for unpaid bill—an “intangible interest”—qualified as protectable property); *see also* *J.B. Ranch, Inc. v. Grand County*, 958 F.2d 306, 309 (10th Cir. 1992) (“‘There are many intangible rights that merit the protection of procedural due process although their infringement falls short of an exercise of the power of eminent domain for which just compensation is required under the Fifth and Fourteenth Amendments.’”) (quoting *Landmark Land Co. of Okla., Inc. v. Buchanan*, 874 F.2d 717, 723 (10th Cir. 1989)).

135. One bankruptcy court has noted that “[t]he gradual demise of substantive due process has been accompanied by an enlargement of what is considered property” in the Fifth Amendment procedural due process context. *Thorp Credit & Thrift Co. v. Pommerer (In re Pommerer)*, 10 B.R. 935, 948 (Bankr. D. Minn. 1981) (citing *Board of Regents v. Roth*, 408 U.S. 564 (1972)). Nevertheless, as other courts have noted, this expansive concept of property does not transform every interest accorded by state law into property. *See, e.g., Jackson*, 675 F. Supp. at 1030.

136. *See, e.g., Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807 (1985) (holding, in class action, that a “chose in action” qualifies as a constitutionally recognized property interest for purposes of procedural due process); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 n.4 (1982) (concluding that, although not traditional property right and thus not subject to takings analysis, state tort-law claim is species of property protected by procedural due process); *A.H. Robins Co. v. Piccinin*, 788 F.2d 944, 1014 (4th Cir.) (accepting, for purposes of procedural due process/change of venue analysis, that tort claim is “‘species of property’ in the constitutional sense”), *cert. denied*, 479 U.S. 876 (1986); *Ryland v. Shapiro*, 708 F.2d 967, 972-73 (5th Cir. 1983) (recognizing wrongful death action as property for procedural due process purposes because state law defined such action as property right); *Jackson*, 675 F. Supp. at 1029-30 (noting that *Mullane* court found cause of action to be protectable property for procedural due process purposes).

137. *See Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 222-23 (1985).

138. *See Board of Regents v. Roth*, 408 U.S. 564, 576 (1972).

139. *Id.* at 577 (“To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral

Whether a future claim fits these requirements is a matter of debate. Arguably, at the time of discharge, the future claimant does not have an already acquired interest in specific benefits under most state laws because the cause of action has not yet accrued.<sup>140</sup> Federal bankruptcy law may nevertheless supply an independent source of legitimate expectation for the future claimant: If future claims are cognizable and dischargeable under the Bankruptcy Code, then they may be estimated and paid under the Code.<sup>141</sup> Thus bootstrapped by the Bankruptcy Code itself, a future claim would qualify as property subject to procedural constitutional protection.

#### *F. Procedural Due Process: What Process is Due?*

In the bankruptcy context, procedural due process seeks to ensure a creditor's meaningful participation in proceedings that could affect its interests. The standard for providing procedural due process to creditors in a Chapter 11 bankruptcy case is derived from the standard applied in other judicial proceedings and set forth by the Supreme Court in *Mullane v. Central Hanover Bank & Trust Co.*:<sup>142</sup> When practicable, interested parties are to receive notice "reasonably calculated . . . to apprise [them] of the pendency of [an] action and afford them an opportunity to present their objections."<sup>143</sup> Essentially, procedural due process intends that a party receive both notice and an opportunity to be heard.

##### *1. Notice*

The procedural process owed to unknown or unidentifiable future claimants does not include actual notice under all circumstances. In *Mullane*, the Court approved notice by publication where unknown trust beneficiaries and their interests "could not with due diligence be ascertained."<sup>144</sup> Outside the mass tort context, courts have thus approved publication notice where unknown creditors or their interests have not been reasonably

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expectation of it. He must, instead, have a legitimate claim of entitlement to it.").

140. See discussion *supra* part IV.A.1.

141. See 11 U.S.C. § 502(c)(1) (1988).

142. 339 U.S. 306, 314-15 (1950) (discussing procedural protections due under Fourteenth Amendment). Due process challenges to federal legislation are grounded in the Due Process Clause of the Fifth Amendment, while the same type of challenges to state legislation are grounded in the Due Process Clause of the Fourteenth Amendment. Because judicial decisions interpreting either clause are relevant for purposes of this Article, *cf.* Paul v. Davis, 424 U.S. 693, 702 n.3 (1976), we make no distinction between Fifth Amendment and Fourteenth Amendment cases.

143. *Mullane*, 339 U.S. at 314.

144. *Id.* at 317.

ascertainable.<sup>145</sup> Moreover, according to the Supreme Court, “in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits,” and such an indirect method “creates no constitutional bar to a final decree foreclosing their rights.”<sup>146</sup> Bankruptcy courts have similarly recognized that a debtor cannot be required to search out each conceivable, possible, conjectural, or speculative creditor in order to give actual notice of a claims bar date.<sup>147</sup>

Under the language of *Mullane*, however, due process with respect to most future claimants cannot be ensured through publication notice alone because publication notice is not “all that the situation permits.”<sup>148</sup> In the mass tort/future claims context, unlike other cases in which particular creditors or their interests may not be reasonably ascertainable, the future claims as a group are usually in some general sense known and foreseeable to the debtor.<sup>149</sup> It is the number, extent, and specifics of the future claims that are unknown. When the debtor possesses general knowledge about a group of likely future claims—especially when future claimants may not

145. See *Tulsa Professional Collection Servs., Inc. v. Pope*, 485 U.S. 478, 490 (1988); see also *City of New York v. New York, N.H. & H.R. Co.*, 344 U.S. 293, 296 (1953) (permitting publication notice to unknown claimants); *In re Best Prods. Co.*, 140 B.R. 353, 359 (Bankr. S.D.N.Y. 1992) (permitting publication notice to unknown products liability claimants); *In re Production Plating, Inc.*, 90 B.R. 277, 284-85 (Bankr. E.D. Mich. 1988) (permitting publication notice to unknown holders of intentional tort, contribution, and indemnity claims).

146. *Mullane*, 339 U.S. at 317. Where conditions do not reasonably permit actual notice, constructive notice is constitutionally adequate if “the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.” *Id.* at 315; see *Vancouver Women’s Health Collective Soc’y v. A.H. Robins Co.*, 820 F.2d 1359, 1364 (4th Cir. 1987) (“Where conditions do not reasonably permit a more adequate notice, the form of notice chosen must not be substantially less likely to bring home notice than other feasible and customary substitutes.”).

147. See, e.g., *Charter Crude Oil Co. v. Petroleos Mexicanos (In re Charter Co.)*, 125 B.R. 650, 655 (M.D. Fla. 1991); *In re Thomson McKinnon Sec., Inc.*, 130 B.R. 717, 720 (Bankr. S.D.N.Y. 1991); *Brooks Fashion Stores, Inc. v. Michigan Employment Sec. Comm’n (In re Brooks Fashion Stores)*, 124 B.R. 436, 444 (Bankr. S.D.N.Y. 1991).

148. *Mullane*, 339 U.S. at 317.

149. See *Waterman S.S. Corp. v. Aguiar (In re Waterman S.S. Corp.)*, 141 B.R. 552, 557 (Bankr. S.D.N.Y. 1992) (“[A]mple evidence existed for [debtor] to conclude that an amorphous class of unmanifested asbestosis claimants . . . existed at the time [it] filed its bankruptcy petition.”), *vacated*, 157 B.R. 220 (S.D.N.Y. 1993); *infra* note 18 and accompanying text; see also *Roe*, *supra* note 3, at 902; cf. *Schweitzer v. Consolidated Rail Corp. (Conrail)*, 758 F.2d 936, 944 (3d Cir.) (under former Bankruptcy Act), *cert. denied*, 474 U.S. 864 (1985); *Hatch v. Riggs Nat’l Bank*, 361 F.2d 559, 566 (D.C. Cir. 1966).

even be aware of their exposure to an offending product—publication notice by itself does not suffice.<sup>150</sup> Rather, the practical situation in a bankruptcy case usually also permits (and therefore *Mullane* usually mandates) the appointment of a future claims representative in order to provide future claims access to a court hearing. In fact, a debtor's failure to seek such appointment has recently been characterized by one court as an attempt to "write out of the Code its estimation provision."<sup>151</sup> The practicality mandate of *Mullane* therefore usually requires the opportunity for future claimants to be heard through a representative when publication notice to them is largely futile.

## 2. Hearing

The procedural due process analysis does not end with the determination that publication notice is, by itself, defective as to future claimants whose claims can be generally fixed and defined.<sup>152</sup> In *Mullane*, the Supreme Court required courts to have "due regard for the practicalities of the case" when determining how to satisfy procedural due process.<sup>153</sup> In

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150. In this context, publication notice arguably functions only as an unacceptable, "emaciated form of minimal due process," where even well-read claimants may remain completely unaware that their substantive rights are being affected by the bankruptcy. *In re Waterman S.S. Corp.*, 141 B.R. at 558 (finding publication notice constitutionally insufficient as to debtor's former employees who were future asbestosis claimants at the time of the bankruptcy). Although arguably futile publication notice does not necessarily offend procedural due process in other circumstances, it does so here because it does not qualify as "all that the situation permits." See *Mullane*, 339 U.S. at 317.

151. *In re Waterman S.S. Corp.*, 141 B.R. at 558. An examination of the *Waterman Steamship* decision reveals the court's distress over two circumstances: First, the court noted the debtor's failure to list on its schedules all of its *known* former employees; and second, the court noted the debtor's failure to seek the appointment of a future claims representative. *Id.* at 558. By failing to take either of these actions, the debtor effectively prevented former employees who were future asbestos claimants from participating in the reorganization process. Moreover, because the debtor had, in fact, already been negotiating with another group of former employees whose injuries had manifested by the time of the bankruptcy, *see id.*, the debtor seemed to demonstrate an almost deliberate indifference to the plight of its future claimants. Thus, despite having determined that the employees' future claims resulting from prebankruptcy asbestos exposure fit within the Bankruptcy Code's definition of "claim," *see id.* at 558-59, the court found that the former employees' claims had not been discharged, *see id.* Presumably, if the claimants had received actual notice, or if a future claims representative had been appointed, the court would have discharged the future claims.

152. *Contra* Bibler, *supra* note 18, at 168-75.

153. *Mullane*, 339 U.S. at 314; *see also* *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (stating that due process is flexible and calls for such procedural protection as particular situation demands); *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971)

essence, *Mullane* requires the best protective procedure that is practicable under the circumstances.<sup>154</sup>

In *Mathews v. Eldridge*,<sup>155</sup> the Supreme Court established a fact-based balancing standard by which courts are to determine what process is constitutionally required. Under this standard, courts are to consider three primary elements:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>156</sup>

These practicability and balancing standards are welcome friends in the bankruptcy arena where courts are frequently guided by the inherently

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(acknowledging that formal and procedural requisites for hearing can vary depending upon importance of interests involved and nature of the subsequent proceedings).

154. See *Tulsa Professional Collection Servs., Inc. v. Pope*, 485 U.S. 478, 490 (1988); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985); *City of New York v. New York, N.H. & H.R. Co.*, 344 U.S. 293, 296 (1953); *Standard Oil Co. v. New Jersey ex rel. Parsons*, 341 U.S. 428 (1951); *Weigner v. City of New York*, 852 F.2d 646, 649 (2d Cir. 1988), *cert. denied*, 488 U.S. 1005 (1989); *Sheftelman v. Standard Metals Corp.*, 839 F.2d 1383, 1386 (10th Cir. 1987), *cert. dismissed*, 488 U.S. 881 (1988); *Charter Int'l Oil Co. v. Ziegler (In re Charter Co.)*, 113 B.R. 725 (M.D. Fla. 1990); *In re Best Prods. Co.*, 140 B.R. 353 (Bankr. S.D.N.Y. 1992); *In re Eagle-Picher Indus.*, 137 B.R. 679 (Bankr. S.D. Ohio 1992); *In re Production Plating, Inc.*, 90 B.R. 277 (Bankr. E.D. Mich. 1988); *In re Waterman S.S. Corp.*, 59 B.R. 724, 727 (Bankr. S.D.N.Y. 1986).

155. 424 U.S. 319 (1976).

156. *Id.* at 335. The cases applying the *Mathews* due process balancing test are numerous. See, e.g., *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 320-34 (1985); *Santosky v. Kramer*, 455 U.S. 745, 755-70 (1982); *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 27-33 (1981); *Proper v. District of Columbia*, 948 F.2d 1327, 1332-35 (D.C. Cir. 1991); *Berg v. Shearer*, 755 F.2d 1343, 1346-47 (8th Cir. 1985); *Burka v. New York City Transit Auth.*, 739 F. Supp. 814, 836-43 (S.D.N.Y. 1990); *Crocker v. Fluvanna County (VA) Bd. of Public Welfare*, 676 F. Supp. 711, 716-17 (W.D. Va. 1987), *aff'd*, 859 F.2d 14 (4th Cir. 1988); *Myers v. Scott County (In re Scott County Master Docket)*, 672 F. Supp. 1152, 1169-71 (D. Minn. 1987), *aff'd*, 868 F.2d 1017 (8th Cir. 1989); *Bradford v. Edelstein*, 467 F. Supp. 1361, 1373-75 (S.D. Tex. 1979). Although the cases generally balance the three factors to determine what kind of hearing due process requires, the factors are equally relevant in determining what type of notice is required.

equitable framework of the Bankruptcy Code.<sup>157</sup> When applied to the discharge of most future claims, these standards make clear that publication notice should be coupled with the appointment of a future claims representative in order to provide future claimants with an opportunity to participate in the case through the representative.

Under the tests of practicability and balancing, procedural due process protections may not be permitted to defeat the substantive rights of all other parties or substantially to waste the distributable value of the estate through delay or otherwise.<sup>158</sup> A court's temptation flatly to prohibit the discharge of future claims in the name of due process is inimical to the interests of present creditors, including present tort claimants,<sup>159</sup> and may actually harm the interests of future claimants as well. The interest of future claimants in preserving their claims against the reorganized debtor must be balanced with the interests of the troubled debtor's other creditors. This statement holds all the more true when the so-called procedural protections have the potential to destroy both the procedural and substantive rights of the future claimants themselves: Failure to discharge future claims may trigger liquidation and entirely defeat recovery for future claimants.<sup>160</sup>

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157. See *Roe*, *supra* note 3, at 901-02; *Hardiman*, *supra* note 18, at 1377-80.

158. See *Vancouver Women's Health Collective Soc'y v. A.H. Robins Co.*, 820 F.2d 1359, 1364 (4th Cir. 1987) ("[C]ourt must balance the needs of notification of potential claimants with the interest of existing creditors and claimants . . . and use discretion in balancing these interests when deciding how much to spend on notification.").

159. As Professor David Carlson points out in his discussion of successor liability issues in bankruptcy, a court's failure to discharge future personal injury claims causes a temporal inequality among claimants. See David G. Carlson, *Successor Liability in Bankruptcy: Some Unifying Themes of Intertemporal Creditor Priorities Created by Running Covenants, Products Liability, and Toxic-Waste Cleanup*, 50 LAW & CONTEMP. PROBS. 119 (1987). The temporal inequality results from the following: First, the failure to discharge future claims lessens the value of the debtor's estate to a potential purchaser, which, in turn, lessens the distribution to present claimants. Second, and more important, present claimants who receive pro rata shares in the diminished estate arguably subsidize 100% of the nondischarged future claims. See *id.* at 127-31. For example, at the most simplistic level, if a company has \$20,000 in future liabilities and would otherwise be valued at \$100,000, a buyer would be willing to pay \$80,000 for the company. Present claimants (including present tort claimants) would then receive their pro rata share of the \$80,000, which is unlikely to cover 100% of their claims. Future claimants, however, will retain the right to recover 100% of their claims from the successor entity. *Id.* at 128.

160. See *Keene Corp. v. Fiorelli (In re Joint E. & S. Dist. Asbestos Litig.)*, \_\_\_ F.3d \_\_\_, 1993 WL 497538 (2d Cir. Dec. 1, 1993); see also *Roe*, *supra* note 3, at 901 ("Surely due process cannot deny the assertion in bankruptcy of a future claim in the face of a serious risk that little or nothing will be left to satisfy the claim when it is eventually reduced to judgment. Due process cannot be so ironically self-defeating."); *Hardiman*, *supra* note 18, at 1380-82; *BIENENSTOCK*, *supra* note 57, at 692 ("Paradoxically, the alternative to providing future claimants with modified due process through the use of



Under the tests of practicability and balancing, the appointment of a future claims representative along with a reasonably calculated publication notice, emerges as a rational, practicable, and constitutionally permissible basis for the discharge of future claims.<sup>161</sup>

## V. CONCLUSION: THE CONSTITUTIONAL DISCHARGE OF FUTURE CLAIMS

### A. A.H. Robins, Manville, and Their Like

The constitutionality of future claims discharge is supported both by the breadth of the Bankruptcy Clause<sup>162</sup> and by the absence of either substantive Fifth Amendment prohibitions on Congress's authority to exercise the full scope of the Bankruptcy Power discharge<sup>163</sup> or Supreme Court precedent prohibiting the discharge of unsecured, contingent claims in appropriate circumstances. The Fifth Amendment's procedural due process standards, moreover, do not preclude the discharge of future claims. Rather, they require only that a debtor undertake the best practicable efforts to give notice to future claimants and afford them a meaningful opportunity to be heard.<sup>164</sup> These procedural requirements are best met through the use of reasonably calculated notice and the appointment of a future claims representative.<sup>165</sup>

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a present representative is that they may receive no process. That predicament may itself justify utilization of a present representative of future claimants.").

161. Although the procedure described may be adequate in the bankruptcy context, it may not suffice in all other contexts. For example, the outcome of the *Mathews* balancing test is not necessarily the same when considering the adequacy of procedures to bar future claims based on a class action settlement as when considering the adequacy of procedures to discharge future claims in bankruptcy. Although the interests of a future claimant are likely to be similar in either setting, the government interests are of different weight. The substantive public policy considerations that favor discharging debts against reorganizing debtors and the specific constitutional grant of power to Congress to enact bankruptcy legislation weigh heavier than the mostly procedural policies supporting the class action rule. (The latter procedural policies are, after all, instituted merely to provide a convenient alternative manner of conducting litigation.) For this reason, in the balance, procedural due process that is constitutionally sufficient to discharge future claims in bankruptcy may be insufficient to bind future claimants to a class action settlement. *Cf. Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974) (holding that due process and FED. R. CIV. P. 23(c)(2) required individually mailed notice to 2,250,000 class members whose names and addresses were easily ascertainable).

162. *See supra* notes 53-60 and accompanying text.

163. *See discussion supra* Part IV.

164. *See supra* part IV.F.

165. *See supra* part IV.F.

The constitutional permissibility of discharging future claims may best be grasped through an understanding of the relationship between the Bankruptcy Power and the procedural requirements of the Due Process Clause. Procedural due process was not intended to bar substantively valid legislative enactments.<sup>166</sup> Procedural due process cannot therefore serve to prohibit the discharge of future claims pursuant to the Bankruptcy Code. To hold otherwise would, in effect, elevate the economic interest in bringing a future tort action to the level of a sacrosanct fundamental right. Thus, the *A.H. Robins*<sup>167</sup> and *Manville*<sup>168</sup> courts constitutionally ordered the de facto discharge of future claims following notice and representation that were imperfect, but consistent with legitimate bankruptcy objectives and practicalities.

To the extent that courts remain ambivalent about appointing future claims representatives<sup>169</sup> and discharging future claims, their ambivalence should be based upon unclear statutory intent or, more persuasively, the obvious absence of clear statutory procedures for ensuring future claimants due process. It is this lack of clarity that has caused courts to agonize over the type of hearing to be afforded future claimants,<sup>170</sup> the necessarily imperfect knowledge possessed by a future claims representative,<sup>171</sup> whether analogies should be drawn to class action procedures,<sup>172</sup> the propriety of filing group claims,<sup>173</sup> the questions related to voting and

166. See *supra* note 128.

167. See *supra* notes 31-37 and accompanying text.

168. See *supra* note 44 and accompanying text.

169. See *supra* note 26 and accompanying text (discussing *H.K. Porter* case).

170. As one bankruptcy court has recently observed, "Unless a person is adequately informed of the reasons for denial of a legal interest, a hearing serves no purpose—and resembles more a scene from Kafka than a constitutional process." *Pettibone Corp. v. Payne* (*In re Pettibone Corp.*), 151 B.R. 166, 172 (Bankr. N.D. Ill. 1993); see *In re Walker*, 149 B.R. 511, 514 (Bankr. N.D. Ill. 1992) (citing *Chicago Cable Communications v. Chicago Cable Commission*, 879 F.2d 1540, 1546 (7th Cir. 1989), *cert. denied*, 493 U.S. 1044 (1990)).

171. Courts such as the *National Gypsum* court obviously fear that, despite the general identifiability of the interests of a group of future claimants, injured parties will unfairly go without compensation if an established trust runs out of money in the future due to improper estimation. See *In re National Gypsum*, No. 390-37213-SAF-11, slip op. at 33 (Bankr. N.D. Tex. Jan. 29, 1993) (declining to issue a permanent injunction barring future claims against reorganized debtor; stating that "[n]on-Bankruptcy Code claimants must be able to pursue their remedies in the future after the exhaustion of the . . . trust [established through the reorganization plan]").

172. See *supra* note 161.

173. See *Reid v. White Motor Corp.*, 886 F.2d 1462, 1469 (6th Cir. 1989) (permitting class proof of claim), *cert. denied*, 494 U.S. 1080 (1990); *Certified Class in Charter Sec. Litig. v. Charter Co.* (*In re Charter Co.*), 876 F.2d 866, 871 (11th Cir. 1989), *cert.*

cramdown standards for future claims, and the propriety of enjoining or discharging future claims.<sup>174</sup> In sum, although the Constitution and the apparent statutory intent of the Code drafters<sup>175</sup> allow the discharge of future claims, the statute omits the roadmap.

### B. Unforeseen Future Claims

Some future claims are so contingent and so remote at the time of the bankruptcy case as to be wholly unanticipated by the debtor, the claimholders, and perhaps by the drafters of the Bankruptcy Code.<sup>176</sup> This category of future claims might exist, for example, against a manufacturer that, at the time of its bankruptcy filing, could not foresee the discovery by scientists ten years later of a latent causal link between the use of a particular product the company manufactured prepetition and cancer.<sup>177</sup> Notwithstanding the remoteness and degree of speculation involved, these claims, based upon the prepetition manufacture of the later-revealed

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*dismissed*, 496 U.S. 944 (1990); *In re American Reserve Corp.*, 840 F.2d 487, 492 (7th Cir. 1988); *Sheftelman v. Standard Metals Corp.* (*In re Standard Metals Corp.*), 817 F.2d 625, 631-32 (10th Cir.) (disallowing class proof of claim), *vacated and rev'd in part on other grounds*, 839 F.2d 1383 (10th Cir. 1987), *cert. dismissed*, 488 U.S. 881 (1988); *In re Energy Resources Co.*, 82 B.R. 172 (D. Mass. 1987) (same); *In re Vestra Indus.*, 82 B.R. 21 (Bankr. D.S.C. 1987) (same).

174. See discussion *supra* Part II.

175. See note 17 and accompanying text.

176. But see *supra* note 17 and accompanying text.

177. The category of future claims described here is more remote than the type contemplated by Judge Newman of the Second Circuit in the *Chateaugay* case:

Consider, for example, a company that builds bridges around the world. It can estimate that of 10,000 bridges it builds, one will fail, causing 10 deaths. Having built 10,000 bridges, it becomes insolvent and files a petition in bankruptcy. Is there a "claim" on behalf of the 10 people who will be killed when they drive across the one bridge that will fail someday in the future?

*United States v. LTV* (*In re Chateaugay Corp.*), 944 F.2d 997, 1003 (2d Cir. 1991). In Judge Newman's hypothetical, at least the existence and nature of a limited group of possible future claims was foreseeable and estimable at the time of the bankruptcy proceeding and, therefore, arguably susceptible of due process and discharge.

With respect to the type of remote future claims described by Judge Newman, one Miami bankruptcy judge has recently suggested that representation for the potential future claimants may be necessary. In the pending *Piper Aircraft* case, Judge Robert Mark ordered the debtor and the unsecured creditors committee to find an agreeable party to represent persons not yet injured in potential Piper Aircraft-related accidents. Judge Mark indicated, moreover, that any approved bidder for the debtor's assets will be required to help insulate the reorganized Piper from future lawsuits—most likely through contributions to a trust fund. See David Lyons, *Future Suit Protection: Piper Deal Comes with a Catch*, NAT'L L.J., May 17, 1993, at 3.

carcinogenic product, meet our working definition of future claims<sup>178</sup> and may well meet the statutory definition of claims.<sup>179</sup>

The policy impetus for discharging these wholly unforeseen future claims, however, is weaker.<sup>180</sup> It is true that, absent their discharge, and if the debtor company has successfully reorganized, unforeseen future claims may be paid in full when they manifest themselves, while present and conventional future claims may have been substantially compromised in the previous bankruptcy. But because they are unforeseen, these future claims, unlike future claims such as those foreseen by A.H. Robins and Manville, do not depress the going concern value of the company at the time of its reorganization. Therefore, the failure to discharge them does not directly tax the bankruptcy distribution to conventional claims.<sup>181</sup>

Irrespective of the wisdom of doing so, Congress may provide for the discharge of unforeseen future claims if their discharge is rationally related to a proper purpose.<sup>182</sup> Under current precedents, one may argue that the Bankruptcy Code already allows for the discharge of unforeseen future claims.<sup>183</sup> Moreover, it is well possible to fashion an argument that unforeseen future claims can be discharged within the prescriptions of due process. Under *Mullane*, publication notice, although futile, may suffice because due process requires only the best notice and opportunity for hearing that can reasonably be given under the circumstances.<sup>184</sup>

Even under the *Mathews* balancing test,<sup>185</sup> the discharge of unforeseen future claims appears constitutionally permissible. The governmental interest in discharging them appears slight<sup>186</sup> because unforeseen future claims do not interfere with reorganization;<sup>187</sup> and the risk of erroneous deprivation may be high because the private interest of unforeseen future claimants may

178. See *supra* note 13 and accompanying text.

179. See *supra* notes 16-20 and accompanying text.

180. See *supra* notes 158-160 and accompanying text.

181. See *supra* note 159 and accompanying text.

182. Because there are no substantive constitutional limits (other than the rational relation test) on Congress's ability to provide for the discharge of future tort claims, see discussion *supra* part IV.A. (with respect to takings) and part IV.C. (with respect to substantive due process), the only other relevant constitutional inquiry would be whether these claimants were afforded sufficient procedural protections at the time their claims were discharged.

183. See *supra* note 18 and accompanying text.

184. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 317-18 (1950).

185. See *supra* notes 155-161 and accompanying text.

186. See, e.g., *Connecticut v. Doehr*, 111 S. Ct. 2105, 2115 (1991). In *Doehr*, the Court broadened the *Mathews* test to include consideration of the interest of the party seeking the deprivation along with the governmental interest. *Id.* at 2112.

187. See *supra* notes 158-161 and accompanying text.

be substantial<sup>188</sup> though yet undiscovered. Nevertheless, the value of additional or substitute procedural safeguards is low if not totally absent.<sup>189</sup> The appointment of an unforeseen future claims representative, for instance, would be virtually meaningless. Thus, even under *Mathews*, unless other practicable and meaningful procedural safeguards are available, a court might validate virtually futile publication notice to unforeseen future claimants and order their discharge.<sup>190</sup> Notwithstanding the constitutional permissibility of discharging unforeseen future claims, however, Congress has left the courts to struggle with statutory inference<sup>191</sup> and to risk allegations of moral bankruptcy in the struggle.<sup>192</sup>

### C. Statutory Reform

This Article has largely avoided the much-mooted question of whether the Bankruptcy Code already provides for future claims. Regardless of the answer to that question, new and explicit statutory provisions are advisable in order to assure the constitutional and consistent treatment of future claims. In addition, such provisions would ensure that Congress intends (if it does) the discharge of future claims as part of the exercise of its Bankruptcy Power—an intention that has its own constitutional significance.<sup>193</sup> Of the present statutory proposals,<sup>194</sup> those of the National

188. See, e.g., *Doehr*, 111 S. Ct. at 2112-13.

189. See, e.g., *id.* at 2114.

190. Although not addressing unforeseen claims per se, some courts have held that due process is not offended by publication notice alone in the case of claims unknown to the debtor. See *Charter Crude Oil Co. v. Petroleos Mexicanos (In re Charter Co.)*, 125 B.R. 650, 655 (M.D. Fla. 1991); *Charter Int'l Oil Co. v. Ziegler (In re Charter Co.)*, 113 B.R. 725, 727 (M.D. Fla. 1990); *In re Chicago, M., St. P. & Pac. R.R.*, 112 B.R. 920, 924 (N.D. Ill. 1990); *GreatAmerican Fed. Sav. & Loan Ass'n v. Adcock Excavating, Inc.*, No. 89C3794, 1990 WL 51219, \*4 (N.D. Ill. Apr. 17, 1990); *Wright v. Placid Oil Co.*, 107 B.R. 104 (N.D. Tex. 1989); *In re Best Prods. Co.*, 140 B.R. 353, 359 (Bankr. S.D.N.Y. 1992); *Brooks Fashion Stores, Inc. v. Michigan Employment Sec. Comm'n (In re Brooks Fashion Stores, Inc.)*, 124 B.R. 436, 444 (Bankr. S.D.N.Y. 1991). But see *Pettibone Corp. v. Payne (In re Pettibone Corp.)*, 151 B.R. 166, 172 (Bankr. N.D. Ill. 1993); *In re Eagle-Picher Indus.*, 137 B.R. 679, 682 (Bankr. S.D. Ohio 1992).

191. A clear statutory statement respecting the discharge of unforeseen future claims would, of itself, advance the argument of constitutionality. See *supra* note 123 and accompanying text and *supra* note 128.

192. In light of weak supporting policy, and in the absence of sympathetic facts, the discharge of unforeseen future mass tort claims seems unduly harsh. Existing precedent and statutory language, particularly in the face of what may prove to be complicated factual circumstances in the future, leave the question of their discharge unresolved.

193. See *supra* note 123 and accompanying text.

194. See *supra* note 12.

Bankruptcy Conference provide a procedural roadmap for the discharge of future claims, are consistent with the conclusions of this Article, and are unlikely to disturb the general fabric of the Bankruptcy Code.<sup>195</sup>

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195. See NAT'L BANKR. CONF. CODE REV. PROJECT, *supra* note 12, at 273-80.

