

## **TREATMENT OF MASS FUTURE CLAIMS IN BANKRUPTCY**

Massive tort or contract liabilities can have an enormous impact on otherwise viable enterprises that are vital to the American economy. Parties have found that traditional individual tort or contract litigation for mass torts or mass contract is unwieldy and too expensive for all parties, and has forced them to seek more efficient alternatives. The bankruptcy system offers a structured system to manage multiple liabilities and has provided a forum for companies with massive liabilities to attempt to do so. At least 15 asbestos manufacturers, including UNR, Amatex, Johns-Manville, National Gypsum, Eagle-Picher, Celotex, and Raytech, have reorganized or liquidated in attempts to address massive numbers of known and unknown asbestos claimants using the Bankruptcy Code. The fact pattern is not unique to asbestos; manufacturers of other products also must find ways to deal with mass claimants alleging injury or damages from products such as silicone implants, polybutylene pipe, airplanes, and intrauterine devices, and some are resorting to bankruptcy to do so.

Treating massive claims is inherently complicated, partly because of the sheer number of the claims. In addition, a more difficult conceptual issue arises with “future claims” that have not manifested but that are relatively certain to manifest in the future and are based on prior acts of the debtor. A collective process that commences well before the damages or injuries develop might be the only opportunity for future claimants to receive any compensation, both because otherwise early claimants may take all the assets of the company or the company’s extraordinary potential liability will dry up access to all capital needed for ongoing business operations. A company may not be able to preserve its going concern value and its work force if it is not able to deal collectively and definitively with all actions arising out of a certain activity. Acknowledging these issues, Congress took the first step in recognizing the treatment of future claimants in bankruptcy in amending the Bankruptcy Code in 1994 to authorize the treatment of future asbestos-related demands against a debtor. Now, after several years of experience with future claims in the bankruptcy system under the 1994 amendments, the Commission recommends additional provisions, not limited to asbestos, to guide the structured treatment of mass future claims in the bankruptcy system.

## RECOMMENDATIONS

### 2.1.1 *Definition of Mass Future Claim*

A definition of “mass future claim” should be added as a subset of the definition of “claim” in 11 U.S.C. § 101(5). “Mass future claim” should be defined as a claim arising out of a right to payment, or equitable relief that gives rise to a right to payment that has or has not accrued under nonbankruptcy law that is created by one or more acts or omissions of the debtor if:

- 1) the act(s) or omission(s) occurred before or at the time of the order for relief;
- 2) the act(s) or omission(s) may be sufficient to establish liability when injuries ultimately are manifested;
- 3) at the time of the petition, the debtor has been subject to numerous demands for payment for injuries or damages arising from such acts or omissions and is likely to be subject to substantial future demands for payment on similar grounds;
- 4) the holders of such rights to payments are known or, if unknown, can be identified or described with reasonable certainty; and
- 5) the amount of such liability is reasonably capable of estimation.

The definition of “claim” in section 101(5) should be amended to add a definition of “holder of a mass future claim,” which would be an entity that holds a mass future claim.

### 2.1.2 *Protecting the Interests of Holders of Mass Future Claims*

The Bankruptcy Code should provide that a party in interest may petition the court for the appointment of a mass future claims representative. When a plan includes a class or classes of mass future claims, the Bankruptcy Code should authorize a court to order the appointment of a representative for each class of holders of mass future claims. A mass future claims representative shall serve until further order of the bankruptcy court.

The Bankruptcy Code should provide that a mass future claims representative shall have the exclusive power to file a claim or claims on behalf of the class of mass future claims (and to determine whether or not to file a claim), to cast votes on behalf of the holders of mass future

claims and to exercise all of the powers of a committee appointed pursuant to section 1102. However, a holder of a mass future claim may elect to represent his, her, or its own interests and may opt out of being represented by the mass future claims representative.

The Bankruptcy Code should provide that prior to confirmation of a plan of reorganization, the fees and expenses of a mass future claims representative and his or her agents shall be administrative expenses under section 503. Following the confirmation of a plan of reorganization, and for so long as holders of mass future claims may exist, any continuing fees and expenses of a mass future claims representative and his or her agents shall be an expense of the fund established for the compensation of mass future claims.

The Bankruptcy Code should provide that a mass future claims representative shall serve until further orders of the bankruptcy court declare otherwise, shall serve as a fiduciary for the holders of future claims in such representative's class, and shall be subject to suit only in the district where the representative was appointed.

### ***2.1.3 Determination of Mass Future Claims***

Section 502 should provide that the court may estimate mass future claims and also may determine the amount of mass future claims prior to confirmation of a plan for purposes of distribution as well as allowance and voting. In addition, 28 U.S.C. § 157(b)(2)(B) should specify that core proceedings include the estimation or determination of the amount of mass future claims.

### ***2.1.4 Channeling Injunctions***

Section 524 should authorize courts to issue channeling injunctions.

### ***2.1.5 Plan Confirmation and Discharge; Successor Liability***

Sections 363 and 1123 should provide that the trustee may dispose of property free and clear of mass future claims when the trustee or plan proponent has satisfied the requirements for treating mass future claims. Upon approving the sale, the court could issue, and later enforce, an injunction to preclude holders from suing a successor/good faith purchaser.

## DISCUSSION

As a consequence of modern technology and a global marketplace, there is an unlimited list of products that might cause massive liabilities. Unlike typical liabilities that are addressed every day in the bankruptcy system and in individualized adjudication, mass tort and mass contract liabilities often have geographically widespread effects and a “long tail;” this means that once a product is distributed, it may take one or several decades for individuals to discover their injuries or property damage caused by that product. As a corollary, widespread damage caused by the product will appear at sporadic times, not all at once.

Asbestos provides a classic example. After asbestos exposure occurs, diseases generally do not manifest for another 15 to 40 years. This means that 100 people might have been exposed to asbestos simultaneously but their injuries are revealed at 100 different times. Fundamental principles of justice require that a person who develops asbestosis 40 years after exposure should have the same entitlement to compensation as a person who got asbestosis 25 years earlier from the same exposure. However, providing reasonable and equitable compensation to victims is not simple, evidenced by the inadequate results of traditional tort litigation:

Dockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims’ recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.<sup>784</sup>

The bankruptcy system is designed to provide equality of distribution to similar creditors in a collective proceeding while ameliorating the devastating effect that a huge liability may have on the worth of a business and, correspondingly, the

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<sup>784</sup> See REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION 2-3, 27-35 (Mar. 1991) (reform will require “federal legislation creating a national asbestos dispute-resolution scheme”). See also JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES 2* (Northwestern Press, 1995) (“We need seriously to readdress the problems of mass toxic tort litigation. Improvements are possible. Litigations involving large numbers of plaintiffs, such as Agent Orange, Dalkon Shield, heart valves, atomic weapons pollution sites, Bendectin, repetitive task syndromes (particularly carpal tunnel problems), breast implants, and the like, require us to treat a wide variety of problems—jurisdictional, scientific, substantive and administrative, as well as philosophical and ethical—differently from the way we have met them in the traditional one-plaintiff-one-defendant case”).

compensation available to all victims.<sup>785</sup> Bankruptcy therefore provides an appropriate vehicle to resolve massive liabilities. In theory, incorporating all claimants into the collective bankruptcy process should be workable and universally beneficial: mass future claimants would benefit from the segregation of assets on their behalf, which otherwise will be exhausted long before they would be entitled to collect, while present creditors would benefit by the enhancement in the debtor's going concern value and the company's rejuvenated ability to attract new capital that will accompany a global resolution to the company's massive liability problems.

As commentators amply have highlighted,<sup>786</sup> notwithstanding its inherent advantages, the bankruptcy system has to correct several significant ambiguities and shortcomings if it is to deal with mass future claims fairly and with certainty. In 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 liabilities, and some have confirmed plans using channeling injunctions to protect the reorganized entity against individual collection attempts while providing a pool of

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<sup>785</sup> *Union Bank v. Wolas*, 502 U.S. 151, 154 (1991).

<sup>786</sup> See, e.g., Jeffrey Davis, *Cramming Down Future Claims in Bankruptcy: Fairness, Bankruptcy Policy, Due Process, and the Lessons of the Piper Reorganization*, 70 AM. BANKR. L. J. 329 (1996) (current system does not provide sufficient flexibility to reach optimal value of company faced with mass tort liability. Code should be amended to permit flexibility to bring future claims into process and deal with them); 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 (1995) (future claims should be defined as claims, with concomitant rights, powers and burdens of claimants, and framework for handling mass torts should be devised instead of legislation designed to fix only certain disputes); Kathryn R. Heidt, *Products Liability, Mass Torts, and Environmental Obligations in Bankruptcy: Suggestions for Reform*, 3 AM. BANKR. INST. L. REV. 117 (1995) (suggesting reforms to Code to define claim to include future claims, to provide for appointment of future claims representatives, and to authorize trust mechanism); Anne Hardiman, *Toxic Torts and Chapter 11 Reorganization: The Problem of Future Claims*, 38 VAND. L. REV. 1369 (1985) (future claimants need to be treated as creditors to protect all parties and promote uniform treatment of future claimants); Georgine M. Vairo, *The Dalkon Shield Claimants Trust: Paradigm Lost (or Found)?*, 61 FORDHAM L. REV. 617 (1992) (Dalkon Shield mechanism should be the model for future cases since it handled large number of claims fairly and efficiently); Richard Epling, *Separate Classification of Future Contingent and Unliquidated Claims in Chapter 11*, 6 BANKR. DEV. J. 173 (1989) (warning against unfair treatment of future claimants under present Bankruptcy Code); Harvey J. Kesner, *Future Asbestos Related Litigants as Holders of Statutory Claims Under Chapter 11 of the Bankruptcy Code and Their Place in the Johns-Manville Reorganization*, 62 AM. BANKR. L. J. 159 (1988) (should recognize that claim arises when debtor's act occurred, but treatment of future claims should meet "fairness test"). See also Thomas A. Smith, *A Capital Markets Approach to Mass Tort Bankruptcy*, 104 YALE L.J. 367 (1994) (future claimants are hurt by current system's inability to estimate liability and balance interests of future and present claimants. Proposes the creation of a new type of tradeable security to ensure fair treatment for future claimants, since capital markets are superior in processing available information).

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.<sup>787</sup>

Recognizing these concerns, Congress enacted amendments in the Bankruptcy Reform Act of 1994 to provide explicit legislative guidance to ensure equitable treatment of mass future asbestos claimants in bankruptcy.<sup>788</sup> Marking an important first step, these amendments introduced a series of additional detailed provisions with limited application to section 524 of the Bankruptcy Code.

As their name suggests, the "asbestos amendments" apply exclusively to demands for payment on account of asbestos injuries.<sup>789</sup> A legislative response to other types of massive future liabilities was specifically reserved for another day.<sup>790</sup> In recent years, it has become even clearer that products other than asbestos give rise to massive liability issues. Similar problems already have arisen in the context of intrauterine devices, polybutylene pipe, lead-related injuries, and silicone implants. The 1994 asbestos amendments have not precluded the use of bankruptcy to deal with other types of mass future claims,<sup>791</sup> and cases currently are pending that might result

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<sup>787</sup> H.R. REP. NO. 103-835 (Oct. 4, 1994). *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. 495 (1995) (uncertainty of law contributed to failure of Manville reorganization).

<sup>788</sup> Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (authorizing establishment of funds for demands arising from exposure to asbestos).

<sup>789</sup> 11 U.S.C. §524(g)(2)(B)(I)(I) (1994) (requiring that the trust is to assume liabilities of debtor named as defendant for asbestos related damages). *See* Linda J. Rusch, *Unintended Consequences of Unthinking Tinkering: The 1994 Amendments and the Chapter 11 Process*, 69 AM. BANKR. L.J. 349, 389 (1995) (discussing limited scope of these amendments and potential repercussions).

<sup>790</sup> "The Committee expresses no opinion as to how much authority a bankruptcy court may generally have under its traditional equitable powers to issue an enforceable injunction of this kind. The Committee has decided to provide explicit authority in the asbestos area because of the singular cumulative magnitude of the claims involved. How the new statutory mechanism works in the asbestos area may help the Committee judge whether the concept should be extended into other areas." 140 Cong. Rec. H10752, 10766 (daily ed. Oct. 4, 1994).

<sup>791</sup> *See, e.g.*, Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 111(b), 108 Stat. 4106, 4117 (uncodified) (asbestos amendments do not affect court's power to deal with other mass claims); *In re Eagle-Picher Indus., Inc.*, 203 B.R. 256, 267 (S.D. Ohio 1996) (permitting inclusion of lead personal injury claims in trust in addition to asbestos claims, and establishing trust for property damage claims as well).

in plans that deal with mass future claims.<sup>792</sup> However, all parties to such cases continue to suffer the consequences of uncertainty that formerly plagued asbestos cases. Moreover, these cases remain subject to disparate treatment in the courts due to the lack of statutory guidance. The Commission's Proposal is not limited to a certain type of liability or industry. Instead, the Proposal focuses on determining the conditions under which it is appropriate to treat mass future claims in the bankruptcy process and the safeguards required in such cases.

The scope of the asbestos provisions enacted in 1994 is limited in other ways too. The provisions are available only to Chapter 11 debtors,<sup>793</sup> and yet mass future claimants of a debtor liquidating in Chapter 7 also should be entitled to equal priority with present claimants. The amendments authorize the establishment only of trusts constructed and funded exactly like the Johns-Manville trust, and therefore do not foster innovation and flexibility that might accommodate other circumstances or yield more successful results.<sup>794</sup> Moreover, the 1994 amendments treat asbestos injuries as "future *demands*," not *claims*, a distinction that calls into question the applicability of other provisions of the Bankruptcy Code to the holders of these future demands. Although the asbestos amendments spell out different procedures for asbestos demand holders, depriving demand holders of "claim" status in the bankruptcy process strips parties with asbestos injuries of the other protections of the Bankruptcy Code, and thus, in a sense, provides them with inferior treatment in the course of the case but discharges their claims as if they were claimholders. At the same time, several attributes of the asbestos amendments afford present claimants with more leverage, potentially undercutting the notion of equality of distribution to similar claimants.<sup>795</sup> The Commission's Recommendations address all three of these issues.

By enacting the 1994 asbestos amendments, Congress made clear that those amendments were a much-needed and important first step in giving legislative approval to the treatment of mass future claims in bankruptcy, but also acknowledged the potential need for a mechanism to deal fairly with *nonasbestos* mass future

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<sup>792</sup> See, e.g., *In re Dow Corning Corp.*, 1997 WL 435029, 95-20512 (Bankr. E.D. Mich. July 29, 1997) (potential massive liabilities from alleged injuries from silicone implants).

<sup>793</sup> 11 U.S.C. § 524(g)(1)(A)(1994).

<sup>794</sup> In fact, some commentators have noted that this type of trust actually might impede full compensation of claimants and successful reorganization. See Ralph R. Mabey & Peter A. Zisser, *Improving Treatment of Future Claims: The Unfinished Business Left by the Manville Amendments*, 69 AM. BANKR. L.J. 500 (1995).

<sup>795</sup> *Id.* at 502 -503.

claims.<sup>796</sup> Building on the spirit of the 1994 amendments, these Proposals are intended to be the second step in establishing procedures to assure that future claimholders receive fair and equitable treatment in the bankruptcy process by addressing some of the issues left open in 1994.

In both reorganizations and liquidations, the Proposals should further the equality of distribution among claimholders, preserve the going concern value of viable businesses, and enhance the likelihood of compensation for parties who might otherwise end up with no compensation. These objectives are applicable in all cases, but the Proposals offer a workable solution for future liabilities in the most pressing and most complex cases, where the claims that are contingent and likely to give rise to future liability are so massive that they warrant special procedures and protections of the type suggested here. Consideration of whether it will be necessary to develop a statutory framework expressly articulating the approach to deal with individual future claims has been reserved for another day. In the meantime, the Commission's Proposals would not change in any way the general handling of obligations that fall within the statutory definition of "claim," including contingent, unmatured, and unliquidated claims, which currently are treated under the Bankruptcy Code.

### ***2.1.1 The Definition of Mass Future Claim***

**A definition of "mass future claim" should be added as a subset of the definition of "claim" in 11 U.S.C. § 101(5). "Mass future claim" should be defined as a claim arising out of a right to payment, or equitable relief that gives rise to a right to payment that has or has not accrued under nonbankruptcy law that is created by one or more acts or omissions of the debtor if:**

- 1) the act(s) or omission(s) occurred before or at the time of the order for relief;**
- 2) the act(s) or omission(s) may be sufficient to establish liability when injuries ultimately are manifested;**
- 3) at the time of the petition, the debtor has been subject to numerous demands for payment for injuries or damages arising from such acts or omissions and is likely to be subject to substantial future demands for payment on similar grounds;**
- 4) the holders of such rights to payments are known or, if unknown, can be identified or described with reasonable certainty; and**
- 5) the amount of such liability is reasonably capable of estimation.**

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<sup>796</sup> See 140 Cong. Rec. H10752, 10766 (Oct. 4, 1994).



**The definition of “claim” in section 101(5) should be amended to add a definition of “holder of a mass future claim,” which would be an entity that holds a mass future claim.**

In one sense, the characteristics of mass future claims outside bankruptcy are relatively self-evident: “mass” claims are associated with a single product, are large in number, and are dispersed geographically and over time.<sup>797</sup> However, defining mass future claim in the statute not only would establish that mass future claims can be treated in the bankruptcy system, but would provide guidance in identifying them. Clearly delineated statutory requirements will enhance uniform treatment in this complex area of the law.

*Parts (1) and (2).* The key to dealing with claims in a bankruptcy case is to determine whether the liability meets the definition of a claim and whether the claim “arose” before the commencement of the bankruptcy case in Chapter 7 cases or before confirmation of a plan of reorganization in Chapter 11 cases. Unlike the Bankruptcy Act of 1898 that required that these claims be “provable,” the Bankruptcy Code of 1978 adopted an expansive definition of “claim.”<sup>798</sup> Notwithstanding this broad definition, courts have had varying degrees of reluctance in bringing claims into the process if all of the elements establishing liability are not yet known. Because courts have reached different interpretations of when a claim has arisen and thus can be dealt with in the bankruptcy case, debtors and plan proponents have been afforded vastly different degrees of latitude in bringing mass future claims into the bankruptcy process.<sup>799</sup>

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<sup>797</sup> Deborah R. Hensler and Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 965 (1993).

<sup>798</sup> H.R. REP. NO. 595, 95-595 309 (1978).

<sup>799</sup> Tests employed to determine whether a potential liability is a claim include the “conduct test,” *see, e.g., In re A.H. Robins Co.*, 839 F.2d 198 (4th Cir. 1988) (claims arise based on time when acts giving rise to alleged liability were performed), *cert. denied*, 487 U.S. 1260 (1988); “preconfirmation relationship test,” *see In re Piper Aircraft Corp.*, 58 F.3d 1573 (11th Cir. 1995) (recognition of claim requires prepetition breach and preconfirmation contact, privity, or other relationship between debtor and creditor); the “prepetition relationship test,” *see, e.g., United States v. LTV Corp. (In re Chateaugay Corp.)*, 944 F.2d 997 (2d Cir. 1991) (recognition of claim requires prepetition act or omission and prepetition contact privity or other relationship), the “fair contemplation test,” *see, e.g., In re Jensen*, 995 F.2d 925 (9th Cir. 1993) (prepetition relationship is not enough; claim must have been within fair contemplation of parties prior to bankruptcy petition); and the “accrued state law claim test,” *see In re M. Frenville Co.*, 744 F.2d 332 (3d Cir. 1984) (claim not cognizable in bankruptcy if not yet cognizable under state law), *cert. denied*, 469 U.S. 1160 (1985).

Some courts will not permit a liability to be a bankruptcy claim if a cause of action has not accrued under nonbankruptcy law.<sup>800</sup> Under this approach, similar parties subject to the same prepetition conduct by the debtor are treated entirely differently depending on when their injuries happen to appear. Numerous courts and commentators have been highly critical of this interpretation, particularly because it appears to directly contradict the statutory definition of “claim” that explicitly includes “contingent,” “unmatured,” and “unliquidated” claims.<sup>801</sup> Notwithstanding widespread condemnation of this approach, the theory remains good law in some courts.<sup>802</sup>

Other courts have deemed mass future claimants to be “parties in interest” under section 1109, but have not given “claim” status to requests for compensation on their behalf.<sup>803</sup> While this approach arguably is preferable to denying recognition altogether, parties in interest do not obtain all of the entitlements of being considered “claims.”<sup>804</sup> As stated previously, the 1994 amendments to section 524 for asbestos

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<sup>800</sup> See, e.g., *In re M. Frenville Co.*, 744 F.2d 332 (3d Cir. 1984) (automatic stay did not enjoin creditor action against the debtor, even though debtor’s act occurred prepetition, since actual cause of action did not accrue prepetition).

<sup>801</sup> According to some commentators, “[b]y far, the most frequently cited and criticized case is the Third Circuit’s *Avellino & Bienes v. M. Frenville Co. (In re M. Frenville Co.)*.” Kenneth N. Klee & Frank A. Merola, *Ignoring Congressional Intent: Eight Years of Judicial Legislation*, 62 AM. BANKR. L.J. 1, 28 (1988); see also Ralph R. Mabey & Annette W. Jarvis, *In re Frenville: A Critique by the National Bankruptcy Conference’s Committee on Claims and Distributions*, 42 BUS. L. J. 697 (1987); Grady v. A.H. Robins Co. (*In re A.H. Robins Co.*), 839 F.2d 198, 201 (4th Cir. 1988), cert. dismissed, 487 U.S. 1260 (1988); *In re Food Barn Stores, Inc.*, 175 B.R. 723, 730-731 (Bankr. W.D. Mo. 1994); *In re Black*, 70 B.R. 645, 648-50 (Bankr. D. Utah 1986). But see Gregory A. Bibler, *The Status of Unaccrued Tort Claims in Chapter 11 Bankruptcy Proceedings*, 61 AM. BANKR. L.J. 145 (1987) (Code is merely distribution mechanism, thus, if cause of action has not arisen under state law, bankruptcy court lacks authority to discharge such claims).

<sup>802</sup> *In re Penn Cent. Transp. Co.*, 71 F.3d 1113 (3d Cir. 1995) (nonbankruptcy law determines when claims accrue for bankruptcy purposes), cert. denied sub nom., 116 S. Ct. 1851 (1996), citing *In re M. Frenville Co.*, 744 F.2d 332 (3d Cir. 1984). Other courts continue to recognize the reasoning of *Frenville*. See, e.g., *In re Kewanee Boiler*, 198 B.R. 519, 528 (Bankr. N.D. Ill. 1996), remanded on other grounds, 1996 WL 556736 (N.D. Ill. Sept. 26, 1996).

<sup>803</sup> See *In re Amatex Corp.*, 755 F.2d 1034 (3d Cir. 1985), rev’g 37 B.R. 613 (E.D. Pa. 1983); *In re UNR*, 46 B.R. 671, 674 (Bankr. N.D. Ill. 1985). Even in the widely-cited *Johns-Manville* case, the treatment of future claims was not predicated on a finding that future claims were actually “claims.” *In re Johns-Manville Corp.*, 36 B.R. 743 (Bankr. S.D.N.Y. 1984), aff’d, 52 B.R. 940 (S.D.N.Y. 1985). See also *In re Piper Aircraft Corp.*, 162 B.R. 619, 628 n. 15 (Bankr. S.D. Fla. 1994) (noting that lack of recognition as bankruptcy claim did not preclude reservation of funds for future claimants), aff’d, 58 F.3d 1573 (11th Cir. 1995).

<sup>804</sup> For discussion of “uncertain and weak position afforded future tort claimants” under the

cases refer to “demands,” not “claims,” and thereby raise the same questions in the interpretation the rights of future asbestos victims in the context of other Bankruptcy Code provisions.

Some courts do not foreclose the possibility that a party who faces future manifestation of an injury has a cognizable bankruptcy claim, but they require some prepetition,<sup>805</sup> or preconfirmation,<sup>806</sup> relationship between a potential claimholder and the debtor or the debtor’s products in order to create a claim. Under this test and variations thereof, the fact that the debtor produced and distributed a product prepetition is not sufficient to create a claim; there must be a threshold showing that a person purchased, used, or was exposed to the product in question before the bankruptcy or before the case was confirmed.

Still other courts believe that the current definition of claim requires only that the debtor’s culpable action occurred prepetition and thus encompasses mass future claims under those circumstances. Courts taking this view known as the “conduct test” have permitted debtors to discharge identified groups of mass future claims if the

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current bankruptcy laws, *see* Flanagan v. Ahearn (*In re Asbestos Litig.*), 90 F.3d 963, 985 (5th Cir.) (arguing that non-opt-out global settlement asbestos claimant class would be worse off if Fibreboard handled these matters in bankruptcy because “courts that have allowed representation of future tort claimants have left them in an uncertain position that falls short of full ‘creditor’ status”). *reh’g en banc denied*, 101 F.3d 368 (5th Cir. 1996), *cert. granted, judgment vacated, and case remanded on other grounds*, 117 S. Ct. 2503 (1997).

<sup>805</sup> *In re Correct Mfg. Corp.*, 167 B.R. 458 (Bankr. S.D. Ohio 1994); *Pettibone Corp. v. Ramirez*, 90 B.R. 918 (Bankr. N.D. Ill. 1988). The prepetition relationship test requires some prepetition relationship, such as contact, exposure, impact, or privity, between the debtor’s prepetition conduct and the claimant for the claimant to hold a section 101(5) claim. *See also* *United States v. LTV Corp. (In re Chateaugay)*, 994 F.2d 997, 1005 (2d Cir. 1991) (prepetition relationship between debtor and EPA/creditor provided “sufficient ‘contemplation’ of contingencies to bring most ultimately maturing payment obligations based on pre-petition conduct within the definition of ‘claims.’”); *In re Jensen*, 995 F.2d 925 (9th Cir. 1993) (prepetition conduct and prepetition relationship might give rise to bankruptcy claim if claim is in *fair* contemplation of parties).

<sup>806</sup> *See In re Piper Aircraft Corp.*, 58 F.3d 1573 (11th Cir. 1995). Under the broader “Piper test” that was adopted by the Eleventh Circuit, a person has a section 101(5) claim against a debtor manufacturer if “ (i) events occurring before confirmation create a relationship, such as contact, exposure, impact, or privity, between the claimant and the debtor’s product; and (ii) the basis for liability is the debtor’s prepetition conduct in designing, manufacturing and selling the allegedly defective or dangerous product. The debtor’s prepetition conduct gives rise to a claim to be administered in a case only if there is a relationship established before confirmation between an identifiable claimant or group of claimants and that prepetition conduct.” *Id.*, 58 F.3d at 1577, *citing* *Piper Aircraft Corp. v. Calabro*, 169 B.R. 766 (Bankr. S.D. Fla. 1994).

debtors made adequate provisions for their treatment through a trust or similar mechanism.<sup>807</sup>

Taking the latter approach one step further, at least one court has permitted certain unanticipated claims to be discharged without identification, representation, or treatment in the plan.<sup>808</sup> This approach raises significant fairness concerns that the Commission's Proposal specifically addresses with respect to mass future claims.<sup>809</sup>

The definition of mass future claims that is proposed by the Commission was crafted in light of the benefits and shortcomings of each of these approaches taken by the courts over the past twenty years. First, the definition makes clear that mass future claims can be dealt with in the bankruptcy process as "claims," not as some other type of interest. This ensures that mass future claims receive the statutory entitlements of claims, such as voting and protection by the "best interest of creditors test" under section 1129(a)(7).<sup>810</sup> Aside from adding a "mass future claims" subset to section 101(5) of the Bankruptcy Code, this Proposal would not change the meaning of "claim," "contingent claim," "unliquidated claim," or "unmatured claim."

The proposed definition clarifies that the time at which a mass future claim "arises" is determined by the timing of the debtor's conduct, not by the claimant's discovery of the injury or an interim relationship between the parties. The Commission therefore adopts as a threshold matter the "conduct test" that currently is used by some courts, but with significant additional limitations built into other components of the definition.

In addition, the definition requires that the acts or omissions "may be sufficient to establish liability." This language was chosen to recognize that use of the bankruptcy process to manage mass future claims is not, in itself, a concession of liability on those claims.

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<sup>807</sup> See, e.g., *Grady v. A.H. Robins Co. (In re A.H. Robins Co.)*, 839 F.2d 198, 201 (4<sup>th</sup> Cir. 1988). See also *Waterman S.S. Corp. v. Aguiar*, 141 B.R. 552, 556 (Bankr. S.D.N.Y. 1992), *vacated on other grounds*, 157 B.R. 220 (S.D.N.Y. 1993).

<sup>808</sup> See, e.g., *Texaco Inc. v. Sanders*, 182 B.R. 937 (Bankr. S.D.N.Y. 1995) (unnoticed and untreated liabilities of debtor were claims that were discharged in bankruptcy).

<sup>809</sup> See *United States v. LTV Corp. (In re Chateaugay)*, 944 F.2d 991, 1003 (2<sup>nd</sup> Cir. 1991) (questioning most liberal reading of "conduct test").

<sup>810</sup> See REFORMING THE BANKRUPTCY CODE: THE NATIONAL BANKRUPTCY CONFERENCE'S CODE REVIEW PROJECT, 40 (rev. ed., 1997) (advocating that with only selected exceptions, future claims should be treated like all other claims).

*Sections (3), (4), and (5).* These components of the definition perform a gatekeeping function and limit “mass future claims” to significant mass tort and contract liabilities. The Proposal is *not* designed to permit debtors to channel future liabilities away from the assets of the reorganized debtor if those future liabilities are so unforeseeable or speculative that they are not reasonably capable of approximation. This definition would provide a more uniform and constrained conception of the appropriate circumstances in which to treat the claims of mass future claimants in both reorganization and liquidations while it filters out attempts to treat mass future claims that are wholly speculative and do not affect the company’s ability to attract capital or deal with the public. The following example illustrates the distinction:

Company X, a pipe manufacturer, is litigating numerous cases regarding polybutylene pipes that cracked from contact with water containing certain chemicals and caused damage to the walls in peoples’ homes. This type of pipe system was installed in millions of homes. Although Company X already had stopped producing this type of pipe, it could anticipate significant future liability on account of the pipe previously manufactured and installed. Because the time of the cracking depends on when a local water supplier adds certain chemicals to the water, the pipes might not start to leak until after many years of use, while some pipes may last for the ordinary lifespan of pipes without leaking at all. Unlike a pipe company that has been sued sporadically for occasional and different problems with pipes of varying composition and continues to produce those pipes (which would not fit the standards of the mass future claims definition), Company X might be an appropriate candidate to use the mass future claims mechanism. Its potential liability for a clearly delineated type of damage claim, with liability that might extend far into the future, may decrease public confidence in Company X and affect its access to the capital markets.<sup>811</sup>

The targets of the Proposal are enterprise-threatening massive liabilities, but the definitional threshold purposely does not require a predicate showing that potential mass future claims liability will make the debtor insolvent. Such a requirement would exclude companies that are ideal candidates for the use of these provisions: an asbestos manufacturer with looming future liabilities may not be nearing insolvency on a cash basis, but that manufacturer may suffer any number of consequences (*e.g.*, inability to raise money for capital investment, public rejection of its products) that so hinder its ability to function productively that it ultimately will

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<sup>811</sup> Polybutylene pipe has been the subject of litigation in the U.S. Brass Corp. bankruptcy and products liability cases. However, the facts of this example are not intended to recount all the details of those cases.

not be able to operate without resolving its mass tort and contract problems.<sup>812</sup> In addition, because insolvency is a malleable concept, a company could plan around such a requirement without much difficulty by changing its capital structure or overleveraging itself through the debt market so that the balance sheet would indicate that potential future claims will put the enterprise over the brink of insolvency. For these reasons, an insolvency predicate is neither a desirable nor an effective method of targeting the appropriate group of cases.

Instead, the Commission recommends additional threshold restrictions that will filter out inappropriate cases. Requiring that the debtor has been subject to substantial previous demands, and is likely to be subject to substantial future demands, captures those cases that are most easily recognized as mass claim cases outside of bankruptcy. Requiring that the liability be reasonably capable of estimation targets those debtors dealing with real, not incidental, threats of massive liability when debtors already have dealt with a sufficient number of claims to be able to estimate or predict their value.<sup>813</sup>

The proposed definition of mass future claims encompasses both tort claims and contract claims, both property damage and personal injury, because the same economic pressures are involved in any of these instances. The underlying cause of action, whether in tort or in contract, does not change the need for a mechanism to deal with mass future claims in a single forum to compensate mass future claimants. Just as the proposed provisions could apply to personal injury claims from asbestos exposure, interuterine devices, silicone implants, and pharmaceuticals, it could apply to mass future claims resulting from defective products that cause extensive and expensive property damage but do not necessarily cause personal injury. Examples

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<sup>812</sup> “Another basic bankruptcy goal, that of debtor rehabilitation, justifies an early resolution of future tort claims. To preserve the firm’s equity and pay early-maturing claims while huge but future claims hang over the firm could bring about the firm’s operational collapse . . . the enterprise is likely to be affected severely and adversely. Access to capital markets will be reduced. The enterprise will shrink; contract claims will mature and be paid. Worthwhile projects will be foregone. Stockholders will be motivated to march the firm down risky paths. Customers and suppliers will flee. Mergers will be barred; management, no longer fearful of ouster by merger, might slacken its performance. To the extent it performs, it must donate its time and energy to the resolution of the firm’s financial troubles, not to operations. An early resolution of a large, contingent tort liability may be necessary, not just to serve distributional norms of creditor equality and priority, but also, as an important bankruptcy value, to prevent the debtor firm’s operational collapse.” Mark J. Roe, *Bankruptcy and Mass Tort*, 84 COLUM. L. REV. 846, 855 (1984).

<sup>813</sup> For example, A.H. Robins had litigated Dalkon Shield cases for 15 years before filing for bankruptcy in 1985. JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES* 326 n.149 (1995).

of products that give rise to alleged contract claims and property damage include polybutylene pipe, crop-destroying fertilizers, and defective heat pump thermostats.

The term “mass future claim” does not encompass police and regulatory causes of action that might be brought against a debtor in the future based on prebankruptcy actions. The incorporation of additional private claimants into the bankruptcy process does not affect the ability of the government to exercise its functions. There is no question that the debtor has an ongoing obligation to comply with applicable laws and the government has the ability to act in its police and regulatory capacity. Nothing in this Proposal changes the current obligations. As the United States Department of Justice has observed,<sup>814</sup> police and regulatory causes of action are of a different nature from mass future claims and do not fit within the definition and scope of this Proposal. The recommended amendments would not alter a debtor’s obligation to operate its business and maintain its on-site conditions in compliance with all applicable laws, regardless of whether a hazard or condition existed prebankruptcy.<sup>815</sup> To the extent that government entities currently can regulate postbankruptcy behavior of debtors whose prefiling acts or omissions injured known claimants, government entities would remain equally able to regulate debtors whose behavior injured unknown claimants. In other words, the fact that a future claims representative pursues claims on behalf of unknown claimants would have no effect on the government’s ability to act pursuant to its police and regulatory capacities postbankruptcy.

### ***2.1.2 Protecting the Interests of Holders of Mass Future Claims***

**The Bankruptcy Code should provide that a party in interest may petition the court for the appointment of a mass future claims representative. When a plan includes a class or classes of mass future claims, the Bankruptcy Code should authorize a court to order the appointment of a representative for each class of holders of mass future claims. A mass future claims representative shall serve until further order of the bankruptcy court.**

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<sup>814</sup> Letter to Chairman Brady C. Williamson from Francis M. Allegra, Deputy Associate Attorney General, U.S. Department of Justice, May 12, 1997; Letter to Chairman Brady C. Williamson from Lois J. Schiffer, Assistant Attorney General, U.S. Department of Justice, Environment and Natural Resources Division, May 12, 1997.

<sup>815</sup> “Having been a debtor in bankruptcy does not authorize a firm to operate a nuisance today, *Ohio v. Kovacs*, 469 U.S. 274, 285 (1985), or otherwise excuse it from complying with laws of general application.” *In re CMC Heartland Partners*, 966 F.2d 1143, 1146 (7th Cir. 1992), *citing In re Chateaugay Corp.*, 944 F.2d 997, 1006-09 (2d Cir.1991); *In re Penn Cent. Transp. Co.*, 944 F.2d 164, 167-68 (3d Cir. 1991), *cert. denied* 112 S. Ct. 1262 (1992); *In re Chicago, Rock Island & P. R.R.*, 794 F.2d 1182 (7th Cir. 1986).

**The Bankruptcy Code should provide that a mass future claims representative shall have the exclusive power to file a claim or claims on behalf of the class of mass future claims (and to determine whether or not to file a claim), to cast votes on behalf of the holders of mass future claims and to exercise all of the powers of a committee appointed pursuant to section 1102. However, a holder of a mass future claim may elect to represent his, her, or its own interests and may opt out of being represented by the mass future claims representative.**

**The Bankruptcy Code should provide that prior to confirmation of a plan of reorganization, the fees and expenses of a mass future claims representative and his or her agents shall be administrative expenses under section 503. Following the confirmation of a plan of reorganization, and for so long as holders of mass future claims may exist, any continuing fees and expenses of a mass future claims representative and his or her agents shall be an expense of the fund established for the compensation of mass future claims.**

**The Bankruptcy Code should provide that a mass future claims representative shall serve until further orders of the bankruptcy court declare otherwise, shall serve as a fiduciary for the holders of future claims in such representative's class, and shall be subject to suit only in the district where the representative was appointed.**

The Commission's Recommendation seeks to remedy the inherent injustice of permitting all resources to be distributed to present parties when some of those resources should be reserved and shared with future parties.<sup>816</sup> Treating only present claimants in bankruptcy is unfair to the future claimants who may be left with equally serious injuries but without any recovery.<sup>817</sup>

Explicitly recognizing mass future claims in the bankruptcy process has its own serious risks that must be carefully addressed. Under the Supreme Court's

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<sup>816</sup> Thomas A. Smith, *A Capital Markets Approach to Mass Tort Bankruptcy*, 104 *YALE L. J.* 367, 370 (1994) (noting that insufficient recognition of future claimholders in bankruptcy is illustrative of larger social problem of expending resources that "rightfully belong to future persons").

<sup>817</sup> Michael J. Saks and Peter David Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 *STAN. L. REV.* 815, 826 (1992). See also James S. Kakalik, et al, *VARIATION IN ASBESTOS LITIGATION COMPENSATION AND EXPENSES*, at v, 84 (Rand Institute For Civil Justice 1984) (stating that by 1982, \$1 billion in legal expenses and compensation already had been expended, but study showed that legal fees tended to comprise over 1/3 of total compensation paid out by defendant companies).



decision in *Mullane v. Central Hanover Bank & Trust Co.*, procedural due process requires notice and the opportunity to be heard to the extent practicable, yet the Supreme Court specifically recognized that it may be impracticable to provide actual notice to parties with future or conjectural interests.<sup>818</sup> This has several implications in the context of mass claims and mass future claims.

*Notice.* It is incumbent on the plan proponent to make every reasonable effort to provide notice to individual claimants. Companies facing massive liabilities that involve geographically diffuse claimants have taken widespread measures to ensure notice to the fullest extent practicable, such as press releases, public relation initiatives, advertisements in the print media and on television, direct mail, mailings to particular interest groups that might be able to further disseminate information or help to locate actual or potential claimants, and use of modern technology, such as the Internet.<sup>819</sup> As a matter of public policy, the Commission recommends that a plan proponent or trustee be permitted to treat mass future claimants in bankruptcy only if the plan proponent or trustee provided sufficient notice, the adequacy of which could be determined by the court.

*Constructive Notice and Representation - The Mass Future Claims Representative.* When a debtor or trustee plans to treat and discharge claims held by people who are unaware of their injuries, widespread notice efforts by themselves may not be sufficient. The use of mass future claims representatives has become readily

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<sup>818</sup> *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). Some commentators have argued that the Fifth Amendment of the Constitution may not extend due process protection to an inchoate claim. See, e.g., Ralph R. Mabey & Jamie Andra Gavrin, *Constitutional Limitations on the Discharge of Future Claims in Bankruptcy*, 44 S.C. L. REV. 745 (1993), citing *Silver v. Silver*, 280 U.S. 117, 122 (1929). But see *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982) (cause of action is property interest). Whether or not procedural process is actually and Constitutionally required, the Commission's Recommendations reflect the intention to provide notice and an opportunity to be heard to the greatest extent and to promote fairness to mass future claimants.

<sup>819</sup> These are some of the methods employed in the *Dow Corning* bankruptcy case, in which the debtor initially spent \$8 million on these activities to disseminate notice of the case to persons with implants produced by the debtor. See *In re Dow Corning Corp.*, 211 B.R. 545, 553 (Bankr. E.D. Mich. 1997). "To achieve that end [of providing notice], the court may well craft a combination of devices, including publication notice and the appointment of a class representative." *In re Fairchild Aircraft Corp.*, 184 B.R. 910 (Bankr. W.D. Tex. 1995) citing *In re Agent Orange Product Liab. Litig.*, 996 F.2d 1425 (2d Cir.1993). "What process is due in a given instance requires the balancing of a variety of interests. In some cases, 'the marginal gains from affording an additional procedural safeguard ... may be outweighed by the societal cost of providing such a safeguard.'" *In re Agent Orange*, 996 F.2d at 1435, citing *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 320-1 (1985). See also *In re GAC Corp.*, 681 F.2d 1295, 1298 (11th Cir. 1982) (notice published in fifty-three major newspapers satisfied notice requirement for class action filed on behalf of purchasers of debentures in debtor company).

accepted in the reorganization context under present law,<sup>820</sup> yet nothing in the Code expressly requires representation for mass future claimants or gives any guidance on the parameters of appointing such representatives. Although some commentators have questioned the cost-efficiency of requiring the use of a representative in every case,<sup>821</sup> the Commission considered this representation an absolute necessity and a fundamental prerequisite to the discharge of mass future claims. A legal representative is essential to represent the interests of classes of holders who were not identified individually during the bankruptcy proceedings.<sup>822</sup> The Commission recommends that discharge of mass future claims be permitted only if the mass future claimants were represented in the plan negotiation process or Chapter 7 distribution process to help ensure that the plan provides reasonably sufficient resources to fund the payment of mass future claims. Each class of mass future claimholders would be entitled to its own representative, as the interests of the classes of mass future claims may be adverse to one another. In addition, the representative neither could hold nor represent an interest adverse to the class other than the necessary fact of the representative's payment out of the estate or trust fund.

The Commission recommends that the Code require the appointment of mass future claims representatives for mass future claimants, regardless of whether the debtor is reorganizing or liquidating. While the courts disagree over whether representatives are necessary or required in liquidation cases,<sup>823</sup> the Commission's Proposal is premised on the notion that mass future claimants of a liquidating company are entitled to adequate representation and equal treatment just as if the company reorganized.<sup>824</sup> Other reasons also support this effort to strive for symmetry

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<sup>820</sup> See *In re Eagle-Picher Indus., Inc.*, 203 B.R. 256, 261 (S.D. Ohio 1996).

<sup>821</sup> See, e.g., Jeffrey Davis, *Cramming Down Future Claims In Bankruptcy: Fairness, Bankruptcy Policy, Due Process, and the Lessons of the Piper Reorganization*, 70 AM. BANKR. L. J. 329 (1996).

<sup>822</sup> See Kathryn R. Heidt, *Future Claims in Bankruptcy: The NBC Amendments Do Not Go Far Enough*, 69 AM. BANKR. L.J. 515 (1995) ("due process problems resulting from insufficient notice or knowledge can be addressed by appointing a representative for the future claimants and establishing a fund to pay the claimants as their claims become fixed").

<sup>823</sup> Compare *Locks v. United States Trustee*, 157 B.R. 89 (W.D. Pa. 1993) (goals of liquidation did not necessitate appointment of representative) with *In re Forty-Eight Insulations, Inc.*, 58 B.R. 476 (Bankr. N.D. Ill. 1986) (appointing future claims representative to prevent inequitable distribution to similarly situated creditors).

<sup>824</sup> For example, *Forty-Eight Insulations* filed for bankruptcy in 1985 with 26,000 asbestos-related property damage and personal injury claims pending and with the anticipation of many more to follow. The bankruptcy case entailed a ten-year asset liquidation process. Pursuant to its Chapter 11 plan of liquidation, the debtor established a trust with two accounts—one for present claimants and

in the protection of mass future claimants; for example, if mass future claim holders only were entitled to representation and protection in Chapter 11 cases but not in Chapter 7 liquidation cases, creditors and shareholders who believed they would receive larger distributions from the debtors without the inclusion of mass future claimants would have an incentive to push for Chapter 7 liquidation of a viable company, even if everyone ultimately would benefit from a successful reorganization and an enhancement in the company's going concern value.<sup>825</sup> The Commission's Proposals would lessen that incentive.

*Fiduciary Standard of Care.* The mass future claims representative would be a fiduciary for the class of holders of mass future claims that he or she represents. Making the representative a fiduciary is consistent with the standard of care charged to representatives in asbestos bankruptcy cases involving future liabilities in which the representative was considered a guardian ad litem.<sup>826</sup> This heightened standard of care reflects the significant responsibility that accompanies the representation of holders of inchoate claims. At the same time, the Commission recognizes that the Bankruptcy Code cannot make a mass future claims representative the guarantor for eventual payment to the members of the class. The actions of the representative should be judged on information known or reasonably knowable at the time the representative serves and exercises his or her judgment, not based on perfect judgment or hindsight. The Proposal would not interfere with otherwise applicable statutes of limitations, nor would it preclude parties in bankruptcy cases from making arrangements that may limit or condition liability after a certain date. Such arrangements would have the salutary effect of channeling and limiting the eternal threat of litigation that might deter qualified individuals from serving in this capacity, chill negotiations between the representative, the debtor, and other creditors, and preclude the development of methods of victim compensation out of fear that any course chosen could result in significant personal liability. Moreover, because expenses such as insurance for the mass future claims representative would be borne

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one for future claimants—along with a detailed procedure for claims allowance. *See In re Forty-Eight Insulations, Inc.*, 115 F.3d 1294 (7th Cir. 1997).

<sup>825</sup> This tension between present and future claimants is what also may preclude the use of one representative for both groups. *See Georgine v. Amchem Prods.*, 83 F.3d 610, 630-31 (3d Cir. 1996) (inherent conflict between extant claimants who desire immediate, unlimited recovery and latent claimants who desire that recovery be capped or delayed to ensure that extant claimants will not deplete fund), *aff'd sub. nom.*, 117 S. Ct. 2231 (1997).

<sup>826</sup> *See, e.g., In re Amatex Corp.*, 755 F.2d 1034 (3d Cir. 1985), *rev'g*, 37 B.R. 613 (E.D. Pa. 1983); *In re UNR Indus., Inc.*, 29 B.R. 741, 748 (N.D. Ill. 1983), *app. dismissed*, 725 F.2d 1111 (7th Cir. 1984), *motion to reconsider granted*, 46 B.R. 671, 674 (Bankr. N.D. Ill. 1985) (appointing representative under section 105 to represent future claimants who were "parties in interest"); *In re Johns-Manville Corp.*, 36 B.R. 743 (Bankr. S.D.N.Y. 1984), *aff'd*, 52 B.R. 940 (S.D.N.Y. 1985).

by the trust, mass future claimants themselves would bear the increased costs of liability. Conditions for liability of a mass future claims representative need to be carefully weighed by the parties in a case for both costs and benefits, and standards need to be developed on an *ex ante* rather than *post hoc* basis.

*Consideration of Alternative Approaches to Dealing with Mass Liabilities: Class Action Settlements.* The Commission's Proposal is premised in part on the availability of the bankruptcy system for collective resolution of massive problems and the evident shortcomings of individualized tort or contract litigation in a mass context.<sup>827</sup> Bankruptcy also yields a jurisdictional advantage; filing for bankruptcy automatically enjoins actions pending in state or federal court. In addition, the bankruptcy court can obtain personal jurisdiction over all parties with an interest in the debtor and can consolidate both state and federal law suits in one forum.<sup>828</sup> However, bankruptcy is not the only alternative to individualized litigation. Class action law suits under Rule 23 of the Federal Rules of Civil Procedure have been used to manage massive liabilities, including future claims, in cases involving asbestos and other products.<sup>829</sup> Rule 23 imposes seemingly rigid conditions on the certification of a class.<sup>830</sup> Yet, "since the 1966 revision of Rule 23, class action practice has become

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<sup>827</sup> See, e.g., JAMES S. KAKALIK ET AL., VARIATION IN ASBESTOS LITIGATION COMPENSATION AND EXPENSES 91 (1984) (RAND study concluding that for every dollar paid to compensate an asbestos plaintiff, \$1.59 was spent on litigation and transaction costs); JACK B. WEINSTEIN, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES 2, 119 (1995) (traditional one-plaintiff-one-defendant model is not effective for mass toxic tort litigation); *In re Agent Orange Product Liability Litigation*, 611 F. Supp. 1396, 1402 (E.D.N.Y. 1985) ("in the case of Agent Orange implementation of any distribution plan based on traditional tort principles is impossible because of a virtual absence of proof of causation, financially impracticable because of administrative costs, and not feasible for other compelling reasons"), *aff'd in part and rev'd in part*, 818 F.2d 179 (2d Cir. 1987), *cert. denied sub nom.*, 487 U.S. 1234 (1988); 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, n.1 (1995) (noting "uniquely expensive" American products liability system). See also Robert L. Rubin, *Tort System on Trial: The Burden of Mass Toxics Litigation*, 98 YALE L. J. 813, 829 (1989).

<sup>828</sup> 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, 490 (1995) (explaining jurisdictional advantage of bankruptcy over class action mechanism).

<sup>829</sup> Another option that is not explored in this chapter is consolidation of claims. Rule 42 of the Federal Rules of Civil Procedure provides for consolidation of related case in a single jurisdiction. In addition, the Multidistrict Act permits consolidation across federal jurisdictional lines for pretrial purposes. See 28 U.S.C. § 1407 (1994); see generally JACK B. WEINSTEIN, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES 137 (Northwestern Press 1995).

<sup>830</sup> Rule 23 provides as follows:

ever more ‘adventuresome’ as a means of coping with claims too numerous to secure their ‘just, speedy, and inexpensive determination’ one by one.”<sup>831</sup> Part of this “adventure” arises through the use of class action certification solely for the purpose of settlement of mass claims;<sup>832</sup> this approach brings certainty and finality, but also can yield particularly acute consequences if future claimants are inadequately represented in a class that contains parties with competing interests. Class members lack the opportunity to protect themselves against this risk. If the case is certified as a Rule 23(b)(1) “limited fund” class action, claimants lack the power to opt out of the class. Even if claimants have the power to opt out, as they do in Rule 23(b)(3) class actions, they lack the information necessary to exercise the right in a manner that would

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(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 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 a class action. FED. R. CIV. P. 23 (1994).

<sup>831</sup> *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231, 2247 (1997), *citing* FED.R. CIV. P. 1 (1994).

<sup>832</sup> Indeed, some defendants request decertification in the event that the settlement fails. *See, e.g., Keene v. Fiorelli (In re Joint E. and S. Dist. Asbestos Litig.)*, 14 F.3d 726, 731 (2d Cir. 1993).

protect their interests.<sup>833</sup> Although some of the more far-reaching uses of class actions for mass future claims cases may subside in light of the Supreme Court's recent settlement class action decision that is discussed in the coming paragraphs,<sup>834</sup> class action settlements still may be less protective of mass future claimants' rights than bankruptcy.<sup>835</sup> Indeed, some courts and commentators have noted that some class action settlements are "end runs" to attain the benefits of bankruptcy without the extensive requirements of the Bankruptcy Code, as the Court of Appeals for the Second Circuit observed when a district court agreed to supervise the negotiation of such a settlement:

[I]t is clear that the complaint is an attempt to compel an adjustment of Keene's creditors' rights outside the Bankruptcy Code and is defended almost entirely by the argument that a mandatory class settlement of present or future asbestos claims would be better for all parties than a bankruptcy proceeding. Indeed, the process contemplated by Keene mirrors a bankruptcy proceeding. The finding of a limited fund corresponds to a finding of insolvency. The preliminary injunction serves much the same function as the automatic stay under section 362(a) of the Bankruptcy Code. [citation omitted] The class representatives correspond to creditors' committees in Chapter 11 proceedings. [citation omitted] The proposed mandatory class settlement mirrors a reorganization plan and "cram-down," [citation omitted] followed by a discharge [citation omitted]. Keene's argument is self-defeating, however, because it is a self-evident evasion of the exclusive legal system established by Congress for debtors to seek relief. [citation omitted] The adoption of Keene's

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<sup>833</sup> "Many persons in the exposure-only category . . . may not even know of their exposure, or realize the extent of the harm they may incur. Even if they fully appreciate the significance of class notice, those without current afflictions may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out." *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231, 2252 (1997).

<sup>834</sup> *Id.* at 2247.

<sup>835</sup> See, e.g., John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1350 (1995) (asserting that defendants have learned how to limit their tort liability in mass tort class actions and solicit plaintiffs' attorneys to bring such class actions, all of which uniquely disadvantages future claimants). See also JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES* 57 (Northwestern Press 1995) (stating that appellate courts have preferred bankruptcy to class actions for settling large mass tort cases against defendants with insufficient assets to satisfy all claimants, but expressing concern about bankruptcy fees).

position would surely lead to further evasion of the Bankruptcy Code as other debtors sought relief in mandatory class actions.<sup>836</sup>

Among other conditions, Rule 23 requires that there be questions of law or fact “common” to all class members that predominate over questions affecting only individual members, and that the class representatives must be “typical” of the class. Another quite crucial consideration of Rule 23 is whether the representatives adequately and fairly protect and represent the interest of a class. However, superimposed onto these requirements is the possibility of certifying a class solely for the purposes of settlement. A controversial amendment to Rule 23 proposed by the Advisory Committee on Civil Rules would permit certification for settlement purposes without a showing that common questions of law and fact predominate over noncommon questions in individual cases.<sup>837</sup> Parties previously have argued with a fair level of success that settlement class certification should be subject to less stringent scrutiny under the Rule 23 standards, but the United States Supreme Court recently held in *Amchem Products v. Windsor* that settlement classes warrant *more*, not less, scrutiny in certification:

[S]pecifications of the rule [23]—those designed to protect absentees by blocking unwarranted or overbroad class definitions—demand undiluted, even heightened, attention in the settlement context. Such attention is of vital importance, for a court asked to certify a

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<sup>836</sup> Keene v. Fiorelli (*In re Joint E. and S. Dist. Asbestos Litig.*), 14 F.3d 726, 732 (2d Cir. 1993); Frederick M. Baron, *Counterpoint: An Asbestos Settlement With a Hidden Agenda*, Wall S. J., May 6, 1993 (concluding that if asbestos producers want to limit their liability to their victims, then “all of their financial resources should be on a table in a bankruptcy” so that “everyone gets a fair share of the available assets” rather than taking the route of a limited fund non-opt-out class action). See also Flanagan v. Ahearn (*In re Asbestos Litig.*), 90 F.3d 963, 996 (5th Cir. 1996) (Smith, J., dissenting) (“Permitting Fibreboard to effect a reorganization bankruptcy proceeding in the guise of a futures-only class action circumvents the detailed protections of the Bankruptcy Code for the express purpose of imposing the entire cost of the bailout on Fibreboard’s most vulnerable creditors, to the betterment of its shareholders”), *reh’g en banc denied*, 101 F.3d 368 (5th Cir. 1996), *cert. granted, judgment vacated, and case remanded on other grounds*, 117 S. Ct. 2503 (1997). John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1355 (1995) (in comparing class actions to bankruptcy, “[i]n terms of both its fairness to creditors and its ability to rehabilitate a financially strained debtor, the latter wins on all counts -- except its ability to preserve management in control”).

<sup>837</sup> This proposed amendment was recommended by the Advisory Committee on Civil Rules in April 1996 and was approved by the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States for publication and public comment. Proposed Amendment to Fed. Rule Civ. Proc. 23(b), 117 S. Ct. CXIX, CLIV to CLV (Aug. 1996) (Request for Comment). The amendment has been met with significant opposition. *Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231, 2247 (1997) (reporting on negative commentary submitted to Committee).

settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold.<sup>838</sup>

The class action settlement can be problematic for mass future claims if courts do not assess adequate representation and commonality with a high level of scrutiny.<sup>839</sup> In the *Amchem Products* case, a district court certified a class to achieve global settlement,<sup>840</sup> but the class included both current and future asbestos-related claims of potentially millions of people who might experience a wide range of adverse effects due to past asbestos exposure. The Supreme Court upheld the ruling of the Court of Appeals for the Third Circuit, which had reversed the district court and decertified the settlement class for failure to satisfy the Rule 23 requirements of commonality of legal and factual issues and adequacy of representation. The *Amchem Products* ruling affected a recent decision of the Court of Appeals for the Fifth Circuit in a similar case: in *Flanagan v. Ahearn*, the district court certified a settlement class

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<sup>838</sup> *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231, 2248, n.16 (1997); *Flanagan v. Ahearn* (*In re Asbestos Litig.*), 90 F.3d 963, 982 (5th Cir.), *reh'g en banc denied*, 101 F.3d 368 (5th Cir. 1996), *cert. granted and judgment vacated, and case remanded*, 117 S. Ct. 2503 (1997); *White v. National Football League*, 41 F.3d 402, 408 (8th Cir. 1994) (“adequacy of class representation . . . is ultimately determined by settlement itself”), *cert. denied*, 515 U.S. 1137 (1995), *abrogated by Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231, 2247 (1997); *In re A.H. Robins Co.*, 880 F.2d 709, 740(4th Cir. 1989) (“[i]f not a ground for certification per se, certainly settlement should be a factor, and an important factor, to be considered when determining certification”), *cert. denied sub nom.*, *Anderson v. Aetna Cas. & Sur. Co.*, 493 U.S. 959 (1989), *abrogated by Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231, 2247 (1997); *Malchman v. Davis*, 761 F.2d 893, 900 (2d Cir. 1985) (certification appropriate, in part, because “the interests of the members of the broadened class in the settlement agreement were commonly held”), *cert. denied*, 475 U.S. 1143 (1986), *abrogated by Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231, 2247 (1997). *See also In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liability Litig.*, 55 F.3d 768,778 (3rd Cir. 1995) (for settlement purposes, Rule 23(a) requirements must be satisfied as if case were going to be litigated), *cert. denied*, 116 S. Ct. 88 (1995); *Keene v. Fiorelli* (*In re Joint E. and S. Dist. Asbestos Litig.*), 14 F.3d 726 (2d Cir. 1993) (vacating injunction of all pending litigation and vacating class certification for settlement for lack of case or controversy).

<sup>839</sup> *Amchem Prods.*, 117 S. Ct. 2231, 2247 (1997).

<sup>840</sup> *See* FED. R. CIV. P. 23(b)(1)(B) (permitting mandatory class action to be certified where prosecution of separate actions would create risk of adjudications for individual class members that would, as a practical matter, be dispositive of interests of the other members not parties to adjudications, or would substantially impair or impede their ability to protect their interests). A court must find that the defendant is a limited fund, potentially because payment of all claims would leave the defendant insolvent. *See In re Joint Eastern and Southern District Asbestos Litig.*, 982 F.2d 721, 739 (2d Cir.1992), *cited with approval in In re Joint E. and S. District Asbestos Litig.*, 78 F.3d 764, 777-79 (2d Cir.1996). *See also In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 292 (2d Cir. 1992), *cert. dismissed*, 506 U.S. 1088 (1993) (approving 23(b)(1)(B) class action on basis that individual litigation would reduce recovery for all plaintiffs from Drexel’s limited assets).



that included both present and future claims and also held that the use of one class counsel for both present and future claimants did not constitute a conflict of interest, and the Fifth Circuit upheld the certification and holdings, albeit with a strong dissent.<sup>841</sup> Shortly after the Supreme Court issued the *Amchem Products* decision, the Supreme Court granted certiorari in *Flanagan*, vacated the Fifth Circuit decision, and remanded it for further consideration in light of the ruling in *Amchem Products*.<sup>842</sup>

Although the Supreme Court's decision may reign in the current class action practices that cause the most concern, there remain substantial apprehensions about the ability of Rule 23 class actions to establish adequate rules to deal with mass future claims.<sup>843</sup> Indeed, the very aspects of bankruptcy that make it an anathema to

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<sup>841</sup> *Flanagan v. Ahearn (In re Asbestos Litig.)*, 90 F.3d 963, 982 (5th Cir. 1996), reh'g en banc denied, 101 F.3d 368 (5th Cir. 1996), cert. granted, judgment vacated, and case remanded, 117 S. Ct. 2503 (1997).

<sup>842</sup> 117 S. Ct. 2503 (1997).

<sup>843</sup> See, e.g., Eric Watt Wiechmann, et al., *Mass Tort Class Actions: Is the Tide Turning?*, 64 DEF. COUNSEL J. 67 (1997) (mass torts should not be handled by class action mechanism because too many questions can be raised about propriety of class, prompting more, rather than reducing, litigation); Bruce L. Hay, *Assymetric Rewards: Why Class Actions (May) Settle for Too Little*, 48 HASTINGS L.J. 479 (1997) (inequality between class counsel's effective share of settlement he negotiates and counsel's effective share of what class members would receive if he did not negotiate a class settlement encourages counsel to settle case for less than it is worth to class); Judith Resnick, et al., *Individuals Within the Aggregate: Relationships, Representation and Fees*, 71 N.Y.U. L. REV. 296 (1997) (discussing problems with attorneys' fees in class litigation); Carrie Menkel-Meadow, *Ethics and the Settlements of Mass Torts: When the Rules Meet the Road*, 80 CORNELL L. REV. 1159 (1995) (new ethical rules should be constructed to handle new methods of conflict resolution, which should consider what fair and just settlement would look like in collective procedure; strong protections or deep scrutiny of outcome is necessary); Susan P. Koniak, *Feasting While the Widow Weeps*, *Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045 (1995) (strongly criticizing process in *Georgine*, specifically noting collusion between class attorney and defendants, court's willingness to liberally construe law and facts, and subordination of class interest to nonparties); Patrick Woolley, *Rethinking the Adequacy of Adequate Representation*, 75 TEX. L. REV. 571 (1997) (arguing that reasonably identifiable members of class should not have to be bound by class representative, but should have right to prosecute their causes of action by presenting evidence and making different legal arguments); Richard A. Nagareda, *Turning from Tort to Administration*, 94 MICH. L. REV. 899 (1996) (to legitimize class action settlements, procedure essentially must be modeled after review of administrative agency rule-making activities administrative agencies, and courts should demand reasoned explanation for settlement, taking criticisms into account, before approving such settlements); Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051 (1996) (legitimization of class action settlement process requires that approval of class action settlement should not shield class action attorneys from suits arising from their conduct based on state law such as consumer protection, tort law, antitrust); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995) (because class action has become shield for defendants instead of sword for plaintiffs, at expense of future claimants, class action should apply only at liability stage and individual damage determinations

some lawyers, with rules requiring collective action, extraordinary disclosure requirements, and regular and extensive court supervision from the inception of the case, make bankruptcy more protective of future claimants because it is a forum that mandates scrutiny of all arrangements.<sup>844</sup> The fundamental structure of the bankruptcy system, with restrictions such as the “absolute priority rule,”<sup>845</sup> provides safeguards for the interests of mass future claimants that are unmatched in the class action system.<sup>846</sup> Bankruptcy is designed to give more claimant protection, and

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should be made, with future claimants given choice to opt out); William W. Schwarzer, *Settlement of Mass Tort Class Actions: Order Out of Chaos*, 80 CORNELL L. REV. 837, 840 (1995) (questioning court authority to certify mass tort claims as mandatory class actions that can provide end run around bankruptcy law, enabling defendant to take benefits of bankruptcy without burdens); Linda S. Mullenix, *Class Actions, Personal Jurisdiction, and Plaintiffs’ Due Process: Implications for Mass Tort Litigation*, 28 U.C. DAVIS L. REV. 871, 911-912 (1995) (“due process quandary” created by class actions); Roger C. Cramton, *Individualized Justice, Mass Torts, and “Settlement Class Actions:” an Introduction*, 80 CORNELL L. REV. 811 (1995) (highlights issues and problems of mass tort class action settlements and recommends judicial involvement to protect plaintiffs, to correct abuses and to restrain private attorneys); Richard L. Marcus, *They Can’t Do That, Can They? Tort Reform Via Rule 23*, 80 CORNELL L. REV. 858 (1995) (class actions should not be end run around problems with state tort actions); Michael D. Ricciuti, *Equity and Accountability in the Reform of Settlement Procedures in Mass Tort Cases: The Ethical Duty to Consult*, 1 GEO. J. LEGAL ETHICS 817 (1988) (class members’ interests do not receive adequate considerations in settlements, guidelines must be constructed to ensure proper representation and rebalance attorney-client relationship in this context); Robert G. Bone, *Statistical Adjudication: Rights, Justice and Utility in a World of Process Scarcity*, 46 VAND. L. REV. 561, 575-76 (1993) (inherently long trial delays coerce mass tort plaintiffs to accept settlements that otherwise would be unacceptable); John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877 (1987) (mass tort settlement values often have little relationship to merits of case); Francis E. McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. CHI. L. REV. 440 (1986) (alternative dispute resolution techniques for complex cases are warranted but experimentation should take place in principled, careful manner); Roger H. Transgrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779 (1985) (class action is questionable for mass tort litigation when victims have substantial individual claims that deserve full measure of due process, and joint trial of common issues is irreconcilable with fairness. However, joinder should be used for discovery, pretrial matters, and for determination of punitive damages); Michael J. Saks and Peter David Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trials of Mass Torts*, 44 STAN. L. REV. 815, 839 (1992) (extreme dissatisfaction of plaintiffs regarding mass tort settlements); Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183 (1982).

<sup>844</sup> See Bob Van Voris, *Bankruptcy In Lieu of Settlements?*, Nat’l L. J., July 28, 1997 at A1, A21.

<sup>845</sup> Under the absolute priority rule, if claimholders in an objecting class of claims or interests will not receive the full amount of their allowed unsecured claims, members of junior classes are not entitled to receive anything. See 11 U.S.C. § 1129(b)(2)(B) (1994).

<sup>846</sup> John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95

therefore to yield fairer and more equitable results, than Rule 23 mandatory settlements.

### 2.1.3 *Determination of Mass Future Claims*

**Section 502 should provide that the court may estimate mass future claims and also may determine the amount of mass future claims prior to confirmation of a plan for purposes of distribution as well as allowance and voting. In addition, 28 U.S.C. § 157(b)(2)(B) should specify that core proceedings include the estimation or determination of the amount of mass future claims.**

Although it does not prescribe a particular method, section 502(c)(1) of the Bankruptcy Code authorizes estimation of claims for purposes of allowance for contingent or unliquidated claims, “the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case.”<sup>847</sup> Using this provision, courts have estimated the aggregate value of pending unliquidated claims in the mass future claim context, which may be the most challenging context for estimation.<sup>848</sup> Estimation is meant to expedite the bankruptcy process notwithstanding pending and protracted nonbankruptcy litigation.<sup>849</sup> The Commission’s Proposal makes mass future claims a subset of claim and distinguishes them from other contingent or unliquidated claims; thus, a specific amendment is recommended to authorize the estimation and determination of mass future claims. This amendment should not have any effect on the estimation of other contingent and unliquidated claims; the extent to which this estimation should be used for assessing feasibility or determining

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COLUM. L. REV. 1343, 1383 (1995); Ralph R. Mabey & Peter A. Zisser, *Improving Treatment of Future Claims: The Unfinished Business left by the Manville Amendments*, 69 AM. BANKR. L.J. 493 (1995) (noting explicit procedures and substantive protections of claimants that are absent in class actions); William W. Schwarzer, *Settlement of Mass Tort Class Actions: Order Out of Chaos*, 80 CORNELL L. REV. 837, 840 (1995) (questioning court authority to certify mass tort claims as mandatory class actions that can provide end run around bankruptcy law, enabling defendant to take benefits of bankruptcy without burdens); Mark J. Roe, *Corporate Strategic Reaction to Mass Tort*, 72 VA. L. REV. 1 (1986) (bankruptcy is best option for putting more assets into victims’ hands).

<sup>847</sup> 11 U.S.C. § 502(c)(1) (1994). Estimation also can be used for temporary allowance for purposes of voting on a plan. FED. R. BANKR. P. 3018(a) (court may temporarily allow claim or interest in “amount which the court deems proper for the purpose of accepting or rejecting a plan”).

<sup>848</sup> For example, the claims in *A.H. Robins* were estimated on the basis of a six-day trial in which the parties’ experts testified on the estimates they had reached on the basis of extensive data collection. See *Menard-Sanford v. Mabey (In re A.H. Robins Co.)*, 880 F.2d 694, 698 (4th Cir. 1989) *cert. denied*, 493 U.S. 959 (1989).

<sup>849</sup> See *Bittner v. Borne Chem. Co.*, 691 F.2d 134, 135 (3d Cir. 1982).

distribution for other unliquidated or contingent claims is a question that remains open under current law, unaltered by this Proposal.<sup>850</sup>

The Commission recommends an amendment to make clear the court's power to make determinations of the present value of mass future claims, whether individually or in the aggregate, for purposes of allowance, voting, *and* distribution. This amendment would inject certainty into the process for debtors and creditors. Such certainty is necessary in situations where the value of the claims is a necessary component of adequate funding for a trust. The notion that courts can determine mass future claims for purposes of distribution has been strongly endorsed by many who have commented on the Commission's work in this area.<sup>851</sup> By expressly authorizing courts to determine mass future claims for purposes of distribution, this Proposal would circumvent some of the confusion over the meaning of "estimation" in the context of contingent or unliquidated claims. Of course, it must be kept in mind that absent a change to the provisions governing bankruptcy jurisdiction, liquidation of personal injury claims may have to take place in the district court.<sup>852</sup>

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<sup>850</sup> Cf. *In re Poole Funeral Chapel, Inc.*, 63 B.R. 527 (Bankr. N.D. Ala. 1986) (estimation dictates distribution), *In re Baldwin-United Corp.*, 57 B.R. 751 (S.D. Oh. 1985) (estimation establishes cap, not floor, on distribution), *and In re MCorp. Fin., Inc.*, 137 B.R. 219 (Bankr. S.D. Tex. 1992), *dismissed* 139 B.R. 820 (S.D. Tex. 1992) (distribution not limited by estimation); *In re Farley, Inc.*, 146 B.R. 748 (Bankr. N.D. Ill. 1992) (estimation can be used for voting and feasibility); *In re National Gypsum Co.*, 139 B.R. 397 (Bankr. N.D. Tex. 1992) (estimation can be used for voting and claim allowance); *In re MacDonald*, 128 B.R. 161 (Bankr. W.D. Tex. 1991) (estimation can be used for feasibility); *In re Rusty Jones, Inc.*, 143 B.R. 499 (Bankr. N.D. Ill. 1992) (estimation used for allowance, liquidation, and distribution). See also *In re Eagle-Picher Indus., Inc.*, 189 B.R. 681, 683 (Bankr. S.D. Ohio 1995) ("it is 'contingent or unliquidated' claims, the value of which we are estimating. This is to be distinguished from estimating the value which claimants might take in satisfaction of their claims through some bankruptcy mechanism such as a trust"). The proposed Recommendation is not intended to disturb current law governing estimation of contingent or unliquidated claims that are not mass future claims.

<sup>851</sup> See, e.g., Memorandum from Stephen H. Case *Comments on 11/26 Future Claims Memo* (December 3, 1996) ("what is needed, may I submit, is a clear statement, not using the weasel word "estimation," that the provisions in the plan providing for distributions to future claimants are final and binding and not subject to being reopened"); Letter from Prof. Barry E. Adler, dated February 24, 1997, at 4 (suggesting that bankruptcy court should be empowered to make binding determinations).

<sup>852</sup> 28 U.S.C. § 157(b)(5) (1994) (district court shall order that personal injury tort and wrongful death claims shall be tried in district court where bankruptcy case is pending or in district court in district in which claim arose). See REFORMING THE BANKRUPTCY CODE: NATIONAL BANKRUPTCY CONFERENCE'S CODE REVIEW PROJECT, 40 (rev. ed. 1997) (noting that change to 28 U.S.C. § 157(b) might be necessary if bankruptcy court were to make binding determinations of distributions to personal injury claimants).

The Commission's Recommendation deliberately retains flexibility for the court and the parties in a number of ways. First, it does not prescribe a method of estimation of mass future claims. Multiple methods of estimation have been employed and additional methods are always in the process of being developed.<sup>853</sup> Second, the recommended amendments would not require courts to make binding determinations in all cases, as there may be circumstances where such determination should be deferred and claims should be estimated for purposes of allowance only. Courts also could permit the use of determinations from other fora or the use of other fact finders to help estimate or determine the amount of mass future claims. Third, the Proposal would not require estimation in all cases. The reasonable estimability of mass future claims is an essential consideration, but the need for actual estimation necessarily depends on the facts and circumstances of the case. For example, if all parties, including the mass future claims representative, consent to a plan of reorganization or an arrangement in a liquidation, estimation or determination during the pendency of the bankruptcy case might invoke needless cost and expense. Some trusts are funded with one hundred percent of a company's stock,<sup>854</sup> so that actual estimation of the value of the claims may serve little purpose in a fully consensual plan; the claimholders already own everything. However, estimation might serve other purposes, such as improving the adequacy of disclosure to claim holders and other creditors.

*Accuracy of Estimation or Determination.* Accuracy is an important component of the integrity of the process whether mass future claims are temporarily estimated or finally determined. This is particularly true when the trust is funded in a way that relies heavily on estimation. The process of developing the Commission's Recommendations has been accented with extensive discussions of claim estimation procedures. The process of estimation can be complicated by challenges to the underlying liability, such as in the Dow Corning case,<sup>855</sup> and by concerns about underestimation of claims, which occurred in one of the earliest asbestos bankruptcy

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<sup>853</sup> See, e.g., David S. Salsburg & Jack F. Williams, *A Statistical Approach to Claims Estimation in Bankruptcy*, 32 WAKE FOREST L. REV. (Forthcoming 1997) (explaining the Face Value Model, the Zero Value Model, the Market Theory Model, the Forced Settlement Model, the Discounted Value Model, the Summary Trial Model, and recommending an alternative Statistical Approach to claims estimation). See also FED. R. EVID. 706; FED. R. BANKR. P. 9017 (authorizing use of independent expert witnesses appointed by court); *In re Joint E. & S. Dists. Asbestos Litig.*, 982 F.2d 721 (2d Cir. 1992) (affirming district court appointment of expert witnesses testifying on expected number of future claimants against Manville Trust), *modified on reh'g*, 993 F.2d 7 (2d Cir. 1993), *vacated*, 982 F.2d 721 (2d Cir. 1992).

<sup>854</sup> See, e.g., *In re National Gypsum Co.*, 118 F.3d 1056, 1059 (5th Cir. 1997) (explaining that settlement trust became sole shareholder of reorganized National Gypsum).

<sup>855</sup> See *In re Dow Corning Corp.*, 211 B.R. 545 (Bankr. E.D. Mich. 1997).

cases, the Johns-Manville case. However, neither of these issues is insurmountable. First, courts dealing with difficulties in estimation due to underlying liability disputes have encouraged the development of various mechanisms to ensure adequate compensation without actual estimation in a traditional sense.<sup>856</sup> In addition, the underestimation in the Johns-Manville case can be attributed to a number of distinguishing factors that have prevented its problems from being repeated in other cases. The case was one of the earliest cases of its kind and the estimation process was novel. The case also ultimately involved multiple and unanticipated types of mass future claims, which the Commission's Proposal would not accommodate if not specifically delineated in the bankruptcy proceeding. In addition, the Johns-Manville trust faced procedural problems that affected its adequacy. Parties "jumped the queue" and proceeded to litigation, while group settlements to avoid litigation multiplied, forcing the trust to litigate on several fronts at once, and not surprisingly, these problems undermined the trust's ability to devote its resources to equitable compensation of asbestos claimants.<sup>857</sup> The adequate funding of trusts in subsequent cases reflect that parties have learned some lessons from Johns-Manville. Most trusts in cases involving mass future claims consistently have made timely distributions without difficulty. Indeed, the A.H. Robins trust was funded in excess of original projections and was able to provide a second distribution to claimants.<sup>858</sup> In addition,

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<sup>856</sup> See *id.* (encouraging litigants to consider more creative mechanisms for compensation), citing Thomas A. Smith, *A Capital Markets Approach to Mass Tort Bankruptcy*, 104 YALE L. J. 367, 394 (1994) (recommending that tort victims receive shares of liquidating trust).

<sup>857</sup> See JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES* 57, 106 (Northwestern Press 1995) (noting that in Manville case, "some plaintiffs' attorneys used their control to amass huge fees for themselves, stripping the trust of its assets, despite the efforts of the courts supervising the trust to limit the fees to reasonable amounts"); 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, 496, n.37 (1995) ("the power of present claimants to jump the queue by filing or prosecuting litigation and thereby force the Trust's hand can hardly be overemphasized as a factor contributing to the early insolvency of the Manville trust"); *Findley v. Blinken (In re Joint E. & S. Dist. Asbestos Litig.)*, 129 B.R. 710, 753 (E & S.D.N.Y. 1991), *vacated*, 982 F.2d 721 (2d Cir. 1992).

<sup>858</sup> The claims in A.H. Robins were estimated on the basis of a six-day trial in which the parties' experts testified on the estimates they had reached on the basis of extensive data collection. See *Menard-Sanford v. Mabey (In re A.H. Robins Co.)*, 880 F.2d 694, 698 (4th Cir. 1989). See generally Georgine M. Vairo, *The Dalkon Shield Claimants Trust: Paradigm Lost (or Found)?*, 61 FORDHAM L. REV. 617 (1992) (recommending Dalkon Shield mechanism as model for future cases since it handled large number of claims fairly and efficiently); see also JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES* 280, n.88 (Northwestern Press 1995) (citing Dalkon Shield Claimants Trust as example of trust mechanism that has functioned very well, given its goals of treating all claimants fairly and equally and focusing on best interest of claimants collectively,

nothing in this Proposal precludes parties from agreeing that there will be future adjustments to a trust.

In addition, creative mechanisms have been proposed for structuring trusts.<sup>859</sup> For example, the parties might establish a liquidating trust to pay mass future claims. After estimating all mass future claims and discounting them to present value, the judge would approve establishing a trust with assets, perhaps common stock of the debtor, in a quantity sufficient to satisfy equitably mass future claims as a group and individually. Such satisfaction would follow the principle that less need be set aside for a claim in the distant future than for a claim in the near future. As claims accrued, the holders would receive shares of the trust, which would liquidate at a time in the future when all claims will have accrued. Of course, those with claims that accrued shortly after the trust was established would receive a larger share of the trust than would those whose claims accrued just prior to liquidation of the trust and distribution of its assets. Retaining flexibility to employ various procedures, therefore, should promote efficiency and economy.

#### 2.1.4 Channeling Injunctions

##### **Section 524 should authorize courts to issue channeling injunctions.**

A channeling injunction steers claimants toward a trust or pool of assets to compensate claimants as it simultaneously steers those claimants away from the reorganized entity. Without explicit statutory authority, but perhaps under the discretionary mandate of section 105(a) of the Bankruptcy Code, some courts have issued channeling injunctions in cases involving mass future claims.<sup>860</sup> The 1994 asbestos amendments specifically provided for channeling injunctions, but only in the

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preserving funds by keeping administrative expenses to minimum, and preferring settlement and prompt payment of claims); 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, 497 n.45 (1995) (explaining current highly solvent state of Robins Trust).

<sup>859</sup> David S. Salsburg & Jack F. Williams, *A Statistical Approach to Claims Estimation in Bankruptcy*, 32 WAKE FOREST L. REV. (Forthcoming 1997); Mark J. Roe, *Bankruptcy and Mass Tort*, 84 COLUM. L. REV. 846, 864 (1984) (advocating that the firm place in trust expected value of tort claims as combination of firm's debt and equity, with debt equaling the minimum expected value of the liability and equity equal to the difference between the minimum and maximum expected value); Morris Shanker, *Insuring Payment to Contingent and Unidentified Creditors in Bankruptcy*, 92 COM. L.J. 199 (1987).

<sup>860</sup> See, e.g., *In re Johns-Manville Corp.*, 843 F.2d 87 (2d. Cir. 1988), *cert. denied*, 488 U.S. 868 (1988); *In re A.H. Robins*, 880 F.2d 694 (4th Cir. 1989), *cert. denied*, 493 U.S. 959 (1989) (referring to doctrine of marshaling); *Unarco Bloomington Factory Workers v. UNR Indus., Inc.*, 124 B.R. 268 (N.D. Ill. 1990).

limited instance of future asbestos demands.<sup>861</sup> Channeling injunctions serve an appropriate and beneficial role in the equitable treatment of mass future claimants. The channeling injunction reinforces the effect of the discharge while it clearly directs claimants toward a specific fund. At the same time, if a mass future claims representative releases the third-party liability of an insurer in exchange for the insurer's contribution, a channeling injunction can be used to bring insurance proceeds into the estate for administration on behalf of the claimants.<sup>862</sup> Without the imposition of a channeling injunction, claimants might attempt to pursue individual suits against defendants, unwinding the benefits of collective action and equality of treatment, which is a particularly detrimental result if the trust is to be financed with stock or payments from the reorganized entity. The channeling injunction is therefore critical to the structure of the overall mass future claims Proposal.

Authorizing channeling injunctions would ensure that the Bankruptcy Code specifically empowers the court to use this valuable tool in appropriate cases to direct mass future claimholders to a reasonably funded pool of resources. Any uncertainty about the effectiveness of a channeling injunction would be eliminated, thus enhancing both the effectiveness of the reorganization and the pool available to fund repayments to victims.

The Proposal deliberately does not mandate that the channeling injunction be used in a particular fashion. Taking a slightly different approach from the 1994 asbestos amendments, the Commission did not seek to prescribe the precise form of a plan involving mass future claims. Traditional trusts in connection with channeling injunctions need not be the sole mechanism of directing compensation to mass future claimants. For example, a plan could entail future contributions of the debtor or

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<sup>861</sup> 11 U.S.C. § 524(g)(1)(B) (1994) provides that "An injunction may be issued under subparagraph (A) to enjoin entities from taking legal action for the purpose of directly or indirectly collecting, recovering, or receiving payment or recovery with respect to any claim or demand that, under a plan of reorganization, is to be paid in whole or in part by a trust described in paragraph (2)(B)(I), except such legal actions as are expressly allowed by the injunction, the confirmation order, or the plan of reorganization."

<sup>862</sup> See *In re MacArthur Co. v. Johns-Manville*, 837 F.2d 89, 91 (2d. Cir. 1988) (noting that channeling claimants away from insurance company and toward insurance proceeds was essential to reorganization and thus fell within bankruptcy court's equitable powers), *cert. denied*, 488 U.S. 868 (1988); *Unarco Bloomington Factory Workers v. UNR Indus., Inc.*, 124 B.R. 268 (N.D. Ill. 1990) (approving channeling injunction that also enjoined workers from pursuing claims against settling insurers because section 105 permitted court to protect property of estate and claims against insurers already had been settled). Compare *In re Forty-Eight Insulations, Inc.*, 149 B.R. 860 (N.D. Ill. 1992) (disallowing channeling injunction that also entailed release of settling insurers from parent corporation claims). REFORMING THE BANKRUPTCY CODE: NATIONAL BANKRUPTCY CONFERENCE'S CODE REVIEW PROJECT, 40 - 41 (rev. ed, 1997) (noting channeling injunctions can be used to bring insurance proceeds to estate).



enable the trust to seek additional funding from the debtor under certain circumstances. Likewise, a plan might provide that the excess in an over-funded trust would be returned to the debtor or distributed to the debtor's shareholders. Other approaches, such as purchasing insurance policies in favor of mass future claimants, may be superior in selected cases.<sup>863</sup> Negotiations among the mass future claims representative and other parties may produce lower-cost, creative alternatives to deal with mass future claims. The Commission's Proposal would encourage rather than chill these alternatives.

### 2.1.5 *Plan Confirmation and Discharge; Successor Liability*

**Sections 363 and 1123 should provide that the trustee may dispose of property free and clear of mass future claims when the trustee or plan proponent has satisfied the requirements for treating mass future claims. Upon approving the sale, the court could issue, and later enforce, an injunction to preclude holders from suing a successor/good faith purchaser.**

*Plan Confirmation and Discharge.* This Proposal does not alter any of the otherwise applicable standards of confirmation of a plan of reorganization. Among other requirements, a plan of reorganization involving mass future claims must be feasible and must meet the "best interest of creditors test,"<sup>864</sup> and, in a nonconsensual case, objecting claimants would be protected against unfair discrimination.<sup>865</sup> Because a mass future claim would be a subset of all claims, the Code would authorize the discharge of a mass future claim without specific additional amendment. However, the repeal of section 524(g) and the modification of section (h) would eliminate confusion over whether special steps are necessary to discharge a mass future claim and to avoid a dual track treatment of future liabilities.

Because the mass future claims provisions deal only with liability for prepetition acts or omissions of the debtor and do not create immunity from postpetition acts, the Proposal would not authorize the discharge of a company's obligation on any liability based on postpetition acts of the debtor. Any debtor in

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<sup>863</sup> See Mark J. Roe, *Bankruptcy and Mass Tort*, 84 COLUM. L. REV. 846, 881 (1984) (discussing how otherwise unaffordable insurance policies become conceivable through mass tort bankruptcy).

<sup>864</sup> It may be necessary to amend section 1129(a)(7) to clarify that the best interest of creditors test can apply to the aggregate estimation of mass future claims. REFORMING THE BANKRUPTCY CODE: NATIONAL BANKRUPTCY CONFERENCE'S CODE REVIEW PROJECT 39 (rev. ed, 1997).

<sup>865</sup> See 11 U.S.C. § 1129 (1994).

bankruptcy has a duty to abide by all laws and regulations, and the debtor that deals with mass future claims in its bankruptcy case would be subject to the same requirements. If, for example, a manufacturer has a duty to warn consumers when it learns of certain kinds of defects and the duty to warn arose or continued postpetition, then the debtor would be required to meet those postpetition obligations.

*Successor Liability for Asset Transfers.* Preserving the value of an enterprise is not always accomplished by a reorganization in a traditional sense. In some cases, selling certain assets to third parties may be the most sensible and economically beneficial way to proceed. Similarly, in the liquidation of an ongoing, multi-faceted business, it may be necessary to sell some assets before the estate is liquidated in its entirety. The Commission recognized that a Proposal setting forth the conditions for treating mass future claims should be applicable where reorganization is actually accomplished through asset sales. This Proposal also applies in Chapter 7 cases to eliminate incentives to favor a liquidation to avoid the operation of the mass future claims provisions.

Under current law, an issue that unavoidably arises in a sale of assets is whether the purchaser of the assets can be sued by mass future claim holders. Section 363(f) of the Bankruptcy Code authorizes a trustee or debtor in possession to sell property free and clear of “interests” in such property.<sup>866</sup> Whether the term “interests” means only security interests and liens, or whether it also includes unsecured claims, is an unresolved question.<sup>867</sup> “A fundamental idea of bankruptcy is that bygone should not prevent the best current deployment of assets.”<sup>868</sup> However, to the extent that sales of assets in bankruptcy may involve the risk of mass future claims liability, the “prices obtained for the assets in bankruptcy will fall to their scrap value,”<sup>869</sup> which in turn, yields a lower return to *all* claimants.

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<sup>866</sup> Additional discussion of section 363(f) can be found later in this chapter. *See also* 11 U.S.C. § 1141(c)(property dealt with in plan is free and clear of all claims and interests of creditors).

<sup>867</sup> *See, e.g.,* In re Leckie Smokeless Coal Co., 99 F.3d 573 (4th Cir. 1996) (application of section 363(f) not limited to in rem interests), *cert. denied*, 117 S. Ct. 1251 (1997). *But see* The Ninth Avenue Remedial Group v. Allis-Chalmers Corp., 195 B.R. 716 (N.D. Ind. 1996) (suggesting that section 363(f) authorizes sales free and clear of liens, but not unsecured claims), *citing* Zerand-Bernal, Inc. v. Cox, 23 F.3d 159 (7th Cir. 1994).

<sup>868</sup> *In re* CMC Heartland Partners, 966 F.2d 1143, 1146 (7th Cir. 1992).

<sup>869</sup> J. Maxwell Tucker, *The Clash of Successor Liability Principles, Reorganization Law, and the Just Demand that Relief be Afforded Unknown and Unknowable Claimants*, 12 BANKR. DEV. J. 1, 7 (1995).

In the corporate law context outside bankruptcy, transfer of assets from one entity to another generally is not accompanied by the liabilities of the transferor.<sup>870</sup> While some state laws have altered this general rule in some contexts to apply successor liability more liberally, the majority of courts and commentators have been critical of that approach.<sup>871</sup> This Proposal incorporates this state law concept with respect to mass future claims *if* those claims have been represented and the debtor or trustee has made provisions for their treatment. The Proposal would prevent a debtor or trustee from selling off the major assets of the business and cutting off mass future claimants' access unless the debtor satisfied the requirements for treating mass future claims. Without the appointment of a mass future claims representative, for example, the successor would not be protected from liability for mass future claims. The protection given to the purchaser is the same protection that would have been given to the reorganized debtor that kept the assets, assuming that the debtor satisfied the set of conditions set forth throughout this Proposal. The Proposal intentionally does not distinguish between sales that are incorporated into plans of reorganization and sales that occur independently under section 363.

By enabling debtors to sell assets free and clear under the circumstances set forth in this Proposal, the Code would give parties the flexibility to choose the form that will maximize the value of the assets of the debtor without empowering parties to act strategically to disadvantage one class of claimants. Freeing the productive assets of the business from the uncertainty of mass future claimants will encourage buyers to offer a better price. In so doing, more assets would be available to fund a greater return for present claimants and holders of mass future claims. At the same time, this approach promotes the equitable treatment of similar creditors by ensuring that holders of mass future claims do not receive preferential treatment over the debtor's other creditors by following assets on a successor liability theory,<sup>872</sup> nor would they receive worse treatment by being omitted from participation in the benefits

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<sup>870</sup> *Id.*, at 8.

<sup>871</sup> See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY, Ch. 3 §12, at 263 (Proposed Final Draft, Reporters' Note, April 1, 1997) (citing cases and scholarly literature noting that "strict liability on successor corporations is inconsistent with the principles of products liability law to impose responsibility on the party who created the risk and was in a position to prevent its occurrence").

<sup>872</sup> See *Volvo White Truck Corp. v. Chambersburg Beverage, Inc.* (*In re White Motor Credit Corp.*), 75 B.R. 944, 951 (Bankr. N.D. Ohio 1987) (successor liability subverts Congressionally created priority scheme in bankruptcy). See also William T. Bodoh & Michelle M. Morgan, *Inequality Among Creditors: The Unconstitutional Use of Successor Liability To Create a New Class of Priority Claimants*, 4 AM. BANKR. INST. L. REV. 325 (1996) (courts hold purchaser liable for prepetition claims against debtor essentially burdens property in favor of individual creditor's private interests and constitutes a servitude).

from the sale even if they live in a jurisdiction that does not recognize successor liability.

A buyer would receive injunctive protection from successor liability for claims of mass future claimants that the debtor/seller had treated in the bankruptcy. Because entering a free and clear order would entail a finding that the debtor satisfied the requisite standards for treating mass future claims, the injunction would ensure that the successor is protected from certain suits when insulation from liability had been factored into the purchase price. This procedure would avoid a situation in which a court must decline to enforce its own free and clear sale order because mass future claimants did not receive treatment in the bankruptcy case.<sup>873</sup> The fact that the bankruptcy court would be empowered to enforce this order would not preclude other courts from enforcing the order, especially if the issue arose long after plan consummation or closure of the bankruptcy case.

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<sup>873</sup> *Cf. In re Fairchild Aircraft Corp.*, 184 B.R. 910 (Bankr. W.D. Tex. 1995) (declining to enforce prior free and clear sale order because claimants were not recognized and treated in bankruptcy case). *See also Zerand-Bernal Group, Inc. v. Cox*, 23 F.3d 159 (7th Cir. 1994) (court did not have “related to” jurisdiction to enjoin suit against successor for post-sale injuries, notwithstanding language in Chapter 11 plan stipulating that court would enforce terms of sale agreement).