ADVISORY COMMITTEE
ON
BANKRUPTCY RULES

Longboat Key, FL
April 3-4, 2003

James Ishida

03/26/2003 02:48 PM

To: Judy Krivit/DCA/AO/USCOURTS@USCOURTS
cc:
Subject: BK Agenda Book - Committee Meeting on April 3-4, 2003 - Tab 9 Addition

Judy: FYI. James
----- Forwarded by James Ishida/DCA/AO/USCOURTS on 03/26/03 02:45 PM -----

James Ishida

03/26/03 02:13 PM

To: Thomas Small/NCEB/04/USCOURTS@USCOURTS, donna_silva@rid.uscourts.gov, robert_gettleman@ilnd.uscourts.gov, Judge_Keeley@wvnd.uscourts.gov, Donna_Logan@flsd.uscourts.gov, Thomas Zilly/WAWD/09/USCOURTS@USCOURTS, Laura T Swain/NYSD/02/USCOURTS@USCOURTS, jdwalkerjr@aol com, Christopher Klein/CAEB/09/USCOURTS@USCOURTS, Mark McFeeley/NMB/10/USCOURTS@USCOURTS, mwiggins@acusd.edu, lawanr@hofstra.edu, elf222@hotmail.com, hla@agmbc.com, jshaffer@stutman.com, chris.kohn@usdoj.gov, morris@udayton.edu, Jim Waldron/NJB/03/USCOURTS@USCOURTS, lawrence.a.friedman@usdoj.gov, Dennis_Montali@canb.uscourts.gov
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Subject: BK Agenda Book - Committee Meeting on April 3-4, 2003 - Tab 9 Addition

Dear All:

A memorandum from Professor Jeffrey Morris to the Subcommittee on Privacy and Public Access and Appeals dated February 12, 2003, was inadvertently omitted from the agenda book. (You should receive the agenda book today.) The missing memorandum is attached.

Please place this memorandum in your agenda book behind Tab 9.

James

Stale Appeals.

MEMORANDUM

TO: SUBCOMMITTEE ON APPEALS

FROM: JEFF MORRIS, REPORTER

RE: DISMISSAL OF STALE APPEALS

DATE: FEBRUARY 12, 2003

The Advisory Committee considered a proposal from Mr. Richard Friedman to amend Rule 8001 to enable the bankruptcy courts to dismiss appeals that appellants had effectively abandoned. The proposal was to authorize the bankruptcy court either on its own motion, or on the motion of the appellee to dismiss the appeal if the appellant had not promptly taken the actions necessary to enable the clerk to assemble and transmit the record to the appropriate appellate court. The suggestion was that these appeals are costly to the appellee as well as for the courts, both the bankruptcy court and the appellate court.

As we discussed in Hyannis, the problem with the proposal is that it seeks to authorize the bankruptcy court to issue the dismissal order, but the filing of the notice of appeal divests the bankruptcy court of jurisdiction over the matter. The matter is then pending in the appellate court (district court or BAP, as the case may be) so that any dismissal must come from the higher court. Also at the meeting, several members noted that the problem of stale appeals is handled both efficiently and informally in their courts. The bankruptcy court notifies the district court that no action has been taken beyond the filing of a notice of appeal, and the district court issues an order to show cause why the appeal should not be dismissed. If there is no response, the appeal is dismissed with no hearing or unnecessary delay.

I spoke with Mr. Leonard Green, Clerk of the Sixth Circuit and Sixth Circuit BAP, regarding any procedures to handle stale appeals either in the BAP or in the Court of Appeals.

He noted first that the problem is essentially nonexistent in the BAP. He suggested that parties appealing to the BAP have each affirmatively chosen that court, and that appeals are usually more quickly resolved in the BAP than in the district courts. Thus, parties interested in expeditious consideration are not likely to create stale appeals. In the Court of Appeals, on the other hand, the wider range of cases and the presence of pro se appellants does create a potential for stale appeals. Mr. Green indicated that these problems are handled relatively informally through correspondence with the parties and their counsel. He noted first that the Court of Appeals does not wait for the transmission of the record. Instead, it sends a letter to the parties setting out their respective responsibilities along with the dates when specific actions must be taken. If an appellate does not act timely, the Clerk sends a second letter indicating that the Court will be dismissing the appeal unless the appellate takes corrective action. If that action is not taken, the Court dismisses the appeal.

The key to the process used by the Sixth Circuit is that the Court of Appeals "takes over" the case prior to the time it receives the record. In fact, Mr. Green indicated that, except in unusual circumstances, the Court does not receive the record for quite some time. It remains with the district court until close to the time for argument of the case. Nonetheless, the Court of Appeals and its Clerk are controlling the case as soon as the notice of appeal comes to their attention. Bankruptcy Rules 8006 and 8007 govern these matters, and they are patterned on Federal Rules of Appellate Procedure 10 and 11. These rules all anticipate that the lower court's clerk will transmit the record to the appellate court only once the record is complete. See Bankruptcy Rule 8007(b) ("When the record is complete for purposes of appeal, the clerk shall transmit a copy thereof forthwith to the clerk of the district court or the clerk of the bankruptcy appellate panel."); FRAP 11(b)(2) ("When the record is complete, the district clerk must number

the documents constituting the record and send them promptly to the circuit clerk together with a list of the documents correspondingly numbered and reasonably identified."). They do not suggest any transmittal of the notice of appeal upon its filing, but it appears that the appellate courts may be receiving some notice that an appeal is pending.

We should consider whether it would be appropriate to amend the Bankruptcy Rules to insert a directive that the clerk of the bankruptcy court must notify the clerk of the appropriate appellate court that a notice of appeal has been filed. This would make the appellate court aware of the pendency of the appeal without having to wait for the compilation of the record. If the appellate court does not receive the record in a reasonable time, it can take action to dismiss the appeal or otherwise address the matter. Bankruptcy Rule 8007(b) is one candidate for locating such a directive for the clerk. That rule already includes the requirement that the clerk transmit the record to the clerk of the district court or bankruptcy appellate panel. This would simply be a related obligation of the clerk. To that end, we could insert language in the rule directing the bankruptcy clerk to notify the appellate clerk that the appellant has failed to designate the record as required by Rule 8006. On the other hand, we could place such an obligation in Rule 8001(d), the location Mr. Friedman proposed for his amendment. This would tie in with the requirement that the appellant file a notice of appeal, Rule 8001(a), and would be more likely to be noted by the appellant than it would if the directive was placed in Rule 8007 which applies more to the clerk than to the appellant.

It is possible that the current system works and that no rules change is necessary. Please share with us any experiences you have had with stale appeals. There may be other systems or processes about which you are aware that would address the issue of stale appeals. We can consider these during our telephone conference tomorrow.

ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of April 3 - 4, 2003
Longboat Key, Florida

Agenda

Introductory Items

1. Approval of minutes of October 2003 meeting.

2. Report on the January 2003 meeting of the Committee on Rules of Practice and Procedure (Standing Committee). (The Chairman and the Reporter will provide an oral report.)

3. Report on the January 2003 meeting of the Committee on the Administration of the Bankruptcy System (Bankruptcy Committee). (This will be an oral report.)

4. Discussion of mass torts and bankruptcy with David M. Bernick, Esq., of the Standing Committee; Hon. Lee H. Rosenthal, of the Advisory Committee on Civil Rules; Hon. Jack B. Schmetterer, of the Committee on Federal-State Jurisdiction; Professor Elizabeth Gibson, of University of North Carolina Law School; and Hon. Dennis Montali, of the Bankruptcy Committee. [Materials: March 2003 Judicial Conference recommendation; Summary of the Report of the Standing Committee; Addendum to the Report of the Committee on Federal-State Jurisdiction; Final Report of the Bankruptcy Committee's Subcommittee on Mass Torts; articles by Professor Resnick and Professor Gibson.]

Action Items

5. Consideration of proposed amendments to Rules 3004 and 3005 concerning the filing of a proof of claim in the name of a creditor by the debtor, trustee, codebtor, or other party.

6. Consideration of comments received on the preliminary draft amendments to Rules 9014.

7. Proposed amendment to Rule 2002(g) to permit a creditor to provide one or more national addresses for receiving notices and to change the address by notifying one court.

8. Consideration of proposed amendments to Rule 7004 to authorize the clerk electronically to issue a summons to be served with a complaint.

9. Recommendation by the Subcommittee on Privacy and Public Access and Appeals concerning pending request to amend Rule 8001.

10. Consideration of proposed amendments to Rule 1007 and Schedule G - Executory Contracts and Unexpired Leases to require a debtor to include parties to executory contracts and unexpired leases on the mailing list filed with the petition.

11. Consider proposed Official [or Director's] form on which an individual debtor is to submit debtor's full Social Security number to the court.

12. Consideration of proposed amendments to the Uniform Numbering System for Local Bankruptcy Court Rules.

13. Consideration of proposed technical amendment to Rule 1011 to conform the rule to Rule 1004.

Information Items

14. Text and Committee Notes to proposed amendments to Rule 2002(j) and 4008.

15. Discussion of proposal to develop a national chapter 13 plan form.

16. Report on activities of the CM/ECF Working Group subcommittee on claims processing. [Oral report.]

17. Report on the implementation of the CM/ECF system (case management/electronic case files) and electronic filing. [Oral report.]

18. Text of the E-Government Act of 2002.

19. Copy of 11th Circuit decision in *Chrysler Financial Corporation v. Powe*, 312 F. 3d 1241 (11th Cir. 2002) concerning the applicability in bankruptcy proceedings of certain provisions of the Federal Rules of Civil Procedure.

20. List and progress chart of proposed amendments.

Administrative Matters

21. Next meeting reminder: *September 18 - 19, 2003, Skamania Lodge, Stevenson, WA.*

22. Discussion of date and location for spring 2004 meeting.

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Subcommittee on Technology and Cross Border Insolvency
Judge Thomas S. Zilly, Chair
Judge Irene M. Keeley
Judge Norman C. Roettger, Jr.
Judge Laura Taylor Swain
Judge Mark B. McFeeley

March 20, 2003
Projects

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ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of October 10-11, 2002
Hyannis, Massachusetts

Draft Minutes

The following members attended the meeting:

Bankruptcy Judge A. Thomas Small, Chairman
District Judge Robert W. Gettleman
District Judge Norman C. Roettger, Jr.
District Judge Ernest C. Torres
District Judge Thomas S. Zilly
District Judge Laura Taylor Swain
Bankruptcy Judge James D. Walker, Jr.
Bankruptcy Judge Christopher M. Klein
Bankruptcy Judge Mark McFeeley
Professor Mary Jo Wiggins
Professor Alan N. Resnick
Eric L. Frank, Esquire
Howard L. Adelman, Esquire
K. John Shaffer, Esquire
J. Christopher Kohn, Esquire

Professor Jeffrey W. Morris, Reporter, attended the meeting. Circuit Judge Anthony J. Scirica, chair of the Committee on Rules of Practice and Procedure (Standing Committee), Professor Daniel Coquillette, reporter of the Standing Committee, and District Judge Thomas W. Thrash, Jr., liaison to the Standing Committee, attended. Bankruptcy Judge A. Jay Cristol, a former member of the Committee, attended. Bankruptcy Judge Wesley W. Steen attended the first day of the meeting as a representative of the Committee on the Administration of the Bankruptcy System (Bankruptcy Committee).

The following additional persons attended all or part of the meeting: Lawrence A. Friedman, Director, Executive Office for United States Trustees (EOUST); Martha L. Davis, Principal Deputy Director, EOUST; James J. Waldron, Clerk, United States Bankruptcy Court for the District of New Jersey; John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office of the United States Courts (Administrative Office); Patricia S. Ketchum and James H. Wannamaker, Bankruptcy Judges Division, Administrative Office; Robert Niemic, Research Division, Federal Judicial Center (FJC); and Ned Diver, law clerk to Judge Scirica.

The following summary of matters discussed at the meeting should be read in conjunction with the various memoranda and other written materials referred to, all of which are on file in the

office of the Secretary of the Standing Committee. Votes and other action taken by the Committee and assignments by the Chairman appear in **bold.**

Introductory Matters

The Chairman introduced Judge Swain, a new member of the Committee, and welcomed all the members, liaisons, advisers, and guests to the meeting. The other new member of the Committee, District Judge Irene M. Keeley, was unable to attend. The Chairman presented a certificate of appreciation to Judge Cristol in recognition of his service as a member of the Committee and as chair of the Technology Subcommittee.

The Committee approved the minutes of the March 2002 meeting.

The Chairman briefed the Committee on June 2002 meeting of the Standing Committee. The Standing Committee approved the six amended rules, one new rule, and 12 amended Bankruptcy Official Forms the Committee had forwarded for adoption and sent them to the Judicial Conference. In addition, the Standing Committee approved the Committee's recommendation to publish a proposed amendment to Rule 9014 for public comment.

Judge Steen reported on the June 2002 meeting of the Bankruptcy Committee. Of the matters currently before that committee, the one most likely to have a major impact on the rules, he said, is the question of venue. The Venue Subcommittee of the Bankruptcy Committee is considering the venue of large corporate bankruptcy cases and has asked the FJC to study what factors affect the debtor's choice of venue and what factors appear to affect the progress of large chapter 11 cases. The Bankruptcy Committee additionally has recommended that bankruptcy judges be allowed to raise the question of venue and to transfer a bankruptcy case sua sponte. At its meeting in September 2002, the Judicial Conference agreed to seek the amendment of the bankruptcy venue statute, 28 U.S.C. § 1412. Judge Steen said the Bankruptcy Committee deferred the issue of whether to request a rules amendment concerning changing venue. Judge Steen stated that Bankruptcy Committee has received comments from other interested committees on the June 2002 report of its Subcommittee on Mass Torts. The report is being revised for presentation at the January 2003 meeting of Bankruptcy Committee.

Action Items

Proposed Amendment to Rule 1009. The proposed amendment was suggested as a means to reinforce the need to serve creditors with notice of the debtor's amended claim of exemptions and to reduce the number of disputes over the timeliness of exemptions claimed by way of amended schedules. Professor Morris noted that the practice in many areas is to serve an amended claim of exemptions only on the trustee, despite the requirement in Rule 1009 that the amendment be served on the trustee and "any entity affected thereby." Pursuant to Rule 4003(b),

a party in interest may file an objection to the list of exemptions within 30 days after the conclusion of the meeting of creditors or within 30 days after any amendment to the list. In the event that the debtor fails to notify all affected parties, the courts generally have held that the time for filing objections does not begin to run. Some courts have held, however, that actual notice of the amendment will trigger commencement of the objection period.

Several members questioned whether it would be more appropriate to amend Rule 4003 to require that an objection be filed within 30 days from when the amendment to the claim of exemptions is filed and served on the trustee and affected creditors. Because the proposed amendment to Rule 1009 applies only to notice of an amended claim of exemptions, one member asked whether there are other circumstances in which all creditors are affected by an amendment to the voluntary petition, list, schedule, or statement. While there may be instances in which other amendments may have an impact on all creditors, the frequency of exemption amendments and their wide ranging impact justify the separate treatment of these amendments. Professor Morris suggested that the Committee Note could be amended to state specifically that the presence of a rule regulating exemption amendments should not be read as suggesting that debtors need not serve copies of amendments to other schedules or statements on affected parties. One member stated that giving notice to all creditors of every amendment is unduly burdensome and that the rule should specify when all creditors should be noticed of any amendment, not just amended claims of exemptions. Mr. Friedman said the debtor's right to amend the petition, schedules, and statements up to the end of the case is a broader problem that presents difficulties for trustees. He said the EOUST would prefer the Committee to consider the whole problem and would present recommendations toward that objective. **The consensus was to do nothing at this time.**

Proposed amendment to Rule 4008. The Bankruptcy Judges Advisory Group had requested that the Committee consider amending Rule 4008 to establish a deadline for filing a reaffirmation agreement. Section 542(c) of the Bankruptcy Code requires that a reaffirmation agreement be in writing, be made before the entry of the debtor's discharge, be approved by the debtor's attorney, and be filed with the court. If the debtor is not represented by counsel, the court must make a finding that the agreement is in the debtor's best interest and does not impose an undue hardship on the debtor. Neither the statute nor the rules set a deadline for filing a reaffirmation agreement with the court. Thus, a reaffirmation agreement could be made before the discharge, but not filed with the court for some time. It appears that late filing of reaffirmation agreements is creating problems for some courts, which must reopen closed cases to permit the filing of these agreements. In addition, setting a deadline in Rule 4008 for filing a reaffirmation agreement would permit the courts to schedule a hearing on any agreement in a pro se case in an orderly fashion.

Professor Resnick stated that the court should have broad discretion to extend the time to file a reaffirmation agreement because a pro se debtor might not know about the filing deadline. He suggested that the Committee Note to the proposed amendment state that a request for extension of the time could be filed before or after the 10-day period. Judge Steen suggested that

the deadline be set at 30 days after the discharge in order to minimize the number of requests for extensions of time. Judge Walker said cases generally are closed shortly after discharge and, therefore, perhaps, the agreements should be filed before discharge. Judge Klein stated that the Court of Appeals for the Ninth Circuit has held, In re Staffer, 306 F.3d 967 (9th Cir. 2002), that closing a bankruptcy case is not jurisdictional and that the bankruptcy court can still entertain a dischargeability action. He added that a case doesn't have to be reopened to file a paper. After discussion, the Committee decided to delete the language of the existing rule that sets deadlines for notices of a discharge and reaffirmation hearing, and to substitute a rule that simply establishes a deadline for filing a reaffirmation agreement with the court. The filing of a reaffirmation agreement will enable the court to determine whether a discharge hearing is necessary, and the court can then schedule the hearing in the most efficient manner. The Committee concluded that getting reaffirmation agreements filed is the most important objective, and leaving discretion to the courts to notice and schedule the hearings permits the courts to set their own calendars in the most efficient manner.

At its March 2002 meeting, the Committee discussed the possibility of a survey of the bankruptcy courts regarding the extent of any problems with the late filing of reaffirmation agreements. Mr. Niemic asked whether the Committee still was interested in a such survey. Chairman Small stated that, if there is a problem, the courts will tell the Committee about it during the comment period on the proposed amendments. Professor Resnick moved to revise the proposed amendment to allow a reaffirmation agreement to be filed not later than 30 days after entry of the discharge, to specify that the court may extend the deadline for cause, to state in the Committee Note that the court has broad discretion to extend the time, and to approve the amendments and the Committee Note, as revised, for publication. The proposed amendment would no longer require the court to hold the hearing within a stated time. **The motion carried without objection.**

Proposed Amendments to Rules 2002 and 3017. Mr. Shaffer had suggested that Rules 2002 and 3017 be amended to establish a shorter notice period for the time to file objections to a disclosure statement than for the time for the hearing to consider approval of the statement. The changes were intended to prevent unnecessary delays at the hearing due to objections that are filed at the hearing. Mr. Shaffer stated that, after reading the Reporter's memorandum on the proposal, he is not sure that the amendments are needed. **The consensus was to take no action.**

Proposed Amendment to Rule 8001. Mr. Richard Friedman, an attorney in the Office of the United States Trustee in Chicago, had suggested that Rule 8001 be amended to address the problem of unperfected appeals. Mr. Friedman noted that in many instances he has faced the situation in which the appellant failed to designate the record under Rule 8006, requiring that he file a motion to dismiss in the district court, wasting time for both the appellee and the appellate court. He suggested that Rule 8001 be amended to allow the bankruptcy court to dismiss the appeal if it has not been docketed in the appellate court and the appellant has failed to take whatever action is necessary to enable the clerk to assemble and transmit the record as provided under Rule 8006.

Professor Morris stated that there is a jurisdictional difficulty with the proposed amendment because, once the notice of appeal is filed, jurisdiction over the appeal is with the appellate court. The Committee members discussed how the situation is handled in different courts. In some courts, the bankruptcy clerk notifies the clerk of the appellate court that the record has not been completed. In others, the bankruptcy clerk transmits the incomplete record or a local rule authorizes the bankruptcy court to dismiss the unperfected appeal. The Committee discussed various approaches, including a model local rule on unperfected appeals, guidance for the clerks and chief judges, a rules amendment providing for the transmission of the incomplete record if the appeal is not perfected in a timely fashion, an amendment providing for the bankruptcy clerk to transmit notice of the filing of the notice of appeal to the appellate court as is provided in Appellate Rule 3(d), and a review of Part VIII rules generally. **The Committee agreed with Chairman Small's suggestion that the matter be referred to the Subcommittee on Appeals.**

Proposed Amendment to Rule 3004. Mr. Frank and Judge Walker each had noted problems with Rule 3004. The rule provides that the trustee or debtor may file a proof of claim on behalf of a creditor if the creditor does not file a proof of claim on or before the first date set for the meeting of creditors. Although the deadline in Rule 3004 for filing such a claim is 30 days after expiration of the time for filing claims pursuant to Rules 3002(c) or 3003(c), the rule provides for a creditor to file a superseding claim "pursuant to Rule 3002 or Rule 3003(c)." Thus, the Reporter stated, the creditor has an earlier deadline for filing a superseding claim than the debtor or trustee has for filing the original claim on behalf of the creditor. The Reporter stated that, by allowing the debtor or trustee to file a proof of claim on behalf of a creditor before the creditor's deadline for filing, Rule 3004 gives the debtor and trustee more power than the statute does. 11 U.S.C. § 501(c) requires that they wait until the creditor's claim would be untimely. Furthermore, the 1983 Committee Note to Rule 3002 and and the 1987 Committee Note to Rule 3004 are inaccurate as a result of subsequent changes in the Bankruptcy Code and Rules. The Reporter stated that there is no mechanism for amending or revising a Committee Note in the absence of an amendment to the rule in question.

Several committee members discussed the extent of a creditor's right to amend a proof of claim filed by the debtor or trustee, as delineated by the Court of Appeals for the Fifth Circuit, In re Kolstad, 928 F.2d 171 (5th Cir. 1991), *cert. denied,* 502 U.S. 491 (1991), and contrasted the right to amend with filing a superseding claim or objecting to the claim filed by the debtor or the trustee. The Reporter offered an amendment to Rule 3004 which would permit the debtor or trustee to file a proof of claim for the creditor within 30 days after the expiration of the time for filing pursuant to Rule 3002(c) or 3003(c), whichever is applicable, and would delete the provision for the creditor to file a superseding claim. The proposed Committee Note stated that the rule leaves to the courts the issue of whether to permit subsequent amendment of such claims filed by the debtor or trustee. Judge Steen suggested that the amended rule state that the clerk shall give notice of the claim, rather than mailing notice. Judge Klein said that the Committee Note should state why the provision for superseding claims was deleted. **The Committee approved the revised amendment to Rule 3004 and Committee Note, including Judge**

Steen's and Judge Klein's suggestions, by a 9-1 vote.

Proposed Amendment to Rule 3005. The Reporter offered an amendment deleting the last sentence of Rule 3005 and making stylistic changes so that the rule would be consistent with section 501(b) of the Code and the proposed amendment to Rule 3002. Professor Resnick suggested adding "in a timely manner" to the first line of the amended rule, deleting the phrase "filed by the codebtor" from the last sentence of the first paragraph of the Committee Note, and ending the second paragraph of the Committee Note after the phrase "in the name of the creditor." **The Committee accepted the suggestions and approved the revised amendment to Rule 3005 without objection.**

Amendment to Rule 9031. Chief Bankruptcy Judge David S. Kennedy had written to the Committee inquiring about the possibility of amending Rule 9031 to permit a bankruptcy court to appoint a special master to assist the court in appropriate circumstances. Judge Kennedy enclosed two law review articles which assert generally that since bankruptcy courts adjudicate matters as complex as the matters heard in the district courts, the bankruptcy courts should be able to call upon the expertise of a special master to the same extent as the district courts under Civil Rule 53. The Reporter stated that the complexity of bankruptcy mega cases provides a reason for changing the rule to authorize the use of special masters but that the expanded use of examiners in chapter 11 cases, the absence of a statutory provision for compensating special masters in bankruptcy cases, and the possibility of unintended consequences resulting from a change all are reasons not to change the rule.

Professor Resnick provided some historical background for the changes made to the bankruptcy statute in 1978 which placed the power to appoint trustees and professionals in hands other than those of the judge. He said that it is important to retain that authority in a disinterested official such as the U.S. trustee or bankruptcy administrator rather than the judge. Professor Resnick also provided additional background on the Committee's prior consideration of a proposal to amend Rule 9031 to permit the appointment of special masters. The Committee expressed concerns about the adjudicatory role of a special master who may make findings of fact and conclusions of law, the constitutionality of a special master's appointment by a non-article III judge, and the standard of review of a special master's findings of fact and conclusions of law by the bankruptcy judge and on appeal.

The Committee discussed the use of court appointed experts pursuant to Evidence Rule 706 or the reference of matters to binding arbitration instead of using special masters. A member stated that parties in a case could consume hours of court time arguing about a motion to appoint a special master. Several members questioned the propriety of imposing the cost of a special master on the bankruptcy estate and whether authority would exist to do so. **The Committee determined to take no action at this time.**

Electronic Issuance of Summons. As more courts convert to the Case Management/Electronic Case Files (CM/ECF) system, there is increasing interest in the

possibility of issuing a summons electronically. The chief deputy clerk of the Bankruptcy Court for the Western District of Pennsylvania wrote to the Committee requesting a rules amendment to permit electronic issuance. Mrs. Ketchum stated that the change would save time for the clerk's office and save attorneys a trip to the courthouse. She stated that attorneys complete a blank summons that has been signed and sealed by the clerk.

Mrs. Ketchum noted the difference between issuing summons electronically and serving the summons and complaint electronically. Civil Rule 5 authorizes the service of certain pleadings and cases papers by electronic means if consented to by the person served, but Civil Rule 4, which governs the service of the summons, does not have a provision for electronic service. **The consensus was to study the matter further. Chairman Small referred it to the Subcommittee on Technology and to the Civil Rules Committee.**

Listing Parties to Executory Contracts and Unexpired leases as Creditors. A debtor must list all of its executory contracts and unexpired leases on Schedule G, along with the name and address of the other parties to the contracts and leases. There is a cautionary reminder for the person completing the form that listing a person on Schedule G will not result in that person receiving notice of the bankruptcy case unless the person is also listed on the appropriate schedule of creditors. The difficulty is that many unexpired leases are not in default at the time of the bankruptcy filing and debtors are reluctant to list landlords on the matrix. In addition, if the debtor is a software licensor, it may have thousands of software users who arguably may be parties to an executory contract. Similarly, a manufacturer may have warranty obligations with thousands of customers.

Mr. Frank stated that the presumption should be to give these parties notice. If there are too many of them, the debtor can file a motion to limit notice. Professor Resnick stated that the other parties to executory contracts are creditors and that the current form gives the debtor the erroneous impression that giving them notice is discretionary. Judge Walker stated that requiring a list of creditors, including parties on Schedule G, would imply that the parties to executory contracts are creditors. Professor Resnick stated that requiring a list of creditors and parties to executory contracts would imply that the parties are not creditors. Mr. Frank suggested deleting the note on Schedule G and revising Rule 1007(a)(1) to require that the debtor file a list of creditors and parties listed on Schedule G. **Chairman Small directed the Reporter to draft proposed amendments to Rule 1007 and the Official Form and submit them at the next meeting.**

Exclusion of Certain Kinds of Adversary Proceedings from Mandatory Disclosure under Civil Rule 26. Civil Rule 26, made applicable to adversary proceedings by Rule 7026, requires a series of actions by parties including the disclosure of a variety of information and participation in a discovery conference. The Committee has proposed an amendment to Rule 9014 to exempt contested matters from the mandatory disclosure requirement because many, if not most, contested matters conclude before the mandatory disclosure periods. The question has been raised whether some categories of adversary proceedings likewise should be exempted.

The Reporter stated that his informal survey of attorneys around the country showed that the mandatory disclosure requirements are more honored in the breach than followed. Judge Klein stated that it would be difficult to get adversary proceedings to trial as quickly as is done now if the court followed the time for mandatory disclosure set out in the rule. The judge stated that he issues an order in every adversary proceeding shortening time and exempting the parties from certain disclosure.

Professor Coquillette stated that it would be difficult to get an exemption approved by the Standing Committee without a very good empirical study of whether the mandatory disclosure is needed. Mr. Niemic said the nature of suit categories used in the Administrative Office's closing statistics on adversary proceedings are not specific enough to serve as the basis for such a Rule 26 study. As a result, he said, it probably would be necessary to use the PACER system to review the dockets of a sample of adversary proceedings. Judge Swain suggested a less formal inquiry, such as a questionnaire asking the courts whether there is a problem and, if so, what are the workarounds. **Chairman Small asked Mr. Niemic to make a preliminary inquiry about such a study and to report back at the spring meeting.** Judge Klein said he had received limited responses from the judges to his inquiries about possible exclusions. **The Chairman asked him to continue his work on a list of possible exclusions and to report back at the spring meeting.**

Information Items

Use of False Social Security Numbers. The Director of the EOUST presented a memorandum on recent cases in which the United States trustees have been involved where debtors have used false social security numbers or sought to conceal their true identities. He stated that these cases underscore he need for U.S. trustees, case trustees, and law enforcement personnel to have access to debtors' full social security numbers.

Rule 2002(g). The Administrative Office's Bankruptcy Noticing Working Group has requested that the Committee consider amending Rule 2002(g) so that a creditor receiving notices electronically could change its address centrally, rather than having to do so through each court individually. The request was discussed at the Tucson meeting and was referred by the Chairman to the Technology Subcommittee for further study. The Committee has received additional information from the Noticing Working Group. In addition, there is a provision in the pending bankruptcy legislation that would permit a creditor to specify and change its address centrally. **The Subcommittee on Technology is to report at the spring meeting if there is no legislative action.**

Transfer of Claims. Mrs. Ketchum stated that an industry has arisen that purchases claims against debtors and thereafter files a notice of the transfer of those claims in the debtors' bankruptcy cases. Generally, if a creditor transfers a claim other than for security after filing a proof of claim, Rule 3001(e)(2) requires that the transferee file evidence of the transfer and that the clerk give the alleged transferor notice of the filing and of the time for objecting to the

transfer. Mrs. Ketchum stated that some clerks follow the notice requirements despite the large number of transfers filed by claims consolidators. Other clerks accept waivers of notice signed by the transferors and filed by the transferees.

Professor Resnick stated that the notice requirement was intended to protect against bogus transfers. He stated that he does not know whether bogus transfers are a problem but that he is concerned about doing away with the notice to the transferor. Judge McFeeley stated that, if a transfer is bogus, the representation that the transferor waived notice also could be bogus. Mr. Waldron stated that processing transfers of claims and issuing the notices is a tremendous amount of work for the clerks and a considerable cost for the Judiciary. He stated that the courts are experimenting with filing transfers of claims electronically and giving electronic notice of the filing, especially to institutional creditors. **Chairman Small appointed Judge McFeeley as liaison to the Claims Subcommittee of the Bankruptcy CM/ECF Working Group. Judge McFeeley is to report on the Claims Subcommittee's work at the spring meeting.**

Confirmation of Receipt for Electronic Notices. The Administrative Office's Bankruptcy Noticing Working Group had requested previously that Rule 9036 be amended to eliminate the requirement that the sender of an electronic notice receive an electronic confirmation that the transmission has been received. Mrs. Ketchum stated that the Bankruptcy Noticing Center (BNC) is trying to expand the use of Electronic Bankruptcy Noticing (EBN) over the Internet, which would reduce the Judiciary's printing and postage costs, but that many Internet service providers do not offer the affirmative receipts required by Rule 9036. EBN also speeds the delivery of notices to the parties and facilitates the use of automated processing by recipients.

Mrs. Ketchum stated that the BNC has tested the reliability of negative receipts which are generated when the transmission fails. The negative receipts proved unreliable at times with email containing large file attachments. She stated that the BNC also has tested text email linked to an electronic copy of the of the notice, which appeared to be reliable. In addition, the BNC is considering setting up its own Internet service provider which would offer affirmative receipts. The Chair stated that it may make sense to delete the requirement for an affirmative receipt or to allow creditors to waive the receipt.

Bankruptcy Abuse Prevention and Consumer Protection Act (Bankruptcy Reform Act). The Committee discussed the possibility of the enactment of the pending Bankruptcy Reform Act, which would require amendments to the rules and forms, as well as new forms. Chairman Small stated that, if the legislation is enacted by December 1, 2002, subcommittee meetings or focus group meetings could be held in Washington in December. A public hearing on the proposed amendment to Rule 9014 has been tentatively scheduled for Washington on January 24, 2003. The Chairman stated that the Committee also could use that day to meet or to hold a focus group hearing in Washington and that another opportunity for meeting would arise in conjunction with the FJC workshop for bankruptcy judges scheduled for March 10-12, 2003, in San Francisco.

Administrative Matters

The Chair announced the appointment of Judge Walker as liaison to the Advisory Committee on Civil Rules and the appointment of Judge Klein as liaison the Advisory Committee on Evidence Rules.

The Committee's next scheduled meeting will be at Longboat Key, FL, on April 3-4, 2003. The Committee discussed several West Coast locations as possible sites of the fall 2003 meeting. The Committee agreed on September 18-19 or September 11-12, 2003, as acceptable dates, with the choice to be made based on when the better hotel rates can be obtained.

Respectfully submitted,

James H. Wannamaker, III

Judge Small and Professor Morris will report orally on the January 2003 meeting of the Standing Committee.

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Judge Montali will report orally on the January 2003 meeting of the Bankruptcy Committee.
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The Committee will discuss mass torts litigation, class claims,
and future claims, with
David M. Bernick, Esq., of the Standing Committee
Hon. Lee H. Rosenthal of the Advisory Committee on Civil Rules
Hon. Dennis Montali of the Bankruptcy Committee
Hon. Jack B. Schmetterer of the Committee on Federal-State Jurisdiction
and
Professor S. Elizabeth Gibson of the University of North Carolina Law School.

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Background Materials are attached.

a. Recommendation adopted by the Judicial Conference March 18, 2003. [Text is included in the Second Addendum to the Report of the Judicial Conference Committee on Federal-State Jurisdiction.]
b. Addendum to the Report of the Judicial Conference Committee on Rules of Practice and Procedure.
c. [First] Addendum to the Report of the Judicial Conference Committee on Federal-State Jurisdiction.
d. Report of the Subcommittee on Mass Torts of the Judicial Conference Committee on the Administration of the Bankruptcy System.
e. University of Pennsylvania Law Review Article by Professor Resnick.
f. University of Pennsylvania Law Review Article by Professor Gibson.
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SECOND ADDENDUM TO THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON FEDERAL-STATE JURISDICTION

TO THE CHIEF JUSTICE AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

CLASS ACTION LEGISLATION

The Committee on Federal-State Jurisdiction offers herein a substitute for its original recommendation regarding class action legislation. Following consideration of comments offered by the Committee on Rules of Practice and Procedure with regard to the original recommendation, the Federal-State Jurisdiction Committee revised its recommendation to accommodate those views and sets forth a new proposed recommendation in which the Rules Committee now concurs. That agreed upon recommendation is as follows:

> **Recommendation:** That the Judicial Conference recognize that the use of minimal diversity of citizenship may be appropriate to the maintenance of significant multi-state class action litigation in the federal courts, while continuing to oppose class action legislation that contains jurisdictional provisions that are similar to those in the bills introduced in the 106th and 107th Congresses. If Congress determines that certain class actions should be brought within the original and removal jurisdiction of the federal courts on the basis of minimal diversity of citizenship and an aggregation of claims, Congress should be encouraged to include sufficient limitations and threshold requirements so that federal courts are not unduly burdened and states' jurisdiction over in-state class actions is left undisturbed, such as by employing provisions to raise the jurisdictional threshold and to fashion exceptions to such jurisdiction that would

> preserve a role for the state courts in the handling of in-state class actions. Such exceptions for in-state class actions may appropriately include such factors as whether substantially all members of the class are citizens of a single state, the relationship of the defendants to the forum state, or whether the claims arise from death, personal injury, or physical property damage within the state. Further, the Conference should continue to explore additional approaches to the consolidation and coordination of overlapping or duplicative class actions that do not unduly intrude on state courts or burden federal courts.

The Judicial Conference in 1999 opposed the class action provisions in legislation then pending (H.R. 1875; S. 353, 106th Cong.) That opposition was based on concerns that the provisions would add substantially to the workload of the federal courts and are inconsistent with principles of federalism. JCUS-SEP 99, p. 45. The substitute recommendation makes clear that such opposition continues to apply to similar jurisdictional provisions.

The recommendation also recognizes that the use of minimal diversity may be appropriate to the maintenance of significant multi-state class action litigation in the federal courts. The use of the term "significant multi-state class action litigation" focuses on the possibility of multi-state membership within the plaintiff class. The actions to which this term applies are nationwide class actions, as well as class actions whose members include claimants from states within a smaller region or section of the country. Minimal diversity in these cases would facilitate the disposition of litigation that affects the interests of citizens of many states and, through their citizens, affects the many states themselves.

Parallel in-state class actions in which the plaintiff class is defined as limited to the citizens of the forum state are not included within the term "significant multi-state class action litigation." Parallel in-state class actions might share common questions of law and fact with similar in-state actions in other states, but would not, as suggested herein, typically seek relief in one state on behalf of citizens living in another state. Accordingly, parallel in-state class actions

would not present, on a broad or national scale, the problems of state projection of law beyond its borders and would present few of the choice of law problems associated with nationwide class action litigation. In addition, to the extent problems arise as a result of overlapping and duplicative in-state class actions within a particular state, the state legislative and judicial branches could address the problem if they were to create or utilize an entity similar to the Judicial Panel on Multidistrict Litigation, as some states have done.

Further, the recommendation seeks to encourage Congress to include sufficient limitations and threshold requirements so as not to unduly burden the federal courts and to fashion exceptions to the minimal diversity regime that would preserve a role for the state courts in the handling of in-state class actions. The recommendation identifies three such factors that may be appropriately considered in crafting exceptions to minimal diversity jurisdiction for class actions. These factors are intended to identify those class actions in which the forum state has a considerable interest, and would not likely threaten the coordination of significant multi-state class action litigation through minimal diversity. (The factors included in the recommendation do recognize certain situations where plaintiffs from another state may be included in an otherwise in-state action.)

The first factor would apply to class actions in which citizens of the forum state make up substantially all of the members of the plaintiff class. Such an in-state class action exception could include consumer class action claims, such as fraud and breach of warranty claims.

The second factor would apply to a class action in which plaintiff class members suffered personal injury or physical property damage within the state, as in the case of a serious environmental disaster. It would apply to all individuals who suffered personal injuries or losses to physical property, whether or not they were citizens of the state in question.

The third factor recognizes that it may be appropriate to consider the relationship of the defendants to the forum state. Such consideration is not intended to embrace the term "primary defendants" (or a similar term), which language has been used in past and present class action bills as part of an exception to minimal diversity. Such a reading could extend minimal diversity jurisdiction to cases in which a single important defendant lacked in-state citizenship. While the relationship of the defendant to the forum may have some bearing on state adjudicatory power, an insistence that all primary defendants maintain formal in-state citizenship is too limiting and may preclude in-state class actions where a defendant has sufficient contacts with the forum state, regardless of citizenship.

Therefore, the Committee on Federal-State Jurisdiction requests that the Judicial Conference approve its recommendation on class action legislation, as revised herein.

Respectfully submitted,

Frederick P. Stamp, Jr., Chair

Susan H. Black
Kathleen A. Blatz
Glen H. Davidson
Fernando J. Gaitan, Jr.
Charles E. Jones
Kermit V. Lipez
James D. Moyer
Michael R. Murphy
Loretta A. Preska
Jack B. Schmetterer
Eugene E. Siler, Jr.
Linda Copple Trout
Gerald W. VandeWalle

(Rev. 03/05/03)
Agenda E-18 (Summary)
Rules
March 2003

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

This report is submitted for the record, and includes the following items for the information of the Conference:

ADDENDUM TO THE REPORT OF THE

JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

OVERLAPPING, COMPETING, AND DUPLICATIVE CLASS ACTIONS

The most vexing issue in modern civil litigation is the problem of mass claims—the accumulation of thousands (even millions) of claims through class actions or through aggregation of individual lawsuits. Especially problematic are mass claims implicating primarily state law that are national in scope and that result in multiple class-action filings in state and federal courts.

Overlapping, competing, and duplicative damages class actions generate unnecessary litigation and threaten to undermine the fairness of class resolutions. Unreasonable delay, unequal distribution of limited funds, and disparate verdicts on liability and damages raise serious questions of fairness. Under the current system, multiple class actions too often prevent the equitable resolution of mass claims and bring the judicial system into disrepute.

This year, in a report adopted by the American Bar Association, the ABA Task Force on Class Action Legislation stated:

> [T]he filing of multiple class actions on the same matters resulting in the pendency of overlapping or competing class actions in a number of courts [is] one of the most serious concerns with class action practice. Such overlapping class actions consume unnecessary litigation resources, encourage "gaming" of court filings, and risk inconsistent treatment of like cases. The Judicial Panel on Multi-District Litigation (MDL) permits consolidation of federal cases for pre-trial proceedings, and although a few states have similar devices for cases within their state, no such device exists for consolidating suits in different states. Thus, removal to a federal court would permit the invocation of MDL treatment that is not available when overlapping cases are pending in state courts.[1]

The problems that arise from overlapping, duplicative, and competing class actions have been studied for more than ten years by the Advisory Committee on Civil Rules, the Standing Committee on Rules of Practice and Procedure, and a Judicial Conference Ad Hoc Mass Torts Working Group. The RAND Institute for Civil Justice, the American Law Institute, the American Bar Association, and the American College of Trial Lawyers have complemented this work.[2] All these efforts have established convincing support for two propositions. First, the problems of multiple damages class actions in state and federal courts are serious and must be addressed. Second, these problems cannot be resolved by amending Federal Rule of Civil Procedure 23. Current jurisdictional statutes stand in the way, and this issue can only be addressed by Congress.

For these reasons, the Advisory Committee on Civil Rules and the Standing Committee on Rules of Practice and Procedure unanimously adopted a resolution recognizing that overlapping and duplicative class actions in federal and state courts threaten the resolution and settlement of such actions on terms that are fair to class members, defeat appropriate judicial

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[1]Report to the House of Delegates, § I. The ABA adopted the recommendations of the Task Force (Feb. 10, 2003).

[2]The Federal Judicial Center studied class action dispositions in four metropolitan district courts over a period of two years and found illustrations of unresolved duplicative filings.

supervision, waste judicial resources, lead to forum shopping, burden litigants with the expenses and burdens of multiple litigation of the same issues, and place conscientious class counsel at a potential disadvantage.[3] The Committees further resolved that "[l]arge nationwide and multi-state class actions, involving class members from multiple states who have been injured in multiple states, are the kind of national litigation consistent with the purposes of diversity jurisdiction and appropriate to jurisdiction in federal court," and that appropriate legislation could be crafted that would not unduly burden the federal courts or invade state control of in-state class actions. Accordingly, the Committees expressed their support for "the concept of minimal diversity for large, multi-state class actions, in which the interests of no one state are paramount, with appropriate limitations or threshold requirements so that the federal courts are not unduly burdened and the states' jurisdiction over in-state class actions is left undisturbed."[4]

The Judicial Conference Committee on Federal-State Jurisdiction has recognized the significance of these issues, and has given them careful and thoughtful consideration. While we believe its recommendations deserve careful scrutiny, we think the problems of multiple class action litigation require a legislative response.

1. Problems.

Cases filed in, or removed to, federal courts are subject to the coordination and consolidation procedures managed by the Judicial Panel on Multidistrict Litigation. These procedures have provided effective remedies for the problems inherent in duplicative and overlapping class actions. Centralization avoids the costs associated with multiple litigation and

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[3]Judge Wm. Terrell Hodges, chair, Judicial Panel on Multidistrict Litigation, supports the views and the conclusions contained in this Standing Rules Committee addendum report. Judge Hodges expresses his views on his own behalf and not on behalf of the panel. There was insufficient time to canvass the entire Multidistrict Litigation Panel.

[4]"Report of the Advisory Committee on Civil Rules" to Committee on Rules of Practice and Procedure (May 7, 2002) (attached as Appendix A).

permits a coordinated approach to the litigation. But there are no similar means to deal with parallel and competing actions in state courts. Those cases often are not removable because of the requirement of complete diversity. Consequently, actions covering the same or similar subject matter, with many of the same class members, may proceed in several states and the federal courts simultaneously.

Multiple and duplicative class actions undermine many of the purposes of the class action device: to eliminate repetitive litigation, promote judicial efficiency, and achieve uniform results in similar cases. Furthermore, the ability of a federal court to assert effective control over its own litigation can be easily thwarted by the competing actions. A federal court, except in bankruptcy, is ordinarily powerless to guard against these risks due to existing limits on jurisdiction and the rules of deference imposed by statutory and decisional law.

Because class-action defendants often have finite resources from which to pay judgments, multiple actions may result in inequitable distribution of recoveries, especially when successful suits or settlements drain the pot. In these situations, plaintiffs in subsequent actions may be denied rightful recovery by a defendant's lack of resources. In many cases, the defendant may seek protection under the bankruptcy code.

The ability to file nationwide or multistate class actions in state courts without the possibility of centralization leads to predictable imbalances. Competing groups of class counsel may vie to seize control of class litigation, bringing their version of the action to resolution ahead of cases pending in other courts, with the connected rewards for counsel. Or the same counsel or group of cooperating counsel may file suits in several courts, pressing ahead in one court or another as the course of apparent advantage indicates. Litigation in one forum may be used to gain leverage in another court by threatening to derail settlement negotiations.

Experienced judges, lawyers, and observers all agree that close judicial supervision is critical to the ultimate fairness of the class-action process. But such supervision may be defeated by multiple filings. That a court may deny class certification or disapprove a settlement does not prevent parties from shopping their actions elsewhere. The refusal of one court to certify a class or approve a settlement may lead not to attempts to achieve a more coherent class or a fairer settlement, but to refiling in other courts in the relentless quest for a different result. Multiple class actions have come to resemble the multi-headed Hydra: after a denial of class certification or settlement, the battle is fought in other venues. Because nationwide class actions can be filed anywhere, litigants have been able to steer their cases to a handful of courts that are perceived to be lax in applying class-action standards. This may be exploited by some plaintiffs' counsel to seek a settlement on terms especially favorable for themselves even where other counsel in parallel cases have declined to settle on such terms. Or a defendant confronting many actions in several courts may negotiate with different class counsel to find the settlement terms that least protect the class. "Coupon settlements" are well-known examples where the interests of the plaintiff class may have been subordinated as a result of these forces. Thus, the filing of multiple, overlapping class actions opens the way to the "reverse auction" or "race to the bottom," in which the interests of the class and appropriate judicial supervision are bartered away.

Furthermore, shopping of class actions encourages nationwide or multistate cases being decided by courts representing the policies of a single state, which may have little or no special interest in the litigation, when a national perspective may be more appropriate. These policies affect important interests, both as to the substance of claims and defenses, and also as to the appropriate use of class-action procedure. Under the current regime, certain counties draw high

numbers of class action filings, and certain state courts are being asked to set national policy on issues that affect interstate commerce, nationwide practices, and the national economy.

Competition among actions and courts too often thwarts the ability of most courts to achieve the desirable goals of class litigation: efficient litigation that fairly and adequately compensates plaintiffs, is consistent among class members, and grants defendants res judicata. Voluntary cooperation among courts has not been able to ensure fulfillment of these goals. Experience over many years suggests that these goals can be achieved only by establishing authority to manage mass litigation through some form of consolidation.

In sum, there are manifold inefficiencies and inequities that result from the filing of duplicative, overlapping class actions in multiple jurisdictions. Where the actions are filed in multiple federal courts, the Judicial Panel on Multidistrict Litigation routinely acts to coordinate the litigation and to control the excesses. When the actions are pending in multiple state and federal jurisdictions, however, there is no such panel or coordination. And this lack of coordination creates the opportunity for destructive forum shopping in which unfair advantage may be taken of class members, of other class counsel, of defendants, and of the judicial system—a system that can ill afford to expend resources on duplicative, complex litigation.

2. Rules Committees' Response.

For several years, the Advisory Committee on Civil Rules has deliberated over possible rules changes to address these problems. After ten years of studying and discussing the problems, the Advisory Committee circulated for comment three sets of proposed amendments designed to limit the problems of overlapping class actions. After extended comments and discussion, including a class-action conference sponsored by the Advisory Committee at the University of Chicago Law School in October 2001, the Committee determined that any attempt to address

these problems through rulemaking faced substantial obstacles to workable, effective solutions—most importantly, the limits of the Rules Enabling Act and the Anti-Injunction Act. As a result, the Committee determined that changes to Rule 23 could not significantly address the problems of state-court actions that compete with federal class actions.[5]

The problems of multiple and competing class actions cannot be addressed without considering the allocation of jurisdiction of the state and federal courts. This inquiry necessarily implicates principles of federalism and judicial workload. Only Congress can effectively address these issues.

3. The Concept of Minimal Diversity.

For several years, Congress has considered bills that would establish a "minimal diversity" basis for federal class action jurisdiction, permitting federal courts to consider large class actions whenever any single plaintiff is a citizen of a state different from any defendant. Minimal diversity would permit eligible class actions to be filed in, or removed to, federal court, where they could be subject to the procedures of the Multidistrict Litigation Panel, reducing the number of overlapping and competing class actions and increasing the effectiveness of judicial supervision of class actions.

Legislation adopting minimal diversity for large class actions must strike the proper balance between legitimate state-court interests and federal-court jurisdictional benefits, while avoiding undue increase in the federal court workload.[6] This determination should take into consideration such factors as the aggregate amount in controversy, the size of the class, the percentage of the class who are citizens or residents of the forum state, the relationship of the

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[5] See Appendix A, "Report of the Advisory Committee on Civil Rules," at 13.

[6] In 2002, there were 2,916 class actions commenced in federal court, 600 of which were based on diversity jurisdiction. Annual Report of the Director of the Administrative Office of the United States Courts.

defendants to the forum state, standards for removal, and the existence of duplicative or overlapping cases.[7]

Congress has the constitutional authority to enact a minimal diversity provision. The complete diversity requirement, first recognized by the Supreme Court in *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806), "is based on the diversity statute, not Article III of the Constitution." *Newman-Greene, Inc. v. Alfonzo-Larrian*, 490 U.S. 826, 829 n.1 (1989); *see also Caterpillar Inc. v. Lewis*, 519 U.S. 61, 68 n.3 (1996); *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 531 (1967) ("[I]n a variety of contexts this Court and the lower courts have concluded that Article III poses no obstacle to the legislative extension of federal jurisdiction, founded on diversity, so long as any two adverse parties are not co-citizens."). In the past, Congress has enacted laws recognizing expanded diversity jurisdiction. The Multiparty, Multiforum Trial Jurisdiction Act of 2002, 28 U.S.C. § 1369 (enacted November 2, 2002), The Y2K Act, 15 U.S.C. § 6614 (enacted July 20, 1999); and the much earlier interpleader statute, 28 U.S.C. § 1335 (enacted June 1948), are all examples.

Congress's authority to adopt minimal diversity jurisdiction under Article III provides ample authority to address class-action problems. Additionally, the American Bar Association Task Force on Class Action Legislation has noted that, "given the legislative finding of impact on interstate commerce, the commerce clause of Article I may provide constitutional authority for expanding federal-court jurisdiction regarding overlapping and multistate class actions." The Task Force also recognized the importance of "appropriate limitations to leave within the jurisdiction of state courts those class actions in which a state's interests are stronger than federal interests."

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[7] Similar factors were included in the ABA's Task Force on Class Action Litigation and the ALI recommended proposal on complex litigation.

In the past, the Judicial Conference has endorsed the concept of extending minimal diversity jurisdiction to multistate complex litigation. In March 1988, it approved in principle the creation of minimal-diversity federal jurisdiction to consolidate multiple litigation in state and federal courts involving personal injury and property arising out of a "single event" (JCUS-MAR 88, pp. 21-22). This position was reiterated in March 2001 when the Judicial Conference supported H.R. 860, the "Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 2001." In 1990, The Federal Courts Study Committee recommended the adoption of minimal diversity jurisdiction for "major multi-party, multi-forum litigation." Minimal diversity for mass litigation has also been endorsed by the Department of Justice in earlier legislation.[8] The ALI in its complex litigation project also proposed extending minimal diversity to allow a centralized judicial panel to remove class action cases to federal court. And as mentioned, the ABA recently adopted recommendations noting that "concerns over class action practices could be addressed with federal legislation providing for expanded federal court jurisdiction."

4. The Class Action Fairness Act of 2003.

One attempt to balance these concerns is reflected in the "Class Action Fairness Act of 2003," S. 274, 108th Congress, 1st Session. The bill provides that any plaintiff class member or any single defendant can file in—or remove to—federal court a class action in which one class member is a citizen of a state different from any one defendant. Eligible cases must involve a class with at least 100 members, and their claims must, in the aggregate, exceed $2,000,000. The statute also demarcates a class of cases of overriding state interest that are not subject to minimal

[8]H.R. Rept. No. 370, 107th Cong., 2d Sess., at 36-38 (2002) (letter dated March 1, 2002, from Daniel J. Bryant, Assistant Attorney General, noting that "[t]he Department supports this change [amendments to Federal diversity jurisdiction and removal procedures contained in H.R. 2341, the Class Action Fairness Act of 2001], which recognizes the Federal interest in such significant litigation. In addition, providing for consistent and uniform Federal adjudication of these claims will protect States and their citizens from other State courts' legal rulings from which there is no recourse."

diversity jurisdiction. Where the "substantial majority" of class members and the "primary defendants" are citizens of a single state, and that state's law primarily governs the claims, minimal diversity jurisdiction would be unavailable. Also, if the "primary defendants" are states, state entities, or state officials against whom a federal court may be foreclosed from ordering relief (most often because of sovereign immunity), the case is not subject to the minimal diversity provision.

Whether the particular provisions of a minimal diversity bill strike the proper balance between state interests, federal court workload, and the benefits of federal jurisdiction is subject to legitimate debate.[9] Amount-in-controversy and class-size requirements are among the appropriate factors to be considered, but the precise terms can only be worked out in the legislative process. Rather than focus on particular provisions, which may well change, it would be better at this time to address broader considerations. Such an approach would encourage Congress to address the problem of overlapping class actions through minimal diversity while preserving an appropriate balance between federal and state courts.[10]

5. General Objections.

The Committee on Federal-State Jurisdiction has expressed its opposition to this legislation in two ways. First, it objects generally to solutions incorporating the minimal diversity concept as inappropriately divesting the state courts of jurisdiction over these cases, citing federal workload and concerns with "long-recognized principles of federalism." And second, assuming

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[9]In 1999, the Executive Committee, on behalf of the Judicial Conference, expressed its opposition to earlier legislation that provided minimal diversity jurisdiction in cases involving 100 class members and $2 million because of workload and federalism concerns (JCUS-SEP 99, p. 45).

[10] Congress should also be encouraged to preserve the Rules Enabling Act process. S. 274 contains provisions that conflict with Federal Rule of Civil Procedure 23. We believe these statutory amendments to Rule 23 are unwise. The procedures specified by the Rules Enabling Act provide the best route to amending the procedural rules. Proposed rule changes should be subject to the full deliberation of the Rules Committees, subject to notice and comment, and subject to approval by the Judicial Conference, the Supreme Court and, ultimately, Congress.

some form of minimal diversity legislation may pass, it suggests specific alternative requirements for enactment.

a. Workload Concerns.

Gauging any increase in the federal workload caused by a minimal diversity provision is necessarily speculative. The Congressional Budget Office estimated that "at least a few hundred additional cases would be heard in Federal court each year" under provisions of earlier minimal diversity legislation, which contained provisions similar to the ones in S. 274.[11] From what we know, this estimate seems reasonable.

In assessing the workload, it must be remembered that many cases filed in both state and federal court are duplicative. Of the 2,916 class actions commenced in federal court in 2002, more than half were filed against the same defendants, many of which were likely competing and duplicative class actions, often filed on the same day or shortly thereafter. And of the 600 diversity class actions, more than two-thirds were filed against defendants already defending cases filed as class actions.[12] Although these numbers do not answer the question how many state-court class action filings are duplicative or overlapping, they may cast some light on the scope of the general phenomenon.

When suits are in federal court, they are subject to centralization. One of the primary benefits of minimal diversity legislation would be the ability to coordinate overlapping actions. It seems likely that many of the cases that would be subject to minimal federal diversity jurisdiction overlap with, or are duplicative of, existing federal class actions. Consequently, the number of

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[11] H.R. Rept. No. 370, 107th Cong., 2d Sess., at 28 (2002). CBO recognized that the number of class actions filed in federal court as a result of the legislation "is highly uncertain." It expects that a few hundred additional cases would be heard in federal court. CBO did estimate that each additional class action would cost the federal government $20,000 and that the added class actions would cost a total of $6 million, apparently estimating that 300 additional class action cases would be heard in federal court ($20,000 x 300 = $6 million).

[12] See Appendix B for a breakdown of federal court class-action filings.

new, separately adjudicated class actions in federal court is likely to be consistent with the CBO's estimate of an additional 300 cases. Amount-in-controversy and class-size requirements are obvious ways to limit the number of cases that would be heard in federal court, and could be adjusted as needed to minimize any significant effect on the federal caseload. Moreover, the assignment of class actions centralized in federal court would often fall within the purview of the Judicial Panel on Multidistrict Litigation, which can distribute class action cases among the courts to ensure that no single court is overburdened.[13]

b. Federalism Concerns.

Principles of federalism support the concept of minimal diversity for nationwide or multistate actions. Article III creates federal jurisdiction for controversies between citizens of different states. The diversity jurisdiction provision seeks to protect interests of states other than the forum state and to foreclose possible bias against out-of-state litigants. These concerns are arguably at their greatest in nationwide or multistate class actions, which may be the paradigm case for federal diversity jurisdiction. Minimal diversity in appropriate cases would facilitate the harmonious disposition of litigation that affects the interests of citizens of many states and, through their citizens, affects the many states themselves. Current jurisdictional standards do not promote these principles; instead, they prevent the cases arguably most appropriate for federal diversity jurisdiction from reaching a federal forum.

Currently, an ordinary $76,000 slip-and-fall case between two parties who are citizens of different states is subject to federal jurisdiction, while actions involving thousands of litigants from every state, and with millions of dollars in controversy, are often kept out of federal court.

[13]In another respect, this legislation might alleviate the federal workload. Multiple and overlapping cases in state courts can impair the ability of federal judges to adjudicate and manage the cases already before them, often resulting in much additional work.

Thus, cases of significant federal interest, where the concerns arising from state-court adjudication of interstate disputes are at their greatest, are excluded from a federal forum. The historical purpose of diversity jurisdiction would be best served in large, multistate class actions.

The Federal Courts Study Committee's Subcommittee on the Role of the Federal Courts and Their Relation to the States recognized this anomaly in 1990 (Judge Richard A. Posner, chair, Congressman Robert W. Kastenmeier, Chief Justice Keith A. Callow of the Washington Supreme Court, and former Solicitor General Rex E. Lee). Though advocating that general diversity jurisdiction be abolished, the Subcommittee recommended that diversity jurisdiction be preserved in complex, multistate cases, and suggested that "Congress may want to broaden jurisdiction from its present boundaries in these cases by eliminating the complete diversity requirement." Report to the Federal Courts Study Committee, March 12, 1990, at 458.[14]

The problems of multiple and duplicative class actions are of recent vintage. The rise of modern class-action litigation can be traced to the 1966 changes to Rule 23. Yet even in the modern era of recent civil litigation, there has been a sea change in the nature of complex litigation involving class actions and the aggregation of individual cases and also in the complex relationship between federal and state jurisdiction, especially regarding duplicative and competing class actions. Changing the diversity requirements for these kinds of cases would not reflect a rejection of longstanding principles of federalism, but rather, reflect the application of those principles to a new problem.

[14] The subcommittee's recommendation was adopted by the full Federal Courts Study Committee, which stated, "Congress should amend the multi-district litigation statute to permit consolidated trials as well as pretrial proceedings and should create a special federal diversity jurisdiction, based on minimal diversity authority conferred by Article III, to make possible the consolidation of major multi-party, multi-forum litigation." Federal Courts Study Committee Report, at 44 (April 2, 1990).

Within our traditional notions of federalism, the question arises whether mass claims truly national in scope affecting litigants in many states should be handled in the courts of a single state. That there are class actions that are more appropriately adjudicated in state courts[15] does not undermine the conclusion that minimal diversity jurisdiction is appropriate in many large class actions. There is no principled reason why these concerns cannot be incorporated into appropriate legislation containing a minimal diversity provision.

6. Specific Reactions to S. 274.

In addition to its general objections, the Committee on Federal-State Jurisdiction has offered specific recommendations with respect to a minimal diversity law. We think the Committee's recommendations highlight the difficulty of striking the appropriate balance—a task better left to the legislative process.

The Committee's recommendation would exclude from federal jurisdiction cases in which "(1) substantially all members of the class are citizens of a single state, or (2) the claims arise from death, personal injury, or physical property damage within a state." The first is similar to the first exception in S. 274, but it omits the requirements that the primary defendants be residents of the same state and that the state's own law be the primary law governing the case.

The Committee's proposal would prevent the filing in, or removal to, federal court of most actions where the class is limited to nearly all in-state plaintiffs—no matter what the primary defendants' relationship is to the state or whether that state's law governed—so long as one non-diverse defendant was joined. The likely consequence would be that a defendant might find itself litigating statewide class actions in many states. While avoiding potential concerns

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[15] The American Law Institute has suggested that "'single disaster' events, area pollution cases, and insurance coverage litigation" may exemplify such cases. Complex Litigation Project, Proposed Final Draft, April 5, 1993, at 209.

about a state court applying its law nationwide, many of the consequences associated with multiple actions would remain. A federal court could still find itself competing with as many as fifty overlapping class actions; the litigants might still find themselves competing for recovery; and the defendants might still seek protection under the bankruptcy laws, because they offer the sole means of consolidating and resolving multiple claims.[16]

The Committee's proposal also would exclude from federal jurisdiction cases where substantially all plaintiffs are from the same state and a primary defendant is from out of state. While these cases might implicate the forum state's interests more than cases not falling under the exception, certain cases would remain of significant national interest and might be appropriate candidates for federal jurisdiction.

The Committee on Federal-State Jurisdiction's second exclusion would likely have a similar effect. It would prevent federal filing or removal on the basis of minimal diversity whenever "the claims arise from death, personal injury, or physical property damage within the state." These are cases in which the states may be viewed as having a special interest in the outcome. But these claims are regularly heard by federal courts in individual litigation under existing diversity jurisdiction. If personal injuries occur nationwide, this provision would permit multiple class actions in multiple states.[17] The approach in S. 274 would provide a greater possibility of a coordinated response in such cases.

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[16] Removal of these S. 274 requirements would mean that federal jurisdiction in any case in which the class was limited to nearly all in-state plaintiffs could easily be avoided by including at least one plaintiff and one defendant - that share a common citizenship, even if the primary defendants were from a different state and the law applied was that of a different state. The result would not materially change the present situation: a suit in which residents of a single state sued a primary defendant from another state, and joined one in-state defendant, could not be removed. This would be true even if the likelihood of recovery against the in-state defendant was slight, and even if, as frequently happens, the in-state defendant is ultimately dismissed after the one-year limitation on removal.

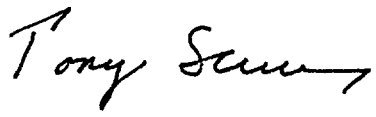
[17] It is uncertain what effect this provision would have in addition to the Committee on Federal-State Jurisdiction's first proposal. Many of these cases would likely have plaintiffs who are "substantially all" from the forum state, making them likely candidates for the first exception. It is unclear how many additional cases would be excepted from federal minimal diversity jurisdiction.

The Committee on Federal-State Jurisdiction's proposals highlight the difficult policy decisions that need to be made. We do not believe the Judicial Conference should involve itself in the specific provisions of proposed legislation. At this point, any positions on details may not be relevant to later revisions of a bill. But more importantly, the substantive provisions of the legislation engage sensitive and powerful political considerations. We think it is sufficient for present purposes to endorse the concept of minimal diversity if enacted in a way that respects state courts' legitimate interests in adjudicating cases of genuine state character, and that avoids an undue increase in the federal court workload.

For these reasons, we believe that special diversity jurisdiction, based on the minimal diversity authority conferred by the Constitution, may be appropriate to the maintenance of major multi-party, multi-forum class action litigation in the federal courts. If Congress determines that certain class actions should be brought within the original and removal jurisdiction of the federal courts on the basis of minimal diversity of citizenship and an aggregation of claims, Congress should be encouraged to include sufficient limitations and threshold requirements so that federal courts are not unduly burdened and states' jurisdiction over in-state class actions is left undisturbed. Moreover, Congress should not detract from the Rules Enabling Act process by legislating amendments to Federal Rule of Civil Procedure 23, particularly given that amendments to Rule 23 have been approved by the Judicial Conference and are now pending

before the Supreme Court of the United States. Further, we should continue to explore additional approaches to the coordination and consolidation of overlapping or duplicative class actions.

Respectfully submitted,



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TO: **Honorable Anthony J. Scirica, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **Honorable David F. Levi, Chair**
Advisory Committee on Civil Rules

DATE: **May 7, 2002**

RE: **Report of the Advisory Committee on Civil Rules**

Over the last ten years, the Advisory Committee on the Civil Rules has undertaken an intensive consideration and review of Rule 23, the class action rule. This ongoing review by the Committee is the first review of Rule 23 following the thorough reworking of the Rule in the 1966 amendments. But in the now almost 40 years since that time, Rule 23 has figured prominently in the explosive growth of large scale group litigation in federal and state courts, and has both shaped and — in its interpretation and application — been shaped by revolutionary developments in modern complex litigation. The drafters of the 1966 amendments knew that after some appropriate period of time it would be important to reconsider what they had done. We are well underway in that process even as we must take account of continuing rapid changes in Rule 23 practice.

A historical perspective may be helpful in placing our current efforts in context and considering our future course.

I. A Brief History of Rule 23

The class action has its ultimate roots in the English Court of Chancery and the bill of peace. It was a practical rule of joinder where joinder was otherwise impractical. The American courts adopted the procedure in the 19th and early 20th centuries. Federal Equity Rule 48, in place from 1842 to 1912, provided for a class action, but, significantly, also provided that the "decree shall be without prejudice to the rights and claims of all the absent parties." In 1938, Rule 23 was included in the new Federal Rules of Civil Procedure. The Rule was adopted with little fanfare or discussion. It divided class actions into three categories: the "true," the "hybrid," and the "spurious." These categories, with their infelicitous names and formalistic attributes, proved difficult to apply. After almost 30 years of experience, the Advisory Committee entirely rewrote the Rule in 1966, and it is that Rule that we still use today.

The 1966 Rule kept a three-part structure but the structure became functional: (b)(1) classes for situations in which necessary parties under Rule 19(a) were too numerous to be joined, including claims involving a common fund, (b)(2) classes for claims involving common injunctive relief, particularly intended for civil rights litigation, and, finally, (b)(3) class actions for damage based on predominant common issues. The 1966 rule provided new procedural protections, for example, by requiring notice to (b)(3) class members of certification, and, for all classes, notice of a proposed settlement. It provided that class members could be bound if they did not affirmatively opt out of (b)(3) damage class actions. In adopting the "opt out" approach, the Committee apparently had in mind small claim, consumer class actions in which no one class member would have a sufficient interest to litigate an individual claim and in which the forces of inertia might be greater than a potential class member's desire to participate, given the small

stakes involved. The 1966 Rule also clarified that any judgment would bind the members of the class in all certified class actions.

It is not entirely clear what the Committee of 1966 expected. Professor Arthur Miller, who was involved with the work of the Committee at that time, tells us that "Nothing was in the Committee's mind . . . Nothing was going on. There were a few antitrust cases, a few securities cases. The civil rights legislation was then putative. . . . And the rule was not thought of as having the kind of application that it now has." But, as Professor Miller went on to explain, the Rule, perhaps by serendipity, caught the wave of "the most incredible upheaval in federal substantive law in the history of the nation between 1963 and 1983, coupled with judicially-created doctrines of ancillary and pendent jurisdiction."

An esteemed member of the 1966 Committee, John Frank, corroborates Professor Miller's recollection. According to Mr. Frank, the Committee of 1966 was operating in "a world to which the litigation explosion had not yet come. The problems which became overwhelming in the 80's were not anticipated in the 60's. The Restatement (Second) of Torts and the development of products liability law [were] still in the offing. The basic idea of a big case with plaintiffs unified as to liability but disparate as to damages was the Grand Canyon airplane crash. A few giant other cases were discussed but . . . were expected to be too big for the new rule."

It is probably fair to say that the 1966 Committee was most interested in facilitating civil rights class actions for injunctive relief under (b)(2), and in this respect the Committee's intentions were fully realized. But it is also fair to say that the Committee did not foresee the scale or range of litigation that was unleashed by the opt out damage class action in (b)(3). Certainly, the Committee then had no expectation that the Rule would be used in the context of

dispersed mass torts, a concept that the Committee could not have been familiar with. The Committee did know about mass accidents, but considered that "A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways." So much for the persuasive power of Committee notes!

According to the then Reporter of the Committee, Harvard Professor Benjamin Kaplan, "It will take a generation or so before we can fully appreciate the scope, the virtues, and the vices of the new Rule 23." In 1991, well past a generation in the world of civil litigation, the Judicial Conference asked the Committee to begin a reconsideration of the Rule in light of the upheaval in modern civil litigation since adoption of the Rule.

II. The Advisory Committee Begins its Reconsideration of Rule 23

There have been several phases in the Committee's work although many continuing themes. At the beginning, the Committee developed a comprehensive re-draft of the Rule. In 1992, Judge Pointer, Chair of the Committee, relying on a 1986 proposal from the Litigation Section of the ABA, prepared a revision that did away with the three part (b)(1), (b)(2), and (b)(3) classification, provided for opt-in classes at the court's discretion, and provided that exclusion from the class could be conditioned upon a prohibition against institution or maintenance of a separate action. Notice was made more flexible such that sampling notice might be permitted depending on the circumstances. This far-reaching draft was presented to the Standing Committee but then withdrawn on the Standing Committee's advice that further consideration would be required before such a sweeping proposal could be published for public

comment. In the years since that time, we have engaged in that further consideration and can now appreciate how prescient and sophisticated that first effort was.

The Committee then began the painstaking and careful inquiry into class action practice in which we are still engaged. The new Chair of the Committee, Judge Higginbotham, pioneered the investigatory model that the Committee continues to use to good effect whenever it considers a complex issue. The model combines multiple informal opportunities for involvement by judges, interested academics, members of the bar, and bar organizations, with targeted empirical work. Thus, the Committee was educated at several class action and mass tort conferences, drawing together academic experts and experienced practitioners. The Federal Judicial Center undertook an empirical study of federal class actions. See Willging, Hooper & Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* (1996). The Reporter circulated a variety of proposals informally to gather guidance from members of the bar. Eventually, several different proposals were published resulting in extraordinarily helpful comment from practitioners and others.

The Committee first turned to the all important certification decision in (b)(3) class actions. The Committee was concerned that the certification decision was the critical issue in class action litigation, and yet the rule included no provision for interlocutory appeal. The Committee was also concerned that the Rule's certification criteria were too loose, leading to improvident certification of actions that were more appropriately handled on an individual basis. The Committee was told repeatedly that class actions were rarely tried and that once the class was certified, defendants were placed under overwhelming pressure to settle. In this portion of its inquiry, the Committee considered a variety of additional certification factors such as the

probable success on the merits of the class claims and whether the public interest in, and the private benefits of, the probable relief to individual class members justified the burdens of the litigation. From this work, one significant amendment emerged: Rule 23(f) providing that a court of appeals may, in its discretion, entertain an appeal from an order of a district court granting or denying class action certification. This provision has apparently had its intended effect of developing the case law on certification thereby providing greater guidance to district judges on the certification decision. In addition, the testimony on the various additional certification criteria provided the Committee with a wealth of new information about class action practice.

The possible tightening of certification criteria required the Committee to consider whether litigation classes should be subject to more exacting standards than settlement classes. The Committee's attention was drawn to the question because of the Third Circuit decision in *Georgine/Amchem* holding that settlement classes must be certified as if they were litigation classes. Because of the importance of settlement to class action litigation, the Committee considered whether a class action might be certified for settlement even if the class could not be certified for trial. A proposed (b)(4) was circulated for public comment in 1996 at the same time as the additional (b)(3) certification criteria. Proposed (b)(4) provided for certification where "the parties to a settlement request certification under subdivision (b)(3) for purposes of settlement even though the requirements of subdivision (b)(3) might not be met for purposes of trial." All of the 23(a) requirements would still apply, however.

The response to this proposal was as copious and thoughtful as the response to the new certification criteria. Opponents of the change warned the Committee that class action

settlements were already prone to unfairness to class members and that this proposal would exacerbate the situation by permitting class counsel to negotiate from a position of weakness, knowing that unless there was a settlement, the class could not be certified for trial. This controversial topic was put aside when the Supreme Court granted certiorari in *Amchem*. The result of *Amchem* has been to permit a certain flexibility in the certification of settlement classes. However, some continue to advise the Committee that there is need for still greater flexibility for settlement classes.

The Committee then entered the present phase of our inquiry. At this point the Committee not only had the comments from the hearings on the proposed amendments, but also the benefit of the RAND Institute for Civil Justice's case study of ten class actions eventually published in 2000 as *Class Action Dilemmas: Pursuing Public Goals for Private Gain*. In addition, in 1998, on the recommendation of Judge Niemeyer, the Chief Justice authorized the formation of an ad hoc working group to study mass torts that would bring together representatives of several Judicial Conference committees under the leadership of the Civil Rules Committee. The Working Group was given one year to study the problems associated with mass tort litigation and to submit a report. Judge Niemeyer designated Judge Scirica as chair of the Working Group. The papers and report of the Working Group provided additional information about the operation of Rule 23 in the context of mass torts and illuminated many of the problems, including the problems associated with multiple, overlapping class actions. See *Report on Mass Tort Litigation* (1999). The Committee was also assisted by appointment of a sub-committee, chaired by Judge Rosenthal, and appointment of a special reporter, Professor Richard Marcus, to support Professor Cooper.

Building on the RAND study, the hearings on the settlement class proposal, and the report of the Working Group on Mass Torts, the Committee determined to provide better judicial supervision of settlements and of class counsel. Proposed new 23(e) requires disclosure of all settlement terms, a fairness hearing, and findings by the court. The court may permit class members who believe that the settlement is unfair to exclude themselves from the settlement. Proposed new Rule 23(g) and (h) provide the court a framework for appointing, monitoring, and compensating class counsel. Notice and the timing of the certification decision also receive attention in the new proposals.

III. Unfinished Business

As this history may demonstrate, the Committee has reason to be both humble, given the complexity and magnitude of the issues, but also proud of its work over the past ten years. It has done much to enhance judicial supervision of the class action process and provide new tools for judicial review, at both the trial and appellate levels.

There are several areas that may yet deserve additional attention and that have not received definitive answers from the Committee. Each has proven controversial and difficult. The first is whether the Rule should incorporate a separate standard for settlement classes. This is a familiar topic. We may wish to reconsider this issue in light of case law under *Amchem* as well as the new proposal on settlement review, including the permission to class members to exclude themselves from settlement upon review of the terms. There may be need for further empirical work in this area. Second, the unique questions surrounding the settlement of future claims in mass tort cases may also merit continued study. Third, we may wish to reconsider the opt in/ opt out question. The 1966 Committee adopted an "opt out" provision but did not foresee

the consequences of doing so. The Committee's 1992 draft, giving the court discretion to certify the class as an opt in or opt out class action, might provide a starting point. Alternatively, we might reasonably conclude that further study of this question is likely to generate more controversy than any clear consensus for change.

Finally, we should complete the substantial inquiry already begun into the difficult problem of overlapping and competing state and federal class actions. Certain aspects, the more modest ones, may be amenable to rule making. The more fundamental issues do not seem so amenable, at least not without specific legislative authorization. At the January meeting the Committee expressed a unanimous consensus that the problems created by overlapping class actions are worthy of congressional attention and that some form of minimal diversity legislation might provide an appropriate answer to some of the problems. The remainder of this memorandum is addressed to this issue.

IV. Overlapping Class Actions

The Committee has been told repeatedly in a variety of forums, by both defense and plaintiff counsel, and without contradiction, that as Rule 23 is reformed to enhance judicial supervision of class counsel, the deliberateness of the certification decision, and the judicial review of settlements, an ever growing number of cases will be filed in those state courts where this kind of supervision is perceived to be less demanding. This results often in multiple filings of multi-state diversity class actions in both federal and state courts. Yet this result is precisely the outcome that the class action device was designed to prevent. The purpose of the class action device is to eliminate repetitive litigation, promote judicial efficiency, permit small claims to find a forum, and achieve uniform results in similar cases. But as our Reporter has noted,

"duplicative class litigation is destructive of just these goals . . . . Multiple filings can threaten appropriate judicial supervision, damage the interests of class members, hurt conscientious class counsel, impose undue burdens of multiple litigation on defendants, and needlessly increase judicial workloads."

The problems generated by overlapping, duplicative, and competing class actions have commanded the attention of many observers. According to the American Law Institute's 1994 Complex Litigation Project, the problems caused by multiple class actions are so pressing that "[w]e are in urgent need of procedural reform to meet the exigencies of the complex litigation problem." "Repeated relitigation of the common issues in a complex case unduly expends the resources of attorney and client, burdens already overcrowded dockets, delays recompense for those in need, results in disparate treatment for persons harmed by essentially identical or similar conduct, and contributes to the negative image many people have of the legal system." American Law Institute, *Complex Litigation: Statutory Recommendations and Analysis* (1984-1994) at 9. Although the Federal Judicial Center's study focused on class-action dispositions in only four federal districts over a period of two years, it found several illustrations of unresolved duplicating filings, pp. 14-16, 23-24, 78-79, 163-164 (Tables 5-7). The RAND study confirmed the seriousness of the problem. Part of this project involved intense study of ten class actions. In four of the ten, class counsel filed parallel actions in other courts. In five of the ten, other groups of plaintiffs' attorneys filed competing actions in other jurisdictions. Only two of the ten cases did not experience either type of additional filings. More recent information suggests that the frequency and number of overlapping class-action filings are growing.

Legislative proposals to deal with overlapping actions have been pursued for several years. In March 1988 the Judicial Conference approved in principle creation of minimal-diversity federal jurisdiction to consolidate multiple litigation in state and federal courts involving personal injury and property damage arising out of a "single event." This position was confirmed in March 2001 when the Judicial Conference supported H.R. 860, the "Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 2001." The 1990 *Report of the Federal Courts Study Committee* recommended, pp. 44-45, that Congress "should create a special federal diversity jurisdiction, based on the minimal diversity authority conferred by Article III, to make possible the consolidation of major multi-party, multi-forum litigation." Congress has considered many bills that would provide easier access to federal courts by initial filing or by removal from state courts. In 2002 the House of Representatives passed one of these bills, H.R. 2341.

One specific source of the concerns reflected in these legislative proposals has arisen from state-court filings on behalf of classes that include plaintiffs from other states. Many of these actions seek — and frequently win — certification of nationwide classes. Membership in these classes may overlap with classes sought — or actually certified — in other courts, state or federal. Pretrial preparations may overlap and duplicate, proliferating expense and forcing delay now in one proceeding, now in another, as coordination is worked through. Settlement negotiations in one action may be played off against negotiations in another, raising the fear of a "reverse auction" in which class representatives in one court accept terms less favorable to the class in return for reaping the rewards that flow to successful class counsel. Moreover, the certification of nationwide or multi-state class actions in one state court poses a threat to the

proper allocation of decisionmaking in a federal system. Individual state courts may properly apply the policy choices of the residents of that state to those residents. But local authorities ought not impose those local choices upon other states and certainly not on a nationwide basis.

After studying these proposals and the underlying problems, the Civil Rules Advisory Committee authorized its Reporter to issue a "Call for Informal Comment: Overlapping Class Actions" in September 2001. The call for comment included draft amendments of the class-action rule that might reduce the incidence of forum shopping and settlement shopping.[1]

Responses to the call for comment were provided in tandem with reactions to the proposed amendments of Civil Rule 23 that were published for comment in August 2001. The most concerted responses were provided in major segments of the class-action conference sponsored by the Advisory Committee at the University of Chicago Law School in October 2001. Many additional responses were provided in the written comments and oral testimony at hearings in San Francisco (November 2001) and Washington, D.C. (January 2002). Although this process does not match any model of rigorous social-science research, it provided repeated evidence of actual experiences that must not be allowed to continue. This evidence is outlined in the

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[1] The call for comment included three sets of possible rule amendments. The first set attempted to end the relitigation of the same class certification issues by providing that a federal court that refuses to certify a class because it does not meet the standards of Rule 23(a)(1) or (2) or 23(b)(1),(2), or (3) "may direct that no other court may certify a substantially similar class." The second set of proposals sought to reduce "settlement shopping," in which counsel may take the same settlement disapproved by one court into another court for approval. The proposal provided that "A refusal to approve a settlement . . . on behalf of a [certified] class . . . precludes any other court from approving substantially the same settlement." The third set of proposals addressed the potential clash between multiple, overlapping cases and provided that a federal court could "enter an order directed to any member of the . . . class that prohibits filing or pursuing a class action in any other court."

summaries of comments and testimony prepared for the Advisory Committee. The question is not whether something should be done, but what should be done and by whom.

One means of doing something about the problems created by overlapping class actions might be through new provisions in the Civil Rules. Some relatively modest provisions might fit comfortably within the authority of the Rules Enabling Act, 28 U.S.C. § 2072. Rule 23, for example, might address the effect one federal court should give to the refusal by another federal court to certify a class action or to approve a class-action settlement. Modest provisions, however, would provide no more than modest benefits — there is no general feeling that federal courts have experienced particular difficulties in working through overlapping actions in different federal courts. The Judicial Panel on Multidistrict Litigation works well within the federal system to achieve coordination and consolidation. Provisions that might address overlapping class actions in state courts, on the other hand, are not likely to be seen as modest. Serious objections were made to the illustrative drafts in the informal call for comments. Both Enabling Act limits and Anti-Injunction Act limits were invoked. There may be room to adopt valid rules provisions in the face of these objections, but to do so might test the limits of rulemaking authority thus inviting litigation over the rules themselves.

In light of these constraints on rulemaking, and because of the sensitive issues of jurisdiction and federalism implicated by overlapping class actions, Congress would seem the appropriate body to deal with the question. There is a secure basis in the Article III authorization of diversity jurisdiction to consider various approaches to consolidating overlapping class actions by bringing them into federal court. One approach, exemplified in several of the bills that have been before Congress, would establish minimal diversity jurisdiction in federal court for class

actions of a certain size or scope. This approach may embody some elements of discretion; several recent bills bring discretion into the very definition of jurisdiction in an attempt to maintain state-court authority over actions that involve primarily the interests of a single state. Another approach would be to rely on case-specific determinations whether a particular litigation pattern is better brought into federal-court control. This approach could be implemented by authorizing the Judicial Panel on Multidistrict Litigation to determine whether a particular set of litigations should be removed to federal court. The potential advantage of this approach would be that it could prove more flexible over time, enabling the federal court system to respond to actual problems as they arise and to stay on the sidelines when the problems are effectively resolved in the state courts. Yet another approach would be to authorize individual federal courts to coordinate federal litigation with overlapping state-court actions, by enjoining state-court actions, if necessary, when the state-court actions threaten to disrupt litigation filed under one of the present subject-matter jurisdiction statutes. While this approach may have the apparent advantage of leaving federal jurisdiction where it is, it also has the obvious disadvantage of potential conflict and tension between the court systems.

Careful study will suggest still other approaches. Many of the possible approaches are likely to provide the occasion for adapting present class-action procedures or developing new ones. The rules committees, acting through the Enabling Act process, can make important contributions. The nature of these contributions will depend on the nature of the underlying legislation; some forms of legislation may present such particular opportunities that supplemental rules-enabling authority should be included in the legislation.

Any proposal to add to federal subject-matter jurisdiction must be considered with great care. But the problems that persist with respect to overlapping and competing class actions are precisely the problems of multistate coordination that can claim high priority in allocating work to the federal courts. It is very difficult for any single state court to fairly resolve these problems, and nearly as difficult for state courts to act together in shifting ad hoc arrangements for cooperation. The apparent need is for a single, authoritative tribunal that can definitively resolve those problems that have eluded resolution and that affect litigation that is nationwide or multi-state in scope.

V. Minimal Diversity as a Possible Partial Solution

Having delved deeply into this topic, the Committee is in a position now to make the following findings and recommendations to the Standing Committee on the Rules of Practice and Procedure and the Committee on Federal-State Jurisdiction concerning the problems posed by overlapping class actions:

1. Beginning in 1991, the Advisory Committee on Civil Rules has undertaken a searching review of class action practice under Rule 23. This review has involved several conferences, close consultation with judges, members of the bar and bar organizations, publication for comment of several proposals, consideration of extensive testimony and comments on the published proposals, review of empirical studies, and creation of the Working Group on Mass Torts and adoption of its report;

2. On the basis of this extensive inquiry, the Advisory Committee finds that overlapping and duplicative class actions in federal and state court create serious problems that: (a) threaten the resolution and settlement of such actions on terms that are fair to class members, (b) defeat

appropriate judicial supervision, (c) waste judicial resources, (d) lead to forum shopping, (e) burden litigants with the expenses and burdens of multiple litigation of the same issues, and (f) place conscientious class counsel at a potential disadvantage;

3. The Advisory Committee has given close consideration to several rule amendments that might address the problems of multi-state class actions but concludes that these proposals test the limits of the Committee's authority under the Rules Enabling Act;

4. Large nationwide and multi-state class actions, involving class members from multiple states who have been injured in multiple states, are the kind of national litigation consistent with the purposes of diversity jurisdiction and appropriate to jurisdiction in federal court. Federal jurisdiction protects the interests of all states outside the forum state, including the many states that draw back from the choice-of-law problems that inhere in nationwide and multi-state classes;

5. With respect to multi-state class actions, the Advisory Committee agrees with the recommendation of the Federal Courts Study Committee that Congress eliminate the complete diversity requirement in complex, multi-state cases to make consolidation possible;

6. Minimal diversity legislation could be crafted to bring cases of nationwide scope or effect into federal court without unduly burdening the federal courts or invading state control of in-state class actions;

7. Minimal diversity legislation could resolve or avoid some of the problems posed by conflicting and duplicative class actions;

8. The federal and state judicial systems, class members, other parties to the litigation, and conscientious class counsel will benefit from the efficient supervision of these multi-forum, multi-state class actions in one federal forum;

9. For these reasons the Advisory Committee on the Federal Rules of Civil Procedure respectfully recommends to the Standing Committee on the Rules of Practice and Procedure and to the Committee on Federal-State Jurisdiction that they support the concept of minimal diversity for large, multi-state class actions, in which the interests of no one state are paramount, with appropriate limitations or threshold requirements so that the federal courts are not unduly burdened and the states' jurisdiction over in-state class actions is left undisturbed.

Federal Class Actions Filed Against the Same Defendant

The overall number of class actions steadily increased by 55%, from 1,881 in 1998 to 2,916 in 2002. But the number of class actions commenced against the same defendants increased by 180%, from 549 in 1998 to 1,535 in 2002, significantly outpacing the increase in overall class actions commenced. The following chart shows the impact of cases filed against the same defendants on the overall number of class actions:

Class Actions Commenced in Federal Court

	1998	1999	2000	2001	2002
Overall Number of Class Actions	1,881	2,133	2,393	3,092	2,916
Filed Against Same Defendant	549	876	920	1,613	1,535
Excluding Actions Filed Against Same Defendant	1,332	1,257	1,473	1,479	1,381

The number of class-action filings in "mega-cases" can be dramatic. For instance, there were 286 class actions filed against Sulzer Orthopedics, Inc., and 88 against Bayer Corp. in 2002, 134 separate class actions against Sulzer in 2001, and 167 class actions against AC&S Inc. in 1999. The number of cases filed against the same defendant, however, usually ranges from about 5 to 20.

A similar, but more striking, pattern is evident regarding diversity-based class actions commenced in federal court during this same five-year period – the rate of filings against the same defendants tripled from 1998 to 2001, and jumped in 2002 to a figure more than sevenfold the number for 1998.

Diversity-Based Class Actions in Federal Court

	1998	1999	2000	2001	2002
Overall Number of Diversity-Based Class Actions	254	286	321	410	600
Filed Against Same Defendant	57	72	136	197	420
Excluding Actions Filed Against Same Defendant	197	214	185	213	180

These statistics were compiled from data listing defendants in class actions and dates of filing for 1998 through 2002 provided by the Statistics Division, Office of Human Resources and Statistics, Administrative Office of the United States Courts.

ADDENDUM TO THE REPORT OF THE

JUDICIAL CONFERENCE COMMITTEE ON FEDERAL-STATE JURISDICTION

TO THE CHIEF JUSTICE AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

CLASS ACTION LEGISLATION

The Committee continued its discussion of certain problems associated with class action litigation and potential solutions. The Committee reviewed the class actions bills (H.R. 2341; S. 1712) pending at the conclusion of the 107th Congress, which were expected to form the framework of legislation to be introduced and actively considered in the 108th Congress. (Such legislation was subsequently introduced in February 2003.[1]) H.R. 2341, which passed the House of Representatives in March 2002, and S. 1712 both would have dramatically expanded access to the federal courts in class action litigation by permitting the use of minimal diversity of citizenship to create original jurisdiction where the aggregated total of the amount in controversy exceeded $2 million.

[1]On February 5, 2003, Senators Charles Grassley (R-IA), Herb Kohl (D-WI), Orrin Hatch (R-UT), Thomas Carper (D-DE), Arlen Specter (R-PA), Zell Miller (D-GA), Lincoln Chafee (R-RI), and Richard Lugar (R-IN) introduced S. 274, the "Class Action Fairness Act of 2003." The jurisdictional provisions of that bill are virtually identical to the class action bills considered in the 107th Congress.

The class action provisions in those bills would have created exceptions to federal jurisdiction through minimal diversity where: (1)(a) the "substantial majority" of the members of the proposed plaintiff class and the "primary defendants" are citizens of the state in which the action was originally filed; and (b) the claims asserted will be governed primarily by the laws of that state; (2) the "primary defendants" are states, state officials, or other governmental entities against whom the district court may be foreclosed from ordering relief; or (3) the number of proposed plaintiff class members is less than 100. The legislation would have required a district court to dismiss any action that failed to satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure but would have permitted amended claims to be re-filed in state court.[2] In addition, the bills would have permitted removal to federal court by any defendant without the consent of all defendants, or by any plaintiff class member even if that member was not a named or representative class member, without the consent of all members of such class. The Congressional Budget Office concluded that under such legislation "most class-action lawsuits would be heard in a Federal district court rather than a state court."[3]

The Committee focused on four problems with class action litigation that have been cited by supporters of minimal diversity legislation. The first problem is universal venue, whereby plaintiffs can choose a state (perceived to be a favorable forum) in which the corporation does business and structure the claim so as to preclude federal jurisdiction. The second problem is the reverse auction, where defendants negotiate among competing plaintiffs' attorneys to obtain

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[2]Although the legislation would have permitted re-filing in state court, it also would have provided for subsequent removal of actions to federal court and the application of the standards of Rule 23 to determine certification. It thus contemplated some circularity of process and likely would have deprived state courts of the ability to apply their own certification procedures to determine whether a proceeding could go forward as a class action.

[3]H.R. Rep. No. 107-370, at 27 (2002).

global peace at the lowest cost to the defendant company, sometimes resulting in an insignificant monetary award to each member of the plaintiff class (including coupon settlements) but a significant payment to the attorneys. The third problem concerns successive or duplicative filings of class actions in state and federal courts, which allow parties to relitigate issues relating to the adequacy of a proposed settlement or the propriety of class certification. Finally, proponents argue that to facilitate the certification of nationwide classes, some state courts have applied the laws of their forum to all claims in the action, even where that state law is inconsistent with the laws of other jurisdictions.

Proponents believe that the above-mentioned minimal diversity legislation will resolve such problems by transferring most class actions to the dockets of federal courts. Those cases involving common questions of fact would then be subject to consolidation by the Judicial Panel on Multidistrict Litigation (JPML).[4] In addition, such cases would be subject to Rule 23 of the Federal Rules of Civil Procedure, which federal judges have construed as restricting the certification of nationwide class actions where the rule of decision differs among states.[5]

When such legislation was introduced in the 106th Congress, the Judicial Conference through its Executive Committee, upon the recommendation of this Committee, expressed its

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[4]28 U.S.C. § 1407. That statute also requires that such transfer serve the "convenience of the parties and witnesses," and "promote the just and efficient conduct of the action." The section does not, however, permit retention of the case for trial. *See* Lexecon, Inc. v. Milberg, Weiss, 523 U.S. 26 (1998). Thus, a transferee court handles pretrial proceedings and must return each claim to its court of origin at the conclusion of such proceedings if settlement does not occur. Nevertheless, multidistrict litigation (MDL) courts have decided motions to certify the class as part of their coordinated treatment of pretrial matters. *See, e.g.*, In re Masonite Siding Litigation, 170 F.R.D. 417 (E.D. La. 1997) (rejecting motion for certification of nationwide class in case transferred from Mississippi to Louisiana through JPML).

[5]*See* Isaacs v. Sprint Corp., 261 F.3d 679, 682 (7th Cir. 2001) (diversity class action involving nationwide class of state-law claims from the 48 states and the District of Columbia; variability in laws of the several states precluded certification of class on manageability grounds); and Castano v. American Tobacco Co., 84 F.3d 734, 741-44 (5th Cir. 1996) (ordering decertification of nationwide class action; district courts must consider the impact of variation in applicable law from state to state when deciding whether common questions predominate for class certification purposes).

opposition to the class action provisions in those bills (H.R. 1875; S. 353, 106th Cong.), in their existing form. JCUS-SEP 99, p. 45.[6] That opposition was based on concerns about the conflict between the jurisdictional provisions and long-recognized principles of federalism, as well as serious concerns about the docket effect of those bills in shifting a significant number of class actions from the state to the federal courts.[7] Those bills encompassed class actions involving state-created claims that arise under the law of property, tort, contract, and state regulatory statutes—areas of the law that traditionally have been considered the province of state courts and state legislatures. Simply moving virtually all class actions into federal court would deprive the state courts of the ability to hear and resolve much of this litigation and perhaps encourage the proliferation of individual state claims.

When the Conference transmitted this position to Congress in 1999, it also expressed its willingness to explore with Congress less intrusive and burdensome approaches to address current problems with class action litigation. Over the past several meetings, this Committee has sought the advice of class action experts while considering the severity of various problems and possible solutions.[8] At its January 2003 meeting, the Committee reviewed information indicating

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[6]When the Judicial Conference took its 1999 position, the Executive Committee also considered the views of the Committee on Rules of Practice and Procedure. The Rules Committee expressed the view that the Conference should defer taking a formal position on the legislation at that time, and instead should encourage Congress to continue exploring with the judiciary less intrusive and burdensome approaches. Although that approach was rejected, correspondence from the federal judiciary to Congress noted a willingness to explore less intrusive alternatives. In June 2002, the Rules Committee requested this Committee to embrace a general statement supporting the use of minimal diversity, which it declined to do because of its continuing study of appropriate elements that might be suggested as a modification to any minimal diversity proposal.

[7]The number of class actions filed in federal court has doubled in the period from 1994 to 2001 (to a current level of 4,563), according to a recent study by the Federal Judicial Center. There is no general database collecting statistics for class actions filed in state courts, although recent research attempts to estimate such filings has indicated that they have outpaced the increase in federal filings.

[8]The Conference of Chief Justices (CCJ) expressed its opposition to class actions bills pending in the 106th and 107th Congresses. In a March 28, 2002 letter to Senator Patrick Leahy (D-VT), the CCJ stated that "[a]bsent hard evidence of the inability of the state judicial systems to hear and decide fairly class actions brought in state courts, we do not believe that such a procedure [as was contemplated in the legislation] is warranted." The letter

that class action legislation would be actively considered in the 108th Congress, and, given the desire of proponents to move forward, the Committee determined that it was now appropriate to formulate a recommendation to be considered by the Conference.

The Committee still feels that the Conference should continue to oppose the class action provisions in minimal diversity legislation such as has been introduced in past Congresses because, as previously explained, an inappropriate shift of state cases into federal court would likely occur. The Committee also recognizes the possibility that Congress might still approve a bill with minimal diversity jurisdictional provisions, and, thus, the Committee focused on what position the Conference should take if class action legislation based on minimal diversity seems likely to emerge from the new Congress.

In that context, this Committee endorsed an approach that it believes will preserve a greater role for the state courts than the role contemplated in the previous legislative proposals. That approach would create new exceptions to any class action legislative proposal relying on minimal diversity jurisdiction. Those exceptions would preclude the use of minimal diversity where (1) substantially all members of the class are citizens of a single state, or (2) the claims arise from death, personal injury, or physical property damage within the state.[9] Parties could not

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also referred to a similar letter sent by the CCJ in 1999 in which the CCJ characterized the bill pending in that Congress ". . . as an unwarranted incursion on the principles of judicial federalism underlying our system of government."

[9]The new exceptions proposed by this Committee are directed at the first exception included in prior class action bills, such as H.R. 2341. That bill recognized an exception for class actions in which a substantial majority of the members of the plaintiff class and the primary defendants are citizens of a single state. The Committee's proposed approach would preclude the use of minimal diversity where substantially all members of the class are citizens of a single state, and would leave the determination of the citizenship of the defendants, and the satisfaction of the complete diversity requirement, to be made in accordance with current jurisdictional rules. Under the Committee's approach, state courts would thus retain jurisdiction of state law class actions in which virtually every member of the plaintiff class (and the class representative) were citizens of a single state so long as one or more non-diverse parties were properly joined as defendants. Because the existing law of complete diversity would still be applicable, the Committee's approach would place a somewhat broader range of state court class actions beyond the reach of minimal diversity jurisdiction than would the primary defendant approach of H.R. 2341.

shift class actions falling within these exceptions to federal court on the basis of minimal diversity.[10] Actions that fall outside the auspices of the minimal diversity scheme would be subject to the current jurisdictional requirements governing diversity jurisdiction, which provide that the claims of each member of the class must exceed the jurisdictional threshold of $75,000 (a requirement that would rule out federal jurisdiction over many consumer class actions) and look to the citizenship of the plaintiff class representative for purposes of determining the citizenship of the class.

The Committee's proposed exceptions to minimal diversity would provide for continuing access to state court in class actions that have strong connections to the forum state. They seek to carve out those types of class actions where state court control appears to be an appropriate response—cases involving consumer fraud, based upon state common law theories of liability or state consumer protection statutes, and cases where individuals have suffered personal injury or tangible property damage in a particular state. Thus, consumer breach of contract class actions could remain in state court so long as the class included substantially all in-state citizens and named non-diverse defendants or asserted claims less than the jurisdictional threshold.[11] Similarly, in cases involving death, personal injury, or physical property damage within the state, plaintiffs would be free to file such actions in state court, and would be free to include non-

[10]The Committee notes that class action bills in the 107th Congress included other exceptions that might possibly result in additional cases remaining in state courts.

[11]It may still be possible, under the terms of the Committee's approach, that more than one state may entertain class actions involving in-state citizens that address the same basic subject, particularly in the consumer rights field. While such parallel litigation may occur, it would go forward on behalf of distinctive classes of in-state plaintiffs and would not present some of the same problems that now arise with overlapping multi-state class actions. Such parallel litigation would, moreover, leave the states free to determine legal questions for themselves in keeping with basic principles of federalism.

resident members (so long as such class members had claims arising from events within the state) without triggering a minimal diversity provision for removal.[12]

This alternative would not interfere with congressional efforts to rely on minimal diversity to secure an appropriate federal role in consolidating litigation involving multistate class actions. In those cases, the regime of minimal diversity would still apply, and common claims would be consolidated by the JPML, assuming that much of that litigation would be pursued in federal court either originally or by removal. As for class actions involving claims of personal injury or physical property damage, the connection of the claims to a particular forum state eliminates the prospect of duplicative or overlapping nationwide filings, and avoids much of the need for federal judicial involvement.

In addition, the Committee recommends an increase in the amount in controversy in class action legislation. Such bills from the past Congress provided for an aggregation of claims to reach the jurisdictional threshold and placed that level at $2 million. In the context of class action litigation where multi-million dollar suits are common, $2 million is nominal and would allow relatively modest claims to be swept into federal court. The Committee believes that Congress should raise the amount in controversy to perhaps at least $10 million. That amount would track the figure agreed upon for federal class action litigation under the Y2K Act.[13]

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[12]The Committee discussed the relationship between the proposal to fashion exceptions for property damage and personal injury in its suggested alternative and the recently adopted Multiparty, Multiforum Trial Jurisdiction Act of 2002 (Pub. L. No. 107-273). It was noted that the Multiparty Act applies only to situations in which a single event or occurrence gives rise to at least 75 deaths, following which there would be consolidated treatment in federal court of such matters. By contrast, the proposed alternative seeks to preserve jurisdiction for state courts in a variety of cases in which personal injuries occur but fail to give rise to any deaths or an insufficient number of deaths to trigger federal jurisdiction under the Multiparty Act. If Congress were to enact class action legislation incorporating the Committee's suggested alternative, federal jurisdiction could still be invoked under the Multiparty Act if the requirements of that Act were met.

[13]The Y2K Act was signed into law on July 20, 1999, as Public Law No. 106-37, with the intent of limiting litigation related to the Year 2000 computer problems. It provided that U.S. district courts shall have exclusive jurisdiction over any Y2K action that is brought as a class action, while raising the threshold for such class actions

This Committee is of the view that its proposed exceptions to the use of minimal diversity, accompanied by an increase in the amount in controversy, are preferable to some of the prior provisions in class action bills relying on minimal diversity. It continues to believe, however, that other means of addressing legitimate problems should be explored within the federal judiciary. For example, the judiciary could explore expanding coordination and communication between MDL transferee judges and state judges having similar class actions. This coordination might extend to the timing or use of discovery information. The Committee also discussed whether there is a need for an entity (or structured interaction) with both state and federal judge participation to facilitate this communication and coordination. Other approaches, whether formal or informal, might be identified that could promote the common goal of litigation efficiencies, which would benefit both the state and federal court systems and all parties to class actions.

> **Recommendation:** That the Judicial Conference continue to oppose class action legislation that contains jurisdictional provisions modeled upon those in the bills introduced in the 106th and 107th Congresses. If Congress determines that class actions should be brought within the original and removal jurisdiction of the federal courts on the basis of minimal diversity of citizenship and an aggregation of claims, Congress should be encouraged to raise the jurisdictional threshold and to fashion exceptions to such jurisdiction that would preserve a role for the state courts in the handling of in-state class actions. Such exceptions for in-state class actions should include those in which substantially all members of the class are citizens of a single state, or where the claims arise from death, personal injury, or physical property damage within the state. Further, the Conference should

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to $10 million in claims (aggregated).

continue to explore additional less intrusive and burdensome approaches to the consolidation and coordination of overlapping or duplicative class actions.

Respectfully submitted,

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U.S. Judicial Conference

Committee on the Administration of the Bankruptcy System

REPORT OF THE SUBCOMMITTEE ON MASS TORTS

This report is a preliminary analysis, by the Subcommittee on Mass Torts of the Committee on the Administration of the Bankruptcy System, of certain recommendations of the National Bankruptcy Review Commission for amendments to the Bankruptcy Code regarding mass torts; it does not propose or endorse specific action with respect to those recommendations. This report does not represent the policy of the Judicial Conference of the United States.

U.S. Judicial Conference

Committee on the Administration of the Bankruptcy System

REPORT OF THE SUBCOMMITTEE ON MASS TORTS

Future claims -- that is, claims that have not yet ripened (or indeed that may not yet exist) but may well do so in the future -- present a great challenge to the adequate legal treatment of mass torts in the bankruptcy system. In 1997, the National Bankruptcy Review Commission (the "Commission"), partly in elaboration of § 524(g) of the Bankruptcy Code, made five Recommendations for revision of the Code to standardize the treatment of mass future claims in bankruptcy. See National Bankruptcy Review Commission, Bankruptcy: The Next Twenty Years 316-18 (1997). The Recommendations are set forth in full in the Appendix to this report. Briefly stated, the Recommendations are to amend the Bankruptcy Code expressly to cover "mass future claims" and "holders of mass future claims" (defined in terms of a modified "conduct" test); to provide for appointment of future claims representatives; expressly to permit estimation of future claims; to limit (as through "channeling injunctions") the assets against which such claims could be satisfied; and to permit discharge of such claims. Id.

In February 2000, the Committee On Federal-State Jurisdiction of the U.S. Judicial Conference asked its sister Committee On The Administration Of The Bankruptcy System (the "Bankruptcy Committee") to review the Recommendations. In June 2000, following a preliminary review, the Bankruptcy Committee determined (as stated in its September 2000 Report to the Judicial Conference) that "the Commission recommendations do have merit and should be examined more closely," and created a Subcommittee on Mass Torts (the "Subcommittee") for this purpose. The Subcommittee did not undertake a comprehensive

analysis of the Commission's Recommendations, but identified certain significant problems with the Recommendations for consideration. It grouped these issues under the headings: (1) due process (including both adequacy of notice and adequacy of representation); (2) estimation; (3) statutes of limitations and repose; and (4) conflicts of interest and inappropriate incentives.

Following further study, the Subcommittee herewith presents its views as to each of the specific problem areas previously identified. By doing so, the Subcommittee does not intend to opine that these are the only issues that need to be resolved in addressing mass torts in the bankruptcy context; the Subcommittee was simply asked to comment on the five specific Recommendations proferred by the Commission.

1. Due Process

As the Supreme Court noted in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950):

> "'The fundamental requisite of due process of law is the opportunity to be heard. Grannis v. Ordean, 234 U.S. 385, 394. . .' This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest."

The Commission's Recommendations raise concerns with respect to both prongs of the due process issue – notice and the opportunity to be heard – because they are specifically designed to include in the bankruptcy process future claimants to whom meaningful individualized notice cannot be given and who cannot actually appear in the case.

A. The Problem of Adequate Notice

In dispersed mass tort cases involving exposure to toxic substances that may produce injury or death after a long latency period, there are potentially four different categories of claimants.

First, there are those claimants who have been exposed and have already developed some illness. These claimants are present claimants, and can receive individualized notice or constructive notice through publication or other means reasonably likely to inform the recipient.

Second, there is the category of those who know that they have been exposed but do not yet show signs of illness.[1] Those in this category know that there is some risk of future illness, or can be informed of that fact, but they do not presently know that they will develop symptoms, when such symptoms will occur, or to what degree of severity. Nevertheless, because these claimants exist and either know or can be notified of their risk, they can also be provided notice of a bankruptcy case, either individually or constructively.

Third, there is the category of those who have been exposed, but do not know of the exposure. They are an " unselfconscious and amorphous" group, Amchem Products, Inc. v. Windsor, 521 U.S. 591, 628 (1997); they may or may not know of the risk of future illness to those who are exposed, but would not connect that risk to themselves because they do not know of their exposure. It follows that they cannot be given either individual or constructive notice of a bankruptcy case that would have any meaning to them; even were they to receive actual notice

[1] In his article, Bankruptcy as a Vehicle for Resolving Enterprise-Threatening Mass Tort Liability, 148 U. Pa. L. Rev. 2045 (2000), Professor Alan N. Resnick refers to these claims, as a group, as "unmanifested." Id. at 2067.

of the case, they would not recognize that they were creditors and that the case could affect their rights.

Fourth, there are those who have not yet been exposed but may be exposed in the future. These potential claimants have claims that are unknowable, not merely unknown or "unmanifested." Providing notice to such a group, even by employing those methods for constructive notice that have been found appropriate when such methods are not "substantially less likely to bring home notice than other of the feasible and customary substitutes," Mullane, 339 U.S. at 658, is impossible.

Under the Commission's Recommendations, debtors would be able to affect and discharge "mass future claims." A "mass future claim" would 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 non-bankruptcy law that is created by one or more acts or omissions of the debtor," if certain things have occurred. See Commission Recommendation 2.1.1. By adopting this "conduct" test, the Commission essentially gives a claim to all those who could be harmed by a debtor's act or omission, whether or not the claim has yet accrued or is even known, that is, all those included in any of the four classes described above.

It is true that the proposed definition of "mass future claim," found at section 2.1.1 of the Commission's Recommendations, does contain further limitations, including:

> . . . .
> (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.

But even with these limitations, the holders of future claims need not be able to be "identified" but, instead, can be merely "described" with reasonable certainty.[2] Claimants who are unknown and incapable of identification cannot receive prior personal notice of the proceedings, let alone of the determination of their claims.

Apparently the Commission believed that the appointment of a "mass future claims representative" (coupled with "every reasonable effort to provide notice to individual claimants" through "press releases, public relations 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," see Commission Recommendation 2.1.2) substitutes for the due process requirement that each claim holder receive personal notice because the future claims representative will adequately represent the interests of the absent (non-notified) claimants.

The Supreme Court in Mullane emphasized that due process does not require personal notice in all cases. Indeed, in the case of persons "missing or unknown, employment of an

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[2] Professor Resnick argues that even the concept of claimholder identification or description can be eliminated because there is a provision for a future claims representative (discussed infra). Interestingly, nowhere in the Commission's comments is there any reference to the "description" requirement, while the other "gatekeeping" provisions are discussed to some extent. It is unclear from the Commission's comments what type of description would suffice. Could it be as general as "all persons who have been or may be exposed, directly or indirectly, to debtor's product"? If so, the "limitation" does not limit the class of claimants. If not, bankruptcy will be unable to achieve closure with respect to future claims.

indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights." 339 U.S. at 317. The Court there upheld published (constructive) notice to beneficiaries of a trust whose interests or addresses were unknown to the trustee. But neither Mullane nor any case following it involved claimants who were not only unknown to the party sending the notice but who were in essence unknown to themselves and who therefore would not recognize themselves as the intended targets of the notice even were the notice actually received. While the Commission does recognize the potential for due process concerns in its approach, see Bankruptcy: The Next Twenty Years, supra, at 331 n. 818, it nevertheless concludes that its Recommendations "reflect the intention to provide notice ... to the greatest extent and to promote fairness to mass future claimants."

Admittedly, some courts have already been willing to deal with future claims in bankruptcy proceedings, and discharge them, where the "conduct" test was employed and there was no actual notice.[3] Nevertheless, it is unclear whether the Due Process Clause permits either constructive notice or use of a future claims representative as a complete substitution for notice when meaningful notice cannot be given.

Indeed, in Amchem Products, Inc. v. Windsor, 521 U.S. 591, 628 (1997), the Supreme Court characterized this question as "grav[e]." Because the Court concluded that the district

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[3] See, e.g., Grady v. A.H. Robins Co., 839 F.2d 198, 201 (4th Cir. 1988) (holding that "claim" existed prior to filing of bankruptcy petition where shield was inserted before bankruptcy); In re Texaco Inc., 182 B.R. 937, 955 (S.D.N.Y. 1995) (stating that publication was sufficient to discharge potential environmental claims of landowners); In re Waterman S.S. Corp., 141 B.R. 552, 556 (S.D.N.Y. 1992) (finding that claims of future asbestos claimants were not discharged where attempt to notify them was unreasonable and Court did not appoint a representative), vacated on other grounds, 157 B.R. 220 (S.D.N.Y. 1993).

court's certification of a broad class of asbestos claimants for settlement purposes did not comply with Federal Rule of Civil Procedure 23, the Court did not rule on the notice given to the purported class.[4] However, the Court questioned "whether class action notice sufficient under the Constitution and rule 23 could ever be given to legions so unselfconscious and amorphous" as those members of the class who did not know of their exposure or without current disease. Id. at 628.[5]

The Commission's Recommendations differ from the class action notice procedures employed in Amchem. While actual notice might be attempted to the maximum extent possible, the Commission contemplated that there would be instances where a complete substitute for

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[4] Similarly, in Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999), in which the Court found impermissible certification of a mandatory settlement class of future asbestos claimants under Fed. R. Civ. Pro. 23(b)(1)(B) where the fund was limited only by agreement of the parties, the Court declined to address whether the efforts to give notice to potential class members were sufficient. Id. at 841 n.19.

[5] The Supreme Court made the following observation in Amchem:

> Impediments to the provision of adequate notice, the Third Circuit emphasized, rendered highly problematic any endeavor to tie to a settlement class persons with no perceptible asbestos-related disease at the time of the settlement. Many persons in the exposure-only category, the Court of Appeals stressed, may not even know of their exposure, or realize the extent of the harm they may incur. Even if they fully appreciated 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.
> . . . .
> . . . In accord with the Third Circuit . . . we recognize the gravity of the question whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous.

521 U.S. at 628 (emphasis added).

notice by way of a class representative would be relied upon as sufficient. How the Supreme Court would view that, in the context of the Bankruptcy Code, is difficult to say. Does the presence of a class representative reduce due process concerns? Can a class representative receive effective constructive notice on behalf of individuals who could not be provided actual notice? Does the presence of a class representative sufficiently satisfy due process to enable a bankruptcy court to resolve future claims that likely could not be resolved in a district court because of due process concerns?

As Professor Gibson notes in her article on this topic, the Supreme Court has not granted certiorari in a mass torts bankruptcy case. S. Elizabeth Gibson, A Response to Professor Resnick: Will this Vehicle Pass Inspection?, 148 U. Pa. L. Rev. 2095, 2098 n.18 (2000). One could argue that there are considerations in bankruptcy that could weigh differently on the Supreme Court's view of the requisite notice. Nonetheless, as Professor Gibson notes, the general due process requirement is "that everyone be afforded her own day in court." Id. at 2107. Therefore, while it could be said that bankruptcy policy considerations might support a relaxed notice requirement to facilitate resolution of claims, policy considerations did not in the end prove sufficient to avoid impediments in the class action setting in Amchem. See Samuel Issacharoff, Class Action Conflicts, 30 U.C. Davis L. Rev. 805, 805 (1997).

As Professor Gibson notes further, in her penultimate footnote:

> Even if the "practicalities and peculiarities" of a mass tort bankruptcy case, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950), justify the provision of constructive notice to such future claimants, I fear that it pushes the limits of due process too far to include within the group of future claimants persons who, at the time of bankruptcy, have not been exposed to the offending product. It cannot even be pretended that someone

> who has not yet purchased, used, or come in contact with a product that precipitates a mass tort bankruptcy will have any reason to understand that the bankruptcy might affect her rights.

Id. at 2115 n. 97.

B. Future Claims Representatives

The second aspect of procedural due process is the requirement that each person have an opportunity to be heard. The Commission's Recommendations contemplate that future claimants will not, as a rule, personally appear in a bankruptcy case (although they could elect to do so, assuming they could effectively be given notice of their right to do so). Instead, their interests will be protected by the appointment of a mass future claims representative who would have the exclusive power to file a claim or claims on behalf of the class, to cast votes on its behalf, and to exercise all of the powers of a committee appointed pursuant to Section 1102. See Commission Recommendation 2.1.2.

The issues raised by the selection and responsibilities of a future mass tort claims representative in bankruptcy proceedings, especially as contemplated by the proposals of the Commission, are usefully considered against the backdrop of similar issues presented by Rule 23 class representatives in dispersed mass tort class actions involving future claimants. In the context of the class action, the courts have made it clear that special obligations and limitations accompany a judge's ability to appoint an adequate representative for such claimants.

In Amchem, supra, the Supreme Court addressed the problem of future claimants in the context of settlement class actions. The Court held that a settlement class of asbestos claimants must meet all the requirements for certification under Rule 23(a) and (b), with the sole exception of trial manageability. In so holding, the Court emphasized that the presence of different

categories of future claimants raised a large obstacle to finding adequacy of representation, a necessary finding for class certification. The Court's discussion made it clear that the problem was not limited to Rule 23, but included constitutional dimensions.

In Amchem, the Court rejected a proposed nationwide settlement of thousands of asbestos claimants. The Court held that the class representatives and their attorneys did not meet the Rule 23(a)(4) adequacy of representation requirement because of conflicts of interest. Those who were presently ill wanted a large present recovery. Those who were exposed but had no manifest symptoms, one category of future claimants, had a conflicting interest in preserving assets for future claims. The Court raised doubts that those who did not even know that they had been exposed to asbestos could ever be given constitutionally sufficient notice. However, such claimants have an identifiable interest in preserving sufficient assets far into the future to respond to the most delayed manifestations of illness.

After Amchem, courts and parties have addressed the problem of cohesiveness in determining whether adequacy of representation can be assured for the purpose of Rule 23. Courts have relied upon subclasses, with separate representation for each discrete group, to avoid problems of conflicting settlement goals and disparate interests that would otherwise defeat Rule 23 certification. For example, courts have attempted to create subclasses, and appoint separate representatives for each subclass, of presently injured and exposed but not yet injured groups, who require measures to assure that assets are available in the future to respond to later manifestations of symptoms; of groups for whom medical monitoring is the only present relief; and of groups that have similar types of present symptoms, who require the availability of an appropriate amount of assets in the present to respond to present symptoms.

The success of these efforts has varied. In some cases, the courts have found that proposed classes present such diversity of interests that adequacy of representation cannot be achieved even with subclasses and separate representatives. See, e.g., Walker v. Liggett Group, Inc., 175 F.R.D. 226 (S.D. W. Va. 1997) (refusing to certify for settlement a proposed class of past and present cigarette smokers, their families and estates, those exposed to secondhand smoke, and those who paid medical claims). Other courts have relied upon subclasses for different types of claims, particularly to separate out future claims, with separate representatives, to achieve cohesiveness and adequacy of representation. See, e.g., O'Connor v. Boeing N. Am., Inc., 185 F.R.D. 272, 275-76 (C.D. Cal. 1999); Cook v. Rockwell Int'l Corp., 181 F.R.D. 473 (D. Colo. 1998).

The Recommendations of the Commission with respect to future claims representatives must be analyzed against this background. Although the only limitation on inclusion of claims within a single class under the Bankruptcy Code is that such claims must be "substantially similar," 11 U.S.C. §1122, the Supreme Court's discussion in Amchem suggests that any classes created in bankruptcy should have "sufficient unity so that absent members can fairly be bound by decisions of the class representatives." 521 U.S. at 621. The Commission's Recommendations that "[e]ach 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 each other" is consistent with Amchem. However, the Recommendations are unclear as to the standards to be applied to the future claims representative and whether these standards are sufficient to meet due process requirements. See Bankruptcy: The Next Twenty Years, supra, at 332.

A future claims representative must not only represent a cohesive class, free of conflicting objectives, but must have a reasonably specific idea of whom she represents and have the power to do so adequately. So armed, the future claims representative for the class of exposed but not yet ill claimants should attempt to create as large a fund as possible to protect those who move from a quiescent to an active condition.

The Commission's Recommendations contemplate that each future claims representative would be empowered to vote on a plan of reorganization on behalf of her class of future claimants, with the number of votes determined by the reasonably estimated amount of future claims, to avoid giving a group of existing creditors more power than future creditors.

Such a future claims representative must also administer the fund created by the plan so as to assure that the fund is protected into the future and will grow to meet increasing demands. Such a future claims representative must pay out funds only under specifically enumerated circumstances to protect the interests of those who have moved from the category of future claimant to that of present claimant, while protecting the fund's ability to respond to those who remain in the future claimant category.

Specific standards governing the appointment and duties of the future claims representative are not set out in the Recommendations. However, while the pay-out from the fund might itself be considered an administrative task, depending upon the nature of the qualifications imposed upon the claimants, the duties imposed on the future claims representative are, under the Commission's proposals, fiduciary in nature. The fiduciary relationship is much like that between the administrator of an ERISA plan and beneficiaries under that plan. Many of the already established principles of insurance law and ERISA law could be applied to the future

claims representative as criteria governing the responsibility for amassing and preserving the fund, administering the fund, and paying claimants from the fund. For the foregoing reasons, the future claims representative should be considered a fiduciary.

A future claims representative possessing these powers and particulars may possibly avoid the due process objections earlier described. To draw again on the analogous principles from insurance and ERISA law, the presence of presently unknown claimants does not necessarily defeat or alter the ability to represent such interests, consistent with fiduciary obligations. The fiduciary nature of the responsibility the future claims representative owes the class of claimants represented is analogous to the responsibility of the insurance adjustor to the policy holder or the ERISA administrator to beneficiaries. The point here is not specifically to list all the powers and responsibilities of the future claims representative, but to suggest that there are sources of familiar and developed principles from which the duties and responsibilities could be derived and applied to the Recommendations.

C. Some Countervailing Considerations and Suggestions

Notwithstanding the potential due process problems described above, it is worth remembering that the Due Process Clause is designed to make the legal process work fairly, not to prevent it from working at all. As a practical matter, if procedures cannot be devised consistent with due process to provide for present protection of future claims and future claimants in the bankruptcy case of the mass tortfeasor, in many cases there will be nothing left to satisfy future claims and compensate future claimants when their injuries become manifest and they most deserve help. Accordingly, notwithstanding cases like Amchem, it may be that the

Supreme Court will not interpret due process so as to prevent bankruptcy courts from dealing with future claims in mass tort bankruptcies.

The key to the Commission's response to the due process concerns discussed above is the appointment of a future claims representative who, as mandated by the Commission's Recommendations and further discussed above, has a fiduciary responsibility to future claimants. Both state and federal law recognize that a fiduciary can sometimes act on behalf of a person who lacks notice without thereby offending due process, not just because of the legal fiction of "constructive notice" but because of the very strict standards to which the fiduciary will be held and the ultimate accounting she will have to render. Thus, for example, courts, consistent with due process, regularly appoint guardians to represent both infants, who will not have any meaningful notice of the guardian's actions until the infant reaches an age of understanding, and incompetents, who will never have any meaningful notice of the guardian's actions. The analogy to a future claims representative is not perfect – the guardian at least knows exactly who he is representing, whereas a future claims representative may not know her actual "clients" until sometime in the future – but the point is that due process should not be so rigid a concept as to preclude practical accommodations to situations where notice is inherently impossible at the very time when action is required.

If the future claims representative is to serve as a fiduciary, however, she must have a reasonably tight idea of the characteristics of the persons she serves, even if she does not yet know their identity. A somewhat narrower definition of "future claimant" than the one suggested by the Commission may therefore be in order. At a minimum, this Subcommittee would recommend that subparagraph "4" of the Commission's definition of a mass future claim be

amended so that it is limited, inter alia, to situations where "the holders of such rights to payments are known or, if unknown, can be identified or described with reasonable certainty and the nature of their rights to payment can be described with specificity" (new language underscored). Likewise, as suggested by the Commission itself and discussed further above, there must be separate future claims representatives to represent definably separate groups of future claimants in order to meet the concerns expressed by the Supreme Court in Amchem over conflicts of interest between members of a single class.

The fiduciary responsibilities of the future claims representative are not the only due process protection that future claimants will receive in a bankruptcy case. As the Commission notes, bankruptcy "rules requir[e] collective action, extraordinary disclosure requirements, and regular and extensive court supervision from the inception of the case . . . . " Bankruptcy: The Next Twenty Years, supra, at 340-41.

In practice, to be sure, some of these protections operate better in some contexts than in others. In a Chapter 7 liquidation, a failure to deal with future claims, however difficult, means, in effect, that future claimants will be deprived of any recovery whatever. If ever some substitute for personal notice would seem direly required, it would be in such a case. By contrast, in the case of a Chapter 11 reorganization there is at least the possibility of meaningful assets being available for future claimants even if no future claims representative is appointed, and, conversely, there is more of a danger of future claimants' rights being unfairly compromised if negotiated by a future claims representative who does not yet know exactly who the future claimants will be. But the protections afforded by a future claims representative for each class with fiduciary duties toward those class members should mitigate these concerns.

Will any or all of this be enough to satisfy the Supreme Court? Prof. Gibson, in her article cited above, is uncertain, noting that "the Court has not shown itself to be pragmatic in its approach to the judicial resolution of mass torts." Gibson, supra, 148 U. Pa. L. Rev. at 2116. Moreover, there are a wide variety of situations in which mass tort bankruptcies may arise, and it may be that a solution that satisfies due process in some such situations may not satisfy it in others. But the Supreme Court has recognized that, although due process generally protects one from an in personam judgment in a litigation to which he or she was not made a party, an exception exists "'when, in certain limited circumstances, a person, although not a party, has his interests adequately represented by someone with the same interests who is a party,' or 'where a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants, as for example in bankruptcy or probate.'" Ortiz, supra, 527 U.S. at 846, quoting Martin v. Wilks, 490 U.S. 755, 762 n.2 (1989) (citations omitted). Whether the combination of adequate representation by a future claims representative with the remedial scheme of bankruptcy satisfies due process concerns remains unresolved.

2. Estimation

The bankruptcy process is appropriate for disposition of mass tort claims, in part, because Section 502(c) of the Bankruptcy Code allows for estimation of present and future tort claims. However, as presently written, the function of Section 502(c) is so limited that, without modification, it would offer little benefit in a mass tort context. This is one of the reasons why, if bankruptcy is to play a successful role in resolving mass tort litigations (particularly those involving future claims), the Commission's proposal for estimation, or something akin to that proposal, would have to be enacted.

Section 502(c) of the Bankruptcy Code provides:

> (c) There shall be estimated for purpose of allowance under this section----
>
> > (1) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case; or
> >
> > (2) any right to payment arising from a right to an equitable remedy for breach of performance.

Section 502(c) is intended to facilitate allowance of claims against a bankruptcy estate. It permits the court to estimate the amount of a contingent or unliquidated claim for purposes of distribution of estate assets to the claimholder. Once the claim has been estimated, the estimated amount can be used to determine the holder's vote for or against a proposed Chapter 11 plan. (Acceptance by a class of creditors requires that a majority in number and at least 2/3 in the amount of claims actually voting vote to accept.) Because claims are payable in accordance with the statutory hierarchy, senior claims normally must be satisfied (by payment in full or acceptance by class) before payment of junior claims. Estimation of contingent or unliquidated claims thus fixes the amount necessary to satisfy such claims (or classes of claims), and therefore when junior claims can be paid. Ordinarily, a contingent or unliquidated debt is scheduled by the debtor, but for such a claim to be allowed, the claimholder must timely file a proof of claim. Once the proof of claim is filed, the claim can be estimated upon notice to the claimholder.

It is important to recognize that estimation of the claims of a class of future claimants under the Code is not the same as determination of liability and the amount of a particular claimant's recovery. In addition, to the extent that the Commission's Recommendations

anticipate that estimation will quantify the recovery to which classes of claimants are entitled, further amendment of the Code will be required.

Future claims are, by nature, unliquidated and in some instances may be contingent. The debtor may schedule such claims by group designation, but it is unlikely that they will be scheduled individually. Without identification of the claimholder(s), the claimholder(s) will receive no individual notice of the bankruptcy case, likely will not file a proof of claim, and will not receive notice of and therefore will not participate in the estimation process.

The Recommendations of the Commission do not solve all these problems, but they attempt to mitigate many of them. Recommendation 2.1.3 proposes amending § 502 to expressly empower the bankruptcy court to estimate mass future claims as a class and determine the amount of such mass future claims prior to confirmation of a reorganization plan for purposes of establishing the total distribution to be made in respect of such claims as well as for allowance and voting purposes. Recommendation 2.1.4 proposes expanding § 524 to authorize courts to issue in all cases involving future claims so-called "channeling injunctions," which would prohibit future claimants from pursuing any of the debtor's present or future assets other than those specifically designated assets that, as part of the plan of confirmation, had been placed into a trust to be administered by the future claims representative for the payment of future claims.

Although these two Recommendations would resolve or reduce many of the legal problems described above, they are not without difficulties of their own. The multiple contingencies inherent in the Commission's definition of future claims make it very difficult to estimate the dollar amount of future claims with a high degree of confidence; and, indeed, the limited experience with such estimation thus far (chiefly in the context of asbestos bankruptcies)

has been that the actual amount of future claims has sometimes materially exceeded both the estimated amounts and the value of the assets put aside for their satisfaction. But the Commission's Recommendations expressly provide that future claims will only apply to liabilities that are "reasonably capable of estimation," see 2.1.1(5), and the Subcommittee would expect that this would be applied much as in the insurance industry to estimate insurable risks but exclude as uncovered those risks too diffuse or speculative to be reasonably estimated. (Those claims that could not be reasonably estimated would not be included in the definition of "mass future claim" and would therefore be unaffected by the bankruptcy case).

Channeling injunctions, by effectively placing a "cap" on the amount of money available to future claimants, are also vital if meaningful reorganization is to occur to a company confronting a mass torts problem. But at the same time placing such a cap on recovery may mean that difficult questions will arise as to whether preference should be given to certain kinds of future claimants over others; and it may also mean that some distant future claimants may not realize any recovery at all (although, because of statutes of limitations, see infra, this may be a small group). Although the risk of unfairness could be reduced if the amount available for distribution were subject to periodic reconsideration in light of new information and experience, the Subcommittee recognizes that the market's need for a final resolution of the claims against a bankrupt debtor may make such readjustments unwise. It should also be noted that channeling injunctions can also provide the bankruptcy court more oversight of the claims liquidation process developed in the context of the plan of reorganization.

With experience, moreover, the extent of the problems sketched above should be reduced. As the Commission points out, while the future claims estimates made in the Johns-Manville

case proved woefully inadequate, the trust established in the subsequent A.H. Robins case turned out to be, if anything, over-funded. Inherent in the bankruptcy process is the recognition that all kinds of creditors, including future tort claimants, will recover less than they would be entitled to in the absence of all other creditors, and the problem of estimation, while difficult, is essentially just a variation on that theme.

3. Statutes of Limitations and Repose

The Commission's Recommendations do not address the issue of whether future claimants should be entitled to seek payment from the estate (or trust created by the plan) when their claims would have been denied under state law because of the expiration of the state's statute of limitations. Nothing in the Commission's Recommendations appears to contradict the general rule in the Bankruptcy Code that state statutes of limitation should determine the enforceability and therefore the allowability of claims in bankruptcy.[6] Stated otherwise, if the victim had a cause of action that could have been pursued under state law (or if applicable, other federal law), and that cause of action expired before bankruptcy, that victim should be precluded from asserting a claim against a bankruptcy estate. The approach is consistent with the interaction between bankruptcy and non-bankruptcy law in general,[7] and there is no sound reason to alter this principle as it applies to claimants in a mass tort bankruptcy case.

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[6] 11 U.S.C. § 502(b)(1) provides in pertinent part: "[T]he court . . shall determine the amount of such claim. . . as of the date of filing of the petition, and shall allow such claim in such amount, except to the extent that . . .such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law...."

[7] In most circumstances, a "claim" arises for bankruptcy purposes when the event or conduct giving rise to liability occurs, though injury is manifested post-petition. In re Jensen, 995 F.2d 925, 928-30 (9th Cir. 1993); Grady v. A.H. Robins, 839 F.2d 198, 201 (4th Cir. 1988), cert. dismissed, 487 U.S. 1260 (1988).

Integrated into the concerns about affording future claimants due process is the issue of whether state statutes of limitations should apply. The main objective of the Commission's Recommendations is to balance the concerns of procedural due process with finality and with the predictability of estimating the number of claimants and extent of claims.

It should be acknowledged that, depending on the type of the cause of action, the state statute of limitations may be difficult to apply. For catastrophic events, the victims will likely be readily aware they have a claim, although the exact extent may be unknown. For personal injuries caused by mass torts, the discovery rule generally applies: the claimant's rights are triggered when he or she knows or should have known that his/her rights existed. The clearest situation involves a present tort claimant with manifested personal injuries that directly relate to the tortious conduct or product. For other types of claims, such as claims based on breach of contract, state law statutes of limitation seem relatively easy to apply. For example, the date payment on a note is due readily triggers the running of time in which the holder may sue.

A more difficult situation is presented when the prospective plaintiff (much like the victim of a classic mass tort who experiences no symptoms) has no way of knowing a claim exists as of the date the prospective defendant files bankruptcy. Take the situation of a developer of real property, or a contractor or architect who works on the project, who negligently performs services that result in latent defects. Some state statutes of limitations for suits against such a party begin running when the conduct takes place, regardless of discovery of the injury.[8] Is it a

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[8] *E.g.* California Code of Civil Procedure § 337.15, which applies to some construction defect litigation, bars actions based upon a "latent deficiency" after ten years from substantial completion, except in cases of fraudulent concealment or wilful misconduct. "Latent deficiency" is defined in the statute to mean "not apparent by reasonable inspection."

denial of due process for state law to bar a claim before the claimant knows of the claim? Apparently the state legislatures that enact such statutes favor finality.

On the assumption that such a statute of limitations could survive a constitutional challenge, there does not appear to be a reason to make a different rule in bankruptcy. If the developer files for relief before the statute of limitations runs, the homeowner who is yet to discover the defect should be allowed to file a claim, assuming that homeowner can discover it in time. The real problem comes along when the homeowner (with or without knowledge of the developer's bankruptcy) has no reason even to suspect that something was done negligently. If the court confirms a plan that says nothing about the class of homeowners who bought latently defective homes but do not know it, it seems as though post-confirmation it would be best to let state statutes of limitations control. If the developer files after the statute of limitations runs, then state law would bar the claim regardless of when it is discovered.

Suppose, instead of a single home, the developer builds 10,000 homes, all with lead-based paint as a primer. The developer, facing mass tort litigation, files for bankruptcy under the provisions contemplated by the National Bankruptcy Review Commission. We see no reason why the same principles regarding choice and application of statutes of limitations should not apply.

Possibly the most difficult application of the state statute of limitations in the mass tort context arises in a case of an insidious tort, such as toxic torts, where injuries may be latent for a period of years. See The Fairness and Constitutionality of Statutes of Limitations for Toxic Tort Suits, 96 Harv. L. Rev. 1684 (May 1983). Where appropriate, notice procedures should be applied so as to reach those claimants to which the "should have known" branch of the discovery

rule applies, and to give them an opportunity to participate. While it may still be impossible to achieve total fairness, this would minimize unfairness and accord with minimal due process (see section on due process, supra).

Although applying state law statutes of limitations to claimants against bankruptcy estates in a mass tort case may be complex and may lead to different results in different states, it is consistent with interpretation of the bankruptcy code generally, and promotes the goal of finality in bankruptcy litigation. By inherently limiting the pool of claimants, it minimizes the "floodgate" problem, and properly discriminates in favor of legitimate claimants.

4. Conflicts of Interest and Inappropriate Incentives

A forceful and independent future claims representative is critical to the Commission's approach. The question therefore arises as to what safeguards can be created to prevent a mass tort future claims representative from colluding with, or simply being overswayed by, counsel for present claimants and debtors.

It should first be noted that the classic kind of collusion said to arise in certain "prepackaged" bankruptcies is very unlikely to arise in mass tort bankruptcies involving future claim representatives. The term prepackaged bankruptcy applies to plans where the negotiations and solicitation of acceptance occurred before commencement of a chapter 11 case. Sandra E. Mayerson, Current Developments in Prepackaged Bankruptcy Plans, 804 PLI/Comm 979, 981 (2000). Although the term has also been used sometimes to apply to "hybrids where all or part of the plan has been negotiated prepetition and/or certain but not all creditors have been solicited prepetition," id., the essence of a "prepack" is that most or all of the negotiation and solicitation occurs prebankruptcy and therefore is presented to the Court as a fait accompli. A future claims

representative, however, would always be appointed after the bankruptcy petition has been filed. Because that additional party would be interjected, any prebankruptcy agreements among other parties could be challenged, and the future claim representative would often have a fiduciary duty to do so. By contrast, without that new party the "prepack" collusion would not likely be challenged. Therefore, appointment of a future claims representative would likely reduce rather than enhance collusive or otherwise unfair arrangements in "prepack" cases.

This is not the end of the issue, however. Some articles have expressed concerns regarding possible conflicts of interest or other inappropriate incentives to which a future claims representative might be subject, see, e.g., Frederick Tung, The Future Claims Representative in Mass Tort Bankruptcy: A Preliminary Inquiry, 3 Chap. L. Rev. 43 (2000); Hon. Edith Jones, Rough Justice in Mass Future Claims: Should Bankruptcy Courts Direct Tort Reform, 76 Tex. L. Rev. 1695 (1998). For example, Judge Jones writes in pertinent part:

> In bankruptcy, as in future claims class actions, the claimants are absent, invisible, and passive, creating room for exploitation in several ways. The class representative, delegated extraordinary exclusive power under the proposal to file and compromise class claims, operates without the supervision or control of real clients. Because the claims themselves are not concrete, but rather amorphous and conjectural, the representative's bargaining position is weak. The representation of future claims thus carries with it a tendency toward conflicts of interest. There is no vigorous check on a class representative's accepting a settlement that provides generous fees for the representative but modest relief for the class. A conflict may arise if the representative undertakes to settle claims of both present and future "future" claimants. In short the Commission proposal offers no protection analogous to "[t]he adequacy inquiry under Rule 23 [which] serves to uncover conflicts of interest between named parties and the class they seek to represent."

Jones, 76 Tex. L. Rev. at 1713.

The concerns raised by Prof. Tung and Judge Jones stem from their asserted apprehension that the future claims representative would be an agent without a principal. They contend that conflicts of interest are inherent in representation of this type. Both authors are skeptical as to whether the future claims representative mechanism would truly provide zealous representation for future claimants when those persons would have no role in choosing or monitoring their agent. Tung, at 67. In addition, the debtor and creditors might initiate the process of whom to appoint, as well as terms of the appointment, of the future claims representative, Tung, at 61 and 67, even though debtors and creditors as moving parties would have interests in likely conflict with those of future claimants. (See Amchem, supra).

But the actual Commission Recommendation 2.1.2. urges that any "party in interest" have standing to petition for appointment of the future claims representative. While the U.S. Trustee is not defined by statute or rule as a "party in interest," that officer is allowed under the Code to "raise . . . appear and be heard on any issue . . ." (except filing of a plan). 11 U.S.C. § 307.

Therefore, the U.S. Trustee could initiate a motion to appoint the future claims representative and nominate the person to be appointed, and this Subcommittee recommends this approach because the U.S. Trustee has no financial interest at stake and would likely be viewed as a source of objective recommendations. Furthermore, this Subcommittee would favor a further modification of the Commission's Recommendations to make explicit that the Bankruptcy Court itself is expected to play an active role in both the selection and the supervision of the future claims representative. Finally, of course, the future claims representative should be required to make the same disclosures regarding possible conflicts of interest as are required for any professional to be employed by a trustee or debtor-in-possession under Rule 2014(a), Fed. R. Bankr. P. See Resnick, supra, 148 U. Pa. L. Rev. at 2078-79.

The other point of concern expressed is that the bargaining power of the future claims representative would be weak because future claimants and their losses are abstract and prospective, while competing present claimants and their losses are concrete and present. Tung, at 75; Jones, at 1713. Moreover, within bankruptcy cases involving mass torts, there is a culture that values consensual reorganization. Lawyers for different interests in large cases may have to "forego strict enforcement of their clients' legal entitlements in order to achieve consensus." Tung, at 73. The future claims representative must operate in this culture, and because future clients are abstract and conceptual, she may be vulnerable to group pressure to compromise interests because the other players have clients to answer to.

On the other hand, as Prof. Tung recognizes, under the Commission's proposals the future claims representative would have an extraordinary amount of independence to resist such pressure. Tung, at 75. Moreover, as described above, the Subcommittee would favor increasing

the powers of the future claims representatives even beyond the Commission's Recommendations.

As mentioned in section 1.B, supra, the future claims representative is in some respects called upon to play a role akin to the classic role of a guardian appointed to protect minors or future interests. While the use of such a representative is not without possible problems, see Hon. Sheila Murphy, Guardian Ad Litem: The Guardian Angels of our Children in Domestic Violence Court, 30 Loy. U. Ch. L.J. 281 (1999); David M. Johnson, The Role of the Guardian Ad Litem; Changes in the Wind, 27 Colo. Law 73 (1998), state courts using such appointments have recognized that the alternative of leaving the future interests and minors unprotected by a representative could result in little or no protection of their interests, see id. Critics of the Commission's future claims representative proposal have not shown why difficulties in use of such representatives in bankruptcy would justify doing nothing to appoint a champion for future claims merely because that champion might not be perfect.

Giving the future claims representative economic motivation has also been suggested as one way to create a further safeguard of independence. Giving that party a financial stake in recovery by future claimants might provide the greatest incentive to maximize recovery, as by compensation giving a percentage of the amount held back for future claimants. Tung, at 78. One concern expressed in creating a compensation arrangement of this sort, however, is that the future claims representative might "unreasonably" scuttle a deal in hopes of obtaining more for the future claimants and thereby increasing the representative's personal compensation. On balance, the Subcommittee is unpersuaded that the economic incentive approach is either necessary or helpful.

In sum, while appointment of a future claims representative is not a perfect solution, in the absence of such a representative the other parties are free to collude with each other without adequately considering future claims of unrepresented parties, leaving only the judge and U.S. Trustee to question projection of future needs, without benefit of an adversarial presentation by someone charged with concern for the future. The Recommendation to add a future claims representative provides a check on collusive or self-interested behavior by others, an imperfect check, but a check nonetheless.

Conclusion

We note at the outset that this report does not comprehensively address every issue raised by the Commission's Recommendations but is, instead, a selective discussion of some of the more prominent issues. Based on our analysis, we offer the following observations:

- Bankruptcy is only one aspect of any solution to the problem of mass tort claims in the federal and state courts. This report expresses no opinion as to the relative merits, advantages or disadvantages of the bankruptcy system as compared with any other claims resolution mechanism for mass torts.

- The Recommendations raise constitutional issues that may not be resolved without guidance by the United States Supreme Court.

- If the Recommendations were enacted in a way that meets the concerns discussed in this report, the bankruptcy courts could deal with mass tort claims more efficiently and effectively than they currently do.

- Any meaningful reform effort, whether incremental or comprehensive, must take into account the multifaceted nature of mass tort litigation, one facet of which is the disposition of mass tort claims in bankruptcy.

Respectfully submitted,

Subcommittee on Mass Torts

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Hon. Larry J. McKinney
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Comments on this report are welcome. Please provide comments by mail or facsimile transmission to:

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Appendix

1997 Recommendations of the National Bankruptcy Review Commission
for Amendments to the Bankruptcy Code Regarding Mass Torts

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 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.

ARTICLE

BANKRUPTCY AS A VEHICLE FOR RESOLVING ENTERPRISE-THREATENING MASS TORT LIABILITY

ALAN N. RESNICK†

INTRODUCTION

A difficult challenge facing the American judicial system is providing for the fair and efficient resolution of litigation arising from mass tort liability. A mass tort involves a harmful act or series of acts by a company, such as the production of a defective product, that results in injuries to numerous victims—sometimes numbering into the thousands or hundreds of thousands. The most difficult cases are those involving "long-tail" mass torts, such as those relating to asbestos, where there is a long latency period between a person's use or exposure to a harmful product and the first manifestation of harm. Removal of the defective product from the marketplace or from society as a whole will not end the continuing manifestation of injuries. Given the thousands of future claimants who will first discover their injuries in decades to come, long-tail mass torts place an enormous burden on the defendant company and the judiciary. The high costs of litigation threaten both adequate compensation for the vast number of victims and the survival of the defendant's business.

The practical inability to provide each tort victim with traditional, individualized adjudication under the usual rules of litigation in these mass tort situations has led to the use of class actions or other mechanisms designed to deal collectively, rather than individually, with numerous claimants. When a defendant company is faced with mass tort liability that threatens the viability of the enterprise, and other mechanisms either

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have failed or would be ineffective in avoiding the destruction of its business, it is likely to seek protection under the federal bankruptcy laws. Johns-Manville Corp.,[1] Celotex Corp.,[2] Eagle-Picher Industries, Inc.,[3] Keene Corp.,[4] and at least a dozen other asbestos manufacturers deluged with thousands of personal injury claims; A.H. Robins Co. facing potentially devastating Dalkon Shield personal injury claims;[5] Dow Corning Corp. under an onslaught of breast implant litigation;[6] and other companies—all expecting countless future claimants who have not yet manifested any injury—have sought protection under Chapter 11 of the Bankruptcy Code within the past twenty years.

When the Bankruptcy Code was enacted in 1978, Congress did not contemplate the unique problems caused by mass tort liability involving future, as well as present, claimants, or that companies facing such massive liability would seek relief under the bankruptcy laws. The Bankruptcy Code's lack of specific guidance on the treatment and dischargeability of future claims has resulted in doubts regarding the powers of a bankruptcy court to deal with mass torts. Moreover, inconsistent judicial decisions have created confusion and lack of uniformity in this area. Commentators[7] and professional organizations,

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[1] *See In re* Johns-Manville Corp., 36 B.R. 743, 744 (Bankr. S.D.N.Y. 1984) (dealing with motion "to appoint a legal representative for asbestos-exposed future claimants in the Manville reorganization case" and holding that those future claimants may appear and be heard in a Chapter 11 case), *aff'd*, 52 B.R. 940 (S.D.N.Y. 1985).

[2] *See* Owens-Illinois, Inc. v. Rapid Am. Corp (*In re* Celotex Corp.), 124 F.3d 619, 622 (4th Cir. 1997) (discussing Celotex Corporation's Chapter 11 petition).

[3] *See In re* Eagle-Picher Indus., 197 B.R. 260, 263-64 (Bankr. S.D. Ohio 1996) (approving of a consolidated Chapter 11 settlement agreement and rejecting all procedural arguments attempting to disallow the agreement).

[4] *See In re* Keene Corp., 208 B.R. 112, 113 (Bankr. S.D.N.Y. 1997) (presenting the background of Keene Corporation's Chapter 11 case)

[5] *See In re* A.H. Robins Co., 880 F.2d 694, 696-97 (4th Cir. 1989) (explaining A.H. Robins Company's reorganization plan).

[6] *See In re* Dow Corning Corp., 211 B.R. 545, 551-54 (Bankr. E.D. Mich 1997) (detailing the history of the silicone breast implant litigation and Dow Corning's resulting bankruptcy action).

[7] *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, 330 (1996) (discussing the Piper Aircraft Corporation litigation and its implications on future claims in the bankruptcy process); Kathryn R. Heidt, *Future Claims in Bankruptcy: The NBC Amendments Do Not Go Far Enough*, 69 AM. BANKR. L J. 515, 515 (1995) [hereinafter Heidt, *Future Claims*] (critiquing the National Bankruptcy Conference ("NBC") amendments and advocating amendments that recognize claims as arising "at the time the debtor commits the act on which liability is based"); Kathryn R. Heidt, *Products Liability, Mass Torts and Environmental Obligations in Bankruptcy: Suggestions for Reform?*, 3 AM. BANKR INST L. REV. 117, 117 (1995) [hereinafter Heidt, *Products Liability*] (suggesting methods of reform for dealing with extraordinary obligations

such as the National Bankruptcy Conference,[8] have studied the special problems relating to the treatment of mass tort claims in bankruptcy and have made recommendations for law reform in this area. Most notably, the National Bankruptcy Review Commission[9] had recommended several revisions to the Bankruptcy Code to enable bankruptcy courts to better deal with mass tort liability involving numerous future claims arising from the debtor's prebankruptcy conduct.[10] In addition, in 1994 Congress added provisions to the Bankruptcy Code specifically dealing with the treatment of asbestos-related liability.[11]

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in bankruptcy); Barbara J. Houser, *Chapter 11 As a Mass Tort Solution*, 31 LOY. L.A. L. REV. 451, 452 (1998) (asserting Chapter 11 as an appropriate means for resolving mass tort claims); Edith H. Jones, *Rough Justice in Mass Future Claims: Should Bankruptcy Courts Direct Tort Reform?*, 76 TEX. L. REV. 1695, 1696 (1998) (advocating "caution before bankruptcy courts enter deeper into the mass tort litigation fray"); Ralph R. Mabey & Jamie Andra Gavrin, *Constitutional Limitations on the Discharge of Future Claims in Bankruptcy*, 44 S.C. L. REV. 745, 749 (1993) (analyzing "head-on the constitutional underpinnings for the discharge of future 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, 488 (1995) (advocating adoption of the NBC amendments); Thomas A. Smith, *A Capital Markets Approach to Mass Tort Bankruptcy*, 104 YALE L.J. 367, 370-71 (1994) (addressing issues of fairness in "allocation to future claimants in a mass tort bankruptcy"); Greg M. Zipes, *After* Amchem *and* Ahearn*: The Rise of Bankruptcy over the Class Action Option for Resolving Mass Torts on a Nationwide Basis, and the Fall of Finality?*, 1998 DET. C.L. MICH. ST. U.L. REV. 7, 12 (discussing the necessity for companies to tolerate uncertainty while courts determine how to balance the divergent concerns of claimants and debtors).

[8] The National Bankruptcy Conference is a voluntary, non-profit, self-supporting organization formalized in the 1940s from a group of leading bankruptcy scholars gathered informally in the 1930s to assist Congress in revising the bankruptcy laws. It consists of approximately 70 lawyers, judges, and law professors elected to membership. Its purpose is to study in a continuing program the operation of bankruptcy and related laws and to consult with Congress from time to time on needed revisions. In 1994, after a comprehensive review of the operation of the bankruptcy laws during the first 10 years of the Bankruptcy Code, the Conference published a report. *See* NATIONAL BANKR. CONF., REFORMING THE BANKRUPTCY CODE: THE NATIONAL BANKRUPTCY CONFERENCE'S CODE REVIEW PROJECT i (1994). A revised edition of the report was published in 1997. *See* NATIONAL BANKR. CONF., REFORMING THE BANKRUPTCY CODE: THE NATIONAL BANKRUPTCY CONFERENCE'S CODE REVIEW PROJECT FINAL REPORT, REVISED EDITION 43 (1997) [hereinafter NBC CODE REVIEW PROJECT REPORT] (summarizing proposals for a revised statutory mechanism).

[9] The National Bankruptcy Review Commission was established by Congress in 1994 to study and make recommendations for improving the bankruptcy system. *See* National Bankruptcy Review Commission Act, Pub. L. No. 103-394, tit. VI, 108 Stat. 4147, 4147-50 (1994) (establishing the National Bankruptcy Review Commission).

[10] *See* NATIONAL BANKR REV COMM'N, BANKRUPTCY. THE NEXT TWENTY YEARS: NATIONAL BANKRUPTCY REVIEW COMMISSION FINAL REPORT 315-50 (1997) [hereinafter NBRC REPORT] (discussing the treatment of mass future claims in bankruptcy)

[11] *See* 11 U S.C. § 524(g), (h) (1994) (dealing with courts' authority to issue injunctions giving effect to a discharge of an asbestos-related liability).

The growth of the mass tort phenomenon during the past twenty years also has caused the federal judiciary to consider procedural improvements for the collective resolution of mass tort liability. After several years of studying this matter, the Advisory Committee on Civil Rules of the Judicial Conference of the United States recommended that Chief Justice William H. Rehnquist appoint an informal working group to study mass torts.[12] The Working Group was formed in 1998 and, after a year of study, produced a report focusing on the problems, competing views, and possible approaches to mass torts, while recommending further study.[13]

The purpose of this Article is to discuss the positive features of the present bankruptcy system that, in general, make it a fair and effective vehicle for dealing with mass tort liability. This Article will then suggest improvements to make bankruptcy an even more effective mechanism for dealing with mass tort cases.

It is not the purpose of this paper to advocate that bankruptcy is the only, or even the best, mechanism for dealing with mass tort liability in all situations.[14] Ideally, class actions, multidistrict litigation, alternative

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[12] *See* ADVISORY COMM. ON CIVIL RULES AND WORKING GROUP ON MASS TORTS, REPORT ON MASS TORT LITIGATION 1 (Feb. 15, 1999) [hereinafter REPORT ON MASS TORT LITIGATION] (noting that the Working Group was formed "in response to the Judicial Conference's interest in reviewing the mass torts phenomenon and the Civil Rules Advisory Committee's recommendation for a single effort working across the Conference committees' jurisdictional lines").

[13] *See id.* at 48-70 (setting forth "Potential Solutions for Consideration" and a "Protocol for Further Action").

[14] Several commentators have compared the bankruptcy system to class actions and other nonbankruptcy mechanisms for resolving mass tort liability. *See, e.g.*, Stuart M. Bernstein, *Mass Torts and Bankruptcy*, LITIGATION, Fall 1997, at 5, 66 ("Class actions . . . lack many of the procedural safeguards and certainties found in bankruptcy."); Mabey & Zisser, *supra* note 7, at 506 ("The Bankruptcy Clause and the Bankruptcy Code already provide the best framework for treating present and future victims of the same faulty product equitably and economically."); Zipes, *supra* note 7, at 61 (focusing on the need to address uncertainties with both bankruptcy and class actions and concluding that, for the meantime, neither device will bring finality for a corporation facing mass tort liability).

Additionally, two commentators have written a comparative analysis of settlement class actions and bankruptcy cases in the mass tort context. *See* Joseph F. Rice & Nancy Worth Davis, *The Future of Mass Tort Claims: Comparison of Settlement Class Action to Bankruptcy Treatment of Mass Tort Claims*, 50 S.C. L. REV. 405, 410 (1999) (introducing the comparison of "settlement class actions with Chapter 11 bankruptcy reorganizations in the resolution of mass tort claims"). Except for a brief discussion of prepackaged bankruptcies in which a plan of reorganization is approved by the parties prior to commencement of the bankruptcy case, Rice and Davis compare class actions in which a settlement was reached before filing the action with traditional Chapter 11 cases in which no settlement was reached before the bankruptcy petition was filed. *See id.* Not surprisingly, the authors found that *settlement* class actions come without the delay and transaction costs present in traditional *nonsettled* bankruptcy cases. *See id.* at 460. The article criticizes the bankruptcy system, but ultimately concludes:

dispute resolution, and other vehicles for resolving mass tort liability will continue to improve as mechanisms for dealing with mass tort cases. When other mechanisms fail or are likely to be ineffective, and survival of the enterprise is threatened, however, companies with otherwise viable businesses will seek protection under the federal bankruptcy laws. The improvement of the bankruptcy system in the treatment of mass tort liability, therefore, should be a part of any comprehensive plan to improve the mechanisms for addressing mass tort liability in the American judicial system.

I. FEATURES THAT MAKE THE BANKRUPTCY SYSTEM AN APPROPRIATE FRAMEWORK FOR DEALING WITH MASS TORT LIABILITY

A. *Treatment of Enterprise-Threatening Mass Tort Liability in the Context of a Chapter 11 Reorganization Case Is Consistent with the Purposes of the Bankruptcy System*

Traditional tort litigation and nonbankruptcy collective proceedings, including class actions, are designed to grant plaintiffs appropriate relief for their injuries without regard to the financial condition of the defendant.[15] The money judgment obtained may be enforced regardless of the consequences to the defendant's viability. Although settlement negotiations often take into account the inability of the defendant to satisfy a probable award, judges and juries may not consider the debtor's financial health when awarding compensatory damages.[16]

In contrast, while liability is determined and disputed or unliquidated claims are fixed or estimated in a Chapter 11 case without regard to the debtor's financial condition,[17] that process is only one aspect of the case. The primary goals of reorganization under the Bankruptcy Code are to provide "equality of distribution to similar creditors in a collective

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

Id. at 461.

[15] *See, e g ,* Geddes v. United Fin. Group, 559 F.2d 557, 560 (9th Cir. 1977) (noting that it has been widely held by courts that the defendant's financial standing is inadmissible in determining the amount of compensatory damages to be awarded); Eisenhauer v. Burger, 431 F.2d 833, 837 (6th Cir. 1970) (holding that evidence of the size of the defendant's trucking company was inadmissible to affect damage award).

[16] *See Eisenhauer*, 431 F.2d at 837 (holding the worth of defendant's company not admissible in determining damages).

[17] *See* 11 U.S C. § 502 (1994) (governing the allowance of claims).

proceeding while ameliorating the devastating effect that a huge liability may have on the worth of a business and, correspondingly, the compensation available to all victims."[18] The protection of the business enterprise by preserving its going concern value, thereby maximizing value for distribution to creditors, is central to the reorganization process.

The use of bankruptcy to protect a business whose viability is threatened by mass tort liability is not foreign to these underlying goals of the Bankruptcy Code. When a company has committed tortious conduct on a massive scale affecting thousands of victims, including those who have not yet manifested injury, all constituents would be disadvantaged by the destruction or termination of the business if it is otherwise viable. Those claimants whose injuries are manifested subsequent to the termination of the defendant business will have nowhere to turn for compensation. Despite its allegedly wrongful conduct, it will not benefit anyone to kill the goose that is laying the golden eggs. Rather, a plan devoting the future profits of the company, at least in part, to the compensation of present and future claimants offers the greatest likelihood that they will be compensated for their injuries. Bankruptcy's goal of providing equal treatment among similarly situated creditors also coincides with the difficult challenge of treating present claimants no better and no worse than unknown future claimants in mass tort cases.

B. *Nationwide Jurisdiction and the Automatic Stay*

Professor Edward H. Cooper has posited as a goal for dealing with mass torts the achievement of "a single, uniform, fair, and efficient resolution of all claims growing out of a set of events so related as to be a 'mass tort.'"[19] To achieve this goal, he calls for eleven changes in the current framework of jurisdictional, procedural, and substantive laws and rules.[20] The first change on his list is to empower a single court to control all litigation events, select cases for mass torts treatment, and enjoin

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[18] NBRC REPORT, *supra* note 10, at 318-19 (citing Union Bank v. Wolas, 502 U.S. 151, 154 (1991)).

[19] Edward H. Cooper, *The (Cloudy) Future of Class Actions*, 40 ARIZ. L. REV. 923, 947 (1998).

[20] *See id.* at 947-62. The 11 changes are: (1) centralize all actions in a particular mass tort in one court, *id.* at 948; (2) consistently apply federal law, *id.* at 949; (3) allow the centralized court power to enjoin related proceedings, and (4) select counsel, *id.*; (5) provide good representation and adequate notice, *id.* at 950, (6) avoid premature efforts at resolution, *id.*; (7) seed the landscape with well-informed settlement terms, *id.*; (8) involve claimants in the settlement, *id.*; (9) appoint an independent representative distinguished from counsel, *id*; (10) involve the court in settlement; and (11) afford objectors discovery of the negotiation process, *id.*

litigation in other courts.[21] A district court exercising bankruptcy jurisdiction, or a bankruptcy court to which the case has been referred by a district court, may be such a court.

The deluge of mass tort litigation against a company often arises in multiple jurisdictions governed by different procedural and substantive laws. Duplication of discovery and other procedural steps greatly increases the financial and operational burdens on the defendant. Even class actions may arise in different jurisdictions, each with a different, narrowly crafted class. In contrast, the American bankruptcy system is governed by federal law designed to bring all disputes and claims regarding the debtor into one system. The Framers of the Constitution, anticipating the need for a single national system governing claims against distressed debtors, provided that Congress shall have the power to establish "uniform Laws on the subject of Bankruptcies throughout the United States."[22]

Bankruptcy jurisdiction is vested in the federal district court.[23] In addition to exclusive jurisdiction over a bankruptcy case, the district court in which the case is pending has original, but not exclusive, jurisdiction over all civil proceedings arising under the Bankruptcy Code or arising in "or related to" the bankruptcy case.[24] The district court in which the case is pending has exclusive jurisdiction over all the debtor's property, wherever located, as of the commencement of the case, and over all

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[21] *See id.* at 947-49 (discussing the single court approach)

[22] U.S. CONST. art. I, § 8, cl. 4. State statutes attempting to provide a discharge of debts have been invalidated. *See, e.g.*, International Shoe Co. v. Pinkus, 278 U.S. 261, 265-66 (1929) (stating that state bankruptcy regulations were superseded by federal bankruptcy law, especially in light of the congressional intent to establish uniformity in this area); *In re* Newport Offshore Ltd., 219 B.R. 341, 353 (Bankr. D.R.I. 1998) ("State laws that operate to effect, or to coerce from creditors, the insolvent debtor's discharge or release from indebtedness are preempted."). It would not surprise this author if non-opt-out, "limited fund" class actions under Rule 23(b)(1)(B) of the Federal Rules of Civil Procedure were held to be an improper use of the Rules Enabling Act, 28 U.S.C. § 2072 (1994), because of Congress's exclusive bankruptcy power. *See* Flanagan v. Ahearn (*In re* Asbestos Litig.), 134 F 3d 668, 674 (5th Cir. 1998) (Smith, J., dissenting) (arguing that certification of a class may have violated "principles of federalism and the limits of the Rules Enabling Act"), *rev'd sub nom.* Ortiz v. Fibreboard Corp., 527 U.S. 815, 119 S Ct. 2295 (1999)

[23] *See* 28 U.S.C. § 1334 (1994) (granting jurisdiction in bankruptcy cases to the federal district court). For a discussion of federal bankruptcy jurisdiction, including the historical evolution of the present jurisdictional scheme, see Ralph Brubaker, *On the Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory*, 41 WM. & MARY L REV. 743 (2000).

[24] 28 U.S.C. § 1334(b); *see also id.* § 1452 (providing for removal of claims and causes of action to the district court if it would have jurisdiction under § 1334); *id.* § 1334(c) (allowing for abstention).

property of the bankruptcy estate.[25] The Federal Rules of Bankruptcy Procedure provide that the service of a summons, complaint, and all other process, except a subpoena, may be served anywhere in the United States.[26] Title 28 of the United States Code permits the district court to refer the bankruptcy case and related proceedings to a bankruptcy judge.[27] In nearly all districts, bankruptcy cases and proceedings are routinely referred to the bankruptcy court. At any time, the district court may withdraw the reference, in whole or in part, with respect to the bankruptcy case or a particular proceeding.[28]

When a company facing mass tort liability files a bankruptcy petition, it is typical for numerous personal injury and wrongful death tort actions to be pending in state and federal courts throughout the United States. Section 157(b)(5) of Title 28 provides that such claims shall be tried in the district court where the bankruptcy case is pending or in the district court where the claim arose, as determined by the district court where the bankruptcy case is pending.[29] The statute has been construed, however, to permit the bankruptcy court to estimate personal injury and wrongful death claims for the purposes of facilitating the formulation of a Chapter 11 plan, determining voting rights, and measuring plan feasibility.[30] In

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[25] *See id.* § 1334(e) (granting exclusive jurisdiction to the district court).

[26] FED. R. BANKR. P. 7004(d) (allowing nationwide service of process). This rule applies in adversary proceedings and contested matters. *See* FED. R. BANKR. P. 9014 (governing contested matters under the Bankruptcy Code).

[27] *See id* § 157(a) (allowing a district court to refer a bankruptcy case and proceedings to a bankruptcy judge)

[28] *See id.* § 157(d) (providing that the district court may withdraw the reference on its own motion or on the motion of a party).

[29] *See id.* § 157(b)(5) ("The district court should order that personal injury tort . . . claims shall be tried in the district court in which the bankruptcy case is pending."). The purpose of this provision is to centralize the administration of the estate and eliminate the multiplicity of tribunals for the adjudication of parts of a bankruptcy case. *See* A.H. Robins Co v. Piccinin, 788 F.2d 994, 1011 (4th Cir. 1986) (discussing the purpose of 28 U.S.C. § 157(b)(5)); *see also* 28 U.S.C. § 1411(a) (1994) (preserving an individual's right to trial by jury with respect to personal injury and wrongful death tort claims).

[30] Courts have construed § 157(b)(5) together with § 157(b)(2)(B), which gives the bankruptcy court the power to hear and determine matters regarding the allowance or disallowance of claims and the estimation of claims for purposes of confirming a plan, but not the liquidation or estimation of personal injury or wrongful death claims "for purposes of distribution." 28 U.S.C. § 157(b)(2)(B) *See, e.g.*, Grzybowski v. Aquaslide 'N' Dive Corp. (*In re* Aquaslide 'N' Dive Corp.), 85 B.R. 545, 549 (B.A.P. 9th Cir. 1987) (affirming the lower court's ruling as an estimation of claims for the purpose of confirming a plan under Chapter 11, rather than as a substitution for a jury's verdict on the plaintiff's tort claim); *In re* Farley, Inc., 146 B R. 748, 752-53 (Bankr. N.D. Ill. 1992) (stating that the court has authority to hear an estimation proceeding for purposes of confirming a plan under Chapter 11 but not to liquidate personal injury claims); *see also In re* Poole Funeral

addition, despite the mandatory language of § 157(b)(5), courts have held that the district court has discretion to abstain from presiding over a personal injury or wrongful death trial and may permit the claim to proceed in the state or federal court where it was pending when the petition was originally filed.[31] For distribution purposes, these claims also may be determined according to a voluntary claims resolution procedure provided under a Chapter 11 plan.[32] But if the claimant does not consent to a claims resolution procedure, and a trial is required to determine the amount of the claim for distribution purposes, § 157(b)(5) gives the district court in which the bankruptcy case is pending discretion to determine where the trial will proceed.[33] The result is that the district court for the district in which the bankruptcy case is pending could bring all trials in personal injury and wrongful death actions against the debtor into that court.[34] Again, the laws governing jurisdiction in the bankruptcy context all point to bringing mass tort litigation into one court.

When a bankruptcy petition is filed, an automatic stay prevents the continuation of litigation against the debtor in any tribunal.[35] The automatic stay has nationwide effect[36] and is a powerful way to halt

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Chapel, Inc., 63 B.R. 527, 533 (Bankr. N.D. Ala. 1986) ("[T]he estimation of claims, including the estimation of personal injury tort claims for the purpose of confirming a plan under Chapter 11, is a core proceeding as to which Movants are not entitled to a trial by jury.").

[31] *See, e.g.*, Coker v. Pan Am. World Airways, Inc. (*In re* Pan Am. Corp.), 950 F.2d 839, 844 (2d Cir. 1991) (holding that the district court had authority to abstain from wrongful death actions pending in state court arising out of an airplane crash in Scotland). The court stated, "Despite the apparently mandatory 'shall order', section 157(b)(5) has consistently been construed to recognize discretion in district courts to leave personal injury cases where they are pending." *Id.*

[32] *See In re* A.H. Robins Co , Inc., 880 F.2d 709, 743-44 (4th Cir. 1989) (describing claims resolution facility under a Chapter 11 plan in which a trust established for the benefit of Dalkon Shield claimants makes an initial settlement offer to each claimant and, if the offer is rejected, the claimant may opt to have the claim submitted to arbitration or to have it determined by jury trial); *see also* Georgene M. Vairo, *The Dalkon Shield Claimants Trust. Paradigm Lost (or Found)?*, 61 FORDHAM L. REV. 617, 633 (1992) (discussing optional claims resolution procedure under the reorganization plan in *A H. Robins*).

[33] "The district court shall order that . . . claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending." 28 U.S C. § 157(b)(5).

[34] For a list of factors used by district courts in determining whether to transfer all pending personal injury and wrongful death actions to the district court where the bankruptcy case is pending, see Houser, *supra* note 7, at 457.

[35] *See* 11 U.S.C. § 362 (1994 & Supp. IV 1998) (detailing the situations in which stays are applicable).

[36] Courts have also held that the automatic stay has worldwide effect if the creditor has sufficient minimum contacts with the United States. *See, e.g.*, Lykes Bros. S.S. Co v.

immediately all actions, including mass tort lawsuits pending in state or other federal courts. Creditors seeking recovery must pursue their claims against the bankruptcy estate by filing proofs of claim in the bankruptcy court within the time specified by the Federal Rules of Bankruptcy Procedure or by court order.[37]

The automatic stay does not apply to actions against co-defendants or other third parties who are not in bankruptcy. Courts, however, have relied on § 105(a) of the Bankruptcy Code as authority for extending the automatic stay to enjoin litigation against third parties under certain circumstances. For example, in *A.H. Robins Co. v. Piccinin*, the court of appeals upheld the bankruptcy court's stay of litigation against the debtor's insurance companies.[38]

The combination of the automatic stay and the broad federal jurisdictional scheme in bankruptcy cases effectively brings the control of all litigation against the debtor under one roof.

C. *Timely Access to the Bankruptcy System*

The likelihood of saving a business facing inevitable financial difficulties, preserving its going concern value, and maximizing distributions to creditors is often increased when the business seeks bankruptcy protection before it becomes insolvent on a balance sheet basis or is unable to pay its debts as they mature. The need for early access to bankruptcy relief—before the debtor's ability to financially rehabilitate its business becomes hopeless—was recognized by the drafters of the Bankruptcy Code. To permit such early access to the bankruptcy system, a debtor's eligibility for relief under either Chapter 7 or Chapter 11 of the Bankruptcy Code does not depend on the debtor's insolvency when the

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Hanseatic Marine Serv. (*In re* Lykes Bros S.S. Co), 207 B.R. 282, 285-87 (Bankr. M.D. Fla. 1997) (holding that so long as the minimum contacts requirement is satisfied, the automatic stay applies to all of the debtor's property, including property located outside of the United States)

[37] *See* 11 U.S.C. § 501 (1994) (permitting a creditor to file a proof of claim); FED. R. BANKR. P 3002 (listing the necessity for filing, the place of filing, and the time for filing in a Chapter 7 liquidation); FED. R. BANKR. P. 3003 (listing filing rules in a Chapter 11 reorganization case). A proof of claim is "deemed filed" in a Chapter 11 case if it appears on the schedule of liabilities filed with the court, unless it is scheduled as disputed, contingent, or unliquidated. 11 U.S.C. § 1111(a) (1994).

[38] 788 F.2d 994, 1003 (4th Cir. 1986) (holding that § 105(a) grants the bankruptcy court power to extend the automatic stay to protect non-debtor parties); *see also* Houser, *supra* note 7, at 453-55 (discussing *A.H. Robins*)

petition is filed.[39] For this reason, a company beginning to face a deluge of mass tort litigation may seek Chapter 11 protection before its capital markets and trade credit disappear or the business is otherwise damaged.

The absence of an insolvency test for eligibility is also attractive because proving insolvency, which requires the valuation of all assets and liabilities, is a very difficult, subjective process, resulting in expensive and time-consuming litigation when the debtor is a large, complex corporation.

The ability to seek bankruptcy protection earlier, rather than later, can be contrasted with the more limited access to a non-opt-out "limited fund" class action under Rule 23(b)(1)(B). In *Ortiz v. Fibreboard Corp.*, the Supreme Court reversed a $1.535 billion class action settlement in part because the parties failed to show that the assets available for distribution to tort victims, including insurance proceeds, were, in fact, a limited fund that would be insufficient to pay claims in full.[40] Although the Court commented that "[w]e need not decide here how close to insolvency a limited fund defendant must be brought as a condition of class

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[39] *See* 11 U.S.C. § 109 (1994) (setting forth the requirements for eligibility for relief under the Bankruptcy Code); *see also* United States v. Huebner, 48 F.3d 376, 379 (9th Cir. 1994) ("The Bankruptcy Act does not require any particular degree of financial distress as a condition precedent to a petition seeking relief."); *In re* James Wilson Assoc., 965 F.2d 160, 170 (7th Cir. 1992) ("One might have supposed that the clearest case of bad faith would be filing for bankruptcy knowing that one was not bankrupt, but the Bankruptcy Code permits an individual or firm that has debts to declare bankruptcy even though he (or it) is not insolvent."); *In re* Johns-Manville Corp., 36 B.R. 727, 732 (Bankr. S.D.N.Y. 1984) ("[N]either Section 109 nor any other provision relating to voluntary petitions by companies contains any insolvency requirement."); *cf. In re* SGL Carbon Corp., 1999 WL 1268082 (3d Cir. 1999) (recognizing that a corporation does not have to be insolvent to file a Chapter 11 petition and that the Bankruptcy Code allows early access to bankruptcy relief to allow a debtor to reorganize before it is faced with a hopeless situation, but holding that the petition of a financially healthy company facing antitrust lawsuits was filed in bad faith because it was filed as a litigation tactic and without a valid reorganizational purpose) (citing this Article).

It should be noted that when a company goes through the bankruptcy system remaining solvent, creditors should receive full payment of their claims. In a Chapter 7 liquidation, creditors must be paid after administrative expenses are paid, and excess value is distributed to shareholders. *See* 11 U.S.C. § 726 (1994) (listing the order of recipients to whom assets are distributed in a Chapter 7 liquidation). In a Chapter 11 case, as will be discussed below, the requirement that each creditor receive in value at least as much as it would receive in a Chapter 7 liquidation results in full payment if the debtor remains solvent after paying administrative expenses. *See id.* § 1129(a)(7)(A) (listing the requirements necessary for a court to confirm a Chapter 11 plan).

[40] 527 U.S 815, 119 S. Ct. 2295, 2321 (1999) (holding improper the use of a limited fund class action settlement where Fibreboard would retain all but $500,000 of its net worth).

certification," it is clear that insufficiency of assets must be demonstrated.[41] This would require a valuation of assets and estimation of liabilities to show at least near insolvency.

D. *Acceleration and Estimation of Unmatured and Contingent Claims*

An important goal in resolving mass tort liability that affects future claimants is assuring that present tort claimants with manifested injuries and causes of action do not exhaust the defendant's assets before future claimants manifest injuries. Similarly, future claimants who will manifest injuries in the short term must not exhaust available assets if exhaustion will result in fewer assets being available for those with longer latency periods. These problems may be addressed by both attempting to estimate the number and amount of future claims, and by putting aside sufficient funds to compensate future claimants as injuries mature. The Bankruptcy Code, with its provisions for acceleration, estimation, and classification of claims that have not yet ripened into matured causes of action, provides an appropriate framework for dealing with these problems.

In bankruptcy, there is great significance in determining whether an obligation is a "claim." In general, only the holder of a "claim" may vote as a creditor on a Chapter 11 plan,[42] file a proof of claim,[43] or receive a distribution in the bankruptcy case.[44] In addition, only "debts" may be discharged.[45] "Debt," according to the Bankruptcy Code, means "liability on a claim."[46] In order to provide the most effective relief for the debtor and the widest participation by affected parties, Congress defined "claim" as broadly as possible. Under § 101(5) of the Bankruptcy Code, "claim" is defined to include unmatured, contingent, and unliquidated obligations, as well as matured, fixed, and liquidated obligations.[47] Regardless of whether a cause of

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[41] *Id.* at 2321 n.34.

[42] *See* 11 U.S.C. § 1126(a) ("The holder of a claim or interest allowed under section 502 of this title may accept or reject a plan.").

[43] *See id.* § 501(a) (providing that a "creditor" may file a proof of claim). "Creditor" is defined to mean, with few exceptions, an entity that has a claim against the debtor that arose on or before the order for relief. *See id.* § 101(10)(A) (defining the term "creditor").

[44] *See id.* § 726 (listing the recipients' property distribution in a bankruptcy case); FED. R BANKR. P. 3021 (same).

[45] *See* 11 U.S.C. § 727(b) (discharging the debtor from any "debt" after fulfilling other statutory requirements), *id.* § 1141(d) (providing that a plan or an order confirming a plan discharges the debtor from any "debt")

[46] *Id.* § 101(12)

[47] *See id.* § 101(5) (defining the term "claim").

action has accrued under state law, the right to receive payment at some future time is as much a "claim" as is an obligation that constitutes a ripe cause of action when the bankruptcy petition is filed. For example, a contractual obligation to pay a debt in the year 2005 is considered a "claim" if the debtor files a bankruptcy petition in 1999, even though the lender would not have the right to any remedy under state law before the due date of the loan. In essence, bankruptcy accelerates the maturity of all unmatured claims.

This premise is illustrated by the following example: Suppose the debtor has a contingent claim and the contingency has not, and perhaps never will, occur. Assume that Corporation *A* has guaranteed Corporation *B*'s bank loan, which becomes due in five years. If Corporation *B* is in good financial condition and is likely to repay the loan in full in five years, Corporation *A* will most likely never be called upon to pay anything to the bank. If Corporation *A* files a bankruptcy petition, however, the bank would have a contingent claim against the debtor and would be treated as a creditor under the Bankruptcy Code. The bank's claim against Corporation *A* would be discharged, and the bank would have the right to participate and possibly receive a distribution in the bankruptcy case. The bank would have no right to sue Corporation *A* outside of bankruptcy, however, because Corporation *B* had not defaulted on the bank loan.

When waiting for the occurrence or nonoccurrence of the contingency on a contingent claim would unduly delay the administration of the bankruptcy case, the Bankruptcy Code mandates that the court estimate the claim for the purpose of allowing it.[48] In the situation described above, the amount of the claim for allowance purposes should be estimated by the court, based on the likelihood of a Corporation *B* default. The Bankruptcy Code also requires the court to estimate unliquidated claims if liquidation of the claim would unduly delay the administration of the case.[49]

Given the Bankruptcy Code's treatment of unmatured and contingent

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[48] *See id.* § 502(c)(1) (requiring the court to estimate any contingent claim that "would unduly delay the administration of the case").

[49] *See id.* Although estimation is required in these situations, the Bankruptcy Code does not specify any method for the court to use when estimating claims. *See generally* Bittner v Borne Chem. Co., 691 F.2d 134, 135 (3d Cir. 1982) (noting the Bankruptcy Code's silence regarding the manner in which to estimate claims), *In re* Farley, Inc , 146 B.R 748, 753 (Bankr N.D. Ill. 1992) (noting that courts should use whatever claims estimation method is best under the circumstances). For a discussion of various models used by bankruptcy courts to estimate claims, see David S. Salsburg & Jack F. Williams, *A Statistical Approach to Claims Estimation in Bankruptcy*, 32 WAKE FOREST L. REV. 1119, 1130-38 (1997).

rights to payment as "claims," it seems natural for future mass tort liability arising from prebankruptcy conduct of the debtor also to be included within that definition. Any future right to payment caused by prebankruptcy conduct, regardless of whether it will ever be triggered or ripen into a cause of action by the manifestation of injury, should fit neatly into the Bankruptcy Code's broad definition of "claim" and its estimation provisions.[50]

E. *Flexibility in Claims Classification*

The Bankruptcy Code requires that a Chapter 11 plan of reorganization place claims in classes.[51] The only statutory restriction on classification is that only similar claims may be placed in the same class.[52] This similarity requirement usually means that the claims must be in the same distributive rank. For example, an unsecured, past-due bank claim differs in many ways from an unliquidated personal injury tort claim. For Chapter 11 purposes, however, these two claims may be placed in the same class and treated equally because they are both of equal rank in that they would share pro rata in any distribution if the debtor were liquidated under Chapter 7.[53]

Claims that differ in their maturity are typically classified together and treated equally under a Chapter 11 plan. For example, suppose a

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[50] *But see In re* Dow Corning Corp., 211 B.R. 545, 563 (Bankr. E.D. Mich. 1997) (denying the Chapter 11 debtor's motion to estimate mass tort claims relating to the manufacture of breast implants and holding that there was insufficient cause for estimation). The court stated:

> From the plain language of § 502(c), it is clear that estimation does not become mandatory merely because liquidation may take longer and thereby delay administration of the case. Liquidation of a claim, in fact, will almost always be more time consuming than estimation. Nonetheless, bankruptcy law's general rule is to liquidate, not to estimate. For estimation to be mandatory, then, the delay associated with liquidation must be "undue."

Id. The court noted that "undue" means "unjustifiable." *Id.*

[51] *See* 11 U.S.C. § 1123(a)(1) (designating which claims are placed in classes). The only claims that are not placed in classes are administrative expense claims, claims arising after an involuntary petition is filed and before the order for relief, and priority tax claims. *See id.*

[52] *See id.* § 1122(a) (permitting only substantially similar claims or interests in the same class); *see also id.* § 1122(b) (permitting the designation of a separate class of claims consisting only of each unsecured claim that is either less than or reduced to an amount that the court approves as reasonably necessary for administrative convenience).

[53] *See, e g., In re* AOV Indus., Inc., 792 F.2d 1140, 1150 (D.C. Cir. 1986) (rejecting appellant's argument that his claim should be separated from the class of other unsecured claims because he had a third party guarantee); William Blair, *Classification of Unsecured Claims in Chapter 11 Reorganization*, 58 AM. BANKR L. J. 197 (1984).

company has an unsecured bank loan that became due and payable several months ago, and also issued an unsecured zero coupon bond that will not become due for another five years. Assume further that the debtor already defaulted on the bank loan, but is not required to make any payments for another five years with respect to the outstanding bond. In the absence of a bankruptcy filing, the bank would be able to sue on the defaulted loan, recover a judgment, and enforce it against the defendant's assets now, while the bondholder would have no cause of action or remedy until the debtor defaults in five years. The bank would currently recover full payment by enforcing its remedies against the debtor's assets under nonbankruptcy law, while the bondholder would receive no recovery because the debtor will have no assets when the bond becomes due in five years. If the debtor were to file a bankruptcy petition now, however, these two claims could be classified together and given the same distribution under the plan.

The requirements that a Chapter 11 plan place virtually all creditors in classes, that members of each class be similarly situated, and that the plan treat class members equally with others in the same class gives a Chapter 11 case the appearance, in structure, of a class action with multiple non-opt-out classes. The classification of claims under a Chapter 11 plan differs significantly, however, from the creation of a class for Rule 23 class action purposes.

Under the Bankruptcy Code, the "substantially similar" requirement in § 1122(a) is far less restrictive than the four threshold requirements applicable to class actions under Rule 23. As mentioned above, claims placed in a Chapter 11 class usually will satisfy the "substantially similar" requirement if they are of equal rank in distribution.

For a class to be certified under Rule 23, regardless of the category of class action under Rule 23(b), the court must find: (1) "numerosity" (the class is so large that joinder of all members would not be practical); (2) "commonality" (there are questions of law or fact common to the class members); (3) "typicality" (claims and defenses of the named parties are typical of those of the class); and (4) "adequacy of representation" (representatives will fairly and adequately protect the class members' interests).[54] The less restrictive classification requirements of the Bankruptcy Code afford greater flexibility in classifying tort and other

[54] *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 613 (1997) (citing Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV 356, 375-400 (1967) (delineating the threshold requirements applicable to all class actions))

unsecured claims in a Chapter 11 plan involving mass tort liability.[55]

F. *The Ability To Impair Classes: Bringing Everyone to the Bargaining Table and Sharing the Pain*

A Chapter 11 plan may impair, or leave unimpaired, any class of claims or equity interests.[56] By placing creditors and shareholders in classes and impairing some or all classes, a Chapter 11 reorganization case may be viewed as the functional equivalent of multiple class actions with the potential to alter the rights of several groups in one proceeding.

For example, suppose that a corporation manufactured a defective product and is now facing thousands of personal injury actions. The corporation also has outstanding unsecured bonds with an aggregate face amount of $1.2 billion. Suppose further that the corporation does not have sufficient funds to pay full compensation to the tort victims and to honor its commitments to the bondholders. In traditional one-on-one tort litigation with each victim, the parties may eventually settle the claim by paying an amount equal to only a percentage of the victim's actual compensatory damages. Similarly, in a class action commenced on behalf of the tort victims, a settlement may provide for less than full compensation to class members. In either case, the bondholders would not be parties to the litigation and could not be compelled to reduce the amount of the debtor's bond liability. In a Chapter 11 case, however, the bondholders could be placed in a class, and the reorganization plan could propose changes to the terms of the bonds, such as a reduction of the face amount or a change in the interest rate or maturity date.

Permitting impairment of several classes of creditors and equity interest holders in one case effectively forces all entities with a financial interest in the debtor to come to the bargaining table. If the debtor's enterprise is threatened by mass tort liability, and the only feasible solution is to pay present and future claimants an amount that is less than what they would receive from one-on-one litigation, it may be unfair to

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> Bankruptcy thereby deals with commonality and typicality issues differently from Article III courts acting under Rule 23's dictates. As the bankruptcy system seeks to provide similarly situated creditors with equal treatment, in theory at least the Bankruptcy Code assigns no distinction between future and present injuries of the same kind. It lumps this group into the same general category, as a pre-petition, unsecured debt.

Zipes, *supra* note 7, at 44.

[56] *See* 11 U.S.C. § 1123(a)(2) (requiring that any class of claims or interests not impaired under the plan be specified); *id.* § 1123(a)(3) (requiring that treatment of any impaired class be specified), *id.* § 1124 (defining impairment of claims or interests).

tort victims to leave intact the legal rights of other creditor and shareholder groups. Why should the corporation's financial difficulties, caused primarily by mass tort liability based on a defective product, fall solely on the tort victims? Rather, unsecured bondholders and other creditors, as well as shareholders, should share the pain of the corporation's financial difficulties. By giving the proponent of a Chapter 11 plan the ability to impair several classes, the bankruptcy system provides a unique mechanism for spreading the loss faced by mass tort liability among all creditor and shareholder groups.

It is important to emphasize, however, that the Bankruptcy Code does not *require* the proponent of a plan to impair every class. In fact, the Code provides that a class or classes may be left unimpaired by the plan.[57] This flexibility allows the proponent of the plan to permit one or more classes to remain unaffected by the bankruptcy reorganization. For example, a plan may provide that the class of unsecured trade creditors will be unimpaired so that they will be assured of full payment.[58]

G. *Creditor Representatives Are Selected by an Independent Official and Professionals Are Employed with Court Approval*

When a company reorganizes under Chapter 11, unsecured creditors are represented by at least one committee of creditors selected by the United States trustee, an official in the Executive Branch appointed by the Attorney General.[59] Each official committee is entitled to retain professionals—typically an attorney, accountant, and investment advisor in large cases—who are selected by the committee and employed only after court approval.[60] Each professional must, as a condition of employment, file an affidavit disclosing the person's connections with the debtor, creditors, any other party in interest, and their attorneys and

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[57] *See id.* § 1123(a)(2) (noting the requirement that any unimpaired classes be specified); *id.* § 1124 (defining impairment of claims or interests).

[58] As the Mass Tort Working Group observed, "a reorganization could 'pass through' all other obligations while resolving—and establishing outer liability limits for—only a mass tort obligation. This procedure could achieve the same effects as a mandatory, no-opt-out settlement class." REPORT ON MASS TORT LITIGATION, *supra* note 12, at 59.

[59] *See* 11 U.S.C. § 1102(b)(1) (noting that such committee "shall ordinarily consist of the persons, willing to serve, that hold the seven largest claims against the debtor"); 28 U.S.C. §§ 581-586 (1994) (providing for appointment of United States trustees who are required to take an oath of office, whose official stations the Attorney General may determine, and who may be appointed to vacant offices, and detailing trustees' duties).

[60] *See* 11 U.S.C. § 1103 (detailing the procedural powers and duties of such committees).

accountants.[61] The United States trustee or any party in interest may object to the professional's employment based on conflicts of interest. Failure to make adequate disclosures, or serving despite a conflict of interest, may result in denial or disgorgement of fees.[62] This retention and disclosure process is an open one, allowing for a complete airing of conflict issues under the watchful eye of the United States trustee and the supervision of the court.

The concern for independent representation of future claimants in mass tort cases has been heightened by the Supreme Court's decisions in *Amchem Products, Inc. v. Windsor*[63] and *Ortiz v. Fibreboard Corp.*[64] In *Amchem*, the Court held that a class proposed by a consortium of former asbestos manufacturers in a settlement-only class action could not be certified because, among other reasons, it could not satisfy the adequate representation requirement of Rule 23. The named parties, who had diverse medical conditions, sought to act on behalf of a single large class of individuals who were injured by, or were exposed to, asbestos. The Court held that, in significant respects, the interests of those within the class were not aligned. The most obvious conflict was that, for the currently injured, the critical goal was generous, immediate payment, whereas the plaintiffs who were exposed to asbestos but did not yet manifest any injuries were interested in ensuring an ample, inflation-protected fund for the future. The Court concluded that "[t]he settling parties, in sum, achieved a global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected."[65]

In *Ortiz*, the Court upset a limited fund class action settlement against an asbestos manufacturer because, among other reasons, class counsel had a conflict of interest.

> [A]ny assumption that plaintiffs' counsel could be of a mind to do their simple best in bargaining for the benefit of the settlement class is patently at odds with the fact that at least some of the same lawyers representing plaintiffs and the class had also negotiated the separate settlement of 45,000 pending claims . . . , the full payment of which was contingent on a

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[61] *See* FED R. BANKR. P. 2014 (detailing requirements for employment of professional persons).

[62] *See* 11 U.S.C. § 328(c) (authorizing denial of compensation or reimbursement in the event of a conflict of interest).

[63] 521 U.S. 591 (1997).

[64] 527 U.S 815, 119 S. Ct. 2295 (1999)

[65] *Amchem*, 521 U.S. at 627.

successful global settlement agreement . . . .[66]

The Court observed that "[c]lass counsel thus had great incentive to reach any agreement in the global settlement negotiations that they thought might survive a Rule 23(e) fairness hearing, rather than the best possible arrangement for the substantially unidentified global settlement class."[67] That incentive "to favor the known plaintiffs in the earlier settlement was, indeed, an egregious example of the conflict noted in *Amchem* resulting from divergent interests of the presently injured and future claimants."[68]

Although the Bankruptcy Code does not expressly provide for it, bankruptcy courts have appointed legal representatives to represent classes of future claimants in mass tort cases.[69] If the bankruptcy court applies the same standards for appointment and disclosure that are applicable to creditors' committees and their counsel, conflicts of interest criticized by the Supreme Court in *Ortiz* could be avoided.

H. *Chapter 11 Confirmation Requirements Are Designed To Protect the Interests of Creditors*

A plan of reorganization has no legal effect and does not bind parties until it is confirmed by the bankruptcy court.[70] Section 1129 of the Bankruptcy Code lists specific requirements for confirmation of a plan. These requirements, which are designed to protect the rights of creditors and equity interest holders, should provide appropriate financial protection for adequately represented classes of mass tort victims.[71]

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[66] *Ortiz*, 119 S. Ct. at 2317-18.

[67] *Id.* at 2318.

[68] *Id.*

[69] *See, e.g.*, *In re* Eagle-Picher Indus., Inc , 203 B R. 256, 261 (Bankr S D. Ohio 1996) (noting the request for appointment of a legal representative "'for future personal injury and property damage claimants'"); *In re* Forty-Eight Insulations, Inc., 58 B.R. 476, 478 (Bankr. N.D. Ill. 1986) (approving the debtor's application for appointment of a legal representative for future asbestos-related claimants).

[70] *See* 11 U.S.C § 1141(a) (1994) (indicating that only a confirmed plan binds parties in interest).

[71] These protections for creditors under the Bankruptcy Code were recently mentioned by the Supreme Court in *Ortiz*.

> While there is no inherent conflict between a limited fund class action under Rule 23(b)(1)(B) and the Bankruptcy Code, . . . it is worth noting that if limited fund certification is allowed in a situation where a company provides only a *de minimis* contribution to the ultimate settlement fund, the incentives such a resolution would provide to companies facing tort liability to engineer settlements similar to the one negotiated in this case would, in all likelihood, significantly undermine the protections for creditors built into the Bankruptcy Code.

1. The "Best Interest of Creditors" Test

The Bankruptcy Code requires that every creditor must either accept the plan or receive at least as much value as the creditor would receive in a Chapter 7 liquidation of the debtor.[72] This requirement, often called the "best interest of creditors test," means that every creditor must receive at least the liquidation value of its claim or personally waive this protection by voting in favor of the plan. A class vote may not waive this protection. If an unsecured creditor is owed $100 and would receive $50 under the proposed Chapter 11 plan, but would receive $60 if the company were liquidated in bankruptcy, that creditor would have a veto power over the entire plan. This would be so even if the creditor's claim were included in a class consisting of 1000 creditors owed a total of $1 billion and all the other members of the class voted to accept the plan.

2. The Absolute Priority Rule and Protection Against Unfair Discrimination

Each impaired class is entitled to vote to accept or reject the plan.[73] A class of creditors accepts the plan if it is accepted by the holders of a majority in number and two-thirds in dollar amount of the claims held by those who actually vote on the plan.[74]

A plan may be confirmed despite rejection by a class, but only if the plan is "fair and equitable" and does not unfairly discriminate with respect to the non-accepting class.[75] The fair and equitable requirement, often called the "absolute priority rule," is satisfied with respect to a non-accepting class of unsecured creditors only if the members of the class will receive property—which often includes cash, debt securities, or stock in the company—equal to the allowed amount of their claims, or no junior creditor or shareholder will receive or retain anything on account of its claim or interest.[76] The fair and equitable requirement assures that no

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119 S. Ct. at 2321 n.34 (citations omitted).

[72] *See* 11 U.S.C § 1129(a)(7).

[73] *See* 11 U.S.C. § 1126(a) (1994) (stating that holders may accept or reject a plan).

[74] *See* 11 U.S.C § 1126(c) (stating the minimum requirements for creditors to accept a plan).

[75] 11 U.S.C. § 1129(b)(1).

[76] 11 U.S.C § 1129(b)(2)(B) (describing the "fair and equitable" requirements as applied to a class of unsecured claims). *See generally* Bank of Am. Nat'l Trust & Sav. v. 203 North LaSalle St. Partnership, 119 S. Ct. 1411 (1999) (holding that the new value exception to the absolute priority rule prevents prebankruptcy equity holders from purchasing new equity interests in the reorganized entity without allowing others to compete or to propose a competing plan).

non-accepting class of creditors could be compelled to accept less than full compensation while a more junior creditor or equity holder receives anything or retains its interest. In essence, shareholders must be wiped out before a less-than-full-payment plan may be "crammed down" on a rejecting class of creditors, including a class of tort claimants. This requirement could result in the distribution of all of a debtor's equity to creditors so that they will own the company after the Chapter 11 case ends.[77]

Similarly, a plan may not be confirmed if it unfairly discriminates against a non-accepting class of creditors.[78] For example, if a class of unsecured bank creditors would receive a greater percentage of their claims than an equally ranked non-accepting class of unsecured bondholders, the plan could not be confirmed without a fair and justifiable business reason for such discrimination among these classes.[79]

3. Feasibility

Whether or not all classes accept the plan, it may be confirmed only if the court finds that it is "not likely to be followed by liquidation, or the need for further financial reorganization of the debtor or any successor to the debtor," unless the plan itself proposes such liquidation or reorganization.[80] This requirement, often called the "feasibility standard," is designed to give some assurance that the plan is likely to work. That is, the debtor is likely to pay any future payments proposed under the plan.

I. *The Effects of Confirmation: Discharge,*

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> [T]he Bankruptcy Code, through its priority system and by shifting debtor's resources from equity holders to other creditors in a plan of reorganization, appropriately penalizes those who take the risk in investing in a company. In contrast, class actions usually do no such thing: they set aside limited funds for the payment of class action claims, while the company and its shareholders escape potentially unscathed.

Zipes, *supra* note 7, at 10 (citation omitted).

[78] *See* 11 U.S.C. § 1129(b)(1) (providing that a court will not confirm a plan against a non-accepting class if it discriminates unfairly).

[79] Unequal treatment of classes of the same rank may be tolerated if "fair" under the circumstances. *See In re* Rochem, Ltd , 58 B R 641, 643 (Bankr D.N.J. 1985) (applying four-part test to determine whether discriminating treatment is fair); *In re* Ratledge, 31 B.R. 897, 900 (Bankr E.D. Tenn. 1983) (holding that a Chapter 13 plan did not unfairly discriminate against an unsecured creditor who, holding the largest claim, would receive only 23% of its claim).

[80] 11 U S.C. § 1129(a)(11).

Finality, and Global Peace

When a plan of reorganization is confirmed, it becomes binding on all creditors and equity interest holders, as well as on the debtor and any entity receiving property or issuing securities under the plan—whether or not they voted to accept it.[81] An objecting creditor or shareholder has no way to opt out of the plan. Unless the plan provides otherwise, all property of the bankruptcy estate is vested in the debtor free and clear of all claims and interests,[82] and the debtor is forever discharged from all debts that arose before confirmation.[83] The only situation where a corporate debtor will not be discharged from debts is when the plan is a "liquidating plan" that calls for the liquidation of substantially all of the debtor's assets and the debtor will no longer engage in business.[84]

Once confirmed, the plan is entitled to res judicata effect.[85] The bankruptcy court may not revoke the order confirming the plan unless the court, upon the request of a party in interest made within 180 days after confirmation, finds that the order was procured by fraud.[86] Appellate review is obtainable, but only if a timely appeal is filed within ten days after entry of the confirmation order[87] and the appeal has not become moot as a result of consummation of the confirmed plan.[88] Thus, the broad discharge of claims and finality of the confirmation order make Chapter 11 an attractive vehicle for a company seeking a lasting and global peace

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[81] *See* 11 U.S.C. § 1141(a) (1994) (describing the effect of a confirmed plan on above mentioned groups).

[82] *See* 11 U.S.C. § 1141(b), (c) (providing that confirmation of the plan vests property in the debtor).

[83] *See* 11 U.S.C § 1141(d)(1)(A) (providing that the plan confirmation discharges the debtor from prior debts). The discharge applies whether or not (i) the creditor filed a proof of claim, (ii) the claim was allowed, or (iii) the creditor has accepted the plan. *See id*

[84] *See* 11 U.S.C. § 1141(d)(3) (setting forth this discharge exception).

[85] *See, e.g.*, Trulis v Barton, 107 F.3d 685, 691 (9th Cir. 1995) ("Once a bankruptcy plan is confirmed, it is binding on all parties and all questions that could have been raised pertaining to the plan are entitled to *res judicata* effect."); Monarch Life Ins. Co. v. Ropes & Gray, 65 F.3d 973, 983 (1st Cir. 1995) (holding that res judicata precluded challenge to injunctions entered as part of a plan confirmation order).

[86] *See* 11 U.S.C. § 1144 (1994) (establishing the conditions for revocation).

[87] *See* FED. R. BANKR. P. 8002(a) (describing the 10-day provision). If the plan is confirmed by a district judge, rather than a bankruptcy judge, an appeal is timely if a notice of appeal is filed within 30 days after entry of the order. *See* FED. R. APP. P. 4(a)(1), 6(a) (noting that appeals from the district court are governed by the 30-day period)

[88] For a case illustrating the broad scope of the mootness doctrine as applied to the consummation of a confirmed Chapter 11 plan, see *In re Continental Airlines*, 91 F.3d 553 (3d Cir. 1996). *See also* Kuntz v. Saul, Ewing, Remick & Saul (*In re* Grand Union Co), 200 B.R. 101, 105 (D. Del. 1996) (identifying five factors to be considered when applying the doctrine of equitable mootness).

with its creditors. As will be discussed below, the effect of the debtor's discharge with respect to future claims based on the debtor's prebankruptcy or preconfirmation conduct depends on the court's construction of the definition of "claim" and its determination as to when such a claim arises.

J. *The Bankruptcy Code's Flexibility in Providing Creative Ways to Treat Claims*

The Bankruptcy Code leaves room for creative flexibility in the treatment of claims under a Chapter 11 plan. In particular, § 1123(b) lists discretionary provisions that may be included in a plan, including "any other appropriate provision not inconsistent with the applicable provisions of this title."[89] The Code also has its own all writs provision, which gives the court the power to issue "any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."[90] This flexibility has been used effectively in mass tort cases to create trusts for the benefit of tort victims and to impose injunctions to channel those victims to the trust and away from the reorganized company.[91] The Code's flexibility is especially appropriate for complex mass tort cases that present unique problems inviting creative solutions.

II. SEVEN STEPS FOR IMPROVING THE BANKRUPTCY SYSTEM TO BETTER DEAL WITH MASS TORT CLAIMS

Despite the many features that make the bankruptcy system an attractive vehicle for dealing effectively with mass tort liability, the system has several shortcomings that can and should be cured by legislative amendments.[92]

A. *Clarify the Definition of "Claim" To Include the Right to Compensation for Unmanifested Injuries*

As discussed above, there is great significance in determining whether an obligation is a "claim" under the Bankruptcy Code and when that

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[89] 11 U.S.C. § 1123(b)(6) (1994).

[90] 11 U.S.C. § 105(a) (1994).

[91] *See* Kane v. Johns-Manville Corp., 843 F.2d 636, 648-50 (2d Cir. 1988) (requiring a plaintiff to adhere to a trust settlement plan arising out of asbestos claims).

[92] If these recommendations are adopted by Congress, § 524(g), (h), which were added to the Bankruptcy Code in 1994 to govern the treatment of asbestos-related claims, should be repealed as unnecessary and too limiting. For an analysis of the 1994 asbestos-related provisions of the Code, see Mabey & Zisser, *supra* note 7

claim first arises. In general, only "claims" that arise before the order for relief in a Chapter 7 case, or that arise before a Chapter 11 plan is confirmed, are discharged in bankruptcy.[93] The automatic stay against the commencement or continuation of actions against the debtor in a nonbankruptcy forum does not apply unless the claimant has a "claim" that arose before the bankruptcy petition is filed.[94] In addition, certain rights to participate in the bankruptcy case, such as the right to file a proof of claim or to vote as a creditor on a Chapter 11 plan, are reserved only for the holders of prebankruptcy claims.[95] If a claim arises after the bankruptcy case commences, but before a Chapter 11 plan is confirmed or a Chapter 7 liquidation case is completed, the claim may be an administrative expense entitled to priority in distribution.[96]

To provide the most effective relief for the debtor and the widest participation from affected parties, Congress defined "claim" as broadly as possible.[97] Under § 101(5) of the Bankruptcy Code, "claim" is defined to include unmatured, contingent, and unliquidated obligations, as well as matured and fixed obligations. In general, whether or not it is too premature for a state court to recognize an unmatured or contingent right to payment as a cause of action, the Bankruptcy Code recognizes it as a "claim" for bankruptcy purposes.[98] Despite the Bankruptcy Code's broad definition of "claim," courts have not agreed on how to apply this definition to mass tort cases involving unmanifested personal injuries. The inconsistency among federal courts and the uncertainty this has caused has created enormous litigation costs and delays. Those courts that have adopted a restrictive view leave reorganized companies vulnerable to future tort litigation and to unequal treatment of victims of the same tortious conduct. The inequality is caused by making distributions to, and discharging the claims of, present tort claimants with manifested injuries, while leaving those with unmanifested injuries to fend for themselves

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[93] *See* 11 U.S.C. §§ 727(b), 1141(d) (1994) (describing the scope of these discharges)

[94] *See* 11 U.S.C. § 362(a) (1994) (describing the scope of the automatic stay).

[95] *See* 11 U.S C. §§ 501, 1126(a) (1994) (describing who may file a proof of claim or vote on a plan).

[96] *See* 11 U.S.C. §§ 503, 507(a) (1994) (describing the allowance of administrative expenses and priority in distribution).

[97] The legislative history of the Bankruptcy Code, when discussing the definition of "claim," refers to it as the "broadest possible definition" intended to assure that "all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case. It permits the broadest possible relief in the bankruptcy court." H.R. REP. NO. 95-595, at 309 (1978).

[98] *But see* F Frenville v. M Frenville Co. (*In re* M. Frenville Co.) 744 F.2d 332, 336-38 (3d Cir. 1984) (holding that a claim must be "ripe" to sustain a cause of action). *See infra* note 108 and accompanying text (discussing the Third Circuit's holding)

many years after the reorganized debtor emerges from bankruptcy and has either failed or succeeded in its postbankruptcy business. As noted by the National Bankruptcy Review Commission, "[b]ecause 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."[99]

It is beyond dispute that tort victims whose injuries have been manifested before a bankruptcy petition is filed, thereby giving them causes of action under state law, have prebankruptcy claims.[100] It also is clear that when the debtor's conduct giving rise to a tort claim occurs entirely after a Chapter 11 plan is confirmed or, in a Chapter 7 case, after the order for relief, the resulting claim may not be impaired or discharged in the bankruptcy case.[101] Courts, however, have used several different tests to determine when a claim arises for bankruptcy purposes where the tortious conduct occurred before, but the resulting injuries are first manifested after, the order for relief in a Chapter 7 case or the confirmation of a Chapter 11 plan.[102]

1. Standards Used by Courts

a. *The "Conduct Test"*

The broadest test for determining when a claim arises is the "conduct test," which recognizes that a "claim" arises for bankruptcy purposes when the debtor's tortious conduct occurs, whether or not an injury is

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[99] NBRC REPORT, *supra* note 10, at 323.

[100] *See* Schweitzer v. Consolidated Rail Corp., 758 F.2d 936, 941 (3d Cir. 1985) ("It is undisputed that a cause of action in tort is a 'claim' pursuant to section 77 [of the Bankruptcy Act] so that if plaintiffs had causes of action that existed . . prior to the relevant consummation dates they had 'claims.'"); Fairchild Aircraft Inc. v Cambell (*In re* Fairchild Aircraft Corp.), 184 B.R. 910, 922 (Bankr W.D. Tex. 1995) ("Certainly claims arising from injuries that manifest themselves anytime before confirmation come within the scope of the definition [of 'claim'], even if both liability and damages are both contested and unresolved."), *vacated*, 220 B.R. 909 (Bankr. W.D. Tex. 1998).

[101] *See* Kresmery v. Service Am. Corp., 227 B.R. 10, 15 (D Conn. 1998) ("As a general rule, a successfully reorganized debtor under Chapter 11 of the Bankruptcy Code is liable for any independent conduct or claims which arose after confirmation of its bankruptcy plan ").

[102] At least one court, while approving a plan to set aside funds for future tort claimants, avoided the issue whether future claimants have "claims" by permitting them to participate in the case as "parties in interest." *See In re* Johns-Manville Corp., 36 B.R. 743, 745-57 (Bankr. S.D N.Y. 1984) (holding that future claimants were parties in interest with the right to appear and be heard in the Chapter 11 case and, therefore, they were entitled to have a representative), *aff'd*, 52 B.R. 940 (S.D.N.Y. 1985)

manifested at that time.[103] For example, if a company manufactures a defective product, sells it on the market to thousands of consumers, and subsequently files a bankruptcy petition, the conduct test dictates that all claims for injuries caused by the defective product that are first manifested in the postbankruptcy future would be treated as prebankruptcy claims and discharged in the bankruptcy case. This test is consistent with the expansive definition of "claim" in the Bankruptcy Code and the policy of affording the broadest relief in a bankruptcy case.

The conduct test has been criticized, however, as being overbroad.[104] Claimants who did not use or have any exposure to the dangerous product until long after the bankruptcy case has concluded would nonetheless be subject to the terms of a preexisting confirmed Chapter 11 plan. These claimants may be unidentifiable because of their lack of contact with the debtor or the product and, accordingly, may not have had the benefit of notice and an opportunity to participate in the bankruptcy case. Others have responded to these fairness and due process concerns by relying on the appointment of a legal representative to represent the interests of the unidentified future claimants.[105]

b. *The "Relationship Test"*

Concerns that the conduct test may be too broad have led other courts to adopt a "relationship test."[106] That is, a claim first arises for bankruptcy purposes when the debtor engaged in the conduct giving rise to liability *and* there is contact, privity of contract, or another relationship between the claimant and the debtor. If the debtor's alleged wrongful acts were committed, and the claimant and the debtor had some relationship before confirmation of a Chapter 11 plan, the right to payment upon the future manifestation of injury would be a discharged debt. If the victim's

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[103] *See, e.g.*, Grady v. A.H. Robins Co., 839 F.2d 198, 199 (4th Cir. 1988) (stating that claims arise based on the time when acts allegedly giving rise to liability were performed).

[104] *See, e.g.*, Houser, *supra* note 7, at 464 (arguing that "[c]laimants who have had no pre-petition exposure to the debtor's products . . . would be subject to discharge before their injury occurs").

[105] *See* Heidt, *Products Liability*, *supra* note 7, at 144 (arguing that "[r]epresentation and a trust mechanism are the keys to satisfying due process concerns").

[106] *See, e.g.*, Epstein v. Official Comm'n of Unsecured Creditors (*In re* Piper Aircraft Corp.), 58 F.3d 1573, 1577-78 (11th Cir. 1995) (holding that a "claim" requires both conduct giving rise to liability and a relationship between the debtor and the claimant); United States v. LTV Corp. (*In re* Chateaugay Corp.), 944 F.2d 997, 1006-08 (2d Cir. 1991) (endeavoring to apply the definition of "claim" as written while being mindful of the purposes of bankruptcy law and discussing injunctive remedies as claims).

relationship with the debtor or his or her exposure to the defective product occurred after confirmation of the Chapter 11 plan, however, the future claimant would not have had a "claim" in the bankruptcy case, and accordingly, would be unaffected by the bankruptcy discharge.

The following illustration demonstrates how the relationship test could result in questionable discrimination against future claimants. Suppose a single-engine airplane was sold to a pilot in 1998 for recreational use and the seller manufacturer subsequently filed a Chapter 11 petition because of an onslaught of personal injury and wrongful death lawsuits alleging product defects. If a Chapter 11 plan is confirmed in 1999, and the airplane crashes in 2002 while the pilot is giving her neighbor his first airplane ride, the pilot's right to damages for personal injury based on an alleged product defect would be a dischargeable claim because of the pilot's preconfirmation contractual relationship with the debtor. Yet, the neighbor's right to damages for personal injury would not be affected by the bankruptcy and could be asserted against the reorganized company because of the absence of any preconfirmation relationship between the debtor and the neighbor.

c. *Fair Contemplation Test*

Several courts have adopted the "fair contemplation test" to determine when a future claim arises. Under this test, a claim does not arise for bankruptcy purposes until the debtor's tortious conduct occurs *and* the potential existence of the claim could have been reasonably contemplated by the parties.[107] Thus, an unknown claim that could not have been reasonably contemplated before bankruptcy is not a prebankruptcy "claim," even if the conduct giving rise to the claim took place before the bankruptcy petition was filed.

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[107] *See, e g* , California Dept of Health Servs v Jensen (*In re* Jensen), 995 F 2d 925, 930 (9th Cir. 1993) (indicating that at least in cases involving alleged violations of environmental statutes, a claim arises for bankruptcy purposes when the claimant has a fair basis for contemplating that it might have a claim against the debtor). The court of appeals in *Jensen* quoted a commentator's criticism that "nothing in the legislative history or the Code suggests that Congress intended to discharge a creditor's rights before the creditor knew or should have known that its rights existed." *Id* (quoting Kevin J Saville, Note, *Discharging CERCLA Liability in Bankruptcy*, 76 MINN. L. REV. 327, 349 (1991)). See also *Hexcel Corp v. Stepan Co. (In re Hexcel Corp.)*, 239 B.R. 564, 567-72 (N D Cal. 1999), in which the district court applied the "fair contemplation test" and held that the applicability of that test is not limited to environmental claims.

d. *Accrued State Law Cause of Action Test*

In *In re M. Frenville Co.*, the Court of Appeals for the Third Circuit surprised the bankruptcy world by holding that a claim does not arise for bankruptcy purposes until it ripens into a cause of action under nonbankruptcy law.[108] The court held that the automatic stay did not preclude a creditor from taking action on an indemnity claim against the debtor because the indemnity claim had not become a cause of action under state law, despite the fact that the debtor's alleged wrongful act took place before bankruptcy. This holding ignores the Bankruptcy Code's definition of "claim," which includes contingent and unmatured rights to payment, and has been heavily criticized by other courts and commentators.[109] If applied in a mass tort case, the Third Circuit approach would preclude a tort victim from having a dischargeable claim under the Bankruptcy Code, unless, either pre-petition in a Chapter 7 case or preconfirmation in a Chapter 11 case, the victim had a cause of action that could have been pursued in litigation under state law.

2. The 1994 Asbestos Amendments Added to the Confusion

As part of the Bankruptcy Reform Act of 1994, Congress amended the Bankruptcy Code to add the so-called "asbestos amendments."[110] These amendments added detailed provisions to § 524 for the purpose of confirming the legality and enforceability of the trust mechanisms set up in the *Johns-Manville*, *UNR*, and other asbestos-related Chapter 11 cases in the 1980s to benefit asbestos victims, while protecting debtor manufacturers from future liability. The amendments also confirm the enforceability of channeling injunctions that enjoin asbestos-related claimants from pursuing the reorganized debtor, thereby forcing them to seek recourse only against the trust.[111]

The 1994 amendments refer to future rights to compensation for

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[108] 744 F 2d 332 (3d Cir. 1984). The Third Circuit reaffirmed its holding in *Frenville* in *In re Penn Central Transportation Co.*, 71 F.3d 1113, 1117-18 (3d Cir 1995), *cert. denied*, 517 U.S. 1221 (1996)

[109] *See, e g.*, Grady v. A.H. Robins Co., 839 F.2d 198, 201 (4th Cir. 1988) (declining to follow *Frenville*'s limiting definitions of "claim"); Kenneth N. Klee & Frank A. Merola, *Ignoring Congressional Intent: Eight Years of Judicial Legislation*, 62 AM. BANKR. L.J. 1, 28-29 (1988) (noting that "[b]y far the most frequently cited and criticized case is [*Frenville*]").

[110] Pub. L. No. 103-394, 108 Stat. 4106 (1994).

[111] *See* 11 U.S C. § 524(g), (h) (1994) (detailing requirements for issuance of injunctions and procedures that apply to existing injunctions relating to asbestos-related liability).

asbestos-related injuries as future "demands," rather than "claims." As the National Bankruptcy Review Commission has noted, this distinction

> 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.[112]

This treatment of asbestos-related injuries as dischargeable "demands" adds to the confusion over whether a future claimant's right to compensation is a "claim" under the Bankruptcy Code, especially in non-asbestos mass tort cases.[113]

3. Proposing a Modified "Conduct Test" for Determining When a Mass Tort Claim Arises

The key to employing the bankruptcy system to effectively and finally resolve mass tort liability so as to preserve the going concern value of the company, while providing fair and equal treatment for all present and future tort victims, is to recognize as a "claim" under the Bankruptcy Code a right to compensation for unmanifested injuries—whether or not state law would treat it as creating a cause of action and regardless of whether the victim has had any prebankruptcy or preconfirmation relationship to the debtor or the product. It is important to recognize that such a claim arises as soon as the debtor has engaged in conduct that is or will become the basis for liability. This is the purest statement of the "conduct test" now applied by some courts. The more restrictive "relationship" or "state law cause of action" tests would have the undesirable effect of leaving some tort claims out of the bankruptcy system while treating and discharging others, although the cause of all injuries was the same or similar prebankruptcy or preconfirmation conduct.

Despite the attractiveness of the conduct test, however, due process and fairness concerns have caused some to recommend the addition of

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[112] NBRC REPORT, *supra* note 10, at 321.

[113] In an uncodified provision of the Bankruptcy Reform Act of 1994, Congress clarified that the asbestos amendments should not be construed to preclude or affect a bankruptcy court's power to deal with non-asbestos mass tort cases. *See* Pub. L. No. 103-394, § 111(b), 108 Stat. 4106, 4117 ("Nothing . . . shall be construed to modify, impair, or supersede any other authority the court has to issue injunctions in connection with an order confirming a plan of reorganization.").

certain gatekeepers to that test when applied to future mass tort victims. These gatekeepers are designed to prevent a company from using bankruptcy as a way to insulate itself from any possible future liability for its past acts when such future liability is not presently a real threat and is much too speculative and incapable of estimation. For example, suppose a pharmaceutical company were to file a Chapter 11 petition only because its declining profits have caused it to default on bank loans and bonds. The company has suffered because of increased competition in the market, not because it has been the target of product liability claims. In fact, it has never been sued for products liability and has no reason to believe that any of its products are defective or will cause any personal injuries. Nonetheless, as a precaution, its lawyer suggests that the company provides in its Chapter 11 plan for the creation of a trust sufficiently funded to cover possible future claims that may arise from putting pharmaceutical products on the market, for a legal representative to act on behalf of future claimants, and for the discharge of any future claims. How much should be set aside in the trust for future claimants? The speculative nature of future liability based on prebankruptcy acts would make estimation a silly exercise. In that situation, future claimants should not be dealt with or discharged in the Chapter 11 case.

The National Bankruptcy Review Commission has recommended that a definition of "mass future claim" be added as a subset of the definition of "claim" in § 101 of the Bankruptcy Code.[114] A claim based on the debtor's acts or omissions would give rise to such a claim, whether or not it has ripened into a cause of action under state law, if such acts or omissions may be sufficient to establish liability when injuries ultimately are manifested.[115] This is the adoption of the conduct test. The Commission, however, also suggested three gatekeeping requirements.[116]

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[114] *See* NBRC REPORT, *supra* note 10, at 322 (articulating a proposed definition of "mass tort claim"). For a Commissioner's dissenting views and harsh criticism of the NBRC's proposed definition of "claim" as creating additional uncertainty, see Jones, *supra* note 7, at 1707-09. See also Thomas E. Willging, *Mass Torts Problems & Proposals: A Report to the Mass Torts Working Group*, *in* REPORT ON MASS TORT LITIGATION, *supra* note 12, app. C at 70-80, for a discussion of Judge Jones's views on the NBRC's proposals defining future claims.

[115] By recommending a definition that requires that the debtor's acts or omissions "*may* be sufficient to establish liability," the NBRC recognized the importance of providing access to bankruptcy to deal with mass tort claims without the need to admit liability. NBRC REPORT, *supra* note 10, at 326

[116] *See id.* at 327-29 (describing the threshold restrictions imposed by the "mass future claim" definition). The National Bankruptcy Conference has instead recommended that the definition of "claim" be amended to add a definition of "future claim," which may arise regardless of whether a cause of action has accrued under state law or whether the identity of the claimant is known. Under the NBC recommendation, a "future claim" is created by

First, at the time of the petition, the debtor must have been subject to numerous demands for payment for injuries or damages arising from the debtor's conduct,[117] and is likely to be subject to substantial future demands on similar grounds. Second, future claimants must be known or, if unknown, they must be identifiable or described with reasonable certainty. Third, the amount of liability must be reasonably capable of estimation.[118]

An appropriate balance between the reorganization needs of the company and the desire to provide sufficient resources to compensate future claimants fairly could be achieved by the adoption of the NBRC proposals regarding future claims, but with two modest alterations. These alterations would avoid the risk that the gatekeeping requirements would be applied in a manner that would be too limiting. First, the requirement

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one or more acts of the debtor if: (1) the act or acts on which liability would be imposed occurred before or at the time of the order for relief in the bankruptcy case, (2) such acts are sufficient to establish liability when injuries are ultimately manifested, (3) the acts upon which the claim is based and the category of entities which may be holders of future claims have been identified with reasonable certainty, and (4) the claim or class of claims is reasonably capable of estimation or no harm results to claimants from a failure to estimate. *See* NBC CODE REVIEW PROJECT REPORT, *supra* note 8, at 35-37 (proposing definition of future claim).

[117] The NBRC proposal recognizes the benefits of what the Mass Tort Working Group calls the "maturation process." REPORT ON MASS TORT LITIGATION, *supra* note 12, at 22-27. As mass tort cases based on similar acts are litigated or settled individually or in small groups, relevant scientific knowledge develops, liability and damage issues are resolved in some tribunals, and experience begins to help predict or assess the value of claims.

> [T]he maturation process is often crucial to determining the consequences of mass tort litigation. Many years may be required to develop reliable scientific information to answer the questions raised by exposure to a product or substance. Premature judicial attempts to determine whether injuries are caused by a product or substance can be so unreliable that the nature of the litigation is distorted dramatically.

Id at 25.

[118] The requirement that mass tort liability be capable of reasonable estimation protects parties in at least three ways. First, a reasonable estimation is needed to provide adequate information for a legal representative of future claimants, as well as other unsecured creditors and equity holders, to vote on a Chapter 11 plan intelligently. *See* 11 U.S C. § 1125 (1994) (requiring that a written disclosure statement containing adequate information be transmitted to claimants before soliciting their acceptances or rejections of a plan) Second, in a cramdown situation in which the legal representative votes to reject a plan, an estimation will assure that the fair and equitable requirements for confirmation are met by funding a trust with sufficient assets. *See id.* § 1129(b) (allowing a reorganization plan to be confirmed despite rejection by a class of creditors if the court finds the plan fair and equitable with respect to that class) Third, estimation enables the plan proponent to provide the same or similar treatment, on a pro rata basis, to other classes of unsecured claims, such as bondholders or trade creditors. *See id.* § 1123(a)(4) (requiring the same treatment under a plan for each claim or interest of a particular class, unless the claim holder agrees to less favorable treatment).

that unknown future claimants must be identifiable or described with reasonable certainty should be either eliminated or clarified so that it will be broadly construed. If the other requirements for the definition of "mass future claim"—the experience of numerous demands and a determination that future claims can be reasonably estimated—are met, and a legal representative is appointed to act on behalf of future claimants, that future claimants are not identifiable or described with reasonable certainty *at the time of bankruptcy* should not be of crucial importance. If this requirement is included in the definition of "mass future claim," then the definition should clarify that a general description of the category of claimants, such as "all persons injured" by a particular medicine, is sufficient to satisfy this requirement.

The second modest alteration that should be made to the NBRC definition of "mass future claim" relates to the requirement that liability be reasonably capable of estimation. If courts construe the estimation requirement so as to require too much precision in the calculations, few mass tort liability cases would pass the test. The Bankruptcy Code should clarify that future claims are reasonably capable of estimation if there is a rational basis for arriving at an estimation. If the court can approximate a range of liability exposure, the court should do its best to refine that range to an estimate for bankruptcy purposes.[119] Future claims should be excluded from the bankruptcy process only if they are so speculative or unforeseeable that there is no rational basis for putting an appropriate dollar amount on eventual liability.

It is important to note that if future mass tort liability is so premature and speculative that there is no rational basis for estimation, the NBRC proposal would not close the door on the use of bankruptcy to deal with eventual liability. Rather, the company's use of bankruptcy for this purpose would be delayed until there will have been sufficient experience in litigating or settling claims so as to create a basis for reasonable estimation.

B. *Provide for the Appointment of a Legal Representative of Future Mass Tort Claimants*

Although the Bankruptcy Code does not expressly provide for it,

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[119] The concept of compelling a bankruptcy court to approximate liability is not novel; the Bankruptcy Code now mandates that bankruptcy courts estimate unliquidated and contingent claims if fixing them would unduly delay the administration of the estate. *See id.* § 502(c) (providing that "[t]here *shall* be estimated for purposes of allowance . . any contingent or unliquidated claim, the fixing or liquidation of which . . would unduly delay the administration of the case" (emphasis added))

bankruptcy courts have appointed legal representatives for future claimants in mass tort cases.[120] The Code should be amended to provide that, unless demonstrated early in the case that future claims will remain unimpaired under a Chapter 11 plan,[121] the bankruptcy court *must* order the appointment of a legal representative to represent the class of future mass tort claimants in every bankruptcy case involving future mass tort liability.[122] Upon ordering the appointment, the United States trustee should be required to appoint, subject to court approval, a legal representative with powers to investigate, negotiate, file a proof of claim, vote on a Chapter 11 plan, and raise and be heard on any issue on behalf of a class of future mass tort claimants.[123] These powers would enable future claimants to take advantage of the protections afforded by Chapter 11 of the Bankruptcy Code, including the right to receive at least as much value as they would receive in a Chapter 7 liquidation case, the absolute priority rule, the protection against unfair discrimination, and a court determination on feasibility of the plan.[124] The representative would be a fiduciary for the class he or she represents.

The legal representative should be required to make the same kind of disclosure regarding possible conflicts of interest as is required for a professional to be employed by a trustee or debtor in possession.[125] The representative also should have the authority, with court approval, to

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[120] *See, e.g.*, *In re* Amatex Corp., 755 F.2d 1034, 1044 (3d Cir. 1985) (directing bankruptcy court to appoint a legal representative for future claimants); *In re* Johns-Manville Corp., 36 B.R. 743, 757-59 (Bankr. S.D.N.Y. 1984) (sustaining motion to appoint guardian for unknown claimants), *aff'd*, 52 B.R. 940 (S.D.N.Y. 1985) .

[121] For a definition of the impairment of claims, see 11 U.S.C. § 1124 (1994)

[122] The National Bankruptcy Conference and the National Bankruptcy Review Commission also have called for statutory changes that specifically authorize bankruptcy courts to appoint legal representatives for future claimants in mass tort cases. *See* NBC CODE REVIEW PROJECT REPORT, *supra* note 8, at 37-38; NBRC REPORT, *supra* note 10, at 329-30.

[123] The National Bankruptcy Review Commission has recommended that a legal representative for the holders of future mass tort claims have the same powers as a creditors' committee under § 1102 of the Bankruptcy Code The NBRC also recommended that the representative have the power to file a proof of claim on behalf of future claimants, but that identifiable future claimants should have the right to file and vote their own claims. Although the NBRC would allow such claimants to opt out of having the legal representative represent their interests, they would not be permitted to opt out of the class or the plan in the way that a class member may opt out of a Rule 23 class action. *See* NBRC REPORT, *supra* note 10, at 330.

[124] *See* 11 U.S.C. § 1129(a)(7), (a)(11), (b)(1) (1994) (stating some of the requirements for confirmation of a plan).

[125] *See* FED. R. BANKR. P. 2014(a) (requiring that in an application for employment, the professional hired must state "to the best of the applicant's knowledge, all of the person's connections").

employ attorneys, accountants, or other professionals as appropriate to effectively represent the class,[126] and all reasonable expenses incurred by the representative should be paid by the bankruptcy estate as administrative expenses.[127]

The appointment of a legal representative should alleviate fairness and procedural due process concerns. In *Mullane v. Central Hanover Bank & Trust Co.*, a landmark due process decision, the Supreme Court held that procedural due process requires notice and an opportunity to be heard before a court may deprive a person of a property interest.[128] The Court, however, also recognized that constructive notice, such as notice by publication, may be sufficient if it is "all that the situation permits" when giving notice to unknown trust beneficiaries.[129] The best practical way to give notice to future mass tort claimants in many cases is by press releases, notices mailed to targeted groups of product users or others likely to have been exposed, and newspaper and other media advertisements.

Notwithstanding *Mullane*, however, the adequacy of these forms of notice alone in mass tort cases has been called into question by the Supreme Court. In *Amchem*, the Supreme Court avoided addressing the adequacy of notice in a mass tort class action case involving future claimants, but recognized "the gravity of the question whether class action notice sufficient under the Constitution . . . could ever be given to legions so unselfconscious and amorphous."[130]

Commentators have suggested that procedural due process requirements could be satisfied by the appointment of a legal representative to act on behalf of future tort claimants "together with the best practicable notice" under the circumstances.[131] Some have gone

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[126] See 11 U.S.C. §§ 327, 1103(a) (1994), for similar powers of a trustee or creditors' committee.

[127] *See id.* §§ 503(b), 507(1) (permitting allowance for administrative expenses and granting such expenses priority).

[128] 339 U.S. 306, 314 (1950).

[129] *Id.* at 317.

[130] Amchem Prods., Inc. v Windsor, 521 U.S. 591, 628 (1997).

[131] NBC CODE REVIEW PROJECT REPORT, *supra* note 8, at 38 The NBC Code Review Project Report suggested:

> Where feasible notice to future claimants is inadequate standing alone, such as where individual claimants are not identifiable and injury has not yet manifested, and where such notice is constitutionally required, the court may find that the appointment of a legal representative for future claims, together with the best practicable notice, satisfies the requirements of due process Such a finding may be appropriate when the outlines of risk and injury to a group of future claimants is discernable such that their representative can present credible evidence respecting

further in suggesting that the appointment of a legal representative in mass tort cases is *necessary* to satisfy procedural due process requirements.[132]

Among the essential characteristics of a legal representative acting on behalf of future mass tort claimants are independence and a lack of conflicts of interest.[133] As discussed above, the legal representative should be selected by the United States trustee with court approval, rather than by the debtor, parties in interest, or attorneys purporting to represent future claimants when the bankruptcy petition is filed.

Caution should be exercised to assure that shortcuts are not taken regarding the selection of the legal representative. For this reason, courts should be extremely reluctant to permit a proposed settlement of future claims—negotiated with a legal representative selected by the parties before bankruptcy—to be presented to the court for confirmation in a "prepackaged" Chapter 11 plan.[134] In such cases, any votes to accept the

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appropriate treatment for the group.

Id.; *see also* Heidt, *Future Claims*, *supra* note 7, at 515 (asserting that "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").

[132] Ralph R. Mabey and Jamie Andra Gavrin advocate this view:

> When the debtor possesses general knowledge about a group of likely future claims—especially when future claimants may not even be aware of their exposure to an offending product—publication notice by itself does not suffice. Rather, the practical situation in a bankruptcy case usually also permits (and therefore *Mullane* usually mandates) the appointment of a future claims representative in order to provide future claims access to a court hearing. . . . The practicality mandate of *Mullane* therefore usually requires the opportunity for future claimants to be heard through a representative when publication notice to them is largely futile.

Mabey & Gavrin, *supra* note 7, at 780-81.

[133] Any doubts as to the importance of these attributes were put to rest by the Supreme Court's decision in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 119 S. Ct. 2295, 2330 (1999), where the Court set aside a class action settlement because, among other reasons, some of the attorneys who served as counsel for the class of future claimants had a conflict of interest arising from their representation of present claimants in the settlement

[134] The Bankruptcy Code recognizes that a debtor may negotiate and formulate a proposed Chapter 11 plan, distribute it with appropriate disclosure documents, and solicit votes *before* the bankruptcy case is commenced. The votes obtained from creditors and equity holders before bankruptcy will count in the bankruptcy case. *See* 11 U.S.C. § 1126(b) (1994) (holding claimants and interest-holders to their pre-case acceptances or rejections of a plan) This procedure reduces the time during which the debtor is in Chapter 11. When acceptances are obtained before bankruptcy, the case is commonly called a "prepackaged" Chapter 11 case.

Prepackaged Chapter 11 plans are common in commercial cases, such as where a company needs to restructure a bond issuance, but are rare in mass tort cases *In re Fuller-Austin Insulation Co.*, No. 98-2038-JJF, 1998 WL 812388 (D Del. Nov. 10, 1998), was the first prepackaged mass tort Chapter 11 case. For a discussion and criticism of the case, see Rice & Davis, *supra* note 14, at 448-51. Rice and Davis comment that the professor

plan cast by the prebankruptcy legal representative should not count. A new, independent legal representative appointed after the filing of the bankruptcy case, with sufficient time to review any proposed estimation or settlement and an opportunity to vote on the proposed plan on behalf of future claimants, should be required.

C. *Provide for Present-Value Estimation of Future Mass Tort Claims for Allowance and Distribution Purposes*

Probably the most difficult challenge facing courts presiding over mass tort cases involving long-tail future claims is a determination or estimation of the aggregate amount of such claims. The difficulty of estimating future claims is the same in a nonbankruptcy proceeding, such as a class action, as it is in a bankruptcy case. Estimating future claims is especially complex when underlying liability, in addition to the magnitude of harm, is disputed.[135]

Skeptics invariably cite the *Johns-Manville*[136] case to demonstrate the futility in attempting to accurately estimate future claims. In that case, the trust established to fund payments to claimants fell short of its goal of preserving assets necessary to provide compensation for claimants who would first manifest an asbestos-related disease in the future. As a result, the trust had to receive an increase in funding several years after its creation.[137] *Johns-Manville*, however, was one of the earliest mass tort cases.[138] As the National Bankruptcy Review Commission found, courts

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selected by the debtor in *Fuller-Austin* to act as a legal representative in prebankruptcy negotiations on behalf of unknown asbestos-related future claimants was approved by the court "without extensive scrutiny," as part of the prepackaged plan. *Id.* at 450. For a general discussion of prepackaged plans, see Leonard P. Goldberger, *The Mass Tort Pre-Pack: What Will They Think of Next?*, 17 AM. BANKR. INST J. 18 (1999).

Although prepackaged Chapter 11 plans are rare in mass tort cases, the Judicial Conference's Advisory Committee on Civil Rules and Working Group on Mass Torts has noted their emergence and has reported that they warrant consideration. "This procedure could achieve the same effects as a mandatory, no-opt-out settlement class." REPORT ON MASS TORT LITIGATION, *supra* note 12, at 59.

[135] *See, e.g.*, *In re* Dow Corning Corp., 211 B.R. 545 (Bankr. E.D Mich. 1997) (illustrating the difficulty of estimating future claims when liability is disputed).

[136] MacArthur Co. v. Johns-Manville Corp., 837 F.2d 89 (2d Cir 1988).

[137] *See In re* Joint E. & S. Dist. Litig., 129 B.R. 710, 755-58 (E.D.N.Y. 1991) (explaining how in 1989, as a result of a cash shortage in the trust, Manville Corp. prepaid a $50 million note payable to the trust in installments in 1990 and 1991), *vacated*, 982 F.2d 721 (2d Cir. 1992).

[138] *See* Mabey & Zisser, *supra* note 7, at 495-96 (describing procedural problems in *Johns-Manville* that resulted in certain advantages to claimants who litigated against the trust); *see also* JACK B. WEINSTEIN, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES 57,

have learned valuable lessons from the *Johns-Manville* experience and have improved the ability to adequately estimate future claims liability in the aggregate.[139] A leading example of a reasonably accurate estimation of future claims is the *A.H. Robins* case where, after a six-day estimation hearing, the trust established for the benefit of personal injury claimants was funded in an amount that exceeded original projections.[140]

Once estimation occurs in a Chapter 11 case, the amount estimated may be used for voting and disclosure purposes and to determine whether a plan of reorganization meets the confirmation requirement of feasibility.[141] It is unclear, however, whether bankruptcy courts have the power to estimate claims for the purpose of placing a cap on aggregate future distributions.[142]

The National Bankruptcy Review Commission and the National Bankruptcy Conference have recommended that the Bankruptcy Code be amended to provide expressly that the bankruptcy court may estimate the aggregate amount of future claims in mass tort cases for the purpose of distribution, as well as for allowance.[143] These recommendations are

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106 (1995), *cited in* NBRC REPORT, *supra* note 10, at 344 n.857 (discussing huge plaintiffs' attorneys fees that plagued the *Johns-Manville* case despite failed efforts to control them).

[139] *See* NBRC REPORT, *supra* note 10, at 344 (discussing the progress of courts with respect to claims estimation since *Johns-Manville*).

[140] *See In re* A.H. Robins Co., 880 F.2d 694, 699 (4th Cir. 1989) (describing the estimation hearing); Mabey & Zisser, *supra* note 7, at 497 n.45 (discussing the administration of the *A.H. Robins* plan); NBRC REPORT, *supra* note 10, at 344 (noting the success of the *A.H. Robins* trust); Vairo, *supra* note 32 (providing a history of the *A.H. Robins* plan and the Dalkon Shield Claimants Trust it created). But see Willging, *supra* note 114, at 76-78, for a critical discussion of the estimation process in *A.H. Robins*.

[141] *See* 11 U.S.C. §§ 1125, 1126(a), 1129(a)(11) (1994) (governing disclosure, voting, and feasibility requirements for plan confirmation).

[142] *See, e g., In re* MCorp. Fin., Inc., 137 B.R. 219, 226 (Bankr. S.D. Tex 1992) (holding that estimation of claims does not limit distributions); *In re* Poole Funeral Chapel, Inc., 63 B R 527, 532 (Bankr. N.D. Ala. 1986) (holding that estimation does dictate distribution); *In re* Baldwin-United Corp., 57 B.R. 751, 758 (S.D. Ohio 1985) (holding that estimation establishes a cap, but not a floor, on distribution); *see also* Sheldon S. Toll, *Bankruptcy and Mass Torts· The Commission's Proposal*, 5 AM. BANKR. INST. L. REV 363, 373 (1997) ("One of the hot topics of current bankruptcy law in the mass tort area is whether estimation can only be used for determining feasibility of a plan of reorganization, or whether it can also be used for determining distribution, thus capping future mass tort claims.").

[143] *See* NBC CODE REVIEW PROJECT REPORT, *supra* note 8, at 39 ("Section 502(c) should be amended to clarify that the estimation of all claims, including any claim filed by a representative of future claims, may be made for purposes of distribution as well as allowance and voting."); NBRC REPORT, *supra* note 10, at 341 ("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.").

sound. If the estimated amounts of aggregate future claims become binding for distribution purposes—so that *estimation* effectively means *determination*—there would be greater certainty, an enhanced ability to provide adequate funding for the trust, and finality in the treatment of future claims. The estimation would limit the aggregate amount of distributions that will ultimately be made and may be used in determining how large the trust should be. The estimation also would be relied upon for confirmation purposes, including the determination whether the plan satisfies the "best interest of creditors" standard and "fair and equitable" requirements.[144]

Once aggregate future claims are estimated, it is necessary to determine how the trust funds will be distributed to individual claimants. Distribution mechanisms for individual claimants are often established by plans of reorganization or trust documents in mass tort Chapter 11 cases. Settlements and mediation mechanisms may be used to determine the amount of an allowed claim for pro rata distribution purposes. However, if an individual personal injury or wrongful death tort claimant insists, Title 28 guarantees the right to a jury trial in district court for the purpose of liquidating the claim.[145] Once the amount of the claim is liquidated, the confirmed Chapter 11 plan will determine how the claim will be treated and the amount to be distributed to the claimant.

The recommendation to give bankruptcy courts the power to estimate aggregate claims for distribution purposes should not be misunderstood as a suggestion that bankruptcy judges are better than state or other federal judges at achieving such estimations. Any judge, whether in the state or federal judiciary, would be faced with the same difficult task of estimating future claims in a mass tort case, and there is no reason to believe that a bankruptcy judge would be any better, nor any worse, than other judges in making the determination.[146]

D. *Expressly Authorize Channeling Injunctions*

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[144] *See* 11 U.S.C. § 1129(a)(7), (b) (codifying the "best interest" and "fair and equitable" requirements).

[145] In 1984, Title 28 of the United States Code, which governs bankruptcy court jurisdiction, was amended to provide that the "district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose." 28 U.S.C. § 157(b)(5) (1994). Title 28 also preserves the right to trial by jury "that an individual has under applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim." 28 U.S.C. § 1411(a) (1994).

[146] *See* Jones, *supra* note 7, at 1716 (noting that "the process of estimating and providing for mass future claims in bankruptcy is no less challenging and settled than in the class action context").

in Appropriate Cases

The key to a fair resolution of mass tort liability is the preservation of assets for future claimants. An effective mechanism for achieving this goal may be to set aside assets in trust for future claimants to be funded, in whole or in part, by future income of the debtor company or by proceeds from the sale of the debtor's assets. It is not unusual for the trust to hold stock in the debtor so that it would share in, or receive all of, its profits. It also could hold proceeds of insurance policies or settlement contributions made by the debtor's insurers.

Bankruptcy courts have issued so-called "channeling injunctions" that direct claimants to pursue any remedies they may have against the trust, while prohibiting actions against the debtor company or the debtor's insurers that have funded the trust.[147] The protected company then feeds the trust with cash contributions through stock dividends, insurance proceeds, or other cash contributions.[148] This mechanism is consistent with the discharge granted to the company under the Bankruptcy Code.

Before 1994, bankruptcy courts issued channeling injunctions and established trusts for mass tort claimants without express statutory authority to do so.[149] Courts relied on § 105(a) of the Bankruptcy Code, a general provision that gives bankruptcy courts the power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]."[150] The Bankruptcy Reform Act of 1994 added a provision to the Bankruptcy Code that expressly provides for channeling injunctions, but only in asbestos cases and only under limited circumstances.[151]

The National Bankruptcy Review Commission has endorsed the use of channeling injunctions in mass tort cases and has recommended that the Bankruptcy Code be amended to expressly provide for such use, regardless of whether the case is asbestos-related.

Authorizing channeling injunctions would ensure that the Bankruptcy Code

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[147] *See, e.g.*, MacArthur Co. v Johns-Manville Corp., 837 F.2d 89, 94 (2d Cir. 1988) (issuing a channeling injunction designed to prohibit claimants from commencing or continuing litigation against the debtor's insurer where the insurer contributed funds to a trust for future asbestos victims).

[148] *See, e.g., id.* at 91.

[149] *See, e.g., In re* A.H. Robins Co., 880 F.2d 694, 701-02 (4th Cir. 1989) (issuing a channeling injunction without specific statutory authority); *Johns-Manville*, 837 F.2d at 93-94 (same).

[150] 11 U.S.C. § 105(a) (1994)

[151] *See id.* § 524(g)(1)(B) (1994) (codifying the power to issue channeling injunctions in asbestos cases).

> specifically empowers the court to use this valuable tool in appropriate cases to direct mass future claim holders 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.[152]

Channeling injunctions may be necessary to protect the debtor under present law because of uncertainties regarding the existence and dischargeability of future mass tort claims. It could be argued that a channeling injunction should no longer be necessary to protect the debtor if the Bankruptcy Code is amended to clarify that mass future claims are dischargeable. Nonetheless, a channeling injunction could play an important role where appropriate to protect asset purchasers, insurers, or other third parties[153] who have contributed substantial assets to a global settlement. For these reasons, the Bankruptcy Code should be amended to clarify that courts have the power to issue channeling injunctions in all appropriate cases involving mass tort liability.

E. *Subordinate Punitive Damage Claims*

The Bankruptcy Code should also be amended to provide that punitive damage claims are subordinated to general unsecured claims in mass tort cases.

The difficulties in estimating future claims and setting aside sufficient assets to compensate all claimants in mass tort cases become even more complex if the court allows holders of punitive damage claims to share in the distribution of a debtor's assets on the same level as holders of compensatory damage claims. Moreover, the risk that a trust funded to compensate future claimants will fall short of its goal—because of inaccuracies inherent in any estimation process—is heightened if payments are made to earlier claimants for punitive damages, thereby depleting funds otherwise available to claimants whose injuries manifest later. For these reasons, the likelihood of success in providing fair compensation for injuries in mass tort cases is increased if punitive damage claims are either

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[152] NBRC REPORT, *supra* note 10, at 346 The National Bankruptcy Conference also suggested that the Bankruptcy Code be amended to clarify that channeling injunctions may be issued in appropriate cases. *See* NBC CODE REVIEW PROJECT REPORT, *supra* note 8, at 41 ("Proposal D.8 is provided to make clear that a court can use the mechanism of channeling injunctions . . . ")

[153] The use of channeling injunctions to protect third parties has received some criticism. *See, e.g.*, Jones, *supra* note 7, at 1717 (urging caution in the granting of channeling injunctions); Willging, *supra* note 114, at 78-79 (noting Judge Jones's warnings that the NBRC channeling injunction would protect third parties from future claimants)

disallowed or subordinated to general unsecured creditors.

The subordination provision should apply whether or not punitive damages were awarded before the commencement of the bankruptcy case. If pre-petition judgments for punitive damages would give a present claimant an advantage over future claimants, the bankruptcy policy of equality of treatment of similar creditors would be frustrated.

The Bankruptcy Code is inconsistent with respect to its treatment of punitive damage claims. In Chapter 7 liquidation cases, punitive damage claims are subordinated to general unsecured claims.[154] That is, all general unsecured claims must be paid in full, excluding interest that accrues during the case, before any creditor receives a distribution on a punitive damage claim. It is more important to compensate all claimants for actual damages than it is to punish the debtor for wrongful conduct. General subordination, however, does not occur in Chapter 11 in a manner that assures that each creditor must be compensated for actual damages in full before any distribution based on punitive damages.[155]

Any concern that the subordination of punitive damage claims would allow companies or managers to escape the kind of punishment for which punitive damage awards are designed should be given little weight. First, punitive damage claims would be subordinated, rather than disallowed, under this proposal and would rank ahead of prebankruptcy equity interests, including those held by management. Second, it is unlikely in mass tort cases that executives whose conduct justifies the award of punitive damages will continue to manage the reorganized debtor.[156]

The subordination of punitive damage claims has occurred already in

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[154] *See* 11 U S.C. § 726(a)(4) (1994) (listing payment of punitive damage claims after general unsecured claims for distribution purposes in a Chapter 7 case). Punitive damage claims, however, are senior to claims for post-petition interest on unsecured claims. *See id.* § 726(a)(4), (5) (ordering payment of interest on a claim fifth in payment priority in a Chapter 7 case while payment of punitive damages is fourth in payment priority).

[155] It could be argued that the subordination of punitive damage claims may be required in Chapter 11 cases to some extent because § 1129(a)(7) provides that a plan may not be confirmed without paying each nonconsenting creditor at least as much as the creditor would receive in a Chapter 7 case. *Id.* § 1129(a)(7), *see also* NBC CODE REVIEW PROJECT REPORT, *supra* note 8, at 42-43 ("While it has been argued that section 1129(a)(7)'s best interest rule requires a similar result in Chapter 11, or that section 510 permits a similar result, statutory clarification is needed to assure consistent treatment " (footnotes omitted)).

[156] *See* NBC CODE REVIEW PROJECT REPORT, *supra* note 8, at 42 ("Typically, former management of the debtor whose conduct justified the assessment of punitive damages has been replaced by new managers forced on the business by its creditors or such managers will be excluded by statute from managing the reorganized entity." (footnotes omitted)); Lynn M. LoPucki & William C. Whitford, *Corporate Governance in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 141 U PA L. REV. 669, 730-31 (1993) (listing the turnover of CEOs in several Chapter 11 cases).

mass tort Chapter 11 cases, despite the lack of specific statutory authority. For example, punitive damage claims were subordinated in the *A.H. Robins* case.[157] Nonetheless, the Code should be amended to expressly provide for such subordination.[158]

F. *Protect Asset Purchasers from Successor Liability*

Companies in Chapter 11 commonly sell assets while the case is pending.[159] In many situations, the sale of one or more business divisions as going concerns—either before a plan is confirmed or as part of a plan—is the most effective way to maximize value for creditors. The purchase price for such assets could be used to fund a trust for mass tort claimants.

To maximize the purchase price for assets, especially functioning business units, it is necessary to assure purchasers that they will not have any liability with respect to any claims against the selling debtor. This would not be a problem under traditional tort law which recognizes that the purchaser of assets is not liable for the torts committed by a seller.[160] Several nonbankruptcy courts, however, have developed a "successor doctrine" that allows an injured party with a product liability claim against a manufacturer to recover damages from property subsequently sold to a third party under certain circumstances.[161] If the successor doctrine could

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[157] *In re* A.H. Robins Co., 89 B.R. 555, 563 (E.D. Va 1988) (finding that given the nature of the case, allowing punitive damages would be inappropriate).

[158] This recommendation is consistent with the proposals of the National Bankruptcy Conference. *See* NBC CODE REVIEW PROJECT REPORT, *supra* note 8, at 42 ("A new section 510(d) should be added to provide that if claims for punitive damages are allowed, they shall be subordinated to general unsecured claims.").

[159] *See, e.g.*, United States v. LTV Corp. (*In re* Chateaugay Corp.), 973 F.2d 141, 145 (2d Cir. 1992) (upholding bankruptcy court order approving the sale of substantially all of the assets of a debtor subsidiary corporation during its Chapter 11 case), Committee of Equity Sec. Holders v. Lionel Corp. (*In re* Lionel Corp.), 722 F.2d 1063, 1070-71 (2d Cir. 1983) (holding that a debtor in Chapter 11 may sell substantially all its assets if there is an articulated business justification for the sale before confirmation of a reorganization plan); *see also* 11 U S.C. § 363(b) (1994) (permitting a trustee, after notice and a hearing, to sell property of the estate outside the ordinary course of business).

[160] *See, e.g* , Polius v Clark Equip. Co., 802 F.2d 75, 77 (3d Cir. 1986) (stating that it is a "well settled rule of corporate law" that when a company sells assets to another, the purchaser does not become liable for the debts or liabilities, including tort liabilities, of the seller).

[161] *See, e g.*, Mooney Aircraft Corp. v. Foster (*In re* Mooney Aircraft, Inc.), 730 F.2d 367, 371-72 (5th Cir. 1984) (discussing the development of the successor doctrine); Ramirez v. Amsted Indus., Inc., 431 A.2d 811, 815-17 (N.J. 1981) (considering different approaches to successor liability taken by various courts); *see also* Toll, *supra* note 142, at 377 (noting that the successor liability doctrine is the exception to the general rule that a corporation buying assets is not liable for the debts and other liabilities of the seller). The successor

be applied when a Chapter 11 debtor sells assets to a third party, so that future claimants could recover from the asset purchaser despite the debtor's discharge, the price that a purchaser would be willing to pay would be discounted substantially.[162]

Courts are not in agreement on whether a bankruptcy court could cut off successor liability of a purchaser of assets. Section 363(f) of the Bankruptcy Code provides that, in certain situations, the court may approve a sale of assets "free and clear of any interest in such property."[163] It is not clear, however, that an injured person with a product liability claim has an "interest" in the assets that could be cut off under § 363(f), and as a result courts have disagreed on this issue.[164]

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doctrine is applicable when:

> (i) the purchaser expressly or impliedly agrees to assume such debts and liabilities; (ii) the transaction is deemed a consolidation or merger of the [buyer and the seller]; (iii) the buyer is merely a continuation of the [seller]; or (iv) the [sale] is entered into fraudulently to escape liability for the seller's debts and other liabilities.

Id. (footnote omitted).

[162] *See, e.g.*, Paris Indus. Corp. v. Ace Hardware Corp. (*In re* Paris Indus. Corp.), 132 B.R. 504, 510 n.14 (D. Me. 1991) ("Every sale must then be discounted by the risk the purchaser sees of future claims."); Rubinstein v. Alaska Pac. Consortium (*In re* New England Fish Co), 19 B.R. 323, 328-29 (Bankr. W.D. Wash. 1982) (commenting that the successor doctrine could have a negative chilling effect on asset sales); 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) (explaining that if asset purchasers could be liable for the debtor's mass tort liability, "prices obtained for the assets in bankruptcy will likely fall to their 'scrap' value").

[163] 11 U.S.C. § 363(f) (1994).

[164] *See, e g., Paris Indus. Corp.*, 132 B.R. at 510 (upholding the bankruptcy court's permanent injunction prohibiting third parties from bringing product liability actions against a purchaser of a Chapter 11 debtor's manufacturing assets who bought the assets subject to a court order that expressly provided that the sale was free and clear of product liability claims) The court in *Paris Industries* noted that "[t]o conclude that a bankruptcy court cannot approve the sale of assets free and clear of such future claims against a purchaser from the debtor significantly impairs the bankruptcy court's ability to administer bankruptcy estates." *Id* at 510 n.14; *see also* Volvo White Truck Corp. v. Chambersburg Beverage, Inc. (*In re* White Motor Credit Corp.), 75 B.R. 944, 948 (Bankr. N.D. Ohio 1987) ("General unsecured claimants including tort claimants, have no specific interest in a debtor's property Therefore, section 363 is inapplicable for sales free and clear of such claims."). Furthermore, the court found that a court has the power to authorize a sale free of such claims under general equitable powers "consistent with its power to discharge claims under a plan of reorganization." *Id. But see* Zerand-Bernal Group, Inc. v. Cox, 23 F.3d 159, 161, 164 (7th Cir. 1994) (affirming the bankruptcy court's holding that it lacked subject matter jurisdiction to enjoin future product liability suits against a purchaser of assets based on the successor liability doctrine with regard to personal injuries occurring after a "free and clear of claims" sale under a confirmed liquidating Chapter 11 plan), *Mooney Aircraft, Inc.*, 730 F.2d at 373 (noting that a sale free and clear of claims does not preclude use of the successor doctrine when the product liability cause of action arises after the sale). *See generally* Ninth Ave. Remedial Group v. Allis-Chalmers Corp., 195 B R. 716, 729-32

Several courts have enjoined product liability suits against asset purchasers recognizing that, if the successor doctrine could be used, personal injury claimants would have an advantage over banks and trade creditors who would not be the beneficiaries of the successor doctrine. The effect would be the discounting of the purchase price to account for the buyer's risks of successor liability—resulting in a smaller distribution to unsecured creditors in the bankruptcy case—together with preferential treatment for product liability claimants. "The result is that successor liability theory would rearrange the priority scheme established by the Bankruptcy Code."[165]

The National Bankruptcy Review Commission made a sound recommendation when it proposed that the Bankruptcy Code be amended to expressly authorize bankruptcy courts to enjoin all creditors, including future mass tort claimants, from suing third party purchasers of assets from a debtor—whether the sale occurs apart from or under a Chapter 11 plan—but only if those claims have been represented in the bankruptcy case and the debtor or trustee has made provisions for their treatment.[166] "Without the appointment of a mass future claims representative, for example, the successor would not be protected from liability for mass future claims."[167] The "free and clear" order would include a finding by the court that the requisite standards for treating mass future claims have been satisfied.

> 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

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(N.D. Ind. 1996) (noting that a few courts have held that § 363(f) applies only to in rem interests, while other courts have applied it more broadly to unsecured employment discrimination and product liability claims).

[165] American Living Sys. v. Bonapfel (*In re* All Am., Inc.), 56 B.R. 186, 190 (Bankr N.D. Ga. 1986); *see also Paris Indus. Corp* , 132 B.R. at 510 n.14 ("The result will be decreasing assets for those who already have claims and essentially a preference for later-filed claims that can be brought against the purchaser."); 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, 330 (1996) ("[T]he application of successor liability to bankruptcy sales thwart[s] the policy goals underlying the Bankruptcy Code, [and has] severe constitutional implications . . . .")

[166] The Commission proposed to amend §§ 363 and 1123 of the Bankruptcy Code to provide for asset sales free and clear of mass future claims.

[167] NBRC REPORT, *supra* note 10, at 349.

> 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, nor would they receive worse treatment by being omitted from participation in the benefits from the sale even if they live in a jurisdiction that does not recognize successor liability.[168]

Statutory clarification of the bankruptcy court's power to enjoin successor liability suits against asset purchasers consistent with the Commission's recommendation would be a significant improvement that would make the bankruptcy system a better vehicle for the final resolution of mass tort liability.[169]

G. *Provide for Preconfirmation Payments of Claimants' Emergency Medical Expenses*

In general, prebankruptcy claims may not be paid in a Chapter 11 case before a plan of reorganization has been confirmed.[170] The delay in confirming a plan may be especially harmful to tort victims who are in immediate need of medical attention without the benefit of adequate insurance protection. The Bankruptcy Code should be amended to permit the bankruptcy court, in limited situations, to authorize distributions to the holders of personal injury claims to the extent needed to satisfy particular emergency medical needs. The court should have to determine that there is a high probability that the claimant would eventually receive distributions in an amount not less than the amount of the emergency distribution.

Section 105(a) of the Bankruptcy Code[171] has been used as the basis for bankruptcy courts to allow the payment of certain prebankruptcy claims prematurely. Under this "doctrine of necessity," courts have permitted the payment of prebankruptcy claims where the nonpayment of such claims would have a detrimental effect on the reorganization

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[168] *Id.* at 349-50 (footnote omitted).

[169] *See* NBC CODE REVIEW PROJECT REPORT, *supra* note 8, at 41 (recommending that the Bankruptcy Code be amended to provide that a good faith purchaser takes free and clear of successor liability for pre-sale acts); Toll, *supra* note 142, at 378 ("The Commission's proposal is a needed improvement to resolve an unfairness noted by commentators.").

[170] *See* Rosenberg Real Estate Equity Fund III v Air Beds, Inc. (*In re* Air Beds, Inc.), 92 B.R. 419, 422 (B.A P 9th Cir. 1988) ("The general rule is that a distribution on a pre-petition debt in a Chapter 11 case should not take place except pursuant to a confirmed plan of reorganization, absent extraordinary circumstances ").

[171] Section 105(a) provides: "The court may issue any order . . . that is necessary or appropriate to carry out the provisions of this title." 11 U S.C. § 105(a) (1994).

effort.[172] For example, courts have permitted debtors to pay pre-petition, priority wage claims so that the debtor's work force will continue postpetition without disruption resulting from poor morale.[173] The Bankruptcy Code should be amended to extend expressly the doctrine of necessity to permit preconfirmation payments to help meet a personal injury claimant's uninsured immediate medical needs.

Any emergency payment for medical assistance would be applied to reduce subsequent distributions following plan confirmation. In that way, emergency payments to tort claimants sufficient to address immediate medical needs would result in an acceleration of payments, not an increase in total distributions to the particular claimant.

An illustration of the need for a mechanism that permits preconfirmation payments of emergency medical expenses is provided by the *A.H. Robins* case.[174] Dalkon Shield personal injury claimants proposed a plan that would allow preconfirmation payments necessary to pay for tubal reconstructive surgery or in-vitro fertilization procedures for women under the age of forty who claimed infertility. The surgical procedures had a thirty to sixty percent success rate. A $15 million fund was proposed, which would pay for the $10,000 to $15,000 cost of each surgical procedure.[175] Despite the support of the debtor and all committees other than the shareholders, and approval of the district court, the court of appeals held that such payments could not be made because there is no authority under the Bankruptcy Code to support paying medical expenses before a plan is confirmed.[176]

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[172] *See, e.g.*, Pension Benefit Guaranty Corp. v. Sharon Steel Corp. (*In re* Sharon Steel Corp.), 159 B.R. 730, 732 (Bankr W D. Pa. 1993) (allowing sale to go forward because proceeds were necessary to pay pre-petition wage claims in exchange for an end to picketing and a work stoppage at debtor's plant), *In re* Quality Interiors, Inc., 127 B R. 391, 396 (Bankr. N.D. Ohio 1991) (recognizing that bankruptcy courts often permit the payment of pre-petition wages so that the debtor in possession can maintain an effective work force).

[173] *See, e.g.*, *In re* Ionosphere Clubs, Inc , 98 B.R. 174, 175 (Bankr. S.D N.Y. 1989) (accepting this rationale as a sound business reason to justify such pre-petition payments).

[174] A H. Robins Co. v. Piccinin, 788 F.2d 994 (4th Cir. 1986).

[175] *See* Official Comm. of Equity Sec. Holders v. Mabey, 832 F.2d 299, 300-01 (4th Cir. 1987) (setting forth the nature of the proposal and the cost estimates).

[176] *See id* at 300 (holding that 11 U.S.C. § 105(a) did not give the district court authority to permit the payment of preconfirmation distributions for emergency medical expenses) The court of appeals also noted that such premature payments would be preferential with respect to other personal injury claimants and other unsecured claimants, even though such payments would be offset against subsequent distributions after confirmation of a Chapter 11 plan. *See id.* For further discussion of this decision, see Jason A. Rosenthal, *Courts of Inequity· The Bankruptcy Laws' Failure to Adequately Protect the Dalkon Shield Victims,* 45 FLA L. REV. 223, 226-32 (1993) (recognizing that "bankruptcy proceedings may be the only equitable method to compensate all of a

CONCLUSION

The bankruptcy system provides an appropriate framework for resolving enterprise-threatening mass tort liability. The automatic stay and nationwide bankruptcy jurisdiction are procedural attributes that facilitate bringing all mass tort litigation against the debtor into one court. The flexible classification scheme and the ability to impair some or all classes of claims and equity interests provide a unique mechanism for spreading the loss caused by mass tort liability among some or all creditor and shareholder groups. The Chapter 11 confirmation requirements—including the absolute priority rule and protection against unfair discrimination in cram down cases, the "best interest of creditors" test, voting provisions, and feasibility requirements—are attributes that assure a minimum level of economic protection and bargaining power for mass tort claimants and other creditors.

Despite the attributes of the bankruptcy system discussed in this Article, however, there is a need for statutory improvements in certain key areas. Most important is the clarification of the meaning of "claim" in a mass tort context to avoid any uncertainties with respect to the ability to treat and discharge "future claims" that are reasonably capable of estimation. Other areas that warrant statutory improvement or clarification include the appointment and role of a legal representative to act on behalf of future claimants, estimation of future claims for distribution purposes, channeling injunctions, subordination of punitive damage claims, protecting asset purchasers from successor liability, and the authorization of emergency medical payments to tort victims before plan confirmation.

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company's tort victims," but discussing the bankruptcy courts' reluctance to authorize an Emergency Treatment Fund for Shield victims); Willging, *supra* note 114, at 84-85 (discussing how some of the infertility caused by the Dalkon Shield could have been prevented if the court of appeals had not reversed the order implementing the plan).

COMMENTARY

A RESPONSE TO PROFESSOR RESNICK: WILL THIS VEHICLE PASS INSPECTION?

S. ELIZABETH GIBSON†

INTRODUCTION

Raising the topic of bankruptcy in the midst of a symposium on any nonbankruptcy topic tends to put a damper on things. It is a little bit like trying to sell life insurance at a wedding: Why spoil the fun of discussing intellectual property law, family law, environmental law, or you-name-it by raising the specter of a distressed debtor's resort to that murky realm of the federal courts? Fortunately, the organizers of this Symposium wisely chose to include among the topics for discussion the consideration of bankruptcy as a tool for resolving mass torts. Perhaps its inclusion comes more naturally to this Symposium than to others, since a discussion of mass torts necessarily devotes itself to a crisis situation. Moreover, given the increasing number of companies that have pursued a bankruptcy reorganization solution to their mass tort problems,[1] a symposium focusing on the current realities presented by mass tort litigation and seeking better means of resolving such cases could not reasonably omit consideration of the topic.[2]

Professor Resnick makes a good case for accepting bankruptcy[3] as an

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[1] *See, e.g.*, Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers of Conn. (*In re* Dow Corning Corp.), 86 F.3d 482, 485 (6th Cir. 1996); *In re* UNR Indus., Inc., 20 F.3d 766, 767-68 (7th Cir. 1994), *In re* Amatex Corp., 755 F.2d 1034, 1035 (3d Cir. 1985); *In re* Eagle-Picher Indus., Inc., 203 B.R. 256 (S.D. Ohio 1996); *In re* A.H. Robins Co., 88 B.R. 742, 743-45 (E.D. Va. 1988), *aff'd*, 880 F.2d 694, 696-97 (4th Cir. 1989); *In re* Johns-Manville Corp., 68 B.R. 618, 621 (Bankr. S.D.N.Y. 1986).

[2] *Cf.* ADVISORY COMM. ON CIVIL RULES AND WORKING GROUP ON MASS TORTS, REPORT ON MASS TORT LITIGATION 58-60 (Feb. 15, 1999) [hereinafter REPORT ON MASS TORT LITIGATION] (discussing possible bankruptcy solutions to mass tort problem).

[3] Unless otherwise indicated, I use the term "bankruptcy" throughout this commentary to refer to bankruptcy reorganizations under Chapter 11 of the Bankruptcy Code, 11 U.S.C.

appropriate vehicle for resolving what he calls "enterprise-threatening" mass tort liability.[4] Among other things, he points out the procedural and jurisdictional advantages of bankruptcy that permit the consolidation and binding resolution of all pending and future tort claims against the debtor. He then advocates statutory changes to clarify existing uncertainties concerning bankruptcy's treatment of mass tort claims and to bolster bankruptcy courts' authority to achieve a "lasting and global peace" of a corporate debtor's mass tort liability.[5] I am in basic agreement with these two main points of Professor Resnick's article. I agree that bankruptcy is an appropriate tool for resolving mass tort claims asserted against certain defendants and that improvements should be sought to make bankruptcy a more effective mass tort resolution method. I fear, however, that Professor Resnick has overstated the case for bankruptcy in certain respects, and so I address constitutional concerns raised in certain mass tort contexts which a bankruptcy resolution may not be able to ignore.

Even those who have not heretofore embraced the idea that bankruptcy is an appropriate vehicle for resolving mass torts may now be forced to consider such a possibility, given the obstacles that the Supreme Court has recently placed in the way of two other collective resolution devices. The Court's first product liability mass tort decision, *Amchem Products, Inc. v. Windsor*,[6] rejected a Rule 23(b)(3) class certification that was sought to achieve a global settlement affecting "hundreds of thousands, perhaps millions, of individuals" either currently or possibly in the future possessing asbestos-related claims against one or more of twenty companies.[7] In so ruling, the Court identified certification problems in that case that may exist for many attempted mass tort settlements[8] and for which the necessary solutions are likely to make Rule 23(b)(3) settlements less attractive as a mass tort remedy.[9] More recently,

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§§ 1101-1146 (1994).

[4] Alan N. Resnick, *Bankruptcy as a Vehicle for Resolving Enterprise-Threatening Mass Tort Liability*, 148 U. PA L. REV. 2045 (2000).

[5] *Id.* at 2067.

[6] 521 U.S. 591 (1997).

[7] *Id.* at 597.

[8] *See id.* at 624 (holding that Rule 23(b)(3)'s requirement that "[common] questions of law or fact predominate" was not satisfied due to the overarching significance of questions "peculiar to the several categories of class members, and to individuals within each category"); *id.* at 626-27 (holding that Rule 23(a)(4)'s adequacy of representation requirement was not met due to lack of alignment of class members' interests and absence of "structural assurance of fair and adequate representation for the diverse groups and individuals affected"); *id.* at 628 (questioning whether constitutionally adequate notice "could ever be given to legions so unselfconscious and amorphous" as the class members who had not manifested any asbestos-related injuries and their future spouses and children)

[9] *See* REPORT ON MASS TORT LITIGATION, *supra* note 2, at 41 ("[C]ertifying and

in *Ortiz v. Fibreboard Corp.*,[10] the Court reversed the certification of a Rule 23(b)(1)(B) class action settlement based on the class's failure to satisfy requirements that the Court derived from a historically based model[11] of limited fund class actions.[12] The Court not only imposed requirements for limited fund class actions that may be difficult to meet,[13] but also pointedly questioned on several occasions, without resolving, whether a mandatory Rule 23(b)(1)(B) class action may ever be appropriately certified in the case of a mass tort.[14] While *Amchem* and *Ortiz* may not sound the death knell for mass tort class action settlements,[15] the decisions certainly increase the difficulty of getting

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settling a large class action under Rule 23(b)(3) for global peace may be more difficult after *Amchem* and may be unachievable for future claimants."); John C. Coffee, Jr., *Conflicts, Consent, and Allocation After* Amchem Products—*Or, Why Attorneys Still Need Consent to Give Away Their Clients' Money*, 84 VA. L. REV. 1541, 1552-53 (1998) (discussing one possible reading of *Amchem* as requiring the "balkaniz[ation of] the class into an unmanageable assortment of small subclasses that cannot easily act in concert"); Eric D. Green, *What Will We Do When Adjudication Ends? We'll Settle in Bunches: Bringing Rule 23 into the Twenty-First Century*, 44 UCLA L. REV. 1773, 1778 (1997) ("[I]t is apparent that few, if any, mass tort classes (especially those involving exposure-only victims), could meet the [*Amchem*] majority's interpretation of Rule 23(b)(3)'s predominance test or Rule 23(a)(4)'s adequacy of representation test, for either class action settlement or trial ").

[10] 527 U.S. 815, 119 S. Ct. 2295 (1999).

[11] *See id.* at 2309-12 (identifying the characteristics of traditional limited fund suits); *id.* at 2313 (noting that "the greater the leniency in departing from the historical limited fund model, the greater the likelihood of abuse" and "[t]he prudent course, therefore, is to presume that . . . the object [of Rule 23(b)(1)(B)] was to stay close to the historical model").

[12] The Court held that a limited fund mass tort settlement class must satisfy the following requirements to be certified, and that the class before it had failed to do so:

> [I]t would be essential that the fund be shown to be limited independently of the agreement of the parties to the action, and equally essential under Rule 23(a) and (b)(1)(B) that the class include all those with claims unsatisfied at the time of the settlement negotiations, with intraclass conflicts addressed by recognizing independently represented subclasses.

Id. at 2323.

[13] *See* Matthew C Stiegler, Note, Ortiz *and the Future of Limited Fund Settlement Class Actions in Mass Tort Litigation,* 78 N.C. L. REV. 856, 900 (2000) ("*Ortiz* has made limited fund class certification substantially, perhaps prohibitively, more difficult and uncertain.").

[14] *See Ortiz*, 119 S Ct. at 2312 ("[W]e cannot . . . decide the ultimate question whether settlements of multitudes of related tort actions are amenable to mandatory class treatment . . . ."); *id.* at 2314 ("We do not, it is true, decide the ultimate question whether Rule 23(b)(1)(B) may ever be used to aggregate individual tort claims." (citation omitted)); *id.* at 2323 ("In sum, the applicability of Rule 23(b)(1)(B) to a fund and plan purporting to liquidate actual and potential tort claims is subject to question . . . ."); *id.* (emphasizing that in holding the settlement class invalid for failure to comport with the attributes of limited fund class actions, the Court "[a]ssum[ed] *arguendo* that a mandatory, limited fund rationale could under some circumstances be applied to a settlement class of tort claimants").

[15] *See id.* at 2322 ("[W]e have not ruled out the possibility under the present Rule of a

either type of class action certified by a district court and ultimately approved on appeal.[16] It is to be expected, therefore, that parties seeking a global resolution of mass tort litigation may look elsewhere for a solution.[17]

Bankruptcy provides such a possible solution—at least until the Supreme Court decides to take and resolve a mass tort case that raises the issue whether bankruptcy may be used as a global resolution vehicle.[18] Companies overwhelmed by the costs of defending and satisfying the claims of thousands of tort claimants have in the past and will continue in the future to seek bankruptcy relief.[19] Accordingly, whether or not

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mandatory class to deal with mass tort litigation on a limited fund rationale . . . ."); Coffee, *supra* note 9, at 1559 ("[T]here is a variety of feasible alternatives by which *Amchem Products* might be implemented. . . *Amchem Products* will in time require fairer rules, but the inquiry has only begun as how to best implement its holdings and its philosophy.").

[16] See, for example, Wish v. Interneuron Pharmaceuticals, Inc. (*In re* Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.), No. MDL 1203, CIV.A.98-20594, 1999 WL 782560 (E.D. Pa. Sept. 27, 1999), in which the court stated:

> While this court does not read Ortiz as a bar to limited fund class certification in all mass tort cases, Ortiz does counsel against those class certifications which would deprive the class of the protections available under the traditional model. For that reason, the court denies the motion for class certification

Id. at *14. *See, e.g.*, Walker v. Liggett Group, Inc., 175 F.R.D. 226, 233 (S.D.W. Va. 1997) ("Intervenor . . . has demonstrated adequately why certification, under either *Rules* 23(b)(1)(B) or (b)(3) cannot occur on these facts after *Amchem*. Accordingly, the Court (1) . . . WITHDRAWS its preliminary approval and certification of the settlement and settlement class; and (2) DENIES Plaintiffs' motion for class certification." (emphasis omitted)).

[17] *See, e.g.*, Richard B. Schmitt & Laura Johannes, *Judge Rejects Interneuron's Proposed Class-Action Settlement Over Diet Pill*, WALL ST. J., Sept. 28, 1999, at B15 (speculating about possible bankruptcy filing by diet pill manufacturer after district court rejection of its proposed limited fund class action settlement).

[18] To date, the Supreme Court has not granted review in a mass tort bankruptcy case. *See, e.g.*, Official Comm. of Tort Claimants v. Dow Corning Corp., 522 U.S. 977 (1997) (denying certiorari in breast implant bankruptcy); Official Comm. of Tort Claimants v. Dow Corning Corp., 519 U.S. 1071 (1997) (same); UNARCO Bloomington Factory Workers v. UNR Indus., Inc., 513 U.S. 999 (1994) (denying certiorari in asbestos bankruptcy); Menard-Sanford v. A.H. Robins Co., 493 U.S. 959 (1989) (denying certiorari in Dalkon Shield bankruptcy). Furthermore, significant procedural obstacles may stand in the way of Supreme Court review of the confirmation of a mass tort bankruptcy reorganization plan. By the time a challenge to a plan would be able to work its way up to the Supreme Court, it is likely that the plan would have been implemented to such a degree that review would be impracticable or futile. *See, e.g.*, *In re* UNR Indus., Inc., 20 F.3d 766, 771 (7th Cir. 1994) (affirming district court's dismissal of appeal because, although the appeal was not legally moot, the plan's trust provisions were too far implemented to be disturbed); Rochman v. Northeast Utils. Serv. Group (*In re* Public Serv. Co. of N.H.), 963 F.2d 469, 476 (1st Cir. 1992) (dismissing appeal from plan confirmation on the ground that "the absence of a stay pending the appeal of the order confirming the reorganization plan permitted its implementation to so substantial an extent as to leave the court powerless to grant fair and effective relief").

[19] *See, e.g.*, *supra* note 1 (listing cases of mass tort defendants seeking bankruptcy

bankruptcy is the preferred solution, attention needs to be paid to how it can be made more effective as a resolution vehicle for mass torts, and one that is constitutionally sound in all respects.

I. ADVANTAGES OF BANKRUPTCY FOR RESOLVING MASS TORTS

Professor Resnick has discussed a number of features of the bankruptcy system that make it an appropriate vehicle for resolving the mass tort litigation facing a bankruptcy debtor. The chief advantage is that bankruptcy, because it demands an all-encompassing financial solution, provides the best conceptual fit for the global resolution of enterprise-threatening mass tort liability. When a company faces massive tort liability that threatens the viability of the company, it is not just a problem for the tort claimants and the company's management. It is a problem affecting all who have a financial relationship with the company, including other creditors, shareholders, employees, customers, suppliers, officers, and directors. As Professor Resnick correctly points out, bankruptcy is the only resolution mechanism that makes the holders of all of those claims and interests come to the table and thereby come to grips with the problem facing the company. By staying other means of collecting debts and receiving property from the debtor, bankruptcy consolidates all financial claims against the debtor—not just those based on tort law—and then allows the various constituencies to participate in attempting to arrive at an equitable solution for all concerned parties.[20]

Bankruptcy's all-inclusive approach stands in contrast to the resolution of mass torts by means of limited fund class action settlements.[21] The theory underlying the certification under Rule 23(b)(1)(B) of a mandatory class of tort claimants is that without such consolidation those who are among the first to sue and recover will deplete the company's assets, leaving nothing for those who seek recovery at a later time.[22] Thus, in

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relief).

[20] *See* THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 17 (1986) (explaining that bankruptcy is both collective and compulsory and stating that it "provides a way to override the creditors' pursuit of their own remedies and to make them work together"); CHARLES JORDAN TABB, THE LAW OF BANKRUPTCY 5 (1997) (describing bankruptcy as "a compulsory collective remedy"); *id* at 8 (noting that a "chapter 11 bankruptcy reorganization contains both a stay provision . . . and a rule binding dissenters to the terms of the plan agreed to by the bulk of creditors").

[21] The contrast with Rule 23(b)(3) class action settlements is even more pronounced, since potential members of the class are allowed to opt out in that type of class action. *See* FED. R. CIV. P. 23(c)(2)-(3) (providing that potential members of a 23(b)(3) class may request exclusion and that those who do so will not be bound by the judgment). Thus, it is likely that not even all tort claimants will be included within the class action resolution.

[22] *See, e.g.*, Fanning v. Acromed Corp. (*In re* Orthopedic Bone Screw Prods. Liab.

order to prevent the impairment of the latecomers' interests, all potential tort claimants are brought together in one proceeding, and the limited assets that the defendant company offers are divided equitably among them.[23]

The problem, however, with this theory is that if the allegedly insufficient fund is the company itself, rather than a finite fund to which only a discrete group has a claim,[24] then the tort claimants are not the only ones competing for the scarce resources. All of the unsecured creditors have a claim to the unencumbered assets—and the shareholders to any remaining balance—and likewise all should be forced, in Professor Resnick's words, to "share the pain."[25] Limited fund class action settlements of mass torts, however, do not operate in this manner. Only the tort claims are compromised; the claims of other unsecured creditors and the interests of shareholders remain unaffected.[26]

There may well be situations where it is fair to place the burden of compromise only on the tort claimants when a limited fund class action

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Litig.), 176 F.R.D. 158, 177 (E.D. Pa. 1997) ("AcroMed's net assets and insurance coverage are vastly insufficient to satisfy the many claims against them. Additionally, . . . [a]fter incurring . . . defense costs, AcroMed would have had little or no ability to pay settlements or judgments to plaintiffs in individual cases."); Butler v Mentor Corp. (*In re* Silicone Gel Breast Implant Prods. Liab. Litig.), Nos. CV 93-P-11433-S, CV 92-P-10000-S, MDL No 926, 1993 WL 795477, at *5 (N.D Ala. June 2, 1993) (basing preliminary certification decision on the "risk that defense costs, individual settlements, or a few judgments would exhaust the Mentor Defendants' assets before other claimants, with similar claims, had an opportunity to be heard").

[23] *See Orthopedic Bone Screw*, 176 F.R.D. at 177 ("This settlement shuts off AcroMed's defense cost flow and places all claimants on the same plane, at the same time, with respect to AcroMed's financial capacity to respond to all of the claims, leaving each claimant[']s share to be determined by traditional application of equitable distribution standards."); *Silicone Gel Breast Implant*, 1993 WL 795477, at *5 ("[T]he capture of these assets in the proposed settlement for equitable distribution to all class members appears to be a fairer and superior alternative to the potential exhaustion of these assets in continued litigation . . . .") *But see* Ortiz v. Fibreboard Corp., 527 U.S. 815, 119 S. Ct. 2295, 2313 (1999) ("[I]t is clear that the Advisory Committee did not contemplate that the mandatory class action codified in subdivision (b)(1)(B) would be used to aggregate unliquidated tort claims on a limited fund rationale.").

[24] *See Ortiz*, 119 S. Ct. at 2309 (noting that among "classic" limited fund class actions are suits by claimants to trust assets, bank accounts, and insurance proceeds).

[25] *See* Richard L. Marcus, *They Can't Do That, Can They? Tort Reform Via Rule 23*, 80 CORNELL L. REV. 858, 880 (1995) ("[T]he limited fund theory would call for the inclusion of *all* claimants, whatever the source of their claims ").

[26] *See* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1458-59 (1995) (criticizing limited fund class action settlements, pursuant to which "stock values soar, while tort creditors are either scaled back or forced to rely on thinly funded or unspecified settlement funds"); Marcus, *supra* note 25, at 880 (emphasizing that limited fund class actions do not adjust the claims of all creditors to the defendant's limited assets).

settlement is approved. If the defendant's tort liability is as yet scientifically unproven and still vigorously disputed, it may in fact be the case that the tort claimants are receiving more under the settlement than they would turn out to be entitled to receive if the claims were litigated, even if they are receiving only a percentage of the amount they initially claimed.[27] Thus, it can be argued that the tort claimants are not being treated inequitably in relation to the commercial creditors. Even when liability is well established, a justification for paying commercial creditors in full while the tort claimants are required to share a limited fund may be that full payment of such creditors is necessary for the continued operation of the business, which in turn provides the basis for funding future pay-outs to the tort claimants.[28]

The advantage bankruptcy has to offer, even when full payment of commercial claims may be in everyone's interest, is that all affected groups have an opportunity to negotiate and vote on the appropriate treatment of tort claimants, trade creditors, bond holders, shareholders, and the like.[29] Thus the fairness of full payment of commercial creditors is not just assumed or accepted unquestioningly, as it is in the case of limited fund class action settlements. If such treatment is provided for by a bankruptcy reorganization plan, it must either be accepted by all classes of creditors and equity security holders, or substantive protections for non-accepting classes must be satisfied.[30]

Professor Resnick also points out the procedural advantages that bankruptcy offers for aggregating mass tort claims against the bankruptcy

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[27] *See* Marcus, *supra* note 25, at 879 ("Plaintiff lawyers are notoriously and understandably generous in their prayers for relief, and these should not be taken as reliable indicators of probable recovery ").

[28] This was the rationale of the district court in *Orthopedic Bone Screw*, 176 F.R.D. at 177. In approving a Rule 23(b)(1)(B) class settlement, the court explained that the settlement was to be funded by "an outside infusion of $100 million of borrowed funds not otherwise available except for the terms of the settlement." *Id.* The court further noted that "[w]ithout this infusion, the settlement cannot be accomplished and without the settlement, AcroMed will consume itself by exhausting all of its resources including its traditional borrowing potential." *Id.* Continued operation of the company was therefore necessary to repay the loan taken out to fund the settlement to the tort claimants.

[29] *See* 11 U.S.C. § 1103(c)(3) (1994) (authorizing creditors' committees to "participate in the formulation of a plan [and] advise those represented by such committee of such committee's determinations as to any plan formulated"); *id.* § 1126(a) ("The holder of a claim or interest allowed under section 502 of this title may accept or reject a plan.").

[30] *See* Keene Corp. v. Fiorelli (*In re* Joint E & S Dist Asbestos Litig), 14 F.3d 726, 732 (2d Cir. 1993) ("[C]lass members in [class action] cases such as this would have no say in the conduct of the court-appointed class representatives and, unlike creditors in bankruptcy, are not able to vote on a settlement. For them, it would be 'cram-down' from start to finish " (citation omitted)).

debtor in a single forum and then for arriving at a global and binding resolution of them. Among the features of bankruptcy that he discusses are the automatic stay, the grant of exclusive jurisdiction over the debtor's property, nationwide service of process, and the bankruptcy court's authority to determine where personal injury and wrongful death tort litigation will take place.[31] These features of bankruptcy are essential components of a system designed to achieve a collective resolution of an ailing debtor's financial liabilities; one court is able to bring a halt to individual collection efforts and to oversee the orderly liquidation or reorganization of the debtor for the benefit of all creditors.[32] These same procedures and grants of authority thus lend themselves naturally to the resolution of a large group of tort claims asserted against a company.[33] Indeed, the value of these procedural tools for the resolution of mass torts is borne out by the extent to which the attempt has been made to incorporate similar procedures into mass tort class actions, effectively turning them into "designer bankruptcies."[34]

If bankruptcy provides such an appropriate theoretical and procedural

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[31] *See* Resnick, *supra* note 4, Part I.B (discussing the advantages of nationwide jurisdiction, automatic stay, and other procedures when dealing with mass torts).

[32] As one commentator has stated:

> This collective approach, when applied to the bankruptcy system, creates a structure that precludes the creditors from individually chasing the debtor's treasure (the available assets). Instead, the creditors work together to both preserve and enhance the treasure and cut back on the costs of trying to recover a piece of it. The loss from the disaster (debtor nonpayment) is then shared among the creditors.

KAREN GROSS, FAILURE AND FORGIVENESS: REBALANCING THE BANKRUPTCY SYSTEM 137 (1997) *See* 3 COLLIER ON BANKRUPTCY ¶ 362.03[2] (15th ed. 1999) ("Without the stay, the debtor's assets might well be dismembered, and its business destroyed, before the debtor has an opportunity to put forward a plan for future operations. . . . The stay prevents this piecemeal liquidation, offering the chance to maximize the value of the business.").

[33] *See* United States Lines, Inc. v. American S.S. Owners Mutual Protection & Indem Ass'n (*In re* United States Lines, Inc.), 197 F.3d 631, 641 (2d Cir. 1999) ("[A]s we have previously pointed out, the bankruptcy court is the preferable venue in which to handle mass tort actions involving claims against an insolvent debtor." (citing *Joint E. & S. Dist. Asbestos*, 14 F.3d at 732)).

[34]

> Indeed, the [class action] 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. The class representatives correspond to creditors' committees in Chapter 11 proceedings. The proposed mandatory class settlement mirrors a reorganization plan and 'cram-down,' followed by a discharge.

Joint E. & S. Dist. Asbestos, 14 F 3d at 732 (citations omitted), *see also* Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV 1148, 1164 (1998) (describing Rule 23 (b)(1)(B) mass tort class actions as the "functional equivalent to bankruptcy").

framework for addressing the situation facing a company whose viability is threatened by mass tort litigation, one might wonder why it has not become the mass tort solution of choice for such companies. Several practical obstacles stand in the way of bankruptcy's becoming the darling of the mass tort world. Generally, lawyers other than the ones who are engaged in litigating mass torts handle bankruptcies,[35] and, as a general rule, judges other than those who handle mass tort litigation preside over bankruptcy cases.[36] While these rules are not invariably true,[37] they are true frequently enough to create a cultural divide that tort lawyers must traverse if a bankruptcy solution is sought.[38] Perhaps an even greater deterrent to seeking a bankruptcy solution is the risk of displacement faced by those in a company who would be the ones generally to make the decision to file for bankruptcy. In cases in which the value of the mass tort claims truly appears to exceed the value of the company, existing management is faced with the very real possibility not only that they will lose their jobs,[39] but also that the tort claimants will emerge from bankruptcy as the owners of the reorganized company. Taking a step that may cause the company to be turned over to its litigation adversaries is likely to be considered only as a last resort.[40] Finally, even from the viewpoint of disinterested policymakers, bankruptcy has the disadvantage of taking a long time to arrive at a resolution, frequently four or more

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[35] *See, e.g.*, REPORT ON MASS TORT LITIGATION, *supra* note 2, app. E at 34 (noting hiring of bankruptcy specialist as counsel to claimants' committee); RICHARD B. SOBOL, BENDING THE LAW 69, 74 (1991) (same).

[36] *See* 28 U.S.C. § 157(a) (1994) (authorizing district courts to refer all bankruptcy cases to bankruptcy courts).

[37] *See, e.g., id.* § 157(d) (authorizing district court "for cause shown" to withdraw a case referred to bankruptcy court); Ackles v. A.H. Robins Co. (*In re* A.H. Robins Co.) 59 B.R. 99, 105-07 (E.D. Va. 1986), *aff'd sub nom.* Beard v. A.H. Robins Co., 828 F.2d 1029, 1031 (4th Cir 1987) (withdrawing reference to bankruptcy court of most matters in Dalkon Shield bankruptcy).

[38] *See, e.g.*, SOBOL, *supra* note 35, at 73 (observing that plaintiffs' attorneys in the Dalkon Shield litigation were suspicious and felt outside their "natural habitat" when the manufacturer filed for bankruptcy).

[39] *See* GROSS, *supra* note 32, at 32 ("[M]anagers of large financially troubled companies are frequently replaced just before or during a large [bankruptcy] case."); Lynn M. LoPucki & William C. Whitford, *Corporate Governance in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 141 U. PA. L. REV. 669, 723 (1993) (finding that publicly held corporations undergoing Chapter 11 reorganizations experience a high rate of CEO turnover).

[40] *Cf* REPORT ON MASS TORT LITIGATION, *supra* note 2, app E at 16 (noting debtor's determination to retain control of the reorganized corporation); SOBOL, *supra* note 35, at 201-04 (noting Company's endorsement of the reorganization plan that would enable management to retain control).

years to reorganize a company facing mass tort liability.[41] The long pendency of the bankruptcy case in turn results in an even longer delay in making payments to tort victims[42] and an ever escalating cost of achieving a resolution.

Some of these obstacles are the inevitable result of enterprise-threatening liability, but others are capable of being addressed through procedural reforms.[43] In either event, the harsh reality is that other options for collective resolution of mass tort claims may be disappearing, so bankruptcy, warts and all, may be a necessary choice for some defendants. Attention needs to be given, therefore, to possible constitutional objections to using bankruptcy to resolve all present and future tort claims.

II. CONCERNS ABOUT BANKRUPTCY AS A MASS TORT VEHICLE

Professor Resnick cites, as one of bankruptcy's advantages, its standard for classifying claims together that "is far less restrictive than the four threshold requirements applicable to class actions under Rule 23."[44] As he points out, the Bankruptcy Code's only requirement for grouping claims together in one class is that they be "substantially similar,"[45] a

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[41] *See* REPORT ON MASS TORT LITIGATION, *supra* note 2, app. C at 84-85 & nn.453-54 (noting that long delays have been "a major criticism" of bankruptcy as a mass tort resolution tool).

[42] *See, e.g.*, Georgene M. Vairo, Georgine, *the Dalkon Shield Claimants Trust, and the Rhetoric of Mass Tort Claims Resolution*, 31 LOY. L A. L REV. 79, 155 (1997) (noting that it took approximately nine years after the Robins plan was consummated and the trust received full funding for all Dalkon Shield claims to be resolved).

[43] Professor Resnick has identified a number of statutory gaps in the Bankruptcy Code that need to be addressed if bankruptcy is to operate more effectively and on a firmer legal footing as a mass tort resolution device. I agree with many of the proposed solutions. For example, because bankruptcy has been, and will be, pursued by mass tort defendants that have sold products other than asbestos, *see, e.g.*, Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers of Conn. (*In re* Dow Corning Corp.) 86 F.3d 482 (6th Cir. 1996) (breast implants); *In re* A.H. Robins Co., 88 B.R. 742 (E.D. Va. 1988), *aff'd*, 880 F.2d 694 (4th Cir. 1989) (birth control devices), the Bankruptcy Code needs to be amended to eliminate asbestos-specific mass tort authority and instead to provide generally for the resolution of mass torts, whatever the source of the claims may be. Likewise, the status in bankruptcy of future claimants needs to be statutorily clarified, although as I discuss below, due process considerations may limit how broadly the class of future claimants should be defined, *see infra* note 97 and accompanying text Finally, I agree with Professor Resnick's suggestions for substantive amendments to the Bankruptcy Code that would allow the subordination of punitive damages in mass tort bankruptcy reorganizations, the pre-confirmation payment of mass tort claimants' emergency medical expenses, and the protection of asset purchasers from successor liability.

[44] Resnick, *supra* note 4, at 2060.

[45] 11 U.S.C. § 1122(a) (1994) (providing that "a plan may place a claim or interest in a

requirement that courts have generally interpreted as meaning that the claims have the same distribution rank against the same property of the debtor.[46] In that sense, all nonpriority, unsubordinated, unsecured claims are substantially similar and are permitted to be grouped together in a single class in a reorganization plan.[47]

Because of this flexibility in classifying unsecured claims, reorganization plans in mass tort bankruptcies frequently place all of the tort claims together in a single class, regardless of the nature of the injury, the existence of issues unique to certain claimants, the varying degrees of legal strength of the claims, or the extent to which injury has been manifested.[48] If such a classification scheme satisfies not only statutory

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particular class only if such claim or interest is substantially similar to the other claims or interests of such class").

[46] *See, e.g.*, *In re* AOV Indus., Inc., 792 F.2d 1140, 1150 (D.C. Cir. 1986) ("[T]he focus of the classification is the legal character of the claim as it relates to the *assets of the debtor*"); 7 COLLIER ON BANKRUPTCY, *supra* note 32, ¶ 1122.03[3] ("[T]he term 'substantially similar' must be construed to mean similar in legal character or effect as a claim against the debtor's assets or as an interest in the debtor."); *id.* ¶ 1122 03[4] ("Claims of the same kind and the same rank involving the same property may be included within a single class "), John C. Anderson, *Classification of Claims and Interests in Reorganization Cases Under the New Bankruptcy Code*, 58 AM. BANKR. L.J. 99, 101 (1984) ("As a general rule, all creditors with equal rank and with claims against the same property are usually placed in the same class . . . "). *But see* Teamsters Nat'l Freight Indus. Negotiating Comm. v. U.S. Truck Co. (*In re* U.S. Truck Co.) 800 F.2d 581, 584-87 (6th Cir. 1986) (affirming district court's conclusion that, because of the union's unique noncreditor interests, its unsecured claim was not substantially similar to other unsecured claims).

[47] *See In re* Eisenbarth, 77 B.R. 228, 236 (Bankr. D.N.D. 1987) ("An unsecured claim is simply that, an unsecured claim. No valid reason exists for treating the unsecured claims of [certain institutional creditors] different than the unsecured claims of the trade creditors."); Anderson, *supra* note 46, at 119 (stating that generally "the unsecured creditors will be placed in the same class and receive the same treatment"); Peter E. Meltzer, *Disenfranchising the Dissenting Creditor Through Artificial Classification or Artificial Impairment*, 66 AM. BANKR. L.J. 281, 290 (1992) ("'Unsecured claims will, generally speaking, comprise one class, whether trade, tort, publicly held debt or a deficiency of a secured creditor.'" (quoting 3 WILLIAM L NORTON, JR., BANKRUPTCY LAW & PRACTICE § 60.05, at 7 (1991))).

[48] *See, e.g.*, *In re A.H. Robins Co.*, 880 F.2d at 697 (referring to the class of Dalkon Shield claimants as one "with so many various unliquidated personal injury claims which vary so much in the extent and nature of injury, medical evidence and causation factors" as to render it nearly impossible to provide specific estimates of recovery); UNARCO Bloomington Factory Workers v. UNR Indus., Inc., 124 B R. 268, 271 (N.D Ill 1990) (describing class of asbestos claimants in UNR reorganization plan as including "asbestos victims who know they have claims against UNR . . . [and] those who may have been exposed to UNR's asbestos products before the bankruptcy, before confirmation, or after confirmation, but do not yet have an injury or know they have an injury"); REPORT ON MASS TORT LITIGATION, *supra* note 2, app E at 34 (describing class 17 of Eagle-Picher reorganization plan as consisting of "all present and future rights to payment for death, bodily injury, or other personal damages resulting from exposure to asbestos or asbestos-

requirements but also passes constitutional muster, then Professor Resnick may be correct in suggesting that bankruptcy offers an advantage in its ability to consolidate claims. The concerns raised after *Amchem* and *Ortiz* about the possible need for an unwieldy number of class action subclasses of mass tort claimants[49] could be alleviated by utilizing bankruptcy's one-class grouping.[50]

Before accepting the argument that bankruptcy offers an advantage in this regard, however, one must determine why bankruptcy is permitted greater flexibility in classification than class actions possess. Perhaps the answer is simply that Rule 23 imposes certain express requirements for class certification that the Bankruptcy Code just does not impose on Chapter 11 plan classification. For all class actions, "the claims . . . of the representative parties [must be] typical of the claims . . . of the class"[51] and "the representative parties [must] fairly and adequately protect the interests of the class."[52] For 23(b)(3) class actions, specifically, "the questions of law or fact common to the members of the class [must] predominate over any questions affecting only individual members."[53] The Bankruptcy Code, by contrast, only requires substantial similarity.[54] Stating the differences in the requirements, however, merely begs the question why typicality, adequacy of representation, and predominance are concerns of class actions and not also of bankruptcy.[55]

The Supreme Court's opinions in *Amchem* and *Ortiz*, while not models of clarity, do provide some insights into the basis for the Court's concerns about proper classification of mass tort claimants involved in class action settlements. In both cases, the Court's holding that the

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containing products, or from products containing lead chemicals, manufactured or distributed by the debtor prior to the bankruptcy petition date").

[49] *See supra* notes 6-16 and accompanying text (suggesting that sub-classes are necessary for a class involving all mass tort victims to be certified).

[50] *See, e.g., In re* Dow Corning Corp., 244 B.R. 634, 655-56 (Bankr. E.D. Mich. 1999) (rejecting argument that more valuable, multi-rupture breast implant claims are not substantially similar to single rupture claims and thus must be separately classified), *id.* at 658 ("[A]ll breast-implant claims, both domestic and foreign, are substantially similar.").

[51] FED R. CIV. P 23(a)(3).

[52] FED. R. CIV. P 23(a)(4).

[53] FED. R. CIV. P. 23(b)(3).

[54] *See* 11 U S.C. § 1122(a) (1994) (providing that "a plan may place a claim or an interest in a particular class only if such claim is *substantially similar* to the other claims or interests of such class" (emphasis added))

[55] *See* Edith H. Jones, *Rough Justice in Mass Future Claims: Should Bankruptcy Courts Direct Tort Reform?*, 76 TEX L. REV 1695, 1713 (1998) ("[O]ne must ask what unique bankruptcy standards warrant replacing the essential Rule 23 'class-qualifying criteria' of commonality, typicality, and adequacy of representation." (quoting Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 621 (1997))).

certification and approval of the class action settlement was invalid rested squarely on the Court's interpretation of Rule 23.[56] To the extent that the decisions interpret Rule 23, they do not apply to questions about the proper classification of tort claimants in bankruptcy reorganization plans under the Bankruptcy Code.

Going beyond the actual holdings of *Amchem* and *Ortiz*, however, one sees suggestions of broader due process and fairness concerns animating the Court's reasoning. For example, in *Amchem*, Justice Ginsburg explained on several occasions that the certification requirements of Rule 23(a) and (b) are designed to focus the certifying court's attention on whether the proposed class is "sufficiently cohesive" to permit representational litigation, thus allowing a departure from the usual rule that only parties to a lawsuit may be bound by its judgment.[57] In other words, because class actions constitute an exception to the general due process requirement that everyone be afforded her own day in court, the rule makers imposed requirements, which the Court applies strictly, designed to confine the certification of classes to those situations in which there is a sufficient identity of interest between class members and their representatives that the class members' rights may be fairly adjudicated in their absence.[58] Similarly, *Ortiz* reflects the Court's underlying concern about the due process implications of imposing a binding resolution of claims on absent parties without strict insistence on the absence of conflicts of interest between class members and those purporting to represent them.[59]

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[56] *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 119 S. Ct. 2295, 2322 (1999) ("The nub of our position is that we are bound to follow Rule 23 as we understood it upon its adoption, and that we are not free to alter it except through the process prescribed by Congress in the Rules Enabling Act."); *Amchem*, 521 U.S. at 628 ("[W]e have concluded that the class in this case cannot satisfy [Rule 23's] requirements of common issue predominance and adequacy of representation . . . .").

[57] *Amchem*, 521 U.S. at 623 ("The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation "); *see also id* at 621 ("Subdivisions (a) and (b) focus court attention on whether a proposed class has sufficient unity so that absent members can fairly be bound by decisions of class representatives."); *id.* at 626 n 20 (noting the overlap of the adequacy of representation, commonality, and typicality requirements and explaining that they all "'serve as guideposts for determining whether . . . maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence'" (quoting General Tel. Co of Southwest v. Falcon, 457 U.S. 147, 157-58 n.13 (1982))).

[58] *See* Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L REV. 805, 805 (1997) (discussing the various ways in which class actions represent "a clear departure from the premise that no one should be bound to a judgment in personam absent the personal security offered by notice and a full opportunity to participate in the underlying litigation").

[59] *See Ortiz*, 119 S. Ct. at 2315 (discussing the "inherent tension between representative

Amchem and *Ortiz* thus suggest that the Constitution, not just the current version of Rule 23, prohibits the certification of broadly defined settlement classes of tort claimants with varying and potentially conflicting interests. If so, the reasoning of these decisions would also seem to apply to classifications in bankruptcy. The Court in *Ortiz,* however, distinguished bankruptcy from the class action context then before it. After discussing the general rule that persons not joined as parties may not be bound by the results of a lawsuit, the Court cited (in addition to representational litigation) bankruptcy as an example of an exceptional situation involving a "'special remedial scheme'" that permissibly "'foreclos[es] successive litigation by nonlitigants.'"[60] Elsewhere in the opinion, the Court referred to the "protections for creditors built into the Bankruptcy Code."[61] These protections are in apparent contrast to the lack of "'structural assurance of fair and adequate representation for the diverse groups and individuals affected,'" which the Court found fatal to the settlement classes presented by both *Ortiz* and *Amchem.*[62] Thus, the Court's view may be that bankruptcy differs from class actions in significant respects that render inapplicable the strict classification requirements that due process may otherwise require for class action certification.[63]

If bankruptcy is distinguishable, it must be because of the procedural

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suits and the day-in-court ideal" and noting that the tension is increased in a mandatory class settlement because "[t]he legal rights of absent class members . . . are resolved regardless either of their consent, or, in a class with objectors, their express wish to the contrary"); *see also* Issacharoff, *supra* note 58, at 822 (discussing concerns about mandatory class settlements in which "there is no capacity to refuse court-appointed representation" and "the individual class member is presented with what purports to be a binding *fait accompli*, with the only recourse a likely futile objection at the fairness hearing required by Rule 23(e)").

[60] *Ortiz*, 119 S. Ct. at 2315 (quoting Martin v. Wilks, 490 U S. 755, 762 n 2, in which the Court noted that bankruptcy and probate are examples of "legal proceedings [that] may terminate pre-existing rights [of nonlitigants] if the scheme is otherwise consistent with due process")

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> [I]t is worth noting that if limited fund certification is allowed in a situation where a company provides only a de minimis contribution to the ultimate settlement fund, the incentives such a resolution would provide to companies facing tort liability to engineer settlements similar to the one negotiated in this case would, in all likelihood, significantly undermine the protections for creditors built into the Bankruptcy Code.

Id. at 2321 n.34.

[62] *Id.* at 2319 (quoting *Amchem*, 521 U.S. at 627).

[63] It should be noted, however, that although the Court in *Amchem* distinguished limited fund class actions from the opt-out class action then before it, *see* 521 U.S. at 623 n.19, it later imposed similarly strict certification requirements on that type of class action, *see Ortiz*, 119 S. Ct. at 2319-21.

and substantive protections it affords creditors—protections that are unavailable to absent class members when a class action is certified. In mass tort class actions, the Court's expressed concern is that the personal injury claims of class members are being compromised without their direct consent by persons designated to represent them.[64] The only protection for class members, other than the opportunity in some cases to opt out[65] and the requirement that the court approve the settlement,[66] is the insistence that the representatives share and competently represent their interests.[67] While bankruptcy also permits some creditors to represent the interests of others,[68] these representatives, by contrast, do not have the final say. An appointed creditors' committee is primarily a negotiating agent.[69] Once a reorganization plan is devised, even one supported by the

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[64] *See id.* at 2314-15 (discussing due process concerns with respect to mandatory class action settlements); *Amchem*, 521 U.S. at 626-27 (discussing need for protection of absent class members' interests by means of representation for homogeneous subgroups).

[65] *See* FED. R. CIV. P. 23(c)(2)-(3) (providing for an opt-out right in the case of a Rule 23(b)(3) class action).

[66] *See* FED. R. CIV. P. 23(e) ("A class action shall not be dismissed or compromised without the approval of the court . . .").

[67] See *Amchem*, 521 U.S. at 626 n.20, which states:

> The adequacy-of-representation requirement "tend[s] to merge" with the commonality and typicality criteria of Rule 23(a), which "serve as guideposts for determining . . . whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." The adequacy heading also factors in competency and conflicts of class counsel.

Id. (quoting General Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 157-58 n.13) (citation omitted). *Moore's Federal Practice* observes that.

> This "adequacy of representation" requirement was designed to protect the due process rights of absent class members. . . . Because the judgment in a class action has res judicata implications . . . for the absent class members, due process requires that the interests of absent members be adequately represented by the class members who are parties to the action.

5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 23.25[1] (3d ed. 1996) (footnotes omitted).

[68] *See* 11 U.S.C. § 1102 (1994) (requiring that a United States trustee appoint an unsecured creditors' committee except in small business bankruptcy cases).

[69] *See, e.g.*, DAVID G. EPSTEIN ET AL., BANKRUPTCY § 10-11 (1993) ("The principal role of the committee is to speak and negotiate for the larger group which it represents."); TABB, *supra* note 20, at 67 ("The committee plays a particularly important role in the formulation and confirmation of a reorganization plan. The committee negotiates directly with the debtor . . over the terms of a plan on behalf of the class of creditors or equity holders represented."); Marjorie L. Girth, *Rethinking Fairness in Bankruptcy Proceedings*, 73 AM. BANKR. L.J. 466 (1999) ("[N]egotiations with the goal of proposing a successful reorganization plan are usually carried out between the debtor's representatives and those representing the creditors' committee.").

committee, it must be sent out for voting by the creditors and interest holders.[70] Thus, each identifiable creditor whose claim is impaired is given the opportunity to express his or her approval or disapproval of the proposed resolution.[71] Although the Bankruptcy Code does not require unanimity,[72] it guarantees dissenting creditors in an accepting class a minimum level of payment.[73] Furthermore, if the preference of a class of creditors as a whole is overridden and the plan is crammed down on them, the Code assures them fair treatment in relation to the other classes of creditors and interest holders.[74] Thus, the Bankruptcy Code contains a package of protections—both procedural and substantive—for the creditors who do not participate directly in the proceedings by serving on a creditors' committee.[75]

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[70] *See* 11 U.S.C. § 1126(a) (1994) ("The holder of a claim or interest allowed under section 502 of this title may accept or reject a plan."); *id.* § 1129(a)(7), (b) (mandating that for a plan to be confirmed, either all impaired classes must accept it, or the plan must satisfy "cram down" requirements).

[71] If a class of claims or interests is not impaired under the plan, the members of that class "are conclusively presumed to have accepted the plan," and they need not be given an opportunity to vote. *Id.* § 1126(f).

[72] *See id.* § 1126(c) ("A class of claims has accepted a plan if such plan has been accepted by creditors . . . that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors . . . that have accepted or rejected such plan.").

[73] *See id.* § 1129(a)(7) (stating that each creditor must either accept the plan or "receive or retain under the plan . . property of a value, as of the effective date of the plan, that is not less than the amount that such [creditor] would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date"). This guarantee of receipt in Chapter 11 of at least the amount of the liquidation dividend is known as the "best interests of creditors" or simply the "best interests" test *See* TABB, *supra* note 20, at 841 ("The best interests test of § 1129(a)(7) is intended to provide a floor of protection for dissenting members of a class.")

[74] *See* 11 U.S.C. § 1129(b)(1) (1994) (stating that to be confirmed by cram-down method, a plan must not "discriminate unfairly" and must be "fair and equitable" with respect to each impaired class that has not accepted the plan). In the case of a class of unsecured creditors, the fair and equitable test incorporates the absolute priority rule pursuant to which no creditors or security interest holders junior to the class of unsecured creditors may receive any property under the plan if the unsecured creditors are not paid in full. *See id.* at § 1129(b)(2)(B)

[75] Because of the opportunity for direct voting in bankruptcy, the need for precise definition of classes to eliminate all conflicts of interest is arguably lessened. Claimants are permitted to speak for themselves, rather than having decisions made for them by representatives. Because some claimants can be outvoted, however, the Bankruptcy Code provides substantive protections to assure fair treatment. *See id* § 1129(a)(7), (b) The Court in *Amchem* held that a court's approval of a class action settlement as fair cannot substitute for satisfaction of the class certification requirements. *See* Amchem Prods , Inc. v. Windsor, 521 U.S. 591, 621 (1997) (stating that Rule 23(e)'s "prescription was designed to function as an additional requirement, not as a superseding direction, for the 'class action' to which Rule 23(e) refers is one qualified for certification under Rule 23(a) and (b)").

Although these built-in protections may be sufficient to satisfy due process concerns in traditional bankruptcy cases,[76] the complexities and innovations usually found in mass tort bankruptcies may render these protections less effective in that context. For example, a bankruptcy class of tort claimants may consist of hundreds of thousands of persons with a variety of injuries, whether manifested or merely potential, and with claims of varying degrees of legal strength.[77] In a class action context, these differences would require the creation of subclasses with independent representation.[78] My concern is that in this bankruptcy context, the ability of all members of the class to vote on the plan may not sufficiently ensure that the voices of each distinct subgroup will be adequately heard.[79] A distinct minority—for example, those tort claimants with especially serious injuries and strong cases—might get outvoted by a large number of holders of small claims who favor a quick pay-out of relatively small amounts with little proof required.[80] Thus, the class as a

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Likewise, in bankruptcy the substantive protections of the best interests test and the absolute priority rule do not supersede the voting and classification requirements. Both aspects, procedural and substantive, are necessary to protect creditors' interests.

[76] *See In re* Dow Corning Corp., 244 B.R. 634, 665 (Bankr. E.D. Mich. 1999) ("[O]ne of Congress' primary motivations for limiting class membership to substantially similar claims was . . . to ensure 'that the votes cast by the class will reflect the joint interests of the class.'" (quoting *In re* Huckabee Auto Co., 33 B.R. 141, 148 (Bankr. N.D. Ga. 1981))); William Blair, *Classification of Unsecured Claims in Chapter 11 Reorganization*, 58 AM. BANKR. L.J. 197, 228 (1984) ("The chapter 11 rehabilitation objectives assume that negotiation accomplished through democratic decision-making will provide fair treatment if the distribution remains within the parameters of the confirmation requirements." (footnote omitted)). *Cf.* Meltzer, *supra* note 47, at 299 ("I contend that a lender's deficiency claim is substantially similar to trade claims, and that, notwithstanding any potential conflicts of interest, the only appropriate interpretation of the Code is to prohibit separate classification of the creditors holding those claims.").

[77] *See, e.g.*, *In re* A.H. Robins Co., 880 F.2d 694, 697 (4th Cir. 1989) (describing class of Dalkon Shield claimants as consisting of approximately 195,000 unliquidated personal injury claims); REPORT ON MASS TORT LITIGATION, *supra* note 2, app. E at 34 (describing the class of asbestos personal injury claims in the Eagle-Picher bankruptcy as consisting of approximately 162,000 claims).

[78] *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 119 S. Ct. 2295, 2319-20 (1999) (holding that the differences between present and future claimants, and between those possessing more valuable claims because of potential insurance coverage and those without that possibility, require separate subclasses for each distinct group).

[79] *See* Bruce A. Markell, *Clueless on Classification: Toward Removing Artificial Limits on Chapter 11 Classification*, 11 BANKR. DEV. J. 1, 12-13 (1995) ("Behind the assumption that voting is meaningful lies the notion that some common interest exists among the members of a class. Otherwise, it makes little sense to say that anything less than a unanimous vote could bind dissenters."); *id.* at 16 ("[A] plan proponent has the opportunity, under the right circumstances, to overwhelm objecting parties by including them in a class filled with sympathetic creditors.").

[80] *Cf. In re* Dow Corning Corp., 244 B.R. at 665 (rejecting the argument that a discrete subgroup within a class of physician claimants was disenfranchised by classification together

whole may support a plan that provides for quick pay-outs and puts significant disincentives in the way of achieving more substantial payments, a result not in the interests of the larger tort claimants included in the class.[81] This possibility is made all the more likely by the frequent practice in mass tort bankruptcies of valuing all claims for voting purposes at one dollar in order to avoid the necessity of individually liquidating each of the thousands of tort claims.[82] This practice mutes the voice of large tort claimants in the voting process.

Once a subgroup of tort claimants is outvoted, the substantive guarantee of the best interests test might provide little protection. In a bankruptcy involving tort claims that have been estimated to amount to hundreds of millions or billions of dollars[83]—an amount frequently far in excess of the value of the company—the court may quickly conclude that the tort claimants as a whole will receive more under the reorganization plan's trust than they would in a Chapter 7 liquidation.[84] No comparison will be made between the amount a particular dissenting tort claimant will receive under the plan and the liquidation dividend he or she would receive in Chapter 7,[85] since most tort claims will not have been

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with a larger group of physician claimants having different interests; so long as the claims are substantially similar, "assertions of attempted vote gerrymandering are simply irrelevant").

[81] *See* SOBOL, *supra* note 35, at 328 (arguing that the vote of the class of the Dalkon Shield claimants was "lopsided" because 94% of the total voting stength would not have filed claims outside of bankruptcy or had only minor injuries, while 6% had substantial claims), Vairo, *supra* note 42, at 134-36 (describing various pay-out options under Robins trust, with quickest payouts being for low value claims).

[82] *See, e.g.*, *In re A.H. Robins Co.*, 880 F.2d at 697 ("[F]or purposes of voting, each Dalkon Shield Claim was estimated and allowed to be equal."); Kane v. Johns-Manville Corp., 843 F 2d 636, 646 (2d Cir. 1988) ("[T]he Bankruptcy Court . . . 'allowed' [asbestos personal injury] claims for voting purposes in the arbitrary amount of one dollar . . . ." (quoting 11 U.S.C. § 502(a) (1994))), REPORT ON MASS TORT LITIGATION, *supra* note 2, app. E at 30 ("When it came time to tabulate the votes, each asbestos personal injury and property damages claim, as well as each lead personal injury claim, would be valued at $1 00.").

[83] *See, e.g.*, *In re A.H. Robins Co.*, 880 F.2d at 699 (noting that the district court valued Dalkon Shield claims at $2.475 billion); REPORT ON MASS TORT LITIGATION, *supra* note 2, app. E at 30 (noting that the bankruptcy court estimated present and future asbestos claims at $2.5 billion; as a result of a compromise with the unsecured creditors' committee, the valuation was reduced to $2 billion).

[84] *See, e g.*, *In re A.H. Robins Co.*, 880 F.2d at 698-700 (indicating that the Fourth Circuit rejects a challenge to the confirmation of the Robins reorganization plan based on the best interests test, and examining only the basis for the district court's estimation of value of Dalkon Shield claims); *In re* Eagle-Picher Indus., Inc., 203 B R. 256, 275 (S.D. Ohio 1996) (concluding, with little discussion, that given the inclusion of future asbestos claims within the bankruptcy proceeding, the best interests test is satisfied); SOBOL, *supra* note 35, at 238-43 (criticizing application of the best interests test in Robins bankruptcy).

[85] *See, e.g.*, sources cited *supra* note 73 (explaining the best interests test)

individually valued at this stage. It is possible, therefore, that the outvoted large tort claimants will not actually receive as much as the Bankruptcy Code supposedly guarantees them.

The inclusion of future claimants within the bankruptcy further complicates the effectiveness of bankruptcy's built-in protections for mass tort claimants. Professor Resnick addresses some of the resulting concerns by endorsing the Bankruptcy Review Commission's proposal for the appointment of a legal representative for future mass tort claimants.[86] This recommendation would provide firmer statutory authority for the practice that has been followed in a number of mass tort bankruptcies.[87] Providing a separate legal representative for the future claimants also addresses the concerns expressed by the Supreme Court in *Amchem* and *Ortiz* about the inadequacy of representation due to conflicts of interest between claimants with present injuries and those whose injuries have not yet manifested.[88] Experience to date shows that future claims' representatives can provide an independent voice for the interests of the unknown future claimants. This independent voice counterbalances the advocacy by other creditors' committees, including any tort claimants' committee that is appointed and that might be presumed primarily to represent the interests of present claimants.[89]

Although the conflict of interest problem can be reduced by the participation of a future claims' representative, other concerns remain. Most future claimants are unable to participate directly in the bankruptcy case because their identities will not be known until some future, post-

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[86] *See* Resnick, *supra* note 4, Part II B

[87] *See, e.g.*, *In re* A.H. Robins Co., 88 B.R. 742, 744 (Bankr. E.D. Va. 1988), *aff'd*, 880 F.2d 694 (4th Cir. 1989) (listing a "Future Claimants' Representative" among the "official committees" appointed in the case); *In re* UNR Indus., Inc., 46 B.R. 671, 674 (Bankr. N.D. Ill. 1985) (authorizing appointment of a legal representative for "putative asbestos disease victims"); REPORT ON MASS TORT LITIGATION, *supra* note 2, app. E at 39 (discussing appointment of a "legal representative for future personal injury and property damage claimants" in asbestos bankruptcy).

[88] *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 119 S. Ct. 2295, 2319-20 (1999) ("[I]t is obvious after *Amchem* that a class divided between holders of present and future claims (some of the latter involving no physical injury and to claimants not yet born) requires subdivision into homogeneous subclasses . . . , with separate representation to eliminate conflicting interests of counsel."); Amchem Prods., Inc. v. Windsor, 521 U.S 591, 626 (1997) ("[F]or the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future.").

[89] *See, e g.*, REPORT ON MASS TORT LITIGATION, *supra* note 2, app. E at 39-40 (discussing independent role played by future claims' representative in asbestos bankruptcy); SOBOL, *supra* note 35, at 222-23 (discussing future claims' representative's opposition to reorganization plans that did not adequately protect the rights of future Dalkon Shield claimants).

bankruptcy date. Thus, even if the rights of present tort claimants are adequately protected by their opportunity to vote to accept or reject the reorganization plan and by the provision of substantive protections for them if they are outvoted, future claimants' rights are exclusively in the hands of their representative. That representative will not only negotiate on the future claimants' behalf, but she will also vote on the plan for them and will raise any objections to confirmation on their behalf.[90] In this instance bankruptcy becomes a representational suit, like a class action, rather than a special remedial scheme with its own built-in protections. Any statutory authorization for the appointment of a future claims' representative therefore needs to take account of the due process and fairness concerns raised with respect to binding absent parties to the results of representational suits,[91] even if bankruptcy generally is freed of those requirements. While the Bankruptcy Review Commission wisely suggests that some mass tort bankruptcies may require the appointment of multiple future claims' representatives,[92] the experience to date has been that only one person is appointed to represent all future tort claimants in the case.[93] *Amchem* and *Ortiz* cast doubt on the legitimacy of such a monolithic representation of future claimants.

Professor Resnick and other commentators have argued that the appointment of a future claims' representative, coupled with the provision of constructive notice, will satisfy any procedural due process concerns about the inclusion of future claimants in a mass tort bankruptcy.[94] Professor Resnick himself notes, however, that the Supreme Court in

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[90] *See, e.g.*, NATIONAL BANKR. REVIEW COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS 329-30 (1997) (recommending the appointment of a mass future claims representative).

[91] *See* Jones, *supra* note 55, at 1722 ("[A] collective remedy is a collective remedy, whether enforced in a class action or bankruptcy, and the criteria necessary to protect absentee class members' rights should not in principle vary depending on the forum.").

[92] *See* NATIONAL BANKR. REVIEW COMM'N, *supra* note 90, at 332 ("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.").

[93] *See, e.g.*, sources cited *supra* note 87 (listing cases in which a single individual was appointed to represent the interests of future tort claimants).

[94] *See* Resnick, *supra* note 4, Part II.B (noting how appointment of a future claimants' representative and constructive notice meets any due process concerns); *see also* Kathryn R. Heidt, *Future Claims in Bankruptcy: The NBC Amendments Do Not Go Far Enough*, 69 AM. BANKR. L.J. 515, 515 (1995) ("Any 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."); Ralph R. Mabey & Jamie Andra Gavrin, *Constitutional Limitations on the Discharge of Future Claims in Bankruptcy*, 44 S C L. REV. 745, 781 (1993) ("The . . . mandate of *Mullane* therefore usually requires the opportunity for future claimants to be heard through a representative when publication notice to them is largely futile.").

Amchem raised questions about the efficacy of notice to persons who "may not even know of their exposure, or realize the extent of the harm they may incur."[95] Although the Court found no need to rule definitively on this point, it did pointedly question whether "notice sufficient under the Constitution . . . could ever be given to legions so unselfconscious and amorphous."[96] Given that statement, one might question whether the Supreme Court will view constructive notice as providing much protection for future claimants in bankruptcy.[97] If not, the Court may be unwilling to allow future claimants to be bound by a reorganization plan confirmed in a bankruptcy case in which their interests were litigated by an appointed representative unless great care was given to ensuring the absence of conflicting interests within the group represented by each future claims' representative.

CONCLUSION

Professor Resnick has stated well the advantages of utilizing bankruptcy as a vehicle for resolving mass torts. Bankruptcy has many procedural and conceptual features that can be applied to permit a resolution of all of the claims facing a beleaguered mass tort defendant. My enthusiasm for a bankruptcy solution, however, is tempered by the recognition of the concerns expressed by the Supreme Court in other mass

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[95] Amchem Prods , Inc. v. Windsor, 521 U.S. 591, 628 (1997).

[96] *Id.*

[97] An argument can be made that in many bankruptcy cases, effective notice can be given to persons who are in the population of those expected to incur claims against the debtor in the future In the asbestos bankruptcies, for example, extensive efforts have been made to provide notice by means of publications directed at unions and organizations of workers in industries that involved exposure to asbestos, as well as notice to attorneys handling such cases and widespread notice in general circulation publications. *See, e.g.*, REPORT ON MASS TORT LITIGATION, *supra* note 2, app. E at 42 (describing extensive notice of bar date given in Eagle-Picher bankruptcy).

Although such announcements may be ignored by many who presently suffer no illness, perhaps it is reasonable to expect that enough persons who know that they have been exposed to asbestos will see the notices that the actions of the future claims' representative can thereby be effectively monitored Moreover, when these future claimants' injuries do manifest themselves, they will still have the opportunity to liquidate their claims pursuant to the trust or administrative mechanism that is established under the reorganization plan. Even if the "practicalities and peculiarities" of a mass tort bankruptcy case, Mullane v. Central Hanover Bank & Trust Co., 339 U.S 306, 314 (1950), justify the provision of constructive notice to such future claimants, I fear that it pushes the limits of due process too far to include within the group of future claimants persons who, at the time of bankruptcy, have not been exposed to the offending product. It cannot even be pretended that someone who has not yet purchased, used, or come in contact with a product that precipitates a mass tort bankruptcy will have any reason to understand that the bankruptcy might affect her rights

tort contexts about forcing a judicial resolution on claimants who are not active participants in the lawsuit leading to the global solution. Perhaps bankruptcy is sufficiently distinguishable from class actions that the Supreme Court will eventually approve it as a mass tort device. As other options disappear or become less attractive, it may become one of the few remaining possibilities. To date, however, the Court has not shown itself to be pragmatic in its approach to the judicial resolution of mass torts.[98] As a result, although a bankruptcy believer, I remain chary about predicting the ultimate triumph of bankruptcy as a mass tort vehicle.

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[98] *See* Ortiz v Fibreboard Corp., 527 U.S. 815, 119 S. Ct. 2295, 2325 (1999) (Breyer, J., dissenting):

> I cannot easily find a legal answer to the problems this case raises by referring, as does the majority, to "our deep-rooted historic tradition that everyone should have his own day in court." Instead, in these circumstances, I believe our Court should allow a district court full authority to exercise every bit of discretionary power that the law provides.

Id. (citation and internal quotation omitted); *see also Amchem*, 521 U.S. at 629 (Breyer, J., dissenting) ("I believe that the need for settlement in this mass tort case, with hundreds of thousands of lawsuits, is greater than the Court's opinion suggests.").

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: RECONSIDERATION OF AMENDMENTS TO RULES 3004 AND 3005

DATE: MARCH 15, 2003

At our meeting in Hyannis, the Advisory Committee recommended amendments to Bankruptcy Rules 3004 and 3005 to bring those rules into compliance with § 502 of the Bankruptcy Code. A copy of those proposed amendments is set out at the end of this memorandum. The amendments essentially would delete language in the rules that authorized persons other than the creditor to file claims for the creditor prior to the expiration of the creditor's time to file a proof of claim as currently permitted under Rule 3004. The Advisory Committee concluded that authorizing the filing of these claims prior to the creditor's claim filing deadline is inconsistent with § 501(c) which authorizes the debtor or trustee to file proof of a claim "if a creditor does not *timely* file a proof of such creditor's claim." (Emphasis added). The amendments were proposed to the Standing Committee for its approval to publish the amendments for comment.

Withdrawal of the Proposal

The Standing Committee on Rules of Practice and Procedure considered the proposed amendments to Rules 3004 and 3005 at its meeting in Phoenix on January 15-16, 2003. A member of the Standing Committee, Mr. David Bernick, expressed reservations about the proposed amendments. Specifically, he noted that the change in Rule 3004 would prevent the

debtor in a chapter 11 case from filing a proof of claim on behalf of a creditor until 30 days after the bar date for filing claims as set by the court. He described briefly a chapter 11 case in which he is involved where the debtor filed a proof of claim on behalf of mass tort claimants so that those claims could be brought before the court and adjudicated. He argued that this method was preferable to the court establishing a bar date in order to "force" those creditors to file a claim or permit the debtor thereafter to file a claim for those creditors because having the debtor file the claim would not require the substantial expense of notifying potential creditors of their need to file. There would be no need to publish notices in the Wall St. Journal or to send individual notices to former employees of the debtor and others as might be required when setting a bar date. He further asserted that permitting this "early" filing of proof of a creditor's claim is consistent with § 501(c) because the word "timely" in that section can be construed to mean "within a time for the court to efficiently resolve matters essential to the case." (My use of quotation marks here is not meant to suggest a direct quote from Mr. Bernick, but rather is my general recollection of a brief conversation about the matter during a break in the Standing Committee meeting.) He also asserted that amending Rule 3004 in the manner we had proposed would unnecessarily limit the courts' ability to manage chapter 11 cases. He proposed that the rule might be amended to begin with a phrase such as "Except as otherwise ordered by the court, if a creditor has not filed a proof of claim...." In this way, the court can maintain greater control over the case and permit the debtor or trustee to file a claim on behalf of a creditor or creditors without having to establish either a general or specific bar date for filing claims in the case.

Rather than pursue a more complete discussion of the matter, Judge Small withdrew the proposal from the floor so that the Advisory Committee could consider this new issue. There is

still time to reconsider the matter and present it to the Standing Committee in time to have the matter placed back on the Standing Committee's agenda with no delay in the publication of the proposal if the Advisory Committee still supports the amendment. Thus, the matter returns for reconsideration.

An Ad Hoc Subcommittee on Rules 3004 and 3005 considered during a conference call whether to insert in our proposed amendment to Rule 3004 language to authorize the court to permit the earlier filing of claims on behalf of creditors. The Subcommittee recognized that the proposal would expand the courts' power to manage a case by giving the debtor and trustee the means to bring claims before the court more quickly than might otherwise occur, particularly in chapter 11 cases. On the other hand, it recognized that such a rule likely would conflict with § 501(c) of the Bankruptcy Code. While a colorable argument can be made that "timeliness" under that section means "within such time as to permit the efficient operation of the case," the Subcommittee concluded that it is much more likely that the term would be interpreted as "within the time set by the rules." Allowing debtors and trustees to file claims on behalf of creditors prior to the expiration of their filing deadlines seems to enlarge the substantive right of the debtor and trustee under § 501(c) and would thereby violate the rules enabling act. See 28 U.S.C. § 2075.

I have found no cases holding that "timeliness" under § 501(c) is determined by the court as a part of its case management powers. Instead, the cases assume that timeliness requires filing by the dates set by the Bankruptcy Rules governing the filing of claims. To the extent that there is discussion of the timeliness of filed claims, the courts generally enforce the deadlines strictly. See generally, 9 Collier on Bankruptcy ¶ 3002.03[1] (15th ed. Rev. 2003) In chapter 11 cases,

the timeliness requirements are likewise strictly enforced. See, e.g., In re Analytical Systems, Inc., 933 F.2d 939 (11th Cir. 1991); 4 Collier on Bankruptcy ¶ 5-1.02[5][b] (15th ed. Rev. 2003). In chapter 11, a creditor can seek to file a late claim, however, under Bankruptcy Rule 9006(b)(1) on a showing of "excusable neglect", a standard the Supreme Court considered in Pioneer Inv. Servs. v. Brunswick Assoc. Ltd. Partnership, 507 U.S. 380 (1993). Even there, the Supreme Court recognized that these deadlines are set by the Bankruptcy Rules and that permitting late filings under the excusable neglect provision applied to Chapter 11 cases but not in chapter 7 cases.

The Rules themselves arguably suggest that there is no need to permit early filing of a proof of claim in chapter 11 cases. Rule 3003(c)(3) provides the courts with exactly the flexibility it is suggested is needed to manage the case. Under that rule, the court can set the bar date for filing claims, and the bar date can be set at different times for different types of claims. If the debtor in possession sees a need for a particular set of claims to be identified with greater precision early in a case, it can move the court for an order setting an early bar date for the filing of those claims. When that date passes, the debtor in possession could file a claim on behalf of any creditor who did not meet the deadline. This process does not solve the problem raised by Mr. Bernick, because this process will include essentially the same costs he has identified as being burdensome, or even prohibitive. Nevertheless, the problem of excessive cost does not seem likely to override the language of § 501(c) and the rules enabling act, particularly when Rule 3003(c) contains a mechanism to expedite the claims filing process. Consequently, the Subcommittee concluded that the amendment to the rule should not include authority for the court to allow the debtor or trustee to file these claims prior to the expiration of the creditor's

claim filing deadline.

Should Creditors be Allowed to File "Superceding" Proofs of Claims

In its reconsideration of the proposed amendment to Rule 3004, the Ad Hoc Subcommittee also discussed the issue of whether to permit the creditor to file a superceding claim even though the time has passed for the creditor to file its own proof of claim. At the Hyannis meeting, the Advisory Committee decided that the rules should not allow the creditor to file such a claim because the deadline for filing had passed. As a part of that discussion, however, the Committee later concluded that the creditor could offer an amendment to the proof of claim filed by the debtor or the trustee. Furthermore, the Committee Note to the rule was revised to state that the rule leaves to the courts the question of the extent to which such claims could be amended.

The discussion in the Ad Hoc Subcommittee again addressed this issue, and other questions were raised regarding debtor filed claims. The Subcommittee did not come to a final conclusion as to whether a creditor should be permitted to file a superceding claim or if the creditor should be permitted to propose an amendment to the proof of claim filed by the debtor or trustee. The discussion noted that the courts have not resolved the issue of a creditor's right to amend the claim. The Fifth Circuit's decision in In re Kolstad, 928 F.2d 171 (5th Cir. 1991), *cert. denied*, 502 U.S. 491 (1991), would allow these amendments, but limits the amendment primarily to changes in the amount and not the nature of the underlying obligation. A creditor could not, by amendment, introduce what is effectively a new claim through the amendment process. A few courts have followed this analysis. See, e.g., In re Bishop, 122 B.R. 96 (Bankr. E.D. Mo. 1990)(citing Kolstad); In re McNicholas, 255 B.R. 857 (Bankr. N.D. Ill. 2000)(noting

that in appropriate circumstances a creditor may amend a claim after the deadline for filing has passed). Other courts have rejected this analysis. See, e.g., In re Hamilton, 179 B.R. 749 (Bankr. S.D. Ga. 1995). Still other courts have denied a particular creditor's attempt to amend a claim filed on its behalf by a debtor either because the creditor did not actually characterize its subsequent filing as an amendment or because the equities of the situation did not warrant allowing the amendment. In re Hill, 286 B.R. 612 (Bankr. E.D. Pa. 2002) (claim was not an "amendment", and creditor did not act in a sufficiently timely manner to pursue the claim); In re Kelley, 259 B.R. 580 (Bankr. E.D. Tex. 2001)(allowing amendment would unjustly affect other creditors).

Another method by which the court could consider the claim is through the claims objection process. Rule 3007 contains no limit on its use by any party in interest. While an insolvent debtor may not have standing to raise objections, it would seem that a creditor on whose behalf a debtor has filed a proof of claim in an amount substantially lower than the actual amount could object to that claim and seek appropriate relief. The creditor might ask the court to disallow the claim, though this could be construed as a finding that there is no claim against the debtor. The creditor might ask that the claim be allowed in an amount different from the amount stated by the debtor. Under Rule 3007, the creditor could also seek other relief, although it may require that the creditor pursue the matter as an adversary proceeding depending on the relief sought (proceedings to determine the validity and extent of a lien is an adversary proceeding under Rule 7001(2)).

Against this backdrop there is also the notion that creditors with notice of a bankruptcy filing act at their own peril. If they seek to collect the prepetition debt from the debtor, they

violate the stay. If they do not object to the confirmation of a chapter 13 plan, they are nonetheless bound by the terms of that plan. Furthermore, this creditor inactivity can have very negative consequences for other creditors. These notions suggest that a creditor with notice of the bankruptcy case should not be given a second chance to establish its claim.

The Advisory Committee must decide whether or to what extent a creditor for whom the debtor or trustee has filed a claim should be permitted either to supercede that proof of claim or otherwise adjust or amend the claim. The rule could be changed to set a new deadline for the filing of a superceding claim (contrary to the Committee's decision in Hyannis), or there can be an extended discussion of the amendment or objection to claim options for the creditor in the Committee Note to the section. Of course, there may be other solutions either in the text of the rule or elsewhere, and these can be considered as well.

RULE 3004. FILING OF CLAIMS BY DEBTOR OR TRUSTEE.

If a creditor ~~fails to file~~ has not filed a proof of claim in a timely manner under Rule 3002(c) or 3003(c), ~~on or before the meeting of creditors called pursuant to § 341(a) of the Code,~~ the debtor or trustee may ~~do so in the name of the creditor,~~ file a proof of such claim within 30 days ~~of~~ after the expiration of the time for filing claims prescribed by Rule 3002(c) or 3003(c), whichever is applicable. The clerk shall forthwith ~~mail~~ give notice of the filing

to the creditor, the debtor and the trustee. ~~A proof of claim filed by a creditor shall supersede the proof filed by the debtor or trustee.~~

COMMITTEE NOTE

The rule is amended to conform to § 501(c) of the Code. Under that provision, the debtor or trustee can file proof of a claim if the creditor fails to do so in a timely fashion. The rule previously authorized the debtor and the trustee to file a claim as early as the day after the first date set for the meeting of creditors under § 341(a). Under the amended rule, the debtor and trustee must wait until the creditor's opportunity to file a claim has expired. Providing the debtor and the trustee with the opportunity to file a claim ensures that the claim will participate in any distribution in the case. This is particularly important for claims that are nondischargeable.

Since the debtor and trustee cannot file a proof of claim until after the creditor's time to file has expired, the rule no longer permits the creditor to file a proof of claim that will supersede the claim filed by the debtor or trustee. The rule leaves to the courts the issue of whether to permit subsequent amendment of such proof of claim.

Other changes are stylistic.

RULE 3005. FILING OF CLAIM, ACCEPTANCE, OR REJECTION BY GUARANTOR, SURETY, INDORSER, OR OTHER CODEBTOR

(a) FILING OF CLAIM. If a creditor has not filed a proof of claim in a timely manner under ~~pursuant to~~ Rule 3002 or 3003(c), any entity that is or may be liable with the debtor to that creditor, or who has secured that creditor, may, within 30 days after the expiration of the time for filing claims prescribed by Rule 3002(c) or 3003(c) whichever is applicable, ~~execute and~~ file a proof of such

claim ~~in the name of the creditor, if known, or if unknown, in the entity's own name~~. No distribution shall be made on the claim except on satisfactory proof that the original debt will be diminished by the amount of distribution. ~~A proof of claim filed by a creditor pursuant to Rule 3002 or 3003(c) shall supersede the proof of claim filed pursuant to the first sentence of this subdivision.~~

* * * * * *

COMMITTEE NOTE

The rule is amended to delete the last sentence of subdivision (a). The sentence is unnecessary because if a creditor has filed a timely claim under Rule 3002 or 3003(c), the codebtor cannot file a proof of such claim. The codebtor, consistent with § 501(b) of the Code, may file a proof of such claim only after the creditor's time to file has expired. Therefore, the rule no longer permits the creditor to file a superseding claim. The rule leaves to the courts the issue of whether to permit subsequent amendment of the proof of claim.

The amendment conforms the rule to § 501(b) by deleting language providing that the codebtor files proof of the claim in the name of the creditor.

Other amendments are stylistic.

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: COMMENTS ON PROPOSED AMENDMENTS TO RULE 9014

DATE: MARCH 10, 2003

We have received only four comments on the published proposed amendment to Rule 9014. As you may recall, Rule 9014 was substantially rewritten in a more accessible style and became effective in that form on December 1, 2002. The pending proposal would make the mandatory disclosure and meeting requirements of Rule 26 of the F.R.Civ.P. inapplicable in contested matters unless the court directs otherwise. This direction can come either in the form of an order in a specific matter, or by way of a local rule.

The United States General Accounting Office offered the first "comment". It simply noted that it had no comments to offer on the subject. The last comment was submitted by the Federal Bar Association. The FBA supports the proposed change without any reservation. The remaining two comments each supported the proposal, but with some suggestions as to either the text of the rule or Committee Note.

Proposal to Amend the Committee Note

Mr. Anthony Sabino from New York supports the amendment to Rule 9014 noting that the amendment will further the goal of expediting the resolution of contested matters. He concurs with the Advisory Committee view that most contested matters are resolved more quickly than the mandatory discovery provisions in Rule 26 would permit. He noted, however,

that there are instances in which the mandatory scheduling conference of Civil Rule 26(f) would be particularly helpful. Mr. Sabino recognizes that the proposal addresses this sufficiently through the retention of the court's authority under the rule to "direct otherwise", but he urges that the Committee Note highlight in stronger terms power of the court. Specifically, he would substitute the following for the existing last sentence in the Committee Note:

> However, nothing in the amendment should be construed to limit the court's discretion, for cause, to apply or reinstate the subject subdivisions of Rule 26, in whole or in part, when the circumstances of a particular controversy so require or the interests of justice would be better served. Such reinstatement can be made either upon the court's own motion or the application of any interested party in individual cases, or may be provided for by local rule.

The final sentence of the published Committee Note is as follows:

> Nevertheless, the court may by local rule or by order in a particular case provide that these provisions of the rule apply in a contested matter.

I think that Mr. Sabino's point that the Note may not sufficiently recognize the court's retention of discretion to reinstate portions of Rule 26 in a contested matter has some validity, but I believe that his suggestion goes well beyond that point. Specifically, his proposed change to the Committee Note inserts the condition that the court may order these changes "for cause." The amendment contains no such limitation. Consequently, I do not believe that we should alter the language on the Committee Note as to that matter.

Mr. Sabino's letter also noted, however, that the court may want to employ some but not all of the Rule 26 matters in a particular case. The amendment certainly allows the court to select any or all of the matters from Rule 26 for application in a particular case. The Committee Note

could be read to limit the court to an all or nothing reinstatement of the provisions, so I would recommend a slight change in the last sentence of the Committee Note. It would read as follows:

> Nevertheless, the court may by local rule or by order in a particular case provide that some or all of these provisions of the rule apply in a contested matter.

This change makes it clear that the courts have wide discretion in determining whether and to what extent the mandatory discovery rules should apply in contested matters.

Proposal to Amend the Text of the Proposed Rule Amendment

Mr. Thomas Yerbich, the Court Rules Attorney for the District of Alaska, supports the proposed amendment to Rule 9014, but he has raised a question regarding the rule. Specifically, he suggests that the language of the rule as proposed be expanded as follows: "The following subdivisions of Fed.R.Civ.P., as incoroporated by Rule 7026, shall not apply in a contested matter unless the court directs otherwise by local rule or order:..." The purpose of the added language is to clarify that the court may take action by local rule as well as by an order in a specific matter. He argues that permitting the circumvention of the national rule should be by the exercise of discretion in a specific case rather than by a local rule, unless the national rule explicitly so authorizes the courts. Mr. Yerbich notes that the rule includes the word "directs" rather than "orders" so that the rule could be construed as authorizing deviation by local rule, but he expressed concern that it would not be sufficient to convey that notion. In fact, the proposal uses "directs" rather than "orders" just to accommodate local rules on the topic.

Mr. Yerbich raised a second issue about the rule and its limits on court authority to issue a local rule to address these matters. He points out that the last sentence in the subdivision mentions "any order issued under this paragraph" and argues that this reference to orders could

be construed to limit the local rule making power. Certainly, that is not the intention of that phrase. The limitation is only applicable to any *order* that the court may issue as to any otherwise inapplicable part of Part VII of the Rules. It does not require the court to give separate notice of a local rule. It does apply to a court order to import via Rule 7026 those portions of Civil Rule 26 that would otherwise not apply. Thus, I think that there is no need to change the language of the proposed amendment.

GAO
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United States General Accounting Office
Washington, DC 20548

11/25/02

02-BK-001

02-CR-004

02-EV-004

October 30, 2002

Mr. Peter G. McCabe
Secretary
Committee on Rules of Practice and Procedures
Judicial Conference of the United States

Dear Mr. McCabe:

By letter dated September 26, 2002, the Rules Committee requested any comments we may have on proposed amendments to Federal Rules of Procedure and to the Federal Rules of Evidence. We appreciate the opportunity but at this time have no comments to offer.

Sincerely yours,

Gary L. Kepplinger
Deputy General Counsel

12/2/02

UNITED STATES DISTRICT COURT
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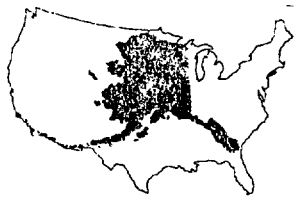

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November 25, 2002

02-BK-002

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544-0001

Re: Proposed Amendment, Rule 9014 Federal Rules of Bankruptcy Procedure

Dear Mr. McCabe:

As proposed, the amendment to Rule 9014(c), F.R.Bank.P. (December 2004 Class), excludes Rules 26(a)(1), 26(a)(2), 26(a)(3), and 26(f) from contested matters unless "the court directs otherwise." The Committee Note indicates that it is intended that the direction may be by local rule or order.

It is recommended that the text of the second sentence of subsection (c) be amended to include the words "by local rule or order" after the word "otherwise" and before the colon. As amended, the first part of that sentence would read:

> The following subdivisions of Fed.R.Civ.P., as incorporated by Rule 7026, shall not apply in a contested matter unless the court directs otherwise by local rule or order: * * *.

The rationale for the proposed change is that it is questionable whether a district court can accomplish by a rule of a general applicability those matters which it is authorized to do by order. In general, orders that depart from the provisions of the rules promulgated by the Supreme Court are discretionary with the court. The exercise of discretion is case specific dependent upon the facts before the court. Exercising discretion by a blanket rule of general applicability in advance is inconsistent with that principle. While the use of the word "directs" in place of "order" may be broad enough to encompass local rules as well as case specific orders, the last sentence of the proposed rule refers to "any order issued under this paragraph," which is indicative that an order, not a local rule, is required.

Adding the proposed language will eliminate any question of the authority of the local district to adopt rules making Rules 26(a)(1), 26(a)(2), 26(a)(3), and 26(f) applicable to contested matters, whether on an across-the-board basis or to specific proceedings. In this district we have had since 1996 local rules adopted under the authority of Rule 26 prior to its amendment in 2000 that made 26(a) applicable to certain contested matters, *e.g.*, 4001-1 dealing with relief from stay. [During the

comprehensive review and revision of the local district rules this past year, those provisions were unaltered. The court is aware that, technically, there is no current authority for those rules; their validity is dependent upon the proposed amendment to 9014. However, it was believed that, under the circumstances, although they are perhaps unenforceable, it was less disruptive to local practitioners to leave the rules in place than abrogate them to reinstate in two years.]

There would be no need to amend the last sentence of the proposed rule. If the court makes 26(a) of 26(f) by order in lieu of a rule, it will remain necessary to provide adequate notice. On the other hand if made applicable by local rule, the rule itself is sufficient notice.

The suggestion may flow from an over-abundance of caution. Rule 9029(a) prohibits local rules inconsistent with the Federal Rules of Bankruptcy Procedure. A local rule that makes applicable that which the Federal Rules of Bankruptcy Procedure specifically makes inapplicable, as does proposed Rule 9014, is clearly inconsistent. By explicitly and unequivocally granting the local district authority to make an inconsistent rule removes any question that it has authority.

Very truly yours,

Thomas J. Yerbich
Court Rules Attorney

cy: Hon. John W. Sedwick, Chief District Judge
Hon. Donald MacDonald IV, Chief Bankruptcy Judge

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11 February 2003

The Honorable Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

Re:Preliminary Draft of Proposed Amendments to the
Federal Rules of Bankruptcy Procedure, May, 2002

Dear Mr. McCabe:

I am pleased to once again provide written comment to the Federal Rules of Bankruptcy Procedure, as above noted.

My comment shall be brief, as the efficacy of the proposed change to Rule 9014 speaks for itself. It is axiomatic in bankruptcy practice that the heightened speed at which most motion practice is conducted obviates the need for application of the full panoply of discovery devices and procedures borrowed from the Federal Rules of Civil Procedure, as found at Fed. R. Civ. P. 26, et seq., and incorporated by Bankruptcy Rule 7026. The proposed textual amendment to Rule 9014 achieves this laudable end.

Nonetheless, my comment goes more to the proposed wording of the Advisory Committee Note to the Rule. While my statements above apply to a simple majority of contested matters, it is equally fair to note that many "contested matters" to be decided pursuant to motion practice under Rule 9014 can quickly escalate into controversies much more akin to full blown litigation. This is partly a function of the inherent complexity of particular issues, the monetary stakes, the number of parties, the temperament of the litigants, and other factors; sometimes, it is simply a function of "nature abhors a vacuum."

Among other things, the mandatory scheduling conference borrowed from Civil Rule 26(f) can be most useful in bringing parties together, ironing out difficulties, sorting out parties that are quarrelsome or unfamiliar with the nuances of bankruptcy practice, and, most important of all, giving the court an opportunity to make an early assessment of the case, and thus be either better prepared to hear the matter to a conclusion or encourage the parties to resolve their difficulties at an earlier phase. To be sure, I address this point from my own experience as a former judicial law clerk to a bankruptcy judge, and twenty years of active bankruptcy practice.

Whatever the cause, the subdivisions of Civil Rule 26 that are proposed to be dispensed with can play a valuable role in streamlining the litigation process, and reaching a result of maximum justice. Therefore, some greater provision should be made to keep the door open to their employment.

To be sure, the proposed textual revision to Rule 9014 maintains that option rather neatly. The simple notation "unless the court directs otherwise" is sufficient, and there is no need to burden the Rule itself with undue verbiage.

However, it is the existing text of the Advisory Note explaining the amendment that I respectfully take issue with. It is my considered opinion that the Note text should be reworded to make explicit the discretion of the court, upon cause, to reinstate the applicability of the subject subdivisions, and to furthermore make equally clear that the parties may request such reinstatement themselves. I have no corner on perfect wording here, but if I may respectfully suggest, the last sentence of the Note explaining the amendment might better serve the interests of justice if it were to instead read something like this:

"However, nothing in the amendment should be construed to limit the court's discretion, for cause, to apply or reinstate the subject subdivisions of Rule 26, in whole or part, when the circumstances of a particular controversy so require or the interests of justice would be better served. Such reinstatement can be made either upon the court's own motion or the application of any interested party in individual cases, or may be provided for by local rule."

In sum, my comment is that the proposed textual amendment to Rule 9014 is valuable and appropriate. Nevertheless, the text of the Advisory Committee Note explaining the change should be expanded, to make clear that the court and parties will still have the ability to invoke the useful provisions of Civil Rule 26 when the circumstances merit a more traditional and fulsome approach to litigation in bankruptcy cases.

Mr. McCabe, my thanks to you and the Committee for the opportunity to be heard, and make a contribution to the proper functioning of our federal courts. I respectfully remain,

Very truly yours,

Anthony Michael Sabino
Associate Professor of Law
Tobin College of Business
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AMS/dal

Federal Bar Association

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February 14, 2003

Submitted Electronically to: www.uscourts.gov

Mr. Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure of the
Judicial Conference of the United States
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
Washington, DC 20544

Re: Comments on Proposed Amendments to Federal Rules

Dear Mr. McCabe:

On behalf of the Federal Bar Association ('FBA"), I am writing to provide the comments of the Association with respect to proposed amendments to certain federal rules. The FBA – founded over 80 years ago and more than 16,000 members strong — is the only national association composed exclusively of attorneys in government and the private sector who practice within or before the federal courts and agencies. Our mission is to serve and protect our nation's federal legal system, and we therefore take a special interest in the rules which govern our members' practice. We very much appreciate the opportunity to provide comment on the Committee's proposals.

Rules of Evidence

The Committee's commendable desire to bring "symmetry" to Rule 804(b)(3) posed a special challenge, because of the Supreme Court's determination in *Lilly* that the hearsay exception for declarations against penal interest was not "firmly rooted" and therefore would be subject to a heightened standard for admissibility by prosecutors. The FBA supports the substance of the proposed amendment to this Rule, but recommends a change in format to provide additional clarity.

Specifically, the FBA suggests that the proposed Rule 804(b)(3)(B) instead be drafted as a separate subdivision 804(b)(4), so that the two subdivisions would read as follows:

> (3) . . . But a statement tending to expose the declarant to criminal liability is admissible under this subdivision if it is offered in a civil case or to exculpate an accused in a criminal case, and it is supported by corroborating circumstances that clearly indicate its trustworthiness.
>
> (4) **Statement against penal interest, offered to inculpate accused.** — If offered to inculpate an accused, a statement tending to expose the declarant to criminal liability is admissible if it is supported by particularized guarantees of trustworthiness.

The Supreme Court's *Lilly* decision has imposed upon prosecutors a higher standard for admissibility than that required of the accused. The FBA agrees that it is appropriate to impose on civil cases the same requirement which has always applied to such statements when offered by the accused in a criminal case; that is, that there be corroborating circumstances clearly indicating trustworthiness. Because there are two standards, for the sake of clarity the FBA believes it makes sense to delineate them in separate subdivisions.

The FBA also agrees with the Committee's recommendation that the specific factors to be considered in assessing whether a proffered statement meets the applicable requirement be left to the Committee Note and to case law rather than being specified in the text of the Rule.

Rules of Criminal Procedure

The FBA supports the proposed amendments to Rule 41 regarding mobile tracking devices, which provides needed guidance on both the issuance of such warrants and the question of delayed notice. The statute that addresses such devices, 18 U.S.C. §3317, provides no guidance regarding the judicial officers authorized to issue such warrants or the required contents of an application for such a warrant, and the U.S. Supreme Court to date has declined to create a standard. The proposed amendments to Rule 41 fill this void.

By identifying the required contents of a tracking-device warrant application, and by limiting the authority to issue such warrants to federal judicial officers, the proposed Rule provides necessary guidance to law enforcement officers, the courts and counsel, and strikes an appropriate balance between respect for constitutional safeguards and the needs of law enforcement in an ever-more threatening world. Furthermore, the new provision allowing a judicial officer to approve delayed notice of the tracking appropriately comports with the recent USA PATRIOT Act.

The FBA similarly supports the proposed revisions to the *habeas corpus* rules and the associated forms.

Bankruptcy Rules

The FBA supports the proposed change to Rule 9014, which would limit the applicability of Rule 26 in contested matters.

Thank you for your consideration of our views on these matters. Please let me know if we can be of further assistance on this or any other matter of mutual interest.

Very truly yours,

Kent S. Hofmeister
National President

KSH/jr

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: NATIONAL CREDITOR ADDRESS REGISTER

DATE: MARCH 12, 2003

The Bankruptcy Noticing Working Group has previously requested that the Advisory Committee consider an amendment to Rule 2002(g) to create a process to permit creditors to receive notices electronically on a nationwide or regional basis. The Bankruptcy Noticing Center (BNC) provides Electronic Bankruptcy Noticing (EBN) to all but six districts. I compared the list of courts on the AO website for local bankruptcy rules to the districts listed on the EBN website, and the only districts not contained on the EBN list were D.C., Ga.-S, Mo.-E, Ok.-E, Ok.-W, and Tn.-M. Thus, the BNC handles the vast bulk of bankruptcy notices throughout the country. It is also increasingly moving to electronic noticing, especially for larger creditors (the IRS is probably the largest), and is reducing its costs significantly.

The Bankruptcy Noticing Working Group has requested that the Advisory Committee consider amending Rule 2002(g) to permit creditors to submit an address or addresses to which they wish notices sent. These addresses would operate throughout the system. That is, the creditor would "register in one place the address or addresses they wish to be used for all cases and in any district throughout the bankruptcy system." Letter from Joseph P. Hurley to Peter G. McCabe, February 4, 2002 (See Tab 13 of March 2002 Agenda Book). The Working Group noted that the technological advances permit the BNC to correct misaddressed notices, batch multiple notices to the same creditor, and enhance the desirability of creditor participation in

EBN program. Mr. Hurley's letter indicates annual postage savings of over two million dollars.

The Technology Subcommittee discussed the propriety of an amendment to Rule 2002(g) to accomplish the national noticing system that the Bankruptcy Noticing Working Group proposed. The Subcommittee concluded that the issue should be placed on the agenda for the March 2003 meeting. The Subcommittee also concluded that the noticing system, however it might be configured in the end, must include safe harbor language similar to that included in Rule 5003(e) for notices to governmental units. That is, the debtor should not be penalized if the Noticing Center changes the creditor's address from what the debtor provided. This may not be a problem for debtors under § 523(a)(3) of the Bankruptcy Code because that section only requires the debtor to schedule or list the creditor's name. If the debtor properly schedules or lists the creditor, then the creditor would have no action under § 523(a)(3). Even though the Code seems to address this problem, there could be numerous instances in which the issue of the proper address for a notice to a creditor may arise. In all of these instances, the debtor should not bear the risk of ineffective notice because it was sent to an address other than the one the debtor provided. For all of these situations, the risk of insufficient notice due to the operation of the proposed national noticing system should be on the creditor who has opted into that system.

Although the Technology Subcommittee proposed a safe harbor comparable to that set out in Rule 5003(e), the amendment to the rules suggested by the Working Group has a very different purpose from that of Rule 5003(e). Operation of this amendment is essentially internal to the BNC. Unlike Rule 5003, it does not anticipate an address register that debtors can rely upon to provide the correct address for particular creditors. Instead, the debtor would use whatever address the debtor believed was appropriate for a particular creditor. The BNC

thereafter would "readdress" notices to the creditor based on the operation of its software and its electronic compilation of address requests submitted by creditors. To accomplish this goal of a national noticing system for creditors, Rule 2002(g) could be amended as set out below.

RULE 2002. Notices to Creditors, Equity Security Holders, United States, and United States Trustee

* * * * *

(g) ADDRESSING NOTICES

(1) Notwithstanding subparts (2) - (4), a creditor may submit to the Bankruptcy Noticing Center an address to receive any notice required to be mailed under Rule 2002. Not later than 30 [10] days after the creditor submits an address, the Bankruptcy Noticing Center shall use the address supplied by the creditor for all notices. A notice sent to the creditor at the address supplied by that creditor is conclusively presumed to be the proper address for the notice for purposes of this subdivision.

(2) ~~(1)~~ Notices required to be mailed under Rule 2002 to a creditor, indenture trustee, or equity security holder shall be addressed as such entity or an authorized agent has directed in its last request filed in the particular case. For purposes of this subdivision –

(A) a proof of claim filed by a creditor or indenture trustee that designates a mailing address constitutes a filed request to mail

notices to that address, unless a notice of no dividend has been given under Rule 2002(e) and a later notice of possible dividend under Rule 3002(c)(5) has not been given; and

(B) a proof of interest filed by an equity security holder that designates a mailing address constitutes a filed request to mail notices to that address.

~~(2)~~ (3) If a creditor or indenture trustee has not filed a request designating a mailing address under Rule 2002(g)~~(1)~~ (2), the notices shall be mailed to the address shown on the list of creditors or schedule of liabilities, whichever is filed later. If an equity security holder has not filed a request designating a mailing address under Rule 2002(g)~~(1)~~ (2), the notices shall be mailed to the address shown on the list of equity security holders.

~~(3)~~ (4) If a list or schedule filed under Rule 1007 includes the name and address of a legal representative of an infant or an incompetent person, and a person other than that representative files a request or proof of claim designating a name and mailing address that differs from the name and mailing address of the representative included in the list or schedule, unless the court orders otherwise, notices under Rule 2002 shall be mailed to the representative included in the list or schedules and to the name and address designated in the request or proof of claim.

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COMMITTEE NOTE

A new subdivision (g)(1) is inserted in the rule, and the former subdivisions are renumbered (2) through (4). The new subdivision authorizes creditors to submit an address or addresses to the Bankruptcy Noticing Center at which the creditor wishes to receive any notices sent under Rule 2002. The new address becomes effective 30 [10] days after the creditor submits the address to the Bankruptcy Noticing Center. This subdivision applies only in those courts that use the Bankruptcy Noticing Center. However, creditors need make only one submission of an address or addresses to the Bankruptcy Noticing Center, and that address shall apply to any Rule 2002 notices sent by the Bankruptcy Noticing Center in any case pending in a bankruptcy court that uses the Center. Thus, creditors will not have to send the address to each court in which they may appear. To the extent that creditors either do not take advantage of this system, or the court in which the case is pending does not use the Bankruptcy Noticing Center, the remaining subdivisions of Rule 2002(g) govern the address for notices.

The proposal leaves open the possibility that the Bankruptcy Noticing Center may send a notice to a creditor listed on the debtor's schedules to an address different from the one provided by the debtor. If this creditor has participated in the BNC program, the notice will be effective under the last sentence of subdivision (g)(1). This safe harbor, however, does not resolve the problem of a notice being sent by BNC to an address it received from Creditor A when the claim listed by the debtor is held by Creditor B. The notice would not be going to the address submitted by Creditor B, so the safe harbor will not apply. The debtor may have properly listed Creditor B, but Creditor B will not receive the notice which instead will be sent to the address supplied by Creditor A.

The BNC asserts a very high level of reliability and accuracy for its software programs to get

notices to the correct entities. It would seem that a private vendor undertaking this responsibility should bear the risk that a particular creditor did not receive notice as provided in Rule 2002. These creditors would have no protection under § 523(a)(3), nor would they be able to participate in other actions for which notice is required under Rule 2002. If a creditor is injured by the failure of BNC to provide proper notice, that creditor should have a cause of action against BNC for that failure. Identifying this possibility of recovery against BNC in the Committee Note may be sufficient to protect creditors who do not receive proper notice through no fault of their own. In the event that notice is not received, and neither the debtor nor the creditor are at fault, it seems that the BNC (and the entity from whom it purchased the software) should bear the loss. Some form of bond could be required to ensure that adequate funds would be available to satisfy any claims brought by injured creditors.

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: ELECTRONIC ISSUANCE OF SUMMONS

DATE: MARCH 12, 2003

The Technology Subcommittee met by teleconference on February 21, 2003, to consider the electronic issuance of a summons under Rule 7004. The Advisory Committee had considered the matter briefly during the meeting in Hyannis this past October and referred the matter to the Technology Subcommittee. The issue was first raised by a deputy clerk who requested that the Committee propose an amendment to the rules to permit the electronic issuance of these summonses.

The Subcommittee identified at least three reasons for amending the rule to permit the issuance of a summons by electronic means. First, the plaintiff can file the complaint electronically. In most CM/ECF courts, the local rules require participants in the system to file all of their pleadings electronically. Thus, it seems logical to allow the clerk to issue a summons electronically. Second, in many bankruptcy cases, the debtor in possession or the trustee may file dozens or even hundreds of cases at the same time. These are typically adversary proceedings to recover preferential or fraudulent transfers, and in larger cases the number of these actions can be extraordinary. Finally, many attorneys are located a great distance from the court, and the issuance of a summons electronically is both more convenient and efficient for that attorney.

Rule 7004(a) provides, *inter alia*, that Rules 4(a) and 4(b) of the Federal Rules of Civil

Procedure apply in adversary proceedings.[1] Those provisions govern the form and issuance of a summons. Under that rule, the clerk must "sign" the summons, and the summons must "bear the seal of the court." If the summons does not bear the signature of the clerk, it is deficient and service of that summons is ineffective. Barrett v. City of Allentown, 152 F.R.D. 46, 49 (E.D.Pa. 1993). Presumably, if the summons includes the clerk's signature but does not include the seal of the court, the summons is likewise deficient and service of such a summons would be ineffective under Rule 4. While one could argue that electronic signatures or encryptions satisfy the requirements of the clerk's signature and the court's seal on the summons, I have been unable to find any case reaching that conclusion. Adoption of a local rule that deems certain actions to constitute the affixing of a signature or the embossing of a seal on a summons might satisfy Rule 4's requirements. Again, however, I have not found any cases that so hold, nor have I found any such local rules.

The Judicial Conference Committee on Court Administration and Case Management has issued Model Local Bankruptcy Court Rules for Electronic Case Filing. Rule 8 of those rules provides that a Filing User's "log-in and password...serve as the Filing User's signature on all electronic documents filed with the court." The term "Filing User is defined only indirectly in those rules. Rule 2 provides that

> Attorneys admitted to the bar of this court (including those admitted pro hac vice), United States trustees and their assistants, bankruptcy administrators and their assistants, and others as the court deems appropriate, may register as Filing Users of the court's

[1] Rule 9014(b) provides that the service provisions of Rule 7004 apply in contested matters. That incorporation of Rule 7004, however, does not include Rule 7004's adoption of the provisions governing the issuance of a summons under Rule 4 of the Federal Rules of Civil Prodedure.

> Electronic Filing System. Registration is in a form prescribed by the clerk and requires the Filing user's name, address, telephone number, Internet e-mail address, and, in the case of an attorney, a declaration that the attorney is admitted to the bar of this court.

The commentary to the rule does not suggest that the clerk of the court, or any deputy clerk, would be a Filing User. Therefore, the rule validating the electronic signatures of Filing Users would not appear to be apply to the electronic signature of the clerk on a summons. I have searched the local rules of approximately a dozen courts that currently participate in CM/ECF, and I have not found any rules that appear to include the clerk in the category of Filing Users. Moreover, even if the rule is read to include clerks, it would only address the requirement of the clerk's signature on the summons and would not resolve the problem of the need for the summons to bear the court's seal to be effective. Thus, local rules that make electronic signatures effective for rules purposes of the local and national rules will not be sufficient to authorize the electronic issuance of a summons under Rule 4(b). Neither the Model Local Bankruptcy Court Rules for Electronic Case Filing nor other local bankruptcy court rules include any provision relating to the clerk's embossing of a seal on a summons.

Since Rule 7004(a) incorporates Civil Rule 4(a) and (b), the amendment to the Bankruptcy Rule must limit the incorporation of the Civil Rule and substitute new language to authorize the issuance of a summons by electronic means. The amendment need not change any of the service requirements in Rule 7004, so no other amendments are necessary to that Rule. Rule 9014 also need not be amended because the only cross reference in Rule 9014 to Civil Rule 4 relates to the service of the motion and has no application to the issuance of a summons. Thus, the proposed amendment is contained entirely in Rule 7004(a) and is set out below. The

bracketed language at the end of the Committee Note is offered for your consideration. The issue is whether we need to make even more clear that the change in the rule to authorize electronic *issuance* of the summons is not meant to authorize electronic *service* of the summons. The earlier statement in the Committee Note says only that the amendment does not address the matter, but a more forceful statement in the Note might be appropriate.

RULE 7004. PROCESS; SERVICE OF SUMMONS; COMPLAINT

(a) SUMMONS; SERVICE; PROOF OF SERVICE

(1) Except as provided in subdivision (a)(2), Rule 4(a), (b), (c)(1), (d)(1), (e)-(j), (*l*), and (m) F.R.Civ.P. applies in adversary proceedings. Personal service under ~~pursuant to~~ Rule 4(e)-(j) F.R.Civ.P. may be made by any person at least 18 years of age who is not a party, and the summons may be delivered by the clerk to any such person.

(2) The clerk may sign and seal a summons electronically by preceding the clerk's name on the summons with "s/", and including the seal of the court on the electronic summons.

COMMITTEE NOTE

There is some doubt that the clerk can issue a summons electronically under F.R.Civ.P. 4(a) and (b), and this amendment resolves that uncertainty by specifically authorizing the clerk to issue a summons electronically. In some bankruptcy cases the trustee or debtor in possession may commence hundreds of

> adversary proceedings simultaneously, and permitting the electronic signing and sealing of the summonses for those proceedings increases the efficiency of the clerk's office without any negative impact on any party. The rule only authorizes electronic issuance of the summons. It does not address the service requirements for the summons. Those requirements are set out elsewhere in Rule 7004. [, and nothing in subpart (a)(2) of the rule should be construed as authorizing electronic service of a summons.]

Amendment of F.R.Civ.P. Rule 4 would be a more direct way to accomplish the goal of authorizing electronic issuance of a summons. It is possible that the Civil Rules Committee will consider amending Rule 4 to authorize electronic issuance, however, that Committee has a number of very substantial issues pending before it that make consideration of this matter unlikely for the near future. Furthermore, there is arguably much less need for this authority in civil actions where it is unlikely that a party will request that the clerk issue hundreds of summonses at the same time. Nonetheless, we have informed the Civil Rules Committee that we are considering an amendment to the Bankruptcy Rules to permit the electronic issuance of a summons. The Civil Rules Committee will likely monitor the matter, and may have some particularly helpful suggestions as we proceed. It is also possible that any amendment to the Bankruptcy Rules on this score could be used as an experiment for the Civil Rules and form the basis of a future amendment to those rules.

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: AMENDMENT OR RULE 8001 TO PERMIT DISMISSAL OF STALE APPEALS

DATE: MARCH 12, 2003

The Subcommittee on Privacy and Public Access and Appeals met by teleconference on February 13, 2003, to consider whether to pursue an amendment to Rule 8001 to expedite the dismissal of appeals when an appellant has filed to complete the record in the matter in a timely fashion. A copy of the memorandum distributed to the Subcommittee follows this memorandum. The Subcommittee discussed the bankruptcy appeals process in those courts in which the members have had any experience, and no one indicated any problems with delays in these matters. Significantly, that included extensive experience in the Northern District of Illinois, which is the location of the Assistant United States trustee who initially submitted the suggestion to the Advisory Committee.

The discussion in the Subcommittee echoed the experience in other courts, including the Court of Appeals for the Sixth Circuit. The clerk of that court indicated that the problem of stale appeals is essentially nonexistent in the Sixth Circuit BAP for which he also serves as clerk. He suggested that parties involved in bankruptcy appeals are generally much more time sensitive and pursue their appeals more diligently than many parties in appeals of other types of cases. The Subcommittee concluded, by unanimous vote, that the lack of any significant problem warrants that the Committee no longer pursue the matter.

If the Advisory Committee still wishes to consider the matter, it may be possible to make a minimal amendment to Rule 8004 to assist in the expeditious resolution of stale appeals. Appellate Rule 3(d) provides in part that the district clerk "must promptly send a copy of the notice of appeal and of the docket entries – and any later docket entries – to the clerk of the court of appeals named in the notice." Rule 8004 is derived from Appellate Rule 3(d), but it does not include a statement directing the bankruptcy clerk to send a copy of the notice to the clerk of the court to which the appeal is being taken. The reason that the rule does not include the transfer of notice in a manner comparable to the appellate rule is that the clerk of the bankruptcy court may not know which court will be hearing the appeal. If the appellate seeks to appeal to the district court, the bankruptcy clerk would know immediately that the district court will be hearing the appeal. If the appellant appeals to the BAP, however, the appellee has 30 days after service of the notice of appeal to elect to have the appeal heard by the district court. 28 U.S.C. § 158(c)(1). This is more time than is provided under Rule 8006 to designate items for inclusion in the record on appeal. Consequently, the appeal can become stale even before one can determine which case will have jurisdiction over the appeal. Nevertheless, the Rule 8004 could be amended to direct the clerk to send a copy of the notice of appeal to the district court if the appellant selects that court for the appeal, and if the appellant chooses the BAP, the clerk could send a copy of the notice of appeal to that court once the time has expired to make the election to have the appeal heard in the district court. Alternatively, the clerk could notify the BAP immediately even though that court may not retain jurisdiction over the matter. If the appellee makes the district court election, then the clerk would presumably have to send a second copy of the notice of appeal out to the district court.

These difficulties in providing notice to the appellate courts and the apparently limited extent of the problem of stale appeals strongly support the Subcommittee's decision to recommend that the Advisory Committee no longer consider this matter.

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: LISTING OF PARTIES ON SCHEDULE G (EXECUTORY CONTRACTS AND UNEXPIRED LEASES) ON CREDITOR MATRIX

DATE: MARCH 15, 2003

The October 2002 meeting of the Advisory Committee meeting included a discussion of the proper treatment of parties listed on Schedule G – Executory Contracts and Unexpired Leases. The Schedule contains a note reminding the person completing the schedule that "[a] party listed on this schedule will not receive notice of the filing of this case unless the party is also scheduled in the appropriate schedule of creditors." This cautionary note may be misleading. It could be read to suggest that parties to executory contracts and unexpired leases are or may not be creditors. Given the broad definition of claim in § 101(5) of the Bankruptcy Code, it would seem that any nondebtor party to one of these contracts or leases would be a creditor unless the debtor assumes the lease or contract under § 365 of the Code. Of course, the decision whether to assume or reject the contract or lease may not come until some time much later in the case. Therefore, the note on Schedule G may mislead debtors into concluding that they do not need to notify these parties of the case.

The rights of the nondebtor parties to unexpired leases and executory contracts can be adversely affected by actions taken during a case. Therefore, it seems appropriate, if not constitutionally necessary, to notify them of the pendency of the case and related matters. An amendment to Rule 1007(a)(1) can implement this requirement. That rule currently directs the

debtor in a voluntary case to "file with the petition a list containing the name and address of each creditor unless the petition is accompanied by a schedule of liabilities." The rule has no provision for the submission of a list of creditors if the schedules of liabilities accompany the petition. Instead, virtually every bankruptcy court has promulgated a local rule that requires the debtor to submit or file a matrix in a specific form or format that lists all of the creditors in the case. The matrix is required even if the debtor has filed full schedules of liabilities. The matrix serves as the clerk's guide for sending the notices. The clerk or the clerk's designee does not use the schedules to prepare the mailings. Clearly, a matrix is essential even when the debtor files complete schedules in the case.

If virtually every bankruptcy court has a local rule requiring the filing of a matrix, the rule is effectively national. I reviewed the local rules of all of the bankruptcy courts as listed on the website of the Administrative Office, and I found a local rule on the topic in all but a few courts. Most include the rule as local rule 1007-1 or 1007-2; although about five courts include the provision as local rule 1002-1. A few other courts include the local rule by a number not yet geared to the uniform numbering system. I was unable to access the local rules for NY-N and TN-M from my computer, so those courts may have such a local rule. I could not locate a rule requiring the debtor to submit a matrix or similar list in the local rules of the bankruptcy courts for the following districts: IL-C; GA-S; OK-W; and NM. These courts may cover this requirement either elsewhere in there than under local rules 1002- or 1007-. Generally though, it is clear that debtors must file a list or matrix of creditors to assist in the sending of notices during the case.

There is some variation in these local rules, but the variance seems minimal. The local

rules do not include any reference to Schedule G, so they do not appear to address the issue before the Advisory Committee. The following proposed amendment to Rule 1007(a)(1) introduces the concept of a matrix or list of creditors, but it does so by reference to persons listed or to be listed on Schedules D through H rather than by reference to "creditors" or "persons holding claims." Cross referencing to the schedules will reach not just the nondebtor parties to executory contracts and unexpired leases, but also to the codebtors listed on Schedule H. Just like parties to executory contracts and unexpired leases, codebtors fit under the definition of creditor in § 101 of the Bankruptcy Code. Nevertheless, nothing in or on Schedule H directs the debtor to include those persons on a list of creditors. The codebtors may have a significant interest in the case, and they cannot participate if they are unaware of its pendency. Therefore, they should receive notice of the case along with other creditors.

A proposed amendment to portions of Rule 1007 follows. It is intended to ensure that all appropriate parties in interest receive notice of the case and matters within the case.

RULE 1007. Lists, Schedules and Statements, Time Limits

(a) LIST OF CREDITORS AND EQUITY SECURITY HOLDERS

(a) List of Creditors and Equity Security Holders

(1) In a voluntary case, ~~the debtor shall file with the petition a list containing the name and address of each creditor unless the petition is accompanied by a schedule of liabilities~~ unless the court orders otherwise, the debtor shall file with the petition a list containing the name and address of each person

included or to be included on Schedules D, E, F, G, and H as prescribed by the Official Forms.

(2) In an involuntary case, the debtor shall file within 15 days after entry of the order for relief, a list containing the mane and address of each ~~creditor unless a schedule of liabilities has been filed~~ person included or to be included on Schedules D, E, F, G and H as prescribed by the Official Forms.

* * * * *

(c) The schedules and statements, other than the statement of intention, shall be filed with the petition in a voluntary case, or ~~if the petition is accompanied by a list of all the debtor's creditors and their addresses,~~ within 15 days thereafter, except as provided in subdivisions (d), (e), and (h) of this rule. In an involuntary case the list in subdivision (a)(1), and the schedules and statements, other that the statement of intention, shall be filed by the debtor within 15 days after the entry of the order for relief. ~~Schedules~~ Lists, schedules, and statements filed prior to the conversion of a case to another chapter shall be deemed filed in the converted case unless the court directs otherwise. Any extension of time for the filing of the schedules and statements may be granted only on motion for cause shown and on notice to the United States trustee and to any committee elected under § 705 or appointed under §

1102 of the Code, trustee, examiner, or other party as the court may direct. Notice of an extension shall be given to the United States trustee and to any committee, trustee, or other party as the court may direct.

* * * * *

(g) The general partners of a debtor partnership shall prepare and file the list required under subdivision (a)(1), the schedules of assets and liabilities, schedule of current income and expenditures, schedule of executory contracts an unexpired leases, and statement of financial affairs of the partnership. The court may order any general partner to file a statement of personal assets and liabilities within such time as the court may fix.

COMMITTEE NOTE

Notice to creditors and other parties in interest is essential to the operation of the bankruptcy system. Sending notice requires a convenient listing of the names and addresses of the persons to whom notice must be sent, and virtually all of the bankruptcy courts have adopted a local rule requiring the submission of a list of creditors. These lists are commonly called the creditor matrix.

Given the universal adoption of these local rules, the need for such lists in all cases is apparent. Consequently, the rule is amended to require the debtor to submit such a list at the commencement of the case. Like all lists, this list must be amended when necessary. See Rule 1009(a).

The content of the list is described by reference to Schedules D through H of the Official Forms rather than by reference to creditors or persons holding claims. The cross reference to the Schedules as the source of the names for inclusion in the list

ensures that persons such as codebtors or nondebtor parties to executory contracts and unexpired leases will receive appropriate notices in the case. Given this form of cross reference, the "Note" contained on Schedule G stating that persons listed on that Schedule will not receive notice unless they are included on the schedule of creditors is deleted from Schedule G.

While this rule renders unnecessary, in part, local rules on the subject, this rule does not direct any particular format or form for the list to take. Local rules still may govern those particulars of the list.

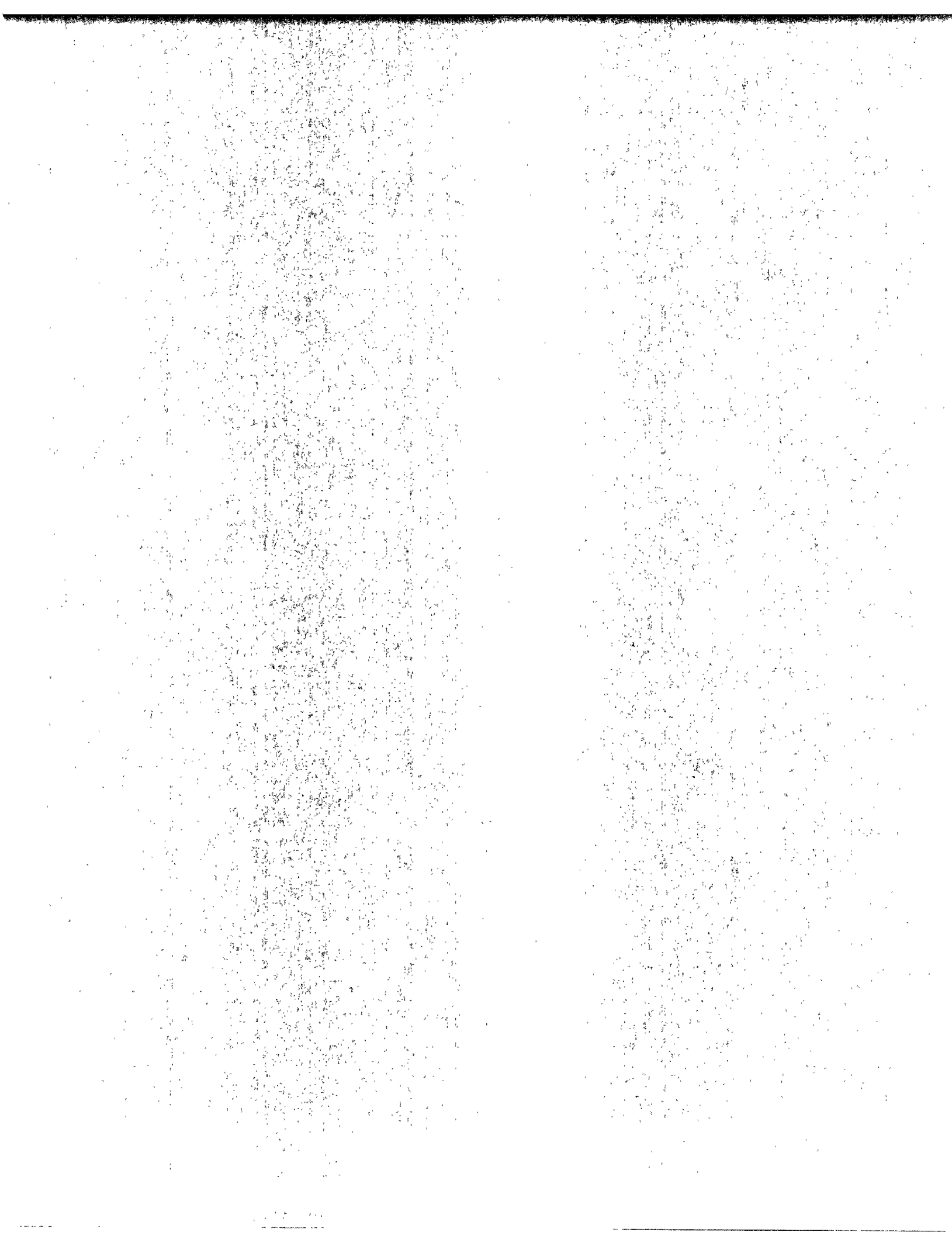
Subdivision (c) is amended to reflect that subdivision (a)(1) no longer requires the debtor to file a schedule of liabilities with the petition in lieu of a list of creditors. The filing of the list is mandatory, and subdivision (b) of the rule requires the filing of schedules. Thus, subdivision (c) no longer needs to account for the possibility that the debtor can delay filing a schedule of liabilities when the petition is accompanied by a list of creditors. Filing of the schedules, like the filing of the (a)(1) list is mandatory. Subdivision (c) simply addresses the situation in which the debtor does not file schedules or statements with the petition, and the procedure for seeking an extension of time for filing.

Other changes are stylistic.

Identifying what is commonly referred to as a creditor matrix as a "list" under the proposed Rule 1007(a)(1) brings that document under other parts of Rule 1007 and Rules 1008 and 1009. These rules already refer to "lists", so the inclusion in Rule 1007(a)(1) of a "list" to operate as the creditor list or matrix subjects that list to the provisions of these other rules.

A concern expressed in prior meetings of the Committee was that some debtors prefer not to notify their landlord of a pending bankruptcy proceeding. After discussion of that issue, however, the consensus seemed to be that the debtor's preferences notwithstanding, the landlord is a creditor entitled to notice of the case. Another area of concern was cases in which the debtor

has licensed software to potentially thousands or even millions of persons. Those persons arguably either are creditors directly or by virtue of being parties to executory contracts with the debtor. Listing them on Schedule G in the past would not necessarily mean that those persons would be included on the list of creditors. These parties are not different from those who may have warranty claims against debtors who manufactured consumer goods. The debtor must make a decision about the need to list these parties on one or more schedules in the case. The same is true with regard to licensees of software. Moreover, given the likelihood that these licensees will be included on an electronic listing in the debtor's control, the initial filing should not pose extraordinary problems for the debtor. As to the notices themselves, the debtor could seek an order from the court limiting notice to an extremely numerous group in appropriate circumstances. See Rule 2002(m).



Form B6G (DRAFT)

In re _____, **Case No.** _____
Debtor **(If known)**

SCHEDULE G- EXECUTORY CONTRACTS AND UNEXPIRED LEASES

Describe all executory contracts of any nature and all unexpired leases of real or personal property. Include any time share interests. If all leases and contracts will not fit on this page, use continuation sheets in a similar format.

Provide the names and complete mailing addresses of all other parties to each lease or contract described, using the same format as in Schedules D, E, and F. Use as many name and address boxes as necessary to list each party to any lease or contract and separate each lease or contract scheduled. State the nature of debtor's interest in each contract, i.e., "Purchaser," "Agent," etc. State whether debtor is the lessor lessee of a lease.

☐ Check this box if debtor has no executory contracts or unexpired leases to report on this Schedule G.

NAME AND MAILING ADDRESS, INCLUDING ZIP CODE, OF OTHER PARTIES TO LEASE OR CONTRACT	DESCRIPTION OF CONTRACT OR LEASE AND NATURE OF DEBTOR'S INTEREST. STATE WHETHER LEASE IS FOR NONRESIDENTIAL REAL PROPERTY. STATE CONTRACT NUMBER OF ANY GOVERNMENT CONTRACT

COMMITTEE NOTE

The form is amended to implement an amendment to Rule 1007 by deleting the instruction that parties to these contracts and leases will not receive notice of the bankruptcy case unless they are listed on one of the schedules of liabilities. Even though a contract or lease may be an asset of the debtor or the debtor may be current on any lease or contract payment obligations, other parties to these transactions may have an interest in the bankruptcy case and should receive notice.

FORM B6H
(6/90)

In re _____, Debtor

Case No. _____ (If known)

SCHEDULE H—CODEBTORS

Provide the information requested concerning any person or entity, other than a spouse in a joint case, that is also liable on any debts listed by debtor in the schedules of creditors. Include all guarantors and co-signers In community property states, a married debtor not filing a joint case should report the name and address of the nondebtor spouse on this schedule. Include all names used by the nondebtor spouse during the six years immediately preceding the commencement of this case.

☐ Check this box if debtor has no codebtors.

NAME AND ADDRESS OF CODEBTOR	NAME AND ADDRESS OF CREDITOR

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
Bankruptcy Judges Division

MEMORANDUM

DATE: March 7, 2003

FROM: Patricia S. Ketchum

SUBJECT: Form for Submitting Debtor's Social Security Number

TO: Advisory Committee on Bankruptcy Rules

The proposed privacy-related amendments to Rules 1007 and 2002, which are expected to take effect December 1, will require an individual debtor to submit to the court the debtor's complete Social Security number for use on the § 341 Notice to Creditors and by any case trustee, the United States trustee, law enforcement, or the court. A draft form is attached for the Committee to consider. The proposed new subdivision (f) of Rule 1007 also provides for the debtor who does not have a Social Security number to so state, and the proposed form includes an option for stating that the debtor has no Social Security number.

A number of questions about the procedure for submitting the Social Security number need to be considered by the Committee, in addition to any substantive comments or questions about the contents of the form. Please note that in an electronic filing environment it is possible that no form may be used. The debtor or debtor's attorney could simply fill in a screen for submitting the number or stating that the debtor has no Social Security number. There are several ways that the required verification could be provided for in those circumstances, which will be discussed below.

First, should the form be an Official Form or a Director's procedural form? Making it an Official Form confers greater dignity on the document and impresses debtors with the importance of providing the information required. On the other hand, creating an Official Form for a document that is not "filed" but rather is "submitted" may invite challenges to the policy of not making public the information contained in the form. A majority of the Forms Subcommittee recommends that the form be an Official Bankruptcy Form.

Second, does the form need a caption if it is not to be "filed"? Perhaps not, but the clerk needs to be able to connect the submitted document to the correct debtor with the least trouble. A caption is a good way to provide the clerk with the necessary information. Moreover, attorneys are accustomed to putting a caption on every document destined for the court. If the Committee chooses not to use a formal caption, the form could be redesigned to request the information in a different format. The Forms Subcommittee recommends that the form begin with a caption.

Third, the form does not provide a space for disclosing some other taxpayer identification

number, such as an IRS Individual Taxpayer Identification Number (ITIN) which is issued to legal aliens who are not eligible for Social Security coverage. Is the Committee satisfied not to request disclosure of any number the individual may have? Rule 1007(f) does not mention other numbers, and creditors (except the IRS) probably would not recognize the number or have a use for it. Automation, although it can process enormous quantities of information, is fairly rigid concerning the format of the information. A paper form, filed and maintained on paper, can accommodate variations in the kinds of numbers submitted, such as number of digits or inclusion of letters or other symbols with numerals. CM/ECF and other electronic filing and case management systems, however, would have to be built or altered to accept every different type of number the Committee determines to require a debtor to submit. A request for any other taxpayer number can, however, be added if the Committee wants to do so.

Fourth, is the Committee satisfied with the electronic submission of a bare Social Security number? How would the Committee recommend that the debtor satisfy the Rule 1007(f) requirement for a verified statement? If the CM/ECF case opening screens are modified to include a space for submitting the debtor's Social Security number or a statement that the debtor does not have a Social Security number, should the screen include a statement that the debtor has signed a Statement of Social Security Number(s) under penalty of perjury? Complicating the picture somewhat is the fact that many attorneys use petition preparation software which can automatically upload new cases into the CM/ECF system without the filer having to manually complete the case opening screens. Does that make a difference? See below.

Fifth, the debtor's Statement of Social Security Number(s) may be a key element of a bankruptcy fraud prosecution or a civil enforcement action by the United States trustee or bankruptcy administrator. In light of this, should the Committee provide guidance on how the Statement is to be submitted and retained? Both the petition preparation software used by attorneys and the CM/ECF system will be modified to accommodate the privacy-related amendments, and the Committee has an opportunity to provide guidance to the programmers working on the CM/ECF system and to attorneys and the forms publishing and software industry.

Historically, the forms publishers and bankruptcy software vendors have been both diligent and responsive not only to the requirements of the Judicial Conference but also those of local courts, including in their packages, for example, Director's forms such as the Statement of Compensation filed by a debtor's attorney under Rule 2016, mailing matrices, and locally prescribed chapter 13 plans. The Committee can, of course, leave the details of compliance with proposed Rule 1007(f) up to the courts and the continued diligence of the forms publishers and software vendors. The CM/ECF programmers, software vendors, and probably the courts and practitioners, however, would welcome guidance from the Committee.

The petition software and CM/ECF could be modified to permit the submission of the full Social Security number as part of case opening together with electronic submission of the Statement of Social Security Number(s) as a private docket event and electronic document accessible only to court staff. The document submitted electronically might bear only an

"s/Name of Debtor" in place of a traditional signature. Many CM/ECF courts, but not all of them, require a debtor whose case has been filed electronically to file a paper affidavit stating that the debtor filed a petition electronically and that the information submitted with the petition is true and correct. This affidavit could include a statement concerning submission of the debtor's Social Security number. On the other hand, the petition software could submit the number electronically and print a copy of the Statement for the debtor to sign manually. The signed copy could be retained by the attorney for the debtor or submitted to the court and retained by the clerk in a binder, or both. The draft Committee Note states that the debtor's attorney should retain a signed copy of the statement. Any further guidance the Committee chooses to provide on this issue could be added to the Committee Note and also provided to the forms publishing and software industry.

The draft Committee Note contains useful information, but committee notes are not traditional for Director's procedural forms. If the Committee decides the form should be a Director's procedural one, the information in the draft Committee Note will be furnished as instructions, along with further directions for completing the form.

If the Committee decides to make the form an Official Bankruptcy Form, the transmittal to the Standing Committee and the Judicial Conference should include the fact that the form has not been published for comment. Although there is no requirement to publish proposed amendments to official forms, the Committee traditionally has done so. This form, which implements the amendments to Rules 1007 and 2002 cannot be delayed, as it will be needed December 1, 2003, when the proposed "privacy" amendments to the rules take effect. Accordingly, as there is no publication requirement and time is of the essence, the Committee needs to request that the form be approved without going through the publication and comment process.

Attachments

Form B 21 Official Form 21
(12/03)

FORM 21. STATEMENT OF SOCIAL SECURITY NUMBER

UNITED STATES BANKRUPTCY COURT
_____District of _____

In re _____,	Case No._____
Set forth here all names, including married, maiden, and trade names used by debtor within last 6 years.	(If known)
	Chapter_____
Debtor*	
Address_____	
_____	
Employer's Tax Identification (EIN) No(s). [if any]:	
_____	
Last four digits of Social Security No(s).:_____	

STATEMENT OF SOCIAL SECURITY NUMBER(S)

1.Name of Debtor (enter Last, First, Middle):_____
(Check the appropriate box and, if applicable, provide the required information.)

/ /Debtor has a Social Security Number and it is: _ _ _-_ _-_ _ _ _
(If more than one, state all.)
/ /Debtor does not have a Social Security Number.

2.Name of Joint Debtor (enter Last, First, Middle):_____
(Check the appropriate box and, if applicable, provide the required information.)

/ /Joint Debtor has a Social Security Number and it is: _ _ _-_ _-_ _ _ _
(If more than one, state all.)
/ /Joint Debtor does not have a Social Security Number.

I declare under penalty of perjury that the foregoing is true and correct.

X _____
Signature of Debtor Date

X _____
Signature of Joint Debtor Date

**Joint debtors must provide information for both spouses.*
Penalty for making a false statement: Fine of up to $250,000 or up to 5 years imprisonment or both. 18 U.S.C. §§ 152 and 3571.

COMMITTEE NOTE

The form implements Rule 1007(f), which requires a debtor to submit a statement under penalty of perjury setting out the debtor's Social Security number. The form is necessary because Rule 1005 provides that the caption of the petition includes only the final four digits of the debtor's Social Security number. The statement provides the information necessary for the clerk to include the debtor's full Social Security number on the notice of the meeting of creditors, as required under Rule 2002(a)(1). Only creditors in a case, along with the trustee and United States trustee or bankruptcy administrator, will receive the full Social Security number on their copy of the notice of the meeting of creditors. The copy of that notice which goes into the court file will show only the last four digits of the number. The court also will make the full nine-digit number available to law enforcement.

The form must be submitted with the petition filed in the case. If the debtor files the case electronically, the information contained in the form also will be submitted electronically, although the debtor or debtor's attorney should retain a signed paper copy of the statement regardless of whether the information has been submitted electronically or in paper form.

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
Bankruptcy Judges Division

MEMORANDUM

DATE: March 14, 2003

FROM: Patricia S. Ketchum

SUBJECT: Uniform Numbering System for Local Bankruptcy Court Rules

TO: Advisory Committee on Bankruptcy Rules

A 1995 amendment to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure provides that all local rules of court "must conform to any uniform numbering system prescribed by the Judicial Conference." The bankruptcy rules amendments appear at Rules 8018 and 9029. A March 1996 Judicial Conference policy adopted at the recommendation of the Committee on Rules of Practice and Procedure (Standing Committee) directs the courts to "adopt a numbering system for local rules of court that corresponds with the relevant Federal Rules of Practice and Procedure." In furtherance of that policy, the Advisory Committee on Bankruptcy Rules developed and distributed to the courts a numbering system for local bankruptcy court rules that corresponds to the numbering system in the Bankruptcy Rules.

The Judicial Conference set a deadline of April 15, 1997, for courts to renumber their rules, and most bankruptcy courts have done so. One of the objectives of uniform numbering is to assist the bar in finding out whether a court has a rule on a particular subject and , if so, what the rule is. The numbering system has been successful, first, because most courts renumbered their rules, and second, because most courts also have established websites where they post their local rules, greatly improving access to them.

The numbering system for local bankruptcy court rules consists of a four-digit national rule number, a dash, and a fifth digit, starting with "1," *e.g.,* 2015-1. An earlier analysis by the Bankruptcy Judges Division of existing local rules, however, had disclosed many local rule topics for which no related national rule exists. These topics were incorporated in the numbering system and were assigned available numbers within the "Part" of the national rules with which they seemed most closely associated, *e.g.,* 2070-1, 5090-1, etc.

The bankruptcy local rule numbering system has not been modified since it was issued seven years ago. The spread of the CM/ECF automation system has rekindled interest in local rule numbering as courts are examining their local rules to determine whether amendments related to electronic filing may be needed. In response to requests, the Bankruptcy Judges

Division recently has posted the local rule numbering system on the J-Net, the judiciary's internal electronic information network. Any court can download the document for use by its local rules committee.

A review of the numbering system in preparation for posting, however, revealed the need for several additions and one correction. A draft showing recommended changes is attached. Most of the new topics would incorporate amendments to the national rules that have been made since 1997. Not every amendment to the national rules should generate a uniform local rule number, however. Proliferation of local rules continues to trouble the Standing Committee, and the existence of a uniform local rule number may lead a court to think it should have a local rule on the subject. Accordingly, only those topics that appear likely to attract local rule making have been added.

The topics to be added are: court security, financial disclosure by a corporate debtor and by a corporate party to an adversary proceeding, electronic service through the court's electronic transmission system, debtor's statement of Social Security number, and privacy of a summons served with a complaint filed by a debtor. Electronic filing was included in the original numbering system.

The number to be corrected is 7027-1. Federal Rule of Civil Procedure 27, which is incorporated by Rule 7027 addresses the taking of a deposition prior to filing the complaint, rather than the more usual deposition during the pretrial phase of an adversary proceeding or contested matter. Rule 7030, which covers depositions after an action has been filed, would be a more appropriate national rule number to use, and the attached draft would substitute 7030-1 for 7027-1.

New topics and the corrected rule number appear in italics. Any changes to the existing uniform local rule numbering system that the Committee approves can be implemented without delay. The electronic version can be modified immediately, a notation added that the numbering system has been updated, and the date of modification displayed.

Attachment

UNIFORM NUMBERING SYSTEM FOR LOCAL BANKRUPTCY RULES

Cite as "_____LBR_____-___." Example: "E.D. Va. LBR 1007-1."
(District) *(Number)*

If a rule is prescribed by a circuit council for a Bankruptcy Appellate Panel Service, cite as "_____ Cir. BAP LBR_____-___." Example: "9th Cir. BAP LBR 8009-1."

The topic names are part of this uniform numbering system and should be used in addition to the rule numbers.

PART I

Uniform Local Rule Number	**Topic**	**See Also LBR**
1002-1	PETITION - GENERAL	1004-1, 1005-1 1010-1, 5005-2
1004-1	PETITION - PARTNERSHIP	
1005-1	PETITION - CAPTION	9004-2
1006-1	FEES - INSTALLMENT PAYMENTS	5080-1, 5081-1
1007-1	LISTS, SCHEDULES, & STATEMENTS	5005-2
1007-2	MAILING - LIST OR MATRIX	
1007-3	STATEMENT OF INTENTION	
1007-4	*FINANCIAL DISCL. BY CORP. DEBTOR*	*7007.1-1*
1007-5	*STATEMENT OF SSN (PRIVACY)*	
1009-1	AMENDMENTS TO LISTS & SCHEDULES	
1010-1	PETITION-INVOLUNTARY	
1014-1	TRANSFER OF CASES	
1014-2	VENUE - CHANGE OF	
1015-1	JOINT ADMINISTRATION/ CONSOLIDATION	

PART I Cont'd.

Uniform Local Rule Number	Topic	See Also LBR
1015-2	RELATED CASES	
1017-1	CONVERSION - REQUEST FOR/ NOTICE OF	
1017-2	DISMISSAL OR SUSPENSION - CASE OR PROCEEDINGS	
1019-1	CONVERSION - PROCEDURE FOLLOWING	
1020-1	CHAPTER 11 SMALL BUSINESS CASES - GENERAL	
1070-1	JURISDICTION	
1071-1	DIVISIONS - BANKRUPTCY COURT	
1072-1	PLACES OF HOLDING COURT	
1073-1	ASSIGNMENT OF CASES	
1074-1	CORPORATIONS	

PART II

Uniform Local Rule Number	Topic	See Also LBR
2002-1	NOTICE TO CREDITORS & OTHER INTERESTED PARTIES	
2002-2	NOTICE TO UNITED STATES OR FEDERAL AGENCY	
2002-3	UNITED STATES AS CREDITOR OR PARTY	
2003-1	MEETING OF CREDITORS & EQUITY SECURITY HOLDERS	

PART II Cont'd.

Uniform Local Rule Number	Topic	See Also LBR
2004-1	DEPOSITIONS & EXAMINATIONS	7027-1, 9016-1
2007.1-1	TRUSTEES & EXAMINERS (Ch. 11)	
2010-1	TRUSTEES - BONDS/SURETY	
2014-1	EMPLOYMENT OF PROFESSIONALS	6005-1
2015-1	TRUSTEES - GENERAL	
2015-2	DEBTOR-IN-POSSESSION DUTIES	
2015-3	TRUSTEES - REPORTS & DISPOSITION OF RECORDS	
2015-4	TRUSTEES - CHAPTER 12	
2015-5	TRUSTEES - CHAPTER 13	
2016-1	COMPENSATION OF PROFESSIONALS	6005-1
2019-1	REPRESENTATION OF MULTIPLE PARTIES	
2020-1	UNITED STATES TRUSTEES	
2070-1	ESTATE ADMINISTRATION	
2071-1	COMMITTEES	
2072-1	NOTICE TO OTHER COURTS	
2080-1	CHAPTER 9	
2081-1	CHAPTER 11 - GENERAL	
2082-1	CHAPTER 12 - GENERAL	

PART II Cont'd.

Uniform Local Rule Number	Topic	See Also LBR
2083-1	CHAPTER 13 - GENERAL	9010-1
2090-1	ATTORNEYS - ADMISSION TO PRACTICE	9011-3
2090-2	ATTORNEYS - DISCIPLINE & DISBARMENT	
2091-1	ATTORNEYS - WITHDRAWALS	

PART III

Uniform Local Rule Number	Topic	See Also LBR
3001-1	CLAIMS AND EQUITY SECURITY INTERESTS - GENERAL	5003-3
3006-1	CLAIMS - WITHDRAWAL	
3007-1	CLAIMS - OBJECTIONS	
3008-1	CLAIMS - RECONSIDERATION	
3009-1	DIVIDENDS - CHAPTER 7	
3010-1	DIVIDENDS - SMALL	
3011-1	UNCLAIMED FUNDS	
3012-1	VALUATION OF COLLATERAL	
3015-1	CHAPTER 13 - PLAN	
3015-2	CHAPTER 13 - AMENDMENTS TO PLANS	
3015-3	CHAPTER 13 - CONFIRMATION	
3016-1	CHAPTER 11 – PLAN	

PART III Cont'd.

Uniform Local Rule Number	Topic	See Also LBR
3016-2	DISCLOSURE STATEMENT – GENERAL	
3017-1	DISCLOSURE STATEMENT - APPROVAL	
3017-2	DISCLOSURE STATEMENT - SMALL BUSINESS CASES	
3018-1	BALLOTS - VOTING ON PLANS	
3018-2	ACCEPTANCE/REJECTION OF PLANS	
3019-1	CHAPTER 11 - AMENDMENTS TO PLANS	
3020-1	CHAPTER 11 – CONFIRMATION	
3021-1	DIVIDENDS - UNDER PLAN (Ch. 11)	
3022-1	FINAL REPORT/DECREE (Ch. 11)	
3070-1	CHAPTER 13 - PAYMENTS	

PART IV

Uniform Local Rule Number	Topic	See Also LBR
4001-1	AUTOMATIC STAY - RELIEF FROM	
4001-2	CASH COLLATERAL	
4001-3	OBTAINING CREDIT	
4002-1	DEBTOR – DUTIES	
4002-2	ADDRESS OF DEBTOR	
4003-1	EXEMPTIONS	

PART IV Cont'd.

Uniform Local Rule Number	Topic	See Also LBR
4003-2	LIEN AVOIDANCE	
4004-1	DISCHARGE HEARINGS	
4004-2	OBJECTIONS TO DISCHARGE	
4007-1	DISCHARGEABILITY COMPLAINTS	
4008-1	REAFFIRMATION	
4070-1	INSURANCE	
4071-1	AUTOMATIC STAY - VIOLATION OF	

PART V

Uniform Local Rule Number	Topic	See Also LBR
5001-1	COURT ADMINISTRATION	
5001-2	CLERK - OFFICE LOCATION/HOURS	
5003-1	CLERK - GENERAL/AUTHORITY	
5003-2	COURT PAPERS - REMOVAL OF	
5003-3	CLAIMS - REGISTER	
5005-1	FILING PAPERS - REQUIREMENTS	1002-1, 1007-1, 9004-1, 9004-2
5005-2	FILING PAPERS - NUMBER OF COPIES	
5005-3	FILING PAPERS - SIZE OF PAPERS	9004-1
5005-4	ELECTRONIC FILING	*9076-1*
5009-1	FINAL REPORT/DECREE	

PART V Cont'd.

Uniform Local Rule Number	Topic	See Also LBR
5010-1	REOPENING CASES	
5011-1	WITHDRAWAL OF REFERENCE	
5011-2	ABSTENTION	
5070-1	CALENDARS & SCHEDULING	9073-1, 9074-1
5071-1	CONTINUANCE	
5072-1	COURTROOM DECORUM	
5072-2	*COURT SECURITY*	
5073-1	PHOTOGRAPHY, RECORDING DEVICES & BROADCASTING	
5075-1	CLERK - DELEGATED FUNCTIONS OF	
5076-1	COURT REPORTING	
5077-1	TRANSCRIPTS	
5078-1	COPIES - HOW TO ORDER	
5080-1	FEES - GENERAL	1006-1
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APPENDIX OF UNIFORM LOCAL RULE NUMBERS FOR BANKRUPTCY APPEALS

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APPENDIX OF UNIFORM LOCAL RULE NUMBERS FOR BANKRUPTCY APPEALS

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: TECHNICAL AMENDMENT TO RULE 1011

DATE: MARCH 11, 2003

The amendment to Rule 1004 became effective on December 1, 2002. At that time, the rule changed from having a subdivision (a) and (b) to becoming a rule with no subdivisions. Former subdivision (a) was eliminated from the rule leaving only the material governing involuntary petitions against a partnership. The surviving portion of the rule, with some stylistic changes, is former Rule 1004(b).

Rule 1011(a) contains a cross reference to Rule 1004(b). The amendment to Rule 1004 now makes that reference incorrect. Consequently, there is a need to make a technical change to Rule 1011(a). All that is needed is to delete "(b)" from line 4 of that rule as set out below.

The amendment is purely technical and makes no substantive or procedural change in the rules or the bankruptcy process. Thus, I believe that it is unnecessary to publish the amendment for public comment. All that should be required, and that I suggest we recommend, is approval of the change by the Standing Committee. The Standing Committee can them recommend its adoption by the Judicial Conference for its presentation to the Supreme Court. This amendment is comparable to the amendment to Rule 2002(j) and should be included in the package of rules forwarded for final approval by the Standing Committee at its next meeting.

Rule 1011. Responsive Pleading or Motion in Involuntary and Ancillary Cases

(a) WHO MAY CONTEST PETITION. The debtor named in an involuntary petition or a party in interest to a petition commencing a case ancillary to a foreign proceeding may contest the petition. In the case of a petition against a partnership under Rule 1004 ~~(b)~~, a nonpetitioning general partner, or a person who is alleged to be a general partner but denies the allegation, may contest the petition.

* * * * *

COMMITTEE NOTE

The amendment to Rule 1004 that became effective on December 1, 2002, deleted former subdivision (a) of that rule leaving only the provisions relating to involuntary petitions against partnerships. Thus, former subdivision (b) essentially became the entirety of Rule 1004, and the rule no longer includes subdivisions. Therefore, this technical amendment changes the reference to Rule 1004(b) to Rule 1004.

RULE 2002. NOTICES TO CREDITORS, EQUITY SECURITY HOLDERS, UNITED STATES, AND UNITED STATES TRUSTEE

* * * * * *

(j) NOTICES TO THE UNITED STATES. Copies of notices required to be mailed to all creditors under this rule shall be mailed (1) in a chapter 11 reorganization case, to the Securities and Exchange Commission at any place the Commission designates, if the Commission has filed either a notice of appearance or a written request to receive notice; (2) in a commodity broker case, to the Commodity Futures Trading Commission at Washington, D.C., (3 in a chapter 11 case to the ~~District Director of~~ Internal Revenue Service at the address of the Service set out in the register maintained under Rule 5003(e) for the district in which the case is pending; (4) if the papers in the case disclose a debt to the United States other than for taxes, to the United States attorney for the district in which the case is pending and to the department, agency, or instrumentality of the United States through which the debtor became indebted; or (5) if the filed papers disclose a stock interest of the United States, to the Secretary of the Treasury at Washington, D.C.

* * * * * *

COMMITTEE NOTE

The rule is amended to reflect that the structure of the Internal

Revenue Service no longer includes a District Director. Thus, rather than sending notice to the District Director, the rule now requires that the notices be sent to the location designated by the Service and set out in the register of addresses maintained by the clerk under Rule 5003(e). The other change is stylistic.

RULE 4008. ~~DISCHARGE AND REAFFIRMATION HEARING~~ FILING OF REAFFIRMATION AGREEMENT

Unless the court, for cause, extends the time, a reaffirmation agreement must be filed not later than 30 days after the entry of an order granting a discharge or confirming a plan in a chapter 11 reorganization case concerning an individual debtor. ~~Not more than 30 days following the entry of an order granting or denying a discharge, or confirming a plan in a chapter 11 reorganization case concerning an individual debtor and on not less than 10 days notice to the debtor and the trustee, the court may hold a hearing as provided in § 524(d) of the Code. A motion made by the debtor for approval of a reaffirmation agreement shall be filed before or at the hearing~~

COMMITTEE NOTE

The rule is amended to establish a deadline for filing reaffirmation agreements. The Code sets out a number of prerequisites to the enforceability of reaffirmation agreements. Among those requirements are that the agreements be entered into prior to the discharge and that they be filed with the court. Since the parties must make their agreement prior to the entry of the discharge, they will have at least 30 days to file the agreement with the court. Requiring the filing of reaffirmation agreements by a certain deadline also serves to inform the court of the need to hold a hearing under § 524(d) whenever the agreement is not accompanied by an appropriate declaration or affidavit

from counsel for the debtor.

The rule allows any party to the agreement to file it with the court. Thus, whichever party has a greater incentive to enforce the agreement can file it. In the event that the parties fail to timely file the reaffirmation agreement, the rule grants the court broad discretion to permit a late filing.

The rule also is amended by deleting the provisions formerly in the rule regarding the timing of the reaffirmation and discharge hearing. Instead, the rule leaves discretion to the courts to set the hearing at a time appropriate for the particular circumstances presented in the case and consistent with the scheduling needs of the parties.

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF TENNESSEE

KEITH M. LUNDIN
U.S. BANKRUPTCY
JUDGE

CUSTOMS HOUSE, SECOND FLOOR
701 BROADWAY
NASHVILLE, TENNESSEE 37203-3976
TELEPHONE: 615-736-5586
FACSIMILE: 615-736-7705

February 26, 2003

The Honorable A. Thomas Small
Judge, U.S Bankruptcy Court
Century Station Post Office
Post Office Drawer 2747
Raleigh, NC 27602-2747

RE: Model Form for the Chapter 13 Plan

Dear Tom:

Enclosed is a copy of the July 2002 *Norton Bankruptcy Law Adviser.* If you've already seen this, throw it away, but otherwise take a look at the first article—it is an account of a workshop at the 2002 meeting of the National Association of Chapter 13 Trustees in San Juan. Fifty bankruptcy professionals representing every region of the country and virtually every aspect of consumer bankruptcy practice drafted a model Chapter 13 plan.

During the drafting exercise in San Juan, the participants recognized that the endless variation in Chapter 13 plans across judicial districts produces enormous inefficiency in Chapter 13 cases, encourages creditor hostility to Chapter 13 and generates many procedural and substantive defects in Chapter 13 practice. Despite many differences in "local legal cultures," the participants reached a consensus that it was possible to standardize most of the necessary content of a Chapter 13 plan and that it was worth the effort. The draft plan at the end of the enclosed article is the product of that effort

Since last summer, I get an e-mail or a phone call about once a week from a bankruptcy judge that is considering the model plan. With small changes, it has been implemented several places and I know of half a dozen districts that plan to try out the form by local rule or general order during 2003. The model plan is being studied by several national organizations with an eye toward spreading the model from the grassroots—from district to district.

You see where this letter is going: would the Advisory Committee on Bankruptcy Rules consider the development of a form Chapter 13 plan? If there is a formal process to request consideration, I would be pleased to start that process by making that request There are several organizations that would wish to be heard, especially creditor groups that have lined up in support

of the model plan after the San Juan meeting. Please let me know what I should do next. Thanks in advance.

Best personal regards,

Sincerely,

Keith

Keith M. Lundin
Judge, U.S. Bankruptcy Court

KML/co
cc: Hon. Chris Klein
Hon. Mark McFeeley
Hon. James Walker

Editor in Chief: William L. Norton, Jr., Former U. S. Bankruptcy Judge (1971-1985)
Attorney at Law, Atlanta, Georgia

July 2002 Issue No. 7

IN THIS ISSUE...

THE SAN JUAN 50: A PROPOSED MODEL FORM FOR THE CHAPTER 13 PLAN

Henry E. Hildebrand, III, Esq.
Chapter 13 Trustee
Nashville, Tennessee
and
Keith M. Lundin
U.S. Bankruptcy Court
Nashville, Tennessee

Picture this: Fifty experienced Chapter 13 bankruptcy professionals from 29 different states-a mix of standing trustees, debtors' lawyers, creditors' lawyers and paralegals-closeted in a conference room at a Caribbean resort with instructions to draft a "perfect" model Chapter 13 plan that fits on two sides of one piece of paper.

This was one of the exercises undertaken by participants in the Advanced Chapter 13 Practice Institute that preceded the annual meeting of the National Association of Chapter 13 Trustees in San Juan, Puerto Rico in July 2002. To prepare for the Advanced Institute, each registrant collected Chapter 13 plans in actual use from at least five districts other than their own. The hundreds of collected plans varied in length from a simple one page form to a complex and detailed 16 pages. Participants also reviewed recent decisions on the effects of confirmation of Chapter 13 plans.

First in small groups, and then altogether with the help of a unique four-screen computer word processing/projection system, the registrants struggled to reach a consensus on the provisions of a model Chapter 13 plan. The often heated discussion produced many important insights:

- There is anarchy in Chapter 13 practice with respect to the content and form of the plan. Many districts have a preferred or required form for the Chapter 13 plan that would not be recognizable outside of the district. Every such district seems to think that its form for the plan is the best. One creditors' attorney with national clients observed that the attorneys and paralegals in her office had to contend with 214 different forms for the Chapter 13 plan.

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- In districts without a preferred or model form for the plan, standing Chapter 13 trustees and creditors constantly struggle to determine the content of plans because the forms used by debtors' counsel vary and the same words used in different plans don't always convey the same meaning.

- National creditors barraged with different plan forms, often cannot determine the treatment of their claims from the papers they receive.

- The words used in plans to describe the treatment of creditors do not mean the same thing from district to district. For example, "pot" and "base"-terms widely used to describe the basis for calculating distributions to unsecured creditors-had four different meanings among the 50 participants.

- Creditors want to be able to look in the same place on every plan to determine their treatment. Creditors want the words used in plans to have the same meaning everywhere.

- Debtors' attorneys like the "local culture" approach to the Chapter 13 plan because it is familiar and local judges "like their own forms." Debtors' attorneys customize their law office software to use unique plan forms. Software manufacturers cannot develop off the shelf programs for preparation of Chapter 13 plans for use across the country. With the impending nationwide implementation of electronic case filing, this computer resource problem is exacerbated.

- Creditors see the encyclopedia of different plan forms as a self-serving opportunity for debtors' attorneys to "hide the ball." Some debtors' attorneys candidly admitted there was a technical advantage to local forms.

- Motions that are determinative of the treatment of creditors in Chapter 13 cases are often separate from the plan-physically and in terms of court procedures. Creditors cannot know the complete treatment proposed for their claims without tracking many different papers on many different time tracks. Everyone would be better off if the motions for such things as valuation of collateral and lien avoidance were included on the same document as the plan itself.

- Accurate notice to creditors of treatment under the plan is a universal problem in Chapter 13 cases. The method and content of notice to creditors varies as dramatically as the forms used for the plan. Noticing responsibility with respect to the content of the plan is assigned to the Chapter 13 trustee in some districts; to the bankruptcy court clerk in other districts; to a central noticing bureau in some districts; and, to the debtor or debtor's counsel in still others. In a few districts, notice includes the entire plan in whatever form it was filed. Some notices include a summary of the entire plan. Some notices contain an excerpt or partial summary of the plan dealing only with the claim of the creditor to which the notice is addressed.

- Longer plan forms compound the notice problems. It is harder to find the treatment of a particular creditor in a multi-page plan. Notice of the content of a long plan typically means composing a summary of the plan. The process of summarizing adds a layer of interpretation and multiplies errors.

- Many recent appellate decisions disrespecting the effects of confirmation in Chapter 13 cases demonstrate that the forms and procedures for confirmation in many districts are not adequate.

- Notwithstanding the startling diversity of plans in actual use, almost all forms for the plan contain a core of similar information. This common information probably can be standardized as to form and content without greatly offending local legal cultures. A short, concise, difficult to corrupt standard form for the plan could be used as the actual notice of the content of the plan in all Chapter 13 cases. This would be an enormously positive step for Chapter 13 practice.

What follows is a slightly edited version of the Model Chapter 13 Plan that emerged from the Advanced Institute in San Juan. No one believes that this form is "perfect." But there was much enthusiasm and determination on the part of the San Juan 50 that a movement should begin to seek a national consensus on a standard form for the Chapter 13 plan. Look at the model that follows with an eye to whether you could make this form work in your Chapter 13 practice. If you have additions, edits or any comments, e-mail, fax or mail them to: Henry E. Hildebrand, III, Chapter 13 Trustee, P.O. Box 190664, Nashville, TN 37219-0664; (615) 242-3241 (fax); <**hank13@ch13nsh.com**>; or to Keith M. Lundin, 701 Broadway, Customs House, 2d Floor, Nashville, TN 37203; (615) 736-7705 (fax);<**Keith_Lundin@tnmb.uscourts.gov**>.

UNITED STATES BANKRUPTCY COURT
_____ DISTRICT OF _____

IN RE:

CASE NO.:
CHAPTER 13

SSN:

CHAPTER 13 PLAN AND MOTIONS ☐ Original ☐ Amended Date_____

YOUR RIGHTS WILL BE AFFECTED. You should read these papers carefully and discuss them with your attorney. Anyone who wishes to oppose any provision of this plan or any motion included below must file a timely written objection. This plan may be confirmed and become binding, and included motions may be granted without further notice or hearing unless written objection is filed before the deadline stated on the separate Notice you should have received from the court.

THIS PLAN DOES NOT ALLOW CLAIMS: You must file a proof of claim to receive distributions under any plan that may be confirmed.

1. PAYMENT AND LENGTH OF PLAN

Debtor shall pay $_____ per _____ to the Chapter 13 Trustee starting _____ for approximately _____ months. Joint debtor shall pay $_____ per _____ to the Chapter 13 Trustee starting _____ for approximately _____ months. Total amount to be paid to Trustee shall be not less than $_____. Other payments to Trustee: _____.

2. PRIORITY CLAIMS (INCLUDING ADMINISTRATIVE EXPENSES AND SUPPORT)

All allowed priority claims will be paid in full unless creditor agrees otherwise:

Creditor	Type of Priority	Scheduled Amount
<Filing Fees>		
<Debtor's Attorney>		

3. SECURED CLAIMS; MOTIONS TO VALUE COLLATERAL AND VOID LIENS UNDER 11 U.S.C. § 506

Debtor moves to value collateral as indicated. Trustee shall pay allowed secured claims the value indicated or the amount of the claim, whichever is less. The portion of any allowed claim that exceeds the value indicated shall be treated as an unsecured claim. Debtor moves to void the lien of any creditor with "NO VALUE" specified below.

Creditor	Collateral	Scheduled Debt	Value	Interest Rate	Monthly Payment

Debtor surrenders the following collateral. Upon confirmation, the stay is lifted as to surrendered collateral.

Creditor	Collateral to be Surrendered

4. UNSECURED CLAIMS

(a) Not Separately Classified

Allowed non-priority unsecured claims shall be paid:

- ☐ Not less than $_____ to be distributed pro rata.
- ☐ Not less than _____ percent.
- ☐ Pro rata distribution from any remaining funds.

(b) Separately Classified Unsecured Claims

Creditor	Basis for Classification	Treatment	Amount

5. CURING DEFAULT AND MAINTAINING PAYMENTS

(a) Trustee shall pay allowed claims for arrearages, and Trustee shall pay postpetition monthly payments to these creditors:

Creditor	Collateral or Type of Debt	Estimated Arrearage	Interest Rate (Arrearage)	Monthly Arrearage Payment	Regular Monthly Payment

(b) Trustee shall pay allowed claims for arrearages, and Debtor shall pay postpetition monthly payments directly to these creditors:

Creditor	Collateral or Type of Debt	Estimated Arrearage	Interest Rate (Arrearage)	Monthly Arrearage Payment	Regular Monthly Payment

6. EXECUTORY CONTRACTS AND UNEXPIRED LEASES

All executory contracts and unexpired leases are rejected, except the following are assumed:

Creditor	Property Description	Treatment by Debtor

7. OTHER PLAN PROVISIONS AND MOTIONS

(a) Motion to Avoid Liens under 11 U.S.C. § 522(f)

Debtor moves to avoid the following liens that impair exemptions:

Creditor	Collateral	Amount of Lien to be Avoided

(b) Lien Retention

Except as provided above in Section 5, allowed secured claim holders retain liens until:

- ☐ Liens are released at discharge.
- ☐ Liens are released upon payment of allowed secured claim as provided above in Section 3.
- ☐ Liens are released upon completion of all payments under the plan.

(c) Vesting of Property of the Estate

Property of the estate shall revest in Debtor:

☐ Upon confirmation. ☐ Upon discharge. ☐ Other: _____

(d) Payment Notices

Creditors and lessors provided for above in Sections 5 or 6 may continue to mail customary notices or coupons to the Debtor or Trustee notwithstanding the automatic stay.

(e) Order of Distribution

Trustee shall pay allowed claims in the following order:

(1) _____
(2) _____
(3) _____
(4) _____
(5) _____

Signed: _____

Attorney for Debtor (or Debtor(s) if not represented by an attorney)

Agenda Item 16.

Judge McFeeley and Mr. Wannamaker will provide an oral report.

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Agenda Item 17.

Mrs. Ketchum and Mr. Wannamaker will provide an oral report.
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Pub.L.No. 107-347-----"E-Government" Act

SEC. 205. FEDERAL COURTS.

(a) INDIVIDUAL COURT WEBSITES- The Chief Justice of the United States, the chief judge of each circuit and district and of the Court of Federal Claims, and the chief bankruptcy judge of each district shall cause to be established and maintained, for the court of which the judge is chief justice or judge, a website that contains the following information or links to websites with the following information:

(1) Location and contact information for the courthouse, including the telephone numbers and contact names for the clerk's office and justices' or judges' chambers.

(2) Local rules and standing or general orders of the court.

(3) Individual rules, if in existence, of each justice or judge in that court.

(4) Access to docket information for each case.

(5) Access to the substance of all written opinions issued by the court, regardless of whether such opinions are to be published in the official court reporter, in a text searchable format.

(6) Access to documents filed with the courthouse in electronic form, to the extent provided under subsection (c).

(7) Any other information (including forms in a format that can be downloaded) that the court determines useful to the public.

(b) MAINTENANCE OF DATA ONLINE-

(1) UPDATE OF INFORMATION- The information and rules on each website shall be updated regularly and kept reasonably current.

(2) CLOSED CASES- Electronic files and docket information for cases closed for more than 1 year are not required to be made available online, except all written opinions with a date of issuance after the effective date of this section shall remain available online.

(c) ELECTRONIC FILINGS-

(1) IN GENERAL- Except as provided under paragraph (2) or in the rules prescribed under paragraph (3), each court shall make any document that is filed electronically publicly available online. A court may convert any document that is filed in paper form to electronic form. To the extent such conversions are made, all such electronic

versions of the document shall be made available online.

(2) EXCEPTIONS- Documents that are filed that are not otherwise available to the public, such as documents filed under seal, shall not be made available online.

(3) PRIVACY AND SECURITY CONCERNS- (A)(i) The Supreme Court shall prescribe rules, in accordance with sections 2072 and 2075 of title 28, United States Code, to protect privacy and security concerns relating to electronic filing of documents and the public availability under this subsection of documents filed electronically.

(ii) Such rules shall provide to the extent practicable for uniform treatment of privacy and security issues throughout the Federal courts.

(iii) Such rules shall take into consideration best practices in Federal and State courts to protect private information or otherwise maintain necessary information security.

(iv) To the extent that such rules provide for the redaction of certain categories of information in order to protect privacy and security concerns, such rules shall provide that a party that wishes to file an otherwise proper document containing such information may file an unredacted document under seal, which shall be retained by the court as part of the record, and which, at the discretion of the court and subject to any applicable rules issued in accordance with chapter 131 of title 28, United States Code, shall be either in lieu of, or in addition, to, a redacted copy in the public file.

(B)(i) Subject to clause (ii), the Judicial Conference of the United States may issue interim rules, and interpretive statements relating to the application of such rules, which conform to the requirements of this paragraph and which shall cease to have effect upon the effective date of the rules required under subparagraph (A).

(ii) Pending issuance of the rules required under subparagraph (A), any rule or order of any court, or of the Judicial Conference, providing for the redaction of certain categories of information in order to protect privacy and security concerns arising from electronic filing shall comply with, and be construed in conformity with, subparagraph (A)(iv).

(C) Not later than 1 year after the rules prescribed under subparagraph (A) take effect, and every 2 years thereafter, the Judicial Conference shall submit to Congress a report on the adequacy of those rules to protect privacy and security.

(d) DOCKETS WITH LINKS TO DOCUMENTS- The Judicial Conference of the United States shall explore the feasibility of technology to post online dockets with links allowing all filings, decisions, and rulings in each case to be obtained from the docket sheet of that case.

(e) COST OF PROVIDING ELECTRONIC DOCKETING INFORMATION- Section 303(a) of the Judiciary Appropriations Act, 1992 (28 U.S.C. 1913 note) is amended in the first sentence by striking `shall hereafter' and inserting `may, only to the extent necessary,'.

(f) TIME REQUIREMENTS- Not later than 2 years after the effective date of this title, the websites under subsection (a) shall be established, except that access to documents filed in electronic form shall be established not later than 4 years after that effective date.

(g) DEFERRAL-

(1) IN GENERAL-

(A) ELECTION-

(i) NOTIFICATION- The Chief Justice of the United States, a chief judge, or chief bankruptcy judge may submit a notification to the Administrative Office of the United States Courts to defer compliance with any requirement of this section with respect to the Supreme Court, a court of appeals, district, or the bankruptcy court of a district.

(ii) CONTENTS- A notification submitted under this subparagraph shall state--

(I) the reasons for the deferral; and

(II) the online methods, if any, or any alternative methods, such court or district is using to provide greater public access to information.

(B) EXCEPTION- To the extent that the Supreme Court, a court of appeals, district, or bankruptcy court of a district maintains a website under subsection (a), the Supreme Court or that court of appeals or district shall comply with subsection (b)(1).

(2) REPORT- Not later than 1 year after the effective date of this title, and every year thereafter, the Judicial Conference of the United States shall submit a report to the Committees on Governmental Affairs and the Judiciary of the Senate and the Committees on Government Reform and the Judiciary of the House of Representatives that--

(A) contains all notifications submitted to the Administrative Office of the United States Courts under this subsection; and

(B) summarizes and evaluates all notifications.

bank, which is
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'ederal Rules of
Ninth Circuit
ı this bankrupt-
ing it to us to
:s and law. We
niss the appeal.

CHRYSLER FINANCIAL CORPORATION, Petitioner,

v.

Michael F. POWE, Theresa Moore Ballard, Respondents.

First Union Mortgage Corporation, Petitioner,

v.

Betty Ann Dean, Respondent.

PNC Mortgage Corp. of America, Petitioner,

v.

Reth Allen Smith, Sherry Ryland Smith, Respondents.

Nos. 01–90036, 01–90039 and 01–90060.

United States Court of Appeals, Eleventh Circuit.

Nov. 19, 2002.

Financial institutions that were named as defendants in class actions brought by

[33]

bankruptcy debtors petitioned for review of class certification orders entered in three separate bankruptcy cases by the United States Bankruptcy Court for the Southern District of Alabama, Nos. 98-10935-MAM-13, 96-14029, MAM-13, and 98-11129-BKC-WWS, Margaret Mahoney, and William S. Shulman, JJ., 281 B.R. 336, 280 B.R. 876. The Court of Appeals, George, District Judge, sitting by designation, held that Court of Appeals did not have authority to directly review class certification order entered by bankruptcy judge, pursuant to provision of the Federal Rule of Civil Procedure that allows for permissive appeal to Court of Appeals of class certification orders of district court.

Dismissed.

Bankruptcy ⇨3765

Court of Appeals did not have authority to directly review class certification orders entered by bankruptcy judges, pursuant to provision of the Federal Rule of Civil Procedure that allows for permissive appeal to Court of Appeals of class certification orders of district court; this provision, which was promulgated pursuant to Supreme Court's authority to prescribe general rules of practice and procedure for cases in district court and in courts of appeals, was not automatically incorporated into Bankruptcy Rules upon its adoption. 28 U.S.C.A. §§ 1292(e), 2702; Fed. Rules Bankr.Proc.Rule 9023, 11 U.S.C.A.; Fed.Rules Civ.Proc.Rule 23(f), 28 U.S.C.A.

Jan T. Chilton, Severson & Werson, San Francisco, CA, C. Lee Reeves, Sirote & Permott, P.C., Birmingham, AL, for Chrysler Financial Corp.

Steven L. Nicholas, Olen & Nicholas, P.C., Olen, Nicholas Copeland, Mobile, AL, Donald J. Stewart, Cabaniss, Johnston, Gardner, Dumas & O'Neal, Mobile, AL, for Respondents.

Russell J. Pope, Pope & Hughes, Towson, MD, for First Union Mortgage Corp.

Thomas M. Hefferon, Goodwin, Proctor & Hoar, Washington, DC, for FNC Mortgage Corp. of America.

Petitions for Permission to Appeal from Orders of the United States Bankruptcy Court for the Southern District of Alabama.

Before BIRCH and COX, Circuit Judges, and GEORGE,* District Judge.

GEORGE, District Judge:

Petitioners Chrysler Financial Corporation, First Union Mortgage Corporation, and PNC Mortgage Corporation of America are separately defendants in adversarial proceedings before a bankruptcy judge in which plaintiffs allege that petitioners violated the bankruptcy code by claiming and collecting attorneys' fees from them and other debtors. In each case, the bankruptcy judge granted class certification, and petitioners filed under Fed. R.Civ.P. 23(f) and Fed. R. Bankr.P. 7023(f) for review by this Court of those class certification orders. This Court raised *sua sponte* and directed briefing and argument on the common jurisdictional issue of whether a party may petition this Court to directly review a bankruptcy judge's order granting class certification. This is an issue of first impression.

* Honorable Lloyd D. George, U.S. District Judge for the District of Nevada, sitting by designation.

I. *Statutory and Rules Framework*

Fed.R.Civ.P. 23 governs the procedure for class actions in the United States district courts. *See* Fed.R.Civ.P. 1; Fed. R.Civ.P. 23. Furthermore, the Federal Rules of Civil Procedure apply to proceedings in bankruptcy to the extent provided by the Federal Rules of Bankruptcy Procedure. Fed.R.Civ.P. 81(a)(1).[1] In 1983, the Supreme Court prescribed, pursuant to 28 U.S.C. § 2075, the Bankruptcy Rules governing the practice and procedure in cases under Title 11, and those rules took effect on August 1, 1983. Fed. R. Bankr.P. 9032 provides:

> The Federal Rules of Civil Procedure which are incorporated by reference and made applicable by these rules shall be the Federal Rules of Civil Procedure in effect on the effective date of these rules and as thereafter amended, unless otherwise provided by such amendment or by these rules.[2]

Effective December 1, 1998, Rule 23(f) was added to Fed.R.Civ.P. 23:

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

The advisory committee's note to Rule 23(f) confirms that "[t]his permissive interlocutory appeal provision is adopted under the power conferred by 28 U.S.C. § 1292(e)." Fed.R.Civ.P. 23 advisory committee's note, 1998 amendments. Section 1292(e) reads:

> (e) The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d) [governing procedure and jurisdiction over interlocutory appeals from the district court].

Section 2072 confers on the Supreme Court "the power to prescribe general rules of practice and procedure and rules of evidence for cases in the Unites States district courts (including proceedings before magistrates thereof) and courts of appeals." 28 U.S.C. § 2072(a).

Section 2075—the provision pursuant to which the Supreme Court prescribed the Bankruptcy Rules in 1983—reads in pertinent part, "[t]he Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure in cases under title 11." 28 U.S.C. § 2075.

II. *Authority to Incorporate Rule 23(f) into the Bankruptcy Rules*

Petitioners urge that under Fed. R. Bankr.P. 9032, Fed.R.Civ.P. 23(f) was au-

1. Prior to the 2001 amendments, Fed.R.Civ.P. 81(a)(1) provided that the Civil Rules "do not apply to proceedings in bankruptcy or proceedings in copyright under Title 17, U.S.C., except in so far as they may be made applicable thereto by rules promulgated by the Supreme Court of the United States." The 2001 amendments restyled the reference to incorporation of the Civil Rules in the Federal Rules of Bankruptcy Procedure. Fed.R.Civ.P. 81 advisory committee's notes, 2001 amendments. This change has no effect on our jurisdictional analysis.

2. The 1991 amendment to Fed. R. Bankr.P. 9032 added the final four words "or by these rules," in order "to provide flexibility so that the Bankruptcy Rules may provide that subsequent amendments to a Federal Rule of Civil Procedure made applicable by these rules are not effective with regard to Bankruptcy Code cases or proceedings." Fed. R. Bankr.P. 9032 advisory committee's note, 1991 amendment.

tomatically incorporated into Fed. R. Bankr.P. 7023 upon Rule 23(f)'s adoption. When the Federal Rules of Civil Procedure are made applicable to cases under the Bankruptcy Code, Bankruptcy Rule 9002 provides that certain phrases take on different meanings unless they are inconsistent with the context. "District court," "trial court," "court," "district judge," or "judge" means "bankruptcy judge" if the case or proceeding is pending before a bankruptcy judge. Fed. R. Bankr.P. 9002(4). According to this substitution, petitioners argue that Bankruptcy Rule 7023(f) should be read:

> A court of appeals may in its discretion permit an appeal from an order of a *bankruptcy judge* granting or denying class action certification under this rule if application is made to it within ten days after the entry of the order. An appeal does not stay proceedings in the *bankruptcy court* unless the *bankruptcy judge* or the court of appeals so orders.[3]

Petitioners also argue that Bankruptcy Rule 7023(f)'s authorization of discretionary interlocutory appeals to the courts of appeals from class certification orders entered by bankruptcy court judges is consistent with Rule 23(f)'s purposes.

Respondents dispute this court's authority to directly review class certification orders entered by bankruptcy judges on grounds of jurisdiction and implementation. The question calls on us first to determine whether authority exists to apply Rule 23(f) to the Bankruptcy Rules.

The advisory committee's note to Rule 23(f) recognizes that the permissive interlocutory appeal provision is adopted under the power conferred by 28 U.S.C. § 1292(e). Fed.R.Civ.P. 23 advisory committee's note, 1998 amendments. Section 1292(e) empowers the Supreme Court to prescribe rules "in accordance with section 2072" to provide for interlocutory appeals to the court of appeals not otherwise provided for in the previous subsections of § 1292. 28 U.S.C. § 1292(e). Section 2072 authorizes the Supreme Court to prescribe general rules of practice and procedure and rules of evidence for cases in the district courts (including proceedings before magistrates thereof) and courts of appeals. 28 U.S.C. § 2072.

Section 2075 expressly authorizes the Supreme Court to prescribe bankruptcy rules; § 2072 does not. Petitioners argue, however, that this difference does not suggest that Congress intended to limit the Supreme Court's rulemaking authority under §§ 1292(e) and 2072 to non-bankruptcy cases. According to petitioners, the language of § 1292(e) authorizing the Supreme Court to prescribe rules "in accordance with section 2072" incorporates § 2072's procedural requirements for adoption of rules of court, but not its sub-

3. As respondents point out, a strict substitution of terms pursuant to Rule 9002(4) fairs poorly with Rule 23(f). Their argument is based in part on Fed. R. Bank. P. 9002(2), which states that "appeal" means "an appeal as provided by 28 USC § 158." The resulting Rule 7023(f) would read:

> The court of appeals may in its discretion permit *an appeal as provided by 28 USC § 158* from an order of a *bankruptcy judge* granting or denying class action certification under this rule if application is made to it within ten days after the entry of the order. An appeal does not stay proceedings in the *bankruptcy judge* unless the *bankruptcy judge* or the court of appeals so orders.

There is no dispute that § 158 provides for direct appeals of bankruptcy orders to the district court or to a bankruptcy appellate panel, not directly to the court of appeals. However, Rule 9002 does not permit the substitution of terms if "they are inconsistent with the context." Fed. R. Bankr.P. 9002. Therefore, setting aside the awkwardness of the wording of the last sentence, the rule may be read harmoniously if the substitution is not made for the word "appeal."

stantive, and therefore, jurisdictional, limits. The wording of § 1292(e), however, does not suggest any such procedural/substantive distinction, and petitioners have presented no authority to support it. Indeed, it is not § 2072, but § 2074, that governs the procedure for the Supreme Court's submission of § 2072–prescribed rules to Congress. Section 1292(e) makes no mention of § 2074. Therefore, petitioners' argument that § 1292(e) institutes only the procedural requirements for adoption of rules of court must fail.

Petitioners also submit that because § 2072 does not itself authorize the Supreme Court to adopt rules allowing appeals from non-final orders, § 1292(e)'s reference to § 2072 cannot be read to preclude application to bankruptcy cases. However, as § 2072 grants the Supreme Court substantive powers to prescribe rules for district courts and courts of appeals, its constraint upon authorizing the prescription of rules for interlocutory appeals under § 1292(e) must be read to apply to the same extent, or mean nothing at all.

Our characterization of the substantive import of § 1292(e)'s incorporation of § 2072 leads us to the central weakness in petitioners' argument that we have jurisdiction over the bankruptcy judge's class certification pursuant to Rule 23(f): If we construe § 2072 to authorize the prescription of rules for bankruptcy proceedings, we render § 2075 superfluous—an act inconsistent with the canons of statutory construction. *See Lyons v. Georgia–Pacific Corp. Salaried Employees Ret. Plan*, 221 F.3d 1235, 1246 (11th Cir.2000) (statutes should not be construed to render certain provisions superfluous or insignificant), *cert. denied*, 532 U.S. 967, 121 S.Ct. 1504, 149 L.Ed.2d 388 (2001).[4]

This is not a case of partially overlapping reaches of jurisdictional statutes as was encountered in *Connecticut National Bank v. Germain*, 503 U.S. 249, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992). In that case, the Supreme Court held that "giving effect to both §§ 1291 and 158(d) would not render one or the other *wholly* superfluous." *Id.* at 253 (emphasis added). A reading of § 2072 to grant authority to prescribe bankruptcy rules would make the entirety of § 2075 irrelevant.[5]

We also conclude that this construction would not deny efficacy to the purposes behind Rule 23(f). Rule 23(f) makes available an avenue of permissive appeal from a district court's class certification order in order to avoid the § 1292(b) requirements that "the district court certify the certification ruling for appeal," or that the district court find that the matter "involve[s] a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." *See* Fed.R.Civ.P. 23(f) advisory committee's note, 1998 amendments. However, the § 1292(b) requirements need not be satisfied when an interlocutory appeal is taken from the bankruptcy court to the district court. In such a case, the district court's discretion to entertain an interlocutory ap-

4. Petitioners argue that, by the same token, this construction writes Rule 23(f) out of the Bankruptcy Rules. The difference, however, is that pursuant to our analysis of the operation of §§ 1292(e) and 2072, Rule 23(f) was never written into the Bankruptcy Rules.

5. This would include not only the prescriptive first paragraph of § 2075, but also the paragraph that proscribes the abridgement, enlargement, or modification of any substantive right, and the paragraph governing transmittal procedure. Those latter paragraphs each expressly and exclusively apply to rules prescribed under § 2075.

peal from the bankruptcy court is analogous to the court of appeals' discretion to entertain a Rule 23(f) appeal from the district court. *See* 28 U.S.C. § 158(a). Thus, an appellate avenue to the district court free of the constraints of § 1292(b) already exists for a bankruptcy judge's class certification order. Nothing in Rule 23(f) suggests that a bankruptcy appeal to the district court would be inadequate, or that an appeal to the court of appeals should trump district court appellate jurisdiction over bankruptcy cases. In sum, the appellate avenue addressed by Rule 23(f) is already available to petitioners through an interlocutory appeal to the district court.[6]

Furthermore, if Rule 23(f) were applied to class certification orders in bankruptcy, litigants could appeal such orders simultaneously to the district court pursuant to 28 U.S.C. § 158(a) and to the court of appeals pursuant to Bankruptcy Rule 7023(f). That scenario, needless to say, is fraught with uncertainty.[7] Therefore, we also find practical value in recognizing that §§ 1292(e) and 2072 do not permit incorporation of Rule 23(f) into the Bankruptcy Rules.

Another consideration runs contrary to petitioners' contention that § 1292(e) authorizes the Supreme Court to prescribe rules providing for discretionary appeals to this court of a bankruptcy judge's class certification determination. While not discussed by the parties, we note that the Supreme Court relied upon § 2075 as the jurisdictional basis for its orders prescribing Bankruptcy Rules and amendments. In its order of April 25, 1983, the Supreme Court expressly drew upon § 2075 for authority to prescribe the new Bankruptcy Rules. That Order also separately invokes § 2075 for authority to transmit the rules to Congress. Moreover, while the orders of the Supreme Court amending the Bankruptcy Rules do not specifically identify § 2075 as authority for prescribing the changes, the Supreme Court identifies § 2075 as authority to transmit the amendments to Congress. Therefore, given that the Supreme Court did not expressly identify § 2074, which authorizes transmittal of rules prescribed under § 2072, as joint authority with § 2075 for its transmittal of the amendments, there is no reason to think that the Supreme Court relied upon § 2072, even tacitly, as authority for prescribing the amendments.

III. *Conclusion*

We conclude that Rule 23(f)'s application is limited by § 1292(e) to rules prescribed

6. The Eleventh Circuit, in an unpublished opinion, previously foreclosed an appeal of a district court's ruling on a bankruptcy judge's class certification order on the ground that the orders were not final or otherwise immediately appealable as of right. *See Homeside Lending, Inc. v. Sheffield,* No. 01–90031–B (11th Cir. Nov. 27, 2001) (citing 28 U.S.C. § 158); *cf. In re El Paso Elec. Co.,* 77 F.3d 793, 794 (5th Cir.1996) (upon certification, the court of appeals may hear appeals of interlocutory orders issued by the district court sitting as appellate court in bankruptcy matters) (citing *Conn. Nat'l Bank v. Germain,* 503 U.S. 249, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992)). This does not change our conclusion, however. Again, the advisory committee's note to Rule 23(f) indicates that the Rule was intended to provide an appellate avenue free of the limitations of § 1292(b); nothing in Rule 23(f)'s terms or the advisory committee's notes suggest that the Rule allows a permissive appeal from all class certification orders to the court of appeals, including those issued by a bankruptcy judge.

7. For instance, there would be confusion regarding the status of the district court's jurisdiction over an appeal of a bankruptcy judge's class certification order if and when the court of appeals exercises Rule 7023(f) jurisdiction, and, if the district court retains such jurisdiction, the risk of inconsistent determinations.

8.

"in accordance with section 2072," which empowers the Supreme Court to prescribe rules in the United States district courts and courts of appeals. We further find that reading § 1292(e) and § 2072 to govern bankruptcy rulemaking would render the specific bankruptcy rulemaking provisions of § 2075 wholly superfluous and irrelevant. The Supreme Court has never identified § 2072 as its rulemaking authority when prescribing rules for practice and procedure in bankruptcy, and we decline to recognize that basis for jurisdiction here.[8]

The instant petitions for permission to appeal pursuant to Fed.R.Civ.P. 23(f) from class certification orders of the United States Bankruptcy Court for the Southern District of Alabama are therefore DISMISSED.

8. Our holding that there is no statutory authority under §§ 1292(e) and 2072 for the incorporation of Rule 23(f) into the Bankruptcy Rules makes it unnecessary for us to resolve whether such an incorporation would improperly expand the jurisdiction of the court of appeals. Nor need we address the timeliness or mootness issues of Chrysler Financial Corporation's and First Union Mortgage Corporation's petitions.

Effective Dates of Proposed Bankruptcy Rules Amendments

December 1, 2003

1007
2003
2009
2016
7007.1 (new rule)

December 1, 2003, Privacy Amendments

1005
1007
2002
Official Forms 1, 3, 5, 6, 7, 8, 9, 10, 16A, 16C, and 19

December 1, 2004

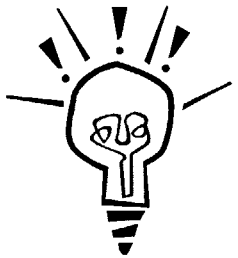
1011
2002(j)
9014

December 1, 2005

1007
2002(g)
4008
7004

Official Form 6 - Schedules G and H

THE GESTATION OF AN AMENDMENT



YEAR 1

1.Advisory Committee considers proposals for amendments. If approved, prepares draft amendments.

2.This period is of indeterminate length.

3. Proposals come from Committee members, the Reporter, judges, clerks, or the public, or result from statutory changes, case law developments, or experience.

Proposed amendments may be at different stages of the process at the same time, i.e., amendments can be at the Supreme Court while others are in the public comment stage or still being discussed by the Advisory Committee.

Advisory Committee approves draft of proposed amendments. (January-May)

Presents "preliminary draft" to Standing Committee, usually at the summer meeting, with request to publish. (June)

If approved, preliminary draft amendments are published and comments invited (August)

YEAR 2

Advisory Committee reviews written comments and holds hearing(s). Public comment period closes. (January - March)

Advisory Committee completes review of comments, final draft of amendments, draft memorandum to Standing Committee re: comments, also memorandum re: controversies, minority views of Advisory Committee members etc., (if appropriate). (March - April)

Standing Committee reviews final draft; may 1) approve 2) approve with changes, or 3) send back to Advisory Committee. (June)

Judicial Conference considers amendments submitted by Standing Committee and if approved, forwards to Supreme Court. (September)

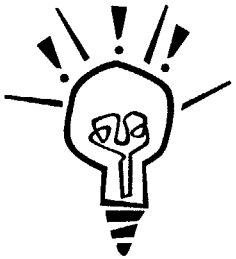
YEAR 3

Supreme Court decides whether to prescribe amendments and, if so, forwards them to Congress. (March or April) (must be by May 1)

Congress can alter or reject during the next seven months. If Congress does not act, amendments take effect December 1.

PREPARED BY THE BANKRUTPCY JUDGES DIVISION - AOUSC
10/2002

THE GESTATION OF AN AMENDMENT



YEAR 1 → **YEAR 2** → **YEAR 3**

1011, 1007, 2002(g), 2002(j), 3004, 3005, and 7004. Official Form 6 - Schedules G and H

Claims Procedures Chapter 13 Plan Form

4008

9014

1005, 1007, 2002, 2003, 2009, 2016 and new rule 7007.I.

* Amendments to Official Forms 1, 3, 5, 6, 7, 8, 9, 10, 16A, 16C, and 19 are scheduled to take effect December 1, 2003, with the privacy-related amendments to Rules 1005, 1007, and 2002. Official Form are prescribed by the Judicial Conference. They do not require Supreme Court or Congressional approval.

PREPARED BY BANKRUPTCY JUDGES DIVISION - AOUSC
04/03

The next meeting of the Committee will take place

September 18 - 19, 2003
at
Skamania Lodge, Stevenson, WA

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The Committee will discuss dates and locations for
the Spring 2004 meeting.
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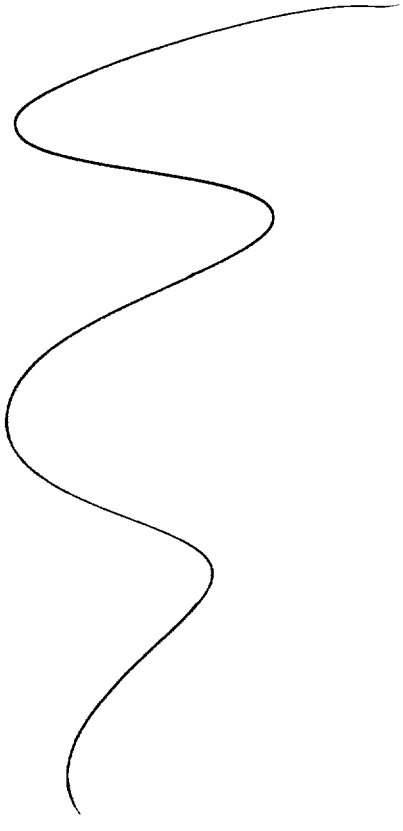
Supplemental

Agenda

Book

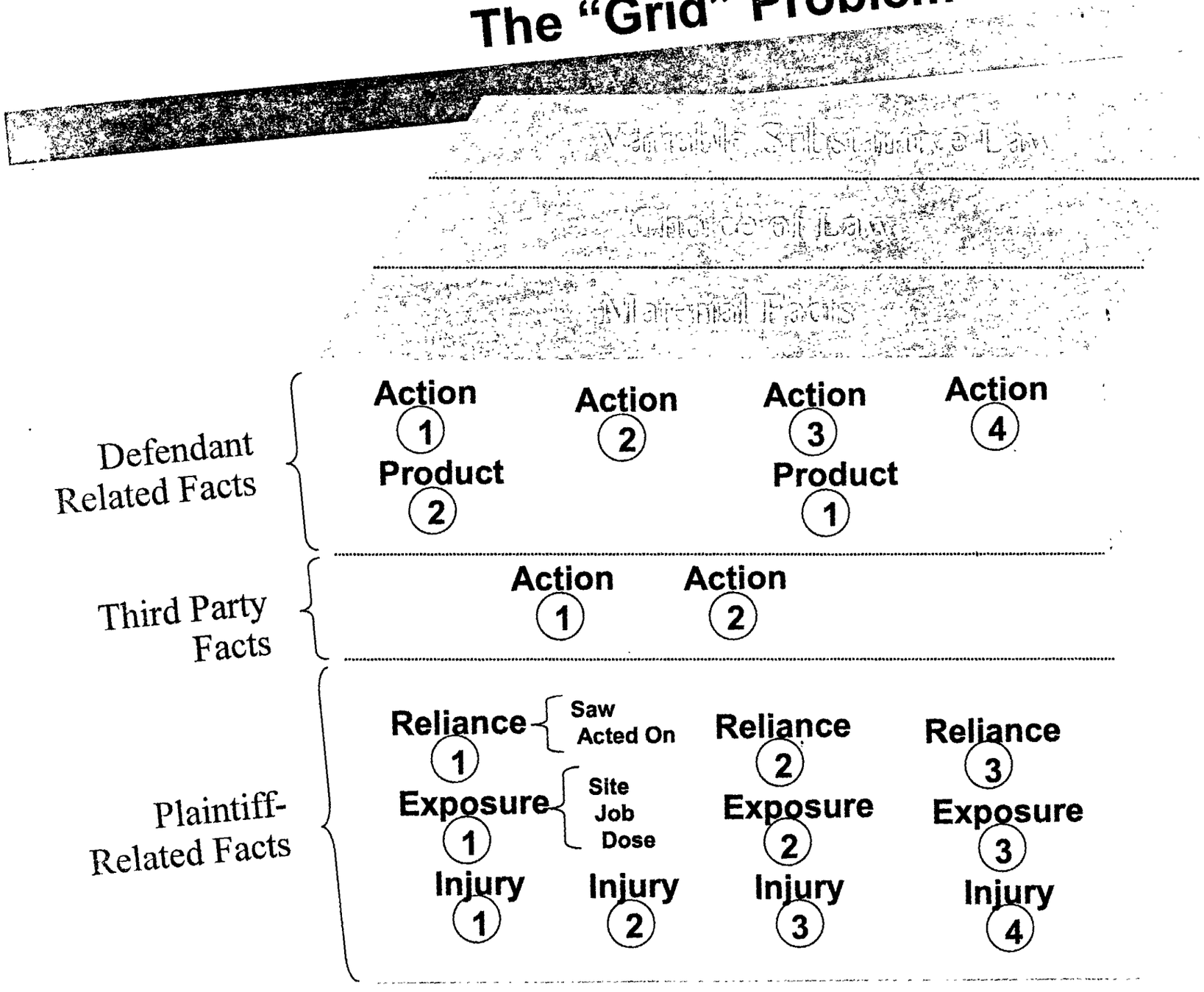
Materials



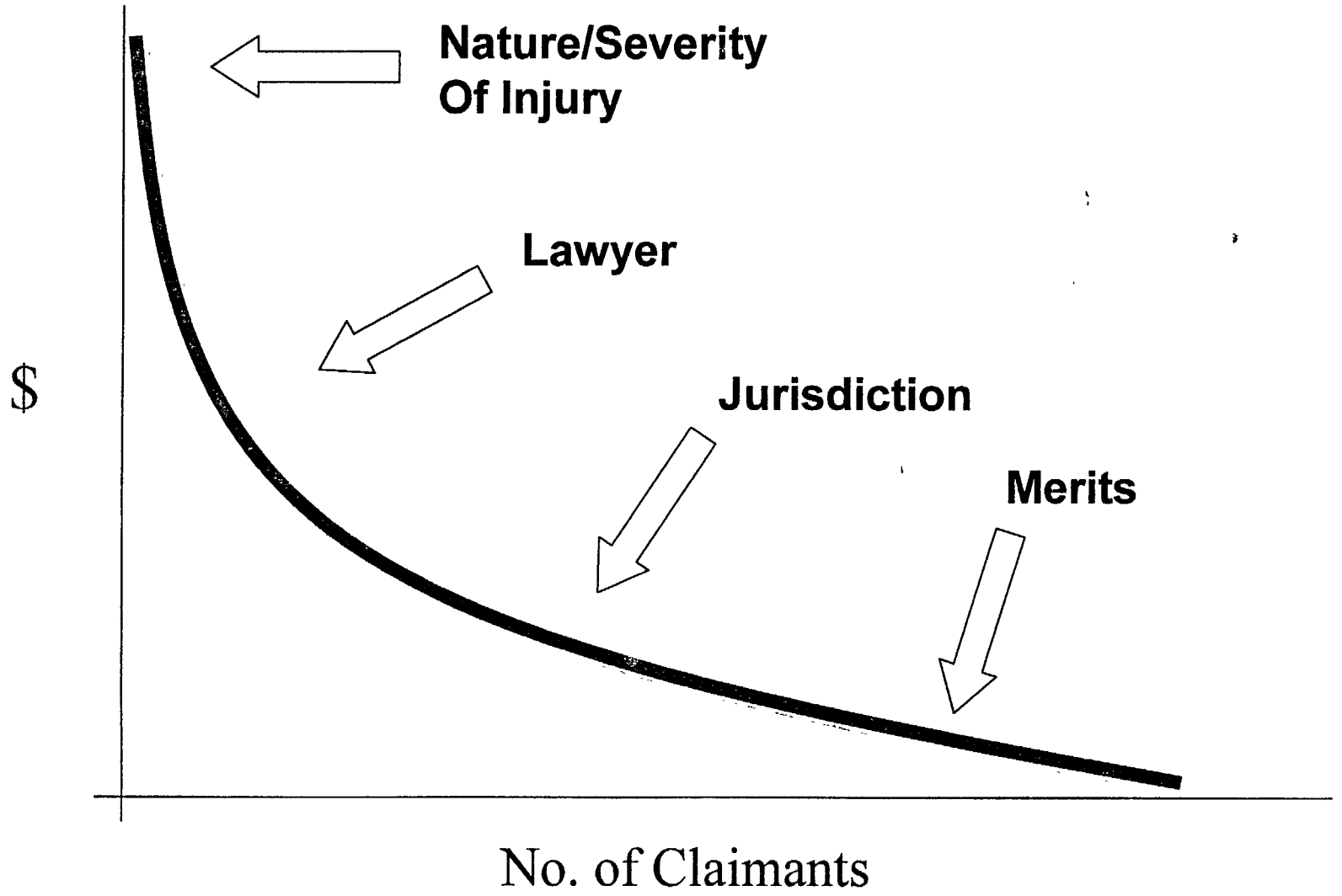
Structural Elements of the Mass Tort Problem

Problems	Factual Source	Legal Source
• Jurisdictional Dispersion - No One Court in Charge	• Fraudulent Joinder	• Jurisdictional Limits • Limited Appellate Review of remands • Permissive Venue Rules
• Inability to Define Liability	• Difficulty of Identifying Common Factual Issues • Difficulty in Defining Common Legal Standards, Rules	• Due Process/7th Amendment Restrictions on Extrapolation • Predominance Requirement of Rule 23 • Reluctance to use Rule 42
• Inability to Attain Closure	• Future Claimants • Variable Demand Curve for Settlement Values	• Opt-out Rights in Rule 23

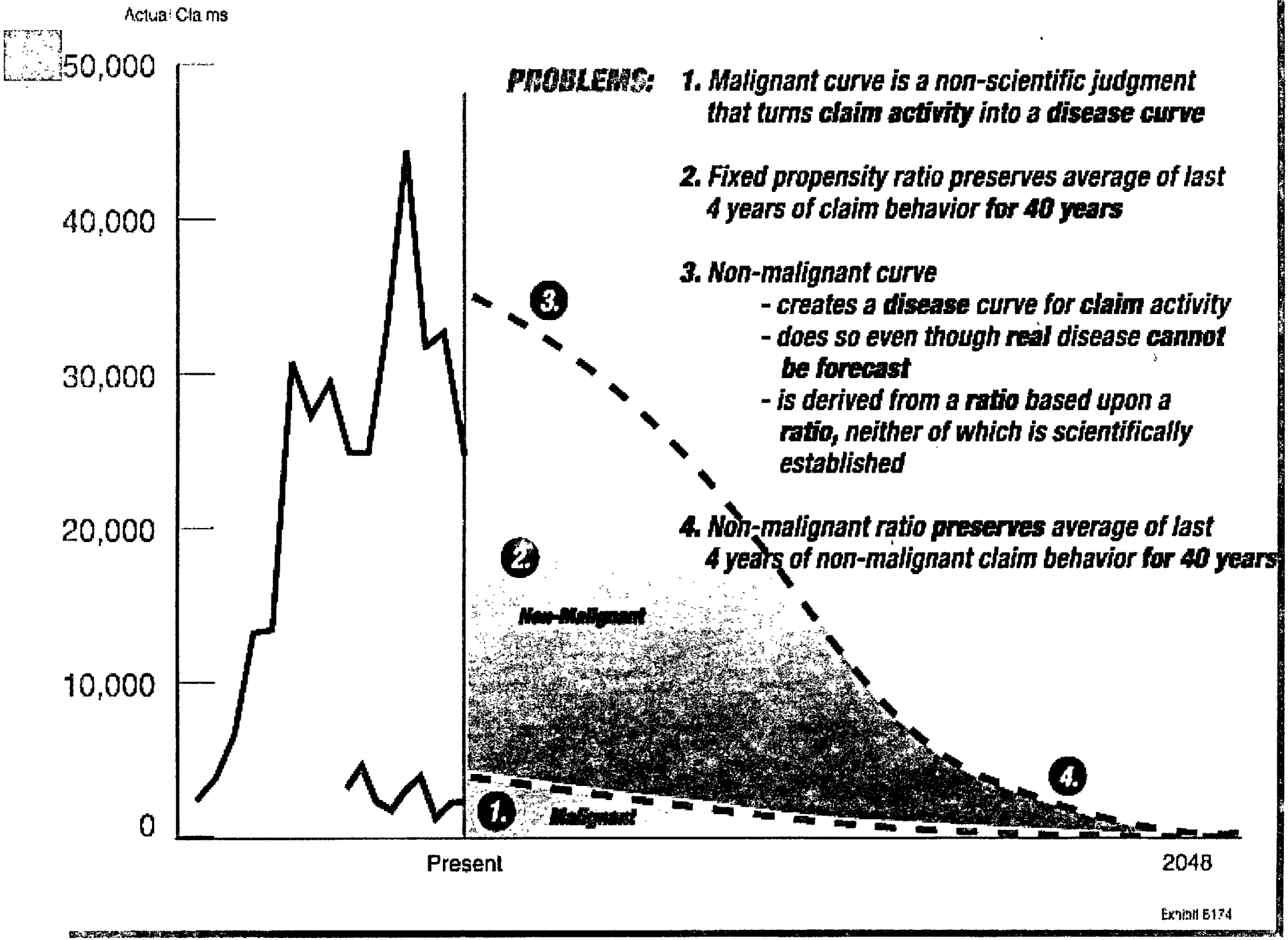
The "Grid" Problem



The Variable Demand Curve



Peterson/Florence Method



Bankruptcy as a Potential Solution to Mass Tort

There is Promise... But...

	Third Parties	Futures	The Debtor
One Court is in Control	• Who Gets A Stay? • What is Reach of "Related-To" Juris		
Tools Exist to Define Liability: - Bar Date/Claims Objections - Evidence Rules - Procedural Rules - Estimation	• Should Cases Involving Common Issues be Transferred?	• Is It Feasible to Project, Litigate Future Claims? • How Do So? • Consistent w/ Due Process?	• What is Estimation? • Can It be Used to Cap Liability? • Should R.23 Classes Be Used? • Is it Feasible to Use Claim Forms + Rule 42?
Bankruptcy is Designed to Produce Closure	• How Should 105 Be Used to Provide Closure?	• What Should be Done w/ Future Claims When They Arise?	

Form B 21 Official Form 21
(12/03)

FORM 21. STATEMENT OF SOCIAL SECURITY NUMBER

UNITED STATES BANKRUPTCY COURT
_____District of _____

In re _____, *Set forth here all names, including married, maiden, and trade names used by debtor within last 6 years.*	Case No._____ (If known)
Debtor* Address_____ _____	Chapter_____
Employer's Tax Identification (EIN) No(s). [if any]: _____ Last four digits of Social Security No(s).:_____	

STATEMENT OF SOCIAL SECURITY NUMBER(S)

1.Name of Debtor (enter Last, First, Middle):_____
(Check the appropriate box and, if applicable, provide the required information.)

/ /Debtor has a Social Security Number and it is: ___-__-____
~~*(If more than one, state all.)*~~
/ /Debtor does not have a Social Security Number.

2.Name of Joint Debtor (enter Last, First, Middle):_____
(Check the appropriate box and, if applicable, provide the required information.)

/ /Joint Debtor has a Social Security Number and it is: ___-__-____
~~*(If more than one, state all.)*~~
/ /Joint Debtor does not have a Social Security Number.

I declare under penalty of perjury that the foregoing is true and correct.

X _____
Signature of Debtor Date

X _____
Signature of Joint Debtor Date

**Joint debtors must provide information for both spouses.*
Penalty for making a false statement: Fine of up to $250,000 or up to 5 years imprisonment or both. 18 U.S.C. §§ 152 and 3571.

COMMITTEE NOTE

The form implements Rule 1007(f), which requires a debtor to submit a statement under penalty of perjury setting out the debtor's Social Security number. The form is necessary because Rule 1005 provides that the caption of the petition includes only the final four digits of the debtor's Social Security number. The statement provides the information necessary for the clerk to include the debtor's full Social Security number on the notice of the meeting of creditors, as required under Rule 2002 (a)(1). Only creditors in a case, along with the trustee and United States trustee or bankruptcy administrator, will receive the full Social Security number on their copy of the not8ce of the meeting of creditors. The copy of that notice which goes into the court file will show only the last four digits of the number.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

ANTHONY J. SCIRICA
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

SAMUEL A. ALITO, JR.
APPELLATE RULES

A. THOMAS SMALL
BANKRUPTCY RULES

DAVID F. LEVI
CIVIL RULES

EDWARD E. CARNES
CRIMINAL RULES

MILTON I. SHADUR
EVIDENCE RULES

TO: **Honorable Anthony J. Scirica, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **Honorable A. Thomas Small, Chair**
Advisory Committee on Bankruptcy Rules

DATE: **May 10, 2002**

RE: **Report of the Advisory Committee on Bankruptcy Rules**

I. Introduction

The Advisory Committee on Bankruptcy Rules met on March 21-22, 2002, in Tucson, Arizona. The Advisory Committee considered public comments regarding proposed amendments to the Bankruptcy Rules and Official Forms that were published in August 2001.

* * * * *

The Advisory Committee also approved a preliminary draft of a proposed amendment to Bankruptcy Rule 9014, and will present that amendment to the Standing Committee at its June 2002 meeting

with a request that the proposal be published for comment. This amendment is set out in Part II C of this Report.

II. Action Items

* * * * *

C. Preliminary Draft of Proposed Amendments to Bankruptcy Rule 9014

1. *Synopsis of Proposed Amendments:*

Rule 9014 is amended to limit the applicability of the mandatory disclosure provisions of Rule 26 of the Federal Rules of Civil Procedure made applicable in contested matters in bankruptcy cases by Bankruptcy Rule 7026. Contested matters typically are resolved more quickly than the time that would elapse under the normal application of the mandatory disclosure provisions of Fed. R. Civ. P. 26. Those disclosure requirements continue to apply in adversary proceedings, and the court can order that they apply in a particular contested matter.

* * * * *

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

Rule 9014. Contested Matters.**

* * * * *

(c) APPLICATION OF PART VII RULES. Except as otherwise provided in this rule, and unless ~~Unless~~ the court directs otherwise, the following rules shall apply: 7009, 7017, 7021, 7025, 7026, 7028-7037, 7041, 7042, 7052, 7054-7056, 7064, 7069, and 7071. The following subdivisions of Fed. R. Civ. P. 26, as incorporated by Rule 7026, shall not apply in a contested matter unless the court directs otherwise: 26(a)(1) (mandatory disclosure), 26(a)(2) (disclosures regarding expert testimony) and 26(a)(3) (additional pre-trial disclosure), and 26(f) (mandatory meeting before scheduling conference/discovery plan). An entity that desires to

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* New material is underlined; matter to be omitted is lined through.

** Text of rule based on amendments that take effect on December 1, 2002, unless Congress takes action otherwise.

perpetuate testimony may proceed in the same manner as provided in Rule 7027 for the taking of a deposition before an adversary proceeding. The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. The court shall give the parties notice of any order issued under this paragraph to afford them a reasonable opportunity to comply with the procedures prescribed by the order.

* * * * *

COMMITTEE NOTE

The rule is amended to provide that the mandatory disclosure requirements of Fed. R. Civ. P. 26, as incorporated by Rule 7026, do not apply in contested matters. The typically short time between the commencement and resolution of most contested matters makes the mandatory disclosure provisions of Rule 26 ineffective. Nevertheless, the court may by local rule or by order in a particular case provide that these provisions of the rule apply in a contested matter.

* * * * *

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

GLEN K. PALMAN
Chief

Bankruptcy Court
Administration Division

March 28, 2003

MEMORANDUM TO PATRICIA KETCHUM

SUBJECT: National Creditor Address Register Agenda Item

Thank you for the opportunity to comment on the agenda item prepared by Jeffrey Morris, Reporter for the Advisory Committee on Bankruptcy Rules, regarding the recommendation to modify Fed.R.Bank.Proc. 2002(g) to establish a national creditor address register. This recommendation was submitted to the committee in February 2002, by Joseph Hurley, former chair of the Bankruptcy Noticing Working Group.

While the proposal fairly represents many of the key points contained in Mr. Hurley's recommendation, I would like to provide clarification on the following:

1. The proposal applies to paper and electronic notices and is not contingent upon Electronic Bankruptcy Noticing (EBN) participation. The first sentence of the document advises that the purpose of the request is to establish a process for creditors to receive notices "electronically on a nationwide or regional basis." The document lists six courts and indicates that they do not support EBN. Actually, all but two bankruptcy districts, Tennessee-Middle and Oklahoma-Western, use the services of the BNC. Moreover, all BNC courts would receive the benefits of the national register automatically and regardless of whether notice is transmitted electronically or by paper. While it is hoped that EBN program participation will increase following the proposed change, participation is not mandatory for creditors and the bankruptcy courts to reap the benefits of a national address register. Paper notices would be batched and redirected to a single address, resulting in significant postage savings. The working group contemplates that the register could easily be made available for access by the non-participating courts and to the public.

2. The Bankruptcy Noticing Center (BNC) is a judiciary-managed program. Throughout the document, there are several references to the BNC. As written, the reader might infer that the BNC is an entity separate from the judiciary, and most benefits of the proposal would accrue to the private vendor. The draft rule change and Committee Note specifies that a creditor would submit an address to the "Bankruptcy Noticing Center. It should be emphasized that although noticing services are provided by a vendor, the BNC program is managed by the judiciary.

- All features and enhancements are provided to the contractor at the direction of

the courts.

- Cost savings resulting from the proposed rule will benefit the judiciary.

- The BNC is generally considered an extension of the bankruptcy courts; therefore, notice served by the BNC is court notification. I suggest that the terms "the judiciary" and "bankruptcy courts" be substituted, as appropriate, where the "Bankruptcy Noticing Center" is included in the draft rule language, and the first reference in the Committee Note:

(g) ADDRESSING NOTICES

(1) Notwithstanding subparts (2) - (4), a creditor may submit to *any bankruptcy court* an address to receive any notice required to be mailed under Rule 2002. Not later than 30 [10] days after the creditor submits an address, the *bankruptcy courts* shall use the address supplied by the creditor for all notices...

3. Risk and improper notification. The reporter suggests that if a creditor is "injured by the failure of BNC to provide proper notice, that creditor should have a cause of action against BNC for that failure." The standard for performance specified in the contract requires 100% accuracy. Notwithstanding this provision, errors by the contractor occur on occasion. The contract contains a section that provides specific liquidated damages for errors resulting from an error made by the contractor that result in late or improper notice delivery. While the liquidated damage provision does not compensate a creditor for damage that might result from the contractor's error, consistent with the discussion in the preceding section, the BNC program is considered an extension of the court. Therefore, it is generally considered that the program is afforded the same immunity provided to court personnel resulting for errors that might result during the course of performing official duties.

Please let me know if you have any questions.

Glen K. Palman

cc: Peter McCabe
John Rabiej

Jim:

As a follow-up to our discussion, here are some additional details to support the recommendation to modify Fed.R.Bank.P. 2002(g) to facilitate the creation of a bankruptcy notice national address register.

(A) **Audit trail.** You had indicated that the committee members were concerned about the ability of a creditor to essentially change the address from what was submitted by the debtor with his petition. Actually, similar to the model currently in place through the Electronic Bankrupty Noticing program, the address is not modified. Here's how the process currently works through EBN:

1) Debtor files petition; creditor address list is entered into court case management system.

2) Notice is electronically received by the BNC from the case management system.

3) The BNC electronically compares the address list submitted to the national address register (maintained separately from the court's case management system). When it finds a "match", the notice is forwarded to the recipient's registered address in paper or electronic format.

4) The BNC provides to the court a certificate of service. The service list clearly indicates the address submitted by the court (filed by the debtor) and the creditor's preferred address to which the notice was forwarded.

(B) **Protections.** You mentioned that a concern was raised about the system's ability to prevent certain errors from occurring connected with the address registration process. Specifically, there was a question about what would happen if a creditor filed a name/address combination that matches one previously submitted by another entity. The name and address matching software currently used has a built-in mechanism to prevent the occurence of this type of error. A filter process prevents a duplicate combination from being added to the system. Noticing center staff receive a report and contact the entities affected to research the problem.

Please do not hesitate to contact me should you or any of the committee members have any other questions.

Gary McCaffrey
EBN Project Manager
Administrative Office of the U.S. Courts
Bankruptcy Court Administration Division
202/502-1541

BANKRUPTCY RULES COMMITTEE MEETING
ELECTRONIC BANKRUPTCY NOTICING

Notes to Support the Proposal of the AO's Bankruptcy Noticing Working Group to modify Fed. R. Bank. Proc. 9036

Recommended Modification to Bankruptcy Rule 9036

Fed.R. Bank. Proc. 9036 includes a receipt requirement that requires a higher standard than is required by Federal Rule of Civil Procedure 5(c) and is adversely affecting the efficiency of the Bankruptcy Noticing Program. Consequently, the Bankruptcy Noticing Working Group has recommended removing the receipt requirement from the rule. (*Reference: February 1, 2002, letter from Joseph Hurley, Chair of the Bankruptcy Noticing Working Group, to the Secretary of the Committee on Rules of Practice and Procedure*).

The receipt requirement prevents potential subscribers of Electronic Bankruptcy Noticing (EBN) from taking advantage of faster noticing and has not permitted the judiciary to maximize potential cost avoidances to the noticing program because notices transmitted electronically avoid postage costs. The current receipt requirement hinders efforts to develop and expand electronic noticing because most Internet Service Providers (ISPs) do not have the capability for the sender to receive a credible electronic confirmation that the transmission has been received as required by Bankruptcy Rule 9036.

Currently, each Internet e-mail transmitted contains an assigned serial number(s) and the subscriber's ID number. The serial number increases each time a message is sent so that subscribers can determine that all e-mails have been received.

Results of Judiciary's Internet Service Provider (ISP) Study

In December 2001, the judiciary tasked its noticing center contractor with conducting a study of delivery of e-mail to national Internet Service Providers (ISPs) to determine the reliability of sending bankruptcy notices via e-mail in the absence of an electronic acknowledgment.

- *Text e-mail is reliable.* The phase of the study that focused on sending Internet e-mail messages with a link to an electronic version of the notice proved that transmission of simple text-based Internet e-mail, without file attachments, is 99.6% likely to reach its intended recipient. A similar service that complies with Bankruptcy Rule 9036 will be offered in 2003.

- *E-mail sent with large file attachments is unreliable.* The portion of the study that examined the reliability of sending Internet e-mails with large electronic notice file attachments proved that this service would not be viable if the receipt requirement were eliminated. This service is currently provided through the EBN program with a rigorous delivery acknowledgment requirement. From the sample, it was determined that delivery of these messages could only be accounted for 95% of the time to ISP accounts that

cannot provide the appropriate receipt. Free Internet e-mail services proved less reliable than the premium subscription services. Should Bankruptcy Rule 9036 be modified, this service would most likely be discontinued; the more reliable text e-mail service described above would be the sole Internet e-mail service offered through the EBN program.

General EBN Program Information

- Electronic Bankruptcy Noticing (EBN) functions like a sophisticated e-mail system, eliminating the production and mailing of paper notices by the judiciary's Bankruptcy Noticing Center (BNC).
- Many organizations choose to route electronic notices to a single electronic mailbox, eliminating the need to route paper notices to the proper people in an organization.
- EBN speeds public service while providing significant cost savings; postage costs are eliminated.
- Fiscal year 1999 was the first full year of national EBN operations through the introduction of Electronic Data Interchange (EDI) formatted notices aimed at large volume notice recipients.
  - EDI provides recipients automated data processing capability via computer to computer data transfers.
- In fiscal year 2000, the second phase of the EBN was introduced which expanded the practicality of EBN to virtually the entire bankruptcy community through Internet e-mail and fax options.
- As of February 2003, EBN usage comprises about 6% of the overall monthly notice volume; over 500,000 notices were transmitted electronically.
- The BNC compares names and addresses listed on the noticing agreements with the names and addresses debtors list on their petitions or an attorney's name and address in the court's database.
  - If the BNC software finds a match of name and address with a subscriber, the notice is sent electronically
  - If recipient names and addresses in the court's notice instructions do not match those on the noticing agreement, the notice is sent by regular U.S. mail.
- *Fed. R. Bank. Proc. 9036* authorizes electronic noticing for notices sent by the court.
  - request must be made in writing by an entity to the court
  - requires that the subscriber's electronic mailbox have the capability to return an appropriate *electronic confirmation* of receipt.

- This requirement was adopted with the rule in 1993 prior to the widespread use of Internet e-mail.

- In fiscal year 2003, an additional Internet e-mail notification service will be developed that provides an Internet e-mail text-based message containing a hyperlink to the PDF version of the notice. A similar service is currently provided through Case Management/Electronic Case Files.
  - Pending consideration of the noticing working group's recommendation to modify Bankruptcy Rule 9036, the AO is working with the noticing working group and the BNC contractor to provide electronic noticing services through an Internet Service Provider created to comply with the electronic acknowledgment requirement of Bankruptcy Rule 9036.

- The service will continue to provide with each Internet e-mail transmission an assigned serial number(s) and the subscriber's ID number. The serial number increases each time a message is sent so subscribers can determine that all e-mails have been received.