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THE FUTURE OF MASS TORT CLAIMS: COMPARISON OF SETTLEMENT CLASS ACTION TO BANKRUPTCY TREATMENT OF MASS TORT CLAIMS*

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* The opinions expressed in this Article are solely those of the authors and do not necessarily reflect the opinions of the law firm of Ness, Motley, Loadholt, Richardson & Poole, its partners, associates, co-counsel, or clients.

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I. INTRODUCTION

During the last thirty years, tort law has experienced unprecedented change in response to the challenges presented by the increasing complexity and volume of mass tort cases. What often begins as a trickle, soon swells to a river, then to a flood of litigation surrounding defective products such as the Dalkon Shield, Agent Orange, silicone breast implants, asbestos, and heart valves. State and federal dockets become clogged with an insurmountable backlog of mass tort cases. Repetitive litigation of the issues of causation, punitive damages, and common defenses marks the initial phases of mass tort litigation. To manage these challenges, bench and bar apply various aggregative methods

to mass tort cases such as consolidation, summary jury trials, bifurcation, litigation class action, multidistrict litigation, settlement class action, and Chapter 11 bankruptcy.[1] These methods have met with varying degrees of success and acceptance. A method's success depends on the perceptions and misperceptions of the jurists and counsel applying the methods. The two most common aggregative methods, settlement class action and Chapter 11 bankruptcy, are mired in controversy and misperception, hindering the full application of these techniques. A bias against settlement class action[2] and in favor of Chapter 11 resolution of mass tort claims has developed. This bias was most clearly expressed in Judge Jerry Smith's dissents in *Ahearn I*[3] and *Ahearn II*[4], the Supreme Court's decision in *Amchem Products, Inc. v. Windsor*,[5] and in numerous settlement class action decisions where certification of the settlement class is narrowly construed.[6] At the same time, some bankruptcy statutes designed to protect claimants are commonly ignored, and the Bankruptcy Code is loosely enforced in mass tort cases.[7]

Some perceive settlement class actions and Chapter 11 reorganizations to be "functional equivalents."[8] They are not. While settlement class actions and Chapter 11 are similar in many ways, there are differences which disadvantage the mass tort claimant when thrust involuntarily into the bankruptcy forum. Both proceedings are representational and aggregative. However, in a

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1. Joseph F. Rice & Nancy Worth Davis, *Judicial Innovation in Asbestos Mass Tort Litigation*, 33 TORT & INS. L.J. 127, 145 (1997). Multidistrict litigation may be used only to dispose of pretrial matters and is not used to resolve fully mass tort claims. *See* Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 118 S. Ct. 956, 964 (1998) (quoting H.R. Rep. No. 90-1130, at 4 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1898, 1900 ("The proposed statute affects only the pretrial stages in multidistrict litigation.")).

2. The bias may be more generalized, applying not only to settlement class actions but to all class actions. *See Appellate Courts Continue Onslaught Against Class Action*, 19 CLASS ACTION REP. 623 (1996).

3. Flanagan v. Ahearn (*In re* Asbestos Litig.) ("Ahearn I"), 90 F.3d 963, 996 (5th Cir. 1996) (Smith, J., dissenting).

4. Flanagan v. Ahearn (*In re* Asbestos Litig.) ("Ahearn II"), 134 F.3d 668, 674 (5th Cir. 1998) (Smith, J., dissenting).

5. Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).

6. *See, e.g.*, *Amchem*, 521 U.S. at 620 (noting that Rule 23 certification requirements are "designed to protect absentees by blocking unwarranted or over broad class definitions, [and] demand undiluted, even heightened, attention in the settlement context"); *see also* Barboza v. Ford Consumer Fin. Co., No. Civ. A. 94-12352-GAO, 1998 WL 148832, at *5 (D. Mass. Jan. 30, 1998) (noting that it is no longer necessary to consider "manageability" of a class, [b]ut that does not mean that settlement classes are, as general matter, more readily certifiable than litigation classes; indeed, the opposite may be true") (citing *Amchem*, 521 U.S. at 620 n.16).

7. *See, e.g.*, Menard-Sanford v. Mobey (*In re* A.H. Robins Co.), 880 F.2d 694, 696 (4th Cir. 1989); Kane v. Johns-Manville Corp. (*In re* Johns-Manville Corp.), 843 F.2d 636, 641-42 (2d Cir. 1988).

8. Georgene M. Vairo, Georgine, *The Dalkon Shield Claimants Trust, and the Rhetoric of Mass Tort Claims Resolution*, 31 LOY. L.A. L. REV. 79, 85 (1997); *see also Ahearn II*, 134 F.3d at 672 (Smith, J., dissenting) (criticizing class action proceedings as circumventing Bankruptcy Code protections); *Ahearn I*, 90 F.3d at 996 (Smith, J., dissenting) (criticizing lower court approval of a settlement class action as avoiding Bankruptcy Code procedural safeguards).

settlement class action, the class is represented by named plaintiffs and counsel who undergo close court scrutiny before final certification is granted; in bankruptcy, claimants are represented by members of creditors' and claimants' committees and counsel for these committees. The committees are appointed by the United States Trustee's office and are routinely approved by the court, in some cases without a hearing.

A common misconception is that bankruptcy resolves all claims of a debtor, including future claims.[9] However, there is a growing consensus in decisional law that the definition of "claim" contained in the Bankruptcy Code does not include future claims. Section 524(g) of the Bankruptcy Code[10] attempts to remedy this defect. The trusts, channeling injunctions, and futures' representatives created by § 524(g) are presently being challenged when trust funds are found to be inadequate to pay all claims including future claims. A recent challenge to the channeling injunction in *In re National Gypsum* resulted in a decision that the bankruptcy court does not have jurisdiction to discharge

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9. The Bankruptcy Code defines "claim" as:

> (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.

Bankruptcy Code, 11 U.S.C. § 101(5) (1994).

Whether a future claim falls within the parameters of § 101(5) has been the subject of much debate and some decisional law. For purposes of this Article, "future claim" means those claims that arise when debtors' prepetition conduct results in injury which manifests or accrues after confirmation of a plan of reorganization. Decisional law on this issue has crystallized around three alternative theories to determine whether a future claim or demand lies within the definition in § 101(5) and is dischargeable. These theories are the "accrued state law" theory, the "conduct" theory, and the "prepetition relationship" theory. The "accrued state law" theory holds that a claim is created for bankruptcy purposes when a claim accrues under state law. Avellino & Bienes v. M. Frenville Co. (*In re* M. Frenville Co.), 744 F.2d 332, 337 (3d Cir. 1984). Under the "conduct" theory, a claim arises in bankruptcy at the time the conduct of the debtor giving rise to the claim occurs. Grady v. A.H. Robins Co., 839 F.2d 198, 202 (4th Cir. 1988). The "prepetition relationship" theory requires "'some prepetition relationship, such as contact, exposure, impact, or privity, between the debtor's prepetition conduct and the claimant'" to create a bankruptcy claim. Epstein v. Official Comm. of Unsecured Creditors (*In re* Piper Aircraft, Corp.), 58 F.3d 1573, 1577 (11th Cir. 1995) (quoting *In re* Piper Aircraft, Corp., 162 B.R. 619, 627 (Bankr. S.D. Fla. 1994)).

These formulations of claims leave room for future claimants to slip through the bankruptcy process unaffected. For example, future claimants who may presently be exposed to an injurious product, but have not manifested injury, would not have a claim in bankruptcy under the "accrued state law" theory. Parties lacking prepetition exposure or contact with the offending product who are injured after bankruptcy confirmation are not entitled to bankruptcy compensation through the bankruptcy claims process under the "prepetition relationship" theory.

10. 11 U.S.C. § 524(g).

future claims.[11] If bankruptcy resolves all claims in a particular bankruptcy, it is due to the strength of the trust that is established, not the strength of the Chapter 11 structure. A trust established through a non-opt-out settlement class action would bear the same result. Where the bankruptcy trust fails, future claimants may receive 100% of their claims through successor suits, while claimants with similar injuries would have received only a pro rata share through bankruptcy.

The Chapter 11 structure results in delay and excessive transaction costs. Debtors view the bankruptcy court's "related to" jurisdiction[12] and its power to bring all cases, including state court actions, into bankruptcy[13] as an opportunity to resolve all claims in one forum. However, tort claimants find these Bankruptcy Code provisions create delay and cut off third-party sources of compensation. Routine extensions of exclusive periods[14] by bankruptcy courts create a status quo which discourages progress toward settlement and causes further delay. The absolute priority rule, designed to protect bankruptcy claimants, is not enforced effectively by bankruptcy courts or by claimants' counsel. Bankruptcy estimation of claims[15] creates a cap on the amount available to pay tort claimants. The interminable delays and excessive costs become coercive devices, placing tort victims at a disadvantage in the bankruptcy process. Protections built into the Bankruptcy Code, such as the absolute priority rule, must be strictly enforced for bankruptcy to work as a solution to mass tort claimants. The delay engendered by the extension of the court's jurisdiction over third parties and the repeated extensions of the exclusive period must be eliminated. Bankruptcy should be a last resort to be used only when a settlement class action fails.

Settlement class actions have many of the same elements and protections of Chapter 11 without the delay and excessive transaction costs associated with the bankruptcy litigation process. Settlement class actions result in a defined outcome resolved in a timely manner. The settlement and the settlement process are subject to extensive court scrutiny. Under the court's discretionary power, it may require due diligence by the defendant company[16] and may rely on expert testimony to determine the fairness of the distribution offered to claimants under the settlement,[17] a process similar to the valuation undertaken

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11. Order on file with authors.
12. 28 U.S.C. § 1334(b)(2).
13. *Id.* § 157(a).
14. 11 U.S.C. § 1121(b).
15. *Id.* § 502(c).
16. Federal Rule of Civil Procedure 23(d)(1) and (3) gives the courts discretion to "determine the course of the proceedings" and to impose "conditions on the representative parties or intervenors." *See* Vairo, *supra* note 8, at 160; *see also* JAY TIDMARSH, FEDERAL JUDICIAL CENTER 1998, MASS TORT SETTLEMENT CLASS ACTIONS: FIVE CASE STUDIES (1998) (reporting on the application of Rule 23(d)(1) and (3) discretionary powers in five representative cases).
17. *See infra* text accompanying notes 109-10.

in bankruptcy. The court may appoint fiduciaries to represent the interests of future claimants[18] and may require that a large general class be divided into subclasses with separate counsel appointed for each.[19]

Settlement class actions have been criticized as collusive proceedings in which claimants' rights are sold out by attorneys seeking to insure their own fees.[20] However, when a district court properly exercises its discretionary powers it may insure that abuses—abuses that may be present in any process, particularly those for which settlement class action is criticized—do not occur. The misconceptions and biases of the bench and bar concerning settlement class action and Chapter 11 bankruptcy bear reconsideration. Both proceedings have a place in the resolution of mass tort claims. Preferring Chapter 11 over settlement class actions this early in the evolution of each method threatens to limit the proper application of both.

This Article compares the use of settlement class actions with Chapter 11 bankruptcy reorganizations in the resolution of mass tort claims. Parts II and III discuss elements that settlement class action and bankruptcy law have in common. Part IV compares the perception and the application of these two aggregative techniques to the global resolution of mass tort claims. Part V discusses conclusions and recommendations for improvement of each. This Article does not attempt to resolve all issues surrounding treatment of mass tort claims in settlement class action and Chapter 11 bankruptcies but attempts to spot issues which merit further discussion.

II. CLASS ACTION

A. Litigation Class Action[21]

Group litigation is not a new concept. References to group litigation may be found as early as the year 1199 when Martin, a rector, sued the parishioners of Nuthampstead in an ecclesiastical court.[22] Mediaeval period suits at law to

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18. *See infra* Part II.B.2.

19. Rule 23(d)(1) and (3) grants general discretion to subclasses. Marisol v. Giuliani, 126 F.3d 372, 379 (2d Cir. 1997) ("Under Rule 23(c)(1), class certification may be altered or amended at any time before a decision on the merits. Under Rule 23(c)(4), the district court may (and in this case must) divide the class into subclasses. And finally, Rule 23(d) allows the district court to make such orders as are necessary to assure the orderly administration of the proceedings.").

20. *See* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1349 (1995); Judith Resnik, *Litigating and Settling Class Actions: The Prerequisites of Entry and Exit*, 30 U.C. DAVIS L. REV. 835, 836 (1997).

21. The term "litigation class action" was developed to distinguish traditional class action, which is litigation oriented, from "settlement class action." TIDMARSH, *supra* note 16, at 19.

22. Master Martin Rector of Barkway c. Parishioners of Nuthampstead, Diocese of London, *in* 95 SELDEN SOCIETY, SELECT CANTERBURY CASES c. 1200-1301, at 8 (Norma Adams & Charles Donahue Jr. eds. 1981).

win money judgments by groups such as guilds, villages, and church congregations gave way in the eighteenth century to equitable actions in chancery court designed to provide a means for large groups of individual litigants with common interests to enforce equitable rights.[23] This equitable group litigation was not aimed at resolving legal claims or winning money damages.[24]

When group or "class" action law established itself in the American colonies, it continued to reside in equity and was governed by the Equity Rules.[25] In 1938, Equity Rule 38 was incorporated into the Rules of Civil Procedure and was expanded to include actions at law in Federal Rule of Civil Procedure 23.[26] The newly constituted rule provided class actions could be used to seek monetary relief.[27] The language of the rule, as stated in 1938, did not prohibit mass tort application. However, the Advisory Committee's comment that mass torts are "ordinarily not appropriate"[28] for class action litigation created a perception that limited its use in mass tort cases.[29] In 1966, after a quarter century of experience with Rule 23, Congress enacted revisions to remedy serious defects[30] and make class actions more available, judicially efficient, and binding.[31] The effect of the revisions, especially the creation of Rule 23(b)(3) to allow a common-question opt-out class, opened class actions to mass tort application.

The first court of appeals that interpreted Rule 23 after the 1966 amendment suggested the rule "should be given a liberal rather than a restrictive interpretation."[32] Courts tended to rule in favor of maintaining a class action.[33] The liberal interpretation given to the 1966 revisions of Rule 23

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23. STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 160-61 (1987).

24. *Id.*

25. *Id.* at 218.

26. *See generally* 7A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1752, at 15 (2d ed. 1986) (discussing class actions under original Rule 23).

27. *See* FED. R. CIV. P. 23. Some types of class action presently available under Rule 23 also provide primarily equitable relief. *See Id.* 23(b)(1)-(2).

28. *Id.* 23, Advisory Committee Notes to 1966 Amendment, *reprinted in* 12A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE app. at 290 (1998) [hereinafter Advisory Committee Notes].

29. *See* WRIGHT ET AL., *supra* note 26, § 1752.

30. *See* Irving A. Gordon, *The Common Question Class Suit Under the Federal Rules and in Illinois*, 42 ILL. L. REV. 518, 520-23 (1947); Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 695-714 (1940-41); Note, *Federal Class Actions: A Suggested Revision of Rule 23*, 46 COLUM. L. REV. 818, 822-33 (1946).

31. Advisory Committee Notes, *supra* note 28, app. at 290 (stating that Rule 23 "encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated").

32. Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 563 (2d Cir. 1968) (citing Escott v. Barchris Constr. Co., 340 F.2d 731, 733 (2d Cir. 1965)).

33. *See, e.g.*, Esplin v. Hirschi, 402 F.2d 94, 99 (10th Cir. 1968) ("But if there is to be an error made, let it be in favor and not against the maintenance of the class action.").

initially resulted in a number of new class action filings. As courts began to perceive management problems with class action cases, denial of certification increased and the number of new cases filed declined. In the first twenty years after the 1966 Rule 23 revision, certification of class actions became commonplace, while courts denied certification of mass tort litigation class actions.[34] This trend changed in the early 1980s as courts hesitantly began to certify mass tort class actions.[35] At that point "certifying a litigation class in a mass tort [was], at least in the right circumstances, no longer unimaginable."[36] Some types of class actions, such as securities class actions, have become routine.[37] If no longer unimaginable, class action certification is still unpredictable due to the tendency of individual courts to interpret strictly Rule 23s requirements regarding commonality, typicality, and representation.[38] Courts have begun to take a more narrow view of class certification, reacting to a perceived increased risk to defendants from the sheer size of the potential liability in mass tort class actions.[39] The restrictive application of class certification criteria has resulted in denials of certification and, in many cases, decertification by higher courts.[40]

B. Settlement Class Action

As promulgated, Rule 23 reflects the "different situations in which a class action was thought to be appropriate by the draftsmen of the new rule."[41] The draftsmen did not envision the impact of mass tort litigation on the American

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34. Abed v. A.H. Robins Co. (*In re* Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig.), 693 F.2d 847, 850-52 (9th Cir. 1982).

35. Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 472-75 (5th Cir. 1986); School Dist. v. Lake Asbestos (*In re* School Asbestos Litig.), 789 F.2d 996, 1009 (3d Cir. 1986) ("[T]he trend has been for courts to be more receptive to the use of the class action in mass tort litigation."); *In re* "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718, 728-30 (E.D.N.Y. 1983), *aff'd.*, 818 F.2d 145 (2d Cir. 1987); TIDMARSH, *supra* note 16, at 21 n.32 (citing *In re* Federal Skywalk Cases, 93 F.R.D. 415 (W.D. Mo.)).

36. TIDMARSH, *supra* note 16, at 21.

37. *See* Thomas E. Willging et al., *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74, 89-91 (1996).

38. TIDMARSH, *supra* note 16, at 21.

39. *See, e.g.*, Coopers & Lybrand v. Livesay, 437 U.S. 463, 470, 476 (1978) (recognizing that refusal to certify a class may induce plaintiffs to abandon their individual claims while granting certification may increase defendants' potential damages liability and litigation costs that they might decide to settle despite valid defenses); *In re* American Med. Sys., Inc., 75 F.3d 1069, 1089 (6th Cir. 1996) (requiring strict adherence to Rule 23); *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1297 (7th Cir. 1995) (stating that "sheer *magnitude* of the risk to which the class action" exposes defendants creates irreparable harm).

40. *See, e.g.*, Namoff v. Merrill Lynch, Pierce, Fenner & Smith (*In re* Dennis Greenman Sec. Litig.), 829 F.2d 1539, 1545-46 (11th Cir. 1987); *In re* Bendectin Prods. Liab. Litig., 749 F.2d 300, 307 (6th Cir. 1984); Abed v. A.H. Robins Co. (*In re* Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig.), 693 F.2d 847, 856-57 (9th Cir. 1982); *In re* Federal Skywalk Cases, 680 F.2d 1175, 1184 (8th Cir. 1982).

41. WRIGHT ET AL., *supra* note 26, § 1753, at 44.

court system or the movement among modern jurists toward alternatives to litigation. As envisioned by its drafters, Rule 23 is a tool for organizing group litigation. The language of the rule itself is litigation oriented,[42] reflecting the

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42. Rule 23 provides:

(a) PREREQUISITES TO A CLASS ACTION. One or more members of a class *may sue* or *be sued* as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the *claims or defenses* of the representative parties are typical of the *claims or defenses* of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) CLASS ACTIONS MAINTAINABLE. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the *prosecution of separate actions* by or against individual members of the class would create a risk of

(A) inconsistent or varying *adjudications* with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) *adjudications* with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party *opposing* the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a *class action is superior to other available methods for the fair and efficient adjudication of the controversy.* The

assumption of the drafters that litigation was the goal of class action.

The drafters of Rule 23 provided not only for litigation as the ultimate goal of a certified class, but also for settlement by the class.[43] Responding to the realities of modern litigation, practitioners specifically have classes certified for approval of settlements reached prior to commencement of litigation. In settlement class actions, the parties typically seek certification of the class under Rule 23(b)(1) or (b)(3) while seeking approval of the settlement under Rule 23(e).

The overt assumption in a settlement class action, in which the parties come to court with an agreement in hand, is that the traditional issues of fault and causation will not be litigated, because these issues have been settled prior to entering the judicial proceeding.[44] Surprisingly, this assumption is not very different from the prevailing covert reality underlying traditional class actions. It is no longer assumed that filing a class action complaint will result in trial. As one commentator states, "[b]oth the practice of litigation and the Federal Rules of Civil Procedure are shaped today by an understanding that the act of *filing* a lawsuit does not constitute a statement of intention to *try* a lawsuit."[45] In a traditional class action, filing a complaint usually marks the commencement of settlement negotiations. This practice is encouraged by both

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> matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the *prosecution or defense of separate actions*; (B) the extent and nature of any *litigation* concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the *litigation* of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of class action.

FED. R. CIV. P. 23 (emphasis added).

43. *Id.* 23(e).

44. The common use of the word "litigation" to describe the legal process is unfortunate because it connotes an actual trial on the merits. Judy Resnik distinguishes between "litigation" and "trial," recognizing that a series of judicial determinations take place prior to the final resolution of the issues at trial. *See* Resnick, *supra* note 20, at 849-51. This system is perhaps better referred to as the "judicial process". This phrase encompasses settlement as well as litigation and trial and does not relegate settlement to an adjunct position. Therefore "settlement" may be seen as a separate form of judicial determination of issues.

45. Resnik, *supra* note 20, at 836. It is important that lawmakers recognize the distinction between litigation and settlement. Litigants possess certain rights that can be redressed by filing a lawsuit. These rights should not be abridged. If litigants or potential litigants choose to negotiate away these rights in exchange for settlement, the law that prefers resolution should provide a means to facilitate settlement such as the Supreme Court did in *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367, 369 (1996), in which the court held that "a federal court may [not] withhold full faith and credit from a state court judgment approving a class-action settlement simply because the settlement releases claims within the exclusive jurisdiction of the federal courts."

the policy and the rules underlying the litigation process.[46] Support for a policy of settlement can be found in a recent Supreme Court decision that provides that state courts lacking jurisdiction to try a lawsuit have jurisdiction to settle a suit.[47] Expanded jurisdiction to settle may be a precursor to a separate jurisprudence for settlement as opposed to litigation.[48]

The number of cases adjudicated fully is a declining percentage of the cases filed,[49] although it is difficult to determine the impact of the rules and policies encouraging settlement. In 1938, approximately twenty percent of the federal civil caseload was adjudicated fully. In the 1990s that figure stands at under five percent.[50] "[T]he fact that a case is processed in the aggregate (by class action, multi-district litigation, or other mechanism) does not appear to vary these proportions. Be it two-party or multi-party litigation, trial remains the odd form of disposition while adjudications other than trial remain frequent."[51]

If the thrust of Rule 23, as presently interpreted, is to provide a structure within which litigation, not settlement, takes place, then Rule 23 should be amended to facilitate certification of settlement class actions. Although the Supreme Court decision in *Amchem* clarifies the authority for a settlement class action within Rule 23,[52] a rule change may be needed to guarantee full acceptance of settlement class actions.[53] Amendment of Rule 23 to provide

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46. Rule 16 of the Federal Rules of Civil Procedure provides for, and the local rules of many courts mandate, settlement conferences in advance of litigation. *See* FED. R. CIV. P. 16. For example, the District Court for the Eastern District of New York has local rules that provide for a mandatory Rule 16 settlement conference. *See* E.D.N.Y. DIV. BUS. R. 50.7. A local rule in the District of Massachusetts requires judges to inquire about settlement possibilities at every conference during the litigation process. *See* D. MASS. CT. R. 16.4.

47. *Matsushita*, 516 U.S. at 369.

48. In the 105th Congress a proposal to eliminate state court class actions was introduced. The authors oppose this proposed limitation on state jurisdiction over tort actions. If enacted, the proposal would eliminate a valuable recourse for mass tort claimants. At present, when federal courts experience delays in resolving their case loads, mass tort claimants can turn to state courts. If the avenue of state court resolution was eliminated, the class action process could experience excessive delay and become a less effective process.

49. Resnik, *supra* note 20, at 838-39.

50. ADMINISTRATIVE OFFICE OF THE U. S. COURTS, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY DECEMBER 31, 1995, at 36, tbl. C-4 (Dec. 31, 1995) (reporting that only 3.2% of civil cases reached trial in 1995).

51. Resnik, *supra* note 20, at 839.

52. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 613-29 (1997).

53. Within the existing rule courts have the ability to certify and manage the settlement class action. Judicial interpretation has resulted in some doubt of the use of the existing rule. *See, e.g.*, *In re* General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig. ("G.M. Truck"), 55 F.3d 768, 778 (3d Cir. 1995) (discussing the district court's failure to inspect fully the Rule 23 requirement in denying certification to the class). This doubt has not been clarified by *Amchem*. For example, when *G.M. Truck* is shepardized, it is cited as "warning negative treatment indicated" but with "no restrictions" and not overturned, as would be expected after the decision in *Amchem*. If Rule 23 is not amended, this doubt may continue even with the Supreme Court's approval of the settlement class action in *Amchem*. Express approval by amendment will end the doubt.

specifically for settlement class actions has been proposed.[54] An amendment providing for settlement class actions would facilitate the policy supporting settlement and would recognize the existing reality that settlement, not litigation, is the prevailing norm for the resolution of legal disputes.

A recent Supreme Court decision provides encouragement for settlement class actions. In *Amchem* the Court recognized the reality of modern litigation and made room for settlement as the starting point of the judicial process.[55] The Court acknowledged the validity of settlement class actions under Rule 23(b)(3) although it decertified the class because the putative class failed both the preponderance of common claims requirement of Rule 23(b)(3) and the adequacy of class representation requirement of Rule 23(a)(4).[56]

In *Amchem* the Supreme Court recognized the policy underlying Rule 23(b)(3), noting that the drafters had "in mind vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.'"[57] The policy underlying Rule 23(b)(3) is victim oriented and is rooted in equity.[58] The Rule 23(b)(3) drafters apparently intended to level the playing field by allowing plaintiffs to aggregate similar claims that are too small for individual suits. In the aggregate, the burden of litigation is shared among many, achieving a balance between the defendants' usually superior economic condition and the individual plaintiffs' relatively small claims.

Some commentators express concern that, in the case of mass tort class actions, the pendulum has swung too far in the other direction so that certification of a class now has a coercive effect upon defendants.[59] The same concern, that the aggregation of small claims into large class actions creates an overwhelming monetary risk and can coerce defendants to settle cases in which they have valid defenses, is expressed in decisional law.[60] In reality, risk of an adverse certification decision is borne equally by plaintiffs and defendants. In

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54. Proposed Federal Rule of Civil Procedure 23(f) provides:

> A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

FED. R. CIV. P. 23 (Preliminary Draft of Proposed Amendments 1996).

55. *Amchem*, 521 U.S. at 600-01.

56. *Id.* at 622-69.

57. *Id.* at 617 (quoting Benjamin Kaplan, *A Prefaratory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1968-1969)).

58. Ryan v. Dow Chem. Co. (*In re* "Agent Orange" Prod. Liab. Litig.), 611 F. Supp. 1396, 1402 (E.D.N.Y. 1985) (quoting Zients v. La Morte, 459 F.2d 628, 630 (2d Cir. 1972)) (finding that "until the fund created by the settlement is actually distributed, the court retains its traditional equity powers").

59. *See, e.g.*, Coffee, *supra* note 20, at 1349-50.

60. *See, e.g.*, Coopers & Lybrand v. Livesay, 437 U.S. 463, 476 (1978).

actions where individual claims are of little monetary value or in cases where individual rights are being vindicated, such as in a civil rights class action, denial of certification comes as a "death knell" to the individual claims of potential class members.[61]

Because of the impact a certification decision has on a party, there must be immediate review of the certification decision. However, interlocutory appeal of certification decisions was difficult to obtain under 28 U.S.C. § 1292(b).[62] Interlocutory appeals required the approval of the district courts, some of which strictly construed the requirements for approval.[63] Recognizing the danger inherent in a certification decision and the difficulty of obtaining appellate review, the Supreme Court adopted the recommendation that Rule 23 be amended to provide for permissive appeal of a certification decision.[64] The amendment became effective December 31, 1998.[65] This amendment, permitting immediate appeal of a certification decision, should have a salutary effect on the application of litigation class actions to mass tort claims.

The issue of coercion is minimized in settlement class actions because certification takes place after settlement is achieved. The financial pressure of aggregated claims and the risk of failure to get recourse for small claims are diminished when settlement negotiations take place among parties of relatively equal power without the immediate threat of a win or lose situation for any party.

In addition to the aggregative strength afforded the plaintiffs in litigation class actions, Rule 23 provides for certain due process safeguards. In order to qualify as a Rule 23(b)(3) class, common questions must predominate over individual questions, and resolution of claims through the class action must be "superior to other available methods for the fair and efficient adjudication of the controversy."[66] The Rule 23(b)(3) drafters intended it to encompass cases "in which a class action would achieve economics of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results."[67]

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61. *Report of the Judicial Conference Committee on Rules of Practice and Procedure*, September, 1997 ("Denial of certification can toll the death knell in actions that seek to vindicate large numbers of individual claims. Alternatively, certification can exert enormous pressure to settle.").

62. 28 U.S.C. § 1292(b) (1994).

63. *See, e.g., Coopers & Lybrand*, 437 U.S. at 476-77; Gardner v. Westinghouse Broad. Co., 437 U.S. 478, 480-82 (1978); *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1294 (7th Cir. 1995); Williams v. Wallace Silversmiths, Inc., 566 F.2d 364, 365 (2d Cir. 1977).

64. FED. R. CIV. P. 23(f) (Preliminary Draft of Proposed Amendments 1996).

65. Order for Amendments to Federal Rules of Civil Procedure, Criminal Procedure, Evidence, and Appellate Procedure, 118 S. Ct. Ct. R. 1 (1998).

66. FED. R. CIV. P. 23(b)(3). Courts may consider other methods, including the bankruptcy option, when certifying a settlement class action.

67. Advisory Committee Notes, *supra* note 28, app. at 290. See Part III of this Article for a discussion of the bankruptcy alternative to settlement class action and the possible "undesirable results" which may derive from bankruptcy in the form of delay, excess transaction

Settlement class action satisfies these objectives.

Because class action was intended as a means of resolving many claims through representatives acting on behalf of individual claimants, interpretations of Rule 23 establish that the court must affirmatively review the actions of the representatives of the class settlements.[68] Court scrutiny of the settlement for fairness and examination of the process by which settlement is achieved provides identifiable class members a high degree of due process protection. Class actions permanently affect the rights of claimants who are absent or are unaware of the pending action. Because the settlement of the class action could involve collusion among the parties, the court's role in reviewing proposed settlements is that of a "'fiduciary . . . serv[ing] as a guardian of the rights of absent class members.'"[69]

To support its fiduciary role, the court is given broad discretionary powers to enter orders concerning the conduct of the class action.[70] The court may enter orders "determining the course of the proceedings,"[71] may order extensive nationwide notice,[72] and may impose "conditions on the representative parties and intervenors."[73] Employing these discretionary powers, district courts may order a company to undertake complete due diligence to support its fairness deliberations and may appoint experts, including special masters and guardians *ad litem*, to assist in the process.[74] District courts increasingly use their discretionary powers to fashion settlement class action processes that are effective in protecting claimant's rights. In many ways these powers and protections parallel those exercised by the bankruptcy courts.[75]

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costs, and forfeiture of ownership in the debtor company.

68. *See* Malchman v. Davis, 706 F.2d 426, 433 (2d Cir. 1983) ("There is no doubt that the district court must make an independent evaluation of whether the named plaintiffs were adequate representatives of the class. . . . A judge has an obligation to consider whether the interests of the class are adequately represented.") (citing East Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 403-06 (1977)).

69. *In re* "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740, 758 (E.D.N.Y. 1984) (quoting Grunin v. International House of Pancakes, 513 F.2d 114, 123 (8th Cir. 1975)).

70. FED. R. CIV. P. 23(d).

71. *Id.* 23(d)(1).

72. *Id.* 23(d)(2); *See infra* Part II.B.1 (discussing notice in a settlement class action).

73. FED. R. CIV. P. 23(d)(3).

74. *See* TIDMARSH, *supra* note 16, at 11-13. Tidmarsh's study analyzed, among other elements, the notice, due diligence, discovery, and appointment of fiduciaries to represent absent and future class members. The five mass tort settlement class action cases studied were *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997); *Ahearn I*, 90 F.3d 963 (5th Cir. 1996); *In re Factor VIII or IX Concentrate Blood Products Litigation* ("*Factor VIII or IX*"), 174 F.R.D. 412 (N.D. Ill. 1996); *Bowling v. Pfizer, Inc.*, 143 F.R.D. 138 (S.D. Ohio 1992); and *In re Silicone Gel Breast Implants Products Liability Litigation*, 793 F. Supp. 1098 (J.P.M.L. 1992).

75. *See infra* Part IV (comparing settlement class action with Chapter 11 bankruptcies).

1. *Class Action Courts May Order Extensive Notice Programs in Mass Tort Cases*

Due process requirements are especially important in class action proceedings due to the representative nature of the action.[76] In *Amchem* the Supreme Court determined that certain due process requirements are heightened in a settlement class action.[77] Rule 23 provides for mandatory and discretionary notice. When a class seeks certification under Rule 23(b)(3), mandatory notice of the choice to opt-out is required. In addition, Rule 23(e) requires mandatory notice of a settlement. The extent of notice required by each section of Rule 23 varies with the degree of due process required.

In addition to the mandatory notice, courts have wide discretion at any step in the class action process to fashion notice to class members under Rule 23(d)(2). This discretionary notice provision is commonly used to provide extensive, nationwide notice of settlement to all class members, including substitution notice to unknown class members.[78]

The notice procedure in *Carlough v. Amchem Produts, Inc.*[79] is an example of the type of notice that a court may fashion using its discretionary powers. *Carlough*, like all settlement class actions, required notice of the commencement of the action and of the proposed settlement.[80] Notice materials proposed by the settling parties were designed to inform prospective class members simultaneously that the case had been commenced and that a settlement proposal had been filed.[81] Although the notices were combined, the court pointed out that the substance of both rules must be satisfied. The requirements regarding commencement are stricter than the requirements regarding settlement and are arguably stricter than the Due Process clause requirements.[82] The *Carlough* court noted that the standard under Rule 23(c)(2) required "'the best notice practicable under the circumstances, including individual notice to all members who can be identified.'"[83] The court went on

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76. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176-77 (1974).

77. *Amchem*, 521 U.S. at 621.

78. *See* Quern v. Jordan, 440 U.S. 332, 336-37 (1979) (holding that requiring individual notice under Rule 23(d)(2) in a civil rights action does not violate the 11th Amendment even though this notice is not required in all cases).

79. 158 F.R.D. 314 (E.D. Pa. 1993). In order to avoid confusion, it is important to note that after Carlough resigned as a class representative, Georgine was substituted, and the case took on the name *Georgine v. Amchem Products, Inc.* This case has also been referred to as *Windsor* in reference to one of the respondents in the Supreme Court. *See* TIDMARSH, *supra* note 16, at 1 n.2.

80. *Carlough*, 158 F.R.D. at 324.

81. *Id.*; *see also* Greenfield v. Villager Indus., Inc., 483 F.2d 824, 830-33 (3d Cir. 1973) (holding notice of proposed settlement via one-eighth page columns in financial newspaper insufficient).

82. *See* Zimmer Paper Prods., Inc. v. Burger & Montague, P.C., 758 F.2d 86, 90 (3d Cir. 1985) ("A higher notice standard is established by Rule 23(c)(2).").

83. *Carlough*, 158 F.R.D. at 325 (quoting FED. R. CIV. P. 23(c)(2)).

to state that "Rule 23 does not require the parties to exhaust every *conceivable* method of identifying the individual class members."[84]

In approving the notice plan, the court found that the notice compared favorably with notice approved in other settlement class actions. The *Carlough*[85] notice program shares many common elements with programs approved in other settlement class actions such as newspaper advertisement notice, magazine advertisement, television, radio (unpaid), notification to labor unions or other special interest organizations, notification to registries and physicians, establishment of a toll free information number, and establishment of an internet site.[86]

The court in *Carlough* also compared its notice plan to the plan approved in the bankruptcy proceedings in *In re Johns-Manville Corp.*[87] The court noted that in the *Johns-Manville* bankruptcy proceedings, no effort was made to give future claimants individual notice, yet the campaign was determined to be adequate.[88]

A comparison can be drawn between settlement class action notice and the notice provided in bankruptcy. How to notify all present and future mass tort victims in both proceedings is uncertain, because the form of the notice is very much a matter of the courts' discretion and not statutorily mandated. In

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84. *Id.* (citing Burns v. Elrod, 757 F.2d 151, 154 (7th Cir. 1985)); *see also* Hilt v. Nissan Motor Co. (*In re* Nissan Motor Corp. Antitrust Litig.), 552 F.2d 1088, 1098 (5th Cir. 1977).

85. *Carlough*, 158 F.R.D. at 326-27. For example, the court compared the notice with that approved in Ivy v. Diamond Shamrock Chemical Co. (In re *"Agent Orange" Products Liability Litigation*), 996 F.2d 1425 (2d Cir. 1993). "*Agent Orange*" was a class action that involved all persons exposed to Agent Orange defoliant in Vietnam, regardless of whether they manifested any physical injury related to that exposure. *Id.* at 1428-30. The individual notice effort involved mailing notice to persons who had already filed law suits in federal court and whose cases had been transferred to the Judicial Panel on Multidistrict Litigation, persons who had intervened or sought to do so, class members who had not yet filed suit or sought to intervene but were represented by counsel associated with plaintiff's management committee, and all persons listed on the Veteran's Administration "Agent Orange Registry." *In re* "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718, 729 (E.D.N.Y. 1983). Additional notice was sent to state governments for referral to any state agencies that might provide the court with names and addresses of class members. *See id.* at 730-31. Media announcements including a toll free telephone number providing further information were also undertaken. *Id.* at 730. The notice provided in *"Agent Orange"* contained the information required under Rule 23(c)(2). In a 23(b)(3) class action, notice must

> advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusions; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

FED. R. CIV. P. 23(c)(2).

86. TIDMARSH, *supra* note 16, at 5, 40, 55, 67-68, 84-85, 96.

87. 68 B.R. 618 (Bankr. S.D.N.Y. 1986).

88. *Carlough*, 158 F.R.D. at 326.

Amchem the Supreme Court questioned whether notice to future claimants was ever possible,[89] a concern that would apply equally to bankruptcy notice programs and class action programs. The issue of notice to future claimants in either proceeding remains open.

2. *Representation of Future Claimants*

In addition to a notice program, settlement class actions may provide for a court-appointed fiduciary to represent the interests of unknown and future claimants.[90] The fiduciary may be a special master[91] or a guardian *ad litem*.[92] The use of a fiduciary for the benefit of absent class members is new to settlement class actions but is finding increasing application.[93] In *Amchem* the settling parties requested appointment of a fiduciary in the form of a special master to determine whether class counsel's clients had benefitted more by making prior settlements outside the class action than they would have had they been included in the class action.[94] The special master was provided with class counsel settlement history for each jurisdiction and asked to verify that the pre-*Amchem* settlements were substantially consistent with each firm's historical settlements for the appropriate jurisdiction.[95] The *Amchem* settlement for class claimants sought to provide historical values for similarly situated claims based

89. Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).

90. The *Johns-Manville* bankruptcy was the first case in which a representative for the interest of the future claimants was appointed. "Future claimants were determined to be parties in interest and entitled to representation in the Manville reorganization . . . ." Manville Corp. v. Equity Sec. Holders Comm. (*In re* Johns-Manville Corp.), 66 B.R. 517, 520-21 n.1 (Bankr. S.D.N.Y. 1986) (citing *In re* Johns-Manville Corp., 36 B.R. 743, 744-45 (Bankr. S.D.N.Y. 1984)). Using its "all writs" power, the *Manville* court appointed a representative of the future claimants to protect their interests in the bankruptcy proceedings. *In re* Johns-Manville Corp., 36 B.R. at 757, *aff'd*, Robinson v. Johns-Manville Corp. (*In re* Johns-Manville Corp.), 52 B.R. 940 (Bankr. S.D.N.Y. 1985). This device was repeated in the *A.H. Robins* bankruptcy. *See* Grady v. A.H. Robins Co., 839 F.2d 198, 198 (4th Cir. 1988); *see also* RICHARD B. SOBOL, BENDING THE LAW: THE STORY OF DALKON SHIELD BANKRUPTCY 110 (1991) ("In the asbestos bankruptcies, the courts had ruled that future claimants were 'parties in interest' entitled to representation . . . ."). The legal representative for the future tort claimants in the *A.H. Robins* case acted as a party with standing and was permitted to take part directly in litigation on behalf of future claimants. *Grady*, 839 F.2d 198.

91. *See* TIDMARSH, *supra* note 16, at 55 (discussing the special master appointed in the *Carlough/Georgine* class action).

92. *See, e.g.*, *Ahearn I*, 90 F.3d 963, 972 (5th Cir. 1996).

93. This fiduciary mirrors the future claimants' representative found in a Chapter 11 asbestos bankruptcy mandated by the Bankruptcy Code. Bankruptcy Code, 11 U.S.C. § 524(g) (1994). These representatives are not confined to asbestos bankruptcies and are replicated in other product-related bankruptcies such as the Dalkon Shield case. *See In re* A.H. Robins Co., 88 B.R. 742, 744 (E.D. Va. 1988).

94. *See* TIDMARSH, *supra* note 16, at 55.

95. *Id.* Special Master Burbank found that there were some disparities between the prior settlement amounts and the *Amchem* settlement amounts. These disparities were small and on occasion were unfavorable to class counsels' clients. *See id.* n.123.

on years of experience and data in a litigation-driven process.[96] The special master confirmed that the settlements that class counsel had entered were consistent with the historical settlements.[97] Future claimants were not represented by a fiduciary during the settlement negotiation process. In the *Ahearn* class action, the judge appointed the guardian *ad litem* to insure that there would be no conflict between future claimants and claimants with pending cases.[98] The fiduciary in *Factor VIII or IX* represented minors, not future claimants.[99] The appointment of a fiduciary in a settlement class action is a flexible concept which may be shaped creatively to fit the facts of the case, providing protections for existing as well as future claimants. Fiduciaries and court officers provide independent, detailed valuation analysis to assist the court's determination of the fairness of the settlement process.

3. *The Determination of Fairness Is a Matter of Judicial Analysis*

The court scrutinizes the settlement procedure for fairness both in the settlement and in the negotiation process leading to the settlement. After a preliminary evaluation of fairness,[100] the class is given notice of a fairness hearing. Class members may object to the settlement or to the negotiation process at the fairness hearing.[101] The court may use its Rule 23(d) discretionary powers to appoint fiduciaries for future claimants.[102] At the time of the preliminary approval, the court can express any concerns it has regarding the settlement agreement, such as the need for subclassification of claims which may lead the parties to reach further amendments to the settlement agreement.

At the hearing on fairness, the first principle that should animate the court's approval of the settlement is that "the law encourages compromise to avoid the uncertainties of the outcome of wasteful litigation and expense incident

96. Interview with Joe Rice, Ness, Motley, Loadholt, Richardson & Poole (Mar. 1, 1999). Mr. Rice, one of the authors of this Article, was one of the class counsel and was directly involved in the settlement process.

97. There is no requirement in bankruptcy to provide the claimant with historical settlement values. While in some mass tort cases historical values have been used to determine estimation for voting purposes, there is no use of such values, to our knowledge, for determination of the plan payment or disbursement.

98. *Ahearn I*, 90 F.3d 963, 972 (5th Cir. 1996).

99. TIDMARSH, *supra* note 16, at 11.

100. *See, e.g.*, 2 HERBERT B. NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS §§ 11.24, 11-34 to -36 (3d ed. 1992). Preliminary court approval is usually sought of a joint stipulation of settlement. The proposed settlement, accompanied by briefs of the proponents, sets out the essential terms of the agreement. Where there has been substantial prior discovery, due diligence, or other judicial or governmental proceedings prior to the settlement, the stipulation may also be accompanied by an affidavit of counsel outlining this prior activity. *Id.*

101. *See, e.g.*, Carlough v. Amchem Prods. Inc., 158 F.R.D. 314, 320 (E.D. Pa. 1993).

102. *See supra* Part II.B.2.

thereto."[103] In mass torts, the claims and the related litigation are complex and, consequently, expensive to litigate on an individual basis. Absent a class action or other form of aggregation, the plaintiffs must present the same evidence to multiple trial courts, while the defendants will repeatedly assert the same defenses. Aggregation and settlement of class claims in a settlement class action result in a savings of litigation costs, which can then be paid to claimants.

The settlement class action not only negates the need for repetitious litigation, but it also provides assurance that, through the court's scrutiny, the claimants are treated fairly and equitably. The settlement-class-action court goes beyond the passive, ministerial task of accepting a settlement as it is read into the record. "[T]he district court acts as a fiduciary who must serve as a guardian of the rights of absent class members. The court cannot accept a settlement that the proponents have not shown to be fair, reasonable, and adequate."[104] The court's close scrutiny while acting as a fiduciary for class members is time intensive[105] but should afford class members a high degree of confidence in both the process and the due process protections.[106]

The court bases its final approval of the settlement on testimony and other evidence produced at the fairness hearing.[107] The determination of fairness is not a simple mathematical test,[108] and the court must analyze both the effect of any proposed settlement and whether the settlement treats all claimants fairly. For example, the court may ask the following:

> [A]re the named plaintiffs the only class members who will receive monetary relief? Is the relief proposed for class

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103. Pfizer Inc. v. Lord, 456 F.2d 532, 543 (8th Cir. 1972).

104. Grunin v. International House of Pancakes, 513 F.2d 114, 123 (8th Cir. 1975) (citations omitted).

105. *See* Willging et al., *supra* note 37, at 96 ("[T]he average class action demands considerably more judge time than the average civil case.").

106. The fairness hearing in *Georgine* lasted 18 days, and in *Ahearn* it lasted 10 days. TIDMARSH, *supra* note 16, at 12.

107. The criteria for finding a settlement fair include:

> (1) likelihood of recovery or likelihood of success; (2) amount and nature of discovery or evidence; (3) settlement terms and conditions; (4) recommendation and experience of counsel; (5) future expense and likely duration of litigation; (6) recommendation of neutral parties, if any; (7) number of objectors and nature of objections; and (8) the presence of good faith and absence of collusion.

In re Ford Motor Co. Bronco II Prods. Liab. Litig., No. MDL-991, 1994 U.S. Dist. LEXIS 15867, at *17 n.12 (E.D. La. Oct. 28, 1994) (citing NEWBERG & CONTE, *supra* note 100, § 11.43); *see also* Giusti-Bravo v. United States Veterans Admin., 853 F. Supp. 34, 36 (D.P.R. 1993) (reviewing settlement proposal according to the criteria proposed by Newberg and Conte).

108. *See* MANUAL FOR COMPLEX LITIGATION § 30.41, at 236 (2d ed. 1985) ("The fairness of settlements cannot be measured by any simple mathematical yardstick.").

> representatives significantly greater than that proposed for other class members? Is the total relief far less than that sought in the complaint or indicated by the preliminary discovery? Have major causes of actions or types of relief sought in the complaint been omitted in the settlement?[109]

In answering these questions, the court may rely on the parties to the settlement and on independent experts and special masters. The court examines both the settlement and the process leading to the settlement. This examination is more critical in a 23(b)(1)(B) class action than in a 23(b)(3) class where the claimants' right to opt out and to seek redress through the tort system acts as a built-in check on the process. If the settlement is unfair, many claimants will opt-out so that the settlement will fail.[110]

The appointment of valuation experts and officers of the court for valuation purposes in the *In re Joint Eastern & Southern District Asbestos Litigation*[111] settlement class action is typical of how judges may use their discretionary powers. In the summer of 1990, Eagle Picher Industries, Inc. sought certification under Rule 23(b)(1)(B) of a mandatory, no-opt-out, nationwide class of all asbestos related personal injury claims.[112] To determine the fairness of the settlement and whether Eagle Picher met the (b)(1)(B) standard, Judge Jack B. Weinstein ordered the appointment of a special master, the Honorable Marvin E. Frankel.[113] Frankel provided a report that was critical of the settlement and also testified concerning the settlement at the fairness hearing.[114] At the conclusion of the hearings on December 7 and 10, 1990, Judge Weinstein directed Frankel to make another report on whether the settlement proposal was more attractive than the bankruptcy alternative.[115] In the interim, claimants' attorneys filed an involuntary bankruptcy petition against Eagle Picher.[116] Eagle Picher then filed a voluntary Chapter 11 bankruptcy prior to the

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109. *Id.*

110. Participation is mandatory in the bankruptcy process with no right to opt-out. Proponents of resolving mass torts via bankruptcy point to the bankruptcy claimants' right to vote on the plan as superior to the rights afforded class action claimants. When observed closely, the process appears to make the claimants' right to vote a hollow privilege. The representative committees and attorneys largely determine the tort claimants' vote. In many cases, mass tort claimants' votes are actually cast by their attorneys. There may be practical reasons for organized voting by counsel in mass-claim cases, but there should be no illusion that tort claimants in bankruptcy exercise more autonomy than settlement class action tort claimants.

111. White v. Eagle Picher Indus., Inc. (*In re* Joint E. & S. Dist. Asbestos Litig.), 134 F.R.D. 32 (E. & S.D.N.Y. 1990).

112. *Id.* at 34.

113. *Id.*

114. *Id.* at 34-35.

115. *Id.* at 35.

116. *Id* at 35.

scheduled hearing on the special master's report.[117] In this example, the court's use of its discretionary power to appoint a special master was effective in preventing an unfair and inadequate settlement class from being confirmed.

4. *Discretionary Injunctions in Class Actions Provide Support to Settlement Agreements Similar to Bankruptcy Injunctions*

To facilitate the federal courts' policy favoring settlement in multi-party litigation,[118] courts have increasingly approved settlement bar orders supporting partial settlements[119] and have exercised wide discretion in fashioning orders to support the particular settlement and the policy of settlement.[120] In multi-party actions where not all co-defendants enter into a settlement agreement, bar orders are used to extinguish the rights of non-settling co-defendants.[121] "Defendants, who are willing to settle, 'buy little peace through settlement unless they are assured that they will be protected against co-defendants' efforts to shift their losses through cross-claims for indemnity, contribution, and other causes related to the underlying litigation.'"[122] Bar orders in class actions were originally used almost exclusively in securities class actions because of the securities statutes regarding contribution among joint tortfeasors.[123] Bar orders in securities settlement class actions are commonly used to enjoin actions for indemnification and contribution.[124] The bar order in a settlement class action is analogous to the channeling injunction in asbestos bankruptcy cases and the discharge in a Chapter 11 bankruptcy. Bar orders in support of settlement are especially important in multi-defendant class actions

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117. Comparing the proposed class action settlement in *Eagle Picher* to the later confirmed Chapter 11 plan of reorganization is tempting. However, the authors question whether a fair comparison can be made or any conclusions drawn after six years of "pot fattening" bankruptcy litigation.

118. *See* Williams v. First Nat'l Bank, 216 U.S. 582, 595 (1910) ("Compromises of disputed claims are favored by the courts . . . ."); City of Detroit v. Grinnell Corp., 495 F.2d 448, 459 (2d Cir. 1974) (describing settlement as "highly favored").

119. *See, e.g.*, Eichenholtz v. Brennan, 52 F.3d 478, 486-87 (3d Cir. 1995) (finding no abuse of discretion in district court's approval of settlement bar order).

120. *See* Franklin v. Kaypro Corp. (*In re* Kaypro Corp., Shareholder Litig.), 884 F.2d 1222, 1225 (9th Cir. 1989) ("In essence, a bar order constitutes a final discharge of all obligations of the settling defendants and bars any further litigation of claims made by nonsettling defendants against settling defendants.").

121. *See* S. Arthur Spiegel, *Settling Class Actions*, 62 U. CIN. L. REV. 1565, 1573 (1994).

122. *Eichenholtz*, 52 F.3d at 486 (quoting Wald v. Wolfson (*In re* United States Oil & Gas Litig.), 967 F.2d 489, 494 (11th Cir. 1992)).

123. The Securities Act of 1934 does not provide an express right of action for contribution among joint tortfeasors, but the majority of federal courts find an implied right of contribution in Rule 10b-5. *See, e.g.*, South Carolina Nat'l Bank v. Stone, 749 F. Supp. 1419, 1430 (D.S.C. 1990).

124. *Eichenholtz*, 52 F.3d at 483 (noting that the Supreme Court has implied a right to contribution).

where defendants may have divergent interests in areas such as liability, tolerance of risk of trial, and availability of insurance coverage. Bar orders may cause some joint defendants to accept settlement more readily than they otherwise would.[125]

Settlement class actions vindicate the underlying policy of tort law—to compensate victims and to discourage bad actions by tortfeasors. In addition, settlement class actions satisfy the public policy favoring settlement. The compromises and trade-offs made in settlements are entered voluntarily by class member representatives. The certification of the class is closely scrutinized by the court on behalf of members of the class not present in the negotiations.[126] Areas of scrutiny include how closely the class representatives represent the class and the fairness of the settlement itself.[127]

Settlement class action is relatively new in the evolution of mass tort resolution, but it is a solution that, with further development and refinement, can become a procedure for achieving favorable and voluntary resolutions of mass tort claims. In a Rule 23(b)(1)(B) class, in which class membership is involuntary, as it is in Chapter 11, a settlement class action offers the protection of the court as it acts in a fiduciary manner and exercises broad discretionary power to achieve fairness for tort claimants.

III. CHAPTER 11 REORGANIZATION

A. Chapter 11 Is a Recent Development

Contemporary bankruptcy laws trace their roots to medieval law.[128] The word "bankrupt" originated in medieval Italy with the practice of expelling insolvent merchants from the marketplace by breaking ("rota") their display benches ("banca").[129] English merchants anglicized the term to "bankrupt."[130] Contrary to common understanding, bankruptcy did not originate in equity.[131] Under English common law, bankruptcy was a criminal matter.[132] Authorities were empowered to imprison a debtor until the debtor turned over his entire estate for liquidation to pay claims.[133] English settlers brought the concept of

125. *Id.* at 485.

126. *See supra* text accompanying notes 104-06.

127. *See supra* text accompanying notes 107-09.

128. Bankruptcy, as the custom of forgiveness of debts, predates medieval law and has its roots in the biblical practice of the jubilee year. Every seven years, the Hebrew people were instructed to forgive all uncollected debt of other Israelites. Debts of foreigners, however, were not forgiven. *Deuteronomy* 15:1-3.

129. *See* William W. Bassett, *Exploring the Origins of the Western Legal Tradition*, 85 COLUM. L. REV. 1573, 1576; James E. Yacos, BROKEN BENCH REVIEW, 1991, at 8 (1971).

130. Yacos, *supra* note 129, at 8.

131. Marcia S. Krieger, *"The Bankruptcy Court Is A Court Of Equity": What Does That Mean?* 50 S.C. L. REV. 276 (1999.)

132. *Id.* at II.B.2 .

133. *Id.* at 285.

bankruptcy to the New World and provided for enactment of laws governing bankruptcy in the United States Constitution.[134]

The concept of bankruptcy-related reorganization is a relatively new development in bankruptcy law. Statutory reorganization did not exist in the federal bankruptcy law prior to the Chandler Act of 1936.[135] Before the Chandler Act, enterprising debtors evolved a form of corporate reorganization known as equity receivership.[136] Creditors used the equity receivership as a tool to liquidate the debtor's assets.[137] Creditors traditionally initiated the process by a "creditor's bill" followed by a sale of existing assets, with the proceeds to be applied to the debts owed.[138] In the hands of enterprising debtors, it became a form of reorganization. An agreeable, petitioning creditor "did not in fact seek application of the debtor's assets to his claim" but instead sought a receiver that would maintain the debtor's business as a going concern and would provide a stream of payments.[139] Far from avoiding the "creditor's" action, debtors often sought the preemptory filing of a bill by a friendly creditor who might lose nearly as much as the debtor if another creditor filed a bill with intentions to liquidate.[140] Debtors would often cooperate with their bankers or other major creditors for the purpose of accomplishing reorganization and avoiding liquidation.[141] Anticipating the filing of the complaint, debtors would often have a prepared response approved in advance by their boards of directors.[142] "Because [the] purpose [of the filing] was reorganization, not liquidation, the substance of the action was far removed from its traditional uses, but its form remained the same."[143] The creditor's objective was to have a healthy debtor with going concern value and a long term payment of debt rather than to take a loss through piecemeal liquidation.

The Chandler Act of 1936 codified the equity receivership procedure as the Chapter XI reorganization.[144] The Bankruptcy Reform Act of 1978[145] amended and further refined statutory reorganization into the Chapter 11 of the

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134. Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 6-13 (1995). The bankruptcy provisions of the Constitution are attributed to Charles Pinckney, one of the delegates to the Constitutional Convention and one of the five signers of the Declaration of Independence from South Carolina.

135. Chandler Act of 1936, ch. 575, 52 Stat. 840 (1938).

136. H.R. DOC. NO. 93-137, pt. 1, at 237-48 (1973), *reprinted in* 5 WILLIAM L. NORTON, JR., NORTON BANKRUPTCY LAW AND PRACTICE 792 (1992).

137. 5 NORTON, supra note 136, at 792.

138. *Id.* at 792-93.

139. *Id.* at 793.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. The Bankruptcy Act of 1898, which the Chandler Act amended, used Roman numerals to refer to sections of the law. Chapter XI under the Bankruptcy Act is today's Chapter 11.

145. Bankruptcy Reform Act of 1978, Pub. L. 95-598, 92 Stat. 2549 (1978) (codified as amended at 11 U.S.C. §§ 101-1330 (1994)) ("Bankruptcy Code").

Bankruptcy Code which we know today.

The Bankruptcy Code contains provisions that, when it was enacted in 1978, were new to the bankruptcy process. Changes in the definitions of "claim" and "debtor" have opened the door for the use of Chapter 11 reorganization by mass tort defendants. A "debtor" is not required to be insolvent[146] but is merely a "person or municipality concerning which a case under [Title 11] has been commenced."[147] Since the enactment of the 1978 Bankruptcy Reform Act, many solvent companies have used bankruptcy to solve litigation problems that may not otherwise have been a threat to the company's solvency.[148] Numerous mass tort defendants have petitioned for bankruptcy court protection to halt pending litigation and to allow attempts to resolve pending and future litigation.[149]

B. Bankruptcy Does Not Resolve Future Claims

The goal of mass tort debtors that file for bankruptcy is to achieve a final resolution of all pending claims and any claims that may be brought in the future. The tort defendant also desires to affect third party claims and to eliminate potential indemnification and contribution actions. The Bankruptcy Code grants jurisdiction over state and federal claims and provides the authority to aggregate all claims, in certain cases (even third-party actions), in one court, making bankruptcy courts appear to be an ideal place for final resolution.[150] However, bankruptcy does not resolve all claims. Emerging case law indicates that the resolution of future claims remains dependent on the strength of the settlement trust rather than on the structure of the Bankruptcy

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146. The Johns-Manville Corporation, for example, was trading on the New York Stock Exchange and listed as a Fortune 500 company in August of 1982 when it filed for bankruptcy reorganization.
Bankruptcy Code, 11 U.S.C. § 101(13) (1994): "Person" is defined as an "individual, partnership, and corporation, but does not include governmental unit." Bankruptcy Code, 11 U.S.C. § 101(41) (1994). However, stock and commodity brokers, railroads, and certain insurance companies and banks may not be debtors because their liquidation or reorganization is controlled by separate processes under the supervision of quasi-governmental agencies such as the FDIC and the SEC. *Id.* § 109(b).

148. *See, e.g., In re* A.H. Robins Co., 88 B.R. 742, 744 (Bankr. E.D. Va. 1988) (attempting to resolve litigation with Dalkon Shield IUD claimants); *In re* Texaco, Inc., 79 B.R. 560, 565 (Bankr. S.D.N.Y. 1987) (attempting to resolve litigation with Penzoil).

149. *See, e.g.*, A.H. Robins Co. v. Piccinin (*In re* A.H. Robins Co.), 788 F.2d 994, 996 (4th Cir. 1986); *In re* Dow Corning Corp., 211 B.R. 545, 553 (Bankr. E.D. Mich. 1997); Manville Corp. v. Equity Sec. Holders Comm. (*In re* Johns-Manville Corp.), 66 B.R. 517, 521-22 (Bankr. S.D.N.Y. 1986).

150. 28 U.S.C. § 1334 ("District courts shall have original but not exclusive jurisdiction of all civil proceedings arising under Title 11, or arising in or related to cases under Title 11.") See *Coar v. National Union Fire Insurance Co.*, 19 F.3d 247 (5th Cir. 1994), in which the district court had "related to" jurisdiction in a tort action against the debtor's insurance carrier in Los Angeles because damages could exceed policy limits and impact the estate.

Code.[151]

1. In Chapter 11, Future Claimants May Opt-Out by Definition

Debtors typically seek to have courts exercise the broadest possible jurisdiction over claims so that the debtors' discharges are complete and lasting.[152] However, the definition of "claim" creates a serious problem in mass tort bankruptcies.[153] The debtor in a mass tort bankruptcy can be faced with many future claims but, due to the latency period of some injuries, cannot be sure of the number of future claims.[154] It is important to the total solution that the bankruptcy "discharge"[155] cover all existing as well as future claims. If all claims, including future claims, are not discharged in bankruptcy, the successor to the debtor will face liability for new tort claims as they mature. No specific definition of future claims is presently found in the Bankruptcy Code.[156] The drafters did not consider the issue of future claims, and debate exists as to whether "claims," as defined in the Bankruptcy Code, includes claims that will not mature until some future date.[157]

The broad definition of "claim" contained in the Bankruptcy Code adequately describes the type of commercial claims the Bankruptcy Code was intended to resolve.[158] Difficulty arises in cases when a debtor's prepetition

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151. *See* National Gypsum's Record of Confirmation Hearing at 33 (on file with authors).

152. The pressure by mass tort debtors to bring all possible claims into the bankruptcy proceeding runs counter to the impetus usually found in bankruptcy cases to exclude claimants whenever possible. There is a natural incentive in the bankruptcy system for participants in the case to exclude all creditors who may not understand the nature of their potential claim or have not already gained knowledge of the existence of the bankruptcy. These existing players, including the debtor; creditors already parties to the case; the trustee, "who often deems himself the agent of the firm's principal creditors"; and even the bankruptcy court, "do not want to thrust additional hands into the till." *In re* American Reserve Corp., 840 F.2d 487, 489 n.2 (7th Cir. 1988). This pressure, typically present even if unspoken, is not as strong in a mass tort bankruptcy in which the debtor seeks to resolve all claims and claimants seek to protect any trust established for their benefit from collateral attack or from diversion of funds to satisfy successor suits.

153. *See* Thomas A. Smith, *A Capital Markets Approach to Mass Tort Bankruptcy*, 104 YALE L.J. 367, 372 (1994).

154. *See generally* Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 72 TEX. L. REV. 1821, 1827 (1995) (discussing the "elasticity" problem of mass torts).

155. In a Chapter 11 proceeding no actual discharge of a corporation is granted, just a permanent injunction against pursuing collection of the debt similar to the automatic stay.

156. The National Bankruptcy Review Commission has recommended that the Bankruptcy Code be amended to provide definitions for the terms "mass future claim" and "holders of a mass future claim." NATIONAL BANKR. REVIEW COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS 316 (1997) (available at <http://162.140.225.1/report/09bmass.html>). However, there is no proposal to define "future claim" in general.

157. *See* H.R. REP. NO. 95-595, (1977), *reprinted in*, 1978 U.S.C.C.A.N. 6266; Grady v. A.H. Robins Co., 839 F.2d 198, 201-03 (4th Cir. 1988); *In re* Johns-Manville Corp., 68 B.R. 618, 628 (Bankr. S.D.N.Y. 1986).

158. *See Supra* note 9.

conduct results in injury which manifests or accrues after confirmation.[159] As bankruptcy courts have attempted to stretch the definition of "claim" to reach mass tort injuries, decisional law has crystallized around three alternative tests to determine whether a claim falls within the § 101(5) definition of claim. The three tests are known as the "accrued state law test," the "conduct test," and the "prepetition relationship test."[160]

The prepetition relationship test reflects the courts' most recent efforts to encompass future claims within the definition of § 101(5).[161] This test incorporates the concept of a claim arising as a result of the debtor's prepetition conduct but, in addition, requires the future claimant to have had some prepetition relationship with the debtor such as exposure to, contact with, or purchase of the debtor's product.[162] It is accepted that claims that arise from prepetition relationships between the debtor and the claimant fall within the definition of claim. The question remains whether future claimants who have no prepetition relationships with the debtor and who are injured subsequent to the confirmation of a plan have a claim that may be discharged in bankruptcy. The outcome of the debate over whether the § 101(5) definition of "claim" includes future claims will directly impact the effectiveness of bankruptcy as a means of resolving mass tort cases. If the bankruptcy court's jurisdiction extends only to present claims and to some categories of future claims,[163] successive bankruptcies would be needed to resolve incipient claims maturing after confirmation.

Presently, courts reach "different interpretations of when a claim has arisen and thus can be dealt with in the bankruptcy case . . . ."[164] This type of determination creates uncertainty and disparate treatment of future claims from court to court.[165] The Bankruptcy Revision Commission suggests that § 101(5)

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159. *See* Avellino & Bienes v. Frenville Co. (*In re* M. Frenville Co.), 744 F.2d 332, 334 (3d Cir. 1984).

160. *In re* Piper Aircraft Corp., 162 B.R. 619, 624-27 (Bankr. S.D. Fla. 1994).

161. *Id.* at 625-27.

162. United States v. LTV Corp. (*In re* Chateaugay Corp.), 944 F.2d 997, 1003-04 (2d Cir. 1991); *In re Piper Aircraft Corp.*, 162 B.R. at 627.

163. *See* Paris Mfg. Corp. v. Ace Hardware Corp. (*In re* Paris Indus., Corp.), 132 B.R. 504, 508 (D. Me. 1991); *In re* A.H. Robins Co., 88 B.R. 742, 754 (E.D. Va. 1988); Volvo White Truck Corp. v. Chambersburg Beverage, Inc. (*In re* White Motor Credit Corp.), 75 B.R. 944, 947-48 (Bankr. N.D. Ohio 1987).

164. NATIONAL BANKR. REVIEW COMM'N, *supra* note 156, at 323.

165. The application of the definition of claims as it relates to future mass tort claims was discussed in Kewanee Boiler Corp. v. Smith (*In re* Kewanee Boiler Corp), 198 B.R. 519, 528 (Bankr. N.D. Ill. 1996), *remanded on other grounds*, *In re* Kawanee Boiler Corp., No. 96-C5447, 1996 WL 556736 (N.D. Ill. Sept. 26, 1996). Speaking in general of the problem of disparate treatment of future claims, the National Bankruptcy Review Commission found that

> [i]n the absence of statutory guidance, courts have reached vastly different determinations of the ability to treat and discharge future claims in bankruptcy. Since the early 1980s, a large handful of courts have presided over cases dealing with uncertain future

be amended to add a definition of "holder of a mass future claim" to the definition of "claim."[166] An amendment would raise a constitutional question, as discussed in dicta in the *Amchem* decision.[167] In *Amchem* the Court expressed concern regarding adequate notice to future claimants which may not be injured at the time of the present proceeding.[168] This question of notice would have equal applicability to a Chapter 11 proceeding attempting to discharge claims that did not exist at the time the discharge was entered. A statutory amendment does not accomplish what the Constitution prohibits. Merely amending the definition of claim to include future claims, without more, would not satisfy due process.

2. *Futures Representatives and Channeling Injunctions Do Not Protect Against Liability for Future Claims*

In attempts to affect all "claims" against the debtors, including "future" claims, bankruptcy courts have created a process in which a fiduciary is appointed and given "party-in-interest" status to protect the interests of future claimants.[169] The appointment of a fiduciary for future claimants in the *Johns-Manville* case was the first use of this appointment process in a mass tort bankruptcy even though "the concept of the appointment of some kind of representative for parties in interest whose identities are yet unknown [was] not unprecedented."[170] The device was immediately repeated in the *A.H. Robins* bankruptcy[171] and is now standard procedure in mass tort bankruptcies involving many future claims. The ability for courts to appoint representatives for future claimants was codified with the addition of subsection (g) to § 524 of the Bankruptcy Code in 1994, which provides for specific treatment of

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> liabilities, and some have confirmed plans using channeling injunctions to protect the reorganized entity against individual collection attempts while providing a pool of resources for the claimants' treatment. Yet, because the Bankruptcy Code did not contain express authorization for these procedures, the resulting uncertainty over the legality of the resolutions restricted access to capital and depressed public stock value.

NATIONAL BANKR. REVIEW COMM'N, *supra* note 156, at 319-20; *see also* Ralph R. Mabey & Peter A. Zisser, *Improving Treatment of Future Claims: The Unfinished Business Left by the Manville Amendments*, 69 AM. BANKR. L.J. 487, 495 (1995) (describing how uncertainty of the law contributed to failure of Manville reorganization).

166. NATIONAL BANKR. REVIEW COMM'N, *supra* note 156, at 316.

167. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 628 (1997).

168. *Id.*

169. *See, e.g.*, *In re* Johns-Manville Corp., 36 B.R. 727, 757 (Bankr. S.D.N.Y. 1984).

170. *Id.*

171. *See* SOBOL, *supra* note 90, at 110.

future claimants in asbestos bankruptcies.[172] The drafters of subsection (g) recognized the risk of successor liability could endanger the reorganization and work a hardship on existing claimants.[173] The appointment of a representative for future claimants is an attempt to provide due process protection for future claimants and to protect present claimants from unequal treatment.

To protect assets of the reorganized debtor further from piecemeal dismemberment by successor suits, bankruptcy courts have fashioned a protective injunction, known as a "channeling injunction," through the exercise of their "all writs" power.[174] In issuing a
channeling injunction, the bankruptcy courts exercise their § 105 power both to aid confirmation orders and to enforce statutory provisions intended to protect the debtor from post confirmation claims.[175] All post confirmation claims against the reorganized debtor are enjoined and directed, or "channeled," to trusts established for the benefit of those claimants.

The channeling injunction, which is now a fixture of mass tort bankruptcies, was another innovation of the *Johns-Manville* bankruptcy.[176] The *Johns-Manville* court found that a channeling injunction could be issued where the injunction preserves the rights of all asbestos claimants to the corpus of the funds and in the absence of the injunction, "inequitable, piece-meal dismemberment of the debtor's estate" would occur.[177] In numerous subsequent mass tort bankruptcies, trusts were established for payment of present and future claims,[178] and all claimants' suits, including future claimants, have been and are channeled to the trusts. In 1994, Congress codified the channeling injunction in § 524(g) as to asbestos claimants' trusts established under this

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172. Bankruptcy Code, 11 U.S.C. § 524(g) (1994). It is important to note that § 524(g) is limited to asbestos claims.

173. H.R. REP. NO. 103-835, at 40 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3340, 3348.

174. 11 U.S.C. § 105. Most of the channeling injunctions presently in place in mass tort bankruptcies, including asbestos-related bankruptcies, are based on the bankruptcy courts' § 105 injunction power, not on § 524(g).

175. The channeling injunction generally lends support to the "free and clear" language of § 1141(c) and § 363(f) of the Bankruptcy Code.

176. *In re* Johns-Manville Corp., 68 B.R. 618, 624-26 (S.D.N.Y. 1986). Apparently the Manville estate had a great deal to fear from future claimants and unidentified claimants. The open-ended Manville trust, which was intended to be replenished by funds from the ongoing operations of the reorganized debtor, found itself overwhelmed by claims and out of money within two years of confirmation of the plan. The channeling injunction has proved more successful in other cases such as *In re A.H. Robins Co.*, 88 B.R. 742, 752 (E.D. Va. 1988), where the trust fund has proved adequate to satisfy claims on a pro rata basis. However, the channeling injunction in *In re National Gypsum Co.*, 139 B.R. 397 (N.D. Tex. 1992), has been challenged and the court has indicated it will lift the injunction if, as presently anticipated, the trust fund proves to be inadequate to pay all claims.

177. *In re Johns-Manville*, 68 B.R. at 626.

178. *See, e.g.*, *In re* Celotex Corp., 204 B.R. 586, 596-97 (Bankr. M.D. Fla. 1996); Keene Corp. v. Acstar Ins. Co. (*In re* Keene Corp.), 162 B.R. 935, 939-40 (Bankr. S.D.N.Y. 1994); *In re* H.K. Porter Co., 156 B.R. 16, 18 (Bankr. W.D. Pa. 1993).

statute.[179]

The effectiveness of a channeling injunction to prevent successor suits may depend upon the adequacy of the trusts to which the claimants are channeled. In the *In re A.H. Robins Co.* bankruptcy plan,[180] the channeling injunction has remained in place and all claimants to date have been paid from the trust.[181] Where trusts are inadequate for the number and value of claims brought against the trust, channeling injunctions are being challenged, as in the *National Gypsum* bankruptcy.

The confirmed plan in *National Gypsum* provided that the channeling injunction established under the court's § 105 injunctive authority should be "terminated as to that Unknown Asbestos Disease Claimant if the [National Gypsum Company] Asbestos Settlement Fund ceases to exist without or before resolving that Unknown Asbestos Disease Claim or upon order of this court finding that the Fund cannot resolve that Unknown Asbestos Disease Claim, whichever occurs first."[182] When it became obvious that the trust would not be sufficient to pay the future and unknown claims, the trustees and the futures representative, joined by the asbestos claimants, sought an order pursuant to the bankruptcy court's retained jurisdiction to nullify the channeling order and to allow the future and unknown claimants to pursue their rights against the successor corporation.[183] At the time the *National Gypsum* channeling order was entered, the court recognized the distinction between the discharge and the § 105 channeling injunction.[184] Discharge, which is a permanent injunction against future suits, leaves a claimant with no recourse except against the debtor's successor. Unlike discharge, the channeling injunction directs the claimant to the substitute recourse for resolution of its claim. In *National Gypsum* the future claimants' representative, recognizing the distinction,

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179. 11 U.S.C. § 524(g).

180. *In re A.H. Robins Co.*, 88 B.R. at 751.

181. Unlike other mass tort bankruptcies discussed in this Article, *In re A.H. Robins Co.* was resolved fairly quickly. The Dalkon Shield IUD device, the subject of the product liability underlying the *A.H. Robins Co.* case, was manufactured for a relatively short period before being removed from the U.S. market. Women were aware whether they were exposed either to the Dalkon Shield product or some other IUD device. Injury from the IUD device was usually manifested prior to the bankruptcy, unlike asbestos injuries, which have a possible thirty- to forty-year latency period. In the Dalkon Shield cases the number and magnitude of future claims were relatively small and more easily resolved than asbestos claims. At this time, the trust in *A.H. Robins Co.* is said to be "over-funded." However, because punitive damages were not calculated in the values of each claim, the overage represents a portion of the punitive damages to which each claimant remains entitled.

The *A.H. Robins Co.* trust has generally been a success. The effectiveness test of the § 105 channeling injunction in the *A.H. Robins Co.* case will come in the event a future claimant makes a claim against the successor company. However, the pool of persons injured by the Dalkon Shield is so limited that such a challenge is remote.

182. Order Confirming the First Amended and Restated Joint Plan of Reorganization § 10(b)(2) (on file with authors).

183. *See* Motion to Terminate Channeling Order at 6 (on file with authors).

184. *See* Record of Confirmation Hearing at 9 (on file with authors).

opposed a permanent discharge of future claims but did not oppose a channeling injunction.[185] The court declined to confirm a plan containing a permanent injunction of unknown and future claims,[186] holding that it lacked jurisdiction over future claims because it could not "provide notice to the claimants consistent with due process to support a permanent injunction."[187] The court entered supporting orders directing all claimants, present and future, to the appropriate trust established for payment of claims.[188] The order contained language to the effect that the assets of the debtor were transferred to the successor "free and clear" of liability.[189]

When presented with the motion to dissolve the channeling injunction, the *National Gypsum* court ruled from the bench that the motion was premature because it was projected that the trust fund would be adequate to pay claims at the present rate until the year 2002.[190] The court ruled that, should the trust fund run out, the motion to lift the channeling injunction could be renewed.[191] The court held that the successor to *National Gypsum* is liable for all future claims because it has not been discharged or otherwise disposed of in the bankruptcy.[192] This decision is on appeal.[193] If the decision is upheld, the § 105 channeling injunction would be effective only to the extent that the trust to which claimants are channeled is sufficient to pay claims.

The court in *In re Fairfield Aircraft Corp.* described future claims issues as "one of bankruptcy's more intractable conundrums."[194] The court also noted that

> it is the nature of the beast that, in all likelihood, it will never be possible for a debtor emerging from bankruptcy (or any successor entity), to know of a certainty that the provisions of a given plan will effectively cut off claimants . . . unless and until a challenge [to the discharge or channeling order] is

185. *See* Objection to Confirmation of Debtors' First Amended and Restated Joint Plan of Reorganization at 3 (on file with authors).

186. *See* Record of Confirmation Hearing at 33 (on file with authors).

187. *Id.* (on file with authors).

188. *See* Order Confirming the First Amended and Restated Joint Plan of Reorganization § 10(b)(1) (on file with authors).

189. Findings of Fact and Conclusions of Law on Confirmation of the First Amended and Restated Joint Plan of Reorganization at 37-38 (on file with authors).

190. *See* Order Denying Motion of Legal Representative to Terminate Channeling Order (on file with authors).

191. *See id.*

192. *See id.*

193. *In re* National Gypsum Co., No. 3-98-CV-1031-G (N.D. Tex.).

194. Fairchild Aircraft Corp. v. Cambell (*In re* Fairchild Aircraft Corp.), 184 B.R. 910, 934 (Bankr. W.D. Tex. 1995). The court declined to discharge future claimants' suits on claims arising due to pre-bankruptcy actions of the debtor although there was no future claims representative, and the plan did not provide compensation for future claimants. *Id.* at 932-34.

mounted.[195]

If the court is right, as it appears, then mass tort debtors face great uncertainty as to the effectiveness and finality of bankruptcy claims resolution for which they put their companies at risk.[196]

C. *Bankruptcy Jurisdiction Over Third Parties Causes Delay and Discourages Settlement*

Bankruptcy courts have broad jurisdiction to determine all matters that touch on debtors' estates.[197] The first invocation of this broad jurisdiction comes in the form of the § 362 automatic stay, which provides the defendant debtor with immediate relief from all further tort litigation.[198] However, while suits against the debtor are stayed, codefendants face continued litigation. Codefendants often include parties related to the debtor, such as officers, directors, parents or subsidiaries, corporations, or entities that would have offsetting claims against the debtor. The Bankruptcy Code provides the tort defendant debtor with powerful tools by which it may bring codefendants under the same protection of the automatic stay.[199] While these mechanisms are designed to give the court the ability to resolve expeditiously all claims against the debtor, they in fact have the opposite effect by removing valuable leverage for settlement from the claimant's hands.

1. *Extension of the Automatic Stay to Codefendants*

The imposition of the automatic stay under § 362 of the Bankruptcy Code is the most immediate benefit of filing a bankruptcy petition by a debtor who is also a defendant in tort actions.[200] The automatic stay provides an "enormous

195. *Id.* at 934.

196. Even advocates of mass tort resolution through Chapter 11 acknowledge due process problems with attempts to discharge future claims. "[A]ssuming due process considerations can be adequately addressed, a chapter 11 filing ultimately provides the debtor with a 'discharge' of such current and future mass tort claims through confirmation of a chapter 11 plan of reorganization that effectively deals with those claims." Barbara J. Houser, *Chapter 11 As a Mass Tort Solution*, 31 LOY. L.A. L. REV. 451, 451 (1998).

197. Those matters "arising under" or "arising in" Chapter 11 are referred to as "core" matters. A list of "core proceedings" is found at 28 U.S.C. § 157(b)(2) (1994). Because "non-core" matters are not defined in the statute, they are for a district court's determination. These "non-core" matters are primarily causes of action either arising under state law or in which there is a right to a jury trial. *See generally* 8 COLLIER ON BANKRUPTCY ¶ 3.01 (James Wm. Moore et al. eds., 14th ed. 1976) (discussing general principles of bankruptcy jurisdiction).

198. Bankruptcy Code, 11 U.S.C. § 362(a).

199. *See* 28 U.S.C. § 157(2); *see also id.* § 1334(b) (giving district courts original jurisdiction for proceedings under Title 11).

200. 11 U.S.C. § 362(a).

benefit,"[201] immediately halting all litigation pending against the debtor and prohibiting the commencement of new litigation.[202] The Bankruptcy Code provides creditors with a means of modifying or lifting the automatic stay.[203] The Code also provides that creditors may move for the court to allow them to continue or to initiate actions against the debtor in other appropriate courts,[204] relief that is granted expeditiously in Chapter 11 proceedings in circumstances such as foreclosures on property with no equity.[205] However, mass tort claimants who seek relief from the stay are seldom granted relief.[206]

The Bankruptcy Code makes no explicit provision for the extension of the automatic stay to third parties. Attempts outside of mass tort bankruptcies to make an extension of the debtor's protections to cover related third parties have met with mixed results.[207] Although the *In re A.H. Robins Co.* court found that it was necessary to have "unusual circumstances" before the bankruptcy court would extend the § 362 automatic stay to non-debtor third parties, the extension of the stay has become common in mass tort bankruptcies.[208] The arguments usually advanced for extending the stay are that suits against codefendants would hamper the debtor's ability to reorganize by creating inconsistent decisions and that decisions against a third party might "in effect be a judgment against [the debtor]."[209] The bankruptcy court's "all writs" power under § 105

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201. Houser, *supra* note 196, at 452. Ms. Houser is counsel for the debtor in Dow Corning's Chapter 11 case. *Id.* at 451 n.1; *see also* Pettibone Corp. v. Baker (*In re* Pettibone Corp.), 110 B.R. 848, 853 (Bankr. N.D. Ill. 1990) ("[T]he automatic stay protects the debtor absolutely."); Oberg v. Aetna Cas. & Sur. Co. (*In re* A.H. Robins Co.), 828 F.2d 1023, 1026-27 (4th Cir. 1987) (staying post-bankruptcy products liability claim against debtor's insurer).

202. Section 362(a) provides that filing a petition in bankruptcy operates as an automatic stay that applies to all entities of

> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title.

11 U.S.C. § 362(a)(1).

203. *Id.* § 362(d).

204. *Id.*

205. *See generally* 3 COLLIER ON BANKRUPTCY ¶ 362.03[4]-[5] (Lawrence P. King et al. eds., 15th ed. 1996) (discussing automatic stay).

206. Houser, *supra* note 196, at 453.

207. *See* A.H. Robins Co. v. Piccinin (*In re* A.H. Robins Co.), 788 F.2d 994, 999 (4th Cir. 1986) (discussing the circumstances under which non-debtor defendants may receive the benefit of the automatic stay) (citing GAF Corp. v. Johns-Manville Corp. (*In re* Johns-Manville Corp.), 26 B.R. 405, 410 (S.D.N.Y. 1983)).

208. Houser, *supra* note 196, at 455.

209. Oberg v. Aetna Cas. & Sur. Co. (*In re* A.H. Robins Co.), 828 F.2d 1023, 1025 (4th Cir. 1987).

is employed to halt third-party litigation that might impact the debtor's estate.[210]

The broad and liberal application of the court's all writs powers under § 105, extending the automatic stay to non-debtor third parties, creates an imbalance within the finely tuned Bankruptcy Code, a statute designed to distribute evenly the pain and the gain of the bankruptcy process. The protections afforded the debtor under the automatic stay and other bankruptcy provisions come at a price to the debtor. A debtor puts ownership of the company at risk when it files a bankruptcy.[211] Ultimately, debtors must confirm a plan of reorganization in order to receive permanent relief from tort claims.[212] However, if the plan is a consensual plan, it is possible for the debtor to negotiate some equity interest in the reorganized debtor for old shareholders.[213] The debtor also has duties and responsibilities that it must satisfy while it enjoys the protections of the bankruptcy court, including filing periodic reports of its financial condition and being available for examination of its financial affairs.[214] Third parties should not benefit from the debtor's automatic stay without being subject to the corresponding duties and responsibilities.

Policy underlying bankruptcy disfavors the application of certain Bankruptcy Code privileges to third parties.[215] The liberal application of the courts' all writs power under § 105 of the Bankruptcy Code, extending the debtor's automatic stay to non-debtor third-parties, coupled with the bankruptcy courts' reluctance to modify the automatic stay, is used by mass tort defendants as "a powerful tool to gain control over mass tort litigation."[216] With action against third-party defendants halted, and with the bankruptcy courts'

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210. *See, e.g.*, Eastern Air Lines, Inc. v. Rolleston (*In re* Ionosphere Clubs, Inc.), 111 B.R. 423, 433-34, (Bankr. S.D.N.Y. 1990); Lahman Mfg. Co. v. First Nat'l Bank (*In re* Lahman Mfg. Co.), 33 B.R. 681, 683 (Bankr. D.S.D. 1983); Otero Mills, Inc. v. Security Bank & Trust (*In re* Otero Mills, Inc.), 21 B.R. 777, 779-80 (Bankr. D.N.M. 1982).

211. If the plan is confirmed through a "cram-down," the absolute priority rule strips shareholders of ownership interest in the reorganized company where a superior class of creditors is not paid in full under the plan. Bankruptcy Code, 11 U.S.C. § 1129(b)(1) (1994). In mass tort bankruptcies the value of the unsecured tort claims commonly exceeds the value of the company, leaving no equity interest for shareholders.

212. *See* Houser, *supra* note 196, at 451.

213. *See* Manville Corp. v. Equity Sec. Holders Comm. (*In re* Johns-Manville Corp.), 801 F.2d 60, 65 (2d Cir. 1986).

214. The reporting requirements that Chapter 11 debtors must satisfy include monthly operating reports and periodic fees. *See* 28 U.S.C. § 1930(a)(6) (1994) ("[A] quarterly fee shall be paid to the United States trustee . . . ."); FED. R. BANKR. P. 2015(5). In addition, the debtor is subject to examination by creditors who may question the debtor extensively about anything of interest. FED. R. BANKR. P. 2004. *See, e.g.*, GHR Energy Corp. v. NLRP (*In re* GHR Energy Corp.), 33 B.R. 449, 453 (Bankr. D. Mass. 1983) (discussing application of Bankruptcy Rule of Procedure 2004).

215. Section 524(e) of the Bankruptcy Code provides that "[e]xcept as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." 11 U.S.C. § 524(e). This section was abrogated in a very narrow way, allowing third-party discharge under specific circumstances, including asbestos mass tort claimants. *See id.* § 524(g)(4)(A)(ii).

216. Houser, *supra* note 196, at 455.

customary refusal to lift the automatic stay, tort claimants are denied the leverage necessary to bring about serious settlement negotiations. Neither the debtor nor its codefendants, safely protected by both the automatic stay and an indefinite exclusive period, is eager to discuss the terms upon which they will cede ownership interest in the debtor corporation.

The *In re A.H. Robins Co.* court was the first to find "unusual circumstances" justifying the extension of the automatic stay to third parties.[217] However, since that decision courts have liberally applied the "unusual circumstances" rule to extend the stay in many mass tort cases.[218] Bankruptcy courts tend to find in favor of assisting the reorganization rather than assisting the claimants' pursuit of non-debtor tortfeasors.[219] The rationale used by the courts for favoring the defendant-debtor and its codefendants is that reorganization serves the higher good of protecting the debtor company from either inconsistent judgments or findings of liability against codefendants, which precludes the debtor from raising a denial in later suits, both of which undermine the debtor's reorganization efforts.[220] When the debtors' liability has been determined repeatedly, as in a mature tort, the argument that protection of codefendants prevented findings of liability and inconsistent decisions is invalid. The primary motivation behind the courts' extension of protection to third parties seems to be the policy, either conscious or unconscious, that favors reorganization of the debtor over other concerns. This bias in favor of the debtor creates an imbalance which may work against the reorganization process.

2. "Related to" Jurisdiction Under 28 U.S.C. § 1334

In addition to extending the debtor's automatic stay to non-debtor third parties, the bankruptcy court may transfer third-party actions to its jurisdiction even though the bankruptcy court cannot decide the cases. Transfer of pending actions to the bankruptcy court is based upon 28 U.S.C. § 1334(b) of Title 28.[221] This provision is known as the bankruptcy court's "related to" jurisdiction, from the description of the jurisdiction as encompassing all matters "related to" the bankruptcy case. The phrase "related to" is not defined in the

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217. A.H. Robins Co. v. Piccinin (*In re* A.H. Robins Co.), 788 F.2d 994, 999 (4th Cir. 1986).

218. *See, e.g.*, Organized Maintenance, Inc. v. Ford (*In re* Organized Maintenance, Inc.), 47 B.R. 791, 797-98 (Bankr. E.D.N.Y. 1985); *In re GHR Energy Corp.*, 33 B.R. at 450-51.

219. *See, e.g.*, Plessey Precision Metals, Inc. v. Metal Ctr., Inc. (*In re* Metal Ctr., Inc.), 31 B.R. 458, 462 (Bankr. D. Conn. 1983) (stating that "the debtor's protection must be extended to enjoin litigation against others if the result would be binding upon the debtor's estate").

220. *See, e.g.*, *In re A.H. Robins Co.*, 788 F.2d at 999.

221. "Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(b) (1994).

Bankruptcy Code, but courts have interpreted it broadly. For example, the Supreme Court recently interpreted "related to" jurisdiction as "a grant of some breadth"[222] and adopted the Third Circuit's test for determining what is "related to" the bankruptcy proceeding[223] but admonished that "related to" jurisdiction is not "limitless."[224] The Seventh Circuit has also cautioned "against an open-ended interpretation of the 'related-to' statutory language 'in a universe where everything is related to everything else'"[225] and that "'[a] court cannot write its own jurisdictional ticket.'"[226] These admonitions to apply "related to" jurisdiction judiciously have not been heeded. The "open-ended interpretation" referred to in *In re Fedpak Systems, Inc.* found a home in the Sixth Circuit's recent decision to bring all claims concerning silicon breast implants into the bankruptcy case.[227] While recognizing the Third Circuit's decision in *Pacor*, the Sixth Circuit created a distinct split with the Seventh and Eleventh Circuits on the issue of "related to" bankruptcy jurisdiction in third party, nondebtor actions by granting "related to" jurisdiction to the bankruptcy court over unripe, potential claims which *might* arise as a result of indemnification or contribution between the debtor and a nondebtor party.[228] The *In re Dow Corning Corp.* decision goes beyond individual indemnification claims, bringing under the bankruptcy court's control all of the silicon gel breast implant injury cases filed in federal courts or consolidated in the multidistrict litigation in Alabama, including cases against manufacturers other than Dow Corning.[229] The Bankruptcy Code's "related to" jurisdiction accomplishes the removal of mass

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222. Celotex Corp. v. Edwards, 514 U.S. 300, 308 (1995).

223. The test asks

> [w]hether the outcome of . . . [the civil] proceeding could conceivably have any effect on the estate being administered in bankruptcy. . . . Thus, the proceeding need not necessarily be against the debtor or against the debtor's property. An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankruptcy estate.

Id. at 308 n.6 (emphasis omitted) (citing Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984)).

224. *Celotex*, 514 U.S. at 308.

225. *In re* Fedpak Sys., Inc., 80 F.3d 207, 214-15 (7th Cir. 1996) (quoting Gerald T. Dunne, *The Bottomless Pit of Bankruptcy Jurisdiction*, 112 BANKING L.J. 957, 957 (1995)).

226. *In re Fedpak Sys., Inc.*, 80 F.3d at 215 (quoting Zerand-Bernal Group, Inc. v. Cox, 23 F.3d 159, 164 (7th Cir. 1994)).

227. Lindsey v. O'Brien (*In re* Dow Corning Corp.), 86 F.3d 482, 493-94 (6th Cir. 1996).

228. *Id.* Whatever the impetus for the decisions of the district court and the court of appeals, this case is in direct opposition to the Third Circuit's decision in *Pacor, Inc.*, 743 F.2d 984 (3d Cir. 1984), which also involved unripe indemnification claims against a debtor.

229. *In re* Silicone Gel Breast Implants Prods. Liab. Litig., 793 F. Supp. 1098, 1099 (J.P.M.L. 1992).

tort cases from other federal dockets. However, the plaintiff is deprived of the right to choice of forum against third-party defendants who did not seek protection from the bankruptcy court, yet who enjoy the benefits of the bankruptcy court's jurisdiction. When tort cases are transferred to the bankruptcy court under its "related to" jurisdiction, the bankruptcy court aggregates to itself cases that, as a non-Article III court,[230] the bankruptcy court has no jurisdiction to decide.

The policy underlying 28 U.S.C. § 1334 of Title 28 is to accomplish a "prompt, fair and complete resolution of all claims 'related to' bankruptcy proceedings."[231] Third-party defendants who come into the bankruptcy process through a broad application of "related to" jurisdiction are under no pressure to create a claims-resolution plan. A stay of litigation removes any incentive for third-party defendants to settle claims, a result contrary to the purpose and underlying policy of § 1334.

3. *Successor Liability May Not Be Cut Off by Bankruptcy*

Tortfeasors have no complete assurance of relief from future claims for product liability under present bankruptcy law. If, as many bankruptcy courts have found, a future claim is not a claim within the meaning of the Bankruptcy Code[232] and is thus outside the jurisdiction of the bankruptcy court, the debtor's liability for future claims is unchanged by bankruptcy. The successor to the debtor may be liable for tort claims based on an act of its predecessor.

Successor liability not only works a hardship on the successor corporation but is also an injustice to the claimants whose claims were disposed of in bankruptcy for only a percentage of their value and who are forced to take a pro rata distribution. Future and other unknown claimants that bring successor liability actions may receive 100% of their claims against assets of the reorganized entity because the claims are not limited by the boundaries of the debtor's estate.[233] This inequity creates a superior class of future claimants and

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230. *See* John T. Cross, *Viewing Federal Jurisdiction Through the Looking Glass of Bankruptcy*, 23 SETON HALL L. REV. 530, 557-58 (1993).

231. *In re Dow Corning Corp.*, 86 F.3d at 497.

232. *See, e.g.*, *In re* Eagle Picher Indus.,Inc., 134 B.R. 255, 257 (Bankr. S.D. Ohio 1991).

233. J. Maxwell Tucker, *The Clash of Successor Liability Principles, Reorganization Law, and the Just Demand That Relief Be Afforded Unknown and Unknowable Claimants*, 12 BANK. DEV. J. 1, 35 (1995).

> In the context of bankruptcy sales and plan transactions, the survival of servitudes creates inequalities between the presently known claims and the unknown and unknowable claims. Unknown claimants (those who have been injured but are not known to the debtor) and unknowable claimants (those who have not yet been injured) may recover in full against the successor at the expense of the known

results in a de facto priority for future and unknown claimants to the disadvantage of present claimants.[234]

D. Extensions of Exclusivity Creates Delay

In addition to the automatic stay and "related to" jurisdiction, the debtor has another important tool with which to delay resolution of the mass tort claims. The Bankruptcy Code provides that the debtor has a period of 120 to 180 days within which to propose and gain approval of a plan of reorganization.[235] During this period, the debtor has the exclusive right to propose a plan of reorganization.[236] In complex bankruptcy cases this period is routinely extended. While the debtor enjoys the benefits of the § 362 automatic stay and the exclusive right to file a plan, it may comfortably continue its business without fear of displacement by its creditors or competing plans of reorganization. This privilege tilts the bankruptcy process in favor of the debtor and is a disincentive to engage in serious settlement negotiation.

Empirical evidence compiled by Harvard Law School Professor Lynn M. LoPucki shows that when the exclusive period is lifted, confirmation of a plan of reorganization occurs very quickly.[237] Drawing statistical information from the Bankruptcy Research Database, Professor LoPucki charted exclusivity-period information for eight mass tort bankruptcy cases.[238] The study found that in cases where the exclusive period is not lifted, the average period of time to achieve a confirmed plan of reorganization was approximately four and one-half years.[239] Where the exclusive period is lifted to allow competing plans, confirmed plans of reorganization are filed within an average of thirteen months from the date the exclusive period is lifted.[240] These statistics demonstrate that lifting the exclusive period reinstates a level playing field upon which consensual settlement plans can be achieved.

> creditors who will receive a ratable share of the purchase price. This share will be determined only after the purchase price has been adjusted downward due to the unknown and unknowable claims.

Id.

234. Thomas A. Smith, *A Capital Markets Approach to Mass Tort Bankruptcy*, 104 YALE L.J. 367, 420 (1994).

235. Bankruptcy Code, 11 U.S.C. § 1121(b), (d) (1994).

236. *Id.* § 1121(b).

237. *Does Lifting Exclusivity Foster Chaos or Cooperation?*, BANKR. CT. DECISIONS WKLY. NEWS & COMMENT, June 16, 1998, at A1, A1, A9-A10. Data were compiled and utilized to support plaintiffs' position in a hearing on a motion to end the exclusive period in the *Dow Corning* Chapter 11 proceeding.

238. The debtors in the cases analyzed were UNR Industries, Manville Corp., A.H. Robins, Hillsborough Holdings, National Gypsum, Lone Star Industries, Eagle Picher Industries, and Dow Corning Corporation. *Id.* at A11.

239. *Id.*

240. *Id.*

E. Chapter 11 Does Not Offer a Superior Valuation Procedure

1. Valuation of Claims

Development of a successful Chapter 11 plan of reorganization can be dependent upon establishing the debtor's tort liability. The Bankruptcy Code provides that a debtor may estimate its contingent, unliquidated debt under § 502(c).[241] Claims estimation is a core proceeding under 28 U.S.C. § 157(b)(2)(B),[242] one in which the bankruptcy court, as an Article I court,[243] has original jurisdiction. The estimation proceeding is not a trial on liability or an award of specific damages to individuals. The estimation of claims conducted in the bankruptcy court is intended solely for the purpose of voting on and determining the feasibility of the plan.[244] The bankruptcy court may not convene a jury trial in a personal injury or wrongful death case.[245] The determination of tort liability and actual damages due to individual personal injury or wrongful death is reserved to the Article III district court.[246] While the tort victim retains his or her right to a jury trial, the Bankruptcy Code does not require that there be an actual trial in the district court.

The inability of the bankruptcy court to liquidate tort claims and the courts' routine denial of modification of the automatic stay guarantees that there will not be access to a jury trial during the pendency of the bankruptcy, which can last a number of years. It is common practice to provide for a jury trial as a

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241. Section 502(c) reads in pertinent part: "There shall be estimated for purpose of allowance under this section—(1) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case . . . ." Bankruptcy Code, 11 U.S.C. § 502(c) (1994).

242. 28 U.S.C. § 157(b)(2)(B) (1994); *see In re* Poole Funeral Chapel, Inc., 63 B.R. 527, 533 (Bankr. N.D. Ala. 1986) ("[T]he estimation of claims, including the estimation of personal injury tort claims for the purpose of confirming a plan under Chapter 11, is a core proceeding."). *But see* Roberts v. Johns-Manville Corp. (*In re* Johns-Manville Corp.), 45 B.R. 823, 826 (S.D.N.Y. 1984) (noting that § 157(b)(2)(B) does not exclude from the definition of core proceedings estimation "for purposes of distribution").

243. Charles R. Haywood, Comment, *The Power of Bankruptcy Courts to Shift Fees Under the Equal Access to Justice Act*, 61 U. CHI. L. REV. 985, 993-94 (1994).

244. *In re* Eagle Picher Indus.,Inc., 164 B.R. 255, 272 (S.D. Ohio 1991) (holding that "the estimation of contingent liabilities pursuant to § 502(c) is a method of treating direct contingent claims rather than the claims of co-liable parties").

245. 28 U.S.C. § 157(b)(5):

> The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

246. *See* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 87 (1982).

component of a claims resolution facility created by a plan of reorganization,[247] but there is no requirement to do so.

The *In re Johns-Manville* Chapter 11 reorganization was the first complex mass tort bankruptcy to raise important issues surrounding mass tort claims, including the issue of how to value claims for voting purposes. When faced with valuing individual claims, the court in *In re Johns-Manville* did not pursue individual trials to determine claim values.[248] Instead, recognizing that the method it contemplated would not comply with the strict letter of the bankruptcy law,[249] the court valued each claim at one dollar for purposes of achieving the required vote to approve the plan.[250] The court collapsed the requirement that "two-thirds in amount and more than one-half in number of the allowed claims" of each class approve the plan[251] and required instead that two-thirds in number of claim holders must accept the plan.[252] The Bankruptcy Code does not provide a mechanism for modifying the plan-approval procedure. Nevertheless, the bankruptcy court ignored the statutory voting requirements.[253] This extra-statutory process should be disallowed as contrary to the express requirements of the Bankruptcy Code. The willingness of bankruptcy courts to find unorthodox, contra-statutory solutions to make bankruptcy work is typical of the willingness on the part of the bench and bar to apply bankruptcy law liberally and loosely in connection with mass tort reorganizations.[254]

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247. *See* SOBOL, *supra* note 90, at 332 (noting that a plan of organization could include a provision granting claimants who do not accept settlement the right to a jury trial against the trust).

248. *In re* Johns-Manville Corp., 68 B.R. 618, 631 (Bankr. S.D.N.Y. 1986). The *In re Johns-Manville* claimants also did not pursue the filing of proofs of claim. Subsequent mass tort bankruptcies followed this example and deferred filing the completely documented proof of claim in the bankruptcy until it could be directed to the claimant's trust established under a plan of reorganization. The estimation process at the bankruptcy court level substitutes for the complete filing, but may not be used as a basis for "distribution." However, it is used as a basis for the district court, which can conduct jury trials and determines final distribution amounts. In practice, the district court conducts very few determinations of causation and liability, with most claims resolved within the reorganization plan's administrative claims resolution process.

249. *Id.* (discussing objections based on 11 U.S.C. §§ 501, 502, and 1126).

250. Kane v. Johns-Manville Corp. (*In re* Johns-Manville Corp.), 843 F.2d 636, 641 (2d Cir. 1988).

251. 11 U.S.C. § 1126(c).

252. *In re Johns-Manville Corp.*, 68 B.R. at 631.

253. *In re Johns-Manville Corp.*, 843 F.2d at 646-47. The modification mechanism is sometimes not challenged because it usually makes no difference in the vote. The sheer weight of numbers is enough to carry or defeat a plan. However, this precedent can be very damaging to tort claimants if applied to a fact pattern where the claimant's votes can be diluted by a one-dollar--to-one-vote scheme.

254. The title of Richard Sobol's book, BENDING THE LAW, is an apt description of the mass tort bankruptcy process. *See* SOBOL, *supra* note 90.

2. Valuing the Company from a Liquidation Point of View

The Bankruptcy Code drafters developed the concept of reorganization from the perspective of a liquidation and framed Chapter 11 in terms of a limited pool paradigm. This liquidation-based perception of reorganization is inappropriate for resolution of mass tort claims.[255] Future claimants play a much greater role in mass tort claims analysis than in conventional bankruptcies, yet there is no provision in the "fixed pool" concept for replenishing the supply or renewal of assets over a period which would satisfy future claimants' demands. The fixed pool is the present value of the estate. At a minimum, creditors get what they would receive in a Chapter 7 liquidation.[256] This paradigm is inappropriate and unfair to both present and future claimants who have recourse to the same pool.[257] While the debtor may have accumulated the debt to tort victims over a period of years and may anticipate further accumulation of injury-based debt in future years due to injuries that have not yet manifested, the distribution to claimants will be from a limited pool based on the value of the claims or the value of the company at the time of the bankruptcy, whichever is greater. The future claimants have a portion of the pool reserved for them, in most cases by a fiduciary who can only estimate epidemiologically who will be a claimant in the future. This "set aside" of an estimated amount for future claimants reduces the amount available to present claimants. If history is any indicator, this is also unfair to future claimants. Asbestos trusts established to satisfy future claims in cases such as *In re Johns-Manville Corp.* and *In re National Gypsum Co.* are experiencing or anticipate shortfalls due to underestimation of claims against the trust.[258] The issue is whether a Chapter 11 reorganization should be used to dispose of future claims. In a Chapter 7 liquidation, only present claims would be paid, and the company would cease to exist. If a policy decision is made to pay future claims, the next issue is how the Bankruptcy Code can provide for future claims on the same basis that present claims are paid. The solution developed in *In re Johns-Manville Corp.*[259] is to turn all or partial ownership of the debtor over to the

255. 11 U.S.C. § 1129(a)(7)(A)(ii).

256. *Id.* The limited pool paradigm underlying bankruptcy law is an inappropriate foundation for the application of bankruptcy law to distribution of mass tort.

257. The arguments advanced here may be validly applied to a Rule 23(b)(1)(B) no-opt-out class. The solution in both cases is the same. Ownership of the entire company must be transferred to claimants to satisfy all claims, present and future. This seems unlikely in a Rule 23(b)(1)(B) settlement class when the company negotiates for the purpose of saving equity. The same result occurs in a bankruptcy where the absolute priority rule is in force. However, in a bankruptcy proceeding, debtors have the benefit of both the automatic stay and the extended exclusive period and can use these advantages to delay tort claimants into abandonment of their equity interest to former shareholders.

258. *See* Findley v. Blinken (*In re* Joint E. & S. Dist. Asbestos Litig.), 120 B.R. 648, 652 (Bankr. E.D.N.Y. 1990) (discussing fiscal problems of the Manville Trust); *In re* National Gypsum Co. Motion to Terminate Channeling Order (on file with authors).

259. *In re* Johns-Manville Corp., 68 B.R. 618, 621-22 (Bankr. S.D.N.Y. 1986).

trust. In *In re Johns-Manville Corp.* eighty percent of the stock of the reorganized debtor was transferred to the claimants' trust.[260] When no equity remains in the debtor after the value of the company is set against the value of the tort claims, the entire reorganized company should be turned over to the claimants. The company would then operate to generate profits to pay its new owners, the tort claimants, ensuring that future claimants are paid to the fullest extent possible from the assets of the reorganized company. Taking ownership in the debtor breaks the fixed-pool paradigm and creates an equitable payout to claimants.

F. Non-Traditional Chapter 11s Offer Solutions Similar to Settlement Class Actions

1. Class Action Within Chapter 11 Bankruptcies

A bright line demarcation between a class action and a bankruptcy proceeding is not necessary. The two may exist in the same case either explicitly through the court's discretionary application of Rule 23[261] or implicitly through the informal treatment of a group of tort claimants as a consolidated entity, such as through the use of a claimants' committee. While the Bankruptcy Code is silent on the subject, courts have permitted a prepetition certified class of claimants to continue to act as a class within the bankruptcy context.[262] Where the certification of a class has been interrupted by the filing of a bankruptcy, or where a class certification otherwise has not occurred outside of bankruptcy, a class may be certified within the bankruptcy context.[263]

The Bankruptcy Code contains no provision specifically allowing or prohibiting classes, as opposed to individuals, to act as creditors in a bankruptcy.[264] Faced with statutory silence, bankruptcy courts initially ruled against class representatives who attempted to file proofs of claim on behalf of their constituents.[265] With the increase in the 1980s of bankruptcy filings by mass tort class action defendants, courts faced this issue with increasing frequency, yet the courts of appeal which have considered the issue since the

260. *Id.* at 621.

261. *See, e.g., In re* American Reserve Corp., 840 F.2d 487, 488 (7th Cir. 1988).

262. A certified class of claimants may file a proof of claim on behalf of a class, *In re* Trebol Motors Distrib. Corp., 211 B.R. 785, 787 (Bankr. D.P.R. 1997), and may also bring an adversary proceeding to reverse certain voidable transfers, Moore v. Ross (*In re* Ross), 37 B.R. 656, 657 (B.A.P. 9th Cir. 1984). A class may also act as an entity to bring an action seeking declaration of non-dischargeability against a debtor. Dickinson v. Duck (*In re* Duck), 122 B.R. 403, 406 (Bankr. N.D. Cal. 1990).

263. *In re* Mortgage & Realty Trust, 125 B.R. 575, 580 (Bankr. C.D. Cal. 1991).

264. *In re* Computer Devices, Inc., 51 B.R. 471, 474 (Bankr. D. Mass. 1985).

265. For a good summary of earlier cases, see Joel Rothstein Wolfson, *Class Actions in Bankruptcy: A Clash of Policies Reconciled*, 5 BANKR. DEV. J. 391, 393-414 (1988).

enactment of the new Bankruptcy Code are nearly unanimous in their approval of class proofs of claim.[266] While there is a strong consensus that class proofs of claim may be filed in a bankruptcy, the reasoning required to reach that conclusion is convoluted. The authority for the recognition of an active class entity in a bankruptcy proceeding is found in Federal Rule of Bankruptcy Procedure 7023. Because Rule 23 comes into play through the initiation of an adversary proceeding or a contested matter,[267] it may be necessary that an objection to the class claim be made in order to trigger the contested matter. This overlap of rules places the class in the odd position of either waiting for the debtor to raise the objection at the time most advantageous to itself or having to precipitate a contested matter by asking the court to approve the class proof of claim, thus alerting the debtor to a problem it might not otherwise have seen. Amendment of the rules to provide that representatives of a class may file proofs of claim on behalf of the class is necessary to clarify the situation and to give classes direct access to standing in the bankruptcy process.

In the seminal decision on class action claims in bankruptcy, the *In re American Reserve Corp.* court analogized the function of a bankruptcy to a class action and found that "[t]he principal function of bankruptcy law is to determine and implement in a single collective proceeding the entitlements of all concerned" and that "[p]rocedurally, the class action concentrates litigation in a single forum, where it may be resolved more readily than a series of suits could be."[268] While the court found that "[t]he bankruptcy forum, as a mandatory collective proceeding, serves this purpose without the overlay of the class action," it recognized that in certain circumstances, the bankruptcy proceeding does not serve the same purpose as a class action and that the overlay of class action procedures is necessary to achieve a "single collective

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266. *See, e.g.*, Birting Fisheries, Inc., v. Lane (*In re* Birting Fisheries Inc.), 92 F.3d 939, 939 (9th Cir. 1996); Reid v. White Motor Corp., 886 F.2d 1462, 1469 (6th Cir. 1989); Certified Class in the Charter Sec. Litig. v. Charter Co. (*In re* Charter Co.), 876 F.2d 866, 873 (11th Cir. 1989); *In re* American Reserve Corp., 840 F.2d 487, 488 (7th Cir. 1988).

267. *In re American Reserve Corp.*, 840 F.2d at 488.

> Bankruptcy Rule 9014, which applies to "a contested matter in a case . . . not otherwise governed by these rules" states that "[t]he court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply." Rule 9014 thus allows bankruptcy judges to apply Rule 7023—and thereby Fed. R. Civ. P. 23, the class action rule—to "any stage" in contested matters . . . . All disputes in bankruptcy are either adversary proceedings or contested matters, so Rule 23 may apply throughout a bankruptcy case at the bankruptcy judge's discretion.

Id. (citations omitted).

268. *Id* at 489 (citing American Pipe & Const. Co. v. Utah, 414 U.S. 538, 553-54 (1974)).

proceeding" where the entitlement of everyone concerned is determined.[269]

Having established that it is possible to have a class certified and functioning within a bankruptcy case, the logical question is why would one want to do that? The answer is simple. The purpose of a class within bankruptcy is the same as outside of bankruptcy: to manage litigation and to represent the interests of large numbers of small claimants.[270]

Some might argue that the Bankruptcy Code gives the court the authority, either at the request of a party-in-interest or *sua sponte*, to appoint a "champion" for the mass tort victims, thereby providing for the representation of a group of claimants without the "overlay" of class action procedure. The bankruptcy court may order the United States trustee to appoint a claimants' committee to represent the interests of present mass tort creditors and the appointment of a future claimants representative.[271]

Membership on a claimants' or creditors' committee has no statutory requirements other than a member must be a creditor who holds one of the "seven largest claims against the debtor of the kinds represented on such committee."[272] "The members of a committee of unsecured creditors need not have parallel interests in order to qualify for membership on the committee."[273] In fact, a broad spectrum of types of claims held by members of the committee is required, resulting in representation by the single committee of all types of unsecured claims.[274] Although, most often, claimants' committees are composed of personal injury attorneys representing claimants in the case, bankruptcy courts may appoint mass tort claimants to the claimants' committees in lieu of, or in addition to, attorneys for claimants.[275] Rule 23 class action within a bankruptcy context would require that the representative of the

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269. *Id.*

270. Because bankruptcy is a litigation process, class action certification in bankruptcy serves the same traditional purpose of managing litigation within the bankruptcy that it does outside of bankruptcy. See *In re* American Reserve Corp. for a discussion of the need for a "champion" within. *Id.* at 490 ("Plaintiffs and their champions at the bar hold the benefits of class litigation in higher esteem than do courts.").

271. Bankruptcy Code, 11 U.S.C. § 1102(a)(2) (1994); *see* Van Arsdale v. Clemo (*In re* A.H. Robins Co.), 65 B.R. 160, 162-63 (E.D. Va. 1986); *In re* Johns-Manville Corp., 36 B.R. 743, 749 n.3 (Bankr. S.D.N.Y. 1984).

272. 11 U.S.C. § 1102(b)(1).

273. *In re* Texaco Inc., 79 B.R. 560, 567 (Bankr. S.D.N.Y. 1987) (citing *In re* Schatz Fed. Bearings Co., 5 B.R. 543 (Bankr. S.D.N.Y. 1980)).

274. *See, e.g., In re* Microboard Processing, Inc., 95 B.R. 283, 286 (Bankr. D. Conn. 1989).

275. In the *In re A.H. Robins* bankruptcy personal injury attorneys representing Dalkon Shield claimants were removed from the claimants' committee and replaced by a five member committee composed of three claimants and two personal injury attorneys. For a general discussion of the *In re A.H. Robins* bankruptcy see MORTON MINTZ, AT ANY COST: CORPORATE GREED, WOMEN, AND THE DALKON SHIELD (1985). More recently, a claimants' committee was appointed in the *Celotex* bankruptcy which consisted only of asbestos claimants. The authors have sat on and chaired committees comprised of only claimants' counsel. One of the authors, Nancy Worth Davis, chaired the Dalkon Shield Claimants' Committee as a claimant.

class meet all the criteria established in a class action, including representation as well as commonality, numerosity, and typicality.[276] Typically a certified class within a bankruptcy enjoys better representation than other creditors who are represented by a creditors' or claimants' committee.

The less formal criteria for the appointment of a claimants' committee in a traditional bankruptcy would seem preferable to the more exacting process of certifying a class within the bankruptcy context. However, there are advantages to the class action process which may justify the added time and expense. While both types of representatives assume a fiduciary duty toward the claimants, the class action representatives have more authority to act on behalf of the class as a whole. A certified class representative may vote for the class and file a unitary proof of claim for the class,[277] eliminating the need for individual filings and allowing class members to vote individually if they wish. In contrast, a creditors' or claimants' committee may merely recommend a voting position to its constituents. Whether or not a claimant votes is up to the claimant, but claimants' failure to vote could result in passage of an unwanted plan. On the other hand, a class representative may vote on behalf of all class members who do not file individual claims so that the force of numbers may carry an acceptable plan or defeat an unacceptable one.[278]

2. *Prepackaged Bankruptcy*

The Chapter 11 process does not need to be as long and attenuated as it presently is. The Bankruptcy Code provides for an expedited, prenegotiated form of Chapter 11 known as a prepackaged bankruptcy.[279] There has been an upsurge in the use of prepackaged bankruptcies in the cases of corporations that became over-leveraged in the late 1980s and found it necessary to clear their bottom line of debt through the bankruptcy process.[280] When a prepackaged bankruptcy is applied to a mass tort case, it may offer many of the advantages of settlement class action without the delays and high transaction costs experienced by mass tort victims in a traditional litigation-oriented bankruptcy.

The first application of prepackaged bankruptcy process to mass tort claims occurred very recently. On September 9, 1998, Fuller-Austin Insulation Company filed its prepackaged bankruptcy in the Bankruptcy Court for the

276. FED. R. CIV. P. 23.

277. *See, e.g., In re* Trebol Motors Distrib. Corp., 211 B.R. 785, 788 (Bankr. D. P.R. 1997).

278. *See, e.g., In re* Mortgage & Realty Trust, 125 B.R. 575, 583 (Bankr. C.D. Cal. 1991).

279. Bankruptcy Code, 11 U.S.C. § 1126(b) (1994).

280. Jef Feeley, *Debt-Ridden Cos. Turning to Prepacks*, NAT'L L. J., Sept. 7, 1998, at B1.

District of Delaware.[281] A hearing to approve the plan[282] of reorganization was held on October 15, 1998. The negotiations and certification of the consensual plan took less than one year. The Fuller-Austin prepackaged bankruptcy is the only example of how a prepackaged bankruptcy works. To draw generalizations from a single sample would be inappropriate. However, a review of the Fuller-Austin experience may provide insight into the advantages and disadvantages prepackaged bankruptcies may hold for mass tort claimants.

In October 1997, attorneys for Fuller-Austin invited attorneys representing large numbers of asbestos claimants to a meeting for the purpose of negotiating a prepackaged, Chapter 11 plan of reorganization. Unlike similar small asbestos manufacturers, Fuller-Austin had a parent company willing to infuse cash to rid itself of a balance sheet liability which might impede its planned initial public offering. At the time that negotiations began, legal action against the company was not stayed as it would have been immediately upon the filing of a Chapter 11 bankruptcy petition. Instead, plaintiffs' attorneys agreed among themselves to cease new case filings.[283] This voluntary injunction against new cases did not prevent pending cases from proceeding to judgment and did not stay appeals. In essence, the plaintiffs' counsel gave themselves the equivalent of a bankruptcy lift stay to continue pending litigation to its final conclusion short of execution against the company.[284] This arrangement had two advantages. First, it relieved the company and plaintiffs' counsel of further litigation costs in anticipation of a settlement. Second, it permitted finalization of pending litigation which in a traditional bankruptcy would remain an estimate because these types of cases cannot be liquidated by the bankruptcy court.

Over the next year, the company, its parent, the mass tort creditors, and the representative for future claimants that was designated by the company negotiated a plan of reorganization. The proposed plan provides for a trust to compensate the mass tort claimants.[285] The plan proposed that the trust be funded by insurance proceeds and by a cash contribution by the parent company. In August 1998 the disclosure statement, the plan of reorganization, and ballots were distributed to all creditors. The creditors' deadline for voting

281. Fuller-Austin Insulation Company Voluntary Petition (on file with authors). The Bankruptcy Court for the District of Delaware is one of the venues of choice for debtors wishing to file a prepackaged bankruptcy. Feeley, *supra* note 280, at B1. The bench and the bar in Delaware have developed a particular expertise in this form of bankruptcy.

282. If the plan is confirmed, Fuller-Austin will be in bankruptcy less than two months.

283. Telephone Interview with Jim Wimberly, Provost-Humphries (Oct. 9, 1998). Mr. Wimberly served as a member of the plaintiff's committee.

284. It is important to note that this "stay" agreement was between plaintiffs' counsel only and was not with the company. This agreement was easily policed by the attorneys because of the limited distribution of the product and the limited jurisdictions in which an action could be filed.

285. Plan of Reorganization Under Chapter 11 of the United States Bankruptcy Code for Fuller-Austin Insulation Company at 5-7 (on file with authors).

was August 31, 1998.[286] The plan was overwhelmingly approved by the creditors.[287] The petition, the disclosure statement, the plan of reorganization, the notice to creditors, an affidavit of the accountants who had counted the ballots, and the usual first day orders were simultaneously filed with the bankruptcy court on September 9, 1998.[288] The entire bankruptcy package was delivered to the court in much the same way that parties arrive at a settlement in a settlement class action and present it to the court for approval along with an application for certification.

At this point the differences in settlement class actions and prepackaged bankruptcies become apparent. In a settlement class action the court would begin scrutinizing the representatives of the class.[289] In the Fuller-Austin prepackaged bankruptcy, the court approved the legal representative for future claimants,[290] the counsel for the legal representatives,[291] and the first day orders, without extensive scrutiny of the representatives.[292] The judge signed all orders on September 9, 1998 with the only contingency being that the future claimants' representative procure insurance. Section 524(g) of the Bankruptcy Code, which triggers appointment of the future claimants' representative, does not state how either the future claimants' representative or counsel should be appointed or any criteria for their selection.[293] Fuller-Austin did not pursue the appointment of counsel for the future claimants' representative through § 105(a) or § 327 of the Bankruptcy Code. Uncertainty exists about the statutory basis of appointment of counsel for the future claimants' representatives; therefore, it is questionable on what authority the future claimants' representatives' counsel was appointed in the Fuller-Austin bankruptcy.

This fault is endemic to the bankruptcy process in general and is not unique to prepackaged bankruptcy. What the prepackaged bankruptcy seems to offer in terms of saved time and transaction costs may be gained by sacrificing the

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286. Declaration of Logan & Company, Inc. Certifying the Methodology for the Tabulation of, and Results of Voting with Respect to the Debtor's Plan of Reorganization at 1 (on file with authors).

287. *Id.* at apps. A, B, C.

288. *Id.* at 1.

289. *See* FED. R. CIV. P. 23(e).

290. Order Approving and Authorizing the Appointment of a Legal Representative at 1-5.

291. Order Authorizing the Retention and Employment of Herb & Gitlin, P.C. as Counsel to the Legal Representative at 1-2.

292. This type of approval requires notice and opportunity for a hearing, both of which were provided in this case. As is routine in matters like these, there was no objection to the representatives of the committee or to the committees' counsel. The court entered these orders on the first day of the bankruptcy. This process provided little or no scrutiny of the "representative" of the claimants' group.

293. Bankruptcy Code, 11 U.S.C. § 524(g) (1994). This defect in the statute is not exclusive to prepackaged bankruptcies. In fact, it is common to the traditional Chapter 11 to which § 524(g) applies equally.

court's scrutiny of the future claimants' representative and professionals hired in the case. Just as in a traditional Chapter 11 bankruptcy, there is a lower degree of scrutiny of the representative process in a prepackaged bankruptcy than in a settlement class action. It will be interesting to watch the development of prepackaged bankruptcy as it is applied to mass tort claims.[294]

IV. COMPARISON OF SETTLEMENT CLASS ACTION AND CHAPTER 11 BANKRUPTCY

A. The Structure of Settlement Class Action and Chapter 11

The evolution and application of settlement class action procedure and Chapter 11 reorganization to resolve mass tort claims have developed in a surprisingly analogous manner. Both began as innovative applications of existing law to meet a new set of facts. Chapter 11 reorganization did not exist in a statute prior to 1936 when it evolved out of a seemingly collusive practice between opposing parties in a liquidation proceeding.[295] Using a creditor's bill, originally designed to liquidate assets, debtors and their major creditors engineered the appointment of trustees to operate and reorganize the debtor.[296] The purpose was to benefit the creditors and to enlarge the estate by distributing the income of the debtor over a period of time. When the experiment proved successful, the innovation was enacted into law.

Similarly, settlement class action has evolved under Rule 23, which traditionally focused on litigation of claims. As it has evolved, settlement class action shifts the focus from manageability of litigation to the question of whether the settlement reached by the parties is fair and was negotiated at arms length. This novel use of existing law to settle rather than to litigate claims has generated the same suspicion of collusion among the parties that greeted the initial use of bankruptcy law to reorganize rather than to liquidate debtors.[297] The process of validation and codification of settlement class action continues. The Supreme Court has recently approved the principle,[298] and the Rules

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294. At this point in the evolutionary process, the insurers of the debtor are accusing the debtor and the mass tort claimants of "collusion" in the Fuller-Austin settlement process. This is the common litany that seems to accompany innovations in the law. For discussion of the history of Chapter 11 and settlement class action see *supra* Part II.A-B.

295. Securities and Exchange Commission Report on the Study and Investigation, Personnel and Functions of Protective and Reorganization Committees: Part I, Strategy and Techniques of Protective and Reorganization Committees 24-26 and 29 (May 10, 1937) (on file with authors).

296. *Id.*

297. *See, e.g.*, Resnik, *supra* note 20, at 836.

298. In *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), the Supreme Court found that district courts have been certifying mass tort cases "in increasing number" since the 1970s, *id.* at 625, that "the 'settlement only' class has become a stock device," *id.* at 618, that "the text of the Rule does not categorically exclude mass tort cases from class certification," *id.* at 625, and that the issue of management of litigation was not applicable in a settlement class

Advisory Committee has recommended an amendment to Rule 23 to provide for the certification of a class for settlement purposes.[299]

Settlement class action and Chapter 11, when applied to mass torts, share some striking similarities.[300] Both are aggregative methods of resolving claims; both rely on representatives of large numbers of claimants;[301] both require the determination of a court as to the fairness and adequacy of the proposed settlement or plan of distribution;[302] and both may rely upon future claimants' representatives, channeling injunctions, and claimants' trusts to attempt to resolve future claims. Additionally, both would require some degree of revision and reorientation of prevailing biases and perceptions in order to accommodate adequately the resolution of future mass tort claims.

While settlement class action and Chapter 11 are similar in many respects, the differences between them bear attention. Where Rule 23(b)(3) settlement class actions provide a voluntary settlement process from which dissenters may opt-out, bankruptcy is a mandatory process in which no form of "opt-out" is provided. "No opt-out" class actions under Rule 23(b)(1)(B) are also mandatory proceedings in which claimants are bound by the settlement with no direct recourse to a jury trial as is available to a Rule 23(b)(3) class. While the claimant in bankruptcy may seek a modification of the automatic stay, this request is not always granted to mass tort claimants.[303] In both a bankruptcy and a Rule 23(b)(1)(B) class, the ultimate right to a jury trial may be written back into the distribution process through negotiation among the parties. The bankruptcy process allows removal of the tort claimant's case from its chosen forum through the application of the court's "related to" jurisdiction under 28 U.S.C. § 157, but in the settlement class action arena, the forum of choice is maintained.

From the mass tort claimant's perspective, the major differences between settlement class action and bankruptcy are the delays and high transaction costs inherent in the bankruptcy litigation process. The protection of the debtor and its codefendants through the extension of the automatic stay, indefinite extensions of the exclusive period, transfer of related cases to the bankruptcy court, and the court's reluctance to lift the automatic stay all serve to remove any pressure to negotiate a plan of reorganization. Without leverage to force serious settlement discussions, mass tort claimants are at a disadvantage in the

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action certification, *id.* at 620.

299. *See supra* note 54.

300. "[I]n most important respects, the use of a class action and a Chapter 11 reorganization plan may be functional equivalents because they both have the potential to provide for the resolution of all, or most, claims of a particular type." Vairo, *supra* note 8, at 84-85.

301. Class representatives under Rule 23 correspond to creditors' and claimants' committees under § 1102 of the Bankruptcy Code.

302. Class action settlement determination under Rule 23(e) corresponds to confirmation of a plan of reorganization under §§ 1123 and 1129(b) of the Bankruptcy Code.

303. Houser, *supra* note 196, at 453.

bankruptcy process.

Because the settlement class action begins with a settlement, it provides the claimant and the defendant company with certainty as to the economic impact of the resolution of claims on each party. In a traditional Chapter 11 bankruptcy, the parties have no certainty at the commencement of the case as to how each will ultimately be treated. When the tort defendant files bankruptcy, it is entering into a process in which it will have no guarantee that future claims will be extinguished or that it may continue to operate its business while it holds payment of claims in abeyance.

B. Treatment of Future Claims

One of the most vexing problems facing those seeking a global resolution of mass tort claims is the treatment of unknown and future claims which threaten to unravel attempts at permanent solutions. The Bankruptcy Code is flawed as a mechanism for resolving future mass tort claims: the definition of "claim" does not extend to future claimants. In essence, future claimants in bankruptcy enjoy a de facto opt-out by definition leaving the reorganized debtor open to successor liability. Methods such as channeling injunctions and appointing futures representatives have evolved to remedy this situation. Yet, debtors that gamble their companies on the belief that the reorganization process will resolve all litigation against them find these newly developed methods of resolving future claims in the bankruptcy context are being challenged.[304] If future claims are not effectively disposed of in Chapter 11, successive bankruptcies are needed to resolve latent claims as they mature and become "claims" within the meaning of § 101(5) of the Bankruptcy Code.[305] In practice, the jurisdiction of the bankruptcy court over future claimants is eroding if it ever existed. Asbestos trust funds, such as those established in the *In re Johns-Manville Corp.*[306] and *In re National Gypsum Co.*[307] bankruptcies, are increasingly found to be inadequate. Where claims are impaired, courts are finding that future claimants' due process rights of notice and hearing are not met. The Supreme Court's concerns about due process requirements as expressed in *Amchem* are equally applicable future claimants in a Chapter 11 reorganization.[308] Where there is no effective notice to creditors, there is no

304. *See, e.g.*, Celotex Corp. v. Edwards, 514 U.S. 300, 313 (1995) (holding that the debtors cannot be permitted to collaterally attack the bankruptcy court's injunction); *In re* Eagle Picher, Indus., Inc., 164 B.R. 265, 272 (Bankr. S.D. Ohio 1994) (rejecting the claimants' proposal for an estimation hearing and establishment of a trust).

305. This being the case, mass tort bankruptcies involving future claims should not be confirmed. Section 1129(a)(11) of the Bankruptcy Code prohibits confirmation of a plan which has a likelihood of being followed by a subsequent bankruptcy. Bankruptcy Code, 11 U.S.C. § 1129(a)(11) (1994).

306. 68 B.R. 618, 621 (Bankr. S.D.N.Y. 1986).

307. 139 B.R. 397 (Bankr. N.D. Tex. 1992).

308. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 621-22 (1997).

discharge of claims through the bankruptcy process.

The focus of concern regarding treatment of future claims is the right to due process: the right to notice and an opportunity to be heard before property is taken or a claim is impaired. The type of notice in a settlement class action and Chapter 11 proceeding are strikingly similar or may be made so at the discretion of the court. The purpose for giving notice is also very similar. The intention is to bring all similarly situated claimants under the court's jurisdiction. In a bankruptcy, it is in the interest of the debtor to give notice to all claimants, including future claimants, so as to achieve finality.[309] There is no doubt that the notice to identifiable claimants provided in a settlement class action and in a bankruptcy adequately meet all due process requirements. The pressing issue is whether the due process rights of future claimants are being met.

In settlement class actions the definition of the class determines the extent of the court's jurisdiction. In bankruptcy it is the definition of "claim" found in the Bankruptcy Code that sets the goalposts. The developing consensus of the decisional law is that the definition of claim in the Bankruptcy Code does not encompass future claimants.[310] Therefore, the court does not have jurisdiction over such claims amounting to opt-out by definition. If the Bankruptcy Code was amended to bring future claims within the bankruptcy courts' ambit, could a notice program be devised for futures that would satisfy due process requirements? The Supreme Court's concern for the due process rights of future claimants as to settlement class actions, which it expressed in dicta in *Amchem*, is equally applicable to bankruptcy. At this time, it is uncertain whether either settlement class action or bankruptcy has resolved the problem of providing due process notice to future claimants. Both employ the same forms of protection for future claimants: the appointment of a representative for the interests of future claimants, the establishment of trusts from which future claimants may seek recourse, and the remedy of injunctions channeling future claimants to the trust and away from the debtor or defendant companies. In the context of bankruptcy, these mechanisms are being challenged.[311] In the settlement class action context, the Supreme Court is questioning the effectiveness of notice in cases that have employed all these protections for future claimants.[312] The future of the resolution of mass tort future claims remains to be written in decisional law.

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309. Previous comparisons made between bankruptcy and class action solutions to mass tort claims have failed to focus on settlement class action as opposed to litigation class action. The combined notice requirements of Federal Rule 23(c) and (e) are stronger than the requirements of Federal Rule 23(c) alone. A complete analysis of the heightened due process requirements of class action settlement after *Amchem* is beyond the purview of this Article.

310. *See, e.g.*, Zerand-Bernal Group, Inc. v. Cox, 23 F.3d 159, 163 (7th Cir. 1994); Fairchild Aircraft Inc. v. Cambell (*In re* Fairchild Aircraft Corp.), 184 B.R. 910, 924-25 (Bankr. W.D. Tex. 1995).

311. *In re National Gypsum*, 139 B.R. at 400-01.

312. *Amchem Prods., Inc.*, 521 U.S. 591, 628 (1997).

C. Comparison of Representation in Settlement Class Action and Bankruptcy

In bankruptcy, mass tort claimants may be represented by members of a creditors' or claimants' committee who are appointed by the U.S. Trustee's office.[313] There is no inquiry into the "representativeness" of members of creditors' and claimants' committees unless there is an objection to committee membership by a party in interest.[314] In a settlement class action, representatives of the class undergo extensive qualification and court scrutiny prior to certification of the class.[315] The criteria for certification of class action, including representativeness, is strictly enforced in a settlement class action.[316] Tort claimants have greater assurance of fair representation in a settlement class action.

D. Comparison of the Approval Processes

Class action settlement occurs outside of court by representatives of the claimants and is reviewed by a judge for fairness of the process and the result.[317] Individual members of the class do not "vote" on the settlement in the sense that they would vote on a plan in a bankruptcy proceeding. However, claimants may "vote with their feet" in a (b)(3) class by exercising their opt-out rights and removing themselves from the class. The court, acting as a fiduciary in both (b)(3) and (b)(1) class actions scrutinizes the agreement on behalf of class members and determines whether the agreement is fair to the class.[318] In Chapter 11 reorganization the court presides over litigated matters in the reorganization process, such as the estimation of claims, although it is absent from the negotiation of the plan of reorganization.[319] The bankruptcy court decides the issue of the fairness and feasibility of the plan of reorganization when a plan is presented for confirmation. The court does not scrutinize the process that leads to the formation of the plan. The bankruptcy plan is voted on

313. *See* Bankruptcy Code, 11 U.S.C. § 1102(a) (1994).

314. *Id.* § 1102(b)(1).

315. FED. R. CIV. P. 23(a)(4).

316. *See, e.g.*, General Tel. Co. v. Falcon, 457 U.S. 147, 156 (1982) (limiting class action suits by requiring strict adherence to the class action requirements of Rule 23); *In re* Kroger Co. Shareholders Litig., 590 N.E.2d 391, 396 (Ohio Ct. App. 1990) (requiring the certification criteria to be met by a preponderance of the evidence).

317. *See supra* Part II.

318. FED. R. CIV. P. 23(e).

319. The Bankruptcy Reform Act of 1978 consciously removed the bankruptcy judge from the administration of the case (which the court had previously exercised). Under the Bankruptcy Code it is common in complex cases to appoint examiners and professional mediators to assist the reorganization process. *See In re* A.H. Robins Co., 88 B.R. 742, 744, 746 (E.D. Va. 1988) (using examiner Ralph Mabey, appointed pursuant to § 1104(c) of the Bankruptcy Code and expert Professor Francis McGovern, appointed under Rule 706 of the Federal Rules of Evidence).

by creditors who receive information about the plan in the form of a disclosure statement.[320] The creditors' and claimants' committees may also make recommendations to the creditors voting on the plan.[321] If approved by those creditors who vote, the court's inquiry into the "fairness" of the plan is limited in scope. The bankruptcy court does not act as a fiduciary for claimants. If the creditors do not agree on a plan, it may be forced on them or "crammed down" over their objections.[322] In that case, the bankruptcy court must determine if the plan is "fair and equitable."[323] A "fairness" test is not applied in a Chapter 11 plan confirmation unless a "cramdown" is attempted. The plan of reorganization that is reached through negotiation in a bankruptcy does not receive the scrutiny of the negotiations and the settlement that the class action settlement receives.

E. Comparison of Settlement Class Action Valuation and Bankruptcy Estimation

The estimation of claims in bankruptcy results in the de facto abrogation of the tort claimant's right to a jury trial and may become a cap on compensation to claimants. While a bankruptcy claimant retains the right to a jury trial conducted by an Article III court, that right is a hollow one. The bankruptcy court, as an Article I court, may not conduct a jury trial. Because the bankruptcy court may not hear a tort action, the claim must be transferred to an Article III court that may try tort actions. However, there is no requirement that the bankruptcy court must allow a jury trial, and in fact, bankruptcy courts routinely deny efforts to modify the automatic stay to proceed in a pending case.[324] In this way, jury trials are deferred without being actually denied, and the bankruptcy court proceeds to value claims through an estimation proceeding rather than liquidate them. In reality, the actual liability is not determined on a case-by-case basis in the bankruptcy proceeding. The estimation serves as the basis of the plan and becomes, in effect, a cap on the distribution.[325] Once confirmed, the plan operates to discharge the debtor of any claim or portion of a claim disposed of in the plan. The tort claimant does not have his day in court before a jury of his peers. The right to a jury trial is involuntarily abrogated by the estimation proceeding.

This jury trial right is often written back into the process through a provision in the distribution scheme that provides for jury trial after initial offers and A.D.R. are nonavailing. In either a settlement class action or a

320. *See* Bankruptcy Code, 11 U.S.C. § 1125, 1126(a) (1994).
321. *Id.* § 1125(b).
322. *Id.* § 1129(b)(1).
323. *Id.*
324. Houser, *supra* note 196, at 452.
325. *See* David R. Weinstein & Robert C. Kim, *Estimation of Claims: Precedential Effects of Court's Estimation*, 15 AMER. BANKR. INST. J. 12, 12 n.1 (1996) (citing *In re* Baldwin-United Corp., 57 B.R. 751, 758 (S.D. Ohio 1985)).

bankruptcy trust, a delicate balance must be struck between paying so much that the trust is depleted and paying so little that the trust must expend assets on litigation which should be used to pay claims.

V. CONCLUSIONS AND RECOMMENDATIONS

A. Bankruptcy Law

1. Section 524(g) Should Not Be Extended to Cover All Mass Tort Bankruptcies at This Time

In analyzing the mass tort problem in bankruptcy, it is necessary to make value judgments as to whom, if anyone, should be disadvantaged. Should the creditors be disadvantaged by, for example, taking a percentage rather than full payment so that the corporation may survive? Should present claimants be disadvantaged in favor of future claimants or vice versa? One commentator speaks of "the unfairness of persons in the present taking for themselves resources that ought to be reserved for the future."[326] It is a value judgment whether resources "ought" to be reserved for future claimants. The reality of the bankruptcy forum is that if the case is filed as a Chapter 7 or converted to a Chapter 7, there is nothing provided for future claimants because the company is liquidated and the proceeds of the sale of assets are distributed among *existing* creditors. What may seem to be "misappropriation of resources rightfully belonging to future persons"[327] is the fundamental premise of a bankruptcy liquidation.

The fact that Chapter 11 reorganization grew out of a liquidation paradigm is evident in the tension that exists within the Bankruptcy Code straining to deal with future claims in mass torts. The statutory existence of Chapter 11 dates to 1936,[328] and its use by a solvent debtor dates to 1978. Our experience with mass tort bankruptcies is a more recent phenomenon. Through its evolution bankruptcy law has departed from its original purpose, which was the liquidation of the debtor's assets to pay its creditors, and has become an effort to reorganize a debtor. The liquidation-based "fixed pool" concept underlying the reorganization process is inapplicable to mass tort claims which continue far into the future.[329]

The mass tort bankruptcy process is presently too heavily skewed in favor of debtors and future claimants to be fair to present mass tort victims. *Pro rata* treatment of present claimants is unequal to the 100% treatment of future claimants via "opt-out" by definition and successor liability. The lack of

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326. Smith, *supra* note 153, at 153.
327. *Id.*
328. *See* text accompanying note 130.
329. Perhaps it is necessary to return to the concept which originally motivated the creation of a Chapter 11: maximization of the estate for the benefit of creditors.

uniform treatment of similarly situated claimants must be remedied. If a value judgment is made that future claimants should be paid, and the method chosen is bankruptcy, then § 524(g) in its present form should be extended to all mass tort bankruptcies. Trusts should be established out of which all mass tort claimants, present and future, are treated equally. All § 524(g) due process protections presently in place, including the future representatives, the channeling injunction (to the extent it directs claims to an adequate trust) and claimants' trusts, should remain in place. There has been too little experience with § 524(g) to determine its effectiveness. It is too early to extend § 524(g) to cover all mass tort bankruptcy cases.

2. *Payment of Claims to the Full Extent of the Debtor's Ability Should Be Enforced*

One of the objectives of mass tort litigation is the deterrence of future injury and the acceptance of corporate responsibility on the part of the tortfeasor. Some economic theorists believe that tortfeasors should pay the full losses suffered by plaintiffs and society.[330] This satisfies the purpose of tort law which is to compensate victims and discourage behavior that causes injury. In the traditional one-on-one tort litigation, the defendant has to compensate the plaintiff for the full amount of the injury which has been incurred and may also face punitive damages. A settlement offered in this context is usually discounted only by the amount of the uncertainty of the final decision and the costs of litigation. In the class action context, the same process is in operation but on a larger scale. In a Chapter 11 bankruptcy proceeding, there is an assumption that the plaintiff will get only a *pro rata* share of the debtor's estate and will not be made whole. This "cents on the dollar" assumption clashes with the deterrent purpose of tort law. The claimant that then negotiates a plan of reorganization with the debtor further discounts its claim, thereby experiencing a double discount. Ironically, tort claimants that do not participate in the bankruptcy, either because they are unknown or are future claimants at the time of the bankruptcy, may make a collateral attack through a successor liability suit on the reorganized entity and may receive up to 100% of their claim.[331] Reorganized debtors should be required to pay into a claimants' trust until all claims are paid in full to effectuate the deterrent policy underlying tort law and promote corporate responsibility. The principal underlying the absolute priority rule should be strictly enforced.

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330. Deborah R. Hensler, *Resolving Mass Toxic Torts: Myth and Realities*, 1989 U. ILL. L. REV. 89, 97 (1989) (citing ELIZABETH M. KING and JAMES P. SMITH, ECONOMIC LOSS & COMPENSATION IN AVIATION ACCIDENTS 7 (1988)).

331. *See supra* Part II.

3. Delay and Excess Expense Should Be Reduced

The transfer of non-debtor third-party claims and the extension of the automatic stay coupled with extended exclusive periods create a disincentive to settle. This inertia on the part of the debtor results in delay and excessive bankruptcy transaction costs. To avoid this result, bankruptcy judges should modify the automatic stay allowing pending litigation claims to proceed up to the point of execution. In this way, pending claims would be liquidated. The real opportunities for a jury trial should be provided in the plan of reorganization for the remaining unliquidated claims.

Based on the empirical data collected by Professor LoPucki,[332] bankruptcy courts should strictly enforce the time periods provided for exclusivity in mass tort cases. Amendment of the Bankruptcy Code to provide for shortened periods of exclusivity and limits on the judge's discretion in granting further exclusive time should be enacted.

B. Settlement Class Action

1. Amendment of Rule 23 to Provide Expressly for Settlement Class Action

The uncertainty surrounding the validity of settlement class action under Rule 23 should be resolved by the Supreme Court decision in *Amchem*. However, it would be prudent for Rule 23 to be amended to expressly authorize settlement class action. The amendment should also provide for the appointment of a future representative for unidentified and future claimants. This would be a codification of current practice.

2. Subclassification to Insure Representativeness

A common reason for denial of certification of a settlement class is the lack of commonality[333] and failure of representativeness[334] among large classes of disparate members. This shortcoming can be remedied and the due process rights of mass tort victims protected by subclassifying the various types of injury to be represented by separate counsel.

At the end of the day there are two elements which determine the fairness of the legal process for tort victims: the speed and efficiency of the process and

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332. *See supra* notes 237-40 and accompanying text.

333. *See* Joseph L. v. Office of Judicial Support, 516 F. Supp 1345, 1352 (E.D. Pa. 1981); Owens-Illinois, Inc. v. Bowling, 429 N.E.2d 172, 181 (Ill. App. Ct. 1981).

334. *See, e.g.*, Stewart v. General Motors Corp., 756 F.2d 1285, 1294 (7th Cir. 1985) (finding no basis for this contention); Hatch v. Reliance Ins. Co., 758 F.2d 409, 416 (9th Cir. 1985); Golub v. Mid-Atlantic Toyota Distrib., Inc. (*In re* Mid-Atlantic Toyota Antitrust Litig.), 93 F.R.D. 485, 487 (D. Md. 1982).

the amount of compensation delivered relative to the value of the claim. The settlement class action is structured to deliver fair compensation to tort victims in an efficient and timely manner. The judicial process begins with a settlement arrived at through negotiations on a level playing field and approved after extensive court scrutiny of the settlement and the settlement process. Third parties that do not contribute to the settlement remain subject to suit.

The bankruptcy process, on the other hand, produces delay and increases transaction costs. It offers no scrutiny of the settlement process and little actual scrutiny of the choice of representatives of the claimant group. Both settlement class action under Rule 23 and Chapter 11 bankruptcy can be improved by faithfully applying available statutes and exercising discretionary powers to protect the rights of mass tort claimants. The application of each proceeding to the resolution of mass tort claims is a recent development which continues to evolve in response to new challenges. The development process is not complete. Both settlement class action and bankruptcy hold promise for the resolution of mass tort claims. It is important at this point in the evolutionary process that both settlement class action and Chapter 11 reorganization be allowed to develop to their fullest potential as solutions to mass tort claims resolution.

C. Conclusion

Settlement class action contains the elements that some perceive to be the advantages of Chapter 11 bankruptcy. However, settlement class action comes without the delay and excessive transaction costs endemic in bankruptcy. In order for settlement class action to succeed as a viable solution to mass tort claims, courts should fully exercise their discretionary powers to insure complete due diligence of the settling company and determine the value of claims of the class. Courts and class counsel must insure proper representation by subclassification of similar claims. The mechanisms found in § 524(g) of the Bankruptcy Code are presently being replicated in settlement class action and should continue to be used with increasing effectiveness. If courts and plaintiffs' counsel fully utilize the discretionary power given to the courts under Rule 23, settlement class action offers a more expedient, less expensive means of resolving the large numbers of claims than does Chapter 11.

If the Bankruptcy Code is enforced as written, Chapter 11 could be a fair and effective means of resolving mass tort claims. In order to reestablish the balances between debtors and creditors which motivated the drafting of the 1978 Bankruptcy Code, bankruptcy courts should refuse to extend the debtors beyond a short period and should grant more liberal modification of the automatic stay to allow liquidation of pending claims. The absolute priority rule should be absolutely enforced so that the full value of the debtor's estate is applied to pay mass tort claims. Bankruptcy court jurisdiction over non-debtor third parties should be applied sparingly and only where it can be shown that it does not cause delay.

Both settlement class action and Chapter 11 reorganization, if used properly, hold promise for resolution of mass tort claims. Neither should be discarded due to prevailing biases favoring one solution over the other. Each should be allowed to evolve so that mass tort claimants have choices available to them for the fair and equitable compensation of their injuries.