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# CHAPTER 11 AS A MASS TORT SOLUTION

*Barbara J. Houser\**

## I. INTRODUCTION

Most bankruptcies involving mass tort claims are rooted in a defective product which was manufactured and distributed to a large number of people. The injury allegedly caused by the defective product might not manifest itself until years after the initial exposure to the product. Manifestation of the injury, and therefore the identity of particular claimants, may not be known until many years following the initial exposure to a product and/or a potential chapter 11 filing. Companies which become debtors in “mass tort” bankruptcy cases are usually faced with defending a staggering number of lawsuits based on injuries allegedly caused by the use of their product. The cost of managing the litigation crisis and of defending against thousands of claims ultimately precipitates the chapter 11 filing.

Chapter 11 has been, and will continue to be, an important tool to assist companies in bringing closure to what appears to be an insurmountable problem: how can thousands, if not hundreds of thousands, of claims asserted in disparate courts around the country and potentially in foreign jurisdictions, be resolved in a cost efficient and fair manner? Under certain circumstances, chapter 11 may provide the only effective way of dealing with mass tort claims.

The immediate result of a chapter 11 filing is to automatically “stay” or stop the continued prosecution of pending litigation—or the filing of new litigation—against the chapter 11 debtor. In addition, assuming due process considerations can be adequately addressed, a chapter 11 filing ultimately provides the debtor with a “discharge” of such current and future mass tort claims through confirmation of a chapter 11 plan of reorganization that effectively deals with those claims. Because most senior management teams prefer not to seek

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protection under chapter 11 and subject themselves to the burdens of operating a large, diversified business as a chapter 11 debtor-in-possession, chapter 11 is frequently considered too late in the process to be most effective. While it is appropriate for chapter 11 to be a remedy of "last resort," implementation of a chapter 11 alternative should not be delayed for such an extended period of time that its effectiveness is adversely impacted.

This Essay will briefly discuss how and why chapter 11 can be an effective way to address and resolve mass tort claims. Specifically, the Essay discusses such chapter 11 functions as the automatic stay, transferring claims, future claims, and claim estimation. In the spirit of full disclosure, this Essay will also briefly discuss problems that must be successfully overcome to make chapter 11 an effective mass tort solution.

## II. AUTOMATIC STAY—11 U.S.C. § 362

### A. *As to the Debtor*

The most significant and immediate benefit realized by a company filing for relief under the Bankruptcy Code is the automatic stay of all litigation pending or threatened against the filing company. Specifically, section 362(a) provides that the filing of a bankruptcy petition operates as a stay of:

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

For a company whose very existence is threatened by the overwhelming burden of defending against ongoing litigation arising from its allegedly defective product, the automatic stay of all litigation is an enormous benefit. Unless the bankruptcy court grants relief from this automatic stay, the stay remains in effect during the pendency of the chapter 11 case.<sup>2</sup> The automatic stay terminates upon confirmation of a plan of reorganization. However, confirmation of such a plan of reorganization results in a "discharge" of all claims against

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1. 11 U.S.C. § 362(a)(1) (1994).

2. *See id.* § 362(c).

the debtor except as provided in the plan.<sup>3</sup>

The Bankruptcy Code specifies certain procedures that parties can utilize to obtain relief from the automatic stay.<sup>4</sup> A claimant must show cause for relief which outweighs the policy considerations underlying chapter 11 bankruptcy filings.<sup>5</sup> Relief from the automatic stay has not been granted regularly in mass tort cases because allowing the continued prosecution of such claims precludes debtors from receiving the benefits that Congress intended debtors to receive when filing for relief under the Bankruptcy Code. Such benefits include the automatic stay and a "breathing spell" from continuing litigation.<sup>6</sup>

### B. As to Third Parties

A question frequently arises during mass tort bankruptcy cases whether the automatic stay can be extended to non-debtor third parties. The results of debtors' efforts to extend the automatic stay to third parties have been mixed.<sup>7</sup> When necessary to protect a chapter 11 debtor or the reorganization process, courts have not hesitated to enjoin litigation that continues against non-debtors, whether by finding that it violates section 362(a) of the Bankruptcy Code or by enjoining it pursuant to their power under section 105 of the Bankruptcy Code.<sup>8</sup> The case for injunctive relief is even more compelling in situations involving mass torts and thousands of litigation cases.

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3. See *id.* § 1141(d); discussion *infra* Part VII.

4. See 11 U.S.C. §362(d).

5. See *id.* § 362(d)(1).

6. See S. REP. NO. 95-989, at 92 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5787.

7. See generally *A.H. Robins Co. v. Piccinin* (*In re A.H. Robins Co.*), 788 F.2d 994, 999 (4th Cir. 1986) (holding that relief may be available to non-bankrupt defendants only in unusual circumstances).

8. See, e.g., *American Film Tech., Inc. v. Taritero* (*In re American Film Tech., Inc.*), 175 B.R. 847, 855 (Bankr. D. Del. 1994) (holding that an injunction will be granted for suits against present and former directors); *Eastern Airlines, Inc. v. Rolleston* (*In re Ionosphere Clubs, Inc.*), 111 B.R. 423, 433-36 (Bankr. S.D.N.Y. 1990), *aff'd in part*, 124 B.R. 35 (Bankr. S.D.N.Y. 1991) (allowing injunctions against the collection of debts which could have been brought against partnerships); *Lahman Mfg. Co. v. First Nat'l Bank of Aberdeen* (*In re Lahman Mfg. Co.*), 33 B.R. 681, 683 (Bankr. D. S.D. 1983) (granting debtor a preliminary injunction against bank's further proceeding against principal shareholders and officers); *Old Orchard Invest. Co. v. A.D.I. Distrib., Inc.* (*In re Old Orchard Invest., Inc.*), 31 B.R. 599, 603 (W.D. Mich. 1983) (general partners may enjoin actions to collect debts which could have been brought against partnership); *Otero Mills, Inc. v. Security Bank and Trust* (*In re Otero Mills, Inc.*), 21 B.R. 777, 779-80 (Bankr. D. N.M. 1982), *aff'd*, 25 B.R. 1018 (D. N.M. 1982) (debtor granted injunction to prevent creditor from bringing action against debtor's president).

In *A.H. Robins Co. v. Piccinin (In re A.H. Robins)*,<sup>9</sup> the Fourth Circuit approved the use of section 105 to extend the automatic stay under section 362 to protect non-debtor parties.<sup>10</sup> In *Robins*, the debtor was a defendant in more than five thousand lawsuits growing out of its sale of the Dalkon Shield intrauterine device when it filed its chapter 11 case.<sup>11</sup> In many of those suits, other parties were named as additional defendants, including Robins's product liability insurer, various physicians, and members of the Robins family who were directors and shareholders.<sup>12</sup> At the debtor's request shortly after the chapter 11 filing, the district court enjoined continued prosecution of the litigation against Robins's co-defendants.<sup>13</sup> The court found that the suits against the co-defendants would interfere with Robins's ability to reorganize and, if the plaintiffs were successful, the suits could either collaterally estop Robins from denying liability in subsequent lawsuits or subject the co-defendants to inconsistent judgments.<sup>14</sup> The district court further found that any hardship to the plaintiffs was outweighed by the irreparable harm to the debtor and its creditors as well as the public interest in promoting the viability of Robins's reorganization.<sup>15</sup>

The Fourth Circuit affirmed, holding that injunctive relief for the non-debtors could be grounded on either section 362 or section 105 of the Bankruptcy Code.<sup>16</sup> Even though section 362(a)(1) generally applies only to a debtor, the Fourth Circuit determined that it may be appropriate to extend the section 362(a)(1) stay to protect non-debtor parties when "unusual circumstances" are present, such as "when there is such identity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant and that a judgment against the third-party defendant will in effect be a judgment or finding against the debtor."<sup>17</sup> The court also examined whether section 362(a)(3), which forbids actions "to obtain possession of property of the estate . . . or to exercise control over property of the estate,"<sup>18</sup> would stay actions against non-debtors and concluded

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9. 788 F.2d 994 (4th Cir. 1986).

10. *See id.* at 1003.

11. *See id.* at 996.

12. *See id.*

13. *See id.* at 1008.

14. *See id.*

15. *See id.*

16. *See id.* at 1003.

17. *Id.* at 999.

18. 11 U.S.C. § 362 (a)(3) (1994).

that section 362(a)(3) could provide an independent basis for enjoining actions against non-debtors.<sup>19</sup> Finally, the court concluded that the bankruptcy court may exercise its injunctive power under section 105 when the failure to enjoin would affect the bankruptcy estate or adversely influence and pressure the debtor to the action of the non-debtor.<sup>20</sup> Injunctive relief under section 105 would be appropriate to stay a variety of proceedings that would undermine the debtor's ability to formulate a chapter 11 plan, including discovery against the debtor or its employees.<sup>21</sup> Indeed, other courts have come to the same conclusions.<sup>22</sup>

Bankruptcy courts clearly have the authority to enjoin litigation against non-debtors pursuant to sections 105 or 362 of the Bankruptcy Code. This ability to stop litigation against the debtor and, under appropriate circumstances, third parties is a powerful tool to gain control over mass tort litigation.

### III. TRANSFER OF CLAIMS—28 U.S.C. § 157(B)(5)

#### A. *As to the Debtor*

Section 1334(b) of Title 28 sets forth Congress' jurisdictional grant to the district courts for bankruptcy cases and related proceedings:

Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11,

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19. See *In re A.H. Robins*, 788 F.2d at 1001-02.

20. See *id.* at 1003.

21. See *id.* (quoting *Johns-Manville Corp. v. Asbestos Litig. Group (In re Johns-Manville)*, 40 B.R. 219, 226 (S.D.N.Y. 1984)); see also *In re A.H. Robins Co.*, 828 F.2d 1023, 1025 (4th Cir. 1987) (reaffirming use of section 105 to enjoin actions against non-debtor).

22. See, e.g., *Celotex Corp. v. Edwards*, 514 U.S. 300, 305, 310 (1995) (holding a collateral attack on a § 105 injunction impermissible, the Court quotes the bankruptcy court opinion granting injunction with approval); *American Imaging Servs., Inc. v. Eagle-Picher Indus., Inc. (In re Eagle-Picher Indus., Inc.)*, 963 F.2d 855, 860-62 (6th Cir. 1992) (relying on principles developed in *Robins* and *Johns-Manville*, the court upholds injunctions for non-debtor parties); *Johns-Manville Corp. v. Asbestos Litig. Group (In re Johns-Manville Corp.)*, 26 B.R. 420, 424 (Bankr. S.D.N.Y. 1983) (granting injunctive relief to protect various officers, directors, employees, insurers and other agents of Manville and to halt discovery and actions involving the same issues and subject matter as the issues facing Manville directly), *aff'd*, 40 B.R. 219 (S.D.N.Y. 1984).

or arising in or related to cases under title 11.<sup>23</sup>

Although the term "related to" is not defined in the statute, the Supreme Court recently confirmed in *Celotex Corp. v. Edwards*<sup>24</sup> that "[Congress's] choice of words suggests a grant of some breadth."<sup>25</sup> In *Celotex*, the Supreme Court adopted the expansive definition of "related to" jurisdiction uniformly embraced by the circuit courts in numerous prior decisions:

[t]he usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether *the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy* . . . . Thus, the proceeding need not necessarily be against the debtor or against the debtor's property. An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate.<sup>26</sup>

Mass tort litigation cases pending against the debtor are obviously "related to" the bankruptcy case within the meaning of 28 U.S.C. § 1334(b). Thus, such cases are within the jurisdiction of the district courts and, by order of reference, the bankruptcy courts. In the context of mass tort litigation, the various claims pending against the debtor are typically scattered in state and federal courts throughout the United States. Another significant benefit of a chapter 11 filing is that the debtor may seek to centralize all such litigation in the district court where the bankruptcy case is pending. Section 157(b)(5) of Title 28 provides:

The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.<sup>27</sup>

As noted in *Robins*, the purpose of this provision is "to centralize the

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23. 28 U.S.C. § 1334(b).

24. 514 U.S. 300 (1995).

25. *Id.* at 307-08.

26. *Id.* at 308 n.6 (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)); see *In re G.S.F., Corp.*, 938 F.2d 1467, 1475 (1st Cir. 1991); *In re Wood*, 825 F.2d 90, 93 (5th Cir. 1987); *A.H. Robins Co. v. Piccinin (In re A.H. Robins)*, 788 F.2d 994, 1002 n.11 (4th Cir. 1986).

27. 28 U.S.C. § 157(b)(5).

administration of the estate and to eliminate the 'multiplicity of forums [sic] for the adjudication of parts of a bankruptcy case.'<sup>28</sup> The case law interpreting section 157(b)(5) has looked to the following factors to determine if the transfer of personal injury tort cases to a single forum will promote the reorganization goals of the debtor and provide a fair and non-preferential forum for the resolution of those pending tort claims:

- Large number of separate tort cases are pending against the debtor or are expected to be brought against the debtor;
- Multiplicity of jurisdictions (state, federal and/or international) where tort cases are pending;
- Significant monetary expense would be incurred by the debtor in defense of tort claims in disparate courts;
- Substantial time and energies of the debtor and its officers and executives are required for defense of tort litigation;
- Unsettled issues regarding liability or damages exist that will necessitate adjudication or estimation prior to confirmation of the debtor's plan;
- Inconsistent pre-bankruptcy judgments have been rendered against the debtor regarding tort liabilities;
- Consolidation of litigation will promote the timely development of the debtor's plan of reorganization; and
- Consolidation of litigation will permit the development of consensual dispute resolution procedures at lower cost than full adjudication.<sup>29</sup>

In most mass tort bankruptcy cases, these factors are present. Thus, 28 U.S.C. § 157(b)(5) provides the debtor with a powerful tool to consolidate and transfer all pending litigation against it to a centralized forum. Even more significantly, section 157(b)(5) clearly provides that cases transferred pursuant to its terms will ultimately be liquidated in federal district court—either where the bankruptcy case is pending or where the claim arose, as determined by the district court where the bankruptcy case is pending—if they cannot be

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28. *In re A.H. Robins*, 788 F.2d at 1011.

29. *See id.*; *Coker v. Pan American World Airways, Inc. (In re Pan Am Corp.)*, 950 F.2d 839 (2d Cir. 1994); *Murray v. Pan American World Airways, Inc. (In re Pan Am Corp.)*, 16 F.3d 513 (2d Cir. 1984).



settled in a consensual plan confirmed by the bankruptcy court.<sup>30</sup> In addition, transferred cases will not be returned for adjudication in their state court of origin absent abstention by the district court presiding over the bankruptcy case.<sup>31</sup>

### B. As to Third Parties

The extent to which the debtor, or third parties, can seek to transfer claims against such non-debtor third parties to the district court presiding over the bankruptcy case pursuant to 28 U.S.C. § 157(b)(5) turns in the first instance on the scope of "related to" jurisdiction under 28 U.S.C. § 1334(b) as discussed above. When faced with such a request, the courts are required to analyze what effect the continuing litigation of claims against the non-debtor co-defendants could conceivably have on the debtor's bankruptcy estate.<sup>32</sup> The most common grounds for such non-debtor co-defendants to argue that "related to" jurisdiction exists include: (i) the assertion of contingent and unliquidated claims for contribution and indemnification; (ii) the existence of jointly owned insurance policies; (iii) the possibility of collateral estoppel being successfully asserted against the debtor with a corresponding increased exposure of the debtor to liability; and (iv) the burden that may be imposed upon the debtor if the debtor is forced to "voluntarily" participate in the ongoing litigation against the co-defendant due to the interrelationship between the debtor and such co-defendant.<sup>33</sup>

In *In re Dow Corning Corporation*,<sup>34</sup> the debtor sought to transfer claims pending against it and its two shareholders, The Dow Chemical Company and Corning Incorporated, to the Eastern District of Michigan.<sup>35</sup> The district court granted transfer under 28

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30. See 28 U.S.C. § 157(b)(5).

31. See, e.g., *In re Dow Corning Corp.*, 86 F.3d 482, 497-98 (6th Cir. 1996) (holding that transfer a motion requires an abstention analysis; remanded to district court for same), *cert. denied*, 117 S. Ct. 718 (1997), *on remand*, 1996 WL 511646 (E.D. Mich. 1996) (district court abstaining on a wholesale basis), *rev'd*, 113 F.3d 565 (6th Cir. 1997) (granting the mandamus petition; finding that discretionary abstention was improper and that the district court was required to analyze mandatory abstention issues on a case by case basis), *petition for cert. filed*, 66 U.S.L.W. 3129 (Aug. 4, 1997).

32. See *In re Dow Corning*, 86 F.3d at 490.

33. See *id.*

34. 187 B.R. 919 (E.D. Mich. 1995), *rev'd*, 86 F.3d 482 (6th Cir.), *cert. denied*, 117 S. Ct. 718 (1997).

35. See *id.* at 921.

U.S.C. § 157(b)(5) as to all claims pending against Dow Corning.<sup>36</sup> However, the district court declined to transfer claims against Dow Corning's shareholders, concluding that it lacked "related to" jurisdiction over such claims.<sup>37</sup> On appeal, the Sixth Circuit reversed and found that "related to" jurisdiction did in fact exist.<sup>38</sup> The court was persuaded that the existence of claims for contribution and indemnity by Dow Chemical and Corning against Dow Corning:

suffices to establish a conceivable impact on the estate in bankruptcy. Claims for indemnification and contribution, whether asserted against or by Dow Corning, obviously would affect the size of the estate and the length of time the bankruptcy proceedings will be pending, as well as Dow Corning's ability to resolve its liabilities and proceed with reorganization.<sup>39</sup>

Moreover, because Dow Corning, Dow Chemical, and Corning were joint insureds under a number of insurance policies, the Sixth Circuit concluded that the continuation of disparate litigation against Dow Chemical and Corning could have an adverse impact upon the single largest asset in Dow Corning's estate, its jointly owned insurance.<sup>40</sup> This potential adverse impact supported a finding of "related to" jurisdiction under 28 U.S.C. § 1334(b).<sup>41</sup> In addressing the issue of the appropriateness of transferring thousands of claims under 28 U.S.C. § 157(b)(5), the Sixth Circuit noted:

[O]ur primary goal is to establish a mechanism for resolving the claims at issue in the most fair and equitable manner possible. In seeking to achieve that goal, we are called upon to balance four different, and frequently competing, interests: those of the individuals who have brought and will bring breast implant claims; Dow Corning's interests with regard to its attempt to formulate a successful reorganization plan; Dow Chemical and Corning Incorporated's interests as shareholders of Dow Corning; and the judicial system's interest in allocating its limited resources effectively and efficiently.<sup>42</sup>

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36. *See id.* at 932.

37. *See id.*

38. *See In re Dow Corning*, 86 F.3d at 494.

39. *Id.*

40. *See id.* at 494-95.

41. *See id.* at 495.

42. *Id.* at 487.

In addition to Dow Corning's efforts to transfer breast implant claims pending against it and its shareholders, three unrelated co-defendants sought the transfer of breast implant claims pending against them to the Eastern District of Michigan in accordance with section 157(b)(5).<sup>43</sup> The district court concluded that it lacked "related to" jurisdiction to order the transfer of claims pending against these co-defendants.<sup>44</sup> While the Sixth Circuit initially reversed, finding that the existence of contribution and/or indemnity claims from these co-defendants did provide a basis for "related to" jurisdiction,<sup>45</sup> they ultimately agreed with the district court's decision to abstain from the claims asserted against the unrelated co-defendants.<sup>46</sup>

The ability of a debtor and third parties to successfully use 28 U.S.C. § 157(b)(5) to transfer claims pending against them to the district court with jurisdiction over the bankruptcy case can be an extremely effective tool to gain control over mass tort litigation and thereafter propose a centralized resolution of all such claims.

#### IV. FUTURE CLAIMS

A major issue in virtually all mass tort cases is how to deal with "future" claims. These claims are generally held and asserted by persons who have used or been exposed to the debtor's product—for example, breast implants or asbestos—before the bankruptcy filing but who do not manifest injuries from those products until after confirmation of a plan of reorganization in the bankruptcy case.<sup>47</sup> Such claims may also be asserted by persons who have neither had contact with, nor manifested injury from, the debtors' pre-petition product, for example, an allegedly defective aircraft until after plan confirmation.<sup>48</sup>

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43. *See id.* at 486-87.

44. *See id.* at 487.

45. *See id.* at 490-94.

46. *See Lindsey v. Dow Chemical Co. (In re Dow Corning Corp.)*, 113 F.3d 565, 568 (6th Cir. 1997).

47. *See Johns-Manville Corp. v. Asbestos Litig. Group (In re Johns-Manville Corp.)*, 26 B.R. 420, 422 (Bankr. S.D.N.Y. 1983) (noting that 32,000 lawsuits were projected to be brought against manufacturer and supplier of asbestos products for twenty-seven years after the filing of the original suit); *In re Amatex Corp.*, 755 F.2d 1034, 1041 (3d Cir. 1985) (holding that individuals exposed to asbestos who have not shown signs of injury do have stake in outcome of proceedings); *see also In re Silicone Gel Breast Implant Prods. Liab. Litig.*, 1994 WL 578353 at \*26 (N.D. Ala. Sept. 1, 1994) (releasing settling defendants and released parties from any "future" claims by class members).

48. *See In re Piper Aircraft Corp.*, 162 B.R. 619, 629 (Bankr. S.D. Fla. 1994),

Dealing with these claims in the bankruptcy case, while striving to satisfy the dual bankruptcy goals of providing a fresh start for the debtor and ensuring equal treatment of all creditors, raises difficult issues for which the Bankruptcy Code provides little or no specific statutory guidance. How should "future claims" be defined? How can unknown future claimants be afforded sufficient legal representation and due process? Should a court estimate future claims for purposes of plan feasibility and distribution? Can future claims against the debtor be discharged upon plan confirmation? Can the bankruptcy court issue an injunction, in connection with plan confirmation, that channels future claims to a plan-created trust or other facility for liquidation and payment, and prohibits the assertion of those claims against the reorganized debtor and perhaps other parties? Each of these questions raises complex issues, the answers to which will affect the success of the chapter 11 solution to the mass tort problem.<sup>49</sup>

Achieving a workable definition of "future claim" has produced much litigation and dissension among the courts. A "future claimant" is generally referred to as an individual who, as of the petition date, has no manifest injury resulting from a debtor's tortious pre-petition conduct.<sup>50</sup> A classic example is a person who is exposed to asbestos that was manufactured by the debtor pre-petition who as of plan confirmation has not manifested an asbestos-related disease. "If such a 'future claimant' holds a 'claim' under section 101(5) [of the Bankruptcy Code], that claim will be discharged under section 1141(d)(1)."<sup>51</sup> If not, the impact of those claims upon the reorganized debtor or its successor after plan confirmation can be devastating.

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*aff'd*, 58 F.3d 1573 (11th Cir. 1995).

49. The National Bankruptcy Review Commission has recommended certain amendments to the Bankruptcy Code to provide more certainty in how courts can deal with these issues in a mass tort bankruptcy case. See Barbara J. Houser et al., *Mass Torts and Other Future Claims*, SB37 ALI-ABA 89, 105-07 (1997). Whether Congress acts upon the recommendation of the Bankruptcy Commission and amends the relevant statutes remains to be seen. While the author believes that the recommendations of the Bankruptcy Commission on "future claims" should be adopted by Congress, this article will not discuss such recommendations.

50. See Margaret I. Lyle, Note, *Mass Tort Claims and the Corporate Tortfeasor: Bankruptcy Reorganization and Legislative Compensation Versus the Common-Law Tort System*, 61 TEX. L. REV. 1297, 1329 (1983); see also *In re UNR Indus.*, 29 B.R. 741, 745 (D.C. 1983) (distinguishing individuals who may eventually claim money from the debtors for injuries resulting from asbestos exposure).

51. Houser et al., *supra* note 49, at 98.

Thus, deciding on an appropriate definition of "future claim" is significant, especially in mass tort or other product liability cases where the importance of such claims can be magnified by the nature of the debtor's product and the relative latency of diseases or injuries associated with the product.<sup>52</sup>

In determining whether future claimants hold a "claim" under section 101(5), the courts must balance the policy of the debtor's "fresh start" against the fundamental fairness and due process rights of future claimants.<sup>53</sup> The broadest possible definition of "claim" provides the most protection to the debtor and ensures that its effective reorganization will not be compromised by post-confirmation lawsuits arising out of the debtor's pre-petition conduct. At the same time, this extremely expansive definition of "claim" could deprive redress to a person who has no knowledge whatsoever of his or her injuries—or even the potential for injury. Unknown to the debtor, this individual may have no meaningful opportunity to participate in the debtor's bankruptcy case.

The scope of the definition of "future claim" can also impact distributions to other creditors under the debtor's plan as well as the debtor's post-confirmation value and financial health.<sup>54</sup> If the debtor's plan of reorganization provides for distributions to individuals with future claims for inchoate injuries, the dividend paid to creditors with manifest injuries will be diluted. Conversely, if no provision is made for such future claimants, they will not receive any recovery under the debtor's plan. Although their claims may not be discharged, their ability to recover against the reorganized debtor will depend on the debtor's post-confirmation financial health. This could result in unequal treatment among creditors because future claimants eventually could receive much less, or significantly more,

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52. See *In re Johns-Manville Corp.*, 36 B.R. 743, 753-57 (Bankr. S.D.N.Y. 1984).

53. Attorneys for present claimants try to encourage a quick settlement for their clients in order to recover for their injuries. But this could work to the detriment of unknown future claimants who may not obtain adequate representation for their unmanifested injuries. See 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, 361-82 (1996) (discussing the justification of balancing fairness, policy, and due process); Anne Hardiman, *Toxic Torts and Chapter 11 Reorganization: The Problem of Future Claims*, 38 VAND. L. REV. 1369, 1392-95 (1985); Frank J. Macchiarola, *The Manville Personal Injury Settlement Trust: Lessons for the Future*, 17 CARDOZO L. REV. 583, 623 (1996).

54. See *In re Amatec Corp.*, 755 F.2d 1034, 1041-43 (3d Cir. 1985).

than other claimants provided for, and bound by, the debtor's confirmed plan. Further, the exclusion of future claimants from the bankruptcy process can significantly affect the reorganized debtor's value and impair its post-confirmation operations, for example by undermining its ability to obtain financing.

All courts seem to agree that each person whose injuries manifest themselves before a bankruptcy case commences holds a "claim."<sup>55</sup> The courts also agree that persons injured by post-confirmation activities of a reorganized debtor do not hold a "claim."<sup>56</sup> The problem arises when a debtor's pre-petition conduct results in an injury that accrues or manifests itself post-petition.<sup>57</sup> In grappling with these issues, the courts have developed three broad tests to determine whether a "future claimant" has a pre-petition "claim" within the meaning of section 101(5) of the Bankruptcy Code: (i) the "accrued state law claim test"; (ii) the "conduct test"; and (iii) the "pre-petition relationship test."<sup>58</sup>

Under the "accrued state law claim test," no claim accrues for bankruptcy purposes until a claim has accrued under state law.<sup>59</sup> Generally, under state law, a cause of action does not accrue until an injury manifests itself.<sup>60</sup> Thus, under the accrued state law claim test, future claimants do not hold a "claim" until an injury manifests itself, even if the injury resulted from the debtor's pre-petition conduct and the claimant's exposure to the debtor's injury causing conduct occurred pre-petition. Many criticize the "accrued state law claim test" because (i) it seems inconsistent with congressional intent that the definition of a "claim" be extremely broad,<sup>61</sup> (ii) its narrow definition of "claim" conflicts with the bankruptcy policy of providing the debtor with a "fresh start,"<sup>62</sup> and (iii) it hinders the reorganization

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55. *See id.*

56. *See In re A.H. Robins Co.*, 88 B.R. 742, 754 (E.D. Va. 1988).

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

58. *See In re Piper*, 162 B.R. at 624-27.

59. *See In re M. Frenville*, 744 F.2d at 337-38.

60. *See, e.g., United States v. LTV Corp. (In re Chateaugay Corp.)*, 944 F.2d 997, 1004 (2d Cir. 1991); *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936, 941 (3d Cir. 1985); *In re Amatex Corp.*, 30 B.R. 309, 311 (Bankr. E.D. Pa. 1983), *aff'd*, 37 B.R. 613 (E.D. Pa. 1983), *rev'd on other grounds*, 755 F.2d 1034 (3d Cir. 1985); *see also Davies v. Krasna*, 14 Cal. 3d 502, 512, 12 Cal. Rptr. 705, 712 (1975) (holding that "[L]imitations clock only begins to run on certain causes of action when the injured party discovers or should have discovered the facts supporting liability.").

61. *See In re Piper*, 162 B.R. at 624.

62. *See id.*

process.<sup>63</sup> Most bankruptcy courts addressing the issue have rejected the "accrued state law claim test."<sup>64</sup>

Under the "conduct test," a right to payment, and thus a bankruptcy "claim," arises when the debtor's conduct giving rise to the alleged liability occurred.<sup>65</sup> As a general rule, the "conduct test" seems consistent with congressional intent to define "claim" broadly and treat all creditors equally.<sup>66</sup> Under this test, all claims arising out of the same conduct are treated equally, and the debtor can obtain a discharge of all such claims, thus facilitating an effective reorganization. The problem with the "conduct test" is that it may be too broad. Claimants who have had no pre-petition exposure to the debtor's products or no other pre-petition relationship or contact with the debtor would be subject to discharge before their injury occurs. Because these people, as of plan confirmation, are unidentifiable given their lack of contact with the debtor or its products, they cannot receive notice and participate in the bankruptcy, which raises substantial, if not insurmountable, concerns about fundamental fairness and due process. Under this test, a debtor could obtain confirmation of a plan that discharges future claimants even if the debtor could not identify and provide notice to those persons—individually or by category—who may eventually be injured by the debtor's pre-petition conduct.<sup>67</sup>

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63. Many courts outside the Third Circuit that have considered this test have rejected it. See, e.g., *Fairchild Aircraft Inc. v. Cambell* (*In re Fairchild Aircraft Corp.*), 184 B.R. 910 (Bankr. W.D. Tex. 1995); *In re Amfesco Indust., Inc.*, 81 B.R. 777 (Bankr. E.D.N.Y. 1988); *Acevedo v. Van Dorn Plastics Mach. Co.*, 68 B.R. 495 (Bankr. E.D.N.Y. 1986); *In re Johns-Manville Corp.*, 57 B.R. 680 (Bankr. S.D.N.Y. 1986).

64. See *Grady v. A.H. Robins Co.* (*In re A.H. Robins Co.*), 839 F.2d 198, 201 (4th Cir. 1988); *In re Food Barn Stores, Inc.*, 175 B.R. 723, 730-31 (Bankr. W.D. Mo. 1994); *In re Black*, 70 B.R. 645, 648-50 (Bankr. D. Utah 1986); *In re Johns-Manville Corp.*, 57 B.R. 680, 689 (Bankr. S.D.N.Y. 1986); *In re Yanks*, 49 B.R. 56, 58-59 (Bankr. S.D. Fla. 1985); see also Ralph R. Mabey & Annette W. Jarvis, *In re Frenville: A Critique by the National Bankruptcy Conference's Committee on Claims and Distributions*, 42 BUS. LAW. 697 (1986) (criticizing the *Frenville* court's adoption of the "accrued state law claim test").

65. See *Grady*, 839 F.2d at 199; *Waterman Steamship Corp. v. Aguiar* (*In re Waterman Steamship Corp.*), 141 B.R. 552, 556 (Bankr. S.D.N.Y. 1992) (holding that "a claim arises at the moment when acts giving rise to the alleged liability are performed").

66. See *Grady*, 839 F.2d at 200 ("Congress intended that the definition of claim in the Code be as broad as possible . . ."); H.R. REP. NO. 95-595, at 10 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 6266.

67. See *United States v. LTV Corp.* (*In re Chateaugay Corp.*), 944 F.2d 997, 1003 (2d Cir. 1991); *Kewanee Boiler Corp. v. Smith* (*In re Kewanee Boiler*

In an attempt to cure the shortcomings of the conduct test, some courts have adopted the "pre-petition relationship test."<sup>68</sup> Under this test, the debtor's tortious conduct must still occur pre-petition, but the future claimant must also have some pre-petition relationship with the debtor, such as a pre-petition purchase, use, or operation of, or exposure to, the debtor's product.<sup>69</sup> The "pre-petition relationship test" often allows the court to identify and notify future claimants when the allegedly defective nature of a product is known at the time of the bankruptcy and there is some reasonable basis upon which to provide actual notice of the bankruptcy case to known potential claimants and/or fashion publication notice to a reasonably well-defined group of potential future claimants.<sup>70</sup> In this sense, the "pre-petition relationship test" ameliorates the problem often attributed to the "conduct test"—that a bankruptcy proceeding cannot identify and afford due process to claimants.

## V. REPRESENTATION OF CURRENT AND FUTURE CLAIMANTS

### A. Committees Appointed by the United States Trustee

The Bankruptcy Act, the predecessor to the current Bankruptcy Code, established that the purpose of granting official status and standing to creditors' committees was to bring creditors into the bankruptcy adjudication process.<sup>71</sup> Creditors should have an active role in the reorganization process in recognition of their significant economic interest in the debtor's estate.<sup>72</sup> In most chapter 11 cases, the Office of the United States trustee appoints a committee of unsecured creditors.<sup>73</sup> Section 1102(a)(1) of the Bankruptcy Code authorizes such action by the United States trustee and provides that "as soon as practicable after the order for relief under chapter 11 . . . the United States trustee shall appoint a committee of creditors holding unsecured claims and *may appoint additional committees of creditors or of equity security holders as the United States trustee*

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Corp.), 198 B.R. 519, 528 (Bankr. N.D. Ill. 1996), *remanded on other grounds*, 1996 WL 556736 (N.D. Ill. Sept. 26, 1996).

68. See *In re Piper*, 162 B.R. at 625-27.

69. See *id.* at 627, *In re Chateaugay*, 944 F.2d at 1003.

70. See California Dept. of Health Servs. v. Jensen (*In re Jensen*), 995 F.2d 925, 930-31 (9th Cir. 1993); *In re Chateaugay*, 944 F.2d at 1005.

71. See *In re Federation Workers Credit Union, Inc.*, 354 F. Supp. 1206, 1208-09 (N.D. Ohio 1973).

72. See *In re Diversified Capital Corp.*, 89 B.R. 826, 828-29 (Bankr. C.D. Cal. 1988).

73. See 11 U.S.C. § 1102(a)(1) (1994).



*deems appropriate.*"<sup>74</sup> The United States trustee will use this discretionary authority to appoint an official committee of tort claimants in a mass tort bankruptcy case.<sup>75</sup>

The Bankruptcy Code provides broad authority to official committees to represent their constituencies.<sup>76</sup> Section 1103(c) of the Bankruptcy Code sets forth a nonexclusive list of permissible activities an official committee may engage in during the course of a bankruptcy case.<sup>77</sup> A committee's primary function "is to aid, assist, and monitor the debtor to ensure that . . . the views [of the committee's constituency] are heard and their interests promoted and protected" in the bankruptcy case.<sup>78</sup> Since a committee's functions under section 1103 are "intimately tied to its [c]ommittee members' economic interests, services performed on behalf of the [c]ommittee should be those in attempted furtherance of such economic interests."<sup>79</sup>

The legislative history of section 1103(c) also indicates that Congress contemplated that committees would play a prominent role in the reorganization process.

[C]ommittees . . . will be the primary negotiating bodies for the formulation of the plan of reorganization. They will represent the various classes of creditors and equity security holders from which they are selected. They will also provide supervision of the debtor in possession and of the trustee, and will protect their constituents' interests.<sup>80</sup>

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74. *Id.* (emphasis added).

75. A dispute exists over whether an official committee of tort claimants can be comprised of attorneys for claimants or whether it must be comprised of actual claimants. Compare *Van Arsdale v. Clemo* (*In re A.H. Robins Co.*), 825 F.2d 794 (4th Cir. 1987) (approving reconstituted committee which includes two attorney members) with *In re Lykes Bros. Steamship Co.*, 200 B.R. 933 (M.D. Fla. 1996) (holding that members of a committee must be actual creditors).

76. See *Pan Am Corp. v. Delta Air Lines, Inc.* (*In re Pan Am Corp.*), 175 B.R. 438, 514 (S.D.N.Y. 1994).

77. See 11 U.S.C. § 1103 (c).

78. *In re Pan Am*, 175 B.R. at 514; see also *Official Unsecured Creditor Committee v. Stern* (*In re SPM Mfg. Corp.*), 984 F.2d 1305, 1315-16 (1st Cir. 1993) (holding that the committee acts as a fiduciary for their constituencies).

79. *In re Wire Cloth Prods., Inc.*, 130 B.R. 798, 812 (Bankr. N.D. Ill. 1991).

80. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, reprinted in 1978 U.S.C.A.N. 5787, 6357; see also *In re Penn-Dixie Indus., Inc.*, 9 B.R. 941, 944 (Bankr. S.D.N.Y. 1981) (stating that a committee has a "wide and important array of authority and responsibility . . . [and] the Bankruptcy Code contemplates a significant and central role for committees in the scheme of a business reorganization").

### B. Appointment of a Legal Representative for Future Claimants

Bankruptcy courts often appoint a legal representative for future claimants, although there is no specific statute authorizing them to do so.<sup>81</sup> The courts that have made such appointments have usually avoided squarely addressing the issue of whether future claimants hold "claims" that may be discharged in a bankruptcy proceeding.<sup>82</sup> Most courts simply recognize that future claimants are "parties-in-interest" under section 1109(b) of the Bankruptcy Code who are entitled to legal representation regardless of whether they hold "claims."<sup>83</sup>

Courts that have addressed the appointment of a future claims representative have given some guidance as to its role and duties. In *In re UNR Industries, Inc.*,<sup>84</sup> the court authorized a legal representative to advise future claimants during the case and represent such claimants in court in connection with any plan of reorganization, any motion to convert the case, and—with further leave of court—other litigation matters in the case.<sup>85</sup> Subject to these parameters, the bankruptcy court authorized the legal representative to exercise the powers and responsibilities of an official creditors' committee under

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81. See, e.g., *In re Piper Aircraft Corp.*, 162 B.R. 619, 621 (Bankr. S.D. Fla. 1994), *aff'd sub nom.* Epstein v. Official Comm. of Unsecured Creditors of the Estate of Piper Aircraft Corp., 168 B.R. 434 (Bankr. S.D. Fla. 1994), *aff'd*, 58 F.3d 1573 (11th Cir. 1995) (explaining lower court's appointment of a legal representative for future claimants).

82. See *id.* (stating that when appointing the future claims representative, "the [c]ourt specifically excluded from the appointment order any finding on whether the Future Claimants hold claims against the Debtor under § 101(5) of the Bankruptcy Code").

83. See, e.g., *In re Amatex Corp.*, 755 F.2d 1034, 1042-44 (3d Cir. 1985) (holding that future claimants are parties-in-interest entitled to representation regardless of whether they hold "claims"); *In re Johns-Manville Corp.*, 68 B.R. 618, 626-27 (Bankr. S.D.N.Y. 1986) (rejecting argument that post-confirmation injunction against continued prosecution of future claims outside the plan violated due process rights of future claimants and concluding that publication notice through an extensive media campaign, when combined with the appointment of a legal representative, provided adequate procedural protection to future claimants); *In re Johns-Manville Corp.*, 36 B.R. 743, 747-49 (Bankr. S.D.N.Y. 1984) (concluding that future claimants are parties-in-interest under section 1109 and are entitled to a legal representative irrespective of whether they hold "claims"); *In re UNR Indus., Inc.*, 29 B.R. 741 (N.D. Ill. 1983), *appeal dismissed*, 725 F.2d 1111 (7th Cir. 1984), *motion to reconsider granted*, *In re UNR Indus., Inc.*, 46 B.R. 671, 674-75 (Bankr. N.D. Ill. 1985) (noting that the unresolved issue of whether future claimants hold "claims" did not preclude the appointment of a legal representative for future claimants).

84. 46 B.R. 671 (Bankr. N.D. Ill. 1985).

85. See *id.* at 675-76.

section 1103 of the Bankruptcy Code.<sup>86</sup> Similarly, in *In re Johns-Manville Corp.*,<sup>87</sup> the court appointed a legal representative with the powers and responsibilities of an official creditors' committee as set forth in section 1103.<sup>88</sup>

## VI. ESTIMATION OF CLAIMS

Section 502(c) of the Bankruptcy Code authorizes the bankruptcy court to estimate, for purposes of allowance, "any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case."<sup>89</sup> Section 502(c) is designed to expedite the calculation of claims and to provide greater certainty for the recovery of contingent or unliquidated claims by bringing them into the bankruptcy estate, so that all claimants will have the same opportunity to share in any distributions from the estate.<sup>90</sup> The bankruptcy court may estimate the claims of an individual creditor or group of creditors if the court concludes that it can come to a fair estimation of the claims so as to benefit the claimants and the debtor by reducing costs and expediting the reorganization.<sup>91</sup>

Although the bankruptcy court has authority to estimate personal injury or wrongful death claims for voting purposes and for determining plan feasibility, the estimation of personal injury or wrongful death claims for purposes of distribution in the bankruptcy case is not within the bankruptcy court's core jurisdiction.<sup>92</sup> Therefore, personal injury and wrongful death claims against the debtor that are not consensually resolved must generally be liquidated in the federal district court in which the bankruptcy case is pending or in the federal district court in the district where the claim arose, as directed by the

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86. *See id.* at 676.

87. 52 B.R. 940 (Bankr. S.D.N.Y. 1985).

88. *See id.* at 943.

89. 11 U.S.C. § 502(c)(1) (1994).

90. *See In re Baldwin-United Corp.*, 55 B.R. 885, 897-98 (Bankr. S.D. Ohio 1985).

91. *Compare* *A.H. Robins Co. v. Piccinin (In re A.H. Robins Co.)*, 788 F.2d 994, 1011-13 (4th Cir. 1986) (allowing over 300,000 unliquidated tort claims relating to the debtor's Dalkon Shield product to proceed under section 502(c)), *and In re UNR Indus., Inc.*, 45 B.R. 322, 326 (N.D. Ill. 1984) (allowing estimation of over 17,000 asbestos claims for purposes of developing a plan), *with In re Dow Corning*, 211 B.R. 545, 570-72 (Bankr. E.D. Mich. 1997) (concluding estimation was inappropriate due to serious dispute over disease causation).

92. *See* 28 U.S.C. § 157(b)(2)(B).

district court with jurisdiction over the bankruptcy case.<sup>93</sup> An exception to this general rule may apply if the claims can be disallowed based upon a legal defense to the claims. In that instance, the bankruptcy court may exercise its core jurisdiction to disallow the personal injury claim.<sup>94</sup>

The bankruptcy court has broad discretion to determine the best method of estimation.<sup>95</sup> Notwithstanding this discretion to establish estimation procedures, the bankruptcy court must give effect to "the legal rules which may govern the ultimate value of the claim."<sup>96</sup> Present law is uncertain as to the effect of estimation under section 502(c) on claims.<sup>97</sup> At least one court has held that estimation sets a cap on the amount of the estimated claims for distribution purposes, while another has held that estimation merely sets an upper limit on claims for voting purposes but does not limit distributions.<sup>98</sup>

Even courts within the same line of authority have reached differing conclusions as to how section 502(c) should be applied. For example, in *In re Baldwin-United Corporation*,<sup>99</sup> the district court stated that estimation sets the outer limits for recovery so that the claimants would be entitled to recover the amount of their judgment or the estimated value of their claims, whichever was lower.<sup>100</sup> Later, the bankruptcy court stated that estimation sets the outer limits of a claimant's recovery subject to a later motion under section 502(j) of

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93. See *id.* § 157(b)(5); see, e.g., *In re A.H. Robins*, 788 F.2d at 1012-13; *In re UNR*, 45 B.R. at 327.

94. See, e.g., *In re Standard Insulations, Inc.*, 138 B.R. 947, 953 (Bankr. W.D. Mo. 1992) (noting that section 157(b)(2)(B) does "not prevent the court from disallowing [personal-injury tort] claims if they ha[ve] no basis at law") (citing *In re Chateaugay Corp.*, 111 B.R. 67, 74 (Bankr. S.D.N.Y. 1990)); *In re Chateaugay*, 111 B.R. at 73-74 (holding that bankruptcy court could exercise core jurisdiction over summary judgment motion seeking to disallow personal-injury claims barred by government contractor defense).

95. See *Bittner v. Borne Chemical Co.*, 691 F.2d 134, 135 (3d Cir. 1982) (stating that bankruptcy judges are to use "whatever method is best suited to the particular contingencies at issue").

96. *Id.*; see also *In re Baldwin-United*, 55 B.R. at 898-900 (discussing the limits of the court's discretion in estimating claims).

97. See generally *In re Baldwin-United*, 55 B.R. at 898-902 (discussing the uncertainty of methods and effects of estimation).

98. Compare *In re Poole Funeral Chapel, Inc.*, 63 B.R. 527, 532 (Bankr. N.D. Ala. 1986) (holding that bankruptcy court had duty to estimate non-tort claims for purposes of confirmation and distribution), with *In re MCorp Fin., Inc.*, 137 B.R. 219, 226 (Bankr. S.D. Tex. 1992) (stating that estimation requirements do not establish a cap on distribution).

99. 57 B.R. 751 (S.D. Ohio 1985).

100. See *id.* at 758.

the Bankruptcy Code to reconsider the estimated amount of the allowed claim.<sup>101</sup> In *United States v. LTV (In re Chateaugay Corporation)*,<sup>102</sup> the Second Circuit stated that estimated claims would be paid based upon their ultimately liquidated amount, in full or pro-rata, depending upon the terms of the reorganization plan.<sup>103</sup> Finally, in *In re MCorp Financial, Inc.*,<sup>104</sup> the bankruptcy court denied confirmation of a chapter 11 plan of liquidation because that plan denied claimants the right to a section 502(j) reconsideration of their estimated claims and did not establish a reserve to pay the claims if they were later resolved at a higher amount.<sup>105</sup>

Pursuant to section 1126(a) of the Bankruptcy Code, only allowed claims are entitled to vote on a plan of reorganization.<sup>106</sup> In most mass tort bankruptcies, it is impracticable to determine the allowability of all claims prior to voting on a plan of reorganization. Bankruptcy Rule 3018(a) provides a mechanism which enables the claimant to participate in the voting on the plan of reorganization without the delay attendant to an individual determination of each claim. Bankruptcy Rule 3018(a) states that "[n]otwithstanding objection to a claim or interest, the court after notice and hearing may temporarily allow the claim or interest in an amount which the court deems proper for the purpose of accepting or rejecting a plan."<sup>107</sup> Courts frequently allow the holders of disputed claims in a mass tort bankruptcy to vote such claims at \$1.00 per claim.<sup>108</sup>

Liquidation of mass tort claims following confirmation of a plan of reorganization is unique. The typical method of liquidating claims post-confirmation is through a claims resolution facility and/or a claimants' trust. For example, in *In re A.H. Robins*,<sup>109</sup> the confirmed plan of reorganization established a settlement fund to compensate parties who claimed injuries resulting from the use of the Dalkon Shield intrauterine device. The plan provided for the establishment

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101. See *In re Baldwin-United*, 55 B.R. at 898.

102. 944 F.2d 997 (2d Cir. 1991).

103. See *id.* at 1006.

104. 137 B.R. 219 (Bankr. S.D. Tex. 1992).

105. See *id.* at 226.

106. See 11 U.S.C. § 1126(a) (1994).

107. Bankruptcy Rule 3018(a).

108. See *In re Johns-Manville Corp.*, 68 B.R. 618, 631 (Bankr. S.D.N.Y. 1986), *aff'd*, 843 F.2d 636, 647 (2d Cir. 1988); see also *In re A.H. Robins Co.*, 88 B.R. at 746-47 (finding that placing a nominal value on each claim for voting purposes was approved), *aff'd*, 880 F.2d 694 (4th Cir. 1989).

109. 88 B.R. 742 (Bankr. E.D. Va. 1988).

of a claimants' trust and a claims resolution facility.<sup>110</sup> The claims resolution facility provided claimants with various options in which to seek compensation for their injuries beginning with "instant settlement offers," in which claimants received \$725.00 in exchange for a release.<sup>111</sup> If a claimant rejected all settlement offers, the claimant could proceed with certain litigation alternatives, including individual jury trials.<sup>112</sup>

Similarly, with respect to its silicone breast implant litigation, Dow Corning recently proposed a plan of reorganization in which claimants are given the option of settling their dispute with Dow Corning over whether breast implants cause disease or litigating such dispute.<sup>113</sup> Claimants choosing to settle by voting to accept the plan will have their claims channeled to a settlement trust where various settlement options are provided to resolve those claims.<sup>114</sup> In contrast, claimants wishing to continue to litigate the legal merit of their claims against Dow Corning will have their claims channeled to a litigation trust.<sup>115</sup> The first step in the litigation process for all rejecting claimants is a threshold common issue causation trial on the question of whether silicone breast implants cause disease.<sup>116</sup> If any claims survive that common issue causation trial, such claims will proceed through a series of sequential steps, including an individual jury trial if the claim is not resolved through an earlier step.<sup>117</sup>

Notwithstanding questions over the legal effect of estimation, the authority of bankruptcy courts to estimate mass tort personal injury claims for purposes of determining the feasibility of a plan of reorganization can provide a mechanism to quantify the extent of the debtor's liability to the holders of mass tort claims. This ability to estimate claims usually helps to define the outlines of a possible consensual resolution of the mass tort claims in the case.

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110. *See id.* at 746-47.

111. *See* Georgene M. Vairo, *The Dalkon Shield Claimants Trust: Paradigm Lost (Or Found)?*, 61 FORDHAM L. REV. 617, 633 (1992).

112. *See In re A.H. Robins Co.*, 880 F.2d 709, 744 (4th Cir. 1989).

113. James P. Miller, *Dow Corning Offers Revised Reorganization Plan*, WALL ST. J., Aug. 26, 1997, at A3.

114. *See id.*

115. *See id.*

116. *See id.*

117. *See id.*

## VII. DISCHARGE OF CLAIMS

Section 1141(a) of the Bankruptcy Code provides that a confirmed plan of reorganization is binding upon any creditor whether or not (i) its claim is impaired under the plan or (ii) it voted to accept the plan.<sup>118</sup> Further, section 1141(d)(1)(A) provides that confirmation of a plan discharges the debtor—unless sections 1141(d)(2) through (4), the plan, or the order confirming the plan provide otherwise—from any debt that arose before the confirmation date.<sup>119</sup> This is true whether or not: (i) a proof of claim is filed or deemed filed under section 501; (ii) such claim is allowed under section 502; or (iii) the claimant votes to accept the plan.<sup>120</sup> Section 1141(a) clearly contemplates that the debtor will be discharged from all “claims” as defined in section 101(5) of the Bankruptcy Code. As discussed previously, the courts are divided on the question of whether “future claims” are “claims” within the meaning of section 101(5).<sup>121</sup>

A statutory discharge of future claims would serve two goals of bankruptcy: providing the debtor with a “fresh start” and promoting an equitable distribution of the debtor’s assets among its creditors. For example, if a confirmed plan does not discharge future claims arising from the debtor’s pre-petition conduct, then such claimants may receive a preferential recovery if their injuries become manifest post-confirmation and they are permitted to recover more than the confirmed plan provides for similar, yet pre-confirmation claims. In addition, the claims of post-confirmation claimants could deplete the resources of the reorganized debtor, leaving those claimants who manifest injury thereafter with little or nothing to recover and possibly impairing the reorganized debtor’s ability to perform its obligations to pre-confirmation claimants according to the debtor’s confirmed plan.

Yet, the extent to which future claims are discharged upon the confirmation of a plan is unclear. Arguably, future claims may be discharged because section 1141(d)(1)(A) provides for a discharge of any pre-confirmation “debt”,<sup>122</sup> a term that section 101(12) defines as “liability on a claim”,<sup>123</sup> without any limitation as to when the liability

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118. See 11 U.S.C. § 1141(a) (1994).

119. See *id.* § 1141(d)(1)(A).

120. See *id.*

121. See *supra* notes 47-70 and accompanying text.

122. See 11 U.S.C. § 1141(d)(1)(A).

123. See *id.* § 101(12).

arises. However, as discussed above, whether future claims are within the present statutory definition of "claim" is uncertain.<sup>124</sup> If not, the "debts" discharged by section 1141(d)(1)(A) do not include future claims. Moreover, the "creditors" upon whom the provisions of a confirmed plan are binding under section 1141(a) are limited to entities who have claims against the debtor "that arose at the time of or before the order for relief . . .,"<sup>125</sup> which could exclude future claims. Thus, no statutes provide clear guidance concerning this issue.

Some courts have allowed the discharge of future claims arising out of the debtor's pre-petition conduct even if the holders of those claims were not represented in the case and the plan of reorganization did not address them.<sup>126</sup> Other courts have compromised a debtor's successful reorganization, or frustrated the expectations of the debtor's successor, by refusing to allow the discharge of future claims that were afforded neither representation during the bankruptcy case nor compensation under the confirmed plan.<sup>127</sup>

### VIII. CONCLUSION

Bankruptcy is a powerful tool to assist a company burdened by mass tort litigation. Mass tort bankruptcies present complex and novel questions that the bankruptcy courts must address. Although chapter 11 may not be the first remedy explored by a company facing significant mass tort claims, it may prove to be the only vehicle through which ongoing litigation can be stopped, through the benefits of the automatic stay; centralized, through the transfer of claims to the district court presiding over the bankruptcy case; and ultimately resolved, with the debtor receiving a discharge of such claims.

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124. See *supra* notes 49-51 and accompanying text.

125. 11 U.S.C. §101(10)(A).

126. See, e.g., *Texaco, Inc. v. Sanders (In re Texaco, Inc.)*, 182 B.R. 937, 952-54 (Bankr. S.D.N.Y. 1995) (involving environmental claims).

127. See, e.g., *Fairchild Aircraft, Inc. v. Cambell (In re Fairchild Aircraft Corp.)*, 184 B.R. 910, 920-25 (Bankr. W.D. Tex. 1995).



